CUNNINGHAM's

LAW DICTIONARY.

VOL. I.

15 J.K.

A

New and Complete Law-Dictionary,

OR

GENERAL ABRIDGMENT of the LAW,

ON

A more Extenſive Plan than any LAW-DICTIONARY hitherto publiſhed:

CONTAINING,

Not only the EXPLANATION of the TERMS, but alſo the LAW itſelf, both with Regard to *Theory* and *Practice*.

Very Uſeful to BARRISTERS, JUSTICES OF THE PEACE, ATTORNIES, SOLICITORS, *&c.*

By T. CUNNINGHAM, Eſq;

THE SECOND EDITION, CORRECTED.

In TWO VOLUMES.

VOL. I.

LONDON:

Printed by his *MAJESTY*'s Law Printers,

For W. FLEXNEY, Holborn; G. KEARSLY, Ludgate-Street; J. and F. RIVINGTON, in St. Paul's Church Yard; T. LONGMAN, and ROBINSON and ROBERTS, in Paternoſter Row.

M.D.CC.LXXI.

PH
MVSEVM
BRITANNICVM

A

New and Complete Law-Dictionary,

OR,

A General Abridgment of the LAW:

CONTAINING,

Not only the Explanation of the Terms, but alſo the LAW itſelf, both with Regard to *Theory* and *Practice*.

A.

A B, When the name of a place begins with *Ab*, it denotes, that either the place belonged to ſome abbey, or that an abbey was founded there. Thus, *Abingdon* in *Berkſhire* took that name ſoon after *Ciſſa* king of the *Weſt-Saxons* had founded the abbey there; for before it was called *Cloveſhoe*. *Cowell.*

Abacot, A cap of ſtate, wrought up in the figure of two crowns, uſed in old time by our *Engliſh* kings. *Cowell. Spelman.*

Abactors, *(Abactores)* Drivers away, or indeed ſtealers of cattle or beaſts, not by one and one, but in great numbers at once; and therefore thus diſtinguiſhed from *fures*, thieves: *Qui unam ovem ſurripuerit, ut fur, coercetur, qui gregem, ut* abactor. It is derived from the verb *abigere*, to drive away. *Cowell. Du Freſne.*

Abacus, *Arithmetic*, or the art of numbering, from the *abacus* or table, on which the ancients ſet down their figures.——*Omnium liberalium artium peritus*, abacum *præcipue, lunarem compotum et curſum rimatus. Cowell. Hen. Knighton, Chron. lib.* 1. *cap.* 3. *Du Freſne.*

Abaciſta, An *arithmetitian*, whence the Italian *abbachier* and *abbachiſta*.—— *Abacum certè primus a Saracenis capiens, regulas dedit, quæ a ſudantibus abaciſtis vix intelliguntur. Cowell. Will. Malmſ. hiſt. Ang. lib.* 2. *c.* 10.

Abandum, *(Abandonum,)* Any thing ſequeſtred, proſcribed, or abandoned. *Abandon*, i. e. *In bannum res miſſa*; a thing banned or denounced as forfeited and loſt. Whence to abandon, to deſert, or forſake as loſt and gone. *Cowell.*

Abarnare, From the Saxon *abarian*, to detect or diſcover any ſecret crime.——*Si homo furtivum aliquid in domo ſua occultaverit, et ita fuerit abarnatus, rectum eſt ut inde habeat quod quæſivit. Leges Canuti regis, cap.* 104. Dr. *Wilkins*, in his Gloſſary on the Saxon laws, thus explains this word *Abarnare: Rem clam et occultè geſtam probationibus manifeſtare: Unde murdrum* abarnatum *idem eſt ac murdrum probatum. Cowell. Du Freſne.*

Abate, Is derived from the French word *abbatre*, to pull down, to overthrow, to demoliſh, to batter down, to deſtroy. In the writers of the Common law it is uſed both actively and neuterly; as to *abate* a caſtle, to beat it down. To *abate* a writ is, by ſome exception to defeat or overthrow it. A ſtranger *abateth*, that is, entreth upon a houſe or land void by the death of him that laſt poſſeſſed it, before the heir take his poſſeſſion, and ſo keepeth him out: wherefore, as he that putteth out him in poſſeſſion is ſaid to diſſeiſe, ſo he that ſteppeth in between the former poſſeſſor and his heir, is ſaid to *abate*. In the neuter ſignification thus: The writ of the demandant ſhall *abate*, that is, ſhall be diſabled, fruſtrated, or overthrown. The appeal *abateth* by covin, that is, the accuſation is defeated by deceit. *Co. Lit.* 134. *b.* 227. *a. Cowell.*

Abatement, (from *abate*,) Sometimes ſignifies the act of the abator; as abatement into land is, when a man dies ſeiſed, and another, who has no right, enters before the heir; ſuch entry is called an *abatement*. *Abatement* of a writ or plaint is, when for any default the defendant prays that the writ or plaint do abate, *viz.* ceaſe againſt him for that time. It is the affection or paſſion of the thing *abated*, as *abatement* of a writ or plaint, is the deſtruction of ſuch writ or plaint. And in this ſignification it is as much as *exceptio dilatoria* with the civilians, or rather an effect of it; for the exception alledged, and made good, works the *abatement*. *Abatement*, in the general acceptation of the word, ſignifies a plea put in by the defendant, in which he ſhews cauſe to the court why he ſhould not be impleaded or ſued, or if impleaded, not in the manner and form he then is. *Co. Lit.* 134. *b.* 227. *a. F. N. B.* 115. *Cowell. Gilb. H. C. P.* 186.

The chief pleas in *abatement* are,

I. *To the juriſdiction of the court.*
II. *To the perſon of the plaintiff.*
III. *To the perſon of the defendant.*
IV. *To the count or declaration.*
V. *To the writ.*
VI. *Abatement by demiſe of the king, marriage, or death of parties.*

A B A

I. *Pleas in abatement to the juriſdiction of the court.* Under this head of pleas to the juriſdiction, it will be neceſſary to make a diviſion of the courts, which, for this purpoſe, may be divided into, *Firſt*, The courts at *Weſtminſter*. *Secondly*, The reſt of the temporal courts in *England*.

Firſt, The courts of *Weſtminſter* are the ſuperior courts in the kingdom, and have a ſuperintendancy over all the other courts, by prohibition, if they exceed their juriſdiction; or, by writs of error, and falſe judgment, if their proceedings are erroneous: ſo that theſe courts have conuzance of all tranſitory actions, except between the ſcholars of *Oxford* and *Cambridge*, and every thing ſuppoſed to be done within their juriſdiction, unleſs the contrary eſpecially appears. On the other hand, nothing ſhall be intended within the juriſdiction of an inferior court, but what is expreſsly alledged; ſo that where an action is brought on a promiſe in a court below, not only the promiſe, but the conſideration of the promiſe, muſt be alledged to ariſe within an inferior juriſdiction; becauſe ſuch inferior courts are bounded in their original creation, to cauſes ariſing within the limits of ſuch new-erected juriſdiction; and therefore if a debtor, that has contracted a debt out of ſuch limited juriſdiction, comes within it, yet they cannot ſue there for ſuch debt; becauſe the cauſe of action did not ariſe within ſuch juriſdiction; and therefore it is not within the limits of their commiſſion to try and determine; for which reaſon the conſideration of the promiſe, which is the cauſe of action, muſt be alledged to be within the juriſdiction of the court; and not only ſo, but it muſt be proved upon the trial; and if the plaintiff prove a conſideration out of the juriſdiction, *that* cannot be given in evidence; and if it be, the defendant's counſel may tender a bill of exceptions: And therefore the firſt of *Saunders* 74. in the caſe of *Deacock* and *Beſt*, makes a true diſtinction between counties palatine and other inferior courts. For the county palatine is a general court, for all the ſubjects of that palatinate, and not merely for the cauſes ariſing within the county palatine; for if a debtor goes from a foreign into a county palatine, his objections go along with him, as much as if he went from one kingdom to another; and if it were otherwiſe, a palatinate juriſdiction would be a ſhelter and aſylum to debtors; for no proceſs but the ſupreme prerogative proceſs runs there; and therefore it is truly determined, though the caſe of action be out of the palatinate; yet if the party be a ſubject of that palatinate, as he is by coming into that dominion, that the action there may be brought againſt him.

Secondly, Of temporal courts in *England:* which may be divided into three, *viz.* Firſt, *Courts palatinate.* Secondly, *Inferior courts.* Thirdly, *Courts not of record.*

Firſt, *Courts palatinate*, which are three; firſt, *Cheſter*; ſecondly, *Durham*, erected by *William the conqueror*; and thirdly, *Lancaſter*, erected by act of parliament in *Edward* the Third's time. Theſe were ſuperior courts within their juriſdiction, in as ample a manner as a court of *Weſtminſter*; and the king's ordinary writs do not run there.

Secondly, *Inferior courts of record.* They are all the king's courts, though another may have the profits, and they ſit either mediate or immediate from the king; and they are either erected by letters patent from the king, or by preſcription; and the proceedings are preſerved on rolls, which are of ſo high a nature, that they are to be tried by themſelves only. Some of theſe have franchiſe to hold pleas within ſuch a compaſs; through which *breve domini regis non currit.*

Thirdly, *Courts not of record*, ſuch as the court baron, hundred court, and county court. *Gilb. H. C. P.* 188.

There are no pleas to the juriſdiction of the courts at *Weſtminſter* in tranſitory actions, unleſs the plaintiff by his declaration ſhews the cauſe of action accrues within the county palatine, or if it be between the ſcholars of *Oxford* and *Cambridge*. 4 *Inſt.* 213. 1 *Sid.* 103. There is a difference between a franchiſe to demand conuſance, and a franchiſe, *Ubi breve domini regis non currit.* For in the firſt caſe the tenant or defendant ſhall not plead it, but the lord of the franchiſe muſt demand conuſance; but in the other caſe, the defendant muſt plead it to the writ. 4 *Inſt.* 224. See titles Franchiſe, Conuzance. Where a franchiſe, either by letters patent or preſcription, hath a privilege of holding pleas within their juriſdiction, if the courts at *Weſtminſter* intrench on their privileges, they muſt demand conuſance, that is, deſire that the cauſe may be determined before them; for the defendant cannot plead to the juriſdiction: And the reaſon is, becauſe a defendant is arreſted by the King's writ. But within a franchiſe, where the King's writ doth not run, he is not legally convened, and therefore he may plead it to the juriſdiction.

The pleas to the juriſdiction of the courts at *Weſtminſter*, according to chief baron *Gilbert*, are,

Ancient demeſne. *Herne's Pl.* 351. See title Antient demeſne.
Held of the King's manor. *Hanſ.* 103.
Counties palatine. *Raſt.* 419. *Herne* 7. See title County palatine.
Cinque ports. See title Cinque ports.

Three things are to be obſerved with reſpect to pleas to the juriſdiction. Firſt, They muſt be pleaded before any imparlance; for by craving leave to imparl, the defendant ſubmits to the juriſdiction. 2 *H.* 6. 30. 22 *H.* 6. 7. *Hard.* 365. 1 *Lut.* 46. Except where antient demeſne is pleaded; for this may be done after imparlance, becauſe the lord might reverſe the judgment by writ of diſceit, and it goes in bar of the action itſelf, *viz.* in that court, becauſe it is *coram non judice.* Secondly, The defendant muſt plead *in propria perſona*; for he cannot plead by attorney without leave of the court firſt had, which leave acknowledges their juriſdiction; for the attorney is an officer of the court; and if he put in a plea by an officer of the court, that plea muſt be ſuppoſed to be put in by leave of the court. Thirdly, The defendant muſt make but half defence. See title Defence.

II. *Pleas in abatement to the perſon of the plaintiff.* And here are the following diſabilities, viz. 1. *Outlawry.* 2. *Excommunication.* 3. *Alienage*, 4. *Præmunire*; and 5. *Recuſancy*; which may be pleaded in abatement of the writ, and the plaintiff ſhall not be anſwered until he hath removed them; and therefore by the antient law he was ſaid to loſe *liberam legem*, becauſe he was not *rectus in cur'*, until he had removed ſuch impediment.

Firſt, *Outlawry*; for until this is reverſed, for the King has granted his charter of pardon, the plaintiff is out of the protection of the law; becauſe he would not be amenable and attendant to the law, and ought not to have any privilege from it; but none ſhould be outlawed until after the *exigent* be returned; for the enquiring after him in the county is in order that he may appear; and therefore if he does appear at the return of the *exigent* the law is ſatisfied, and the outlawry muſt not be recorded againſt him. *Lit. ſect.* 197. *Dy.* 28, 222. *Aſſ.* 49. *Br. Nonability* 25, 23.

But this diſability is only pleadable when the plaintiff ſues in his own right; for if he ſues *in auter droit*, as executor or adminiſtrator, or as mayor with his commonalty, outlawry ſhall not diſable him; becauſe the perſon whom he repreſents has the privilege of the law. *Co. Lit.* 128. Nor when the plaintiff brings a writ of error to reverſe an outlawry, ſhall outlawry in that ſuit, nor at any ſtranger's ſuit, diſable him; for if he were outlawed at ſeveral mens ſuits, and one ſhould be a bar to another, he could never reverſe any of them. The outlawry itſelf is no objection; for that would be *exceptio ejuſdem rei cujus petitur diſſolutio:* Nor is another outlawry pleadable in bar to ſuch writ of error; for then two erroneous outlawries would be irreverſible; and therefore that is tantamount to *exceptio ejuſdem rei cujus petitur diſſolutio. Co. Lit.* 128. *Doct. Placit.* 396.

Outlawry does not entirely abate the writ, but is only a temporary impediment that diſables the plaintiff from proceeding; for upon obtaining a charter of pardon, or reverſing the outlawry, he is reſtored to his law, and

ſhall

ſhall oblige the defendant to plead to the ſame writ. *Co. Lit.* 128. *Doct. Placit.* 397.

As outlawry is a dilatory plea, when it is pleaded in another court than where the outlawry iſſued, the defendant muſt bring it in immediately. For this being in delay, if the court ſhould give time and it ſhould not be brought in, then the delay of juſtice would be from the court; and ſince there is a way of having it immediately, by producing it under the great ſeal, no time ſhall be given to bring it *ſub pede ſigilli*; but otherwiſe when it is in the ſame court; for then the record is already in court. *Doct. Placit.* 393. *Stamf.* 103. *Fitz. Coron.* 233.

In pleading outlawry in diſability in another court, the antient way was to have the record of the outlawry itſelf *ſub pede ſigilli* by *certiorari* and *mittimus*; but this being very expenſive, it is now ſufficient to plead the *capias utlagatum* under the ſeal of the court from whence it iſſues; for the iſſuing of execution could not be without the judgment; and therefore ſuch execution is a proof to the court that there is ſuch a judgment, which is a proof that the defendant's plea of matter of record is proved by matter of record; and therefore appears to the court not to be merely dilatory; and therefore on ſhewing ſuch execution, if the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in. *Co. Lit.* 128. *Doct. Placit.* tit. *Outlawry.* But where excommunication is pleaded, it is not ſufficient to ſhew the writ *de excommunicato capiendo* under the ſeal of the court; for the writ is no evidence of the continuance of the excommunication, ſince he may be abſoiled by the biſhop, and that will not appear in the king's court, becauſe ſuch aſſoilment is not returned into the king's court from whence the *ſignificavit* is ſent. But the reverſal of the judgment of outlawry muſt appear in the ſame court where the outlawry is returned; and therefore the iſſuing of the execution is a ſtrong proof of the continuance of the judgment; and if it is denied on the other ſide, they will give him a day to maintain his plea; but in caſe of an excommunication, the iſſuing the writ is no certain proof of excommunication, even at the time of iſſuing the writ; for he might be abſoiled between the *ſignificavit* and the iſſuing the writ *de excommunicato capiendo*; and therefore there muſt be a certificate under the ſeal of the biſhop to maintain the plea, ſince it is dilatory; and the court, on ſhewing only the writ *de excommunicato capiendo*, have no ground to give the defendant time; beſides, it is below the dignity of the court to write to the biſhop to ſatisfy dilatories; and there is no way by *certiorari* or *mittimus* to bring it in. *Fitz. Cor.* 233. 12 *E.* 4. 16. *Doct. Placit.* 396.

Outlawry in a county palatine cannot be pleaded in any of the courts of *Weſtminſter*; for he is only ouſted of his law within that juriſdiction, and it ſhall not extend to diſable a man in another county where they have no power; for the county *palatine* being a royal juriſdiction within bounds, the loſing the privileges of law within that juriſdiction, can be no diſadvantage to him in another county; and if he does not live within the *palatine* juriſdiction, he is not obliged to attend there. But it ſeems that outlawry in the county *palatine* of *Lancaſter* may be pleaded in the courts of *Weſtminſter*; becauſe that county was erected by act of parliament in the time of *Ed.* 3. but *Durham* and *Cheſter* are by preſcription. *Fitz. Coron.* 233. 12 *Ed.* 4. 16. *Doct. Placit.* 396.

2. *Excommunication.* This cannot be pleaded after general imparlance; for thereby the plaintiff is admitted to be a good plaintiff; but after a ſpecial imparlance it may be pleaded. When excommunication is pleaded, the biſhop's letter under his ſeal, witneſſing the excommunication, muſt be ſhewn; and though the plaintiff cannot deny the plea, yet the writ ſhall not abate, but the defendant *eat inde ſine die*; becauſe the plaintiff upon producing his letters of abſolution, ſhall have a re-ſummons or re-attachment. *Lit. ſect.* 201. 8 *Co.* 68.

Excommunication is a good plea to an executor or adminiſtrator, though they ſue *in auter droit*; and the difference between this and outlawry is, that an excommunicate perſon is excluded from the body of the church, and is incapable to lay out the goods of the deceaſed to pious uſes; but the outlaw, though incapable of law for his own benefit, may be allowed to do all charitable actions for the ſoul of the deceaſed; and it is one of the effects of excommunication, that he cannot be procurator or attorney for any other perſon; and therefore cannot repreſent the deceaſed. *Co. Lit.* 134. 43 *E.* 3. 13. *Thel.* 11.

Excommunication is no plea on a *qui tam*, becauſe it is for example, and the ſtatute having given the informer an ability to ſue, and not excepted excommunicated perſons from the liberty of informing, he is enabled to ſue by the ſtatute, notwithſtanding the cenſures of the church. 12 *Co.* 61.

When prohibition is brought againſt the biſhop, and he pleads excommunication againſt the plaintiff, and in the excommunication there is no cauſe of ſuch excommunication ſhewn, this is no good plea; for in ſuch caſe it will be intended, that the excommunication was for endeavouring to hinder the biſhop's proceeding by application to the temporal court; and if ſuch excommunication were allowed, it would deſtroy all prohibitions, and the plea of excommunication in this caſe is *exceptio ejuſdem rei cujus petitur diſſolutio.* *Thelo.* 10, 11. 28 *E.* 3. 27. 8 *Co.* 68.

In an action brought by the bailiffs and commonalty, the defendant ſhall not plead excommunication in the bailiffs; becauſe they ſue as a corporation, and a corporation cannot be excluded from the communion of the viſible church. *Thelo.* 11. 30 *E.* 3. 4. *Co. Lit.* 134.

When excommunication is pleaded in the plaintiff, he ſhall not reply, that he has appealed from the ſentence; for the ſentence is in force until it is repealed, and whilſt it is in force he cannot appear in any of the courts of juſtice; but he may reply that he is abſolved, for then his diſability is taken away. *Bro. Excom.* 3. 3 *Bulſ.* 72. 20 *H.* 6. 25. *Rol.* 226.

In the times of popery, excommunication certified by the pope, or delegates commiſſioned by him, did not diſable the plaintiff; becauſe the courts had no perſon to whom they ſhould write to have him aſſoiled. And it ſeems by this, that if the ſentence be a nullity, as if they excommunicate for a temporal offence, the King's court will write to the biſhop to aſſoil him; and when the plaintiff brings in the letter of abſolution, the court will oblige the defendant to plead in chief. *Bro. Excom.* 17. 1 *Rol. Abr.* 883. 14 *Hen.* 4. 14.

The court will not receive the certificate of excommunication of one biſhop from another, becauſe they muſt have the certificate from the biſhop whoſe ſubject he was; and he might have been aſſoiled by his own ordinary after the firſt certificate to the biſhop. *Bro. Excom. Fitz. Excom.* 8 *Co.* 68. *Co. Lit.* 134. Nor will they receive a certificate; becauſe he may ſtand aſſoiled by the preſent ordinary that now is, after the deceaſe of the biſhop who has certified; and the court will not receive any certificate, but from ſuch perſon to whom they can write to aſſoil. *Bro. Excom.* 21. *Fitz. Excom.* 26. 1 *Rol.* 883.

3. *Alienage.* It may be pleaded in abatement in an action real, perſonal or mix'd, that the defendant or plaintiff is an alien, if he be an alien enemy. *Co. Lit.* 129. *b.* But an alien in league ſhall maintain perſonal actions; otherwiſe he would not be able to merchandiſe and trade amongſt us. But he ſhall not maintain real or mix'd actions, becauſe there is no neceſſity that he ſhould ſettle amongſt us. *Co. Lit.* 129. *b. Yelv.* 198. 1 *Bulſtr.* 134. If alienage be pleaded to an alien in league, that muſt be in diſability of the plaintiff; but if it be to an alien enemy, it may be pleaded to the action; becauſe it is forfeited to the king, as a reprizal for the damages committed by the dominion in enmity with him. *Bro. Denizen* 10. *Co. Lit.* 129. *b.* See title **Aliens.**

4. *Præmunire.* Perſons attainted of præmunire are incapable of bringing any action; for they are out of the protection of the law. *Lit. ſect.* 199. *Co. Lit.* 129. See title **Præmunire.**

5. *Papiſh recuſancy.* This diſability of popiſh recuſancy convict, is by ſtat. 3. *Jac.* 1. *c.* 5. which diſables to all intents, as excommunication, except where he ſues for lands,

lands, tenements, leaſes, annuities, rents, and hereditaments, or for the iſſues and profits thereof, which are not to be ſeized into the King's hands, his heirs or ſucceſſors.

III. *Pleas in abatement to the perſon of the defendant.* Under this head it will be neceſſary to conſider the privilege that the courts at *Weſtminſter* give to all ſuitors in general, and their own officers and ſervants in particular. As the courts of juſtice are open to all; ſo the law protects the perſons of thoſe who come to attend them both in going thither and returning. But in this caſe the defendant muſt appear in perſon, that the court may examine him, and that they may be ſatisfied upon his oath, that he was either proſecuting or defending ſome ſuit pending in that court, when he was arreſted. 2 *Roll. Abr.* 272. 2 *Hen.* 7. 2. 1 *H.* 6. 3. 38 *H.* 6. 30. So if the court gives either plaintiff or defendant leave to go after evidences in any cauſe depending in that court, and he be arreſted, he ſhall have privilege. 2 *Roll. Abr.* 272. 13 *Hen.* 4. 1. The courts not only protect the parties themſelves, but all witneſſes are protected *eundo et redeundo*; for ſince they are obliged to appear by the proceſs of that court, they will not ſuffer any one to be moleſted, whilſt he is paying obedience to their writ. 1 *Moor* 66.

The particular privilege, which the officers of each court enjoy, is not to be drawn out of their own court, to be impleaded elſewhere; for as their attendance is conſtantly to diſpatch the buſineſs of the court to which they belong, if they might be ſued in any other place, their cauſes muſt ſuffer, becauſe they could not be ſpared from their own court to defend them. 2 *Roll. Abr.* 272. 1 *Lutw.* 44, 639. *Vaugh.* 155. 2 *H.* 7. 2. But this is to be underſtood, when the plaintiff can have the ſame remedy againſt the officer in his own court, as in that where he ſues him; for if money be attached in an attorney's hands by foreign attachment in the ſheriff's court in *London*, he ſhall not have his privilege; becauſe in this caſe the plaintiff would be remedileſs. For the foreign attachment is by the particular cuſtom of *London*, and does not lie at Common law; ſo that if the attorney ſhould have his privilege, the plaintiff ſhould be without his redreſs. 1 *Saund.* 67, 68. So if a writ of entry, or other real action be brought againſt an attorney of the *King's Bench*, he cannot plead his privilege; becauſe, if this ſhould be allowed, the plaintiff would have a right without a remedy; for the *King's Bench* hath not cognizance of real actions. 1 *Saund.* 67.

But the privilege, which the court indulges their officers with, is reſtrained to the ſuits only which they bring in their own right; for if they ſue or are ſued as executors or adminiſtrators, they then repreſent common perſons, and are to have no privilege. *Hob.* 177. For more matter concerning the privilege of attornies, ſee *Law of Attornies and Solicitors, chap.* 8.

Miſnomer is a good plea in *abatement*; for ſince the names are the only marks and *indicia* of things that human kind can underſtand each other by, if the name be omitted or miſtaken, there is a complaint againſt no body. But though a defendant may, by pleading in *abatement*, take advantage of a *miſnomer* when their is a miſtake in the writ or declaration, as to the name of baptiſm or ſurname; yet in ſuch a plea he muſt ſet forth his right name, ſo as to give the plaintiff a better writ. *Finch.* 363. 9 *Hen.* 5. 1. One defendant cannot plead *miſnomer* of his companion; for the other defendant may admit himſelf to be the perſon in the writ. 1 *Lutw.* 36. The defendant, though his name be miſtaken, is not obliged to take advantage of it; and therefore if he be impleaded by a wrong name, and afterwards impleaded by his right name, he may plead in bar the former judgment, and aver that he is *una et eadem perſona*. *Gilb. H. C.* 218. In caſe of felony at Common law, if a perſon were indicted by a wrong name, he could not plead *miſnomer*, but was obliged to plead to the felony. For the fact being ſworn againſt the party preſent, it was thought there could be no injury by the *miſnomer*, as might be where the party appeared by attorney; and felons generally go by no certain name, nor have they any fix'd habitation. But this is altered by the ſtatute of additions, viz. 1 *Hen.* 5. *c.* 5. which was made to prevent the inconvenience of troubling one perſon for another. See *Cro. Car.* 104. 21 *E.* 4. 72. 2 *Inſt.* 870. 1 *Sid.* 40. *Lit. Rep.* 8. In criminal caſes, the party accuſed may take advantage of *miſnomer*, or the want of addition, but yet muſt plead over to the felony: But though ſuch plea be found for him, he is not to be diſcharged, but muſt be indicted over again; neither ſhall ſuch plea, if found againſt him, be peremptory, but he ſhall be tried on his plea in chief. 2 *Hawk. P. C.* 186. Alſo the ſtate, place of abode and dignity of the perſon impleaded is neceſſary to be ſet forth in judicial proceedings, leſt an innocent perſon, by having the ſame name with the real defendant, ſhould ſuffer; and therefore the ſtat. 1 *Hen.* 5. *c.* 5. enacts, that in all perſonal actions, appeals and indictments, there ſhall be added to the name of the defendants, their eſtates, degrees, miſtery and place of abode. See titles **Addition** and **Miſnomer.**

IV. *Pleas in abatement to the count or declaration.* The firſt act, after the appearance of the parties, and the admittance of the juriſdiction, and the abilities of both parties, is that the party ſuing counts or declares: and afterwards the party impleaded may demand *oyer* of the writ: and then, if there be any fault or inſufficiency in the count for a cauſe apparent in itſelf, or if there be a variance between the count and the writ, or between the writ and a record, ſpecialty, *&c.* mentioned in the count, the party impleaded ought to ſhew it, and plead. *Thel. lib.* 10. *c.* 1. *ſect.* 5. *Fitz. Count* 27. If the declaration varies from the writ, as by laying the cauſe of action in the reign of a preſent king, where the writ ſuppoſed it to have been in the reign of a former king; or by giving the defendant a name different from that in the writ. As where the writ calls him *A. B.* of *London*, Alderman, and the plaintiff declares againſt him as *A. B.* of *London*, Eſq; or where the declaration is otherwiſe defective, in not purſuing the writ, or not ſetting forth the cauſe of action with that certainty which the law requires, or laying the offence in a different county from that in which the writ was brought.

V. *Pleas in abatement to the writ.* The law is very ſtrict in obliging men to keep up to the legal forms it preſcribes; and therefore in the writ, which is the foundation of the whole proceeding, requires that certainty and exactneſs, as that no perſon ſhould be arreſted or attached by his goods, unleſs there appears ſufficient grounds to warrant ſuch proceedings; ſo that if the writ vary materially from that in the *Regiſter*, or be defective in ſubſtance, the party may take advantage of it. See 5 *Co.* 12. 9 *H.* 7. 16. 10 *Ed.* 3. 1. 2 *Inſt.* 662. *Hob.* 1, 51, 52, 80. *Carth.* 172. See title **Writ.**

VI. *Abatement by demiſe of the King, marriage or death of parties.* At Common law all ſuits depending in the King's courts where diſcontinued by the death of the King; ſo that the plaintiffs were obliged to commence new actions, or to have re-ſummons or attachment on the former proceſſes, to bring the defendant in; but to prevent the inconvenience, expence and delay which this occaſioned, the ſtatutes of 1 *Ed.* 6 *c.* 7. 7 *&* 8 *Will.* 3. *c.* 27. and 7 *Ann. c.* 8. which ſee under title **Prerogative.**

If a writ be brought by *A. B.* as baron and feme, whereas they were not married until the ſuit depended, the defendant may plead this in abatement; for though they cannot have a writ in any other form, yet the writ ſhall abate, becauſe it was falſe when ſued out. *Fitz. Brief.* 476. If a writ be brought againſt a feme covert as ſole, ſhe may plead her coverture; but if ſhe neglects to do it, and there is a recovery againſt her as a feme ſole, the huſband may avoid it by writ of error, and may come in at any time and plead it. *Latch.* 24. *Style* 254, 280. 2 *Roll. Rep.* 53. If an action be brought in an inferior court againſt a feme ſole, and pending the ſuit ſhe intermarries, and afterwards removes the cauſe by *habeas corpus*, and the plaintiff declares againſt her as a feme ſole, ſhe may plead coverture at the time of ſuing the

the *habeas corpus*; becauſe the proceedings here are *de novo*; and the court takes no notice of what was precedent to the *habeas corpus*; but upon motion on the return of the *habeas corpus*, the court will grant a *procedendo*. For though this be a writ of right, yet where it is to abate a rightful ſuit, the court may refuſe it; and the plaintiff had bail below to this ſuit, which by this contrivance he is ouſted of, and poſſibly by the ſame means of the debt. 1 *Salk.* 8.

As to pleas in abatement by the death of parties, the general rule is, that whenever the death of any party happens pending the writ, and yet the plea is in the ſame condition as if ſuch party were living, there ſuch death makes no alteration. For where the death of the parties makes no change of proceeding, it would be unreaſonable that the ſurviving parties ſhould make any alteration in the writ; and it would be abſurd, that what made no alteration ſhould change the writ and the proceſs. *G. Hiſ. C. P.* 242.

By ſtatute 8 & 9 *Will.* 3. *c.* 11. *ſect.* 7. it is enacted, "that if there be two or more plaintiffs or defendants, and one or more of them ſhould die, if the cauſe of ſuch action ſhould ſurvive to the ſurviving plaintiff or plaintiffs, or againſt the ſurviving defendant or defendants, the writ or action ſhall not be thereby abated; but ſuch death being ſuggeſted upon the record, the action ſhall proceed at the ſuit of the ſurviving plaintiff or plaintiffs, againſt the ſurviving defendant or defendants." Before this ſtatute it was held, that if there were two executors, and they brought an action of debt, and one of them died, that the writ ſhould not abate; for in this caſe ſummons and ſeverance lies, after which the one executor does not proceed for a moiety, but for a whole, as repreſentative of the teſtator. *Cro. Eliz.* 652. *Co. Lit.* 139. 1 *Leon.* 44. So in a *quare impedit*, by two jointenants, and one is ſummoned and ſevered, and the ſevered perſon dies, the writ ſhall not abate, becauſe the advowſon is an intire thing, and he proceeded for the whole, after the ſeverance; and ſo he may after the death of the ſevered jointenant. *Dyer* 279.

If there were ſeveral defendants in the original action, and one died, the writ did not abate; becauſe there being a joint demand, it ſurvives againſt the reſidue; but in this caſe there muſt be a ſuggeſtion on the roll, becauſe it would be error to give judgment againſt a deceaſed perſon. *Hard.* 151, 164. *Style* 299. 3 *Mod.* 249. *Cro. Car.* 426. 1 *Jones* 367. 1 *Rol. Abr.* 756. 1 *Show. Rep.* 186. But in a writ of error, if there be ſeveral plaintiffs, and one dies, the writ ſhall abate, becauſe the writ of *error* is to ſet perſons *in ſtatue quo*, before the erroneous judgment given below; and they that are plaintiffs in error were diſtinct ſufferers in the judgment, ſince there might be different executions iſſued thereupon, and different heirs were made by ſuch judgment, on the lands of each of them; and by conſequence the ſurvivor cannot proſecute the writ of error for the whole waſte, leſt by a colluſive perſuaſion, or by negligence or deſign he ſhould hurt the repreſentative of the deceaſed. *Bridg.* 78. *Yelv.* 208, 212, 213. 10 *Co.* 135. 1 *Vent.* 34. 1 *Sid.* 419. *cont.* But if any of the defendants in error die, yet all things ſhall proceed, becauſe the benefit of ſuch judgment goes to the ſurvivor, and he only is to defend it. *Sid.* 419. *Yelv.* 208. In an *audita querela*, by two, the death of one ſhall not abate the writ; for the ſurvivor is not to be reſtored to any thing he has loſt, but to diſcharge himſelf of the execution; and thereupon, notwithſtanding the death of the other, he may proceed for a diſcharge *in toto* for himſelf. 1 *Vent.* 34. 3 *Hen.* 7. 1. 3 *Mod.* 249. If there be ſeveral perſons named as plaintiffs in the writ, and one of them was dead at the time of purchaſing the writ, this may be pleaded in *abatement*; becauſe it falſifies the writ; and becauſe the right was in the ſurvivors, at the time of ſuing the writ, and the writ not accommodated, as the caſe was. 20 *Hen.* 6. 30. 18 *E.* 4. 1. 2 *H.* 7. 16. 1 *Brownl.* 3, 4. *Clift. Ent.* 6. *Raſt. Ent.* 126.

By ſtat. 17 *Car.* 2. *c.* 8. (made perpetual by 1 *Jac.* 2. *c.* 17.) it is enacted, that the death of either of the parties between verdict and judgment, ſhall not be alledged

for error, ſo as judgment be entered within two terms after ſuch verdict.

By ſtat. 8 & 9 *Will.* 3. *c.* 11. *ſect.* 6. it is enacted, that if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the ſaid action ſhall not abate by reaſon thereof, if ſuch action might originally be proſecuted or maintained by the executors or adminiſtrators of ſuch plaintiff; and if the defendant die after ſuch interlocutory judgment, and before final judgment therein obtained, the ſaid action ſhall not abate, if ſuch action might originally be proſecuted or maintained againſt the executors or adminiſtrators of ſuch defendant and the plaintiff; or if he be dead after ſuch interlocutory judgment, his executors or adminiſtrators ſhall and may have a *ſcire facias* againſt the defendant, if living after ſuch interlocutory judgment; or if he die after, then againſt his executors or adminiſtrators, to ſhew cauſe why damages in ſuch action ſhould not be aſſeſſed and recovered by him or them; and if ſuch defendant, his executors or adminiſtrators, ſhall appear at the return of ſuch writ, and not ſhew or alledge any matter ſufficient to arreſt the final judgment; or being returned, warned, or upon two writs of *ſcire facias* it be returned, that the defendant, his executors or adminiſtrators had nothing whereby to be ſummoned, or could not be found in the county, ſhall make default, that thereupon a writ of enquiry of damages ſhall be awarded, which being executed and returned, judgment ſhall be given for the ſaid plaintiff, his executors or adminiſtrators, proſecuting ſuch writ or writs of *ſcire facias* againſt ſuch defendant, his executors or adminiſtrators reſpectively.

As pleas in abatement enter not into the merits of the cauſe, but are dilatory, the law has laid the following reſtrictions on them. Firſt, By the ſtatute of 4 & 5 *Ann. cap.* 16. for amendment of the law, no dilatory plea is to be received unleſs on oath, and probable cauſe ſhewn to the court. Secondly, No plea in abatement ſhall be received after a *reſpondeas ouſter*, for then would they be pleaded *in infinitum*. 2 *Saund.* 41 Thirdly, That they are to be pleaded before imparlance. See *Yelv.* 112. 1 *Lutw.* 46, 178. 2 *Lutw.* 1117. *Doct. Pla.* 224. Fourthly, That when iſſue is joined on them, if it be found againſt him who pleads ſuch dilatory plea, it ſhall be peremptory. 2 *Show. Rep.* 42. 6 *Mod.* 236.

Abatamentum, (from *abate*) Is an entry into lands by interpoſition; that is, when a perſon dies ſeiſed, and another who has no right enters before the heir. *Co. Lit.* 277. *a.*

Abator, Is he that *abateth*, that is, intrudeth into a houſe or land, void by the death of the former poſſeſſor, and not yet entered by his heir. *Cowel. Old Natura Brev.* 115. *Perkins* 76.

Abatuda, Is any thing diminiſhed. *Moneta abatuda*, is money clipt or diminiſhed in value. *Du Freſne.* Charta Simonis Comitis Leiceſtriæ et Montisfortis an. 1209. in 30 Regeſto tabularii regii, ch. 44. *Si tempore ſolutionis hæc moneta Melgorienſis fuerit abatuda ſeu deteriorata, &c. Cowel. Du Freſne.*

Abbacy, In Latin *Abbatia*, or *Abbathia*, is the ſame as to the government of a religious houſe, and the revenues thereof, ſubject to an abbot, as a biſhoprick is to a biſhop: we may call it his *paternity*. *Talis* abbatia *(quæ paternitas Latino ſermone dicitur) funditus removeatur.* Concil. Meldenſ. *anno dom.* 845. cap. 10. This word is uſed in ſome of our antient grants, particularly *anno* 34 & 35 *Hen.* 8. in a grant of the Counteſs of *Pembroke. Sciant, &c. quod ego* Iſabella *Comitiſſa* Pembr. *pro ſalute animæ meæ, &c. Dedi Deo et* abbatiæ *de* Nutteleg *totam* Wickham *juxta prædictam* abbatiam, *&c. Cowel. Du Freſne.*

Abbat, or **Abbot**, *Abbas* in Latin, in French *abbe*, in Saxon *abbud*, is a ſpiritual lord or governor, having the rule of a religious houſe. Some learned men derive it from the Syriack *abba, pater. Juſtinian's Novel Conſtitut.* 115. *ſect.* υπολειπον, terms him *archimandrita*; others *cœnobiarcha*, or *archimonachus*. Of theſe abbots here in *England*, ſome were elective, ſome preſentative: ſome were *mitred*, and ſome were not. Such as were mitred had epiſcopal authority within their limits, being

exempted from the juriſdiction of the dioceſan; but the other ſort of abbots were ſubject to the dioceſan in all ſpiritual government. The mitred *abbots* were lords of parliament, and called *abbots ſovereign*, and *abbots general*, to diſtinguiſh them from the other *abbots*. And as there were *abbots*, ſo there were alſo *lords priors*, who had exempt juriſdiction, and were likewiſe lords of parliament. Some reckon twenty-ſix of theſe lords *abbots* and priors that ſat in parliament. Sir *Edward Coke* ſays, there were twenty-ſeven parliamentary *abbots*, and two priors. *Co. Lit.* 97. In the parliament 20 *R.* 2. there were but twenty-five *abbots*, and two priors: But in the ſummons to parliament at *Winton*, *anno* 4 *Ed.* 3. (*in dorſo clauſo ejuſdem an. membran.* 41.) more are named; to which I have added the founders out of the *Monaſticon Anglicanum*.

Abbots and Priors.	*Founders names.*
1. Abbot of St. *Auſtin's* in *Canterbury*.	*Athelbertus Rex*, anno 602.
2. Abbot of *Ramſey*.	*Ailwinus Semi-rex*, 969.
3. Abbot of *Peterborough*.	*Wulferus Rex*, 664.
4. Abbot of *Croyland*.	*Ethelb. Rex Merciæ*, 726.
5. Abbot of *Eveſham*.	*Egwin. Epiſc. Wigorn.* 708.
6. Abbot of St. *Benet de Hulmo*.	*Canutus Rex*, *anno* 1026.
7. Abbot of *Thornby*.	*Wil. Albemarle Sub Hen.* 2.
8. Abbot of *Colcheſter*.	*Eudo Dapifer*, *Hen.* 1.
9. Abbot of *Leiceſter*.	*Rob. Boſſue*, *Comes Leic.* 1141.
10. Abbot of *Winchcomb*.	*Kenulphus Rex Merciæ*, 789.
11. Abbot of *Weſtminſter*.	*Seabert Rex Occid. Sax.* 604.
12. Abbot of *Cirenceſter*.	*Henricus Primus*, 1133.
13. Abbot of St. *Albans*.	*Offa Rex Merciæ*, 795.
14. Abbot of St. *Mary York*.	*Alanus Comes Britanniæ*, 1088.
15. Abbot of *Shrewſbury*.	*Roger. Comes Montgom.* 1081.
16. Abbot of *Selby*.	*Gulielm.* Conqueſtor, 1078.
17. Abbot of St. *Peter's Glouceſter*.	*Offric. Rex Northumb.* 700.
18. Abbot of *Malmeſbury*.	*Maidulfus Hibern. Scot.* 648.
19. Abbot of *Waltham*.	*Haraldus Rex*, 1036.
20. Abbot of *Thorney*.	*Ethelwoldus*, *et Edgarus Rex*, 972.
21. Abbot of St. *Edmond's*.	*Canutus Rex*, 1020.
22. Abbot of *Beaulieu*.	*Johannus Rex*, *Anno Regni* 6.
23. Abbot of *Abingdon*.	*Ciſſa Rex*, An. 675.
24. Abbot of *Hyde*.	*Aluredus Rex*, 922.
25. Abbot of *Rading*.	*Henricus Primus Rex*, 1125.
26. Abbot of *Glaſtonbury*.	*Inas Rex Occid. Rex.* 708.
27. Abbot of *Oſney*.	*Rob. Fitz-Nigel Doily*, 1129.
28. Prior of *Spalding*.	*Io. Talbois*, *Com. Andegav.* 1074.
29. Prior of St. *John's* of Jeruſalem.	*Jordanus Briſet et Ux. ejus*, 1100.
30. Prior of *Lewes*.	*Will. de Warren*, *Primus Comes Sur.* 1078.

To which were afterwards added,

31. Abbot of St. *Auſtin's Briſtoll*.	*Henricus Secundus Rex.*
32. Abbot of *Bardeney*.	*Rex Ethelredus*, 712.
33. Prior of *Semplingham*.	*Sanctus Gilbertus*, 1131.

To theſe alſo *Henry* the eighth added the abbot of *Taviſtock*. And in the *teſte* to *Magna Charta*, the names of ſome other abbots are inſerted, among the great men of the realm. An abbot with the monks of the ſame houſe were called the *Convent*, and made a corporation. But the abbot was not chargeable by the act of his predeceſſor, unleſs it were under the common ſeal, or for ſuch things as came to the uſe of the houſe or convent. *Terms de la ley* 2. By ſtatute 27 *Hen.* 8. *c.* 28. All abbeys, monaſteries, priories, *&c.* not above the value of 200*l. per ann.* were given to the King. *Anno* 28 *Hen.* 8. the reſt of the abbots, *&c.* made voluntary ſurrenders of their houſes, to obtain favour of the King: And *anno* 31 *Hen.* 8. a bill was brought into the houſe to confirm thoſe ſurrenders; which paſſing, compleated the diſſolution, except the hoſpitals and colleges, which were not diſſolved; the firſt, till the 33d, and the laſt till the 37th of *Hen.* 8. when commiſſioners were appointed to enter and ſeize the ſaid lands, *&c.* *Cowel.*

Abatis, (derived from ἀβατος, *bardus*, vel *ſtupidus*) an *avener* or ſteward of the ſtables. The word was ſometimes uſed for a common hoſtler; being pronounced ſhort in the middle ſyllable, which diſtinguiſhes it from the genitive of *abbas*, an abbot. As in this old line,

Abbatis ad cœnan, dat equis abatis avenam. *Cowel. Spelman. Du Freſne.*

Abbettor. See *Abet.*

Abbrochment. See *Abrochment.*

Abbuttals, (from the French *aboutir*, to border upon) are the *buttings* and boundings of land either to the eaſt, weſt, north or ſouth, ſhewing on what other lands, rivers, highways, or other places it does *abut*: As in *Cro. Jac.* 184. *The plaintiff hath failed in his abbuttals*, that is, in ſetting forth how the land is *abutted* and bounded. *Cambden* ſays, that limits were diſtinguiſhed by hillocks raiſed on purpoſe, which were called *botentines*; whence we have the word *butting*. In a terrier, or deſcription of the ſite of land, the ſides on the breadth are properly *adjacentes*, lying or bordering, and the ends only in length are *abuttantes*, *abutting* or *bounding*: Which in old ſurveys, they ſometimes expreſſed by *capitare*, to head; whence *abuttals* are now called *head-lands*. *Cowel.*

Abdicate, (from *abdico*) to give up right; to reſign.

Abdication, (*abdicatio*) in general, is where a magiſtrate, or perſon in office, renounces and gives up the ſame, before the term of ſervice is expired. This word is frequently confounded with reſignation, but differs from it in that *abdication* is done purely and ſimply; whereas reſignation is in favour of ſome third perſon. *Chamb. Dict.* It is ſaid to be a renunciation, quitting and relinguiſhing, ſo as to have nothing further to do with a thing; or the doing of ſuch actions as are inconſiſtent with the holding of it. On King *James's* leaving the kingdom, and *abdicating* the government, the lords would have the word *deſertion* made uſe of; but the commons thought it was not comprehenſive enough, for that the King might then have liberty of returning. *Abdication Debates.* The *Scots* called it *forfeiture* of the crown, from the verb *forisfacio*. For the *abdication* of King *James* 2. See *Stat.* 1 *Will. & Ma. ſeſſ.* 2. *c.* 2. *ſect.* 7.

Abditorium, (from *abdere*, to hide) an abditory or place to hide and preſerve goods, plate, or money, or a cheſt in which relicks were kept. As in the inventory of the church of *York*, *Mon. Angl. tom.* 3. *p.* 173. *Item unum*

unum coffeur, et una pixis de ebore ornata cum argento deaurato. Item tria abditoria *et tres pixides de ebore ornatæ cum cupro deaurato. Cowel. Du Freſne.*

Aberhed, from the French *abbecher*, to feed, is an old word, which ſignifies to be ſatisfied. *Cowel.*

Aberemurder, *Aberemurdrum*, plain or downright murder; as diſtinguiſhed from the leſs heinous crimes of *manſlaughter* and *chancemedley*. It is derived from the Saxon, *æbere*, apparent, notorious, and *mord*, murder. So *æbere theof*, a notorious thief. This *aberemurder* was declared a capital offence, without fine or commutation by the laws of *Cnute*, *cap.* 61. *Irruptio in domum, et incendium, et furtum manifeſtum, et cædes publica, et domini proditio, juxta leges humanas ſunt inexpiabilia.—Hoc ex ſcelerum genere fuit, nullo pretio, etiam apud Saxones noſtros, expiabilium: cùm alia licuit pecuniis commutare*, ſays *Spelman*. And in the laws of *Hen.* 1. *c.* 12. *Ex his placitis quædam emendantur centum ſolid', quædam* Wera, *quædam* Wita, *quædam non poſſunt emendari, quæ ſunt* Huſbreek, *et* Bernet, *et* Openthifthe, *et* Eberemorth, *&c. Cowel. Du Freſne. Wilkins Leg. Anglo-Sax.*

Abet, *(Abettare)* from the Saxon *a*, an energetical article, and *betan*, to ſtir up, or excite. In our law it ſignifies as much as to encourage or ſet on. The ſubſtantive *abetment*, ſignifies encouragement or inſtigation. *Standf. Pl. Cr.* 105. And *abettor (abettator)* is an inſtigator or ſetter on; one that promotes or procures a crime. *Old Nat. Brev.* 21. But both the verb and noun are always taken in the worſt ſenſe. As *abettors* of murder, are ſuch as command, procure, or counſel others to commit a murder: And in ſome caſes ſuch *abettors* ſhall be taken as principals; in others, but as acceſſaries; their preſence or abſence at the time of committing the fact, making the difference. *Co. Lit.* 475. *Cowel. Spelman.*

Abeyance, hath by ſome been derived from the French *aboyer*, to bark; but it ſeems rather to come from the French word *béer*, to gape after, or to expect. This word in *Littleton*, *cap. Diſcontinuance*, we find thus uſed: The right of fee-ſimple lieth in *abeyance*, that is, according to his own interpretation, only in the rememberance, intendment and conſideration of the law. Sir *Edw. Coke* calls it *in gremio egis*. And it is a maxim in law, that of every land there is a fee-ſimple in ſome man, or elſe it lies in *abeyance*. If a man makes a leaſe for life, remainder to the right heirs of *J. S.* the fee-ſimple is in *abeyance* until *J. S.* dies. *Co. Lit.* 342. In this caſe the remainder paſſeth from the grantor preſently; though it veſts not preſently in the grantee, but is ſaid to be in *abeyance*. *Termes de la ley.* If lands be leaſed to *A. B.* for life, remainder to another perſon for years, the remainder for years is in *abeyance* until the death of the leſſee, and then it ſhall veſt in him in remainder as a purchaſer, and as a chattel ſhall go to his executors. 3 *Leon.* 23. Where tenant for term of another's life dieth, the freehold of the lands is in *abeyance* till the entry of the occupant. Fee-ſimple in *abeyance* cannot be charged until it comes *in eſſe*; ſo as to be certainly charged or aliened; though by poſſibility it may fall every hour. *Co. Lit.* 378. The word *abeyance* hath been compared to what the civilians call *hæreditatem jacentem*; for as the civilians ſay lands and goods do *jacere*; ſo the common lawyers ſay, that things in like eſtate are in *abeyance*; as the logicians term it, *in poſſe*, or in underſtanding; and as we ſay, *in nubibus*, that is, in conſideration of law. *Cowel. Spelman.*

Abgatoria, *Abgetorium*, the alphabet A, B, C, *&c. Mat. Weſt.* reports of St. *Patrick*——Abgetoria *quoque* 345 *et eo amplius ſcripſit, totidem epiſcopos ordinavit.* So Sir *James Ware de Scriptor. Hibern. lib.* 1. *Baptizavit quotidie homines et illis literas legebat, et* abgatorias. *Cowel. Du Freſne.*

Abigevus, for *Abigeus*, (from *abigo*, to drive away) ſignifies a thief who hath ſtolen many cattle. *Quantitas diſcernit furem ab abigevo, ſecundum quod furtum fuerit majus vel minus, ut ſi quis ſuem ſurripuit, fur erit, et ſi quis gregem, abigevus. Bract. lib.* 3. *c.* 6. *Cowel. Du Freſne.*

Abiſherling, is underſtood to be quite of amercements. It originally ſignified a forfeiture or amercement; and is more properly *miſhering*, or *miſkering*, according to *Spelman*. Old authors have termed it a freedom or liberty, becauſe whoever hath this word inſerted in a charter or grant, hath not only the forfeitures and amercements of all others within his fee for tranſgreſſions, but alſo is himſelf free from the controul of any within that compaſs. *Cowel. Du Freſne.*

Abjuration, *(Abjuratio)* Is a renouncing by oath, and ſignifieth a ſworn baniſhment, or an oath taken to forſake the realm for ever. *Saundf. Pl. Cor. lib.* 2. *cap.* 40. *Abjuration* by the courſe of the Common law may be thus deſcribed: When a man or a woman had committed felony, and the offender for ſafeguard of his or her life had fled to the ſanctuary of a church or church-yard, and there, before the coroner of that place, within 40 days had confeſſed the felony, and taken an oath for his or her perpetual baniſhment out of the realm into a foreign country, chooſing rather *perdere patriam quam vitam.* But that foreign country into which he was to be exiled, muſt not be among infidels. 3 *Inſt. cap.* 51. Abjuration of the realm was the party's oath before the coroner himſelf, to depart the realm for ever at the time and place appointed for him; going the direct way to the ſea-ſide for that purpoſe; ſtaying there but one flood and one ebb, if he can have a paſſage; and till he can ſo paſs, going every day into the ſea up to the knees, *(Fleta* ſays, up to the neck) to try if he can paſs over; and if he cannot paſs within 40 days, then to put himſelf again into the church as a felon, *&c. Finch of Law.* A man abjured the realm and was taken out of the highway by force, and put in priſon, and afterwards eſcaped, and then was taken and arraigned for it; and becauſe he did not endeavour to go to his port when he was eſcaped, therefore he was not reſtored to the way, but was hanged. For it was ſaid, that his life was not granted to him upon the abjuration, but upon condition that he ſhould go to the port aſſigned him with ſpeed; and if he does not do ſo, he ſhall be hanged; but if he be taken out of the way, he ſhall be reſtored if he prays it, if no default be in him. *Br. Coron. pl.* 144. *Cites* 7 *Hen.* 7. 7. A man could not abjure for *petit larceny*, but for ſuch felonies for which he ſhall ſuffer death. *Br. Cor. pl.* 182. But at laſt, this puniſhment becoming but a perpetual confinement of the offender to ſome ſanctuary, wherein, upon abjuration of his liberty and free habitation, he would chooſe to ſpend his life; as appears by ſtat. 22 *Hen.* 8. *c.* 14. it was enacted by ſtat. 21 *Jac.* 1. *c.* 28. *ſect.* 7. that thence after no ſanctuary, or privilege of ſanctuary ſhould be allowed; whereupon this abjuration ceaſed: And yet the abjuration by force of the ſtatute of 35 *Eliz. cap.* 1. before juſtices of peace or juſtices of aſſize, or by force of 35 *Eliz. cap.* 2. before two juſtices of peace or the coroner by a recuſant, remaineth ſtill; becauſe ſuch abjuration hath no dependence upon any ſanctuary. 3 *Inſt.* 115, 116. *cap.* 51. An abjuration for ever into a foreign country is a civil death; and called by Lord *Coke* a divorce between huſband and wife; and the wife of ſuch perſon may bring actions, or be impleaded during the natural life of the huſband, which ſhe may not do in any other caſe. *Co. Lit.* 133. The form of the oath of abjuration was thus, according to *Staundforde*, 'Hoc audis, Domine coronatur, quòd ego ſum 'latro bidentium, vel alicujus alterius animalis, vel ho-'micida unius, vel plurium, et felo domini regis Angliæ. 'Et quia multa mala et latrocinia, vel hujuſmodi in terra 'feci, abjuro terram domini regis Angliæ. Et quòd 'debeo me feſtinare verſus portum de tali loco quem 'mihi dediſti; et quòd non debeo abire de altera 'via: Et ſi faciam, volo quòd ſim captus ſicut latro et 'felo domini regis; et quod ad talem locum diligenter 'quæram tranſitum, et quòd non expectabo illic, niſi 'fluxum et refluxum, ſi tranſitum habere potero; et niſi 'tanto ſpatio tranſitum habere potero, ibo quolibet die 'in mare uſque ad genu, tentans tranſire: Et ni hoc po-'tero infra 40 dies continuos, mittam me iterum ad ec-'cleſiam ſicut latro et felo domini regis: Sic me deus ad-'juvet,' *&c.* For the abjuration oath to be taken, ſee ſtat. 13 *Will.* 3. *cap.* 6. 6. *Ann. c.* 7. *ſect.* 20.

Abolition, A deſtroying, effacing, or putting out of memory: It is the leave given by the King or judges to a criminal accuſer, to deſiſt from farther proſecution: *Inſtitutæ actionis peremptio.* See ſtat. 25 *Hen.* 8. *c.* 21. *Cowel.*

Abridge, (from the French *abbreger)* Signifies to make ſhorter in words, ſo as to retain the ſenſe or ſubſtance. But in the Common law it ſignifies particularly the making a declaration or count ſhorter, by taking away or ſevering ſome of the ſubſtance from it. For example, a man is ſaid to abridge his plaint in aſſize; and a woman her demand in action of dower, where any land is put into the plaint or demand, which is not in the tenure of the tenant or defendant. For if the defendant pleads non-tenure, joint-tenancy, *&c.* in abatement of the writ, the plaintiff may leave out thoſe lands, and pray that the tenant may anſwer to the reſt. The reaſon of this abridgment of the plaint is, becauſe the certainty is not ſet down in ſuch writs, but they run in general: And though the demandant hath abridged his plaint in part, yet the writ will be good for the remainder. *Cowel. Brook.* tit. *Abridgment.* By ſtat. 21 *Hen.* 8. *cap.* 3. The plaintiff in aſſiſe may abridge his plaint of any part whereunto a bar is pleaded, without prejudice to the reſidue; in like manner as he might do in caſe the plea in bar had been made to any certainty or number of acres.

Abridgment, *(Abbreviamentum)* A large work contracted into a narrow compaſs. *Abridgment* of a plaint, ſee **Abridge.**

Abrogate, *Abrogare,* To diſannul or repeal; as to abrogate a law, that is, to lay aſide, or repeal it. This word is uſed in the ſtat. 5 *&* 6 *Ed.* 6. *c.* 3.

Abſentees, A parliament ſo called, held at *Dublin,* 10 *May,* 28 *Hen.* 8. and mentioned in letters patent, dated 29 *Hen.* 8. *Cowel.* See 4 *Inſt.* 354.

Abſolve, *(Abſolvere)* To *abſolve* a perſon excommunicated, is to deliver or ſet him free from an excommunication. See **Abſoile.**

Abſolution from *Rome.* See **Bull.**

Abſoniare, To deteſt, ſhun or avoid. It was uſed by the *Engliſh-Saxons* in the oath of fealty; as in the form of the oath among the *Saxons* recorded by Mr. *Somner: In illo Deo, pro quo ſanctum hoc ſanctificatum eſt, volo eſſe nunc domino meo fidelis et credibilis, et amare quod amat, et* abſoniare *quod* abſoniat, *per Dei rectum, et ſeculi competentiam. Cowel. Du Freſne.*

Abuttals. See **Abbuttals.**

Abſque hoc, Are words of exception, made uſe of in a traverſe. See **Traverſe.**

Accapitum, and **Accapitare,** The ſame with relief due to lords of manors: Thus *Capitali domino* accapitare, is to pay a relief to the lord. *Cowel. Du Freſne. Fleta, lib.* 2. *cap.* 50.

Accedas ad Curiam, Is a writ that lies for him who has received falſe judgment, or fears partiality in a court-baron, or hundred-court. It is directed to the ſheriff; and iſſued out of *Chancery,* but returnable into *B. R.* or *C. B.* and is in the nature of the writ *de falſo judicio,* which lies for him that had received falſe judgment in the county-court. In the *Regiſter* of writs, it is ſaid to be a writ that lies as well for juſtice delay, as for falſe judgment; and that it is a ſpecies of the writ *Recordare,* the ſheriff being to make record of the ſuit in the inferior court, and certify it into the King's court. *Cowel. Reg. Orig.* 56. *F. N. B. Dyer* 169.

Accedas ad vicecomitem, Is a writ directed to the coroner, commanding him to deliver a writ to the ſheriff; who having a *pone* delivered to him, ſuppreſſes it. *Cowel. Reg. Orig.* 83.

Acceptance, *(Acceptatio)* Is the taking and accepting of any thing in good part, and as it were a tacit agreement to a preceding act, which might have been defeated and avoided, were it not for ſuch acceptance had. For example; if a biſhop before the ſtatute 1 *Eliz.* leaſed part of his biſhoprick for term of years, reſerving rent, and then dies; and afterwards another is made biſhop, who *accepts* and receives the rent when due, by this *acceptance* the leaſe is made good, which otherwiſe the new biſhop might have avoided. In like manner, if baron and feme, ſeiſed of lands in right of the feme, join and make a leaſe or feoffment, reſerving rent; and the baron dies, after whoſe death the feme receives or *accepts* the rent; by this the leaſe or feoffment is confirmed, and ſhall bar her from bringing a *cui in vita. Cowel. Co. Lit.* 211.

Under this head ſhall be conſidered,

I. *Where acceptance of rent confirmeth a leaſe.*
II. *Where acceptance of rent ſhall not make the leaſe good.*
III. *Acceptance of rent after the aſſignment of a term; and where acceptance of one eſtate ſhall deſtroy another.*
IV. *Where acceptance of one thing ſhall be a good bar to demand another, and where not.*
V. *Where acceptance of money diſcharges a bond.*

I. *Where acceptance of rent confirmeth a leaſe.* Tenant in tail made a leaſe for years, rendring 20*s.* rent, and afterwards releaſed 19*s.* and died; the iſſue in tail accepted the 12*d.* rent: the better opinion was, that by the acceptance of the ſhilling for rent he had affirmed the leaſe, and could not diſtrain for the 19*s.* rent. *Dyer* 304. Tenant for life, remainder in tail; a ſtranger levies a fine to him in remainder, who leaſed the lands to the conuſor, rendring rent, the tenant for life died, and the iſſue in tail accepted the rent: adjudged, that by the fine and acceptance of the rent, the leaſe was affirmed. *Dyer* 299. See *Smith* againſt *Stapleton, Plowd.* 418, 434. Lord and tenant; the rent is behind many years, the tenant made a feoffment in fee, and the lord accepted the rent of the feoffee which became due in his time; adjudged, that by ſuch acceptance he ſhall loſe all the arrearages, and cannot avow for the ſame. 3 *Rep.* 65. *Penant's* caſe. Leaſe for years, rendring rent, with a clauſe of re-entry; the leſſee paid the rent, which the leſſor accepted, and put into a bag, but afterwards finding braſs money amongſt it, he refuſed to carry it away, and entered for the condition broken; but adjudged unlawful; becauſe after he had accepted the rent he is barred. 5 *Rep.* 113. *Wade's* caſe. Leſſor made a leaſe for years rendring rent at *Lady-Day,* with clauſe of re-entry; the rent was not paid at the day; afterwards the leſſor accepted it, and entered for the condition broken: adjudged, that his entry was lawful; for the rent was due before the condition broken; but if the leſſor accepts the next quarter's rent, then he hath loſt the benefit of re-entry, for thereby he admits the leſſee to be his tenant: and if the leſſor diſtrain for rent due at the ſaid feaſt, after the forfeiture, he cannot afterwards re-enter for the ſaid forfeiture; for by his diſtreſs, he hath affirmed the poſſeſſion of the leſſee: ſo if he makes an acquittance for the rent as a rent; contrary, if the acquittance be but for a ſum of money, and not expreſsly for the rent. 1 *Leon.* 262.

II. *Where acceptance of rent ſhall not make the leaſe good.* If a parſon or tenant for life make a leaſe for years, there no acceptance can make the leaſe good, becauſe the leaſe is void by their death. *Dyer* 46. 7. *Rep.* Earl of *Bedford's* caſe. A biſhop made a leaſe for years to two, not confirmed, afterwards he made another leaſe to one of them, which was confirmed by the dean and chapter, and died; the acceptance of the rent by his ſucceſſor did not affirm the firſt leaſe, becauſe it was void, and the ſame was in prejudice of the ſecond leaſe. *Dyer* 46. Tenant in tail made a leaſe for years, rendring rent to him and his heirs, and died; his ſon and heir accepted the rent, and was afterwards executed for treaſon, leaving iſſue a ſon; the King accepted the rent, but that did not make the leaſe good, the lands being in his hands by the attainder, and not in the reverter. *Dyer* 115. Leaſe for years, with condition, that the leſſee ſhall not alien or aſſign, without the aſſent of the leſſor, and if he did, that then the leſſor ſhould re-enter: he aſſigned part of the land without aſſent, *&c.* and then the leſſor *before notice* of the aſſignment, accepts the rent, and afterwards entered for the condition broken, and adjudged lawful; for the condition being collateral, he might aſſign the land ſo ſecretly, that it may be impoſſible for the leſſor to know it. 3 *Rep.* 65. *Pennant's* caſe. *Cro. Eliz.* 453. S. C. The provoſt of *Wel's* was parſon imparſonee of the parſonage of *W.* and made a leaſe of the tithes, rendring rent, which leaſe was confirmed by the dean and chapter, but not by the patron and ordinary; the provoſtſhip was united to the deanery; the provoſt died, and the dean accepted the rent: adjudged, that this leaſe

was

was void by the death of the provoſt, and the acceptance of the rent did not confirm it, becauſe the patron and ordinary did not join in the leaſe. *Dyer* 239. Leſſee for years of an houſe and lands, rendring rent, provided that the leſſee ſhall not parcel out any of the land from the houſe; afterwards he did parcel out the land from the houſe; then the rent was in arrear, the leſſor demanded it, and tho' he had a title to re-enter for the condition broken; yet he afterwards accepted the rent which became due after he had a title to enter, and then he re-entered: adjudged, that tho' he accepted the rent, as aforeſaid, yet his entry was lawful. *Noy* 7. Leaſe for twenty-one years, rendring rent, on condition, that if the leſſee did let any part of it above three years, then the leaſe to be void, and that the leſſor might enter; he let it out for three years, and ſo from three years to three years, during the term of twenty-one years, if he ſo long lived; the leſſor accepted the rent of the aſſignee, and afterwards entered; this was a breach of the condition, and the acceptance afterwards did not diſpenſe with it, becauſe the original leaſe was void and determined. *Cro. Car.* 368.

III. *Acceptance of rent after the aſſignment of a term; and where acceptance of one eſtate ſhall deſtroy another, and where not.* Leſſee for years aſſigned his term, and died inteſtate, the leſſor brought debt againſt his adminiſtrator, who pleaded the aſſignment, and that the plaintiff had notice, and had accepted the rent of the aſſignee: adjudged, that by the death of the leſſee, the privity of contract was determined, and the action would not lie againſt the adminiſtrator. *Cro. Eliz.* 715. and cited in *Walker*'s caſe, 3 *Rep.* 24.

Debt for rent; the defendant pleaded in bar, that before the action brought he aſſigned the leaſe to *R. B.* and that the leſſor had accepted the rent of the aſſignee, which became due after the aſſignment: adjudged, that ſuch acceptance was ſufficient notice of the aſſignment, and the plaintiff could not reſort to the firſt leſſee. 2 *Bulſt.* 151.

A man in conſideration of a marriage to be had with *M. R.* made an eſtate to her for life of certain lands in full ſatisfaction of her dower; afterwards they married, and the huſband died, and the widow brought a writ of dower againſt the heir, who pleaded in bar the acceptance of the eſtate for life: adjudged no good plea; for ſuch acceptance did not bar her of her dower at the Common law, becauſe ſhe had no title of dower when the acceptance was made; and beſides no collateral acceptance can bar any right of inheritance or freehold. See 4 *Rep. Vernon*'s caſe.

A man made a leaſe of a manor for thirty years, excepting the wood, *&c.* and afterwards made a leaſe of the woods to the ſame leſſee for ſixty years, and a third leaſe to him of the manor for thirty years, without any exception; reſolved, that by the acceptance of this future leaſe, the leaſe for ſixty years was ſurrendered; becauſe by ſuch acceptance the leſſee had affirmed, that the leſſor had authority to make a new leaſe. 5 *Rep.* 11. *Ives*'s caſe.

In a ſpecial verdict in treſpaſs, the caſe was, a leaſe was made to huſband and wife for their lives, and afterwards they accepted a new leaſe for themſelves and their ſon; *habendum* to all three of them, *a die datus indenturæ*, for the term of their lives with a letter of attorney to make livery: adjudged, that the acceptance of a ſecond leaſe, to commence *a die datus*, was a ſurrender of the firſt, and this by the expreſs agreement in writing of the leſſees themſelves; for otherwiſe the leſſor had no power to make a new leaſe. *Moor* 636.

A widow had judgment in dower, and upon a writ to the ſheriff he returned, that he had delivered eighty-four acres to her of the lands mentioned in the declaration; afterwards the widow brought a *ſcire facias* againſt the tertenant, ſuggeſting, that ſixty acres, parcel of the eighty-four, were the lands of another perſon not mentioned in the writ, and therefore prayed another diviſion; the tenant pleaded, that the other twenty-four acres were parcel of the lands recovered in dower, and that the widow had entered and accepted thoſe twenty-four acres; and upon demurrer to this plea, the tenant had judgment, becauſe by this entry and acceptance, though of a leſſer part, the widow had barred herſelf of the thirds of the whole in her declaration. *Moor* 679.

Leaſe for years to *R. B.* rendring rent; the next year a leaſe was made of the ſame lands to the lady *P.* for ninety-nine years; the next year the ſame lands were demiſed to the ſaid *R. B.* for forty-one years, who accepted the leaſe, but that did not extinguiſh his firſt leaſe; becauſe the leſſor by making the intermediate leaſe to the lady *P.* had only a reverſion, and could not afterwards give any intereſt to *R. B.* but if it had not been for this intermediate leaſe, then the acceptance of the ſecond leaſe for forty-one years had been a ſurrender of the firſt. *Hutt.* 104.

IV. *Where acceptance of one thing ſhall be a good bar to demand another, and where not.* Where the condition of a bond is collateral, there the acceptance of another thing is no bar; as if the condition be to make up an accompt; in an action of debt on the bond, the defendant cannot plead, that he made a leaſe for years to the plaintiff of lands, which he accepted. *Dyer* 1.

Where the condition is to pay money, there the acceptance of another thing is good; as in an action of debt on a bond, conditioned to pay 10*l.* at ſuch a day, the defendant pleaded, that before the day he gave the plaintiff a horſe in ſatisfaction, which he accepted, and held good. *Dyer* 56.

If a man be bound in 200 quarters of corn, with condition to pay 20*l.* the obligor may by agreement, give the obligee any other thing in ſatisfaction of the money; but if the condition had been to pay 100 quarters of corn, there the acceptance of money, or any other thing, had not been good, becauſe the contract was not made for money, but for a collateral thing. *Peytoe*'s caſe, 9 *Rep.* 79.

Debt upon bond, conditioned for the obligor to make an aſſurance of ſuch lands to ſuch uſes as in the condition mentioned; the defendant pleaded, that he had made a feoffment of the ſame lands to other uſes than in the condition expreſſed, which the obligee had accepted; and upon demurrer it was adjudged an ill plea; for the obligor ought not to vary from the uſes ſet forth in the condition. 1 *Brownl.* 60. Acceptance of a *leſs* ſum may be in ſatisfaction of a *greater* ſum, if it be before the day on which the money becomes due. 3 *Bulſt.* 301.

Debt on bond; the defendant pleaded payment of the money according to the condition, *&c.* upon which they were at iſſue, and the evidence was, that the defendant had paid the money before the day appointed by the condition, and that the plaintiff had *accepted* it: adjudged, this was a good diſcharge of the bond, if it had been ſpecially pleaded; but as the defendant had pleaded, it muſt be found againſt him, and ſo it was. *Godbolt.* 10.

Aſſumpſit, &c. the defendant pleaded, that he gave the plaintiff a beaver hat in ſatisfaction of the promiſe, and that the plaintiff accepted it in ſatisfaction; the plaintiff replied *proteſtando*, that the defendant did not *give* the hat in *ſatisfaction*, and traverſed, that he (the plaintiff) accepted it in ſatisfaction; and upon demurrer to this replication, it was objected, firſt, that the plea was ill, becauſe it was pleaded in ſatisfaction of the *promiſe*, when it ſhould be in ſatisfaction of the *damages*; but adjudged, that a releaſe of the *promiſe* had been a good plea in bar to this action; that if the defendant had pleaded a gift, without ſhewing that the plaintiff accepted it, this would have been an ill plea; becauſe the acceptance is as material as the *gift*, and either is *traverſable*; but this replication is ill, becauſe the plaintiff neither admitted or confeſſed the *gift*, but by a *proteſtando*; and if there was no *gift*, then there could be no acceptance. 2 *Salk.* 627. 5 *Mod.* 86. See *Hob.* 178.

V. *Where acceptance of money diſcharges a bond.* Debt upon bond; the defendant pleaded, that it was agreed between the plaintiff and the creditors of the defendant, that he ſhould by indenture convey lands to the ſaid creditors to be ſold by them, and the money to be ſhared

amongſt them, and ſays *de facto*, that by indenture he ſold the lands to them, and aſſigned to them a leaſe for years of certain cuſtoms of wines and ſums of money, which they accepted; adjudged, that this indenture ſounds in nature of a *covenant*, the breach whereof muſt be ſatisfied by damages, which are uncertain, and ſhall not be accepted or pleaded in ſatisfaction, yet, it not being performed, it ſhall be no bar, tho' accepted by the creditors. *Cro. Car.* 192. See 6 *Rep.* 34. *Blake*'s caſe. Debt upon bond for the payment of 7*l.* upon the birth of the plaintiff's next child; the defendant pleaded, that before the birth of the child it was agreed between them, that the plaintiff ſhould have a load of lime of the defendant; for which he would be indebted to him (the ſaid defendant) and that he would acquit him (the plaintiff) of the ſaid debt, and the plaintiff accepted it in *ſatisfaction* of the bond; and upon demurrer it was inſiſted, that nothing could be taken in ſatisfaction of the 7*l.* becauſe it was not a duty, but a ſum payable upon a contingency, and that the *lime* could not be accepted in ſatisfaction of the bond, becauſe the bond itſelf could not be diſcharged without a ſpecialty, and therefore he ought to have pleaded, that the plaintiff accepted it in ſatisfaction of the money mentioned in the condition, *&c.* And this laſt was adjudged a material exception. 2 *Cro.* 254. 1 *Bulſt.* 66. 1 *Brownl.* 109. *Yelv.* 192. Debt on a bond of 100*l.* conditioned for the payment of 52*l.* 10*s.* on a *certain day*; the defendant pleaded, that *at the day*, &c. he and his ſon gave a *new bond* of 100*l.* conditioned for the payment of 52*l.* 10*s.* *at another day* then to come, which the plaintiff accepted in ſatisfaction of the *old bond*; and upon demurrer it was adjudged for the plaintiff, becauſe the acceptance of a new bond to pay money at another day, could not be a preſent ſatisfaction for the money due on the day when it was to be paid on the old bond. *Hob.* 68. Debt upon bond, conditioned to pay 8*l.* *&c.* Defendant pleaded payment of 5*l.* before the day mention d in the condition, which the obligee accepted in ſatisfaction of the bond; and upon demurrer this was adjudged a good plea, upon this difference, that where a leſs ſum is paid before it is due, and the payment is accepted, it ſhall be good in ſatisfaction of a greater ſum; but after the money is due, then a leſs ſum, tho' accepted, ſhall not be a ſatisfaction for a greater ſum. *Moor* 677. Debt upon bond of 16*l.* conditioned to pay 8*l.* 10*s.* on a certain day; the defendant pleaded, that before that day, he at the requeſt of the plaintiff, paid to him 5*l.* which he accepted in ſatisfaction of the debt, and upon demurrer the plaintiff had judgment, becauſe the defendant had pleaded the payment of the 5*l. generally*, without alledging, that it was *in ſatisfaction* of the debt. It is true, he ſets forth, that it was accepted in ſatisfaction of the debt, but it ought likewiſe to be paid in ſatisfaction. 5 *Rep.* 517. Debt upon bond, conditioned, that in conſideration the plaintiff had paid 12*l.* to the defendant, he became bound to pay the plaintiff 12*l.* if he lived one month after the date of that bond; and if not paid at that time, then to pay to him 14*l.* if he lived ſix months after the date of the bond; the defendant pleaded, that after the ſix months, he paid the plaintiff 8*l.* and then gave him another bond in the penalty of 20*l.* conditioned to pay him 10*l.* on a certain day, in full ſatisfaction of the other bond, and that the plaintiff did accordingly accept the ſaid bond; upon a demurrer to this plea it was held ill; for admitting that one bond might be given in ſatisfaction of another, yet it cannot be after the other is forfeited, as it was in this caſe; becauſe after the forfeiture the penaly is veſted in the obligee, and a leſs ſum cannot be a ſatisfaction for a greater. 1 *Lut.* 501. Debt upon bond, conditioned for payment of 50*l.* and intereſt on the ſecond day of *March*, 31 *Car.* 2. the defendant pleaded in bar, that after the making the ſaid bond, he entred into another bond to the plaintiff of the ſame penalty, conditioned for payment of the like ſum, as in the firſt bond, which ſecond bond the plaintiff did accept in full diſcharge and ſatisfaction of the firſt; and upon a demurrer to this plea the plaintiff had judgment, becauſe the defendant did not alledge that he gave the ſecond bond in ſatisfaction of the firſt but only that the plaintiff accepted it, *&c.* 1 *Lut.* 501.

Acceſſory, or **Acceſſary**, *(Acceſſorius)* ſignifies a man guilty of a felonious offence, not principally, but by participation, as by command, advice, or concealment: *Particeps criminis. Cowel.* Acceſſaries are of two kinds, *viz.* acceſſaries *before* the fact, and acceſſaries *after* it. An acceſſary *before* is he, that being abſent at the time of the felony committed doth yet procure, counſel, command, or abet another to commit a felony, and it is an offence greater than the acceſſary after; and therefore in many caſes clergy is taken away from acceſſaries before, which yet is not taken away from acceſſaries after, as in petit treaſon, murder, robbery, and wilful burning, by 4 *&* 5 *P. & M. c.* 4. 1 *Hale's hiſtory of the pleas of the crown* 615. Acceſſaries *after* the fact is where a perſon, knowing the felony to be committed by another, receives, relieves, comforts, or aſſiſts the felon. 1 *H. H. P. C.* 618.

Under this head it is thought proper to conſider,

I. In what offences there are acceſſaries, and where not; and of acceſſaries by the Common law, and by act of parliament.

II. Acceſſaries before the fact.
III. Acceſſaries after the fact.
IV. Order of proceeding againſt acceſſaries.

I. *In what offences there are acceſſaries, and where not; and of acceſſaries by the Common law, and by act of parliament.* In the higheſt capital offence, namely, high treaſon, there are no acceſſaries, neither before nor after; for all conſenters, aiders, abetters, and knowing receivers and comforters of traitors are all principals. 1 *H. H. P. C.* 613. But yet as to the courſe of proceeding, it hath been and indeed ought to be the courſe, that thoſe who did actually commit the very fact of treaſon, ſhould be firſt tried, before thoſe that are principals in the ſecond degree, becauſe otherwiſe this inconvenience might follow, *viz.* that the principals in the ſecond degree might be convicted, and yet the principals in the firſt degree may be acquitted, which would be abſurd. 1 *H. H. P. C.* 613.

In caſes that are criminal but not capital, as in treſpaſs, mayhem, or *præmunire*, there are no acceſſaries, for all the acceſſaries before are in the ſame degree as principals; and acceſſaries after by receiving the offenders cannot be in law under any penalties as acceſſaries, unleſs the acts of parliament that induce thoſe penalties, do expreſly extend to receivers or comforters, as ſome do. 1 *H. H. P. C.* 613. It remains therefore, that the buſineſs of this title of acceſſary refers only to felons, whether by the Common law or by act of parliament. As to felonies by act of parliament; regularly if an act of parliament enact an offence to be felony, tho' it mention nothing of acceſſaries before or after, yet virtually and conſequentially thoſe, who counſel or command the offence, are acceſſaries before, and thoſe that knowingly receive the offender, are acceſſaries after; as in the caſe of rape made felony by the ſtatute of *Weſtminſter* 2. *c.* 34. 1 *H. H. P. C.* 613. 2 *Inſt.* 434. *Staundf. P. C. lib.* 1. *c.* 47. But if the act of parliament, that makes the felony, in expreſs terms comprehend acceſſaries before, and makes no mention of acceſſaries after, namely, receivers or comforters, there it ſeems there can be no acceſſaries after; for the expreſſion of procurers, counſellors, abetters (all which import acceſſaries before) makes it evident, that the law-makers did not intend to include acceſſaries after, which is an offence of a lower degree than acceſſaries before; as the ſtatute of 8 *Hen.* 6. *c.* 12. for ſtealing of records, the ſtatute of 33 *Hen.* 8 *c.* 8. for witchcraft, *&c.* 1 *H. H. P. C.* 614. And though generally an act of parliament, creating a felony, renders conſequentially acceſſaries before and after within the ſame penalty, yet the ſpecial penning of the act of parliament in ſuch caſes ſometimes varies the caſe. Thus the ſtatute of 3 *Hen.* 7. *c.* 2. for taking away maidens,

&c.

&c. makes the offender, and the procuring and abetting, yea and wittingly receiving alſo, to be all equally principal felonies, and excluded of clergy. Again, the ſtatute of 27 *Eliz. c.* 2. makes the coming in of a Jeſuit treaſon, the receiving or relieving of him felony, the contributing money to his relief a *præmunire*. So that acts of parliament may diverſify the offences of acceſſary or principal, according to the various penning thereof, and ſo have done in many caſes. 1 *Hale's Hiſt. P. C.* 614, 615.

II. *Acceſſaries before the fact.* Thoſe offences, which in the conſtruction of law are ſudden and unpremeditated, cannot have any acceſſaries before, as killing a man *per infortunium*, *ſe defendendo*, or manſlaughter. And therefore, if *A.* be indicted of murder, and *B.* as acceſſary before, if the jury find *A.* guilty only of manſlaughter, there ſhall be no inquiry of *B.* but he ſhall be forthwith diſcharged; becauſe bare homicide is always ſudden, for if it were premeditated, it had been murder and not barely homicide; but there may be an acceſſary after. 1 *H. H. P. C.* 616. 4 *Co. Rep.* 43. *b.* Again, the ſmallneſs of the offence, though it be felony, yet becauſe it is not capital, excludeth acceſſaries before or after, and therefore in petit larceny there can be no acceſſary: And this is alſo the reaſon why there can be no acceſſary either before or after in manſlaughter *per infortunium*, or *ſe defendendo*, becauſe there is no judgment of death in that caſe. 1 *H. H. P. C.* 616. *Cro. Eliz.* 750. That which makes an acceſſary before is command, counſel, abetment, or procurement by one to another to commit a felony, when the commander or counſellor is abſent at the time of the felony committed, for if he be preſent, he is a principal. And therefore words that ſound in bare permiſſion, make not an acceſſary, as if *A.* ſays he will kill *J. S.* and *B.* ſays, you may do your pleaſure for me, this makes not *B.* acceſſary. 1 *H. H. P. C.* 616. 21 *Hen.* 7. 36. 37. *Cromp.* 41. *b.* If *A.* hire *B.* to mingle or lay poiſon for *C.* and *B.* doth it accordingly, and *C.* is poiſoned, *B.* though abſent, is principal, and *A.* is acceſſary; but if *A.* were preſent at the mingling or laying of the poiſon, though both were abſent at the taking of it, yet both are principal, for they are both equally acting in the poiſoning. But if *A.* buys the materials of the poiſon, knowing and conſenting to the deſign, and deliver them to *B.* to mingle and apply it, or lay it in the abſence of *A.* here it ſeems *A.* is only acceſſary before. *H. P. C.* 616. See 3 *Inſt. p.* 50. *State Tr. vol.* 1. *p.* 329.

If *A.* command or counſel *B.* to commit felony of one kind, and *B.* commits a felony of another kind, *A.* is not acceſſary; as if *A.* command *B.* to ſteal a plate, and *B.* commits burglary to ſteal the plate, *A.* is acceſſary to the theft, but not to the burglary. 3 *Inſt. p.* 51.

If *A.* commands *B.* to take *C.* and *B.* takes *C.* and robs him, *A.* is not acceſſary to the robbery. But if *A.* command *B.* to beat *C.* and *B.* beats *C.* ſo that he dies, *A.* is acceſſary, becauſe it may be a probable conſequence of his beating. 1 *H. H. P. C.* 617. *Staundf. P. C. lib.* 1. *c.* 45. the like it is if he command *B.* to rob him, and in robbing him *B.* kills him, *A.* is acceſſary to the murder. 1 *Hale's H. P. C.* 617. *Plowd. Com.* 475. *Cromp.* 43. *b.*

A. commands *B.* to burn the Houſe of *C. B.* kills, robs, or ſteals from *C. A.* is not acceſſary, for it is an offence of another kind; ſo if *A.* commands *B.* to ſteal the horſe of *C.* and he ſteals his cow, *A.* is not acceſſary. *Plowd.* 475. *Saunders's* caſe. But if *A.* command *B.* to ſteal generally from *C.* then he is acceſſary to any kind of theft from *C.* though it were done by robbery; for that varies the offence only in degree.

A. commands *B.* to poiſon *C. B.* kills him with a ſword, yet *A.* is acceſſary; for the ſubſtance of the thing commanded was the death of *C.* and the differing in the manner of its execution from the command doth not excuſe *A.* from being acceſſary. But if *A.* command *B.* to kill *C.* and *B.* by miſtake kills *D.* or elſe in ſtriking at *C.* kills *D.* but miſſeth *C. A.* is not acceſſary to the murder of *D.* becauſe it differs in the perſon. 3 *Inſt* 51. *Plowd. Com.* 475. *Saunders's* caſe.

A. gets *B.* with child, and before the birth counſels *B.* to kill it: The child is born, *B.* murders it. *A.* is acceſſary to the murder, yet at the time of the counſel given the child was not *in rerum natura*. *Dyer* 186. *a.*

A. lets out a wild beaſt, or employs a madman to kill others, whereby any is killed, *A.* is principal in this caſe though abſent, becauſe the inſtrument cannot be a principal. *Dalt. c.* 108.

A. commands *B.* to kill *C.* but before the execution thereof *A.* repents and countermands *B.* and yet *B.* proceeds in the execution thereof, *A.* is not acceſſary, for his conſent continues not, and he gave timely countermand to *B.* 3 *Inſt.* 51. *Plowd. Com.* 474. *Saunders's* caſe. *Dalt. c.* 161. But if *A.* had repented, yet if *B.* had not been actually countermanded before the act committed, *A.* had been acceſſary.

If many perſons come to commit an unlawful act, though one of them only doth it, they are all principals.

III. *Of acceſſaries after the fact.* This kind of acceſſary after the fact is where *a perſon knowing the felony to be committed by another, receives, relieves, comforts, or aſſiſts the felon.* 1 *H. H. P. C.* 618. This holds place only in felonies, and in thoſe felonies, where by the law judgment of death regularly ought to enſue; and therefore there is no acceſſary in petit larceny, homicide *per infortunium*, or homicide *ſe defendendo*. 1 *H. H. P. C.* 618. If *A.* knows that *B.* hath committed a felony, but doth not diſcover it, this doth not make *A.* an acceſſary after, but it is miſpriſion of felony, for which *A.* may be indicted, and upon his conviction fined and impriſoned. 1 *H. H. P. C.* 618. If *A.* ſees *B.* commit a felony, but conſents not, nor yet takes care to apprehend him, or to levy hue and cry after him, or upon hue and cry doth not purſue him, this is a neglect puniſhable by fine and impriſonment, but it will not make *A.* an acceſſary after. 1 *H. H. P. C.* 618. If *B.* commits a felony, and comes to the houſe of *A.* before he be arreſted, and *A.* ſuffers him to eſcape without arreſt, knowing him to have committed a felony, this doth not make *A.* acceſſary; but if he take money of *B.* to ſuffer him to eſcape, this makes him acceſſary. And ſo it is if *A.* ſhut the foredoor of his houſe, whereby the purſuers are deceived, and the felon hath opportunity to eſcape, this makes *A.* acceſſary; for here is not a bare omiſſion, but an act done by *A.* to accommodate his eſcape. 1 *H. H. P. C.* 619.

A. hath his goods ſtolen by *B.* if *A.* receives his goods again ſimply without any contract to favour him in his proſecution, or to forbear proſecution, this is lawful; but if he receive them upon agreement not to proſecute, or to proſecute faintly, this is theſtbote, puniſhable by fine and impriſonment; but yet it makes not *A.* an acceſſary. 1 *H. H. P. C.* 619. 42 *Aſſ.* 5. *b. Fitz. Coron.* 353. *Staundf. P. C.* 40. *a.* But if he take money of *B.* to favour him, whereby he eſcapes, this makes him acceſſary. *Dalt. c.* 263. *Crompt.* 41. *b.*

By ſtatute 3 & 4 *Will. & M. c.* 19. "Receivers of ſtolen goods knowing them to be ſtolen, are to be deemed acceſſaries after the fact, and ſuffer as ſuch." But becauſe theſe receivers often concealed the principal felons, and thereby eſcaped being puniſhed as acceſſaries; therefore by 1 *Ann. c.* 9. it is enacted, that "whoſoever ſhall buy or receive ſtolen goods, knowing them to be ſtolen, may be proſecuted for a miſdemeanor, and puniſhed by fine and impriſonment, tho' the principal felon be not convicted"; and this ſhall exempt them from being puniſhed as acceſſaries, if the principal ſhall afterwards be convicted. But by 5 *Ann. c.* 31. it is enacted, that "if any perſon ſhall receive or buy knowingly any ſtolen goods, or knowingly harbour or conceal any felon, he ſhall be taken as acceſſary to the felon, and ſhall ſuffer as a felon." This ſtatute does not take away the benefit of clergy; but by ſtat. 4 *Geo.* 1. ſuch perſon may be tranſported for fourteen years. And by this laſt-mentioned ſtatute it is alſo enacted, that "whoſoever ſhall take a reward under the pretence of helping any one to ſtolen goods, ſhall ſuffer as a felon, as if he himſelf had ſtolen the ſaid goods, unleſs he cauſe ſuch felon to be apprehended and brought to trial, and give evidence againſt him." Upon this

this clauſe the famous *Jonathan Wild* was convicted and executed. 10 *Geo.* 1.

It ſeems agreed, that the law hath ſuch a regard to that duty, love, and tenderneſs, which a wife owes to her huſband, as not to make her an acceſſary to felony by any receipt given to her huſband; yet if ſhe be any way guilty of procuring her huſband to commit it, it ſeems to make her an acceſſary before the fact, in the ſame manner as if ſhe had been ſole. Alſo it ſeems agreed, that no other relation, beſides that of a wife to her huſband, will exempt the receiver of a felon from being an acceſſary to the felony; from whence it follows, that if a maſter receive a ſervant, or a ſervant a maſter, or a brother a brother, or even a huſband a wife, they are acceſſaries in the ſame manner as if they had been mere ſtrangers to one another. 2 *Hawk.* 210.

But if the wife alone, the huſband being ignorant of it, do knowingly receive a felon, the wife is acceſſary and not the huſband. 1 *H. H. P. C.* 621. But if the huſband and wife both receive a felon knowingly, it ſhall be judged only the act of the huſband, and the wife ſhall be acquitted. 1 *H. H. P. C.* 621.

If a felon be in goal, for a man to convey inſtruments to him to make an eſcape, or to bribe the goaler to let him eſcape, makes the party an acceſſary; for though common humanity allows every man to afford them neceſſary relief, yet common juſtice prohibits all men unawful attempts to make their eſcapes. 1 *Hale's hiſt. P. C.* 621.

If *A.* be committed for felony, and *B.* an attorney adviſe the friends of *A.* to write to the witneſſes not to appear againſt him, who writes accordingly, this makes neither *B.* nor the friends acceſſary, but is a miſdemeanor puniſhable by fine and impriſonment. 3 *Inſt.* 139.

IV. *Order of proceeding againſt acceſſaries.* The acceſſary may be indicted in the ſame indictment with the principal, and that is the beſt and moſt uſual way; but he may be indicted in another indictment, but then ſuch indictment muſt contain the certainty and kind of the principal felony. 1 *H. H. P. C.* 623.

If a man were acceſſary before or after in another county, than where the principal felony was committed, at Common law it was diſpuniſhable, but now by the ſtatute 2 & 3 *Ed.* 6. *c* 24. the acceſſary is indictable in that county where he was acceſſary, and ſhall be tried there, as if the felony had been committed in the ſame county; and the juſtices, before whom the acceſſary is, ſhall write to the juſtices, *&c.* before whom the principal is attainted, for the record of the attainder. 1 *Hale's hiſt. P. C.* 623. This writing is to be by writ in the King's name, under the *Teſte* of the juſtice ſo ſending it. *Dyer* 253. *b.*

The acceſſary ſhall not be conſtrained to anſwer to his indictment, till the principal be tried; but if he will wave that benefit, and put himſelf upon his trial before the principal be tried, he may; and his acquittal or conviction upon ſuch trial is good. But it ſeems neceſſary in ſuch caſe to reſpite judgment till the principal be convicted and attainted; for if the principal be after acquitted, that conviction of the acceſſary is annulled, and no judgment ought to be given againſt him; but if he be acquitted of the acceſſary, that acquittal is good, and he ſhall be diſcharged. 1 *H. H. P. C.* 623, 624.

It ſeems to be ſettled at this day, that if the principal and acceſſary appear together, and the principal plead the general iſſue, the acceſſary ſhall be put to plead alſo; and that if he likewiſe plead the general iſſue, both may be tried by one inqueſt; but that the principal muſt be firſt convicted; and that the jury ſhall be charged, that if they find the principal Not guilty, they ſhall find the acceſſary Not guilty. But it ſeems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the acceſſary ſhall not be forced to anſwer, till that plea be determined; for if it be found for the principal, the acceſſary is diſcharged; if againſt the principal, yet he ſhall after plead over to the felony, and may be acquitted. 1 *H. H. P. C.* 624. 2 *Hawk.* 323.

By ſtat. 3 *Ed.* 1. *c.* 15. Thoſe who are *accuſed of the receipt of felons, or of commandment, or of force, or of aid of felony done, ſhall be bailable*; but this ſeemeth to be only where it ſtands indifferent whether the party be guilty or innocent; for if there are ſtrong preſumptions of guilt, it ſeemeth that he is not bailable. 2 *Hawk.* 102. Anciently, the acceſſary could not be tried, unleſs the principal were *attainted.* 2 *Inſt.* 183. But by ſtat. 1 *Ann. ſtat.* 2. *c.* 9. *ſect.* 1. If the principal be convicted, or ſtand mute, or peremptorily challenge above twenty of the jury, the acceſſary may be tried and puniſhed as if the principal had been attainted; and this, although the principal be admitted to his clergy, pardoned, or otherwiſe delivered before attainder. But in the caſe of ſtolen goods, if the principal cannot be taken, the buyer or receiver may be proſecuted as for a miſdemeanor, to be puniſhed by fine and impriſonment, or other ſuch corporal puniſhment as the court ſhall think fit, although the principal be not convicted, which ſhall exempt the offender from being puniſhed as acceſſary, if the principal be afterwards taken and convicted. 1 *Ann. ſtat.* 2. *c.* 9. *ſect.* 2. 5. *Ann. c.* 31. *ſect.* 6. And by ſtat. 29 *Geo.* 2. *c.* 30. the buyer or receiver of ſtolen lead, iron, copper, braſs, bell-metal, or ſolder, may be convicted, although the principal hath not been convicted; and ſhall be tranſported for fourteen years. If the principal be erroneouſly attaint, yet the acceſſary ſhall be put to anſwer, and ſhall not take advantage of the error in that attainder; but the principal reverſing the attainder, reverſeth the attainder of the acceſſary. 1 *H. H. P. C.* 625.

It ſeemeth not reaſonable, where a perſon is charged as acceſſary to more than one principal, to try him on the conviction of one, before all of them have appeared; becauſe hereby he may be ſubject to the hardſhip and hazard of two trials for his life for the ſame offence, which is contrary to the general courſe of the law. 2 *Hawk.* 323.

If *A.* be indicted as principal, and *B.* as acceſſary before or after, and both be acquit, yet *B.* may be indicted as principal, and the former acquittal as acceſſary is no bar. 1 *H. H. P. C.* 625. But if *A.* be indicted as principal and acquitted, he ſhall not be indicted as acceſſary before, and if he be, he may plead his former acquittal in bar, for it is in ſubſtance the ſame offence. 1 *H. H. P. C.* 626.

Accola, an huſbandman who came from ſome other parts or country to till the lands, *eo quod adveniens terram* colat; and is thus diſtinguiſhed from *incola*, viz. Accola *non propriam, propriam colit* incola *terram. Cowel. Du Freſne.*

Accolade, a ceremony uſed in knighthood by the King's putting his hand about the knight's neck; from the *French*, accoler, to embrace about the neck, *collum amplecti. Cowel.*

Accompt. See **Account.**

Accord, is an agreement beween two perſons to give and accept ſomething in ſatisfaction of a treſpaſs, or offence done by one to the other. This agreement, when executed, may be pleaded in bar to an action for the treſpaſs; for in all perſonal injuries, the law gives damages, as an equivalent; and when the party accepts of an equivalent, there is no injury or cauſe of complaint; and therefore preſent ſatisfaction is a good plea, but if the wrong-doer only promiſes a future ſatisfaction, the injury continues till ſatisfaction is actually made; and conſequently there is a cauſe of complaint in being; and if the treſpaſs were now barred by this plea, he can have no remedy for the future ſatisfaction; for that ſuppoſes the injury to have continuance. 1 *New Abr.* 22. 5 *E.* 4. 7. *Plowd.* 5. *b.* 1 *Roll's Abr.* 129. See *Raym.* 450. 2 *Keb.* 332. 2 *Jones* 158, 168.

I. *What ſhall be a good accord, and a bar of actions.*
II. *The form and manner of pleading accords.*
III. *To what actions may accord be pleaded.*

I. *What ſhall be a good accord, and a bar of actions.* An accord muſt appear to be advantageous to the party, otherwiſe

wiſe it can be no ſatisfaction; therefore in an action of treſpaſs for taking the plaintiff's cattle, it is no good plea to ſay, that there was an accord that the plaintiff ſhould have his cattle again; for this is not any ſatisfaction. 1 *New Abr.* 22. 9 *E.* 4. 19. 1 *Roll's Abr.* 128.

In covenant againſt the executor of tenant for life, *&c.* he pleads an *accord* that he ſhould quietly depart, and leave the poſſeſſion, *&c.* and held good; though after the death of tenant for life, he had no intereſt, but a licence in law only to carry away his goods. *Yelv.* 124.

An accord that each of them ſhould be quit of actions againſt the other, is not good; becauſe it is not any ſatisfaction. 1 *Roll's Abr.* 128. *Style* 245.

In an action upon the ſtatute of *Rich.* 2. if the defendant ſaith, that after the entry an accord was made between them, that the plaintiff ſhould re-enter into the land, and that the defendant ſhould deliver the evidences of the plaintiff to the plaintiff, this is not any bar of the action; for the delivery of the plaintiff's own evidences can be no ſatisfaction of the tortious entry. 9 *Ed.* 4. 19. 1 *Roll's Abr.* 128. But if he made title to the evidences it would be a good bar. 1 *Roll. Abr.* 128.

An accord that the defendant ſhould endeavour to make up and adjuſt differences between the plaintiff and *J. S.* that he did endeavour, and at his own coſt make up ſuch differences, is a good plea. 1 *Roll. Abr.* 128.

In treſpaſs for trampling his graſs, the defendant pleads that he was amerced in the court-baron of the plaintiff for the ſame treſpaſs, which was aſſeered to two ſhillings; for which he hath agreed with the plaintiff; and held a good plea by the acceptance thereof; though the amercement in the court-baron was extortion. *Bro. Treſpaſs* 66.

In an action on the caſe for ſlanderous words, the defendant pleaded an agreement between the plaintiff and him, that he ſhould confeſs that he had done the plaintiff wrong, and ſhould aſk forgiveneſs on his knees, and that after ſuch ſubmiſſion the plaintiff ſhould releaſe the defendant of all actions for the ſaid words; and that accordingly he (the defendant) did make the ſubmiſſion, and the plaintiff forthwith diſcharged him; and upon a demurrer to this plea, it was objected, that it was ill, becauſe there was no conſideration in law pleaded to this action; for aſking forgiveneſs, is no conſideration: The plaintiff had judgment. 2 *Roll. Rep. Covill* v. *Jeffery.*

In an action on the caſe for words, the defendant pleaded an accord between him and the plaintiff, that whereas the plaintiff had done a treſpaſs to him, this treſpaſs of the defendant ſhould be ſet againſt the other; and upon a demurrer to this plea, it was adjudged no good plea. *Style* 245.

Debt upon bond againſt the executor of the obligor; the defendant pleaded an accord 28 *April*, by which it was agreed, that he ſhould give the plaintiff a new ſecurity for this debt, and for another alſo which was due to him on bond, who accordingly gave a new ſecurity purſuant to the accord by a bill ſealed by himſelf, and upon a demurrer to this plea the plaintiff had judgment; becauſe one bond given in ſatisfaction of another, is no diſcharge; for it doth not amend the matter; though in this caſe the new bond binds the obligor *in bonis propriis*, whereas by the old bond he was bound only *in bonis teſtatoris.* 3 *Lev.* 55. *Lobly* v. *Gildart.*

In covenant, the plaintiff declared, that the defendant by indenture covenanted to permit the plaintiff to receive 100*l.* *per annum* rent, part of which was to go in ſatisfaction of a debt, and the reſidue to be paid to the defendant, and aſſigned a breach in diſturbing him (the plaintiff) in receiving the rent: The defendant pleaded an accord between them, that each ſhould deliver his part of the indenture to *T. S.* to be cancelled, and that each ſhould be diſcharged of all actions upon the ſaid indenture; and averred, that he did deliver his part, *&c.* and upon demurrer, this was adjudged ill; becauſe accord is no plea, unleſs executed on both ſides. 3 *Lev.* 189. *Ruſſel* v. *Ruſſel.*

Covenant, &c. in conſideration the plaintiff would permit *S. P.* to enjoy a farm in *Chipſham* for one year, paying 72*l.* rent, that then the defendant would pay to the plaintiff 200*l.* which was then in arrear for rent, and alſo the ſaid 72*l.* and the breach aſſigned was non-payment of the 72*l.* The defendant pleaded in bar, that *before* any cauſe of action did ariſe for breach of covenants, *&c.* it was agreed between him and the plaintiff, that he, (the defendant) ſhould pay to the plaintiff 30*l.* in diſcharge of all covenants, which ſum the plaintiff received and accepted in full ſatisfaction thereof; and upon demurrer the plaintiff had judgment, becauſe upon the defendant's own ſhewing, there was no covenant broken at the time of this agreement made; and accord and ſatisfaction is no good plea, but only in diſcharge of damages for a covenant actually broken, or for damages actually ſuſtained. 1 *Lutw.* 358. *Snow* v. *Franklin.*

Indebitatus aſſumpſit; the defendant pleaded an accord between the plaintiff and him to do ſeveral things, and averred the performance of *part*, and that he tendered to do the reſt, and upon demurrer this plea was adjudged ill, becauſe an accord was pleaded, but not executed. *T. Jones* 6. *Sheppard* v. *Lewis.*

In an action on the caſe the plaintiff declared, that in conſideration of money paid to the defendant, he promiſed to deliver 400*lb.* of wax, *&c.* and that at the day he delivered only 200*lb.* of bad wax; the defendant pleaded an accord between them for the ſaid 200*lb.* of wax, which agreement he had performed; and this was held a good bar. *Dyer* 75. *Andrew's* caſe.

Covenant for not repairing an houſe, the defendant pleaded in bar an accord, and execution of it in ſatisfaction of the repairs; this was held a good plea; for though a certain duty, which accrues by a deed, muſt be avoided by matter of as high a nature, and in ſuch caſe accord without writing is no ſatisfaction; yet where the duty accruing by a deed is not certain, but a wrong is done ſubſequent to the deed, for which damages only are recoverable, as in this caſe, for not repairing, there accord with ſatisfaction, is a good plea. 6 *Rep.* 43. *Blake's* caſe.

B. owed 100*l.* to *A.* which he covenanted to repay within three years; the ſaid *B.* covenanted likewiſe, that *A. ſhould enjoy a leaſe of certain lands*, &c. *peaceably during all that time*, but notwithſtanding this covenant, *B.* entered ſeveral times before the three years were expired, for which the action was now brought, and the breach aſſigned accordingly; the defendant *B.* pleaded, that after the firſt, and *before* the other entries, there was an accord and ſatisfaction between him and the plaintiff of all the ſaid entries; and this was held a good plea, becauſe *damages* for the entries were the ground of this action, which may be diſcharged *without deed.* 2 *Roll. Rep.* 187. *Roberts* v. *Stoker.*

II. *The form and manner of pleading accords.*

The beſt and ſafeſt way to plead an *accord*, is to plead it by way of *ſatisfaction*, and not by way of *accord*; for if it is pleaded by way of *accord*, a preciſe execution thereof, in every part, muſt be pleaded; and if there be a failure in any part, the plea is inſufficient; but if it be pleaded by way of *ſatisfaction*, the defendant need plead no more, but that he paid the plaintiff 10*s.* in full ſatisfaction of the action, which he received. 9 *Rep.* 80. *See* 1 *Roll. Abr.* 129. 1 *Danv. Abr.* 241.

Ejectment againſt three; they pleaded, that after the ſuppoſed treſpaſs and ejectment, there was an agreement between the plaintiff and defendants, that one of them ſhould pay unto the plaintiff 10*l.* in ſatisfaction thereof, which he had performed; and this was held a good plea. 9 *Rep.* 77. *Petoe's* caſe; and in that caſe it was held, that where the condition is by deed to pay money, there by accord between the parties, any other thing may be given in ſatisfaction of the money; but if the condition be to deliver 50 quarters of wheat, there an accord to pay money in ſatisfaction thereof is not good: It is otherwiſe, where the contract is *without deed. Goldſ.* 80.

In covenant, by the heir of the reverſioner againſt the executor of tenant for life, for not repairing, *&c.* the defendant pleads that the teſtator died the 19th of *March*, and that the 22d of *March concordat' et agreat' fuit* between the plaintiff and defendant, that the defendant ſhould quietly depart and leave the poſſeſſion to the plaintiff, and that *in conſideratione inde* the plaintiff did agree to

diſcharge him of the breach *in non reparando*, and ſhews that the 25th of *March* he did depart, &c. this is no good plea; becauſe the concord is uncertain as to the time of his departure; and though he ſhews a departure within five days yet he cannot help the original inſufficiency of the concord, which is the foundation of all: And the time being indefinite, the departure ought to have been immediately. *Yelv.* 124. 125.

In an *aſſumpſit* for wares ſold and delivered, the defendant pleaded that he gave and delivered unto the plaintiff a *bever hat* in ſatisfaction and diſcharge, &c. and that the plaintiff accepted the ſaid hat in full ſatisfaction and diſcharge of the promiſes, &c. the plaintiff replied *proteſtando* that the defendant never gave him any ſuch hat in ſatisfaction and diſcharge of the ſaid promiſes, and *pro placito dicit*, that he never accepted a bever hat in ſatisfaction and diſcharge, &c. On demurrer, it was inſiſted firſt, that the iſſue ought to be upon the giving in ſatisfaction, and not upon the receiving in ſatisfaction; becauſe every gift or payment muſt be directed by him who gives or pays, and not by him who receives it; but the court held it well enough, and that the whole matter concerning the payment, as well as the acceptance in ſatisfaction, would be tried upon this iſſue; and as to the ſaid objection of its being pleaded to be given in ſatisfaction and diſcharge of the promiſes, &c. when it ſhould be pleaded in ſatisfaction of the money mentioned in the promiſes, and not of the very promiſes; the court held it of no weight. *Carth.* 347. 5 *Mod.* 86. 2. *Salk.* 627. *S. C.*

Debt on bond to pay 40*l.* at *Michaelmas-Eve*. Defendant pleaded a concord, that if he gave the plaintiff a hawk and 20*l.* at *Michaelmas-Day* the obligation ſhould be void, and ſaid that he gave a hawk and 20*l.* at *Michaelmas-Day*, and the plaintiff accepted it. This was held no plea; for it appears that for non-payment at the day the bond was forfeited, and ſo became ſingle, which cannot be diſcharged by ſuch a *naked averment* in fact of ſuch acceptance, although the agreement was before the day; but acceptance before the day was a good diſcharge. *Cro. Eliz.* 46.

In debt on a bond for 16*l.* conditioned to pay 8*l.* 10*s.* at *Michaelmas*. The defendant pleaded, that before that day he, at the plaintiff's requeſt, paid him 5*l.* 2*s.* 2*d.* which he accepted in full ſatisfaction of the debt; but becauſe he pleaded the payment of part *generally*, whereas he ſhould have pleaded the payment to have been in full ſatisfaction of the whole debt, the plaintiff had judgment. 5 *Rep.* 117.

Treſpaſs *quare clauſum fregit*, &c. The defendant pleads that the treſpaſs was done by him and *Jane Rowland*; and that after the ſaid treſpaſs it was accorded between the plaintiff and the ſaid *Jane*, that the ſaid *Jane* ſhall abate 14*s.* due to the ſaid *Jane* from *Edward*, father to the plaintiff, in ſatisfaction of the ſaid treſpaſs, and avers that the ſaid *Jane* had abated the ſaid 14*s.* &c. And upon this the plaintiff demurred, firſt, becauſe it is a thing to be done for the benefit of a *third perſon*, and therefore the accord was not good. 2dly, Becauſe he ſaid that ſhe had abated the ſaid 14*s.* and not ſhewn *how*. As to the firſt exception the court was *è contra*; for it being in diſadvantage of one of the treſpaſſers, and made at the requeſt of the plaintiff, tho' it be to a third perſon, it is well enough; but as to the ſecond fault, the court held the plea to be ill; for ſhe ought to have ſhewn how ſhe had abated the 14*s.* as to ſay the father of the plaintiff owed her ſo much, and had paid her but ſo much, ſo that the 14*s.* be deducted and abated out of it; and to plead that ſhe had abated *generally*, as it is pleaded here, is uncertain and ill, and adjudged accordingly in the following term. *Skin.* 391. *pl.* 28.

III. *To what actions accord may be pleaded.*

In every action where only amends is demanded by way of damages, accord executed is a good bar in diſcharge of them. *Cro. Jac.* 100. *pl.* 29.

An accord with ſatisfaction is no good plea to an action real; for a right or title to a freehold cannot be barred by any collateral ſatisfaction. 4 *Co.* 1. 9 *Co.* 79. *b.* But in detinue for charters concerning a freehold and inheritance, an accord is a good plea. 7 *E.* 4. 33. 2 *Co.* 78. So in *waſte* againſt leſſee for years, though in the *tenet*, an accord is a good plea; becauſe a chattel only is to be recovered. *Bend.* 35. 9 *Co.* 78. 6 *Co.* 44. So in raviſhment of ward, and *quare ejecit infra terminum*. 9 *Co.* 78. An accord with ſatisfaction is a good plea in an *ejectione firmæ*; for an ejectment includes a treſpaſs; and they are ſo interwoven, they cannot be ſevered; and in all actions which ſuppoſe a wrong *vi et armis*, where a *capias* and *exigent* lay at Common law, there an accord is a good plea. 9 *Co.* 77. 1 *Brownl.* 134. *S. C.* 2 *Brownl.* 128. *S. C. Godb.* 149. In an appeal of *mayhem* an accord with ſatisfaction is a good plea, notwithſtanding the writ be *feloniè*. 6 *Co.* 44. 9 *Co.* 78.

Covenant for not repairing a houſe. The defendant pleaded in bar an accord, and execution of it in ſatisfaction of the repairs. Reſolved a good plea; for it is not pleaded in diſcharge of the covenant, but of the damages only, which are demanded by reaſon of the covenant being broken; and the covenant remains, and the plea ſounds only in diſcharge of the defendant, and is not like an obligation which is a certain duty, and there it is no plea, tho' it be before or after the day of payment. *Cro. Jac.* 99, 100.

When a duty in certain, accrues by the deed *tempore confectionis ſcripti*; as by covenant, bill or obligation, to pay a certain ſum of money, this certain duty takes its eſſence originally and only by writing; and therefore ought to be avoided by matter of as high a nature, though the duty be merely in the perſonalty. 6 *Co.* 43. 1 *Lutw.* 358. *S. P.* *Cro. Jac.* 254. *S. P.* See 2 *Rol. Rep.* 187.

Account, (*Computus*) Is a writ or action which lies againſt a bailiff or receiver, who by reaſon of his office or buſineſs, is to render an *account* to another, and refuſeth to do it. *Cowel. Termes de la ley.*

A writ of *account* lieth divers ways; for if a man make one his bailiff of his manor, &c. he ſhall have a writ of account againſt him as bailiff. And if a man make one his receiver to receive his rents or debts, &c. he ſhall have a writ of account againſt him as receiver. And if a man make one his bailiff, &c. and alſo his receiver, then he ſhall have an account againſt him as bailiff, and alſo as receiver. A man ſhall have a writ of account againſt one as bailiff or receiver where he was not his bailiff or receiver; for if a man receive money to my uſe, I ſhall have an account againſt him as receiver; or if a man do deliver money unto another to deliver over unto me, I ſhall have an account againſt him as my receiver. And ſo if a man enter into my land to my uſe, and receive the profits thereof, I ſhall have an account againſt him as my bailiff. *Fitz. Nat. Brev.* 117.

The proceedings upon this action, being difficult, dilatory and expenſive, it is now ſeldom uſed, eſpecially if the party has other remedy, as *debt*, *covenant*, *caſe*, or other action; or if the demand be of conſequence, and the matter of an intricate nature. For in ſuch caſe it is more adviſable to reſort to a court of equity, where matters of *account* are more commodiouſly adjuſted, and more advantageouſly determined for both parties; the plaintiff being in that court, intitled to a diſcovery of books, papers and the defendant's oath: And on the other hand, the defendant allowed to diſcount the ſums paid or expended by him, and all reaſonable allowances, and to diſcharge himſelf of ſums under 40*s.* by his own oath, if by anſwer or other writing he charges himſelf with the ſame; and he is intitled, after the account is ſtated, to a decree in his favour, if any thing be due to him on the balancing thereof. 1 *New. Abr.* 16. 1 *Salk.* 9. *Carth.* 89. *Chan. Ca.* 249. 1 *Vern.* 282, 470. 2 *Vern.* 176. *Abr. in Eq.* 10.

Though the action of account is ſeldom uſed, yet it may not be improper to conſider briefly,

I. *For what things this action lies.*
II. *Againſt whom action of account lies, either by the Common law or by Statute.*
III. *What ſhall be a good bar to this action.*
IV. *What ſhall be a good diſcharge before the auditors.*

I. *For*

I. *For what things this action lies.*

If a man delivers money to another, upon condition that if the defendant makes an aſſurance of certain lands by a certain day, that then he ſhall have the money, and if not, that he ſhall redeliver it to the deliverer; if he does not make this aſſurance, the deliverer may have a writ of account againſt him for the money. 41 *Ed.* 3. 10. *Fitz. Accompt*, 24. *S. C. Br.* 11. *S. C.* If a man delivers money to you to pay to me, I ſhall have account for this againſt you. 6 *Hen.* 4. 8. *Godb.* 210. *S. P.*

An action of account lies not for a thing certain; as, if a man deliver 10*l.* to *B.* to merchandiſe with, he ſhall not have account of the 10*l.* but of the profits, which are uncertain. *Bro.* tit. *Account* 355. 2 *Brown.* 76.

No action of account lies for rent reſerved on a leaſe; ſo if a leſſee of goods waſte them, yet no action of account lies againſt him. 1 *Roll. Abr.* 116.

If the bailee of goods waſte them, or refuſe to deliver them, no action of *account* lies, but an action of *detinue*, or *trover* and *converſion*. 1 *Roll. Abr.* 116.

If *A.* hath a term for years in a rectory, and tithes being ſet forth and ſevered from the nine parts, *B.* without any pretence of title, carries them away and ſells them, yet *A.* ſhall not have a writ of *account* againſt *B.* for, after ſeverance, the tithes immediately veſted in *A.* and the taking by *B.* was merely wrongful, and therefore without privity. *Owen* 86. 3 *Leon.* 24.

If *A.* acknowledges by deed, that he has received 100*l.* from *B.* to be adventured to the *Weſt-Indies*, and thence to *England* back again, and covenants to render a true account thereof upon his return; though *B.* may have a writ of covenant upon this deed, yet he may alſo have a writ of account thereupon, at his election. 1 *Roll. Rep.* 52. 2 *Bulſt.* 256.

Aſſumpſit, in which the plaintiff declared, that the defendant, intending to go beyond ſea, delivered a box full of goods to the defendant, which he promiſed to diſpoſe of, and to give the plaintiff an account thereof at his return; the defendant pleaded in abatement, that he was bailiff to the plaintiff, to merchandiſe the ſaid goods; and that he ought to bring an action of *account*, and not an action on the caſe; and upon demurrer, it was adjudged, that here being an expreſs promiſe, on which the action is founded, *aſſumpſit* will lie as well as *account*; and that where-ever one acts as bailiff, he promiſes to render an account. 1 *Salk.* 9. *Wilkins* v. *Wilkins.*

II. *Againſt whom action of account lieth, either by the Common law, or by Statute.*

By the Common law, *account* lay only againſt a guardian in ſocage, bailiff, or receiver, or by one in favour of trade and commerce, naming himſelf merchant, againſt another naming him merchant, and for the executors of a merchant; for between theſe there was ſuch a privity, that the law preſumed them conuſant of each other's diſburſements, receipts and acquittances. 2 *Hen.* 4. 12. *b. Co. Lit.* 172. *a. Co. Lit.* 90. *b. F. N. B.* 117. 11 *Co.* 90. *a.* 2 *Roll. Abr.* 161.

The ſtatute of 13 *E.* 3. *c.* 23. gives an action of *account* to the executors of a merchant; the ſtatute 25 *Ed.* 3. *c.* 5. to executors of executors; the ſtatute 31 *Ed.* 3. *c.* 11. to adminiſtrators: And by the ſtatute 3 & 4 *Ann. c.* 16. actions of *account* may be brought againſt the executors and adminiſtrators of every guardian, bailiff and receiver, and by one jointenant, tenant in common, his executors and adminiſtrators againſt the other as bailiff, for receiving more than his ſhare, and againſt their executors and adminiſtrators.

Before theſe ſtatutes, if one jointenant, or tenant in common, received all the profits, the other could not have his action, unleſs he actually appointed him bailiff or receiver. *Co. Lit.* 172. *a.* 186. *a.* 200. *b.* So if two had a ward in common, and one took all the profits. *F. N. B.* 118. So if there had been two executors, and one had received all the debts of the teſtator; for between theſe there was not ſuch privity as the law required. *Bro.* tit. *Accompt*, 58. 39 *Ed.* 3. 28.

Though an infant may be an executor, or may be charged in trover, being a tort; yet if he be made factor, bailiff or receiver, he ſhall not be accountable for what he does during his infancy, either in law or equity; for the ſame reaſon that other acts of his bind him not; therefore when ſuch one is appointed factor, his friends ſhould give ſecurity for his accounting. 1 *Roll. Abr.* 117. *F. N. B.* 118. *Co. Lit.* 172. *S. P.*

If I make *J. S.* my bailiff or receiver, and he makes a deputy, I muſt have account againſt the bailiff or receiver himſelf, and not againſt the deputy; for the receipt of the deputy was to the uſe of his maſter. *F. N. B.* 119. 4 *Leon.* 32.

If the King appoints *J. S.* or he of his own head takes upon himſelf the charge and care of the eſtate of a lunatick, he is but in nature of a bailiff, and accountable to the lunatick, his executors or adminiſtrators. 4 *Co.* 127.

A man ſhall not be charged in *account*, as ſurveyor, controller, apprentice, reve, or heyward, or a diſſeiſor, or other wrong-doer; for, to maintain an action of *account*, there muſt be a privity either in law or by the proviſion of the parties. *Co. Lit.* 172.

At Common law, if a man were diſſeiſed, and his entry taken away, he could never recover, by any action, the mean profits; but if the diſſeiſor made a feoffment in fee, by the ſtatute of *Glouceſter*, the diſſeiſee in an aſſiſe might have recovered damages for the mean profits, being a continuation of the firſt wrong. 2 *Roll. Abr.* 550.

But the chancery interpoſed, and at laſt carried the remedy farther than had been admitted at Common law; for though in the caſe of *Owen* and *Aprice*, which was adjudged 4 *Car.* 1. the court left the plaintiff to his remedy at Common law, for the recovery of the mean profits, and would not aſſiſt by their decree: So in the caſe of *Eyre* and *Jackſon*, 14 *Car.* 2. they refuſed to aſſeſs any damages for a treſpaſs; for that was a matter determinable at Common law, and to be aſcertained by a jury; but afterwards they began to make the perſon, who was the diſſeiſor of the mean profits, accountant to him who had the right; and this was firſt begun where lands were ſettled for the payment of debts, there ſuch truſtees, and the heir of the debtor, where accountants to the creditors for whom the profits were to be received; and this was very clear and plain; becauſe ſuch perſon came in and took the profits under the truſt; and this was ſettled in the caſe of *Gilpin* and *Smith*, 18 & 19 *Car.* 2. Afterwards they came to extend their notions; and the perſon that took the meſne profits by wrong, was taken as the truſtee for, and accountant to, him that had the right; and this was ſettled in the great caſe of *Coventry* and *Hall*, which was in the years 33, 34 & 35 *Car.* 2. and was thus: Sir *Thomas Thynn*, having treated with the lord keeper *Coventry*, for a marriage between his ſon and *Catharine* the daughter of the lord keeper, the ſaid Sir *Thomas* covenanted to ſettle lands on his ſon, but the conveyance was defective; becauſe it wanted the words, *that he ſhould ſtand ſeiſed*; the ſon recovered the lands by a decree in chancery, notwithſtanding the defect in the conveyance, againſt the heir at law of Sir *Thomas* the father; and afterwards came with his bill for the meſne profits; yet the court, on this bill, carried back the account againſt the heir at law, for all the profits received by him; and though it was objected, there was no agreement, nor no truſt, that the heir ſhould receive the profits for the rightful proprietor; yet the court reſolved that he ſhould account from the original juſtice, which intitled the proprietor to ſeek an *account* againſt the perſon that had taken the profits of the land; which in equity and juſtice belonged to him; and though the heir had the title in law, yet ſince, in equity and conſcience, the eſtate belonged to another, ſuch heir ought to account with him for the profits he had made of what was his: and from hence equity began to make all perſons account for the mean profits they had received to ſuch perſons as had the equitable title; but in the caſe, where the huſband ſold lands for valuable conſideration, and the wife, after his death, received her dower againſt the purchaſer, and brought her bill in chancery for the meſne profits, from the time of the death of her huſband; the lord chancellor *Cowper* would not relieve her; for that he ſaid he could not alter the law of dower, which gave no damages againſt a purchaſer under the huſband; and he

ſaw

law no reaſon in equity to introduce a different rule. 1 *New. Abr.* 18. cites 1 *Chan. Rep.* 32, 229. 1 *Chan. Ca.* 80, 81. 2 *Chan. Ca.* 71, 72, 134, 135. 2 *Chan. Rep.* 259, 261. 1 *Vern.* 295.

A bailiff cannot be charged as receiver, becauſe if he be charged as bailiff upon his account, he ſhall have allowance of his charges and expences, which he is not intitled to when he charged as a receiver; alſo he is not allowed, in an action brought againſt him as receiver, to plead that he was before charged as receiver. 1 *Rol. Abr.* 119.

By bailiff is underſtood a ſervant that hath adminiſtration and charge of lands, goods and chattels, to make the beſt benefit for the owner, againſt whom an action of account doth lie for the profits which he hath raiſed or made, his reaſonable charges and expences deducted. A receiver is one who receiveth money, and is to render an account of it, but is not allowed any charges or expences, but what is agreed on by the parties; and in this caſe the plaintiff is to declare by whoſe hands he received it. *Co. Lit.* 172. *a.*

III. *What ſhall be a good bar to this action.*

In account againſt one as bailiff, it is a good plea that he was never his bailiff. 1 *Roll. Abr.* 121.

In account againſt a bailiff, it is a good plea that he was the plaintiff's ſervant to drive his plough, and keep his cattle for the drawing of his plough, *abſque hoc*, that he was his bailiff in other manner, becauſe he is not accountable for this occupation. *Bro.* 34. 1 *Roll. Abr.* 121.

It is a good plea in bar to an action of *account*, that the plaintiff hath releaſed to him all actions. 1 *Roll. Abr.* 123. So it is a good plea in bar, that the plaintiff and defendant ſubmitted to the award of *J. S.* who awarded that the defendant ought to be acquitted againſt the plaintiff. *Cro. Car.* 116. *Hetl.* 114.

It is a good plea in bar, that after the receipt of the ſum of which the account is demanded, by the mediation of their friends it was agreed between them, that the defendant ſhould make an obligation of 100*l.* for the 100*l.* received, and the profit thence to ariſe, which obligation of 100*l.* he did make and deliver accordingly to the plaintiff; for the acceptance of the obligation deſtroys the duty, and the ſum in demand is thereby as ſtrongly releaſed as by a releaſe of all actions. *Bro.* 48. 1 *Roll. Abr.* 123.

IV. *What ſhall be a good diſcharge before the auditors.*

In an action of *account* there are two judgments; the firſt is *quod computet*, after which the court aſſigns auditors, uſually two of the officers of the court, who are armed with authority to convene the parties before them from day to day, at any day or place that they ſhall appoint, till the *account* is determined: The time by which the account is to be ſettled, is prefixed by the court; but if it be of a long and confuſed nature, the court, on application, will enlarge the time. If either of the parties think they do him injuſtice, he may apply to the court: and if the defendant denies any article, or demurs to any demand, it is to be tried and determined in court. 1 *Mod.* 42. 1 *Brownl.* 24. *Co. Ent.* 46.

Whatever may be pleaded to the action ſhall never be allowed of as a good diſcharge before the auditors; therefore, where in *account* the defendant pleaded *never his receiver*, &c. and this being found againſt him, he was adjudged to account: and before the auditors, he pleaded a ſubmiſſion of all debts, accounts, &c. to *J. S.* who awarded that the defendant ſhould pay 10*l.* only in diſcharge of all debts, accounts, &c. which he paid accordingly; this was held no good plea; for this award made before the action brought, ought to have been pleaded in bar thereof; which being omitted, he hath loſt the advantage thereof, and ſhall not plead it before auditors. *Cro. Car.* 116.

It is a good diſcharge before auditors, for a factor to ſay, that in a tempeſt, becauſe the ſhip was ſur-charged, the goods were caſt over-board into the ſea. 1 *Roll. Abr.* 124.

If a bailiff of a manor receives the rents and profits of the tenants, and retains them two or three years, yet in a writ of *account*, he is not to account for the profits thence ariſing in the mean time; for he had not any warrant to merchandize with the money, or to gain or loſe thereby.

Accountant-General, A new officer in the court of chancery, appointed by act of parliament, to receive all money lodged in court, in the place of the maſters, &c. He is to convey the money to the bank, and take the ſame out by order; and ſhall only keep the account with the bank; for the bank is anſwerable for all money received by them, and not the *accountant-general*. See *ſtat.* 12 *Geo.* 1. *c.* 32. No fees ſhall be taken by this officer or his clerks, on pain of being puniſhed for extortion; but they are to be paid ſalaries, the *accountant-general* 650*l. per annum*, the firſt clerk 250*l.* and the ſecond clerk 120*l.* out of intereſt made of part of the ſuitors money.

Accouped: His conſcience accouped him thereof: From the Latin *adculpare*. *Cowel. Pierce Ploughman, par.* 1. *fo.* 77.

Accroch, from the French *Accrocher*, to fix, hook, claſp or grapple unto. This word is uſed in ſtat. 25 *Ed.* 3. *ſtat.* 3. *c.* 8. and ſignifieth there as much as to encroach; and the French uſe it for delay, as *accrocher un procès*, to delay the proceedings in a ſuit for ſome time. *Cowel.*

Accuſation, *(Accuſatio)* The act of accuſing, or the charge brought againſt any one for a crime. By *Magna Charta*, no man ſhall be impriſoned or condemned on any accuſation, without trial by his peers, or the law. 9 *Hen.* 3. None ſhall be vexed upon any *accuſation*, but according to the law of the land: And no man may be moleſted by petition to the king, &c. unleſs it be by indictment, or preſentment of lawful men, or by proceſs at Common law. 25 *Ed.* 3. 28 *Ed.* 3. *c.* 3. None ſhall be compelled to anſwer an accuſation to the King, without preſentment, or ſome matter of record. *Stat.* 42 *Ed.* 3. Promoters of ſuggeſtions are to find ſurety to purſue them, and not making them good, ſhall ſatisfy damages to the party *accuſed*, and pay a fine to the King. 38 *Ed.* 3. *c.* 9. In treaſon there ſhall be two lawful *accuſers*. *Stat.* 5 & 6 *Ed.* 6. A perſon is not obliged to anſwer on oath to a matter by which he may accuſe himſelf of any crime, &c. 2 *Mod. Rep.* 278. *Jacob.*

Acemannes Ceaſter, Acemanni Civitas. See *Bath.*

Acephali, The levellers in the reign of King *Hen.* 1. who acknowledged no head or ſuperior: They were deemed ſo poor that they had not a tenement by which they might acknowledge a ſuperior lord. *Cowel. Du Freſne.*

Ac etiam Billae, Words or a clauſe of a writ, where the action requires good bail. By ſtat. 13 *Car.* 2. *ſeſſ.* 2. *c.* 2. (which was the foundation of *ac etiam billæ* in writs) it is enacted, that no perſon arreſted by proceſs out of the King's Bench or Common Pleas, in which proceſs the true cauſe of action is not expreſſed, and for which the defendant is bailable by 23 *Hen.* 6. *c.* 10. ſhall be forced to enter into bond with ſureties for appearance in any ſum exceeding 40*l.* See titles **Arreſt, Bail.**

An *ac etiam billæ* ought not to be made out againſt any *peer* or *peereſs*, or any *executor*, or *adminiſtrator*, or upon a *penal ſtatute*, or for any *debt* or *aſſumpſit* under 10*l.* nor in action of *account render*, nor in any action of *covenant* or *trover*, unleſs the damages are 10*l.* or more; nor in any action of *treſpaſs*, or for *battery*, *wounding* or *impriſonment*, unleſs there be an order of court for it, or a warrant under the hand of one of the judges of the court, out of which the writ iſſues for that purpoſe. 1 *Lill. P. R.* 13.

In caſe for inveigling away his ſon, who was alſo his *ſervant* (the defendant being a ſeafaring man) an *ac etiam billæ* of 50*l.* was ordered on motion and affidavit. *Comb.* 311.

The plaintiff laid his *ac etiam* for 300*l.* and then ſwears only that the defendant owed him above 10*l.* juſt to bring him within the rule of ſpecial bail. The court ordered him to take common bail for his fraud. *Comb.* 265.

In an action of treſpaſs, aſſault and battery, by bill of *Middleſex* with an *ac etiam* for 48*l.* and recovered 100*l.* the court held the bail ſhould not be liable for more than the *ac etiam*, for that is the meaſure and ground of his undertaking. 1 *Salk.* 102. *pl.* 16.

Defendant in a ſcuffle bit off the fore-finger of an attorney's right hand; and in treſpaſs with an *ac etiam* by a judge's warrant, the bail was not held to juſtify themſelves to a ſum ſuitable to the *ac etiam*, the defendant being poor. 6 *Mod.* 230.

It was moved for a ſpecial *ac etiam* in treſpaſs for lying with the plaintiff's wife, which was granted; and held the defendant to 50*l.* bail. *N. B.* Affidavits were produced of the indecent liberty they took together. 11 *Mod.* 275. *pl.* 24. *Hil.* 8 *Ann. B. R.*

An action with an *ac etiam billæ* was brought in a great ſum to hold the defendant to ſpecial bail *where nothing was due*, as appeared on being ſummoned before a judge to ſhew his cauſe of action; the court held this not to be ſuch a contempt as to grant an attachment againſt the plaintiff, but directed, that if the defendant was demnified he might bring his action. 8 *Mod.* 227. 10 *Geo.* 1. The *King* v. *Pepper.*

Achat, (Fr. *Achat*) Is a purchaſe or bargain. Hence perhaps purveyors were by ſtat. 36 *Ed.* 3. called *achators*, from their frequent making of bargains; and hence perhaps may be alſo derived the word *cates*, ſignifying proviſion bought in the market for great feaſts. *Cowel.*

Acherſet, A meaſure of corn, conjectured to be the ſame with one quarter or eight buſhels. The monks of *Peterborough* had an allowance weekly of 12 *acherſetos de frumento*, and 8 *acherſetos de braſio*, *et* 6 *de grad. et* 11 *acherſetos de fabis*, *&c. Cowel.*

Acholite, *(Acholitus)* An inferior church-ſervant, who, next under the ſubdeacon, followed or waited on the prieſts and deacons, and performed the meaner offices of lighting the candles, carrying the bread and wine, and paying other ſervile attendance. They were, according to Sir *Hen. Spelman*; *Juvenes ex imo ordine eccleſiæ, qui in peragendis ſacris, ſacerdotibus olim, diaconis, et ſubdiaconis adminiſtrabant, ab epiſcopo ad hoc deſignati; ſacra autem non attrectabant, nec inter clericos deputati ſunt, ſed a neutris tamen excluſi; dicti* απὸ τῦ ακολουθειν, i. e. *à ſequendo, aſſectando, conſequendo.* This officer was in our old Engliſh called a *colet*, from which appellation came the family of dean *Colet*, founder of St. *Paul's* ſchool.

Acknowledgment-money, Is a ſum of money had by the tenant on the death of the landlord, in acknowledgment of the new landlord.——*Solvet* 12*d. ad recognitionem cujuſlibet novi domini de Hope, &c. Ex libro cart. priorat. Leominſtriæ*, and called in Latin, *Laudativum vel Laudemium a laudando domino. Cowel.*

Aclea, A place or field where oaks grow, from the Sax. *ac*, *quercus*, an oak, and *leag*, *locus*, a place. We find it in ſeveral authors, *viz.* in *Aſſer*, in the life of *Elfred*, in *Florence* of *Worceſter* 851. and in *Ethelward*, *lib.* 4. *Hiſt. Angl. cap.* 3. *Cowel. Du Freſne.*

Acquietantia de ſhiris et hundredis. A privilege to be free from ſuit and ſervice in ſhires and hundreds; to which purpoſe it is ſaid in *Regiſt. Priorat de Cokesford. Quod prior non debet facere ſectum ad comitatum* Norwici *vel in* hundredo *pro manerio de* Rudham *cum pertin'. Cowel.*

Acquietandis plegiis. This writ we find in the *Regiſter of writs*, *fo.* 158. being in truth a *juſticies*, and lies for a ſurety againſt a creditor, that refuſeth to *acquit* him after the debt is paid. *Cowel.*

Acquietare. This, ſays Dr. *Wilkins* in his Gloſſary, is a law-word, and ſignifies *quietum reddere.* See *Spelman.* It alſo ſometimes ſignifies to pay, as in *Monaſticon*, *tom.* 1. *fo.* 199. *Tenentur hæredes teſtamenta patrum et aliorum prædeceſſorum ſuorum ſervare, et debita eorum* acquietare. *Cowel.*

Acquittal, (from the French word *acquitter*, and the Latin *acquietare*, to acquit or diſcharge) Signifies in one ſenſe to be free from entries and moleſtations of a ſuperior lord for ſervices iſſuing out of lands; but in the moſt general ſignification it is taken for a deliverance and ſetting free of a perſon from the ſuſpicion of guilt; as he that on trial is diſcharged of a felony, is ſaid to be *acquietatus de felonia*; and if he be drawn in queſtion again for the ſame crime, he may plead *auter foits acquit*; as his life ſhall not be twice put in danger for the ſame offence. *Acquittal* is two-fold, *acquittal in law*, and *acquittal in fact*; acquittal in law is, when two are indicted, the one as principal, and the other as acceſſary, the principal being diſcharged, the acceſſary of conſequence will be *acquitted* by law: Acquittal in fact, is when by verdict a perſon is found *Not guilty* of the offence whereof he is charged. 2 *Inſt.* 385. *Staundf. Pl. Cor.* 168. But in murder if a man is aquitted, appeal may be brought againſt him. 3 *Inſt.* 273.

If *A.* be indicted in the county of *B.* for a robbery or other felony ſuppoſed to be done at *D.* in the county of *B.* and be acquitted, and be afterwards indicted for a robbery upon the ſame perſon in the county of *B.* but at another vill, yet he ſhall plead *auterfoits acquit* notwithſtanding the variance of the vill, and may aver it to be the ſame; but if he be afterwards indicted in the county of *C.* for a robbery ſuppoſed to be committed in the ſame county of *C.* (as it muſt be,) he ſhall never plead *auterfoits acquit* of the ſame robbery in the county of *B.* for the juſtices in the county of *B.* can only inquire touching a felony in that county, and therefore it can never be averred to be the ſame; but it is ſaid that it is otherwiſe in an appeal. 2 *H. H. P. C.* 245. But ſee 2 *Hawk.* 370.

If a perſon is lawfully *acquitted* on a malicious proſecution, he may bring his action, *&c.* for damages, after he hath obtained a copy of the indictment and the judge's certificate: But it is uſual for the judges of goal-delivery to deny a copy of an acquittal to him who intends to bring an action thereon, where there was probable cauſe for a criminal proſecution. *Carth.* 421.

A ſon-in-law indicted his mother for poiſoning her huſband his father, and ſhe being *acquitted*, brought an action for a malicious proſecution againſt him, and recovered damages; and he, to requite her kindneſs, brought an appeal of murder, on which ſhe was tried, convicted and executed. *Cro. Car.* 383. A man having brought an action for ſaying of him that he was a highwayman; and it appearing upon evidence he was ſo, he was taken in court, committed to *Newgate*, and convicted and hanged the next ſeſſions. *Mod. Ca.* 217.

Acquittance, *(Acquietantia)* ſignifieth a diſcharge in writing, of a ſum of money, or debt due; as where a man is bound to pay rent, reſerved upon a leaſe, *&c.* And the party to whom due, on receipt thereof gives a writing under his hand witneſſing that he is paid; this will be ſuch a diſcharge in law, that he cannot demand and recover the ſum or duty again, if the acquittance be produced. *Termes de la ley.* An *acquittance* in law ought to be a deed ſealed, tho' in common practice it is otherwiſe. 3 *Salk.* 298. *pl.* 2. If ſigned only and not ſealed, it is only an evidence or proof of payment, and no pleadable acquittance, becauſe it is no deed, ſo as it nothing differs from proof by witneſſes, only that it is not mortal as they are. *Wentw. Off. of Executors.* 217.

It is obſerved, that a general receipt or *acquittance* in full of all demands will diſcharge all debts, except ſuch as are on ſpecialty, *viz.* bonds, bills, and other inſtruments ſealed and delivered; on which account thoſe can only be deſtroyed by ſome other ſpecialty of equal force, ſuch as a general releaſe, *&c.* See 2 *Cro.* 650.

I. *In what caſes payment may be refuſed without an acquittance given.*

II. *When plea of payment without an acquittance may be good.*

I. *In what caſes payment may be refuſed without an acquittance given.*

The obligor is not bound to pay without acquittance upon a *ſingle* obligation; nor is he obliged to pay the money before he hath the *acquittance:* But in caſe of an obligation with condition it is otherwiſe; for there one may aver payment. *Bro. Obligation*, *pl.* 10. And by ſtat. 3 & 4 *Ann. c.* 16. If an action of debt is brought upon a ſingle bill, and the defendant hath paid the money, ſuch payment may be pleaded in bar of the action.

If one is bound in a *ſtatute-merchant* or *bond* for payment of money, he is not bound to pay it unleſs the conu-

ee or obligee will deliver a releaſe or acquittance. *Bro. Faits, pl.* 77.

It was ſaid that in debt upon an obligation, it is a good plea that the defendant has been always ready to pay, *&c.* if he could have acquittance. *Br. Tout temps, &c. pl.* 39.

In caſe of a grant of a *bare* annuity, where the grantee has no remedy by diſtreſs, there muſt be an acquittance under ſeal; otherwiſe it is not of ſo high a nature as the grant; *per Hale Ch. B. Hard.* in *Wilſon*'s caſe.

II. *When plea of payment without an acquittance may be good.*

In debt the defendant pleaded acquitttance; the plaintiff ſaid that the acquittance was for another 10*l.* *abſque hoc* that it was for this 10*l.* and a good plea. *Br. Traverſe, pl.* 318.

Debt upon indenture of covenants, where the defendant had covenanted to do ſeveral things, and the plaintiff likewiſe to do ſeveral other things, *ad quas quidem conventiones perimplendas uterque obligatur alteri in* 100*l.* and the one broke the covenant, by which the other brought debt; and the defendant pleaded payment of 10*l.* at *D.* which was all to which he was bound; judgment *ſi actio* and no plea *per cur.* becauſe he does not ſhew a deed thereof, whereas the plaintiff declared upon the indenture which is made. And yet *contra* in pleading of payment of rent reſerved upon a leaſe for years made by indenture; for there he may levy it by diſtreſs, and therefore averment may come in ure. *Bro. Dette. pl.* 173.

One by indenture was bound to pay a ſum of money, and in an action of debt thereupon the defendant pleaded payment; and without acquittance, *per Montague*, this is no good plea; for this indenture is like a ſimple obligation, payment whereof is no plea without acquittance. But it is otherwiſe if the obligation be with condition. *Dyer* 25. *b. pl.* 160.

The wife *dum ſola* had recovered 26*l.* damages, and had execution, and was yet poſſeſſed of the ſaid money, and that judgment was reverſed in error, and reſtitution awarded; and afterwards ſhe married the defendant, and thereupon the plaintiff brought *ſcire facias* to have reſtitution. The defendant pleaded that after the reverſal, and before this writ brought, he paid the ſaid 26*l.* to the plaintiff. The queſtion was, whether payment was good without acquittance. *Barkeley* juſtice held it was, becauſe the certainty of the damages appears not of record, and it may be that they were without proceſs, *&c.* ſo as the execution appears not of record; but the other three juſtices *contra*, becauſe the *ſcire facias* ſhews the recovery to be for 26*l.* and that plaintiff had execution for ſo much; therefore the judgment being reverſed, and he demanding reſtitution of 26*l.* only, payment is not good without acquittance. *Jo.* 326. *pl.* 8. *Mich.* 8 *Car.* 1. *B. R. Harris* v. *Harris.*

In *audita querela* to avoid execution of a judgment, it was ſurmiſed that after the judgment he had paid the intire ſum. *Popham* thought ſuch ſurmiſe not ſufficient to avoid a judgment upon a bare payment without writing or other matter of evidence; but *Tanfield* ſerjeant cited *Hawkins* v. *Malins*, where it was held a good ſurmiſe, becauſe it is not only a ſuit in law but in equity alſo, and is as a commiſſion to examine the cauſe; for it is not reaſon that if the money be ſatisfied he ſhould lie in execution. And ſo held all the court (beſides *Popham*;) whereupon he was let to bail. *Cro. J.* 29. *pl.* 7. *Paſch.* 2 *Jac.* 1. *B. R. Ognel* v. *Randel.*

Acre, (from the German *Acker*, that is, *ager*) is a quantity of land containing in length forty perches, and four in breadth, or, according to that proportion, be the length more or leſs. *Crompton* ſaith that according to the cuſtom of divers countries the perch differeth; being moſt commonly 16 feet and a half, but in *Staffordſhire* 24 feet. In the ſtatute made concerning ſowing flax, 34 *Hen.* 8. *c.* 4. 160 perches make an acre, which is 40 multiplied by four: And the ordinance of meaſuring land made 33 *Ed.* 1. *ſtat.* 6. agrees with this account; and by ſtat. 31 *Eliz. c.* 7. if a man erect any new cottage, he muſt lay four acres of land to it after this meaſure. The word *acre* at firſt ſignified not a determined quantity of land, but any open ground, eſpecially a wide campaign, from the Saxon *æcer*, a field: And this antique ſenſe of it ſeems to be preſerved in the names of places, as *Caſtle-acre*, *Weſt-acre*, &c. in the county of *Norfolk*. When the word was applied to the meaſure of ground, the quantity was various, till determined by ſtat. 33 *Ed.* 1. *ſt.* 6. and 24 *Hen.* 8. *c.* 4. For the different computation of acres obſerve this note in a terrier of the eſtate belonging to the *prior* and *convent* of *Burceſter Com. Oxon. A. D.* 1339. 1 *Hen.* 4. *Quælibet acra continet duas ſeliones cum omnibus furlongiis—Exceptis virgis et buttis quarum quatuor virgæ faciunt unam acram, et aliquando plures. Similiter aliquando quatuor buttes, aliquando quinque, aliquando ſex, aliquando ſeptem, aliquando octo faciunt unam acram, &c. Paroch. Antiq. p.* 534. At the great dooms-day inquiſition, the common paſture ſeems to be meaſured by *hides*, the arable land by *carucates*, and the meadow by acres. *Cowel.*

Acre, An old ſort of duel fought by ſingle combatants, *Engliſh* and *Scotch*, between the frontiers of their kingdom with ſword and lance. *Ex abuſu obtento de voluntate et mandato domini regis Angliæ et Scotiæ, non ſolum ſimplices clerici, ſed et abbates et priores in diœceſi Karleoli, ſi appellati fuerint ab aliquo de regno Scotiæ, de re aliqua, et e converſo compeliuntur cum lanceis et gladiis, alias inermes, duellum, quod dicitur* acram, *committere inter fores utriuſque regni—Moneatis igitur utrumque regem—quod tam deteſtabilis abuſio quoad perſonas eccleſiaſticas non ſervetur. Annal. Burton, Sub. An.* 1237. Hence it is conjectured that, as this ſort of judicial duelling was called *camp fight*, and the combatants *champions*, from the open field that was the ſtage of trial; ſo *æcer* among the Saxons being the ſame with *campus*, the borderers on *Scotland*, who beſt retained the Saxon dialect, called ſuch *camp fight*, *æcer-feoht*, *acre-fight*; and ſometimes ſimply *acre*. *Cowel.*

Acroiſia, Blindneſs. The right word is *acraſia*; but we find in the *Monaſticon*, *page* 694. *Inter medios homines qui eis inſidias tetenderant, quaſi* acroiſia *percuſſos, ad inſtar Eliſæi tranſierunt. Cowel. Du Freſne.*

Act. See **Acts.**

Actilia, Military utenſils. *Quilibet paratus ſit cum* actiliis *et harneſſiis, &c. Et quicunque habet decem libras in bonis, et non habuerit omnia cremorum* actilia, *perdat omnia bona. Cowel. Du Freſne.*

Action, *Actio*, is defined by *Bracton*, *lib.* 3. *c.* 1. in the ſame manner as by *Juſtinian*, *lib.* 4. *Inſt. tit. de actionibus, viz. Actio nihil aliud eſt quam jus proſequendi in judicio quod alicui debetur.* Action is otherwiſe defined to be a legal demand of one's right. *Co. Lit.* 285. 2 *Inſt.* 40. *Mirror, cap.* 2. *ſect.* 1. It implies a recovery of, or reſtitution to ſomething, *(Co. Lit.* 289.) and differs from a writ of error, which is no action, but only a commiſſion to the judges to examine the record, *&c. Jenk.* 25. 2 *Inſt. Yelv.* 209. But yet, if by writ of *error*, the plaintiff therein may recover, or be reſtored to any thing, it may be releaſed by the name of an action. *Co. Lit.* 288. *b.* The ſuit till judgment is properly called an action, but not after; and therefore a releaſe of all actions is regularly no bar of an execution. *Co. Lit.* 289. *a.* 1 *Roll's Abr.* 291.

The deſign of entring into ſociety being the protection of our perſons and ſecurity of our property, men in civil ſociety have a right, and indeed are obliged to apply to the public for redreſs, when they are injured; for were they allowed to be their own carvers, or to make repriſals, which they might do in the ſtate of nature, ſuch permiſſion would introduce all that inconvenience which the ſtate of nature endured; and which government was at firſt invented to prevent. Hence therefore they are obliged to ſubmit to the public the meaſure of their damages, and to have recourſe to the law and the courts of juſtice, which are appointed to give them eaſe in their affairs; and this application is what we call bringing an action. 1 *New Abr.* 26.

Under this head it is thought proper to conſider,

I. *The different kinds of actions.*

II. *In what caſes an action will lie; and who may ſue and be ſued.*

III. *In*

III. *In what caſes diſtinct things may be laid in the ſame action.*

IV. *Actions local and tranſitory; and in what caſes the venue may be changed.*

V. *Actions on the caſe.*

VI. *Actions on the caſe upon aſſumpſit.*

VII. *Actions on the caſe for ſlander or defamation.*

VIII. *Actions popular, or actions* qui tam.

I. *The different kinds of actions.*

Actions are divided, according to Lord *Coke*, into criminal and civil; criminal are either to have judgment of death, as appeals of death, robbery, &c. or only to have judgment of damages to the party, fine to the King, and impriſonment; as appeals of *mayhem*, &c. *Co. Lit.* 184. 2 *Inſt.* 40. Criminal actions or pleas of the crown are otherwiſe defined to be offences done againſt the crown and dignity of the King. *Staund. P. C.* 1.

A civil action is that which tends only to the recovery of that which by reaſon of any contract, or other like cauſe, is due to a perſon. *Cowel.* Civil actions are divided into real, perſonal, and mixed. *Co. Lit.* 284. 2 *Inſt.* 40.

A real action is defined to be that whereby a perſon claims title to have a freehold in any lands or tenements, rents or commons in fee-ſimple, fee-tail, or for life. *Bract. lib.* 3. *c.* 2.

Every real action is *poſſeſſory*, *viz.* of his own poſſeſſion or ſeiſin; or *auncеſtrel*, *viz.* of the poſſeſſion or ſeiſin of his anceſtor. 6 *Co.* 3. And real actions auncеſtrel are *poſſeſſory*, *viz.* when the anceſtor dies in poſſeſſion, and the land deſcends; or *rightful*, when only the right deſcends from the anceſtor. 6 *Co.* 3. *b.*

The law always diſtinguiſhed between a right of entry and a naked right to the land itſelf; and therefore there were different remedies; for to recover the naked right, the law only gave a writ of *right*; and in this action, the defendant at his election might put himſelf upon his country, or wage battle; but when the diſſeiſee had a right of entry, it was preſumed that the diſſeiſin was freſh and recent; and therefore the trial was *coram paribus*; but if the diſſeiſee did not come till the heir was ſeated in the poſſeſſion, and had paid relief to the lord, then the entry of the diſſeiſee was taken away, and his title became doubtful; and then they appealed to providence in ſuch deciſions; and if any freeman would, with his own body, defend the title of the poſſeſſor, the demandant was obliged to find a champion to enter the liſts with him. *Booth* 99. *Co. Ent.* 182. 1 *H.* 6. 7.

But to recover the right of poſſeſſion, the ancient way was by writ of entry, where the proceſs was by *ſummons*, *grand cape* before appearance, and *petit cape* afterwards, as in the writ of right, and the general iſſue was *diſſeiſivit vel non diſſeiſivit*; and this iſſue was tried by a jury, becauſe when the diſſeiſin was freſh, they did not put it upon the hazard of a battle, as they did in thoſe caſes where the long poſſeſſion had made the right doubtful. *Booth* 177, 179.

But in the writ of *entry*, they received no damages; for that ſuch writ only demanded the freehold, and was not mixed with the perſonalty; and therefore to recover the profits which are merely perſonal, they had an action of treſpaſs, which was the proper remedy for the damages ſuſtained. *Booth* 175. 2 *Inſt.* 289, 343.

There were anciently only three ſorts of writs of *entry*; one againſt the diſſeiſor himſelf; the other, which was againſt his feoffee, was called the *writ of entry in the per*; the third was after a ſecond alienation, which was called *a writ of entry in the per and cui*; but the ſtatute of *Marlb. cap.* 30. gave a writ of *entry* in the *poſt*, which did not lie in common againſt an alienee at a third hand. *F. N. B.* 191. *Booth* 175. 2 *Inſt.* 153.

And as a man might have have brought ſuch writ of *entry* for his own diſſeiſin, ſo he might have brought it for the diſſeiſin of his father, or he might have brought it for a diſſeiſin done to his grandfather, which was called a writ of *ayle*, or a diſſeiſin done to his great grandfather, which was called a writ of *beſail*, or any collateral coſins that were more remote than brothers and ſiſters, uncles and aunts, nephews and neices; and this was called a writ of *coſinage*. *F. N. B.* 191, 221. *Booth* 175, 176, 200.

But becauſe the proceſs in a writ of *entry* became tedious, when ſuch actions were removed out of the Lord's court into that of the King's, and thereby the proceſs which iſſued from three weeks to three weeks in the Lord's court, was depending ſo many ſeveral terms in the King's court, therefore the aſſiſe was invented, which was in the nature of a commiſſion to put the diſſeiſee in poſſeſſion by trial at one aſſiſes; and this was ſo ſudden and immediate a remedy, that the writ of *entry* became obſolete; and therefore when the aſſiſe was the uſual remedy, the writ of *entry* began to be called *a writ of entry in the nature of an aſſiſe*. *Glan. cap.* 7. *Fleta* 214, 215. See title Aſſiſe.

There was likewiſe other remedies, as the *formedon in remainder* and *reverter*, and a *formedon in deſcender*, which was given by the ſtatute *de donis*, which created eſtates-tail. See title Writs.

But the proceedings on real actions, being dilatory and expenſive, and in many caſes concluding the party upon one trial, a more commodious method was contrived to diſpute the title of lands, which begun in the reign of *Hen.* 7. in this manner; by forming a term for years, and the leſſee's bringing an ejectment to recover the term, and thereby to aſſert the title of the leſſor of the plaintiff; before this time, if a termor for years, who only claimed as a bailiff to the freeholder, had been ouſted of his poſſeſſion, he had only a remedy to recover damages in ejectment, and could not recover the term itſelf; but in the reign of *Hen.* 7. the courts of equity having obliged ſuch wrong doer to a ſpecifick reſtitution, the courts of law have likewiſe given an *habere facias poſſeſſionem* to recover the term in *ſpecie*. 1 *New Abr.* 27. See title Ejectment.

A perſonal action is that which one man may have againſt another, by reaſon of any contract for money or goods, or for any offence done by him, or ſome other, for whoſe act he is anſwerable. *Bract. lib.* 3. *c.* 3.

Perſonal actions are either *ex contractu*, or *ex delicto*; perſonal actions *ex contractu*, are thoſe founded on contract, as debt, which is to reſtore the things *in numero*; or *detinue*, which is to reſtore the ſame in ſpecie, or damages, where it cannot be had; alſo actions of *account*, *covenant*, *aſſumpſit*, *quantum meruit*, *quantum valebat*, *covenant* and *annuity* are perſonal actions. Perſonal actions *ex delicto*, are treſpaſſes founded upon force, which are treſpaſſes *vi et armis*, or upon *fraud*, which are actions upon the caſe. Therefore, if a man gets the goods or chattles of another, by lawful means, as by bailment, borrowing or pledging, he cannot have an action of *treſpaſs*, but muſt bring *detinue* or *trover*; becauſe the party had not violated his poſſeſſion. 1 *New Abr.* 28.

So where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, no *trover* lies, but an *aſſumpſit* for the money, becauſe the property was changed by a lawful bargain. 1 *New Abr.* 28.

If I borrow a horſe to go to *Dover*, and go to other places, the owner may have an action on the caſe againſt me, for exceeding the purpoſes of the loan; for ſo far it is a ſecret and fallacious abuſe of his property; but no general action of *treſpaſs* lies, becauſe it is not an open and violent invaſion of it. 1 *Rol. Rep.* 128.

Mixed actions are thoſe, in which the freehold is recovered, and alſo damages for the unjuſt detention of it. *Co. Lit.* 284. *b.*

II. *In what caſes an action will lie, and who may ſue and be ſued.* In life, liberty, and eſtate, every one (who has not forfeited them) has a property and right; and if they are violated, the law gives an action to redreſs the wrong, and puniſh the wrong-doer. *Vaugh.* 337.

For all injuries done to a man's perſon, reputation or property, he ſhall have an action, and for every right he is to have a remedy; for want of right and want of remedy are the ſame thing. It is alſo agreed, that where a perſon has ſeveral remedies, he may chooſe which he pleaſes; but he cannot deviſe or lay hold on any but thoſe

preſcribed

preſcribed by the laws of his country; for if this were allowed, it would be conſtituting as many actions as there are men, which would be highly inconvenient. 1 *New Abr.* 28. *Co. Lit.* 145. *Style* 4.

But in this the great difficulty is, when a man ſhall be ſaid to have ſuffered an injury, or to have ſuch a right as will intitle him to an action; and here the rules eſtabliſhed by that ſociety, of which he is a member, muſt govern; and therefore, though a man had a right, and is barred by the ſtatute of limitations, yet he can have no remedy. 1 *New Abr.* 28.

So if I promiſe by word only to convey lands, or to give goods, without delivering poſſeſſion; or if I promiſe to build a houſe, without conſideration, *&c.* though by the laws of nature theſe promiſes are binding, yet no action lies; for without deed duly ſealed and executed, or without conſideration, no property is altered; and every ſuch promiſe is eſteemed, in the eye of the law, to be *nudum pactum unde non oritur actio.* 1 *New Abr.* 28. *Yelv.* 196. *Cro. Car.* 270. 1 *Brownl.* 111. 6 *Co.* 18. 1 *Roll. Abr.* 9.

Alſo in caſes where there may be *damnum abſque injuria*, the party can have no action; as if a ſchool be ſet up in the ſame town where an antient ſchool has been time out of mind, by which the old ſchool receives damage, yet no action lies. 1 *New Abr.* 28. 1 *Roll. Abr.* 107. 1 *Mod.* 69. *Noy* 184.

So if I retain a maſter in my houſe to inſtruct my children, tho' this be to the damage of the common maſter, yet no action lies. 11 *Hen.* 4. 47. 1 *Roll. Abr.* 107.

As the law grants redreſs for all injuries, and gives a remedy for every kind of right, ſo it is open to all kinds of perſons, and none are excluded from bringing an action, except on account of their crimes or their country; as men attainted of treaſon or felony, popiſh recuſants, perſons outlawed or excommunicated, convict in a *præmunire*, or alien enemies. *Co. Lit.* 128.

A man that hath a ſpecial and limited property in goods, as a carrier that hath goods delivered to him, a ſheriff who hath levied goods, a bailee who hath goods in his keeping, *&c.* ſhall have actions againſt thoſe who take them away, becauſe they are anſwerable in damages to the abſolute owner. 1 *New Abr.* 29. 2 *Bulſt.* 311. 1 *Sid.* 438. 1 *Mod.* 30. 2 *Saund.* 47. 2 *Keb.* 588. *Yelv.* 44. *Dyer* 98, 99.

Alſo a man who has cauſe of action againſt two, may bring it againſt which he pleaſes; as if *A.* takes the goods of *C.* and *B.* takes them from *A. C.* ſhall have his action againſt *A.* or *B.* at his election, becauſe both damnified *C.* in their taking. 1 *Sid.* 438.

So if two of the ſheep of *A.* have been loſt, and one of them is found again, and the ſhepherd of *A.* affirms it to be one of them, whereupon *A.* pays for the feeding of it, and cauſes it be ſhorn and marked with his own mark, and after the ſhepherd knowing this to be the ſheep of *A.* falſly and fraudulently affirms to the bailiff of the manor, to which waif and ſtray belongs, that the ſaid ſheep is a ſtray, whereupon the ſaid bailiff ſeizes it, *&c. A.* may have an action againſt his ſhepherd; for that by his falſe practice he hath created a trouble, diſgrace and damage to him; and tho' he hath good cauſe of action againſt the bailiff, yet this will not excuſe the ſhepherd. *Allen* 3. 1 *Roll. Abr.* 101.

So if one ſlanders my title, whereby I am wrongfully diſturbed in poſſeſſion, tho' I have remedy againſt the treſpaſſer, yet I may have an action againſt him who cauſed the diſturbance. *Allen* 3.

If there are ſeveral proprietors of a ſhip which hath uſually tranſported goods for hire, and a maſter placed therein by the part-owners, who hath 60*l.* wages for every voyage from *London* to *T.* and *J. S.* without making any contract with the part-owners, and none of them being preſent, delivers certain goods abroad to the maſter, to be carried for hire from *London* to *T.* and the ſhip ſafely arrives there, but the goods are ſpoiled through the neglect of the maſter, an action lies againſt the part-owners; for tho' the maſter is chargeable in reſpect to his wages, ſo are the proprietors in reſpect of the freight, at the election of the plaintiff. 1 *New Abr.* 29. *Carth.* 58. 2 *Salk.* 440. 3 *Lev.* 258.

III. *In what caſes diſtinct things may be laid in the ſame action.*

The diſtinction herein with reſpect to real actions, depends on the different kinds of writs; for all original writs are of two ſorts, *viz. Breve nominatum et innominatum*; the firſt contains the time, place and demand very particularly, and therefore in ſuch writ ſeveral lands by ſeveral titles cannot be demanded in the ſame writ: the other contains only a general complaint, without expreſſing time, damages, *&c.* as the writ of *treſpaſs, quare clauſum fregit, &c.* and therefore ſeveral lands coming to the demandant by ſeveral titles, may be demanded in ſuch writ. 8 *Co.* 87. See *F. N. B.* 209. *Owen* 11 *Kelw.* 105. *Dyer* 145. 2 *Brownl.* 274.

As to perſonal actions, the difference ariſes from the above mentioned diviſion of perſonal actions, *viz.* ſuch as are *ex contractu*, and ſuch as are *ex delicto*, or founded on a tort; therefore debt on an obligation and on a *mutuatus* may be joined, becauſe the writ is general, and the declaration upon both will be warranted by the authority given by the general words of the writ; ſo debt and detinue may be joined in the writ, becauſe there are writs in the *Regiſter* in which they are both compriſed in the ſame writ; ſo debt upon a leaſe and for cloths, they being in the words of the ſame writ; but debt and account, or debt and treſpaſs cannot be joined. *Cro. Car.* 20, 316. 1 *Vent.* 366. 1 *Keb.* 847. *Bro. Joinder in Action*, 97. *Regiſter* 95, 139.

The true reaſon why actions may or may not be joined is not the difference of the defendants pleas; for if that were the reaſon, debt upon an obligation (to which the plea is *non eſt factum*) and on a *mutuatus*, to which the plea is *nil debet*, could not be joined; therefore the true reaſon ariſes from the difference of the proceſs, and the fines paid on taking out the original; for in debt the old proceſs was ſummons, attachment and diſtreſs, and on taking out the original a fine was paid to the King, which was in proportion to the ſum demanded; but in treſpaſs the proceſs was a *capias*, becauſe the man that had committed a *tort* might be ſuppoſed to fly from juſtice; and in this action the court ſet a fine upon him in proportion to his offence, and levied it by a *capiatur.* 1 *Vent.* 366.

In perſonal actions ſeveral wrongs or treſpaſſes may be joined, becauſe they may be compriſed in the ſame writ, and ſo may ſeveral actions on the caſe, where the caſe is of the ſame kind; as an action for a fraud on the delivery of the goods, and on the warranty of the ſame goods, being both on the contract; ſo againſt a common carrier on the cuſtom of the realm, and *trover* may be joined, becauſe both on the *tort*; it being a violation of the cuſtom not to deliver the charge. 1 *Co.* 87. *Jenk.* 211. 3 *Lev.* 93. *Raym.* 233.

But actions founded upon a *tort*, and upon a contract, cannot be joined; as an *aſſumpſit* and trover againſt a carrier, for tho' theſe come under the general head of actions on the caſe, yet are they more diſtinct caſes than debt and account, which cannot be joined. 1 *Lev.* 101. 1 *Salk.* 10. 3 *Keb.* 59. 3 *Mod.* 322. 1 *Sid.* 244.

If trover and *aſſumpſit* are joined in one action, and upon Not guilty the jury *quoad* the trover find for the defendant, and *quoad* the *aſſumpſit* for the plaintiff, yet he ſhall not have judgment, for theſe cannot be joined in the ſame action, and the ſeverances of the jury will not help it, the declaration being nought at firſt. 3 *Lev.* 99.

One action will lie for entering the houſe of the plaintiff, breaking his cheſts, and carrying away his goods, and for beating his ſervant *per quod ſervitium amiſit*; for a general action of treſpaſs and a ſpecial action upon the caſe may be joined in one action. *Allen* 9. *Style* 43, 202.

If in an action upon the caſe the plaintiff declares, that whereas *accommodaſſet* to the defendant a gelding *ad equitand' ab L. uſque E. & ibidem ſalvo deliberand'* to the plaintiff the defendant intending to deceive the plaintiff, rid upon the ſaid gelding from *L.* to *E.* and from *E.* unto *L.* again, and by that riding ſo much abuſed the ſaid horſe, that he became of little value; and though he the plaintiff at *E.*

demanded

demanded a redelivery of the ſaid gelding, yet the defendant refuſed, and yet doth refuſe to deliver him, and hath converted the ſaid gelding to his own uſe; this declaration is not good, becauſe it contains diſtinct matters, for part is founded upon the contract, and part upon the *tort*, which are ſeveral cauſes of action. *Cro. Car.* 20.

An ejectment and aſſault and battery were joined in one writ, and not guilty pleaded, and a verdict and intire damages given for the plaintiff; and it ſeems to have been aided after verdict.

Where one hath a right to recover in the ſame kind of action, though he derives his right from different titles, yet being conjoined in him, he may recover in one action; as if in debt upon 2 *E.* 6. for not ſetting forth of tithes, though the plaintiff ſhews, that by preſcription the rector of *A.* hath had two parts, and the vicar of *A.* the third part of the tithes there, and that the ſaid rector and vicar, by ſeveral leaſes, did demiſe to the plaintiff, *per quod* he became *proprietarius* of the ſaid tithes, and the defendant ſowed, *&c.* this action is well brought, for though the vicar and parſon could not join becauſe they claim ſeverally by divided rights, yet when both titles are conjoined in one perſon, the matter of the title is alſo conjoined; and this being a perſonal action and founded upon a wrong, it is ſufficient to ſhew generally, that the plaintiff is *firmarius* or *proprietarius* of the tithes, without ſaying by what title. *Yelv.* 63. 1 *Brownl.* 86. *Cro. Jac. Moor* 914. *Noy* 3.

If *A.* being ſeiſed of a third part of a meſſuage, *&c.* in fee, demiſes the ſame to *B.* for years, who aſſigns to *C.* and *A.* by bargain and ſale inrolled, conveys his reverſion to *D.* and his heirs, who was then ſeiſed of another third part in fee, and afterwards the ſaid *D.* leaſes his third part alſo to the ſaid *C.* for years, and dies; and his heir, by bargain and ſale inrolled, conveys the reverſion of the ſaid two third parts to *E.* and his heirs, after which waſte is done, *E.* may bring one action of waſte upon theſe ſeveral leaſes, for that neither the intereſt of the terms nor of the inheritance were ſevered or divided to ſeveral, but were in one perſon at the time when the waſte was done. *Poph.* 24, 25. *Cro. Eliz.* 290. *Owen* 11. *S. C.*

If in covenant the plaintiff ſhews that *A.* was ſeiſed in fee of one meſſuage, and poſſeſſed of another for a certain term of years yet enduring, and let both to the defendant for a leſſer term of years, and that the defendant did covenant to repair, *&c.* and ſhews that *A.* by one deed did grant to the plaintiff the reverſion in fee, and by another the reverſion for years, *&c.* and that after the houſes were out of repair, *&c.* this action is well brought, for as upon ſeveral leaſes or upon ſeveral grants of a reverſion one action of waſte lies, ſo for the ſame reaſon one writ of covenant will lie. *Cro. Jac.* 329.

But one cannot in the ſame action join a demand in his own right, and that which he has in the right of another; as if in *aſſumpſit* againſt an adminiſtratrix, the plaintiff declares upon a ſale of goods to the inteſtate for 200*l.* and upon another ſale to the defendant herſelf for 27*l.* and that upon account the defendant was found indebted to the plaintiff in theſe ſums, and promiſed, *&c.* the declaration is naught; for the charge being in ſeveral manners, *viz.* in her own right and as adminiſtratrix, it ought to have been by ſeveral actions. *Hob.* 88. See *Cro. Eliz.* 406. *Moor* 419. *Hob.* 184. *Noy* 19. 1 *Vent.* 268. 2 *Lev.* 110, 111, 228. 2 *Keb.* 814.

Several perſons may join in an action where their intereſt is joint; as if the ſeveral cattle of *A.* and *B.* are diſtrained, and *C.* in conſideration of 10*l.* to him paid by *A.* and *B.* aſſumes and promiſes to them to procure the cattle to be redelivered to them; if they are not redelivered accordingly, one joint action lies, for the conſideration is intire and cannot be divided. *Style* 156. 1 *Roll. Abr.* 31.

So if *A.* hath one mill and *B.* another in the ſame manor, which they have uſed to repair, and time out of mind all the grain which was ground and ſpent in the houſes of the tenants of the ſaid manor, and was not ground at one of the ſaid mills, hath always, and ought to be ground at the other, and *C.* a tenant of the ſaid manor, grinds at another mill, *&c.* *A.* and *B.* may join in one action againſt *C.* for the damage is intire to both their mills. 2 *Lev.* 27. 2 *Keb.* 631. 2 *Saund.* 115.

If within the pariſh of *A.* there is a cuſtom for the pariſhioners yearly to elect two perſons to be churchwardens there, and according to the ſaid cuſtom *B.* and *C.* are elected, but the ſurrogate of the biſhop refuſes to admit and ſwear them into the ſaid office; upon which they bring a *mandamus*, and he falſly returns a cuſtom for the vicar to chooſe one churchwarden, and that therefore he cannot admit both the ſaid parties, but is ready to admit one of them; they may join in an action for this falſe return, for the *mandamus* and whole proſecution thereof was joint; and this is no office of profit, nor action brought for that, but for the unjuſt return. 3 *Lev.* 362.

So if the regiſter of the biſhop refuſes to regiſter a licence of a chapel for a conventicle, according to 1 *Will. & M.* and upon a *mandamus* to do it makes a falſe return, all the inhabitants may join in one action againſt him. 3 *Lev.* 363.

But if one man calls two other men thieves, and ſhews in certain of what, *&c.* they ſhall not join in one action againſt him; for the wrong done to one is no wrong to the other.

So in aſſault and battery; for the battery done to one cannot be the ſame as that done to the other, and one battery may hurt more than the other. *Kelw.* 55.

If two joint owners of a ſum of money are robbed upon the highway, they may join in one action againſt the hundred in which, *&c.* otherwiſe if the ſums are ſeveral, and ſeveral properties. *Dyer* 370.

If *A.* deliver goods to *B.* to deliver over to *C.* and *B.* does not deliver them over accordingly, but converts them to his own uſe; either *A.* or *C.* may have an action againſt *B.* But both ſhall not have an action; but he who firſt begins his action ſhall go on with the ſame. 1 *Bulſt.* 68. *Hard.* 321.

If *A.* is ſeiſed in fee of the reverſion of a cloſe expectant upon a term for years, and *B.* is poſſeſſed of another cloſe adjoining thereto, between which ſaid cloſes there runs a rivulet, and *B.* ſtops it, *per quod* the cloſe of *A.* is ſurrounded, ſo that the timber trees, *&c.* become rotten; *A.* in reſpect of the prejudice to the reverſion, and the termor in reſpect of the poſſeſſion, and of the ſhade, ſhelter, *&c.* may have an action, and a ſatisfaction given to the one is no bar to the other. 3 *Lev.* 209.

One action will not lie againſt ſeveral men for ſpeaking the ſame words; for the words of the one are not the words of the other, and can no more produce a joint action, than their words and tongues can be ſaid to be one. *Palm.* 313.

But if two men procure another to be indicted falſely for a common barretor, he may have an action upon the caſe againſt them both; though in ſtrictneſs the procurement of one is not the procurement of the other. *Latch* 262.

A man cannot declare againſt one defendant for an aſſault and battery, and againſt the other for taking away his goods; becauſe the treſpaſſes are of ſeveral natures, and againſt ſeveral perſons.

If *A.* leaſes for years to *B.* and *C.* rendring rent, and *C.* aſſigns his moiety to *D.* and after rent is arrear, *A.* may bring one action of debt; for the rent againſt *B.* and *D.* for the reverſion remains intire. *Palm.* 283.

IV. *Actions local and tranſitory; and in what caſes the venue may be changed.*

Originally all actions were tried in the proper counties in which they aroſe, purſuant to *maximè vicini vicinorum facta præſumuntur ſcire*; this created no inconveniency, for all men being anciently *in decenna*, they were eaſily come at, the *decenna* being reſponſible for their appearance; but when the cuſtom of the *decennary* began to wear off, men uſed to fly from their creditors, and this begot the diſtinction between *local and tranſitory actions*; the firſt relating to lands, which muſt be tried where the lands lie; the other a debt or duty adhering to the perſon where-ever he fled: hence men omitted to date their contracts from any certain place, and began their obligations with a *Noverint univerſi*; when this diſtinction was

eſtabliſhed, it began to be abuſed to a great degree; for plaintiffs would lay their actions far from the place where the fact was done; and the defendants, for fear of being outlawed, were neceſſitated to carry their witneſſes into that county, how far ſo ever remote from the place where the fact was done. 1 *New Abr.* 33. 2 *Inſt.* 231.

To remedy this, the ſtat. 6 *R.* 2. *c.* 2. provides," that to the intent that writs of debt and of account, and all other ſuch actions, be from henceforth taken in their counties, and directed to the ſheriff of the county where the contracts of the ſame actions did ariſe; it is ordained that from thenceforth on pleas on ſuch writs, when it ſhall be declared that the contract thereof was made in another county than is contained in the original writ, that then incontinently the ſaid writ ſhall be abated."

This was intended to have confined all actions to their proper counties; but as it would have created greater miſchief than it was intended to prevent, if a creditor could not follow his debtor into another county; and as the ſtatute is ſo worded, that it only preſcribes that the declaration ſhall agree with the writ, as to the place, the judges conſtrued it ſo as to impower them to change the venue, and thereby oblige the plaintiff to give evidence of the fact within the county where the writ is brought; and this in effect tends to abate the writ according to the ſtatute. 1 *New Abr.* 34.

All actions real or mixed, as *treſpaſſes*, *quare clauſum fregit*, *ejectment*, *waſte*, *&c.* muſt be laid in the county where the lands lie. 1 *New Abr.* 34.

So an action of debt for rent, againſt an aſſignee of a term, on the privity of eſtate, is local, and will lie no where but in that county where the lands are. *Cro. Car.* 183. *Latch.* 187. 1 *Jones* 43.

So where *A.* granted a rent-charge to *B.* and *C.* for their lives, and the lands out of which it iſſued came to the defendant after the death of *A.* and the plaintiff, as executor of the ſurvivor of the grantees, brought debt for arrears incurred in their life time, and laid his action in the county where the lands lay; and on application of the defendant to have it tried elſewhere, ſuggeſting the plaintiff's power and intereſt in that county, but it was held a local action, and not triable elſewhere. *Hob.* 37.

A. as aſſignee of a reverſion, brought covenant againſt the aſſignee of the leſſee, on an expreſs covenant between the leſſor and the leſſee, for payment of rent reſerved out of lands which lay in *Ireland*, and which was made payable in *London*; on plea to the juriſdiction of the court, it was held, that though ſuch action may be maintained here by the leſſor againſt the leſſee, yet that by the aſſignment, the privity of the contract was deſtroyed; and there being nothing but a privity of eſtate between the two aſſignees it made the action local. *Carth.* 182. 1 *Salk.* 80. 3 *Mod.* 336. 1 *Show.* 191. *S. C.*

But where the leſſor brought debt againſt the leſſee, and declared on a demiſe of lands which lay in *Jamaica*; on plea to the juriſdiction of the court, and objection, that if the defendant had any good local plea, he was hereby deprived of it; the court held, that this being on the privity of contract, was a tranſitory action, and might be laid any where; and that if a foreign iſſue aroſe which was local, it might be tried where the action was laid; and for that purpoſe there may be a ſuggeſtion entered on the roll, that ſuch a place in ſuch a county is next adjacent; and it may be tried here by a jury from that place, according to the laws of that country; and upon *nil debet* pleaded, the laws of that country may be given in evidence. 6 *Mod.* 194. 2 *Salk.* 651. *S. C.*

If a declaration contains matters lying in two counties that join, it ſhall be tried by both counties, on a *venire* directed to the ſheriffs of both counties, who are to ſummon ſix of each county; but the trial may, by conſent of parties, be otherwiſe. See ſtat. 16 & 17 *Car.* 2. that after verdict, judgment ſhall not be ſtayed or reverſed, for that there was no right venue; ſo that the cauſe were tried by a jury of the proper county or place where the action is laid. See 4 & 5 *Ann. c.* 16.

An action of *debt* againſt the executor of a leſſee, in the *detinet* for arrears in the teſtator's life-time, may be brought any where; but where it is in the *debet* and *detinet*, for rent accrued in the executor's time, it muſt be where the lands lie. *Latch* 262, 271. 3 *Co.* 24.

All perſonal actions, as *debt*, *detinue*, *aſſault*, *deceit*, *trover*, and *converſion*, *account*, *&c.* may be brought in any county, and laid in any place; and the defendant cannot traverſe it, or be allowed to ſay, that the cauſe of action accrued in another county or different place, except in the caſe of an officer of juſtice, who may plead a ſpecial juſtification. *Co. Lit.* 282. 2 *Inſt.* 231. 7 *Co.* 3.

An action may be brought on a contract or matter which aroſe beyond ſea; as if *A.* enters into a bond to *B.* in any foreign country, and the bond bears date in no place, *B.* may bring his action where he pleaſes, and alledge that the bond was made in any place in *England*; but if there be a place mentioned, as *Bourdeaux* in *France*, then ſhall he alledge that the bond was made in *quodam loco vocat' Bourdeaux* in *France*, in *Iſlington* in the county of *Middleſex*, and from thence the jury ſhall come. *Co. Lit.* 261. *Latch* 4. 2 *Keb.* 315. 6 *Mod.* 228.

The defendant cannot by his plea oblige the plaintiff to lay his action in a different county from that in which he brought it, unleſs the matter pleaded be local, for in tranſitory actions he muſt move the court on affidavit, that if the plaintiff hath any cauſe of action, ſuch cauſe accrued in the county of, *&c.* and not where the plaintiff hath laid it, *&c.* and ſuch motion muſt be made before iſſue joined; for by joining iſſue, he agrees with the plaintiff, as to the manner of bringing the action, and though the court ſeldom refuſes on ſuch an affidavit to change the venue, yet if before or after the motion made, the plaintiff will enter into a rule, to offer no evidence but what ariſes in the county where he had laid his action, the cauſe will be tried there. 1 *Sid.* 44. 2 *Salk.* 669, 670.

But though the court, on application ſeldom refuſes to change the venue, yet there are caſes in which the judges have refuſed; as where a peer of the realm brings an action of *ſcandalum magnatum*, the court will not change the venue; becauſe a ſcandal raiſed on a peer reflects on him through the whole kingdom. 2 *Mod.* 215. 1 *Lev.* 56. *S. P.* For the king himſelf is party to the ſuit; but in lord *Shaftſbury*'s caſe, who brought *ſcandalum magnatum*, and laid it in *London*, the venue was changed. 1 *Vent.* 364. 2 *Jones* 192. but *note*, that was by reaſon of the great influence he had in the city; and the eſtabliſhed doctrine is, that the venue cannot be changed in an action of *ſcandalum magnatum*. 2 Salk. 668. Carth. 40.

Alſo a ſerjeant at law, barriſter, attorney, or any other privileged perſon, whoſe attendance is neceſſary at *Weſtminſter-hall*, may lay his action in *Middleſex*, though the cauſe of action accrued in another county; and the court, on the uſual affidavit, will not change the venue. 2 *Salk.* 668, 670. 2 *Show. Rep.* 176, 177, 242. *S. P.*

But if a privileged perſon be ſued, and the action brought againſt him in the right county, his privilege will not intitle him to have it tried in *Middleſex*. Carth. 126. 2 Salk. 668.

So if an attorney lays his action in *London*, the court will change the venue on the uſual affidavit; for by not laying it in *Middleſex*, he ſeems regardleſs of his privilege, and is to be conſidered as a perſon at large. 2 *Vent.* 47.

If material evidence may be given in two counties, the plaintiff may elect to bring his action in which he pleaſes; as if *A.* draws a bill of exchange in *Briſtol*, payable in *London*, the action accrues by the refuſal to pay the money in *London*, and therefore the plaintiff is not obliged to change the venue. 1 *Salk.* 669. *Comb.* 84. 1 *Lutw.* 215. 7 *Co. Bulver*'s caſe.

So where an *aſſumpſit* was brought for goods ſold and delivered, and the action laid in *London*, and a motion was made to change the venue upon affidavit that the ſale was in *Kent*, but it appearing that the delivery was in *London*, the court held, that where the matter conſiſts of two parts in ſeveral counties, the plaintiff ſhall have his election. 1 *Vent.* 344.

So in an action againſt a lighterman for not delivering goods, which was laid in *London*, where they were to be carried to, it was moved to change the venue; becauſe the

the damages and neglect was in *Kent*; *ſed non allocatur*; for the neglect is tranſitory, and not material where it was; and the court will never change the venue for a carrier, which is the ſame caſe. 2 *Salk.* 670.

If the action be grounded on a ſpecialty, the court will not change the venue; for not being dated at any particular place, it may be preſumed to be omitted, that it may charge the defendant at any place. 2 *Mod.* 228.

It is not the courſe of the court to change the venue in an action of eſcape; *per Holt* Ch. Juſt. 2 *Mod.* 228. The court will not change the venue in an action of *covenant.* 1 Lev. 307.

V. *Actions on the caſe.*

It hath been obſerved, that for every right, and for every injury done a man in his perſon, reputation or property, the party hath a remedy, but this remedy he muſt take according to the methods laid down, and rules preſcribed by the law; for which purpoſe there are writs framed; and ſettled actions to which he muſt apply; as debt upon a contract, treſpaſs on a manifeſt and open invaſion of his property, *&c.* but where the law has made no proviſion, or rather, where no general action could well be framed before hand, the ways of injuring, and methods of deceiving being ſo various, every perſon is allowed to bring a ſpecial action on his own caſe. 1 *New Abr.* 44. *Co. Lit.* 56. *a.* 6 *Mod.* 53, 54. Nor is it any objection that ſuch action was never brought before; as where the leſſor coming to view the lands, to ſee if any waſte was committed, being hindred by a ſtranger from entring the premiſſes, brought an action on the caſe againſt him; and it was held to lie, though ſuch action had never been brought before. *Cro. Jac.* 478. 1 *Rol. Abr.* 108, 109. 2 *Rol. Rep.* 311. See 6 *Mod.* 53. and *Lit. ſect.* 108. Where *per Littleton*, no action having been brought on the ſtatute of *Merton*, it is to be preſumed that no action will lie: And *Co. Lit.* 81. *b. per* lord *Coke*, non-uſage is a good interpreter of a law. But *per Holt* Ch. Juſt. wherever an act of parliament gives a right, the Common law gives a remedy; ſo where the Common law gives a right, or makes a thing an injury, the ſame law gives a remedy or action. 1 *Salk.* 20, 21. 6 *Mod.* 54.

Under this diviſion of actions it is thought neceſſary to conſider,

1. *In what caſes, and for what injuries an action on the caſe will lie.*

2. *Actions on the caſe againſt carriers, and upon the cuſtoms of* England.

3. *Concerning commons and commoners.*

4. *For conſpiracy.*

5. *For deceits, frauds, and on expreſſed and implied warranties.*

6. *On eſcapes and reſcous.*

7. *For and againſt innkeepers and hoſts.*

8. *For miſ-feaſance, non-feaſance, negligence.*

9. *For nuſances.*

1. *In what caſes and for what injuries an action on the caſe will lie.*

In all caſes, where a man has a temporal loſs, or damage by the wrong of another, he may have an action upon the caſe to be repaired in damages. But an action on the caſe doth not lie, when there is not any temporal damage; as, againſt a woman, who pretends herſelf ſingle, and inveigles a man into a marriage, whereby he was diſturbed in conſcience. 1 *Lev.* 247. *Vid. Ent.* 13. See 1 *Sid.* 375. Nor doth action on the caſe lie, for refuſing to adminiſter the ſacrament. See 1 *Sid.* 34. Nor doth action on the caſe lie for not reading divine ſervice to a man, and the tenants of his manor. 5 *Co.* 73. *a.* 1 *Rol.* 110. Nor doth action on the caſe lie for a legacy; for it is only due by the ſpiritual law. *Raym.* 24. 1 *Sid.* 46.

No action on the caſe lies where the particular damage is not ſpecially alledged. As if there be an action upon the caſe for ſtopping up a highway, whereby buyers could not come to his coal-pit; for he ought to ſay that buyers were coming and were hindered. See, *Salk.* 15. 16.

Action on the caſe lies not for an act not prohibited by law, tho' it be to the damage of the party; as if a leſſee at will by negligence burn his houſe, an action upon the caſe does not lie; for the law does not puniſh him for permiſſive waſte. 5 *Co.* 13 *b. Cro. Eliz.* 777, 784. 4 *Mod.* 12. If a man erect a dove-cote, or coney-borough in his own land, tho' the doves or conies, hurt the neighbours, nō action lies. *Mo.* 420, 453. If a man ſhut the doors of his houſe againſt the ſheriff, who comes to do execution of the goods of another, which are in his houſe, no action lies. 5 *Co.* 81. *Mo.* 668. If a maſter give correction to the ſon and heir apparent of *B.* who was his apprentice, whereby he becomes lame, and is diſparaged in his marriage, *B.* cannot have an action upon the caſe. 1 *Leon.* 50.

If a ſchool be ſet up in the ſame town where an ancient ſchool has been time out of mind, by which the old ſchool receives damage, yet no action upon the caſe lies, becauſe it is lawful for a man to teach where he pleaſes: and this is for the eaſe of the people. 6 *Mod.* 46. *per Gould*, Juſtice. 11 *H.* 4. 47. 22 *H.* 6. 14. *b. Fitz Action ſur le caſe* 28. *S. C. Bro.* 42. *S. C. Noy* 184. *S. C.* cited. 1 *Roll. Abr.* 107. *S. C.* 1 *Mod.* 69. *S. P. per Twiſden arguendo.* In like manner, if I retain a maſter in my houſe to inſtruct my children; though this be to the damage of the common maſter, yet no action lies. 11 *H.* 4. 47. 1 *Roll. Abr.* 107. *S. C.* So if I have a mill, and my neighbour builds another mill upon his own ground; by which the profit of my mill is diminiſhed, yet no action lies againſt him; for every one may lawfully erect a mill on his own ground. 1 *Roll. Abr.* 107. *Hard.* 162. *Brownl.* 57. *Noy* 184. But if I have had a mill by preſcription in my own land, if another erects a new mill upon his own land, if this draws away the ſtream from my mill, or ſtops it, or makes too great a quantity of water run to my mill, by which I receive damage, ſo that my mill cannot grind as much as it was uſed to do, I ſhall have an action on the caſe againſt him. 22 *Hen.* 6. 14. *Dyer* 148. 1 *Roll. Abr.* 107.

If I have 100 acres of paſture in a town, and before this time no man hath ever had any paſture within the ſame town, and thoſe of the town hath uſed to agiſt their cattle in my paſture; and another who has a freehold within the town, converts his arable into paſture, ſo that thoſe of the town agiſt their cattle there; whereby I ſuffer damage, yet I cannot have any remedy againſt him; for it is lawful for him to make the beſt advantage he can of his own land. 22 *H.* 6. 14. *Noy* 184. 1 *Roll. Abr.* 107.

An action on the caſe lies not for a wrong, which is a felony; as if a man kill the ſervant of another, an action upon the caſe does not lie by the maſter *per quod ſervitium amiſit. Yelv.* 90. 1 *Sid.* 375. 1 *Lev.* 247. Nor doth action on the caſe lie for the battery of a man's wife, by reaſon of which ſhe languiſhed for ſix months, and then died. 2 *Roll.* 557.

2. *Actions on the caſe againſt carriers, and upon the cuſtoms of* England.

If a man delivers goods to a common carrier to carry to a certain place; if he loſes them, an action on the caſe lies againſt him; for by the common cuſtom of the realm he ought to carry them ſafely. If a man delivers goods to a common hoyman, who is a common carrier of goods, to carry them to a certain place, and gives him according to the cuſtom for the carriage of them, and after by default of good keeping of them they are loſt, an action upon the caſe lies againſt him; for by the common cuſtom of the realm he ought to keep and carry them ſafely. *Hob.* 25.

And if a man delivers goods to ſuch common hoyman to carry to a place, and after delivers them (being of good value) to another to keep ſafely in the boat, and does not diſcharge the hoyman, and after they are loſt through negligence, an action upon the caſe lies againſt him. *Hob.* 25. *Cro. Jac.* 330. *pl.* 9. *S. C.* ſays the defendant confeſſed the receipt, and ſaid he was a common bargeman; but that he fearing to carry it, delivered it to *J. D.*

to

to carry, and that he gave notice thereof to the plaintiff, and he agreed thereto, and diſcharged him of the carriage. The plaintiff traverſed the diſcharging him, and adjudged for the plaintiff; for the delivery by his aſſent is not material; but the only matter traverſable is the diſcharge, which is iſſuable and found for the plaintiff; and the judgment was affirmed on error brought.

In account for wares delivered *ad merchandizandum*; the defendant pleaded, that he was robbed of thoſe goods, and of many more of his own goods; it was held, that this might be a good plea for a factor or for a ſervant, but not for a *common carrier*, becauſe he receives a *premium* for the charge. *Moor* 462. *Woodliffe*'s caſe.

A *carrier* agreed to carry goods of the plaintiff from *H.* to *London*, paying him for the carriage, and in an action on the caſe brought againſt the *carrier*, the plaintiff declared againſt him for not carrying goods, and that *paratus fuit ſolvere*; it was objected, that the declaration was ill, for he ſhould have ſet forth, that he had paid for the carriage, or had tendered the money; but the plaintiff had judgment. 2 *Roll. Rep.* 466.

Caſe, *&c.* by the plaintiff, who was a *merchant*, ſetting forth, that by the Common law every *lighterman* ought to govern his *lighter*, that the merchants goods come to no damage; that the plaintiff was a *merchant* and the defendant a lighterman, and that he had carried the plaintiff's goods from ſuch a place to ſuch a place for hire, *viz.* for ſo much money, and that he had ſo negligently governed his *lighter* that the goods were damnified; after a verdict for the plaintiff, it was objected, that the action would not lie, becauſe the plaintiff had not averred, that the defendant was a *common lighterman*; beſides, he did not ſet forth how his goods were ſpoiled, but both theſe exceptions were over-ruled; and though there was no promiſe, yet ſince this action ariſes *ex malefacto*, there is no occaſion to alledge a promiſe, for the delivery of the goods to a common carrier implies a contract. *Palm.* 523.

Caſe, *&c.* againſt a *common carrier*, for ſo negligently carrying the plaintiff's goods that they were loſt, and he declared likewiſe in *trover*; adjudged, that the declaration was good, becauſe the plea of Not guilty goes to both; but this was after a verdict. *Sid.* 244.

Caſe, *&c.* in which the plaintiff declared, that he delivered to the defendant (being a water carrier) goods in *York* to carry them from *Hull* to *London*, and that the goods were loſt; after a verdict for the plaintiff it was objected in an arreſt of judgment, that there was no *poſitive agreement ſet forth between the plaintiff and defendant for any certain ſum for the carriage*; beſides, the agreement was to carry the goods from *Hull* to *London*, ſo that the defendant did not undertake to carry them from *York* to *London*; but adjudged, that he ſhall be charged upon the *general receipt at* York, and that 'tis not requiſite to ſet forth any agreement of the *premium*. *Sid.* 36.

Aſſumpſit by a carrier, upon a promiſe to pay ſo much for carrying goods from *York* to *London*; if the plaintiff in his declaration doth aver performance, and doth not ſhew in *what pariſh and ward* he brought the goods, 'tis ill upon a demurrer. *Sid.* 178.

Caſe, *&c.* upon the cuſtom of *England* againſt a *maſter* of a *ſhip*, for negligently keeping the plaintiff's goods; in which a ſpecial verdict found, that the ſhip lay in the river *Thames*, and that the goods were delivered on board, *&c.* that in the night-time ſeveral perſons pretending to preſs ſeamen by force, ſeized thoſe men which were in the ſhip, and the goods were loſt; that the *maſter* was to have wages of the owner of the ſhip, and the mariners wages of the maſter; the queſtion was, whether the *maſter* was chargeable for the loſs of theſe goods; it was argued that he was not, becauſe the *maſter* is but a ſervant to the owners, and he receives his wages from them; but adjudged he is rather an *officer* than a *ſervant*, for he may pawn the ſhip if he ſee occaſion, be may ſell *bona peritura*, *&c.* and tho' he receives his wages from the *owners*, yet in effect he is paid by the merchant; for 'tis he who pays the owners, and there is no difference between this caſe and that of a hoyman or a common carrier. 1 *Vent.* 190, 238.

Aſſumpſit for money due by *cuſtom* for *ſcavage*; upon *non aſſumpſit* the jury found the duty to be due, but no promiſe expreſly made to pay it; adjudged that an *aſſumpſit* will lie for this money due by cuſtom, without an expreſs promiſe. 2 *Lev.* 174.

Caſe againſt the defendant for *negligently keeping his fire*, ſetting forth, that by the cuſtom of *England* every houſekeeper is bound to keep his fire ſafe at all times, leſt by the neglect thereof, and of his ſervants and *lodgers*, any damage ſhould happen; that the defendant being a houſekeeper in *Chancery-lane* took a *lodger*, who kept his fire ſo negligently that *the goods* of the plaintiff were burnt; the plaintiff had a verdict, but the judgment was arreſted, becauſe the cuſtom was never extended to ſervants or *lodgers*; beſides, he ſets forth, that *his goods* were burnt and ſpoiled, but did not ſay *what goods*. 1 *Lut.* 33.

Adjudged, that a *common carrier* is liable in reſpect of the *reward* he takes, and not becauſe the *hundred* is anſwerable over to him; for he was chargeable at Common law before the ſtatute of *Winton*, which makes the hundred liable; and the reaſon why he is chargeable is, becauſe he might be robbed by conſent and combination, of which it might be difficult to make any proof. 1 *Salk.* 143.

In an action on the caſe upon the cuſtom of the realm againſt the defendant, who was maſter of a *ſtage-coach*, the plaintiff ſets forth, that he took a place in the coach for ſuch a town, and that in the journey the defendant, by negligence, loſt the plaintiff's trunk; upon Not guilty pleaded, the evidence was, that the plaintiff gave the trunk to the man who drove the coach, who promiſed to take care of it, but loſt it; and the queſtion was, whether the *maſter* was chargeable, and adjudged that he was not, unleſs the *maſter* takes a price for the *carriage of the goods* as well as for the *carriage of the perſon*, and then he is within the cuſtom as a carrier is; that a *maſter* is not chargeable for the acts of his *ſervant*, but when they are done in execution of the authority given by the maſter, and then the act of the ſervant is the act of the maſter. 1 *Salk.* 282.

By ſtatute 6 *An. c.* 31. it is enacted, "that if any ſervant, thro' negligence, ſhall cauſe an houſe or outhouſe to be fired, ſuch ſervant being thereof convicted upon oath before two juſtices, ſhall forfeit 100*l.* unto the churchwardens of the pariſh of, *&c.* to be diſtributed amongſt the ſufferers, as to the churchwardens ſhall ſeem juſt; and upon non payment, ſhall be committed to ſome workhouſe by a warrant of one juſtice, there to be kept eighteen months at hard labour: and by the ſame act it is enacted, That an action ſhall not be brought againſt any, in whoſe houſe or chamber any fire ſhall accidently happen; and if it be brought, then the defendant may plead the general iſſue, and give the act in evidence, and if the defendant recover he ſhall have treble coſts.

3. *Concerning commons and commoners.*

A *copyholder* in fee preſcribed to have common in *B.* and alledged, that the defendant put his cattle into the common, which deſtroyed the ſame, ſo that *communiam habere non potuit, ſed totum proficuum ſuum amiſit*; and adjudged, the action did lie. 9 *Rep.* 111.

Caſe, *&c.* For that he was ſeiſed of ſixteen acres of land in *Corſham*, by reaſon whereof he had common in twenty acres adjoining every year after harveſt, and that the defendant had ploughed the ſaid twenty acres, by reaſon whereof the plaintiff had loſt his common; it was objected, that *caſe* did not lie, but an aſſiſe; but adjudged, that the plaintiff might have either action. *Cro. Eliz.* 199. 2 *Leon.* 184.

Caſe, for that the defendant having a wood adjoining to a common, where the plaintiff and other copyholders had common, the plaintiff kept *conies* in the wood, which ran out into the common, and eat up the graſs, *&c.* adjudged, that the action did not lie; becauſe when the *conies* were out of the wood, the defendant had no property in them, and the commoner is at no miſchief, for he may then kill them. *Cro. Car.* 281.

Caſe againſt *R. B.* for ſurcharging the common; it was objected in arreſt of judgment, that *caſe* would not lie, but an aſſiſe; adjudged, that the plaintiff might have either action. *Style* 164.

Caſe, *&c. by a commoner for digging pits* and ſpreading the gravel, *&c.* by which he loſt his common; the defendant pleaded, that he is lord of the ſoil, and that he did dig for coals, doing as little damage to the paſture as he could, and averred, that he had left common ſufficient; and upon a demurrer to this plea, it was adjudged, that it amounted to no more *than the general iſſue*, and that the lord could not dig pits in the common, for the ſtatute of 43 *Eliz.* intends only an improvement by encloſing. *Sid.* 106. 2 *Cro.* 165.

Caſe, *&c. for diſturbing him in a common*, in which the plaintiff declared, that he was poſſeſſed of a meſſuage, and ſo many acres of land, *&c.* for a term of years not yet expired, and that for all that time *habuiſſet & gaudere debuiſſet communiam paſturæ pro omnibus averiis levan' & cuban'*, *&c.* upon Not guilty pleaded, the plaintiff had a verdict; it was objected againſt the declaration, that the plaintiff had not ſhewed any title *either by grant or preſcription. Per curiam*, This might be a good exception upon a *demurrer*, but 'tis cured by a verdict. 4 *Mod.* 175.

4. *For conſpiracy.*

It ſeems agreed, that for a falſe and malicious proſecution for any crime, whether capital or not, by which the party may be put in peril of his life, ſuffer in his liberty, reputation or property, an action on the caſe in the nature of a conſpiracy lies whether the proſecutor proceeded ſo far as actually to exhibit an indictment on which the party was acquitted, or not.

Where an action in nature of a *conſpiracy* lieth, the plaintiff muſt be *lawfully acquitted*; and therefore where there was a general pardon *by parliament*, and plaintiff did not plead it, but was tried and acquitted, he ſhall not have this action againſt thoſe who cauſed him to be indicted, becauſe he was not lawfully acquitted, *viz.* by the act of grace, which the court ought to have allowed without pleading it. *Dyer* 28, 85.

If a man is acquitted upon an inſufficient indictment, he cannot have this action againſt the indictors, becauſe he may again be indicted, and *auterfoits acquit* is no plea, unleſs where the acquittal is lawful. 4 *Rep.* 41.

Three conſpired to charge *R. B.* with a robbery, and preferred an indictment againſt him, which was returned *ignoramus*, the action lieth. 9 *Rep. Poulterer's* caſe.

It will not lie before a man is *acquitted* of the indictment, or it be traverſed or reverſed by error; for if it ſhould, it might prevent the trial at law. *Goldſ.* 51.

Caſe, in nature of a conſpiracy, againſt the *mayor*, *town clerk* and *goaler* of *B.* for that the plaintiff had levied a plaint of debt in the town-court before the *mayor*, *&c.* againſt *R. B.* and cauſed him to be arreſted, and that the defendants did conſpire to delay him in his ſuit, and had let *R. B.* go at large, without bail; adjudged, that the action lay. 1 *Leon.* 189.

This action ought not only to be *falſe* but *malicious*, and the *malice* ought to be proved; therefore where a robbery is committed, and the perſon robbed accuſes another by miſtake, as being like the offender, the action will not lie. *Godb.* 206.

It doth not lie againſt the *jury*, becauſe they are returned by the ſheriff to make their inquiry for the King, and being on oath, are ſuppoſed to be indifferent; neither will it lie againſt a *judge* for what he does in court as judge. 12 *Rep.* 23. *Evans* and *Barker's* caſe.

If a man will encourage another, who is robbed, to cauſe the felon to be indicted, and accompanies him to the aſſizes in order to the proſecution, and the party is acquitted, no action on the caſe will lie againſt him, unleſs he knew that the perſon was not robbed. 1 *Brownl.* 9.

Action on the caſe, wherein the plaintiff declared againſt three defendants, for that on ſuch a day and place *per conſpirationem prius ibidem inter eos adinde habitam*, and to oppreſs the plaintiff, and to cauſe him to be arreſted at the ſuit of *William Gunton* (one of the now defendants,) and that he might be detained in priſon for want of bail, they levied a plaint againſt him in the ſheriff's court, in a plea of treſpaſs, which was laid to the damage of the ſaid *William Gunton*, in 300*l.* by virtue whereof they cauſed him to be arreſted, and impriſoned for the ſpace of twenty days, when in truth the ſaid defendant *Gunton* had no cauſe of action againſt him: Upon Not guilty pleaded, the jury found *Gunton* Guilty, but acquitted the other two; and upon a motion in arreſt of judgment, it was objected, that this verdict had falſified the declaration, for that was in an action of *conſpiracy between three*, and two of them being acquitted, 'tis impoſſible for *one to conſpire* with himſelf; beſides the plaintiff did not alledge in his declaration, that the plaint levied in the Compter was determined either by a nonſuit, diſcontinuance, or a verdict againſt the plaintiff; and if ſo, then the plaintiff had commenced this action too ſoon, which is very true, and this might have been a good exception, if the defendants had *demurred* to the declaration; but 'tis not ſo after a *verdict*, which had found the defendant guilty of levying a plaint, without any cauſe of action; and threfore in ſuch caſes it ſhall be intended, that the plaint was determined in the inferior court, and againſt the defendant; by which it appeared, that he had no cauſe of action; and as to the objection, that this was an action of conſpiracy, it was adjudged, that this was an action on the caſe for an injury done to the plaintiff; for it was the arreſting him without a cauſe, which was the ſubſtance of the action, and not the *conſpiracy*. *Moreton*, juſtice, of a contrary opinion; and ſo was *Saunders*, who reports the caſe, that this was a plain action of conſpiracy by the words *per conſpirationem inde verſus eos habitam*. 1 *Saund.* 228.

Caſe, *&c.* in the nature of a conſpiracy, for indicting the plaintiff for *barretry*; one of the defendants was found guilty, and the reſt were acquitted; and it was moved in arreſt of judgment, that one cannot conſpire by himſelf; but adjudged, that this being in an action on the caſe, 'tis well enough. *Raym.* 180.

5. *For deceits, frauds, and on expreſſed and implied warranties.*

A merchant ſtranger, ſhipped 4500 kintals of wood to be brought to *England*, and a great tempeſt ariſing, the maſter caſt part of it into the ſea, and afterwards coming into port, *told* the cuſtom-officer, that he believed 2000 kintals remained, when upon further examination there were above 1000 more; and an information being exhibited for the forfeiture of thoſe 1000 kintals, for which no cuſtom was paid, it was adjudged, that the uncertain account made with the officer for 2000 kintals only before the landing, was good, becauſe it appeared there was no manner of *deceit*. *Plowd.* 1.

The defendant ſold ſheep, and *warranted that they were ſound*, and ſhould be ſound for a year next enſuing; adjudged, that the warranty is not impoſſible to be performed, no more than to warrant, that ſuch a ſhip ſhall return ſafe to *London*; ſo the action will lie. *Owen* 60.

Caſe, *&c.* in which the plaintiff declared, that in conſideration of 20*l.* paid by him to the defendant, he promiſed to deliver to him 400 pounds of wax on ſuch a day, and that at the day he did deliver 373 pounds of bad wax, which *he warranted to be good* and merchantable; by which he was damnified, *&c.* the defendant pleaded *an agreement* between them, as well for the *twenty-ſeven pounds* not delivered, as for the badneſs of that which was delivered; upon which plea the plaintiff demurred, becauſe the defendant had not anſwered the *deceit*; adjudged that it was not material to anſwer it, becauſe the *warranty*, that the wax was good, was after the contract made. *Dyer* 75.

Aſſumpſit, *&c.* for that there being a diſcourſe between the plaintiff and *B. G.* about certain *hogs* of the plaintiff's to be put to *maſt*; the defendant promiſed in conſideration the plaintiff would give *B. G.* 3*s.* for every hog put to maſt, that they ſhould be well fatted and *redelivered* to the plaintiff, and the action was brought for *fifty hogs not redelivered*; adjudged, that the action lay, tho' the de-

fendant had no manner of *benefit by the promiſe*, becauſe it was grounded upon a *deceit*. *Cro. Eliz.* 200.

The plaintiff being a merchant in *London* went beyond ſea to trade, and appointed the defendant to receive all goods conſigned to him in his abſence, and to pay the cuſtoms, and to diſpoſe them to the plaintiff's uſe; afterwards twenty pieces of *velvet* were conſigned to the plaintiff, and imported into *London*, of which the defendant having notice, cauſed the goods to be landed without paying the cuſtoms, or agreeing with the officer, by reaſon whereof they were forfeited and ſeized; adjudged, that for this matter a ſpecial action on the caſe did lie. 2 *Cro.* 265.

The maſter declared, that *B. G.* was his *ſervant*, and had 65*l.* of his (the maſter's) money in his poſſeſſion, and that the defendant, to deceive him, procured a letter to be written and directed to the *ſervant*, and to be delivered to him, which he affirmed to be written by the maſter, and that he, the defendant, was ſent with it by the maſter to the ſervant, who cauſing it to be read, and underſtanding that his maſter had therein appointed him to pay the money to the defendant, he paid it accordingly; when in truth, the letter was counterfeited, and he never ſent the defendant for the money: It was objected after a verdict for the *maſter*, that he ought not to bring the action, but the ſervant; but adjudged the action was well brought by the *maſter*, for he had the loſs. 2 *Cro.* 223.

Caſe, in which the plaintiff declared, that he had 100*l.* delivered to him to pay to *W. R.* and that the defendant affirmed to him, that he was *W. R.* and thereupon the plaintiff delivered the 100*l.* to him, when in truth he was not the ſaid *W. R.* It was objected, that the action did not lie; but adjudged, that the plaintiff having alledged in his declaration, that the defendant *falſo et fraudulenter* had affirmed himſelf to be *W. R.* the action would lie upon this deceit. *Moor* 538.

The defendant having counterfeit jewels, and *knowing* them to be ſuch, ſent his ſervant with them to the plaintiff, being a merchan in *Barbary*, to ſell them there; and the plaintiff ſold them to the King of *Morocco* for 800*l.* and the ſervant received the money, and returned home to *London*; afterwards the cheat being diſcovered, the plaintiff was impriſoned in *Barbary*, and compelled to make reſtitution to the King; adjudged, that the action did lie againſt the maſter. *Poph.* 143.

A clothier made good cloth, to which he ſet his mark, and got a great trade; another clothier ſet the ſame mark upon bad cloth, for which the action was brought, and adjudged that it did lie. *Poph.* 143. 2 *Cro.* 468.

Caſe in nature of a deceit, wherein the plaintiff declared, that he, diſcourſing with the defendant about the purchaſe of certain houſes, the defendant *affirmed* the yearly rent to be ſo much, which the plaintiff believing, he bought the houſes; when in truth the yearly rent was not ſo much; after a verdict for the plaintiff it was moved in arreſt of judgment, that this action would not lie, becauſe there was only a *diſcourſe* about the houſes, and no *warranty* that they were of that yearly value; 'tis true, if a man ſells goods and *affirms* them to be his own, when they are not, an action will lie, becauſe the buyer cannot tell who had any property in them, and ſo it will in the principal caſe, becauſe the rent is a certain thing, and the ſame to every body; but to *affirm* a jewel or land is worth ſo much, when 'tis not, an action will not lie, becauſe that may be of greater value to one than to another. *Sid.* 146.

Caſe, &c. *for a deceit*; in which the plaintiff declared, that he bought ſilk of the defendant for ſuch ſilk, *&c.* whereas it was of another kind, and that the defendant knowing the deceit, ſold it to him; upon Not guilty pleaded, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond ſea; but adjudged, that his deceit ſhall charge the merchant, becauſe 'tis more reaſonable, that he who puts a truſt in a deceiver ſhould loſe than a ſtranger. 1 *Salk.* 289.

Aſſumpſit, *&c.* to pay for a horſe a barley-corn a nail, doubling it on every nail; and the plaintiff averred, that there were 32 nails in the four ſhoes of his horſe, and that the barley-corn being doubled in every nail, it came to 500 quarters of barley; on *non-aſſumpſit* pleaded, the chief juſtice, at the trial, directed the jury to give the value of the horſe, which was 8*l.* in damages, and ſo they did 1 *Lev.* 111.

If there be a communication between *A.* and *B.* for the buying of certain ſheep, and thereupon *B.* the vendor ſays they are his own ſheep, when in truth they are the ſheep of another; but thereupon *A.* buys them of *B.* though *B.* made not any expreſs warranty of the ſheep, yet an *action upon the caſe*, in nature of diſceit, lies againſt *B.* 1 *Roll. Abr.* 90. *Cro. Jac.* 474. *S. C.*

So if the vendor affirms that the goods are the goods of a ſtranger, his friend, and that he had an authority from him to ſell them to him, and thereupon *B.* buys them, when in truth they are the goods of another; yet if he ſold them fraudulently and falſly, upon this pretence of authority, though he did not warrant them, and though it is not averred that he ſold them, knowing them to be the goods of a ſtranger, yet *B.* ſhall have an *action upon the caſe* for this diſceit. 1 *Rol. Abr.* 91.

In an *action upon the caſe* by *A.* againſt *B.* if the plaintiff declares that the defendant craftily intended, *&c.* and offering to ſell a gelding to the plaintiff, affirmed that he brought up that gelding from a colt, and that the ſaid gelding was then his own; which the plaintiff believing, afterwards, that is to ſay, upon the ſame day and year, and at the place aforeſaid, did buy the ſaid gelding, *&c.* the action lies upon this declaration, though there was no warranty upon the ſale; for this was an apparent deceit contrary to his own knowledge; and though it is not averred that he ſold him at the ſame time, when he affirmed he bred him up of a colt, but that he *poſtea* the ſame day and place bought him, giving credit thereunto, this ſhall be intended immediately after ſpeaking of the words; for all the words could not be ſpoke together. 1 *Roll. Abr.* 91. *Style* 310. *S. C.*

So in *caſe* in which the plaintiff declared that there being a *colloquium* between him and the defendant, concerning the buying and ſelling of two oxen which the defendant then had in his poſſeſſion, that he (the defendant) *adtunc & ibidem falſo & malitioſe affirmabat*, that theſe oxen were his, to which he giving credit bought them of the defendant for ſo much money, when in truth the ſaid oxen were the proper goods of *J. S.* and that he the ſaid *J. S. poſtea*, *&c.* lawfully recovered the ſaid oxen from the plaintiff, *&c.* and it was held after verdict, that the action lay on the bare affirmation, without any expreſs warranty, and though objected that it was not ſet forth that he *ſciens* that the oxen were the oxen of *J. S.* nor that he did it *deceptive*. *Carth.* 90. 3 *Mod.* 261. *S. C. Comb.* 142. *S. C.* 1 *Show.* 68. *S. C.*

So where the plaintiff declared that the defendant being poſſeſſed of a certain lottery-ticket, ſold it to him, affirming it to be his own, whereas in truth it was not his but another's; defendant pleaded he bought it *bona fide*, and ſold it: On demurrer, *Holt* C. J. held, where one having the poſſeſſion of any perſonal chattle ſells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having poſſeſſion is a colour of title, and perhaps no other title can be made out; *aliter* where the ſeller is out of poſſeſſion; for there may be room to queſtion the ſeller's title, and *caveat emptor* in ſuch caſe to have either an expreſs warranty or a good title; ſo it is in the caſe of lands, whether the ſeller be in or out of poſſeſſion; for the ſeller cannot have them without a title, and the buyer is at his peril to ſee it. 1 *Salk.* 210. See *Style* 343, 346. *Cro. Jac.* 197.

If the plaintiff declares, that whereas Queen *Elizabeth* was ſeiſed in fee of the advowſon of the vicarage of *S.* whereto the tithes in *S.* did belong, and that the defendant upon the ninth of *June* did affirm himſelf to be lawful incumbent thereof, and that he had right to the tithes from the death of *J. N.* and after upon the ſixteenth of *June*, the plaintiff having a communication with the defendant about his buying of the defendant the ſaid tithes till *Michaelmas* following, the defendant *ad tunc ſciens* that he had no right thereto (the defendant not having been inſtituted, *&c.*) yet *falſo & deceptive* ſold them to the plaintiff for 30*l.* and alledges *in facto*, that *J. N.* was after

after preſented, &c. and took the tithes, &c. the action does not lie; for there was no warranty that the plaintiff ſhould enjoy them, and this affirmation alſo was in time precedent to the ſale. *Cro. Jac.* 196. *Moor* 467. *S. C.*

So if the plaintiff declares that upon a communication between the plaintiff and the defendant, for the purchaſe of a certain term for years, which the defendant then had in certain lands, the defendant *aſſeruit* to the plaintiff, that the ſaid term was worth 150*l.* to be ſold; to which the ſaid plaintiff *fidem adhibens* did give the defendant 150*l.* for the ſame; and that after the plaintiff, offering the ſaid term to ſale, could not get ſo much for the ſame; the action does not lie; for here was only a naked affirmation of the defendant, that the term was worth ſo much; and it was the plaintiff's folly to believe him. *Yelv.* 20.

But if on a treaty for the purchaſe of a houſe, the defendant affirms the rent to be 30*l.* *per ann.* whereas in truth it is but 20*l.* and thereby the plaintiff is induced to give ſo much more than the houſe is worth, the action lies; for the value of the rent is matter that lies in the private knowledge of the landlord and tenant; and if they affirm the rent to be more than it is, the purchaſer is cheated, and ought to have a remedy for it. 1 *Salk.* 211.

If *A.* being a goldſmith, and having ſkill in jewels and precious ſtones, hath a ſtone which he affirms to be a bezoar ſtone, and ſells it to *B.* for 100*l.* *ubi revera* it was no bezoar-ſtone, no action lies againſt *A.* for every one in ſelling his wares will affirm that his wares are good, or that the horſe which he ſells is ſound; and yet if he does not warrant them ſo, if falſe, no action lies. *Cro. Jac.* 4.

But if a man ſells a tun of wine, and warrants it to be ſound and not corrupted, if it be corrupted, an *action upon the caſe* lies. 1 *New Abr.* 52. 11 *H.* 6. 18. *F. N. B.* 94. *S. P.*

So if a man ſells a horſe, and warrants him to be ſound of his wind and limbs, if he be not, an action upon the caſe lies. 11 *H.* 6. 18. 1 *Roll. Abr.* 96. *S. C.*

If a man, knowing his horſe to be lame and foundered, offers him to me to buy, and warrants him to be ſound, &c. relying upon which I buy him, by which I am deceived, though the warranty was before the ſale, yet becauſe this was the cauſe of the ſale, an action upon the caſe lies thereupon. 1 *Roll. Abr.* 96.

If *A.* ſells a horſe to *B.* and warrants him to be ſound of wind and limb, and clean of legs, whereas he well knows that he is ſhoulder-pitch'd, and has ſplints upon his legs, an action lies againſt him upon this warranty; for theſe imperfections are not ſubject to the view of an unſkilful perſon otherwiſe. 1 *Roll. Abr.* 79.

The plaintiff declared that the defendant ſold him a horſe ſuch a day and place, & *adtunc & ibidem warrantizavit equum prædict'* to be ſound wind and limb, whereupon he paid his money, and avers the horſe had but one eye, &c. on plea of *non warrantizavit*, the plaintiff had a verdict; and it was objected in arreſt of judgment, firſt, that the want of an eye is a viſible thing, whereas the warranty extends only to ſecret infirmities; but to this it was anſwered, and reſolved by the court, that this might be ſo, and muſt be found to be ſo, ſince the jury have found that the defendant did warrant. Secondly, as the warranty is here ſet forth, it might be at a time after the ſale, whereas it ought to be part of the very contract; and therefore it is always alledged *warrantizando vendidit*; *ſed non allocatur*; for the payment was afterwards, and it was that compleated the bargain, which was imperfect without it. 1 *Salk.* 211.

6. *On eſcapes and reſcous.*

On a *ca. ſa.* directed to the plaintiffs, who were *ſheriffs of* Norwich, they made a warrant to the three ſerjeants to arreſt *B. G.* which they did, and let him eſcape, for which an action on the caſe was brought by them againſt the *ſerjeants*, yet it was objected that the action did not lie, becauſe the *ſheriffs were not damnified*, there being no ſuit againſt them for the eſcape, and they might die before there was any; but adjudged that the action did lie before any ſuit againſt the ſheriffs, for the perſon arreſted did a wrong to them by the eſcape, and if they ſhould ſtay till they were ſued, he might die in the mean time. *Cro. Eliz.* 53.

Caſe, &c. againſt the ſheriffs of *Briſtol*, for ſuffering a man to eſcape who was committed by the *commiſſioners of bankrupts*; adjudged, that an action would lie. *Moor* 834.

A man was arreſted by the *old ſheriff*, who returned *languidus*; and afterwards, on leaving his office, he delivered the priſoner to the *new* ſheriff, who ſuffered him to eſcape; the action lies againſt him. 2 *Cro.* 380.

The *old ſheriff took a man in execution*, and on leaving his office, delivered him over to the *new ſheriff*; and upon a *habeas corpus* he was delivered to the *marſhal in execution*, who ſuffered him to eſcape, for which an action was brought againſt him; but upon a demurrer to the declaration it was held, that the action did not lie, becauſe the plaintiff did not ſhew that the *old ſheriff* delivered the priſoner *in execution to the new ſheriff*, with the cauſe of his impriſonment. 2 *Cro.* 587.

Judgment for the plaintiff in an action for a *reſcous*, and it was moved, that the party did not ſhew that the perſon was in cuſtody of the ſerjeant from whom he was reſcued, but the plaintiff had his judgment. *Style* 342.

Caſe againſt the ſheriff for ſuffering a perſon to eſcape, who was taken upon a *capias excommunicatum*; upon Not guilty pleaded, the plaintiff had a verdict, but it was moved in arreſt of judgment, that this action would not lie, becauſe the original matter was ſpiritual, *(viz.)* an *excommunication* for not paying tithes, and therefore the plaintiff ought to have his remedy in the Spiritual court; it is true, the original matter is ſpiritual, and after the *excommunication* the proceſs iſſues out of the Spiritual court; but it is directed to a temporal officer, and executed by him, and he ſuffering the perſon to eſcape, this is a perſonal injury, and the conſequential damages are temporal; but the court relied upon the caſe of the ſheriffs of *Briſtol*, ſo the plaintiff had his judgment. 1 *Lutw.* 122.

Caſe, &c. Againſt the ſheriffs of *London*, for ſuffering a priſoner to eſcape who was taken upon *meſne proceſs*; the defendants pleaded a *reſcous* in bar to this action; the plaintiff replied, that the perſon who eſcaped was arreſted in the pariſh of St. *Andrew Holborn*, in the county of *Middleſex*, in which county there is a priſon called *Newgate*, to keep priſoners arreſted for debt; whither they ought to be carried in ſome convenient time after the arreſt, and that the defendants might have carried this perſon thither within half an hour, but did not within two days after he was arreſted, but kept him in an alehouſe, which was not a place of ſafe cuſtody; and that the *reſcous*, if any, was made in the ſaid houſe; and upon demurrer to this replication, it was held to be all matter which might be given in evidence, and upon which no iſſue could be taken. 1 *Lutw.* 128. See titles **Eſcape** and **Reſcous.**

7. *For and againſt innkeepers.*

In an action againſt an innkeeper, the iſſue was, whether the goods were ſtolen through his default; the evidence was, that the *inn* was full of gueſts, and the innkeeper refuſed to entertain the plaintiff, who thereupon ſaid he would make a ſhift; adjudged, that if the *inn* was not full, an action lay againſt the innkeper for his refuſal. *Dyer* 158, 266. 4 *Rep.* 8. *Southcote's* caſe. 8 *Rep. Caley's* caſe.

The plaintiff declared, that it was the *cuſtom for common inns* to keep the goods of their gueſts ſafe; that he was *hoſpitatus in hoſpitio*, but did not ſay *communi*, and that his goods were embezilled; and this being objected in arreſt of judgment, it was diſallowed, becauſe the cuſtom was laid for *common inns*, &c.

An innkeeper deſired his *gueſt* to put his goods in ſuch a place under lock, otherwiſe he would not warrant the ſafe-keeping; the gueſt was negligent and left the goods in an outward room, but not locked, and were taken away; the innkeeper ſhall not be charged in an action. *Dyer* 266.

If a gueſt leave goods with an *innkeeper* (who hath no profit in keeping them) telling him he will return in two or three days, and in that time the goods are ſtolen, the innkeeper is not liable, without a ſpecial promiſe for the

ſafe-

ſafe-keeping; becauſe, when the plaintiff departed for ſo long a time, he is not a gueſt, but if he go out in the morning and return at night, he is a gueſt. 2 *Cro.* 188.

A ſervant lodged in a common inn with the goods of his *maſter*, which where there loſt, the *maſter* may have an action againſt the *innkeeper*; affirmed on error in the *Exchequer Chamber*. 2 *Cro.* 224.

Caſe againſt an innkeeper, upon the cuſtom of *England*, for the ſafe-keeping the goods of his gueſts, muſt be brought in the county where the inn is. *Godbolt.* 29 *Eliz.*

Caſe, &c. lieth againſt an *innkeeper* for denying lodging to a traveller, if he have any to ſpare, for his money; and in ſuch action the plaintiff need not ſhew that the defendant hath licence to keep an inn, and this action will lie, though he take down his ſign, if he ſtill keep the inn; it was likewiſe held, that 'tis lawful for any man to build an *inn*, if 'tis not *ad nocumentum*, &c. and that if the defendant is indicted for building it, theſe words muſt be in the indictment, otherwiſe it is ill. *Godbolt* 345.

In *Caley*'s caſe before mentioned, theſe points were reſolved, that if the gueſt gives his horſe to the hoſtler, and requires him to put the horſe to *graſs*, and he doth ſo, and afterwards the horſe is ſtolen, he ſhall not be charged, becauſe 'tis not *infra hoſpitium*; but if the *innkeeper* put the horſe to paſture, without requeſt, then 'tis otherwiſe; and that if a writ be brought againſt an innkeeper, it need not mention that he keeps a common inn. 8 *Rep. Caley*'s caſe.

A ſtranger came to an *inn* with an horſe without the knowledge of the owner, and there left him at hay; the horſe remained there 'till he eat out more than he was worth; the owner hearing where he was, demanded him of the innkeeper, who refuſed to deliver him without paying for what he had eaten; the court was divided, whether the innkeeper might keep the horſe; but this doubt was reſolved in a caſe about five years afterwards, (*viz.*) that he might keep the horſe till he was ſatisfied for his keeping, and ſhould not be put to his action againſt the perſon who left him at the inn. 1 *Bulſt.* 170. 2 *Roll. Rep.* 438.

It was the opinion of juſtice *Doderidge*, that if a traveller lodgeth three days together in a common inn, that in ſuch caſe the innkeeper is not anſwerable if his goods are ſtolen out of his chamber; but the court was of another opinion in *Dalope*'s caſe; for clothiers and others coming to *London* to ſell cloths and cattle, ſtay commonly a week, and if they are robbed in the inn, the innkeepers ſhall be charged in an action. *Latch* 88, 126.

In an action on the caſe brought againſt an *innkeeper* for goods ſtolen out of the inn, the defendant pleaded in bar an agreement made between him and the plaintiff, that he (the defendant) would not be chargeable for any goods brought thither, by his gueſt, but for ſuch as were delivered either to himſelf or to his wife; and this was adjudged a good plea. *Moor* 158.

Caſe, &c. againſt an innkeeper for an horſe, &c. the defendant pleaded the general cuſtom of the realm, that where an horſe is put to an innkeeper to keep, and continues ſo long in the inn that his meat amounts to more than the value of the horſe, then the innkeeper may call four neighbours to appraiſe the horſe, and ſet a value upon his meat; and if it appear to them, that it comes to more than the value of the horſe, then the innkeeper may detain him as his own; and upon demurrer to this plea the plaintiff had judgment, becauſe there is no ſuch *general cuſtom of the realm*, 'tis only ſo in *London* and *Exeter*; but it was reſolved that an innkeeper might detain an horſe for his meat, or might have an action on the caſe for it. *Moor* 876.

Treſpaſs for aſſault, battery, and taking his horſe in *Cheapſide*; the defendant, as to the aſſault and battery, pleads Not guilty, and as to the reſt he ſet forth, that he was an *innkeeper* in St. *Martin*'s pariſh, and that the plaintiff came to his houſe and agreed to give 2*s.* *per* week for his lodging, and 6*d.* for his horſe for a day and night; and if he did not pay the ſame, and 10*s.* more, which he owed the defendant, then he ſhould detain the horſe till he was paid, and ſhews how long he lodged there, and how many days, &c. his horſe was there, and how much was due, and becauſe it was not paid, he detained the horſe, till the plaintiff took him out of his (the defendant's) ſtable, and rode him to *Cheapſide*; where the defendant retook him, as he might lawfully; and upon a demurrer to this plea, it was inſiſted for the plaintiff, that the defendant might detain the horſe for his hay and oats, whilſt he was *in his poſſeſſion*, becauſe it was in nature of a diſtreſs, but he could not retake him when once out of his poſſeſſion. *Sed per curiam*, If he hath the horſe by *diſtreſs*, then the taking him out of his poſſeſſion is a *reſcous*, and in ſuch caſe he may retake him; but here he had a property as well as a poſſeſſion by the agreement of the plaintiff, *viz.* to detain the horſe, if he (the plaintiff) did not pay for his lodging, horſemeat, and a debt of 10*s.* and having a property as well as the poſſeſſion, he might retake him. 2 *Roll. Rep.* 438.

The plaintiff declared, that he was an *hoſtler*, and that the defendant brought an horſe to him, and agreed to give ſixpence livery for a day and night, and becauſe the horſe had been there ſo many days and nights as amounted to 20*l.* he brought the action, and declared *licet ſæpius requiſit'*, the defendant had not paid the money; it was inſiſted for the defendant, that there ought to have been a *ſpecial requeſt*; but adjudged, that were the ground of the action is a *debt*, there the law induceth a promiſe, and in ſuch caſe the *requeſt* is not iſſuable, nor any part of the conſideration; and in this caſe this promiſe is intire, and the plaintiff may demand for ſo many days and nights together, without bringing an action for every 6*d.* and that if a man brings an horſe to an inn and leaves him in the ſtable, without any ſpecial agreement to pay, &c. the innkeeper may detain him till he is ſatisfied for the keeping; and if he eat more than he is worth, he may get him appraiſed, and juſtify the ſale. *Yelv.* 66.

8. *For miſ-feaſance, non-feaſance, and negligence.*

Caſe, for that *B. G.* was *excommunicated*, and the inſtrument was delivered to the defendant, who was curate of the pariſh were *B. G.* lived, in order to publiſh it in the church, and that he maliciouſly raſed out the name of *B. G.* and put in the name of the plaintiff, and read it in the church, by reaſon whereof he was forced to abſent himſelf from divine ſervice, and to be at the expence to procure a diſcharge; it was objected, that this action would not lie, becauſe the matter was *ſpiritual*; but adjudged, that tho' the excommunication and the denouncing it was ſpiritual, yet the raſing the inſtrument was the offence, and that is temporal. *Cro. Eliz.* 838.

Caſe, &c. in which the plaintiff did not declare upon the cuſtom of the realm, ſafely to keep fire, &c. but that the defendant ſtanding at his door, ſhot at a fowl, and fired his neighbour's houſe, for which the action was brought, and adjudged good; but it had not been good, if he had declared on the cuſtom. *Cro. Eliz.* 10.

Caſe, &c. for that the plaintiff brought a *writ of entry* againſt *B. G.* returnable *Octab. Mich.* and delivered it to the defendant, who was then *under ſheriff*, to execute *in forma juris*, and gave him a fee, who ſummoned the ſaid *B. G.* but intending to deceive the plaintiff, did not return the writ at the day, *per quod retardatus fuit* to recover the lands; the plaintiff had a verdict; it was inſiſted to ſtay the judgment, for that the action ought to be brought againſt the *high ſheriff*, and not againſt his *under ſheriff*; but adjudged, that the action is well brought againſt the under ſheriff, for 'tis imbezilling the writ. *Cro. Eliz.* 175.

A cuſtom was laid by the lord of a manor, that all the *reſiants* and *inhabitants* there had uſed to grind at his mill, and that the defendant being an inhabitant there, had built a mill contrary to the cuſtom; now, tho' the cuſtom was laid generally againſt *all the inhabitants*, yet 'tis good, becauſe ſuch a *preſcription* by way of *tenure* had been good, and if ſo, *a fortiori*, 'tis good by way of cuſtom. 2 *Bulſt.* 195.

Caſe, for that the defendant being a ſurgeon had *undertaken* the cure of the plaintiff's ſervant, who was bruiſed by a cart, and that he was not only careleſs in the cure, but

but applied unwholeſome medicines, *per quod ſervitium amiſit* for one year; adjudged, that the action lay, becauſe the defendant had undertaken the cure. 2 *Bulſt.* 332.

Caſe, for that the defendant *tam negligenter & improvide cuſtodivit ignem*, that the plaintiff's houſe was burnt; upon Not guilty pleaded it was found, that the plaintiff was only tenant at will; adjudged, that at Common law no action lay againſt *tenant at will, or for years, for permiſſive waſte*, but for voluntary *waſte* 'tis otherwiſe. 5 *Rep.* 13.

If one is bound to repair a *ſea-bank*, and the danger is become inevitable thro' his negligence, or if he is not able to repair it, by reaſon whereof other perſons are charged to repair it; in ſuch caſe each of them may have an action on the caſe againſt him who ought to repair it, and recover damages according to their loſs. 10 *Rep.* 139.

Caſe, &c. in which the plaintiff declared, that the defendant took his (the plaintiff's) *gelding* to depaſture, at 2*s. per* week, and that he (the defendant) was to keep the gelding ſafely, and to redeliver him to the plaintiff when he ſhould be thereunto required; but that he had kept him ſo negligently, that he was taken away by perſons unknown; upon a demurrer to this declaration, the better opinion was, that the action would lie, it being upon the *negligence and the ſpecial promiſe* of the defendant, &c. but that the plaintiff ought to alledge a *requeſt* for the delivery, and likewiſe to alledge, that the horſe was ſtrayed or loſt. *Moor* 543.

The plaintiff *Markham* entered into a recognizance with Sir *Francis Willoughby*, to one *Tracy*, and for the debt of the ſaid Sir *Francis*, who, together with one *Fox*, his ſervant, entred into a bond to *Markham*, to ſave him harmleſs, &c. in which the recognizance was recited; but there was a blank left for the *chriſtian name* and *dwelling place* of the ſaid *Tracy*; which after the ſealing of the bond, and without the aſſent of the plaintiff *Markham*, was filled up by the defendant *Gomaſton*, by reaſon whereof the ſaid bond was void, and thereupon the plaintiff brought an action on the caſe againſt the defendant, having before brought an action of debt againſt *Fox* upon this bond; and this matter being proved at the trial upon the bond, he was nonſuited, and after a great debate adjudged, that this action on the caſe would lie againſt the defendant for *filling up this bond after it was ſealed.* *Moor* 547.

A man had two cloſes adjoining time out of mind, and he ſold one of the cloſes to *W. R.* the queſtion was, who ſhould repair and make the *fences*; the court was divided, *viz.* two judges, that the vendor ſhould do it, and two judges that the vendee ſhould. *Moor.* 775.

Caſe againſt an *apparitor*, who having a citation againſt the plaintiff, returned, that he had ſummoned him, when in truth he had not, by reaſon whereof the plaintiff was *excommunicated*; adjudged, that the action would lie; and ſo it will againſt an *archdeacon* for refuſing to induct a clerk. *Moor* 835.

Caſe, &c. in which the plaintiff ſet forth a *cuſtom*, that all the inhabitants in certain ancient meſſuages, held of the biſhop of *Saliſbury*, in that city, uſed to grind *all the corn* which they ſpent in their houſes *or ſold*, at certain mills called the *Biſhop's mills*, &c. and not elſewhere, without leave of the biſhop, and derived a title to himſelf, under a leaſe of thoſe made to him *anno* 11 *Jac.* and alledged, that the defendant at ſeveral times, from 2 *Jac.* to 12 *Jac.* had ground his corn elſewhere, &c. the plaintiff had a verdict, but could never get judgment, becauſe the *cuſtom* was unreaſonable for a man to *grind all his corn* at the mills, &c. *which he ſhould ſell*; beſides, damages were aſſeſſed for not bringing his corn to be ground at the mills ſeveral times, from the *ſecond* year to the *twelfth* year of king *James*, when the plaintiff's leaſe commenced in the *eleventh* year of that reign. *Moor* 887.

Caſe, &c. againſt a *bailiff of a liberty*, ſetting forth, that a warrant upon a *fi. fa.* was directed to him by the ſheriff, to levy a debt at the ſuit of the plaintiff, and that the defendant had levied the money and concealed the warrant, and made no return thereof; after a verdict for the plaintiff, it was moved in arreſt of judgment, that the action ought not to be brought againſt an *under bailiff* but againſt the *ſheriff*, for even an *under ſheriff* ſhall not be charged for not *returning a writ*; which is very true, where there is no perſonal wrong ſuppoſed to be done by him; but in the principal caſe the bailiff is charged with a *perſonal wrong* by concealing the warrant after the money was levied, therefore the action lies againſt him. 1 *Roll. Rep.* 78.

Caſe againſt a *bargeman*, who juſtified, for that there were ſeveral paſſengers in his barge, and a ſudden *tempeſt* ariſing, all the goods in the barge were thrown overboard to ſave the lives of the paſſengers, amongſt which the goods of the plaintiff were thrown over, and that he had not any notice that there was *money in the pack*; adjudged, that the action would not lie, becauſe what the owner of the barge did in this caſe, was occaſioned by the *act of God*, and in defence of their lives. 1 *Roll. Rep.* 79.

Caſe againſt the defendant for making a *falſe affidavit* in Chancery, by reaſon whereof he was damnified to ſuch a ſum; there was a verdict for the plaintiff, and damages to 300*l.* It was objected in arreſt of judgment, that the action would not lie, but that the plaintiff ought to take his remedy by indictment; for when a man is compelled to give evidence, if 'tis falſe, he ſhall not be puniſhed by an action on the caſe: *et per curiam*, the judgment was ſet aſide. 2 *Roll. Rep.* 195.

Caſe, &c. for taking away a *box with writings*; the plaintiff had judgment in an *inferior court*; and upon a writ of error brought, the error aſſigned was, that the plaintiff in his declaration had made no *title* to the box, neither did he ſet forth that it was *locked, ſealed*, or *nailed*, nor the quality of the writings, whether bonds, releaſes, or other deeds, or evidences in particular, and for theſe reaſons, amongſt others, the judgment was reverſed. *Godb.* 370.

Caſe, &c. in which the plaintiff declared, that he was poſſeſſed of ſuch goods in *London*, and that in conſideration of 2*s.* paid by him to the defendant at *London*, he promiſed, that if the plaintiff would deliver the goods to the defendant, he would carry them aboard ſuch a ſhip, and averred, that he did *deliver the goods* to the defendant, but that he had not carried them aboard the ſhip; upon *non aſſumpſit* pleaded, the plaintiff had a verdict; and it was objected in arreſt of judgment, that the declaration was ill, becauſe the plaintiff did not ſhew *when and where* he delivered the goods to the defendant, but only generally, *that he did deliver them*; adjudged, that it need not be ſhewed preciſely, becauſe 'tis only an inducement to the promiſe. *Godb.* 41.

Leſſee for twenty years made an under-leaſe to *T. S.* for one year, who after the end of the year, and before the firſt leſſee re-entered, took up the *planks* and other things which were *fixed to the freehold*, and the leſſee for twenty years brought an action on the caſe againſt him; adjudged that it would lie. *W. Jones.* 224.

Caſe, &c. in which the plaintiff declared, that he was poſſeſſed of an houſe, &c. which had three windows on the north ſide *et adhuc poſſeſſionatus exiſtit*, and that the defendant was poſſeſſed of an houſe and a void piece of ground adjoining to the plaintiff's houſe on the north ſide *et adhuc poſſeſſionatus exiſtit*, and that his (the plaintiff's) lights were *antient lights* time out of mind; and that the defendant had built *ſuper vacuam peciam terræ*, and thereby ſtopped his (the plaintiff's) lights; upon Not guilty pleaded, the plaintiff had a verdict; it was objected in arreſt of judgment that the declaration was repugnant, for the ground could not be *vacua*, ſince it appears that the defendant built upon it: *Sed per curiam*, That part of the declaration ſhall be rejected as *ſurpluſage*; beſides, part of it might be ſtill *vacua* and not built on, and ſo it ſhall be intended. *W. Jones.* 326.

Caſe, in which the plaintiff declared, that the defendant being a *coachman*, did by careleſs driving his coach break a pipe of wine of the plaintiff's which lay in the ſtreet, by which *much* wine run out and was loſt, and the defendant being arreſted for the ſame, he promiſed, that if the plaintiff would *forbear* to proſecute him for the ſaid wine, he would pay him as much as he was damni-

fied; after a verdict for the plaintiff it was moved in arreſt of judgment, that the declaration was ill, becauſe the plaintiff had not averred how much the wine was worth which was thus ſpilled; and therefore the defendant could not tell what ſatisfaction to make; neither did the plaintiff alledge that he required the defendant to make ſatisfaction; but adjudged, that by the declaration it appears, that the plaintiff had damage done to his wine, and that the defendant had not ſatisfied him for the damages, or made any tender of amends; and as to the value, that was now made certain by the jury, and the defendant is bound to take notice of what damage he had done. *Style* 458.

Caſe, *&c.* for that the defendant did ride an unruly horſe in *Lincoln's Inn Fields*, &c. which broke from the defendant and run over the plaintiff and grievouſly hurt him, *&c.* Upon Not guilty pleaded, the plaintiff had a verdict, and it was inſiſted in arreſt of judgment, that it appears by the declaration, that this happened againſt the defendant's will, and ſo *damnum abſque injuria*; but adjudged, that the defendant was in fault to bring an unruly horſe into a place where miſchief might enſue, by reaſon of the concourſe of the people; and that it had been adjudged an action lay againſt a butcher, who had made an ox run from his ſtall and gored the plaintiff, and this was alledged in the declaration to lie in default of penning him up. 1 *Vent.* 295.

9. *For nuſances.*

It is clearly agreed, that for a common nuſance, which is an offence againſt the public, either by doing a thing which tends to the annoyance of all the King's ſubjects, or by neglecting to do a thing which the common good requires, no action on the caſe will lie; for this would create a multiplicity of actions, one man being as well intitled to bring an action as another; and therefore in ſuch caſes the remedy muſt be by indictment at the ſuit of the King. *Co. Lit.* 56. *a.* 1 *Roll. Abr.* 88, 110. 2 *Roll. Abr.* 140, 141. *Moor* 180. 4 *Co.* 8. 9 *Co.* 113. 2 *Brownl.* 147. *Vaugh.* 341. *Cro. Eliz.* 664. 3 *Mod.* 294. *Carth.* 191, 451. 1 *Salk.* 15.

But if by ſuch a nuſance I ſuffer a particular damage, as if by ſtopping up a highway with logs, *&c.* my horſe throws me, by which I am wounded or hurt, an action lies. *Co. Lit.* 56. *Cro. Jac.* 446. 1 *Keb.* 847. 2 *Jones* 157.

Alſo an action lies for continuing a nuſance, as where for erecting a nuſance 2 *die Febr.* the defendant pleaded a prior action brought for erecting a nuſance 20 *die Martii*, and a recovery thereupon, and averred theſe to be the ſame nuſance and erection; and on demurrer the plaintiff had judgment; for though he cannot have a new action for the ſame erection, yet he may for the continuing the ſame nuſance. 1 *Salk.* 10.

VI. *Actions on the caſe upon aſſumpſit.*

An aſſumpſit is an action the law gives a party injured, for the breach or non-performance of a contract legally entered into; it is founded on a contract either expreſs or implied by law, and gives the party damages in proportion to the loſs he has ſuſtained by the violation of the contract. 4 *Co.* 92. *Moor* 667.

But here it muſt be obſerved, that the law diſtinguiſhes between a general *indebitatus aſſumpſit* and a *ſpecial aſſumpſit*; for though they come under the denomination of actions on the caſe, and the party is to be recompenſed in damages alike in both, yet the firſt ſeems to be of a ſuperior nature, and will lie in no caſe but where debt will lie; but for a particular undertaking, or collateral promiſe to diſcharge the debt or duty of another, a ſpecial *aſſumpſit* muſt be brought. 1 *New Abr.* 163.

If *A.* and *B.* having dealings with each other, make up their accounts, and *B.* is found in arrear, and promiſes to pay the balance, an *aſſumpſit* lies againſt him, and *A.* need not bring a writ of account. *Cro. Jac.* 69. *Yelv.* 70.

So if *A.* gives money, or delivers goods to *B.* to merchandize therewith, and *B.* promiſes to render an account, *aſſumpſit* lies on this expreſs promiſe as well as account. 1 *Salk.* 9.

So if a tenant being in arrear for rent, ſettles an account of the arrears with his landlord, and promiſes to pay him the ſum in which he is found in arrear, an *aſſumpſit* lies on this promiſe. 1 *Roll. Abr.*

But if the obligor in a bond, without any new conſideration, as forbearance, *&c.* promiſes to pay the money, an *aſſumpſit* will not lie, but the obligee muſt ſtill purſue his remedy by action of debt. 1 *Roll. Abr.* 8.

So if a man leaſes for years, reſerving rent, an *aſſumpſit* will not lie, becauſe it ſavours of the realty. 1 *Roll. Abr.* 7.

An *indebitatus aſſumpſit* lies for money by cuſtom due for ſcavage; adjudged upon a ſpecial verdict, by which it was found, that the ſum demanded was due by cuſtom, but that there was no expreſs promiſe to pay it. 2 *Lev.* 174.

If a man by grant of the King hath fines *pro licentia concordandi*, and one will not pay a fine, he may have an *indebitatus aſſumpſit* for it. 3 *Leon.* 179.

Neither debt nor general *indebitatus aſſumpſit* will lie againſt the acceptor of a bill of exchange; for his engaging is but a collateral promiſe, on which a ſpecial action on the caſe lies, founded on the cuſtom of merchants; but debt or a general *indebitatus* may be brought againſt the drawer, as for money received for the uſe of the party. *Hard.* 485, 486.

Alſo if *A.* delivers money to *B.* to pay over to *C.* and gives *C.* a bill of exchange drawn upon *B.* and *B.* accepts it, *C.* may have an *indebitatus aſſumpſit* againſt *B.* as having received money to his uſe, but muſt not declare only on the bill of exchange accepted. 1 *Vent.* 153.

An *indebitatus aſſumpſit* lies for 20*l.* forfeited by the ordinances and conſtitutions of a company, for not ſerving in the office of ſteward of the company, according to a bye-law by them made. 2 *Lev.* 252.

If one receives my rent under pretence of title, I may have an *indebitatus aſſumpſit* againſt him. 2 *Mod.* 263.

So where *A.* took out adminiſtration to a perſon ſuppoſed to have died inteſtate, and appointed *J. S.* his attorney, who received money, *&c.* and paid it to the adminiſtrator; afterwards a will appearing, the letters of adminiſtration were called in, and the executor brought an *indebitatus aſſumpſit* againſt the attorney; who objected, 1. That he acting only as attorney for him, who in fact was adminiſtrator, the receipt of the money was not his but the adminiſtrator's: And 2dly, That the action ought to have been a ſpecial *aſſumpſit*, the money being received by ſpecial authority, and that expreſly to the uſe of another; but the court held, that the authority being void, it was a receipt of ſo much money for the uſe of the plaintiff on an implied contract, for which an *indebitatus aſſumpſit* well lies. 1 *Salk.* 27.

If a feme ſole marries a man, who in truth is married to another woman, and he makes a leaſe of her lands and receives the rents, ſhe may bring an *indebitatus aſſumpſit* againſt him for ſo much money received to her uſe; adjudged after verdict, though objected, that he having no right to receive, the tenant remained ſtill liable, and he had his remedy over againſt the huſband; but the court held, that he being viſibly a huſband, the tenant was diſcharged, at leaſt that the recovery in this action would diſcharge the tenant, as it would be a ſatisfaction to the true leſſor. 1 *Salk.* 28.

If a ſheriff levies money upon a *fieri facias*, the plaintiff may have an *indebitatus aſſumpſit* againſt him for ſo much money received to his uſe. *Comb.* 430.

If *A.* takes an apprentice and receives 30*l.* with him, for which he is to teach him his trade, and make him free of the city of *London*, and being no freeman himſelf, the boy is bound likewiſe to a freeman; admitting that by the cuſtom of *London*, the laſt binding will not make him free without actual ſervice, yet an *indebitatus aſſumpſit* will not lie, nor has the party any remedy, unleſs for the cheat, or on a ſpecial action on the caſe for not making him a freeman. *Comb.* 431.

If three are bound in an uſurious obligation, and one of them pays part of the money, and afterwards the obligee brings debt againſt one of the obligors, who avoids the bond for uſury, yet the obligor who paid the money cannot

not maintain an *indebitatus aſſumpſit* for it, for he is *particeps criminis*, and having parted with his money freely, he comes within the rule *volenti non fit injuria*. 1 *Salk.* 22.

But if *A.* pays money to *B.* upon a miſtake, as thinking that there was ſo much due on account, *&c.* he may maintain an *aſſumpſit* for it. 1 *Salk.* 21.

So if a man pays money upon a policy of aſſurance, ſuppoſing a loſs, when in truth there was not any, he may bring an *indebitatus aſſumpſit* for ſo much money received to his uſe. *Skin.* 412.

So if *A.* gives money to *B.* to pay *C.* upon *C*'s delivering up writings, *&c.* and *C.* will not do it, an *indebitatus* will lie for *A.* againſt *B.* for ſo much money received to his uſe. 6 *Mod.* 161.

If one be named a commiſſioner to examine witneſſes in a cauſe in Chancery or Exchequer, who officiates accordingly, he may bring an *aſſumpſit* for his labour and pains; for though he is to be conſidered as an officer of the court, yet he is not compellable to attend againſt his will, nor does the truſt repoſed in him make his taking a reward bribery; for the party is to take care to name ſuch as will ſerve, and it is but reaſonable it ſhould be at the charge of him for whom he officiates. *Carth.* 208. *Comb.* 186. *S. C.*

The gentlemen uſhers and daily waiters to the King brought an *aſſumpſit* againſt the defendant, in which they declared, that all gentlemen uſhers, daily waiters, *&c.* time out of mind, had uſed to have a fee of 5*l.* of every perſon who voluntarily accepted the honour of knighthood, and that the defendant (on ſuch a day) had voluntarily accepted knighthood, and thereupon became indebted to them in 5*l.* and in conſideration thereof had promiſed to pay the money, which he had not performed; and upon a demurrer to this declaration, it was adjudged this action would lie for this duty. *Carth.* 95.

Where a man comes to buy goods, and they agree upon a price and a day for the payment, and the buyer takes them away, an *aſſumpſit* for the money is the proper action, for *trover* will not lie for the goods, becauſe the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree upon a price for preſent money, and the buyer takes the goods away without payment, *trover* lies, becauſe the property is not altered, and therefore the taking away the goods without payment of the money, is an injurious taking, for which the action lies; but if a man ſells goods on payment of money on a day to come, and the money be paid, and the goods not delivered, *trover* lies becauſe the property is in the buyer. 1 *New Abr.* 167.

If a man and woman, being unmarried, mutually promiſe to marry each other, and afterwards the man marries another woman, by which he renders himſelf incapable of performing his contract, an *aſſumpſit* lies, in which the woman ſhall recover damages; for though matrimonial cauſes are regularly cognizable in the ſpiritual courts, yet the contract in the preſent caſe being executory, and revoked by the huſband by the ſubſequent marriage, could not be inforced by eccleſiaſtical cenſures, as a contract *in præſenti* may; hence therefore, there being no adequate remedy in the ſpiritual courts, and marriage being an advantage, and the loſs of it a temporal loſs, it is fit that there ſhould be a remedy in the temporal courts, otherwiſe there would be a failure of juſtice. *Carter* 233.

All promiſes and contracts are to receive a favourable interpretation; and ſuch conſtruction is to be made, where any obſcurity appears, as will beſt anſwer the intent of the parties; otherwiſe a perſon, by obſcure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promiſes ſhall be taken moſt ſtrongly againſt the promiſor, and are not to be rejected, if they can by any means be reduced to a certainty: Therefore,

If *A.* in conſideration that *B.* will marry his daughter, aſſumes and promiſes to give with her a child's part, and that at the time of his death he will give to her as much as to any of his children, except his eldeſt ſon; this is a good promiſe; for though a child's part in itſelf is altogether uncertain, yet being to give as much as to any of his children, the promiſe is certain enough, it being averred what the younger ſon had. 1 *New Abr.* 168. *Poph.* 148. 2 *Roll. Rep.* 104.

But if there be a diſcourſe between the father of *A.* and *B.* in relation to a marriage between the ſaid *A.* and the daughter of *B.* and *B. tunc & ibidem* affirms and publiſhes to the father of *A. quod daret ei qui maritaret* his ſaid daughter with his conſent 100*l.* and after *A.* marries the daughter of *B.* with his conſent; yet this affirmance and publication of *B.* ſhall raiſe no promiſe upon which an action upon an *aſſumpſit* may be brought, becauſe theſe words do not include any promiſe. 1 *Rol. Abr.* 6.

If a man promiſes another, in conſideration that he will aſſign to him a certain term, to pay him 10*l.* this is a good *aſſumpſit*, though the time of aſſignment and payment be not appointed; for the 10*l.* ſhall be paid in a convenient time after the aſſignment, which alſo muſt be done in a convenient time, and he ſhall not have time during his life. 1 *Roll. Abr.* 14, 15.

So if *A.* be indebted to *B.* for certain things to him ſold, and *C.* comes to *B.* and promiſes him that if *A.* ſhall not pay him the money, that then he himſelf will pay it; an action upon the caſe lies for *B.* againſt *C.* upon this promiſe, if *A.* does not pay the money in a convenient time. 1 *Roll. Abr.* 15.

If *A.* is indebted to *B.* in 10*l.* and upon this *C.* promiſes that in conſideration that he will forbear *A.* till ſuch a day, if *A.* does not pay him the ſaid day, he himſelf will pay him the ſaid day, this is a good promiſe, upon which *B.* may have an action againſt *C.* for though *A.* had the whole day to pay it, and ſo it was impoſſible for *C.* to pay it the ſame day, if he did not pay it, yet the ſubſtance of the promiſe is to pay, and the time limitted being impoſſible, is void, and then it ought to be paid on requeſt. 1 *Roll. Abr.* 13.

If *A.* is indebted to *B.* in 10*l.* by obligation, and *A.* dies and makes *C.* his executor, and *C.* in conſideration *quod daret diem ſolutionis pro uno anno*, promiſes payment, if *C.* does not pay it, an action on this promiſe will lie againſt him; for though in proper ſenſe, a day cannot be given upon the bond, yet it ſhall be taken according to common parlance, *viz.* deferring the day of payment. *Cro. Eliz.* 643.

If the plaintiff declares, that whereas there was a communication between the plaintiff and defendant, concerning the bark of certain wood, and that thereupon it was agreed that the defendant ſhould give to the plaintiff two ſhillings per ſeam for all the bark of ſuch wood as the plaintiff ſhould cut, and that thereupon the defendant aſſumed and promiſed to have ready upon a certain day, articles purporting the agreement, and an obligation for the performance thereof, *&c.* the declaration is not good, becauſe not ſaid in what ſum the obligation was to be; and a certain ſum cannot be intended, becauſe the number of ſeams are altogether uncertain; but being after verdict upon the general iſſue, it was adjudged for the plaintiff; but *per cur.* upon demurrer, or the ſpecial iſſue, it had been naught. 1 *Sid.* 270. 1 *Keb.* 776.

But if there be an agreement to enter into an obligation for performance of a thing of a certain value, without mentioning in what ſum, it ſhall be according to the value. 1 *Sid.* 240.

In an *aſſumpſit*, the plaintiff declared that the defendant in conſideration, *&c.* ſix months before the return of King *Charles* the ſecond, aſſumed to pay 20*l.* to the plaintiff, if *Charles Stewart foret Rex Angliæ infra* 12 *menſes tum prox' ſequent'*, and adjudged a good promiſe; for the words ſhall be taken according to the ſubject matter, *viz.* that the King that was then out of poſſeſſion, ſhould be in poſſeſſion within ſix months. 1 *Lev.* 33. 1 *Keb.* 56. *S. C.* For more matter concerning *Aſſumpſit*, ſee title **Aſſumpſit.**

VII. *Actions on the caſe for ſlander or defamation.*

Slander is the publiſhing words in writing, or by ſpeaking of any perſon, by reaſon of which he becomes liable to ſuffer ſome corporal puniſhment, or ſuſtains ſome damage.

It

It is no excuſe, at leaſt *in foro conſcientiæ*, that the thing charged was true. The law does indeed, in compaſſion to mens infirmities, allow it to be a juſtification in an action for words *ſpoke*; but as to *written* ſcandal it admits of none, if the matter of the ſlander be true: yet it is very unbecoming a man, and much more ſo a chriſtian, to be guilty of this offence. If a perſon has done any thing which the law prohibits, he is liable to anſwer for it judicially; but it can anſwer no good end for private perſons to brand him with it, and there is a degree of cruelty as well as inhumanity in ſo doing. To rally a man for ſome foible or ſmall failing, if it be done with humour and in a friendly way, may do him ſervice; but the publiſhing even any of theſe, which can ſerve only to leſſen him in the eſteem of his neighbours, or make him the object of ridicule, ſhould be abſtained from; for, although it may not amount to ſlander in the legal notion of that word, it muſt create ill blood between the parties.

This offence was ever held in great deteſtation; but ſlander in writing hath at all times, and with good reaſon, been puniſhed in a more exemplary manner; for as it has a greater tendency to provoke men to breaches of the peace, quarrels, and murders, it is of much more dangerous conſequence to ſociety. Words, which are frequently the effect of ſudden paſſion, may ſoon be buried in oblivion; but that which is committed to writing, beſides that the author is actuated by deliberate malice, is ſpread further, and the ſlander is for the moſt part ſo laſting, as to be ſcarce ever forgiven.

For written ſcandal the party injured may proceed againſt the author by indictment or information, it being conſidered as a public offence; and he may alſo proceed by an action upon the caſe for the private damage thereby ſuſtained, or, if the defamation be merely ſpiritual, by a ſuit in the eccleſiaſtical court.

Peers and the great men of the realm, beſides theſe ways of redreſs, have another, by an action of *ſcandalum magnatum*, which is peculiar to themſelves.

If the ſlander is by words ſpoke, there is in general no other remedy than by an action on the caſe, or a ſuit in the ſpiritual court; yet even this may in certain caſes be proceeded againſt criminally; for inſtance, if it be a ſlander of the ſtate, as the ſaying the coin is abaſed by authority, or any other thing whereby the ſtate is or may be prejudiced; or if it be a ſlander which it more particularly concerns the public to prevent, as the ſpeaking any thing ſcandalous to a juſtice of peace in the actual execution of his office, it may be proceeded againſt by indictment or information. 4 *New Abr.* 480.

The criminal way of proceeding againſt perſons guilty of this offence, being proper to be treated of under the titles **Indictment, Information,** and **Libel,** and the method of proceeding by action of *ſcandalum magnatum*, under its proper title, it only remains to conſider that ſort of ſlander for which the remedy is by an action upon the caſe.

An action upon the caſe lies for publiſhing any words, by reaſon of which the perſon of whom they are publiſhed does in fact receive damage; but it is not always neceſſary to ſhew the damage received. The diſtinction is that where the natural conſequence of the words is a damage; as if they import the charge of being guilty of a crime, or of having ſome contagious diſtemper; or if the title to an eſtate is by them brought in queſtion; or if they are a diſgrace in an office, profeſſion, or trade, they are in themſelves actionable: But in other caſes the party, who brings an action, muſt alledge the ſpecial damage received from them. 4 *New Abr.* 482, 483.

It makes no difference whether the ſlander is publiſhed in writing or print, or by ſpeaking; for, although the party injured may, where it is in writing or print, (it being a publick offence) proceed in a criminal way againſt the author of it, he is not thereby precluded from obtaining ſatisfaction by action for the private injury to himſelf. 4 *Co.* 14. 3 *Leon.* 138. *Cro. Eliz.* 247.

Writing ſlanderous words of any perſon in a private letter to a third perſon, is ſuch a publication as this action will lie for. 2 *Vent.* 28.

If the words are a mere ſpiritual defamation no action lies, for only the ſpiritual courts have juriſdiction in this caſe. 1 *Roll. Abr.* 34.

But whenever any temporal damage is received from words, which in general are no more than a mere ſpiritual defamation, or if ſuch words are coupled with others which are actionable, a prohibition lies for the whole words to the eccleſiaſtical courts; it would be vexatious if proceedings could be in both temporal and ſpiritual courts; and as none but the former can make the injured party ſatisfaction for the damages ſuſtained, the proceedings in the latter being *pro ſalute animæ* only, it is very reaſonable that he ſhould be confined to an action in them.

Under this head it is thought proper to conſider,

1. *Where action lies for words which import capital offences; and where not.*
2. *Where action lies for words which import the charge of other crimes; and where not.*
3. *Where action lies for words ſpoken of magiſtretes; and where not.*
4. *Where action lies for words ſpoken of men of profeſſion; and where not.*
5. *Where action lies for words ſpoken of tradeſmen; and where not.*
6. *Where action lies for ſlandering women; and where not.*
7. *Of adjective and negative words, and by way of interrogation.*
8. *Pleadings in actions of ſlander.*

1. *Where action lies for words which import capital offences; and where not.*

An action lies for theſe words, *Thou art a rebel, and not the Queen's friend. Cro. Eliz.* 638. So it doth for ſaying of *J. S. He is an enemy to the ſtate*; for theſe are a great ſlander, if not a charge of treaſon. *Cro. Eliz.* 638.

So it is actionable to ſay of any perſon, he did treaſon in the *Low Countries*; becauſe he may be tried and puniſhed in *England* for a treaſon committed there. 1 *Rol. Abr.* 63.

Theſe words, *He is a Jacobite, and is for bringing in the Prince of Wales and popery, to the deſtroying our nation,* are ſaid to be actionable; becauſe they are a charge of evil principles. *Salk.* 696. In another report of the ſame caſe, theſe words are held to be actionable if ſpoken of a perſon in office; but it is not determined, whether they are ſo or not when ſpoken of a private perſon. *Lord Raym.* 812. The doctrine however in *Salkeld* ſeems to be law; for in a ſubſequent caſe it was held, that an action lies for the following words, ſpoken of any perſon, viz. *He has the pretender's picture in his room, and I ſaw him drink his health; and he ſaid he had a right to the crown.* 4 *New Abr.* 484. 8 *Mod.* 283. *Fry* and *Corne.*

An action lies for ſaying to *J. N. Thou haſt killed a man*; for although no particular man is named, it is a great ſlander. 1 *Roll. Abr.* 77.

So it does for ſaying *You have killed a ſervant of J. S.* or *You have ſtole the horſe of J. S.* although it is not ſhewn that *J. S.* had a ſervant or a horſe; for till the contrary is ſhewn, this ſhall be intended. *Cro. Jac.* 423.

It was heretofore held, that no action would lie for words importing a charge of murder, without an averment that the perſon ſaid to be killed was dead; but the later and better opinion is, that the party ſhall be intended to be dead, unleſs the contrary appears in the pleadings. 1 *Vent.* 117. *Cro. Jac.* 489. *Sid.* 53. *Cro. Eliz.* 569, 823.

The words, *There is a great neſt of thieves at P. and John Burgis is the maintainer of them, and he is a ſtrong thief himſelf,* are actionable; and the plaintiff had judgment, tho' the word *ſtrong* was not found. *Dyer* 75.

Caſe, &c. for calling the plaintiff *murderer and thief*; the defendant juſtified the word *murderer*, for that the plaintiff

plaintiff was indicted for a murder at *C.* and the word *thief*, for that a robbery was done, *&c.* and the *common fame* was, it was by the plaintiff; adjudged, that the juſtification is not good. *Dyer* 236.

The words *Mr. Halley* (*innuendo* the plaintiff) *is infected of the robbery and murder lately committed, and doth ſmell of it*, are actionable, by reaſon of the word *infected*. *Dyer* 317.

Caſe, *&c.* for theſe words, *I will abide by it*, that *Chriſtopher Ruſſel was and is a falſe thief, and was at my door in the ſeſſions-day at night, between one and two of the clock after midnight, and would have robbed me, and did break open my door, and put me in jeopardy of my life*; adjudged actionable. *Dyer* 26.

For ſaying that the plaintiff *hired a man to kill the defendant*, actionable. *Cro. Eliz.* 214.

The words *My Lord Preſident ſhewed Mr.* Stapleton's *hand ſet to a book, wherein he conſented to the late rebel in the North; but by the means of Mr.* Fairfax, *my Lord was perſuaded, and the matter ſuppreſſed*; actionable. *Cro. Eliz.* 25.

The words were, *Parlor was in goal for ſtealing Mr. Piggot's beaſt*; objected, that this was only an implication, that he did ſteal him; but adjudged actionable, for 'tis an expreſs affirmation of ſtealing. *Goldſ.* 130.

I was robbed, and you were privy to it, and had part of the money; actionable. *Goldſ.* 138.

You, &c. ſtole three pounds of tobacco out of my maſter's ſhop, actionable; but to ſay, he ſtole tobacco in his maſter's ſhop, not actionable, without averring, that there was tobacco there. *Winch.* 6

I doubt not to prove, he (*innuendo* Sir *Robert Hitcham*, who was then the King's ſerjeant) *had ſpoken treaſon*; objected in arreſt of judgment, that this was no direct *affirmation*; but adjudged, that it was more than an affirmation, for he ſaid, *he doubted not but to prove it* *Hutt.* 79.

Thou haſt taken out of my pocket 40l. *of my money, and I will cauſe thee to be indicted at the ſeſſions of the peace, and to hold up thy hand at the bar for it*, and that *ex ulteriori malitia*, at another day and place, he ſaid, *he hath picked out of my pocket ſilver and gold*; actionable, tho' ſpoke at ſeveral times. 2 *Bulſt.* 227.

Thou art a rogue and a raſcal, and haſt killed thy late wife, actionable; for the words ſhall be intended according to the uſual way of ſpeaking, and that he killed her wilfully. *Cro. Car.* 352.

The words, *Mr.* Long *was robbed of* 40l. *and of plate, and* Long *and* King *have it*; actionable. 1 *Bulſt.* 147.

The words, *He hath harboured and received his ſon into his houſe, having notice before that he was a ſeminary prieſt*, actionable; for it is felony by the ſtat. 27 *El. cap.* 2. 1 *Bulſt.* 181.

The words, *Thou art a thief, and haſt ſtolen my corn*, actionable; for it ſhall not be intended ſtanding corn, but reaped. 2 *Cro.* 39. Here the words are taken in the *worſt ſenſe*. *Thou art a thief and haſt ſtolen my corn, and never made ſatisfaction*; actionable. 2 *Roll. Rep.* 380.

Thou art a ſheep thief, ſpoken in *Weſtmorland*, where thoſe import a *ſheep ſtealer*; actionable. 2 *Bulſt.* 145.

Thou haſt robbed the church, and haſt ſtolen lead off the church, meaning the church of *A.* actionable, 2 *Cro.* 153.

Thou haſt been in goal for ſtealing a pan; actionable. 2 *Cro.* 154.

Thou haſt ſtolen my wood, actionable; for it ſhall be intended wood cut down. 2 *Cro.* 166.

The defendant ſaid, that one *R. B.* did ſay, that Mr. *Lewis* (being a juſtice of peace) did ſay, *that there was no Prince in England*; actionable; becauſe averred to be ſpoken *maliciouſly, tho' on a hearſay*. 3 *Bulſt.* 225.

Thou art a ſheep-ſtealer, or *Thou art a horſe-ſtealer*, tho' general words, yet actionable. 3 *Bulſt.* 303.

Mr. Berisford hath ſpoken treaſon, and I will prove it; actionable. 2 *Cro.* 275.

Tooſe his wife killed her huſband; actionable; for the words ſhall be taken in the worſt ſenſe. 2 *Cro.* 306.

Thou haſt committed treaſon beyond ſea, and run away from thy captain, actionable; for it ſhall be intended he committed treaſon againſt this ſtate. 2 *Cro.* 424.

Caſe, &c. for that the plaintiff's huſband died by the viſitation of God, and the defendant ſaid, *Thou haſt poiſoned thy huſband*; actionable. 2 *Cro.* 438.

Thou waſt in Lancaſter goal for coining, and were burnt in the hand for it; actionable. 2 *Cro.* 536.

Thou art a thief and haſt ſtolen my gold; actionable, without ſhewing *when* the words were ſpoken. 2 *Cro.* 622.

Caſe, &c. for that Sir *William Ailoffe* was robbed by perſons unknown; the defendant, to ſcandalize the plaintiff, being ſervant to Sir *William*, ſaid, *Thou art a maintainer of thieves to ſteal my maſter's goods*; actionable; for the words ſhall be taken in the worſt ſenſe. 2 *Cro.* 629.

She, meaning the plaintiff, *is a thief to you and me, and hath ſtolen* 20l. *from me and* 40l. *from you*; the defendant juſtified, that the plaintiff was a thief, and had ſtolen two hens from the defendant felonioufly, on ſuch a day and year; and upon demurrer, the juſtification was held ill, becauſe 'tis not a juſtification of all, but of part of the words. 2 *Cro.* 676.

The plaintiff did load a ſhip of my father's with barley, and did ſteal and cozen ſeven quarters thereof in meaſure; actionable, tho' the word *cozen* is joined with the word *ſteal*. *Winch* 45, 102.

The defendant ſaid, *I will hang him, for he hath ſpoke words which are treaſon*; tho' he did not ſet forth what the words were, 'tis actionable. *Yelv.* 107.

The defendant ſaid, that the plaintiff *is a felon, and he* (meaning the plaintiff) *knew of the murder of B. G. and did conceal it*; adjudged, that the ſubſequent words did enlarge the ſlander; for tho' to conceal felony doth not make a man a felon, yet it ſhews *malice* in the defendant to affirm, that the plaintiff did conceal a murder. *Yelv.* 154.

Caſe, for theſe words, viz. *the plaintiff is a felon*; a ſtranger who heard theſe words replied, Take heed what you ſay; the defendant anſwered, *why, is he not a felon, who knew of a murder and concealed it? he* (*innuendo* the plaintiff) *knew of the murder of W. C. and did not reveal it till long after it was openly known*; adjudged, that the words are actionable; for tho' to conceal a felony doth not make the plaintiff a felon, being an offence only fineable, yet the ſubſequent words ſhew the *malice* of the ſpeaker, and are a great ſlander of the plaintiff. *Yelv.* 154.

Caſe, &c. *W. R. is a rebellious and traiterous knave*; adjudged, that the word *rebellious* is not actionable, but being coupled with the word *traiterous*, the action lies. *Cro. Eliz.* 171.

Caſe, &c. for theſe words, *Thy father is a thief, and hath ſtolen more goods than I am worth*; now, tho' the plaintiff did not *aver* that he was worth ſo much in goods, yet adjudged actionable without ſuch an averment; but if the words had been, *for he hath ſtolen my goods*, then the plaintiff muſt aver, that he had ſuch goods, *&c.* 2 *Bulſt.* 140.

Huſband and wife brought an action on the caſe againſt huſband and wife, for that the wife of the defendant ſaid, that the plaintiff's wife *had procured one to murder W. R.* actionable, tho' the murder did not follow. *Moor* 182.

Caſe, &c. for theſe words, *He hath laid wait to rob and was one of them who would have robbed me*; actionable. *Moor* 409.

Caſe, &c. *when wilt thou bring home my huſband's ſheep which thou haſt ſtolen*; actionable. *Moor* 418.

At a trial in an action on the caſe for ſlanderous words, the defendant, *by his counſel*, in mitigation of damages, and to diſcredit the plaintiff, offered evidence, that *one Medman had ſtolen ſheep, and that* by agreement *between the plaintiff and the ſaid Medman, the plaintiff did take a leaſe of a cloſe*, &c. *of Medman, to conceal him from the ſaid felony*; the defendant then ſaid, *that he would affirm all to be true that his counſel had ſaid*; for which words the action was brought, and after a verdict for the plaintiff, he had judgment; for tho' the words, if true, are not an accuſation of the plaintiff as acceſſary to the felony,

which is only fineable; yet 'tis a great ſlander to ſay a man choaks felony. *Moor* 428.

The defendant ſpoke *falſly and maliciouſly* of the plaintiff, *that he was arraigned at W. for ſtealing twelve hogs, and if he had not made good friends, it had gone hard with him*, with an averment, that he never was arraigned or queſtioned; the words actionable. *Cro. Car.* 628.

The words, *He had four children by his ſervant Agnes, and hath killed them all, or cauſed them to be killed*; actionable; the plaintiff averring, that he is not guilty or incontinent. *Poph.* 187.

B. G. is a baſe gentleman, and had four or five children by R. his maid, and hath either killed them or procured them to be killed; the firſt words are not actionable, but being *joined* with the laſt, ſhall be taken in the *worſt ſenſe*, and the word *killing* ſhall be taken unlawful killing. *Latch.* 159.

Caſe for theſe words, *John Lewkner*, &c. *knowing that W. R. a goldſmith, carried with him a great deal of plate, did lie in wait to rob him, and ſet upon him in the highway, but he raiſing the county, John Lewkner fled away and loſt his horſe*, &c. After a verdict for the plaintiff, it was moved in arreſt of judgment, that there was no felony committed, but only an *intention* to do it, and therefore the words amounted to no more than to charge the plaintiff with a *miſdemeanor*; but adjudged, that the action lieth, tho' the defendant did not charge the plaintiff with a felony; for an intention to commit felony comes very near to the act itſelf. *Cro. Car.* 99, 140.

Caſe, &c. againſt huſband and wife, in which the plaintiff declared againſt them for ſcandalous words ſpoken of him *by the wife*, viz. *Thou and thy father had been hanged for coining of money, if you had had your deſerts, long ſince.* Upon Not guilty pleaded, the wife was found guilty; it was objected, that this was not an *affirmative* charge, but only conditional, viz. *if you had your deſerts*; but adjudged actionable, for 'tis a condition which amounts to an affirmation. *Palm.* 68.

Caſe, *&c.* for theſe words, *he kept* Faukner *the jeſuit in his houſe a week together, knowing him to be a jeſuit:* It was objected after a verdict for the plaintiff, that the action doth not lie, becauſe it might be before the ſtatute 27 *Eliz.* and it was not felony before; but adjudged, actionable. *Palm.* 410.

Caſe, &c. for that the defendant ſaid of the plaintiff, *(viz.) ſhe cauſed Mr.* Langley's *ſervant to ſteal* 30*l.* *and received it*; after a verdict for the plaintiff, the judgment was affirmed on a *writ of error in the Exchequer-Chamber*, becauſe the plaintiff was charged with procuring a felony to be done, and receiving the things ſtolen. *Allen* 5.

Caſe, &c. for theſe words, *You are a rogue, you are a branded rogue, you have held up your hand at the bar, and I will have you hanged.* After a verdict for the plaintiff, it was objected, that *branded rogue* was not actionable; for it ſhall be intended to be done by virtue of the ſtatute 1 *Jac.* 1. *c.* 7. and if ſo, then his puniſhment is *paſt*, and conſequently the words not actionable, becauſe they cannot be any damage to him; but adjudged actionable, becauſe if a branded rogue wander again, it is felony by that ſtatute, and ſo the words put him in a nearer degree of felony. *Allen* 35.

Caſe, &c, *You are a buggering rogue, go home and bugger another man.* The plaintiff had a verdict, but it was moved to arreſt the judgment, becauſe the plaintiff is not charged with any act done; but adjudged actionable, becauſe the words imply an action done. *Allen* 61.

Action on the caſe, for theſe words ſpoken by the defendant, *(viz.) That T. S.* (the plaintiff) *ſet upon* him *with violence in the highway, and took his purſe from him, and would have cut him in the middle, had not the plaintiff run away*; actionable; though no felony was committed, or the plaintiff put in fear. *W. Jones* 302.

Caſe, *&c.* for theſe words ſpoken to *T. S. tell thy landlord, that he is a thief, innuendo* the plaintiff; it was moved in arreſt of judgment, that the action will not lie; becauſe it is not averred, that plaintiff was landlord to *T. S.* and ſo it was adjudged. *W. Jones* 376.

Caſe, &c. for theſe words, ſpoken at an election for knights of the ſhire; *You and your crew brought the late King to his death:* upon Not guilty pleaded, the plaintiff had a verdict and 200*l.* damages; and it was moved in arreſt of judgment, that the words are not actionable, for they ought to be taken *in mitiori ſenſu*; not that the plaintiff killed the late King, but, that he attended him *to his death*; but adjudged, that the words import ſcandal, and that in common acceptation they amount to charge the plaintiff with the king's death. *Hard.* 203.

Thou haſt killed thy maſter's cook, and it doth not appear that he had a maſter, or that his maſter had a cook; actionable. *Poph.* 128.

Your ſon ſtole a horſe, and ſold him for 10*l.* actionable. *Style* 46.

The defendant ſpoke to a *conſtable* (viz.) *there he is, take him, for I charge him with flat felony*, without alledging, that the words are ſpoken falſly and maliciouſly; actionable becauſe the words themſelves were ſcandalous, and in ſuch caſe the plaintiff need not aver, they were ſpoken *falſly and maliciouſly. Style* 59.

The defendant, and another, having a diſcourſe about the defendant's cow, he ſaid, *he* (meaning the plaintiff) *hath ſtolen her, and I charge him with flat felony*, by reaſon whereof the plaintiff was *impriſoned*, &c. the defendant pleaded in bar an award, made, *&c.* adjudged, that the award went only to ſpeaking the words, and not to the *impriſonment*, ſo that the plea was entire, and yet did not go to all which was alledged in the declaration, and therefore naught: and tho' the declaration was likewiſe ill, yet, if 'tis good in any part, judgment ſhall be againſt the defendant for that part. *Style* 247.

Caſe, *&c. The knave, the apothecary, that married my ſiſter, hath poiſoned my uncle, and I will have him taken up again to hang him*; actionable. *Style* 245.

Caſe, *&c. Thou art a ſcurvey fellow, I am no traitor, but I have ſeen thee in rebellion*; after a verdict for the plaintiff, it was moved in arreſt of judgment, that the firſt part of the ſentence imports no ſcandal; and to ſay, *he hath been in rebellion*, is not actionable, becauſe it might be upon proceſs out of *Chancery*; but adjudged, that the word rebellion is explained by the precedent words, *I am no traitor*, which ſhews, that ſuch a rebellion was intended which relates to treaſon. *Sid.* 381.

Caſe, &c. for theſe words, *thou art a rogue, and receivedſt ſtolen mutton of* Beſs Gamble, *and ſhe ſtole it, and thou was partner with her and hadſt part of it*; upon Not guilty pleaded, the plaintiff had a verdict; and it was moved in arreſt of judgment, that the plaintiff was not charged with any crime, but *Beſs Gamble*; but adjudged, that the plaintiff's words, *partner with her*, relates to the whole ſentence, and muſt be conſtrued to be partners in theft. *Sid.* 412.

Caſe for theſe words, *Thou haſt ſtolen as much lead out of my maſter's houſe as is as big as a houſe*; after a verdict it was objected, that it might be lead fixed to the freehold, which is true, if the words had been, *off my maſter's houſe*; but it was, *out of my maſter's houſe*; the plaintiff had judgment. 1 *Lev.* 156.

Caſe, *&c.* for theſe words, *Thou art a clipper and ſhall be hanged for it*; after a verdict for the plaintiff, it was inſiſted in arreſt of judgment, that it might be intended a clipper of cloth; but adjudged actionable, for it muſt be a clipper of ſuch things for which he *ought to be hanged*, and that is clipper of money; ſo where the words were, *thou art a clipper and thy neck ſhall pay for it*, adjudged actionable. 3 *Lev.* 166.

Caſe, *&c.* for theſe words, *I have an honeſt man in* Langattock, *who will prove that* Williams (the plaintiff) *ſaid he had killed a man in* Ireland *and buried him in the ſands*, and the plaintiff averred he did not ſay ſo; after a verdict for the plaintiff it was inſiſted againſt him, that the declaration was ill, becauſe *he did not aver, that he did not kill a man in* Ireland, and that there was not a man in *Langattock* who could prove, that he (the plaintiff) ſaid ſo; but adjudged, that if the words had been laid as ſpoken from the *report of another*, then it muſt be averred, that the other *did not ſo report*; but here the defendant undertakes to *prove it himſelf*, by a man he had in *Langattock*. 3 *Lev.* 171.

Caſe,

Caſe, &c. for theſe words, Nuttall, *that was* Solomon Smith's *clerk, is a knave and a rogue, and I will prove it, and he is in* Newgate, *and is to be hanged for counterfeiting the* King's *hand and ſeal*; actionable. *Raym.* 17.

Caſe, &c. for theſe words; *Thou haſt ſtolen our bees, (innuendo* a ſtock of bees) *and thou art a thief*; upon Not guilty pleaded, the plaintiff had a verdict: It was moved in arreſt of judgment, that felony cannot be committed of *bees*, becauſe they are *feræ naturæ*; but adjudged, that the ſubſequent words, *thou art a thief*, do import, that the ſtealing was of ſuch *bees*, of which a felony may be committed, and ſo actionable. *Raym.* 33.

Caſe, &c. for theſe words, *viz. He is a clipper and a coiner*; upon Not guilty pleaded, the plaintiff had a verdict: It was moved in arreſt of judgment, that the words did not charge the plaintiff with *clipping or coining money*; for they may be applied to many other things; but adjudged actionable; for it muſt ſtrongly be intended, that the defendant meant money, and in that caſe they are uſually underſtood. 1 *Vent.* 172.

Caſe, &c. in which the plaintiff ſet forth, that there was a *diſcourſe* between *T. S.* and the defendant, concerning the plaintiff and a baſtard child, ſuppoſed to be born of her (the plaintiff) ſince the death of her huſband, and that *T. S.* ſaid to the defendant, *I hope ſhe did not murder her child*; the defendant replied, *but ſhe did, and blood requires blood (innuendo*, ſhe had murdered her baſtard); upon Not guilty pleaded, the jury found the defendant guilty of ſpeaking theſe words, *blood requires blood, modo et forma*, as the plaintiff had declared; but as to the other words, Not guilty; and upon a writ of error brought it was inſiſted, that the jury having not found the words ſpoken by *T. S.* the words which they had found were inſenſible, without relating to the precedent words ſpoken by him; which, *per curiam*, is very true, and therefore the judgment was reverſed; but if thoſe words had been found, they are actionable. *T. Jones* 211.

Caſe, &c. for theſe words, *He is a clipper, (innuendo* the coin of the realm) *and his neck ſhall pay for it*; actionable; for tho' the word *clipper* is not actionable, yet the ſubſequent words ſhew that it muſt be a *clipper of money*, becauſe they are, that *his neck ſhall pay for it*, which is a common expreſſion for hanging. *T. Jones* 235.

Caſe for theſe words, *You are a raſcal, you have forgot ſince you lived in* Black Bull-Yard, *there you could procure broad money for gold, and clip it when you had done, and then the ſheers could go*; after a verdict for the plaintiff, it was inſiſted for the defendant in arreſt of judgment, that the words are not actionable; for they are not an imputation of any act done, but only of a power of doing it; but adjudged, that where the matter is confined to a *particular place*, as in this caſe, to the *Black Bull-Yard*, it muſt be intended that ſome act was done in that place, becauſe a power to do a thing is the ſame in all places, like the caſe of *Horne* v. *Powell, Trin.* 12 *W.* 3. *C. B.* where the words were, *You may well ſpend money at law, for you can coin money out of farthings and half-pence*, actionable; for the words import an act done, becauſe by a bare power to coin, he could not be ſupplied with money to ſpend at law. 2 *Salk.* 697.

Thou haſt killed my wife and art a traitor, when it appeared by the declaration that the wife was living, and for that cauſe not actionable. 4 *Rep.* 16.

He is a brabler and quarreller; *for he gave his champion a deed of his goods to kill me, and then to fly out of the country*; adjudged, that a purpoſe without an act done is not actionable. 4 *Rep.* 16.

Mr. Barham *did burn my barn (innuendo* a barn with corn) *with his own hands, and none but he*; not actionable; for 'tis not felony to burn a barn if 'tis not parcel of the dwelling-houſe, and the *innuendo* will not help, where the words are not ſcandalous. 4 *Rep.* 20.

Thou haſt ſtolen half an acre of corn, innuendo corn ſevered, not actionable; for the *innuendo* cannot alter the precedent words, and *half an acre of corn* can never be intended to be corn ſevered. *Owen* 57.

Thou haſt ſtolen a mare, or conſentedſt to the ſtealing her, not actionable; for the words are in the *disjunctive*; and a man may conſent when he doth not contradict it. *Cro. Eliz.* 780.

He hath poiſoned W. R. *(innuendo quendam* W. R. *adtunc defunct')*, and did not aver that he was dead at the time of the ſpeaking the words; adjudged, for that reaſon the action doth not lie. 2 *Cro.* 343.

Thou mayeſt well be richer than I, for thou haſt coined 30*l. in one day, and thou art a coiner of money*; not actionable, for he might coin by authority in the mint; here the words were taken in the mildeſt ſenſe. *Godb.* 167.

Thou art as errant a thief as any in England, *for thou haſt broken up* R. B's *cheſt and taken away* 40*l.* not actionable, for the firſt words are not ſo without an *averment*, that there is a thief in *England*, and they do not prove that any felony was done; and as for breaking open the cheſt, it might be upon pretence of title. 2 *Cro.* 687.

The plaintiff declared, that whereas ſeveral malefactors unknown had *feloniouſly* ſhorn the ſheep of *R. B.* and there being a *colloquium* between the defendant and another concerning the ſhearing the ſaid ſheep, but did not ſay *feloniouſly*, the defendant ſaid it was the plaintiff and *M.* who did ſhear them, *innuendo felonice*; adjudged, that the *colloquium* being laid only of the ſhearing, and not concerning the felony, and the defendant having not ſaid, that the plaintiff did ſhear the ſheep *feloniouſly*, but only that he did ſhear them, generally, the ſcandal muſt grow out of an *innuendo*, and ſo the words not actionable. 3 *Bulſt.* 85.

You might have known your own ſheep, and not have ſtolen mine; the court divided in opinion, two judges, that the words were not actionable, being no direct charge, but only by implication; two other judges, that they were actionable; for it is a ſtrong implication, and neceſſary conſequence of a charge, that the plaintiff had ſtolen the ſheep. *Yelv.* 144.

Caſe, &c. for theſe words, *(viz.) Bear witneſs miſtreſs, that he hath ſtolen my haircloth*; not actionable, for it is not a direct affirmation to charge the plaintiff with a theft, but reſts only upon teſtimony and proof. *Yelv.* 126.

The words were as follow, *(viz.)* it would be proved by many vehement preſumptions, that *W. R.* the plaintiff, was an inventor and plotter of the death of *M. M.* becauſe he would not ſell him his land; adjudged not actionable, becauſe he doth not *affirm* any thing of the plaintiff, but refers all to *preſumptions*, which are *uncertain*, and ſlanderous words muſt be in the *affirmative*. *Yelv.* 153.

Caſe, &c. for theſe words, *he is in* Warwick *goal for ſtealing a mare*, not actionable, becauſe no *poſitive affirmation*, that he did ſteal the mare. *Hob.* 177.

Caſe, &c. for theſe words, thou haſt ſtolen me *(innuendo* the defendant) *a hundred of ſlate*; after a verdict for the plaintiff it was inſiſted for him, that this is the uſual phraſe of the country, *thou haſt ſtolen me* (i. e.) *thou haſt ſtolen from me*; *ſed per Coke* C. J. then the plaintiff ſhould have averred, that this was the uſual phraſe, &c. which he had not done, therefore it being *inſenſible*, the action will not lie. 1 *Roll. Rep.* 286.

Caſe, for theſe words, Margaret Whitacre *is a thief and ſtole my wood, and I will put her in* Bridewell; two judges only in court, and they were divided upon a motion in arreſt of judgment after a verdict for the plaintiff; for one held the words not actionable; it is true, the firſt part of the words are actionable, but they are qualified by the words which follow, *viz. and I will have her put in* Bridewell, becauſe by the ſtatute 43 *Eliz. c.* 7. Perſons who ſteal wood growing are to be whipped, and *Bridewell* is known to be the proper place for whipping; ſo that this is an accuſation for an offence which is *not* felony, but only puniſhable by *whipping*: But *Rolls* held the words actionable, *viz. ſhe is a thief*, and the words which follow being joined with the copulative *and* make them accumulative; it might have been otherwiſe if they had been, *for ſhe ſtole my wood*, becauſe then they would have been explanatory. *Allen* 10.

Caſe, &c. for theſe words, *thy huſband was the death of* John Parrott, *and had it not been for thee and thy huſband, he had been alive unto this day*: After a verdict for the plaintiff, adjudged not actionable, for he might be the occaſion, but not the cauſe of his death. 2 *Sid.* 71.

Caſe,

Caſe, &c. for that the defendant carrying one *Woodford* to goal for felony, when he came thither, ſaid of the plaintiff *maliciouſly and falſly, that he met one on the road*, who told him; *What are you carrying* Woodford *to goal, I ſhall follow you ſhortly, and bring with me* Heneage Crawford *for ſtealing a mare*, for which words *Crawford* brought this action; and after a verdict it was held, that the words were actionable, though *no direct affirmation* that *Crawford* did ſteal the mare; but in the principal caſe judgment was given againſt the plaintiff, becauſe he did not aver in his declaration, that the defendant did not meet any body on the road who told him thoſe words; for that had been traverſable. 1 *Lev.* 82.

2. *Where action lies for words which import the charge of other crimes; and where not.*

The defendant being a *juſtice of peace*, directed his warrant to the conſtables, in which it was alledged, that the plaintiff was accuſed before him, *for ſtealing a horſe*, whereas he was never accuſed, nor ſtole any horſe; actionable, if the party was apprehended on the warrant. 1 *Leon.* 187.

Thou haſt cozened Mr. Windſor *of his fee, and I will ſue thee for it in the ſtar-chamber*; actionable. 1 *Leon.* 187.

The defendant *Ford* wrote a letter, in which were theſe words, *it is reported that the lord* Lumley *ſeeketh my life*, and the truth was, it was not ſo reported; actionable. 1 *Leon.* 187.

Thou didſt keep and ſell by falſe weights, and in beſtowing 24s. *thy weights were falſe two ounces, and thy man will be a witneſs againſt thee*; actionable. *Brownl.* 5.

The defendant ſaid, that the plaintiff *maintained, victualled, and let go pirates*, contrary to the law, &c. actionable; for though *piracy* is triable by the *Civil law*, yet by the ſtatute 35 *H.* 8. our law takes notice of it. *Cro. Eliz. Morgan* v. *Kitt.*

If you had your deſerts you had been hanged before now; actionable, for it ſhall be intended he committed an offence for which death was to be the puniſhment. *Cro. Eliz.* 62.

The defendant ſaid, that the plaintiff was a perjured perſon, and that he was forſworn in the court of Requeſts, and that he ſhall be ſet upon the pillory; actionable. *Cro. Eliz.* 135.

Thou haſt taken a falſe oath in the conſiſtory court of Exeter; now, tho' perjury in the Spiritual court is not within the ſtatute 5 *Eliz.* of perjury, yet the words were adjudged actionable. *Cro. Eliz.* 185.

He is a ſuborner of perjury; actionable, becauſe one cannot be *ſuborner* of perjury, but it muſt be neceſſarily intended, that he did ſuborn ſome perſon to forſwear himſelf. *Cro. Eliz.* 308.

One told me, he heard ſay, that Mrs. Meggs *had poiſoned her huſband, ubi revera nullus dixit, &c.* actionable; for it may occaſion her being indicted for petty treaſon. *Cro. Eliz.* 400.

Thou art a perjured knave, for thou didſt ſwear this day at the leet, that I baked bread in my houſe, when I did not; actionable, for tho' perjury cannot be in a *leet*, of which the law takes notice, ſo as to puniſh it by the ſtatute or otherwiſe, yet 'tis a diſcredit. *Cro. Eliz.* 709.

Thou art a healer of felons; actionable; for it ſhall be intended a concealer of felons. *Hob. More*'s caſe.

The Devil appears to thee every evening in the likeneſs of a black man riding upon a black horſe, and thou conferreſt with him, and whatſoever thou doſt aſk, he doth give it thee, and this is the reaſon thou haſt ſo much money, and this I will juſtify; actionable. *Hob.* 129.

He hath caught the French pox, and hath carried it home to his wife; actionable. *Hob.* 219.

The plaintiff being heir to his father, and to his younger brother, the defendant ſpoke theſe words, *thou art a baſtard*, by reaſon whereof they gave away their lands; actionable. *Godb.* 415.

He is not worthy to bear office in ſuch a place, for he keeps a bawdy-houſe in London; actionable. 1 *Bulſt.* 138.

The defendant being arreſted by a warrant upon a *latitat*, ſaid, that it was *a counterfeit warrant made by Mr. Stone*; actionable. 2 *Cro.* 648.

Thou art a leprous knave, actionable; for 'tis as much as to ſay, thou wert laid of the pox. 2 *Cro.* 144.

Caſe, &c. for theſe words, *George Lucas is a falſe knave, and worthy to ſtand in the pillory*; the defendant juſtified, for that the plaintiff took a falſe oath in the *mayor's court*, &c. and this juſtification was held good. *Moor.* 79.

Thou haſt forged a privy ſeal and commiſſion: it was objected, that he did not ſay *what privy ſeal* he meant; but it being alledged that the words were ſpoken to ſcandalize him, it ſhall be intended the King's privy ſeal. 1 *Cro.* 257, 326.

Thou waſt forſworn in a court of record, and that I will prove: Judgment was given in the Common pleas, that the action would not lie; becauſe he did not ſhew in what court of record he was forſworn; but upon *error* brought, that judgment was reverſed in *B. R.* and adjudged, that the action did lie; for it ſhall be intended the defendant ſpoke the words maliciouſly, accuſing him of perjury, in taking a falſe oath upon judicial proceedings in a court of record. *Cro. Car.* 366.

Thou art a whore and a two-penny whore; this was held to be a good cauſe of action in *London* by the *cuſtom*; for they puniſh ſuch perſons there, by *carting* them. *Cro. Car.* 350.

The plaintiff declared, that he was retained by *T. S.* as a ſervant in huſbandry, and behaved himſelf honeſtly, &c. and that the defendant to ſlander him, and to bring him in diſcredit with his maſter, ſaid, *that he* (the plaintiff) *was a cozening knave and had cozened his maſter:* after a verdict for the plaintiff, it was moved in arreſt of judgment, that the action would not lie for theſe words; *ſed per curiam*, the plaintiff had judgment. *W. Jones* 395.

Words ſpoken of an innkeeper, *Colonel Egerton had the French pox, and hath ſet it in the houſe, and Smith and his wife have it*; objected, that the word *ſet* made it inſenſible; but adjudged actionable, and well brought by the *huſband alone*. *Style* 112.

Thou wenteſt to the wells to be cured of the pox, actionable. *Style* 219.

Thou art a baſtard getting rogue, and hadſt a baſtard at Oxford, and art a pocky rogue, &c. actionable. *Style* 283.

He (meaning the plaintiff) *got Mary Nabb with child, and the child is his, and I have tried it with ſieve and ſhears:* objected, that the laſt words were *inſenſible*; but adjudged the firſt words were actionable. *Style* 379.

Caſe, &c. for theſe words, *Thou haſt forged a deed to cheat W. R. of his lands*; actionable, but 'tis not to ſay that he forged a *writing* or a *warrant*, becauſe thoſe are words of uncertain ſignification. *Sid.* 16.

Caſe, &c. for theſe words, *Thou art a buggering rogue, and I could hang thee:* After a verdict for the plaintiff, it was moved in arreſt of judgment; and adjudged, that the words were actionable; ſo 'tis to ſay, *Thou art a thieving rogue*; for thoſe words import an act done, but *thieviſh rogue*, imply only an inclination to ſteal. *Sid.* 373.

Men cannot have their cattle go upon the common, but Barber and his children will kill them with Barber's dogs; adjudged, upon error brought, not actionable. *Dyer* 118.

The plaintiff brought an action in *London*, for calling his wife a *whore*; 'tis actionable only there by cuſtom; but cuſtom to maintain actions for babling words is againſt law. 4 *Rep.* 18.

Sir Chriſtopher Hilliard is a blood ſucker, and ſucketh blood; but if a man will give him a bribe, as a ſheep or a couple of capons, he will take it; not actionable, for it cannot be intended what blood he ſucked. *Cro. Eliz.* 306.

For words ſpoken part in *Latin*, (viz.) *Inimicus meus is an extortioner*, not actionable. *Cro. Eliz.* 496.

Caſe againſt the defendant for ſpeaking theſe words, (viz.) the plaintiff *hath ſaid maſs many times to W. R.* upon demurrer to the declaration, it was adjudged ill, becauſe he did not ſet forth, *where* the maſſes were ſaid, nor the *day when*; for it might be in *France*, or in ſome other place out of *England*, and the ſtatute appoints no penalty, unleſs the indictment be within a year and a day. *Godb.* 106.

Caſe,

Caſe, &c. *He is a cuckold, and a wittal, which is worſe than a cuckold, and B. B. hath lain with his wife*; not actionable. 2 *Cro.* 78.

Thou haſt forged writings, for which thou ſhouldſt loſe thy ears; the court divided, two judges of opinion, that tho' the firſt words are not actionable, yet the ſubſequent words make them ſo, and they ſhall be conſtrued by theſe words. *Two judges contra:* the words are *uncertain* what manner of writings they were, and they may be frivolous writings, and then he is in no danger of his ears. 3 *Bulſt.* 265.

Caſe, for calling the plaintiff *Idonor*, in the Welſh language, with an averment, that it was ſpoken before thoſe who underſtood Welſh, and that it ſignified *perjured*; actionable. *Hob.* 191.

Caſe, for calling the plaintiff *adulterer*; not actionable, becauſe 'tis an offence not puniſhable at Common law, but only in the Spiritual court; but to call a man *knave* or *villain*, an action will lie. *Moor* 29.

Caſe, &c. for calling the plaintiff *briber and common extortioner*; not actionable, unleſs the plaintiff aver that he is an officer. *Moor* 182.

Caſe, &c. for theſe words, *Hang him, he is full of the pox, I marvel you will eat and drink with him, innuendo* the plaintiff; not actionable, for it may be intended the ſmall pox; beſides, the words were not ſpoken with an intent to defame the plaintiff, but by way of advice to a friend. *Moor* 573.

Cozening knave, not actionable. *Hutt.* 13.

Falſe knave, not actionable. *Hutt.* 14.

Caſe for theſe words, *You are a rogue, a baſe rogue, a cozening rogue, a coney-catching rogue, a cut-purſe rogue*; adjudged not actionable. *Palm.* 10.

Caſe for theſe words, *Thou haſt the French pox:* upon Not guilty pleaded, the jury found, that he ſpoke theſe words, (viz.) *Thou haſt had the French pox*; adjudged a material variance, and that the declaration was not maintained by this verdict. *Allen* 30.

Caſe, &c. for theſe words, *Thou art a knave, and a cheating knave*; after a verdict for the plaintiff, it was held in arreſt of judgment, that theſe words are not actionable, upon the general inducement, that the plaintiff is *verus et fidelis ſubditus*, without ſhewing that he is of ſome *trade*, and ſo had ſome ſpecial damage. *Sid.* 48.

Caſe, &c. for theſe words, *Thou art a forſworn fellow, and we will prove thee ſo*; not actionable, becauſe in the *future tenſe*. *Sid.* 48.

Caſe, &c. by the plaintiff, who is a carrier, for theſe words, *Thou haſt forged falſe letters, and haſt given me a falſe and forged acquittance:* After a verdict for the plaintiff, adjudged in arreſt of judgment, not actionable. *Sid.* 155.

Caſe, &c. *You are a forger of bonds, a publiſher of forgery, and ſue upon forged bonds:* Upon not guilty pleaded, the jury found the defendant Not guilty, as to the firſt words, and adjudged, that the laſt words were not actionable, it not being laid, that he *knew* of the forgery. 1 *Vent.* 3.

3. *Where action lies for words ſpoken of magiſtrates; and where not.*

The plaintiff being a *juſtice of peace*, the defendant ſaid, *Mr. Stukely covereth and hideth felonies, and is not worthy to be a juſtice of peace*; actionable, for tho' his office is not named, the words neceſſarily refer to it. 4 *Rep.* 16.

The plaintiff being a *juſtice of peace*, and high ſheriff, the defendant ſaid, *'tis well known I am a true ſubject*; *but thou (innuendo* the plaintiff's ſervant) *ſerveſt no true ſubject, and thy own conſcience may accuſe thee thereof*; actionable. 1 *Leon.* 335.

The plaintiff was a *land-meaſurer*, and the defendant having ſome diſcourſe about meaſuring lands, ſaid, *Thou art a cozening and ſhifting knave, and a cheating knave*; adjudged, that a ſurveyor of land, being an office of ſkill, the words are actionable. *Godb.* 287.

The defendant ſpoke of a *juſtice of peace*, viz. *I am in danger of my life, my blood is ſought, and I was like to have been murdered; I was at Sir John Harper's houſe, and his ſon John Harper drew me forth to ſee a gelding in the ſtable, and then Tho. Beaumont (Sir Henry Beaumont's ſon) did throw his dagger at me twice, and thruſt me thro' the breeches twice with his rapier, to have killed me; all this was done by the inſtigation of Sir John Harper, and I can prove it*; actionable. 2 *Cro.* 56.

Words ſpoke of a *commiſſioner* to examine witneſſes in Chancery, viz. *Sir George Moor is a corrupt man, and hath taken bribes of King for executing that commiſſion; King hath ſet Sir George Moor on horſeback, with his bribes to pervert juſtice and equity:* It was objected, that the plaintiff was only a *voluntary commiſſioner*, by the aſſent of the parties, and an arbitrator, and not a judge; but adjudged, that tho' not ſworn, yet having the King's commiſſion to execute, 'tis a truſt, and the breach of it is puniſhable. 2 *Cro.* 65.

The defendant ſpoke of a *juſtice of peace*, *Mr. Kemp is a baſket juſtice, a partial juſtice, I will give* 5*l. every year for his gifts in juſtice matters*; not actionable, for one may take a preſent in victuals, without any offence. 2 *Cro.* 90.

The defendant ſpoke of a *juſtice of peace*, *You are a ſweet juſtice, you ſent your warrant for R. B. to be brought before you for ſuſpicion of felony, and afterwards ſent to R. B. to him to give him warning thereof, that he might abſent himſelf*; actionable. 2 *Cro.* 413.

The defendant ſpoke of a *juſtice of peace*, *He (innuendo* the plaintiff) *for malice and ſpleen, did many times wreſt the law, and pervert juſtice to ſerve his own turn*: It was objected, that the words might be ſpoken before the plaintiff was a juſtice; but adjudged, they ſhall be taken in the *worſt ſenſe*. 2 *Cro.* 240.

Caſe, &c. againſt the biſhop of *Litchfield* and *Coventry*, for writing a letter to the Earl of *Leiceſter*, that the plaintiff who was a *juſtice of peace, was a vermin in the commonwealth, a falſe and corrupt man, an hypocrite in the church of God, a diſſembler; he hath uſed many corrupt practices to work his will, he procured my regiſter to be indicted for extortion; he willingly and wittingly hath boulſtered out one Greenwood, a lewd man, convicted of many offences, and knowing him to be an evil man, maintaineth him againſt me, without law, conſcience, or honeſty:* Upon not guilty pleaded, the plaintiff had a verdict and 300*l.* damages; and it was moved in arreſt of judgment, that theſe words, *written in a letter* are not actionable, but that there muſt be ſome overt-act to make them a ſcandal; but adjudged, that if the *letter* had been written to the plaintiff, it might be ſo, but being written to another, 'tis actionable. *Moor* 141

Caſe for theſe words ſpoken of a *juſtice of peace*, *My brother hath ſtole a black mare, and you* (the plaintiff) *were privy to it*, &c. now, tho' privity doth not make a man acceſſary to the felony, yet the words being ſpoken of a juſtice of peace, are actionable. *Moor* 401.

Caſe, &c. for theſe words, ſpoken of a *juſtice of peace*, viz. *He hath received money of a thief, (that was apprehended and brought before him for ſtealing of ſheep) to let him eſcape, and to keep him from the goal:* Upon Not guilty pleaded, the plaintiff had a verdict and 40*l.* damages, and upon a writ of *error* in the *Exchequer chamber*, the judgment was affirmed. *Moor* 695.

Caſe for theſe words ſpoken of a juſtice of peace, *one* W. W. *being taken as acceſſary to the ſtealing his own goods, Mr.* Stafford *knowing thereof, diſcharged him by an agreement of* 3*l. to which Mr.* Stafford *was party, whereof* 30*s was paid to him, and the reſt was paid to his man by appointment*; upon Not guilty pleaded, the plaintiff had a verdict and judgment, which was affirmed in the *Exchequer-Chamber*. *Moor* 704.

Caſe for theſe words ſpoken to a juryman, *Thou art a juryman, and haſt been the overthrow of a hundred men by thy ſubtile and falſe means*; actionable, with an averment that he had been a juryman in juries upon life and death. *Moor* 876.

Of a juſtice of peace, (viz.) *he had two ſervants preſented five or ſix years ſince for ſtealing ſheep, and he deſired me not to proſecute them*; actionable, with an averment that he was a *juſtice of peace* for the county where the words were ſpoken. *Latch.* 40.

Caſe, &c. in which the plaintiff declared, that he was a *juſtice of the peace* and *deputy lieutenant of* Suſſex, *&c.* and had been often employed in commiſſions, and that a commiſſion out of Chancery was directed to him and others, to examine witneſſes in a cauſe then depending between the now defendant *Large* and *T. S.* and that he took the depoſitions of witneſſes, *&c.* and that the defendant ſaid *Sir* William Parker *hath put out depoſitions that were taken, and hath inſerted others which were not taken*; adjudged actionable. *Palm.* 67.

Caſe, *&c.* in which the plaintiff declared, that there was a diſcourſe between the defendant and one *Horewood* of him (the plaintiff) who was *receiver of the court of Wards*, and that the defendant ſpoke theſe words of the plaintiff, *(viz.) Mr.* Deceiver *hath deceived the King, and dealt falſly with him, and I have him in queſtion, and I doubt not but to prove it*; after verdict for the plaintiff, and 400 marks damages, it was objected, that here was not a ſufficient deſcription of the perſon; beſides, he is not charged with any miſbehaviour in his office; but adjudged actionable, for the words *deceiver* cannot be intended of any other deceit than in his office. *Palm.* 69.

The plaintiff being a *juſtice of peace*, the defendant ſpoke theſe words, *Mr.* Hamond *did put in of his own head theſe words taken in examination by him*, (viz.) R. B. *did ſteal twenty ſheep of ſuch a man's*, and *Mr.* Hamond *is a debauched man, and not fit for a juſtice*; the firſt words are actionable, but the laſt the court took time to conſider. *Style* 22, 210.

The defendant ſpoke of an officer, *(viz.) You have cozened the ſtate of* 20000*l.* *and I will prove it, for you have received* 25000*l.* *of the office, and not compounded for it, and have foiſted in words in the order of your commiſſion*; actionable. *Style* 436.

Caſe, &c. for theſe words ſpoken of a *juſtice of peace and deputy lieutenant of the county of* Warwick, *(viz.) I have heard that a maid of Sir* John Knightly's *ſhould report, that he being ſick, and ſhe looking thro' a hole of the door where he then lay, ſaw a prieſt (innuendo* a popiſh prieſt) *give the euchariſt and extreme unction to Sir* John Knightly; and that the defendant, of his farther malice, *&c.* at another day ſaid, *I have heard that a maid ſervant, who then lived with Sir* John Knightly, *peeped thro' a cranny of a door where Sir* John *lay ſick, and ſaw a popiſh prieſt anoint him*, (extreme unction *innuendo) and give him the ſacrament of the euchariſt*; after a verdict for the plaintiff, and 1000*l.* damages, it was objected, that theſe words did not amount to calling him *papiſt*, for by the firſt words it doth not appear of what religion the *prieſt* was, unleſs by an *innuendo*, and in the latter words the *extreme unction* is brought in by an *innuendo*, which is not ſufficient; but adjudged, that one part of the words explain the ſcandal of the other, for a *prieſt who gave the euchariſt and extreme unction* muſt be a *popiſh prieſt*, and he to whom 'tis given, muſt be a *papiſt*, and the word *anoint* cannot be intended of any thing elſe but *extreme unction*, which is never done, nor the eucharift given but to thoſe who are papiſts. 3 *Lev.* 68.

Caſe, &c. in which the plaintiff declared, that he was a true profeſſor of the *proteſtant religion*, &c. and had been a member of the long parliament, of both which, the defendant diſcourſing, ſaid to *T. W.* the plaintiff's ſervant, *Your maſter is a papiſt, when he is at home he goes to church, and when at* London *he goes to maſs*, &c. upon Not guilty pleaded, the plaintiff had a verdict; it was moved in arreſt of judgment, that the words are not actionable; for to call a man *papiſt* is not actionable, unleſs ſpoken of a biſhop. 1 *Leon.* 336. and *Cro. Car.* 192. *Savage* ver. *Cook*; 'tis true, if ſpoken of a man in ſome eminent office, 'tis otherwiſe, and that was Sir *John Knightly*'s caſe, who was a juſtice of peace and deputy lieutenant; ſo in *Peak* and *Tucker*'s caſe, where the plaintiff was a merchant, and the defendant ſaid of him, *He is a rogue, a papiſt dog, never a rogue in town would have a bone-fire but he*; this was on the day when King *James* came to the crown; adjudged in the principal caſe, that the words were actionable, becauſe he who *goes to maſs* forfeits 100*l.* by the ſtatute 23 *Eliz. cap.* 4. and is to be impriſoned for a year, therefore to ſay the plaintiff *goes to maſs* is actionable, for it expoſes him to corporal puniſhment. See *Allen's Rep.* 11.

Caſe, &c. for theſe words ſpoken of a juſtice of peace, *He is a forſworn juſtice, and not fit to be a juſtice of peace*; after a verdict for the plaintiff it was inſiſted, that the words were not actionable, becauſe *forſworn* doth not intend *judicial perjury*, and there was no diſcourſe of his office; but adjudged actionable, becauſe the words *forſworn juſtice* ſhew that the defendant intended perjury relating to his office; for *ſermo refert ad conditionem perſonæ.* 1 *Vent.* 50.

Slander, &c. brought by a *doctor of Civil law*, who was alſo a *juſtice of peace* and *chancellor of the biſhoprick of* Norwich, for theſe words, *He is not fit to be a chancellor or a juſtice of peace, he is a knave, a raſcal, and a villain, he is not fit to practiſe, he ought to have his gown pulled over his ears*; actionable, the plaintiff had a verdict, and 40*l.* damages. 2 *Lutw.* 1288.

Slander, &c. In which the plaintiff ſet forth, that he was formerly choſen *knight of the ſhire for the county of* Glouceſter, and intending to ſtand *candidate* at the next election, there being a writ iſſued out to chooſe two knights, *&c.* the defendant, before the election, ſaid, Jack How *is an enemy to the King and kingdom, and in the* French *intereſt*; actionable; the plaintiff had a verdict and great damages, and upon a writ of error in parliament, the judgment was affirmed. 2 *Lutw.* 1293.

Caſe, &c. in which the plaintiff declared, that he was a *deputy lieutenant for the county of* Middleſex, *and a privy counſellor in* Ireland, and that he ſtood choſen burgeſs for parliament at *Chriſt Church*, &c. and that the defendant ſpoke theſe words of him, *(viz.) He is a papiſt*; upon Not guilty pleaded, the plaintiff had a verdict and judgment, and afterwards *a writ of error* was brought, and the judgment affirmed, becauſe by the ſtatutes 23 *Eliz.* and the 3 *Jac.* and 25 *Car.* 2. papiſts are expoſed to ſeveral penalties and incapacities; *à fortiori*, as the words ſpoken do relate to a perſon thus qualified; 'tis true, the word *papiſt* was not actionable formerly, but times alter the ſenſe of words, and this word is now a word of reproach; ſo the word *knave* formerly ſignified *ſervant*, but now 'tis actionable to call an *attorney knave*; and to ſhew that the law doth alter with the times, there is no precedent before 21 *Ed.* 3. 23. *of an infant bringing an appeal*; but ſince that time, and now, 'tis very frequent. *Raym.* 482.

Caſe, &c. for theſe words ſpoken of a *juſtice of peace, He makes uſe of the King's commiſſion to worry me out of my eſtate*, and afterwards the words were laid in *Latin* (without an *Anglicè ad tenorem & effectum ſequen'*); after a verdict for the plaintiff, and intire damages, the judgment was ſtayed; for tho' *per curiam*, the words are actionable, yet being laid *ad tenorem & effectum ſequen'*, ſomething may be omitted which may alter the ſenſe, and 'tis not an expreſs allegation, that the defendant did ſpeak the words. 3 *Mod.* 71.

Caſe, &c. for theſe words ſpoken of a *juſtice of peace*, ſet forth, that there was a rebellion in the *Weſt* by the *Duke of Monmouth*, that ſearch was made for the defendant, being ſuſpected to be in that rebellion; thereupon the defendant ſaid, John Prowſe *is* a *knave, and a buſy knave for ſearching after me, and other honeſt men of my ſort, and I will make him give me ſatisfaction for plundering me*; after a verdict for the plaintiff it was objected, that here was no *colloquium* laid of his office, or that the words were ſpoken relating to his office, therefore an action would not lie, tho' an information might; the court was divided. 3 *Mod.* 163.

The plaintiff being a *juſtice of peace*, the defendant ſaid, *Sir* William Berton's *men have ſtolen ſheep, and he ſpoke to me that I ſhould not proſecute them*; not actionable, becauſe not averred, that *Sir* William *is a juſtice of peace. Poph.* 180.

Of a *juſtice of peace, Thou haſt forged a recognizance taken of one* Fiſher, *and others*; actionable, for the word *(forged)* ſhall be intended *(counterfeited)*, and the word *(taken)* ſhall be intended *(acknowledged.) Cro. Eliz.* 865.

The plaintiff was *bailiff* to *R. B.* for three years, and had the ſelling of all his corn; and the defendant ſaid,

Thou

Thou art a cozening knave, and thou haſt cozened me in ſelling falſe meaſure in my barley, and the country is bound to curſe thee for ſelling with falſe meaſure, and I will prove it, and thou haſt changed my barley which I bought of thee; not actionable, becauſe it doth appear that the words were ſpoken of the ſale of *corn whilſt he was bailiff*. *Hob.* 6.

The plaintiff being a *knight*, and one of the gentlemen of the King's privy chamber, the defendant ſaid, *Sir* William Bronker *is a cozening knave and lives by cozenage*; not actionable. 2 *Cro.* 427.

Caſe, &c. for theſe words ſpoken of a *juſtice of peace*, upon a *colloquium* between the defendant and another, concerning the patronage to the church of *C.* that he was right patron thereof, whereupon the defendant ſaid, *That* Jaſborough (the plaintiff) *was the true patron, but that he had loſt the patronage by being a* ſchiſmatick and recuſant, *both which he would prove on him*; not actionable, without alledging temporal damages. 2 *Roll. Rep.* 43.

Of an *attorney* and *town clerk of* Southampton, who kept the court-roll, *Thou haſt made many falſe certificates to the mayor and burgeſſes, and the more thou ſtirreſt in it the more it will ſtink*; not actionable, becauſe the plaintiff did not alledge that there was a *colloquium* of his office, nor that the making certificates did belong to his office, or that he knew them to be falſe. *Hutt.* 123.

Caſe, &c. for theſe words, *The mayor of* Tiverton *hath cozened the town and country*; adjudged, that the words are not actionable. *W. Jones* 308.

Caſe, &c. for words ſpoken of a juſtice of peace to his ſervant, *viz. Your maſter's witneſſes* (in ſuch a cauſe) *were perjured, and your maſter is the maintainer and upholder of them*; after a verdict for the plaintiff it was objected that the words were not actionable, for they did not relate to the plaintiff's office; beſides, 'tis not ſaid that he *upheld their perjury*, but that he upheld and maintained *their perſons*; but the chief baron *Hale* held the words actionable; for if true, they were a ſcandal to his office, and the word *upholding* can have no other meaning than *abetting* them in their perjury. *Hard.* 501.

Caſe, &c. for theſe words, *You would be a juſtice of peace, like Major* Bell, *(innuendo* the plaintiff) *a fool, an aſs, a coxcomb, a buffleheaded juſtice*; not actionable, adjudged in arreſt of judgment, unleſs the plaintiff had a particular loſs. *Sid.* 67.

4. *Where action lies for words ſpoken of men of profeſſions; and where not.*

The defendant ſpoke of a *clerk of the King's Bench, you are known to be a corrupt man, and to deal corruptly*; actionable, for the words imply, that he dealt corruptly in his profeſſion. 4 *Rep. Birchley*'s caſe.

The defendant ſpoke of a *ſteward of a court and a barriſter, I marvel you will have ſuch a paultry lawyer for your ſteward, for he hath as much law as a jackanapes*, by reaſon whereof he loſt his ſtewardſhip; actionable. *Owen* 13.

Is Martin *your attorney? he is the fooliſheſt and ſimpleſt attorney towards the law, and if he do not overthrow your cauſe I will give you my ears; he is a fool and an aſs, and ſo I will prove him*; actionable. *Goldſ.* 128.

Of an attorney, *He will overthrow his client's cauſe*; actionable. *Cro. Eliz.* 594.

Caſe for words ſpoken of an *attorney*, John Jenkinſon (the plaintiff) *deſerveth to have his ears nailed to the pillory*; actionable. *Moor.* 401.

Caſe for theſe words ſpoken of a *barriſter* at law and reader, *(viz.)* one told the defendant, that the plaintiff *Hele* affirmed upon his credit, that the fee ſimple of ſuch lands was in the grantees of the King; whereupon *Giddy* the defendant replied, *No, friends*, Hele's *warrants we know well, a great number in this country truſting to his warrants have been undone*; upon Not guilty pleaded, the plaintiff had a verdict and 100*l.* damages; and upon a writ of *error* brought in the *Exchequer-Chamber*, the judgment was affirmed, for the words are actionable. *Moor.* 695.

Brown *is a good attorney, but he will play on both ſides*; actionable, but no judgment entered, becauſe the plaintiff did not aver the words were ſpoken of himſelf. *Brownl.* 5.

The defendant ſpoke of an *attorney, Thou art a common maintainer of ſuits and champertor, and I will have thee thrown over the bar*; actionable, by reaſon of the word *champertor*. *Hob.* 117.

Of a *barriſter*, viz. *A fool, an aſs, an hangman, a counſellor at law, a fool in the profeſſion*; actionable. *Poph.* 207.

Of an *attorney, Thou art a paultry fellow, thy credit is fallen, for thou dealeſt on both ſides, and doſt deceive many who truſt thee*; actionable, tho' an attorney may lawfully *deal on both ſides* as an arbitrator, yet by taking all the words together, it ſhall be intended they were ſpoken in the *worſt ſenſe*. *Yelv.* 32.

The defendant ſpoke theſe words of an *attorney* to his client, *Your attorney is a bribing knave, and hath taken* 20*l. of you for a bribe to cozen me*; adjudged actionable. *Moor* 855.

Caſe for theſe words ſpoken of an *attorney, Thou art a common maintainer of ſuits, and champertor, I will have thee thrown over the bar next term*; actionable. *Moor* 867.

Caſe, in which the plaintiff declared, that he was *ſteward* of a court, *&c.* and alſo a *town-clerk of* Plymouth, and that the defendant ſpoke theſe words of him, *(viz.) He is a preciſian, puritan, diſſembling, bribing, and a corrupted knave*; upon Not guilty pleaded, the plaintiff had a verdict; it was objected in arreſt of judgment, that the words are not actionable, becauſe there was not a *colloquium* laid of the plaintiff, or of his offices of ſteward and town-clerk; but the plaintiff had judgment. 2 *Roll. Rep.* 23.

The defendant diſcourſing of *Stone the lawyer*, ſaid, *This is a counterfeit made by* Stone; it was a warrant to the ſheriff to arreſt another; actionable. 2 *Roll. Rep.* 266.

The defendant ſpoke of an *attorney, He is a common barretor, a judas, and a promoter*; and at another time, *He is a common barretor, a cheater, and I will make him be barred of his practice*; the words muſt be taken according to the quality and condition of the plaintiff; adjudged actionable. *Cro. Car.* 139.

Words ſpoken of an *attorney, He is a cozener, and cozens his clients in the Sheriffs court of* London; the judgment affirmed in *error*. *Cro. Car.* 190.

Of an *attorney, I marvel you will employ ſuch a knave as* Nicholls, *you will have but diſgrace and diſcredit in employing him, he is proclaimed knave in a market*; the judgment for the plaintiff affirmed in *error*. *Cro. Car.* 331.

Of a *doctor of phyſick, Thou art a drunken fool, and an aſs, thou never wert a ſcholar, and art not worthy to ſpeak to a ſcholar, and that I will prove and juſtify*; actionable. *Cro. Car.* 196.

Of a *barriſter, He is a dunce, and will get little by the law, he was ever accounted but a dunce in the* Middle Temple; actionable. *Cro. Car.* 278.

Of an *attorney, He is a very baſe rogue, and a cheating knave, and hath maintained himſelf, his wife and children, by cheating*; the judgment for the plaintiff affirmed in error. *Cro. Car.* 570.

Of a *doctor in divinity, Doctor Sibthorp is robbing the church*; and at another time, *Doctor* Sibthorp *hath robbed the church*; actionable. *Cro. Car.* 301, 417.

Of a *barriſter, (viz.)* William Gibbs *hath done falſe by me, being his client, and hath joined with my adverſary*; the plaintiff averring, that he was a practitioner; actionable. *Style* 283.

Of an *attorney, He hath forged the will of* W. R. upon Not guilty pleaded, the plaintiff had a verdict; adjudged actionable. *Hutt.* 29.

The defendant *Harriſon*, who was a *bachelor in divinity*, came to the Common pleas where juſtice *Hutton* was ſitting, and ſaid, *I accuſe juſtice Hutton of high treaſon*; for which words an action was brought by the judge, and he had a verdict and 10,000l. damages. *Hutt.* 131.

Of

Of an *attorney*, viz. *He ſtirreth up men to ſuits, and promiſeth, that if he doth not recover for them he will have no fees, &c.* actionable; for the words tend to ſlander the plaintiff in his profeſſion, by ſtirring up ſuits unlawfully. *Style* 184.

Of an attorney, (there being a colloquium of him laid) the defendant ſpoke theſe words, *Go tell the lawyer, that he is a baſe raſcal, and that I will have him loſe his ears, and teach him or any lawyer of them all, how they dare ſerve a writ on me*; actionable, by reaſon of the words, *I will make him loſe his ears. Latch* 220.

Caſe, &c. in which the plaintiff declared, that he was an *attorney*, &c. and that the defendant ſaid to him, *You are a knave, you were attorney to my father, and for my mother againſt my huſband, and made him ſpend* 100*l. and ſuch knaves as you have made my huſband ſpend all his eſtate*; after a verdict for the plaintiff, it was objected in arreſt of judgment, that there was no *colloquium* laid of the plaintiff's profeſſion, ſo that the word *knave* could not be applied to his being an *attorney*; but the better opinion was, that the ſubſequent words ſhew, that the word *knave* was intended in his profeſſion, and therefore a *colloquium* of it was not neceſſary. *Allen* 13.

Caſe, &c. in which the plaintiff declared, that he was inſtituted and inducted into a parſonage in, *&c.* and that he executed the office of a paſtor in that church for the ſpace of four years, and that the defendant ſaid of him, *You are a drunkard, a whore-maſter, a common ſwearer, and a common lawyer, and you have preached falſe doctrine, and deſerve to be degraded*; after a verdict for the plaintiff, it was objected, that the words are not actionable, becauſe they import no civil or temporal damage to the plaintiff; but adjudged actionable, for, if true, he may be degraded, and ſo loſe his freehold. *Allen* 63.

Caſe, &c. for theſe words ſpoken of an attorney, *He hath no more law than Mr. C.'s bull:* After a verdict for the plaintiff, it was objected, that the words were not actionable in themſelves, and if they were, 'tis not averred, that Mr. *C.* had a bull; but adjudged actionable without that averment. *Sid.* 237.

Caſe, &c. in which the plaintiff declared, that he is an *attorney*, and that the defendant and *J. P.* had diſcourſe of the plaintiff and his profeſſion, and that he (the defendant) ſaid of the plaintiff, in the hearing of ſeveral people, *Thou canſt not read a declaration*, by reaſon whereof *J. P.* and *R. W.* who were formerly his clients, deſerted him; upon Not guilty pleaded, the plaintiff had a verdict and judgment. *Raym.* 196.

Information for writing a ſcandalous *letter* to *Hatton Rich*, who owed the defendant 300*l.* and he delaying the payment, and going into the King's bench, the defendant *Saunders* wrote this letter to him, that *if he had any honeſty, civility, ſobriety, or humanity, he would not deal ſo by him, and that he would one day be damned and in hell for cheating him*; then the information ſets forth, that he *publiſhed* this letter in the preſence of many people: Upon Not guilty pleaded, there was a verdict for the informant, and it was moved in arreſt of judgment, that the ſubſtance of this letter is not ſcandalous, but impertinent, and ſhewed only his ſenſe of the injury done him in not paying what was due to him; but adjudged, that the letter is ſcandalous, and tends to incenſe Mr. *Rich* to break the peace, and therefore an information lies, and *Saunders* was fined forty marks. *Raym.* 201.

Caſe, &c. for theſe words ſpoken of a *parſon*, who was about to be retained chaplain to the Duke of *Ormond*, viz. *He hath a baſtard on the other ſide of the river, and 'tis ſo certainly his, that I fear not to divulge it, and if I am troubled for it, I will juſtify it*, whereby he loſt his chaplainſhip: after a verdict for the plaintiff, it was objected, that the chaplainſhip was ſpiritual; but adjudged, that his preferment was temporal. 1 *Lev.* 248.

Caſe, &c. for that the plaintiff being bred up to the *law*, and practiſing it, the defendant did *falſo & malitioſe write a letter to* Anne *Counteſs of* Lincoln, who was his (the plaintiff's) client, *that the plaintiff would give vexatious and ill counſel, and ſtir up a ſuit, and that he* (the plaintiff) *would milk her purſe, and fill his own large pockets, per quod* he loſt the ſaid *Counteſs* and other clients: After a verdict for the plaintiff, and a motion in arreſt of judgment, *Vaughan* held theſe words were not actionable; that in ancient books no words were actionable, unleſs the ſlander concerned life; that the growth of theſe actions would ſpoil all converſe, for they extend to all profeſſions; that theſe words relate no more to the plaintiff's profeſſion than to ſay, that *he had a little head*; for every counſellor gives vexatious and ill advice, when he adviſes an action which proves unſucceſsful, becauſe the party is amerced *pro falſo clamore*, and to ſay, that all the words together make a ſlander, is to reaſon *à male diviſis ad bene cunjuncta*, which is never allowed; 'tis true, to ſay that he had the *uſe of a woman's body*, is actionable, it being an *idiom* of ſpeech that he *lay with her*; but to ſay he will *milk your purſe* ſignifies no more than *milking a bull*, if we take the words *enunciatively*; for this phraſe is not come to an *idiom*; but the other three judges held, that the words were actionable. 2 *Vent.* 28.

Caſe, &c. by an *attorney*, for theſe words, *he is a cheating knave, and not fit to be an attorney:* After a verdict for the plaintiff in was moved in arreſt of judgment, that the words did not relate to his practice, and that he had not laid any communication of his profeſſion; but adjudged actionable; for the ſaying *he was not fit to be an attorney*, ſhewed, that the preceding words, *cheating knave*, muſt neceſſarily refer to his profeſſion as an attorney. 2 *Vent.* 172.

Theſe words ſpoken of a phyſician, *He hath killed me with phyſick*; not actionable; but to ſay, that he *ſcienter & voluntarie* did adminiſter phyſick to one to kill him; actionable. *Cro. Eliz.* 620.

Theſe words ſpoken of a preaching parſon, *Parrat is an adulterer, and had two children by* B. G*'s wife, and I will cauſe him to be deprived for it*; not actionable; for 'tis a *ſpiritual defamation*, and puniſhable in that court. *Cro. Eliz.* 502.

Caſe, &c. for theſe words ſpoken of a *lawyer:* the plaintiff being of counſel for the defendant, he, the ſaid defendant, ſpoke theſe words, that the plaintiff *had delivered copies of his evidence to his adverſary*; not actionable; becauſe he might deliver them to a good intent, as well as a bad one. *Moor* 409.

Of a barriſter, (viz.) *You are a paltry lawyer, and uſe to play on both hands*; not actionable. 2 *Cro.* 267.

Caſe, &c. in which the plaintiff declared, that he was educated in the ſtudy of the *mathematicks*, and for ſeveral years had been employed by his neighbours, and others, in meaſuring land, and that at ſuch a time and place, there being a diſcourſe between him and the defendant, concerning his (the plaintiff's) profeſſion and art aforeſaid, he (the defendant) did then and there ſay to him (the plaintiff) *Thou art a cozener and a cheating knave, and that I can prove, &c.* Upon Not guilty pleaded, the plaintiff had a verdict; and upon a motion in arreſt of judgment, it was agreed by the court, That if theſe words had been ſpoken of one who got his living by a trade or manual occupation, as of a *ſhoemaker, baker, &c.* the action would not lie, becauſe the goodneſs or defects of their wares might be ſeen, and it was the folly of the buyer, that he was deceived in what he might have ſeen; but that a *land-meaſurer* was an artificial labour, and his deceit could not be preceived but by men of ſkill and art; but if the words had been ſpoken of *a common meaſurer*, viz. of one who meaſures by the rod, an action would not lie, becauſe every huſbandman could meaſure after that manner; not adjudged. 2 *Roll. Rep.* 72.

Caſe, &c. in which the plaintiff declared, that he had been an attorney *pro diverſis annis jam elapſis*, and that the defendant maliciouſly ſpoke theſe words of him, viz. *He is a forging knave:* After a verdict and judgment for the plaintiff in *C. B.* and a writ of *error* brought in *B. R.* it was objected, that the word *forging* is *adjectively* ſpoken, and therefore the action will not lie, unleſs it appear, that the plaintiff was an attorney at that time, which did not appear in this caſe; for it was ſaid, that he was an attorney *pro diverſis annis elapſis*, which might be thirty years ſince; it ſhould have been *ultimo elapſis*; but as he had declared, he might be an attorney long ſince, and not at the time of the words ſpoken, and the words in themſelves

ſelves do not import a ſcandal in his profeſſion; and for this reaſon the judgment was reverſed. 2 *Roll. Rep.* 84.

Caſe, &c. for theſe words ſpoken of a *ſcrivener*, *He is a baſe rogue, a cozening rogue, a coney-catching rogue, and cut-purſe rogue:* After a verdict for the plaintiff, the judgment was ſet aſide, for that the words are not actionable; becauſe a *ſcrivener* is not a profeſſion ſo much regarded in law as to enable him to maintain an action for calling him by ſuch adjective names. 2 *Roll. Rep.* 91.

The plaintiff declared, that the defendant, to defame him, being a merchant, did ſay, *de præfat' the plaintiff*, viz. *He (innuendo* the plaintiff) *is a bankrupt*; adjudged, that if theſe words, *de præfat' the plaintiff* had been left out, the plaintiff could never have judgnent; for by the *innuendo* there is not a ſufficient certainty of whom the words were ſpoken. 2 *Roll. Rep.* 243.

There was a ſuit in the *ſtar-chamber* between the company of woodmongers and carmen; and ſerjeant *Richardſon*, being retained for the carmen, ſaid, *that he did know of his own knowledge, that the company of woodmongers had ſet up engine-bars, machinans et intendens deceptionem, &c. curiæ domini regis*, and to ſcandalize the ſaid company; all which was found by the jury upon an indictment exhibited againſt him upon the ſtatute *Weſtm.* 1. *c.* 29. and they likewiſe found that the company did not ſet up any engine-bars; it was moved, that this indictment was inſufficient, becauſe it was never intended by that ſtatute to puniſh a pleader for words ſpoken in his client's cauſe, but for ſome act done in pleading by colluſion or deceit to inveigle the court; and juſtice *Dodderidge* ſaid, that he never ſaw but one indictment upon this ſtatute, and that was in the reign of *Edw.* 1. and it was upon pleading, and not for bare words; the indictment was quaſhed. *Palm.* 287.

Caſe, &c. for theſe words ſpoken of an *attorney* of *B. R.* viz. *That he could not read a declaration*, by reaſon whereof his clients left him; the court inclined they were not actionable, unleſs the words had imported ſome ſlander concerning his knowledge in his profeſſion, for the allegation of damages would not maintain the action; and 'tis very probable, that a declaration might be wrote in ſuch a hand, that a man might not read it. 1 *Vent.* 98.

Caſe, &c. for theſe words ſpoken of an *attorney*, *You are a preſbyterian, and deſign to practiſe againſt the King and his intereſt*; the defendant demurred to the declaration, and had judgment; for *per curiam*, the words are not actionable. *T. Jones* 23.

5. *Where action lies for words ſpoken of tradeſmen; and where not.*

William Kemp will be within theſe two days a bankrupt; actionable. *Dyer* 72.

Of a gentleman trading in lead in *Derbyſhire*, viz. *He is a bankrupt, and is not able to pay his debts, but will run his country*; actionable. *Hutt.* 46.

Of a merchant, being an *alien* born, viz. *Firſcot is a bankrupt*; actionable. 1 *Bulſt.* 134.

Of a dyer, *Thou art a bankrupt knave*; actionable, tho' two ſubſtantives; but if it had been *bankruptly knave*, otherwiſe. 2 *Cro.* 345.

Of a merchant, *He is a bankrupt ſlave*; actionable. 2 *Cro.* 578.

Of a ſhoemaker, *He is a bankrupt rogue*; actionable; for tho' it was inſiſted, that the word *bankrupt* is but an adjective to rogue, and ſo 'tis extenuated; yet it was adjudged, that the addition of the word *rogue* to *bankrupt* aggravates it; and that a ſhoemaker is within the ſtatute of bankrupts, for he gets his living by buying and ſelling. *Hutt.* 52.

Of a midwife, viz. *Many have periſhed for her want of ſkill*; actionable. *Cro. Car.* 153.

Of a merchant, viz. *He is not worth a groat, he is* 100l. *worſe than nought*; actionable. *Cro. Car.* 193.

Of a merchant, viz. *Thou art a rogue and a beggarly fellow, and I will prove thee a bankrupt before next term*; and at another time he ſaid to one *Harris*, *Truſt him not, for he will be thy undoing*; actionable. *Cro. Car.* 171.

Of a merchant, viz. *He is a cheating knave, and hath cheated his father, by returning* 20l. *for wares*; actionable. *Cro. Car.* 413.

Caſe, &c. *Thou cameſt a broken merchant from Hamburgh into England*; actionable; for 'tis the ſame as to ſay he is a bankrupt. *W. Jones* 321.

There was to be a trial at *Guildhall*, between one *Buxton* and another, plaintiffs, and *Johnſon*, defendant, who was likewiſe a merchant, and the day before the trial, one *Bolton* diſcourſing with the now defendant *Lemman*, aſked him, Will you be at the trial to-morrow, between *Buxton* and *Johnſon*, who replied, *Johnſon is broke, I warrant you he dares not be there*; adjudged actionable. *Palm.* 63.

Caſe for theſe words ſpoken of a *malſter*, wherein the plaintiff laid a *colloquium* of his trade; the words were, *Have a care of him, and do not deal with him, he is a cheat and will cheat you, he has cheated all the farmers at Epping, and dares not ſhew his face there, and now he is come to cheat at Hatfield:* Upon not guilty pleaded, a ſpecial verdict found all theſe words, but there was no *colloquium* of his trade; adjudged, that the words ſupply the *colloquium*, ſo they appear to be ſpoke of his trade. 2 *Lev.* 62.

An action was brought by a *draper* for theſe words, *You are a cheating fellow, and keep a falſe book, and I will prove it:* Upon Not guilty pleaded, the plaintiff had a verdict, but the judgment was arreſted, becauſe plaintiff did not alledge, that there was any *colloquium* of his trade, or of his buying and ſelling at the time when the words were ſpoken; for to ſay a man is a *cheating fellow*, it doth not follow that he is ſo in his trade, for he may cheat at gaming and not in his dealing, and the words being general, may as well be applied to that as to his trade; and the keeping a *falſe book* doth not imply, that the defendant kept a *falſe debt-book*, for he might have a book which is *falſe printed*, as well as a *falſe debt-book*. 2 *Saund.* 307.

Caſe, &c. for theſe words, viz. *Orton ſays I am a perjured knave, but he is a perjured knave as well as I, for he and Field ſwore one for another:* After a verdict for the plaintiff, it was moved, that this was no poſitive charge that the plaintiff was perjured, but only by relation, viz. that *he was perjured as well as the defendant*; but adjudged for the plaintiff. *Raym.* 51.

Caſe, &c. for words of a *broker*, ſpeaking of his profeſſion, *He is a cheating knave, he hath cheated me with braſs money*; adjudged, that to call a tradeſman a *cheat* generally, an action will not lie, but if you ſpeak of his trade, it will lie. *Raym.* 62.

Caſe, &c. by a *merchant* for theſe words, (there being a communication of him,) *I believe all is not well with Daniel Vivian; there are many merchants that have lately failed, and I expect no otherwiſe of Daniel Vivian:* After a verdict for the plaintiff, the words were held actionable. *Raym.* 207.

Caſe, &c. in which the plaintiff declared, that he is a *lime-burner*, &c. and gets his living by buying and ſelling *lime*, and that the defendant ſpoke of him (the plaintiff) *in arte ſua*, viz. *John Terry is a run-away, and a cheating rogue:* Upon Not guilty pleaded, the plaintiff had a verdict; it was moved in arreſt of judgment, that the defendant did not ſpeak thoſe words as relating to the trade of *lime-burning*, but generally *de arte ſua*, and he may have another trade; but adjudged, that tho' in ancient times it was the conſtant courſe to lay a *colloquium* in declarations for words, and it was a doubt, whether it was good without it till the caſe of *Smith* and *Ward*, 2 *Cro.* 673. yet in that caſe it was reſolved, that to alledge the words to be ſpoken *de querente* ſupplied the *colloquium*, and in the principal caſe the words are alledged to be ſpoken *de arte ſua*, which is applicable to his profeſſion. *Raym.* 86.

Caſe, in which the plaintiff declared, that he is a *mercer*, and that the defendant ſpoke theſe words, *Thou art a cheating knave, and a rogue:* After a verdict for the plaintiff it was moved in arreſt of judgment, that here was no *colloquium* laid of his trade; the judgment was ſtaid. *Raym.* 169.

Caſe brought by a merchant for theſe words, *Auſtin Drake is broke, he is a beggarly fellow, and not worth a groat, and not able to pay his debts:* Upon Not guilty pleaded, the plaintiff had a verdict; and it was moved in arreſt of judgment, that theſe words are not actionable, for he may be an honeſt man and not worth a groat, and to be a beggarly fellow is no crime, for it imports only that he was a poor man, and that is not a fault but a misfortune; but the plaintiff had judgment, becauſe to ſay, *He is not able to pay his debts*, is actionable. *Raym.* 184.

Caſe, &c. in which the plaintiff declared, that he is keeper of a *livery ſtable*, and of *Bell Savage Inn*, and that the defendant had other ſtables in the ſame yard, and that *T. P.* coming with a waggon into the yard, aud enquiring of the defendant, which was *Bell Savage Inn*, the defendant replied, *This is* Bell Savage Inn, *deal not with* Southam, (the plaintiff) *for he is broke, and there is neither entertainment for man or horſe*; after a verdict for the plaintiff and great damages, the judgment was affirmed. *Raym.* 231.

Caſe, *&c.* in which the plaintiff declared, that by buying and ſelling wares, *uberrimam ſibi & familiæ acquiſivit vivendi ſuſtentationem*, (without mentioning any *trade)* and that the defendant ſaid of him (the plaintiff) *Thou art a pittiful, beggarly, broken fellow*; after a verdict for the plaintiff, it was objected, that the plaintiff did not alledge, that he was of any trade; but this objection was over-ruled, and the plaintiff had judgment. *T. Jones* 140.

Caſe, *&c.* in which the plaintiff declared, that he is a renter of lands, and that he had gained great profit by buying and ſelling *wheat, barley*, &c. and that the defendant ſaid theſe words of him, *(viz.) He hath cheated in corn*; after a verdict for the plaintiff, it was held *per curiam*, that the words are not actionable, and that the words of inducement were only a deſcription of a *farmer*, and if they ſhould be actionable, every farmer would be intitled to the like action. *T. Jones* 156.

Caſe, &c. in which the plaintiff declared that, there being a communication of his trade, the defendant ſaid, *He was a cheating knave, and kept a falſe debt book, with which he cheated the country*; after a verdict for the plaintiff, it was moved in arreſt of judgment, that to ſay of a tradeſman, *He is a cheating knave*, tho' there was a *colloquium* of his trade, is not actionable; becauſe it may be intended he ſold his goods too dear, and ſo cheated the buyer in the price; and to ſay he *kept a falſe book* is not actionable, becauſe he may keep ſuch a book, not knowing it to be falſe; but adjudged, that the words taken all together are actionable, for tradeſmens books are often given in evidence, and therefore they ought not to be falſe. 1 *Vent.* 263.

Caſe for theſe words, ſpoken of a merchant who made a *bone-fire* at his door when King *James* the ſecond came to the crown, *(viz.) He is a rogue, a papiſt dog, and a pittiful fellow, and never a rogue in town had a bone-fire before his door but he*; after a verdict for the plaintiff, and 500*l.* damages, a writ of error was brought; but *per curiam*, the *words are actionable.* 3 *Mod.* 103.

Caſe, &c. for theſe words ſpoken of a *farmer*, *He owes more money than he is worth, he is broke and run away*; after a verdict for the plaintiff, *per curiam*, the words are actionable.

His ſon Brooks *hath deceived me in a reckoning for wares, and his debt-book which he keepeth for ſale of his wares in his ſhop, is a falſe debt-book, and I will make him aſhamed of his calling*; not actionable. *Brownl.* 4.

The plaintiff declared, that for many years paſt *fuit mercator, &c.* and the defendant ſaid, *Thou art a beggarly knave, and a bankrupt*; it was doubted whether actionable, becauſe he did not alledge, that he was a merchant at the time the words were ſpoken. *Cro. Eliz.* 794.

Caſe by an innkeeper againſt the defendant, for calling him, (the plaintiff) *Catterpillar, for he liveth by robbing his gueſts*; adjudged not actionable. *Moor* 179.

Caſe, &c. for theſe words ſpoken of an *innkeeper*, *Your maſter* Thomas Clerke *did harbour and lodge cut-purſes and rogues, and did receive ſtolen goods, and there are yet ſome in his houſe*; and declared, that by reaſon of ſpeaking thoſe words he loſt his gueſts; adjudged, not actionable; for an innkeeper's houſe being common to all his gueſts, he may lodge *cut-purſes, and receive ſtolen goods*, and not *know them to be ſuch.* 2 *Roll. Rep.* 136.

Caſe, &c. againſt huſband and wife, in which the plaintiff declared, that he was a *freeman of* London, and a *tradeſman*, and that he got his living by *buying and ſelling crewel*, and that the wife, *&c.* ſaid, *He* (the plaintiff) *is a cheater, and hath cozened and cheated my huſband of* 500*l.* after a verdict for the plaintiff, and 40*l.* damages, the judgment was arreſted, for that the words were not actionable, becauſe it did not appear that the *cozening and cheating* was in any thing concerning his *trade. W. Jones* 366.

Caſe, *&c.* in which the plaintiff declared, that he was a *common brewer*, and that the defendant, upon a diſcourſe which he had with another concerning the plaintiff, ſaid theſe words of him, *I will give my mare a peck of malt, and give her water after it, and ſhe ſhall piſs as good beer as* Thomas Fen *breweth (innuendo* the plaintiff) by reaſon whereof *he loſt ſeveral cuſtomers*, but mentioned none *in particular*; and that being moved in arreſt of judment, after verdict for the plaintiff, the judgment was reverſed; for the words are not actionable, without alledging a particular loſs. *W. Jones* 444.

Caſe for theſe words ſpoken of a *diſtiller*, in which the plaintiff declared, that the defendant diſcourſing with one *Iles*, aſked him of whom he bought *aqua vitæ*, who replied, of Mr. *Godfrey* (the plaintiff); thereupon the defendant ſaid, *He is a variet, he hath ſuppreſſed his brother's will, to cozen and deceive men of their legacies, we will make him cry* peccavi *on his knees, he maketh ſhew of religion, but is an hypocrite*; adjudged not actionable, becauſe the words do not relate to his *trade. Palm.* 21.

The plaintiff being a *mercer*, declared againſt the defendant for theſe words, *(viz.) Thou doſt owe more than thou art worth, and art not able to pay thy debts*; adjudged not actionable, becauſe the words do not imply any *fraud* or *deceit*, ſo they will not amount to a bankruptcy within the ſtatutes, for a man may owe more than he is worth, and yet be an honeſt man, and have credit by friends to ſupport him in trade. *Style.* 213.

Caſe, *&c.* for theſe words ſpoken of a *merchant*, *Thou art a cheating rogue, and a runagate rogue*; after a verdict for the plaintiff, adjudged not actionable; for to ſay generally, that a man is a *cheater*, is not actionable without a *colloquium* laid of his trade or profeſſion, which was not done in this caſe. *Hard.* 8.

Caſe, &c. for theſe words ſpoken of a watchmaker, *(viz.) He is a bungler, and knows not how to make a good piece of work*; after a verdict for the plaintiff, wherein the jury ſaid that he was a *watchmaker*, it was objected, that there was no *colloquium* laid of his *trade*; 'tis true, if the words had been, he could not make a *good watch*, it would have been known what he meant, but here the words are indifferent, and may have no relation to his *trade*; the judgment was ſtayed. 1 *Mod.* 19.

Caſe, &c. in which the plaintiff declared, that he was a *merchant*, and that by his good name he had the goodwill of his neighbours, and alſo that by *buying and ſelling* he got *diverſa lucra, &c.* and that the defendant called him a *bankrupt*; after a verdict for the plaintiff it was moved in arreſt of judgment, that the declaration was ill, becauſe it did not appear that he gained his *living by buying and ſelling*; the judgment was ſet aſide. *Sid.* 299.

Caſe, &c. in which the plaintiff declared, that he for ſeven years laſt paſt, had lawfully uſed the *art of buying and ſelling*, and had gained *great profit* thereby, for the ſupport of himſelf and family, and that the defendant *falſo & malitioſe* ſaid of him (the plaintiff), *He is a runagate, and worſe than a rogue, and if he had his deſerts he had been hanged*; whereby he loſt his cuſtom, but he did not lay any ſpecial damage; after a verdict for the plaintiff the judgment was ſtayed, becauſe *runagate* is not of the ſame ſignification as *bankrupt*; and here the plaintiff did not ſet forth what trade he uſed, and it might be that of a

tinker

tinker or *pedler*, who are *rogues* by the ſtatute *Eliz.* ſo the words are not actionable. 2 *Lev.* 214.

Caſe, &c. in which ſhe declared, that ſhe was ſkilled in *dancing*, and taught young women to dance, by which *ſhe gained a livelihood*, and that the defendant, to injure her, ſaid, *She is as much a man as I am, ſhe is an hermaphrodite*; by which ſhe loſt divers ſcholars, *but did not mention any in particular*; after a verdict for the plaintiff it was adjudged, that the words are not actionable, for 'tis no ſcandal to her profeſſion to ſay, ſhe is an *hermaphrodite*, for young women are commonly taught by men to dance, and here is no ſpecial damages laid. 2 *Lev.* 233.

Caſe, &c. in which the plaintiff declared, that he is a *trader*, and that the defendant ſpake theſe words of him, *You are a cheat, and have been a cheat for many years*; not actionable without laying a *colloquium* of his *trade*. 2 *Salk.* 694.

Caſe for words ſpoken of a *butcher*, in which a *colloquium* was laid of a *cow killed by him*, and of the fleſh of that cow; and that the defendant ſaid, *The cow died with calving*, by reaſon whereof he loſt ſuch and ſuch *cuſtomers*; there was a verdict for the plaintiff, *&c.* and upon a writ of error brought, the judgment was reverſed, becauſe the words in themſelves are not actionable; 'tis true, here are *ſpecial damages* laid, but yet that will not help, becauſe he did not alledge, that he could *not ſell the cow*, but only that he *loſt his cuſtomers*. 2 *Salk.* 695.

6. *Where action lies for ſlandering women; and where not.*

The plaintiff being in communication of a *marriage* with the *Earl of* Kent, the defendant ſaid, that *Arſcot* reported, *That he had the uſe of her body, innuendo*, that he had carnal copulation with her; actionable. 2 *Cro.* 162.

Caſe, *&c.* by the huſband, for words ſpoken of his wife, *(viz.) Mrs.* Miller *is a whore, and hath had the pox, and hath holes one may turn his finger in them, Mr.* King, *the apothecary, gave her a drink for it, and therefore take heed how you drink with her*; actionable. 2 *Cro.* 430.

Caſe, &c. for theſe words, *Elizabeth Roots did lie with a weaver of* Colcheſter *in a ditch*, (*innuendo* had carnal knowledge of her body) *and the weaver's breeches were down and they were at it*; after a verdict for the plaintiff, it was moved in arreſt of judgment, that the weaver might lie with the plaintiff without any offence, and where the words in themſelves are not actionable, an *innuendo* will not make them actionable; *ſed per curiam*, Tho' the words are not actionable, yet the circumſtance which follows ſhews the intention, which was to ſlander the plaintiff, and adjudged, that the action lies. 1 *Roll. Rep.* 420.

Of a *widow*, who was about to marry with one *Cowley*, viz. *She is a whore, and her children which ſhe had by* Brian *her late huſband, are* Frambiſhe's *baſtards*; tho' the firſt are words of heat, and the laſt repugnant, yet adjudged actionable. *Cro. Car.* 234.

Of an alehouſe-keeper's wife, *(viz.) Hang thee bawd, thou art worſe than a bawd, thou keepeſt an houſe worſe than a bawdy houſe, and thou keepeſt a whore in thy houſe to pull out my throat*; actionable. *Cro. Car.* 234.

Caſe, &c. for theſe words, *Thou art a whore, and* T. H.*'s whore, thou didſt play the whore with him at ſuch a gate, and didſt forget thy gloves behind thee; thou hadſt a baſtard by him, which was ſent to* Ireland; after a verdict for the plaintiff, it was objected, that the action would not lie, becauſe the plaintiff did not alledge any temporal loſs, this being in its nature a ſpiritual offence, and puniſhable in that court; but adjudged, that by the *ſtatute* 18 *Eliz.* and 7 *Jac.* the one appointing a puniſhment for a woman who hath a *baſtard*, and the other appointing that *a whore ſhall be ſent to bridewell for a year*, had altered the nature of the offence, and given the temporal courts juriſdiction; and tho' ſhe is not puniſhed by the juſtices, by virtue of theſe ſtatutes, 'tis ſufficient, that ſhe is liable to be puniſhed. *Palm.* 298.

Caſe, &c. in which the plaintiff declared, that there was a communication of *marriage* between the plaintiff and one *Mary Hicks*, who had 300*l.* portion, which marriage was like to take effect, but that the defendant, in the hearing of ſeveral people, ſaid, *Mary Hicks is Mr.* Edwards *his whore*, (*innuendo* the plaintiff) whereupon ſhe refuſed to marry him; after a verdict for the plaintiff, it was moved in arreſt of judgment, that it was not alledged, that the marriage was agreed on, nor that the words were ſpoke *of the plaintiff*, but only by the *innuendo*; but the judgment was affirmed. *Allen* 6.

Caſe, *&c. Thou art a whore, and a baſe burnt arſe whore*; actionable. 2 *Sid.* 5.

Caſe, *&c.* in which the plaintiff declared, that the defendant, to ſcandalize him and his niece, ſpoke of the ſaid niece, and her aunt, *I hold it not fit this girl ſhould live with her aunt, ſhe keeping a bawdy-houſe*, with an *averment*, that ſhe did at that time live with the *aunt*; after a verdict for the plaintiff, it was moved in arreſt of judgment, that the words are not actionable, becauſe *ſhe keeping* doth not imply, that ſhe did keep a bawdy-houſe; but adjudged, that this ſpeaking by a participle in the preſent ſenſe, doth imply, that ſhe did keep a bawdy-houſe. 2 *Sid.* 15, 33.

Caſe, *&c. He aſſaulted my wife, with an intent to raviſh her*; actionable, for though here was only an act *intended* and not done, yet an *aſſault with an intent to raviſh*, is a defamation, and actionable. 2 *Sid.* 76, 100.

Caſe, &c. for theſe words, *your daughter* Bridget *is a Whore, and a pocky arſt whore*; after a verdict for the plaintiff in *C. B.* and a writ of error brought in *B. R.* adjudged actionable; for though to ſay, *thou art a whore*, is not actionable, nor to ſay, *thou haſt the pox*; but when the word *whore* is coupled with the *pox*; it is intended the *French* pox. *Sid.* 50.

Caſe, for calling the plaintiff *whore*, in which ſhe declared, that ſhe lived in the borough of *Southwark*, and that *omnes exercitantes artem meretricii et conſervatores lupanar' et communes lenones per conſuetudinem uſitatam et approbatam* within the ſaid borough were impriſoned and carted; adjudged, that ſince this preſcription is in the conjunctive, and the plaintiff had not alledged, that ſhe was *ſtill an inhabitant* there, and ſo was not capable to be puniſhed, within the preſcription, that the action did not lie. *Sid.* 97.

Caſe, *&c.* in which the plaintiff declared, that ſhe was poſſeſſed of a copyhold *dum ſola & caſta vixerit*, and that the defendant, intending to endanger the loſing her copyhold, ſaid, *Thou art a whore and I will throw thee out of thy living*; after a verdict for the plaintiff, it was adjudged in arreſt of judgment, that the words are actionable, becauſe accoupled with words which imported ſpecial damages; but as entire damages were given for theſe and other words ſpoken at another time, and the other words were not actionable, the judgment was ſtayed. *Sid.* 214.

Caſe, &c. for theſe words, *Thou art a whore, and my huſband's whore*; the cauſe was tried in the Sheriff's court in *London*, and the proof was, that the words were ſpoken in *Clerkenwell, out of the city*, and thereupon the counſel for the defendent *demurred on the evidence*, for tho' the words are actionable in *London*, they are not out of it; the judge over-ruled the demurrer, whereupon a *bill of exceptions* was tendered to him to ſeal, but the parties being poor, the plaintiff had a verdict, and ſmall damages. The defendant, inſtead of pleading Not guilty, ſhould have pleaded, that the words were ſpoken *in Clerkenwell*, and traverſed, that they were ſpoken *in London*. 1 *Lev.* 116.

Caſe, &c. by huſband and wife, for theſe words ſpoken of her, *(viz.) She is a ſtrumpet and a bawd, and kept a bawdy-houſe*; after a verdict for the plaintiff, it was objected, that the laſt words only being actionable; and that it being the *preter-tenſe*, (viz.) *kept a bawdy-houſe*, it ſhall be intended before the general pardon; but adjudged, that the ſcandal remains, and that it ſhall not be ſo intended, unleſs it appear, that the defendant ſpoke in that ſenſe. 2 *Lev.* 233.

Caſe, &c. for theſe words, *You are a whore*; and the plaintiff declared, that by reaſon of ſpeaking the words *ſhe loſt her marriage*: Upon Not guilty pleaded, there was a verdict for the plaintiff, and judgment; upon a *writ of error* brought, *error* aſſigned was, that *the loſs of marriage* was the cauſe of this action, and it doth not appear that it was within the juriſdiction of the court, *viz.* the court of *Marſhalſea*, where the action was brought, and the judgment was reverſed. *Raym.* 63.

Caſe

Caſe, &c. for theſe words, *You are a bawd, and I will prove you a bawd, and you took* 5 s. *for a clean pair of ſheets for two whores and two rogues*; and at another time for theſe words, *You are a bawd, and I will prove you a bawd, and have you carted:* Upon Not guilty pleaded, the plaintiff had a verdict and entire damages; and upon a motion in arreſt of judgment, the words were held actionable, becauſe a bawd is puniſhable in the ſpiritual court. *Raym.* 115.

Caſe, &c. for theſe words ſpoken of a *midwife*, viz. *She is an ignorant woman, and of ſmall practice, and very unfortunate in her way; there are few that ſhe goes to, but lie deſperately ill, or die under her hands*; actionable. 1 *Vent. Wharton* v. *Brook.*

Huſband and wife brought an action on the caſe, for theſe words ſpoken of the wife, *She is a whore, ſhe is my whore*, and concluded *ad damnum ipſorum:* After a verdict for the plaintiff, it was objected in arreſt of judgment, that the words were not actionable without ſpecial damages laid; and that the concluſion *ad damnum ipſorum* was ill: *Sed per curiam*, the words are actionable, and the concluſion is well; for if ſhe ſurvive, the damages will go to her. 3 *Mod.* 120.

Caſe for theſe words ſpoken to the ſervant, *Thy miſtreſs is a whore, and would have lain with me ſeven years ſince, and I would not, unleſs ſhe would go to the hedge:* Now, tho' it was laid in the declaration, that ſhe was in communication with *W. R.* of a marriage between them, who was ſeiſed of lands of 200 *l. per annum*, and that by reaſon of ſpeaking theſe words ſhe loſt her *marriage*; yet the words were adjudged not actionable, becauſe they were a *ſpiritual defamation*, and puniſhable in thoſe courts; but if the words had been ſpoken *to the man*, who was in communication of marriage with her, ſo as the purpoſe was to hinder the marriage, the action would lie for the loſs. *Cro. Eliz.* 786.

Thou art a whore, for R. B. the goldſmith had the uſe of thy body, and the cart is too good for thee; not actionable, for the Common law cannot define who is a whore. *Goldſ.* 172.

Thou art Luſcomb's hackney whore, and a thieviſh whore, and I will prove thee ſo; not actionable; *quia verba accipienda ſunt in mitiori ſenſu. Goab.* 278.

Slander by a feme ſole for theſe words, *You are a whore, and a forſworn jade, and I will prove you one*, by reaſon whereof ſeveral perſons who courted her before, did now avoid her company; the plaintiff had a verdict, but could never get judgment, becauſe ſhe did not alledge the loſs of marriage with any particular perſon. 2 *Lutw.* 1295.

Caſe, &c. for theſe words, brought againſt the defendant by the huſband and wife, *Thou hold Calabine's baſtard-bearing whore, thou didſt throw thy baſtard into the dock, innuendo quandam ſocam* vocat' *le Armitage*, &c. adjudged not actionable. *W. Jones* 356.

Caſe, &c. *You are a pimp and a bawd, and fetch young gentlewomen to young gentlemen*; the court inclined, that the action would not lie, for a *bawd* is not puniſhable by our law, unleſs ſhe keep a *bawdy-houſe*, for the other is a crime of eccleſiaſtical cognizance. 1 *Vent.* 63.

Caſe for ſpeaking theſe words, viz. *This is the whore that W. R. got a baſtard on, and ſpent all my money upon, and the queen hath been too long in town for my eaſe:* After a verdict for the plaintiff, the judgment was arreſted, becauſe no ſpecial damages were laid. *Style* 274.

Caſe, &c. for theſe words, *She hath married the huſband of another woman*; and the plaintiff averred in his declaration, that he had no other wife; he had a verdict, but the judgment was arreſted, becauſe it might be that his firſt wife was dead, or that ſhe was beyond ſea for ſeven years; and then the caſe is out of the ſtatute 1 *Jac. cap.* 11. and probably the defendant might mean, that the plaintiff was contracted to another man, and ſo in conſcience he was her huſband. *Allen* 37.

Caſe, &c. *She was with child by T. S. whereof ſhe miſcarried, by reaſon whereof her father turned her out of doors*; adjudged, that an action would not lie without ſpecial damages alledged, as that ſhe had loſt her marriage. 1 *Vent.* 4.

Caſe, &c. for that the defendant *falſe & malitioſe*, wrote a letter to a man who intended to marry the plaintiff, in which he tells him, that *He ought not to marry her, for before God ſhe is my wife, and therefore if you do, you will live in adultery with her, and your children will be baſtards*; and ſets forth, that this letter was delivered at *Exeter*, by which ſhe loſt her marriage; after a verdict for the plaintiff, it was moved in arreſt of judgment, that the words were not actionable, becauſe the defendant claimed nothing but his own, which was lawful for him to do; and of this opinion were three judges at firſt, againſt the opinion of *Twiſden*; but afterwards they agreed with him, that the words were actionable, for admitting that the contract was private, he ought not to publiſh it, unleſs he could prove it; but to acquaint the woman herſelf with it; but this was done to ſcandalize her, and being found to be *falſe & malitioſe*, the plaintiff had her judgment. *Sid.* 79.

Caſe, &c. in which the plaintiff declared, that ſhe was about to marry *J. S.* and the defendant ſaid, *She is a whore, a common whore, and R. N.'s whore, per quod maritagium amiſit*; the jury found, that the defendant ſpoke the words, but that the plaintiff did not loſe her marriage thereby: *Et per curiam*, in arreſt of judgment, the words are not actionable, being only ſcolding. 2 *Mod.* 296.

Caſe, &c. for theſe words, *She is a whore, and had a baſtard by her father's apprentice:* After a verdict for the plaintiff, the judgment was arreſted, becauſe *fornication* is a *ſpiritual offence*, and no action for it lay at Common law without *ſpecial damage.* 2 *Salk.* 696.

Caſe, &c. in which the plaintiff declared, that ſhe being a young woman, the defendant, to hinder her marriage, ſaid, *What did you go to London for but to drop your ſlink; ſhe went to London laſt winter to lie in, and to my knowledge ſeveral people have lain with her*; adjudged not actionable, without ſpecial damages laid, becauſe fornication is only a ſpiritual offence. 2 *Salk.* 693.

7. *Of adjective and negative words, and by way of interrogation; and of ſlandering a title, and calling one baſtard.*

There was a treaty of marriage between the plaintiff and one *Mary Syvedale*, with whom he was to have 600*l.* and the defendant ſaid, *Hath that baſtard Brian Nelſon cauſed you to be arreſted? &c.* by which he loſt his marriage; actionable, tho' ſpoke by way of interrogation. 2 *Cro.* 422.

Have you brought home the forty yards you ſtole? The judgment for the plaintiff affirmed in error. 2 *Cro.* 568.

Thou art a long ſhag-haired murdering rogue; actionable, tho' *adjective* words. *Cro. Car.* 232, 318.

Caſe, &c. for that the defendant having a *colloquium* of the plaintiff, ſpoke theſe words of him, *I know what I am, and I know what Snell is, I never buggered a mare*; after a verdict for the plaintiff, it was objected, that theſe words do not charge the plaintiff with buggery; adjudged, a charge of buggery by implication, and that it might be ſo underſtood by thoſe who heard it. 2 *Lev.* 150.

The defendant ſaid, that *Lands were lawfully aſſured to John Talbot for* 1600 *years, and that he was lawfully poſſeſſed thereof*, whereas in truth they were not lawfully aſſured; it was adjudged, that tho' *John Talbot* had a limitation of the land by a will, yet becauſe the defendant took upon him to take notice of the law, and to meddle in a matter which did not concern him, the plaintiff had judgment. 4 *Rep.* 175. See 2 *Leon.* 111.

The plaintiff was in treaty with *R. B.* to demiſe to him the manor of *D.* and the defendant *præmiſſorum non ignarus*, ſaid, *I have a leaſe of the ſaid manor for ninety-nine years*, and ſhewed a *counterfeit* leaſe, knowing it to be counterfeit, by reaſon whereof *R. B.* did not proceed; adjudged, that ſince the defendant knew of the treaty, and that the leaſe be produced was *forged*, and yet he publiſhed it, and by that the plaintiff loſt his bargain, the action would lie. 4 *Rep.* 18.

The earl of *Arundel* gave a *manor* to the plaintiff *in tail*; the defendant was a copyhold tenant of an houſe and lands held of the ſaid manor for his life, and the plaintiff being in treaty with *R. B.* to make a leaſe of the ſaid houſe and lands, to commence after the defendant's death, for which *R. B.* was to give 500*l.* the defendant ſaid, *The late earl of Arundel made a leaſe of my tenement to one R. W. for ſixty years, to begin after my eſtate is ended, and the ſame is a good leaſe*; by reaſon whereof *R. B.* would not give him 10*l.* to make him a leaſe; actionable. 2 *Cro.* 163.

The plaintiff and his wife had both lands by *deſcent*, the defendant ſpeaking of them ſaid, (viz.) *Shall Elborow's wife ſit above my wife? he is but a baſtard*; by reaſon whercof the plaintiff was at great expence to defend his title; actionable, tho' the plaintiff had not laid that there was any ſpeech about his eſtate, or that he was about ſelling or leaſing it. 2 *Cro.* 642.

Error to reverſe a judgment in an action on the caſe for calling the plaintiff *baſtard*, wherein the plaintiff ſet forth, that his grandfather was tenant in tail of ſuch lands, with divers remainders over, that his father was the iſſue in tail, and that he was his youngeſt ſon, and that *W. R.* was about purchaſing the land, and offered him a ſum of money for his title, and to join in the conveyance; but afterwards, by reaſon of ſpeaking thoſe words, he refuſed to give him any thing; the error aſſigned was, that the plaintiff hath not aſſigned any *ſpecial loſs*, for upon his own ſhewing he had no title, being a remote remainderman to the eſtate; but adjudged, that tho' he had not a preſent title, yet it appears, that by poſſibility he might inherit the *eſtate-tail*, and being offered money for that poſſibility to join in the conveyance, he had a preſent loſs and damage by ſpeaking thoſe words; ſo the judgment was affirmed. 2 *Cro.* 213.

Suit was brought in the ſpiritual court againſt the defendant, for ſaying, that the plaintiff *had a baſtard*; the defendant pleaded, that the plaintiff was adjudged the reputed father of a baſtard by two juſtices of the peace, according to the ſtatute, by reaſon whereof *he ſpoke thoſe words*; this was a plain confeſſion of the libel, but that court would not allow the juſtification, and therefore the defendant moved for a prohibition, which was granted. 2 *Cro.* 535, 625.

In a *ſpecial action on the caſe*, the plaintiff declared, that the defendant did *endeavour to queſtion him, and to charge him at the quarter-ſeſſions, to be the reputed father of a baſtard child*; adjudged, that the action doth not lie, becauſe 'tis only an *eccleſiaſtical ſlander*, and to be puniſhed in the ſpiritual court; but if he had declared, that the defendant had procured an order to be made at the ſeſſions againſt him to be the reputed father, and ſo to keep the child; in ſuch caſe the action would lie, becauſe of the *temporal* loſs and damage. 2 *Bulſt.* 343.

Caſe againſt the defendant being an *attorney*, for that the plaintiff being ſeiſed of lands in fee which he had by deſcent from his father; and having agreed with one *W. R.* who was to purchaſe them, the ſaid *W. R.* came to the defendant, deſiring his advice in the conveyance, who told him, that *he had heard* that the plaintiff's father had granted a rent-charge in fee out of the lands, by reaſon whereof the ſaid *W. R.* refuſed to purchaſe; and all other perſons were afraid of incumbrances *ad damnum, &c.* the defendant pleaded in abatement, that he was an *attorney at law*, and that *W. R.* came to him for his counſel, and that he privately ſpoke the words; and upon demurrer, the defendant had judgment. *Moor* 187.

The defendant, *who pretended a title to the lands*, ſpoke publickly, that he had a better title, *&c.* than the tenant in poſſeſſion, for which words the tenant brought an action; and adjudged, that it did not lie, becauſe *the defendant claimed a right to the lands*; but if another man had ſpoke the ſame without any pretence to a title, it had been otherwiſe. *Moor* 188.

Caſe for theſe words, (the plaintiff being about the ſale of his lands) *I would not wiſh any man to deal with the land, for I know one who hath a good title to it, and will not depart with their intereſt for any reaſon*; the defendant juſtified, for that he had a leaſe in reverſion of part, *&c.* adjudged, that if he claimed a title himſelf 'tis not actionable; but here he ſaid, *he knew one who had*, which he ſhall not ſalve by applying it to himſelf. *Moor* 410.

Caſe, &c. in which the plaintiff declared, that he was ſeiſed of lands, and had a diſcourſe with *J. S.* about ſelling the ſame, and the defendant knowing thereof, ſaid to *J. S. Take heed how you buy it, for 'tis mine, if every man had his own; and I will ſpend* 20*l. but I will have it*; by reaſon whereof he loſt the ſale, *&c.* after a verdict for the plaintiff the judgment was arreſted, for that the words are not actionable, becauſe he *claimed the lands to himſelf*; but it had been otherwiſe if he had affirmed, that a third perſon had a title. 1 *Roll. Rep.* 409.

Caſe, &c. in which the plaintiff declared, that he was ſeiſed of ſeveral parcels of land, and that the defendant being tenant at will of one parcel, and there being a diſcourſe between him and *J. S.* of the ſale of the lands, he (the defendant) ſaid to *J. S.* that he, the defendant, would keep the poſſeſſion till the 17*th day of Auguſt*, and that after that day the plaintiff had no title to it, *but that one G. D. had*, by reaſon whereof he loſt the ſale; adjudged, that tho' the words were ſpoken of a parcel of the land, yet the plaintiff ſhall recover damages for the loſs of the ſale of the whole. 2 *Roll. Rep.* 447.

This action will not lie without ſhewing ſome loſs; as for inſtance, the plaintiff was *ſeiſed in fee of copyhold lands* within the juriſdiction of the defendant's court, who ſaid, *he had no title to the lands*; the judgment for the plaintiff was reverſed by error, becauſe he did not ſhew that he had any loſs by ſpeaking the words. *Cro. Car.* 99, 140.

Error of a judgment in an action on the caſe, wherein the plaintiff declared, that one *J. D.* was delivered of a baſtard-child, and that the defendant diſcourſing with her concerning the plaintiff and the ſaid child, ſaid, *He* (meaning the plaintiff) *is the reputed father of that baſtard child*; the error aſſigned was, that theſe words are not actionable; and ſo it was adjudged, unleſs the plaintiff had alledged ſome *temporal* loſs, as marriage or the like; or that by reaſon of the ſpeaking theſe words, he was ordered to maintain the baſtard. *Cro. Car.* 315.

8. *Pleadings in actions of ſlander.*

If two have ſpoke words for which an action lies, the action againſt them muſt be ſeveral; for, as the ſpeaking of one is not the ſpeaking of the other, they cannot be charged jointly in an action. *Cro. Jac.* 647.

Nor can two who are ſlandered by the ſame words join in an action againſt the publiſher of them; but each muſt bring a ſeparate action. *Cro. Car.* 512.

It is declared by the ſtatute of limitations, that all actions upon the caſe for words ſhall be brought within two years after the publiſhing them; but it has been held, that in ſome caſes of ſlander this ſtatute is no bar.

In an action for words the plaintiff declared, *for certain falſe and ſcandalous words of which the tenor follows*, and then the declaration recites ſome words; it was held on a motion in arreſt of judgment, that the action did not lie, becauſe, as the expreſs words are not ſet out, ſome which would perhaps have rendered the reſt not actionable might be omitted. It is indeed in many caſes ſufficient to plead a deed or record by way of recital, for in ſuch caſes the recital may be compared with the deed or record; but, if there is any miſtake in thus reciting words, no recourſe is to be had to any thing by which it may be ſet right. *Cro. Eliz.* 857.

It was alledged, that the defendant ſpoke certain words, and then the declaration went on *cumque etiam poſtea* the defendant ſpoke other words; a verdict being found for the plaintiff, and entire damages given, it was inſiſted upon, in a motion to arreſt the judgment, that, as the latter words are not by reaſon of the *cumque etiam* ſufficiently affirmative, and only by way of recital, the plaintiff ought not to recover. Several caſes were cited, where, in treſpaſs and battery, the judgment had been arreſted, becauſe it had only been alledged *cum* the defendant committed ſuch a treſpaſs or ſuch a battery. *Sed per cur.* This being an action upon the caſe, and the firſt

words being laid positively, the latter shall be intended to be so. Besides, *cumque etiam* shall here be intended to mean the same as *porro* moreover; for so these words are explained in divers dictionaries, and in that sense they are used by several classic authors. 3 *Lev.* 338.

If the words found by the verdict are not precisely the same as those laid in the declaration, yet if they agree in substance, an action lies. *Dyer* 75.

In an action for these words, *If Sir* John Sydenham *might have his will he would kill the King*; the defendant pleaded that he spoke other words, *absque hoc* that he spoke the words laid. The jury found specially that he spoke these words, *I think in my conscience, if Sir* John Sydenham *might have his will, he would kill the King*; and the question was, if the variance between the words laid and the words found was fatal; the court of King's Bench were of opinion that, as the words laid were actionable, and the force of them not taken off but rather augmented, by the others, which are also found, it was not; and their judgment for the plaintiff was, upon a writ of error brought in the Exchequer-Chamber, affirmed. *Cro. Jac.* 407.

J. N. brought an action for these words thus laid, *You have murdered* J. S. *innuendo* J. S. *modo defunctum*; and judgment was for the plaintiff. Upon a writ of error in the Exchequer-Chamber, it was reversed; because, as the words *modo defunctum* can only relate to the time of the declaration, and it is not averred that *J. S.* was dead at the time the words are laid to be spoke, there was no ground of action when the suit was commenced. *Cro. Ja.* 215. *Cro. Ja.* 343. 1 *Roll. Abr.* 77. *Hob.* 6.

In an indictment it must be laid, that the defendant spoke the words charged *falso & malitiose*, because that has been the usual form; but neither of these technical words are necessary in a declaration in this action. *Style* 392.

Upon a motion in arrest of judgment it was objected to a declaration, that it only alledged that the defendant spoke *hæc ficta falsa verba*, whereas it ought to have alledged *quod ficte et falso dixit*; but it was held to be well enough. 1 *Keb.* 273.

A writ of error being brought, upon a judgment in an action for words, it was assigned for error, that the words were not laid to be spoke maliciously: *Sed per cur.* This is no error, for such words are in themselves malicious. *Noy* 35. *Ow.* 51.

It is sufficient to alledge in a declaration, that the defendant spoke the words *palam et publice*; for the words *palam et publice* imply that it was *in præsentia et auditu aliorum. Cro. Eliz.* 861.

Where two sets of words are declared for, and only the first are laid to be spoken *in præsentia et auditu quamplurimorum*; the *præsentia et auditu quamplurimorum* of the first shall go to the second. 2 *Lev.* 193.

If the declaration alledge that the words were spoken *in præsentia diversorum*, it is well enough, although it is alledged to be *in auditu*; for, as the words were spoken *in præsentia*, it shall be intended they were spoken *in auditu diversorum. Cro. Eliz.* 846.

As the sense of words is to be collected from the consideration of the whole of them, and all the circumstances which attended the speaking of them, if any of these are omitted in the declaration of the plaintiff, the defendant may, in pleading, avail himself of such of them as he thinks it material for him to shew. 4 *Co.* 13 *b.* 14. *a.* 19. *b. Cro. Car.* 510.

In an action for calling the plaintiff *a perjured man*, the defendant pleaded in his justification, that the plaintiff was *perjured* in a certain cause, and judgment was for him. Another action being brought by the plaintiff for the same words, the defendant pleaded this judgment, and it was held to be a good plea. 2 *Brownl.* 49.

After a judgment in an action for these words, *He is a rascally alderman, a factious alderman, a lampooner*; a second action was brought for the same words, with an averment that the word *lampooner* means libeller. Upon a demurrer to a plea, in which the former judgment was pleaded in bar, it was insisted that by this explanation of the word *lampooner*, it becomes a different action. *Sed per cur.* As the plaintiff has been once barred in an action for the same words, he shall never intitle himself to another action by any explanation of one of those words. 1 *Lev.* 248.

If the words as laid in the declaration are not actionable, no additional one in a replication can make them so; for no rejoinder can be to words in a replication, which were not contained in the declaration or plea. *Style* 70.

It is in general very dangerous for a defendant to demur in an action upon the case for words; for he may, after taking the chance of trying the fact, avail himself of any matter of law in arrest of judgment, which would have been good upon a demurrer. 4 *Co.* 14. *a. Doct. Pl.* 186.

In all cases, where there is not in the words themselves a sufficient ground of action, the want of this must be cured by averment, otherwise no action lies. 4 *New Abr.* 513.

It was heretofore doubted whether the want of certainty in the words themselves, as to the person of whom the words for which an action is brought were spoke, could be supplied by any averment without the help of a *colloquium:* but it seems to be now settled, that an averment that the words were spoken of the plaintiff is sufficient, although it is not alledged that there was, at the time of speaking them, a *colloquium* concerning him. *Cro. Jac.* 241. 1 *Roll. Abr.* 80. *Cro. Jac.* 673. *Cro. Car.* 378. *Cro. Jac.* 107. 1 *Roll. Abr.* 79.

Whenever there is an apparent uncertainty in the words themselves, no averment can cure this; but, whenever a certain person is intended, it may by averment be ascertained who this is.

If three men have given evidence at a trial, and *J. S.* says to them, *One of you three is perjured*, no action lies; for there is in these words such an apparent uncertainty as cannot be cured by averment. 1 *Roll. Abr.* 81. *Cro. Jac.* 107.

But if a conversation be concerning six defendants to a bill in Chancery, and it is said by *J. S. These defendants are those who helped to murder T. S.* every one of them, although no one is particularly named, may have an action with an averment, that he is one of the defendants concerning whom such conversation was had. 1 *Roll. Abr.* 75.

So if these words are spoke, *That perjured rogue and villain* Potter, any one of the name of *Potter*, if it is averred that they were in a conversation concerning him, may maintain an action for them. 1 *Roll. Abr.* 76.

It has been held, that if the person, of whom the words are spoken, is in any one respect well ascertained, there is no need to remove by averment, every other doubt, as to this point, to which the words may be liable. Thus, if it be said to *J. S. Go tell thy landlord* Hendey *he is a thief*, an action lies for one whose name is *Hendey*, with an averment that the words were spoke of him; nor is it necessary for him to aver that he is the landlord of *J. S.* 1 *Roll. Abr.* 80.

So if these words are spoke by *J. S.* to *J. N. Thy master* Brown *hath robbed me*, one of the name of *Brown*, if it be averred that these words were spoken of him, shall have an action for them, although there is no averment that he was the master of whom the words were spoke; for it shall not be intended that *J. N.* had more masters than one of that name. *Cro. Jac.* 444. 1 *Roll. Abr.* 79.

The doctrine of these two cases, which corresponds with what is laid down in *Wiseman* and *Wiseman*, *Cro. Jac.* 107. is shaken by some subsequent cases.

In one of these it is held, that if these words are spoke to *J. S. Thy brother is perjured*, it is not enough for the party who brings an action, to aver that they were spoken of him, but he must also aver that he is the brother of *J. S. Cro. Car.* 443.

In another case it is laid down that, if it is said to *J. N. Your son* J. N. *stole my hens*, an action brought by *J. N.* the younger, with averment that the words were spoken of him, does not lie, because it is not likewise averred that he is the son of *J. N.* to whom the words were spoke. 1 *Roll. Abr.* 84.

But

But in a ſtill later caſe the former, which ſeems to be the better opinion, is confirmed.

It was held in this, that, if theſe words are ſpoke, *Captain* Nelſon *is a thief*, an action lies for *Robert Nelſon*, with an averment that they were ſpoken in a converſation concerning him, although it is not averred that he is a captain, or uſually called ſo. 1 *Roll. Abr.* 85.

No action lies for theſe words, ſpoken of *J. S. He is as great a thief as any in* England, unleſs it be averred that there is a thief in *England*. *Cro. Jac.* 187.

So none lies, if it be ſaid to *J. N. You are as bad as your wife when ſhe ſtole my cuſhion*, without an averment that the felony here alluded to was committed. *Cro. Jac.* 331.

So none lies for ſaying to *J. S. You are as great a rogue as* J. N. *who ſtole quilts*, except it is averred that *J. N.* did ſteal quilts. *Com.* 267.

But if theſe words are ſpoke to *J. N. As ſure as God governs the world, or King* James *this kingdom, you are a thief*, an action lies without averring that God governs the world, or King *James* this kingdom; for things ſo apparent as theſe need not be ſhewn. *Sid.* 53.

So where the defendant had ſpoke theſe words, J. S. *ſays I am a perjured rogue, he is a perjured rogue as well as I, J. S.* ſhall have an action, although it is not averred that the defendant was a perjured rogue; for the words *as well as I*, amount to a confeſſion of his having been ſo. 1 *Lev.* 65.

So if it be ſaid of *J. N. he robbed the* Hockley *butcher*, there is no neceſſity to aver, in an action brought by *J. N.* that there was a *Hockley* butcher, for the words themſelves imply that there was one. *Comb.* 247.

It is not neceſſary to aver, what the meaning of words ſpoken in a foreign language is in *Engliſh*; for it is the duty of the judge, before whom the cauſe is tried, to inform himſelf of this from thoſe who underſtand the language. 1 *Roll. Abr.* 86.

No action lies for words ſpoken of a perſon in office, unleſs it be averred, that at the time of ſpeaking the words there was a *colloquium* of his office; for the diſgrace in office is here the ſole ground of the action. *Cro. Jac.* 557.

So none lies for words of a man of profeſſion, unleſs a *colloquium* of his profeſſion is laid. *Strange* 1138.

So it is not actionable to ſay of a tradeſman, *He is a cheat*, unleſs theſe words are alledged to be ſpoke of him in a converſation concerning his trade. 5 *Mod.* 395. 2 *Saund.* 307. *Salk.* 694. Ld. *Raym.* 1417. *Str.* 696.

But if it appears from the words themſelves, that they do relate to the office, profeſſion, or trade, of the perſon of whom they are ſpoke, it is not neceſſary to alledge a *colloquium*. Thus, if it be ſaid of *J. S.* a phyſician, *He is no ſcholar*, an action lies, although no *colloquium* is laid of his profeſſion; for, as no man can be a good phyſician unleſs he is a ſcholar, theſe words neceſſarily imply a ſlander in his profeſſion. 1 *Roll. Abr.* 54.

So an action lies for theſe words of a tradeſman, *Have a care of him, do not deal with him, he is a cheat, he has cheated all the farmers at* E. *and now he is come to cheat at* F. it being apparent from the words themſelves, that they do relate to his trade. 2 *Lev.* 62.

So theſe words, if ſpoke of a man in trade, *He is a ſorry pitiful fellow, and compounded his debts*, are actionable without alledging a *colloquium*; for ſuch words muſt greatly leſſen the credit of a tradeſman, and be very prejudicial to him. Ld. *Raym.* 1480.

If it is alledged that the *colloquium* was at a certain place, and that the defendant ſpoke the words laid, it is well enough, although it is not averred that he ſpoke them then there; for it ſhall be intended that they were ſpoke where the *colloquium* was. *Palm.* 385.

It is ſufficient to aver, that the words, for which the action is brought, were ſpoke of the plaintiff in a *colloquium* with *J. S.* it not being neceſſary to aver, that they were ſpoken in a converſation concerning the plaintiff. 1 *Keb.* 273.

Nothing, which would otherways have been doubtful, can be reduced to certainty by an *innuendo*; for the uſe of this, which means no more than the word *aforeſaid*, is to point out what was before well aſcertained. And ſo little regard is paid to words which only come in under an *innuendo*, that no iſſue can be taken upon ſuch words. 4 *Co.* 17. *Cro. Car.* 443.

If it is alledged that *one of the ſervants of* J. S. *(innuendo* J. N. *a ſervant of* J. S.*) is a thief*, no action lies; for, as it is not averred that theſe words were ſpoken of *J. N.* it ſhall not be collected from the *innuendo* that he was the perſon intended. 4 *Co.* 17. *b.*

So for theſe words of *J. N. He did burn my barn, (innuendo) a barn with corn in it*, no action lies; becauſe theſe words, taken in the milder ſenſe, (it not being felony to burn a barn that has no corn in it, unleſs it is parcel of a manſion-houſe) would not be actionable, and the *innuendo* ſhall not make them ſo. 4 *Co.* 20. 1 *Roll. Abr.* 82.

So no action lies for ſaying of *J. S. He hath forſworn himſelf, (innuendo before the juſtices of aſſize)*; for theſe words are not actionable in themſelves, and what is ſuppoſed by the *innuendo* could not have been collected from them. 1 *Roll. Abr.* 82.

So where theſe words were ſpoke to *J. N. Thou (innuendo* the plaintiff) *art a thief*, no action lies; for the want of averment that they were ſpoken of the plaintiff ſhall not be ſupplied by an *innuendo*. 1 *Roll. Abr.* 83.

But on the other hand, as the *innuendo* ſhall not ſupply any defect in the words themſelves, or the want of averment, no repugnancy therein contained ſhall vitiate, if the words would, without the help of an *innuendo*, have been actionable. Thus, an action was brought for theſe words ſpoken of *J. S. He was perjured in his anſwer in the Star-Chamber* (innuendo *in a certain bill exhibited there by the plaintiff)*. It is impoſſible that what is contained in this *innuendo* can be true, becauſe, as a man is not ſworn to ſuch a bill, he cannot be perjured in exhibiting it; yet it was held that this action did lie: *Et per cur'*, As theſe words are in themſelves actionable without it, the *innuendo*, being repugnant, is void, and ought not to be regarded. 4 *New Abr.* 516. *Cro. Eliz.* 609. 1 *Roll. Abr.* 83.

In the caſe of ſlander for words ſpoke, the law, which conſiders that theſe may and frequently do proceed from ſudden paſſion, allows the truth of the charge implied in them to be pleaded in juſtification. Thus, if an action is brought for calling the plaintiff *a thief*, the defendant may plead in his juſtification, that the plaintiff has been guilty of a theft. 1 *Roll. Abr.* 87.

So if the words, for which an action is brought are, J. S. *is a perjured man*, the defendant may juſtify by pleading that *J. S.* was perjured in a certain cauſe.

But however the tenderneſs of the law may admit it to be a juſtification of words ſpoke, that the charge therein contained is true, it admits of no ſuch juſtification in the caſe of written ſlander. Thus, in an action for publiſhing a libel, upon Mr. *Branley*, recorder of *Warwick*, it was agreed by the whole court, that, where ſlander is in writing, the truth of the charge therein contained can no more be juſtified in an action upon the caſe, brought by the injured perſon, than in a criminal proſecution at the ſuit of the crown. 4 *New Abr.* 516.

In an action for theſe words ſpoken of the plaintiff, *He is a thief*, the defendant pleaded that he had been guilty of ſtealing ſomething. It was replied, that after the felony, and before the ſpeaking of the words, the plaintiff had been pardoned by a general pardon. Upon a demurrer, this replication was held to be good; becauſe the guilt as well as puniſhment is taken away by the pardon. It was alſo laid down, that it makes no difference, in ſuch a caſe, whether it was a general pardon or a ſpecial one, of which the defendant might perhaps be ignorant; for that he is at his peril to take care how he ſpeaks words which are ſlanderous. *Hob.* 81.

But where the plaintiff to a plea of juſtification replies a general pardon, it is incumbent upon him to ſhew, that he is not within any of the exceptions therein contained. *Raym.* 23.

An action being brought for theſe words, *He ſtole plate out of my chamber*, the defendant pleaded that he had loſt plate out of his chamber, and that, ſuſpecting the plaintiff to have ſtolen it, he had ſpoke the words. This plea was upon

upon a demurrer held to be ill; *et per cur'*, Suſpicion is not a ſufficient juſtification for the ſpeaking ſuch words. *Cro. Car.* 52.

Common fame will juſtify the arreſting a perſon on ſuſpicion of having committed a felony, and charging him in a judicial way with being guilty of it; but common fame is no good juſtification for ſuch a charge in an extra-judicial way. 1 *Roll. Abr.* 43. *Hob.* 82. *Cro. Eliz.* 248. *Hutt.* 13.

The preciſe words, and the whole of them, as laid in the plaintiff's declaration, muſt be confeſſed and juſtified in the defendant's plea, otherwiſe it is no good juſtification. 4 *Co.* 13. *b.* 14. *a.*

If an action is brought for theſe words of the plaintiff, *He is a traitor*, it is not a ſufficient anſwer, for the defendent to plead that he only ſpoke the following words, *Such things traitors do*, or any other words than the very words laid in the declaration. *Cro. Eliz.* 153. 1 *Roll. Abr.* 83.

So if the plaintiff declares, that whereas ſhe was of good fame and reputation, the defendant ſpoke the following words of her, *She is a common whore*; and the defendant alledges by way of juſtification, that at the time of ſpeaking the words, ſhe was not of good fame or reputation, this plea is ill; for it is no anſwer to the charge contained in the words, and only goes to what is laid by way of inducement, which required no anſwer. *Style* 118.

So if a declaration charges the ſpeaking certain words of the plaintiff, it is not a good juſtification, for the defendant to alledge that he heard another ſpeak the words, *quæ eſt eadem*; for the preciſe charge ought to be juſtified; and beſides, it can never be the ſame thing to ſpeak words and to hear them ſpoke. 2 *Roll. Rep.* 284.

So if theſe words are laid to be ſpoke of *J. S. He is a thief, and hath ſtolen* 20 l. *or* 40 l. and the defendant pleads that the plaintiff did ſteal two pullets; this is no good juſtification, it being no anſwer to the charge. 1 *Roll. Rep.* 214.

So where in an action for theſe words, *Thou haſt played the thief, for thou haſt ſtolen my cloth and half a yard of velvet*, the defendant juſtified the ſpeaking the following words, *Thou haſt ſtolen part of the velvet delivered to you*; this juſtification was held to be ill, becauſe it only goes to part of the words laid in the plaintiff's declaration. *Cro. Eliz.* 239.

So if the words, for which an action is brought, charge a tradeſman with being a bankrupt upon the firſt day of *April* 17 *Ja.* and the defendant pleads that the plaintiff became a bankrupt upon the firſt day of *April* 15 *Ja.* and that therefore he ſpoke the words; this plea is not a good bar; becauſe it is not alledged that the plaintiff continued a bankrupt till the time of ſpeaking the words, for he might afterwards recover his credit in trade. *Cro. Ja.* 578.

But although it is not a good juſtification unleſs all the preciſe words, in the declaration of the plaintiff, are juſtified, yet the defendant is not confined to do this only; for, if any other words were ſpoken at the ſame time, by which the force of thoſe laid would be taken away, he may in pleading avail him thereof. 4 *Co.* 13. *b.* 14. *a.* 19. *b.* *Cro. Car.* 510.

In an action for ſaying to the plaintiff *You are a murderer*, the defendant alledged, that in a converſation with the plaintiff concerning poaching, the plaintiff confeſſed he had killed a great number of hares, and that thereupon the defendant ſaid to him, *You are a murderer (innuendo* a murderer of hares) this plea, which confeſſes and juſtifies the words, was held to be a good juſtification; for it would be unreaſonable, where this is done, to put the defendant to the general iſſue. 4 *Co.* 13. *b.* 14. *a.*

Beſides that ſlanderous words, publiſhed by ſpeaking, may always be juſtified if the charge contained in them is true, they may in certain caſes be juſtified where it is not ſo. Thus, any words which import the charge of a crime may, notwithſtanding the falſity of them, be publiſhed, if they are publiſhed in a courſe of juſtice. *Cro. Eliz.* 230, 248. *Hob.* 82. *Hutt.* 113. 1 *Roll. Abr.* 43. 4 *Co.* 14. *b.* 15. *a.*

So a barriſter my juſtify the ſpeaking words, in pleading his client's cauſe, that are both falſe and ſlanderous, for which if ſpoken on another occaſion an action would lie. *Cro. Ja.* 90. 1 *Roll. Abr.* 87. *Style* 462.

So a witneſs may juſtify the ſpeaking ſlander, although it is falſe, in giving his evidence; this being done for the furtherance of juſtice. *Cro. Eliz.* 230.

So if a parſon, without any intent to ſlander, recites a ſtory in his ſermon which is falſe as well as ſlanderous, the doing this may be juſtified. *Cro. Ja.* 91. 1 *Roll. Abr.* 87.

Heretofore the truth of the charge contained in the words was allowed to be given in evidence, in mitigation of damages, on a plea of Not guilty; but at a meeting of all the judges, upon a caſe in the court of Common pleas, it was agreed not to allow this to be done for the time to come; becauſe, unleſs the truth of the words is pleaded by way of juſtification, the plaintiff cannot come prepared to defend himſelf as to that point. *Str.* 1200.

VIII. *Actions popular, or actions* qui tam.

Actions *qui tam* are ſuch as are given by act of parliament, which give a penalty and create a forfeiture for the neglect of ſome duty or commiſſion of ſome crime, to be recovered by action or information, at the ſuit of him who proſecutes as well in the King's name as in his own. It is ſometimes called a popular action, when the penalty or part of it is given to any one who will ſue for the ſame. 1 *New Abr.* 37.

Under this head is conſidered,

1. *In what caſes actions* qui tam *lie: and what ought to be the form of them.*
2. *In what courts they may be brought and where laid; and the proceedings and pleadings in them.*
3. *Of the judgment, coſts, and compounding the penalty in ſuch actions.*

1. *In what caſe actions* qui tam *lie; and what ought to be the form of them.*

Wherever a ſtatute prohibits a thing, as being an immediate offence againſt the publick good in general, under a certain penalty, and the penalty or part of it is given to him who will ſue for it, any perſon may bring ſuch action or information, and lay his demand *tam pro domino rege quam pro ſeipſo*. *Co. Ent.* 375. 1 *Lutw.* 133, 138. *Dyer* 95. 1 *And.* 139.

Alſo where a ſtatute prohibits or commands a thing, the doing or omiſſion whereof is both an immediate damage to the party, and alſo highly concerns the good of the publick, the honour of the King, *&c.* the party grieved may, and as ſome ſay, ought to bring his action on ſuch ſtatute, *tam pro domino rege quam pro ſeipſo*, eſpecially if the King be intitled to a fine. See 2 *Hawk. P. C.* 265. 4 *Co.* 13.

It is agreed, that an action or information on a publick ſtatute, need not recite the ſtatute on which it is grounded, whether the offence be ſuch only becauſe prohibited, or be an evil in its own nature, and whether it be prohibited by more than one ſtatute, or by one only; for the judges are bound *ex officio* to take notice of all publick ſtatutes. 5 *H.* 7. 17. *b.* 2 *Roll. Abr.* 79. *Plowd.* 179. 4 *Co.* 48. *Cro. Eliz.* 236. *Cro. Car.* 229. *Dyer* 155, 159.

But if the proſecutor takes upon him to recite the ſtatute, and materially varies from a ſubſtantial part thereof, this is fatal, becauſe it does not judicially appear to the court that there is ſuch a foundation for the proſecution as that whereon it is expreſly grounded. See 2 *Hawk.* 246.

But if an information contain ſeveral offences againſt a ſtatute, and be well laid as to ſome and defective as to others, the informer may have judgment for what is well laid; as where the words of the ſtatute are fully purſued in the deſcription of ſome of the offences, and not of others; or where the time is in part certain and in part uncertain.

uncertain. *Cro. Jac.* 104. 1 *Sid.* 368. 2 *Keb.* 366, 367. 2 *Rol. Abr.* 696. *Cro. Jac.* 529.

Alſo an action or information *qui tam*, need not conclude *contra pacem*, or *in contemptum domini regis*, as an indictment muſt. 2 *Hawk. P. C.* 266.

He who brings an action on a penal ſtatute, which gives one moiety of the forfeiture to the King, and the other to the informer, may either have a writ againſt the defendant, *quod reddat domino regi*, & A. B. *qui tam*, &c. *quas ei debet*, or *quod reddat* A. B. *qui tam*, &c. *quas ei debet*, and in either caſe the writ is well purſued by a declaration in the name of the plaintiff only. 1 *Jones* 261. *Cro. Car.* 256. *Plowd.* 77. *Dyer* 95.

It ſeems agreed, that every information muſt be in this form, viz. that the informer *tam pro domino rege quam pro ſeipſo ſequitur*, even where it is brought upon a ſtatute, which gives one third part of the penalty to a third perſon; but there is great variety in the form of ſuch informations in other reſpects; for ſometimes they ſay that the action accrues to the informer, to demand the forfeiture for the King and himſelf, and ſometimes that it accrues to the King and to the informer, and to *J. S. viz.* where it is divided into three parts; and ſometimes they have no clauſe at all of this kind, and ſometimes a proceſs is prayed to bring in the defendant to anſwer the informer, and ſometimes to anſwer as well the King as the informer, and ſometimes to anſwer concerning the premiſſes, without ſaying to whom. See 2 *Hawk. P. C.* 265, 267.

Such information may demand what is due to the informer, without mentioning what is due to the King; alſo if the *quantum* depend on what ſhall be found by the jury, a blank may be left for the ſum; but if it demand more or leſs for the party than his due, it is inſufficient as to him; but even in ſuch caſe it may be ſufficient as to the King's ſhare. 2 *Hawk. P. C.* 267.

If the action be popular, *i. e.* ſuch as any perſon may bring, it may conclude *ad grave damnum*, without adding *of the plaintiff*; becauſe every offence for which ſuch action is brought, is ſuppoſed to be a general grievance to every body. *Bro. Action popular* 2. 2 *Hawk. P. C.* 267.

Where the penalty is given for continuing ſuch a practice for a certain time, or for doing ſuch an act within ſuch a time, the information muſt be very particular in bringing the offence within the time preſcribed. 1 *Lutw.* 162. 2 *Hawk. P. C.* 267, 268.

By the ſtat. 18 *Eliz. cap.* 5. *None ſhall purſue againſt any perſon on a penal ſtatute, but by way of information or original action, except where the penalty is limited to certain perſons*, &c. yet popular actions in the King's Bench or Exchequer, ſeem not within the meaning of this ſtatute; for it doth not reſtrain the ſuit to original writs, but only to original actions, and ſuch actions by bill are properly orignal ones in the courts in which they are concerned; and therefore it ſeems a reaſonable conſtruction that the meaning of the ſtatute was only to reſtrain ſuits commenced in inferior courts, and afterwards removed into ſuperior. 2 *Hawk. P. C.* 267, 268.

2. *In what courts they may be brought, and where laid; and the proceedings and pleadings in them.*

By the ſtatute 21 *Jac.* 1. *c.* 4. "All offences againſt penal ſtatutes, for which any common informer may ground any popular action, bill, plaint, ſuit or information, before juſtices of aſſiſe, or *niſi prius*, or of general goal-delivery, or of oyer, &c. or of peace, &c. (except offences concerning recuſancy, or maintenance, or the King's cuſtoms, or tranſporting gold or ſilver, or munition or wooll or leather, &c.) ſhall be commenced, ſued, tried, recovered and determined by action, plaint, bill, information or indictment before the juſtices of aſſiſe, of *niſi prius*, of *oyer*, &c. or goal-delivery, or before juſtices of the peace of every county, city, borough or town corporate or liberty, having power to inquire of, hear and determine the ſame, wherein ſuch offences ſhall be committed in any of the courts, places of judicature, or liberties aforeſaid reſpectively, only at the choice of the parties which ſhall or will commence ſuit or proſecute for the ſame, and not elſewhere, ſave only in the ſaid counties or places, or places uſual for theſe counties or any of them; and the like proceſs in every popular action, bill, plaint, information or ſuit, ſhall be as in actions of treſpaſs *vi et armis* at Common law; and all informations, actions, bills, plaints and ſuits whatſoever, either by the attorney general, or by any officer whatſoever, in any of the courts of *Weſtminſter*, for or concerning any the offences aforeſaid, ſhall be void."

"And in all ſuits on penal ſtatutes, the offence ſhall be in the proper county; and if on the general iſſue the offence be not proved in the ſame county in which it is laid, the defendant ſhall be found not guilty."

"And no officer ſhall receive, file, or enter of record, any information, bill, plaint, count or declaration on the ſaid ſtatutes, which by this act are appointed to be heard and determined in their proper counties, till the informer or relator hath taken an oath before a judge of the court, that the offence was not committed in any other county, than where by the information, &c. the ſame is ſuppoſed to have been committed, &c. the ſame oath to be there entred of record."

In the conſtruction of this ſtatute it has been holden, that no action of *debt* or *information*, or other ſuit whatever, can be brought on any penal ſtatute made before 21 *Jac.* 1. in any of the courts of *Weſtminſter-Hall*, for any offence not excepted by the ſtatute, and for which the offender may be proſecuted in the county, unleſs ſuch offence ſhall be committed in the ſame county in which ſuch court ſhall ſit; and as to the objection, that by this reſtraint of ſuits on penal ſtatutes to the ſaid courts, the offence would become diſpuniſhable by the offender's removing from the county; it may be anſwered, that he may be ſued to an outlawry in the ſame manner as in an action of treſpaſs. 1 *Salk.* 372. 5 *Mod.* 425. 2 *Lev.* 204. 3 *Inſt.* 192. 1 *Jon.* 193.

That where a ſubſequent ſtatute gives an action of debt, or any other remedy for the recovery of a penalty in any court of record generally, it ſo far impliedly repeals the reſtraint of 21 *Jac.* 1. and conſequently leaves the informer at his liberty to ſue in the courts of *Weſtminſter-Hall*. 1 *Salk.* 372.

That the ſtatute gives no juriſdiction to the courts therein mentioned, over any offences, in relation to which they had none before; and therefore that ſuits for ſuch offences muſt be brought in the courts of *Weſtminſter*, in the ſame manner as before. *Cro. Car.* 119. *Lite. Rep.* 163. *Hutt.* 98. 1 *Vent.* 8.

That the ſaid ſtatute hinders not the removal of any cauſe in the King's Bench by a *certiorari*, after which it may be either tried there or in the county by a *niſi prius*. 1 *Jones* 193. 2 *Hawk. P. C.* 271.

Alſo where a ſtatute limits ſuits by an informer *qui tam* to other courts, yet any one may, by conſtruction of law, exhibit an information in the Exchequer for the whole penalty, for the uſe of the King. 1 *And.* 127. *Cro. Jac.* 178. 2 *Hawk. P. C.* 267.

That on the laſt clauſe of the ſtatute it cannot be aſſigned for error, that it did not appear upon the record, that an information, &c. was filed with ſuch previous oath as the ſtatute requires, for it is no parcel of the record, but is only directory to the officer, that no information ſhall be received, unleſs the informer be firſt ſworn. *Cro. Car.* 316.

By the 18 *Eliz. cap.* 5. "Every informer on any penal ſtatute, ſhall exhibit his ſuit in his proper perſon, and purſue the ſame either by himſelf or by his attorney in court, and ſhall not uſe any deputy."

Any informer *qui tam*, or plaintiff in a popular action may be nonſuit, and thereby determine the ſuit as to himſelf at the leaſt; and though the king cannot be nonſuit, the attorney general may enter a *nolle proſequi* to an information by the king only. *Co. Lit.* 139. *Bro. Nonſuit* 68. See 1 *Sid.* 420. 1 *Salk.* 21.

By the ſtat. 29 *Eliz. cap.* 5. and 31 *Eliz. cap.* 10. "If any natural-born ſubject or denizen, ſhall be ſued on any penal law in the King's Bench, Common Pleas, or the Exchequer, where he is bailable, or by form of

upon a demurrer held to be ill; *et per cur'*, Suſpicion is not a ſufficient juſtification for the ſpeaking ſuch words. *Cro. Car.* 52.

Common fame will juſtify the arreſting a perſon on ſuſpicion of having committed a felony, and charging him in a judicial way with being guilty of it; but common fame is no good juſtification for ſuch a charge in an extra-judicial way. 1 *Roll. Abr.* 43. *Hob.* 82. *Cro. Eliz.* 248. *Hutt.* 13.

The preciſe words, and the whole of them, as laid in the plaintiff's declaration, muſt be confeſſed and juſtified in the defendant's plea, otherwiſe it is no good juſtification. 4 *Co.* 13. *b.* 14. *a.*

If an action is brought for theſe words of the plaintiff, *He is a traitor*, it is not a ſufficient anſwer, for the defendent to plead that he only ſpoke the following words, *Such things traitors do*, or any other words than the very words laid in the declaration. *Cro. Eliz.* 153. 1 *Roll. Abr.* 83.

So if the plaintiff declares, that whereas ſhe was of good fame and reputation, the defendant ſpoke the following words of her, *She is a common whore*; and the defendant alledges by way of juſtification, that at the time of ſpeaking the words, ſhe was not of good fame or reputation, this plea is ill; for it is no anſwer to the charge contained in the words, and only goes to what is laid by way of inducement, which required no anſwer. *Style* 118.

So if a declaration charges the ſpeaking certain words of the plaintiff, it is not a good juſtification, for the defendant to alledge that he heard another ſpeak the words, *quæ eſt eadem*; for the preciſe charge ought to be juſtified; and beſides, it can never be the ſame thing to ſpeak words and to hear them ſpoke. 2 *Roll. Rep.* 284.

So if theſe words are laid to be ſpoke of *J. S. He is a thief, and hath ſtolen* 20 l. *or* 40 l. and the defendant pleads that the plaintiff did ſteal two pullets; this is no good juſtification, it being no anſwer to the charge. 1 *Roll. Rep.* 214.

So where in an action for theſe words, *Thou haſt played the thief, for thou haſt ſtolen my cloth and half a yard of velvet*, the defendant juſtified the ſpeaking the following words, *Thou haſt ſtolen part of the velvet delivered to you*; this juſtification was held to be ill, becauſe it only goes to part of the words laid in the plaintiff's declaration. *Cro. Eliz.* 239.

So if the words, for which an action is brought, charge a tradeſman with being a bankrupt upon the firſt day of *April* 17 *Ja.* and the defendant pleads that the plaintiff became a bankrupt upon the firſt day of *April* 15 *Ja.* and that therefore he ſpoke the words; this plea is not a good bar; becauſe it is not alledged that the plaintiff continued a bankrupt till the time of ſpeaking the words, for he might afterwards recover his credit in trade. *Cro. Ja.* 578.

But although it is not a good juſtification unleſs all the preciſe words, in the declaration of the plaintiff, are juſtified, yet the defendant is not confined to do this only; for, if any other words were ſpoken at the ſame time, by which the force of thoſe laid would be taken away, he may in pleading avail him thereof. 4 *Co.* 13. *b.* 14. *a.* 19. *b. Cro. Car.* 510.

In an action for ſaying to the plaintiff *You are a murderer*, the defendant alledged, that in a converſation with the plaintiff concerning poaching, the plaintiff confeſſed he had killed a great number of hares, and that thereupon the defendant ſaid to him, *You are a murderer (innuendo* a murderer of hares) this plea, which confeſſes and juſtifies the words, was held to be a good juſtification; for it would be unreaſonable, where this is done, to put the defendant to the general iſſue. 4 *Co.* 13. *b.* 14. *a.*

Beſides that ſlanderous words, publiſhed by ſpeaking, may always be juſtified if the charge contained in them is true, they may in certain caſes be juſtified where it is not ſo. Thus, any words which import the charge of a crime may, notwithſtanding the falſity of them, be publiſhed, if they are publiſhed in a courſe of juſtice. *Cro. Eliz.* 230, 248. *Hob.* 82. *Hutt.* 113. 1 *Roll. Abr.* 43. 4 *Co.* 14. *b.* 15. *a.*

So a barriſter my juſtify the ſpeaking words, in pleading his client's cauſe, that are both falſe and ſlanderous, for which if ſpoken on another occaſion an action would lie. *Cro. Ja.* 90. 1 *Roll. Abr.* 87. *Style* 462.

So a witneſs may juſtify the ſpeaking ſlander, although it is falſe, in giving his evidence; this being done for the furtherance of juſtice. *Cro. Eliz.* 230.

So if a parſon, without any intent to ſlander, recites a ſtory in his ſermon which is falſe as well as ſlanderous, the doing this may be juſtified. *Cro. Ja.* 91. 1 *Roll. Abr.* 87.

Heretofore the truth of the charge contained in the words was allowed to be given in evidence, in mitigation of damages, on a plea of Not guilty; but at a meeting of all the judges, upon a caſe in the court of Common pleas, it was agreed not to allow this to be done for the time to come; becauſe, unleſs the truth of the words is pleaded by way of juſtification, the plaintiff cannot come prepared to defend himſelf as to that point. *Str.* 1200.

VIII. *Actions popular, or actions* qui tam.

Actions *qui tam* are ſuch as are given by act of parliament, which give a penalty and create a forfeiture for the neglect of ſome duty or commiſſion of ſome crime, to be recovered by action or information, at the ſuit of him who proſecutes as well in the King's name as in his own. It is ſometimes called a popular action, when the penalty or part of it is given to any one who will ſue for the ſame. 1 *New Abr.* 37.

Under this head is conſidered,

1. *In what caſes actions* qui tam *lie: and what ought to be the form of them.*
2. *In what courts they may be brought and where laid; and the proceedings and pleadings in them.*
3. *Of the judgment, coſts, and compounding the penalty in ſuch actions.*

1. *In what caſe actions* qui tam *lie; and what ought to be the form of them.*

Wherever a ſtatute prohibits a thing, as being an immediate offence againſt the publick good in general, under a certain penalty, and the penalty or part of it is given to him who will ſue for it, any perſon may bring ſuch action or information, and lay his demand *tam pro domino rege quam pro ſeipſo. Co. Ent.* 375. 1 *Lutw.* 133, 138. *Dyer* 95. 1 *And.* 139.

Alſo where a ſtatute prohibits or commands a thing, the doing or omiſſion whereof is both an immediate damage to the party, and alſo highly concerns the good of the publick, the honour of the King, *&c.* the party grieved may, and as ſome ſay, ought to bring his action on ſuch ſtatute, *tam pro domino rege quam pro ſeipſo*, eſpecially if the King be intitled to a fine. See 2 *Hawk. P. C.* 265. 4 *Co.* 13.

It is agreed, that an action or information on a publick ſtatute, need not recite the ſtatute on which it is grounded, whether the offence be ſuch only becauſe prohibited, or be an evil in its own nature, and whether it be prohibited by more than one ſtatute, or by one only; for the judges are bound *ex officio* to take notice of all publick ſtatutes. 5 *H.* 7. 17. *b.* 2 *Roll. Abr.* 79. *Plowd.* 179. 4 *Co.* 48. *Cro. Eliz.* 236. *Cro. Car.* 229. *Dyer* 155, 159.

But if the proſecutor takes upon him to recite the ſtatute, and materially varies from a ſubſtantial part thereof, this is fatal, becauſe it does not judicially appear to the court that there is ſuch a foundation for the proſecution as that whereon it is expreſly grounded. See 2 *Hawk.* 246.

But if an information contain ſeveral offences againſt a ſtatute, and be well laid as to ſome and defective as to others, the informer may have judgment for what is well laid; as where the words of the ſtatute are fully purſued in the deſcription of ſome of the offences, and not of others; or where the time is in part certain and in part uncertain.

uncertain. *Cro. Jac.* 104. 1 *Sid.* 368. 2 *Keb.* 366, 367. 2 *Rol. Abr.* 696. *Cro. Jac.* 529.

Alſo an action or information *qui tam*, need not conclude *contra pacem*, or *in contemptum domini regis*, as an indictment muſt. 2 *Hawk. P. C.* 266.

He who brings an action on a penal ſtatute, which gives one moiety of the forfeiture to the King, and the other to the informer, may either have a writ againſt the defendant, *quod reddat domino regi*, & A. B. *qui tam*, &c. *quas ei debet*, or *quod reddat* A. B. *qui tam*, &c. *quas ei debet*, and in either caſe the writ is well purſued by a declaration in the name of the plaintiff only. 1 *Jones* 261. *Cro. Car.* 256. *Plowd.* 77. *Dyer* 95.

It ſeems agreed, that every information muſt be in this form, viz. that the informer *tam pro domino rege quam pro ſeipſo ſequitur*, even where it is brought upon a ſtatute, which gives one third part of the penalty to a third perſon; but there is great variety in the form of ſuch informations in other reſpects; for ſometimes they ſay that the action accrues to the informer, to demand the forfeiture for the King and himſelf, and ſometimes that it accrues to the King and to the informer, and to *J. S. viz.* where it is divided into three parts; and ſometimes they have no clauſe at all of this kind, and ſometimes a proceſs is prayed to bring in the defendant to anſwer the informer, and ſometimes to anſwer as well the King as the informer, and ſometimes to anſwer concerning the premiſſes, without ſaying to whom. See 2 *Hawk. P. C.* 265, 267.

Such information may demand what is due to the informer, without mentioning what is due to the King; alſo if the *quantum* depend on what ſhall be found by the jury, a blank may be left for the ſum; but if it demand more or leſs for the party than his due, it is inſufficient as to him; but even in ſuch caſe it may be ſufficient as to the King's ſhare. 2 *Hawk. P. C.* 267.

If the action be popular, *i. e.* ſuch as any perſon may bring, it may conclude *ad grave damnum*, without adding *of the plaintiff*; becauſe every offence for which ſuch action is brought, is ſuppoſed to be a general grievance to every body. *Bro. Action popular* 2. 2 *Hawk. P. C.* 267.

Where the penalty is given for continuing ſuch a practice for a certain time, or for doing ſuch an act within ſuch a time, the information muſt be very particular in bringing the offence within the time preſcribed. 1 *Lutw.* 162. 2 *Hawk. P. C.* 267, 268.

By the ſtat. 18 *Eliz. cap.* 5. *None ſhall purſue againſt any perſon on a penal ſtatute, but by way of information or original action, except where the penalty is limited to certain perſons*, &c. yet popular actions in the King's Bench or Exchequer, ſeem not within the meaning of this ſtatute; for it doth not reſtrain the ſuit to original writs, but only to original actions, and ſuch actions by bill are properly orignal ones in the courts in which they are concerned; and therefore it ſeems a reaſonable conſtruction that the meaning of the ſtatute was only to reſtrain ſuits commenced in inferior courts, and afterwards removed into ſuperior. 2 *Hawk. P. C.* 267, 268.

2. *In what courts they may be brought, and where laid; and the proceedings and pleadings in them.*

By the ſtatute 21 *Jac.* 1. *c.* 4. "All offences againſt penal ſtatutes, for which any common informer may ground any popular action, bill, plaint, ſuit or information, before juſtices of aſſiſe, or *niſi prius*, or of general goal-delivery, or of oyer, &c. or of peace, &c. (except offences concerning recuſancy, or maintenance, or the King's cuſtoms, or tranſporting gold or ſilver, or munition or wooll or leather, &c.) ſhall be commenced, ſued, tried, recovered and determined by action, plaint, bill, information or indictment before the juſtices of aſſiſe, of *niſi prius*, of *oyer*, &c. or goal-delivery, or before juſtices of the peace of every county, city, borough or town corporate or liberty, having power to inquire of, hear and determine the ſame, wherein ſuch offences ſhall be committed in any of the courts, places of judicature, or liberties aforeſaid reſpectively, only at the choice of the parties which ſhall or will commence ſuit or proſecute for the ſame, and not elſewhere, ſave only in the ſaid counties or places, or places uſual for theſe counties or any of them; and the like proceſs in every popular action, bill, plaint, information or ſuit, ſhall be as in actions of treſpaſs *vi et armis* at Common law; and all informations, actions, bills, plaints and ſuits whatſoever, either by the attorney general, or by any officer whatſoever, in any of the courts of *Weſtminſter*, for or concerning any the offences aforeſaid, ſhall be void."

"And in all ſuits on penal ſtatutes, the offence ſhall be in the proper county; and if on the general iſſue the offence be not proved in the ſame county in which it is laid, the defendant ſhall be found not guilty."

"And no officer ſhall receive, file, or enter of record, any information, bill, plaint, count or declaration on the ſaid ſtatutes, which by this act are appointed to be heard and determined in their proper counties, till the informer or relator hath taken an oath before a judge of the court, that the offence was not committed in any other county, than where by the information, &c. the ſame is ſuppoſed to have been committed, &c. the ſame oath to be there entred of record."

In the conſtruction of this ſtatute it has been holden, that no action of *debt* or *information*, or other ſuit whatever, can be brought on any penal ſtatute made before 21 *Jac.* 1. in any of the courts of *Weſtminſter-Hall*, for any offence not excepted by the ſtatute, and for which the offender may be proſecuted in the county, unleſs ſuch offence ſhall be committed in the ſame county in which ſuch court ſhall ſit; and as to the objection, that by this reſtraint of ſuits on penal ſtatutes to the ſaid courts, the offence would become diſpuniſhable by the offender's removing from the county; it may be anſwered, that he may be ſued to an outlawry in the ſame manner as in an action of treſpaſs. 1 *Salk.* 372. 5 *Mod.* 425. 2 *Lev.* 204. 3 *Inſt.* 192. 1 *Jon.* 193.

That where a ſubſequent ſtatute gives an action of debt, or any other remedy for the recovery of a penalty in any court of record generally, it ſo far impliedly repeals the reſtraint of 21 *Jac.* 1. and conſequently leaves the informer at his liberty to ſue in the courts of *Weſtminſter-Hall*. 1 *Salk.* 372.

That the ſtatute gives no juriſdiction to the courts therein mentioned, over any offences, in relation to which they had none before; and therefore that ſuits for ſuch offences muſt be brought in the courts of *Weſtminſter*, in the ſame manner as before. *Cro. Car.* 119. *Lite. Rep.* 163. *Hutt.* 98. 1 *Vent.* 8.

That the ſaid ſtatute hinders not the removal of any cauſe in the King's Bench by a *certiorari*, after which it may be either tried there or in the county by a *niſi prius*. 1 *Jones* 193. 2 *Hawk. P. C.* 271.

Alſo where a ſtatute limits ſuits by an informer *qui tam* to other courts, yet any one may, by conſtruction of law, exhibit an information in the Exchequer for the whole penalty, for the uſe of the King. 1 *And.* 127. *Cro. Jac.* 178. 2 *Hawk. P. C.* 267.

That on the laſt clauſe of the ſtatute it cannot be aſſigned for error, that it did not appear upon the record, that an information, &c. was filed with ſuch previous oath as the ſtatute requires, for it is no parcel of the record, but is only directory to the officer, that no information ſhall be received, unleſs the informer be firſt ſworn. *Cro. Car.* 316.

By the 18 *Eliz. cap.* 5. "Every informer on any penal ſtatute, ſhall exhibit his ſuit in his proper perſon, and purſue the ſame either by himſelf or by his attorney in court, and ſhall not uſe any deputy."

Any informer *qui tam*, or plaintiff in a popular action may be nonſuit, and thereby determine the ſuit as to himſelf at the leaſt; and though the king cannot be nonſuit, the attorney general may enter a *nolle proſequi* to an information by the king only. *Co. Lit.* 139. *Bro. Nonſuit* 68. See 1 *Sid.* 420. 1 *Salk.* 21.

By the ſtat. 29 *Eliz. cap.* 5. and 31 *Eliz. cap.* 10. "If any natural-born ſubject or denizen, ſhall be ſued on any penal law in the King's Bench, Common Pleas, or the Exchequer, where he is bailable, or by form of

the court may appear by attorney; in every ſuch caſe he may, at the time contained in the firſt proceſs, appear by attorney, and not be urged to perſonal appearance, or to put in bail."

If the defendant plead a ſpecial plea, he muſt take care to ſet it forth with all convenient certainty, and to anſwer the whole time laid in the information; and if he plead the general iſſue, he muſt depend upon it, for he cannot plead together with it a ſpecial plea, either to the whole or to part of the charge. 1 *Roll. Rep.* 49, 134. *Bridg.* 115.

If the defendant plead *Nil debet*, it is ſafeſt to ſay expreſsly that he owes nothing to the informer, nor to the King; for if he only plead that he owes nothing to the informer, it may be objected that the whole declaration is not anſwered. *Co. Ent.* 165. *Hob.* 327. 1 *Vent.* 122. 3 *Lev.* 375.

If there be more than one defendant, they ought not to plead jointly that they are not guilty, but ſeverally, that neither they nor any of them are guilty, *&c.* See 2 *Hawk. P. C.* 276.

If the ſuit be grounded on the breach of a ſtatute appearing by matter of record, *nil debet* is no good plea. 2 *Hawk. P. C.* 277.

Wherever a ſuit on a penal ſtatute may be ſaid to be depending, it may be pleaded in bar of a ſubſequent proſecution, being expreſly averred to be for the ſame offence, as it may, though it be laid on a day different from that in the former; and it is ſaid, that a miſtake in ſuch a plea, of the day whereon ſuch prior ſuit was commenced, will not be fatal on the iſſue of *nul tiel record*, if it appears in truth to have been prior, *&c.* and if two informations be exhibited on the ſame day, they may mutually abate one another; becauſe there is no priority to attach the right of ſuit in one informer, more than in the other. *Cro. Eliz.* 261. 1 *Roll. Rep.* 49, 134.

If the defendant be within the *proviſo* of a penal ſtatute, he may take advantage of ſuch *proviſo* on the general iſſue, in a ſuit on ſuch ſtatute; but it hath been holden (even ſince the ſtatute of 21 *Jac.* 1.) that if he have matter in his diſcharge depending on a ſubſequent ſtatute, he muſt plead ſpecially. 2 *Roll. Abr.* 683. See 2 *Hawk. P. C.* 277.

As to replications to ſpecial pleas to informations *qui tam*, in the courts of *Weſtminſter Hall*, they are properly made in the name of the attorney general only; and ſuch replications in ſuits at aſſizes, are proper in the name of the clerk of aſſizes only; alſo replications to general iſſues, on ſuch informations in the King's Bench or Exchequer, may be in the name of the attorney general only; but generally the plaintiff only replies in actions *qui tam*; and in the *Common pleas* a demurrer to an information *qui tam* in the defendant's name only has been received. 2 *Hawk. P. C.* 277.

Wherever a plaintiff may declare *tam pro domino rege quam pro ſe ipſo*, he may continue the ſame form of words both in the joining of iſſue and in the *venire*; but is not bound to do it unleſs the King be intitled to part of the penalty. 2 *Hawk. P. C.* 278.

Where ſeveral perſons are jointly charged for an offence againſt a ſtatute, which in it's own nature may be committed by a ſingle perſon, without the concurrence of any other, ſome of them may be acquitted and others found guilty; for though the words of the information be joint, yet in judgment of law the charge is ſeveral againſt each defendant; alſo if one be informed againſt, as having offended oftner, or in a higher degree than is proved, as for having been abſent from church ten months, where he has been abſent but eight, or for having ingroſſed 1000 quarters of wheat, where he has ingroſſed but 100; he may be found guilty as to what is proved, and not guilty as to the reſidue, for ſuch offences are in the nature of treſpaſſes, which it is ſufficient to prove for any part; but if the offence conſiſts in making a contract contrary to the purview of a ſtatute, as in the caſe of uſury, it muſt be proved as it is laid. 2 *Roll. Abr.* 707. *Lane* 19, 59.

3. *Of the judgment, coſts, and compounding the penalty in ſuch actions.*

Where by a ſtatute the offender is to forfeit ſuch a ſum, to be divided into three parts, whereof one ſhall go to the King, one to the informer, and the other to the poor, and to be committed if he do not pay within ſuch a time, the judgment may be general that the King and informer ſhall recover the whole, without mentioning how it ſhall be diſtributed, or that the party be committed for non-payment; but if it mention only that the informer only ſhall recover, without ſaying any thing of the King, it is erroneous; yet if on ſuch information, as it is laid, the informer appears to have no right to any part, but the King ought to have the whole, and the judgment be that the defendant forfeit the whole, and that the King ſhall have one part, and the informer another, *&c.* it is erroneous only as to ſuch laſt clauſe, which diſtributes the forfeiture, but may ſtand for the firſt clauſe, that the defendant ſhall forfeit the whole; alſo if there be no clauſe at all concerning the forfeiture, in a conviction on a penal ſtatute, but only judgment *quod convictus*, it is ſufficient, for the forfeiture is implied. 1 *And.* 139. *Style* 329. 2 *Roll. Abr.* 102. 2 *Keb.* 820. 2 *And.* 128. 2 *Hawk. P. C.* 279

An informer on a popular ſtatute ſhall in no caſe whatſoever have his coſts, unleſs they be expreſly given by ſuch ſtatute, for the Common law gives coſts in no caſe; and the ſtatute of *Glouceſter* gives the demandant coſts only in caſes wherein he ſhall recover his damages, which ſuppoſes ſome damage to have been done to the demandant in particular, which cannot be ſaid in any popular action. 2 *Keb.* 781. 1 *Roll. Abr.* 574. 1 *Lutw.* 200. 1 *Vent.* 133. 1 *Salk.* 206. *Cont. Moor* 65. 3 *Lev.* 374. 2 *Inſt.* 288.

But wherever a ſtatute gives a certain penalty to the party grieved, he is intitled to his coſts by the ſtatute of *Glouceſter*, which gives the demandant his coſt sin all caſes wherein he ſhall recover his damages; for otherwiſe it would be in vain for him to ſue, ſince in many caſes the coſts would exceed the penalty. 2 *Hawk. P. C.* 274.

By the ſtat. 18 Eliz. c. 5. (*made perpetual by* 27 Eliz. c. 10) "If any informer or plaintiff, on a penal ſtatute, ſhall willingly, delay his ſuit, or diſcontinue, or be nonſuit, or ſhall have the trial or matter paſſed againſt himſelf therein, by verdict or judgment of law, he ſhall pay to the defendant his coſts, charges and damages, to be aſſigned by the court, in which the ſuit ſhall be attempted, *&c.*"

This ſtatute extends only to a common informer, and not to a party grieved; yet if a party grieved brings his action, and ſuch action be for any offence or wrong perſonal, immediately ſuppoſed to be done to the plaintiff or plaintiffs, or whatſoever the nature of the action may be; if the plaintiff might have coſts in caſe judgment ſhould be given for him, he ſhall pay them on a nonſuit, or verdict againſt him, by virtue of 23 *Hen.* 8. *c.* 15. and 4 *Jac.* 1. *c.* 3. See 2 *Hawk. P. C.* 274.

By the 18 Eliz. cap. 5. "No informer or plaintiff ſhall compound or agree with any that ſhall offend, or ſhall be ſurmiſed to offend againſt any penal ſtatute, for an offence committed, or pretended to be committed, but after anſwer made in court to the ſuit, nor after anſwer, but by conſent of the court in which the ſuit ſhall be depending; on pain that whoever ſhall offend, contrary to the true intent of this ſtatute, or ſhall by colour or pretence of proceſs, or without proceſs on colour of any offence againſt any penal law, make any compoſition or take any reward, or promiſe of reward, for himſelf, or to the uſe of any other, without conſent of ſome of his Majeſty's courts at *Weſtminſter*, and ſhall be thereof convict, ſhall ſtand in the pillory, *&c.* and ſhall be diſabled to ſue on any popular or penal ſtatute, and ſhall forfeit 10*l. &c.*"

This ſtatute extends only to common informers. 2 *Hawk. P. C.* 279.

This ſtatute extends as well to ſubſequent penal ſtatutes, as to thoſe which were in being when it was made. *Hutt.* 35. Alſo it extends to the compounding of ſuits commenced in courts which have no juriſdiction, as much as if they had juriſdiction. 1 *Keb.* 106. 1 *Sid.* 311.

By

By the ſtat. 21 *Jac.* 1. *cap.* 3. "It is declared, that all commiſſions, grants, licences, charters, or letters patent, of power, liberty, or faculty, to diſpenſe with, or to give licence or toleration to do any thing againſt the tenor or purport of any law, or to give or to make any warrant for any ſuch diſpenſation, *&c.* or to agree or compound for any forfeiture limited by any ſtatute; or of any grant or promiſe of the benefit of any ſuch forfeiture, before judgment thereupon, and all proclamations, *&c.* tending to the furthering of the ſame, are contrary to law, and void; *and it is enacted*, that all ſuch commiſſions, *&c.* ſhall be examined, heard, tried and determined by and according to the Common laws of this realm, and not otherwiſe; *but it is provided that this act ſhall not extend* to any warrant or privy ſeal from the King, to the juſtices of either bench, or the Exchequer, or of aſſize, or of *oyer* and *terminer*, and goal delivery; or of peace, or other juſtices, having power to hear and determine offences againſt any penal ſtatute, to compound for the forfeitures of any penal ſtatutes depending in ſuit before them, after plea pleaded. *Alſo it is further provided*, that the ſaid act ſhall not extend to any grants, *&c.* that had been granted concerning the licenſing of taverns, or ſelling, uttering, or retailing wines, or to be ſpent in the houſe of the party ſelling the ſame; or concerning the making of compoſitions for ſuch licences; ſo as the benefit thereof be reſerved to the uſe of the King, *&c.*"

This ſtatute is in affirmance of the Common law. See 2 *Hawk. P. C.* 280.

Action of trover See title **Trover.**

Action of debt. See title **Debt.**

Action of detinue. See title **Detinue.**

Action of covenant. See title **Covenant.**

Action upon a ſtatute, Is brought upon the breach of a ſtatute, whereby an action is given that lay not before; as where one commits perjury, to the prejudice of another, he who is damaged, ſhall have a writ upon the ſtatute, that is, where the ſtatute gives the *ſuit* or *action* to the party grieved, or otherwiſe to one perſon certain. *Cowel.*

Action prejudicial, (otherwiſe called *preparatory*, or *principal*) Is an action which ariſes from ſome doubt in the principal; as in caſe a man ſues his younger brother for lands deſcended from his father, and it is objected againſt him that he is a baſtard: Now this point of baſtardy is to be tried before the cauſe can any further proceed: And therefore it is termed *prejudicialis, quia prius judicanda. Bract. lib.* 3. *c.* 4 *num.* 6. *Cowel.*

Action of a writ, Is a phraſe of ſpeech uſed, when one pleads ſome matter, by which he ſhews the plaintiff had no cauſe to have the writ he brought, yet it may be that he may have another *writ* or *action* for the ſame matter. Such a plea is called *a plea to the action of the writ*; whereas, if by the plea, it ſhould appear that the plaintiff hath no cauſe to have an *action* for the thing demanded, then it ſhall be called *a plea to the action. Cowel. Termes de la ley.*

Actionare, i. e. *In jus vocare*, Or to proſecute one in a ſuit at law. *Jacob. Thorn's Chron.*

Acto, *Acton, Aketon*, A coat of mail. *Ex gallico* hoqueton, *aut* hauqueton, *ſue potius, ex cambro-britannico*, actym, *lorica, dupla, duplodes. Du Freſne.*——*Tho. Walſing*, in *Ed.* 3. *Indutus autem fuit epiſcopus quadam armatura, quam* aketon *vulgariter appellamus. Stat. Rob.* 1. *regis Scot. cap.* 27. *Quilibet habent in defenſione regni unum ſufficientem* actonem; *unum baſinetum, et chirothecus de guerra.*

Acton Burnel, A ſtatute ſo called, made 13 *Ed.* 1. *ann.* 1285. ordaining the *ſtatute merchant:* It was ſo termed from a place named *Acton Burnel*, where it was made; being a caſtle ſometime belonging to the family of *Burnel*, and afterwards of *Lovel*, in *Shropſhire. Cowel.*

Actor, The proctor or advocate in civil courts or cauſes. *Actor dominicus*, was often uſed for the lord's bailiff or attorney. *Actor eccleſiæ*, was ſometime the forinſick term for the advocate or pleading patron of a church. *Actor villæ* was the ſteward or head bailiff of a town or village. *Cowel.*

Acts done, Are diſtinguiſhed into *acts of God*, the *acts of the law*, and *acts of men.* The *act of God* ſhall prejudice no man: As where the law preſcribeth a means to perfect or ſettle any right or eſtate; if by the *act of God* this means in ſome circumſtance becomes impoſſible, no party ſhall receive any damage thereby. *Co. Lit.* 123. 1 *Rep.* 97.

Debt upon bond conditioned, that if *W. R.* performed the award of *J. N.* (if any ſuch were made) before *Eaſter*, and if none be made, then if he come to *Guild-hall* at *Whitſontide*, and there ſuffer himſelf to be arreſted at the ſuit of ſuch a perſon, if any ſuch ſuit ſhall be commenced, or pay to the plaintiff at *Michaelmas* following ten pounds, then the bond to be void; the defendant pleaded that no award was made before *Eaſter*, and that *W. R.* died before *Whitſontide*, but ſaid nothing as to the reſt of the condition, and yet adjudged a good plea, becauſe he was hindered from appearing at *Guild-hall* by the act of God, and ſo the obligation is ſaved, tho' he did not pay the 10*l.* for he had his election, either to do one or the other. *Cro. Eliz.* 277.

Caſe againſt a *bargeman*, who juſtified, for that there were ſeveral paſſengers in his barge, and a ſudden *tempeſt* ariſing, all the goods in the barge were thrown over-board to ſave the lives of the paſſengers, amongſt which the goods of the plaintiff were thrown over, and that he had not any notice that there was *money in the pack*; adjudged, that the action would not lie, becauſe what the owner of the barge did in this caſe, was occaſioned by the *act of God*, and in defence of their lives. 1 *Roll. Rep.* 79.

If any of the circumſtances, which are required by law to perfect an eſtate, become impoſſible to be performed by the *act of God*, no perſon ſhall be prejudiced thereby; as where leſſee for another man's life is diſſeiſed, the means which the law requires to recover the profits is, that the leſſee re-enter and bring an action of treſpaſs; but if the *ceſtui que vie die* before re-entry, in ſuch caſe the leſſee ſhall have an action of treſpaſs without re-entry. 1 *Rep.* 97. *Shelley's* caſe.

Edw. Shelley made a leaſe for years, and there covenanted to ſuffer a *recovery* to the uſe of himſelf for life, and afterwards to the uſe of *R. B.* for 24 years, then to the heirs males of his and to the heirs males of their bodies, *&c. Edw. Shelley died the firſt day of* Michaelmas *term*, and on the ſame day the recovery paſſed, and an *habere facias ſeiſinam* was awarded, but the recovery was not executed until the day following, and about two months afterwards the widow of his eldeſt ſon, was delivered of a ſon; adjudged, that here being no neglect in the recoverers, for they ſued forth execution immediately by *habere facias ſeiſinam*, and it being impoſſible they ſhould do it in the life time of *Edw. Shelley*, who died early in the morning of the ſame day, therefore the ſon, who was after-born, ſhould not be prejudiced. 1 *Rep.* 98. *Shelley's* caſe.

Leaſe for twenty-one years, if the leſſee lived ſo long, *and continued in the ſervice of the leſſor*, who died within that time; adjudged, that the leaſe was not determined, for there was no default in the leſſee; but 'tis the act of God, that he could ſerve no longer. *Cro. Eliz.* 643.

Aſſumpſit againſt *huſband and wife*, in which the plaintiff declared, that the wife, *dum ſola*, in conſideration, that the plaintiff would lend her his horſe (to her uſe *dum ſola*) to ride about her buſineſs as long as her huſband ſhould pleaſe, ſhe promiſed to re-deliver *eundem ſpadonem*, when ſhe ſhould be thereunto *required*; then he ſets forth, that the wife *dum ſola*, or the huſband and wife after marriage, had not delivered the horſe, nor any wiſe contented the plaintiff, nor either of them had contented him, altho' at ſuch a day, year and place, they were required: The defendant, by proteſtation ſaid, that the wife *dum ſola*, was not required to re-deliver the horſe; and for plea ſaid, that before the requeſt as alledged by the plaintiff, *(viz)* on ſuch a day, and at ſuch a place, the horſe *per diverſos morbos in corpore ſuo moritur*, ſo that he could not re-deliver it; and upon demurrer to this plea it was inſiſted for the plaintiff, that he ought to recover,

cover, becauſe the defendant, tho' not bound in law, yet is bound by expreſs agreement to re-deliver *eundem ſpadonem*; but adjudged, that where an agreement is poſſible to be performed, at the time when it was made, and afterwards becomes impoſſible by the act of God, and without any default in the party, he is for ever diſcharged. *Palm.* 548.

The *act of the law* doth injury to none; *Actus legis nemini eſt damnoſus.* 2 *Inſt.* 287. If land, out of which a rent-charge is granted, be recovered by elder title, and thereby the rent-charge becomes avoided; yet the grantee ſhall have a writ of annuity. *Dyer.* This is becauſe the rent-charge is made void by courſe or *act* of law.

As to *acts of men*; that which a man doth by another, ſhall be ſaid to be done by himſelf; but perſonal things cannot be done by another. *Co. Lit.* 158. A man cannot do an act to himſelf, unleſs it be where he hath a double capacity: No perſon ſhall be ſuffered to do any thing againſt his own *act*, and every man's *acts* ſhall be conſtrued moſt ſtrongly againſt himſelf that doth them. *Plowd.* 140. But if many join in an *act*, and ſome may not lawfully do it; it ſhall be adjudged the act of him who might lawfully do the ſame. *Dyer* 192. Acts that men are forced by neceſſity and compulſion to do, are not regarded: And an act done between perſons, ſhall not injure a ſtranger not party or privy thereto. *Plowd.* 19. 6 *Rep.* 16.

Who is to do the firſt act, and of diſability by a perſon's own act.

Debt on a bond conditioned to give ſuch a releaſe in *Michaelmas-term*, as the judge of the *prerogative court* ſhould think proper; the defendant pleaded, that in that *term B. B.* was judge of that court, and that he did not appoint any *releaſe*; and upon demurrer it was held an ill plea, becauſe the defendant did not alledge, that he had prepared a *releaſe*, and tendered it to the judge to be allowed, for 'tis on his part to draw the *releaſe*. *Cro. Eliz.* 716.

Debt upon bond, conditioned, that if the plaintiff did bring ſuch a ſhip to a port in *Greece*, there to remain for *forty days*, or ſo long of the *forty days* as the defendant pleaſed, ſo as he might freight the ſaid ſhip, that then the defendant would freight it within *forty days*, and bring it to ſuch a port in *England*; there was a frivolous plea, to which the plaintiff demurred, and it was inſiſted for the defendant, that the firſt act was to be done by the plaintiff, *(viz)* to bring the ſhip to ſuch a port, there to remain by the ſpace of *forty days*, and he had not averred, that the ſhip was at that port by the ſpace of *forty days*, and for that reaſon the court inclined that the condition was not broken. *Godb.* 74.

Leaſe for years, in which the leſſor covenanted with the leſſee, that *upon ſurrender* of his ſaid leaſe at any time within the term, he would grant a new leaſe, afterwards the leſſor levied a *fine ſur cognizance de droit* of the lands, and granted and rendered the ſame to the cogniſee for 80 years; adjudged, that by this means the cogniſor had *diſabled* himſelf either to take the ſurrender or to make a new leaſe, and altho' the leſſee was to do the firſt act, *(viz) to make the ſurrender*, yet when the leſſor had *diſabled* himſelf to take it, the law will not compel him to do that which will be in vain; eſpecially in this caſe, for if he ſhould make a *ſurrender*, then he would loſe his old term without any poſſibility of having a new leaſe. 5 *Rep.* 20.

The condition of a bond was, that the obligor and his wife ſhould before *Eaſter term*, *&c.* levy a *fine* of ſuch lands to the plaintiff; the defendant pleaded, that before that term the plaintiff did not ſue for a *writ of covenant* to make himſelf capable of the *fine*, and *Hobart*, chief juſtice, was of opinion it was a good plea. *Hutt.* 48.

Debt upon bond, for performance of covenants, *&c.* the *covenant* was, that the obligor before ſuch a day ſhould make a *further aſſurance* of lands to the obligee, but at the *coſts and charges of the obligee*; the queſtion was, whether the obligee was firſt to offer the *coſts*, or whether the obligor was firſt to declare what *manner of aſſurance* he would make? and adjudged, that it being purely in the choice of the obligor, what manner of *aſſurance* he would make, he ought to do the firſt act, *(viz)* to give notice to the obligee what aſſurance he intended to make, and then the obligee is to ſupply the coſts. *Moor* 454.

The huſband ſettled an eſtate to the uſe of himſelf for life, and afterwards, to the uſe of *Dorothy* his wife for life, *ſo long as ſhe would be effectually ready to demiſe it to his heir at law at* 50*l.* *yearly rent, when ſhe ſhould not dwell in it her ſelf*; the huſband died, the widow married again, and lived with her huſband in another place, and having made no leaſe to the heir, he entred; adjudged, that ſhe ought to make none unleſs it had been *demanded*, and that the heir ought to *tender a leaſe* to her to ſign, with a reſervation of 50*l.* rent. *Moor* 626.

Debt by the *mayor*, *&c.* of *London*, for rent of a mill, which went by the labour of priſoners in *Bridewell*; the defendant pleaded a proviſo in the leaſe, that if the leſſors did not find eight men to work in the mill every day, that the leſſee might retain 8*d.* of the rent for every man wanting in that day, and ſo *toties quoties*; and that there had been ſo many men wanting for ſo many days, and the money retained for that defect amounted to more than the rent; the plaintiffs replied, that the defendant had ſo altered the mill, that he made it go with *one horſe* inſtead of *eight men*, for which reaſon they did not provide the men; and upon demurrer the plaintiffs had judgment, becauſe the alteration was made in the mill by the defendant's own act. *Moor* 877.

The *condition* of a bond was to deliver 200 *weight of hops*, *&c.* and the obligee was to chooſe them out of *twenty-four bags* of the obligor's own growing; in an action of debt brought on this bond for not delivering the *hops*, the defendant pleaded, that he was ready to deliver them, but the plaintiff had not choſe them; adjudged, that the plaintiff ought to do the firſt act, (viz.) to require the defendant to ſhew the twenty-four bags that he might make his choice. *March* 24.

Debt upon bond, conditioned, that whereas there was a ſuit in Chancery depending between the now plaintiff and ſeveral *infants*, by their *guardian*, and that it was decreed, that the plaintiff ſhould pay the ſaid *guardian* to the uſe of the *infants* 840*l.* in full ſatisfaction of their right and title to a *leaſe of the manor of Martley-Hall*, and other lands in *Suffolk*, if therefore the ſaid *guardian* ſhall procure the ſaid infants, when they come of age, to releaſe all their right and intereſt in and to the ſaid leaſe, then to be void; the defendant pleaded in *bar*, that the ſaid *infants* never had or pretended to have any right, title, or intereſt to the leaſe of the *ſaid manor*, which they might releaſe; and upon demurrer to this plea, the plaintiff had judgment; for, whether the infants had a title or not, the defendant had obliged himſelf to procure a releaſe from them *de facto*, and 'tis not material whether it was *de jure* or not; and the rather, becauſe by their bill in equity they pretended to have a title. 1 *Saund.* 215.

Aſſumpſit, *&c.* in which the plaintiff declared, that the defendant (as he affirmed) was poſſeſſed of a ſixth part of a ſhip, which he offered to ſale; whereupon it was agreed between the plaintiff and him, that the defendant ſhould ſell all his intereſt to the plaintiff, and that the *ſale ſhould be in writing*, and the plaintiff ſhould pay the defendant 600*l.* *&c.* (viz.) 20*l.* in hand, and the reſt upon *executing the writing*, and in conſideration, that the plaintiff had paid the ſaid 20*l.* and had promiſed to perform the agreement on his part, the defendant promiſed to perform it on his part, but that the defendant *had not performed the agreement on his part*: After a verdict for the plaintiff, it was objected that the *breach* was not well aſſigned, it being too general to ſay, that *he had not performed the agreement on his part*, for he ought to ſhew ſome particular in which he had not performed it; as, that he tendred the defendant a *writing*, which he refuſed to execute, or that he had not delivered to the plaintiff the ſixth part of a ſhip, *&c.* but adjudged, that 'tis not the plaintiff, but the defendant, who is to do the firſt act; 'tis he who is to tender the writing, becauſe

he

he had undertaken to sell his part by a writing; as where a *covenant* is to enter into a bond, the covenanter is to prepare it and tender it: Judgment for the plaintiff in *C. B.* and affirmed in error in *B. R.* 3 *Lev.* 319.

Covenant to seal and deliver a *lease for years*, to commence from *Michaelmas* next, and bond for performance of covenants; and on action of debt brought on that bond, the *breach* assigned was, that the obligor had not made one part of such lease, whereupon the obligee put one part in writing, and tendered it to the obligor to seal, which he refused. *Et per curiam*, Where a man covenants to *seal and deliver a deed*, he is bound to put it in *writing*; but if he refuses, the covenantee may do it, and 'tis warranted by law. 2 *Roll. Rep.* 177.

Det upon bond, conditioned to perform an *award*: Upon the pleadings in this case, the question did arise upon one part of the award, which was, that the defendant should *seal and execute* within seven days, such a *release* to the plaintiff as should be to the satisfaction of *his* (the plaintiff's) *counsel*; and the question was, which of the parties was to *tender* it? for *the defendant was to execute it*; but it was to be to the satisfaction of the *plaintiff's counsel*, and adjudged, that the defendant was to *tender* it; for 'tis not like the case where a deed is to be *made* by *T. P. as the counsel of R. W. shall advise*, for there the deed must be tendered as the *counsel doth advise*, and *R. W.* to whom 'tis to be made, must do the first act, *(i. e.)* he must tender the deed to *T. P.* by advise of his counsel. 1 *Vent.* 255.

Debt upon articles of agreement, wherein the plaintiff covenanted *to execute a good conveyance* of certain lands to the *use* of the defendant, *at or before the 17th of November*, and the defendant, *in consideration thereof*, agreed to pay the plaintiff 503*l. &c.* at such a place, *tempore executionis* of such conveyance, *&c.* for which the action was now brought; and upon a demurrer to this declaration, it was objected, that the plaintiff ought to execute the conveyance before the defendant was obliged to pay the money, because *where no certain day is appointed for the payment*, it must be reduced to a certainty by the act of the plaintiff, which in this case was by executing the conveyance; but the law had been the same, if a *certain day* had been appointed for the payment of the money, because the payment must necessarily relate to the *execution of the deed*, and not to the very day in which it was appointed to be executed, and so it was adjudged. 1 *Lutw.* 565.

Acts of parliament, Are positive laws, which consist of two parts, that is, the words of the *act*, and the sense and meaning, which both joined together make the law. *Cowel.* See titles **Parliament, Statutes.**

Actuary, *(actuarius)* Is the clerk or scribe, that registers the canons and constitutions of the convocation; also an officer in the Court Christian, who is in nature of a register. *Cowel.*

Adcredulitare, To purge himself by oath: *Qui in collegio fuerit, ubi aliquis occisus est*, adcredulitet *se quod eum non percussit*. Leges Inæ, cap. 36. *Apud Bromptonum, cap.* 34. *apud Wilkins*, who interprets it *justificet se*. *Cowel. Du Fresne.*

Addition, *(additio)* Signifieth a title given to a man besides his christian and surname, shewing his estate, degree, mistery, trade, place of dwelling, *&c.* As for example; additions of estate are *yeoman*, *gentleman*, *esquire*, and such like; additions of degree are names of dignity, as *knight*, *earl*, *marquis*, *duke*: And additions of mistery are *scrivener*, *painter*, *mason*, *carpenter*, and all others of like nature; for mistery is the craft or trade whereby a man gets his living: Additions of towns, as *London*, *Kingston*, *Chester*, *&c.* and where a man hath a household in two places, he shall be said to dwell in both of them; so that his addition in either shall suffice. It is provided by the following statute, viz. 1 *Hen.* 5. *cap.* 5. that in suits or actions, where process of outlawry lies, such *additions* should be to the name of the defendant, to shew his estate, mistery, and place where he dwells; and that writs, not having such *additions*, shall abate, if the defendant take exception thereto, but not by the office of the court; and this was ordained by that statute, that one man might not be vexed or troubled by the outlawry of another, but that by reason of the certain *addition*, every person may be known, and bear his own burden. *Cowel.*

Stat. 1 *Hen.* 5. *cap.* 5. *A. D.* 1413. intitled, *In which original writs additions of the defendants names shall be put.* "Item, it is ordained and established, that in every original writ of actions personals, appeals, and indictmets, and in which the exigent shall be awarded, to the names of the defendants in such writs original, appeals, and indictments, additions shall be made of their estate or degree, or mistery, and of the towns, or hamlets, or places, and counties, of the which they were, or be, or in which they be or were conversant; and if by process upon said original writs, appeals, or indictments, in the which the addition be omitted, any utlagaries be pronounced, that they be void, frustrate, and holden for none; and that before the utlagaries pronounced, the said writs and indictments shall be abated by the exception of the party, where in the same the said additions be omitted. Provided always, that though the said writs of additions personals be not according to the records and deeds, by the surplusage of the additions aforesaid, that for that cause they be not abated; and that the clerks of the Chancery, under whose names such writs shall go forth written, shall not leave out, or make omission of the said additions as is aforesaid; upon pain to be punished, and to make a fine to the King, by the discretion of the Chancellor."

Regularity by the Common law, every natural man, having no name of dignity, ought to be named in all originals and other suits by his christian name and surname; and *that*, before this act, sufficed; but if he had a name of inferior dignity (as knight, or banneret) he ought to be named by his christian name and surname, and by the addition of his name of dignity. 2 *Inst.* 666.

If there be a corporation of one sole person, that hath a fee simple, and may have a writ of right, he may be named by the common law by his christian name without any surname, as *John* bishop of *P.* 2 *Inst.* 666. If it be a corporation aggregate of many able persons, as mayor and commonalty, dean and chapter, the mayor or dean need not be named by his christian name, because such a corporation standeth in lieu both of the christian name and surname. 2 *Inst. ib.*

The addition as well of the estate, degree, or mistery, as of the town, hamlet, or place, ought by force of this act to be alledged in the first name; for an addition after the *alias dictus* is ill: As for instance, where the indictment was against *W. R.* otherwise called *W. R.* of *H.* for without the *alias dictus* there is no addition of the vill; and if the party is not sufficiently named in the first part the *alias dictus* cannot aid or help it. 2 *Inst.* 669. 3 *Salk.* 20. No addition is necessary where process of outlawry doth not lie. 1 *Salk.* 5.

Where there are several defendants of different names, and the same addition, it is safest to repeat the addition of each of their names, applying it particularly to every one of them. 2 *Hawk.* 87.

And where a father hath the same name and the same addition with a defendant being his son, the action is abateable, unless it add the addition of *the younger* to the other additions; but where the father is the defendant, it is said that there is no need of addition of *the elder*. 2 *Hawk.* 187.

Esquire is a good addition; and the sons of all peers and lords of parliament in the life of their fathers, are in law esquires, and so to be named; also the eldest son of a knight is an esquire. 2 *Inst.* 667.

Gentlemen and gentlewomen are good additions; and if a gentlewoman be named spinster, she may abate and quash the writ or indictment. 2 *Inst.* 668.

Lord *Coke* says, he that hath taken any degree in either of the universities, may be named by that degree without question. 2 *Inst.* 668. But this is doubted by others. 2 *Hawk.* 187.

A gentleman by reputation, that is neither gentle by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a sufficient addition; but if he be named yeoman, he cannot quash the indictment. 2 *Inst.* 668.

cover, becauſe the defendant, tho' not bound in law, yet is bound by expreſs agreement to re-deliver *eundem ſpadonem*; but adjudged, that where an agreement is poſſible to be performed, at the time when it was made, and afterwards becomes impoſſible by the act of God, and without any default in the party, he is for ever diſcharged. *Palm.* 548.

The *act of the law* doth injury to none; *Actus legis nemini eſt damnoſus.* 2 *Inſt.* 287. If land, out of which a rent-charge is granted, be recovered by elder title, and thereby the rent-charge becomes avoided; yet the grantee ſhall have a writ of annuity. *Dyer.* This is becauſe the rent-charge is made void by courſe or *act* of law.

As to *acts of men*; that which a man doth by another, ſhall be ſaid to be done by himſelf; but perſonal things cannot be done by another. *Co. Lit.* 158. A man cannot do an act to himſelf, unleſs it be where he hath a double capacity: No perſon ſhall be ſuffered to do any thing againſt his own *act*, and every man's *acts* ſhall be conſtrued moſt ſtrongly againſt himſelf that doth them. *Plowd.* 140. But if many join in an *act*, and ſome may not lawfully do it; it ſhall be adjudged the act of him who might lawfully do the ſame. *Dyer* 192. Acts that men are forced by neceſſity and compulſion to do, are not regarded: And an act done between perſons, ſhall not injure a ſtranger not party or privy thereto. *Plowd.* 19. 6 *Rep.* 16.

Who is to do the firſt act, and of diſability by a perſon's own act.

Debt on a bond conditioned to give ſuch a releaſe in *Michaelmas-term*, as the judge of the *prerogative court* ſhould think proper; the defendant pleaded, that in that *term B. B.* was judge of that court, and that he did not appoint any *releaſe*; and upon demurrer it was held an ill plea, becauſe the defendant did not alledge, that he had prepared a *releaſe*, and tendered it to the judge to be allowed, for 'tis on his part to draw the *releaſe*. *Cro. Eliz.* 716.

Debt upon bond, conditioned, that if the plaintiff did bring ſuch a ſhip to a port in *Greece*, there to remain for *forty days*, or ſo long of the *forty days* as the defendant pleaſed, ſo as he might freight the ſaid ſhip, that then the defendant would freight it within *forty days*, and bring it to ſuch a port in *England*; there was a frivolous plea, to which the plaintiff demurred, and it was inſiſted for the defendant, that the firſt act was to be done by the plaintiff, *(viz)* to bring the ſhip to ſuch a port, there to remain by the ſpace of *forty days*, and he had not averred, that the ſhip was at that port by the ſpace of *forty days*, and for that reaſon the court inclined that the condition was not broken. *Godb.* 74.

Leaſe for years, in which the leſſor covenanted with the leſſee, that *upon ſurrender* of his ſaid leaſe at any time within the term, he would grant a new leaſe, afterwards the leſſor levied a *fine ſur cognizance de droit* of the lands, and granted and rendered the ſame to the cogniſee for 80 years; adjudged, that by this means the cogniſor had *diſabled* himſelf either to take the ſurrender or to make a new leaſe, and altho' the leſſee was to do the firſt act, *(viz) to make the ſurrender*, yet when the leſſor had *diſabled* himſelf to take it, the law will not compel him to do that which will be in vain; eſpecially in this caſe, for if he ſhould make a *ſurrender*, then he would loſe his old term without any poſſibility of having a new leaſe. 5 *Rep.* 20.

The condition of a bond was, that the obligor and his wife ſhould before *Eaſter term*, *&c.* levy a *fine* of ſuch lands to the plaintiff; the defendant pleaded, that before that term the plaintiff did not ſue for a *writ of covenant* to make himſelf capable of the *fine*, and *Hobart*, chief juſtice, was of opinion it was a good plea. *Hutt.* 48.

Debt upon bond, for performance of covenants, *&c.* the *covenant* was, that the obligor before ſuch a day ſhould make a *further aſſurance* of lands to the obligee, but at the *coſts and charges of the obligee*; the queſtion was, whether the obligee was firſt to offer the *coſts*, or whether the obligor was firſt to declare what *manner of aſſurance* he would make? and adjudged, that it being purely in the choice of the obligor, what manner of *aſſurance* he would make, he ought to do the firſt act, *(viz)* to give notice to the obligee what aſſurance he intended to make, and then the obligee is to ſupply the coſts. *Moor* 454.

The huſband ſettled an eſtate to the uſe of himſelf for life, and afterwards, to the uſe of *Dorothy* his wife for life, *ſo long as ſhe would be effectually ready to demiſe it to his heir at law at* 50*l.* *yearly rent, when ſhe ſhould not dwell in it her ſelf*; the huſband died, the widow married again, and lived with her huſband in another place, and having made no leaſe to the heir, he entred; adjudged, that ſhe ought to make none unleſs it had been *demanded*, and that the heir ought to *tender a leaſe* to her to ſign, with a reſervation of 50*l.* rent. *Moor* 626.

Debt by the *mayor*, *&c.* of *London*, for rent of a mill, which went by the labour of priſoners in *Bridewell*; the defendant pleaded a proviſo in the leaſe, that if the leſſors did not find eight men to work in the mill every day, that the leſſee might retain 8*d.* of the rent for every man wanting in that day, and ſo *toties quoties*; and that there had been ſo many men wanting for ſo many days, and the money retained for that defect amounted to more than the rent; the plaintiffs replied, that the defendant had ſo altered the mill, that he made it go with *one horſe* inſtead of *eight men*, for which reaſon they did not provide the men; and upon demurrer the plaintiffs had judgment, becauſe the alteration was made in the mill by the defendant's own act. *Moor* 877.

The *condition* of a bond was to deliver 200 *weight of hops*, *&c.* and the obligee was to chooſe them out of *twenty-four bags* of the obligor's own growing; in an action of debt brought on this bond for not delivering the *hops*, the defendant pleaded, that he was ready to deliver them, but the plaintiff had not choſe them; adjudged, that the plaintiff ought to do the firſt act, (viz.) to require the defendant to ſhew the twenty-four bags that he might make his choice. *March* 24.

Debt upon bond, conditioned, that whereas there was a ſuit in Chancery depending between the now plaintiff and ſeveral *infants*, by their *guardian*, and that it was decreed, that the plaintiff ſhould pay the ſaid *guardian* to the uſe of the *infants* 840*l.* in full ſatisfaction of their right and title to a *leaſe of the manor of Martley-Hall*, and other lands in *Suffolk*, if therefore the ſaid *guardian* ſhall procure the ſaid infants, when they come of age, to releaſe all their right and intereſt in and to the ſaid leaſe, then to be void; the defendant pleaded in *bar*, that the ſaid *infants* never had or pretended to have any right, title, or intereſt to the leaſe of the *ſaid manor*, which they might releaſe; and upon demurrer to this plea, the plaintiff had judgment; for, whether the infants had a title or not, the defendant had obliged himſelf to procure a releaſe from them *de facto*, and 'tis not material whether it was *de jure* or not; and the rather, becauſe by their bill in equity they pretended to have a title. 1 *Saund.* 215.

Aſſumpſit, *&c.* in which the plaintiff declared, that the defendant (as he affirmed) was poſſeſſed of a ſixth part of a ſhip, which he offered to ſale; whereupon it was agreed between the plaintiff and him, that the defendant ſhould ſell all his intereſt to the plaintiff, and that the *ſale ſhould be in writing*, and the plaintiff ſhould pay the defendant 600*l.* *&c.* (viz.) 20*l.* in hand, and the reſt upon *executing the writing*, and in conſideration, that the plaintiff had paid the ſaid 20*l.* and had promiſed to perform the agreement on his part, the defendant promiſed to perform it on his part, but that the defendant *had not performed the agreement on his part*: After a verdict for the plaintiff, it was objected that the *breach* was not well aſſigned, it being too general to ſay, that *he had not performed the agreement on his part*, for he ought to ſhew ſome particular in which he had not performed it; as, that he tendred the defendant a *writing*, which he refuſed to execute, or that he had not delivered to the plaintiff the ſixth part of a ſhip, *&c.* but adjudged, that 'tis not the plaintiff, but the defendant, who is to do the firſt act; 'tis he who is to tender the writing, becauſe

he

he had undertaken to ſell his part by a writing; as where a *covenant* is to enter into a bond, the covenanter is to prepare it and tender it: Judgment for the plaintiff in *C. B.* and affirmed in error in *B. R.* 3 *Lev.* 319.

Covenant to ſeal and deliver a *leaſe for years*, to commence from *Michaelmas* next, and bond for performance of covenants; and on action of debt brought on that bond, the *breach* aſſigned was, that the obligor had not made one part of ſuch leaſe, whereupon the obligee put one part in writing, and tendered it to the obligor to ſeal, which he refuſed. *Et per curiam*, Where a man covenants to *ſeal and deliver a deed*, he is bound to put it in *writing*; but if he refuſes, the covenantee may do it, and 'tis warranted by law. 2 *Roll. Rep.* 177.

Det upon bond, conditioned to perform an *award*: Upon the pleadings in this caſe, the queſtion did ariſe upon one part of the award, which was, that the defendant ſhould *ſeal and execute* within ſeven days, ſuch a *releaſe* to the plaintiff as ſhould be to the ſatisfaction of *his* (the plaintiff's) *counſel*; and the queſtion was, which of the parties was to *tender* it? for *the defendant was to execute it*; but it was to be to the ſatisfaction of the *plaintiff's counſel*, and adjudged, that the defendant was to *tender* it; for 'tis not like the caſe where a deed is to be *made* by *T. P. as the counſel of R. W. ſhall adviſe*, for there the deed muſt be tendered as the *counſel doth adviſe*, and *R. W.* to whom 'tis to be made, muſt do the firſt act, *(i. e.)* he muſt tender the deed to *T. P.* by adviſe of his counſel. 1 *Vent.* 255.

Debt upon articles of agreement, wherein the plaintiff covenanted *to execute a good conveyance* of certain lands to the *uſe* of the defendant, *at or before the 17th of November*, and the defendant, *in conſideration thereof*, agreed to pay the plaintiff 503*l. &c.* at ſuch a place, *tempore executionis* of ſuch conveyance, *&c.* for which the action was now brought; and upon a demurrer to this declaration, it was objected, that the plaintiff ought to execute the conveyance before the defendant was obliged to pay the money, becauſe *where no certain day is appointed for the payment*, it muſt be reduced to a certainty by the act of the plaintiff, which in this caſe was by executing the conveyance; but the law had been the ſame, if a *certain day* had been appointed for the payment of the money, becauſe the payment muſt neceſſarily relate to the *execution of the deed*, and not to the very day in which it was appointed to be executed; and ſo it was adjudged. 1 *Lutw.* 565.

Acts of parliament, Are poſitive laws, which conſiſt of two parts, that is, the words of the *act*, and the ſenſe and meaning, which both joined together make the law. *Cowel.* See titles **Parliament, Statutes.**

Actuary, *(actuarius)* Is the clerk or ſcribe, that regiſters the canons and conſtitutions of the convocation; alſo an officer in the Court Chriſtian, who is in nature of a regiſter. *Cowel.*

Adcredulitare, To purge himſelf by oath: *Qui in collegio fuerit, ubi aliquis occiſus eſt*, adcredulitet *ſe quod eum non percuſſit*. Leges Inæ, cap. 36. *Apud Bromptonum, cap.* 34. *apud Wilkins*, who interprets it *juſtificet ſe*. *Cowel. Du Freſne.*

Addition, *(additio)* Signifieth a title given to a man beſides his chriſtian and ſurname, ſhewing his eſtate, degree, miſtery, trade, place of dwelling, *&c.* As for example; additions of eſtate are *yeoman*, *gentleman*, *eſquire*, and ſuch like; additions of degree are names of dignity, as *knight*, *earl*, *marquis*, *duke*: And additions of miſtery are *ſcrivener*, *painter*, *maſon*, *carpenter*, and all others of like nature; for miſtery is the craft or trade whereby a man gets his living: Additions of towns, as *London*, *Kingſton*, *Cheſter*, *&c.* and where a man hath a houſhold in two places, he ſhall be ſaid to dwell in both of them; ſo that his addition in either ſhall ſuffice. It is provided by the following ſtatute, viz. 1 *Hen.* 5. *cap.* 5. that in ſuits or actions, where proceſs of outlawry lies, ſuch *additions* ſhould be to the name of the defendant, to ſhew his eſtate, miſtery, and place where he dwells; and that writs, not having ſuch *additions*, ſhall abate, if the defendant take exception thereto, but not by the office of the court; and this was ordained by that ſtatute, that one man might not be vexed or troubled by the outlawry of another, but that by reaſon of the certain *addition*, every perſon may be known, and bear his own burden. *Cowel.*

Stat. 1 *Hen.* 5. *cap.* 5. *A. D.* 1413. intitled; *In which original writs additions of the defendants names ſhall be put.* "Item, it is ordained and eſtabliſhed, that in every original writ of actions perſonals, appeals, and indictmets, and in which the exigent ſhall be awarded, to the names of the defendants in ſuch writs original, appeals, and indictments, additions ſhall be made of their eſtate or degree, or miſtery, and of the towns, or hamlets, or places, and counties, of the which they were, or be, or in which they be or were converſant; and if by proceſs upon ſaid original writs, appeals, or indictments, in the which the addition be omitted, any utlagaries be pronounced, that they be void, fruſtrate, and holden for none; and that before the utlagaries pronounced, the ſaid writs and indictments ſhall be abated by the exception of the party, where in the ſame the ſaid additions be omitted. Provided always, that though the ſaid writs of additions perſonals be not according to the records and deeds, by the ſurpluſage of the additions aforeſaid, that for that cauſe they be not abated; and that the clerks of the Chancery, under whoſe names ſuch writs ſhall go forth written, ſhall not leave out, or make omiſſion of the ſaid additions as is aforeſaid; upon pain to be puniſhed, and to make a fine to the King, by the diſcretion of the Chancellor."

Regularity by the Common law, every natural man, having no name of dignity, ought to be named in all originals and other ſuits by his chriſtian name and ſurname; and *that*, before this act, ſufficed; but if he had a name of inferior dignity (as knight, or banneret) he ought to be named by his chriſtian name and ſurname, and by the addition of his name of dignity. 2 *Inſt.* 666.

If there be a corporation of one ſole perſon, that hath a fee ſimple, and may have a writ of right, he may be named by the common law by his chriſtian name without any ſurname, as *John* biſhop of *P.* 2 *Inſt.* 666. If it be a corporation aggregate of many able perſons, as mayor and commonalty, dean and chapter, the mayor or dean need not be named by his chriſtian name, becauſe ſuch a corporation ſtandeth in lieu both of the chriſtian name and ſurname. 2 *Inſt. ib.*

The addition as well of the eſtate, degree, or miſtery, as of the town, hamlet, or place, ought by force of this act to be alledged in the firſt name; for an addition after the *alias dictus* is ill: As for inſtance, where the indictment was againſt *W. R.* otherwiſe called *W. R.* of *H.* for without the *alias dictus* there is no addition of the vill; and if the party is not ſufficiently named in the firſt part the *alias dictus* cannot aid or help it. 2 *Inſt.* 669. 3 *Salk.* 20. No addition is neceſſary where proceſs of outlawry doth not lie. 1 *Salk.* 5.

Where there are ſeveral defendants of different names, and the ſame addition, it is ſafeſt to repeat the addition of each of their names, applying it particularly to every one of them. 2 *Hawk.* 87.

And where a father hath the ſame name and the ſame addition with a defendant being his ſon, the action is abateable, unleſs it add the addition of *the younger* to the other additions; but where the father is the defendant, it is ſaid that there is no need of addition of *the elder*. 2 *Hawk.* 187.

Eſquire is a good addition; and the ſons of all peers and lords of parliament in the life of their fathers, are in law eſquires, and ſo to be named; alſo the eldeſt ſon of a knight is an eſquire. 2 *Inſt.* 667.

Gentlemen and gentlewomen are good additions; and if a gentlewoman be named ſpinſter, ſhe may abate and quaſh the writ or indictment. 2 *Inſt.* 668.

Lord *Coke* ſays, he that hath taken any degree in either of the univerſities, may be named by that degree without queſtion. 2 *Inſt.* 668. But this is doubted by others. 2 *Hawk.* 187.

A gentleman by reputation, that is neither gentle by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a ſufficient addition; but if he be named yeoman, he cannot quaſh the indictment. 2 *Inſt.* 668.

Clerk is a good addition of a clergyman. 2 *Inſt.* 668.

Yeoman and labourer are good additions, and are applied only to the man, and not to the woman. 2 *Hawk.* 188.

Widow or ſinglewoman, or (as ſome ſay) wife of ſuch a one, are all of them good additions of the eſtate and degree of a woman; but no ſuch like addition is good for the eſtate and degree of a man; and ſpinſter is a good addition for the eſtate and degree of a woman, and perhaps alſo for that of a man. 2 *Hawk.* 188.

The word *miſtery* in this ſtatute includeth all lawful arts, trades and occupations, as *taylor*, *merchant*, *mercer*, *pariſh clerk*, *ſchoolmaſter*, *huſbandman*, *labourer*, and the like. 2 *Haw.* 188.

But *ſervant*, *groom*, or *farmer*, are not additions within this act, becauſe they are not of any miſtery; and chamberer, butler, pantler, or the like, are additions of offices, and not of any miſtery or occupation. 2 *Inſt.* 668.

Neither doth this act extend to unlawful practices, as *extortioner*, *maintainer*, *thief*, *vagabond*, *heretick*, and ſuch like. 2 *Hawk.* 188.

If a man have divers arts, trades, or occupations, he may be named by any of them; but if a gentleman by birth be a tradeſman, he ſhall not be named by his trade, but by the degree of gentleman, becauſe it is worthier than the addition of any miſtery. And in general, a man ſhall be named by his worthieſt title of addition. 2 *Inſt.* 668, 669.

If there be two towns in a county of the ſame principal name, with different additions to diſtinguiſh them from one another, as *Great Dale*, and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant be named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the ſame county, and none without an addition. But if there be two towns of the ſame name in a county, without any addition to diſtinguiſh them, it may be ſufficient in ſuch caſe to name the defendant generally of either of ſuch towns, without adding any thing to diſtinguiſh it from the other. 2 *Hawk.* 189.

If the defendant live in a hamlet of a town, it is ſaid to be in the election of the party to name him either of the hamlet or of the town. 2 *Hawk.* 189.

But the addition of a pariſh, if there be two or more towns in it, is not good; but if there be but one town, the addition of pariſh is good. 2 *Inſt.* 669.

The addition of the place of habitation of a wife, is ſufficiently ſhewn, by ſhewing that of the huſband; becauſe it ſhall be intended that the wife lives where the huſband does. 2 *Hawk.* 190.

If the defendant lives in a place known by a ſpecial name, and lying out of any town or hamlet, he may be well named of ſuch place; but if he lives in any place known within a town or hamlet, it is ſaid to be ſafeſt to name him of the town or hamlet. 2 *Hawk.* 189, 190.

The addition of the eſtate, degree, or miſtery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of ſuch a degree or miſtery; but it is a good addition to name the defendant *late* of ſuch a town or place, becauſe men do often remove their habitations. 2 *Inſt.* 670.

Addoubors. See **Redoubors.**

Adeling, or *Etheling*, from the Saxon *Ædelan*, Signifying *noble*, *excellent*, was a title of honour among the *Angles*, properly belonging to the King's children, and ſucceſſors of the crown. King *Edward* the Confeſſor being himſelf without iſſue, and intending to make *Edgar* (to whom he was great uncle by the mother's ſide) the heir of his kingdom, gave him the ſtile and title of *Adeling*. It was uſual with the *Saxons* to join the word *ling*; which ſignified a ſon, or the younger, to the chriſtian name, as *Edmundeling* for the ſon of *Edmund*; ſo that *Adeling* ſignified the ſon of a king. *Cowel.* See more of this word in *Spelman* and *Du Freſne*'s Gloſſaries.

Ademption, or taking away of a legacy: This ariſes from a ſuppoſed alteration of a teſtator's intent, by calling in money due to him on bond, *&c.* that he had expreſly deviſed by will to another perſon. *Jacob.* See title **Legacy.**

Ad inquirendum, Is a writ *judicial*, commanding inquiry to be made of any thing touching a cauſe depending in the King's Court for the better execution of juſtice; as of *baſtardy*, and the like. *Cowel.*

Adjournment, (*Adjournamentum*) The ſame with the French *adjournement*, and ſignifies *denunciatio*, or *diei dictio*, that is, an aſſignment of a day, or a putting off until another day and place. So adjournment in *eyre* in ſtat. 25 *Ed.* 3. *c.* 18. is an appointment of a day, when the juſtices in *eyre* mean to ſit again; and *adjournment* hath the ſame ſignification in 2 *Ed.* 3. *c.* 11.

The terms may be *adjourned* to ſome other place, and there the King's Bench and other courts at *Weſtminſter* be held: And if the King puts out a proclamation for the *adjournment* of the term, this is a ſufficient warrant to the keeper of the Great ſeal to make out writs accordingly; and proclamation is to be made, appointing all perſons to keep their day, at the time and place to which, *&c.* 1 *And.* 279. 1 *Lev.* 176.

In the firſt year of King *Car.* 1. a writ of *adjournment* was delivered to all the juſtices, to *adjourn* two returns of *Trinity* term: And in the ſame year *Michaelmas* term was adjourned until *Craſtino animarum* to *Reading*; and the King by proclamation ſignified his pleaſure, that his courts ſhould be there held. *Cro. Car.* 13, 27.

The court of King's Bench was adjourned to *Oxford* on account of the plague; and from thence to *Windſor*; and afterwards to *Weſtminſter* again. 1 *Lev.* 176, 178.

A term was adjourned, except only the two laſt returns, to *Windſor*; thoſe two laſt terms cannot be held at *Weſtminſter* by re-adjournment, becauſe by the firſt adjournment the day in court is the *quarto die poſt*, and ſo only part of the return would be adjourned, which muſt not be; and it was held that it could not. And therefore upon the *quarto die poſt craſt' Pur'* which was 6 *Feb.* the courts ſat at *Windſor*, and heard ſome motions, and then read writs of adjournment of the laſt return to *Weſtminſter*; and accordingly the courts ſat at *Weſtminſter Octab. Pur.* for it was ſaid that it is not requiſite to wait till the *quarto die poſt* upon the ſecond adjournment; and ſhould it be ſo in this caſe, the term would be ended before that day. *Sid.* 276. *Pl.* 2. *Hill.* 17 & 18 *Car.* 2.

In real actions in *London*, if a foreign plea be pleaded, it ſhall be *adjourned* to the Common Pleas to be tried. But otherwiſe it is in perſonal actions. 4 *Hen.* 4. 12. See *Bro.* tit. *Adjournment.*

If the judges of the court of King's Bench, *&c.* are divided in opinion, two againſt two, upon a demurrer or ſpecial verdict, (not on a motion) the cauſe muſt be *adjourned* into the *Exchequer Chamber*, to be determined by all the judges of *England.* 3 *Mod.* 156. 5 *Mod.* 335.

After diſſolution or prorogation of parliament, and after *adjournment* for above fourteen days, actions may be proſecuted againſt perſons intitled to privilege, by ſtat. 12 *W.* 3. *c.* 3. See titles **Prorogation, Privilege.**

Adiratus, Miſlaid, ſtrayed, or put out of the way. *Adiratus*, ſays *Du Freſne*, *dicitur de re*, *non tam deperdita*, *quam quæ non eſt ad manum.* Galli *egarè* dicunt. *Bract. lib.* 3. *tract.* 2. *cap.* 32. *ſect.* 2. *Poterit enim rem ſuam petere ut* adiratam, *per teſtimonium proborum hominum*, *et ſic conſequi rem ſuam quamvis furatam. Et lib.* 2. *cap.* 1. *ſect.* 5. *Si* (res) *petatur tanquam* adirata.

Adjudication, (*Adjudicatio*) A ſettlement by judgment, decree or ſentence; the act of giving or pronouncing judgment; a judgment, decree or ſentence. This word is uſed in ſtat. 16 & 17 *Car.* 2. *c.* 10. *Cowel.*

Ad jura regis, Is a writ that lies for the King's clerk againſt him that ſought to eject him, to the prejudice of the King's title in right of his crown. *Reg. of Writs*, *fo.* 61. *a. Cowel.*

Ad largum, At large: And there is *title* at large, aſſiſe at large; to vouch at large, *&c. Jacob.*

Adlegiare, Is to purge himſelf of a crime by oath. In the laws of King *Alfred*, in *Brompt. Chron. c.* 4. *Si ſe velit* adlegiare, *&c. cap.* 13. *Si accuſetur*, *inde* adlegiet *ſe per ſexaginta hidas*, *&c. Cowel. Du Freſne.*

Admeaſurement, (*Admenſuratio*) Is a writ brought for remedy againſt ſuch perſons as uſurp more than their ſhare, to bring them to reaſon. It lies in two caſes; one

one is termed *admeaſurement of dower*, *admenſuratio dotis*, where the widow of the deceaſed holdeth from the heir or his guardian, more in the name of her dower, than of right is belonging to her. *Regiſt. Orig.* 171. *a. F. N. B.* 148. The other is, *admeaſurement of paſture*, *admenſuratio paſturæ*, which lieth between thoſe that have common of paſture appendant to their freeholds, or common by vicinage, in caſe any one or more of them do ſurcharge the common with more cattle than they ought. *Reg. Orig.* 156. *F. N. B.* 125. In the firſt caſe, the heir ſhall have this writ againſt the widow, whereby ſhe ſhall be *admeaſured*, and the heir reſtored to the overplus; and in the laſt caſe, it may be brought againſt all the other commoners, and him that ſurcharged; for all the commoners ſhall be *admeaſured*. *Termes de la ley. F. N. B.* 125.

The heir ſhall have a writ of *admeaſurement* of dower, for dower aſſigned in the time of his anceſtor: And if an heir within age aſſign unto the wife more in dower than ſhe ought to have, *&c.* the guardian in right may have a writ of *admeaſurement*. But if the guardian aſſigns dower more than ſhe ought to have, the heir, during his non-age, ſhall not have a writ of *admeaſurement* of dower. *F. N. B.* 149.

If the wife after aſſignment of dower do improve the land, and make it better than it was at the time of the aſſignment; an *admeaſurement* doth not lie of that improvement. But if the improvement be by caſualty of a mine of coals or of lead, which are in the land, *&c.* which had been occupied in the huſband's time, the doubt is the more; but ſhe cannot dig new mines; for that ſhall be waſte if ſhe ſo do. *F. N. B.* 149.

The writ of *admeaſurement of paſture* is *vicontiel*, and ſhall be directed to the ſheriff, and not be returnable; and is thus:

A writ of *admeaſurement of paſture.*

George *the Third*, &c. *to the ſheriff of*, &c. *greeting.* A. B. *hath complained to us, that* C. D. *and* E. F. *have unjuſtly ſurcharged their common of paſture in*, &c. *ſo that they have in it more beaſts and cattle, than they ought to have, and to them belongeth to have; and therefore we command you, that juſtly and without delay, you cauſe to be admeaſured that paſture, ſo that the ſaid* C. D. *and* E. F. *may not have therein more beaſts and cattle than they ought, and to them it belongs to have, according to their freehold which they have in the ſame town; and that the ſaid* A. B. *may have in that paſture ſo many beaſt and cattle as he ought to have, and belongs to him to have; that we may hear no more clamour thereof*, &c.

The writ of *admeaſurement of dower* is alſo *vicontiel*, and ſhall be directed unto the ſheriff, and ſhall not be returnable; and the form of it is thus:

A writ of *admeaſurement of dower.*

George *the Third*, &c. *to the ſheriff of*, &c. A. *the ſon* [or *couſin*] *and heir of* B. *hath complained unto us, that* C. *who was the wife of the aforeſaid* B. *hath for dower more of the freehold which was of the aforeſaid* B.*'s ſometime her huſband, in* N. *than ſhe ought to have, and than belongs to her to have; and therefore we command you that juſtly and without delay you cauſe that dower to be admeaſured, ſo that the aforeſaid* C. *may not have more for dower of the inheritance of the aforeſaid* A. *than ſhe ought to have, and than belongs to her to have, according to her reaſonable dower; and let the aforeſaid* A. *have of that dower that which he ought to have and belongs to him to have, that we may hear no more clamour thereof for want of right*, &c.

By *ſtat. Weſtm.* 2. 13 *Edw.* 1. *cap.* 7. A writ of admeaſurement of dower ſhall be granted to a guardian; neither ſhall the heir when he cometh to full age be barred by the ſuit of the guardian, if he ſueth againſt the tenant in dower feignedly and by colluſion, but that he may admeaſure the dower after; and as well in this writ as in a writ of admeaſurement of paſture, more ſpeedy proceſs ſhall be than hath been uſed hitherto; ſo that when it is come unto the great diſtreſs, days ſhall be given, within which two counties may be holden, at which open proclamation ſhall be made, that the defendant come in at the day; at the which day, if he comes in, the plea ſhall go forward; and if he do not come, and the proclamation be teſtified by the ſheriff, upon the default they ſhall proceed to make admeaſurement.

Before this act, if the heir within age, before the guardian in chivalry enters into the land, had aſſigned dower to the wife more than ſhe ought to have, the guardian had been without remedy; for no writ of admeaſurement of dower (being a real action) lay for the guardian at the Common law. 2 *Inſt.* 367.

Stat. Weſtm. 2. 13 *Ed.* 1. *cap.* 8. Upon the ſecond overcharge of paſture, the plaintiff ſhall have remedy in this manner: If the admeaſurement were before the juſtices, the plaintiff ſhall have a writ judicial, that the ſheriff, the parties being ſummoned, ſhall inquire of the ſecond overcharge, which if it be found, it ſhall be returned before the juſtices under the ſeals of the ſheriff and of the jurors; and the juſtices ſhall award to the plaintiff damages, and they ſhall put into their eſtreat the value of the beaſts which were put into the paſture after ſuch admeaſurement above the due number, and ſhall deliver the eſtreats unto the barons of the Exchequer, that they may thereof anſwer unto the King. If ſuch admeaſurement be made in the county, a writ ſhall go out of the Chancery, that the ſheriff ſhall inquire of ſuch overcharge, and that of the beaſts put in above the due number, or of the value of them, he anſwer to the King at the Exchequer. And all writs *de ſecunda ſuperoneratione*, that paſs out of the Chancery, ſhall be inrolled, and at the year's end the tranſcripts ſhall be ſent into the Exchequer under the Chancellor's ſeal.

Adminiſtration. See **Adminiſtrator.**

Adminiſtrator, (*Adminiſtrator* in Lat.) Is, in the ſenſe of our Common law, taken for one that hath the goods of a man dying inteſtate, committed to his charge by the ordinary, and is accountable for the ſame, whenever it ſhall pleaſe the ordinary to call him thereto. *Cowel.*

Under this head is conſidered,

1. *Statutes concerning adminiſtrators.*
2. *Who are intitled to adminiſtration.*
3. *By whom adminiſtration may be granted.*
4. *Of diſtribution among lineal and collateral relations.*
5. *Of bona notabilia.*
6. *Pleadings in ſuits by and againſt adminiſtrators.*

1. *Statutes concerning adminiſtrators.*

Stat. Weſt. 2. 13 *Ed.* 1. *c.* 19. *A. D.* 1285. Whereas after the death of a perſon dying inteſtate, which is bounden to ſome other for debt, the goods come to the ordinary to be diſpoſed; the ordinary from henceforth ſhall be bound to anſwer the debts as far forth as the goods of the dead will extend, in ſuch ſort as the executors of the ſame party would have been bounden, if he had made a teſtament.

Stat. 31 *Edw.* 3. *cap.* 11. *(A. D.* 1357*)* Where a man dieth inteſtate, the ordinaries ſhall depute the next and moſt lawful friends to adminiſter his goods, which deputies ſhall have action to demand and recover as executors the debts due to the inteſtate, and ſhall anſwer alſo to other to whom the ſaid dead perſon was holden and bound, in the ſame manner as executors, and ſhall be accountable to the ordinaries as executors.

Sat. 21 *Hen.* 8. *cap.* 5. *ſect.* 13. In caſe any perſon die inteſtate, or the executors refuſe to prove the teſtament, then the ordinary ſhall grant adminiſtration to the widow or next akin, or to both, by diſcretion of the ordinary, taking ſurety for true adminiſtration.

Sect. 4. Where divers perſons be in equality of kindred, the ordinary is to be at liberty to accept one or more, taking nothing for the ſame, as in probate of teſta-

ments,

ments, unleſs the goods of the deceaſed amount above the value of an hundred ſhillings.

Stat. 22 & 23 *Car.* 2. *cap.* 10. *ſect.* 1. All ordinaries and eccleſiaſtical judges, having power to commit adminiſtration, ſhall upon their granting adminiſtration of inteſtates goods, take bonds with ſureties, two or more, in the name of the ordinary, with this condition, *viz.*

The condition of this obligation is ſuch, that if the within-bounden A. B. *adminiſtrator of all and ſingular the goods, chattels and credits of* C. D. *deceaſed, do make, or cauſe to be made, a true and perfect inventory of all and ſingular the goods, chattels and credits of the ſaid deceaſed, which have or ſhall come to the hands, poſſeſſion, or knowledge of him the ſaid* A. B. *or into the hands and poſſeſſion of any other perſon, or perſons for him; and the ſame ſo made, do exhibit, or cauſe to be exhibited, into the regiſtry of court, at or before the day of next enſuing; and the ſame goods, chattles and credits, and all other the goods, chattles and credits of the ſaid deceaſed, at the time of his death, which at any time after ſhall come to the hands or poſſeſſion of the ſaid* A. B. *or into the hands and poſſeſſion of any other perſon or perſons for him, do well and truly adminiſter according to law; and further do make, or cauſe to be made, a true and juſt account of his ſaid adminiſtration, at or before the day of and all the reſt and reſidue of the ſaid goods, chattels and credits, which ſhall be found remaining upon the ſaid adminiſtrators account, the ſame being firſt examined and allowed of by the judge or judges for the time being, of the ſaid court, ſhall deliver and pay unto ſuch perſon or perſons reſpectively, as the ſaid judge or judges, by his or their decree or ſentence, purſuant to the true intent and meaning of this act, ſhall limit and appoint: And if it ſhall hereafter appear, that any laſt will and teſtament was made by the ſaid deceaſed, and the executor or executors therein named do exhibit the ſame into the ſaid court, making requeſt to have it allowed and approved accordingly, if the ſaid* A. B. *within bounden, being thereunto required, do render and deliver the ſaid letters of adminiſtration (approbation of ſuch teſtament being firſt had and made) in the ſaid court; then this obligation to be void and of none effect, or elſe to remain in full force and virtue.*

Sect. 2. The ordinaries, &c. may call ſuch adminiſtrators to account, and order diſtribution of what remaineth after debts, funerals, and juſt expences of all ſorts allowed, according to the laws in ſuch caſes, and the rules hereafter ſet down; ſaving to perſons aggrieved the right of appeal.

Sect. 3. The cuſtoms of the city of *London*, and province of *York*, and other places, ſaved.

Sect. 4. The ſurpluſage ſhall be diſtributed as follows, *viz.* one third to the wife of the inteſtate, the reſidue among his children, and ſuch as legally repreſent them, if any of them be dead, other than ſuch children (not heirs at law) who ſhall have any eſtate by ſettlement of the inteſtate in his life-time, equal to the other ſhares. Children, other then heirs at law, advanced by ſettlements or portions not equal to other ſhares, ſhall have ſo much of the ſurpluſage as ſhall make the eſtate of all to be equal. But the heir at law ſhall have an equal part in the diſtribution with the other children, without any conſideration of the value of the land which he hath by deſcent or otherwiſe from the inteſtate.

Sect. 5. If there be no children, nor legal repreſentatives of them, one moiety ſhall be allotted to the wife, the reſidue equally to the next of kindred to the inteſtate, in equal degree, and thoſe who repreſent them.

Sect. 6. No repreſentation ſhall be admitted among collaterals after brothers and ſiſters children. And if there be no wife, all ſhall be diſtributed among the children; and if no child, to the next of kin to the inteſtate in equal degree, and their repreſentatives.

Sect. 7. No ſuch diſtribution ſhall be made till one year after the inteſtate's death; and every one, to whom any ſhares ſhall be allotted, ſhall give bond with ſureties in the ſaid courts, that if debts afterwards appear, he ſhall refund his ratable part thereof, and of the adminiſtrator's charges.

Sect. 8. In all caſes where the ordinary hath uſed to grant adminiſtration *cum teſtamento annexo*, he ſhall continue ſo to do. *Made perpetual*, 1 *Jac.* 2. *cap.* 17.

Stat. 29 *Car.* 2. *cap.* 3. *ſect.* 25. The act of 22 & 23 *Car.* 2. *cap.* 10. ſhall not extend to the eſtates of *feme coverts* that die inteſtate, but that their huſbands may have adminiſtration of their perſonal eſtates, and recover and enjoy the ſame as they might have done before the making of the ſaid act. *Made perpetual*, 1 *Jac.* 2. *c.* 17.

Stat. 1 *Jac.* 2. *cap.* 17. *ſ.* 6. No adminiſtrator ſhall be cited into court to render an account of the perſonal eſtate of his inteſtate, otherwiſe than by an inventory thereof, unleſs at the inſtance of ſome perſon in behalf of a minor, or having a demand out of ſuch eſtate as a creditor, or next of kin; nor ſhall be compellable to account before any ordinary or judge empowered by the act of 22 & 23 *Car.* 2. *cap.* 10. otherwiſe than as aforeſaid.

Sect. 7. If after the death of a father, any of his children ſhall die inteſtate, without wife or children, in the life-time of the mother, every brother and ſiſter, and their repreſentatives, ſhall have equal ſhare with her.

Sect. 8. The clauſe in the ſaid act of 22 & 23 *Car.* 2. *c.* 10. by which is provided, that that act ſhall not prejudice the cuſtoms of the city of *London* and province of *York*, ſhall not extend to ſuch part of any inteſtate's eſtate, as an adminiſtrator, by virtue of his being ſo, by pretence of any cuſtom may claim, to exempt the ſame from diſtribution.

2. *Who are intitled to adminiſtration.*

Before the ſtatute of *Weſtm.* 2. *cap.* 19. [See the preceding ſection] The ordinary had the abſolute diſpoſal of inteſtates eſtates; and as that ſtatute firſt ſubjected them to an action at the ſuit of creditors; ſo from thence they found, as Lord *North* obſerves, that what was before very beneficial to them, began to be very troubleſome, which obliged them to put the adminiſtration into other hands, taking ſecurity to ſave them harmleſs from ſuits. *Raym.* 497.

But this method did not intirely free them from the trouble they had before; for ſuch perſons, being looked upon as ſervants or attornies to the ordinaries, could not ſue for, nor gather in the inteſtate's eſtate. 2 *Inſt.* 397. *Co. Lit.* 133. 1 *Roll. Abr.* 906.

But they were eaſed from this trouble by the ſtatute of 31 *E.* 3. *cap.* 11. which ſee in the preceding ſection.

But notwithſtanding this ſtatute, the widows of inteſtates were often excluded, upon pretence that they had no right to adminiſter; and therefore the ſtatute 21 *Hen.* 8. *c.* 5. was made. See this act in the preceding ſection.

Hereupon the Common law was to judge who were the beſt friends; and therefore if there were huſband or wife; in default of them, ſon or daughter; in default of them, or their children, father or mother; in default of them, brothers or ſiſters; in default of them, or their children, uncles or aunts, the ordinary was compellable to grant adminiſtration to them in their ſeveral orders. *Raym.* 498.

But as they had a liberty by the ſtatute of granting adminiſtration to the wife or next of kin, ſo alſo had they a liberty where there were ſeveral in an equal degree of kindred, to prefer whom they pleaſed; which liberty they made uſe of on pretence of avoiding confuſion, and was a matter of great advantage to their juriſdiction; for hereby they choſe him that was moſt obſequious to them; and when they called him to account, upon pretence of beſtowing the overplus for the good of the deceaſed's ſoul (a device in thoſe popiſh times to make profit for the clergy) they diſpoſed of the overplus as their own. *Raym.* 498.

But it came afterwards to be ſolemnly reſolved, that the ordinary, after adminiſtration granted by him, could not compel the adminiſtrator to make diſtribution; but it being very unreaſonable, that one perſon ſhould run away with the whole perſonal eſtate, tho' there were ſeveral others in equal degree of kindred with him; this miſchief was remedied by the 22 & 23 *Car.* 2. [ſee the preceding ſection] which allows all thoſe who are in equal

equal degree, to come in for a diſtributive ſhare, tho' one only, or tho' a creditor or ſtranger takes out adminiſtration. *Hob.* 191. *Cro. Car.* 62. *Hob.* 83. 1 *Sid.* 179.

It ſeems to have been always holden, that the huſband was intitled to adminiſtration as beſt friend to his wife, within the words of the ſtatute 31 *E.* 3. but there being ſome doubt, whether ſince the ſtatute of 22 & 23 *Car.* 2. he was not obliged to make diſtribution amongſt the reſt of her kindred, it was thought proper to ſettle this matter by a ſubſequent law, viz. ſtat. 29 *Car.* 2. *cap.* 3. *ſect.* 25. which ſee in the preceding ſection. See 4 *Co.* 51. *b.* 1 *Roll Abr.* 910. *Cro. Car.* 106. 1 *Mod.* 231. 1 *Show.* 351. *Raym.* 93. 1 *Sid.* 409.

Alſo ſince the ſtatute 22 *Car.* 2. the ordinary may grant adminiſtration to the wife or next a-kin, at his election; but then ſhe muſt have her diſtributive ſhare; alſo the ordinary may grant adminiſtration *quoad* part to the wife, and as to the other part, to the next of kin; in which caſe neither can complain, ſince the ordinary need not have granted any part of the adminiſtration to the party complaining. 1 *Sid.* 179. *Raym.* 93. 1 *Show.* 351. 1 *Salk.* 36.

If there be grandfather, father and ſon, and the father dies inteſtate, the ſon ſhall have the adminiſtration, and not the grandfather, tho' they be both in equal degree as to nearneſs of kindred. 2 *Vern.* 125. ſaid *arguendo.*

Sir *Thomas Hinſon* was poſſeſſed of lands for years under ſeveral leaſes, and having iſſue *William* and *Thomas*, he, by his laſt will, made *William* his executor and *reſiduary legatee*, after debts and legacies paid; *William* married and proved the will, but died inteſtate before the debts and legacies were paid; the judge of the prerogative court granted adminiſtration of the goods of Sir *Thomas* to his other ſon *Thomas*, which he afterwards revoked, and granted it to the *widow of William the inteſtate*, from which ſentence *Thomas appealed*, but was not relieved; for *per curiam*, The adminiſtration was rightly granted to the widow. 2 *Roll. Rep.* 158.

The inteſtate's eſtate conſiſted in leaſes for years, and other perſonal things, and after his deceaſe adminiſtration was granted to an *alien*, and adjudged good, becauſe he hath not the eſtate in his own right, but in the right of the inteſtate *Cro. Car.* 8.

Prohibition to the ſpiritual court upon a ſuggeſtion, that they refuſed to grant the adminiſtration to the *next of kin* to the inteſtate, but to another; but the prohibition was denied, becauſe they are judges who is next of kin. *Palm.* 416.

Prohibition was granted, for that the ſpiritual court would have granted adminiſtration of the goods of the wife to her brother, when her huſband was living, to whom of right it doth belong. *Palm.* 521.

The niece and the nephew are in equal degree to the inteſtate, but where the niece got adminiſtration, the *nephew* could not get it repealed; for when the ordinary hath executed his power according to the ſtatute, he cannot afterwards revoke it. *Allen* 56.

The teſtator made two executors, who both died in his life-time, then he died, leaving two ſiſters, and the eldeſt got adminiſtration; afterwards the youngeſt moved *B. R.* for a prohibition to repeal it, becauſe ſhe being in equal degree, ought to have an equal ſhare; but it was denied, becauſe if the adminiſtration was not duly granted, ſhe might bring an appeal. *Style* 147.

The plaintiff *Davis*, as adminiſtrator to a *feme covert*, brought an action of debt upon a bond due, *&c.* the defendant pleaded, that adminiſtration of the goods of the wife ought *de jure* to be granted to the huſband, who was then alive; and upon a demurrer to this plea, it was adjudged ill, for the plaintiff is rightful adminiſtrator till 'tis repealed. 1 *Mod.* 231.

Where *adminiſtration* is granted to a legatee, he may *retain* his legacy, tho' the adminiſtration is afterwards repealed upon a *citation*; but not upon an *appeal*, becauſe in ſuch caſe it was void *ab initio.* 1 *Vent.* 219.

The eldeſt ſon of Sir *George Sands* died inteſtate; adminiſtration was granted by the prerogative court to the father, as next of kin; his ſon's widow libelled to have it repealed, and Sir *George* moved for a prohibition, and it

was granted; becauſe the ſtatute 21 *Hen.* 8. gives the ordinary power to grant it, as well to the next blood as to the widow; and here he hath executed that power, therefore he cannot repeal it, and grant it to another. *Raym.* 93.

Since the making this ſtatute 22 & 23 *Car.* 2. a man died inteſtate having one ſon, who likewiſe died inteſtate, and adminiſtration of goods was granted to the *next of kin of the father*, becauſe there being but *one child*, there can be no *diſtribution*; and ſo this is a caſe out of the ſtatute, and therefore the ſon is to have the whole at Common law; but it hath been otherwiſe adjudged ſince that time, *(viz.)* that by this ſtatute of diſtribution of inteſtates eſtates, a right is veſted in one child, where there is one and no more, *(viz.)* a right to ſue for the eſtate; and by conſequence, if he die, before the eſtate is recovered and actually in his poſſeſſion, it muſt go to his adminiſtrator, and not to the adminiſtrator of the father. *Bunhill* v. *Newton*, 35 *Car.* 2. *Palmer* v. *Allcock.* 3 *Mod.* 58.

So where a perſon died inteſtate, leaving two, who were next a-kin, in equal degree to him, one of them died inteſtate within the year, and before diſtribution; adjudged, that *an intereſt was veſted in him*, and his next of kin ſhall have adminiſtration, like the caſe of a *reſiduary legatee* dying before probate of the will, *(viz.)* his next of kin ſhall have the adminiſtration, and the next of the teſtator. *Show.* 25.

Adminiſtration was granted to the *grandmother*; and the *aunt* moved for a *mandamus*, but it was denied; for ſhe is as near of kin as the *aunt*, or rather nearer, becauſe ſhe is in the right line aſcending. 1 *Salk.* 38, 39.

So where 'tis granted to a *wrong perſon*, 'tis not void (as 'tis where 'tis granted in a *wrong dioceſe)* but voidable only; for if it was void, there would be a nullity in all the acts of the adminiſtrator; but the law is otherwiſe; ſo if 'tis granted to a *creditor of the inteſtate*, and afterwards repealed at the ſuit of the *next of kin*, and granted to him; in ſuch caſe the creditor may *retain* againſt the rightful adminiſtrator, and his diſpoſal of the goods, even after a citation, and till the ſentence of repeal, ſhall be good. 1 *Salk.* 38.

T. S. died inteſtate, without child or kindred, the plaintiff *procured letters patent*, and adminiſtration was committed to the patentee, which is the uſual courſe in ſuch caſes; the defendant entered *caveats* by reaſon thereof, putting the plaintiff to charges; he brought an action on the caſe againſt the defendant; and upon demurrer to the declaration it was adjudged, that till adminiſtration granted, the property of the goods was in the ordinary, and that the plaintiff had neither *jus in re*, *nec ad rem*, that the appointment by *letters patent* was but a recommendation, and that the granting adminiſtration to the patentee was rather of reſpect to the King, than of right; for notwithſtanding the opinion in *Henſloe*'s caſe, adminiſtrations generally belonged to the *biſhop*, and the inſtances of ſome lords of manors granting them, is not a proof to the contrary. 1 *Salk.* 37.

An adminiſtrator, *during the abſence of J. S. (who is executor*) brought an action of debt on a bond, but did not aver in his declaration, that *J. S. was abſent*; 'tis true, he need not aver *where* he was *abſent*, for it ſhall be intended to be beyond ſea; but he muſt aver that he is abſent, which being omitted, the declaration was held ill. 1 *Salk.* 42. See 2 *Salk.* 751. the pleadings.

A *feme ſole* had divers debts owing to her by *ſpecialty*; ſhe marries, and the *bonds not being put in ſuit during the coverture*, ſhe died, and her huſband was ſued in the ſpiritual court by her brother, to make diſtribution by virtue of the ſtatute 29 *Car.* 2. *cap.* 35. and the queſtion was, whether a *feme covert* was intended by that act, which provides only where the *huſband dies inteſtate*, and a married woman can never die inteſtate within the meaning of this ſtatute, becauſe it provides, that the ordinary ſhall take a bond of the adminiſtrator, if it appear that the deceaſed made any will, which a *feme covert* cannot do without the conſent of her huſband, therefore adminiſtration of the wife's eſtate ſhall go to him. 2 *Mod.* 20.

In a *prohibition* the caſe was, the brother died inteſtate, leaving one ſiſter, an infant, whoſe *great grandmother* was aſſigned her *guardian*, and thereupon ſhe obtained adminiſtration *durante minori ætate*; and now the plaintiff in the prohibition, who was the grandfather to the infant, ſuggeſted, that the adminiſtration was granted by ſurprize, and that he being near of kin, adminiſtration ought to be granted to him: *Sed per curiam*, 'Tis not material who ſhall be adminiſtrator, for it being *durante minori ætate*, he hath no power over the eſtate; but ſince the ordinary hath an original power in this caſe, and this being a ſpecial adminiſtration, when he hath once executed that power, he ſhall not repeal it. 3 *Mod.* 23.

3. *By whom adminiſtration may be granted.*

A bond was made in *Ireland* to *R. B.* of *London*, who died inteſtate in *London*, and there the bond remained at his death; a *biſhop of Ireland* granted adminiſtration to the ſon of the inteſtate, who releaſed the debt; afterwards adminiſtration was granted by the *prerogative court* here to the widow, who brought an action of debt againſt the obligor and recovered the debt, becauſe the firſt was a wrong adminiſtration, for it ought to be committed by *the ordinary where the bond was at the inteſtate's death*, and not by the ordinary where the debt did at firſt ariſe. *Dyer* 303.

The granting adminiſtration is a power annexed to the perſon of a biſhop, and is not local; for a biſhop of *Ireland* being in *England*, may grant adminiſtration here of any thing within his dioceſe in *Ireland*. *Godb.* 33.

The plaintiff declared on an adminiſtration committed to him by the *dean of Litchfield*, and did not ſay by what authority, or that he was *loci ordinarius*; and this was held ill. *Cro. Eliz.* 791.

An adminiſtrator declared on an adminiſtration *per Andrew Vane ſacræ theologiæ doctorem*, and did not ſay, *loci iſtius ordinarium*, or *cui de jure pertinuit*, &c. this was held ill after a verdict. *Cro. Eliz.* 431.

An adminiſtrator declared on an adminiſtration *de bonis non*, granted to him by the *ſteward of the manor of Manſfield*, &c. *cui commiſſio adminiſtrationis illius de jure pertinuit*, and concludes with a *profert hic in curia*, and this was held good. *Cro. Eliz.* 102.

Leſſee for years died poſſeſſed of ſeveral leaſes of ſeveral lands in the dioceſe of *York*, and in a *peculiar* in the ſame dioceſe, having deviſed thoſe leaſes to his ſon, and made his daughter an infant *executrix*; the mother took out adminiſtration in the *peculiar* where her huſband died, and this was *durante minori ætate* of the infant *executrix*; adjudged, that there ought to be two adminiſtrations granted, one by the *peculiar*, and the other by the *archbiſhop of York*, and he ſhall not have a prerogative in both places, becauſe this *peculiar* was derived out of his juriſdiction, but hath now a proper juriſdiction by itſelf. *Cro. Eliz.* 718.

It hath been held, that *adminiſtration* may be granted by the *delegates*, in *Godbolt*; but later reſolutions are otherwiſe, for that court hath only authority *corrigere & non exequi*. 2 *Bulſt.* 2.

Adminiſtration was granted by the biſhop of *Briſtol*, when in truth the inteſtate had *bona notabilia*; and afterwards the prerogative court granted adminiſtration to another, who brought treſpaſs againſt the firſt adminiſtrator for taking the goods; it was objected, that it would be hard to make him a treſpaſſor, becauſe the granting adminiſtration doth belong to the ordinary *mero jure*, and 'tis probable, that neither he nor the party did know, that the inteſtate had *bona notabilia*; but the court held, that, becauſe the firſt adminiſtration was *void*, therefore the adminiſtrator was a treſpaſſor. 2 *Leon.* 155.

The commiſſary of the biſhop of *Norwich* being in *London*, granted adminiſtration there; and it was held good, becauſe the power is not local, but follows his perſon. *Godb.* 342.

Aſſumpſit by an adminiſtrator, and upon *oyer* of the letters of adminiſtration it appeared they were granted by *Tho. Taylor*, *a bachelor of divinity*, *and commiſſary of the biſhop of London*; the defendant pleaded, that adminiſtration was granted to him under the ſeal of the *vicar general*, and alſo pleaded the ſtatute 37 *Hen.* 8. by which 'tis enacted, that a *doctor of law* may be a *commiſſary*, but that *Tho. Taylor* was a mere layman, and not *doctor legis civilis*, &c. but adjudged, that the adminiſtration granted to the plaintiff was good, untill avoided by ſentence. *Poph.* 37.

Where an adminiſtration granted by the ſpiritual court is affirmed upon an appeal to the *arches*, the ſame is uſually remitted to the ſpiritual court; but if the adminiſtration is repealed upon the *appeal*, in ſuch caſe, that court where the repeal was, ſhall grant adminiſtration *de novo*, and not the ſpiritual court, becauſe by the repeal their juriſdiction is gone as to this caſe, ſo likewiſe upon an appeal to the *delegates*, if the adminiſtration is repealed, they may grant adminiſtration *de novo*. *Latch* 85.

An adminiſtrator declared on an adminiſtration granted by king *Charles*, without ſaying, *debito modo*, and held good. *Allen* 53.

It regularly muſt be granted by the biſhop of the dioceſe where the party dies, and in ſuch caſe 'tis ſufficient for the plaintiff to ſay, that it was granted to him by the biſhop *loci iſtius ordinarium*; if he doth not ſay by whom it was granted, but only, that *debito modo commiſſa fuit*, this is nought upon a *demurrer*, but good after a verdict. *Style* 282.

The authority of an *archdeacon* need not be ſet forth, becauſe he is *oculus epiſcopi*, and is to grant adminiſtration *jure ordinario*. *Style* 54.

An adminiſtrator declared on an adminiſtration committed to him by *R. B.* archdeacon of *Norfolk*, and did not ſay *loci iſtius ordinarium*; and held good. *Sid.* 302.

The defendant ſet forth, that adminiſtration was granted to her by the commiſſary of the biſhop of *Litchfield*, *legitime conſtitutum*; and held good. 1 *Lutw.* 9.

An adminiſtrator declared on an adminiſtration granted to him *per W. Lewen*, *vicarum generalem in ſpiritualibus epiſcopi Roffen'*, without ſaying, *loci iſtius ordinarium*, and held well, for ſuch a *vicar* amounts to a *chancellor*. 1 *Lutw.* 408.

Covenant againſt Huſband and wife, *adminiſtratrix* of her firſt huſband, upon a leaſe made to him, wherein he covenanted *not to aſſign it without leave* of the leſſor; and the breach was, that he did aſſign it without leave, ſo that the inteſtate in his life time did break the covenant, and the defendant alſo after his deceaſe *dum ſola fuit (to whom adminiſtration of her huſband's goods was committed)* and likewiſe the huſband and wife did the like after their marriage; upon demurrer to this declaration it was objected, that the plaintiff ought to ſhew *by whom adminiſtration was committed to the widow*, *and by what authority*; 'tis true, if the *adminiſtratrix had been plaintiff*, this had been a reaſonable objection, but as ſhe was a *defendant* in this action, 'tis unreaſonable, that the plaintiff, who was a mere ſtranger to the proceedings, ſhould ſhew by *whom*, *and by what authority* it was granted. 1 *Lutw.* 297.

Ruled by the judges, that where a man dies inteſtate, having goods in ſeveral *peculiars*, the granting of adminiſtration is in the *metropolitan*, and not in the *ordinary*. 1 *Lev.* 78.

If granted by a *peculiar*, the plaintiff muſt ſhew by whom, and muſt add *cui commiſſio adminiſtrationis præd' de jure pertinet*. 1 *Salk.* 38.

An adminiſtrator declared on an adminiſtration by the *official of the biſhop of* Carliſle, without ſaying *loci iſtius ordinarium*; and upon a demurrer this was held good. 2 *Mod.* 65.

Adminiſtrator, *durante minori ætate cum teſtamento annexo*, was plaintiff, but did not ſet forth, that adminiſtration was committed to him, and yet he concluded with a *profert hic in curia literas teſtamentarias*; this was held ill, and not cured by a verdict. *T. Jones* 193.

Adminiſtration granted by an *official of a peculiar debito modo commiſſa*, without averring *cui de jure commiſſio adminiſtrationis in hac parte pertinet*, held good, and affirmed in *error* upon this difference, *(viz.)* where the power of granting adminiſtration is by ſpecial commiſſion from the ordinary, as by his *chancellor*, &c. there it muſt be *averred*, he had juriſdiction; but where the power is by

by *office* or *privilege*, as by a *commiſſary* or *official*, it need not be averred, becauſe the office imports the power as incident to it, and the law takes notice of the *office*. 1 *Salk.* 41.

It ought to be granted by the *biſhop of the dioceſe where the party dies*, and therefore where the plaintiff declared on an adminiſtration granted by the *biſhop of* London, the defendant pleaded in bar, that the inteſtate at the time of his death, was reſident in the dioceſe of *W.* and this was held a good plea. 1 *Salk.* 37.

By the ſtatute 16 & 17 *Car.* 2. *cap.* 8. The omiſſion of ſetting forth by what authority the adminiſtration is granted, is cured by a verdict; as for inſtance, an adminiſtrator declared, that adminiſtration was granted to him by *W. R. ſurrogate and official of* D. D. *prebendary of the prebend of* C. and did not ſay, *cui adminiſtratio de jure pertinet*; this was aided by a verdict. 4 *Mod.* 113.

Debt by an adminiſtrator, &c. and in concluding his declaration, he alledged, that adminiſtration was granted to him by the archbiſhop of *Canterbury apud caſtrum Eborum*; upon *non eſt factum* pleaded, the plaintiff had a verdict, and it was moved in arreſt of judgment, that the granting adminiſtration was a judicial act, and it appearing, that it was granted by the *archbiſhop of* Canterbury *out of his province*, it was therefore void; but adjudged, that 'tis only a miniſterial act, becauſe the ordinary is directed by the ſtatute, to grant it. 1 *Lutw.* 533.

Debt by an adminiſtrator on an adminiſtration granted to him by the biſhop of *L.* the defendant pleaded in bar, that the inteſtate at the time of his death, was reſident in another dioceſe; and upon a demurrer this was held a good plea. 1 *Salk.* 37.

Debt by an adminiſtrator, to whom adminiſtration was committed *debito modo* by *T. C.* maſter of arts, *commiſſary or official of a peculiar legitime fulcit'*; upon a demurrer to this declaration, it was objected, that the court could not take notice that every peculiar had a right to grant adminiſtration, and therefore the plaintiff ſhould have ſet forth the power, *(viz.) cui de jure commiſſio adminiſtrationis in hac parte pertinet*; but adjudged, that every *peculiar* hath a power of granting adminiſtration, for they have a ſpecial ordinary for that purpoſe, and all the caſes relating to this matter may be thus reconciled, *(viz.)* that wherever the power of him who grants adminiſtration is by *commiſſion*, his authority muſt be averred, *(viz.) cui juriſdictio in ea parte pertinuit:* thus adminiſtration granted by *T. S. theologiæ profeſſorem*, or *per D. G. decanum de S.* or *per R. G. chancellor of* Cheſter, is naught; becauſe all theſe are by *ſpecial commiſſion under the biſhop*; but where adminiſtration is granted *virtute officii*, there the plaintiff need not aver the authority of the perſon granting, becauſe the office itſelf imports a power to grant it; thus, where the plaintiff declared on an adminiſtration granted to him *per abbatem de Weſtm' loci iſtius ordinarium*; this is good, becauſe the word *ordinary* implies ſuch a power; the like of a *commiſſary of a biſhop*, becauſe the law knows every *commiſſary* muſt have that power; ſo likewiſe *per R. W. officialem epiſcopi*; ſo *per M. R. archidiaconum*, good. 1 *Salk.* 40.

The plaintiff, as adminiſtrator to *Thomas Rider*, brought an action of debt on a bond for 40*l.* and ſets forth, that the adminiſtration of all his goods, not exceeding 40*l.* was granted to him by Dr. *Cartwright dean rural of Fradſham*, within dioceſe of *Cheſter*, who had a *peculiar* juriſdiction; the defendant pleads, that the inteſtate, *Thomas Rider*, had goods above the value of 40*l.* *(viz.)* of the value of 50*l.* at *Fradſham within the dioceſe of Cheſter*, and that the official of the biſhop had granted adminiſtration to *S. D.* and traverſed, that the *dean rural* had any power to grant adminiſtration, *&c.* this plea was held ill upon a demurrer, becauſe the defendant had not alledged, that *Fradſham* was within the *peculiar*, for if it was, then the inteſtate having above 40*l.* there the dean rural had no power to grant adminiſtration; now it not appearing, whether *Fradſham* was within the peculiar or not, but only, that it was in the dioceſe of *Cheſter*, then the dean rural may grant adminiſtration in his peculiar, where the value doth not exceed 40*l.* and where it doth exceed that value out of the peculiar, the biſhop may grant another adminiſtration, and both may ſtand. 5 *Mod.* 423.

4. *Of diſtribution among lineal and collateral relations.*

By the ſtatute 21 *Hen.* 8. the ordinary upon granting adminiſtration, is to *take ſecurity, that the adminiſtrator ſhall truly adminiſter the goods*; and this was uſually done by a bond, in which this clauſe was inſerted, *(viz.) that after debts paid, the ſurplus ſhould be diſtributed as the ordinary ſhould direct*; and accordingly they directed the diſtribution according to the courſe of the Imperial law, with which the Common law agreeth in this matter *(i. e.)* to the wife and children, and where there were none, then to the next of kin in a natural order of ſucceſſion; and when they began to break that order, then this clauſe was conteſted, firſt in the caſe of *Tooker* and *Lean*, where Lord *Hobart* was of opinion, that after adminiſtration was granted, the adminiſtrator had a property in the ſurplus, after debts paid. *Hob.* 83.

But in *Levan*'s caſe it was adjudged, that after adminiſtration granted, the adminiſtrator had an abſolute property in the goods, and that the ordinary having executed his power, he had nothing farther to do. *Cro. Car.* 201.

But now by the ſtatute 22 & 23 *Car.* 2. *c.* 10. the ordinary is to take a bond, with ſureties, in his own name, with a condition particularly mentioned in this ſtatute, the ſubſtance whereof is, to exhibit a true inventory of the goods, and truly to adminiſter the ſame according to law; to account before the ordinary, and to pay the reſidue as he ſhall direct, but purſuant to the true meaning of the ſtatute, *viz.* after debts, funerals, and juſt expences allowed, then to diſtribute the ſurplus, as the ſtatute directs. See *ſect* 1. of this title.

Since this ſtatute a man died inteſtate, without any wife or child, and the queſtion was, whether his ſiſter of the half blood ſhould have a diſtributive part with the brother of the whole blood? It was adjudged that ſhe ſhould; for the ſtatute made no alteration in ſuch caſes, and before the ſtatute was made, the Common law made no difference between the whole blood and the half blood as to this matter; 'tis true, the ſurplus is to be divided *amongſt the next of kin in equal degree*; now, ſhe who is of the half blood, is next of kin to the inteſtate, as well as he who is of the whole blood, for tho' 'tis only the *half*, 'tis the *ſame blood* with the whole, but not ſo much of it. 1 *Mod.* 209.

Repreſentatives amongſt collaterals, even before the making the ſtatute of 22 & 23 *Car.* 2. *c.* 10. were always rejected in thoſe of remote degrees, becauſe the kindred might be branched out amongſt ſo many perſons, and the eſtate divided into ſo many parts, that very little benefit would accrue to them; and tho' repreſentations amongſt lineals are allowed in remote degrees, yet, even in ſuch caſe the diſtribution is to be made *per ſtirpes*, and not *per capita*, for the reaſon before mentioned. But now by the ſaid ſtatute 'tis expreſly enacted, that *there ſhall be no repreſentation amongſt collaterals after brothers and ſiſters children*, that is, the brothers and ſiſters of the inteſtate, and not brothers and ſiſters of children of any collaterals. It is true, it hath been otherwiſe adjudged; as for inſtance, a man died inteſtate, and his next of kin were *two aunts*, but one of them died before him, and left *two children*, and adminiſtration being granted to the ſurviving aunt, ſhe was ordered to diſtribute a ſhare to them, and ſuch a ſhare as their mother would have, if ſhe had been living; but this was contrary to the opinion of the chief juſtice *North*, who would not allow repreſentations amongſt collaterals ſo remote. *Raym.* 496.

5. *Of bona notabilia.*

If a man hath goods to the value of 5*l.* in one dioceſe, and a leaſe in another, this is a chattel; and tho' 'tis not properly movables or goods, yet it ſhall make *bona notabilia*. 1 *Roll. Abr.* 909.

If a man die inteſtate in one dioceſe, and have a *bond* in another, in ſuch caſe adminiſtration muſt be in the *prerogative court*, becauſe the debt doth not follow the *perſon*, but

but 'tis a debt where the bond was at his deceaſe. *Cro. Eliz.* 472.

If a man dies in one dioceſe without any goods there, but hath *bona notabilia* in another dioceſe, in ſuch caſe the right to grant adminiſtration is in the *archbiſhop*, becauſe he hath a general juriſdiction. *Cro. Eliz.* 457.

If the *archbiſhop* grants adminiſtration on a pretence of *bona notabilia*, when in truth the inteſtate had none, this is not void, becauſe of his general juriſdiction, but 'tis voidable; but if a biſhop grant *adminiſtration* when the inteſtate had *bona notabilia*, 'tis void, becauſe he hath no juriſdiction out of his dioceſe. 5 *Rep.* 30.

But it hath been held, that ſuch an adminiſtration is not void, becauſe of common right the ordinary is to grant adminiſtration, and that neither he or the perſon to whom 'tis granted may know that there were *bona notabilia*. 2 *Leon.* 155.

If there are two adminiſtrations, one by the *metropolitan* and the other by the *biſhop*, if there were not *bona notabilia*, the prerogative adminiſtration ought to be repealed. *Cro. Eliz.* 283, 315, 457.

Indebitatus aſſumpſit, &c. againſt an *executrix*, who pleaded in abatement, that her huſband died *inteſtate*, but did not ſay, *in what dioceſe*, and that he had *bona notabilia* in ſeveral dioceſſes, but did not ſet forth *where*, and that adminiſtration was granted to her by the *prerogative court*, ſo that ſhe ought to be ſued as adminiſtratrix, and not as executrix, and *averred* her plea; upon a ſpecial demurrer this plea in abatement was held ill; for where a *defendant adminiſtratrix* pleads either in *bar or abatement*, ſhe muſt ſet forth *in what dioceſe* her huſband died, and *where* he had *bona notabilia*, that it may appear the prerogative adminiſtration was well granted. 5 *Rep.* 33.

Debt by huſband and wife as *adminiſtratrix*, ſetting forth, that adminiſtration was granted to her by the *biſhop of Rocheſter*; the defendant pleaded, that adminiſtration was granted to her by the *dean and chapter of Canterbury*, *ſede vacante*, for that the inteſtate, at the time of his death had *bona notabilia in diverſis diœceſibus provinciæ Cantuar.* now in the firſt reſolution in this caſe it was held, that becauſe the defendant did not ſet forth any certainty where the inteſtate had *bona notabilia*, but only *in diverſis diœceſibus provinciæ*; therefore it ſhall be taken, that adminiſtration was granted by that ordinary where he had not *bona notabilia*, becauſe every plea ſhall be taken in the ſtricteſt ſenſe againſt the pleader; however, if the inteſtate had *bona notabilia, &c.* the adminiſtration in an inferior dioceſe, is not void, but voidable. 8 *Rep.* 135.

If a man dies, leaving *bona notabilia* in both provinces, there muſt be ſeveral adminiſtrations. *Hard.* 216.

If the inteſtate leaves goods in ſeveral *peculiars*, the archbiſhop of the province hath the right to grant adminiſtration. 2 *Lev.* 86.

Debt upon a bond to ſave the plaintiff harmleſs, *&c.* the defendant pleads, *non damnificatus*; the plaintiff replies, that one *Wynn* had obtained a judgment againſt him in *London*, and that he died inteſtate, and that adminiſtration of his goods was granted by the *biſhop of Lincoln* to one *W. G.* and that he paid the money to the adminiſtrator; and upon a demurrer to this replication the defendant had judgment, becauſe plaintiff alledged he paid the money to the adminiſtrator, when in truth he had no authority to receive it, for the adminiſtration granted by the *biſhop of Lincoln* was void, becauſe the inteſtate obtained the judgment in *Weſtminſter*. 1 *Lutw.* 399.

It is more certain to plead, that the inteſtate had *bona notabilia in diverſis diœceſibus* within the province of *Canterbury*, (viz.) at *Weſtminſter* in the county of *Middleſex* and dioceſe of *London*, and at *St. Edmundſbury* within the dioceſe of *Norwich*; in this caſe the adminiſtration was granted by the archdeacon of *Sudbury*. 2 *Lutw.* 985.

Debt againſt the defendant as executor to *John White*; who pleaded, that *John White* did make a will, but did not make him (the defendant) executor, but that he had *bona notabilia* in ſeveral dioceſes, and that the archbiſhop of *Canterbury* granted adminiſtration to him, and concluded in bar; to which there was a demurrer, and the plea was adjudged ill, becauſe this was a plea only in abatement, and the concluding it in *bar* made it ill; beſides, he did not expreſsly alledge, that *John White* died inteſtate; he only ſays, he made a will, but did not make him (the defendant) executor by that will; which may be true, and yet he might be made executor by a codicil; ſo the plaintiff had judgment. 1 *Mod.* 239.

Where there are *bona notabilia in ſeveral dioceſes* both in the ſame *province*, the prerogative hath the right of granting adminiſtration. *Salk.* 39.

Adjudged, that *debts upon ſimple contract are perſonal*, and adminiſtration thereof muſt be granted by the ordinary where the *inteſtate dies*; ſo if he have two houſes in ſeveral dioceſes, and uſually lives in one, but ſometimes in the other, and being there for a few days, he dies, adminiſtration of his perſonal eſtate ſhall be granted by the *biſhop of that dioceſe where he died.* 1 *Salk.* 37.

Adjudged, that where there are *bona notabilia* in *two dioceſes in the ſame province*, there muſt be a *prerogative adminiſtration*; and where there are *bona notabilia* in *one dioceſe in one province*, and in another dioceſe *in another province*, there muſt be two prerogative adminiſtrations. 1 *Salk.* 39.

6. *Pleadings in ſuits againſt adminiſtrators.*

Debt againſt an adminiſtratrix, who pleaded that *J. S.* had obtained a *judgment* againſt her for 100 *l.* and that ſhe *plene adminiſtravit*, and had not *goods* of the inteſtate in her hands at the time of the original writ brought, nor at the time of judgment, *nec unquam poſtea*, *præterquam bona & catalla non attingentia ad* 5 *l.* It was objected againſt this plea, that it did not ſet forth the certain value of the goods, and that it was repugnant, becauſe the defendant, after he had pleaded *plene adminiſtravit*, confeſſed that there was 5 *l.* not adminiſtred; but it was anſwered and adjudged, that it was only matter of form to aſcertain the value of the goods, and that the ſubſtance of the plea was, that the defendant had not above 5 *l.* to ſatisfy the demand of 100 *l.* neither is this plea repugnant; for the three firſt adverbs, *nec unquam poſtea*, relate as well to the time of the original writ brought, as to the time of the judgment, and the next adverb, *præterquam*, explains the whole; ſo that the ſenſe is, that the defendant, after the writ brought, and judgment obtained againſt her, had never any of the inteſtate's goods, except goods not of the value of 5 *l.* and if ſo, then *plene adminiſtravit* before that time, excepting thoſe goods. *Hob.* 133, 218.

The teſtator owed 500 *l.* on *ſpecialities*, and 500 *l.* more on *ſimple contract*, and having deviſed 400 *l.* in legacies, and made an executor *durante minori ætate* of his ſon, he died, leaving a perſonal eſtate to the value of 2000 *l.* the executor paid 1400 *l.* in diſcharge of the ſaid debts and legacies, and accounted with the *infant*, when he came of age, and upon payment of 91 *l. reſiduum* to him, had a *releaſe*, afterwards an action was brought againſt him by one of the creditors of his teſtator, and upon pleading *plene adminiſtravit* the jury found, that he paid the debts and legacies as aforeſaid, and that he delivered up *all the reſidue of the perſonal eſtate* of the teſtator to his executor, when he came of age: It was objected againſt this verdict, that it did not maintain the plea of *plene adminiſtravit*, becauſe here were aſſets delivered over to the executor, and this plea is never proper, but where all debts are paid as far as there are aſſets; but it was adjudged good, for where-ever the executor lawfully diſcharges himſelf of the teſtator's eſtate, he may plead this plea. 1 *Mod.* 174.

Where the defendant pleads *plene adminiſtravit*, to an action of *debt on a bond*, the debt is admitted by that plea; and if the defendant give evidence, that he paid a debt on another bond, owing by the teſtator, he muſt prove that the bond was ſealed and delivered; but ſuch a plea to an action of *debt upon ſimple contract* is good, if the defendant prove the payment of the debt, for where there is no bond, 'tis good adminiſtration to pay any debt. *Show.* 81.

Aſſumpſit againſt an *adminiſtrator*, who pleaded, that on ſuch a day the inteſtate entered into *bond* to *J. S.* to pay 40 *l.* at *Michaelmas* next enſuing, and that *plene adminiſtravit* all the goods of the ſaid inteſtate's *præterquam* to ſatisfy that 40 *l.* and upon a demurrer it was adjudged a good

a good plea; for tho' *the debt on the bond* is not due till the day of payment, yet a *debt upon a contract* ſhall not be paid before it. *Cro. Eliz.* 315.

Debt upon a bond of the inteſtate was brought againſt the adminiſtrator, who pleaded, that his inteſtate being a *citizen of London*, contracted with another *citizen* to pay money to him, and that by the *cuſtom of London* he is chargeable with ſuch *contract*, as if it had been *a debt due on bond*, and that he had not aſſets *ultra*, to pay the debt upon *contract*; and upon a demurrer, this was adjudged a good plea; for a debt upon *ſimple contract* is as much a debt as a *debt on bond*, only the law hath made the bond debt payable before the other; but this being a reaſonable cuſtom, by conſequence 'tis a law, and hath made the debt on a contract equal to that on the bond. *Cro. Eliz.* 409.

Debt againſt the *adminiſtrator* of *J. S.* who pleaded, that *W. P.* had obtained a *judgment* againſt him as *executor* to *J. S. prout patet per recordum*, and this was held a good plea, tho' it was objected in the like caſe, that the defendant ought to have pleaded in *abatement* to the action, that he was *executor* and not *adminiſtrator*; but adjudged, that he need not plead it in *abatement*, eſpecially ſince the judgment was obtained for a true debt. *Cro. Eliz.* 646.

Caſe againſt an adminiſtrator, upon a promiſe of the inteſtate; the defendant pleaded in bar, *two judgments* had againſt him, one in debt upon *ſimple contract*, and the other upon an *inſimul computaſſet prout per ſeparalia recorda inde plenius apparet*, beyond which he had not aſſets; and upon demurrer to this plea, for that he did not ſay the judgments were had *pro veris & juſtis debitis*, and for that he did not conclude to each record, but only *prout per ſeparalia recorda*, &c. yet the plea was adjudged good, for 'tis not neceſſary to aver, that the judgments were obtained *pro veris & juſtis debitis*; for if they were not ſo obtained, the plaintiff ought to ſhew it in his replication, and ſo is 3 *Cro.* 471. *Further's* caſe; then, as to the concluſion, *prout patet per ſeparalia recorda*, 'tis well enough, for it ſhall be taken diſtributively; then, as to the matter of the plea in bar it was adjudged, that judgments in debt upon *ſimple contract* are pleadable to this action; for the debt is not loſt by the death of the inteſtate, but his adminiſtrator is ſtill liable, becauſe an action on the caſe lies againſt him for ſuch things, for which debts upon ſimple contract are brought, and upon which the plaintiff may recover againſt him, and he ought not to uſe dilatories, but to let judgment paſs againſt him by *non ſum informatus*, as he did in this caſe; 'tis true, debt upon *ſimple contract* cannot be maintained againſt *an executor*, if he had *demurred* to the declaration; but if he plead to it, 'tis good, and the judgment ſhall not be reverſed for that reaſon, and thoſe caſes in 1 *And.* 182. and 3 *Cro.* 121. which are to the contrary, are not law; now, if this plea is not good, then the debts, which the defendant paid in ſatisfaction of theſe judgments will be a *devaſtavit*, which no man will affirm, becauſe, if an action is brought on a contract, and the defendant pleads *plene adminiſtravit*, he may give payment on another contract in evidence, and by the ſame reaſon he may ſuffer judgment to paſs againſt himſelf. *Sid.* 333.

Debt upon bond of 40*l.* againſt an *adminiſtratrix*, who pleaded, that the inteſtate was indebted to *W. R.* in 250*l.* on a *ſtatute merchant*, yet in force, &c. and that ſhe had not above 40*s.* aſſets, beſides what will ſatisfy that *ſtatute*; the plaintiff replied, that *the ſtatute was burnt with fire*; and upon a demurrer to this replication, three judges were of opinion for the plaintiff, becauſe by the demurrer the defendant had admitted, that the ſtatute was burnt, and if ſo, then it would never riſe up in judgment againſt him, becauſe, by the ſtatute 23 *Hen.* 8. *cap.* 6. execution is to be made on *ſtatutes ſtaple*, in ſuch manner as therein is provided, and the *ſtatute ſtaple* refers to the *ſtatute merchant*, and that to the ſtatute of *Acton Burnell* made 13 *Ed.* 1. which provides, that *if it be found by the roll*, that the debt was acknowledged, and *the day of payment paſt*, that then, &c. now if the roll is burnt, it cannot appear that the day of payment is paſt, and conſequently there cannot be any execution; beſides, the cogniſee in pleading muſt ſay *hic in curia prolat'*, which is now impoſſible: But *Vaughan* Ch. Juſt. held the plea good and the replication ill; for admitting the record was burnt, the plaintiff cannot avoid it by ſuch a replication, becauſe 'tis againſt a rule in law, that a matter of record ſhould be avoided by matter of fact: this is proper for a caſe in equity. 1 *Mod.* 186.

Aſſumpſit againſt an *adminiſtrator*, upon a promiſe made by the *inteſtate* to pay 418*l.* to the plaintiff, for goods ſold and delivered; the defendant pleads ſeveral judgments obtained againſt him as adminiſtrator upon *ſimple contracts*, and avers, that the ſeveral debts, at the time of the death of the inteſtate and at the time of the judgments obtained, were *juſt and true debts*; and that the judgments were in force and not ſatisfied; and that he had not aſſets beyond thoſe judgments; the plaintiff replied, that the ſaid judgments were *obtained by fraud*, and traverſed, that they were had for *juſt and true debts*; and upon a ſpecial demurrer to this replication it was objected, that it was double; for the plaintiff having avoided the judgments by pleading, that they were obtained *by fraud*, ought to have relied upon that, and then the judgment would have been *de bonis inteſtati*; and therefore he ought not to have perplexed it with a *traverſe*, that they were obtained for *juſt and true debts*; and ſo is *Beaumont's* caſe, in *Latch* 111. but adjudged, that the plaintiff ſhall have liberty to *traverſe* the ſpecial matter, or to rely upon the *fraud*, which he will, and that either way the replication is good. 2 *Saund.* 49.

Aſſumpſit againſt the defendant as *adminiſtratrix* of her huſband, ſhe pleaded, that he was bound in a *ſtatute* to one *Cordell* for 2000*l. pro vero & juſto debito minime ſoluto*; the plaintiff replied, that *Cordell the cogniſee* had ſued out an extent, and upon a *liberate* had got the poſſeſſion of the lands of the cogniſor, which he the ſaid *Cordell* had accepted in ſatisfaction of the recognizance, *prout patet per recordum*; adjudged, this was a good replication, becauſe the cogniſor was concluded by this acceptance of the lands to have any other execution upon the goods of the inteſtate, and therefore thoſe goods are liable in the hands of the adminiſtratrix, and ſhe is chargeable. 3 *Lev.* 269.

Debt upon a bond againſt an *adminiſtrator*, who pleaded a judgment recovered againſt his inteſtate in *Hilary* term 26 *Car.* 2. and that he had not aſſets *ultra*, &c. The plaintiff replied, and confeſſed, that an action was then brought againſt the inteſtate, but that *he died before judgment* was had in that action, and that it was obtained after his death, and kept on foot by *fraud*; the defendant rejoined and traverſed the *fraud*, but did not anſwer the *death of the inteſtate*; and upon a demurrer to the rejoinder, it was inſiſted for the plaintiff, that he being a *ſtranger* to this judgment, might well avoid it by a plea, as he had done in this caſe, and that he had no other way to avoid it; becauſe being a ſtranger to it, he could neither bring a writ of error or writ of deceit; and of that opinion was the court. 2 *Mod.* 308.

Action againſt an *adminiſtrator*, who, pending that ſuit, let judgment be had againſt him by another, and did not plead that judgment in bar to the firſt action, but ſold part of the goods of the inteſtate to ſatisfy that judgment; however, the plaintiff in the firſt action proceeded, and he likewiſe got judgment and brought a *fi. fa.* to take the goods in execution, and the ſheriff levied part, and as to the reſt he returned a *devaſtavit*, and an action was brought againſt him for a falſe return; it was inſiſted for the plaintiff, that ſuffering judgment to go by default *pending* the action, was no confeſſion of aſſets, and that the ſheriff ought not to have returned a *devaſtavit*, but *nulla bona*, and ſo there ſhould be a *ſcire fieri* inquiry; but adjudged, that he may return a *devaſtavit*, that the *ſcire fieri inquiry* is only for his ſafety, that if an executor ſuffers judgment to *go by default*, *or confeſſes it*, he admits aſſets; 'tis true, he might have pleaded that judgment and *riens ultra*; but not pleading it when he might, is an admiſſion of aſſets, as to the ſecond judgment, and he is eſtopped to ſay the contrary upon a *devaſtavit* returned. 1 *Salk.* 310.

Debt againſt an adminiſtrator, who pleaded, that before the action brought, the adminiſtration was revoked and granted to another, he having then aſſets in his hands to the value of 200*l.* which he had delivered over to the new adminiſtrator; the plaintiff replied, that it was done by *fraud and covin*, upon which they were at iſſue, and ſo it was found, and thereupon the plaintiff had judgment to recover the debt *de bonis teſtatoris*; and upon a writ of error brought it was objected, that the judgment ought not to be abſolute *de bonis teſtatoris* only, but conditional, *ſi tantum habuit in manibus*; but adjudged, that it was well enough. *Yelv.* 219.

Debt againſt an *adminiſtrator*, who pleaded, that a judgment was obtained againſt him in *London* in an action of debt due and owing by his *inteſtate*; and that he had not aſſets *præterquam to ſatisfy that judgment*; the plaintiff in his replication confeſſed, that ſuch judgment was had againſt the defendant, but that before the plaintiff brought his action, the judgment creditor *had acknowledged ſatisfaction on record*; and upon demurrer to this replication it was adjudged againſt the defendant, becauſe *ſatisfaction being acknowledged* on that judgment, he cannot plead that he had not aſſets *præterquam* to ſatisfy it, when that was done already. *Cro. Eliz.* 726.

Debt againſt an *adminiſtrator*, who pleaded ſeveral judgments had againſt him amounting to 514*l.* and that he had not goods of the inteſtate to adminiſter *præterquam bona & catalla quæ non attingunt ad valenciam præd'* 514*l. verſus ipſum in forma præd' recuperat'*; the plaintiff replied, that one of the judgments was obtained by *covin*, and that the other judgment creditor had accepted a compoſition of part for the whole debt, and the defendant delayed to take *a releaſe* from him; and upon a demurrer to this replication the plea was adjudged ill, for theſe reaſons; firſt, for that it was *uncertain*, becauſe every leſs ſum than 514*l. non attingit* to pay that ſum; beſides, nothing ſhall be accompted to be adminiſtered but what was really paid purſuant to the compoſition; and that the converſion of any part of the inteſtate's eſtate to the uſe of the defendant, and his neglecting to take a releaſe of the judgment, is plainly againſt the duty of an adminiſtrator. 8 *Rep.* 132.

Debt againſt an adminiſtrator, who pleaded *two recognizances* acknowledged by the *inteſtate*, which were not ſatisfied, and that he had not goods, *&c. præterquam bona & catalla*, which *did not amount* to what was due on the ſaid recognizances; and upon a demurrer to this plea it was adjudged againſt the defendant, for he ought to have pleaded, that he had not goods *præterquam bona, to ſatisfy* the ſaid recognizances, or no goods beyond ſuch value, which did not amount to the ſums due on the ſame 2 *Brown.* 118, 153.

Debt againſt an adminiſtrator, who pleaded a *recognizance* acknowledged by his *inteſtate*, and not ſatisfied; as alſo a *judgment* in debt for 5000*l.* on a note payble upon demand, *with intereſt*, and that the money being not paid on ſuch a day, *the intereſt amounted to* 700*l.* and ſo there was a judgment againſt him for the principal and *intereſt*, for ſuch a certain ſum, and that he had not aſſets *ultra* 40*l.* chargeable to this recognizance and judgment; and upon demurrer to this plea, it was adjudged againſt the defendant; for his pleading the judgment obtained againſt him for *intereſt on the note*, is not good, becauſe 'tis a *devaſtavit* in him to ſuffer ſo much *intereſt* to incur; beſides he ought to have pleaded, that there was not *aſſets* to ſatisfy the principal ſum before any *intereſt* became due, 2 *Lev.* 39.

Debt againſt an adminiſtrator upon a *bill penal* of the inteſtate, *&c.* the defendant pleaded in bar ſeveral judgments obtained againſt him as an adminiſtrator, upon bonds of the inteſtate, amounting to 115*l.* and that he had fully adminiſtred *præterquam* 10*l.* which was not ſufficient to diſcharge the ſaid judgments: The plaintiff replied, and confeſſed the bonds, but that at the time of the judgments obtained there was but 48*l.* 10*s.* due on the ſaid bonds, and ſhews to whom, and that it was more than was really due for all the debts and damages on the ſaid judgments: and *that it would be accepted in full diſcharge thereof*, and that the defendant had aſſets *ultra* the ſaid 48*l.* 10*s.* to ſatisfy the plaintiff's debts; and upon demurrer to this replication, it was held ill, becauſe nothing was put in iſſue, for the allegation, that 48*l.* 10*s. would be accepted in full diſcharge of the judgments*, is matter which might be given in evidence to prove the fraud; he ſhould have ſaid that the creditors would have accepted leſs than the debts due to them, and that the defendant would not pay it, but kept the judgments on foot by fraud. 1 *Lutw.* 445.

Adminiſtratrix, *(Lat.)* She that hath goods and chattels of an inteſtate committed to her charge, as an *adminiſtrator*.

Admiral and Admiralty, (*Admiralius*, *Admiral'us*, *Admiralis*, *Capitaneus*, or *Cuſtos maris*) Signifieth a high officer or magiſtrate, who hath the government of the King's navy, and the hearing of all cauſes belonging to the ſea. *Cromp. Jur. fol.* 88. This officer is in all kingdoms of *Europe* that border upon the ſea. This magiſtrate among the *Romans* was called *præfectus claſſis*, as appeareth by *Tully*, in *Verrem*. Mr. *Guin*, in his *Preface to his Reading*, believes this office was firſt created in the time of *Ed.* 3. his reaſon is this; becauſe *Britton* who wrote in the time of *Ed.* 1. in the beginning of his book, taking upon him to name all the courts of juſtice, maketh no mention of this court, or magiſtrate, and *Richard* the ſecond, in the tenth year of his reign, limited his juriſdiction to the power he had in the days of his grandfather *Ed.* 3. but contrary to this, it appears by ſome antient records, that not only in the days of *Ed.* 1. but alſo of King *John*, all cauſes of merchants and mariners, and things happening within the main ſea, were ever tried before the lord admiral: to this purpoſe he hath his court called the *Admiralty*. *Cowel.*

The firſt title of *Admiral of England* expreſly conferred upon a ſubject, was given by patent of *Ric.* 2. to *Richard Fitz Alen*, jun. Earl of *Arundel* and *Surry*, 10 *Sep. ann.* 10 *Rich.* 2. for thoſe who before enjoyed the office were ſimply termed admirals, tho' their juriſdiction ſeems to have been as large, eſpecially in the reign of *Ed.* 3. when the court of admiralty was firſt erected. See *Spelman*, who gives a catalogue of the admirals from 8 *Hen.* 3. to 16 *Jac.* 1.

The court of admiralty is a court for all maritime cauſes or matters ariſing upon the high ſea, and its juriſdiction is derived from the King, who protects his ſubjects from pirates, *&c.* and who has dominion over all the *Britiſh* ſeas. This juriſdiction he exerciſes by the lord high admiral, or thoſe lawfully deputed for that purpoſe. 1 *New. Abr.* 622. 4 *Inſt.* 142. *Molloy* 66. *Seld. Ma. Clauſ.*

The juriſdiction of the lord admiral is very ancient, and long before the reign of *Ed.* 3. as ſome have ſuppoſed; as may appear by the laws of *Oleron*, (ſo called, for that they were made by King *Richard* the firſt, when he was there) and by many other ancient records in the reigns of *Hen.* 3. *Ed.* 1. and *Ed.* 2. This great officer in the *Saxon* language is called *aen mere*, i. e. *over all the ſea*, *præfectus maris ſive claſſis*, *archithalaſſus*: And in ancient time the office of the admiralty was called *cuſtodia marinæ Angliæ*, or *maritimæ Angliæ*. *Co. Lit.* 260. *b.*

1. *To what places and things the juriſdiction of the Admiralty extends.*

2. *To what contracts and crimes its juriſdiction extends.*

3. *Form of proceeeding in the court of Admiralty.*

1. *To what places and things the juriſdiction of the Admiralty extends.*

It is laid down as a general rule in our Common law books, that the admiral's juriſdiction is confined to matters ariſing on the high ſeas only, and that he cannot take conuſance of contracts, *&c.* made or done in any river, haven or creek within any county; and that all matters ariſing within theſe are triable by the Common law. See 4 *Inſt.* 137, 138, 139, 140. 12 *Co.* 129. *Moor* 122, 892. *Godb.* 261. 2 *Sid.* 81. *Hob.* 79, 212.

212. 13 *Co.* 52. 2 *Brownl.* 10, 37. 2 *Bulſt.* 322. 1 *Rol. Rep.* 133.

But our books ſeem not to be agreed what ſhall be counted the high ſea, or *altum mare*. By ſome it is no part of the ſea where one may ſee what is done on the other ſide of the water. 4 *Inſt.* 140, 141. 12 *Co.* 80. *Moor* 892.

What is within the body of the county is no part of the ſea; and the court of admiralty cannot hold plea of a thing done upon the river *Thames*, becauſe within the body of the county. 4 *Inſt.* 140. 1 *Roll. Abr.* 531. *Owen* 122. 2 *Brownl.* 37. *S. C.* adjudged. 1 *Leon.* 106. *Moor* 916. 2 *Roll. Rep.* 413. *S. P.* adjudged. Nor can the court of admiralty hold plea of a matter ariſing at *Limehouſe*. *Cro. Jac.* 514. 2 *Roll. Rep.* 49. *Moor* 891. *S. P.* adjudged. But by *Owen* 123. ſuch place as is covered with ſalt water is *altum mare:* And 1 *Roll. Rep.* 250. by *Coke*, the court of admiralty hath conuſance of a matter done in a ſhip, riding in a port that is not within the body of a county.

But it ſeems agreed, that tho' in a libel in the court of admiralty the fact is laid to be done *ſuper altum mare*; yet it may be ſurmiſed that it was done *in corpore com'*, *&c.* and thereupon a prohibition will be granted, for the ſurmiſe is traverſable. *Moor* 891. *pl.* 1255. *Latch.* 11.

It hath been reſolved, that between the high and low water mark, the Common law and admiralty have *imperium diviſum*, that is, the one when it is not, and the other when it is, covered with water; and that the ſoil upon which the ſea flows and reflows, may be parcel of a manor. 5 *Co.* 107. Sir *Henry Conſtable*'s caſe. 1 *And.* 89. *S. C.* 3 *Inſt.* 113. *S. P.*

If a man's lands lie to the ſea, and if they are increaſed by inſenſible degrees, they belong to the ſoil adjoining; but if the ſea leaves any ſhore by a ſudden falling off of the water, then ſuch derelict lands belong to the King. *Dyer* 326. 2 *Roll. Abr.* 170.

By the ſtatute 13 *Rich.* 2. *c.* 5. it is enacted that, *upon complaint of incroachments made by the admirals and their deputies, the admirals and their deputies ſhall meddle with nothing done within the realm, but only with things done upon the ſea.* For the conſtruction of this ſtatute, ſee 2 *Bulſtr.* 323. 3 *Bulſtr.* 205. 13 *Co.* 52.

By *ſtat.* 15 *Ric.* 2. *c.* 3. it is declared that, *all contracts, pleas and quarrels, and other things done within the bodies of counties by land or water, and of wreck, the admiral ſhall have no conuzance, but they ſhall be tried,* &c. *by the law of the land; but of the death of a man, and of mayhem done in great ſhips, being in the main ſtream of great rivers beneath the points near the ſea, and in no other place of the ſame river, the admiral ſhall have conuzance; and alſo to arreſt ſhips in great flotes, for the great voyages of the King and the realm, ſaving to the King his forfeitures; and ſhall have juriſdiction in ſuch fleets during ſuch voyages, only ſaving to lords,* &c. *their liberties.*

By the ſtatute 2 *Hen.* 4. *c.* 11. reciting the 13 *R.* 2. *c.* 13. it is enacted, *that he that finds himſelf aggrieved againſt the form of the ſtatute, ſhall have his action by writ grounded upon the caſe againſt him that ſo purſues in the admiralty, and recover double damages againſt him, and he ſhall incur the pain of* 10*l. if he be attainted.*

The admiralty court has juriſdiction where a ſhip founders, or is ſplit at ſea, over the goods which become *flotſam*, *jetſam*, or *lagan*; and a ſuit for theſe muſt be in that court; but for goods wrecked they muſt be claimed by action at Common law. 5 *Co.* 107. 2 *Inſt.* 167. 4 *Inſt.* 154. *Palm.* 96. 1 *Sid.* 178. 1 *Roll. Abr.* 531.

And although the admiralty court has juriſdiction of *flotſam*, *&c.* and ſhall determine what it is by the rules of the Civil law, yet that muſt be underſtood where the thing is *ſuper altum mare*; and therefore if a ſhip, which becomes *flotſam* and derelict, comes into the body of a county, they have no juriſdiction.

So if *flotſam* comes to land, and is taken by one that hath no title, an action lies at Common law, but there ſhall be no proceedings thereon in the Admiralty; for it need not be condemned as a prize. 2 *Mod.* 294.

At Common law, none but the King only could erect beacons, light-houſes, and ſea-marks, but of later times, by letters patents granted to the lord admiral, he hath power to erect beacons, ſea-marks, and ſigns for the ſea. 4 *Inſt.* 148.

If the original cauſe ariſes upon the ſea, and other matters happen upon the land depending thereupon, yet the trial ſhall be in the court of admiralty. 1 *Vent.* 173. 2 *Lev.* 25. 1 *Sid.* 320.

As if a man takes a thing upon the ſea and brings it to land, and afterwards carries it away, the ſuit for this ſhall be in the admiralty court, for this is a continued act. 1 *Roll. Abr.* 533. 4 *Inſt.* 130. 12 *Co.* 97.

So if goods are taken piratically out of a ſhip, and afterwards ſold upon land, a ſuit may be commenced in this caſe in the admiralty court againſt the vendee. *March* 110. 2 *Saund.* 259. 1 *Vent.* 173. *Cro. Eliz.* 685.

So if a ſhip be taken by pirates, and carried to *Tunis* and there ſold, it being originally within the juriſdiction of the admiral, it ſo continues, notwithſtanding the ſale afterwards upon the land. 1 *Vent.* 308.

But if the owner of a ſhip ſends her to the *Indies* to merchandize, and the crew commit piracy, by which, according to the Admiral law, the ſhip becomes forfeited, and the admiral ſeizes her accordingly, if afterwards the owner takes the ſails and tackling out of the ſhip, lying *infra corpus com'*, no ſuit for this can be in the admiralty court; for the admiral hath his remedy by action at Common law. 1 *Roll. Abr.* 532. 1 *Roll. Rep.* 285.

If a ſhip is taken by pirates upon the ſea, and the maſter, to redeem the ſhip, contracts with the pirates to pay them 50*l.* and pawns his perſon for it, and the pirates carry him to the iſle of *S.* and there he pays it with money borrowed, and gives bond for the money, he may ſue in the admiralty for the 50*l.* becauſe the original cauſe aroſe upon the ſea, and what followeth was but acceſſory and conſequential. *Hard.* 183.

If there be a war with the *Dutch*, and an *Engliſhman* having letters of mark, takes an *Oſtender* for a *Dutch* ſhip, and brings it into a haven, and libels againſt it to have it condemned as a prize; but ſentence is given that it was no prize; the *Oſtender* may libel in the admiralty againſt the captain, for the damage the ſhip received while it lay in the port; for the original taking being at ſea, the bringing it into the port, in order to have it condemned, is but a conſequence thereof. 1 *Lev.* 243. 1 *Sid.* 367.

If an *Engliſh* ſhip takes a *French* ſhip richly laden, the *French* being in enmity with us, and ſuch ſhip is libelled againſt, and after due notice on the *Exchange*, &c. declared a lawful prize, the King's proctor may exhibit a libel in the admiralty court, to compel the taker (who ſent the ſhip to *Barbadoes*, and converted the lading to his own uſe) to anſwer the value of the prize to the King; although it was objected, that by the firſt ſentence the property was veſted in the King, and that this ſecond libel was in nature of an action of trover, of which the court of admiralty cannot hold plea. *Carth.* 399.

2. *To what contracts and crimes its juriſdiction extends.*

The court of admiralty hath no juriſdiction as to contracts made at land, whether ſuch contract be made here or in foreign parts. 4 *Inſt.* 134, 139. 12 *Co.* 103. *Hob.* 79, 212.

If a ſhip lying at anchor wants victuals, and ſends to land to *J. S.* to bring victuals, and ſo the contract is made in the ſhip, the admiralty can have conuſance; *ſecus* if the contract is made intirely at land, and the victuals after ſent to the ſhip. *Latch* 11.

If a contract or obligation be made upon the ſea, yet if it be not for a marine cauſe, the ſuit upon this contract or obligation ſhall be at Common law, and not in the admiralty court; for if a man makes an obligation for the ſecurity of a debt growing before upon the land, or if he makes a promiſe to pay it, this cannot be ſued in the court of admiralty, but at Common law. *Hob.* 12. 1 *Roll. Abr.* 532.

If

If a man contracts with me in *London*, in conſideration of 100*l.* to tranſport certain commodities into *Turkey*, if he does not perform it I cannot ſue him in the court of admiralty, becauſe the contract was here, and nothing done upon ſea. 1 *Roll. Abr.* 532. 4 *Inſt.* 139.

If a charter-party be made in *England*, to do certain things in ſeveral places upon the ſea, though no act is to be done in *England*, but all upon the ſea, yet no ſuit can be in the admiralty court for the non-performance of the agreement; for the contract is the original, without which no cauſe of ſuit can be, and this contract is out of their juriſdiction; and where part is triable by the Common law, and part by the Admiral law, the Common law ſhall be preferred. 1 *Roll. Abr.* 532, 533. 1 *Roll. Rep.* 486. *S. C.* 4 *Inſt.* 135, 139, 142.

In caſes of neceſſity, the maſter may hypothecate or pledge the ſhip or goods, and ſuch contract is cognizable in the admiralty court. 1 *Roll. Abr.* 530. *Hob.* 11. *Moor* 913.

The mariners may ſue in the Admiralty court for their wages, although the hiring was by the maſter on land; and this is allowed of in favour of navigation, for here they may all join in the ſame libel; alſo by the Admiral law they have remedy againſt the ſhip and owners, as well as againſt the maſter; and it would be a great diſcouragement to ſeafaringmen, to oblige them to bring ſeparate actions, and thoſe againſt a maſter who may happen to be inſolvent. *Winch.* 8. 4 *Inſt.* 141. 1 *Vent.* 146, 343. 3 *Mod.* 244, 245. 1 *Salk.* 33, 31. and ſee 4 & 5 *Ann. c.* 16.

So of the other officers under the maſter, as the mate, purſer, boatſwain, *&c.* for they contract with the maſter, yet it is on the credit of the ſhip, *&c.* 1 *Salk.* 33. *Raym.* 3.

So a ſhipwright may ſue in the admiralty court, for the making a ſhip for navigation upon the ſea. 1 *Roll. Abr.* 533.

But if there be any ſpecial agreement, by which the mariners are to receive their wages in any other manner than is uſual, or if the agreement is under ſeal, the mariners cannot ſue in the admiralty court. 1 *Salk.* 31.

Nor can the maſter ſue in the admiralty court; for his contract is on the credit of the owners, and not like that of the mariners, which is on the credit of the ſhip. 4 *Inſt.* 141. *Raym.* 3. 1 *Salk.* 33.

If a contract is made at *Malaga*, concerning the lading of a ſhip, and for breach thereof upon the ſea, (*viz.*) that he would not receive forty buts of wine into the ſhip, according to agreement, there is a libel in a foreign admiralty, and ſentence that the wine ſhall be received into the ſhip, which is refuſed; yet there can be no ſuit in the admiralty here, reciting the former ſentence, and charging the defendant with the breach thereof; for though one may libel here upon a ſentence, in a foreign admiralty, for the execution of it; yet there being no complete ſentence in the foreign admiralty, but an award only, that the wine ſhould be received; this ſuit for the breach thereof is in nature of an original ſuit, which ought not to be, though the breach was at ſea, becauſe upon a contract made at land. 1 *Vent.* 32. 1 *Sid.* 418.

If there are ſeveral partners of a ſhip, and the major part of them are for ſending her a voyage to ſea, to which the reſt diſagree; whereupon, according to common uſage in ſuch caſes, the greater number ſuggeſt in the admiralty court the diſagreement of their partners; and then, according to their uſage there, they order certain perſons to appraiſe the ſhip, who accordingly ſet a value thereon; and the major part, who agreed to the voyage, enter into a recognizance, wherein they bind themſelves jointly and ſeverally to the diſagreeing parties, in a ſum proportionable to their ſhares, according to the value ſet by the appraiſers, to ſecure the ſhares in the ſhip of thoſe who diſagree to the voyage againſt all adventures; there can be no ſuit on this agreement for ſtipulation in the admiralty court; for the contract was made on land, and therefore the temporal courts muſt have conuſance of it. *Carth.* 26.

By the ſtatute 28 *Hen.* 8. *cap.* 15. it is enacted, that "all felonies and robberies, *&c.* upon the ſea, or in any haven, river, creek or place, where the admiral or admirals have, or pretend to have power, authority or juriſdiction, ſhall be inquired, tried, heard, determined and adjudged in ſuch ſhires and places in the realm, as ſhall be limitted by the King's commiſſion or commiſſions to be directed for the ſame, in like form and condition as if any ſuch offence or offences had been committed or done in or upon the land; and ſuch commiſſions ſhall be had under the King's great ſeal, directed to the admiral or admirals, or to his or their lieutenant, deputy or deputies, and to three or four ſuch other ſubſtantial perſons as ſhall be named or appointed by the lord chancellor of *England* for the time being, from time to time, and as oft as need ſhall require, to hear and determine ſuch offences after the common courſe of the laws of this land, uſed for felonies and robberies, *&c.* done and committed upon the land within this realm": *And it is further Enacted*, "that if any perſon or perſons happen to be indicted for any ſuch offence done, or hereafter to be done upon the ſeas, or in any other place above limitted, that then ſuch order, proceſs, judgment and execution, ſhall be uſed, had, and done, and made to and againſt every ſuch perſon or perſons ſo being indicted, as againſt felons, *&c.* for any felony, *&c.* upon the land, by the laws of the land is accuſtomed; and ſuch as ſhall be convict of any ſuch offence, by verdict, confeſſion or proceſs, by authority of any ſuch commiſſion, ſhall have and ſuffer ſuch pains of death, loſſes of lands, goods and chattels, as if they had been attainted and convicted of ſuch offence done upon the land; and alſo, that they ſhall be excluded from the benefit of the clergy."

It was held (*Yelv.* 134.) that by force of this ſtatute, acceſſaries to this offence could not be tried; but this is remedied by 11 & 12 *W.* 3. *cap.* 5. by which their aiders and comforters, and the receivers of their goods, are made acceſſaries, and to be tried as pirates by 28 *Hen.* 8. *cap.* 15. alſo the ſaid ſtatute 11 & 12 *W.* 3. directs how pirates may be tried beyond ſea, according to the Civil law, by commiſſion under the great ſeal of *England*.

By ſtat. 2 *W.* & *M. ſt. c.* 2. The office of lord admiral may be executed by commiſſioners.

By the ſtatute 5 *Eliz. cap.* 5. ſeveral offences in the act mentioned, if done on the main ſea, or coaſts of the ſea, being no part of the body of any county, and out of any haven and pier, ſhall be tried before the admiral or his deputy, and other juſtices of *oyer* and *terminer*, according to the ſtatute of 28 *H.* 8.

By the ſtatute 1 *Ann. cap.* 9. captains and mariners belonging to ſhips, and deſtroying the ſame at ſea, ſhall be tried in ſuch places as ſhall be limitted by the King's commiſſion, and according to 28 *H.* 8.

The ſtatute 10 *Ann. cap.* 10. directs how the trial of officers and ſoldiers, that either upon land out of *Great Britain*, or at ſea hold correſpondence with a rebel enemy.

And by the ſtatute 4 *Geo.* 1. *cap.* 11. all perſons who ſhall commit any offence for which they ought to be adjudged pirates, felons, or robbers by 11 & 12 *W.* 3. may be tried, and judged for every ſuch offence according to the form of 28 *H.* 8. and ſhall be excluded from the benefit of clergy.

All maritime affairs are regulated chiefly by the Civil law and *Rhodian* laws, the laws of *Oleron*, or by certain peculiar and municipal laws and conſtitutions, appropriated to certain cities, towns and countries bordering on the ſea.

If the owner of a ſhip victuals it and furniſhes it to ſea, with letters of repriſal, and the maſter and mariners when they are at ſea commit piracy upon a friend of the King, without the notice or aſſent of the owner, yet by this the owner ſhall loſe his ſhip by the admiral law, and our law ought to take notice thereof. 1 *Roll. Abr.* 530. But ſee 1 *Roll. Rep.* 285.

By the Civil law and cuſtom of merchants, if the ſhip be caſt away, or periſh through the mariners defaults, they loſe their wages; ſo if taken by pirates, or if they run away; for if it were not for this policy, they would forſake the ſhip in a ſtorm, and yield her up to enemies in any danger. 1 *Sid.* 179. 1 *Mod.* 93. 1 *Vent.* 146.

If a man of *Frieſland* ſues an *Engliſhman* in *Frieſland* before the governor there, and there recovers againſt him a certain ſum, upon which the *Engliſhman* not having ſufficient

ſufficient to ſatisfy it, comes into *England*; upon which the governor ſends his letters miſſive into *England omnes magiſtratus infra regnum Angliæ rogans* to make execution of the ſaid judgment; the judge of the admiralty may execute this judgment by impriſonment of the party, and he ſhall not be delivered by the Common law; for this is by the law of nations, that the juſtice of one nation ſhall be aiding to the juſtice of another nation, and for one to execute the judgment of the other; and the law of *England* takes notice of this law, and the judge of the admiralty is the proper magiſtrate for this purpoſe, for he only hath the execution of the Civil law within this realm.

The maſter of a ſhip may hypothecate or pledge the ſhip without the conſent of the owner for tackling and victuals, or he may borrow money for the neceſſaries of the ſhip; and in ſuch caſes the party may in the admiralty court (of which our law takes notice) either proceed againſt the owner or againſt the ſhip. *Hob.* 11. *Moor* 918. 1 *Rol. Abr.* 530.

But the maſter cannot ſell the ſhip and broken tackle, tho' there is no probability of its being ſaved, partly in reſpect of the tempeſt, and partly in reſpect of the barbarity of the inhabitants, who took away every thing that was caſt upon the ſhore. 1 *Sid.* 453.

If a merchant's ſhip is taken by an enemy, and a month after is retaken by an *Engliſh* ſhip, the firſt owner ſhall not have reſtitution, for the ſhip was gained by a battle with the enemy. 2 *Brownl.* 11.

If two ſhips meet at ſea together, tho' they went not forth conſorts, and one of the ſhips in the preſence of the other takes a prize, the other ſhip which was preſent ſhall have the moiety; for the preſence of this ſhip was a terror to the ſhip taken. 2 *Leon.* 182.

If an infant being maſter of a ſhip at *St. Chriſtopher's* beyond ſea, by contract with another, undertakes to carry certain goods from *St. Chriſtopher's* to *England*, and there to deliver them according to the agreement, but waſtes and conſumes them; he may be ſued for the goods in the court of Admiralty, tho' he be an infant; for this ſuit is but in nature of a detinue, or trover and converſion at the Common law. 1 *Rol. Abr.* 530.

If goods are thrown over-board in ſtreſs of weather, in danger or juſt fear of enemies, in order to ſave the ſhip, and the reſt of the cargo, that which is ſaved ſhall contribute to a proportion of that which is loſt; and this average, which by the Civil law and cuſtoms of merchants binds the owners, may be pleaded to an action at Common law. *Molloy* 246. 2 *Bulſt.* 290.

But average is not due, unleſs the goods are loſt in ſuch a manner that thereby the reſidue in the ſhip is ſaved; as if goods are thrown overboard to lighten the ſhip, or by compoſition part is given to a pirate to ſave the reſt; but if a pirate takes part by violence, average ſhall not be paid for them. *Moor* 297.

So where *A.* being one of the owners of a ſhip, loaded on board her 210 tuns of oil, and *B.* loaded on board her 80 bales of ſilk upon a freight, by contract both to be delivered at *London*; the ſhip was purſued by enemies, and forced into an harbour, *&c.* and the maſter ordered the ſilk on ſhore, being the moſt valuable commodity (tho' they lay under the oils, and took up a great deal of time to get at them); the ſhip and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the ſilk; but in this caſe, as the loſs of the oils did not ſave the ſilks, nor the ſaving of the ſilks loſe the oil, the bill was diſmiſſed. *Show. Par. Ca.* 18, 19.

By the Civil law the Admiralty court may take a recognizance in nature of a ſtipulation from the defendant to anſwer the action; and if he does not obey, they may take his body; for it is neceſſary that every court ſhould have a compulſory power of enforcing obedience to its decrees; and this courſe having prevailed there time out of mind, cannot be altered without an act of parliament. 1 *Rol. Abr.* 531. *Cro. Eliz.* 685. *Noy* 24. *Hard.* 473. 13 *Co.* 52. 2 *Brownl.* 26. 2 *Inſt.* 51. *Yelv.* 135. *Godb.* 193, 260.

Though the court of Admiralty is no court of record, becauſe they proceed there according to the Civil law, yet by the cuſtom of the court, they may amerce the defendant for his default by their diſcretion, and may make execution for the ſame of the goods of the defendant *in corpore com.* and if he hath no goods take his body. 13 *Co.* 53.

By the ſtatute 8 *Eliz. cap.* 5. a definitive ſentence in a civil or maritime cauſe, by delegates by commiſſion upon an appeal in Chancery, ſhall be final.

Admiſſion, (*admiſſio*) Is when a patron of a church hath preſented to it, and the biſhop upon examination, admits the clerk by ſaying *admitto te habilem.* It is properly the ordinary's declaration that he approves of the preſentee, to ſerve the cure of the church to which he is preſented. *Co. Lit.* 344. In a larger ſenſe, admiſſion is ſometimes uſed to include alſo inſtitution; but more frequently and properly, admiſſion is taken to be, when the biſhop upon examination doth approve of the preſentee as a fit perſon to ſerve the cure of the church to which he is preſented. *Watſon's Complete Incumbent, c.* 15.

Admittendo clerico, A writ where a man has recovered his right of preſentation againſt the biſhop. *Reg. Orig.* 3. If a man do recover his preſentation in the *Common pleas* againſt the biſhop, then he may have a writ to the ſame biſhop to *admit* his clerk, or unto the metropolitan. *F. N. B.* 38. 7 *Hen.* 8. 32. 8 *Hen.* 4. 22.

But if the King do recover in the Common pleas any prebendary or ſubdeanry, or dignity againſt the biſhop, and giveth the ſame by his letters patent unto another clerk; the clerk ſhall ſhew the letters patent in the Common pleas, and thereupon ſhall have a writ unto the biſhop to admit him and to induct him. And if the clerk die before he be admitted and inducted, and the King giveth the ſame by other letters patent unto another clerk; that clerk ſhall have a writ out of the Chancery directed unto the juſtices of the Common pleas, reciting the recovery, and how the other clerk died before he was admitted, and how he hath granted the ſame to this clerk by his letters patent, commanding the juſtices to ſend another writ to the biſhop, to admit this clerk, notwithſtanding the King's collation before made unto the other clerk. *F. N. B.* 38.

In a *quare impedit* betwixt two ſtrangers, if there doth appear to the court a title for the King, they ſhall award a writ unto the biſhop for the King. *F. N. B.* 38.

If a man do recover an advowſon, and the ſix months paſs, yet if the church be void, the patron may pray a writ unto the biſhop, and ſhall have it; and if the church be void when the writ cometh to the biſhop, the biſhop is bound to admit his clerk, and in reaſon the ſame law is, if the patron after the ſix months preſent unto the biſhop, if the church be then void, the biſhop is bound to admit his clerk. *F. N. B.* 38.

Admittendo in ſocium, A writ for aſſociating certain perſons to juſtices of aſſize. *Reg. Orig.* 106.

Admittance. See title **Copyhold.**

Adnichiled, (from the Latin *nihil*, or as it was written of old, *nichil*) Signifies annulled, made void, or brought to nothing. It is uſed in ſtat. 28 *Hen.* 8. *c.* 7. *Cowel.*

Ad Pontem, *Paunton* in *Lincolnſhire.*

Adquietare, Is the ſame as *acquietare*, i. e. to pay, *Petitum eſt ut clerus* adquietaret *novem millia marcarum. Mat. Par. Ann.* 1287. *Cowel.*

Ad quod damnum, Is a writ that lies to the ſheriff, to inquire what damage it may be to others for the King to grant a *fair* or *market*; or for the King, or any other perſon to give any lands holden in fee-ſimple, in *mortmain*, to any houſe of religion, or other body politick; for in that caſe the land is ſaid to fall *in manum mortuam*, into a dead hand; that is, it is in ſuch an eſtate and condition, that the chief lords loſe all hope of *heriots, ſervice of courts* and *eſcheats* upon any traiterous or felonious offence committed by the tenant; for a body politick dieth not, neither can perform perſonal ſervice, or commit treaſon, or felony, as a ſingle perſon may. And therefore it ſeems convenient, that, before any ſuch grant be

made, it be known what prejudice it is like to work either to the grantor or others. *F. N. B. fo.* 221. *Termes de lay ley.*

Stat. 27 *Ed.* 1. *ſt.* 2. *ſect.* 1. ordains, *that ſuch as would purchaſe new parks ſhall have writs out of Chancery to inquire concerning the ſame.*

Sect. 3. *And perſons dwelling beyond ſea that have lands or rents in* England, *and will purchaſe letters of protection, or to make general attornies, they ſhall be ſent into the Exchequer, and there make fines, and from thence ſhall be ſent unto his chancellor or lieutenant.*

Sect. 4. *In like manner they ſhall do that will purchaſe any fair, market, warren, or other liberty.*

If there be an *ancient trench or ditch coming from the ſea*, by which boats and veſſels uſed to paſs to the town, if the ſame be *ſtopped* in any part by outragiouſneſs of the ſea, and a man will *ſue the King to make a new trench, and to ſtop the ancient trench*, &c. they ought firſt to ſue a writ of *ad quod damnum*, to enquire what damage it will be to the King or others. *F. N. B.* 225.

And if the King will grant to any city the *aſſiſe of bread and beer*, and the keeping of weights and meaſures, an *ad quod damnum*, ſhall be firſt awarded, and when the ſame is certified, *&c.* then to make the grant. *F. N. B.* 225.

The river *Thames is an highway*, and cannot be diverted without an *ad quod damnum*, and to do ſuch a thing ought to be by patent of the King. *Noy* 105.

If upon the *return* of an *ad quod damnum* it appears to be *ad damnum* vel præjudicium *of no man*, the King may then licenſe the ſtopping up of an anctent highway, or diverting a water-courſe, or part of it, for the concern is then wholly his own; but without his *licence* it can never be done, tho' a better way be ſet out, and ſo returned upon an *ad quod damnum*. *Vaugh.* 341.

If an *ad quod damnum* iſſues to enquire *ad quod damnum vel præjudicium* a licence for a mortmain will be; one *inquiry* is, *ſi patria per donationem illam magis ſolito non oneretur, &c.* tho' the return be that by ſuch licence *patria magis ſolito oneretur*, yet the licence if granted will be good; which ſhews *that* clauſe is for information of the King, that he may not licenſe that which he would not, and not for reſtraint to hinder him to licenſe what he would. For by *F. N. B.* 222. the uſual licence is now with, *et hoc abſque aliquo brevi de ad quod damnum.* And when the King can licenſe without any writ of *ad quod damnum*, he may, if he will, licenſe, whatever the return of the writ be. Tho' it be ſaid in the caſe of monopolies, that in the King's grant it is always a condition expreſſed or implied, *quod patria plus ſolito non oneretur*, but that ſeems but *gratis dictum. Vaugh.* 345.

An *ad quod damnum fraudulently executed* (as where it was for a market, and tho' the next market town was within a mile and an half of the place where the new market was to be, yet the writ was executed many miles diſtant) is a ground for a *ſcire facias* to repeal the grant. 2 *Vent.* 344.

By ſtat. 8 & 9 *W.* 3. *c.* 16. *ſ.* 6. (for enlarging common highways) it is enacted, *that where any common highway ſhall be encloſed after a writ of* ad quod damnum *iſſued and executed, any perſon injured or aggrieved by ſuch incloſure may complain to the juſtices at the quarter ſeſſions next after ſuch inquiſition, who may hear and finally determine the ſame, &c. but if no ſuch appeal be made, then the ſaid inquiſition and return, recorded by the clerk of the peace, to be for ever binding.*

An *ad quod damnum* was ſued out, and an *ad nullius damnum* returned; and an order thereupon made for the incloſing ſuch an ancient highway, and ſetting out a place for another in ſuch a place. On appeal from this order to the ſeſſions, the incloſure is declared to be a great nuſance to the whole country. Several exceptions were taken to this order: 1. That it did not appear to have been made at the next quarter ſeſſion after the order made. 2. An exception was taken to the whole purport of the order; that it did not appear by it, what the way to be incloſed was, or what the new way. So that there was no certainty what the ſubject matter of appeal was; for this being a method ordained by the ſtatute for making a final end of the matter, it ought to appear very certain. It was held that this clauſe does not alter the nature of the writ of *ad quod damnum*, nor the proceedings thereupon; that the writ when executed is to be returned into Chancery, and the ſheriff is to return the inquiſition without delay, and if the Queen thereby ſees that there is no harm in the incloſing, ſhe may grant licence to do ſo, and in order thereto the inquiſition muſt find it *ad damnum nullius*, and there can be no foundation of incloſing without ſuch return; and that tho' it be found and returned *ad damnum nullius*, yet none can lawfully incloſe without licence or grant to incloſe the old way; for the authority is not from the inquiſition, but from the licence; and the appeal muſt be brought at the next ſeſſions after the inquiſition taken, and it muſt be by ſome perſon grieved; that in the preſent caſe, there being no licence, it is not by the authority of the ſtatute, and therefore not ſuch as obliges the party to appeal; therefore *per tot cur.* the inquiſition was quaſhed. 7 *Mod.* 45.

A writ of *ad quod damnum.*

George *the Third*, &c. *to the ſheriff of the county of* W. *greeting. We command you that by the oath of honeſt and lawful men of your bailiwick*, (or, *of your county*) *by whom the truth of the matter may be better known, you diligently inquire, whether it will be to the damage or prejudice of us or others, if we grant to* C. D. *one fair at*, &c. *And if it will be to the damage or prejudice of us or others, then to what damage and what prejudice of us, and to what damage and prejudice of others, and of whom, and in what manner, and how, and where*, &c. *And the inquiſition thereupon, diſtinctly and openly made, to us in our Chancery, under your ſeal, and the ſeals of thoſe by whom it was made, do you ſend without delay, and this writ*, &c.

Adjamire. See **Arraign.**

Adjectare, *Addretiare, Addreſſare*, i. e. *ad rectum ire, recto ſtare*, To ſatisfy, to make amends.—*Gerv. Dorobern. ſub anno* 1170. *Quod erunt coram domino rege die quem eis conſtituerit, ad rectum faciendum et addretiandum ei, et hominibus ſuis quod addretiare debuerunt. Cowel.*

Ad terminum qui præteriit, A writ of entry that lies for the leſſor and his heirs, where a leaſe has been made of lands or tenements for term of life or years; and after the term is expired, the lands are withheld from the leſſor by the tenant, or other perſon that poſſeſſeth the ſame: And it likewiſe lies for the heir of the leſſor. *F. N. B.* 201.

Advent, (*Adventus*) A ſpace of time containing about a month preceding the feaſt of the nativity of our ſaviour *Chriſt*. It begins from the *Sunday* that falls either upon St. *Andrew*'s day, being the 30th of *November*, or next to it, and continues to the feaſt of *Chriſt*'s nativity, commonly called *Chriſtmas*. *Durandus* tells us it was inſtituted by St. *Peter*. Our anceſtors ſhewed great reverence and devotion to this time, in regard to the approach of the ſolemn feſtival; ſo that *in* Adventu *domini nulla aſſiſa debet capi. Inter placita de temp. Regis Johan. Ebor.* 126. But the ſtatute *Weſt.* 1. *cap.* 48. ordained that notwithſtanding the uſual ſolemnity and times of reſt, it ſhould be lawful (in reſpect of juſtice and charity, which ought at all times to be regarded) to take aſſiſes of *novel diſſeiſin, mortdanceſtor*, and *darrein preſentment* in the time of *Advent, Septuageſima* and *Lent*. This is alſo one of the ſeaſons from the beginning of which to the end of the *octaves* of the *Epiphany* the ſolemnizing of marriage was forbidden, (by reaſon of certain ſpiritual joy that the church ought to conceive in the remembrance of her ſpouſe, *Chriſt Jeſus*) without a ſpecial licence, according to the old verſes,

Conjugium Adventus *prohibet*, Hilarique *relaxat*;
Septuagena *vetat, ſed* Paſchæ Octava *reducit*;
Rogatio *vetitat, concedit* Trina *poteſtas.*

See *Rogation-week*, and *Septuageſima*. This ſolemn feaſt had its name of *Advent*, becauſe it immediately preceded the appearance of our Lord, and therefore was *præparatio ſancta in adventum domini. Cowel.*

Ad ventrem inſpiciendum, A writ mentioned in the ſtatute of eſſoins, 12 *Ed.* 2. See **Ventre inſpiciendo,** by which a woman is to be ſearched, whether ſhe be with child by a former huſband, on her withholding lands from the heir.

Adventure, A thing ſent to ſea, the adventure whereof the perſon ſending it ſtands to out and home. *Jacob, Lex Mercat.* See **Aventure.**

Adverare, To *aver,* to affirm or make good. *Cowel.*

Adultery, (in *ſtat.* 1 *H.* 7. *cap.* 4. and in divers other places and authors termed *Advowtry*) in Latin *adulterium,* as it were, *ad alteriuſt horum aſcendere,* is properly the ſin of incontinence between two married perſons; and if one of the perſons be married it is nevertheleſs adultery. But in this laſt caſe, it is called ſingle adultery, to diſtinguiſh it from the other, which is double. This crime is ſeverely puniſhed by the laws of God, and the antient laws of the land; the *Julian* law, among the old *Romans,* made it death: But in moſt countries at this time the puniſhment is by fine, and ſometimes baniſhment: In *England* it is puniſhed by fine, penance, *&c.* King *Edmund a Saxon, cap.* 4. *leg. ſuar.* Adulterium *affici juſſit inſtar homicidii.* And *Canute* the *Dane, hominem* adulterum *in exilium relegari juſſit, fœminam naſum et aures præcidi. Leg. par.* 2. *c.* 6. *et c.* 50. *Qui uxoratus faciet adulterium, habet Rex vel dominus ſuperiorem, epiſcopus inferiorem. Leges Hen.* 1. *cap.* 12. Domeſday-Book, tit. Chent, [Kent] Rex, Dover. *De* adulterio *per totam Chent, habet Rex hominem, archiepiſcopus mulierem, exceptâ terrâ S. Trinitatis, S. Auguſtini, & S. Martini, de quibus Rex nihil habet. Et. tit. Ceſtre Civitas——Vidua ſi ſe non legitime commiſcebat* xx *s. emendabat, puella vero* x *s.* The penalty of this ſin was called *lairevite* by our *Saxons.* See in 2 part *Coke's Inſtit.* the remarkable caſe of *Margaret,* the wife of *John de Camois,* who with the conſent of her huſband, lived in adultery with Sir *William Panell,* and loſt her dower. *Rex—Vic. Southt.—Præcipimus tibi quod diligenter inquiri facias per legales homines de viſn.* Candeur. *Si* Robertus Pincerna, *habens ſuſpectum* Will. Wake *qui cum uxore ſua* adulterium *committeret, prohibuit ei ingreſſum domus ſuæ, & ſi idem* Will. *poſt prohibitionem illam, domum ipſius* Roberti *ingreſſus* adulterium *prædictum commiſit, inde præfatus* Robertus *mentulâ eum privavit, et ſi inquiſitio dederit, quod ita ſit, tunc eidem* Roberto *et ſuis qui cum eo erant ad hoc faciend. ter. et catalla ſua, occaſione illâ in manum noſtram ſeiſita, in pace eſſe facias, donec aliud inde tibi præcipimus, et veritatem illius inquiſitionis G. fil. Petri juſtic. et baronibus noſtris de ſcacc. ſcire fac. Teſte G. fil. Petri com.* Eſſex. *apud Wade Stoke.* 3 *Nov. Clauſ.* 14 *Joh. m.* 2. Perhaps this might be in ſome degree, purſuant to a law made by *William* the Conqueror, *that whoever forced a woman, ſhould loſe his genitals, the offending parts.* Before the ſtatute 22 *Car.* 2. which makes malicious maiming felony, it was a queſtion whether cutting off the privy members of a man, taken in adultery with another man's wife, was felony or not? for according to *Bracton, ſequitur pœna aliquando capitalis:* But *anno.* 13 *Hen.* 3. one *John,* a monk, being taken by *Henry Hull* in the act with his wife, he cut off the privy members of the monk, and was only indicted for a maihem. 3 *Inſt.* 118.

Advocate, Is the patron of a cauſe, aſſiſting his client with advice, and who pleads for him: He is the ſame with reſpect to the Civil or Eccleſiaſtical laws, as a counſellor is with reſpect to the Common law. The eccleſiaſtical or church *advocate* was of two ſorts; either an *advocate* of the cauſes and intereſt of the church, retain'd as a counſellor and pleader, to maintain its properties and rights; or an *advocate,* or patron of the preſentation and advowſon. Both theſe offices did originally belong to the founders of churches or convents, and their heirs, who were bound to protect and defend their churches, as well as to nominate or preſent to them; as *Ailwin,* founder of *Ramſey* abby, *proruit in medium, ſe Rameſienſis eccleſiæ advocatum, ſe poſſeſſionum ejus tutorem allegans. Lib. Rameſ. ſect.* 49. But when the patrons grew negligent in their duty, or were men of no intereſt or ability in the courts of juſtice, then the religious began to retain a law *advocate,* to ſolicit and proſecute their cauſes. *Cowel.* See *Spelman* and *Du Freſne.*

Advocati, Were thoſe whom we now call patrons of churches, and who reſerved to them and their heirs a liberty to preſent on any avoidance.

Advocatione decimarum, Is a writ that lieth for the claim of the fourth part, or upward, of tithes that belong to any church. *Reg. Orig.* 29.

Advow, or **Avow,** *Advocare,* cometh of the *French* word *avouer,* and ſignifieth to juſtify or maintain an act formerly done. For example, one takes a diſtreſs for rent, or other thing, and he that is diſtrained ſueth a replevin; now he that took the diſtreſs, or to whoſe uſe the diſtreſs was taken by another, juſtifying or maintaining the act, is ſaid to *avow. Termes de la ley.* Hence comes *advowant* and *advowry. Old Nat. Brev. fol.* 43. *Bracton* uſes the *Latin* word in the ſame ſignification (as *advocatio diſſeiſinæ*) *lib.* 4. *cap.* 26. and *Caſſanæus, de conſuet. Burg. pag.* 1210. uſes *advocare* in the ſame ſignification; and page 1213, the ſubſtantive *deſavohamentum* for a diſavowing, or refuſal to avow. This word alſo ſignifies to bring forth any thing: Anciently when ſtolen goods were bought by one, and ſold to another, it was lawful for the right owner to take them wherever they were found; and he in whoſe poſſeſſion they were found, was bound *advocare, i. e.* to produce the ſeller to juſtify the ſale; and ſo on till they found the thief. Afterwards the word was taken for any thing which a man acknowledged to be his own, or done by him, and in this ſenſe it is mentioned in *Fleta, lib.* 1. *c.* 5. *par.* 4. *Si vir ipſum in domo ſua ſuſceperit, nutrierit et* advocaverit *filium ſuum. Cowel.*

Advowee, or **Avowee,** *(Advocatus)* Is uſed for him that hath right to preſent to a benefice: And in *ſtat.* 25 *Ed.* 3. *ſt.* 5. we find *advowee paramount* is taken for the King, the higheſt patron.——Advocatus *eſt ad quem pertinet jus* advocationis *alicujus eccleſiæ, ut ad eccleſiam, nomine proprio non alieno, poſſit præſentare. Fleta, lib.* 5. *c.* 14.

Advowſon, *(Advocatio)* Signifies the right of preſentation to a church or benefice: And he who hath this right to preſent is ſtiled *patron,* becauſe they who originally maintained the right of preſentation to any church, were maintainers of, or benefactors to, the ſame church, either by building or increaſing it; and they are therefore ſometimes termed *patroni,* ſometimes *advocati,* and ſometimes *defenſores. Decretal. cap.* 4 *ſect.* 2. *De jure patronatus. Cowel.*

When the Chriſtian religion was firſt eſtabliſhed in *England,* Kings began to build cathedral churches, and to make *biſhops*; and afterwards in imitation of them, ſeveral lords of manors founded particular churches on ſome part of their own lands, and endowed them with glebe, reſerving to themſelves and their heirs, a right to preſent a fit perſon to the biſhop when the ſame ſhould become void: And this right is called an advowſon, and he that hath this right of preſentation is termed the patron, it being preſumed that he who founded the church, will *avow* and take it into his protection, and be a patron to defend it in its juſt rights. By the Common law, therefore, the right of patronage is a real right, fixed in the founder of the church, and his heirs and ſucceſſors, wherein they have as abſolute a property as any other man hath in his lands and tenements; and when manors were firſt created, and lands ſet apart to build a church on ſome part of the manor, the advowſon or right of preſentation to that church became *appendant* to the manor; and by a grant thereof *cum pertinentiis* the advowſon paſſed. 1 *Nelſ. Abr.* 184.

Under this title are conſidered,

1. *The ſeveral kinds of advowſons; and how they may be granted, deviſed, and inherited.*

2. *Statutes concerning advowſons.*

1. *The*

1. *The ſeveral kinds of advowſons; and how they may be granted, deviſed, and inherited.*

The right of advowſon, or of preſenting a clerk to the biſhop, as often as a church becomes vacant, was firſt granted by ſuch as were founders, benefactors, or maintainers of the church; either by reaſon of the foundation, as where the anceſtor was founder of the church; or by donation, where he endowed the church; or by reaſon of the ground, as where he gave the ſoil whereupon the church was built. 1 *Inſt.* 119.

For altho' the nomination of fit perſons to officiate throughout the dioceſe was originally in the biſhop, and in no other, yet when lords of manors were willing to build churches, and to endow them with manſe and glebe, for the accommodation of fixed and reſiding miniſters, the biſhops on their part (for the encouragement of ſuch pious undertakings) were content to let thoſe lords have the nomination of perſons to the churches ſo built and endowed by them; with reſervation to themſelves of an intire right to judge of the fitneſs of the perſons ſo nominated. And what was the practice, became in proceſs of time the law of the church. *Gibſ. Codex*, 756. *ſecond Ed.*

They were called *advocati* and *patroni*, becauſe they were bound to protect and defend the rights of the church, and their clerks, from oppreſſion and violence.

The right of nominating, which was firſt annexed to the perſon building or endowing the church, became by degrees appendant to the manor in which it was built; for the endowment was ſuppoſed to be parcel of the manor, and the church was built by ſuch lord for the uſe of the inhabitants of his manor; and the tithes of the manor were alſo annexed to the church. Upon all which accounts, it was moſt natural for the right of advowſon (which was now become hereditary) to paſs with the manor, or with ſuch part of it, as might at any time be granted or aliened together with the advowſon: to which (whether to the whole, or part, it is therefore ſaid to be *appendant*; that is, to the demeſnes, which are of perpetual ſubſiſtence, but not to rents or ſervices, which (tho' parcel of the manor) may be extinguiſhed, and cannot therefore ſupport ſuch appendency. *Gib.* 757. *Watſ. c.* 7.

If he that is ſeiſed of a manor, to which an advowſon is appendant, grants one or two acres of the manor, together with the advowſon; the advowſon is appendant to ſuch acre; eſpecially after the grantee hath preſented. *Watſon's Complete Incumbent*, *c.* 7.

But this feoffment of the acre with the advowſon ought to be by deed, to make the advowſon appendant; and the acre of land and the advowſon ought to be granted by the ſame clauſe in the deed; for if one having a manor with an advowſon appendant, grant an acre parcel of the ſaid manor, and by another clauſe in the ſame deed grants the advowſon; the advowſon in ſuch caſe ſhall not paſs as appendant to the acre: but if the grant had been of the intire manor, the advowſon would paſs as appendant. So if a huſband, ſeiſed in right of his wife of a manor to which an advowſon is appendant, doth alien the manor by acres to divers perſons, ſaving one acre; the advowſon ſhall be appendant to that acre. Or if a leſſee for life of a manor to which an advowſon belongs, alien one acre, with the advowſon appendant, the advowſon is thereby appendant to that acre. *Watſ. c.* 7.

An advowſon of a vicarage may be appendant to a parſonage, as being derived and endowed out of the ſame; upon which account it is, that if a parſon be patron of a vicarage, and doth leaſe the parſonage to another, the patronage of the vicarage ſhall paſs as incident thereunto; and upon the ſame account, the rector of common right is ever eſteemed patron of the vicarage, tho' by ſome ordinance or compoſition, or by the King's grant, it may be appointed and ſettled otherwiſe; and ſo may even an advowſon of a vicarage be appendant unto other things, as to a manor, by reſervation upon the appropriation, becauſe the advowſon of the rectory was appendant thereunto; as alſo by the grant of the parſon, before the time of memory; and in this caſe, altho' the act of appropriation be not extant, yet the uſe of preſenting time out of mind is a ſufficient evidence of the appendancy to the manor, contrary to the common right. *Watſ. c.* 7.

The right of advowſon, tho' appendant to a manor, caſtle, or the like, may be ſevered from it; and being ſevered, is become *an advowſon in groſs*; and this may be effected divers ways: as, 1. If a manor or other thing to which it is appendant is granted, and the advowſon excepted. 2. If the advowſon is granted alone, without the thing to which it was appendant. 3. If an advowſon appendant is preſented to by the patron, as an advowſon in groſs. *Gibſ.* 757.

A diſappendancy may alſo be temporary; that is, the appendancy, tho' turned into groſs, may return: as, 1. If the advowſon is excepted in a leaſe of a manor for life; during the leaſe, it is in groſs, but when the leaſe expires it is appendant again. 2. If the advowſon is granted for life, and another enfeoffed of the manor with the appurtenances; in ſuch caſe the reverſion of the advowſon paſſeth, and at the expiration of the grant it ſhall be appendant. 3. If the advowſon is allotted to one coparcener, and the manor to another, and ſhe who had the advowſon dies without iſſue, it is appendant again: and ſo, if the demeſnes are allotted to the one, and the ſervices to the other, the advowſon becomes in groſs; but if the one die without iſſue, and the manor deſcend to her who had the ſervices, the advowſon becomes appendant as it was before. 4. If tenant in tail aliens ſome part of the manor with the advowſon, and the alienee grants the advowſon to a ſtranger; or if a common perſon hath an advowſon appendant, and a ſtranger preſents his clerk, who is in by ſix months; in both theſe caſes, the advowſon is made diſappendant; but yet, if in the firſt caſe, the land aliened is recovered by tenant in tail, and in the ſecond caſe the rightful patron recovers, the appendancy returns. 5. Where an advowſon is appendant to a manor, and the owner mortgages the manor in fee excepting the advowſon, by this means it is become in groſs; but if the money be paid punctually at the day, then it is become appendant again, and if it is paid after the day it is appendant in reputation, and may paſs by the name of an advowſon appendant, in a grant or other conveyance, tho' in reality the appendancy is deſtroyed; for if it is ſevered one inſtant from the manor by the act of the party, it is then in groſs, and not appendant. 6. So where the owner of a manor, to which an advowſon was appendant, accepts a fine of the advowſon, with a grant and render back of every ſecond turn; now, for ſuch turn the advowſon is in groſs, but for other turns the appendancy ſtill continues; but if a man levy a fine of the advowſon, and accepts a grant and render, the appendancy is quite gone, becauſe there was an inſtant of time, in which it became ſevered. 7. So where there are two coparceners of a manor to which an advowſon is appendant, and they make partition of the manor, without taking notice of the advowſon; at every other turn it is ſtill appendant: but if there had been any expreſs exception of the advowſon, it would then be in groſs. *Gibſ.* 757.

But in caſe of the King, by the ſtatute of *prærogativa regis*, 17 Ed. 2. *c.* 15. *When the King giveth or granteth land or a manor with appurtenances; without he make expreſs mention in his deed or writing, of advowſons of churches when they fall, belonging to ſuch manor or land, at this day the King reſerveth to himſelf ſuch advowſons, albeit that among other perſons it hath been obſerved otherwiſe.*

Giveth or granteth] But when he *reſtoreth*, as in caſe of the reſtitution of a biſhop's temporalities; then advowſons paſs without expreſs mention, or any words equivalent thereto. 10 *Co.* 64.

Without he make expreſs mention] Either by name, or *with the appurtenances*, or *as fully and perfectly*, or *in as ample manner and form*; or the like; which have been adjudged equivalent to an expreſs mention; becauſe the grantee may inquire what the appurtenances were, and in what manner and form it was held; and forasmuch as the uncertainty may be reduced to a certainty by inquiry or circumſtance, the grant is good. 10 *Co.* 64.

Other

Other perſons] the law, in the caſe of a common perſon, is thus ſet down by *Rolle*, out of the ancient books: If a man ſeiſed of a manor to which an advowſon is appendant, aliens that manor, without ſaying *with the appurtenances* (and much more without *naming* the advowſon) yet the advowſon ſhall paſs; for 'tis parcel of the manor. 2 *Rol. Abr.* 60.

The right or property which a patron hath in an advowſon, will not warrant a plea (as it is in temporal property) that he is ſeiſed in his demeſne as of fee, but only ſeiſed in fee; the reaſon of which is, becauſe that inheritance, ſavouring not *de domo*, cannot either ſerve for the ſuſtentation of him and his houſhold, nor can any thing be received for the ſame, for defraying of charges. And in the caſe of *John London* and the church of *Southwell*, where the words of the leaſe were, commodities, emoluments, profits and advantages to the prebend belonging; it was adjudged, that the advowſon could not paſs by the ſaid words, becauſe all of them implied things gainful; and (as was added) is contrary to the nature of an advowſon, regularly. 1 *Inſt.* 17.

And hereby it appeareth, how the Common law doth deteſt ſimony and all corrupt bargains for preſentations to any benefice; but that a fit perſon for the diſcharge of the cure, ſhould be preſented freely without expectation of any thing; nay, ſo cautious is the Common law in this point, that the plaintiff in a *quare impedit* could recover no damages for the loſs of his preſentation, untill the ſtatute 13 *Ed.* 1. *c.* 5. and that is the reaſon that guardian in ſocage ſhall not preſent to an advowſon, becauſe he can take nothing for it, and by conſequence he cannot account for it; and by the law he can meddle with nothing that he cannot account for. 1 *Inſt.* 17.

Which ſaid doctrine, and the plain tendency thereof, are exactly agreeable, not only to the nature of advowſons, which are merely a truſt veſted in the hands of patrons by conſent of the biſhop, for the good of the church and religion; but alſo to the expreſs letter of the Common law, the rule of which is, that the right of patronage, being annexed to the ſpiritualty, cannot be bought or ſold: So that the notion and practice of making merchandiſe of advowſons and next avoidances, is not eaſily reconciled, either to the laws of the church, or to the ancient laws of the land, or to the nature of advowſons, conſidered as truſts for the benefit of mens ſouls. Nor doth it follow, either from the patron's being now veſted with that right by the Common law, or from its being annexed to a temporal inheritance, that it is itſelf a temporal inheritance, or ought (legally ſpeaking) to be conſidered otherwiſe than as a ſpiritual truſt; ſince it is certain, that the foundation of the right was the conſent of the biſhop; and as to what is called appendancy, it amounteth to no more than this, that a truſt of a ſpiritual nature, and for ſpiritual ends, ſhall reſt in the ſame perſon to whom the temporal inheritance doth belong; for the ſeparation of advowſon from the manors, and the grant of next avoidances, and the like, were ſteps taken afterwards, and what undoubtedly were never thought of by the biſhop upon the firſt conceſſion; who had nothing in his eye, but the encouragement of ſuch pious foundations, and a reaſonable reſpect to the founder (who was ſuppoſed to dwell there) in the nomination of ſuch a clerk as might be acceptable to himſelf; under the reſtraint, of being admitted, or not admitted by the biſhop. *Gibſ.* 758.

The equity of which union of the advowſon to the manor, ſeems to be the foundation of that maxim of the Canon law, *jus patronatus tranſit cum univerſitate niſi ſpecialiter excipiatur*; and of the Common law, that the advowſon paſſeth with the manor of courſe, without any expreſs words to convey it; for tho' it be otherwiſe in the caſe of the King, yet that is upon the foot of the ſtatute of *prærogativa regis*, and not of the Common law. *Gibſ.* 758.

To this purpoſe it is material, that the Canon law expreſly forbad the obtaining and procuring of next preſentations; as we find in a decretal epiſtle of pope *Alexander*, the third biſhop of *Exeter*; upon which the rule of the law is, that he who purchaſeth an advowſon ought to be deprived thereof. *Gibſ.* 758.

Advowſon being an inheritance incorporeal, and lying in manual occupation, cannot paſs by livery; but may be granted by deed, or by will, either for the inheritance, or for the right of one or more turns, or for as many as ſhall happen within a time limited.

But this general rule, with regard to advowſons in groſs, next avoidances, and the like, is to be underſtood with two limitations.

Firſt, That it extends not to eccleſiaſtical perſons of any kind or degree, who are ſeiſed of advowſons in the right of their churches; nor to maſters and fellows of colleges, nor to guardians of hoſpitals, who are ſeiſed in right of their houſes; all theſe being reſtrained (the biſhops by the 1 *Eliz. cap.* 19. and the reſt by the 13 *Eliz. cap.* 10.) from making any grants but of things corporeal, of which a rent or annual profit may be reſerved; and of that ſort, advowſons and next avoidances, which are incorporeal and lie in grant, cannot be; and therefore ſuch grants, however confirmed, are void againſt the ſucceſſor; tho' they have been adjudged to be good againſt the grantors (as biſhop, dean, maſter, or guardian) during their own times.

Secondly, Where the right of granting is abſolute and indiſputable; yet a grant cannot be made by a common perſon, whilſt the church is void, ſo as to be intitled thereby to ſuch void turn; for however the avoidance that ſhall happen next after, or the inheritance of the advowſon, may be granted when the church is void; the void turn itſelf (being a mere ſpiritual thing and annexed to the perſon of the patron) is not grantable: it is then (as the law books ſpeak) a thing in power and authority, a thing in action and effect; the *execution* of the advowſon, and not the *advowſon*. This is the doctrine and language of all the books; which alſo ſay, that if two have a grant of the next avoidance, and one releaſeth all right and title to the other while the church is void; ſuch releaſe for the ſame reaſon is void. But all this is to be underſtood of common perſons only, and not of the King, whoſe grant of a void turn hath been adjudged to be good. *Gibſ.* 758. *Watſ. c.* 10.

And with reſpect to *clergymen* in particular, it is enacted by the 12 *Ann. ſt.* 2. *c.* 12. as follows: *Whereas ſome of the clergy have procured preferments for themſelves, by buying eccleſiaſtical livings, and others have been thereby diſcouraged; it is enacted, that if any perſon ſhall for any ſum of money, reward, gift, profit or advantage, directly or indirectly, or for or by reaſon of any promiſe, agreement, grant, bond, covenant or other aſſurance, for, or for any ſum of money, reward, gift, or benefit whatſoever, directly or indirectly, in his own name or in the name of any other perſon, take, procure or accept the next avoidance of, or preſentation to, any benefice with cure of ſouls, dignity, prebend, or living eccleſiaſtical, and ſhall be preſented or collated thereupon; every ſuch preſentation or collation; and every admiſſion, inſtitution, inveſtiture and induction upon the ſame, ſhall be utterly void, fruſtrate and of no effect in law; and ſuch agreement ſhall be deemed a ſimoniacal contract; and it ſhall be lawful for the queen, her heirs and ſucceſſors, to preſent or collate unto, or to give or beſtow every ſuch benefice, dignity, prebend and living eccleſiaſtical for that one time or turn only; and the perſon ſo corruptly taking, procuring or accepting any ſuch benefice, dignity, prebend or living, ſhall thereupon and thenceforth be adjudged a diſabled perſon in law to have and enjoy the ſame, and ſhall alſo be ſubject to any puniſhment, pain or penalty limited, preſcribed or inflicted by the laws eccleſiaſtical, in like manner as if ſuch corrupt agreement had been made after ſuch benefice, dignity, prebend or living eccleſiaſtical had become vacant; any law or ſtatute to the contrary in any wiſe notwithſtanding.*

But this act being only reſtrictive upon clergymen, all other perſons continue to purchaſe next avoidances as they did before, and preſent thereunto as they think proper.

As to advowſons in groſs, there cannot be any deſcent thereof from the brother to the ſiſter of the intire blood,

but the ſame ſhall deſcend to the brother of the half blood, unleſs the firſt had preſented to it in his life time, and then it ſhall deſcend to the ſiſter, ſhe being the next heir of the intire blood. *Watſ. c.* 8.

So if one be ſeiſed of an advowſon in fee, and the church doth become void, the void turn is a chattle; and if the patron dieth before he doth preſent, the avoidance doth not go to his heir, but to his executor. *Watſ. c.* 9.

But if the incumbent of a church be alſo ſeiſed in fee of the advowſon of the ſame church, and die, his heir, and not his executors, ſhall preſent; for altho' the advowſon doth not deſcend to the heir at the death of the anceſtor, and by his death the church become void, ſo that the avoidance may be ſaid in this caſe to be ſevered from the advowſon before it deſcend to the heir, and veſted in the executor; yet both the avoidance and deſcent to the heir happening at the ſame inſtant, the title of the heir ſhall be preferred as the more ancient and worthy. *Watſ. c.* 9.

By laſt will and teſtament, the right of preſenting to the next avoidance, or the inheritance of an advowſon, may be deviſed to any perſon; and if ſuch deviſe be made by the incumbent of the church, the inheritance of the advowſon being in him, it is good tho' he die incumbent; for altho' the teſtament hath no effect but by the death of the teſtator, yet it hath an inception in his life time. And ſo it is, tho' he appoint by his will who ſhall be preſented by the executors, or that one executor ſhall preſent the other, or doth deviſe that his executors ſhall grant the advowſon to ſuch a man. *Watſ. c.* 10.

Where there are divers patrons, and they vary in their preſentment; if they be jointenants or tenants in common of the patronage, the ordinary is not bound to admit any of their clerks, and if the ſix months paſs then he may preſent by the lapſe; but he may not within the ſix months, for if he do, they may agree and bring a *quare impedit* againſt him, and remove his clerk, and ſo the ordinary ſhall be a diſturber. *Dr. & Student, b.* 2. *c.* 30.

And by the Canon law, where divers did preſent, being either coparceners, jointenants, or tenants in common, the biſhop, if he pleaſed, might judge of the fitneſs of the clerks, and chooſe which of them he would. *Gibſ.* 765.

By the Common law, if the patrons have the patronage by deſcent, as coparceners; then is the ordinary bound to admit the clerk of the eldeſt ſiſter; for the eldeſt ſhall have the preference in the law, if ſhe will; and then at the next avoidance, the next ſiſter ſhall preſent, and ſo by turns one ſiſter after another, till all the ſiſters or their heirs have preſented; and then the eldeſt ſiſter ſhall begin again. And this is called a preſenting by turn; and it holdeth always between coparceners of an advowſon, except they agree to preſent together, or that they agree by compoſition to preſent in ſome other manner; and if they do ſo, the agreement ſtands. But if after the death of the common anceſtor the church voideth, and the eldeſt ſiſter preſenteth together with another of the ſiſters, and the other ſiſters every one in their own name or together; in that caſe the ordinary is not bound to receive any of their clerks, but may ſuffer the church to lapſe: For he ſhall not be bound to receive the clerk of the eldeſt ſiſter, but where ſhe preſenteth in her own name. 1 *Inſt.* 186, 243. 2 *Inſt.* 364.

And in this caſe, where the patrons vary in preſentment, the church is properly ſaid to be litigious, ſo that the ordinary ſhall be bound at his peril to direct a writ to inquire of the right of patronage, for that writ lieth, where two preſent by ſeveral titles: But theſe patrons preſent all in one title, and therefore the ordinary may ſuffer it to paſs, if he will, into the lapſe. *Dr. & Student, b.* 2. *c.* 30.

2. *Statutes concerning advowſons.*

Stat. Weſtm. 2. 13 *Edw.* 1. *cap.* 5. *ſect.* 1. "Whereas when any, having no right, had preſented to any church, whoſe clerk was admitted, the true patron could not recover his advowſon, but by writ of right, whereby heirs within age, by fraud or negligence of their guardians, and heirs both of full age and within age, by negligence or fraud of tenants by the curteſy, tenants in dower, for term of life, or for years, or in fee tail, were many times diſherited, or driven to their writ of right: It is provided, that ſuch preſentments ſhall not be ſo prejudicial to the right heirs, but that at the next advoidance after that the heir ſhall become to full age, or that the advowſon ſhall revert unto the heir being of full age, he ſhall have the ſame action by a poſſeſſory writ of advowſon which the laſt anceſtor of that heir, being of full age, ſhould have had at the laſt avoidance happening in his time, or before the demiſe was made for term of life or in fee-tail. The ſame ſhall be obſerved in preſentments made unto churches, being of the inheritance of women under the power of their huſbands. Alſo biſhops, and other eccleſiaſtical men, ſhall be aided by this ſtatute, in caſe any having no right, preſent unto the churches belonging to their prelacies, dignities, or parſonages, what time ſuch prelacies, *&c.* be vacant."

Sect. 2. "Yet ſhall not ſuch perſons have the recovery aforeſaid, ſaving that the guardians, tenants by the curteſy, *&c.* did faintly defend the pleas; becauſe that the judgment given in the King's courts ſhall not be adnulled; but ſhall ſtand in force, until it be reverſed as erroneous, or the aſſiſe of *darrein preſentment*, or the inqueſt in the *quare impedit*, adnulled by attaint, or by certification, which ſhall be freely granted. And from henceforth in writs of *darrein preſentment*, or *quare impedit*, if the defendant alledge plenarty of his own preſentation, the plea ſhall not ſtay, ſo as the writ be purchaſed within ſix months, tho' he cannot recover his preſentation within ſix months. And ſometimes, where a fine is levied between many claiming one advowſon, that one of them ſhall preſent the firſt time, and at the next avoidance another: And when one hath had his preſentment, and at the next avoidance, he to whom the ſecond preſentation belongeth, is diſturbed by any that was party to the ſaid fine, or in his ſtead: It is provided, that he that is ſo diſturbed, ſhall have no need to ſue a *quare impedit*, but ſhall reſort to the fine. And if the ſaid agreement be found in the roll, then the ſheriff ſhall be commanded, that he give knowledge unto the diſturber, that he be ready at ſome ſhort day, containing the ſpace of fifteen days, or three weeks (as the place happeneth to be near or far) to ſhew if he can alledge any thing, wherefore the party diſturbed ought not to preſent: And if he come not, or can nothing alledge to bar the party of his preſentation, by reaſon of any deed made ſince the fine levied, he ſhall recover his preſentation with damages. And where, after the death of the anceſtor that preſented, the ſame advowſon is aſſigned in dower, or to tenant by the curteſy, which do preſent, and after the death of ſuch tenants, the true heir is diſturbed to preſent when the church is void: It is provided, that it ſhall be in the election of the party diſturbed, whether he will ſue by *quare impedit*, or *darrein preſentment*. The ſame ſhall be obſerved in advowſons demiſed for term of life, or years, or in fee-tail."

Sect. 3. "In *quare impedit*, and *darrein preſentment*, damages ſhall be awarded, to wit, if ſix months paſs by ſuch let, ſo that the biſhop do preſent, and the true patron loſeth his preſentation for that time, damages ſhall be awarded for two years value of the church. And if the ſix months be not paſſed, but that the preſentment be recovered, then damages ſhall be awarded to the half year's value of the church. And if the diſturber have not whereof he can recompence the damages (in caſe where the biſhop preſenteth by lapſe) he ſhall be puniſhed by two years impriſonment; and if the advowſon be recovered within the half year, the diſturber ſhall be puniſhed by impriſonment of half a year."

Sect. 4. "Writs ſhall be granted for chapels, prebends, vicarages, hoſpitals, and other houſes, which be of the advowſons of other men, that have not been uſed to be granted before. And when the parſon of any church is diſturbed to demand tithes in the next pariſh by writ of *indicavit*, the patron of the parſon ſo diſturbed ſhall have a writ to demand the advowſon of the tithes in demand, and

and when that is tried, then ſhall the plea paſs in the court chriſtian, ſo far as it was tried in the King's court."

Sect. 5. "When an advowſon deſcendeth unto parceners, tho' one preſent twice, yet he that was negligent ſhall not be barred, but another time ſhall have his turn to preſent."

Stat. Praerog. Reg. 17 *Edw.* 2. *cap.* 8. "Of churches vacant, the advowſons whereof belong to the King, and others preſent, if the King recover his preſentation, tho' it be after the ſix months from the time of the avoidance, no time ſhall prejudice him, ſo that he do preſent within ſix months."

Stat. 25. *Edw.* 3. *ſtat.* 3. *cap.* 3. "When the King ſhall make collation or preſentment to any benefice in any other's right, the title whereupon he groundeth himſelf ſhall be well examined. And at what time before judgment the title be found untrue or unjuſt, the collation or preſentment thereof made ſhall be repealed. And the patron or poſſeſſor, which ſhall prove the falſe title, ſhall have thereupon writs out of the Chancery, as many as ſhall be needful."

Stat. 25 *Edw.* 3. *ſtat.* 3. *c.* 7. "When ordinaries have given a benefice by lapſe, and the King taketh his ſuit againſt the patron, which percaſe will ſuffer that the King ſhall recover in deceit of the ordinary or the poſſeſſor; in ſuch caſe, and all other caſes like, where the King's right is not tried, the ordinary or poſſeſſor ſhall be received to counterplead the title taken for the King."

Stat. 13 *Rich.* 2. *ſtat.* 1. *cap.* 1. "If the King preſent to any benefice full of any incumbent, the preſentee of the King ſhall not be received by the ordinary till the King hath recovered his preſentment by proceſs of law; and if any preſentee of the King be otherwiſe received, and the incumbent put out, the ſaid incumbent ſhall begin his ſuit within a year after the induction of the King's preſentee."

Stat. 4 *Hen.* 4. *cap.* 22. "If any incumbent be put out of his benefice by the King's preſentee, without proceſs, the ſaid incumbent may ſue for his remedy by the ſtatute 13 *Rich.* 2. *cap.* 1. and begin his ſuit within the year, or after, at his will, notwithſtanding the term limited by the ſaid ſtatute."

Stat. 7. *Ann. cap.* 18. "No uſurpation upon any avoidance in any eccleſiaſtical promotion, ſhall diſplace the eſtate of the patron, or turn it to a right; but he may preſent upon any other avoidance, and maintain a *quare impedit*; and if coparceners, jointenants, or tenants in common, are ſeiſed of an eſtate of inheritance in any advowſon, and a partition is made to preſent by turns, each of them ſhall be ſeiſed of his ſeparate part, to preſent in his turn."

By *Stat.* 1 *El. c.* 4. *ſect.* 25. The King ſhall have the advowſon of vicarages belonging to rectories impropriate, renounced by Queen *Mary*.

By the ſtatutes 3 *Jac.* 1. *c.* 5. *ſect.* 18. & 19. 1 *W.* & *M. c.* 26. and 12 *Ann. c.* 14. the preſentation to benefices belonging to papiſts, is given to the two univerſities.

By the ſtatute 13 & 14 *Car.* 2. *c.* 25. conveyances of advowſons, impropriations, &c. to truſtees appointed by the long parliament, by pretended delinquents are made void.

By the ſtatute 10 *Ann. c.* 12. the rights of advowſons in *Scotland* are reſtored. See titles **Quare impedit, Preſentation, Simony.**

Form of the grant of a perpetual advowſon.

This indenture made the ——— *day of* ——— *in the* ——— *year of the reign of our ſovereign lord* ——— *of* Great Britain, France *and* Ireland *King, defender of the faith, and ſo forth, and in the year of our lord* ——— *between* A. B. *of* ——— *in the county of* ——— *eſquire, of the one part, and* C. D. *of* ——— *in the county of* ——— *gentleman, of the other part; witneſſeth, that the ſaid* A. B. *for and in conſideration of the ſum of* ——— *of lawful money of* Great Britain, *to him in hand paid at or before the ſealing and delivery hereof, the receipt whereof he the ſaid* A. B. *doth hereby acknowledge, and himſelf therewith fully ſatisfied and paid, and thereof and of every part thereof doth hereby acquit, releaſe and for ever diſcharge the ſaid* C. D. *his heirs, executors and adminiſtrators, and every of them by theſe preſents, and alſo for divers other good cauſes and valuable conſiderations him the ſaid* A. B. *thereunto moving, he the ſaid* A. B. *hath given and granted, and by theſe preſents doth fully, freely and abſolutely give and grant, unto the ſaid* C. D. *his heirs and aſſigns for ever, all that the advowſon of the rectory or parſonage of* E. *in the county of* ——— *and all the eſtate, right, title, intereſt, property, claim and demand whatſoever of him the ſaid* A. B. *of, in and to the ſaid advowſon, and to the donation, preſentation and free diſpoſition and right of patronage of the ſaid church: To have and to hold the ſaid advowſon and premiſſes aforeſaid hereby given and granted, or meant, mentioned or intended to be hereby given and granted, with the appurtenances, unto him the ſaid* C. D. *his heirs and aſſigns, to and for the ſole and only proper uſe and behoof of the ſaid* C. D. *his heirs and aſſigns for ever, and to and for no other uſe, intent or purpoſe whatſoever. And the ſaid* A. B. *hath granted, and by theſe preſents doth grant for himſelf and his heirs, that they will warrant to the ſaid* C. D. *and his heirs the aforeſaid advowſon of the ſaid church and premiſſes aforeſaid and every of them, with the appurtenances, unto him the ſaid* C. D. *his heirs and aſſigns, againſt him the ſaid* A. B. *his heirs and aſſigns, and againſt all perſons whatſoever claiming or to claim the ſame, or any right or title thereunto, by, from, or under him, them or any of them. And the ſaid* A. B. *doth hereby for himſelf, his heirs, executors and adminiſtrators, covenant, promiſe, grant and agree to and with the ſaid* C. D. *his heirs, executors, adminiſtrators and aſſigns, and to and with every of them, by theſe preſents, in manner and form following; that is to ſay, that he the ſaid* A. B. *is at the time of the ſealing and delivery hereof, and until the execution of theſe preſents, the true right, and undoubted patron of the ſaid church of* E. *and of the rectory aforeſaid; and hath good right, full power, and lawful and abſolute authority, to grant and convey the ſame to the ſaid* C. D. *his heirs and aſſigns in manner and form as aforeſaid; and that it ſhall and may be lawful to and for the ſaid* C. D. *his heirs and aſſigns, from time to time, and at all times for ever hereafter, whenever the ſaid church ſhall or may, by the death, reſignation, deprivation, ceſſion or change of all or any the rectors or incumbents thereof, or otherwiſe happen to become vacant, to preſent ſome other honeſt, learned and well qualified clerk, to ſucceed in the ſaid church as the rector or parſon thereof, and to do all other acts which to the office of patron of the ſaid rectory doth of right belong or appertain, as fully and amply as he the ſaid* A. B. *his heirs or aſſigns might or could do, if theſe preſents had not been made, without any let, ſuit, hindrance, moleſtation, interruption or diſturbance whatſoever of or from him the ſaid* A. B. *his heirs or aſſigns, or any other claiming under him, them or any of them: And that he the ſaid* A. B. *his heirs and aſſigns, and all other perſons whatſoever having or claiming any right or title to the ſaid advowſon under him or them, ſhall and will from time to time, and all times hereafter, upon the reaſonable requeſt, and at the proper coſt and charges of the ſaid* C. D. *his heirs and aſſigns, in the law, make, do, levy, execute and ſuffer all and every ſuch further and other lawful and reaſonable act and acts, grant and grants, conveyances and aſſurances in the law whatſoever, for the further, better, and more perfect and abſolute granting, conveying, and aſſuring of the ſaid advowſon of the ſaid church to the ſaid* C. D. *his heirs and aſſigns, be it by grant, confirmation, fine or recovery, or in any other manner, as by the ſaid* C. D. *his heirs and aſſigns, or his or their counſel learned in the law, ſhall be reaſonably deviſed, adviſed or required: All which further and other aſſurance and aſſurances, ſo to be made of the ſaid premiſſes, ſhall be and enure, and ſhall be adjudged, deemed and taken to be and enure, and are hereby declared to be and enure, to the ſole, only and proper uſe of the ſaid* C. D. *his heirs and aſſigns for ever, and to and for no other uſe, intent or purpoſe whatſoever. In witneſs whereof the parties aboveſaid to theſe preſents have interchangeably ſet their hands and ſeals, the day and year firſt above written.*

Grant

Grant of a *Next Avoidance.*

THIS *indenture made the —— day of —— in the year of our lord —— Between* A. B. *of —— in the county of —— eſquire, of the one part, and* C. D. *of —— in the county of —— gentleman, of the other part,* witneſſeth, *that the ſaid* A. B. *for divers good cauſes and conſiderations, him the ſaid* A. B. *thereunto moving, hath given and granted, and doth by theſe preſents give and grant unto the ſaid* C. D. *his executors, adminiſtrators and aſſigns, the firſt and next donation, nomination, preſentation, and free diſpoſition of the rectory or parſonage of the church of* E. *in the county of* F. *and that it ſhall and may be lawful to and for the ſaid* C. D. *his executors, adminiſtrators and aſſigns, whenſoever, howſoever, and by whatſoever means, by death, reſignation, privation, ceſſion, permutation, or by any other ways or means whatſoever, the aforeſaid church of* F. *ſhall firſt or next happen to be void, to preſent any one fitting, honeſt and learned man thereunto; and to do all other things which belong to the office and duty of a patron; and to do, for the fulfilling of ſuch firſt and next vacation or avoidance only, as fully and amply, as he the ſaid* A. B. *in that behalf might do, if theſe preſents had not been made. And the ſaid* A. B. *doth hereby, for himſelf, his heirs, executors, adminiſtrators and aſſigns, covenant, promiſe and grant, to and with the ſaid* C. D. *his executors, adminiſtrators and aſſigns, that he the ſaid* A. B. *hath full power and lawful authority to give, grant, and diſpoſe of the next preſentation, of and in the aforeſaid rectory and church of* E. *to the ſaid* C. D. *his executors, adminiſtrators and aſſigns as aforeſaid; and further that he the ſaid* A. B. *his heirs or aſſigns, ſhall and will from time to time and at all times hereafter, at the reaſonable requeſt, and coſts and charges of him the ſaid* C. D. *his executors, adminiſtrators and aſſigns, make, do and execute, or cauſe to be made, done and executed, ſuch further and other reaſonable act and acts, thing and things, conveyance and aſſurance in the law whatſoever, for the further, better, and more abſolute giving and granting of the ſaid next preſentation of, in, and to the aforeſaid rectory and church of* E. *unto him the ſaid* C. D. *his heirs, executors, adminiſtrators and aſſigns, as by him the ſaid* C. D. *his executors, adminiſtrators and aſſigns, or his or their counſel learned in the law, ſhall be reaſonably deviſed, or adviſed and required. In witneſs whereof the parties to theſe preſents have hereunto interchangeably ſet their hands and ſeals, the day and year firſt above written.*

Advowſon of the moiety of the church, *(Advocatio medietatis eccleſiæ)* Is where there are two ſeveral patrons and two ſeveral incumbents in one and the ſame church; the one of the one moiety, the other of the other moiety thereof. *Co. Lit.* 17.

Medietas advocationis, a moiety of the advowſon, is when two muſt join in the preſentation, and there is but one incumbent; as where there are two parceners: And though they agree to preſent by turns, yet each of them hath but the moiety of the church. *Co. Lit.* 17. But ſee ſtat. 7 *Ann. c.* 18. under the preceding title.

Advowſon of religious houſes, As they who built and endowed a pariſh church, were by that title made patrons of it; ſo thoſe who founded any houſe of religion had thereby the *advowſon* or patronage of it. Sometimes the patron had the ſole nomination of the prelate, abbot or prior; either by inveſtiture or delivery of a paſtoral ſtaff: As *William Mareſhal,* E. of *Pembroke,* to the abby of *Nately, Com. Buc. A. D.* 1200. or by direct preſentation to the dioceſan: As *Reginald,* E. of *Bolein,* in his charter to the priory of *Cold Norton, Com. Oxon.* 1201. *Non hoc autem prætermittendum eſt quod domus illa de noſtra donatione eſt, et nos ibi priorem apponere debemus, &c.* If a free election were left to the religious, yet a *conge d' eſſire,* or licence of electing, was firſt to be obtained of the patron; and the elect was confirmed by him. The patronage of a convent lapſed to the lord of the honour, if the family of the founder were extinct: So *Edmund,* Earl of *Cornwall,* became patron of the nunnery of *Goring,* Com. *Oxon.* by no other title than as that houſe was ſituate within the honour of *Wallingford. Cowel.* See *Kennet's Paroch. Antiq. p.* 147, 163.

Aduri Portus. *Ederington. Cowel.*

Ægale Eyig, (from the Saxon) *Ayleſbury.*

Aelmeſeoh, *Pecunia Eleemoſynaria, ſcilicet, denarii ſancti Petri.* See **Almeſeoh.** *Cowel.*

Aerie, or, *Ayry* of Goſhawks *(Aeria accipitrum)* Is the proper term for hawks, for that which of other birds we call a neſt. Thus it is uſed in ſtat. 9 *Hen.* 3. *cap.* 12. in the charter of the foreſt, and divers other places. *Aerie* comes from the French *Aire,* the proper term for a hawk's neſt. But *Spelman* derives it from the Saxon *eghe,* which the Germans and Normans melted into *eye,* an *egg*; whence *eyerie* was a common name for a bird's neſt, *i. e.* the place or repoſitory of eggs; hence to the *eye,* or brood of pheaſants. The liberty of keeping theſe *ayeries* of hawks, was granted as a privilege to ſome great perſons; as in the charter of *Henry* 3. to the church of *York — In nemore de Blideward habebat archiepiſcopus & canonici de Ebor. proprios foreſtarios ſuos, & mel, & areas accipitrum & noiſorum.—— Regiſtr. Joh. Romani Arepi Ebor. MS. f.* 91. the preſerving of *aeries* in the King's foreſts and woods, was one ſort of *ſerjeanty,* or tenure of land by ſervice. So ann. 20 Ed. 1. *Simon de Raghton & alii tenent terras in Raghton, Com. Cumbr. per ſerjantiam cuſtodiendi aerias auſturcorum domini regis. Cowel.*

Aeſica, *Netherby* upon *Eſk* in *Cumberland. Cowel.*

Aeſnecy. Vide **Eſnecy.**

Æſtimatio capitis, Sax. *were,* i. e. *pretium hominis.* King *Athelſtan* in a great aſſembly held at *Exeter,* declared that mulcts were to be paid *pro æſtimatione capitis,* for offences committed againſt ſeveral perſons, according to their degrees; the eſtimation of the King's head to be 30,000 *thuringæ,* of an archbiſhop or ſatrapas or prince 15,000, of a biſhop or ſenator 3000, of a prieſt or a *thane* 2000, *&c. LL. Hen.* 1. and *Creſſy's Church Hiſt. fol.* 384. *b. Cowel.*

Æſtivalia, A ſort of thin boots worn in ſummer, *æſtivalibus largis ſeu botis pro calceamentis utuntur. Addit. ad Mat. Pariſ. pag.* 162. *Calceamenta pedum ſunt caligæ & æſtivalia. Ibid. pag.* 168.

Ætate probanda, Is a writ that the King's tenant holding in chief, by chivalry, and being ward, by reaſon of nonage, obtaineth to the eſcheator of the county where he was born, or where the land lieth, to enquire whether he be of full age to receive his lands into his own hands. *Reg. Orig. fo.* 294, 295. *F. N. B. fol.* 253. & 257. He ſaith that this writ is ſometimes directed to the ſheriff, to impanel a jury againſt a day certain, before commiſſioners authorized under the great ſeal, to deal in ſuch caſe; now out of uſe. *Cowel.*

Affeerers, *(Afferatores,* alias *affidati)* May probably be derived from the French *affier,* that is, *affirmare confirmare*; and ſignifies in the Common law ſuch as are appointed in court leets, upon oath, to ſet the fines on ſuch as have committed faults arbitrarily puniſhable, and have no expreſs penalty appointed by the ſtatute. The form of their oath you may ſee in *Kitchin, fo.* 46. The reaſon of this denomination may ſeem to be, becauſe they that be appointed to that office, do affirm upon their oaths, what penalty they think in conſcience the offender hath deſerved. Another probable derivation may be from *feere,* an old Engliſh word ſignifying a companion, as *gefera* doth among the Saxons, by Mr. *Lambard's* teſtimony *(verb. contubernalis,)* in his explication of Saxon words; and ſo it may be gathered that *Kitchin* takes it, *cap. Amercements, fol.* 78. in theſe words, *Mes tiel amerciament ſoit affire per pares*; where *pares* is *affeerers*; and the reaſon hereof may be, for that in this buſineſs they are made companions or equals. We find this word uſed, 25 *Ed.* 3. *ſtat.* 7. viz. *The ſame juſtices before their riſing in every ſeſſions, ſhall cauſe to be* affeered *the amercements*; and alſo to the ſame effect, 26 *H.* 6. *c.* 6. and *Kitchin fol.* 78. joins theſe three words together as *ſynonymous,* viz. *affidati, amerciatores, affirors*; *affidare* in the Canon law is uſed for *fidem dare, ca. fina. de cognation ſpirit. in Decretal. & ca. ſuper eo de teſtibus. Bracton* hath *affidare' mulierem,* to betroth to a woman, *lib.* 2. *cap.* 12.

But

But in the *Cuſtumary of Normandy*, *cap.* 20. this word *affeerer* the latin interpreter expreſſes by *taxare*, that is, to ſet the value of a thing; and the ſame with *æſtimare*, *&c.* which ſeems indeed the beſt etymology. *Cowel.* By Magna Charta, 9 *Hen.* 3. *c.* 14. it is ordained, that perſons are to be amerced after the manner of the fault; and the amerciaments ſhall be aſſeſſed by the oath of honeſt and lawful men of the vicinage. 9 *Hen.* 3. *c.* 14.

The oath of *Affeerers*.

YOU *ſhall well and truly affeer and affirm the ſeveral amerciaments here made, and now to you read over; you ſhall ſpare no one out of love, fear or affection; nor raiſe or inhance any out of hatred or malice; but impartially ſhall do your duties herein.*

So help you God.

Affiance, Is the plighting of troth betwixt a man and a woman, upon agreement of marriage to be had between them. The Latin word *affidare*, from whence this is derived, is as much as *fidem ad alium dare*, and the word *affiance* is uſed by *Littleton*, *ſect.* 39. *Cowel.*

Affidare, To plight one's faith, or give fealty, *i. e.* fidelity, by making oath, *&c.* *Mulier accuſata de aſſiſa cereviſiæ fracta poteſt ſola manu facere legem ſi voluerit, id eſt*, affidare *in manu Ballivi et eſſe quieta, quod ſi noluerit* affidare, *amerciabitur per* Ballivum. *Conſuetudinar. Dom. de* Farendon, MS. fo. 22. *Cowel.*

Affidatio dominorum, An oath taken by the lords in parliament, *anno* 3 *Hen.* 6. *Rot. Parl. Cowel.*

Affidatus, Signifies a tenant by fealty; as in this charter: *Ego Rogerus, &c. dedi, &c.* Willelmo Wallenſi *pro ſuo ſervitio unam acram, &c. pro hac donatione et conceſſione devenit prædictus* Will. *affidatus meus, &c.* Affidati *non proprie vaſalli ſunt, ſed quaſi vaſalli, qui in alicujus fidem et clientelam ſunt recepti, &c.* Affidatio *accipitur pro mutua fidelitatis connexione tam in ſponſaliis quam inter dominum et vaſallum. Proles de* affidata *et non maritata, non eſt hæres.* MS. Penes. *Arth. Trevor. Arm. Affidatus* ſignifies alſo a retainer. *Cowel.*

Affidavit, Signifies in law an oath in writing; and to make *affidavit* of a thing, is to teſtify it upon oath. *Cowel.* An affidavit, generally ſpeaking, is an oath in writing, ſworn before ſome perſon who hath authority to adminiſter ſuch oath: And the true place of habitation, and true addition of every perſon who ſhall make an *affidavit*, is to be inſerted in his *affidavit*. 1 *Lill. Abr.* 44, 46.

As moſt motions and orders of court are grounded on affidavits, it ſeems impracticable, and indeed unneceſſary to inſtance in what caſes they are to be made uſe of, or when they may be ſaid to be defective, ſhort or evaſive; this being a matter of practice, and few things relating thereto thought worth reporting. Affidavits were formerly only to be taken by ſome judges of that court in which they were made uſe of. *Styl. Prac. Reg.* 78. But now,

By the ſtat. 29 *Car.* 2. *cap.* 5. "The chief juſtice, and other the juſtices of the court of King's Bench, or any two of them, whereof the chief juſtice to be one for that court; the chief juſtice of the Common Pleas, and the reſt of the juſtices there, or two of them, whereof the chief juſtice to be one of that court; and the lord treaſurer, chancellor, and barons of the Exchequer, or two of them, whereof the lord treaſurer, chancellor, or chief baron, to be one for that court; may by commiſſion or commiſſions under the ſeal of the ſaid reſpective courts, from time to time, as need ſhall require, impower perſons in the ſeveral counties to take affidavits concerning any thing depending or concerning any proceeding in the ſaid courts, as maſters of chancery in extraordinary do uſe to do; and any judge of aſſize, in his circuit, may take affidavits concerning any thing depending, *&c.* as aforeſaid; which affidavits ſhall be filed in the ſeveral offices of the ſaid courts, and be made uſe of as other affidavits taken in the ſaid courts; and all perſons forſwearing themſelves in ſuch affidavits, ſhall incur the ſame penalties as if they had been taken in open court. The perſon taking ſuch affidavits ſhall receive only 1*s.* for ſo doing; beſides the King's duty; which duty ſhall be paid to the proper officer in the ſaid courts before ſuch affidavit be there filed or made uſe of."

If affidavits before commiſſioners in the country, according to the above ſtatute, be expreſſed to be in a cauſe depending between *A.* and *B.* and there is no ſuch cauſe in court, they cannot be read, becauſe the commiſſioners have no authority to take them, and there can be no perjury; otherwiſe, if there be a cauſe in court, and this concerns ſome collateral matter. 2 *Salk.* 461.

The law and practice of the courts require, that on all motions for an information, attachment, complaint, againſt any officer for any offence not committed in the face of the court, for a new trial, relating to the ſerving and returning of writs or proceſs, *&c.* oath or affidavit be made of what is affirmed, that the judges may be ſatisfied, as well of the truth thereof, as of the reaſonableneſs of granting relief when made out. 1 *New Abr.* 65.

Alſo by acts of parliament affidavits are made neceſſary; as the ſtatute 4 *&* 5 *Ann.* enacts, that "no dilatory plea ſhall be received unleſs on oath, and probable cauſe ſhewn to the court." By ſtat. 12 *Geo.* 2 *cap.* 29. affidavit muſt be made of the cauſe of action, and that the ſum exceeds 10*l.* otherwiſe the defendant is not to be held to ſpecial bail.

If a perſon exhibits a bill for the diſcovery of a deed, and prays relief thereupon, he muſt annex an affidavit to his bill, that he has not ſuch deed in his poſſeſſion, or that it is not in his power to come at it; for otherwiſe he takes away the juriſdiction of the Common law courts, without ſhewing any probable cauſe why he ſhould ſue in equity. 1 *Chan. Ca.* 11, 231. 1 *Vern.* 59, 180, 247.

But if he ſeeks diſcovery of the deed only, or that it may be produced at a trial at law, he need not annex ſuch affidavit to his bill; for it is not to be preſumed that in either of theſe caſes he would do ſo abſurd a thing, as exhibit a bill, if he had the deed in his poſſeſſion. 1 *Vern.* 180, 247.

Alſo, if he ſets forth the whole circumſtances of his caſe, and prays general relief, the prayer of relief ſhall be applied to the diſcovery only. *Abr. Ca. in Eq.* 14. *Preced. in Eq.* 536.

In bills of interpleader, the party who prefers it muſt make affidavit that he does not collude with either of the other parties. 1 *New Ab.* 66.

He, who moves for a *ne exeat regno* againſt another, muſt make affidavit of the loſs he is like to ſuſtain by the party's going out of the kingdom, and that thereby the debt may be loſt, and that the party is actually going out of the kingdom. 1 *New. Ab.* 66.

A peereſs by her anſwer owned that ſhe had ſeveral deeds in her power, but did not ſet them forth; and on motion ſhe was ordered to produce them on oath, but that order was changed, and ſhe to produce them on honour only, being in ſupplement to her anſwer, which was on honour. *Preced. in Eq.* 93.

An affidavit muſt ſet forth the matter poſitively, and all material circumſtances attending it, that the court may judge whether the deponent's concluſion be juſt or not. 1 *New Abr.* 66.

And therefore, on motion to put off a trial for want of a material witneſs, it muſt appear that ſufficient endeavours were made uſe of to have him at the time appointed, and that he cannot poſſibly be preſent, though he may on further time given. *Fareſt.* 121. *Comb.* 421, 422.

Upon a rule to ſhew cauſe, the plaintiff offered ſeveral new affidavits, and this diverſity was taken, *viz.* where they contain new matter, and where they tend only to confirm what was alledged and ſworn when the rule was made; in the latter caſe they may be read, not in the former. 1 *Salk.* 461.

If there be affidavit againſt affidavit, the proper method is to have it tried by an iſſue at law. *Comb.* 399. But this is matter diſcretionary in the court. See 3 *Mod.* 108. where an action on the caſe was brought for ſcandalous

Grant of a *Next Avoidance.*

THIS *indenture made the —— day of —— in the year of our lord —— Between* A. B. *of —— in the county of —— eſquire, of the one part, and* C. D. *of —— in the county of —— gentleman, of the other part,* witneſſeth, *that the ſaid* A. B. *for divers good cauſes and conſiderations, him the ſaid* A. B. *thereunto moving, hath given and granted, and doth by theſe preſents give and grant unto the ſaid* C. D. *his executors, adminiſtrators and aſſigns, the firſt and next donation, nomination, preſentation, and free diſpoſition of the rectory or parſonage of the church of* E. *in the county of* F. *and that it ſhall and may be lawful to and for the ſaid* C. D. *his executors, adminiſtrators and aſſigns, whenſoever, howſoever, and by whatſoever means, by death, reſignation, privation, ceſſion, permutation, or by any other ways or means whatſoever, the aforeſaid church of* E. *ſhall firſt or next happen to be void, to preſent any one fitting, honeſt and learned man thereunto; and to do all other things which belong to the office and duty of a patron; and to do, for the fulfilling of ſuch firſt and next vacation or avoidance only, as fully and amply, as he the ſaid* A. B. *in that behalf might do, if theſe preſents had not been made. And the ſaid* A. B. *doth hereby, for himſelf, his heirs, executors, adminiſtrators and aſſigns, covenant, promiſe and grant, to and with the ſaid* C. D. *his executors, adminiſtrators and aſſigns, that he the ſaid* A. B. *hath full power and lawful authority to give, grant, and diſpoſe of the next preſentation, of and in the aforeſaid rectory and church of* E. *to the ſaid* C. D. *his executors, adminiſtrators and aſſigns as aforeſaid; and further that he the ſaid* A. B. *his heirs or aſſigns, ſhall and will from time to time and at all times hereafter, at the reaſonable requeſt, and coſts and charges of him the ſaid* C. D. *his executors, adminiſtrators and aſſigns, make, do and execute, or cauſe to be made, done and executed, ſuch further and other reaſonable act and acts, thing and things, conveyance and aſſurance in the law whatſoever, for the further, better, and more abſolute giving and granting of the ſaid next preſentation of, in, and to the aforeſaid rectory and church of* E. *unto him the ſaid* C. D. *his heirs, executors, adminiſtrators and aſſigns, as by him the ſaid* C. D. *his executors, adminiſtrators and aſſigns, or his or their counſel learned in the law, ſhall be reaſonably deviſed, or adviſed and required. In witneſs whereof the parties to theſe preſents have hereunto interchangeably ſet their hands and ſeals, the day and year firſt above written.*

Advowſon of the moiety of the church, *(Advocatio medietatis eccleſiæ)* Is where there are two ſeveral patrons and two ſeveral incumbents in one and the ſame church; the one of the one moiety, the other of the other moiety thereof. *Co. Lit.* 17.

Medietas advocationis, a moiety of the advowſon, is when two muſt join in the preſentation, and there is but one incumbent; as where there are two parceners: And though they agree to preſent by turns, yet each of them hath but the moiety of the church. *Co. Lit.* 17. But ſee ſtat. 7 *Ann. c.* 18. under the preceding title.

Advowſon of religious houſes, As they who built and endowed a pariſh church, were by that title made patrons of it; ſo thoſe who founded any houſe of religion had thereby the *advowſon* or patronage of it. Sometimes the patron had the ſole nomination of the prelate, abbot or prior; either by inveſtiture or delivery of a paſtoral ſtaff: As *William Mareſhal,* E. of *Pembroke,* to the abby of *Nately, Com. Buc. A. D.* 1200. or by direct preſentation to the dioceſan: As *Reginald,* E. of *Bolein,* in his charter to the priory of *Cold Norton, Com. Oxon.* 1201. *Non hoc autem prætermittendum eſt quod domus illa de noſtra donatione eſt, et nos ibi priorem apponere debemus, &c.* If a free election were left to the religious, yet a *conge d' eſſire,* or licence of electing, was firſt to be obtained of the patron; and the elect was confirmed by him. The patronage of a convent lapſed to the lord of the honour, if the family of the founder were extinct: So *Edmund,* Earl of *Cornwall,* became patron of the nunnery of *Goring,* Com. *Oxon.* by no other title than as that houſe was ſituate

within the honour of *Wallingford. Cowel.* See *Kennet's Paroch. Antiq. p.* 147, 163.

Aduri Portus. *Ederington. Cowel.*

Aegale Byrig, (from the Saxon) *Ayleſbury.*

Aelmeſeoh, *Pecunia Eleemoſynaria, ſcilicet, denarii ſancti Petri.* See **Almeſeoh.** *Cowel.*

Aerie, or, *Ayry* of Goſhawks *(Aeria accipitrum)* Is the proper term for hawks, for that which of other birds we call a neſt. Thus it is uſed in ſtat. 9 *Hen.* 3. *cap.* 12. in the charter of the foreſt, and divers other places. *Aerie* comes from the French *Aire,* the proper term for a hawk's neſt. But *Spelman* derives it from the Saxon *eghe,* which the Germans and Normans melted into *eye,* an *egg*; whence *eyerie* was a common name for a bird's neſt, *i. e.* the place or repoſitory of eggs; hence to the *eye,* or brood of pheaſants. The liberty of keeping theſe *ayeries* of hawks, was granted as a privilege to ſome great perſons; as in the charter of *Henry* 3. to the church of *York — In nemore de Blideward habebat archiepiſcopus & canonici de Ebor. proprios foreſtarios ſuos, & mel, & areas accipitrum & noiſorum. —— Regiſtr. Joh. Romani Arepi Ebor. MS. f.* 91. the preſerving of *aeries* in the King's foreſts and woods, was one ſort of *ſerjeanty,* or tenure of land by ſervice. So ann. 20 Ed. 1. *Simon de Raghton & alii tenent terras in Raghton, Com. Cumbr. per ſerjantiam cuſtodiendi aerias auſturcorum domini regis. Cowel.*

Aeſica, *Netherby* upon *Eſk* in *Cumberland. Cowel.*

Aelnecy. Vide **Elnecy.**

Aeſtimatio capitis, Sax. *were,* i. e. *pretium hominis.* King *Athelſtan* in a great aſſembly held at *Exeter,* declared that mulcts were to be paid *pro æſtimatione capitis,* for offences committed againſt ſeveral perſons, according to their degrees; the eſtimation of the King's head to be 30,000 *thuringæ,* of an archbiſhop or ſatrapas or prince 15,000, of a biſhop or ſenator 3000, of a prieſt or a *thane* 2000, *&c. LL. Hen.* 1. and *Creſſy's Church Hiſt. fol.* 384. *b. Cowel.*

Aeſtivalia, A ſort of thin boots worn in ſummer, *æſtivalibus largis ſeu botis pro calceamentis utuntur. Addit. ad Mat. Pariſ. pag.* 162. *Calceamenta pedum ſunt caligæ & æſtivalia. Ibid. pag.* 168.

Aetate probanda, Is a writ that the King's tenant holding in chief, by chivalry, and being ward, by reaſon of nonage, obtaineth to the eſcheator of the county where he was born, or where the land lieth, to enquire whether he be of full age to receive his lands into his own hands. *Reg. Orig. fo.* 294, 295. *F. N. B. fol.* 253. & 257. He ſaith that this writ is ſometimes directed to the ſheriff, to impanel a jury againſt a day certain, before commiſſioners authorized under the great ſeal, to deal in ſuch caſe; now out of uſe. *Cowel.*

Affeerers, *(Afferatores,* alias *affidati)* May probably be derived from the French *affier,* that is, *affirmare confirmare*; and ſignifies in the Common law ſuch as are appointed in court leets, upon oath, to ſet the fines on ſuch as have committed faults arbitrarily puniſhable, and have no expreſs penalty appointed by the ſtatute. The form of their oath you may ſee in *Kitchin, fo.* 46. The reaſon of this denomination may ſeem to be, becauſe they that be appointed to that office, do affirm upon their oaths, what penalty they think in conſcience the offender hath deſerved. Another probable derivation may be from *feere,* an old Engliſh word ſignifying a companion, as *gefera* doth among the Saxons, by Mr. *Lambard's* teſtimony *(verb. contubernalis,)* in his explication of Saxon words; and ſo it may be gathered that *Kitchin* takes it, *cap. Amercements, fol.* 78. in theſe words, *Mes tiel amerciament ſoit affire per pares*; where *pares* is *affeerers*; and the reaſon hereof may be, for that in this buſineſs they are made companions or equals. We find this word uſed, 25 *Ed.* 3. *ſtat.* 7. viz. *The ſame juſtices before their riſing in every ſeſſions, ſhall cauſe to be* affeered *the amercements*; and alſo to the ſame effect, 26 *H.* 6. *c.* 6. and *Kitchin fol.* 78. joins theſe three words together as *ſynonymous,* viz. *affidati, amerciatores, affirors*; *affidare* in the Canon law is uſed for *fidem dare, ca. fina. de cognation ſpirit. in Decretal. & ca. ſuper eo de teſtibus. Bracton* hath *affidare' mulierem,* to betroth to a woman, *lib.* 2. *cap.* 12.

But

But in the *Cuſtumary of Normandy*, *cap.* 20. this word *affeerer* the latin interpreter expreſſes by *taxare*, that is, to ſet the value of a thing; and the ſame with *æſtimare*, *&c.* which ſeems indeed the beſt etymology. *Cowel.* By Magna Charta, 9 *Hen.* 3. *c.* 14. it is ordained, that perſons are to be amerced after the manner of the fault; and the amerciaments ſhall be aſſeſſed by the oath of honeſt and lawful men of the vicinage. 9 *Hen.* 3. *c.* 14.

The oath of *Affeerers.*

YOU *ſhall well and truly affeer and affirm the ſeveral amerciaments here made, and now to you read over; you ſhall ſpare no one out of love, fear or affection; nor raiſe or inhance any out of hatred or malice; but impartially ſhall do your duties herein.*

So help you God.

Affiance, Is the plighting of troth betwixt a man and a woman, upon agreement of marriage to be had between them. The Latin word *affidare*, from whence this is derived, is as much as *fidem ad alium dare*, and the word *affiance* is uſed by *Littleton*, *ſect.* 39. *Cowel.*

Affidare, To plight one's faith, or give fealty, *i. e.* fidelity, by making oath, *&c.* *Mulier accuſata de aſſiſa cereviſiæ fracta poteſt ſola manu facere legem ſi voluerit, id eſt,* affidare *in manu Ballivi et eſſe quieta, quod ſi noluerit* affidare, *amerciabitur per* Ballivum. *Conſuetudinar. Dom. de* Farendon, MS. fo. 22. *Cowel.*

Affidatio dominorum, An oath taken by the lords in parliament, *anno* 3 *Hen.* 6. *Rot. Parl. Cowel.*

Affidatus, Signifies a tenant by fealty; as in this charter: *Ego Rogerus, &c. dedi, &c.* Willelmo Wallenſi *pro ſuo ſervitio unam acram, &c. pro hac donatione et conceſſione devenit prædictus* Will. *affidatus meus, &c.* Affidati *non proprie vaſalli ſunt, ſed quaſi vaſalli, qui in alicujus fidem et clientelam ſunt recepti, &c.* Affidatio *accipitur pro mutua fidelitatis connexione tam in ſponſaliis quam inter dominum et vaſallum. Proles de* affidata *et non maritata, non eſt hæres.* MS. Penes. *Arth. Trevor. Arm. Affidatus* ſignifies alſo a retainer. *Cowel.*

Affidavit, Signifies in law an oath in writing; and to make *affidavit* of a thing, is to teſtify it upon oath. *Cowel.* An affidavit, generally ſpeaking, is an oath in writing, ſworn before ſome perſon who hath authority to adminiſter ſuch oath: And the true place of habitation, and true addition of every perſon who ſhall make an *affidavit*, is to be inſerted in his *affidavit.* 1 *Lill. Abr.* 44, 46.

As moſt motions and orders of court are grounded on affidavits, it ſeems impracticable, and indeed unneceſſary to inſtance in what caſes they are to be made uſe of, or when they may be ſaid to be defective, ſhort or evaſive; this being a matter of practice, and few things relating thereto thought worth reporting. Affidavits were formerly only to be taken by ſome judges of that court in which they were made uſe of. *Styl. Prac. Reg.* 78. But now,

By the ſtat. 29 *Car.* 2. *cap.* 5. "The chief juſtice, and other the juſtices of the court of King's Bench, or any two of them, whereof the chief juſtice to be one for that court; the chief juſtice of the Common Pleas, and the reſt of the juſtices there, or two of them, whereof the chief juſtice to be one of that court; and the lord treaſurer, chancellor, and barons of the Exchequer, or two of them, whereof the lord treaſurer, chancellor, or chief baron, to be one for that court; may by commiſſion or commiſſions under the ſeal of the ſaid reſpective courts, from time to time, as need ſhall require, impower perſons in the ſeveral counties to take affidavits concerning any thing depending or concerning any proceeding in the ſaid courts, as maſters of chancery in extraordinary do uſe to do; and any judge of aſſize, in his circuit, may take affidavits concerning any thing depending, *&c.* as aforeſaid; which affidavits ſhall be filed in the ſeveral offices of the ſaid courts, and be made uſe of as other affidavits taken in the ſaid courts; and all perſons forſwearing themſelves in ſuch affidavits, ſhall incur the ſame penalties as if they had been taken in open court. The perſon taking ſuch affidavits ſhall receive only 1*s.* for ſo doing; beſides the King's duty; which duty ſhall be paid to the proper officer in the ſaid courts before ſuch affidavit be there filed or made uſe of."

If affidavits before commiſſioners in the country, according to the above ſtatute, be expreſſed to be in a cauſe depending between *A.* and *B.* and there is no ſuch cauſe in court, they cannot be read, becauſe the commiſſioners have no authority to take them, and there can be no perjury; otherwiſe, if there be a cauſe in court, and this concerns ſome collateral matter. 2 *Salk.* 461.

The law and practice of the courts require, that on all motions for an information, attachment, complaint, againſt any officer for any offence not committed in the face of the court, for a new trial, relating to the ſerving and returning of writs or proceſs, *&c.* oath or affidavit be made of what is affirmed, that the judges may be ſatisfied, as well of the truth thereof, as of the reaſonableneſs of granting relief when made out. 1 *New Abr.* 65.

Alſo by acts of parliament affidavits are made neceſſary; as the ſtatute 4 *&* 5 *Ann.* enacts, that "no dilatory plea ſhall be received unleſs on oath, and probable cauſe ſhewn to the court." By ſtat. 12 *Geo.* 2 *cap.* 29. affidavit muſt be made of the cauſe of action, and that the ſum exceeds 10*l.* otherwiſe the defendant is not to be held to ſpecial bail.

If a perſon exhibits a bill for the diſcovery of a deed, and prays relief thereupon, he muſt annex an affidavit to his bill, that he has not ſuch deed in his poſſeſſion, or that it is not in his power to come at it; for otherwiſe he takes away the juriſdiction of the Common law courts, without ſhewing any probable cauſe why he ſhould ſue in equity. 1 *Chan. Ca.* 11, 231. 1 *Vern.* 59, 180, 247.

But if he ſeeks diſcovery of the deed only, or that it may be produced at a trial at law, he need not annex ſuch affidavit to his bill; for it is not to be preſumed that in either of theſe caſes he would do ſo abſurd a thing, as exhibit a bill, if he had the deed in his poſſeſſion. 1 *Vern.* 180, 247.

Alſo, if he ſets forth the whole circumſtances of his caſe, and prays general relief, the prayer of relief ſhall be applied to the diſcovery only. *Abr. Ca. in Eq.* 14. *Preced. in Eq.* 536.

In bills of interpleader, the party who prefers it muſt make affidavit that he does not collude with either of the other parties. 1 *New Ab.* 66.

He, who moves for a *ne exeat regno* againſt another, muſt make affidavit of the loſs he is like to ſuſtain by the party's going out of the kingdom, and that thereby the debt may be loſt, and that the party is actually going out of the kingdom. 1 *New. Ab.* 66.

A peereſs by her anſwer owned that ſhe had ſeveral deeds in her power, but did not ſet them forth; and on motion ſhe was ordered to produce them on oath, but that order was changed, and ſhe to produce them on honour only, being in ſupplement to her anſwer, which was on honour. *Preced. in Eq.* 93.

An affidavit muſt ſet forth the matter poſitively, and all material circumſtances attending it, that the court may judge whether the deponent's concluſion be juſt or not. 1 *New Abr.* 66.

And therefore, on motion to put off a trial for want of a material witneſs, it muſt appear that ſufficient endeavours were made uſe of to have him at the time appointed, and that he cannot poſſibly be preſent, though he may on further time given. *Fareſt.* 121. *Comb.* 421, 422.

Upon a rule to ſhew cauſe, the plaintiff offered ſeveral new affidavits, and this diverſity was taken, *viz.* where they contain new matter, and where they tend only to confirm what was alledged and ſworn when the rule was made; in the latter caſe they may be read, not in the former. 1 *Salk.* 461.

If there be affidavit againſt affidavit, the proper method is to have it tried by an iſſue at law. *Comb.* 399. But this is matter diſcretionary in the court. See 3 *Mod.* 108. where an action on the caſe was brought for ſcandalous

matter inſerted in an affidavit. The party is to put nothing in an *affidavit*, but what is material to the point, and therefore not to ſet forth the merits of his cauſe on motion. *Styl. Practi. Reg.* 79. See *ſtat.* 17. *Geo.* 2. *c.* 7. for taking and ſwearing affidavits to be made uſe of in the county *Palatine* of *Lancaſter*.

An affidavit of ſerving a *ſubpœna* in *Chancery*.

In *Chan.* Between *A. B.* plaintiff, *C. D.* defendant.

E. F. *of* ——— *gentleman, maketh oath, that he this deponent did on*, &c. *laſt, ſerve the defendant* C. D. *with a writ of* ſubpœna *iſſuing out of and under the ſeal of this honourable court, by delivering the ſaid writ ſo under ſeal to the ſaid* C. D. *whereby the ſaid* C. D. *was directed to appear in the ſaid court on* ——— *then next, at the ſuit of the ſaid* A. B. *complainant.*

Sworn the —— day of —— before ——.

Affidiari, *Seu affidiari ad arma*, To be muſtered and enrolled for ſoldiers upon an oath of fidelity.—*Rex dilectis* —— *Cum aſſignaverimus vos ad ſuperprovidendum quod omnes homines de com. Berk.* —— *Equitatura et aliis armis competentibus muniantur, et ad arma affidientur, et arraientur juxta formam ſtatuti. Conſuetud. Dom. de Farendon. MS. fo.* 55. *Cowel.*

Affidiatus, The ſame with *affidatus*.

Affinage, (Fr. *affinage*) *purgatio metalli*, a refining of metal; hence to fine, and to refine. *Cowel.*

Affirm, *Affirmare*, Signifies to ratify or confirm a former law or judgment: So is the ſubſtantive *affirmance* uſed in ſtat. 8 *Hen.* 6. *c.* 12. And ſo is the verb itſelf by *Weſt*, *part* 2. *Symbol.* tit. *Fines*, *ſect.* 152. If the judgment be affirmed, *&c.* and alſo by *Crompton* in his *Juriſd. fo.* 166. See *ſtat.* 19 *Hen.* 7. *c.* 20. *Cowel.*

Affirmare, The ſame with *firmare*, that is, to ſhut. *Obtulit duo monilia, et juſſit ei feretro indelibiliter ad memoriam ſui clavis fortiter* affirmari. *Mat. Par. anno* 1251. *Cowel.*

Affirmation, An indulgence allowed by law to the people called *Quakers*, who in caſes where an oath is required from others, may make a ſolemn *affirmation* that what they ſay is true; and if they make a falſe *affirmation*, they are ſubject to the penalties of perjury. But this relates only to oaths to the government, and on publick occaſions; for Quakers may not give teſtimony in any criminal cauſe, *&c.* *Stat.* 7 & 8 *Will.* 3. *c.* 34. and 22 *Geo.* 2. *c.* 46. See **Quakers**.

Afforare, To ſet a value on a thing. *Et quod amerciament. prædictor. tenentium* afforentur *et taxentur per ſacramentum parium. Charta anno* 1316. *apud Thorn. Cowel. Du Freſne.*

Afforatus, Apprized or valued, as things vendible in a fair or market. —— *Retinuit Rex poteſtatem pardonandi ei omnimoda amerciamenta tam* afforata, *quam non* afforata, *tam de ſe quam de omnibus homnibus. Cartularium Glaſton. MS. fo.* 58. *Cowel. Du Freſne.*

Afforciamentum curiæ, The calling of a court upon a ſolemn and extraordinary occaſion. —— *Faciunt bis in anno rectum ad hundredum ipſius abbatis de Niwetone, ſcil. ad cur. Hokeday, et ad feſtum S. Martini; et ad* afforciamentum curiæ, *quotieſcunque latro adjudicandus fuerit, vel quum aliqua loquela ibi fuerit, quæ terminari non poterit ſine* afforciamento curiæ. *Cartular. Glaſton. MS. fo.* 43. *Cowel.*

Afforciament, A fortreſs or ſtrong hold, or other fortification. —— *Pro reparatione murorum et aliorum* afforciamentorum *dictæ civitatis. Pryn's Animad. on Coke, fo.* 184. *Faciendo unam ſectam per* afforciamentum *ad curiam Dunham-Maſſy. Charta Will. de Tabley tempore Ed.* 1. *Cowel.*

Afforciare, Signifies to add, increaſe or make ſtronger: *Cum juratores in veritate dicenda ſunt ſibi contrarii de concilio curiæ* afforcietur aſſiſa, [that is, let the witneſſes be increaſed] *ita quod apponantur alii juxta numerum majoris partis, quæ diſſenſerit. Bract. lib.* 4. *c.* 19. *Cowel.*

Afforeſt, *(Afforeſtare)* To turn ground into a foreſt. *Chart. de Foreſt. c.* 1. *et* 30. *An.* 9 *Hen.* 3. When foreſt ground is turned from foreſt to other uſes, it is called *diſafforeſted*. See **Foreſt**.

Affray, Is derived from the *French* word *effrayer*, to *affright*, and it formerly meant no more; as where perſons appeared with armour or weapons not uſually worn, to the terror of others; and ſo is the word uſed in the ſtatute of *Northampton*, 2 *Ed.* 3. *c.* 3. It is now commonly taken for a ſkirmiſh, or fighting between two or more: In our books it is many times confounded with an *aſſault*, as appears by *Lambard*, in his *Eirenarcha*, *lib.* 2. *c.* 3. *& lib.* 1. *c.* 17. Yet, as it is there ſaid, they differ in this, that where an *aſſault* is but a wrong to the party, an *affray* is a wrong to the commonwealth, and therefore both inquirable and puniſhable in a leet. It may be ſaid likewiſe, that an aſſault is but of one ſide, but an *affray* is the fighting of many together: Beſides this ſignification, it may be taken for a terror wrought in the ſubject by an unlawful ſight of violence, *&c.* as if a man ſhew himſelf furniſhed with armour or weapons not uſually worn, it may ſtrike a fear into others unarmed; and ſo it is uſed in ſtat. 2 *Ed.* 3. *c.* 3. 4 *Hen.* 6. *c.* 3. 8 *E.* 4. *c.* 5. *Cowel.*

Lord *Coke* defines this word thus: *An affray is a publick offence to the terror of the King's ſubjects, and ſo called, becauſe it affrighteth and maketh men afraid.* 3 *Inſt.* 158.

From this laſt definition it ſeemeth clearly to follow, that there may be an *aſſault*, which will not amount to an *affray*; as where it happens in a private place, out of the hearing or ſeeing of any, except the parties concerned, in which caſe it cannot be ſaid to be to the terror of the people. 1 *Hawk.* 134.

Alſo, it is ſaid, that no quarrelſome or threatening words whatſoever ſhall amount to an affray; and that no one can juſtify laying his hands on thoſe who ſhall barely quarrel with angry words, without coming to blows; yet it ſeemeth, that the conſtable may, at the requeſt of the party threatened, carry the perſon who threatens to beat him before a juſtice in order to find ſureties. 1 *Hawk.* 135.

Alſo, it is certain, that it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the meſſenger of ſuch a challenge; or even barely to endeavour to provoke another to ſend a challenge, or to fight; as by diſperſing letters to that purpoſe, full of reflections, and inſinuating a deſire to fight. 1 *Hawk.* 135.

But altho' no bare words, in the judgment of law, carry in them ſo much terror as to amount to an affray, yet it ſeems certain, that in ſome caſes there may be an affray, where there is no actual violence; as where a man arms himſelf with dangerous and unuſual weapons, in ſuch a manner as will naturally cauſe a terror to the people; which is ſaid to have been always an offence at the Common law, and is ſtrictly prohibited by ſtatute: For by 2 *Ed.* 3. *c.* 3. it is enacted, *that no man of what condition ſoever, except the King's ſervants, in his preſence, and his miniſters in executing their office, and ſuch as be in their company aſſiſting them, and alſo upon a cry made for arms to keep the peace, ſhall come before the King's juſtices, or other of the King's miniſters doing their office, with force and arms, nor bring any force in affray of peace, nor go nor ride armed, by night or day in fairs or markets, or in the preſence of the King's juſtices or other miniſters or elſewhere; upon pain to forfeit their armour to the King, and their bodies to priſon at the King's pleaſure. And the King's juſtices in their preſence, ſheriffs and other miniſters in their bailiwicks, lords of franchiſes and their bailiffs in the ſame, and borough-holders, conſtables and wardens of the peace within their wards, ſhall have power to execute this act. And the judges of aſſize may puniſh ſuch officers as have not done their duty herein.*

Upon a cry made for arms to keep the peace] It is holden upon theſe words of exception, that no perſon is within the intention of this ſtatute, who arms himſelf to ſuppreſs dangerous rioters, rebels, or enemies, and endeavours to ſuppreſs or reſiſt ſuch diſturbers of the peace and quiet of the realm. 1 *Hawk.* 136.

In

In affray of peace] *En effrayer de la pees*; Lord *Coke* has it *pais*, of the country, or the people; and ſo, he obſerves, that the writ grounded upon this ſtatute ſaith, *In quorundam* de populo *terrorem*; and therefore the printed book, *in affray of peace*, ought to be amended. 3 *Inſt.* 158.

And it is holden upon theſe words, that no wearing of arms is within the meaning of this ſtatute, unleſs it be accompanied with ſuch circumſtances as are apt to terrify the people; from whence it ſeems clearly to follow, that perſons of quality are in no danger of offending againſt this ſtatute, by wearing common weapons, or having their uſual number of attendants with them, for their ornament or defence, in ſuch places, and upon ſuch occaſions, in which it is the common faſhion to make uſe of them, without cauſing the leaſt ſuſpicion of an intention to commit any act of violence, or diſturbance of the peace. 1 *Hawk.* 136.

Nor to go nor ride armed] It is holden that a man cannot excuſe the wearing ſuch armour in publick, by alledging that ſuch a one threatned him, and that he wears it for the ſafety of his perſon from his aſſault; but it hath been reſolved, that no one ſhall incur the penalty of the ſaid ſtatute for aſſembling his neighbours and friends in his own houſe, againſt thoſe who threaten to do him any violence therein, becauſe a man's houſe is his caſtle. 1 *Hawk.* 136.

Their bodies to priſon] The ſtatute of 20 *R.* 2. *c.* 1. adds a fine likewiſe.

Wardens of the peace] It is holden that any juſtice of the peace, or other perſon who is impowered to execute this ſtatute, may proceed thereon *ex officio*; and if he finds any perſon in arms, contrary to the form of the ſtatute, he may ſeize the arms, and commit the offender to priſon; and that he ought alſo to make a record of the whole proceeding, and certify the ſame into the exchequer. 1 *Hawk.* 135.

It ſeems agreed, that any one who ſees others fighting may lawfully part them, and alſo ſtay them till the heat be over, and then deliver them to the conſtable to be carried before a juſtice to find ſureties for the peace. 1 *Hawk.* 136.

And the law doth encourage him hereunto; for if he receives any harm by the affrayers, he ſhall have his remedy by law againſt them; and if the affrayers receive hurt, by the endeavouring only to part them, the ſtanders by may juſtify the ſame, and the affrayers have no remedy by law. 3 *Inſt.* 158.

But if either of the parties be ſlain, or wounded, or ſo ſtricken that he falleth down for dead; in that caſe the ſtanders by ought to apprehend the party ſo ſlaying, wounding, or ſtriking, or to endeavour the ſame, by hue and cry; or elſe for his eſcape they ſhall be fined and impriſoned. 3 *Inſt.* 158.

It ſeems agreed, that a conſtable is not only impowered, as all private perſons are, to part an affray which happens in his preſence; but is alſo bound at his peril to uſe his beſt endeavours to this purpoſe; and not only to do his utmoſt himſelf, but alſo to demand the aſſiſtance of others, which if they refuſe to give him, they are puniſhable with fine and impriſonment. 1 *Hawk.* 137.

And it is ſaid, that if a conſtable ſee perſons either actually engaged in an affray, as by ſtriking or offering to ſtrike, or drawing their weapons, or the like; or upon the very point of entering upon an affray, as where one ſhall threaten to kill, wound, or beat another, he may either carry the offender before a juſtice to find ſureties for the peace, or he may impriſon him of his own authority for a reaſonable time, till the heat ſhall be over, and alſo afterwards detain him till he find ſurety by obligation: But it ſeems, that he has no power to impriſon ſuch an offender in any other manner, or for any other purpoſe; for he cannot juſtify the committing an affrayer to goal, till he ſhall be puniſhed for his offence: And it is ſaid, that he ought not to lay hands on thoſe, who barely contend with hot words, without any threats of perſonal hurt; and that all which he can do in ſuch caſe, is to command them under pain of impriſonment to avoid fighting. 1 *Hawk.* 137.

But he is ſo far intruſted with a power over all actual affrays, that though he himſelf is a ſufferer by them, and therefore liable to be objected againſt, as likely to be partial in his own cauſe, yet he may ſuppreſs them; and therefore, if an aſſault be made upon him, he may not only defend himſelf, but alſo impriſon the offender, in the ſame manner as if he were no way a party. 1 *Hawk.* 137.

If an affray be in an houſe, the conſtable may break open the doors to preſerve the peace; and if affrayers fly to an houſe, and he follow with freſh ſuit, he may break open the doors to take them. 1 *Hawk.* 137.

But it is ſaid, that a conſtable hath no power to arreſt a man for an affray done out of his own view, without a warrant from a juſtice, unleſs a felony were done, or likely to be done; for it is the proper buſineſs of a conſtable to preſerve the peace, and not to puniſh the breach of it. 1 *Hawk.* 137.

In a very dangerous *affray*, a conſtable can juſtify commitment, till the offenders find ſureties for the peace. *Lamb.* 139. He may likewiſe put the *affrayers* in the ſtocks till he can procure proper aſſiſtance to convey them to goal. *Dalt.* 38.

In caſes of *affrays*, the conſtable muſt apprehend the perſons offending before the affray is over, or elſe he may not do it without a warrant from a juſtice, except it be in an extraordinary caſe; as where a perſon is wounded dangerouſly. *Dalt.* 36.

In caſe of a ſudden *affray*, through paſſion or exceſs of drinking, the conſtable may put the perſons in priſon, if there be one in the vill, until the heat of their paſſion and intemperance is over, though he deliver them afterwards; or till he can bring them before a juſtice of peace, and that to avoid the preſent danger. 2 *Hale's Hiſt. P. C.* 95, 90.

If a conſtable is hurt in an *affray*, he may have his remedy by action of treſpaſs, and have good damages; but the *affrayers*, if they are hurt, ſhall have no remedy. *Lamb.* 141. And where any other perſons receive harm from the *affrayers* they may have remedy by action againſt them. *Dalt.* 35.

There is no doubt but that a juſtice of peace may and muſt do all ſuch things to that purpoſe, which a private man or conſtable are either enabled or required by the law to do: But it is ſaid, that he cannot without a warrant authorize the arreſt of any perſon for an affray out of his own view; yet it ſeems clear, that in ſuch caſe he may make his warrant to bring the offender before him, in order to compel him to find ſureties for the peace. 1 *Hawk.* 137.

All affrays in general are puniſhable by fine and impriſonment. 1 *Hawk.* 138.

An *indictment* for an *affray*.

The jurors for our ſovereign lord the King upon their oath preſent, that A. B. *of* ——— *in the county of* ——— *and* C. D. *of* ——— *in the ſaid county, with force and arms, that is to ſay, with ſwords, ſtaves, and other warlike inſtruments, on the* ——— *day of* ——— *in the* ——— *year of the reign of our ſovereign lord* George *the Third, by the grace of God, of* Great Britain, France, *and* Ireland, *King, defender of the faith, and ſo forth, at* ——— *in the county aforeſaid, being arrayed and unlawfully aſſembled together in a warlike manner, did make an affray, to the terror and diſturbance of divers of the ſubjects of our ſovereign lord the King then and there being, and to the evil example of all other the liege people of our ſaid ſovereign lord the King, and againſt the peace of our ſaid lord the King, his crown and dignity.*

Affreightment, (*Affretamentum*) The freight of a ſhip, from the French *fret*, which ſignifies the ſame. *Pat.* 11 *Hen.* 4. *Cowel.*

Affri, vel *affra*, Bullocks, or horſes or beaſts of the plough.——*Vicecomes liberet ei omnia catalla debitoris, exceptis bobus & affris carucæ. Weſtm.* 2. c. 18. *Et communiam*

niam paſturæ ad decem boves & duos affros *in prædictis paſturis. Mon. Angl. par.* 2. *f.* 291. And in the county of *Northumberland*, the people to this day call a dull or ſlow horſe, a falſe *aver* or *afer. Spelm. Gloſs. Cowel.*

African company, The royal *African company* of merchants eſtabliſhed by King *Charles* II. for trading to *Africa*; and all perſons may trade thither as well as the company, paying 10 *per cent.* on exportation of goods, for maintaining the forts, *&c.* and the like duty upon importation; on payment of which duties they ſhall be protected in their trade. *Stat.* 9 & 10 *W.* 3. Vide **Merchant.** See *ſtat.* 23 *Geo.* 2. *c.* 31. for extending and improving the trade to *Africa*, and *ſtat.* 24 *Geo.* 2. *c.* 49. and alſo *ſtat.* 25 *Geo.* 2. *c.* 40. for the application of a ſum of money therein mentioned, granted to his majeſty for a compenſation to the *African company*, for their charter, land, forts, caſtles, ſlaves, military ſtores, and other effects; and to veſt the lands, forts, caſtles, ſlaves, military ſtores, and other effects, in the company of merchants trading to *Africa*, *&c.*

Agalma, The impreſſion or image of any thing on a ſeal, *Ego* Dunſtanus *hanc libertatem crucis* agalmate *conſignavi.*——Chart. Edg. Reg. pro Weſtmonaſt. Eccleſ. ann. 698. *Cowel.*

Age, *(Ætas*, Fr. *aage)* In common acceptation ſignifies a man's life, from his birth to any certain time, or the day of his death: It alſo hath relation to that part of time wherein men live; but in the law it is particularly uſed for thoſe ſpecial times which enable perſons of both ſexes to do certain acts, which before through want of years and judgment they are prohibited to do. As for example; a man at twelve years of *age* ought to take the oath of allegiance to the king; At fourteen, which is his *age* of diſcretion, he may conſent to marriage, and chooſe his guardian; and at twenty-one he may alien his lands, goods and chattels: A woman at nine years of age is dowable; at twelve ſhe may conſent to marriage; at fourteen ſhe is at years of diſcretion, and may chooſe a guardian; and at twenty-one ſhe may alienate her lands, *&c.* 1 *Inſt.* 78. There are ſeveral other *ages* mentioned in our ancient books, relating to aid of the lord, wardſhip, *&c.* now of no uſe. *Co. Lit.* 78. The *age* of twenty-one is the full *age* of man or woman; which enables them to contract and manage for themſelves, in reſpect to their eſtates; until which time they cannot act with ſecurity to thoſe who deal with them; for their acts are in moſt caſes either void or voidable. *Perk.* But a perſon under twenty-one may contract for neceſſaries ſuitable to his quality, and it ſhall bind him; alſo one under *age* may be executor of a will 1 *Inſt.* 171. And at fourteen years of *age* a perſon may diſpoſe of goods and perſonal eſtate by will; tho' not lands till the *age* of twenty-one. It hath been adjudged, that if one be born on the firſt of *February* at 11 o'clock at night, and the laſt of *January* in the one and twentieth year at one o'clock in the morning, he makes his will of lands, *&c.* and dies; yet ſuch will is good, for he then was of *age*. *Mod. Caſ.* 260. A perſon under the *age* of twenty-one may make a purchaſe; but at his full *age* he may agree or diſagree to it. 1 *Inſt.* 2. So where perſons marry, the man under *age* of fourteen, or the woman within twelve, they may diſagree to the marriage at thoſe *ages:* And the law is the ſame in other caſes. Perſons under the *age* of fourteen, are not generally puniſhable for crimes: But if they do any treſpaſs, they muſt anſwer for the damage. 1 *Inſt.* 247. 2 *Roll. Abr.* 547. Fourteen is the *age* by law to be a witneſs; and in ſome caſes a perſon of nine years of *age* hath been allow'd to give evidence. 2 *Hawk.* 434. None may be a member of parliament under the *age* of twenty-one years; and no man can be ordained prieſt till twenty-four; nor be a biſhop till thirty years of *age*. By ſtatute *Weſtm.* 1. 13 *Ed.* 1. *c.* 47. *age* ſhall not delay the demandant in a writ of entry upon diſſeiſin in the *Per.* By ſtat. *Glouc.* 6 *Ed.* 1. *c.* 2. Nonage of the plaintiff ſhall not delay the taking an inqueſt in *mort d'anceſtor*. *Age* ſhall not be allowed the vouchee in *Cui in vita*, by ſtat. *Weſtm.* 2. 13 *Ed.* 1. *c.* 40. The full *age* of a man or woman to alien, demiſe, let, contract, *&c.* by the Civil law, is 25 years; for then the Romans allowed men to have *plenam maturitatem*, and the Lombards at 18 years. *Co. Lit.* 78. *b.*

By the law of *Scotland*, a woman cannot *contrahere ſponſalia* before her age of ſeven years. 1 *Rol.* 342. But by the Common law of *England*, perſons may marry at any *age:* And upon ſuch marriage the wife ſhall be endowed, if ſhe attain the age of nine years, of whatſoever age her huſband be; but not before the age of nine years. *Co. Lit.* 33. *a.* And if the huſband alien his land, and afterwards his wife attain the age of nine years, ſhe ſhall be endowed of the land ſold before: And if there be a writ to the biſhop to certify, whether they were ever coupled in lawful matrimony, he ought to certify that they were, of what age ſoever the huſband be. *Co. Lit.* 33. *a. Reſolved, Dyer* 369. *a.*

By the law of *Scotland*, and the Civil as well as the Common law, the age of conſent to marriage of the man is the age of 14 years. 1. *Rol.* 342. The age of the woman by the Civil and Common law, is the age of 12 years. 1 *Rol.* 342. By the law of *Scotland* it is at the age of 14 years. 1 *Rol.* 342.

If at the time of the marriage the huſband be above 14, and the wife under 12, when ſhe attains the age of 12 years, the huſband may diſagree as well as the wife, and ſo *vice verſa*. *Co. Lit.* 79.

A diſagreement to the marriage, before the age of conſent, is of no force; for, if the huſband diſagree before 14, and marry another, the iſſue of the ſecond marriage is a baſtard. 1 *Rol.* 341. *Contra Dyer* 13. *a. in Marg.* If after the age of conſent, the huſband or wife diſagree by parol, yet cohabit as huſband and wife, this amounts to an agreement. 1 *Rol.* 341.

For other matters, ſee title **Infant**, and 2 *Vin.* tit. *Age.*

Age prier, *(Ætatem precari*, or *ætatis precatio)* Is when an action being brought againſt a perſon under age for lands which he hath by deſcent, he by petition or motion ſhews the matter to the court, and prays that the action may ſtay till his full age, which the court generally agrees to. *Termes de la ley.*

But as a purchaſer, a minor ſhall not have *age prier*, nor in a writ of aſſiſe, becauſe it is of his own wrong, and this writ ſhall not be delayed; nor in a writ of dower; nor in a writ of partition, ſtat. 3 *Ed.* 1. 38 *Ed.* 3. *Hob.* 342. In a writ of debt againſt an heir, he ſhall have his age, for at full age he may plead *riens per deſcent*, or a releaſe to his anceſtor, and be diſcharged. *Danv. Abr.* 259. See **Parol Demurrer.**

Agelocum, *Littleborough* upon *Trent.*

Agenfrida, The lord or owner of any thing——*Si porcus non fuerit ibi ſæpius quam ſemel det* agenfrida *unum ſolidum.* Leg. Inæ, c. 50. *apud* Brompt. c. 45. *Cowel.*

Agenhine, A gueſt who ſtays at an inn three nights; after which he is accounted one of the family. See **Hoghenhine.**

Agent and patient, Is the perſon who is the doer of a thing, and the party to whom done: As where a woman endows herſelf of the beſt part of her huſband's poſſeſſions, this being the ſole act of herſelf to herſelf, makes her *agent and patient*. Alſo if a man be indebted to another, and afterwards he makes the creditor his executor, and dies, the executor may retain ſo much of the goods of the deceaſed as will ſatisfy his debt; and by this retainer is *agent and patient*, that is, the party to whom the debt is due, and the perſon that pays the ſame. But a man ſhall not be judge in his own cauſe, *quia iniquum eſt aliquem ſuæ rei eſſe judicem.* 8 *Rep.* 138. *Cowel.*

Agild, Signifies to be free from penalties, not ſubject to the cuſtomary fine or impoſition. Sax. *agild, fine mulcta. Leges Aluredi, cap.* 6. *Si utlaga efficiat ut occidatur, pro eo quod contra dei rectum & regis imperium ſtet —jaceat agild.* In leg. Hen. 1. c. 88. *Agilde* was a perſon ſo vile, that whoever kill'd him was to pay no mulct for his death. *Cowel.*

Agiler, From the Sax. *a*, privative, and *gilt, culpa*, An obſerver or informer.

Agillarius, A hey-ward, herd-ward, or keeper of cattle in a field. Towns and villages had their heywards, to

to ſupervife and guard the greater cattle or common herd of kine and oxen, and keep them within due bounds; and if theſe were ſervile tenants, they were privileged from all cuſtomary ſervices to the lord, becauſe they were preſumed to be always attending their duty, as a ſhepherd on his flock; and lords of manors had likewiſe their heywards to take care of their tillage, harveſt-work, &c. and ſee that there were no incroachments made on their lordſhips; but this is now the buſineſs of bailiffs. *Cowel.* See *Kennet's Paroch. Antiq.* 534, 576.

Agiſt, (From the Fr. *giſte*, a bed or reſting-place) Signifies to take in and feed the cattle of ſtrangers in the King's foreſt, and to collect the money due for the ſame. *Chart. de foreſta*, 9 *H.* 3. *c.* 9. the officers appointed for this purpoſe are called *agiſters*, or *giſt-takers*, and are made by the King's letters patent: There are four of them in every foreſt wherein the King hath any pawnage. *Manw. for laws* 80. they are alſo called *agiſtators*, to take account of the cattle *agiſted*. *Cowel.*

Agiſtment, *(Agiſtamentum)* Is where other mens cattle are taken into any ground, at a certain rate *per* week: It is ſo called, becauſe the cattle are ſuffered *geſir*, that is, to be levant and couchant there; and many great farms are employed to this purpoſe. 2 *Inſt.* 643. Our graziers call cattle which they thus take in to keep *giſements*; and to *giſe* or *juice* the ground, is when the occupier thereof feeds it not with his own ſtock, but takes in the cattle of others to *agiſt* or paſture it. *Agiſtment* is likewiſe the profit of ſuch feeding in a ground or field; and extends to the depaſturing of barren cattle of the owner, for which tithes ſhall be paid to the parſon. There is *agiſtment of ſea-banks*, where lands are charged with a tribute to keep out the ſea. *Terræ agiſtatæ* are lands whoſe owners are bound to keep up the ſea-banks. *Cowel. Spelman.*

Agitatio animalium in foreſta, The drift of beaſts in the foreſt. *Leg. foreſt.*

Agius, (Gr.) *i. e.* Holy. —— *Ego triumphalem trophæum agiæ crucis impreſſi.* Mon. Angl. p. 15, 17.

Agnus dei, A piece of white wax in a flat oval form, like a ſmall cake, ſtamped with the figure of a lamb, and conſecrated by the pope. By ſtatute 13 *Eliz. c.* 2. *Agnus dei*, croſſes, &c. are not permitted to be brought into this kingdom, on pain of a *præmunire.*

Agraria lex, A law made by the Romans for the diſtribution of lands among the common people. *Cowel.*

Agreement. An *agreement* is the conſent of two or more perſons concurring, the one in parting with, and the other in receiving ſome property, right or benefit; the notion of contracting or entering into agreements aroſe from the increaſe of commerce, and the neceſſity men were under of bartering their ſuperfluities for things of real uſe, and which lay out of the way of their acquiring; that men ſhould execute their agreements and perform their promiſes, though made without writing or conſideration, is enjoined by the law of nature; but in civil ſocieties, and in ours in particular, circumſtances are required which protect the weak, and thoſe who are under the power of others; alſo proviſion is made againſt fraud and circumvention; and that no man ſhould be injured in his property by the turn of any unwary expreſſion. 1 *New Abr.* 67.

An agreement is defined *aggregatio mentium in re aliqua facta vel facienda. Plowd.* 17. *a.* Though a contract executed with all the ſolemnity required by law, may properly be called an agreement; yet, in the more common acceptation of the word, articles, minutes, an eſcrow, &c. containing ſomething preparatory to a more ſolemn and formal execution, are called *agreements.* 1 *New Abr.* 67.

Under this head is conſidered,

1. *Who are capable of contracting and binding themſelves or others by their agreements.*

2. *Agreements which are good in law, and will be decreed to be ſpecifically performed in a court of equity; and the manner in which they are to be performed.*

3. *Parol agreements, and ſuch as may be ſaid to be within the ſtatute of* frauds *and* perjuries.

1. *Who are capable of contracting and binding themſelves or others by their agreements.*

A perſon *non compos* is not capable of entering into any agreement, for an agreement is an act of the underſtanding which they are incapable of; and therefore they are to be under the care of their curators or guardians, by a commiſſion from the publick. 1 *New Abr.* 67. See title Idiots and Lunaticks.

Alſo an infant, for the ſame reaſon, is generally incapable of contracting.

A wife during the intermarriage is incapable of entering into any agreement *in pais*, being under power of her huſband. See title Baron and feme.

The anceſtor ſeiſed in fee may by his agreement bind his heir; therefore if *A.* agrees to ſell lands, and receives part of the purchaſe-money, but dies before a conveyance is executed, and a bill is brought againſt the heir, he will be decreed to convey, and the money ſhall go to the executor, eſpecially if there are more debts due than the teſtator's perſonal eſtate is ſufficient to pay. 2 *Vern.* 215. *Abr. Eq.* 265.

So if a father conveys to a younger ſon, by a defective conveyance, and dies, the heir at law in two caſes ſhall be compelled to make it good. 1. Where there is a covenant for further aſſurance, binding the heir, becauſe the heir is bound by the covenant. 2. Where there is a proviſion made by the father in his life-time for the heir, or he hath ſuch a proviſion by deſcent from the father. 1 *New Abr.* 68.

If tenant in tail agrees to convey, or bargains and ſells the lands for valuable conſideration, without fine or recovery, and dies before the fine or recovery be levied or ſuffered, the iſſue is not bound either in law or equity; for equity cannot ſet aſide the ſtatute *de donis*; which ſays, That *voluntas donatoris obſervetur*; nor can the court ſet up a new manner of conveyancing, and thereby ſuperſede fines and recoveries; for thereby the King would loſe the perquiſites by fines, or the writs of entry and fines for alienation. *Hob.* 203. 1 *Chan. Ca.* 171. 1 *Lev.* 239. 2 *Vent.* 350.

A. ſeiſed of lands in tail, agrees with *B.* that he and his heirs ſhall enjoy the intailed lands, if *A.* and his heirs may enjoy his fee-ſimple lands; this agreement is executed accordingly, and *B.* had a decree againſt *A.* to levy a fine and ſettle it, purſuant to the agreement; but *A.* died without doing it; and though it was decreed that *A.* himſelf was bound by this agreement to convey, yet ſince he died before he executed the fine, his iſſue was not bound by the agreement; but if the iſſue in tail had approved of his anceſtor's agreement, as he did in this caſe by entering on the lands of *B.* then it becomes his own agreement, and conſequently in equity he ſhall be obliged to perform it. 1 *Chan. Ca.* 171.

If there be tenant in tail in equity as of a truſt, or under an equitable agreement, and he for valuable conſideration bargains and ſells the land without fine or recovery, this ſhall bind his iſſue, becauſe the ſtatute *de donis* doth not extend to it, being an intail in equity and a creature of the court. 1 *Chan. Ca.* 234. 2 *Chan. Ca.* 64. 1 *Vern.* 13, 440. 2 *Vern.* 133, 583, 702.

As tenant in tail is reſtrained from alienating the eſtate without fine or recovery, ſo he is from charging of it, or diſpoſing of the laſting improvements after his death; therefore if tenant in tail ſells the trees growing on the inheritance, the vendee muſt ſever them during the life of tenant in tail, for if he dies before they are cut down, his iſſue ſhall have them as part of the inheritance, and the vendee, though obliged to pay the whole ſum contracted for, yet ſhall not be allowed to cut down one tree after the death of the tenant in tail; for as the tenant in tail has power over the inheritance but during his own life, ſo he cannot delegate that power to another but for the ſame time, and conſequently whatever remains part of the inheritance at the death of the tenant in tail, at which time his power over it ceaſes, muſt neceſſarily go to the heir to whom the inheritance belongs. *Bro. Contract* 26. 11 *Co.* 50. *Pop.* 194.

2. *Agreements which are good in law, and will be decreed to be ſpecifically performed in a court of equity; and of the manner in which they are to be performed.*

In many caſes the party injured by breach of an agreement, may have a remedy either by action at Common law, or have recourſe to a court of equity; but here a general rule muſt be obſerved, that wherever the matter of the bill is merely in damages, there the remedy is at law, becauſe the damages cannot be aſcertained by the conſcience of the chancellor, and therefore muſt be ſettled by a jury. See *Abr. Eq.* 16.

But if there be matter of fraud mixt with the damages; as if *A.* ſues *B.* on a covenant at law for damages, and *B.* files a bill for an injunction upon this equitable ſuggeſtion, that the covenant was obtained by fraud, if *A.* files his croſs bill for relief upon that covenant, the court will retain it, becauſe the validity of the covenant is diſputed in that court, and on a head properly cognizable there; and therefore, if the validity of the deed be eſtabliſhed, the court will direct an iſſue for the *quantum* of the damages. *Abr. Eq.* 17. 1 *Chan. Rep.* 158.

So where the agreement is to do ſomething in *ſpecie*, as to convey lands, execute a deed, *&c.* there it will be proper to apply to a court of equity for a ſpecifick execution to which the party is entitled, if the agreement be good and ſufficiently proved, when otherwiſe he could only recover damages at law. 1 *Chan. Ca.* 42.

The plaintiff aſſigned ſome ſhares of the exciſe to the defendant, who thereupon covenanted to ſave him harmleſs, and to ſtand in his place touching all payments to the King; the plaintiff being ſued by the King, brought his bill to have the agreement performed in *ſpecie*; and although it was inſiſted that the plaintiff might recover damages at law, and that this was not a covenant for any thing certain, and by this means a maſter in Chancery was to tax damages inſtead of a jury; yet it was decreed that the defendant ſhould perform his covenants; and it was directed to a maſter, that, as often as any breach ſhould happen, he ſhould report it ſpecially, that the court, if occaſion ſhould be, might direct a trial in a *quantum damnificat'*. 1 *Vern.* 189. 2 *Chan. Ca.* 146.

So if a jointreſs brings her bill to have an account of the real and perſonal eſtate of her late huſband, and to have ſatisfaction thereout for a defect of value of her jointure lands, which he had covenanted to be and to continue of ſuch value; and the defendant inſiſts, that this is a covenant which ſounds only in damages, and properly determinable at law; though it be admitted that a court of Equity cannot regularly aſſeſs damages; yet in this caſe, a maſter in Chancery may properly enquire into the value and defect of the lands, and report it to the court, which may decree ſuch defect to be made good, or ſend it to be tried at law, upon a *quantum damnificat'*. *Abr. Eq.* 18.

The condition of a bond was to ſettle certain lands in ſuch a manor, by ſuch a day; the obligor died before the day; ſo that the bond was ſaved at law, yet the court decreed a ſpecifick execution. *Abr. Eq.* 18.

But here it muſt be obſerved, that agreements, out of which an equity can be raiſed for a decree in ſpecie, ought to be obtained with all imaginable fairneſs, and without any mixture tending to ſurprize or circumvention; and that they be not unreaſonable in themſelves. *Abr. Eq.* 17.

As where by a marriage agreement the ſon's intended wife was to have more than would have been left for the father (though indebted) his wife and two daughters unpreferred; the court would not decree it, principally, by reaſon of the extremity of it, but left the party to his remedy at law. 2 *Chan. Ca.* 17.

So where *A.* articled for the purchaſe of *B*'s eſtate, pretending he bought it for one whom *B.* was willing to oblige, and thereby got it ſomewhat cheaper, when in truth he bought it for another, equity would not decree an execution of this agreement. 1 *Vern.* 227.

So where *A.* on a marriage of his daughter to *B.* covenanted, that *B.* ſhould have his lands at his death cheaper than any other perſon, and he lived twenty years after, and deviſed to *B.* 1000*l.* and to his daughter, *B*'s wife, 500*l.* and he deviſed the lands to his grandſon; the court refuſed an execution of the agreement, becauſe of the uncertainty of it; and it not being mutual, *B.* not being bound to take it at any price. 1 *New Abr.* 70.

An agreement for a purchaſe being obtained by an attorney from an old woman of ninety, and ſeveral ſuſpicious circumſtances appearing, the court would neither decree it to be carried into execution againſt the heir at law, nor to be delivered up upon a croſs bill exhibited for that purpoſe, but left the parties to their remedies at law. 2 *Vern.* 632. *Green* and *Wood.*

But as theſe caſes, and all others on this head, depend ſo much upon circumſtances, and are to ſtand or fall according to the degrees of fraud and circumvention attending them, and proved in the cauſe, or by what appears unreaſonable on the face of them, I ſhall only obſerve that a court of equity will much eaſier be prevailed on to diſmiſs a bill which prays a ſpecifick execution of an unreaſonable agreement, than ſet aſide an agreement, though not ſtrictly fair, on a bill for that purpoſe; for this deprives the party of what he had a right to by law; and that where ſuch agreements are ſet aſide, it muſt be on refunding what was *bona fide* paid, making allowances for improvements, *&c.* 1 *New Abr.* 70. 3 *Chan. Ca.* 136. 1 *Vern.* 271. 2 *Vern.* 15, 27.

As men have a property in their acquiſitions, ſo may they diſpoſe of them at their pleaſure, and without valuable conſideration; but if a man promiſes to convey lands, or to give goods without valuable conſideration, or without delivering poſſeſſion of them, this alters no property, nor has the party any remedy in law or equity, being *nudum pactum unde non oritur actio.*

But if it be done by deed duly executed, under ſeal, this is good in law, though there be no conſideration or no delivery of poſſeſſion; becauſe a man is eſtopped to deny his own deed, or affirm any thing contrary to the manifeſt ſolemnity of contracting. *Yelv.* 196. *Cro. Jac.* 270. 1 *Brownl.* 111. 6 *Co.* 18. *b.*

Alſo in equity voluntary conveyances are good againſt the parties, and cannot be revoked, nor will the court interpoſe in behalf of one volunteer againſt another; but if they affect creditors, purchaſers or younger children, the court will ſet them aſide. 1 *Chan. Rep.* 173. 1 *Vern.* 100, 464.

If there be a defective conveyance, without an equitable conſideration, a court of equity will not oblige the party to make it good, tho' their be a covenant for further aſſurances; as if a man makes a feoffment to a ſtranger without livery, the feoffor or heir ſhall not be obliged to make good that feoffment, but it ſhall be conſtrued in equity to be an eſtate at will, as it is in law. 2 *Vent.* 365. 2 *Vern.* 40. 2 *Vern.* 475.

If an annuity is granted by one to his houſe-keeper, with a bond for payment of it, and the bond is loſt, equity will decree payment of the annuity; for ſervice is a conſideration, and no *turpis contractus* ſhall be preſumed unleſs proved. *Abr. Eq.* 24.

If an agreement be to quit the poſſeſſion of lands, the court will not decree a conveyance of the lands themſelves; but if the agreement was to convey the lands, it is ſaid that the court would have decreed the agreement, though the party was not appriſed what eſtate he had in the lands. 1 *Vern.* 121.

If one is bound to transfer 300*l.* *Eaſt India* ſtock before ſuch a time, which he neglects to do, and ſtock is much riſen, he ſhall be obliged to transfer the ſtock in *ſpecie*, and account for all dividends from the time that it ought to have been transferred. 2 *Vern.* 394. See *Prec. in Chan.* 533.

If a creditor agrees with a debtor to take leſs than his debt, ſo that it be paid preciſely at ſuch a day, and the creditor fails of payment, he cannot be relieved, for *cujus eſt dare ejus eſt diſponere.* 1 *Vern.* 210. 1 *Chan. Ca.* 110.

If money be lent on mortgage, at 5 *per cent.* and the mortgagor covenants to pay 6 *per cent.* if he made default for the ſpace of ſixty days after the time of payment, if he makes default, the court will not relieve, this being the agreement of the parties. 2 *Vern.* 134.

If

If a leſſee for a long term of years covenants to lay out 200*l.* upon the premiſſes, within the firſt ten years, and lays out but 30*l.* and after the expiration of thirty years of the leaſe, the leſſor brings an action of *covenant*, and recovers 150*l.* damages, equity will neither relieve againſt the damage, nor decree the money to be now laid out in improvements; for though the damages ſeem exceſſive, yet the jury were proper judges; for it is probable the leſſee would not be ſo careful in laying it out in laſting improvements, as he would be were it laid out at firſt. 1 *Vern.* 316.

3. *Parol agreements, and ſuch as may be ſaid to be within the ſtatute of frauds and perjuries.*

The Common law required no other ſolemnity in paſſing lands or tenements, but that of livery and ſeiſin, which being a tranſlation of the feud *coram paribus curtis*, and teſtified by them, was held an act of ſufficient notoriety to direct the lord of whom to demand his ſervices, and ſtrangers againſt whom to commence their actions; but now by the ſtat. 29 *Car.* 2. *c.* 3. *ſect.* 1. it is enacted, that "all leaſes, eſtates, intereſts of freehold, or terms of years, or any uncertain intereſts of, in or out of any meſſuages, manors, lands, tenements or hereditaments made or created by livery and ſeiſin only, or by parol, and not put in writing, and ſigned by the parties ſo making or creating the ſame, or their agents thereunto lawfully authoriſed by writing, ſhall have the force and effect of leaſes or eſtates at will only, and ſhall not either in law or equity be deemed or taken to have any other or greater force or effect; any conſideration for making any ſuch parol leaſes or eſtates, or any former uſage to the contrary notwithſtanding."

Sect. 2. "Except leaſes not exceeding the term of three years from the making thereof, whereupon the rent reſerved to the landlord, during ſuch term, ſhall amount unto two third parts, at the leaſt, of the full improved value of the thing demiſed."

Sect. 3. *Alſo it is enacted*, that "no leaſes, eſtates or intereſts, either of freehold or terms of years, or any uncertain intereſt, not being copyhold or cuſtomary intereſt of, in, to or out of any meſſuages, manors, lands, tenements or hereditaments ſhall be aſſigned, granted or ſurrendered, unleſs it be by deed or note in writing, ſigned by the party ſo aſſigning, granting or ſurrendring the ſame, or their agents thereunto lawfully authoriſed; by writing or by act or operation of law."

Sect. 4. *And it is further enacted*, that "no action ſhall be brought whereby to charge any executor or adminiſtrator, upon any ſpecial promiſe to anſwer damages out of his own eſtate, or whereby to charge the defendant upon any ſpecial promiſe to anſwer for the debt, default or miſcarriages of another perſon, or to charge any perſon upon any agreement made upon conſideration of marriage, or upon any contract or ſale of lands, tenements or hereditaments, or any intereſt in or concerning them, or upon any agreement that is not to be performed within the ſpace of one year from the making thereof, unleſs the agreement upon which ſuch action ſhall be brought, or ſome *memorandum* or note thereof ſhall be in writing, ſigned by the party to be charged therewith, or ſome other perſon by him thereunto lawfully authoriſed."

Sect. 7. *It is enacted*, that "all declarations or creations of truſts, or confidences of any lands, tenements or hereditaments, ſhall be manifeſted and proved by ſome writing ſigned by the party who is by law enabled to declare ſuch truſt."

Sect. 4. "Provided that where any conveyance ſhall be made of lands or tenements, by which a truſt or confidence ſhall or may ariſe, or reſult by the implication or conſtruction of law, or be transferred or extinguiſhed by an act or operation of law; then, and in every ſuch caſe, ſuch truſt or confidence ſhall be of the like force and effect as the ſame would have been if this ſtatute had not been made."

Sect. 17. *It is enacted*, that "no contract for the ſale of any goods, wares and merchandiſes for the price of 10*l. ſterling*, or upwards, ſhall be allowed to be good, except the buyer ſhall accept part of the goods ſo ſold, and actually receive the ſame, or give ſomething in earneſt to bind the bargain, or in part of payment; or that ſome note or *memorandum*, in writing, of the ſaid bargain be made and ſigned by the parties to be charged, or their agents thereunto lawfully authorized."

In the conſtruction of this ſtatute, the following points have been reſolved.

That if there be a parol agreement for the purchaſe of lands, and a bill brought for a ſpecifick execution thereof, and the ſubſtance of the agreement ſet forth in the bill, and confeſſed by the defendant's anſwer, that in ſuch caſe the court will decree a ſpecificate execution; becauſe there is no danger of perjury, which was the principal thing the ſtatute intended to prevent. *Abr. Eq.* 19.

Alſo a parol agreement which is intended to be reduced into writing, but prevented by fraud, may be decreed in equity; as if upon a marriage-treaty inſtructions are given by the huſband to draw a ſettlement, and by him privately countermanded; and afterwards he draws in the woman, by perſuaſions and aſſurances of ſuch ſettlement to marry him. *Abr. Eq.* 19.

So where a parol agreement was concerning the lending of money on a mortgage, and the conveyance propoſed was an abſolute deed from the mortgagor, and a deed of defeaſance from the mortgagee, and after the mortgagee had got the deed of conveyance, he refuſed to execute the defeaſance; yet it was decreed againſt him on the point of fraud. *Abr. Eq.* 20.

So where the defendant, on a treaty of marriage for his daughter with the plaintiff, ſigned a writing comprizing the terms of the agreement, and afterwards deſigning to elude the force thereof, and get looſe from his agreement, ordered his daughter to put on a good humour and get the plaintiff to deliver up that writing, and then marry him, which ſhe accordingly did, and the defendant ſtood by at a corner of a ſtreet to ſee them go by to be married; and the plaintiff was relieved on the point of fraud. *Abr. Eq.* 20. 2 *Vern.* 373.

On a bill exhibited for a marriage portion, the chief evidence to ſupport it was a letter proved to have been written by the father's direction, wherein it was ſaid he would give 1500*l.* portion with his daughter, and that he was afterwards privy to the marriage, and conſented to it; and the portion was decreed the huſband. 2 *Vern.* 322.

But where on a marriage treaty the lady's father propoſed to give 4500*l.* portion, and the huſband was to ſettle 4 or 500*l. per ann.* for a jointure, the father and intended huſband went to Mr. *Minſhul*'s chambers, who hearing the propoſals on both ſides, took down minutes or heads thereof in writing, and the ſame day gave them to his clerk to draw a ſettlement according to the terms of the agreement; the next day the father fell ſick ſuddenly, and died in two hours after, and the next morning the marriage was conſummated; and on a bill brought to have a ſpecifick performance of the agreement, my lord Chancellor decreed it to be within the ſtatute of *frauds*, and ſaid he knew no caſe where an agreement, though wrote by the party himſelf, ſhould bind, if not ſigned or in part executed by him; and that thoſe preparatory heads might have received ſeveral alterations or additions, or the agreement might have intirely broke off upon ſome further enquiry of the party's circumſtances; and this decree was thought very juſt by the bar, who all agreed with my lord Chancellor, that if the marriage had been on the foot of this writing, and the father had been privy and conſenting to it, that he ſhould afterwards have been obliged to execute his part thereof. *Abr. Eq.* 21.

On the marriage of the plaintiff with the defendant's daughter, the defendant promiſed to give her 450*l.* portion, and accordingly paid the plaintiff 200*l.* in part, but took a bond from him for it till a ſuitable ſettlement ſhould be made, and the defendant himſelf gave particular directions concerning the ſettlement, which was drawn accordingly and engroſſed; but before it was executed the plaintiff's wife died, and the bill was brought to have the 200*l.* bond delivered up, and the remaining 250*l.* paid, the defendant pleaded the ſtatutes of *frauds* and *perjuries*, the

the agreement not being reduced into writing and ſigned by the parties; and by way of anſwer, denied that the 200*l.* was paid in part of the portion, but ſaid it was lent to the plaintiff, and the bond given for it; and the plea was allowed; for if the marriage ſhould be looked upon as an execution of the agreement on one ſide, ſo as to take it out of the ſtatute, it would intirely evade it; for all promiſes of this kind, ſuppoſe a marriage either already had or to be had. 1 *New Abr.* 74.

There are ſeveral caſes in which it has been held, that a parol agreement in part executed ſhall be performed in the whole; but as thoſe caſes are not exactly ſtated or well reported, it will be ſufficient to mention what ſeems to be the ſenſe of them, and what with any juſtneſs can be collected from them, *viz.* that if an agreement be made concerning lands, though not in writing, and the party by whom it was made receives all or part of the money, equity will compel a ſpecifick performance of the whole agreement; becauſe this is out of the ſtatute, which deſigned to defeat ſuch agreements only, no part whereof was carried into execution, and are ſet up merely by parol; for that was the occaſion of the ſtatute of *frauds* and *perjuries*, that perſons uſed to impoſe verbal agreements upon others, and by ſuch falſe oaths charge the parties in equity to perform ſuch agreements, though they had never been made; and therefore the mere parol proof of ſuch agreements concerning lands cannot be admitted in a court of equity; but where the price is paid, there it doth not ſtand upon the parol proof of the agreement only, but upon the execution of part of the agreement, which is evidence that the agreement was really made; and therefore there is the ſame reaſon that the plaintiff in equity ſhould have the land for his money, as it is that he ſhould deliver the goods where he hath received the money; but the doubt in theſe caſes is, what ſhall be a proof of the receipt of the money. Thus far it ſeems certain, that if the defendant in his anſwer confeſſeth the receipt of the money for that purpoſe in the bill; or if he denies the money, and it be proved upon him by writing, as by letter under his hand, or other written evidence, he ſhall be obliged ſpecifically to perform the whole agreement; becauſe he hath carried part into execution; but if the defendant confeſſes the receipt of the money, but ſays that he borrowed it from the plaintiff, and that he had it not in execution of that agreement; there he turns the proof of the agreement upon the plaintiff, and then the plaintiff muſt prove the receipt of the money by the defendant, for the purpoſe in the bill, by ſome written agreement. 1 *Vern.* 151, 159. 1 *Vern.* 363. 2 *Vern.* 455. 1 *Vern.* 210, 220, 472. 2 *Vern.* 627. 1 *Vern.* 240. 2 *Chan. Caſ.* 135.

If a man, on a promiſe of a leaſe to be made to him, lays out money on improvements, he ſhall oblige the leſſor afterwards to execute the leaſe, being executed on the part of the leſſee, and the leſſor ſhall not be allowed to take advantage of his own fraud, and run away with the improvements made by another; but if no ſuch expence had been on the leſſee's part, a bare promiſe of a leaſe, though accompanied with poſſeſſion, would be within the ſtatute of *frauds*. *Preced. in Chan.* 561. 1 *Vern.* 159. See *Prec. in Chan.* 519.

One that could read, agreed to take a leaſe for twenty-one years; the leſſor himſelf drew the leaſe but for one year, and yet read it for twenty-one years, and after the expiration of the year ejected the leſſee. On a bill brought to be relieved upon this matter, which was proved, the court held it to be within the ſtatute of *frauds* and *perjuries*, and diſmiſſed the bill with coſts, it being the plaintiff's own folly, being able to read; *ſecus*, if he had been unlettered. *Skin.* 159.

If a man purchaſes lands in another's name, and pays the money, it will be a truſt for him that paid the money, though there be no deed executed, declaring the truſt thereof; for the ſtatute of *frauds* and *perjuries* extends not to truſts raiſed by operation of law. 2 *Vent.* 361. 1 *Vern.* 366.

Alſo the following points have been reſolved in the Common law courts, on the ſeveral branches of the abovemention'd ſtatute.

1. That the clauſe which enacts, that no action ſhall be brought, to charge an executor, *&c.* that this extends not to promiſes made before, though to be performed after the making of the ſtatute; for it would be againſt natural juſtice, that a promiſe made upon good conſideration ſhould be deſtroyed by the retroſpect of a law which none could divine would be made. 2 *Jones* 108. 1 *Vent.* 330. 2 *Mod.* 310. 2 *Lev.* 227. 2 *Show. Rep.* 56.

2. That the plaintiff in his declaration need not ſhew any note in writing, but it will be ſufficient for him to produce it on the trial; but if ſuch promiſe is pleaded in bar of another action, it muſt be ſhewn to be in writing; ſo that it may appear to the court to be ſuch a promiſe upon which an action will lie. *Raym.* 450, 451. 2 *Jones* 158. *S. C.*

3. That the clauſe relating to marriage extends as well to a promiſe to marry, as to the payment of marriage portions, *&c.* 3 *Lev.* 65. See *Skin.* 196. which ſeems *cont'*.

4. That the clauſe which ſays, *That no action ſhall be brought upon any agreement that is not to be performed within the ſpace of one year from the making thereof, unleſs it be in writing*, extends not to a parol promiſe made to pay ſo much money upon the return of ſuch a ſhip, which ſhip happened not to return within two years after the promiſe made; for the ſhip by poſſibility might have returned within the year; and the clauſe extends only to ſuch promiſes where, by the expreſs appointment of the party, the thing itſelf is not to be performed within a year. 1 *Salk.* 280. *Skin.* 326, 353. *S. P.*

On the clauſe, *That no action ſhall be brought on a ſpecial promiſe, to anſwer for the debt, default, &c. of another*, it has been reſolved, that if *A.* is about hiring a horſe from *B.* and *C.* to encourage him to lend the horſe, promiſes that *A.* ſhould deliver him ſafe; this is a collateral promiſe, and an undertaking within the ſtatute; for *C.* ſubjects himſelf to an action, on the breach of the original contract by *A.* againſt whom *detinue* lies on the bailment. So if two come to a ſhop, and one of them contracts for goods, and the ſeller does not chooſe to truſt him, whereupon the other ſays, Let him have them, and I will undertake he ſhall pay you; but if the promiſe be, I will ſee you paid, or I will be your paymaſter, it is otherwiſe. So if *A.* comes to *B.* and tells him, Hire your horſe to *J. S.* and I will ſee you paid the hire; there the hiring is to *A.* and not to *J. S.* who is conſidered as ſervant to *A.* So in all caſes where the whole credit is given to the undertaker, or he alone liable to an action. 1 *Salk.* 27, 28. 6 *Mod.* 248, 249.

Articles of Agreement *for Sale of an Eſtate.*

Articles of *Agreement*, indented, made, concluded and agreed upon, the day and year, *&c.* Between *A. B.* of, *&c.* of the one part, and *C. D.* of, *&c.* of the other part, as followeth, &c.

FIRST, *the ſaid* A. B. *in conſideration of the ſum of, &c. to be paid as herein after mentioned, doth covenant and agree with the ſaid* C. D. *that he the ſaid* A. B. *ſhall and will, at the coſts and charges of ſaid* C. D. *on or before the day, &c. next coming, by ſuch conveyances, ways and means in the law, as his counſel ſhall reaſonably adviſe, well and ſufficiently grant, convey and aſſure to the ſaid* C. D. *and his heirs, or to whom he or they ſhall appoint, and to ſuch uſes as he or they ſhall direct; all that meſſuage or tenement, &c. ſituate, &c. with covenants to be therein contained, againſt all incumbrances done or committed by him the ſaid* A. B. *or any claiming under him. Alſo, the ſaid* C. D. *for himſelf, his heirs and aſſigns, doth covenant and grant, to and with the ſaid* A. B. *his heirs and aſſigns, that the ſaid* C. D. *ſhall and will, on executing the ſaid conveyance, pay unto the ſaid* A. B. *his heirs or aſſigns, the ſaid ſum of, &c. as and for the purchaſe-money for the ſaid meſſuage, tenement and premiſſes above-mentioned. Alſo, it is further agreed by and between the ſaid parties to theſe preſents, that the ſaid* C. D. *his heirs and aſſigns, ſhall and may,*

on

on the day, &c. enter into and upon the ſaid premiſſes, and recover the profits thereof, to his and their own uſe and uſes. In witneſs, &c.

Agri, In our law denotes arable land in the common fields. *Jacob. Forteſcue.*

Aid, *(Auxilium)* Is all one with the French *aide*, and is generally underſtood to be a ſubſidy granted to the crown. By the ancient law of the land, the King and any lord of the realm, might lay an *aid* upon their tenants, for knighting an eldeſt ſon, or marriage of a daughter; but this was taken away by the ſtatute 12 *Car.* 2. *c.* 24. This impoſition, which was levied in former times, ſeems to have deſcended to us from *Normandy*, or rather from the feudal law. *Grand Cuſtum. c.* 35. It is ſaid to differ from tax in ſignification; for taxes were anciently levied at the will of the lord, upon any occaſion whatſoever, but *aids* could not be levied but where it was lawful and cuſtomary ſo to do; as to make the eldeſt ſon a knight, marry the eldeſt daughter, or redeem the lord from priſon. By ſtatute 34 *Ed.* 1. *c.* 1. it is ordained, that the King ſhall levy no *aid* or tax without his parliament. *Cowel.* See *Du Freſne, verbo* auxilium.

Aid-prayer, *(Auxilium petere)* A word made uſe of in pleading, for a petition in court to call in help from another perſon that hath an intereſt in the thing conteſted: this gives ſtrength to the party praying in *aid*, and to the other likewiſe, by giving him an opportunity of avoiding a prejudice growing towards his own right. As tenant for life, by the curteſy, for term of years, *&c.* being impleaded, may *petere auxilium*, that is, pray in *aid* of him in reverſion; that is, deſire the court that he may be called by writ to alledge what he thinks proper for the maintenance of the right of the perſon calling him, and of his own. *F. N. B.* 50. *Aid* ſhall be granted to the defendant *in ejectione firmæ*, when the title of the land is in queſtion; leſſee for years ſhall have *aid* in treſpaſs; and tenants at will: but tenants in tail ſhall not have *aid* of him in remainder in fee; for he himſelf hath the inheritance. *Danv. Abr.* 292. In a writ of replevin, the avowry being for a real ſervice, *aid* is granted before iſſue; and in action of treſpaſs after iſſue joined, if there be cauſe, it ſhall be had for the defendant, tho' never for the plaintiff. *Jenk. Cent.* 64. *Fitz. Abr.* 7. There ought to be privity between a perſon that joins in *aid* and the other to whom he is joined; otherwiſe joinder in *aid* ſhall not be ſuffered. *Danv.* 318. There is a prayer in *aid* of *patrons*, by parſons, vicars, *&c.* and between *coparceners*, where one coparcener ſhall have *aid* of the other to recover *pro rata. Co. Litt.* And alſo ſervants, having done any thing lawfully in right of their *maſters*, ſhall have *aid* of them. *Termes de la ley. Cowel.*

Aid of the King, *(Auxilium regis)* Is where the King's tenant prays *aid of the king*, on account of rent demanded of him by others. A city or borough, that hold a fee-farm of the King, if any thing be demanded againſt them which belongs thereto, they may pray in *aid of the King*; and the King's bailiffs, collectors, or accountants ſhall have *aid of the King*. In theſe caſes, the proceedings are ſtopp'd till the King's counſel are heard to ſay what they think fit, for avoiding the King's prejudice: and this *aid* ſhall not in any caſe be granted after iſſue; becauſe the King ought not to rely upon the defence made by another. *Jenk. Cent.* 64. *Termes de la ley.* 35.

By the *ſtat. de bigamis*, 4 *Edw.* 1. *cap.* 1. it is enacted that, "Where a feoffment, with a charter thereupon, being made by the King, hath ſo much in it, that another perſon by a like feoffment, and like deed, ſhould be bound to warranty, the juſtices may not proceed without the King's commandment."

By the *ſtat. de bigamis*, 4 *Edw.* 1. *cap.* 2. "But where the King confirmeth or ratifieth another's act in another man's thing, or granteth any thing as much as in him is, or where a deed is ſhewed, whereby the King hath rendered any tenement, and no clauſe of warranty is contained therein; and in like caſes (the ſame being ſhewed to the King) the juſtices may proceed."

By the *ſtat.* 1. *H.* 4. *cap.* 8. it is enacted that, "In caſe lands be granted by the King's patent without title found, where the King's entry is not given by law; the diſſeiſes ſhall have ſpecial aſſiſe of the chancellor's grant, without other ſuit to the King: and if the patentees pray in aid, a *procedendo* ſhall be granted by the chancellor without other ſuit to the King; and in caſe the diſſeiſee recover againſt the patentees, they ſhall have treble damages."

Aiel, (of the French *aieul*, i. e. *avus)* Signifies a writ which lies where a man's grandfather or great grandfather (called *Beſaile)* being ſeiſed of lands and tenements in fee-ſimple, the day that he died, and a ſtranger abateth or entereth the ſame day, and diſpoſſeſſes the heir of his inheritance. *F. N. B.* 222. The aunt and the niece ſhall join in a writ of *aiel* of the ſeiſin of their grandfather; and the writ runs thus: *Rex vic. &c. A. B. quod juſte, &c. redd. B. & D. unum meſſuagium, &c. de quo D.* avus *præd. B. & proavus præd. D. cujus hæred' ipſi ſunt, fuit ſeiſitus, &c.* See *Plowd. Com. fo.* 449. And the cuſtoms of *aiel* and its appurtenances, in *Rot. Parl.* 4 *Ed.* 3. *Cowel.*

Aiſiamenta, *Ayſſamenta, eaſements*, or *conveniences*, from the French *aiſe*, eaſy; or from the Saxon *eith*, eaſy or ready, which *Chaucer* calls *eith* and *eth*, and the *Northumbrians* ſtill uſe *eeth*. In grants of conveyances and demiſes, *aiſiamenta* did include any liberty of paſſage, open way, water-courſe, or other cuſtomary benefit for the *eaſe* and accommodation of tenants, of the owners and inhabitants of any houſe, or the tenants of any land. *Cowel.*

Al, Ald, Words which begin with *Al* or *Ald* in the names of places, ſignify antiquity; as *Alborough, Aldworth*, &c. from the Saxon *eald*, i. e. *vetuſtas. Cowel.*

Alae eccleſiae, The wings or ſides, *iſles* of a church; from the French *les ailes de l'egliſe.*—— *Ad baſes pilariorum murus erat tabulis marmoriis compoſitus, qui chorum cingens et preſbyterium, corpus eccleſiæ lateribus quæ* alæ *vocantur, dividebat. Gervaſ. Dorobern. in Deſcrip. Eccl. Cantuar. Cowel.*

Alanerarius, A manager and keeper of dogs, for the ſport of hawking, from *alanus*, a dog, known to the ancients. *Du Freſne.* But Mr. *Blount* renders it a faulconer.—— Robertus de Chedworth, *vicecom. Linc. liberavit lvi s. viii d.* Johanni de Bellovento, *pro putura ſeptem leporariorum, & trium falconum &* alanerarii *& pro vadiis unius bracenarii.* 16 *Ed.* 1. *Cowel.*

Alba, The *alb*, or *aub*, a ſurplice or white ſacerdotal veſt, antiently uſed in divine ſervice by the officiating prieſts. It is likewiſe called *camiſia, podaris, talaris, ſubucula, &c.*

Alba firma, This word is uſed by my lord *Coke*, and ſeems to ſignify a yearly rent or tribute.—— *Duplex tenura in com.* Weſtmorland, *ſcilicet, una per* albam firmam, *& alia per cornagium, &c.* 2 *Inſt.* 10.

Cenſus annualis qui centenario ſive domino hundredi penditur. Ideo alba *dicta, quod non ex more priſci ſæculi in annona quæ tunc* black-mail *nuncupata fuit (hoc eſt cenſus vel firma nigra) ſed argento, quaſi cenſu* albo *reddebatur. Spelman. Cowel.*

Albergellum, The ſame with *half berga: omnis homo, &c. habet* albergellum *& cappellum ferreum, lanceum & gladium.* It here ſignifies a defence for the neck. *Hoveden* 611. *Cowel.*

Alborough. See **Elburum.**

Album, Is a word made uſe of for white rent; paid in ſilver. *Rot. Parl.* 6 *Hen.* 3. *Cowel.*

Alder, Signifies the firſt; as *alder beſt*, is the beſt of all; *alder lieſeſt*, the moſt dear. *Cowel.*

Alderman, (Sax. *Ealdorman*; Lat. *Aldermannus)* Hath the ſame ſignification as *ſenator*, or *ſenior*, or *elder*; and was the ſame among the *Saxons* as *earl* among the *Danes. Camb. Brit. fo.* 107. But at this day, and long ſince, thoſe are called *aldermen* who are aſſociates to the civil magiſtrate of a city or town corporate. *Stat.* 24 *Hen.* 8. *cap.* 13. An *alderman* ought to be an inhabitant of the place, and reſident where he is choſen; and if he removes, he is incapable of doing his duty in the government of the city or place, for which he may be diſfranchized.

chized. 4 *Mod. Rep.* 36. *Alderman Langham* was a freeman of the city of *London*, and choſen *alderman* of ſuch a ward, and being ſummoned to the court of *aldermen* he appeared, and the oath to ſerve the office was tendered to him, but he refuſed to take it, in contempt of the court, *&c.* whereupon he was committed to *Newgate*; and it was held good. *March Rep.* 179. The *aldermen* of *London*, &c. are exempted from ſerving inferior offices; nor ſhall they be put upon aſſiſes, or ſerve on juries, ſo long as they continue to be *aldermen*. 2 *Cro.* 585. In *Spelman's Gloſſary* we find that we had antiently a title of *aldermannus totius Angliæ*; witneſs this inſcription on a tomb in *Ramſey abby* — *Hic requieſcit* D. Alwinus, *inclyti Regis* Eadgari *cognatus*, *totius* Angliæ Aldermannus, *et hujus ſacri cœnobii miraculoſus fundator*. See *Spelman's* gloſſary at large on this word.

Alderman was one of the three degrees of nobility among the *Saxons*: *Ætheling* was the firſt, and *thane* the loweſt; but *alderman* was the ſame as our earl. The word was diſuſed in the later ages of the *Saxons*, and in its place the word earl was introduced. It is certain that it was uſed in King *Athelſtane's* reign. It is true it literally imports no more than *elder*; but amongſt the *Saxons* it ſignified a duke, an earl, a nobleman, and ſometimes a general; but then he was called *heretoga*, viz. *Mercna heretoga*, alderman of *Mercland*; which title he had in relation to his military power: But the title *alderman* ſhewed his civil juriſdiction; which title afterwards was applied to a judge; as in the reign of King *Edgar*, *Alwin*, the ſon of *Æthelſtane*, is called *aldermannus totius Angliæ*, that is, as *Spelman* tells us, *juſticiarius Angliæ*.

There was likewiſe *aldermannus hundredi*: Which dignity was firſt introduced in the reign of *Hen.* 1. Among his laws, *cap.* 8. we read, *præſit autem ſingulis hominum novenis decimus, et toti ſimul hundredo unus de melioribus, et vocatur aldermannus, qui dei leges et hominum jura vigilanti ſtudeat obſervantia promovere. Du Freſne. Cowel.*

Alecenarium, A ſort of a hawk called a *lanner*. See **Putura.**

Alcat, (Sax. *Alfæth*) A cauldron or furnace, wherein boiling water was put for a criminal to dip his arm in up to his elbow, and there hold it for ſome time. *Du Freſne.*

Alehouſes. Before the ſtatute of 5 & 6 *Ed.* 6. *c.* 25. it was lawful for any one to keep an alehouſe without licence; for it was a means of livlihood, which any one was free to follow: But if it was diſorderly kept, it was indictable as a nuſance. 1 *Salk.* 45.

The ancient, true, and principal uſe of inns, alehouſes, and victualling houſes, was for the receit, relief and lodging of wayfaring people travelling from place to place, and for ſuch ſupply of the wants of ſuch people as are not able by greater quantities to make their proviſion of victuals, and not meant for entertainment and harbouring of lewd and idle people, to ſpend and conſume their money and their time in a lewd and drunken manner. *Preamble to ſtat.* 1 *Jac.* 1. *c.* 9.

1. *Penalties on ſelling ale without licence.*
2. *Licenſing alehouſes, and the requiſites upon that occaſion.*
3. *Penalties on perſons ſuffering tipling.*
4. *Penalties on perſons guilty of tipling and drunkenneſs.*

1. *Penalties on ſelling ale without licence.*

Stat. 5 *Ed.* 6. *c.* 25. *ſect.* 1. The juſtices of peace in every ſhire, city, and borough, town corporate, franchiſe or liberty, or two of them (whereof one to be of the *quorum*) ſhall have power to put away common ſelling of ale and beer, in common alehouſes and tipling-houſes, where they ſhall think meet. And none ſhall keep any common alehouſe or tipling-houſe, but ſuch as ſhall be thereunto admitted in the open ſeſſions of the peace, or elſe by two juſtices of peace, whereof one to be of the *quorum*. And the juſtices ſhall take bond and ſurety from time to time, by recognizance, of ſuch as ſhall be admitted to keep any common alehouſe or tipling-houſe, as well againſt the uſing unlawful games, as alſo for the maintenance of good order. For making of which recognizance, the party ſhall pay but twelve pence.

Sect. 2. The juſtices ſhall certify the recognizance at the next quarter ſeſſions, there to remain of record before the juſtices, upon pain of forfeiture for every ſuch recognizance taken and not certified, three pounds ſix ſhillings and eight pence.

Sect. 3. The juſtices of peace where ſuch recognizance ſhall be taken, ſhall have power, in their quarter ſeſſions, by their diſcretion, to enquire of all ſuch perſons as ſhall be admitted to keep any alehouſe or tipling-houſe, and that be bound by recognizance, if they have forfeited the ſame recognizance. And the juſtices ſhall, upon every ſuch preſentment or information, award proceſs againſt ſuch perſon, to ſhew why he ſhould not forfeit his recognizance, and ſhall have power to hear and determine the ſame.

Sect. 4. If any perſon, other than ſuch as ſhall be admitted by the juſtices, ſhall obſtinately take upon him to keep a common alehouſe or tipling-houſe, or ſhall, contrary to the commandment of the juſtices or two of them, uſe commonly ſelling of ale or beer; the ſaid juſtices, or two of them (whereof one to be of the *quorum*), ſhall commit ſuch perſon to the common goal, there to remain three days. And before his deliverance, the juſtices ſhall take recognizance of him, with two ſureties, that he ſhall not keep any common alehouſe or tipling-houſe, or uſe commonly ſelling of ale or beer.

Sect. 5. The juſtices ſhall make certificate of every ſuch recognizance and offence at the next quarter ſeſſions, which certificate ſhall be a ſufficient conviction. And the juſtices, upon the ſaid certificate made, ſhall in open ſeſſions aſſeſs the fine for every ſuch offence at twenty ſhillings.

Sect. 6. In ſuch places where any fair ſhall be kept, for the time only of the fair, it ſhall be lawful for every perſon to uſe common ſelling of ale or beer in booths, or other places there.

The firſt ſection of the foregoing ſtatute muſt be underſtood of unlicenſed houſes only. 1 *Salk.* 46. And by the ſame ſection, the juſtices in their ſeſſions have power to ſuppreſs ſuch unlicenſed alehouſes, and need not proceed by information or conviction; but they have thereby a diſcretionary power to ſuppreſs them, without ſhewing any cauſe or miſdemeanor. Lord *Raym.* 1303.

There is a difference between ſuppreſſing an unlicenſed alehouſe, and one that is licenſed. Where an alehouſe is licenſed, the juſtices to ſuppreſs it, muſt either proceed upon the recognizance, the condition whereof muſt at leaſt be broken; and therefore his having another trade, or being a bailiff, can be no cauſe in ſuch caſe: or by indictment, and then there muſt be ſuch diſorders as prove a nuſance. But where an alehouſe is unlicenſed, the juſtices may ſuppreſs it at diſcretion; for on the denial of a licenſe no appeal lies, and this ſtatute, which gives the juſtices a power to ſuppreſs *where they ſhall think meet*, would ſignify nothing if it did not extend to ſuch caſes; for it cannot extend to alehouſes that are licenſed, becauſe they are not puniſhable without a breach of the recognizance. And as to thoſe that are unlicenſed, if they be ſuppreſſed, the want of a licence can only come in queſtion in ſuch caſe, and not the reaſon and cauſe why it was denied. 1 *Salk.* 45, 46.

Stat. 4 *Jac.* 1. *c.* 4. No perſon ſhall ſell any beer or ale to any perſon, that then ſhall ſell beer or ale as a common tipler, or alehouſe-keeper, the ſame perſon not having any licence (other than for the uſe of his houſhold) upon pain to forfeit for every barrel ſix ſhillings and eight pence, and after that rate.

Stat. 3 *Car.* 1. *c.* 4. *ſect.* 2. If any perſon ſhall, not being licenſed, keep a common alehouſe, or uſe commonly ſelling of ale or beer, cyder or perry, ſuch perſon ſhall forfeit twenty ſhillings to the uſe of the poor of the pariſh; the offence being viewed by the mayor, bailiff, or juſtice of peace, or other head officer, or confeſſed by the party, or proved by the oath of two witneſſes: the ſaid penalty to be levied by the conſtables or churchwardens, who ſhall be accountable therefore to the uſe of the poor;

poor; and for default of ſatisfaction within three days, the diſtreſs to be appraiſed and ſold, and the overplus to be delivered to the party. And if ſuch offender ſhall not have ſufficient goods, or ſhall not pay the ſaid twenty ſhillings within ſix days after conviction, then the mayor, bailiff, &c. ſhall commit the offender to ſome conſtable, or other inferior officer, to be openly whipped.

Sect. 3. If any conſtable or officer ſhall neglect to execute the ſaid warrant, it ſhall be lawful for the mayor, bailiff, &c. to commit the conſtable or officer to the common goal, until the ſaid offender ſhall be by the ſaid conſtable or officer, or by his procurement, puniſhed and whipped, or until he ſo neglecting ſhall have paid forty ſhillings to the uſe of the poor of the pariſh.

Sect. 4. If the offender, being an unlicenſed alehouſe-keeper, ſhall offend the ſecond time, then the mayor, bailiff, &c. ſhall commit him to the houſe of correction for one month. And if ſuch perſon ſhall again offend, he ſhall be committed unto the houſe of correction until by the order of the juſtices in their general ſeſſions he ſhall be delivered.

Sect. 5. Such offender, as ſhall be puniſhed by virtue of this act, ſhall not be puniſhed again for the ſame offence by the act 5 & 6 *Ed.* 6. *c.* 25. and ſuch offender as ſhall be puniſhed by virtue of the act 5 & 6 *Ed.* 6. ſhall not be puniſhed again for the ſame offence by virtue of this act.

Sect. 6. In places where any fair ſhall be kept, for the time only of the ſame fair, it ſhall be lawful for every perſon to uſe common ſelling of ale or beer in booths or other places.

Stat. 26 *Geo.* 2. *c.* 31. *ſect.* 9. Where any juſtice ſhall ſuſpect that any alehouſe-keeper, victualler, or retailer, ſells ale, beer, cyder, or perry, without ſuch licence, it ſhall and may be lawful for ſuch juſtice to call ſuch ſuſpected perſon before him, and alſo any exciſe officer or gauger, to produce before ſuch juſtice his ſtock-book, or other account, which ſuch officer keeps, of the charge or ſurvey of ſuch ſuſpected perſon, in reſpect of any of the liquors aforeſaid; and likewiſe to examine ſuch exciſe officer or gauger upon oath, touching the manner in which ſuch officer ſurveys or charges ſuch ſuſpected perſon, in reſpect of any of the liquors aforeſaid, or how, or in what manner ſuch ſuſpected perſon actually pays the duties for any of the ſaid liquors; if it ſhall appear by ſuch ſtock-book or other account, or by the examination of the ſaid officer or gauger, that ſuch perſon ſo ſuſpected, is ſurveyed as a victualler or retailer, and is charged with the ſame duties that victuallers and retailers are uſually charged with, and pay for any of the liquors aforeſaid, and is not intitled to the allowance or abatement given to common brewers, then, and in ſuch caſe, ſuch ſuſpected perſon ſhall be deemed an alehouſe-keeper, victualler, retailer, or ſeller of any of the liquors aforeſaid, to all intents and purpoſes, as if the ſame had been proved by two witneſſes.

Sect. 10. And if any perſon ſhall make information before any one juſtice of the peace, and ſhew probable cauſe that he ſuſpects that any perſon ſells ale without licence, beer, or other liquors withont a licence from two juſtices, it ſhall and may be lawful to and for ſuch juſtice to call ſuch ſuſpected perſon before him, and alſo to ſummon any other perſon or perſons as evidence, to prove the charge againſt ſuch ſuſpected perſon, and if ſuch perſon ſo ſummoned ſhall refuſe to appear, or, when appearing, ſhall refuſe to be examined upon oath, and give evidence as aforeſaid, ſuch perſon or perſons ſhall forfeit the ſum of ten pounds, to be levied by diſtreſs and ſale of the goods and chattles, of ſuch offender or offenders, by warrant under the hand and ſeal of ſuch juſtice, rendering him or them the overplus, after charges of the ſaid diſtreſs and ſale deducted, to be paid to the overſeers for the uſe of the poor where the offender ſhall live.

Sect. 11. And that if any perſon ſhall be diſabled by conviction to ſell ale, beer, cyder, or perry, ſuch perſon ſhall, by the ſame conviction, be alſo diſabled to ſell any ſpirituous liquors or ſtrong waters; any licence before obtained for that purpoſe notwithſtanding; and every licence granted to the perſon ſo convicted, to ſell ale, beer, cyder, perry, ſpirituous liquors, ſtrong waters, or any of them, from the time of ſuch conviction, ſhall be null and void; and every perſon ſelling ale, beer, cyder, perry, ſpirituous liquors, ſtrong waters, or any of them, during the term of ſuch diſability, ſhall be ſubject to all, or ſuch of the penalties, as are reſpectively inflicted by law for ſelling ale, beer, cyder, perry, ſpirituous liquors, ſtrong waters, or any of them, by retail without licence; and in all proſecutions of ſuch offenders, a certificate from the clerk of the peace (or perſon acting as ſuch) of any ſuch conviction, ſhall be legal evidence; which certificate ſuch clerk of the peace or perſon ſhall grant on demand without fee or reward.

Sect. 12. And every perſon ſo convicted of the offence of ſelling ale, beer, or other liquors, without a licence from two juſtices of the peace, ſhall, for every ſuch firſt offence, forfeit the ſum of forty ſhillings; and for every ſuch ſecond offence ſhall forfeit the ſum of four pounds; and for every ſuch third offence ſhall forfeit ſix pounds; all which ſaid reſpective forfeitures ſhall and may be levied by diſtreſs and ſale of the goods and chattles of every ſuch offender (rendering to him the overplus, after charges of the ſaid diſtreſs and ſale deducted) by warrant under the hand and ſeal of the juſtice convicting ſuch offender; and ſhall be paid one moiety thereof to the informer, and the other moiety thereof to the overſeers of the poor, for the uſe of the poor of the pariſh or place where ſuch offence was committed; and if no ſufficient diſtreſs ſhall be found, whereon to levy the ſaid reſpective forfeitures, then the ſaid juſtice of the peace ſhall and may commit every ſuch offender ſo reſpectively convicted as aforeſaid, to the common goal or other priſon, or houſe of correction, within his juriſdiction, without bail or mainpriſe, for the ſpace of one month, for the firſt offence; and for the ſecond offence, for the ſpace of two months; and for the third offence, until ſuch offender ſhall be diſcharged by order of the court of general quarter ſeſſions.

Stat. 28 *Geo.* 2. *cap.* 19. *ſect.* 2. Every perſon ſelling ale, beer, or other liquors without licence, after a third conviction, ſhall, for every ſuch offence, ſo often as it ſhall happen, forfeit the ſum of ſix pounds, to be levied and diſpoſed of in like manner as the forfeitures in the firſt, ſecond, and third conviction are directed to be, in and by the ſaid act; and in caſe no ſufficient diſtreſs ſhall be found, whereon to levy the ſaid ſeveral forfeitures, then the juſtices of the peace, who ſhall have convicted ſuch offender, ſhall and may commit him or her ſo convicted, to the common goal, or other priſon or houſe of correction within his juriſdiction, without bail or mainprize, until ſuch offender ſhall be diſcharged by order of the court of general or quarter ſeſſions.

2. *Licenſing alehouſes, and the requiſites upon that occaſion.*

Stat. 2 *Geo.* 2. *c.* 28. *ſect.* 11. Whereas many inconveniencies have ariſen from perſons being licenſed to keep inns and common alehouſes, by juſtices of the peace, who, living remote from the places of abode of ſuch perſons, may not be truly informed as to the occaſion or want of ſuch inns or common alehouſes, or the characters of the perſons applying for licences to keep the ſame: Be it therefore enacted by the authority aforeſaid, that from and after the twenty-fourth day of *June* one thouſand ſeven hundred and twenty-nine, no licence ſhall be granted to any perſon to keep a common inn, or alehouſe, or to retail any brandy or ſtrong waters, but at a general meeting of the juſtices of the peace, acting in the diviſion where the ſaid perſon dwells, to be holden for that purpoſe, on the firſt day of *September* yearly, or within twenty days after, or at any other general meeting of the ſaid juſtices, to be holden for the diviſion wherein the ſaid perſon reſides; and all licences which ſhall, after the ſaid twenty-fourth day of *June* one thouſand ſeven hundred and twenty-nine, be granted to the contrary hereof ſhall be null and void.

Sect. 12. Nothing herein contained ſhall extend to alter the method or power of granting licences for keeping of

of common inns, alehouſes, or brandy-ſhops, in any city or town corporate.

Stat. 26 *Geo.* 2. *cap.* 31. *ſect.* 1. Upon granting licences by juſtices of the peace to any perſon to keep an alehouſe, inn, victualling-houſe, or to ſell ale, beer, and other liquors by retail, every ſuch perſon ſhall enter into recognizance to the King's majeſty, his heirs, and ſucceſſors, in the ſum of ten pounds, with two ſufficient ſureties, each in the ſum of five pounds, or one ſufficient ſurety in the ſum of ten pounds, under the uſual condition, for maintenance of good order and rule within the ſame; and in caſe the perſon applying for ſuch licence ſhall be hindred through ſickneſs or infirmity, or any other reaſonable cauſe, to be allowed by the ſaid juſtices of the peace at the meeting of the ſaid juſtices for granting the ſaid licences, then that it ſhall and may be lawful for them to grant ſuch licence upon two ſufficient ſureties entering into ſuch recognizance, each in the penalty of ten pounds, for performance of the condition of the ſaid recognizance; which ſaid recognizance, with the condition thereof, fairly written or printed, ſhall forthwith, or at the next general or quarter ſeſſions of the peace at fartheſt, after granting ſuch licences, be ſent or returned to the clerks of the peace, or perſons acting as ſuch for every county, riding, city, liberty, or town corporate, in that part of *Great Britain*, called *England*, wherein ſuch licences ſhall be granted, under the hands of the juſtices of peace before whom ſuch recognizances were taken, to be by the ſaid clerks of the peace, or ſuch other perſon acting as ſuch, duly entered or filed amongſt the records of the ſeſſions of the peace; and that for every ſuch licence granted without taking ſuch recognizance, and for every ſuch recognizance taken, and not ſent or returned as aforeſaid, every juſtice of the peace ſigning ſuch licence ſhall forfeit 3*l.* 6*s.* 8*d.*

Sect. 2. To prevent diſorders in alehouſes, no licence to keep the ſame ſhall be granted, to any perſon not licenſed the year preceding, unleſs ſuch perſon produce, at the general meeting of the juſtices in *September*, a certificate under the hands of their parſon, vicar, or curate, and the major part of the churchwardens and overſeers, or elſe of three or four reputable and ſubſtantial houſholders and inhabitants of the pariſh or place where ſuch alehouſe is to be; ſetting forth, that ſuch perſon is of good fame and of ſober life and converſation; and it ſhall be mentioned, in ſuch licence, that ſuch certificate was produced, otherwiſe ſuch licence ſhall be null and void.

Sect. 3. If any perſon licenſed ſhall die or remove from an alehouſe, it ſhall be lawful for the perſon ſucceeding to ſuch houſe, to keep on the ſaid alehouſe during the reſidue of the term of ſuch licence, on condition that within thirty days after ſuch death or removal, ſuch perſon obtain ſuch certificate as aforeſaid, to be ſigned by ſome neighbouring juſtice, in order to its being produced at the next general meeting in *September*; and if ſuch certificate be not ſo obtained and ſigned within the ſaid thirty days, then, immediately from and after the expiration thereof, ſuch licence ſhall be null and void; and no licence ſhall intitle any perſon to keep an alehouſe in any other place than that in which it was firſt kept by virtue of ſuch licence, and ſuch licence, with regard to all other places, ſhall be null and void.

Sect. 4. No licence ſhall be granted but on the firſt day of *September* yearly, or within twenty days after; and that ſuch licence ſhall be made for one year only, and to commence on the twenty-ninth day of the ſaid *September*; and that the day and place for granting ſuch licence ſhall be appointed by two or more juſtices acting for the diviſion, by warrant under their hands and ſeals, at leaſt ten days before ſuch meeting, directed to the high conſtable, or high conſtables, of the ſaid diviſion; requiring him or them to order his or their reſpective petty conſtables or other peace officers, to give notice to the ſeveral innkeepers and alehouſe-keepers within their reſpective conſtablewicks, of the day and place of ſuch meeting; and all licences hereafter granted at any other time or place, ſhall be null and void to all intents and purpoſes whatſoever.

Sect. 5. The clerks of the peace ſhall keep a regiſter or calendar of all recognizances ſo ſent or returned, and ſhall deliver, or cauſe to be delivered to the juſtices of the peace at their general meetings in *September* every year, for granting licences in each diviſion or place, a true copy of ſuch regiſter or calendar; and that for every recognizance there ſhall be paid, by the clerk or clerks of the juſtices taking ſuch recognizances, to the ſaid clerks of the peace, as their fee for filing or recording the ſaid recognizance, and for making and delivering copies of the ſaid regiſter or calendar thereof, the ſum of one ſhilling, and no more; which ſhall be paid to the clerks of the ſaid juſtices by the perſons licenſed, over and above the fees payable to the ſaid juſtices clerks.

Sect. 6. The ſaid forfeitures for granting licences, without taking recognizances, ſhall and may be ſued for, and recovered by action of debt, bill, plaint, or information, in any of his Majeſty's courts of record at *Weſtminſter*, for the uſe of the perſon or perſons who ſhall ſue or proſecute for the ſame, together with coſts of ſuit; wherein no eſſoin, or wager of law, or more than one imparlance ſhall be allowed.

Sect. 7. Any juſtice of the peace of any county, *&c.* wherein ſuch licence ſhall be granted, upon complaint or information that ſuch licenſed perſon hath done or committed, any act, offence, or miſdemeanor, whereby in the judgment of the ſame juſtice ſuch recognizance may be forfeited, or the condition thereof broken, may by ſummons under hand and ſeal, require ſuch perſon ſo complained of or informed againſt, to appear at the next general or quarter ſeſſion of the peace for the ſaid county, *&c.* then and there to anſwer to the matter of ſuch complaint or information; and alſo may bind the perſon or perſons who ſhall make ſuch complaint or information, or any other perſon or perſons, in a recognizance to appear at ſuch general or quarter ſeſſion, and give evidence againſt ſuch perſon ſo complained of or informed againſt; and the juſtices of the peace, in their general or quarter ſeſſions, ſhall have power to direct the jury which ſhall attend at ſuch ſeſſions for the trial of traverſes, or ſome other jury of twelve honeſt and ſubſtantial men, to be then and there impanelled by the ſheriff without fee or reward, to enquire of the miſdemeanor charged in the ſaid complaint or information; and if ſuch jury ſhall find that the perſon ſo complained of or informed againſt, hath done any act whereby the condition of his recognizance is broken, ſuch act being ſpecified in ſuch complaint or information, it ſhall and may be lawful for the court, at ſuch general or quarter ſeſſions, to adjudge ſuch perſon guilty of the breach of ſuch recognizance; which verdict and adjudication ſhall be final to all intents and purpoſes; and thereupon the ſaid juſtices ſhall order the recognizance entered into by ſuch offender to be eſtreated into the Exchequer, to be levied to his Majeſty's uſe; and that the ſaid perſon, the condition of whoſe recognizance ſhall be adjudged to be broken and forfeited, ſhall, from and after ſuch adjudication, be utterly diſabled to ſell any ale, beer, cyder, perry, ſpirituous liquors, or ſtrong waters, for the ſpace of three years; and any licence or licences, granted or to be granted to ſuch perſon during ſuch term, ſhall be void and of no effect.

Sect. 8. Provided, that the ſaid juſtices may, at the requeſt of the proſecutor, or party ſo complained of or informed againſt, or either of his or her ſureties, if they ſhall ſee juſt, adjourn the hearing and trial of the ſaid complaint or information, to the then next general or quarter ſeſſions of the peace, where the ſame ſhall be finally determined.

Sect. 13. And every conviction of any offender for ſelling ale, beer, or other liquors, without ſuch licence, or after being diſabled to ſell as aforeſaid, ſhall be certified by the juſtice of peace making the ſame, to the next general or quarter ſeſſion of the peace, to be filed or entered amongſt the records of the ſaid ſeſſion; and that ſuch conviction ſhall and may be drawn up and certified in the following form of words, as the caſe ſhall happen, or in any other form of words to the ſame effect, *mutatis mutandis*, that is to ſay,

Middleſex.

Middlesex. A. B. *is convicted on his or her own confession (or on the oath of ——) of having sold ale, beer, or other liquors, in the parish of —— in this county, on the —— day of —— without being licensed thereto, according to law (or, after being disabled to sell, as the case may be). Given under my hand and seal this —— day of ——*

And there shall be added, that the same is the first, second, or third conviction; which said conviction, in the same or the like form of words, shall be good and effectual in law to all intents and purposes, and shall not be quashed, set aside, or adjudged void or insufficient for want of any other form or words whatsoever.

Sect. 14. Provided always, that such offender who shall be punished by virtue of this act, shall not be punished again for the same offence by any former act; and that such offender who shall be punished by virtue of any former act, shall not be punished again for the same offence by virtue of this present act, or any thing herein contained.

Sect. 15. Provided, that this act, or any thing herein contained, shall not in any wise be prejudicial to the privilege of licensing taverns and other publick houses, claimed by the two Universities of that part of *Great Britain* called *England*, or either of them, nor to the chancellor, masters and scholars, or any officers of the same, or their successors, but that they may use and enjoy such privilege, as they have heretofore lawfully used and enjoyed; any thing herein contained to the contrary notwithstanding.

Sect. 16. Provided always, that nothing herein contained shall extend, or be construed to extend, to alter the time or times of granting licences for keeping of common inns or alehouses, or to oblige persons, not licensed the year preceding, to produce certificates, in any city or town corporate.

Sect. 17. Provided, that any person shall be deemed a competent witness, and be admitted to give evidence upon any information or complaint for any offence committed against this act; notwithstanding such person be an inhabitant of, or charged or liable to be charged to the payment of any rates or assessments for the relief of the poor of any parish or place, where such offence shall be committed.

By stat. 26 *Geo.* 2. *c.* 13. *sect.* 12. No justice of the peace, being a common brewer of ale or beer, innkeeper, or distiller, or other seller of or dealer in ale, or any kind of spirituous liquors, or interested in any of the said trades or businesses, or being a victualler or malster, shall during such time as he shall be such common brewer, innkeeper, *&c.* or interested in any of the said trades or businesses, be capable, or have any power to grant any licence or licences to any person or persons whatsoever, for selling ale, beer, or any other liquors by retail; and in case any such justice or justices shall grant any such licence, the same shall be null and void.

By the statutes 1 *Ann. stat.* 2. *c.* 22. *sect.* 6. and 6 *Geo.* 1. *c.* 21. *sect.* 56. All mayors, town-clerks, and other persons whom it may concern, shall make out ale-licences duly stamped, before the recognizance be taken, on pain of 10*l.* half to the king, and half to the prosecutor, with costs.

This stamp duty by stat. 9 *Ann. c.* 23. is one shilling; and by stat. 29 *Geo.* 2. *sect.* 1. every licence is charged with a further duty or stamp of 20*s.* And by last mentioned act, *sect.* 20. If any person shall write any licence without such stamp, he shall forfeit 10*l.* with costs, to be recovered as stamp penalties; and the licence shall not be available till the duty shall be paid, and also a penalty of 5*l.*

By statutes 16 *Geo.* 2. *c.* 8. *sect.* 8. and 24 *Geo.* 2. *c.* 40. *sect.* 9. No person shall retail any distilled spirituous liquors, without a licence from the officer of excise taken out ten days before, for which he shall pay 40*s.* yearly. And by statutes 16 *Geo.* 2. *c.* 8. *sect.* 11. and 29 *Geo.* 2. *c.* 12. *sect.* 22. Such persons shall be first licensed to sell ale or spirituous liquors by two or more justices of the peace. And by statutes 9 *Geo.* 2. *c.* 23. *sect.* 14. and 24 *Geo.* 2. *c.* 40. *sect.* 28, 29. The justice's clerk shall have 2*s.* 6*d.* and no more for such licence.

Stat. 29 *Geo.* 2. *c.* 12. *sect.* 23. If any person so licensed to sell ale, beer, or other exciseable liquors, shall die or remove from the alehouse or other place wherein such ale, beer, or other liquors, shall by virtue of such licence, be sold, it shall and may be lawful for the executors, administrators, and assigns of such person so dying or removing, who shall be possessed of such house or place, or the occupier thereof, to sell ale, beer, or other liquors therein, during the residue of the term for which such licence shall have been granted to the person so dying or removing, without any certificate from any justice of the peace, or any new licence to be had or obtained in that behalf, notwithstanding 26 *Geo.* 2.

Sect. 24. In case any alehouse shall be empty or unoccupied after the general day appointed for licensing (the occupier whereof was duly licensed the year preceding) it shall be lawful for any two justices of peace, at a petty sessions, to grant a licence to any new tenant or occupier, to open such house as an alehouse, and to sell ale there, till the next general licensing day, so as the said licence be stamped as herein directed.

Sect. 26. Every person who shall retail ale, beer, or other liquors, in any prison or house of correction, or workhouse to be appointed for the reception of poor persons, shall be deemed a keeper of a common alehouse or tipling-house, unless he or she shall obtain from the justices of the peace, according to due course of law, a licence to sell such beer, ale, or other exciseable liquor.

3. *Penalties on persons suffering tipling.*

Stat. 1 *Jac.* 1. *c.* 9. *sect.* 2. If any inn-keeper, victualler, or alehouse-keeper, permit any person dwelling in any city, town corporate, market town, village or hamlet, where such inn, alehouse or tipling-house is, to remain drinking or tipling in the said inn, victualling-house, tipling-house or alehouse; other than such as shall be invited by any traveller, and shall accompany him only during his abode there; and other than labouring and handicraftmen in cities and towns corporate, and market towns, upon the usual working days for one hour at dinner-time, to take their diet in an alehouse; and other than labourers and workmen, which for the following of their work for the day, or by the great, in any city, *&c.* shall for the time of their continuing in work there, lodge or victual in any inn, *&c.* other than for urgent occasions, to be allowed by two justices of peace: Every such inn-keeper, victualler, *&c.* shall for every offence forfeit ten shillings to the use of the poor of the parish; the same offence being viewed by any mayor, bailiff, or justice of peace, within their several limits, or proved by the oath of two witnesses, to be taken before any mayor, bailiff, or other head officer, or justice of peace.

Sect. 3. The said penalties to be levied by the constable or churchwardens of the parish by way of distress; and for default of satisfaction within six days, the same to be appraised and sold, and the surplusage to be delivered to the party: And for want of sufficient distress, the party offending to be by the mayor, bailiff, *&c.* committed to the common goal until the penalty be paid.

Sect. 4. If the constables or churchwardens do not levy the penalties, or in default of distress to certify the same default of distress, by the space of twenty days, to the mayor, bailiff, *&c.* within whose jurisdiction the offence is committed; every person so offending shall forfeit forty shillings, to the use of the poor of the parish; to be levied by distress, by warrant from any one justice, to be detained for six days; within which time, if payment be not made, the goods to be presently appraised and sold, and the surplusage delivered to the party; and for want of distress, the constables or churchwardens offending, to be by the mayor, bailiff, *&c.* committed to the common goal until the penalty be paid: For all which penalties levied by the constables or churchwardens, the said constables and churchwardens shall be accountable to their suc-

ceſſors, and other the pariſhioners, as they uſually be in other church reckonings. And for all forfeitures, by reaſon of any neglect of the conſtables or churchwardens, thoſe ſhall be accountable, who by force of any warrant or precept do levy the ſame, or upon the enlargement of perſons committed do receive the ſame.

4 *Jac.* 1. *c.* 5. *ſect.* 5. The ſaid offence ſhall be inquired of and preſented before the juſtices of aſſiſe in their circuit, juſtices of peace in their ſeſſions, and before the mayors, bailiffs, or other head officers of every city or town corporate, who have power to enquire of treſpaſſes, *&c.* and in every court leet; and due proceeding ſhall be againſt the offenders, as in like caſes.

Sect. 7. All conſtables, churchwardens, headboroughs, tithingmen, aleconners, and ſidemen, ſhall in their oaths incident to their offices, be charged to preſent the ſaid offence contrary to this ſtatute.

Stat. 21 *Jac.* 1. *c.* 7. *ſect.* 4. If any alehouſe-keeper ſhall be convicted of the ſaid offence, he ſhall for three years be diſabled to keep any alehouſe.

4. *Penalties on perſons guilty of tipling and drunkenneſs.*

By the ſtatutes 4 *Jac.* 1. *c.* 5. *ſect.* 4. 1 *Jac.* 1. . 9. 21 *Jac.* 1. *c.* 7. 1 *Car.* 1. *c.* 4. it is enacted that, if any perſon ſhall continue drinking or tipling, in any inn, victualling houſe, or alehouſe, or any tavern, keeping an inn or victualling-houſe; he ſhall on conviction thereof before the mayor or a juſtice of the peace, on view, confeſſion, or oath of one witneſs, forfeit for every offence 3*s.* 4*d.* to be paid within one week next after the conviction, to the churchwardens, who ſhall be accountable for the ſame to the uſe of the poor: And if he ſhall refuſe or neglect to pay the ſame, it ſhall be levied by diſtreſs: And if he be not able to pay the forfeiture, then the mayor, juſtice, or court where the conviction ſhall be, may puniſh the offender, by ſetting him in the ſtocks for every offence by the ſpace of four hours.

By 4 *Jac.* 1. *c.* 5. *ſect.* 5. the ſaid offence may alſo be inquired of and preſented, before juſtices of aſſize, juſtices of the peace in ſeſſions, mayors, and in the leet; and proceeding ſhall be had thereupon for the conviction, as upon indictment or preſentment.

And by the laſt mentioned ſtatute, *ſect.* 11. the offender is to be preſented, indicted, or convicted in ſix months.

And all conſtables, churchwardens, aleconners, and ſidemen, ſhall in their ſeveral oaths incident to their offices, be charged to preſent the ſaid offence. 2 *Jac.* 1. *c.* 7. *ſect.* 5.

And if any alehouſe-keeper ſhall be convicted of the ſaid offence, he ſhall moreover for the ſpace of three years be diſabled to keep any ſuch alehouſe. 7 *Jac.* 1. *c.* 10. 21 *Jac.* 1. *c.* 7.

Drunkenneſs excuſeth no crime; but he who is guilty of any crime whatever, through his voluntary drunkenneſs, ſhall be puniſhed for it as much as if he had been ſober. 1 *Hawk.* 2.

If any offend their brethren by drunkenneſs, the churchwardens and ſidemen ſhall preſent the ſame to the ordinary, that they may be puniſhed by the ſeverity of the laws, according to their deſerts; and ſuch notorious offenders ſhall not be admitted to the holy communion, till they be reformed. *Canon* 109.

And all conſtables, churchwardens, aleconners, and ſidemen, ſhall be ſworn to preſent the offence of drunkenneſs. 4 *Jac.* 1. *c.* 5. *ſect.* 7.

By the ſtatutes 4 *Jac.* 1. *c.* 5. *ſect.* 2. and 21 *Jac.* 1. *c.* 7. *ſect.* 1, 3. it is enacted, that every perſon who ſhall be drunk, and thereof ſhall be convicted before one juſtice, or mayor, on view, confeſſion, or oath of one witneſs, ſhall forfeit for the firſt offence 5*s.* to be paid within one week after conviction to the churchwardens, who ſhall be accountable for the ſame to the uſe of the poor; and if he ſhall refuſe or neglect to pay the ſame as aforeſaid, it ſhall be levied by diſtreſs, and if the offender be not able to pay the ſaid ſum of 5*s.* he ſhall be committed to the ſtocks, there to remain by the ſpace of ſix hours.

And if any conſtable, or other inferior officer to whom that ſhall be given in charge by the precept of any mayor or juſtice, do neglect the due correction of the offender, or the due levying of the penalties where diſtreſs may be had; every perſon ſo offending ſhall forfeit 10*s.* to be levied by diſtreſs, by any other perſon ſo having warrant from any mayor, juſtice or court, where any ſuch conviction ſhall be, to be paid to the churchwardens, who ſhall account for the ſame, to the uſe of the poor where the offence ſhall be committed. 4 *Jac.* 1. *c.* 5. *ſect.* 3.

And if any perſon once convicted of drunkenneſs, ſhall after that be again convicted of the like offence, he ſhall be bounden with two ſureties in a recognizance of 10*l.* with condition to be from thenceforth of good behaviour. 4 *Jac.* 1. *c.* 5. *ſect.* 6. 21 *Jac.* 1. *c.* 7. *ſect.* 3.

The ſaid offence may alſo be inquired of and preſented before juſtices of aſſize, juſtices of the peace in their ſeſſions, mayor, and in the leet; and thereupon proceſs ſhall be had for the conviction, as upon indictment or preſentment. But the offender ſhall be preſented, indicted or convicted in ſix months after the offence. 4 *Jac.* 1. *c.* 5. *ſect.* 5. 11.

But when the offender hath been once puniſhed, by any the ways before mentioned, he ſhall not be puniſhed again by any other ways or means. 4 *Jac.* 1. *c.* 5. *ſect.* 9.

If any alehouſe-keeper ſhall be convicted of being drunk; he ſhall, beſides the penalties abovementioned, be utterly diſabled to keep any ſuch alehouſe, for the ſpace of three years next enſuing the conviction. 7 *Jac.* 1. *c.* 10. 1 *Car.* 1. *c.* 4.

Aler ſans jour, *(French)* To go without day, that is, to be finally diſmiſſed the court, becauſe there is no further day aſſigned for appearance. *Kitch.* 146. *Cowel.*

Ale-ſilver, A rent or tribute annually paid to the Lord Mayor of *London*, by thoſe that ſell *ale* within the liberty of the city. *Antiq. Purvey.* 183. *Cowel.*

Aleſtake, A may-pole called *aleſtake*, becauſe the country people drew much *ale* there: But it is not the common may-pole, but rather a long ſtake drove into the ground, with a ſign on it that ale was to be ſold there. *Cowel.*

Ale-taſter, Is an officer appointed in every court-leet, ſworn to look to the aſſize and goodneſs of *ale* and beer, *&c.* within the precincts of the lordſhip. *Kitch.* 46. Where may be ſeen the form of his oath. In *London* there are *ale-conners*, who are officers appointed to *taſte* ale, beer, *&c.* in the limits of the city.

Alfetum, A cauldron or furnace: Sax. *alfæth*, compounded (according to *Du Freſne)* from *ælan*, or *onælan*, *accendere*; and *fæt*, *vas*; *quaſi vas calefactionis.* But more likely from *æle*, *cereviſia*, and *fæt*, as we ſtill ſay, the *ale-fat*, or *ale-vat*, or brewing veſſel. —— *Et ſi aquæ judicium ſit, calefiat, donec excitetur ad bullitum, et ſit* alfetum *ferreum, vel æneum, vel plumbeum.* The *alfret* was a cauldron in which boiling water was put for the criminal to dip his hand in up to the elbow, and there hold it for ſome time; ſays *Du Freſne in verbo* alfretum. *Leges Athelſtani Regis apud Brompt. cap.* 19. *Cowel.*

Alias, A ſecond or further writ, iſſued from the courts at *Weſtminſter*, after a *capias*, *&c.* ſued out without effect. *Pract. Attor. Jacob.*

Alien, *(Alienare)* Is derived from the *French* word *aliener*, and ſignifies as much as to transfer the property of any thing to another. To *alien in mortmain*, is to make over lands or tenements to a religious houſe or other body politick. *Staund. Prær. Reg.* 48. See **Mortmain.** To alien in fee, is to ſell the fee-ſimple of any land or tenement, or of any incorporeal right. *Stat. Weſt.* 2. *c.* 25. *ann.* 13 *Ed.* 1. *Cowel.*

Alien, Is one born out of the ligeance of the King. *Lit. ſect.* 198. 7 *Co.* 16. *a. Calvin's* caſe.

Alien, alius, alienus, alienigena, ſignifies one born in a ſtrange country: It is uſually taken for the contrary to a denizen, or natural ſubject; that is, one born in a ſtrange country, and never here enfranchiſed. *Bro. Denizen* 4. Yet a man born out of the land, ſo it be within the limits of the King's obedience, beyond the ſeas, or of *Engliſh*

liſh parents out of the King's obedience, is not accounted an alien, but a ſubject. *Stat.* 25 *Ed.* 3. Alſo if one born out of the King's allegiance, come and dwell in *England*, his children begotten here, are not *aliens*, but *denizens*. 7 *Co. Rep. Calvin*'s caſe.

An *alien* is one born in a ſtrange country and different ſociety, to which he is preſumed to have a natural and neceſſary allegiance; and therefore the policy of our conſtitution has eſtabliſhed ſeveral laws relating to ſuch a one; the reaſons whereof are, that every man is preſumed to bear faith and love to that prince and country where firſt he received protection during his infancy; and that one prince might not ſettle ſpies in another's country; but chiefly that the rents and revenues of the country might not be drawn to the ſubjects of another. 1 *New Abr.* 76. 7 *Co.* 18. 1 *Vent.* 427. *Molloy* 363.

Some have thought that the laws againſt aliens were introduced in the time of *Hen.* 2. when a law was made at the parliament of *Wallingford*, for the expulſion of ſtrangers, in order to draw away the *Flemings* and *Picards*, introduced into the kingdom by the wars of King *Stephen*. *Daniel* 67. Others have thought that the original of this law was more ancient; and that it is an original branch of the feudal law; for by that law no man can purchaſe any lands but he muſt be obliged to do fealty to the lords of whom the lands are holden; ſo that an alien, that owed a previous faith to another prince, could not take an oath of fidelity in another ſovereign's dominions. *Spelm.* tit. *Legeant'* 368. *Cuſtumer, cap.* 43. We find it uſed among the *Romans*, and only the *Cives Romani* were eſteemed freemen among them. Afterwards, when their territories increaſed, all the *Italians* were made free, under the name of *Latines*, only they had not the privilege of wearing gold rings, which was altered by *Juſtinian*; and as the empire increaſed, ſo all born within the pale of the empire were citizens, *in orbe Romano qui ſunt ex conſtitutione imperatoris Antonini cives Romani effecti ſunt. Dig. lib.* 1. *tit.* 5. *f.* 16.

Lord chief juſtice *Hale* ſays, that the law of *England* rather contracts that extends the diſability of aliens, becauſe the ſhutting out of aliens tends to the loſs of the people, which laborioufly employed are the true riches of any country. 1 *Vent.* 427.

Under this head is conſidered,

1. *Who are aliens by the Common law, or by Statute; and who not.*
2. *Of naturalization and denization.*
3. *What acts aliens may do; what not.*
4. *Of pleading alienage.*

1. *Who are aliens by the Common law, or by Statute; and who not.*

All thoſe are natural born ſubjects, whoſe parents, at the time of their birth, were under the actual obedience of our King, and whoſe place of birth was within his dominions. 7 *Co.* 18. *a.*

In *aſſiſe* for certain tenements in *Shoreditch*; the defendants pleaded in bar, that the plaintiff, *Robert Calvin*, was an *alien*, born on the 5th *day of November*, *anno* 3 *Jac. at Edinburgh in Scotland, ac infra ligeantiam domini regis regni ſui Scotiæ, ac extra ligeantiam regni ſui Angliæ*; and upon demurrer to this plea, the queſtion was, whether the plaintiff born in *Scotland*, ſince the crown of *England* deſcended to King *James*, was *an alien* born, and ſo diſabled to bring an action real for lands here; and adjudged, that he was not an *alien*. 7 *Rep. Calvin*'s caſe.

A bill was exhibited in the Star Chamber againſt *William Courteen and* 160 *Dutchmen*, for buying and tranſporting ſeveral ſums of money, who pleaded the *general pardon* 7 *Jac.* the queſtion was, whether thoſe who were neither *naturalized*, nor made *denizens*, were capable of the pardon? The *chief juſtice Hobart* held, that the *Dutch* living here under the King's protection, and being *alien amies*, were truly under the King's ſubjection, and therefore were comprehended under theſe words in the preamble of the act, *of loving and obedient ſubjects*, but they could not properly be called *natural ſubjects*; and if ſuch *alien amies* commit treaſon, the indictment ſhall be, that it was done *contra dominum regem*, but not *contra naturalem dominum*; and it ſhall conclude *contra ligeantiæ ſuæ debitum. Hob.* 271.

An *Engliſh* merchant died in *Poland*, leaving his wife with child, who was an alien; this child was adjudged a ſubject born; for in this caſe *partus non ſequitur ventrem*; but the child ſhall be of the condition of the father. *Cro. Car.* 437.

Information for not paying the cuſtom for *linen cloth*; the caſe was, the defendants were born in this realm, their father was an *alien*, but their mother was *born* here; and the queſtion was, whether they ſhould pay cuſtom as *aliens*, or not? For that the attorney general affirmed, that it had been lately held in the Exchequer, *that the iſſue of aliens for the firſt generation, being merchants*, ſhould pay *alien* duties; but in this caſe the mother was an *Engliſhwoman*, ſo that the defendants were not the iſſue of *aliens. Hard.* 335.

If one of the King's ambaſſadors in a foreign country, hath iſſue there by his wife, being an *Engliſhwoman*, by the Common law they are natural ſubjects. 7 *Co.* 18. *a.*

If the King of *England* makes a new conqueſt, the perſons there born are his ſubjects; but if it be retaken from him again, the perſons there born afterwards are aliens. *Dyer* 224. *Vaugh.* 281, 282.

One born in *Ireland*, *Scotland*, *Wales*, or any of the King's plantations, is a natural ſubject of *England*, becauſe his natural allegiance is due to the King of *England* at his birth; and that faith and allegiance is every where due within the King's dominions. *Vaugh.* 279, 301. 7 *Co.* 1 *to* 28.

The *antenati*, or thoſe born in *Scotland* before the deſcent of the *Engliſh* crown to King *James* 1. are aliens; for the uniting the kingdoms by a ſubſequent deſcent, cannot make them ſubjects of that crown to which they were born aliens; but the *poſtnati*, or ſuch as were born after, are not aliens; for being born within the allegiance, and under the protection of the King of *England*, they are his natural ſubjects, and not aliens. 7 *Co.* 1 *to* 28.

If aliens come as enemies into the realm, and poſſeſs themſeves of a town or fort, and one of them has iſſue born here, this iſſue is an alien; for it is not *cœlum* nor *ſolum* that makes a ſubject, but the being born within the allegiance, and under the protection of the King. 7 *Co.* 18. *a.*

Thoſe born on the *Engliſh* ſeas are not aliens. *Molloy* 370.

If an alien has iſſue by an *Engliſhwoman* out of the King's ligeance, the iſſue ſhall be alien, tho' ſhe is a natural ſubject; for ſhe is *ſub poteſtate viri.* 1 *Vent.* 422.

The children of the King's ambaſſadors, born of *Engliſh* parents in a place out of the King's ligeance, are not aliens by the Common law. 7 *Co.* 18. *a. Calvin*'s caſe.

By *ſtat.* 25 *Ed.* 3. *de natis ultra mare*, it is declared, that "the King's children, wherever born, ought to inherit; and that all children inheritors, which from henceforth ſhall be born without the ligeance of the King, whoſe fathers and mothers, at the time of their birth be and ſhall be of the faith and allegiance of the King of *England*, ſhall have and enjoy the ſame benefits and advantages to have and bear the inheritance within the ſame ligeance as other inheritors aforeſaid, in time to come, ſo always that the mothers of ſuch children do paſs the ſea by the licence and wills of their huſbands."

If an *Engliſh* merchant goes beyond ſea, and takes an alien wife, the iſſue ſhall inherit him; ſo it is if an *Engliſhwoman* goes beyond ſea and takes an alien huſband, the children there born ſhall inherit her; for though the ſtatute be in the conjunctive, yet it hath been conſtrued in the diſjunctive to hinder this diſability; and the word *and* being taken inſtead of *or*, as ſometimes it is, it being not reaſonable that the child ſhould not inherit the parent that is of ability, for the defect of the other that is not. *Cro. Car.* 601, 602. *Lit. Rep.* 22, 24. *S. C.* 1 *Sid.* 198.

S. C.

S. C. cited; but it was held that if a baron and feme *Engliſh*, go beyond ſea without licence, or ſtay there beyond the time limited by the licence, and have iſſue, that ſuch iſſue is an alien and not inheritable. *Cro. Eliz.* 3. But *quære*, and ſee *Lit. Rep.* 27. and *Bro.* tit. *Denizen* 6.

Huſband and wife dwelling in *Calais*, when it was taken by the *French*, fled into *Flanders*; where the wife was delivered of a ſon; the iſſue was adjudged a denizen, becauſe his parents were born in *Calais*, then reckoned part of the King's dominions, and becauſe he himſelf was begotten there, though to avoid the rage of enemies, born in another prince's territories. *Dyer* 224.

A baſtard was begot at Tournay by an Engliſhman of an *Engliſh* woman after the conqueſt thereof by *H.* 8. and *Cataline* Ch. J. *Saunders* Ch. B. *Widdon* and *Brown* J. and *Dyer*, held that this baſtard was a liege man, in like manner as iſſue born here in *England* between huſband and wife, and ſo capable of purchaſing and impleading here as a denizen, *Tournay* being at the time parcel of the dominions of *England*. *Dyer* 224.

If an alien comes into *England*, and has iſſue two ſons, thoſe two ſons are *indigenæ*, ſubjects born, becauſe born within the realm. *Co. Lit.* 8. *a.*

There are regularly (unleſs in ſpecial caſes) *three incidents to a ſubject born.* 1. That the *parents be under the actual obedience* of the king. 2dly, That the *place of his birth* be within the king's dominions. 3dly, The *time* of his birth chiefly to be conſidered; for he cannot be a ſubject born of this kingdom, that was born under the ligeance of the king of another kingdom; albeit afterwards the one kingdom deſcends to the king of the other kingdom. 7 *Rep.* 18. *a.*

And therefore all perſons *born in Normandy*, *Gaſcoign*, *Guyen*, *Anjou*, and *Bretaigne*, *while* they were *under the actual obedience of the king of England*, were inheritable within this realm as well as Engliſhmen, becauſe they were under one ligeance, due to one ſovereign; and therefore perſons born in the iſles of *Guernſey* and *Jerſey*, parcel of the dukedom of *Normandy*, tho' no parcel of the realm of *England*, but ſeveral dominions enjoy'd by ſeveral titles, and govern'd by ſeveral laws, are inheritable to lands within the kingdom of *England*. 7 *Rep.* 20. *b.* 21. *a.* —— But perſons born in other parts of *Normandy*, *&c.* now out of the actual poſſeſſion of the kings of *England*, are not for that reaſon ſubjects to the kings of *England*. 7 *Rep.* 18. *a.*

A merchant trading to Poland married an alien, and *died*, *leaving her big with child:* It was held, that the father, being an Engliſh merchant, and living abroad for merchandize, the after-born child is born a denizen, and ſhall be heir to him; for as *Berkley* J. ſaid, She is *ſub poteſtate viri*, *& quaſi* under the allegiance of our king. And *per Bramſton*, tho' the Civil law is that *partus ſequitur ventrem*, yet our law is otherwiſe, and the child ſhall be of the father's condition, and he being an *Engliſh* merchant, and reſiding there for merchandize, his children ſhall by the common law, or rather, as *Berkley* ſaid, by the ſtatute 25 *Ed.* 3. be accounted the king's lieges, as their father was. And another caſe being cited to have been adjudged 2 *Car.* accordingly, judgment was given for the plaintiff the after-born child. *Cro. Car.* 601.

So were ſuch merchant had ſeveral children born in *Poland*, of a *Poliſh* woman, and deviſed his lands in *England* to ſuch children; and it being demanded of all the juſtices of *England* at *Serjeants Inn*, as *Yelverton* J. ſaid, they made no ſcruple any of them, but that the iſſue ſhould inherit, and were not aliens, becauſe the father went with licence, being a merchant, and in our law *partus ſequitur patrem*; and alſo there is blood between him and his iſſue, and he communicates nature to them; and the judges took it that the words of the 25 *E.* 3. de natis ultra mare, *whoſe fathers and mothers be*, *or ſhall be of the allegiance of the king*, ſhall be taken diſtributively and not copulatively, fathers *or* mothers. But the reporter adds a *nota*, that no ſuch opinion was delivered by ſome of the juſtices as mentioned by *Yelverton* J. *Litt. Rep.* 28, 29.

By the 7 *Ann.* it is enacted, that "the children of all natural-born ſubjects, born out of the ligeance of her majeſty, her heirs and ſucceſſors, ſhall be deemed, adjudged, and taken to be natural-born ſubjects of this kingdom, to all intents, conſtructions, and purpoſes whatſoever."

By the ſtat. 4 *Geo.* 2. the above clauſe is confirmed with the following proviſo, "that it ſhall not extend to any children, ſo as to make them natural-born ſubjects of *Great Britain*, whoſe father, at the time of the birth of ſuch children, reſpectively were or ſhall be attainted of high treaſon, by judgment, outlawry or otherwiſe, either in this kingdom or in *Ireland*, or whoſe fathers, at the time of the birth of ſuch children reſpectively, by any law or laws made in this kingdom, or in *Ireland*, were or ſhall be liable to the penalties of high treaſon or felony, in caſe of their returning into this kingdom or into *Ireland*, without the licence of his majeſty, his heirs or ſucceſſors, or any of his majeſty's royal predeceſſors, or whoſe fathers, at the time of the birth of ſuch children reſpectively, were or ſhall be in the actual ſervice of any foreign prince or ſtate, then in enmity with the crown of *England*; but that all ſuch children are, were and ſhall be and remain in the ſame ſtate, plight and condition, to all intents, conſtructions and purpoſes whatſoever, as they would have been in, if the ſaid act of the ſeventh year of her ſaid late majeſty's reign, or this preſent act had never been made; but out of this proviſo are excepted (other than the children of ſuch perſons who went out of *Ireland* in purſuance of the articles of *Limerick*) the child of every ſuch perſon before deſcribed, who at any time between the ſixteenth day of *November* 1708, and the twenty-fifth day of *March* 1731, hath come into *Great Britain* or *Ireland*, *&c.* and hath continued to reſide in any of thoſe places for the ſpace of two years, and during ſuch reſidence hath profeſſed the proteſtant religion; alſo every child, whoſe father came into *Great Britain* or *Ireland*, *&c.* and profeſſed the proteſtant religion and died there, between the times aforeſaid; alſo every child, whoſe father continued in the actual poſſeſſion, or receipt of the rents and profits of any lands, *&c.* for the ſpace of one whole year, at any time between the aforeſaid times, or hath *bona fide*, and for valuable conſideration, ſold, conveyed or ſettled any lands, *&c.* in *Great Britain* or *Ireland*; and any perſon claiming title thereto under ſuch ſale, *&c.* hath been or continued in the actual poſſeſſion or receipt of the rents and profits thereof, for the ſpace of ſix months, between the times aforeſaid, then, *&c.*

By the ſtat. 5 *Geo.* 1. it is enacted, "that if any manufacturer or artificer of or in wool, iron, ſteel, braſs, or any other metal, clockmaker, watchmaker, or any other artificer or manufacturer of *Great Britain*, ſhall at any time after the firſt day of *May* 1719, go into any country out of his majeſty's dominions, there to uſe or exerciſe, or teach any of the ſaid trades or manufactories to foreigners; or in caſe any of his majeſty's ſubjects now being, or who hereafter ſhall be in any ſuch foreign country out of his majeſty's dominions, as aforeſaid, and there uſing or exerciſing any of the ſaid trades or manufactories herein before mentioned, ſhall not return into this realm within ſix months next after warning ſhall be given to him by the ambaſſador, envoy, reſident, miniſter or conſul of the crown of *Great Britain*, in the country in which ſuch artificer ſhall be, or by any perſon authorized by ſuch ambaſſador, *&c.* or by one of his majeſty's ſecretaries of ſtate for the time being, and from thenceforth continually inhabit and dwell within this realm; then and in ſuch caſe every ſuch perſon ſhall be deemed an alien.

2. *Of naturalization and denization.*

Naturalization is an adoption of one to be intitled by birth to what an *Engliſhman* may claim; and where naturalization is, it *takes effect from the birth of the party*, but *denization* takes effect from the date of the patent. *Arg. Cart.* 187.

Naturalization is *always by parliament, and perpetual*; for if one be naturalized *for a day, it is good for ever*; per *Mountague*, Ch. J. *Cro. Jac.* 539.

Aliens denizens are those who are made so by *letters patent*; but *aliens naturalized* are so by *act of parliament*; the one will not make the heir inheritable to his ancestor, but the other will; as for instance, *Cornelius Godfrey* being an *alien* born, had issue his eldest son born in *Flanders*; afterwards the father was made *denizen*, and had issue his youngest son born in *England*, and died; then the eldest son was *naturalized*, and having made a lease for years to *Dixon*, rendring rent, he died without issue, and the younger brother brought an action of debt for the rent arrear; and adjudged that he might; for by the *naturalization* of the elder brother, he was capable to *purchase*, and by consequence to make a lease, and that his brother was inheritable to him; and so the action brought by him was good. *Godb.* 275.

An alien born may become a subject of *England* two ways, by *denization* and by *naturalization*; *denization* is by the King's letters patent, which receive him into the society as a new man, and make him capable to purchase, and to transmit land by descent; but it doth not make him inheritable to any other relation; for though the King by his charter may admit him into the society, yet it cannot alter the law, which denied him to inherit any relations; but if he be naturalized by act of parliament, then he in all things inherits like a natural-born-subject, because in an act of parliament every man's consent is involved. 1 *Inst.* 8. *a.* 129. *a. Palm.* 13. *Cro. Jac.* 539.

If a man take an alien to wife, and afterwards sell his land, and his wife be naturalized, she shall be endowed of the lands sold before her naturalization. *Co. Lit.* 33. *a.*

A man may be made a denizen in tail for life, years, or upon condition; also the King may make a particular denization, as if he grants to an alien *quod in quibusdam curiis suis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem quod est alienigena.* 2 *Jones* 12. *Cro. Jac.* 539. *Co. Lit.* 129. *a.*

It was taken for a ground, that *no statute of naturalization shall be taken by equity*, because it carries with it a prejudice to the subjects in general, by making others sharers with them, not only in the rules, but also in the trades of the kingdom, by which our subjects born are less capable of acquiring a livelihood; *per* three justices; and for this reason, and also for that hereby other subjects may be disinherited of their lands, *Bridgman* Ch. J. said, *Naturalization* (if it may be said of a parliament) carries in it somewhat of injustice; and the rather, because it is not agreeable to the policy of other states, as in *France* and elsewhere, where persons naturalized have not so great privileges as here. *Sid.* 197.

But one cannot be naturalized, either with limitation for years, life, or in tail, or upon condition, for it is against the absoluteness, purity, and indelibility of natural allegiance. *Co. Lit.* 129. *a.* 2 *Rol. Rep.* 95.

A. devised an house to his wife for life, remainder to *B.* (who was an alien) if he should be then a denizen, and capable to take, if not, then to the heirs of his body, and in default of such issue, remainder to the master and governors of the free school of St. *Olaves*. After the death of the wife, *B.* enter'd and enjoy'd the same many years, and sold the same to *C.*; the master and wardens brought an ejectment, supposing that *B.* was an alien, and died without issue; but to prove that he was a denizen, it was shewed, that *in the deed and fine he called himself a freeman, and that the fine was with proclamations, and five years passed*; and that as aliens are prohibited by statute from being of any trade, upon pain of forfeiture of their goods, he would not have incurred the penalty by *using a trade here*, without being first made a denizen. But *per Williams* J. a denizen cannot be made but by letters patent, or act of parliament, which cannot be sufficiently proved without matter of record. The court were all clear of opinion, that the plaintiff had good title, but the parties agreed, and no verdict given, but a juror withdrawn. 2 *Bulst.* 33.

Naturalizing in Ireland is *of no effect as to England*, for naturalization is but *a fiction of law*, and can have effect but upon those only consenting to that fiction; therefore it has the like effect as a man's birth hath, where the law-makers have power, but not where they have not. Naturalizing in *Ireland* gives the same effect in *Ireland* as being born there; so in *Scotland* as being born there; but not in *England*, which consents not to the fiction of *Ireland* or *Scotland*, nor to any but her own. *Vaugh.* 280.

He that is *born within the King's ligeance*, is called sometimes *a denizen*, quasi *deins nee*, viz. born within, and thereupon in latin is called *indigena*, the king's liegeman, for *ligeus* is ever taken for a natural-born subject; but many times in acts of parliament *denizen* is taken for *alien born*, that is *infranchised* or *denizated by letters patent*, whereby the King does grant unto him, *Quod ille in omnibus tractetur, reputetur, habeatur, teneature, & gubernatur tanquam ligeus noster infra dictum regnum nostrum Angliæ oriundus, & non aliter, nec alio modo.* But the king may make a *particular denization*, as he may grant to an alien, *quod in quibusdam curiis suis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem, quod sit alienigena & natus in partibus transmarinis*, to enable him to sue only. *Co. Lit.* 129. *a.*

Note, for law, that where an *alien born* comes into *England*, and brings his son with him who was *born beyond sea*, and is an alien as his father is, there *the king by his letters patent cannot make the son heir to his father*, nor to any other; for *he cannot alter his law by his letters patent*, nor otherwise but by parliament; for he cannot disinherit the right heir, nor disappoint the lord of his escheat. *Bro. Deniz. pl.* 9.

If *an alien born has issue a son beyond sea*, this son is an alien as the father is; and if he comes into *England*, and *is made a denizen*, and after *has issue another son in England*, and he purchases land, *viz.* the father; the *second son shall inherit*, and not the eldest. *Bro. Discent, pl.* 57.

If an alien be made a denizen, and the letters of denization have a *proviso* (usual in such charters) that the denizen shall do his liege homage, and that he shall be obedient, and observe the laws of this realm; this *proviso* is not any condition, for though he never doth his liege homage, nor be obedient to all the laws of this realm, yet this will not make the denization void; for if he doth not observe the laws, he shall forfeit the penalties appointed by them. 1 *Roll. Abr.* 195. *Lane* 58. *S. C.*

An *alien* had issue *two sons*, one of them purchased lands in fee, and died without issue, the other shall not be his heir, because there was no inheritable blood between the father and them; and where the son cannot be heir to the father, there one son cannot be heir to another; but if a man hath *two sons*, and is afterwards *attainted*, and then one of them purchaseth lands, and dieth without issue, in such case the other son shall be heir to his brother, because by the attainder the lineal blood was attainted, and not the blood collateral which was between the brothers. 4 *Leon.* 5. *Palm.* 19.

If an *Englishman* and an *alien* purchase lands *jointly* and the alien die, it was a question, whether the *Englishman* should have the whole by survivorship, because they were joint-tenants till office found; But this is denied by others; because, if the freehold should be in the *alien till office found*, then he might have an action of trespass, for a trespass done on the land; but 'tis plain an alien cannot maintain such an action. *Dyer* 283.

In *ejectment*, the case was, the testator devised an house to his wife for life, remainder to *W. R.* (who was an *alien*) if he should be then a *denizen*, and a person capable to take; if not, then to the heirs of his body, after the death of the wife; *W. R.* enter'd, and the remainder being limited over to the master and wardens of the free school of St. *Olaves* in *Southwark*; they enter'd and brought an action, supposing that *W. R.* was an *alien*, and having sold the estate, was now dead without issue. It was given in evidence for the defendant, that *W. R.* was a *denizen*, because he called himself so in the conveyance which he made of the house; besides, *he exercised a trade*, which by implication proves him to be a *denizen*; but adjudged,

A L I

S. C. cited; but it was held that if a baron and feme *Engliſh*, go beyond ſea without licence, or ſtay there beyond the time limited by the licence, and have iſſue, that ſuch iſſue is an alien and not inheritable. *Cro. Eliz.* 3. But *quære*, and ſee *Lit. Rep.* 27. and *Bro.* tit. *Denizen* 6.

Huſband and wife dwelling in *Calais*, when it was taken by the *French*, fled into *Flanders*, where the wife was delivered of a ſon; the iſſue was adjudged a denizen, becauſe his parents were born in *Calais*, then reckoned part of the King's dominions, and becauſe he himſelf was begotten there, though to avoid the rage of enemies, born in another prince's territories. *Dyer* 224.

A baſtard was begot at Tournay by an Engliſhman of an *Engliſh* woman after the conqueſt thereof by *H.* 8. and *Cataline* Ch. J. *Saunders* Ch. B. *Widdon* and *Brown* J. and *Dyer*, held that this baſtard was a liege man, in like manner as iſſue born here in *England* between huſband and wife, and ſo capable of purchaſing and impleading here as a denizen, *Tournay* being at the time parcel of the dominions of *England*. *Dyer* 224.

If an alien comes into *England*, and has iſſue two ſons, thoſe two ſons are *indigenæ*, ſubjects born, becauſe born within the realm. *Co. Lit.* 8. *a.*

There are regularly (unleſs in ſpecial caſes) *three incidents to a ſubject born.* 1. That the *parents be under the actual obedience* of the king. 2dly, That the *place of his birth* be within the king's dominions. 3dly, The *time* of his birth chiefly to be conſidered; for he cannot be a ſubject born of this kingdom, that was born under the ligeance of the king of another kingdom; albeit afterwards the one kingdom deſcends to the king of the other kingdom. 7 *Rep.* 18. *a.*

And therefore all perſons *born in Normandy*, *Gaſcoign*, *Guyen*, *Anjou*, and *Bretaigne*, *while* they were *under the actual obedience of the king of England*, were inheritable within this realm as well as Engliſhmen, becauſe they were under one ligeance, due to one ſovereign; and therefore perſons born in the iſles of *Guernſey* and *Jerſey*, parcel of the dukedom of *Normandy*, tho' no parcel of the realm of *England*, but ſeveral dominions enjoy'd by ſeveral titles, and govern'd by ſeveral laws, are inheritable to lands within the kingdom of *England*. 7 *Rep.* 20. *b.* 21. *a.* —— But perſons born in other parts of *Normandy*, *&c.* now out of the actual poſſeſſion of the kings of *England*, are not for that reaſon ſubjects to the kings of *England*. 7 *Rep.* 18. *a.*

A merchant trading to Poland married an alien, and *died*, *leaving her big with child:* It was held, that the father, being an Engliſh merchant, and living abroad for merchandize, the after-born child is born a denizen, and ſhall be heir to him; for as *Berkley* J. ſaid, She is *ſub poteſtate viri*, *& quaſi* under the allegiance of our king. And *per Bramſton*, tho' the Civil law is that *partus ſequitur ventrem*, yet our law is otherwiſe, and the child ſhall be of the father's condition, and he being an *Engliſh* merchant, and reſiding there for merchandize, his children ſhall by the common law, or rather, as *Berkley* ſaid, by the ſtatute 25 *Ed.* 3. be accounted the king's lieges, as their father was. And another caſe being cited to have been adjudged 2 *Car.* accordingly, judgment was given for the plaintiff the after-born child. *Cro. Car.* 601.

So were ſuch merchant had ſeveral children born in *Poland*, of a *Poliſh* woman, and deviſed his lands in *England* to ſuch children; and it being demanded of all the juſtices of *England* at *Serjeants Inn*, as *Yelverton* J. ſaid, they made no ſcruple any of them, but that the iſſue ſhould inherit, and were not aliens, becauſe the father went with licence, being a merchant, and in our law *partus ſequitur patrem*; and alſo there is blood between him and his iſſue, and he communicates nature to them; and the judges took it that the words of the 25 *E.* 3. de natis ultra mare, *whoſe fathers and mothers be*, *or ſhall be of the allegiance of the king*, ſhall be taken diſtributively and not copulatively, fathers *or* mothers. But the reporter adds a *nota*, that no ſuch opinion was delivered by ſome of the juſtices as mentioned by *Yelverton* J. *Litt. Rep.* 28, 29.

By the 7 *Ann.* it is enacted, that "the children of all natural-born ſubjects, born out of the ligeance of her majeſty, her heirs and ſucceſſors, ſhall be deemed, adjudged, and taken to be natural-born ſubjects of this kingdom, to all intents, conſtructions, and purpoſes whatſoever."

By the ſtat. 4 *Geo.* 2. the above clauſe is confirmed with the following proviſo, "that it ſhall not extend to any children, ſo as to make them natural-born ſubjects of *Great Britain*, whoſe father, at the time of the birth of ſuch children, reſpectively were or ſhall be attainted of high treaſon, by judgment, outlawry or otherwiſe, either in this kingdom or in *Ireland*, or whoſe fathers, at the time of the birth of ſuch children reſpectively, by any law or laws made in this kingdom, or in *Ireland*, were or ſhall be liable to the penalties of high treaſon or felony, in caſe of their returning into this kingdom or into *Ireland*, without the licence of his majeſty, his heirs or ſucceſſors, or any of his majeſty's royal predeceſſors, or whoſe fathers, at the time of the birth of ſuch children reſpectively, were or ſhall be in the actual ſervice of any foreign prince or ſtate, then in enmity with the crown of *England*; but that all ſuch children are, were and ſhall be and remain in the ſame ſtate, plight and condition, to all intents, conſtructions and purpoſes whatſoever, as they would have been in, if the ſaid act of the ſeventh year of her ſaid late majeſty's reign, or this preſent act had never been made; but out of this proviſo are excepted (other than the children of ſuch perſons who went out of *Ireland* in purſuance of the articles of *Limerick*) the child of every ſuch perſon before deſcribed, who at any time between the ſixteenth day of *November* 1708, and the twenty-fifth day of *March* 1731, hath come into *Great Britain* or *Ireland*, *&c.* and hath continued to reſide in any of thoſe places for the ſpace of two years, and during ſuch reſidence hath profeſſed the proteſtant religion; alſo every child, whoſe father came into *Great Britain* or *Ireland*, *&c.* and profeſſed the proteſtant religion and died there, between the times aforeſaid; alſo every child, whoſe father continued in the actual poſſeſſion, or receipt of the rents and profits of any lands, *&c.* for the ſpace of one whole year, at any time between the aforeſaid times, or hath *bona fide*, and for valuable conſideration, ſold, conveyed or ſettled any lands, *&c.* in *Great Britain* or *Ireland*; and any perſon claiming title thereto under ſuch ſale, *&c.* hath been or continued in the actual poſſeſſion or receipt of the rents and profits thereof, for the ſpace of ſix months, between the times aforeſaid, then, *&c.*

By the ſtat. 5 *Geo.* 1. it is enacted, "that if any manufacturer or artificer of or in wool, iron, ſteel, braſs, or any other metal, clockmaker, watchmaker, or any other artificer or manufacturer of *Great Britain*, ſhall at any time after the firſt day of *May* 1719, go into any country out of his majeſty's dominions, there to uſe or exerciſe, or teach any of the ſaid trades or manufactories to foreigners; or in caſe any of his majeſty's ſubjects now being, or who hereafter ſhall be in any ſuch foreign country out of his majeſty's dominions, as aforeſaid, and there uſing or exerciſing any of the ſaid trades or manufactories herein before mentioned, ſhall not return into this realm within ſix months next after warning ſhall be given to him by the ambaſſador, envoy, reſident, miniſter or conſul of the crown of *Great Britain*, in the country in which ſuch artificer ſhall be, or by any perſon authorized by ſuch ambaſſador, *&c.* or by one of his majeſty's ſecretaries of ſtate for the time being, and from thenceforth continually inhabit and dwell within this realm; then and in ſuch caſe every ſuch perſon ſhall be deemed an alien.

2. *Of naturalization and denization.*

Naturalization is an adoption of one to be intitled by birth to what an *Engliſhman* may claim; and where naturalization is, it *takes effect from the birth of the party*, but *denization* takes effect from the date of the patent. *Arg. Cart.* 187.

A L I

Naturalization is *always by parliament, and perpetual*; for if one be naturalized *for a day, it is good for ever*; per *Mountague*, Ch. J. *Cro. Jac.* 539.

Aliens denizens are those who are made so by *letters patent*; but *aliens naturalized* are so by *act of parliament*; the one will not make the heir inheritable to his ancestor, but the other will; as for instance, *Cornelius Godfrey* being an *alien* born, had issue his eldest son born in *Flanders*; afterwards the father was made *denizen*, and had issue his youngest son born in *England*, and died; then the eldest son was *naturalized*, and having made a lease for years to *Dixon*, rendring rent, he died without issue, and the younger brother brought an action of debt for the rent arrear; and adjudged that he might; for by the *naturalization* of the elder brother, he was capable to *purchase*, and by consequence to make a lease, and that his brother was inheritable to him; and so the action brought by him was good. *Godb.* 275.

An alien born may become a subject of *England* two ways, by *denization* and by *naturalization*; *denization* is by the King's letters patent, which receive him into the society as a new man, and make him capable to purchase, and to transmit land by descent; but it doth not make him inheritable to any other relation; for though the King by his charter may admit him into the society, yet it cannot alter the law, which denied him to inherit any relations; but if he be naturalized by act of parliament, then he in all things inherits like a natural-born-subject, because in an act of parliament every man's consent is involved. 1 *Inst.* 8. *a.* 129. *a. Palm.* 13. *Cro. Jac.* 539.

If a man take an alien to wife, and afterwards sell his land, and his wife be naturalized, she shall be endowed of the lands sold before her naturalization. *Co. Lit.* 33. *a.*

A man may be made a denizen in tail for life, years, or upon condition; also the King may make a particular denization, as if he grants to an alien *quod in quibusdam curiis suis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem quod est alienigena.* 2 *Jones* 12. *Cro. Jac.* 539. *Co. Lit.* 129. *a.*

It was taken for a ground, that *no statute of naturalization shall be taken by equity*, because it carries with it a prejudice to the subjects in general, by making others sharers with them, not only in the rules, but also in the trades of the kingdom, by which our subjects born are less capable of acquiring a livelihood; *per* three justices; and for this reason, and also for that hereby other subjects may be disinherited of their lands, *Bridgman* Ch. J. said, *Naturalization* (if it may be said of a parliament) carries in it somewhat of injustice; and the rather, because it is not agreeable to the policy of other states, as in *France* and elsewhere, where persons naturalized have not so great privileges as here. *Sid.* 197.

But one cannot be naturalized, either with limitation for years, life, or in tail, or upon condition, for it is against the absoluteness, purity, and indelibility of natural allegiance. *Co. Lit.* 129. *a.* 2 *Rol. Rep.* 95.

A. devised an house to his wife for life, remainder to *B.* (who was an alien) if he should be then a denizen, and capable to take, if not, then to the heirs of his body, and in default of such issue, remainder to the master and governors of the free school of St. *Olaves*. After the death of the wife, *B.* enter'd and enjoy'd the same many years, and sold the same to *C.*; the master and wardens brought an ejectment, supposing that *B.* was an alien, and died without issue; but to prove that he was a denizen, it was shewed, that *in the deed and fine he called himself a freeman, and that the fine was with proclamations, and five years passed*; and that as aliens are prohibited by statute from being of any trade, upon pain of forfeiture of their goods, he would not have incurred the penalty by *using a trade here*, without being first made a denizen. But *per Williams* J. a denizen cannot be made but by letters patent, or act of parliament, which cannot be sufficiently proved without matter of record. The court were all clear of opinion, that the plaintiff had good title, but the parties agreed, and no verdict given, but a juror withdrawn. 2 *Bulst.* 33.

Naturalizing in Ireland is *of no effect as to England*, for naturalization is but *a fiction of law*, and can have effect but upon those only consenting to that fiction; therefore it has the like effect as a man's birth hath, where the law-makers have power, but not where they have not. Naturalizing in *Ireland* gives the same effect in *Ireland* as being born there; so in *Scotland* as being born there; but not in *England*, which consents not to the fiction of *Ireland* or *Scotland*, nor to any but her own. *Vaugh.* 280.

He that is *born within the King's ligeance*, is called sometimes *a denizen*, quasi *deins nee*, viz. born within, and thereupon in latin is called *indigena*, the king's liegeman, for *ligeus* is ever taken for a natural-born subject; but many times in acts of parliament *denizen* is taken for *alien born*, that is *infranchised* or *denizated by letters patent*, whereby the King does grant unto him, *Quod ille in omnibus tractetur, reputetur, habeatur, teneature, & gubernatur tanquam ligeus noster infra dictum regnum nostrum Angliæ oriundus, & non aliter, nec alio modo.* But the king may make a *particular denization*, as he may grant to an alien, *quod in quibusdam curiis suis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem, quod sit alienigena & natus in partibus transmarinis*, to enable him to sue only. *Co. Lit.* 129. *a.*

Note, for law, that where an *alien born* comes into *England*, and brings his son with him who was *born beyond sea*, and is an alien as his father is, there *the king by his letters patent cannot make the son heir to his father*, nor to any other; for *he cannot alter his law by his letters patent*, nor otherwise but by parliament; for he cannot disinherit the right heir, nor disappoint the lord of his escheat. *Bro. Deniz. pl.* 9.

If *an alien born has issue a son beyond sea*, this son is an alien as the father is; and if he comes into *England*, and *is made a denizen*, and after *has issue another son in England*, and he purchases land, *viz.* the father; the *second son shall inherit*, and not the eldest. *Bro. Discent, pl.* 57.

If an alien be made a denizen, and the letters of denization have a *proviso* (usual in such charters) that the denizen shall do his liege homage, and that he shall be obedient, and observe the laws of this realm; this *proviso* is not any condition, for though he never doth his liege homage, nor be obedient to all the laws of this realm, yet this will not make the denization void; for if he doth not observe the laws, he shall forfeit the penalties appointed by them. 1 *Roll. Abr.* 195. *Lane* 58. *S. C.*

An *alien* had issue *two sons*, one of them purchased lands in fee, and died without issue, the other shall not be his heir, because there was no inheritable blood between the father and them; and where the son cannot be heir to the father, there one son cannot be heir to another; but if a man hath *two sons*, and is afterwards *attainted*, and then one of them purchaseth lands, and dieth without issue, in such case the other son shall be heir to his brother, because by the attainder the lineal blood was attainted, and not the blood collateral which was between the brothers. 4 *Leon.* 5. *Palm.* 19.

If an *Englishman* and an *alien* purchase lands *jointly* and the alien die, it was a question, whether the *Englishman* should have the whole by survivorship, because they were joint-tenants till office found; But this is denied by others; because, if the freehold should be in the *alien till office found*, then he might have an action of trespass, for a trespass done on the land; but 'tis plain an alien cannot maintain such an action. *Dyer* 283.

In *ejectment*, the case was, the testator devised an house to his wife for life, remainder to *W. R.* (who was an *alien*) if he should be then a *denizen*, and a person capable to take; if not, then to the heirs of his body, after the death of the wife; *W. R.* enter'd, and the remainder being limited over to the master and wardens of the free school of St. *Olaves* in *Southwark*; they enter'd and brought an action, supposing that *W. R.* was an *alien*, and having sold the estate, was now dead without issue. It was given in evidence for the defendant, that *W. R.* was a *denizen*, because he called himself so in the conveyance which he made of the house; besides, *he exercised a trade*, which by implication proves him to be a *denizen*; but adjudged,

that ſince a *denizen* cannot be made but by *letters patent*, or by act of parliament, the proof that he is ſo muſt be by matter of record; and the defendant having failed in ſuch proof judgment was given for the maſter and wardens of the ſchool. 2 *Bulſt.* 33.

By the 7 *Ja.* 1. *cap.* 2. it is enacted, "that no perſon or perſons, of what quality, condition, or place ſoever, being of the age of eighteen years or above, ſhall be naturalized or reſtored in blood, unleſs the ſaid perſon or perſons have received the ſacrament of the Lord's Supper within one month before any bill exhibited for the purpoſe; and alſo ſhall take the oath of ſupremacy and the oath of allegiance in the parliament houſe, before his or her bill be twice read; which oath the lord chancellor, or lord keeper, and the ſpeaker of the houſe of commons, have authority to adminiſter."

A denizen is not capable of nobility, nor to ſit in parliament; for that to have a power of making laws, 'tis neceſſary he ſhould be totally received into the ſociety, which he cannot be without the conſent of parliament. *Molloy* 382.

By the *ſtat.* 12 & 13 *W.* 3. *c.* 2. it is enacted, "that no perſon born out of theſe kingdoms, (although he be naturalized or made a denizen) except ſuch as are born of *Engliſh* parents, ſhall be capable to be of the privy council, or a member of either houſe of parliament, or to enjoy any office or place of truſt, either civil or military; or to have any grant of lands, tenements or hereditaments, from the crown to himſelf, or to any other or others in truſt for him."

But this ſtatute by the 1 Geo. 1. ſt. 2. c. 4. *is explained*, ſo as not to extend to diſable or incapacitate any perſon, who at or before his Majeſty's acceſſion to the crown was naturalized, to be of the privy council, or a member of either houſe of parliament, *&c. and by this ſtatute it is enacted*, that no perſon ſhall hereafter be naturalized, unleſs in the bill exhibited for that purpoſe there be a clauſe, or particular words inſerted, to declare that ſuch perſon ſhall not thereby be enabled to be of the privy council, or a member of either houſe of parliament; or to take any office or place of truſt either civil or military, or to have any grant of lands, tenements or hereditaments from the crown, to himſelf, or any other in truſt for him; and that no bill of naturalization ſhall hereafter be received in either houſe of parliament, unleſs ſuch clauſe or words be firſt inſerted or contained therein.

3. *What acts aliens may do; and what not.*

If an alien, chriſtian or infidel, purchaſe houſes, lands, tenements or hereditaments to him and his heirs, altho' he can have no heirs, he is of capacity to take a fee-ſimple but not to hold. For upon an office found, the King ſhall have it by his prerogative of whomſoever the land is holden. And ſo it is if the alien doth purchaſe land and die, the law doth caſt the freehold and inheritance upon the King. If an alien purchaſe any eſtate of freehold in houſes, lands, tenements or hereditaments, the King upon office found ſhall have them. If an alien be made denizen and purchaſe land, and die without iſſue, the lord of the fee ſhall have the eſcheat, and not the King. But as to a leaſe for years, there is a difference between a leaſe for years of a houſe for the habitation of a merchant ſtranger being an alien, whoſe King is in league with ours, and a leaſe for years of lands, meadows, paſtures, woods, and the like. For if he take a leaſe for years of lands, meadows, *&c.* upon office found the King ſhall have it. But of a houſe for habitation, he may take a leaſe for years as incident to commerce, for without an habitation he cannot merchandize or trade. But if he depart or relinquiſh the realm, the King ſhall have the leaſe. So it is if he die poſſeſſed thereof, neither his executors or adminiſtrators ſhall have it, but the King: For he had it only for habitation, as neceſſary to his trade or traffick, and not for the benefit of his executor or adminiſtrator. But if the alien be no merchant, then the King ſhall have the leaſe for years, tho' it were for his habitation, and ſo it is if he be an alien enemy. And all this was reſolved by the judges aſſembled together for that purpoſe, in the caſe of Sir *James Croſs*, *Paſch.* 29 of the reign of Queen *Elizabeth*. *Co. Lit.* 2. *b.*

An alien cannot purchaſe or inherit any lands in *England*, and the reaſon is, becauſe every perſon is preſumed to have a natural and neceſſary allegiance to that ſociety that firſt protected and preſerved him, and therefore he cannot pay an allegiance to any other ſociety, unleſs he be afterwards received into it. *Vaugh.* 227, 291. 7 *Co.* 16. *Dyer* 2. *pl.* 8.

An alien ſhall take nothing by deſcent, curteſey, dower, or guardianſhip. 1 *Vent.* 417. *Molloy* 464. But he may take the eſtate though he is not capable of holding it; therefore if in tail, he may ſuffer a recovery and dock the remainders. *Co. Lit.* 2. *b.* 2 *Rol. Rep.* 321. *Goldſb.* 102. 4 *Leon.* 82. *Bro.* tit. *Denizen* and *Alien.* 17.

And as an alien cannot inherit himſelf, ſo he cannot be inherited; the grandfather born in *England*, the ſon an alien, the grandſon born in *England*, the grandſon ſhall not inherit the grandfather, becauſe he muſt then repreſent the father, who cannot be repreſented; but if the father be an alien, and two brothers born in *England*, they may inherit each other, becauſe the deſcent is immediate, and they don't take by repreſentation of the father. 1 *Sid.* 193, 198. 1 *Vent.* 413 *to* 429. *Hard.* 224. *Co. Lit.* 8. *Cont.*

If the eldeſt ſon be an alien, the younger brother born in *England* ſhall inherit the father; otherwiſe it were if the eldeſt ſon were attainted, becauſe the eldeſt ſon and all his deſcendants are before the younger brother, and the younger cannot inherit before that line is extinct; and it is a foreign preſumption, to ſuppoſe that any of that line ſhould come over and have children in *England*; but the perſon attainted is ſuppoſed to have all his children reſiding in the kingdom under the King's allegiance; therefore there is a line continuing before that of the younger brother. 1 *Vent.* 417. 1 *Inſt.* 8. *a.* 1 *Sid.* 195.

For the ſame reaſon, if an alien hath four ſons, the two eldeſt aliens, and the two younger naturalized, and one of the younger ſons purchaſe lands and dies, the eldeſt brother having iſſue born within the realm, the younger brother, and not the iſſue of the eldeſt, ſhall inherit. *Hard.* 224.

If an alien hath a ſon an alien, and afterwards is made a denizen, and hath a ſecond ſon, the ſecond ſon ſhall inherit though the eldeſt ſon be alive. *Cro. Jac.* 539.

In *an action of debt* brought by an *adminiſtratrix*; the defendant pleaded, that the plaintiff was an *alien born in Gant*, under the allegiance of the King of *Spain*, an enemy to the Queen: Upon demurrer to this plea, it was inſiſted for the plaintiff, that the action being brought by her as *adminiſtratrix*, tho' ſhe was an *alien*, it was good, becauſe ſhe was not to recover in her own right, but in the right of another, and to his uſe; and it was a queſtion, whether the King of *Spain* could be called an enemy till war was proclaimed? *Owen* 45.

The *Spaniſh ambaſſador* exhibited his bill in Chancery againſt Sir *Richard Bingley*, to have a diſcovery of ſeveral goods, which he ſet forth, as belonging to the *ſubjects* of his maſter *generally*, without alledging any perſons certain; and upon a demurrer to this bill, it was referred by the *chancellor* to ſome of the judges; it was reſolved by them, that the *ambaſſador*, as procurator general of all the ſubjects of *Spain*, could not bring the bill, becauſe the King of *Spain* could not make a *procurator* general of all, or any of his ſubjects, without their conſent; 'tis true, he may appoint an *ambaſſador*, who is a publick miniſter for the King and not for his ſubjects, otherwiſe than as it concerns the King and his miniſter to protect them; and therefore he may mediate, proſecute, and defend them at the council-table, which is in the nature of a court of ſtate. Therefore in this caſe, the chancellor ordered a bill and anſwer to be filed by conſent only, that examination of witneſſes might be taken, and then to determine the matter by way of arbitration, and not by a formal decree. *Hob.* 78.

Caſe, &c. *by an alien*, for words ſpoken by the defendant, *(viz.) that he was a bankrupt:* After a verdict for the plaintiff, it was moved in arreſt of judgment, that the plaintiff was an *alien ſub ligeantia* of another prince, and

extra

extra ligeantiam domini regis; and tho' ſuch an *alien* may have an action here for his *goods or merchandiſe*, and may have an *houſe* for his habitation, yet he cannot maintain a perſonal action for defaming him; but adjudged, that he may; for *merchants ſtrangers* are enabled to trade here, and by conſequence they are entitled to all perſonal actions for the ſupport of their credit and trade, and other actions likewiſe, as *aſſault and battery*, for aſſaults done upon themſelves. 1 *Bulſt.* 134.

If an alien hath iſſue two ſons, *A.* born beyond ſeas, and *B.* born in *England*, and *A.* is naturalized, he ſhall inherit *B. Palm.* 3. 3 *Cro. Jac.* 539.

And now by the 11 & 12 *W.* 3. *c.* 6. it is enacted, "that all and every perſon or perſons, being the King's natural-born ſubject or ſubjects, within any of the King's realms or dominions, ſhall and may hereafter lawfully inherit and be inheritable, as heir or heirs to any honours, manors, lands, tenements or hereditaments, and make their pedigrees and titles by deſcent from any of their anceſtors, lineal or collateral, although the father and mother, or fathers and mothers, or other anceſtor of ſuch perſon or perſons, by, from, through or under whom he, ſhe or they ſhall or may make or derive their title or pedigree, were or was, or is or are, or ſhall be born out of the King's allegiance, and out of his majeſty's realms and dominions, as freely, fully and effectually to all intents and purpoſes, as if ſuch father or mother, or fathers or mothers, or other anceſtor or anceſtors, by, from, through or under whom he, ſhe or they ſhall or may make or derive their title or pedigree, had been naturalized or natural-born ſubjects." See *ſtatute* 25 *Geo.* 2. *c.* 39. *for explaining ſome doubts upon this act.*

If an alien purchaſes lands, the King ſhall have it upon office found, for ſince the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be deveſted out of him but by ſome notorious act, by which it may appear that the freehold is in another; but if an alien purchaſes lands and dies, then the freehold is in the King without office found, becauſe no man can take it as heir to the alien, therefore the freehold is caſt upon the King; but if an alien purchaſe, and afterwards is made a denizen, and then hath iſſue and dies, the iſſue ſhall inherit till office found, becauſe there is a perſon in being to take as heir to the denizen, upon whom the law caſts the freehold, which is not to be deveſted out of him without the ſolemnity of an office. *Co. Lit.* 2. 1 *Leon. pl.* 61.

If an alien and a ſubject purchaſe lands to them and their heirs, the ſurvivorſhip ſhall take place till office found, but the office found intitles the King and ſevers the jointenancy; for the freehold is in the alien by the ſolemnity of livery, 'till 'tis deveſted out of him by ſolemn office found; and every perſon is ſuppoſed a natural-born ſubject that is reſident in the kingdom, and owes a local allegiance to the King till the contrary be found by office. *Cro. Eliz.* 123. *Dyer* 283. *pl.* 31.

If an alien purchaſes a copyhold in fee in the name of *J. S.* in truſt for him and his heirs, though it be found that the copyhold was in truſt for the alien, and that *J. S.* had the legal eſtate, yet the King muſt ſue in Chancery to have the truſt executed for his benefit. 1 *Roll. Abr. Allen* 14. *Style* 20, 21, 41, 76.

An alien cannot purchaſe a leaſe for years of lands, but he may, if he be a merchant, take a leaſe of a houſe for his habitation for years only, and this is for the encouragement of commerce; for if an alien trade he muſt have an abode amongſt us, but if he depart the kingdom or die, it goes to the King, not to his executors or adminiſtrators; becauſe it was a perſonal privilege annexed to the alien, as a merchant, for the encouragement of commerce, and conſequently muſt expire with him, without going to his executors or adminiſtrators. *Poph.* 36 *Co. Lit.* 2. *b.* 1 *Roll. Abr.* 194.

But by the 32 *H.* 8. *cap.* 16. *ſect.* 13. it is enacted, "that all leaſes of any dwelling houſe or ſhop within this realm, or any the King's dominions, made to any ſtranger, artificer, or handicraftſman born out of the King's obeiſance, not being a denizen, ſhall be void and of no effect; and the perſon ſo taking ſuch leaſe forfeits 100*l.* and the perſon letting 100*l.* more; one moiety to the King, and the other to him that ſues for the ſame."

Upon this ſtatute the caſe was, an action of debt was brought upon an obligation, and upon *oyer* demanded of the condition it was recited, and it referred to indentures, which indentures were likewiſe recited *in hæc verba*; the indentures were upon a leaſe of a houſe in *Weſtminſter*, reſerving rents with covenants, *&c.* the defendant pleaded 32 *Hen.* 8. *cap.* 16. and that he was an alien, *&c.* and ſo would avoid the leaſe and the rent, and all the ſecurity; divers exceptions were taken to this plea. 1. He has not ſaid where he was an artificer; but this was over-ruled; for it is a perſonal quality, and ſhall follow the perſon and is univerſal. 2. The defendant ought to have ſet forth and pleaded the indenture, but *per cur'*, Since the plaintiff has brought it into court, as muſt be intended, and ſet it forth, the defendant may plead upon it without ſetting of it forth again. 3. The plea is, that *indentura prædicta vacua exiſtet*, and this was likewiſe over-ruled; for the law is, that the indenture and bond make but one ſecurity, and if the covenant be releaſed before breach, the bond will ſignify nothing. 4. This appears to be a meſſuage or tenement, but he has not averred it to be a manſion-houſe or ſhop, according to the ſtatute; and upon this point the court at firſt were divided. *Keyling* held, that *meſſuagium* is *manſum*, *et quod clare conſtat non debet verificari*. *Moreton:* Though *meſſuagium* be a word of art, and may be applied to other things by a large ſenſe, as to a barn or chapel; yet in propriety it is a manſion-houſe, and ſhall be intended ſo. *Twiſden* and *Wyndham*, That it ought to have been averred; for he muſt bring himſelf preciſely within the ſtatute, eſpecially in ſuch a caſe as this, where he would avoid his own contract; but afterwards the defendant had judgment. 1 *Saund.* 1 *to* 10. 1 *Sid.* 308. *S. C.* 2 *Keb.* 102, 116. *S. C.* 2 *Show. Rep.* 135. *S. C.* cited, and agreed to be good law.

A ſpecial verdict found, that the plaintiff made a leaſe of a houſe to the defendant, who was found to be an alien artificer, and that this leaſe was made by indenture between the plaintiff and defendant, and that there was no other ſecurity or promiſe made by the defendant, and that the defendant entered and enjoyed ſo long, for which the plaintiff brought a *quantum meruit*; to which the defendant pleaded *non aſſumpſit*, and the matter being found *ut ſupra*, the court held, that an *aſſumpſit* would not lie. 1. Becauſe this would evade the ſtatute. 2. A promiſe in law never takes place where there is an actual agreement. 2 *Show. Rep.* 135.

Debt upon an obligation for performance of covenants in a leaſe of a houſe, *&c.* the defendant pleaded the ſtatute 32 *Hen.* 8. *cap.* 16. and ſets forth that he was a *vintner*, and alien artificer; and upon demurrer it was inſiſted upon for him, that a *vintner* is as much an artificer, and within the meaning of the ſtatute, as a *mercer*, *draper*, or *grocer:* Ch. Juſt. This ſtatute refers to another made 1 *R.* 3. *c.* 9. *which prohibits alien artificers to exerciſe any handicraft in* England, *unleſs as ſervant to a ſubject ſkilful in the ſame art, upon pain of forfeiture of his goods*; now the miſtery of a *vintner* chiefly conſiſts in mingling of wines, and that is not properly an art but a cheat; ſo the plaintiff had judgment. 3 *Mod.* 24.

If a woman alien, be ſhe friend or enemy, marry a ſubject, ſhe ſhall not be endowed, becauſe by the policy of the Common law, all aliens are diſabled from acquiring any freehold amongſt us; alſo dower is an eſtate created by act of law, and therefore the law, which *nil fruſtra agit*, ſhall not transfer an eſtate to one who cannot keep it, but muſt immediately, in reſpect of her legal diſability, give title to another; and there is a diverſity between ſuch acts of law and the acts of the party himſelf; as if an alien makes an actual purchaſe, *&c.* So aliens ſhall not be tenants by the courteſy, by the ſame reaſon. 7 *Co.* 25. *Co. Lit.* 31.

An alien friend may have perſonal actions but not real; an alien enemy ſhall have neither real, perſonal, nor mixt actions. The reaſon why an alien friend is allowed to maintain a perſonal action is, becauſe he would otherwiſe

wiſe be incapacitated to merchandiſe, which may be as much to our prejudice as his; but as to the allowing of him to maintain real actions, there is no reaſon for it, becauſe there is no neceſſity that he ſhould ſettle amongſt us; an alien enemy is diſabled from the prejudice that may accrue to the King and kingdom, if he were allowed to maintain an action. *Co. Lit.* 129. *b.* 1 *And.* 25. *Dyer* 2. *b.*

A merchant ſtranger ſhall have an action for ſaying *He is a bankrupt*, for by law he may have perſonal actions, and theſe words tend to impair his credit in trade. *Yelv.* 198. 1 *Bulſ.* 134. *S. C.*

An alien friend, merchant, may upon a ſtatute extend lands, and upon office the King ſhall not have them, and upon ouſter he ſhall have an aſſize; for the main end and deſign of both the ſtatute-ſtaple and merchant, was to promote and encourage trade, by providing a ſure and ſpeedy remedy for merchant ſtrangers as well as natives, to recover their debts at the day aſſigned for payment. *Dyer* 2. *b. in marg.*

An alien friend may be an adminiſtrator, and ſhall have adminiſtration of leaſes, as well as perſonal things, becauſe he hath them in another's right, and not to his own uſe. *Cro. Car.* 8. 1 *Vent.* 417. *S. C.* cited.

But it has been long doubted, whether an alien enemy ſhould maintain an action as executor; for on the one hand it is ſaid, that by the policy of the law, alien enemies ſhall not be admitted to actions to recover effects which may be carried out of the kingdom, to weaken ourſelves and inrich the enemy; and therefore publick utility muſt be preferred to private convenience; but on the other hand it is ſaid, that theſe effects of the teſtator are not forfeited to the king by way of repriſal, becauſe they belong not to the alien enemy, for he is to recover them for others; and if the law allows ſuch alien enemies to poſſeſs the effects as well as an alien friend, it muſt allow them power to recover, ſince in that there is no difference, and by conſequence he muſt not be diſabled to ſue for them; if it were otherwiſe it would be a prejudice to the King's ſubjects, who could not recover their debts from the alien executor, by his not being able to get in the aſſets of the teſtator. *Cro. Eliz.* 683. *Molloy* 870. *Carter* 49, 191. *Skin.* 370.

If an alien enemy comes here *ſub ſalvo conductu*, he may maintain an action. So if an alien may come hither in time of peace *per licentiam domini regis*, as the *French* proteſtants did, and lives here *ſub protectione*, and a war afterwards happens between the two nations, he may maintain an action, for ſuing is but a conſequential right of protection; and therefore an alien enemy, that is here in peace under protection, may ſue a bond; *aliter* of one commorant in his own country. 1 *Salk.* 46.

4. *Of pleading alienage.*

If one born in *Jerſey*, or elſewhere within the King's obedience, brings a real action, and the tenant pleads, that the demandant is an alien born under the obedience of the *French* King, and out of ligeance of, *&c.* the demandant may reply, that he was born at ſuch a place in *England*, within the King's allegiance, *&c.* and ſuch hath ever been the manner of pleading in ſuch caſe. *Co. Lit.* 161. 7 *Co.* 26. 6 *Co.*

In an aſſiſe *tempore Jac.* 1. the defendant pleaded that the plaintiff was born *apud E. infra regnum Scotiæ ac intra ligeantiam dicti domini regis regni ſui Scotiæ, ac extra ligeantiam dicti domini regis regni ſui Angliæ*; and this was held no good plea, becauſe it referred ligeance and faith to *England*, and not to the King. 7 *Co.* 1, 9. *Litt. Rep.* 26.

In debt on an obligation, which was for payment of rent reſerved by leaſe for years; the defendant pleaded the 32 *Hen.* 8. and that he was an alien artificer, *&c.* the plaintiff replied, that he was no alien artificer; but having laid no place where he was born, the replication was held naught. 1 *Sid.* 357.

The defendant pleaded in abatement, that the plaintiff was an alien enemy, born in ſuch a place in *France*; the plaintiff replied that he is *indigena*, and born at ſuch a

place in the kingdom of *England*, *& non alienigena modo & forma prout, &c. et hoc petit quod inquiratur per patriam*, and upon demurrer to this replication, it was held to be ill; for that the plaintiff did not rely upon the firſt part of it, that he was born in *England*, and ſo conclude with an averment, that an iſſue might be taken by the other ſide, *viz.* that he was born in *England*, and that this matter might be triable by a proper *viſne*; but here he hath put *alien* or not *alien* in iſſue, viz. *non alienigena modo & forma*, which cannot be tried for want of a *viſne*; and therefore judgment was given that the bill ſhould abate. *Carth.* 302.

In *indebitatus aſſumpſit* the defendant pleaded that the plaintiff was an alien enemy born at *Roan* in *France*, under the allegiance of, *&c.* The plaintiff replied, he was born at *Hamburgh*, under the allegiance of the emperor, a friend of the King, *&c.* and *traverſed*, that he was *born at Roan* in *France*, *&c.* Upon demurrer, the defendant had judgment, becauſe by the traverſe *Roan* is part of the iſſue, which is very immaterial; the plaintiff ſhould have traverſed, that he was born under the allegiance of the *French* King. 3 *Salk.* 28.

In debt for an eſcape, the defendant pleaded that the plaintiff was an alien enemy, born at *Roan* in *France*, under the allegiance of the *French* King, *&c.* and the plaintiff replied that he was a natural ſubject, born at *Weſtminſter* in the county of *Middleſex*; and traverſed, that he was born in *France*; and upon demurrer, the court held this to be an *immaterial traverſe*; for the plaintiff ſhould have reſted and tendered an iſſue upon his being born at *Weſtminſter*. 3 *Salk.* 28.

The moſt uſual and beſt pleading in actions brought by an alien, is both excluſive and incluſive, viz. *extra ligeantiam domini regis, &c. et infra ligeantiam alterius regis.* 7 *Rep.* 16. *b.* cites 9 *E.* 4. 7. *et Lib. Intrat. fo.* 244.

Alienage may be pleaded in bar after imparlance, as well as to the writ before imparlance. *Jenk.* 130. *pl.* 64.

Alien-priories, Thoſe cells of the religious in *England* which belonged to foreign monaſteries. Theſe were diſſolved by authority of parliament, in the reign of *Hen.* 4. but ſome were made *indigenæ*, or endenized. *Cowel.*

Alienation, (from *alienare*, to alien) A transferring the property of a thing to another. It chiefly relates to lands and tenements; as to *alien* land in fee, is to ſell the fee-ſimple thereof, *&c.* and to *alien* in mortmain, is to make over lands or tenements to a religious houſe or body politick; for which the King's licence is to be obtained. *Stat.* 15 *R.* 2. *c.* 5. *Stat. Weſt.* 2. *c.* 25. *ann.* 13 *Ed.* 1. fines for alienations are taken away by ſtatute; except fines due by particular cuſtoms of manors. 12 *Car.* 2. *c.* 24. *Danv. Abr.* 327. All perſons who have a right to lands may generally *alien* them to others: But ſome *alienations* are forbidden; as an *alienation* by a particular tenant, ſuch as tenant for life, *&c.* which incurs a forfeiture of eſtate. 1 *Inſt.* 118. For if leſſee for life, by livery alieneth in fee, or makes a leaſe for the life of another, or gift in tail, it is a forfeiture of his eſtate: So if tenant in dower, tenant for another's life, tenant for years, *&c.* do alien for a greater eſtate than they lawfully may make. 1 *Inſt.* 233, 251. Conditions in feoffments, *&c.* that the feoffee ſhall not *alien*, are void. 1 *Inſt.* 206. *Hob.* 261. And it is the ſame where a man poſſeſſed of a leaſe for years, or other thing, gives and ſells his whole property therein, upon ſuch condition: but one may grant an eſtate in fee, on condition that the grantee ſhall not *alien* to a particular perſon, *&c.* and where a reverſion is in the donor of an eſtate, he may reſtrain an *alienation* by condition. *Lit.* 361. *Wood's Inſt.* 141. Eſtates in tail, for life, or years, where the whole intereſt is not parted with, may be made with condition not to *alien* to others, for the preſervation of the lands granted in the hands of the firſt grantee.

Alimony, *(Alimonia)* Signifies nouriſhment or maintenance: and in a legal ſenſe, it is taken for that allowance which a married woman ſues for and is entitled to, upon any occaſional ſeparation from her huſband. *Cowel. Termes de la ley.* Where a woman is divorced *a menſa & thoro*, ſhe may ſue her huſband in her own name for

alimony

alimony or maintenance out of the husband's estate, during the separation, either in the *Chancery* or *spiritual* court; and it will be allowed, except it be in cases of elopement and adultery. 1 *Inst.* 235. But the *spiritual* court is the proper court to sue in for *alimony:* And the not allowing a wife maintenance, is not an offence within the statute 1 *Eliz.* but a neglect of the husband's duty, and a breach of his vow. 12 *Rep.* 30. A man may be sued in the *spiritual* court for beating his wife, and he may be order'd to pay her so much *per* week *alimony:* But a prohibition hath been granted by *B. R.* in such a case; and the wife may have sureties of the peace for unreasonable beating her. *Trin.* 11 *Jac.* 1. *Moor* 874. *Alimony* was antiently expressed by *rationabile estoverium*, reasonable maintenance; as we may see by this writ: *Rex vic.* Bucks *salutem. Præcipimus tibi quod de maritagio* Emmæ de Pinckney *uxoris* Laurentii Penire, *qui excommunicatus est, eo quod prædictam* Emmam *affectione maritali non tractat, eidem* Emmæ rationabile estoverium *suum invenias, donec idem* Laurentius *vir suus eam tanquam uxorem suam tractaverit, ne iteratus clamor ad nos inde perveniat. T.* 29 *Aug. Rot. Claus.* 7 *Hen.* 3. *p.* 1. *m.* 3. *Cowel.*

Allaunds, *Ab alanis, scythiæ gente*, hare-hounds. *Cowel.*

Allay, (Fr. in Lat. *allaya)* A word used for the tempering and mixture of other metals with silver or gold. *Sat.* 9 *Hen.* 5. *st.* 2. *c.* 4. and *st.* 1. *c.* 11. This *allay* is to augment the weight of silver or gold, so as it may defray the charge of coinage, and to make it the more fusile. A pound weight of standard gold, by the present standard in the mint, is twenty-two carats fine, and two carats *allay:* And a pound weight of right standard silver, consists of eleven ounces two pennyweights of fine silver, and eighteen pennyweight of *allay. Lownd's Essay upon Coins, p.* 19. *Cowel.* One pennyweight of angel gold is worth four shillings and two pence; of crown gold, three shillings and ten pence: And one ounce of pure silver, is worth five shillings and four pence, and with *allay* five shillings. *Mod. Just.* tit. *Coin. p.* 120. See **Coin.**

Allegiance, or **Ligeance,** *Allegiantia*, (from the Lat. *alligare)* Is the lawful obedience, which a subject is bound to render to his sovereign. *Co. Lit.* 129. *a.* 7 *Co.* 4.

Allegiance is *naturalis, acquisita, vel localis*; that is, *natural, acquired*, or *local. Natural*; as every subject born immediately upon his birth ought to pay a natural allegiance to his sovereign, and is called a *natural* liegeman, as the King is said to be his *natural* liege lord. *Acquired*; so a man naturalized, or made denizen, *acquires* a ligeance to the King. *Local*; so a man who comes under the dominion of the King, ought to pay a *local* allegiance; for he has his protection. And therefore, if an alien friend come into *England*, and commit treason, the indictment shall be *contra ligeantiæ suæ debitum.* 7 *Co.* 4, 5, 6.

But ligeance is *reciprocum ligamen, quia sicut subditus tenetur ad obedientiam, ita rex tenetur ad protectionem.* Thus, an alien enemy, if he comes into the realm, does not owe any allegiance, and cannot be indicted for treason; but shall be punished by the martial law. 7 *Co.* 5, 6.

By the antient law in the time of King *Arthur*, and afterwards revived in the time of King *Edgar*, every man of the age of twelve years or upwards, ought to have been sworn to the King in the tourn, or in the leet. *Co. Lit.* 68. *b.* 172. *b.* 7 *Co.* 6. *b.* 7. *a.* 1 *Bulst.* 199.

By the statute 1 *El. c.* 1. *s.* 19. Every archbishop, bishop, and other ecclesiastical person and officer, and every judge, justice, mayor, and other temporal officer, and every person, who has fees or wages of the crown, shall take the oath of supremacy and fidelity, therein declared and set forth.

And by *sect.* 24, 25. Every person, before he sue livery, or *ouster le main*, do homage, be received into the Queen's service, take orders, or any degree in the University, must take the said oath.

By the stat. 5 *Eliz. c.* 1. *s.* 5. Every schoolmaster, publick or private teacher of children, bencher, utter barrister, antient of any house of court, principal of any inn of *Chancery*, attorney, prothonotary, philizer, sheriff, escheator, feodary, and all persons admitted to any office at Common law, or other law, shall take the said oath.

By the statute 3 *Jac.* 1. *c.* 4. the oath of allegiance is prescribed.

And by the stat. 7 *Jac.* 1. *c.* 6. All persons above 18, of whatever sex or degree therein intended, shall take it, *viz.* every archbishop and bishop, before the lord chancellor or lord keeper:

An ecclesiastical judge or officer before the archbishop, bishop, or ordinary of the dioceses, where he exercises his office:

Every person of, or above the degree of a baron or baroness, and all of the privy council, and the presidents of *Wales*, and the North, before four of the privy council, of whom the lord chancellor, treasurer, privy seal, or secretary to be one; or, if above thirty miles from *London*, before the bishop of the dioceses, or such whom the lord chancellor, or lord keeper, by *dedimus potestatem* shall authorize:

The servants of the King, Queen, or Prince, *&c.* before the lord steward, *&c.* judges, justices of peace, sheriffs, or other officers of justice, or who receive a fee of the King, before the lord chancellor or lord keeper; treasurer, admiral, warden of the *cinque ports*, chief justice of *B. R.* or *C. B.* justices of assize in the county where they reside, or other whom the lord chancellor or keeper shall authorize:

Mayor, or other chief officer of a corporation, before such who administer the oath of office: Aldermen, and under officers, and every freeman of a corporation, before the chief officer in the open hall:

All of the house of commons, before their entry into the house in every parliament, before the lord steward, or his deputies:

Master of the ordnance, lieutenant of the tower, and mint master, the four principal officers of the navy under the lord admiral, before lord chancellor, or lord keeper or lord admiral; and all officers, *&c.* of the tower, before the lord lieutenant of the tower:

Vice-admirals, captains, and soldiers in the King's ships, before any two of the said principal officers of the navy:

All persons, having the charge of forts, *&c.* captains of soldiers within the realm, before justices of assise, or two justices of peace:

Doctors, advocates, and proctors of the Civil law, and their clerks, before the bishop of the dioceses where they reside:

All who sue livery, or *ouster le main*, before the master or surveyor, or attorney of the court of wards, in open court:

Serjeants at law, servants to the judges, and officers in Serjeants Inn, before one of the chief justices, or chief baron:

All subjects in inns of court, and principals and treasurers of inns of *Chancery*, before the benchers or readers of the said houses: And all admitted into inns of *Chancery*, before the principal, or treasurer, and antients, or four of them, in their open halls:

Prothonotaries, filizers, officers, attornies, and chief clerks of any court of record, before the judges of the same court:

Clerks of *Chancery*, and all officers of *Chancery*, before the master of the rolls, or two masters in *Chancery:*

Parsons, vicars, and curates, and others in orders, schoolmasters, and ushers, before the bishop of the dioceses, or ordinary, in open court:

Vice chancellors of both Universities, heads of colleges and halls, proctors and beadles, before the senior master in convocation: And others promoted to any degree, before the vice chancellor in the congregation house: All fellows and scholars of houses, before the head of such house, in the open hall:

Doctors of physick, who are admitted into the college of physicians, by the president of such college.

By the *stat.* 25 *Car.* 2. *c.* 2. all persons admitted into any office, civil or military, or who shall receive any salary, fee, *&c.* by patent, or grant from the crown, or have any place of trust, or in the navy, or service in the houshold of the King, or Duke of *York*, shall take the said

ſaid oaths of ſupremacy and allegiance the next term, or at the next quarter ſeſſions of the place were he reſides.

By the *ſtat.* 1 *W. & M. c.* 8. all perſons, required to take the aforeſaid oaths, ſhall inſtead thereof take the oaths thereby preſcribed.

By the *ſtat.* 7 & 8 *W.* 3. *c.* 24. all, who ſhall act as ſerjeant, counſellor, barriſter, advocate, attorney, ſollicitor, proctor, clerk, or notary, not having before taken the ſaid oaths, ſhall incur a *præmunire.*

By the *ſtat.* 13 & 14 *W.* 3. *c.* 6. and 1 *Ann. c.* 22. all in office, *&c.* (as by the *ſtat.* 25 *Car.* 2. *c.* 2.) and all eccleſiaſtical perſons, members of colleges and halls in either univerſity, of the foundation, (being 18,) all teaching pupils in the univerſity or elſewhere, ſchoolmaſters, uſhers, teachers of ſeparate congregations, all who act as ſerjeant, *&c.* (as by the *ſtat.* 7 & 8 *W.* 3. *c.* 24.) ſhall take the oath of abjuration in three months after admiſſion to ſuch place, or practice, in one of the courts at *Weſtminſter*, or at the quarter ſeſſions of the place where he reſides, or at the next term or quarter ſeſſions, tho' after three months.

By the *ſtat.* 6 *Ann. c.* 14. and 8 *Ann. c.* 15. all officers, civil and military in *Scotland*, ſhall take the oaths of allegiance, aſſurance, and abjuration in the courts of ſeſſion, juſticiary, or *Exchequer* of *Scotland*, or quarter ſeſſion there; or in Chancery, *B. R. C. B.* or *Exchequer* in *England.*

By the *ſtat.* 1 *Geo.* 1. *c.* 13. all perſons in office, *&c.* (as by the *ſtat.* 1 *Ann. c.* 22.) conſtables, writers in *Scotland*, being in *London*, or *Weſtminſter*, or thirty miles diſtance on the firſt day of *Michaelmas* term, ſhall take the oaths in Chancery, *B. R. C. B.* or Exchequer the ſame term, or otherwiſe before the 23d of *January*, at the quarter ſeſſions of the place where he ſhall reſide on the firſt of *December* 1715; and all who come after into office, *&c.* ſhall do ſo in three months.

By the *ſtat.* 2 *Geo.* 2. *c.* 31. it is ſufficient, if any take the oaths before the end of the next term, or before the next quarter ſeſſions, tho' not within three months; or if beyond ſea, within four months after return; and all omiſſions before, are pardoned

By the *ſtat.* 5 *El. c.* 1. the biſhop may tender the oath of ſupremacy and allegiance required by 1 *El. c.* 1. to any ſpiritual, or eccleſiaſtical perſon within his dioceſs.

By the *ſtat.* 3 *Jac.* 1. *c.* 4. *ſ.* 13. the biſhop, or two juſtices of peace may tender the oath of allegiance therein required to any convict, or perſon indicted for recuſancy, or who hath not taken the ſacrament twice the year paſt, and may examine on oath perſons unknown, who paſs through their county, and if they do not deny being recuſant, and having received the ſacrament, may (if not noblemen or noblewomen) tender them the ſaid oath.

And by *ſect.* 41. of the ſame ſtatute, ſix of the privy council, whereof the lord chancellor, treaſurer, or ſecretary of ſtate to be one, may tender to nobility.

By the *ſtat.* 7 *Jac.* 1. *c.* 6. *ſect.* 26. any of the privy council, or the biſhop of the dioceſs, may require any nobleman or noblewoman of 18 years of age, or any two juſtices of peace of the county or corporation, may require any other perſon of that age, to take the ſaid oath: And, if any baron or baroneſs of that age be indicted or convicted for not coming to church, or receiving the ſacrament, three of the privy council, of whom the lord chancellor, treaſurer, privy ſeal, or ſecretary, to be one, ſhall require ſuch oath: And, if any of that age, and under that degree, be ſo indicted or convict; or, if the miniſter, conſtable, and churchwardens, or any two of them, complain to a juſtice of peace where the perſon ſuſpected dwells, one juſtice of peace ſhall require it.

But a conſtable, upon ſuch warrant, cannot break open a houſe to take him. 12 *Co.* 131.

By the *ſtat.* 1 *W. & M. c.* 8. Perſons ſhall take the oaths there preſcribed, before thoſe enabled to tender the former oaths.

By the *ſtat.* 7 & 8 *W.* 3. *c.* 27. thoſe who may lawfully tender the oaths, may ſummon any to take the ſaid oaths.

So by the *ſtat.* 1 *Geo.* 1. *c.* 13. *ſ.* 10. two or more juſtices of the peace, or any appointed by the King by order in privy council, or by commiſſion under the great ſeal, may tender the ſaid oaths to any they ſuſpect to be dangerous, or diſaffected to the government.

Sect. 11. By writing under their hands and ſeals they may ſummon any to appear before them at a certain time therein appointed, to take the ſaid oaths: Which ſummons ſhall be ſerved on him, or left at his dwelling or uſual abode, with one of the family.

By the *ſtat.* 11 *Eliz. c.* 1. he, who obſtinately refuſes the oath there preſcribed, ſhall loſe, for his life only, every eccleſiaſtical or temporal promotion, or office, or benefice he had at the time of the refuſal.

By the *ſtat.* 3 *Jac.* 1. *c.* 4. *ſect.* 14. if a perſon refuſe the oath therein preſcribed, when tendered by the biſhop or two juſtices, or to be examined upon oath, (unleſs noble) they may commit him to goal without bail, 'till next aſſizes or quarter ſeſſions, when the oath ſhall be again tendered, and if refuſed, the refuſer (unleſs noble) incurs a *præmunire.*

A *feme covert* ſhall be committed only 'till ſhe takes the oath.

And noblemen or noblewomen (other than *feme covert*) refuſing, when tendered by ſix of the privy council, incur a *præmunire.*

By the *ſtat.* 7 *Jac.* 1. *c.* 6. *ſ.* 26, 27. refuſers to take the oath duly tendered, ſhall be committed to goal without bail, by thoſe impowered to tender it, 'till next aſſiſes, or quarter ſeſſions, where the oath ſhall be again tendered, and a refuſal incurs a *præmunire*, (except *femes covert*, who ſhall be committed till they take it;) and ſuch perſon is incapable of any office, *&c.* (being no office of inheritance, or miniſterial function) or to practiſe the Common law, phyſick, ſurgery, or as apothecary, or other liberal ſcience, 'till he take ſuch oath.

So he ſhall be committed for a refuſal, tho' he be a lord of parliament. 12 *Co.* 131.

By the *ſtat.* 25 *Car.* 2. *c.* 22. *ſect.* 4, 5. a perſon thereby required to take the oaths, who ſhall neglect or refuſe, ſhall be *ipſo facto* incapable of office, or employment: And if he executes it after ſuch neglect, he forfeits on conviction 500*l.* and ſhall be diſabled to ſue in any court of law or equity; to be guardian, executor, or adminiſtrator; to take a legacy, or deed of gift; or bear any office within the realm.

By the *ſtat.* 1 *Geo.* 1. *c.* 13. *ſect.* 7. all, who refuſe to take the oaths in the places, and at the times preſcribed, ſhall be *ipſo facto* adjudged incapable to enjoy their offices, or any profit appertaining to them; and every ſuch office ſhall be void.

And by *ſect.* 10, 11. any, who refuſes the oaths tendred purſuant to that act, or to appear at the time to which ſummoned, or at the next quarter ſeſſions, and there take the ſaid oaths, ſhall be adjudged a popiſh recuſant convict, and to forfeit and be proceeded againſt as ſuch.

Allegiare, To excuſe, defend, or to juſtify by due courſe of law.——*Si quis ſe velit* allegiare *ſecundum regis weregilidum hoc faciat. Leges Alured. c.* 4. —— *Allegiat ſe facinoris*, that is, clear or purge himſelf of the crime objected to him. *Ib. c.* 16. Allegiare, *i. e. juxta legem ſe a crimine, quo impetitur, liberare. Spelman. Cowel.*

Aller-good, The word *aller* is uſed to give a ſuperlative ſenſe to the word added to it; ſo *aller-good* is the greateſt good. *Cowel.*

Allevíare, Signifies to levy or pay an accuſtomed fine. Some of our antient hiſtorians mention ſuch fines paid by perſons to their lords for redemption of their daughters, or for a licence to marry them. *Brad. Pref. to Eng. Hiſt. p.* 64. *Cowel.*

Allocation, *(Allocatio)* In a legal ſenſe is an allowance made upon account in the *Exchequer*; or more properly a placing or adding to a thing. *Cowel.*

Allocatione faciendâ, A writ for allowing to an accountant ſuch ſums of money as he hath lawfully expended in his office; directed to the lord treaſurer, and barons of the *Exchequer*, upon complaint made. *Reg. Orig.* 206.

Allocato comitatu, Is a new writ of *exigent*, allowed before any other *county court* holden, on the former not being fully ſerved, or complied with, &c. *Fitz. Exig.* 14. *Jacob.*

Allodial, This is where an inheritance is held without paying any acknowledgement to any lord or ſuperior; and therefore is of another nature from that which is *feodal* or *beneficiary*. It is derived from the Saxon *a* privative and *leod*, *vaſallus*, or rather *leof*, *dominus*, *i. e.* held without any burthen or vaſſalage, or without a ſuperior. Allodial lands are free lands, which a man enjoys without paying any fine, rent, or ſervice to any other. *Cowel.* See **Alodium.**

Alluginoſus, i. e. *Mucidus.*

Alluminor, (from the Fr. *allumer*, to lighten) Is uſed for one who coloureth or painteth upon paper or parchment; and the reaſon is, becauſe he gives light and ornament by his colours to the letters or other figures. The word is uſed in ſtat. 1 *R.* 3. *c.* 9. but we now call ſuch a one a *limner*. *Cowel.*

Almaine rivets, Is a light kind of armour for a man, with ſleeves of mail, or plates of iron, for the defence of his arms: This may ſeem to have been the pattern of the rocket, not long ſince in uſe among us, having looſe ſleeves, which the livery-cloaks of noblemens coachmen may alſo ſeem to imitate. *Cowel.*

Almanack, Is part of the law of *England*, of which the court muſt take judicial notice; *per Holt* Ch. J. 6 *Mod.* 41.—6 *Mod.* 81. *Trin.* 2 *Ann. B. R.* in the caſe of *Brough* v. *Perkins*, *S. P.* by *Holt* Ch. J. and ſo is *annas biſſextilis*, and that it is the ſame in caſe of moveable feaſts, and the diverſity between them and fixed feaſts is ridiculous; but the almanack to go by is that annexed to the Common-prayer book.—3 *Salk.* 69. *S. C.* but the ſame point does not appear—The diverſity of fixed and moveable feaſts was condemned *per tot cur.* for we know neither the one nor the other but by the almanacks, and we are to take notice of the courſe of the moon. 6 *Mod.* 150, 160. *Paſch.* 3 *Ann. B. B.* in the caſe of *Harvey* v. *Broad.*—*ibid.* 196. *S. C.* and *Holt* Ch. J. ſaid, that at the council of *Nice* they made a calculation moveable for *Eaſter* for ever, and that is received here in *England*, and become part of the law; and ſo in the calendar eſtabliſhed by act of parliament.—2 *Salk.* 626. *pl.* 8. *S. C.* accordingly *per cur.*

Whether the patent to the company of ſtationers for ſole printing of almanacks be good or not, ſee 10 *Mod.* 105.

Whether ſuch a day of the month was on a *Sunday* or not, and ſo not a *dies juridicus*, is triable by the country or the almanack. *Dyer* 182. *pl.* 55.

It was ſaid that the court might judicially take notice of almanacks, and be informed by them; and cited *Robert*'s caſe in the time of Lord *Catline*; and *Coke* ſaid, that ſo was the caſe of *Galery* v. *Banbury*, and judgment accordingly. 1 *Leo.* 242. *pl.* 328. *Paſch.* 29 *Eliz. B. R. Page* v. *Fawcett.*—*Cro. Eliz.* 227. *pl.* 12. *S. C.* and held that examination by almanacks was ſufficient, and a trial *per pais* not neceſſary, tho' the error aſſigned, *viz.* that the 16 *Feb.* on which day judgment was ſaid to be given, was on a *Sunday*, was an error in fact; and the judgment was reverſed.

Almaria, for *Armaria*, The archives of a church, a library.—*Omnia etiam eccleſiæ* almaria *confregit*, *chartas & privilegia quædam igne cremavit. Gervaſ. Dorob. in Rich.* 1. *Cowel. Du Freſne.*

Almner or **Almoner,** *(Eleemoſynarius)* An officer of the King's houſe, whoſe buſineſs it is to diſtribute the King's *alms* every day. He ought to admoniſh the King to beſtow his alms, eſpecially upon ſaints days and holy days; and he is likewiſe to viſit the ſick, widows that are poor, priſoners and other neceſſitous people, and to relieve them under their wants; for which purpoſe, he hath the forfeiting of deodands, and the goods of *felo's de ſe*, allowed him by the King. *Fleta*, *lib* 2. *cap.* 22. The lord *almoner* has the diſpoſition of the King's diſh of meat, after it comes from the table, which he may give to whom he pleaſes; and he diſtributes four pence in money, a twopenny loaf of bread, and a gallon of beer; or inſtead thereof, three pence daily at the court gate, to twenty-four poor perſons of the King's pariſh, to each of them that allowance. This officer is uſually ſome biſhop. *Cowel. Jacob.*

The almoner has not any intereſt, but is miniſter and has diſpoſition of the alms of the King *durante bene-placito*; and if the almoner commit treaſon, and be *attaint*, this is no forfeiture of what is granted to him in the uſual form, but only during his life, yet the King may grant it at will without recital, becauſe it is a leſs eſtate than he has, and if he grant the goods and chattels of *felo de ſe*, he need not recite the grant of them made to the almoner, nor determine his will as to them. 1 *Rep.* 50.

If a *felo de ſe* is indebted to the King, ſuch debt ſhall be paid before the almoner ſhall diſtribute. *Savil* 60. *pl.* 129.

Almoine. See **Aumone,** and **Frank-almoine.**

Almonarium, *Almonaria*, *Almeriola*, A cup-board or ſafe, to ſet up cold and broken victuals, to be thence diſtributed for alms to the poor. This ſort of repoſitory is in the northern parts ſtill called the *aumbry*, *ambry*, and *ammery.*—*Nos dedimus totam illam ſeldam vocatam le Huſe, cum ſchopis, ſolariis, ſtallis, ciſtis, et almorietis cum omnibus ſuis pertinentiis. Cart.* 5 *Rich.* 2. *Cartular. Hoſpital. S S. Trinit. de Pontefracto. M S. f.* 44. *Cowel.*

Almesfeoh, or *Aelmesfeoh*, Saxon, for *alms money*: It has been taken for what we call *Peter pence*, firſt given by *Ina* King of the *Weſt Saxons*, and anciently paid in *England* on the firſt of *Auguſt*. It was likewiſe called *romefeoh*, *romeſcot*, and *Heorthpening*. *Selden's Hiſt. Tithes* 217.

Almond, *Amygdalum*, Is the kernel of a nut, and noticed among merchandize, that are to be garbled, in *ſtat.* 1 *Jac.* 1. *cap.* 19. *Cowel.*

Almond-furnace, At the ſilver mills in *Cardiganſhire*, they have a particular furnace, in which they melt the ſlags or refuſe of the litharge not ſtamped, with charcoal only, which they call the *almond*, or *almond-furnace*. *Cowel.*

Almutium, A garment which covered the head and ſhoulders of prieſts. *Quæſivit epiſcopus in quali habitu eſſet? Reſponſum eſt, quod in tunica de Burneto et* almutio *ſine cuculla. W. Thorn.* 1330. *Cowel. Du Freſne.*

Alnage, (Fr. *Aulnage*) Signifies the meaſure of an ell, or meaſuring with an ell. It is uſed in *ſtat.* 17 *Ed.* 4. *c.* 5.

Alnager, or *Aulnager*, (Fr. *auneur*, Lat. *ulniger*) Is properly a meaſure by the ell; and the word *aune* in *French* ſignifieth *an ell*. An *aulnager* with us is a publick ſword officer of the King's, whoſe place is to examine into the aſſiſe of all cloths, made throughout the land, and to fix ſeals upon them; and another branch of his office is to collect a ſubſidy or *aulnage* duty granted to the king. He hath his power by *ſtat.* 25 *Ed.* 3. *ſt.* 4. *c.* 1. and ſeveral other antient ſtatutes; which appoint his fees, and inflict a puniſhment for putting his ſeal to deceitful cloth, &c. *viz.* a forfeiture of his office, and the value. 27 *Ed.* 3. 3 *R.* 2. But there are now three officers belonging to the regulation of clothing, who bear the diſtinct names of *ſearcher*, *meaſurer*, and *aulnager*; all which were formerly compriſed in one perſon. 4 *Inſt.* 31. And becauſe the ſubjects of this kingdom ſhould not be abuſed, an office of *ſearching* is eſtabliſhed by act of parliament. *Cowel.*

Alne, A river in *Northumberland.*

Alnetum, A place where *alders* grow; or a grove of *alder trees*: Alnetum *eſt ubi alni arbores creſcunt. Unum pomarium, et unum* alnetum, *et unum ſokemannum, et decem libratas terræ. Pat.* 16 *Hen.* 3. *par.* 1. *m.* 8. It alſo often occurs in *Domeſday.*

Alodium, Signifies a manor, and *alſidarii* or *alodarii*, the lords of the ſame manor. The old tranſlation of the *Saxon* laws uſeth this word for *bockland*. And *aloacii*, or rather *alodacii*, for them that hold *bockland* or *charter-lands*. *Quando moritur* alodarius, *rex inde habet relevationem terræ, &c. Domeſday*, *Rent.* and *Coke's Inſt. fo.* 1 & 5. *Cowel.* See **Fee.**

Aloverium, A purſe. This word is mentioned in *Fleta*, *lib.* 2. *c.* 82. *par.* 2 *Cowel.*

Altarage,

Altarage, *(Altaragium)* The offerings made upon the *altar*, and alſo the profit that ariſes to the prieſt by reaſon of the *altar*, *obventio altaris*. *Godol. Repert. Can. Introd. p.* 51. *Mich.* 21 *Eliz.* It was declared in the Exchequer, that by *altarage* is meant tithes of wool, lambs, colts, calves, pigs, chickens, butter, cheeſe, fruits, herbs, and other ſmall tithes with the offerings due: The caſe of the vicar of *Weſt Haddon* in *Northamptonſhire*. But the word *altarage* at firſt is thought to ſignify no more than the caſual profits ariſing to the prieſt, for the peoples voluntary oblations at the *altar*; out of which a portion was aſſigned by the parſon to the vicar: Since that our parſons have generally contented themſeves with the greater profits of glebe, and tenths of corn and hay; and have left the ſmall tithes to the officiating prieſts: And hence it is that vicarages are endowed with them. *Termes de la ley* 39. 2 *Cro.* 516——*Vicarius de* Tickill *ad ſuſtentationem ſui habeat totum* altaragium, *ita quod nomine* altaragii *contineantur omnes obventiones, decimæ et proventus ipſius eccleſiæ de* Tickill, *exceptis decimis bladi, leguminis et fœni, et terris ad dictam eccleſiam pertinentibus, &c. ordinatio* Walteri *archiep.* Ebor. *An. Dom.* 1249. *Vicaria in eccleſia ſancti Martini de* Stampford *conſiſtit in toto* altaragio *dictæ eccleſiæ. Monaſt.* 2 *tom.* 881. 3 *tom.* 139.

It ſeems to be certain, that the religious, when they allotted the altarage in part or in whole to the vicar or chaplain, did mean only the cuſtomary and voluntary offerings at the altar, for ſome divine office or ſervice of the prieſt, and not any ſhare of the ſtanding tithes, whether predial or mixt. *Kenn. Paroch. Antiq. Gloſſ.*

In the caſe of *Franklyn* and the maſter and brethren of St. *Croſs*, *T.* 1721, it was decreed, that where *altaragium* is mentioned in old endowments, and ſupported by uſage, it will extend to ſmall tithes, but not otherwiſe. *Bunb.* 79.

It is moſt probable, that the greateſt annual revenue by *altars*, if not by *altarages* in any one church within this realm, was in that of St. *Paul's London*. For when the chantries were granted to King *Henry* 8. whereof there were 47 belonging to St. *Paul's*, there were in the ſame church at that time no leſs than 14 ſeveral altars. And altho' they were but chantry prieſts that officiated at them, and had their annual ſalaries on that account, diſtinct from altarages in the proper ſenſe of oblations; yet in regard theſe annual profits accrued by their ſervice at the altar, they may not improperly be termed *penſion altarages*, tho' not *oblation altarages*. *God. Introd. p.* 51.

Alteration, *(Alteratio)* Is a changing of a thing: And when witneſſes are examined upon exhibits, &c. they are to remain in the office, and not to be taken back into private hands, by whom they may be altered. *Jacob.*

Alto et baſſo, By this is meant the abſolute ſubmiſſion of all differences, great and ſmall, high and low. *Pateat univerſis per præſentes quod* Willielmus T. *de* Y. *et* Thomas G. *de* A. *poſuerunt ſe in* alto et baſſo *in arbitrio quatuor hominum, viz.—de quadam querela pendente, &c. Et prædicti quatuor homines judicaverunt, &c. Dat. anno* 2 *Hen.* 5. *Cowel. Du Freſne.*

Amabyr, vel **Amvabir,** A cuſtom in the honour of *Clun*, belonging to the Earl of *Arundel*: *Pretium virginitatis domino ſolvendum.* LL. *Eccl. Gul.* Howeli Dha, *regis* Walliæ. *Puella dicitur eſſe deſertum regis, & ob hoc regis eſt de ea* amvabyr *habere.* This cuſtom *Henry* Earl of *Arundel* releaſed to his tenants, *anno* 3 & 4 *P. & M.* by the name of the cuſtom of *amabyr* and *chevage.* See **Chevage.**

Amayl, Enamel.——*Una cuppa rubea de Samy bene brudata imaginibus in tabernaculis, cum uno nouche nobili de argento cum ſolutione protracta in* amayl *ſaphyri coloris.* Hiſtor. Elien. apud Whartoni Angl. Sac. p. 1. p. 642.—*Prior Elienſis contulit altari unum dorſale magnum, et duas pelves argenteas nobiles et puleras quarum labra ſunt per gyrum deaurata, et in fundo* amayl *inſerti in opere artificioſo.* Ib. p. 649. *Cowel.*

Ambactus, A ſervant or client. *Du Freſne.*

Ambaſſador, or **Ambaſſadour.** [*Ambaſſadeur*, French; *embaxador*, Spaniſh. It is written differently, as it is ſuppoſed to come from the *French* or *Spaniſh* language; and the original derivation being uncertain, it is not eaſy to ſettle its orthography. Some derive it from the Hebrew בשר, *to tell*, and מבשר, a *meſſenger*; others from *ambactus*, which, in the old *Gauliſh* ſignified a ſervant; whence *ambaſcia* in low Latin, is found to ſignify *ſervice*, and *ambaſciator*, a *ſervant*; others deduce it from *ambacht*, in old *Teutonick*, ſignifying a *government*; and *Junius* mentions a poſſibility of its deſcent from αναβαινω; and others from *am* and *ad*, and *baſſus*, low, as ſuppoſing the act of ſending an ambaſſador, to be in ſome ſort an act of ſubmiſſion. All theſe derivations lead to write *ambaſſador*, not *embaſſador.*] A perſon ſent in a publick manner from one ſovereign power to another, and ſuppoſed to repreſent the power from which he is ſent. The perſon of an ambaſſador is inviolable. *Ambaſſador* is, in popular language, the general name of a meſſenger from a ſovereign power, and ſometimes, ludicrouſly, from common perſons. In the judicial and formal language, it ſignifies particularly a miniſter of the higheſt rank reſiding in another country, and is diſtinguiſhed from an *envoy*, who is of leſs dignity. *Johnſon.*

An ambaſſador is a perſon ſent by one ſovereign prince to another, to tranſact in the place of his ſovereign, ſuch matters as relate to both ſtates. 1 *New Abr.* 85.

An *ambaſſador* and *agent* are the ſame thing, if we conſider only the function of their charges: Only in this they differ; an agent hath charge to repreſent the *affairs* only; but an ambaſſador ought to repreſent the *greatneſs of his maſter, and his affairs. Molloy de Jure Maritimo, b.* 2. *ch.* 10. *ſect.* 1.

Ambaſſadors are in two capacities, either ordinary or extraordinary: The ordinary ambaſſadors, are thoſe who are commanded to reſide in the place whither ſent, unleſs they receive letters of revocation; and as the time of their return is indefinite, ſo their buſineſs is uncertain, ariſing out of emergent occaſions; and commonly the protection and affairs of the merchants is their greateſt care. The extraordinary are thoſe who are employed upon ſome particular great affairs, as condolements, or congratulations, or for overtures of marriage, &c. their equipage is generally very magnificent and illuſtrious, and they may return without requeſting leave, unleſs there be a reſtraining clauſe in their commiſſion. *Molloy ib. ſect.* 2.

By the laws of nations, none under the degree of a ſovereign prince can nominate or ſend any in that quality; nor can any ſubject ſend or receive any ambaſſador, be he ever ſo great; if a viceroy doth it, it is no leſs than high treaſon; and ſo it was declared when the Scots, *inconſulto principe*, ſent *Loudon* and others, in quality of private commiſſioners, to treat with the *French* King *Lewis* the Thirteenth, in the name of the whole nation, for aſſiſtance; the King would not admit or hear them. So did Queen *Elizabeth* when *Chriſtopher Aſſonville* came into *England* in quality of miniſter of ſtate, ſent from the Duke of *Alva* then governor of *Flanders:* She refuſed to admit him, he not having any commiſſion or credentials from the King of *Spain.* It is true, the Electors and Princes of *Germany* have obtained the privilege of ſending and the reception of ambaſſadors; but that is limited only to matters touching their own territories, and not the ſtate of the empire. And ſo likewiſe the *Hans towns* may do the ſame; for they claim the like privilege, they being free imperial cities, and partake of the ſame regalia, either by preſcription, or by grants from former emperors, whoſe neceſſities forced them to part with ſuch royal flowers of the empire; generally they ſend for their ambaſſadors two perſons, one of great birth, and who hath been a ſoldier, to maintain decency; and the other a doctor or lawyer, to regulate affairs with learning, and by the pen. *Molloy ib. ſect.* 4.

Stat. 7 *Ann. c.* 12. *A. D.* 1708.

An act for preſerving the privileges of *ambaſſadors*, and other publick miniſters of foreign Princes and States.

Sect. 1. WHEREAS *ſeveral turbulent and diſorderly perſons, having in a moſt outrageous manner inſulted the perſon of his Excellency* Andrew Artemonowitz Mattueof,

A M B

Mattueof, *ambaſſador extraordinary of his* Czariſh *Majeſty, Emperor of* Great Ruſſia, *her Majeſty's good friend and ally, by arreſting him, and taking him by violence out of his coach in the publick ſtreet, and detaining him in cuſtody for ſeveral hours, in contempt of the protection granted by her Majeſty, contrary to the law of nations, and in prejudice of the rights and privileges, which ambaſſadors and other publick miniſters, authorized and received as ſuch, have at all times been thereby poſſeſſed of, and ought to be kept ſacred and inviolable*; Be it therefore declared, &c. That all actions and ſuits, writs and proceſſes, commenced, ſued, or proſecuted againſt the ſaid ambaſſador, by any perſon or perſons whatſoever, and all bail-bonds given by the ſaid ambaſſador, or any other perſon or perſons on his behalf, and all recognizances of bail given or acknowleged in any ſuch action or ſuit, and all proceedings upon or by pretext or colour of any ſuch action or ſuit, writ or proceſs, and all judgments had thereupon, are utterly null and void, and ſhall be deemed and adjudged to be utterly null and void, to all intents, conſtructions, and purpoſes whatſoever.

Sect. 2. And be it enacted by the authority aforeſaid, that all entries, proceedings, and records againſt the ſaid ambaſſador, or his bail, ſhall be vacated and cancelled.

Sect. 3. *And to prevent the like inſolences for the future*; Be it further declared by the authority aforeſaid, That all writs and proceſſes, that ſhall at any time hereafter be ſued forth or proſecuted, whereby the perſon of any ambaſſador, or other publick miniſter of any foreign prince or ſtate, authorized and received as ſuch by her Majeſty, her heirs or ſucceſſors, or the domeſtick, or domeſtick ſervant of any ſuch ambaſſador, or other publick miniſter, may be arreſted or impriſoned, or his or their goods or chattles may be diſtrained, ſeized or attached, ſhall be deemed and adjudged to be utterly null and void to all intents, conſtructions and purpoſes whatſoever.

Sect. 4. And be it further enacted by the authority aforeſaid, that in caſe any perſon or perſons ſhall preſume to ſue forth or proſecute any ſuch writ or proceſs, ſuch perſon or perſons, and all attornies and ſolicitors proſecuting and ſoliciting in ſuch caſe, and all officers executing any ſuch writ or proceſs, being thereof convicted, by confeſſion of the party, or by the oath of one or more credible witneſs, before the lord chancellor or lord keeper of the great ſeal of *Great Britain*, the chief juſtice of the court of Queen's Bench, the chief juſtice of the court of Common Pleas for the time being, or any two of them, ſhall be deemed violators of the laws of nations, and diſturbers of the publick repoſe, and ſhall ſuffer ſuch pains, penalties, and corporal puniſhment, as the ſaid lord chancellor, lord keeper, and the ſaid chief juſtices, or any two of them, ſhall judge fit to be impoſed and inflicted.

Sect. 5. Provided, and be it declared, that no merchant or other trader whatſoever, within the deſcription of any of the ſtatutes againſt bankrupts, who hath or ſhall put himſelf into the ſervice of any ſuch ambaſſador or publick miniſter, ſhall have or take any manner of benefit by this act; and that no perſon ſhall be proceeded againſt as having arreſted the ſervant of an ambaſſador or publick miniſter, by virtue of this act, unleſs the name of ſuch ſervant be firſt regiſtred in the office of one of the principal ſecretaries of ſtate, and by ſuch ſecretary tranſmitted to the ſheriffs of *London* and *Middleſex* for the time being, or their under ſheriffs or deputies, who ſhall, upon the receipt thereof, hang up the ſame in ſome publick place in their offices, whereto all perſons may reſort, and take copies thereof without fee or reward.

Sect. 6. And be it further enacted by the authority aforeſaid, that this act ſhall be taken and allowed in all courts within this kingdom as a publick act; and that all judges and juſtices ſhall take notice of it without ſpecial pleading; and that all ſheriffs, bailiffs, and other officers and miniſters of juſtice, concerned in the execution of proceſs, are hereby required to have regard to this act, as they will anſwer the contrary at their peril.

[Adjudications upon the foregoing ſtatute.]

Strange moved to diſcharge the defendant out of execution, as being an ambaſſador's ſervant, *viz.* his *Engliſh* ſecretary; and it was objected, that he did not lie in the houſe; and the words of 7 *Ann. c.* 12. are *domeſtick ſervant: Sed per curiam*, The nature of his employment requires his attendance at the houſe, and it is not neceſſary he ſhould lie there; and the general words *all writs and proceſſes ſhall be void*, take in this caſe; and therefore the execution muſt be ſet aſide. 2 *Strange* 797. *Eaſt.* 1 *Geo.* 2. *B. R.*

4 *Geo.* 2. *Widmore* v. *Alvarez:* In the caſe of the *French* ambaſſador, it was ruled, that the perſon need not lie in the houſe, but he muſt do ſome actual ſervice there.

Rule upon hearing counſel of both ſides was made, to diſcharge the defendant out of execution, by virtue of the ſtatute of 7 *Ann. c.* 12. it being made appear to the court, that he was a domeſtick ſervant of the envoy from the Elector *Palatine*, *viz.* his ſecretary, and that all the ſteps preſcribed by the act were purſued. *May* 25, 1728. *Ld. Raym.* 1524. *Eaſt.* 1. *Geo.* 2.

The defendant was ſecretary to the reſident from *Venice*, but yet was taken in execution; accordingly upon affidavit from the reſident that he was ſo, and that his name was entered in the Duke of *Newcaſtle's* office, tho' it was not tranſmitted over to the ſheriff of *Middleſex* at the time he was arreſted, but a few days after; and upon affidavit that he offered to ſhew his teſtimonial to the officer, and that he really exerciſed the office, the court diſcharged him, notice being given of the motion. *Barnardiſt. Rep. in B. R. Mich.* 2 *Geo.* 2.

On rule to ſhew cauſe, why the defendant ſhould not be diſcharged out of cuſtody, being a ſervant to an ambaſſador, Mr. *Reeves* ſaid, that the words of the affidavit, upon which the rule was made only were, that he was hired in quality of a domeſtick ſervant to the ambaſſador, and did what ſervice he required of him: But he objected, that it was not ſworn, that he actually ſerved the ambaſſador in the capacity he was hired in; and beſides he ſaid, the defendant has ſtiled himſelf apothecary in the affidavit; and by an expreſs clauſe in the act, which gives protection to ambaſſadors ſervants, no one is intitled to ſuch protection, who is liable to an act of bankruptcy. The attorney general on the other ſide ſaid, that by the defendant's ſtiling himſelf apothecary, it does not appear that he was any thing more than a journeyman, and in ſuch caſe he would not be liable to become bankrupt; and as to the other objection, he ſubmitted it, that the affidavit was certain enough. But the court ſaid, It was neceſſary that the defendant ſhould have ſworn, that he actually ſerved in the capacity he was hired; and upon that diſcharge the rule. *Barnard. Rep. in B. R.* 4 *Geo.* 2.

The defendant was arreſted, and held to ſpecial bail, and moved to be diſcharged on producing a certificate from the *French* ambaſſador, that he was his maſter of horſe. It appeared that he was a trader, and ſuch a one as a commiſſion of bankruptcy might iſſue againſt; and ſo the court diſcharged the rule to ſhew cauſe. 2 *Vin.* 289.

Upon a motion to ſuperſede a proceſs againſt the defendant, upon the ſtatute 7 *Ann.* as being in the ſervice of a foreign ambaſſador; the court held, that to be a privileged ſervant within the act, it is not required that the party actually live in the ambaſſador's houſe; but neither is it enough that the party be regiſtred in the ſecretary's office as a ſervant; but when he comes for the benefit of the act, he muſt ſhew the nature of his ſervice, that the court may judge, whether he be a domeſtick ſervant within the meaning of the act of parliament. In this caſe, it was objected againſt the defendant, that he was a trader, and ſo expreſly excluded from privilege by the ſtatute: To which Mr. Solicitor general, who was counſel for the defendant, anſwered, that by traders within this act, muſt be underſtood ſuch as may have the benefit

of the ſtatutes concerning bankrupts, which infants are not intitled to, as it was determined in one *Whitlock*'s caſe; and that the defendant could prove he had exerciſed no trade ſince his full age. *Fitzgib. Rep.* 200.

Defendant ſaid that he was a *menial ſervant* to the *Mecklenburg* ambaſſador. It was held that menial ſervants are not within the act; the words being *domeſtick*, or *domeſtick ſervant*, who are ſuch as are employed in and about the houſhold affairs only.

The defendant, a courier to the *Spaniſh* ambaſſador, moved to ſtay proceedings. The plaintiff alledged the defendant was a trader. It was anſwered, the trade was ſo inconſiderable, that it could not amount to a bankruptcy. It was again replied, that a probable cauſe will make a bankrupt; and it was further alledged, that the defendant being *no domeſtick*, *had no ſettled yearly wages*; and that being regiſtered in the ſheriff's office was not material: So the court diſcharged the rule to ſtay proceedings. 2 *Vin.* 288. *Mich.* 10. *Geo.* 2.

A domeſtick of the Duke of *Holſtein*, reſident here, was arreſted, and thereupon gave a bail-bond; and it was moved upon this ſtatute to ſet the ſame aſide; all the terms required by the act being complied with, and thereupon the arreſt was ſet aſide, and the bail-bond vacated. 8 *Vin.* 288.

A ſervant to the *Genoeſe* ambaſſador brought a bill in Chancery. It was moved that he ſhould not proceed, till he gave ſecurity by bond in 40*l.* penalty for payment of coſts of ſuit if awarded againſt him, in the ſame manner as where a plaintiff is beyond ſea; and a precedent was cited where a like order was made in the caſe of an ambaſſador's ſervant plaintiff in this court, and dated 25 *July* 8 *Ann.* and it was ordered accordingly. 2 *Vin.* 288.

Ambidexter, *(Lat.)* One that can uſe his left hand as well as his right; or that plays on both ſides. But in a legal ſenſe, it is taken for a juror or embraceor, who takes money of both parties for giving his verdict; and ſuch a one ſhall be impriſoned, never more be of a jury, and further puniſhed at the King's pleaſure, by ſtat. 5 *Ed.* 3. *c.* 10. which is inforced and amended by 34 *Ed.* 3. *c.* 8. 38 *Ed.* 3. *ſt.* 1. *c.* 12. the latter enacting that a juror taking money ſhall forfeit ten times the ſum taken. See *Crompt. Juſt.* 156. *Fitz. Decies tant'*, 12. *Raſt.* 145. *Regiſt.* 188. See **Decies tantum.**

Ambra, (Sax. *Amber*, Lat. *Amphora)* A veſſel among the *Saxons:* It contained a meaſure of ſalt, butter, meal, beer, *&c. Leg. Inæ Weſt Sax. Spelman. Du Freſne.*

Ambry, The place where the arms, plate, veſſels, and every thing which belonged to houſe-keeping were kept; and probably the *ambry* at *Weſtminſter* is ſo called, becauſe formerly ſet apart for that uſe: or rather the *aumonery*, from the Latin *Eleemoſynaria*, an houſe adjoining to an abby, in which the charities were laid up for the poor. *Cowel Edit.* 1727.

Amenable, (Fr. *Amener*, to bring or lead unto) or *amainable* (from the Fr. *main*, a hand) ſignifies tractable, that may be led or governed: And in our books it is commonly applied to a woman that is governable by her huſband. *Cowel Edit.* 1727.

Amendment, and **Jeofails.** *Amendment*, *emendatio*, Signifieth in our common law a correction of an error committed in a proceſs, and eſpied before judgment, and ſometimes after the party ſeeks advantage by the error. *Cowel. Termes de la ley. Bro.* tit. *Amendment.* But if the fault be found after judgment given, the party that will redreſs it, is driven to his writ of error. *Cowel. Bro.* tit. *Error.*

Jeofail is a compound of three *French* words, *J' ay faillé*, that is, I have failed, *ego lapſus ſum*, and in a legal ſenſe denotes an overſight in pleading; or a *jeofail* is, when the parties to a ſuit have proceeded to iſſue, and this pleading or iſſue is ſo badly pleaded or joined, or the proceedings ſo defective, that it will be error if they proceed: then ſome of the ſaid parties might by their counſel ſhew it to the court, which occaſioned many delays in ſuits. *Cowel.*

Un'er this head is conſid'ered,

1. *Amendment at Common law.*
2. *Statutes concerning amendment and jeofail.*
3. *Original and judicial writs amendable, and not amendable.*
4. *Declarations and rolls amendable, and not amendable.*
5. *Records and* poſteas *amendable, and not amendable.*
6. *Iſſues, verdicts and judgments amendable, and not amendable.*
7. *Fines and recoveries amendable, and not amendable.*
8. *Indictments amendable.*

1. *Amendment at Common law.*

At Common law there was little room for amendments, which appears by the ſeveral ſtatutes of *amendments and jeofails*, and likewiſe by the conſtitution of the courts; for, ſays *Britton*, the judges are to record the parols [or pleas] deduced before them in judgments; alſo, ſays he, *Ed.* 1. granted to his juſtices to record the pleas pleaded before them, but are not to eraſe their records, nor amend them, nor record againſt their inrolment, nor any way ſuffer their records to be a warrant to juſtify their own miſdoings, nor that they eraſe their words, nor amend them, nor record againſt their inrolment. This ordinance of *Ed.* 1. was ſo rigidly obſerved, that when Juſtice *Ingham*, in his reign, moved with compaſſion for the circumſtances of a poor man who was fined 13*s.* 4*d.* erazed the record, and made it 6*s.* 8*d.* he was fined 800 marks, with which a clock-houſe at *Weſtminſter* was built, and furniſhed with a clock; yet notwithſtanding there were ſome caſes that were amendable at Common law; and out of this general rule there are the following exceptions.

Firſt, All miſtakes were amendable the ſame term, becauſe it is a roll of that term, and ſo in the breaſt of the court during the whole term; and even a new roll might be brought in the cauſe, and conſequently the ſame roll may be amended. 8 *Co.* 157. 1 *Salk.* 49. 6 *Mod.* 274.

Secondly, That part of the count which records the writ was amendable at Common law, though of a ſubſequent term, as *South*, for *Southampton*, without a tittle or daſh, was amended at Common law; becauſe the recording of the writ was ſurpluſage, and by the law which conſtitutes the court, the judges were not to record againſt a former record. 8 *Co.* 156. *b.* 7 *Hen.* 6. 45. *Vide Cro. Car.* 144.

Thirdly, An eſſoin, if the plaintiff's name was miſtaken, or if an eſſoin was made as guardian, when there was no guardian in the writ; this was amendable at Common law, becauſe ſuch an eſſoin was contrary to the writ, and conſequently an inrolment of it would contradict a former record. 2 *Hen.* 4. 4. *Fitz. Amendment* 7, 61. *Bro. Amendment* 26.

Fourthly, Continuances could be amended at Common law; as where *A.* brought a bill againſt *B.* who vouched *C.* who entered into warranty, and pleaded to iſſue, a *venire facias*, and a *jurat' inter A.* and *B.* were put in; which *jurat'* ought to have been between *A.* and *C.* and becauſe it appeared by the record of the iſſue, and the award of the *venire facias*, and the *venire* itſelf, that the *jurat'* ought to have been between *A.* and *C.* this was amended; otherwiſe it would be an inrolment againſt a former record. 6 *Ed.* 3. 25. *Fitz. Amendment* 73. 8 *Co.* 156. *b.* 1 *Rol. Abr.* 199. *G. H. C. P.* 109.

Fifthly, In the caſe of the King they amended the writ, where the fault was in the form; as in a *quare impedit* brought by the King, the writ was *præſentare* inſtead of *præſentare*; and it was amended; for it could not be intended that the original inſtitution of the court was to deſtroy or leſſen the prerogative of the King. 8 *Co.* 156. *b.* 42. *Ed.* 3. 6.

No original writ was amendable at Common law. Ld. *Raym. Rep.* 565. *Arg.*

An original writ was not amendable at Common law in the caſe of a common perſon; but in caſe of the King

in

in *quare impedit*, where the writ was *præſentere* for *præſentare*, it was amended, and the defendant awarded to anſwer. 8 *Rep.* 156. *b.*

Whatever at Common law *might be* amended *in civil caſes was at* Common law *amendable in criminal caſes*, and ſo it is at this day; reſolved by *Holt* Ch. J. *Powell* and *Powis* J. 1 *Salk.* 51. *pl.* 14.

Tho' *miſawarding of proceſs on the roll* might be amended at Common law the *ſame term*, becauſe it was the act of the court; yet if any clerk at Common law iſſued out an *erroneous proceſs on a right award of the court*, that was never amended in any caſe at the Common law. 1 *Salk.* 51. *pl.* 14.

Statutes of amendment *extend only* to pleadings of record, therefore pleadings while *in paper*, are amendable by the Common law. Anciently all pleas were *ore tenus* at the bar; and then, if any error was ſpied in them it was preſently amended. Since that cuſtom is changed, the motion to amend becauſe all in paper, ſucceeded in the room of it; and it is a motion that the court cannot refuſe: But they may refuſe it if the party deſiring it *refuſe to pay coſts*, or the amendment deſired ſhould amount to a *new plea*. 10 *Mod.* 88.

2. *Statutes concerning amendment and jeofail.*

The conſtitution of *Ed.* 1. before mentioned, was found to be very inconvenient, becauſe the court being tied down ſo ſtrictly not to alter their records after the firſt term, was found very inconvenient, and many judgments were reverſed by the miſpriſion [or neglect] of their clerks in proceſſes; to remedy which inconvenience the following ſtatute was made.

Stat. 14 Ed. 3. c. 6. *It is aſſented, that by the miſpriſion of a clerk in any place whereſoever it be, no proceſs ſhall be adnulled or diſcontinued, by miſtaking in writing one ſyllable, or one letter too much or too little; but as ſoon as the thing is perceived, by challenge of the party, or in other manner, it ſhall be haſtily amended in due form, without giving advantage to the party that challengeth the ſame, becauſe of ſuch miſpriſion.*

Challenge of the party] In Ld. *Raym. Rep.* 669. *Paſch.* 13 *W.* 3. it was ſaid *arguendo* that theſe words, *challenge of the party*, muſt be underſtood of a demurrer; but *Holt* Ch. J. *contra*, that challenge of the party is for *arreſt of judgment*. 1 *Salk.* 50. *pl.* 11.

In *detinue of three writings*, one of the writings *was omitted in the continuance*. It was held that all the proceſs was diſcontinued notwithſtanding this ſtatute, which enacts the proceſs ſhall be amended. 8 *Rep.* 157. *a.* cites 15 *Ed.* 3. *Amendment* 158.

In *præcipe quod reddat by John Martel of Sleford*, they were at iſſue, and *in the venire facias Sleford was omitted*, and the jury paſſed for the demandant; and this matter was alledged in arreſt of judgment, and it was amended by the ſtatute of the 14 *E.* 3. *Br. Amendment, pl.* 50.

Coſinage of the manor of *Tybynry-Brooke*, and the *writ was* of the manor of *Tybynry*, and (*Brooke*) was left out, and the opinion was, that it may be well amended, and yet the ſtatute ſays, where a *ſyllable* or *letter* is too much or too little in a word, but if part of the word be wanting, the word is wanting. *Bro. Amendment, pl.* 18.

Miſpriſion of the clerk, where he made *writ of execution of* 100 *pounds*, whereas the *roll was but* 100 *marks*; and *per Thorpe:* The plaintiff ſhall not have it, but till 100 marks are levy'd. *Bro. Amendment, pl.* 25.

By this ſtatute the juſtices had liberty, on challenge of the party, to amend the proceſs where the clerk had miſtaken one ſyllable or letter, and the judges afterwards conſtrued the ſtatute ſo favourably, that they *extended it to a word*; but they were not ſo well agreed, whether they could make theſe amendments as well *after* as *before* judgment; for they thought their authority was determined by the judgment; and therefore to put an end to the diverſity of opinions by the following ſtatute, *viz.* 9 *H.* 5. *c.* 4. It is declared that the judges ſhall have the ſame power, as well after as before judgment, as long as the record in proceſs is before them. *Gilb. H. C. B.* 110.

Sat. 9 Hen. 5. c. 4. *Whereas it was ordained and eſtabliſhed in the ſtatute made the fourteenth year of King* Edward *the Third after the conqueſt, that for miſpriſion of the clerk in any place whereſoever it be, the proceſs of the plea ſhould not be avoided or diſcontinued by miſtaking in writing one letter or ſyllable too much or too little; but as ſoon as the thing is perceived, by challenge of the party, or in other manner, it ſhould haſtily be amended in a due form, without giving advantage to the party that challengeth the ſame becauſe of ſuch miſpriſion; the King our ſovereign lord, conſidering the diverſity of opinions which have been upon the ſaid ſtatute, and to put the thing in more open knowledge, hath declared and ordained at this time, by authority of this preſent parliament, that the juſtices before whom ſuch plea or record is made, or ſhall be depending, as well by adjournment, as by way of error, or otherwiſe, ſhall have power and authority to amend ſuch record and proceſs, as afore is ſaid, according to the form of the ſame ſtatute, as well after judgment given in any ſuch plea, record, or proceſs given, as before judgment given in any ſuch plea, record, or proceſs, as long as the ſame record and proceſs is before them, in the ſame manner as the juſtices had power to amend ſuch record and proceſs before judgment given by force of the ſaid ſtatute made in the time of the ſaid King* Edward.

This ſtatute is confirmed by ſtatute 4 *Hen.* 6. *c.* 3. with an exception, that it ſhall not extend to proceſs on outlawry, or to records or proceſſes in *Wales*. But by 2 *Sand.* 40. this laſt exception, and the like exception in 8 *Hen.* 6. *c.* 15. ſeem to be annulled by the ſtatute 27 *Hen.* 8. *c.* 26. by which it is enacted, that the laws of *England* ſhall be uſed, practiſed and executed in *Wales*.

Though the foregoing ſtatutes gave the judges a greater power than they had before, yet it was found that they were too much cramped, having authority to amend nothing but *proceſs*, which they did not conſtrue in a large ſignification, ſo as to comprehend the whole proceedings in real and perſonal actions, and criminal and common pleas, but confined it to the *meſne proceſs and jury proceſs*. 8 *Co.* 157. *a.* And therefore to enlarge the authority of the courts, the following ſtatute, *viz.* 8 *Hen.* 6. *c.* 12. gives them power by them and their clerks to amend what they ſhall think in their diſcretion to be the miſpriſion of their clerks in any record, proceſs, and plea, warrant of attorney, writ, panel, or return. *Gilb. H. C. B.* 110.

Statute 8 *Hen.* 6. *c.* 12. *ſect.* 1. "Our lord the King hath ordained and eſtabliſhed by the authority of this preſent parliament, that for error aſſigned or to be aſſigned, in any record, proceſs or warrant of attorney, original writ or judicial, panel or return, in any places of the ſame raſed or interlined, or in any addition, ſubſtraction, or diminution of words, letters, titles, or parcel of letters found in any ſuch record, proceſs, warrant of attorney, writ, panel, or return, which raſings, interlinings, addition, ſubſtraction, or diminution, at the diſcretion of the King's judges of the courts and places, in which the ſaid records or proceſs by writ of error, or otherwiſe, be certified, do appear ſuſpected, no judgment nor record ſhall be reverſed nor adnulled."

Sect. 2 "And that the king's judges of the courts and places in which any record, proceſs, word, plea, warrant of attorney, writ, panel, or return, which for the time ſhall be, ſhall have power to examine ſuch records, proceſs, words, pleas, warrants of attorney, writs, panels or return, by them and their clerks, and to reform and amend (in affirmance of the judgments of ſuch records and proceſſes) all that which to them in their diſcretion ſeemeth to be miſpriſion of the clerks in ſuch record, proceſſes, word, plea, warrant of attorney, writ, panel, and return; except appeals, indictments of treaſon and of felonies, and the outlawries of the ſame, and the ſubſtance of the proper names, ſurnames, and additions left out in original writs and writs of *exigent*; according to the ſtatute another time made the firſt year of king *Henry*, father to our lord the King that now is, and in other writs containing proclamation; ſo that by ſuch miſpriſion of the clerk, no judgment ſhall be reverſed nor adnulled. And if any record, proceſs, writ, warrant of attorney, return, or panel be certified defective, otherwiſe

wiſe than according to the writing which thereof remaineth in the treaſury, courts or places from whence they be certified, the parties in affirmance of the judgments of ſuch record and proceſs ſhall have advantage to alledge, that the ſame writing is variant from the ſaid certificate, and that found and certified, the ſame variance ſhall be by the ſaid judges reformed and amended according to the firſt writing."

Sect. 3. "Imbezilling of a record, whereby any judgment ſhall be reverſed, is felony."

Sect. 4. "Provided always, that if any ſuch record, proceſs, writ, or warrant of attorney, panel, or return, or parcel of the ſame, be now, or hereafter ſhall be exemplified in the King's Chancery under the great ſeal, and ſuch exemplification there of record inrolled, without any raſing in the ſame place in the exemplification and the inrollment of the ſame, that another time for any error aſſigned, or to be aſſigned in the ſaid record, proceſs, writ, warrant of attorney, panel, or return, in any letter, word, clauſe, or matter of the ſame varying, or contrary to the ſaid exemplification and the inrollment, there ſhall be no judgment of the ſaid records and proceſs reverſed nor adnulled."

There are only two ſtatutes of amendments, *viz.* the 14 *Ed.* 3. and 8 *H.* 6. the reſt are reckon'd to be ſtatutes of jeofails, and not of amendments; *per Powell* J. 1 *Salk.* 51. *pl.* 14. *Mich.* 3 *Ann. B. R.* in caſe of the Queen v. *Tutchin.* ——— And *ibid.* he held that the 8 *H.* 6. was only to enlarge the ſubject-matter of 14 *Ed.* 3. and that 14 *E.* 3. extends only to proceſs out of the roll, *viz.* writs that iſſue out of the record, and not to proceedings in the roll itſelf; but that the 14 *E.* 3. extend not to the King, becauſe of theſe words (*challenge of the party*) and that the ſtatute 8 *H.* 6. has always been conſtrued in imitation of the act of *Ed.* 3. and the exception in the ſtatute of *H.* 6. was only *ex abundanti cautela*; and all judges and ſages of the law in all ages have taken it not to extend to the crown; and the caſes on the other ſide are not to be relied upon.

Stat. 8 *Hen.* 6. *c.* 15. "It is ordained and eſtabliſhed that the King's juſtices, before whom any miſpriſion or default is or ſhall be found, be it in any records and proceſſes which now be, or ſhall be depending before them, as well by way of error as otherwiſe, or in the returns of the ſame, made or to be made by ſheriffs, coroners, bailiffs of franchiſes, or any other, by miſpriſion of the clerks of any of the ſaid courts of the King, or by miſpriſion of the ſheriffs, coroners, their clerks, or other officers clerks, or other miniſters whatſoever, in writing one letter or one ſyllable too much or too little, ſhall have power to amend ſuch defaults and miſpriſions according to their diſcretion, and by examination thereof by the ſaid juſtices to be taken where they ſhall think needful. Provided that this ſtatute do not extend to records and proceſſes in the ports of *Wales*, nor to the proceſſes and records of *outlawries*, felonies and treaſons, and the dependances thereof."

As theſe ſtatutes only extended to what the juſtices ſhould interpret the miſpriſion of their clerks, and other officers, it was found by experience, that many juſt cauſes were overthrown *for want of form*, and other failings, not aided by this ſtatute, though they were good in ſubſtance; and therefore the following ſtatute was made. *Gilb. H. C. B.* 111.

Stat. 32 *Hen.* 8. *c.* 30. "Foraſmuch as the party plaintiffs and defendants, in all manner of actions and ſuits, as well real as perſonal, at the Common law of this realm, before this time have been greatly delayed and hindered in their ſuits and demands, by reaſon of the crafty, ſubtile, and negligent pleadings of the plaintiffs or demandants, defendants or tenants, where any action or demand hath been ſued, had, or made, as well in miniſtring of their declarations at bars, as alſo in their replications, rejoinders, rebutters, joining of iſſues, and other pleadings, to the great hurt, delay, and hindrance of the ſaid plaintiffs or demandants, or to the vexation of the defendants or tenants; inſomuch, that when the iſſues joined in the ſame actions between the parties to the ſame, have been tried and found by the verdict of twelve or more indifferent perſons, for the ſaid plaintiffs or demandants, or for the tenants or defendants, and the juſtices ready to give judgement for the ſaid parties for whom the ſame iſſue was found, the ſame parties have been compelled, by the courſe and order of the Common law of this realm afore this time, to replead, and the ſaid verdicts ſo given, as is afore rehearſed, to be taken as void and of none effect; ſometimes becauſe the iſſues have been misjoined, and jeofail, and ſometimes by taking advantages of the parties own miſpleading, or in the purſuing, miſconveying, or diſcontinuing of proofs of any of the parties, and for divers other cauſes, the which is thought as well a great ſlander to the Common law of this realm, and to the miniſters of the ſame, as alſo a plain delay and hinderance unto the ſaid parties, in that they ſhould not have their judgments when the iſſue hath been found and tried as is aforeſaid, to their great coſts and charge: Be it therefore enacted, *&c.* That from henceforth if any iſſue be tried by the oath of twelve or more indifferent men, for the party, plaintiff or demandant, or the party, tenant or defendant, in any manner of action or ſuit at the Common law of this realm, in any of the King's courts of record, that then the juſtice or juſtices by whom judgment thereof ought to be given, ſhall proceed and give judgment in the ſame; any miſpleading, lack of colour, inſufficient pleading, or *jeofail*, any miſcontinuance, or diſcontinuance, or miſconveying of proceſs, misjoining of the iſſue, lack of warrant of attorney for the party againſt whom the ſame iſſue ſhall happen to be tried, or any other default or negligence of any of the parties, their counſellors or attornies, had or made to the contrary notwithſtanding; and the ſaid judgments thereof, ſo to be had and given, ſhall ſtand in full ſtrength and force to all intents and purpoſes, according to the ſaid verdict, without any reverſal or undoing of the ſame by writ of error or of falſe judgment, in like form as though no ſuch default or negligence had never been had or committed."

Sect. 2. "Provided alway, and be it enacted by the authority aforeſaid, in avoiding of errors, and other great inconveniences that daily do fortune to ariſe and grow in the King's courts of record at *Weſtminſter*, through the negligence of attornies, becauſe they deliver not their warrants of attorney in ſuch actions and ſuits, wherein they be named attorney, according to the laws of this realm, that all and every ſuch perſon and perſons, which ſhall fortune hereafter to be attorney to or for any other perſon or perſons, being demandant or plaintiff, tenant or defendant, in any action or ſuit at any time hereafter commenced or taken in any of the King's ſaid courts, and plead to any iſſue in the ſame action or ſuit; that then the ſame attornies, and every of them, from time to time ſhall deliver, or cauſe to be delivered, his or their ſufficient and lawful warrant of attorney, to be entred of record, for every of the ſaid actions or ſuits wherein they be named attornies, to the officer or his deputy, ordained for the receipt and entring thereof, in the ſame term when the ſaid iſſue is entred of record in the ſaid court, or afore; upon pain of forfeiting unto our ſaid ſovereign lord 10*l.* ſterling for every default, for not delivering of the ſaid warrant of attorney."

Sect. 3. "And alſo further to ſuffer impriſonment, as by the diſcretion of the juſtices of the court for the time being, where any ſuch default ſhall fortune to be had or made, ſhall be thought convenient.

If any iſſue be tried by the oath of 12 *men*] See *ſect.* 1. of the foregoing ſtatute.

A judgment by *nil dicit* is not within the intent of the ſtatute of jeofails, which ſpeaks of verdicts; for this ſhall not be ſaid a verdict; for a verdict is that put in iſſue by the joining of the parties; agreed *per cur'*. *Goldſ.* 49. *pl.* 9. *Paſch.* 29 *Eliz.*

A judgment given upon a *retraxit* is not aided by the ſtatute of jeofails, as it would be if given on the verdict. *Cro. Jac.* 211. *pl.* 3. *Mich.* 6 *Jac.* 1. *B. R.*

It aids not diſcontinuances after *failure of record* on *nul tiel record* pleaded. *Cro. Jac.* 303, 304. *pl.* 5. *Trin.* 10 *Jac.* 1. *B. R.*

This

This ſtatute doth not help *imperfect verdicts*. *Arg.* 2 *Leon.* 196. in *pl.* 245. cites this caſe; an information was brought againſt *B.* for entry into an houſe and 100 acres of land in *S.* he pleaded Not guilty; but the jury found him guilty *as to the* 100 *acres, but ſaid nothing as to the houſe*; whereupon error was brought, and the judgment reverſed; ſays it was a great caſe argued in the Exchequer, and was *Brache*'s caſe; and *Coke*, who cited it, ſaid, that it was not a diſcontinuance, but no verdict for part.

An iſſue upon the *vi et armis* is not within the act; but it muſt be joined upon the ſpecial matter alledged. *Cro. Jac.* 599. See 1 *Saund.* 81, 82.

If in replevin the plaintiff is nonſuit after evidence, and the jury aſſeſs damages for the avowant, this is no trial within the act; for the enquiry of the jury is only in nature of an office of inqueſt. *Cro. Eliz.* 339.

For the party plaintiff, or demandant] In treſpaſs againſt *A.* and *B. A.* pleads guilty, and *B.* confeſſes the action, and writ of enquiry is awarded upon the roll, but afterwards, *quoad B.* there is no continuance entered, and afterwards the iſſue is found for the plaintiff; admitting there is a diſcontinuance *quoad B.* yet it is aided by the ſtatute; for *B.* was party to the original, and is privy to the verdict, being liable to the damages. 11 *Co.* 6. *b.*

Any miſcontinuance, or diſcontinuance] If as to part, the defendant joins iſſue, but ſays nothing as to the reſt, and this iſſue is found for the plaintiff, he ſhall have judgment. 11 *Co.* 6. *b.* 2 *Leon.* 194.

This extends as well to thoſe on the part of the plaintiff, as to the part of the defendant. 1 *Roll. Rep.* 161.

Diſcontinuances after, as well as thoſe before verdict, are within this act. *Cro. Eliz.* 489. *Cro. Jac.* 528.

Diſcontinuances are helped by the ſtatute, but not imperfect verdicts. 2 *Leon.* 196. *Cro. Eliz.* 133. *Godb.* 57. 3 *Lev.* 55.

Miſconveying of proceſs] But if upon an information of perjury, the court awards a *ſubpœna* againſt the defendant, this is not a miſconveying, but a diſorderly proceſs, and not aided by the ſtatute. 1 *And.* 48. adjudged. *Kelw.* 214. adjudged, and there ſaid, this is no more helped by the ſtatute, than if in *ejectment* the court ſhould award a *petit cape*, or in a real action a diſtreſs or attachment; for ſuch diſorders were never intended to be redreſſed by the ſtatute. See *Cro. Jac.* 89. Where one proceſs does not warrant the other.——So when a *venire* is awarded to a wrong officer, and he returns it, and thereupon a trial is had, this is a miſ-trial, and not helped. 1 *Brownl.* 134. *Cro. Eliz.* 574, 586.

But if there be any defect in an original, or in the return thereof, it is not helped by this act. *Kelw.* 207.

Lack of warrant of attorney] Where the entry was, that the defendant *obtulit ſe per Higgens attor' ſuum*, without ſhewing his Chriſtian name; and it was argued, that it was helped by this ſtatute; and in *Cro. Eliz.* 153. it was ſaid, that if there were any warrant of attorney, and his name appears, then it may be amended by it; but for this *vide* 1 *Roll. Abr.* 289. 1 *Leon.* 175. and *vide* 18 *Eliz. c.* 14. [which immediately follows] by which a proviſion is made againſt the want of any warrant of attorney. See 1 *Leon.* 175. *Cro. Eliz.* 145, 153.

This ſtatute, though much more extenſive than the former, and though it very much enlarged the authority of the judge in amendments in miſtakes; yet it remedied no omiſſion, but that the party's own neglect in filing his own warrant, ſhould not after verdict prejudice the right of the party that had prevailed; therefore to remedy the omiſſions which the prevailing party might be guilty of, as well as the other ſide, the following ſtatute was made. *Gilb. H. C. B.* 111.

Stat. 18. *Eliz. c.* 14. "Be it enacted, &c. That if any verdict of twelve men or more, ſhall be given in any action, ſuit, bill, plaint, or demand in any court of record, the judgment thereupon ſhall not be ſtayed or reverſed by reaſon of any default in form or lack of form, touching falſe latin, or variance from the *Regiſter*, or other defaults in form, in any writ original or judicial, count, declaration, plaint, bill, ſuit or demand, or for want of any writ original or judicial, or by reaſon of any imperfect or inſufficient return of any ſheriff or other officer, or want of any warrant of attorney, or by reaſon of any manner of default in proceſs, upon or after any *aide prier* or vouchee, nor any ſuch record or judgment after verdict to be given hereafter, ſhall be reverſed for any the defects or cauſes aforeſaid; any law, ſtatute, or uſage to the contrary notwithſtanding."

Sect. 2. "Provided that this act, or any thing therein contained, ſhall not extend to any writ, declaration, or ſuit of appeal of felony or murder, nor to any indictment, or preſentment of felony, murder, treaſon, or other matter, nor to any proceſs upon any of them, nor to any writ, bill, action or information upon any popular or penal ſtatute; any thing aforeſaid to the contrary notwithſtanding."

Sect. 3. "Provided alſo, that all attorneys in any ſuit or action in any court of record, ſhall deliver in the warrant of attornies in ſuch action or ſuit, wherein they be named attornies, to be entered or filed of record, in ſuch manner and form as heretofore by the law or ſtatutes in that behalf made they ſhould or ought to have done, upon pain to forfeit ten pounds for every ſuch offence; the one moiety thereof to be to the Queen's Majeſty, her heirs and ſucceſſors, and the other moiety to ſuch officer or officers to whom, or in whoſe office the ſame warrant ſhould be delivered, entered or filed, and to ſuffer impriſonment by the diſcretion of the juſtices of the court for the time being, where any ſuch default ſhall fortune to be had or made; the ſaid ten pounds to be recovered by action of debt, bill or information, in which no eſſoin, protection, or wager of law ſhall be allowed."

The meaning of this ſtatute is, that the giſt of the action muſt be ſubſtantially alledged; but any other circumſtances relative to that action ſhall be ſuppoſed by the verdict; for it was not the intention of the ſtatutes perfectly to deſtroy the allegata; for this would have ruined all proceedings in the courts of juſtice; but the deſign was to cure any inſufficiency that was not of the eſſence of the plaintiff's action. What is ſubſtance, and what not, muſt be determined in every action according to its nature; and that ſeems properly to be the eſſence of the action, without which the court would have no ſufficient grounds to give judgment. In the ſame manner, that is of the eſſence of a plea, where the court has ſufficient ground to diſmiſs the defendant on ſuch plea found for him. *G. H. C. B.* 111.

Judgment thereupon] See the preceding ſtat. *ſect.* 1.

But if in treſpaſs againſt *A. B.* and *C. A.* pleads Not guilty, and it is found for him, but againſt the other two; if there is judgment by default, the want of an original may be aſſigned for error; for the verdict being found for *A.* he is out of the caſe, and it is as if the action had been brought againſt the other two only; but if the verdict had been for the plaintiff, the want of the original *quoad* the other had been cured. 1 *Leo.* 210.

Other faults] But the omiſſion of *vi et armis* in a declaration of treſpaſs is ſubſtance, becauſe that is the inducement for the King's fine. *Cro. Car.* 407. *March* 149. *Cro. Jac.* 443, 526, 536. So is the aſſignment of a breach upon a recognizance for good behaviour. *Cro. Jac.* 412.

For want of any writ original or judicial] An ill writ in ſubſtance, or a good writ which warrants not the declaration, is not aided by the ſtatute. *Cro. Eliz.* 722. *Yelv.* 108, 109. 1 *Sid.* 84. 5 *Co.* 37. *b.* 3 *Bulſt.* 224. When the variance is ſuch that it ſhall be taken as no original. *Cro. Eliz.* 204. *Hob.* 251. *Cro. Jac.* 654, 655. But not ſo where the vicious writ is certified to be the writ upon which the proceedings were, and that there is no other. *Cro. Jac.* 185, 479, 664, 675. *Palm.* 428. But where it appears there was a good original, no averment ſhall be taken that the proceedings were on the vicious one. *Cro. Jac.* 597. *Palm.* 428. And in *ejectment*, where the declaration recited the original to be *ſummonitus eſt*, there being none upon the file, the court would not intend a vicious one; but that there was a good

a good one, which is loſt; and that the plaintiff's clerk miſtook in the recital thereof. 1 *Saund.* 317. So the want of a *venire*, *diſtringas*, *&c.* is aided, but not a vicious one; and where a vicious one ſhall be taken as none, *vide Cro. Eliz.* 483. *Owen* 59. *Moor* 465. *Noy* 57. *Moor* 684. *pl.* 944. The want of a bill on the file, which is in nature of an original, is aided by the equity of this act. *Hob.* 130, 134, 264, 282. 1 *Jones* 304. *Cro. Car.* 282.

Imperfect o inſufficient return] But if there be no return; as if the writ be *album breve*, or the name of the ſheriff not indorſed, this is not help'd. 1 *Roll. Rep.* 295. 5 *Co.* 41. *Cro. Eliz.* 310, 509. *Yelv.* 110. *Cro. Jac.* 188, 189.

In the return of the *venire*, the words *quilibet juratorum per plegiat'* were wanting, and *Cro. Jac.* 534. *per curiam*, it was held not as a blank or no return, but as an inſufficient one, and help'd. 2 *Roll. Rep.* 87. Adjudged, becauſe by the appearance of the jurors it was ſalved, and ſaid it was not like Dr. *Huſſy*'s caſe, where pledges were wanting upon an original, which *vide* 3 *Bulſt.* 275, 276, *&c.* 1 *Roll. Rep.* 445, 446, 447. *Cro. Jac.* 414. Where it is ſaid, that not finding pledges upon an original is merely the neglect of the party, and ſo not help'd.

If a *venire* is awarded to the coroners, and returned by two of them only, whereas at the time of the award and return thereof, there were two more, this is only a miſ-return, and aided. *Lamb* and *Wiſeman*, *Cro. Jac.* 383. adjudg'd. *Hob.* 70. adjudg'd; and yet if one ſheriff of *London* makes a return without the other, this is not helped, being no return at all; for they make but one officer; and the court knows that one ſheriff there is two perſons. *Hob.* 70.

Upon the return of a *venire de medietate linguæ*, it did not appear which were denizens, and which aliens. *Cro. Eliz.* 841. *per curiam*, It is an inſufficient return, and aided by the ſtatute.

Upon the *venire* twenty-three only were returned, but the *habeas corpora* was awarded againſt the twenty-three and *A.* eleven of the other and *A.* were ſworn and tried the cauſe, *Fines* and *North*, 1 *Jones* 302. adjudged, it was not help'd; for *A.* was not returned by the ſheriff. *Cro. Jac.* 278. 5 *Co.* 36. *b.* 37. *a. Cro. Eliz.* 194. 1 *Brownl.* 274. 1 *Jones* 357.

So if the trial had been by eleven of the twenty-three, and one of the *tales de circumſtantibus*, *Sankell* and *Stoeker*. *Cro. Car.* 223. adjudged *per curiam cont. Croke*, 1 *Jones* 245. But *vide* 1 *Brownl.* 274. where it was adjudged according to the opinion of *Croke*, *vide Latch* 54. But if twenty-five were returned, and the twenty-fifth is ſworn, and tries the cauſe, it is not helped, becauſe a miſtrial. *Cro. Jac.* 647. But if tried by twelve of the other, it is helped. *Cro. Jac.* 647.

In a *ſcire facias* upon a recognizance againſt the heirs and tertenants of the conuzor, the ſheriff returns *J. S.* tertenant, but ſays nothing as to the heir, and *J. S.* pleads to iſſue, and it is found againſt him. *Cro. Car.* 295. Adjudged by three judges againſt *Croke*, that *quoad* the heir, there being no return, it is not helped by the ſtatute; but *per Croke*, The defendant having pleaded to iſſue, and that being found againſt him, he ſhall not now take advantage of the heir's not being returned ſummoned, and *Cro. Car.* 312, 313. it was adjudged for the plaintiff, becauſe *quoad* the heir, it was only a diſcontinuance, which is aided by the 32 *H.* 8. 1 *Jones* 319. adjudged.

The foregoing ſtatutes extended only to the courts above, but the ſubſequent ſtatutes extend to all courts of record, and remedy ſeveral defects and omiſſions not included in the former. 2 *Saund.* 258.

Stat. 21 *Jac.* 1. *c.* 13. enacts, "that if any verdict of twelve men or more, ſhall hereafter be given for the plaintiff or demandant, or for the defendant or tenant, bailiff in aſſize, vouchee, pray in aid, or tenant by receit, in any action, ſuit, bill, plaint or demand in any court of record, the judgment thereupon ſhall not be ſtayed nor reverſed by reaſon of any variance in form only, between the original writ or bill, and the declaration, plaint or demand; or for lack of any averment of any life or lives of any perſon or perſons, ſo as upon examination, the ſaid perſon be proved to be in life; or by reaſon that the *venire facias*, *habeas corpora*, or *diſtringas*, is awarded to a wrong officer, upon any inſufficient ſuggeſtion; or by reaſon the *viſne* is in ſome part miſawarded, or ſued out of more places, or of fewer places than it ought to be, ſo as ſome one place be right named; or by reaſon that any of the jury which tried the ſaid iſſue is miſnamed, either in the ſurname or addition, in any of the ſaid writs, or in any return upon any of the ſaid writs, ſo as upon examination it may be proved to be the ſame man that was meant to be returned; or by reaſon that there is no return upon any of the ſaid writs, ſo as a pannel of the names of jurors be returned and annexed to the ſaid writ; or for that the ſheriff's name, or other officer's name having the return thereof, is not ſet to the return of any ſuch writ, ſo as upon examination it be proved that the ſaid writ was returned by the ſheriff or under ſheriff, or any ſuch other officer; or by reaſon that the plaintiff in an *ejectione firmæ*, or in any perſonal action or ſuit, (being an infant under the age of one and twenty years) did appear by attorney therein, and the verdict paſs for him; any law, cuſtom or uſage to the contrary notwithſtanding."

"Provided, that this act, or any thing therein contained, ſhall not extend to any writ, declaration or ſuit of appeal of felony or murder; nor to any indictment or preſentment of felony, murder or treaſon, nor to any proceſs upon any of them; nor to any writ, bill, action or information upon any popular or penal ſtatute; any thing therein contained to the contrary notwithſtanding."

The main deſign of this ſtatute was to help any miſtake in the jury proceſs, but there were ſeveral things ſtill to be ſupplied, and ſeveral others to be adjudged form, which were always conſtrued to be matters of ſubſtance, and conſequently not aided by any of the former ſtatutes; and therefore the following act was made, called by Judge *Twyſden*, *The Omnipotent Act. G. H. C. P.* 113.

Stat. 16. *&* 17 *Car.* 2. *c.* 8. *ſect.* 1. "Whereas great delay, trouble and vexation hath been, and ſtill is occaſioned to the people of this realm, as well by arreſting and reverſing of judgments, as by ſtaying executions by writ of error and ſuperſedeas: for remedy thereof, be it enacted, *&c.* That if any verdict of twelve men ſhall be given in any action, ſuit, bill or demand, to be commenced from and after 25 *March* 1665, in any of his Majeſty's courts of record at *Weſtminſter*, or in the courts of record in the counties palatine of *Cheſter*, *Lancaſter*, or *Durham*, or in his Majeſty's courts of the great ſeſſions in any of the twelve ſhires of *Wales*, judgment thereupon ſhall not be ſtayed or reverſed, for default in form, or lack of form; or by reaſon that there are not pledges, or but one pledge to proſecute, returned upon the original writ; or becauſe the name of the ſheriff is not returned upon ſuch original writ; or for default of entering pledges upon any bill or declaration; or for default of alledging the bringing into court of any bond, bill, indenture, or other deed whatſoever, mentioned in the declaration or other pleading; or for default of allegation of bringing into court of letters teſtamentary, or letters of adminiſtration; or by reaſon of the omiſſion of *vi & armis*, or *contra pacem*; or for or by reaſon of the miſtaking of the chriſtian name or ſurname of the plaintiff or defendant, demandant or tenant, ſum or ſums of money, day, month, or year, by the clerk, in any bill, declaration or pleading, where the right name, ſurname, ſum, day, month or year, in any writ, plaint, roll or record preceding, or in the ſame roll or record where the miſtake is committed, is or are once truly and rightly alledged, whereunto the plaintiff might have demurred; and ſhewn the ſame for cauſe; nor for want of the averment of *hoc paratus eſt verificare*; or for *hoc paratus eſt verificare per recordum*; or for not alledging *prout patet per recordum*; or for that there is no right *venue*, ſo as the cauſe were tried by a jury of the proper county or place where the action is laid; nor any judgment after verdict, confeſſion by *cognovit actionem*, or *relicta verificatione*, ſhall be reverſed for want of *miſericordia*, or *capiatur*; or by reaſon that a *capiatur* is entered for a *miſericordia*, or a *miſericordia* is entered where a *capiatur* ought to have been

been entered; nor for that *ideo conceſſum eſt per curiam* is entered for *ideo conſideratum eſt per curiam*; nor for that the increaſe of coſts after a verdict in an action, or upon a nonſuit in *replevin*, are not entered to be at the requeſt of the party for whom the judgment is given; nor by reaſon that the coſts in any judgment whatſoever are not entered to be by conſent of the plaintiff; but that all ſuch omiſſions, variances, defects, and all other matters of like nature, not being againſt the right of the matter of the ſuit, nor whereby the iſſue or trial are altered, ſhall be amended by the juſtices or other judges of the courts where ſuch judgments are or ſhall be given, or whereunto the record is or ſhall be removed by writ of error."

Sect. 2. "Provided, that this act, or any thing therein contained, ſhall not extend to any writ, declaration, or ſuit of appeal of felony or murder, nor to any indictment or preſentment of felony, murder, treaſon, or other matter, nor to any proceſs upon any of them; nor to any writ, bill, action or information upon any penal ſtatute, other than concerning cuſtoms and ſubſidies of tonnage and poundage."

Sect. 5. "Provided, that this act ſhall not extend to any writ of error to be brought by any executor or adminiſtrator; nor to any action popular, nor unto any other action which is, or hereafter ſhall be brought upon any penal law or ſtatute (except action of debt for not ſetting forth of tithes); nor to any indictment, preſentment, inquiſition, information, or appeal."

The foregoing ſtatutes being chiefly calculated to aid imperfections after verdict, and the ſtatute 27 *Eliz. c.* 5. aiding defects in form only on a general demurrer, it was thought proper to enlarge the authority of the courts further in favour of ſuitors; and therefore the following act was made. *Carth.* 66. *Skin.* 49.

Stat. 4 & 5 *Ann. c.* 16. *ſect.* 1. For *the amendment of the law in ſeveral particulars, and for the eaſier, ſpeedier, and better advancement of juſtice*, Be it enacted, &c. "That where any demurrer ſhall be joined, and entered in any action or ſuit in any court of record within this realm, the judges ſhall proceed and give judgment, according as the very right of the cauſe and matter in law ſhall appear unto them, without regarding any imperfection, omiſſion or defect in any writ, return, plaint, declaration, or other pleading, proceſs, or courſe of proceeding whatſoever, except thoſe only which the party demurring ſhall ſpecially and particularly ſet down and expreſs, together with his demurrer, or cauſes of the ſame, notwithſtanding that ſuch imperfection, omiſſion or defect, might have heretofore been taken to be matter of ſubſtance, and aided by the ſtatute made 27 *Eliz. c.* 5. ſo as ſufficient matter appear in the ſaid pleadings, upon which the court may give judgment, according to the very right of the cauſe; and therefore no advantage or exception ſhall be taken of or for an immaterial traverſe; or of or for the default of entering pledges upon any bill or declaration; or of or for the default of alledging the bringing into court any bond, bill, indenture, or other deed whatſoever, mentioned in the declaration or other pleading; or of or for the default of alledging of the bringing into court letters teſtamentary, or letters of adminiſtration; or of or for the omiſſion of *vi & armis & contra pacem*, or either of them; or of or for the want of averment of *hoc paratus eſt verificare*, or, *hoc paratus eſt verificare per recordum*; or of or for not alledging *prout patet per recordum*; but the court ſhall give judgment according to the very right of the cauſe, as aforeſaid, without regarding any ſuch imperfections, omiſſions and defects, or any other matter of like nature, except the ſame ſhall be ſpecially and particularly ſet down and ſhewn for cauſe of demurrer."

Sect. 2. "And all the ſtatutes of jeofails ſhall be extended to judgments which ſhall at any time afterwards be entered upon confeſſion, *nihil dicit*, or *non ſum informatus*, in any court of record; and no ſuch judgment ſhall be reverſed, nor any judgment upon any writ of enquiry of damages executed thereon be ſtayed or reverſed, for or by reaſon of any imperfection, omiſſion, defect, matter or thing whatſoever, which would have been aided and cured by any of the ſaid ſtatutes of jeofails, in caſe a verdict of twelve men had been given in the ſaid action or ſuit, ſo as there be an original writ or bill, and warrants of attorney duly filed according to the law as is now uſed."

By ſtat. 9 *Ann. c.* 20. *ſ.* 7. This ſtatute is extended to writs of *mandamus* and informations in nature of *quo warranto*.

Notwithſtanding the great enlargment of the power of the judges by the ſeveral ſtatutes before mentioned, in amending writs, proceſſes, &c. yet none of them was thought to extend to writs of *error*, and the rather, becauſe ſuch amendment could not be in affirmance of the judgment; but it being found, that defective writs of error occaſioned great delay of juſtice, it is enacted,

By ſtatute 5 *Geo.* 1. *c.* 13. "That all writs of error wherein there ſhall be any variance from the original record, or other defect, may and ſhall be amended and made agreeable to ſuch record, by the reſpective courts where ſuch writ or writs of error ſhall be made returnable; and that where any verdict hath been or ſhall be given in any action, ſuit, bill, plaint or demand in any of his Majeſty's courts of record, the judgment thereupon ſhall not be ſtayed or reverſed for any defect or fault; either in form or ſubſtance, in any bill, writ original or judicial, or for any variance in ſuch writs from the declaration or other proceedings."

3. *Writs original and judicial amendable, and not amendable.*

Error to reverſe a judgment in *treſpaſs*, for that the writ of enquiry was directed to the ſheriffs of *London quod inquirant*, when it ſhould be *quod inquirerent*; alſo it was that they *inquirant per ſacr'um proborum, &c. de civitate præd'*, when it ſhould be *de Balliva*, and there was no city mentioned before; adjudged, that the firſt was amendable, for it was the default of the clerk, and that the other was well enough; for it was ſometimes *de civitate*, and ſometimes *de Balliva*. *Cro. Eliz.* 657.

The caſe was, a *common recovery* was ſuffered, but the *writ of entry* either by being wet or ill keeping, was ſo much defaced, that in ſome material places it was not legible, but in the roll it plainly appeared what things were in demand, and ſo likewiſe in the *habere facias ſeiſinam*; and upon conſideration of the ſtatute 8 *H.* 6. *by which power is given to the juſtices to amend writs and records in affirmance of judgments, where it ſhall appear to them to be the miſpriſion of the clerk*; It was ruled, that this writ ſhall be amended, becauſe the *cuſtos brevium* is the clerk of the court, in whoſe cuſtody this writ was kept and defaced, and by whatever means it happened, 'tis a miſpriſion, *viz.* 'tis an offence and a default in the clerk, which as to this matter is the ſame thing as a miſpriſion; but if the parchment had been eaten by rats or deſtroyed in part, it could not have been amended. 1 *And.* 79.

If an *original writ* wants form, or if there is *falſe latin* in it, or if it *varies from the Regiſter in point of form*, the judgment ſhall not be ſtayed after a verdict, but the ſame is amendable. 4 *Rep.* 45.

A note was delivered to the *curſitor* to make an original againſt *B. B. militem*, and inſtead of that *addition*, he put in *generoſum*, and in all the proceedings he was named *militem*; adjudged, that the *negligent omiſſion or addition* of any thing, which the clerk ought to have added or omitted of courſe, ſhall be amended. 8 *Rep. Blackamore*'s caſe.

In treſpaſs, upon the general iſſue pleaded, one of the jurors of the principal panel appeared at the aſſizes, and no more; and upon the prayer of the plaintiff, a *tales* was awarded, and the ſheriff returned a panel in this manner; *Nomina decem talium*, and under it he returned the names of *eleven* jurors; adjudged, that this was only a *miſpriſion of the clerk*, and the word *decem* was put out, and then the title was *Nomina talium*, &c. 4 *Rep.* 102.

In treſpaſs, there was a verdict for the plaintiff, and it was moved in arreſt of judgment, that the *venire facias* was directed *vicecomiti*, &c. leaving out the *county* of which he was ſheriff; but becauſe the roll was right, and it being in a judicial writ, it was amended. 2 *Cro.* 78.

Ejectment,

Ejectment, &c. the original was for *one houſe*, but the *pleadings*, the *roll*, and the *record* of *niſi prius* mentioned *two houſes*; after a verdict for the plaintiff, and a writ of error brought, and before the record was moved, the plaintiff moved the court, that the writ might be amended; which was granted, becauſe the writ which mentioned *one houſe* could never be the ground of all thoſe proceedings where *two houſes* were mentioned. *Brownl.* 144.

Judicial writs ſhall be amended *after a verdict*, to make them agree with the *roll*, if that is right; therefore a *venire facias*, which bore *teſte* out of term, or on a Sunday, or a *diſtringas* awarded a long time before the trial, ſhall be amended by the roll. 2 *Cro.* 161.

In ejectment the *diſtringas* was between *Richard Folkes* and *John Child*, and the panel was between *Richard Folkes* and *William Child*; the truth was, there were two records of *niſi prius*, in both which *Richard Folkes* was plaintiff, in one againſt *John Child*, and in the other againſt *William Child*, and the ſheriff, by miſtake, had annexed the panel between *Richard Folkes* and *John Child* to the *diſtringas* between him and *William Child*; but adjudged, it was aided by the ſtatute of jeofails, and 'tis as if there had been no writ at all. 2 *Cro.* 396.

Error of a judment, &c. and the error aſſigned was becauſe a *juror* was returned in the *venire facias* by the name of *Hugh Maltby*; and upon the *diſtringas*, *Hugh Moltby* was returned and ſworn, and another juror was returned by the name of *John Collingham* of *Cortlington*; and upon the *diſtringas*, *John Collingham* of *Gortlington* was returned and ſworn, and both theſe faults were amended; the firſt becauſe the *juror* came into court, and upon examination it appeared he was the ſame man mentioned both in the *venire facias* and *diſtringas*, there being only the alteration of one letter in his ſurname, and the other was amended, becauſe the variance of the town where the juror dwelt is not material; for at the time of the return of the *venire facias* he may dwell in one town, and at the time of the return of the *diſtringas* in another. 2 *Cro.* 457.

Adjudged, that where the *venire facias* is good, and well returned, a fault in the *diſtringas* ſhall be amended by it, by the ſheriff in court. 2 *Roll. Rep.* 111.

Quare impedit to preſent *ad eccleſiam*, &c. and before appearance the plaintiff moved, that the writ might be amended, for his title was to preſent to a *vicarage*, and not to a *rectory*; the court doubted, becauſe it was in an original writ, and in a matter of *ſubſtance*, but becauſe the attorney gave a note to the *curſitor* to draw the writ to preſent *ad vicariam*, &c. it was held to be the *miſpriſion of the clerk*, and amendable. *Cro. Car.* 53.

Aſſumpſit againſt *Anne*, the executrix of Sir *William Wade*, and the record and *venire facias* were between the ſame parties, but the *habeas corpora* was between the plaintiff and the Lady *Wade*, executrix of Sir *Henry Wade*; it was inſiſted, that the trial was without warrant; but adjudged, that ſince all the other proceedings were right, this miſpriſion of the *habeas corpora* ſhall be amended. *Cro. Car.* 21.

The *venire facias* and other proceſs was directed to the *ſheriffs of Canterbury*, and the return was made by *one ſheriff*; adjudged, this was amendable at Common law, and likewiſe by the ſtatute of jeofails, for that extends to *indictments and informations on penal ſtatutes*, but this is an indictment for a miſdemeanor; ſo the ſheriff of *Canterbury* was ſworn in court, that there was but one ſheriff, and it was amended. *Sid.* 244.

Debt upon the ſtatute againſt the *hundred* was brought by original, and at the *niſi prius* the plaintiff was nonſuit, becauſe the original was *Edward*, when it ſhould be *Edmund*; a rule was made for the *curſitor* to attend, and that if he had right inſtructions, then to amend it; which was done in court. *Sid.* 412.

The plaintiff brought an action by *original*, and the inſtructions to the *curſitor* were right, by his proper name *Weſtby*, but the writ was *Weſtly*, and ſo were all the proceedings; upon a motion to the court, the curſitor was ordered to attend, and it appearing that his inſtructions were right, the original was amended in court, and ſo were all the proceedings, without applying to the Chancery. 2 *Vent.* 152.

In ejectment brought by original, the record upon the *iſſue roll* was, that the defendant, *ſummonitus fuit* to anſwer the plaintiff, &c. after a verdict for the plaintiff, upon Not guilty pleaded, it was moved in arreſt of judgment, that here was a *vitious original*, which is not aided by any ſtatute of *jeofails*; for it was, that the defendant *ſummonitus fuit*, &c. when in ejectment (as this cauſe was) it ought to be *attachiatus fuit*, &c. and this is not helped by the verdict; but upon ſearch of the file, there was no original found; and therefore it was inſiſted for the defendant, that ſince no original could be found, it muſt be intended that there was an original, but that it was vitious, becauſe it appeared to be ſo upon the *iſſue roll*; but adjudged, that it ſhall be intended a good original, this being after a verdict, and that ſuch good original is loſt; but if it had been vitious, the court will not intend that it was ſo, unleſs 'tis produced by the *defendant*. 1 *Saund.* 318.

Upon a motion in arreſt of judgment it was inſiſted, that the *day on which the aſſizes was to be held*, and *the place where*, were left out of the *diſtringas*, and ſo a miſtrial: *Sed per curiam*, If there had been no *diſtringas*, the trial had been good, becauſe the warrant to try the cauſe is the *jurata*, and that being right, the *diſtringas* ſhall be amended by it. 3 *Mod.* 78.

After the death of the Lord *Powis*, &c. the eſcheator took a verdict in paper, afterwards a *ſuperſedeas* came to him at the ſuit of one *Herbert* and his wife, in which writ the ſyllable *(ſe)* was omitted, for it was written thus at full length, *ſuperdeas*; adjudged, that it was not amendable. *Dyer* 170.

In an action of *waſte* upon the ſtatute of *Glouceſter*; the writ was *quod nullus faciat vaſtam, venditionem & diſtrictionem*, when it ſhould have been *deſtructionem*; adjudged, this being an original writ ſhall not be amended, becauſe 'tis *matter of ſubſtance*; for the word *diſtrictio* alters the very ſenſe of the ſtatute. 4 *Rep.* 44. *Freeman*'s caſe.

Upon a motion to amend a *ve. fa.* which was *album breve*, the court refuſed to amend it, tho' the ſheriff's name was to the panel; but if the ſheriff had returned the *ve. fa.* as uſual, *(viz.) executio iſtius brevis patet in quodam pannello huic brevi annex'*, tho' he had not ſet his name to that return, yet becauſe it was in the *panel*, it ſhould have been amended. *Brownl.* 43.

After a verdict for the plaintiff, it was moved in arreſt of judgment, that the *name of the ſheriff* was not endorſed on the *diſtringas*; it was inſiſted, that this being a judicial writ, it was not neceſſary; but adjudged that it was ill, and not amendable by any ſtatute; and 'tis the ſame caſe, as where the ſheriff's name is not endorſed on the *ve. fac.* which is never amendable. 2 *Cro.* 188.

Error of a judgment in an inferior court, in which the *plaint* was entered againſt *Francis*, but all the proceedings were againſt *John*, adjudged, that a plaint is in nature of an *original writ*, and this being erroneous, cannot be amended after a verdict. *Style* 115.

After a verdict for the plaintiff, it was moved to ſet it aſide, becauſe the *diſtringas* and *jurata* are returnable *a die ſanctæ Trinitatis in tres ſeptimanas* (which happened to be on the 26*th day of June*) *niſi Johannes Holt miles*, &c. 27 *die Junii*, &c. *prius venerit*; ſo that the day of *niſi prius* was *after the day in bank*; but the plea roll was right, for there it was *a die ſancti Michaelis in tres ſeptimanas*; adjudged, this could not be amended, for the day appointed by the *niſi prius* is impoſſible; 'tis true, where the *diſtringas* and *jurata* are right, the *niſi prius roll* may be amended by the *plea roll*, ſo as it doth not alter the point in iſſue; but here they are both wrong. 1 *Salk.* 48.

Upon a motion to amend a *writ of error*, for that it recited a judgment given *in curia regis*, when it ſhould be *regis & reginæ*, for that the note to the *curſitor* was right, and this was a *miſpriſion* only in matter of form; but it was denied to be amended, for there is no fault in the writ itſelf; 'tis true, it doth not agree with the record; now the ſtatute 8 *H.* 6. which gives the court power to amend, 'tis in matters precedent to the judgment, and to ſupport judgments; but if a *writ of error* might

might be amended, it may be to reverſe a judgment; beſides, this writ is a commiſſion to the court, and they cannot amend their own commiſſion. 1 *Salk.* 49.

The defendant was found guilty upon an information for a libel; and it was objected in arreſt of judgment, that the *ve. fa.* was returnable *die lunæ prox' poſt tres ſept. ſanct. Michaelis*, which was 23 *Octob.* but the *diſtringas*, *thro' miſtake*, *was teſted* 24 *Octob.* which was the day after the *venire facias* was returnable, when it ſhould be on the ſame day; this was agreed to be a diſcontinuance, for the 24th day cannot continue the 23d day, and 'tis not amendable at Common law, or by any ſtatute of amendments: not at Common law, becauſe this would be to warrant a trial that was tried without any authority, and to make it contrary to the truth of the fact; not by any ſtatute of *amendments*, of which there are but two, *(viz.)* 14 *Ed.* 3. *cap.* 6. and 8 *H.* 6. *cap.* 2. 12. Now this laſt ſtatute was only to enlarge the ſubject-matter of the firſt, which extends only to *proceſs* out of the roll; *(i. e.)* writs which iſſue out of the record, and not to proceedings on the roll itſelf; and that ſtatute doth not extend to caſes wherein the King is concerned; and the ſtatute 8 *H.* 6. has always been conſtrued in imitation of the ſtatute of 1 *Ed.* 3. not to extend to the crown. 1 *Salk.* 51.

Judgment in treſpaſs againſt five defendants; and a *writ of error* being intended, the attorney left a note with the *curſitor* to make it out between the plaintiff and five more, naming them: Note; *E. one of the defendants is dead*, *make out the writ of error*, which he did againſt *four*, and took no notice of him that was *dead*; the queſtion was, whether this was amendable; and adjudged it was not; for all the parties in the firſt judgment ought to join in a writ of error, which was not done here, but only four, without mentioning the other to be dead; 'tis true, the inſtructions to the curſitor were plain, and it was his miſtake, but yet it ſhall not be amended, becauſe this is a writ to reverſe a judgment, and the ſtatutes were made to amend writs for the ſupport of judgments; ſo this writ was quaſhed. 5 *Mod.* 16, 69.

4. *Declarations and other pleadings and rolls, amendable, and not amendable.*

Aſſumpſit, *&c.* by the plaintiff againſt *two defendants*; he had a verdict, and it was moved in arreſt of judgment, that by the *Imparlance roll* (which is called the declaration upon the file) the promiſe was alledged to be made by *one defendant*, and no more, but in the plea roll, and in the record of *niſi prius*, and in all the other proceedings after, it was alledged to be by two; but adjudged, that the Imparlance roll in this caſe ſhall be amended, becauſe it appeared by the paper-book, that the promiſe was made *by two*; ſo that it was a plain miſtake of the clerk to enter it on the imparlance roll, that it was made by one. *Cro. Eliz.* 258.

Ejectment, *&c.* againſt two defendants, in which the plaintiff declared, that they *intraverunt*, *&c.* but the expulſion and ejectment were laid in the ſingular number, *viz. a poſſeſſione ſua expulit & ejecit*; it was objected, that 'tis not amendable, becauſe 'tis the point of the action; adjudged, that it was amendable, for 'tis only the miſpriſion of the clerk. 2 *Bulſt.* 35.

In ejectment, the plaintiff declared upon a demiſe 25 *March* 6 *Jac.* by virtue of which he entered and was poſſeſſed, *&c.* until the defendant *poſtea ſcilicet anno ſexto ſupradicto* ejected him; ſo that he named the year, but not the *day* when he was ejected; the defendant imparled to the next term, and the plaintiff declared right, and both the *day and the year* were named when he was ejected: After a verdict for the plaintiff, on *error* brought, the queſtion was, whether it was erroneous, for that *no day* was ſet forth in the firſt declaration, when the plaintiff was ejected? It was agreed by the court, that the firſt is the moſt material declaration; therefore if any matter of ſubſtance is omitted in it, that ſhall not be amended by the ſecond declaration after the imparlance, becauſe that is but a recital of the firſt, but in this caſe the firſt declaration is good; for the plaintiff declared on a demiſe 25 *Martii* 6 *Jac.* which is the firſt day of the year, and that the defendant *poſtea ſcilicet anno ſexto Jac.* ejected him, which is certain enough, tho' *the day* was not mentioned, becauſe it was after the demiſe, and before the action brought. 2 *Cro.* 211.

Error of a judgment, *&c.* and after the record removed and error aſſigned, which was in the entry after the imparlance, in this manner, *Ad quem diem venerunt tam præd' Thomas* (the plaintiff) *quam præd' Samuel* (the defendant) *per attornatos ſuos prædictos et præd' Thomas defendit vim & injuriam*, *&c.* when it ſhould be *Samuel*, the defendant; ſo that the name of the plaintiff was miſtaken, and put in ſtead of the defendant; but it was adjudged amendable. 2 *Cro.* 627.

In trover, *&c.* the plaintiff, amongſt many other goods, declared, that he was poſſeſſed *de uno ſpadone*, *una equa pretii* 52*s.* 4*d.* ſo there was *no price* added to the *gelding*: The court was divided, whether this was a defect of *form* or of *ſubſtance*; the two judges, who held it to be a defect of *ſubſtance*, inſiſted that a *value* ought to be added to every *dead thing*, and a *price* to every live thing; but the other two held it not neceſſary; eſpecially where the thing itſelf was not in demand, but damages, and that it was only a defect of *form*, which was aided by the *ſtatute* 18 *Eliz.* but upon viewing the roll it appeared to be *de uno ſpadone & de una equa pretii* 53*s.* 4*d.* ſo that the copulative *et* making it an entire ſentence, the price ſhall relate to both *gelding and mare*, and the record of *niſi prius* was amended by the roll. 2 *Cro.* 129.

Debt againſt an adminiſtrator, who pleaded *plene adminiſtravit*, *&c.* the plaintiff replied, that *die impetrationis*, *&c. habuit diverſa bona*, which muſt be intended, that the plaintiff himſelf *habuit diverſa bona*, *&c.* when he ſhould have alledged, that the defendant *habuit diverſa bona*, *&c.* but adjudged upon a motion in arreſt of judgment, that it ſhould be amended, for it was only the miſtake of the clerk. *Yelv.* 65.

Debt againſt an *heir* upon the bond of his anceſtor, and the plaintiff, in reciting the bond in his declaration, had left out the words *ad quam quidem ſolutionem obligo me et hæredes meos:* after a verdict for the plaintiff, it was inſiſted, that it might not be amended, becauſe it was the ſubſtance of the declaration; but adjudged, that it ſhall be amended, eſpecially ſince the action was brought againſt the *heir*, and he ſo named in the declaration; and this omiſſion was merely by the negligence of the clerk, who had the bond before him. *Cro. Car.* 147.

Debt for 300*l.* part upon an *indebitatus aſſumpſit*, and part upon an *inſimul computaſſet*, and in ſumming it in the *imparlance roll* both did not amount to 300*l.* for it wanted 10*l.* of that ſum: after a verdict for the plaintiff, and error brought, this was amended. *Hutt.* 83.

Aſſault, *&c.* the plaintiff had a verdict and damages to 3100*l.* upon view of the record the attorney for the defendants found that there was no *day or year* entered on the imparlance roll, when the aſſault was committed, but a blank left for it; and there being a day given to move in arreſt of judgment, the attorney for the plaintiff got by night into the treaſury, and filled up the *imparlance roll* with the *day and year*; the attorney for the defendant having beſpoke of the pronotary a *recordatur*, which he was to have the next day; this matter being diſcovered, it was moved, that the roll might be made as before; but adjudged, that it was amendable, until and after the *recordatur* entered, in the one caſe by the *clerks*, and in the other by the *court*, for what was amendable was only matter of form. *Latch.* 164.

Caſe, wherein the plaintiff declared, that whereas in ſuch a court of pie-powders held at *Glouceſter ſecundum conſuetudinem civitatis illius*, he brought an action of debt againſt *W. R.* who arreſted, *&c.* and afterwards ſuffered to eſcape, *&c.* thoſe words *ſecundum conſuetudinem civitatis illius* were in the *imparlance roll*, but were left out of the *iſſue roll*; and after a verdict for the plaintiff, this was one objection in arreſt of judgment; but adjudged, that it was only *vitium clerici*, and therefore amendable. *Cro. Car.* 33.

In an action upon the ſtatute of *Winton*; the caſe was, *Bearcroft* ſent 4000*l.* by the *Worceſter carrier* towards *London*, and divers ſervants to guard the waggon, which

was afterwards robbed in the hundred of *Burnham and Stone*; and he himſelf declared againſt the hundreds for an aſſault and robbery done to *himſelf* when he was at *Worceſter*, above fifty miles from the place where the robbery was committed, and declared, that he made oath, that he did not know the robbers, or any of them; and the jury being ready at the bar to try the cauſe, the trial was put off to another day, before which day there was a miſtake found in the declaration, for that he ought to have declared of a robbery on his ſervants, and of the oath made by them; and upon a motion he had leave to amend the declaration, for otherwiſe the year would be lapſed, and ſo the action loſt, tho' this made great raſures and obliterations in the record. 3 *Lev.* 349.

Declarations which want *ſubſtance* ſhall not be amended in *another term*, neither ſhall matters of *ſubſtance* in a plea in bar, or in a replication, eſpecially matters in fact, be amended in *another term*. 8 *Rep. Blackmore's* caſe.

Debt on a bond to ſtand to an award, *&c.* the defendant pleaded that the arbitrators made no award; the plaintiff replied and ſhewed the award, but aſſigned no breach, iſſue being joined upon the award; the plaintiff had a verdict, but could have no judgment, becauſe that defect in his replication, in not aſſigning a breach being matter of *ſubſtance*, could not be amended; for if there was no breach, there was no cauſe of action. 2 *Cro.* 220.

In debt for 800l. the plaintiff declared upon a *ſtatute*, the money to be paid *upon requeſt*; and upon *oyer* of the ſtatute it appeared, that it was to be paid *on a certain day*; adjudged not amendable: this was upon a demurrer to the declaration. 2 *Cro.* 316.

Caſe, &c. wherein the plaintiff declared that he having brought an action of battery againſt the defendant, and proceeding to a trial, a juror was withdrawn, and they ſubmitted the cauſe to the award of two of the jurors *infra unum menſem proxime ſequen' fiend'*, and that afterwards *eodem die*, in conſideration that the plaintiff did promiſe to perform on his part, what the arbitrators ſhould award (leaving out *infra menſem*) the defendant promiſed in the ſame manner, *&c.* but the words *infra unum menſem* were put in by the plaintiff's attorney after iſſue joined, and without notice given to the defendant; upon *non aſſumpſit* pleaded, the plaintiff had a verdict, but the judgment was arreſted by *Roll* only in court, for that this amendment was in a point material; for tho' every ſubmiſſion to an award *implies* a promiſe to perform it, and tho' the award muſt be taken according to and with relation to the ſubmiſſion, which in this caſe was to be made *within a month*, yet in judgment of law the *promiſe* is collateral to the ſubmiſſion; and not being laid in this declaration, to be made at the ſame time, but another time tho' it be *eodem die*, yet 'tis not adequate to the ſubmiſſion, becauſe it cannot immediately be applied to it, for a little diſtance of time, tho' in the ſame day, alters the intendment of the law, a new trial was awarded. *Allen* 69.

Aſſumpſit, *&c.* againſt *John Germain*, *knight*, the defendant pleaded in abatement that he is *a knight and baronet*; the plaintiff replied that he is a knight; and moved to amend his declaration upon payment of coſts; but it was denied, becauſe there was nothing to amend by, and the defendant had taken advantage of the fault. 1 *Salk.* 50.

In covenant not to make, or ſuffer any act or thing to incumber, *&c.* the breach aſſigned was that the defendant *ad ſeſſionem Ceſtriæ tent'*, *&c. anno.* 4 *Jac.* 2. *utlagat' fuit*; and upon *demurrer* to this declaration, becauſe the plaintiff did not ſet forth *in what term* the outlawry was had, it was moved to amend it; but adjudged, that if the defendant had pleaded in *abatement*, or to the right, it might be reaſonable to amend the declaration, but never where he *demurs*, becauſe this fault might be the reaſon of the demurrer. 1 *Salk.* 50.

Debt qui tam, *&c.* for 100l. againſt a juſtice of peace, for refuſing to grant his warrant to ſuppreſs a conventicle; after iſſue joined, and the cauſe ſet down to be tried at the *niſi prius*, the plaintiff moved to amend a word in his declaration, which was, that he had laid the conventicle to be at *Mr. Turner's manſion-houſe*, when in truth it was not, but at a little diſtance from it: *Sed per curiam*, After iſſue joined, *&c.* and this information being on a penal ſtatute, it ſhall not be amended. 2 *Mod.* 144.

Writ of error to reverſe a judgment upon a *mutuatus*, the error aſſigned was, for that the *memorandum* was *die veneris*, on ſuch a day, which was before the debt became due; it was moved for leave to amend the *memorandum*, and to make it another day, that it might agree with the judgment; but *per curiam* it was denied. 4 *Mod.* 367.

Caſe againſt huſband and wife for words ſpoken by the wife; the plaintiff had a verdict, and the judgment was entered thus, *et præd'* (the wife) *in miſericordia*, when the huſband ought likewiſe to be amerced; upon error brought, the record was certified in *B. R.* and becauſe upon view of the prothonotary's book of judgments it was right entered there, it was amended by the court. *Hob.* 127.

In an action upon the *ſtatute of Winton of hue and cry*, the plaintiff had miſtaken to alledge the *very day* on which the robbery was done, but ſhewed, that it was committed in *September*, &c. and that he gave notice to the hundred, when in truth it was committed in *October*, ſo that by this record it would appear, that notice was given before the robbery was committed; the record was made up for trial, but it was not put in to the clerk of the aſſiſe, becauſe of this miſtake; and thereupon the court was moved, that it might be amended, which was granted. 1 *Brownl.* 156.

In a *quo warranto*, the plaintiff had judgment by diſclaimer of the liberties, *virtute vel prætextu literarum geren' dat' decimo ſeptimo anno Jacobi Regis*, which laſt words were written in the margin of the paper book, but there being a line drawn croſs, they were left out by the clerk in engroſſing the judgment, therefore it was moved, that the words *geren' dat' anno decimo ſeptimo Jacobi* might be interlined in the record; againſt which it was objected, that it could not be amended, it being now *another term* after the judgment was entered; but adjudged, that it was amendable, as well in *another term* as in the ſame term, and that by the Common law, for 'tis no more than the miſpriſion of the clerk, as where a ſpecial verdict is miſtaken it ſhall be rectified by the notes of the clerk. *Cro. Car.* 101.

Aſſaults againſt the defendant, in which the plaintiff declared againſt *W. Malin of Langley*; and the record of *niſi prius* was *W. Langly of Malins*; the plaintiff had a verdict, and it was moved in arreſt of judgment for that reaſon; but adjudged, that it ſhall be amended, for 'tis a plain miſtake of the clerk, and the record of *niſi prius* ſhall be amended by the *roll*. *Hetley* 64.

In ejectment againſt four defendants, the jury found two not guilty and one of the other guilty as to one *meſſuage*, *ten acres of land*, *and ten acres of paſture*, and the other as to ſixty acres of land, and fifteen acres of paſture; and in entering up the judgment, the *clerk* miſtook the parcels, and entered, that the *firſt* was guilty as to the *ſixty acres*, and the other as to the *meſſuage*, &c. and upon a writ of error in *B. R.* the queſtion was, whether this could be amended; and adjudged that it might, becauſe 'tis only the *miſpriſion of the clerk in matter of fact*, when he had the record before him, by which he might be directed, but if it had been *miſpriſion in matter of law* it could not be amended. *Palm.* 258.

Error of a judgment in ejectment, for that in the record a *ſpace* was left to inſert the coſts, which were not yet taxed; but becauſe the record was not *certified*, the plaintiff had liberty to get the coſts taxed and make the record perfect; but *per Hale* chief baron, *If it had been certified*, it had been amended by rule of court, and if it ſhould afterwards be removed by writ of error, the court there muſt amend it; for if a record is removed out of the *C. B.* into *B. R.* by writ of error, and afterwards amended by the rule of court, it muſt likewiſe be amended in *B. R.* becauſe 'tis an affirmance of the judgment, and therefore favoured in law. *Hard.* 505.

5. *Records of* niſi prius *and* poſteas *amendable, and not amendable.*

In ejectment, the caſe upon the pleading was, that *J. W. biſhop of Glouceſter*, being ſeiſed of a barn and tithe, demiſed the ſame to the plaintiff, reciting the confirmation of the *dean and chapter*, but that was of a leaſe made by *R. W.* upon the trial the jury did not find *de facto*, that the *dean and chapter* did confirm any leaſe made by *J. W.* but they found expreſly that he did make a leaſe of this barn, and tithes, to the plaintiff, who now moved the court, that the confirmation of the dean and chapter of a leaſe made by *R. W.* might be amended, and made *J. W.* the plaintiff ſuggeſting that the jury intended to find it ſo, which might appear by the notes of the clerk of aſſiſes; but the court would not amend the verdict upon ſuch ſuggeſtion, it being returned to the court, and now too late to have it amended. *Cro. Eliz. Normington* v. *Try.*

After a verdict for the plaintiff at the aſſiſes, it was moved to amend the *jurata* in the record of *niſi prius*, which was thus, *(viz.) Ponitur in reſpectu coram domino rege et domina regina apud Weſtm', &c. niſi juſticiar', &c. ad aſſiſas capiend' aſſign prius die, &c. viceſimo die Martii*; now here were two miſtakes, for the *Queen died in December* before, ſo it could not be *coram domina regina*, and the aſſiſes were on the 23*d day*, and not on the 20*th day of March*; the record was right in both theſe matters, and therefore it was inſiſted, that the *jurata* in the record of *niſi prius* might be amended by it, as it was in *Merchant* and *Reaſon*'s caſe, and in *Aquila Week*'s caſe; but it was denied; for in all caſes where the record of *niſi prius* hath been amended by the *roll*, the writ of *diſtringas* hath been right, which, together with the *niſi prius* is a ſufficient authority for the judge to try the cauſe, but here the *diſtringas* was wrong, for it was *Gulielmus & Maria dei gratia*, when the Queen was at that time dead; 'tis true, the miſpriſion of the clerk in a *writ of niſi prius* is amendable by the ſtatute 8 *H.* 6. according to *Blackmore*'s caſe, but then it muſt have ſufficient matter to authoriſe the judge to try the iſſue, for without that writ he cannot try it; now in this caſe there could be no authority from the *Queen*, for ſhe was dead, and the cauſe was tried three months after her death, for which reaſon it was not amendable. 5 *Mod.* 211.

6. *Iſſues, verdicts and records amendable, and not amendable.*

Error, &c. in a *writ of annuity*, wherein the judgment was, that the plaintiff ſhould recover the arrears before and pending the writ, *quæ quidem arreragia in toto ſe attingunt ad* 75*l.* which in truth was a quarter's rent more than was in arrear; and this was aſſigned for error; but adjudged, that becauſe it appeared upon the record to what the arrears did amount at the day of the writ brought, and becauſe the judgment had been perfect, if the clerk had not put it into a certain ſum, which was not his buſineſs to do; therefore this was only his miſtake, and ſhall be amended. *Dyer* 55.

In *Blackmore*'s caſe it was adjudged, that the court in the ſame term may as well amend their own judgment, as any other part of the record; for in the ſame term the judgment is given, the record is in the breaſt of the judges, and not in the roll. 8 *Rep.*

Error of a judgment againſt *Edward Seymour* at the ſuit of *Sir John Clifton*; and the error aſſigned was, that the judgment was entered thus; *(viz.) quod recuperet verſus Edvardum Seymour*, leaving out the word *prædictum*; adjudged, that it was amendable. *Goldſ.* 113.

Two plaintiffs brought an ejectment in *C. B.* againſt two defendants: upon Not guilty pleaded, the jury found one of the defendants guilty as to the lands in *D.* and the other defendant guilty as to the lands in *S.* and in entering the judgment there was a miſtake by the clerk, who entered quite contrary to the finding of the jury; for that the defendant which was found guilty as to the lands in *D.* the entry was, that he was guilty of the ejectment of the lands in *S.* and ſo *e converſo*; and upon a writ of error brought in *B. R.* the queſtion was, whether this could be amended after the record moved? The better opinion was, that upon a writ of error in *B. R.* upon a judgment in *C. B.* the entry is *mittitur tranſcriptum recordi*; but upon a writ of error in the *Exchequer* chamber, upon a judgment in *B. R.* the record remains ſtill in *B. R.* and therefore that court may amend it after ſuch writ of error brought; but this muſt be in a miſtake, and not in point of judgment, where there is matter of law. 2 *Roll.* 252.

Upon a *demurrer* to a declaration in *C. B.* judgment was given againſt the plaintiff, who brought a writ of *error* in *B. R.* for that the judgment was entered thus, *(viz.)* that on ſuch a day the plaintiff being *exactus non venit, ideo nil capiat per breve*, and thereupon a writ of inquiry was grounded, and this was aſſigned for error, for that this judgment was entered upon a *nonſuit*, when it ſhould have been upon a demurrer: *Sed per curiam*, There is little difference between judgment in both caſes; for the judgment in both is, that *nil capiat per breve*; ſo that this being only a *miſ-entry of the clerk*, when he had the whole record before him, it was amended, tho' the error and miſ-entry was in another court. 1 *Rol. Rep.* 309.

In ejectment the plaintiff had a verdict for ten meſſuages, fifteen acres of land, fifteen acres of meadow, and fifteen acres of paſture, and as to the reſt in the declaration the jury found the defendant Not guilty; and the entry of the judgment was, that the plaintiff ſhould recover *the meſſuages and the greater number of the acres in the verdict*; and thereupon the defendant brought a writ of error, and aſſigned errors; and upon a *ſcire facias ad audiendum errores*, the defendant in error pleaded *in nullo eſt erratum*, and moved in *C. B.* to amend the judgment: it was objected, that the time was paſt after the aſſignment of errors to amend the judgment, and if it was not, yet the judgment could not be amended, becauſe 'tis the act of court; *Sed per curiam*, The time is not paſt ſo long as *diminution* may be alledged, or a *certiorari* awarded; and this being a plain miſtake in the clerk, in entering the judgment not according to the verdict, it was amended. *W. Jones* 9.

Debt, *&c.* by *Thomas Welcome*, againſt *B. B.* in which the plaintiff had a verdict, and the judgment was entered *quod præd' B. B. recuperet*, when it ſhould have been *quod præd' Thomas recuperet*; it was moved, that the record might be amended, this being only the miſpriſion of the clerk; but adjudged, that it ſhould not be amended, becauſe the judgment is the act of the court, and not of the clerk. *Goldſb.* 104.

Error of a judgment, *&c.* and error aſſigned was, that the judgment was entered, that the plaintiff ſhould recover 20*l.* aſſeſſed to him *per juratores necnon* 10*l. per jur'*, when it ſhould be *cur'*, ſo that there was only a miſtake of a letter, *(viz.) j* for *c*; but becauſe it was part of the judgment, it could not be amended. *Goldſ.* 151.

An attorney directed his clerk to make a *ca. ſa.* returnable in *Trinity-term*, the laſt return whereof was on the 25*th of June*, and the clerk by miſtake wrote the 25*th of July*; adjudged, this was not amendable, becauſe of the miſchief which might inſue; for if 'tis amended, and made returnable the laſt return of *Trinity term*, it may happen that the party may be in the company of the ſheriff after the return, and before 'tis amended. 2 *Sid.* 7, 12.

In the year 1676 the Earl of *Stafford* gave a warrant of attorney to one *Simpſon* to confeſs a judgment at the ſuit of the plaintiff, *&c. Simpſon* ſent the warrant to one *Wall*, his entering clerk, who entered the judgment, that the plaintiff *recuperet debitum et damna ſua*, but left a blank for the *damages*; *Wall* died, and his warrant of attorney was loſt, but *Simpſon*, who was ſtill living, made *affidavit* of the fact, and thereupon a motion was made to inſert a ſum certain for the damages and coſts; for that at Common law, before any ſtatute of amendments, the court had power to amend their own judgments, and in this caſe the words omitted are the act of the court; they might likewiſe amend it if it had been the miſpriſion of the

the clerk; all which is very true; but in this case there is nothing to amend it by; for the warrant of attorney being lost, 'tis uncertain what sum shall be allowed for costs; besides, admit that this is amendable, yet it must be in the *same term* in which the judgment was entered; for so long and no longer, the court hath power to amend their own judgments; but here the judgment was entered above 19 years past, and so not amendable. 5 *Mod.* 147.

In ejectment, the plaintiff declared on a demise 10 *Aprilis* 1697, instead of 1696, so that at the trial, the year 1697 was not come: There was a verdict for the plaintiff, and now he moved to amend it; but it was denied; because if it should be granted, it altered the issue and made a new title in the plaintiff. 1 *Salk.* 48.

Two as principals, and one as accessary, were *indicted for the murder of a woman*; one of the principals confessed the fact; the other principal and accessary were convicted; both the *principals* were hanged, and *Sampson* the *accessary* was pardoned, and brought a writ of error to reverse his attainder; and upon a *certiorari* to the clerk of the assise to certify the record, he returned, that at the general goal delivery, *&c.* held 18 *die Martii* in such a year, before such judges, the defendants were indicted, *&c.* and afterwards, 20 *die Martii* aforesaid, *coram præfat' justiciariis*, they were tried, convicted, and had judgment, *&c.* the error insisted on was, that there was not *continuance* by *adjournment from the* 18*th to the* 20*th of March*; 'tis true; 'tis *coram præfat' justiciariis*, but they may still be the same justices by another commission; that this record thus certified is ill, and cannot be amended, neither by the common law, or by any statute. *Jones* 420.

7. *Fines and recoveries amendable, and not amendable.*

In a *formedon* for the manor of *Ilfeild*, the defendant pleaded in bar a *common recovery* against the donee in tail of the said manor; the plaintiff replied, *nul tiel record*, which being certified, it appeared, that the recovery was of the manor of *Isfield*; adjudged, this being the mistake of the clerk in one letter, it shall be amended, especially it being in the case of a common recovery, which is suffered by the assent of both parties. 5 *Rep.* 46.

Upon a *fine levied in Michaelmas term* 11 *Eliz.* the *proclamations* ingrossed by the chirographer were right; but in the note of the fine delivered to the *custos brevium*, the second proclamation was entered to be made 20 *Maii*, where it should have been 23 *Maii*; adjudged, that it shall be amended, because the engrosment by the *chirographer* is the foundation, and that being right, 'tis a sufficient warrant to mend the other; but the court held it to be a good fine without any amendment. *Hut.* 122.

The writ of covenant was *tested* six months after the *dedimus*; the court of *Grand Sessions in Wales* ordered it to be amended; whereupon the *Earl of Pembroke* petitioned the house of peers for a bill to set aside this amendment, whereby he had lost the benefit of a *writ of error*, and the matter was referred to the judges, to certify whether the amendment was warranted by law; and *Holt* Ch. J. certified that it was not, because the *writ of covenant* was an *original*, and not amendable either by the *common law*, *or by any statute*; that as to amendments, there is no difference between an amicable and an adversary action; that a *fine and common recovery* are as much an assurance as a deed, and no-body pretends to amend a mistake in a deed; that *Gage's* case in the 5*th Rep.* 45. is misreported, and no law; hereupon a bill was allowed by the lords, but rejected by the commons. 1 *Salk.* 52.

A recovery was suffered, but the *writ of seisin* was made *returnable the same return as the writ of entry*; the return was ordered to be amended. *Rep. of Pract. in C. B.* 127.

The *writ of entry* was made *returnable tres Mich.* 23 *Car.* 2. which was *before the date of the deed*, to make a tenant to the præcipe; and ordered to be *amended* by making the writ *returnable Crastin' animarum*. *Rep. of Pract. in C. B.* 127.

It was moved to amend a *recovery suffered* by *Jane Knight*, the *lands* being *said* in the recovery to *lie in parochia sanctæ Mariæ salvatoris in Southwark*, whereas there is *no such parish*; for the proper name is *sancti Salvatoris*; and the court gave him leave to raise the word *(Mariæ)*; and *per Treby* Ch. J. the vulgar name is *St. Mary Over-ree*, that is, over the river; but *sancti Salvatoris* is the name used in pleadings. *L. Raym.* 134.

Upon the certificates of the *custos brevium*, Mr. Prothonotary *Tempest*, and the clerk of the warrants of this court, said, that the writ of entry and writ of seisin between the parties had been duly issued; and also that the *recovery* in this cause was *taken at the bar* of this court of the term of St. *Michael*, *in the* 8*th year of K. Charles the First*, *all the parties in the said recovery named then and there appearing in their own persons*. It was ordered, that the said recovery should be enter'd of record of that same term of St. *Michael*, upon the 13th roll, among the rolls of the pleas of land inrolled in that term. *Rep. of Pract. in C. B.* 127.

On motion to amend a writ of entry *by putting out Cowickbury, and inserting (in paroch' de Sheering)* it appeared that the deed to lead the uses thereof was right; and upon producing several precedents, *a fine was to the heirs males*, and *scire facias is made to the heirs in general*; this shall be amended. *Bro. Amendment, pl.* 113.

A common recovery was suffered, to the intent to bar an intail, and the warrant of attorney was, that *Alicia Pinde ponit loco suo A. B. &c.* whereas her name was *Elizabeth*, and so it was assigned for error, that no warrant was entered for *Elizabeth*; the query was, if this were amendable, and the book says, that it was amended afterwards. *Dyer* 105.

In *formedon* the writ was *præcipe quod reddat* 20 *acres Heddington*, not saying *in Heddington*; the cursitor upon oath confessed, that the *paper deliver'd to make out the writ by*, *had the word (in,)* and therefore it was amended by order of the court, it being only the default of the clerk. *Cro. Eliz.* 644. *pl.* 49.

In the *third proclamation upon the foot of a fine levied in Trin. term.* 5 *Jac.* the said proclamation as *said to be made* 6 *Jac.* and upon the foot of the fine the *fourth proclamation is wholly left out*; but because upon view of the *proclamations indorsed upon record remaining with the chirographer*, and the book in which the proclamations were first enter'd, it appear'd that the said proclamations were *rightly and duly made*; it was adjudged that they may be amended. 13 *Rep.* 54. *Trin.* 7. *Jac.* 1.

In a recovery agreed to be suffered by *A. B.* and *R. C.* the *writ of entry* was sued out in the name of *J. C.* instead of *R. C.* but ordered to be amended. *Rep. of Pract. in C. B.* 127.

A warrant to suffer a recovery by *W. R.* and *Hester his wife*; the serjeant had certified that the warrant was given by *W. R.* and *Margaret* his wife, and the *mittitur* and transcript made, and the recovery enter'd accordingly, but order'd to be amended.

A recovery enter'd by *A. B.* and *C.* his wife, but the *name of the wife totally omitted*, ordered by the court to be amended. *Rep. of Pract. in C. B.* 127.

A motion to amend a recovery in *Hill.* 1703. wherein *West-Engleston and West-Tyneham* was put in the writ of entry, *instead of Ingleston Tyneham:* the deed to lead the uses was right; *E. J.* who was one of the vouchees was dead, the other parties alive and consenting; and it appearing that it was the intent of all the parties that it should be right, and common recoveries being common assurances, amendments ought more easily to be made than in other cases; therefore the court ordered it to be amended accordingly. *Rep. of Pract. in C. B.* 17.

A motion to amend a recovery *by putting in* these words, *paroch' sanctæ Mariæ in Wallingford*, *and in paroch' de Wargrove*, and a rule to shew cause was granted; this was afterwards opposed strongly, three justices against the amendment; but *Tracey* seem'd for it, tho' the *parties*

were

were all dead, and purchaſers in the caſe: It was denied chiefly becauſe if the amendment was made, *the King would loſe his fine for the parcels to be inſerted. Rep. of Pract. in C. B.* 25, 26.

A motion was made laſt term to amend a fine *by inſerting the word (woorth,)* and this preſent term on ſhewing the cauſe, the rule was made abſolute for the amendment, tho' it was objected that the heirs at law would be prejudiced if the fine was amended; the court ſaid, they could not take notice, whether it would be a prejudice to the heirs at law or not; but it was the duty of the court *to make the fine agreeable to the deed and intention of the parties. Rep. of Pract. in C. B.* 52.

A motion to amend a recovery by *inſerting ſeveral pariſhes* which were *left out in the inſtructions to the curſitor*; it appeared that the deed to lead the uſes of the recovery, was dated the 7th of *October*, the writ of entry teſted the 11th of *December*, and returnable *in menſem Mich.* The court ordered the recovery to be amended. *Rep. of Pract. in C. B.* 85.

It was moved to amend a fine by ſtriking out the words *in America in partibus tranſmarinis*, this *fine was of lands* and tenements *in the iſland of Antigua, or otherwiſe Antiguea, in paroch' ſanctæ Mariæ Iſlington in the county of Middleſex*, and was paſſed in the year 1714; application had been made to the maſter of the rolls, and an order made by his honour for the amendment, which order was ſet aſide by my lord chancellor: After great debate in this cauſe (a writ of error being depending) the judges were unanimouſly of opinion, that this court had the only cognizance of fines, and order'd the ſame to be amended. *Rep. of Pract. in C. B.* 121.

A rule *to compleat a recovery* of *Eaſter* term the 9th of Queen *Ann.* the *præcipe at bar was ſign'd* by ſerjeant *Richardſon*, the *plea roll enter'd*, and the *exemplification ingroſſed but not ſealed, and neither the roll carried in, nor the writs filed*; upon reading the deeds and affidavit of notice to the reſpective parties, the recovery was order'd to be compleated, and the rolls and writs to be filed. *Rep. of Pract. in C. B.* 126.

8. *Indictments and popular actions amendable, and not amendable.*

An action was brought, upon the ſtatute of *hue and cry*, againſt the *hundred of Cheſſam*; the plaintiff had a verdict; and upon error brought, and all the records certified, the plaintiff prayed, that the title of the action might be amended, for upon the *roll* it was an action on *the caſe*, when it ſhould have been, an action on *the ſtatute*; but adjudged, that it could not be amended, becauſe the ſtatute 18 *Eliz.* did not extend to amendments upon popular actions, upon penal ſtatutes or indictments. *Winch.* 66.

Two were indicted of felony, and found guilty, but the indictment was only in the ſingular number, tho' both their names were in it; nine of the judges were of opinion, that it was amendable; it being doubted by juſtice *Yelverton* at the aſſizes, before the felons were tried, and therefore he deſired the opinion of the judges, who agreed as aforeſaid, and the parties were executed. 2 *Bulſt.* 35.

An indictment was removed into *B. R.* by a *certiorari*, and the court was moved, that the word *(publicè)* might be inſerted, but it was denied, becauſe it was of another term. *Style.* 321.

The defendant was indicted for *barretry in Middleſex*, and upon a *certiorari* brought, two or three lines of the indictment were left out; and the clerk of the peace of *Middleſex* attending, it was moved to amend it by the record: adjudged, that if this had been to remove an indictment in *London*, it might be amended, becauſe they have power by their charter to certify *tenorem recordi*, ſo that the record ſtill remains with them, and the court may amend by it; but it cannot be amended in any other county, becauſe the law ſuppoſes the record itſelf to be removed, and ſo there is nothing remaining for them to amend it by. *Sid.* 155.

The defendant being indicted for murder, pleaded, that he is *Earl of Banbury*, &c. the attorney general replied, and then the defendant moved to amend his plea; which was granted, becauſe not entered on the roll, but only filed. 1 *Salk.* 47. *The King* verſus *Knolles.* The like rule in an information for perjury. 1 *Salk.* 47.

Amercement, *Amerciamentum*, (from the Fr. *Merci*, *i. e. Miſericordia*) ſignifies the pecuniary puniſhment of an offender againſt the King, or other lord, in his court, that is found to be in *miſericordia*; that is, to have offended, and to ſtand at the mercy of the King or lord. There ſeems to be a difference between *amercement* and *fines. Kitchin, fol.* 214. For *fines*, as they are taken for puniſhments, are certain, and grow expreſly from ſome ſtatute, but *amerceaments* are ſuch as are arbitrarily impoſed by *affeerors*, which *Kitchin, fol.* 78. in ſome manner confirms in theſe words, *L' amerciament eſt affire per pares. Manwood*, in his *Foreſt Laws, par.* 1. *fol.* 166. ſaith, an *amerceament* is a more eaſy, more merciful penalty, and a *fine* more ſharp or grievous: his words are theſe. *If the pledges for ſuch a treſpaſs do appear by common ſummons, but not the defendant himſelf, then the pledges ſhall be impriſoned for that default of the defendant. But otherwiſe it is, if the defendant himſelf do appear and be ready in court before the lord Ch. J. in* Eyre, *to receive his judgment, and pay his fine: if ſuch pledges do make default, in that caſe the pledges ſhall be* amerced, *but not fined.* So that an *amercement* is for a ſmall fault, and a *fine* for a great one. The author of the *New Terms of Law*, ſaith, that *amerceament* is properly a penalty aſſeſſed by the peers or equals of the party *amerced*, for an offence done; for the which he putteth himſelf upon the mercy of the lord: who alſo makes mention of an *amercement royal*, and defines it to be a pecuniary puniſhment laid upon a ſheriff, coroner, or ſuch like officer of the King, by juſtices, for ſome offence. *Ratcliff* baron of the *Exchecquer.* 2. *H.* 7. See *Miſericordia.* If the *amerceament* were too grievous, *i. e.* diſproportioned to the nature of the offence, or the abilities of the offender, there was a releaſe to be ſued by a writ called *moderata miſericordia. Amerciamenta illevabilia* were ſuch *amercements* as, thro' the poverty or eſcape of the *amerced*, became deſperate debts, and were deducted in the accounts of the bailiff, or ſteward, or collectors of rents and other dues. So *A. D.* 1425. the prior and canons of *Burcheſter*, allowed to the receiver their rent at *Kirthington* —— *In allocatis eidem pro* amerciamentis *illevabilibus hoc anno ſex denarios.* See *Kenn. Paroch. Antiq.* 573. and *Gloſſary, in voc.* amerciamentum. *Cowel.*

In all actions *quare vi et armis*, as in *reſcous, treſpaſs, vi et armis*, &c. if judgment is given againſt the defendant, he ſhall be *fined* and impriſoned, for *impriſonment* is incident to a *fine*; and when the judgment is *quod capiatur*, it muſt be intended *capiatur* till he pays the fine; if the defendant plead a falſe deed, or denies his own deed, and 'tis found againſt him, or if *relicta verificatione* he confeſſeth the action, he ſhall be *fined*; but if he pleads the deed of his anceſtor, or denieth it, and it is found againſt him, he ſhall be only *amerced*, if the defendant in *replevin* claimeth a property, where in truth he hath none, and 'tis found againſt him, he ſhall be *fined.* In an *appeal of robbery, death, felony, or maihem*, if the plaintiff be *nonſuit, barred*, or his writ *abate* by his own default, he ſhall be *fined*, and ſo in *attaint*; ſo likewiſe for any *contempt* done to a *court of record*, and alſo in all caſes where a thing is prohibited by any ſtatute: Thus much concerning *fines.*

Now for *amercements* theſe rules were agreed, *(viz.)* in all writs of *præcipe quod reddat, formedon, quod permittat*, &c. if the plaintiff be barred or nonſuit, or his writ abate, either for matter or form, he ſhall be *amerced*; but if there are two plaintiffs, and the writ abate for the death of one of them, in ſuch caſe the other ſhall be *amerced.* In all *perſonal actions without force*, as in *debt, detinue*, &c. if the plaintiff be *nonſuit, barred*, or his writ *abate for matter or form*, he ſhall be *amerced*; but if the writ abate for the *death of one plaintiff*, or if one of them is *nonſuit*, which in law is a *nonſuit of both*, he who ſurviveth ſhall not be amerced, nor he who was nonſuited, but the other who was. In all *judicial proceſs*, if the plaintiff be *nonſuit, barred*, or his *writ abate*, he ſhall *not be amerced*, becauſe 'tis a proceſs founded on a judgment

and record, and in these actions *he shall not find pledges.* In all *real and personal actions*, if part be found for the plaintiff, and part for defendant, or part against one defendant, and part or nothing against the other defendant, where there are two, in such case, neither the plaintiff nor defendant shall be amerced; and therefore, in *assault* brought against *husband and wife*, supposing the *battery* to be done by *both*, and the wife is only found guilty, the plaintiff shall not be amerced; *one defendant* shall not be *twice amerced*, but one plaintiff may: upon a *discontinuance* in any action, the plaintiff shall not be amerced, because 'tis the act of the court; and so it is where the court hath no jurisdiction. In all actions, *&c.* where the defendant appeareth the first day, and *tendereth* the thing *in demand*, he shall not be amerced, because he doth what the King commanded by his writ; but in all actions in which the offence is supposed to be done *by force*, if the defendant at the first day confesseth the action, yet he shall be *fined*, because his confession is not a satisfaction, but a declaration of the offence. In all actions, *&c.* where the *writ doth abate* for want of *form* or *substance*, or if the plaintiff or defendant is barred, the judgment for the defendant is, *quod quærens nihil capiat per breve suum, &c. sed sit in misericordia pro falso clamore suo, &c.* and that the defendant *eat inde sine die*; but if the plaintiff be nonsuit, then the judgment is, *ideo consideratum est per curiam quod* (the plaintiff) *et plegii sui de prosequendo sint in misericordia.* 8 *Rep.* 61. *Beecher's* case.

In trespass, *&c.* the defendant justified the taking, *&c.* for at the sheriffs *torn* the plaintiff was presented for not appearing there, being duly summoned, and thereupon he was *amerced by the jury*, which was *affeered* by four of the jurors to 40*s.* which was certified to the next quarter sessions, and there it was confirmed, whereupon the *steward of the sheriff's court* made a warrant to the defendant to levy the 40*s.* by virtue whereof he took the bullock, *&c.* Upon demurrer to this plea it was insisted for the plaintiff, that the *amerciament* ought to have been assessed *by the court, and not by the jury*, as the defendant had pleaded, because 'tis a judicial act; besides, it ought not to be levied by the defendant as bailiff, by a *warrant from the steward*, &c. because 'tis expresly provided by the statute 1 *Ed.* 4. that no fine or amerciament in a *torn* shall be levied, unless 'tis certified to the next sessions by indenture, and there inrolled; and *by process made from the sessions to the sheriff himself*, so that it cannot be levied by *warrant from his steward to the bailiff*, for that is directly contrary to the statute; and so it was adjudged. *Cro. Car.* 260.

In dower, the defendant confessed as to part, and judgment against him *quod sit in misericordia*, and pleaded in bar as to the rest; and upon demurrer to that plea, judgment against him *quod sit in misericordia* again; upon a writ of error brought it was insisted, that he could not be twice *amerced* in the same action; but adjudged, that he may, where both the judgments are final and independant on one another, as in this case, but not where one is interlocutory. 1 *Salk.* 54.

Upon a *capias* directed to the sheriff of *Yorkshire*, he issued a warrant to the bailiff of the liberty of *Pomfret*; to take the defendant *Smith*; who (not returning the writ) was amerced at several times to 50*l.* which was *estreated into the Exchequer*; afterwards the parties agreed that upon producing a certificate from the plaintiff's attorney that the debt was paid, these amerceaments should be discharged, which was accordingly done upon motion, tho' it was said that there ought to be a *constat of the estreat*, and that the amerceaments are not usually discharged upon motion, but that the court in such cases gives the sheriff leave to compound them. 1 *Salk.* 54.

Issues were returned upon the *distringas*, and so upon a second and third; and upon a motion for a rule to estreat them, it was denied, because 'tis the course of the court to send twice in a year into the Exchequer, *(viz.)* on the last day of the two issuable terms; but in extraordinary cases there may be a rule to estreat them sooner. 1 *Salk.* 55.

The town shall be amerced for an *escape of a murderer*, tho' it was committed in a field or a by-lane, if the escape was in the day time. *Dyer* 210.

But in *Milbourne's* case it was adjudged, that at Common law, if a man be killed in a town in the day-time, so long as there is full day, if the murderer escape, the town shall be amerced; but if it was done in the night, and the felon escape, the town shall not be amerced, because in such case it shall not be presumed that they neglected to apprehend him. 7 *Rep.* 4. *Milbourn's* case.

Some courts may *fine, but not imprison*, as the leet; some *cannot fine nor imprison, but amerce*, as the county court, hundred, court baron, *&c.* for no court can fine or imprison which is not a court of record; some *may imprison, but not fine*, as the constable at petty-sessions for an affray made in disturbance of the court; some *cannot fine, imprison nor amerce*; as the ecclesiastical courts held before the ordinary, archdeacon, *&c.* or their commissaries, and such as proceed according to the Canon or Civil law; and some *may fine, imprison, and amerce*, as the case requires, as the courts of record at *Westminster* and elsewhere. 11 *Rep.* 43. *b.*

The *sheriff in his tourn* may impose a fine on all such as are guilty of any *contempt in the face of the court*; for he still continues a judge of record; and there seems to be no doubt but he may impose what reasonable fine he thinks fit upon a *suitor refusing to be sworn*, or upon a *bailiff refusing to make a panel*, &c. or upon a *tithingman neglecting to make his presentment*, or upon a *juror refusing to present the articles wherewith they are charged*, or upon a person duly chosen constable refusing to be sworn. 2 *Hawk. P. C.* 58. *c.* 10. *sect.* 15.

Admiralty court, which is *no court of record*, may punish one that resists the process of their court, and may fine and imprison for a *contempt* to their court *in the face of it*; but should they proceed to give the party *damages*, a *prohibition* would be granted. *Vent.* 1. 20 *Car.* 2. *B. R. Sparkes* v. *Martin.*

Amelle, (from the Lat. *Amictus)* A priestly garment. *Cowel.*

Amicia, (the same with *Almutium)* A cap made with goat's or lamb's skins; that part whereof which covered the head was square, and one part of it hung behind and covered the neck. It is mentioned in the *Monasticon*, 3 *tom. pag.* 36. *pennulas autem hujus amiciarum caprinas esse volumus vel agninas.*

Amictus, Was the uppermost of the six garments worn by priests; it was tied round the neck, *ne inde ad linguam transeat mendacium*; and it covered the breast and heart, *ne vanitates cogitet.* —— *Amictus, alba, cingulum, stola, manipulus et planeta* —— These were the six garments of priests. *Cowel.*

Amicus curiae, If a judge is doubtful or mistaken in a matter of law, a by-stander may inform the court, as *amicus curiæ.* 2 *Inst.* 178. In some cases, a thing is to be made appear by suggestion on the roll by motion; sometimes by pleading, and sometimes as *amicus curiæ.* 2 *Keb.* 548. Any one as *amicus curiæ* may move to quash a vicious indictment; for if there were a trial and verdict, judgment must be arrested. *Comberb.* 13. A counsel urged that he might, as *amicus curiæ*, inform the court of an error in proceedings to prevent giving false judgment; but it was denied, unless the party was present. 2 *Show. Rep.* 297.

If an action be abated, any one as *amicus curiæ* may move to have the verdict set aside, even the defendant himself. *Comb.* 170.

Amittere legem terrae, To lose and be deprived of the liberty of swearing in any court, or (as Sir *Edw. Coke* says) to become infamous, is used by *Glanvill, lib.* 2. *c.* 13. for the punishment of the champion, over-come or yielding in battle, upon a writ of right, and of jurors found guilty in a writ of attaint. *Cowel.* See *Selden's Titles of Honor*, and statute 5 *Eliz. c.* 9. against perjury.

Ammallare, To enamel. It is often mentioned in the *Monasticon*, 3 *tom. p.* 170.

Ammobragium, A ſervice —— *Terræ in Com.* Flint. *tenentur de domino rege per certa ſervitia, et per* ammobragium *quod ad quinque ſolidos extenditur cum acciderit. Pat. 7 Ed. 2. m. 7. Cowel.*

Amneſty, *(Amneſtia, Oblivio)* An act of pardon or *oblivion*, ſuch as was granted by King *Charles* the ſecond at the reſtoration. *Cowell*, ed. 1727.

Amnitum inſulae, Iſles upon the weſt coaſt of *Britain. Blount.*

Amortization, *(Amortizatio,* Fr. *Amortiſſement)* Is an alienation of lands or tenements in mortmain, *viz.* to any corporation or fraternity, and their ſucceſſors, *&c.* and the right of *amortization* is a privilege or licence of taking in mortmain. *Jus* amortizationis *eſt privilegium ſeu licentia capiendi in manum mortuam.* In the ſtatute *de libertatibus perquirendis anno 27 Ed.* 1. the word *amortiſſement* is uſed. *Cowell.* See **Mortmain.**

Amortize, (Fr. *Amortir*) Is to alien lands in mortmain. See **Mortmain,** and the *ſtat. 7 Edw.* 1. of *amortizing* lands.

Amoveas manum. See **Ouſter le main.**

Ampliation, *(Ampliatio)* An enlargement, but in ſenſe of law it is a referring of judgment, till the cauſe be further examined. *Cowell.*

Amy, *(Amicus)* in Law *prochein amy* is the next friend to be truſted for an infant. *Alien amy* is a foreigner here ſubject to ſome prince in friendſhip with us. *Cowell. Jacob.*

Amytte, The garment with which the prieſt in ſacrificing covered his head and ſhoulders. From the Lat. *amictus. Cowell.*

Analagium. *Rex Johannes Concedit Jordano de London* analagium *dumiſiæ apud* Bray *in feudo. Rot. Cart. 7. Joh. m.* 1.

An, jour et waſte, *(Fr.)* Year, day and waſte; a forfeiture of lands to the King by tenants committing felony and afterwards the land falls to the lord.

Analogium, A pulpit. *Cowell*, ed. 1727.

Anabus, i. e. *Mendoſus. Cowell, ib.*

Anar, i. e. A King. *Cowell, ib.*

Anacalites, The hundred of *Henley. Cowell, ib.*

Ancaſter. See **Crococalana.**

Anceſtor, *(Anteceſſor)* Signifies one that has gone before in a family: But the law makes a difference between what we commonly called an anceſtor and a predeceſſor; the one being applied to a natural perſon and his anceſtors, and the other to a body politick and their predeceſſors. *Co. Litt. ſect.* 103. A prepoſſeſſor of an eſtate hath been called *anceſtor. Cowell.*

Anceſtrel, What relates to or hath been done by one's anceſtors; as *homage anceſtrel, &c.*

Anchor, Is a meaſure of brandy, *&c.* containing ten gallons.

Anchorage, *(Ancoragium)* A duty taken of ſhips for the uſe of the haven where they caſt anchor. *MS. Arth. Trevor. Ar.* The ground in ports and havens belonging to the King, no perſon can let any anchor fall thereon, without paying therefore to the King's officers. *Cowell*, ed. 1727.

Ancients, Gentlemen of the *inns* of *court.* In *Gray's Inn*, the ſociety conſiſts of *benchers, ancients, barriſters,* and *ſtudents* under the bar; and here the *ancients* are of the oldeſt barriſters. In the *Middle Temple*, ſuch as have gone through or are paſt their readings, are termed *ancients:* The inns of *Chancery* conſiſt of *ancients* and *ſtudents* or *clerks*; and from the *ancients* one is yearly choſen the principal or treaſurer. *Jacob.*

Ancient demeſne, or **demain,** *(Vetus patrimonium domini)* Is a certain *tenure*, whereby all manors belonging to the crown in the days of Saint *Edward*, or *William the Conqueror*, were held; the numbers and names as well of ſuch manors as belonged to the King, as of all others belonging to common perſons after a ſurvey made of them, he cauſed to be written in a book, now remaining in the Exchequer, and called *Domeſday*; and thoſe, which by that book appear to have at that time belonged to the crown, and are contained under the title *Terra Regis*, are called *antient demeſne. Kitchin, fol.* 98. Of theſe tenants were two ſorts; one that held their lands frankly by charter, the other by copy of court roll, or by the verge at the will of the lord, according to the cuſtom of the manor. *Britton, cap.* 66. *num.* 8. The benefit of this *tenure* conſiſts in theſe points: 1. The tenants holding by charter, cannot be impleaded out of their manor; or if they be, they may abate the writ by pleading their tenure, before or after anſwer made. 2. They are free from toll for all things concerning their livelihood and huſbandry. They may not be panelled upon any inqueſt. *F. N. B. fol.* 14. *d. & fol.* 228. *&c.* By whom it appears, theſe tenants held originally by plowing the King's lands, plaſhing his hedges, or ſuch like, towards the maintenance of his houſhold; for which cauſe they had ſuch liberties granted to them: And to avoid diſturbances, they may have writs to ſuch as take duties of toll; they have alſo immunity of portage, paſſage and ſuch like.

All thoſe lands which were in the poſſeſſion of *Edward the Confeſſor*, and afterwards came to *William the Conqueror*, and were by him about the 20th year of his reign ſet down in a book, called *Domeſday*, under the title *de terra Regis*, are antient demeſne lands; theſe were exempt from any feudal ſervitude, and were let out to huſbandmen to plough and cultivate for ſupplying proviſions and neceſſaries for the King's houſhold and family; and for this purpoſe the tenants (who are called by *Bracton villani privilegiati)* enjoy certain privileges, and the tenure itſelf had ſeveral properties diſtinct from others, which it retains to this day, though the lands be in the hands of a ſubject, and the ſervices changed from labour to money 4 *Inſt.* 296. 2 *Inſt.* 542. *F. N. B.* 14. 1 *Salk.* 57.

1. *How ancient demeſne is to be tried.*
2. *Privileges of tenants in ancient demeſne.*
3. *By what acts the tenure may be changed.*
4. *Pleading ancient demeſne, and the form thereof.*

1. *How ancient demeſne is to be tried.*

This tenure, my Lord Ch. Juſt. *Holt* ſays, is as antient as any other, though he ſuppoſes that the privileges annexed to it commenced by ſome act of parliament, for that it cannot be created by grant at this day. 1 *Salk.* 57.

The lands which were in the poſſeſſion of *Edward the Confeſſor*, and were given away by him, are not at this day antient demeſne, nor any others, except thoſe writ down in the book of *Domeſday*; and therefore, whether ſuch lands are antient demeſne or not, is to be tried only by that book. 1 *Salk.* 57. 4 *Inſt.* 269. *Hob.* 188. 1 *Brownl.* 43.

But if the queſtion is, whether lands be parcel of a manor which is antient demeſne, this ſhall be tried by a jury. *Salk.* 56, 774.

Ancient demeſne is pleaded as to ſuch a manor, and iſſue is taken whether 'tis ſo or not, this ſhall be tried by the book of *Domeſday*; but if iſſue be taken, that *certain acres are parcel* of the manor of *H.* which is ancient demeſne, *that* ſhall be tried by a jury; for parcel or not parcel is matter of fact, which cannot be tried by that book. 9 *Rep.* Caſe of the abbot of *Strata Marcelia.*

The tenant pleaded ancient demeſne held of the manor of *Sudbury* in the county of *Suffolk*, and iſſue being taken, whether that manor was *ancient demeſne* or not, the book of *Domeſday* was brought into the court of Common Pleas at the trial, and this was by a *certiorari* out of the Chancery, directed to the treaſurer and chamberlain of the Exchequer, and by *mittimus* ſent to the Common-Pleas. *Dyer* 150. *b.*

Iſſue was taken whether the manor of *Bowden* in the county of *Northampton* was *ancient demeſne*, or not; and the *Book of Domeſday* being brought into court, it appeared, that the manor of *Bowden* in the county of *Leiceſter* was *ancient demeſne*, but not the manor of *Bowden* in the county of *Northampton.* 1 *Brownl* 43.

It appears, that all the land which is intitled in the Domeſday book in the *Exchequer*, under tit. *Terræ Regis Terræ E. Regis & Confeſſoris*, or *Terræ Regis W. Conqueſtoris*, is antient demeſne; and thoſe which are intitled under other titles, *terræ epiſcopi S. &c.* are not ancient demeſne; and plea was made there, where it was ſhewn,

ſhewn, that the manor of *D. was ancient demeſne*; that *in this will are three manors of one name, and that they hold of the manor which is under this tit. Terræ epiſcopi E.* and not of the manor, which is under this title *Terræ regis*; *quod nota*, and ſo he confeſſed, and avoided the record which was ſhewn to prove the ancient demeſne. *Br. Ancient Demeſne, pl.* 5. cites 40 *Ed.* 3. 45.

Iſſue was, whether the *manor of Otterbury* was ancient demeſne, and the court *awarded quod quærens habeat recordum libri de Domeſday hic in Octab. Hillarii.* At the day, the plaintiff had the book brought into court by a porter. It appear'd that *Edward the Confeſſor anno* 18 *Regni ſui, had given this manor to the abbot of R.* and that *it was not under the title de terra regis*; for all lands held in ancient demeſne which the Confeſſor had, were written by *William the Conqueror, anno* 20 of his reign, in the book of Domeſday, under the title *de terra regis*, and theſe are all held in ancient demeſne at this day; but thoſe which were given away by the Confeſſor, and which are not written in Domeſday under that title, are not ancient demeſne, and a *reſpondeas ouſter* was awarded. Cited by *Holt* Ch. J. 1 *Salk.* 57.

It is in a manner agreed, that the land in the Domeſday book which comes under tit. *terræ regis E.* or under *terræ regis only*, which *is intended W. the conqueror*, in whoſe time the book was made, ſhall be intended ancient demeſne; and the plaintiff *ſhew'd divers charters by* inſpeximus, *which rehearſed, that W. the conqueror dedit, conceſſit, et confirmavit, &c.* the ſaid manor, to prove that it was land of *W. the conqueror*, and becauſe *dedimus may be a confirmation*, and the grant of land in poſſeſſion, *&c.* therefore *per Belk.* This is no trial that it was the land of *W. the conqueror*, or of King *E.* and alſo that ancient demeſne *ſhall not be tried by charter*, nor in other manner *but only by the Domeſday book*; *quod nemo negavit*; and therefore the plaintiffs were nonſuited, and by him the *lands of other lords are alſo in the Domeſday book under other titles. Br. Ancient demeſne, pl.* 9. cites 49 *Ed.* 3. 22.

An ejectment for land in *Long-Hope* in the county of *Glouceſter*, the iſſue was, whether it was ancient demeſne or not; and at the trial, the Domeſday book was brought in by an officer of the Exchequer, by which it appear'd, that *Hope* was ancient demeſne, but nothing was mention'd of *Long-Hope*; thereupon they offered to prove by the ſteward of the manor and others, that it was the ſame as was formerly called *Hope*, and lately had got the name of *Long-Hope*. And *Windham* J. was for examining the witneſſes, but all the court *e contra*, and that he had fail'd of the record to prove the iſſue; and if the truth was as ſuppoſed, they might have help'd it in pleading, that it was known by the one name and the other, and that *Long-Hope* and *Hope* are one and the ſame vill. *Sid.* 147. *pl.* 6.

Tenant in ancient demeſne brought a *monſtraverunt* againſt the lord, who prayed, that the tenant might make it appear to the court, that the manor is *ancient demeſne*, and thereupon he produced the book of *Domeſday* under this title, (*viz*) *terra ſancti Stephani*, and not *terra regis Edwardi*, or *terra regis*; he offered alſo to prove, that this manor was in the King's hands by producing a grant of *Ed.* 1. in which there was an *inſpeximus* of the grant of *H.* 1. in which there was another *inſpeximus* of the grant of *William the conqueror*, who had granted this manor to *G. D.* in which there was alſo an *inſpeximus chartam Edwardi regis*; ſo that it appeared, that this manor was in the poſſeſſion of *William the conqueror* and *Edward the confeſſor*; but adjudged, that the lands under the title of *terra ſancti Stephani* could never be intended to be in the poſſeſſion of either of thoſe Kings, it being ſo long after the conqueſt; and as to the *inſpeximus* in thoſe grants, 'tis only a word of form, and therefore did not prove that the lands were ever in the poſſeſſion of thoſe Kings. 43 *Ed.* 3. 23. 49 *Ed.* 3. 22.

2. *Privileges of tenants in ancient demeſne.*

My lord *Coke* enumerates the ſix following privileges which tenants in ancient demeſne are to enjoy. 1. That they ſhall not be impleaded for any of their lands, *&c.* out of the ſaid manor, but are to have juſtice adminiſtred to them at their own doors by *petit writ of droit cloſe*, directed to the bailiffs of the King's manors, or to the lord of the manor, if it be in the hands of a ſubject. 2. They cannot be impanelled to appear at *Weſtminſter*, or elſewhere in any other court, upon any inqueſt or trial of any cauſe. 3. They are free and quiet from all manner of tolls in fairs and markets, for all things concerning huſbandry and ſuſtenance. 4. They are to be free of taxes and tallages by parliament, unleſs they be ſpecially named. 5. That they were not to contribute to the expences of knights of parliament. 6. That if they be ſeverally diſtrained for other ſervices than they are obliged to by cuſtom of the manor, they all for ſaving of charges may join in a writ of *monſtraverunt*, although they be ſeveral tenants. 4 *Inſt.* 269.

Lands in ancient demeſne are extendable upon a *ſtatute merchant, ſtaple*, or *elegit*. 2 *Inſt.* 397. 4 *Inſt.* 270.

In an indictment for not taking upon him and executing the office of a conſtable, to which he was choſen by the leet, the queſtion was, whether a tenant in ancient demeſne was obliged to execute the office; and the court held he was. 1 *Vent.* 344.

Note; in *Hutton*'s reports, there is cited one *Ward*'s caſe, to be adjudged in *B. R.* 20 *Eliz.* touching the toll of the town of *Leiſtock* in *Suffolk*, where it was adjudged that the privilege of ancient demeſne does not extend to him that is a merchant, or that trades and gets his living by buying and ſelling, but the privilege was annexed to the perſon in reſpect of the land, *ſcilicet*, becauſe they manure the demeſnes of the King, and provide corn for the garriſons of the King, and purveyance was not then in uſe, but the privilege is intended for thoſe things which ariſe or are to be uſed on the land, or for his family that manures the land.

Where a ſheriff returns tenants in ancient demeſne upon any jury, they may have a writ *de non ponendis in aſſiſis & juratis* againſt the ſheriff, or any one who hath return of writs; and if notwithſtanding ſuch writ, *de non ponendis, &c.* the ſheriff will return them in ſuch caſe, they may have an attachment againſt him; ſo where the defendant pleaded *ancient demeſne*, and the ſheriff returned perſons who held in ancient demeſne, they may be challenged and withdrawn. 1 *Rep.* 105.

Where the *tenants in ancient demeſne* are diſtrained to do the lord other ſervices or cuſtoms than they or their anceſtors have formerly done, they may have a writ of *monſtraverunt* directed to the lord, commanding him not to diſtrain for other ſervices, *&c.* and if he will ſtill diſtrain, *&c.* then by a writ directed to the ſheriff, he may command him not to demand or diſtrain for other ſervices; and if he ſtill perſiſts, then he may raiſe the *poſſe comitatus*, or command the neighbours to reſcue and reſtore the diſtreſs; but the uſual courſe is, that if after the writ to the ſheriff, the lord will ſtill diſtrain, then an attachment lies againſt him, returnable in one of the courts of record at *Weſtminſter*, to anſwer for the contempt. *Plowd. Com.* 129.

3. *By what acts the tenure may be altered.*

If a fine be levied, or recovery ſuffered of lands in ancient demeſne, this makes them frank-fee. 4 *Inſt.* 270. 10 *Co.* 53.

But if the lord be not a party, he may have a writ of *diſceit*, and avoid the fine or recovery; for lands in ancient demeſne were not originally within the juriſdiction of the courts of *Weſtminſter*; but the tenants thereof enjoy this amongſt other privileges, not to be called from the buſineſs of the plow by any foreign litigation. 7 *Hen.* 4. 44. 1 *Rol. Abr.* 327.

But if the lord be party, then the lands became frank-fee, and are within the juriſdiction of the courts of *Weſtminſter*, for the privilege of ancient demeſne being eſtabliſhed for the benefit of lord and tenant, they may deſtroy it at pleaſure. 2 *Rol. Abr.* 324. 1 *Salk.* 57.

If a fine be levied of lands, part ancient demeſne and part frank-fee, and the lord brings a writ of *diſceit*, the court

court of *B. R.* upon view of the tranſcript of the record, and proof that part are ancient demeſne, will reverſe and avoid the fine as to that parcel; but they will not order the fine to be torn off the file, as in caſes where the whole fine is reverſed, becauſe it ſhall ſtand good as to the frank-fee; but they will order a mark to be made on the fine to ſignify that it is cancelled as to that part; and in this caſe the tertenant muſt be made party by *ſcire facias*; for otherwiſe the conuſance of him that was party to the fine ſhall not bind, if the tenements are frank-fee; becauſe by that means the tertenant might be diſpoſſeſſed without notice; whereas if he appears upon the *ſcire facias*, he may plead a releaſe or confirmation in bar, and ſo preſerve his poſſeſſion. *Kelw.* 43. 1 *Rol. Abr.* 775. 1 *Leon.* 290. *Cro. Eliz.* 417.

But if a fine be levied of land all ancient demeſne, and the lord reverſes it by writ of *diſceit*, it ſeems doubtful from the books, whether the fine ſhall ſtand good between the parties; ſome ſay that it ought not to be wholly ſet aſide, nor the conuzor reſtored to his land againſt his own ſolemn acknowledgment on record, eſpecially ſince the lord, who brings the writ of *diſceit*, ſeeks nothing but to reſtore the land to the privileges of ancient demeſne; others on the contrary hold, that the writ of *diſceit* and the reverſal thereon wholly avoids the fine, and reſtores the conuzor to the poſſeſſion of the land; and the conuzance, though on record, ſhall be no eſtoppel; becauſe it was made in a court that had no juriſdiction of the matter; and therefore the whole proceedings *coram non judice*. *Bro.* tit. *Fine*, 101. 17 *Ed.* 3. 31. *F. N. B.* 98. *a.* 9 *Hen.* 7. 12. 8 *Ed.* 4. 6. 1 *Rol. Abr.* 863. *Cro. Eliz.* 471.

Where there is a *cuſtom*, that lands in *ancient demeſne* ſhall be divided between heirs males, and a *fine* is levied at *common law* of thoſe lands, in ſuch caſe the *cuſtom* is gone, becauſe the land is changed by the *fine* from that which was *ancient demeſne* to lands at *common law*, and the *cuſtom* doth not run with the lands ſimply, but *quatenus* they were *ancient demeſne*; but 'tis otherwiſe where a *fine* is levied of lands held in *gavelkind*, for there the cuſtom of dividing it runs with the lands. *Dyer* 60, 72.

If the lord of a manor in ancient demeſne confirms the eſtate of his tenant to hold by certain ſervices at common law, the quality of his eſtate is by this means changed, tho' there is no tranſmutation of poſſeſſion; for the tenant is now diſcharged from the cuſtoms of the manor, and ſhall never be impleaded by a *petit writ of droit-cloſe*. 9 *Rep.* 40. *Beaumont*'s caſe.

Writ of deceit, for a fine levied of land in *ancient demeſne*; the defendant pleaded a *releaſe* made by the lord of the manor, in the reign of *Ed.* 2. by a *fine* then levied to one who was then tenant of thoſe lands, which *releaſe* was of one meſſuage and yard-land, and of *all ſervices and cuſtoms, &c.* except 2*s.* for one acre of land, ſuit of court and reliefs; the queſtion was, whether the *ſeigniory*, as to the cuſtom of ancient demeſne, was extinguiſhed by this *releaſe of the cuſtoms and ſervices*; and adjudged, that it was; but that by the *ſaving* the rent, the ſuit of courts and reliefs ſtill continued. *Moor* 143.

Tenant in fee made feoffment of lands in *ancient demeſne* to the uſe of himſelf and wife, for life, remainder to the uſe of his daughter *Mary Andrews, and the heirs of her body to be begotten by one John Givillim*, with divers remainders over; afterwards the ſaid *John Givillim* married *Mary Andrews*, by whom he had iſſue *Thomas Givillim*, and he and his wife, after the death of his father and mother, levied a fine *in placito conventionis* in the court of the manor, by which fine *conceſſerunt* the ſaid lands to *three perſons* during their reſpective lives, under the yearly rent of ſix pounds, by virtue whereof they entered; and afterwards the ſaid *Thomas Givillim* and his wife levied another fine in the ſaid court, to the uſe of the ſaid *Thomas and his heirs*; and at the quarter ſeſſions he, by bargain and ſale there enrolled, conveyed the *reverſion* to *Thomas Payne* and his heirs, to whom he likewiſe releaſed all his right, and then died, leaving iſſue *Thomas*, who had iſſue *Richard*, the leſſor of the plaintiff. It was inſiſted againſt him, that he was barred by the ſtatute of limitations, becauſe this fine levied by his grandfather, being only a *diſcontinuance* of the eſtate-tail, his father was intitled to a *formedon*, and he having neglected to proſecute it for twenty years, *Richard* his ſon, tho' an infant, is now barred by that ſtatute; but adjudged, firſt, that a fine may be levied in the court of the manor, where the lands are ancient demeſne, tho' it is enacted by the ſtatute *de modo levandi fines anno* 18 *Ed.* 1. that they ſhall be levied in the Common Pleas, and not elſewhere, becauſe a *writ of diſceit* lies againſt him who levies a fine of lands in *ancient demeſne*, in any other court but that of the manor; therefore that ſtatute muſt extend to invalidate fines levied in *Borough-Courts*, and other baſe and inferior courts; and a fine thus levied is no *bar* to the eſtate-tail, for that muſt be a fine with proclamations, by virtue of the ſtatute 4 *H.* 7. but 'tis a *diſcontinuance* and in this caſe only during the lives of the three grantees for life: Now the father of the plaintiff could not enter, becauſe the eſtate for lives was not determined whilſt he was living; but a title of entry commenced in his ſon, the now plaintiff, upon the death of the ſurvivor of the three grantees for life, and he having made an entry within *twenty years* after his title did accrue, by conſequence he is not barred by that ſtatute. 1 *Lutw.* 770.

If in a writ of right in ancient demeſne, the tenant pleads in abatement of the writ, and that by judgment is abated, and the demandant brings a writ of *falſe judgment*, wherein the writ of *right* is affirmed to be good, the court of Common Pleas ſhall proceed as the inferior court ſhould have done; and altho' judgment be there given to recover the land, yet the land is not frank-fee, but continues ancient demeſne; becauſe the beginning and foundation of thoſe proceedings was in the court of ancient demeſne. *F. N. B.* 19. 4 *Inſt.* 270.

If the lord infeoffs another of the tenancy, this makes the land frank-fee, becauſe the ſervices are extinguiſhed perpetually. 1 *Rol. Abr.* 324.

So if the lord releaſes to the tenant all his right in the tenancy, or if he confirms to him to hold by certain ſervices at the Common law, theſe make the land frank-fee. See 1 *Rol. Abr.* 324, 325.

A fine was levied of lands in *ancient demeſne*, and the cognizor, and cognizee and *his wife* being all dead, a *writ of diſceit* was brought againſt the heir of the one and the other, and againſt the tertenant and the purchaſer under the fine; and it was objected, that this writ did not lie againſt *the heir of the cognizor*, becauſe the levying the fine was *a perſonal wrong* in the anceſtor, and *moritur cum perſona*; but adjudged, that it was not a perſonal wrong alone, but a total diſinheriſon to all ſucceeding lords of that manor; and it ſeems unreaſonable, that by the act of God, (viz.) by the death of the cognizor, they ſhould be defeated of the proper remedy: Then it was objected, that this writ ought to be brought as well againſt the *heirs of the wife*, as the heirs of the huſband, they being *both cognizees in the fine*: But adjudged, that the *tertenant* is the proper perſon againſt whom this writ lies, and that all others may be brought in by the *ſcire facias*, if there ſhall be occaſion. 3 *Lev.* 417.

Writ of diſceit againſt the defendants, wherein the plaintiff ſet forth, that he was ſeiſed in fee of the manor of *Bromeſgrove in Com. Wigorn.* which time out of mind was *ancient demeſne*, and that all the lands held of the ſaid manor are *pleadable in curia manerii* there *per parvum breve de recto clauſo*; that the defendants intending to defraud the plaintiff of the profits of the ſaid manor, had levied a fine in the court of Common Pleas, of certain lands, parcel thereof; and that by reaſon of the ſaid fine, thoſe lands were now become *frank-fee*, and pleadable at Common law *in exhæreditationem* of the plaintiff, and to his damage of 40*l.* The objection made to this declaration was, that the plaintiff had ſet forth, that the lands were *placitat' & placitabilia in curia manerii*, but did not ſay before whom the court was held, *(viz.) coram ballivis & ſectatoribus*; but this objection was diſallowed: Then the queſtion was, whether the fine ſhould be reverſed *quoad* the benefit of the lord of the manor, as in the whole; and adjudged, that it ſhould be intirely reverſed, becauſe it was levied *coram non judice*, which makes it wholly void. 1 *Lutw.* 711.

4. *Pleading ancient demeſne, and the form thereof.*

In all actions wherein if the demandant recovers, the lands would be frank-fee, ancient demeſne is a good plea. 8 *Hen.* 35. 1 *Rol. Abr.* 322.

Therefore in all actions real, or where the realty may come in queſtion, ancient demeſne is a good plea; as *aſſiſe*, writ of *ward of land*, writ of *account* againſt a bailiff of a manor, writ of *account* againſt a guardian, *&c.* See 4 *Inſt.* 270. 1 *Rol. Abr.* 322, 323.

In *replevin* ancient demeſne is a good plea, becauſe by indictment, the freehold will come in queſtion. *Godb.* 64. 1 *Bulſt.* 108.

In an *ejectione firmæ*, ancient demeſne is a good plea; for by common intendment the right and title of the land will come in queſtion; and if in this action it ſhould not be a good plea, the ancient privileges of thoſe tenants would be loſt, inaſmuch as moſt titles at this day are tried by *ejectment*. *Hob.* 47. 1 *Bulſt.* 108. *Hetl.* 177. *Cro. Eliz.* 826.

But in all actions merely perſonal, as *debt* upon a leaſe, *treſpaſs quare clauſum fregit*, *&c.* ancient demeſne is no plea. *Hob.* 47. 5 *Co.* 105.

A writ of right was brought in a court of *ancient demeſne*, and the plaintiff made proteſtation to ſue there in nature of a *writ of right at Common law*; the tenant joined the *miſe* upon the meer right, and thereupon the record was removed by an *accedas ad curiam*; but adjudged, this is no ſufficient cauſe of removal, and therefore a *proſedendo* was awarded. *Dyer* 112.

In ejectment, the defendant pleaded *ancient demeſne* to the juriſdiction, *&c.* and upon demurrer it was inſiſted for the plaintiff, that this was no good plea, becauſe this action is in nature of an action of *treſpaſs*, and in ſuch action 'tis not a good plea; but adjudged, that it is a good plea in *ejectment*, becauſe by common intendment the right and title of the land may come in queſtion, and ſo it may in *replevin*, and in *account againſt a guardian in ſocage*; and therefore 'tis a good plea. 5 *Rep. Alden's* caſe.

The demandant recovered in a *writ of right c'oſe*, which was directed to the *bailiffs* of the manor, and the tenant brought a *writ of falſe judgment* to reverſe it, and aſſigned for error, that the writ of *right cloſe* was directed to the *bailiffs* when the court was held *coram ſectatoribus*: But the judgment given in the manor court was affirmed, becauſe it ſhall be *intended* that the *bailiffs* were likewiſe *ſuitors*; for none elſe can be judges of that court. 3 *Leon.* 63.

The plaintiff brought an action for taking a *cable rope for toll*, ſetting forth, that *Loſtocke* is a village and ancient demeſne, and that the *tenants of ancient demeſne* are to be quit of *toll in all places*; that he was an inhabitant and tenant there, *&c.* the defendant juſtified the taking by virtue of a cuſtom to take *toll* for any goods brought by ſea to *merchandiſe*, and that the plaintiff brought thither goods by ſea, twenty hundred weight of cable to *merchandiſe*; and for that reaſon it was held a good plea. *Cro. Eliz.* 227.

In *treſpaſs contra pacem*, though the realty comes in debate, yet ancient demeſne is no plea; for this is at the ſuit of the King, and puniſhable for the good of the commonwealth. *Cro. Eliz.* 826. 1 *Rol. Abr.* 322.

In an *aſſiſe* by tenant by ſtatute-merchant, ancient demeſne is no good plea, becauſe the plaintiff does not demand the freehold, but till he hath ſatisfaction. 2 *Inſt.* 397.

In a *quare impedit*, ancient demeſne is no plea, becauſe if it ſhould be granted there would be a failure of right; for there they cannot grant a writ to the biſhop. 1 *Rol. Abr.* 323. *Hob.* 48.

So in an action of *waſte* ancient demeſne is no plea, becauſe in ancient demeſne they cannot, upon the diſtreſs returned, award a writ to enquire of waſte, according to the ſtatute; for the ſheriff ought by the ſtatute to go in perſon, which cannot be ſupplied by their officer, and there would be a failure of right; but in this caſe the lands ſhall not be frank-fee. 2 *Inſt.* 306. 4 *Inſt.* 270. *Hob.* 47. 1 *Rol. Abr.* 323.

If the manor and demeſne thereof are demanded, ancient demeſne is no plea, becauſe the lord would be judge in his own cauſe. *F. N. B.* 11. 2 *Leon.* 194. 1 *Salk.* 56. *Comb.* 183.

Antient demeſne may be pleaded after imparlance, becauſe the lord may reverſe the judgment by writ of *diſceit*; and it goes in bar of the action itſelf, *viz.* in that court, becauſe it is *coram non judice*. *Dyer* 210. *Stile* 30. *Latch* 83. *Moor* 451.

In *treſpaſs*, upon Not guilty pleaded, the jury gave a ſpecial verdict, that the defendant was ſeiſed of the lands in queſtion, and that he held the ſame of the manor of *Bromeſgrove*, which is *ancient demeſne*; and that the plaintiff having obtained a judgment againſt him, took out execution by *elegit*, by virtue whereof the ſheriff delivered the lands to him, and he entered, upon whom the defendant re-enter'd, and now the plaintiff brought an action of treſpaſs, *&c.* the queſtion was, whether lands held in *antient demenſne* might be delivered in execution upon an *elegit*? Adjudged, that a *freehold in antient demeſne* could not be recovered in any of the courts of Common law; and even where the *poſſeſſion* is to be recovered, antient demeſne is a good plea, but not in *treſpaſs*, tho' the freehold ſhould come in queſtion, becauſe the iſſue is upon the *wrong done*: Now in this caſe, tho' the *poſſeſſion* is recovered by the act of the ſheriff, in purſuance and by virtue of a *judgment obtained in a court of Common law*, yet the land itſelf was never directly in queſtion; and ſince the judgment is good, and in force, the *elegit* doth warrant the extending a moiety of the defendant's lands, and thoſe held in *antient demeſne* are his lands, as well as thoſe which are not ſo held; therefore neither the ſheriff, nor he to whom he delivered poſſeſſion of thoſe lands, are liable to any action of treſpaſs. *Hob.* 47.

In ejectment, there was a judgment obtained for lands held in *antient demeſne*, and a writ of *procedendo ad executionem judicii* iſſued out of the King's Bench, to the *ſuitors of the court of antient demeſne*, who returned, that they could not execute it, becauſe the land was *frank-fee*, as it appeared to them by a tranſcript of a *fine* levied of the ſame; but this return was diſallowed, becauſe the parties had allowed the juriſdiction of the court before; and if the land had been *frank-fee*, it ought to have been pleaded; but now after judgment 'tis too late to ſay, that 'tis frank-fee. *Moor* 451.

In ejectment, after *imparlance*, the defendant pleaded *antient demeſne*; and upon demurrer it was inſiſted by the plaintiff that this plea came too late; but adjudged, that ſince the land is not impleadable at Common law, and the defendant hath pleaded no other plea, 'tis ſoon enough after an *imparlance*. *Cro. Car.* 6.

In replevin, &c. the defendant made cognizance, *&c.* for *toll* in *Highworth* market which being demanded, and the plaintiff refuſing to pay, they juſtified the taking the cattle, *&c.* the plaintiff replied, that ſhe is *tenant* of the manor of *Hanningdon*, which is *antient demeſne*, and that the tenants of *antient demeſne* lands are quit of *toll in all places* in the kingdom; and upon demurrer to this replication, it was objected, that the plaintiff had not well intitled herſelf to this privilege, for ſhe ſays, that ſhe is *tenant* of the manor, *&c.* ſhe ſhould have ſaid, that ſhe is ſeiſed in fee of ſuch lands, *&c.* which ſhe held of *J. F.* as of his manor of *Hanningdon*, which is *antient demeſne*; but adjudged 'tis not neceſſary to mention what eſtates ſuch tenants have, but that *homines et tenentes de antiquo dominico*, *&c.* ought to be diſcharged of *toll*, &c. Then it was objected, that the privilege was laid too general, for it was to be diſcharged of toll in *in all places*, &c. when by law they are not diſcharged of toll, but only of *ſuch things* which ariſe on their own tenements, and which are for the ſupport and eaſe of their families; and the reaſon is, becauſe in the beginning they manured the King's *demeſnes*, which by their tenure they were obliged to do; and therefore to encourage them in that labour they had this privilege, to be quit of *toll of all things which*

which did ariſe or grow on their own lands; but when they turn merchants, they are not within the reaſon of this privilege; but adjudged, that to be quit of *toll* in all places ſhall be intended of *ſuch things* in *all places* where he is tenant. 2 *Lutw.* 1144.

Ancienty, (Fr. *Anciennetè*, that is, *Antiquitas)* Elderſhip, or ſeniority: It is uſed in the ſtatute of *Ireland*, 14 *Hen.* 3. As, *The eldeſt ſiſter can demand no more than her other ſiſters, by reaſon of her* ancienty. *Cowel.*

Andates lucus, *(Anderida.)* Mr. *Camden* was of opinion, that *Newenden* in *Kent*, ſituated near the wood called *Ander*, was the place where a famous caſtle was built by the *Romans*, to defend the ſea-coaſts from the *Saxon* pirates. But Mr. *Somner* was of another opinion: He rather thinks it was *Pevenſa*, becauſe that is near the ſea-coaſt; but the other is more remote. *Cowel, edit.* 1727.

Andena, A ſwath in mowing. See **Dole.** It likewiſe ſignifies as much ground as a man can ſtride over at once. *Cowel, edit.* 1727.

Anealing of tile, Signifies the burning and hardening them, and comes from the Saxon *onelan, accendere.* It is uſed in ſtat. 17 *Ed.* 4. *c.* 4. *Cowel, edit.* 1727.

Anelacius, A ſhort knife or dagger. It is mentioned in *Mat. Par. p.* 277. *viz. Loricâ erat indutus, geſtans* anelacium *ad Lumbare. Cowel, edit.* 1727.

Anfeldtyhde. *Et ſi* anfeldtyhde *ſit, immergatur manus poſt lapidem, vel examen uſque ad wriſte. Leg. Adelſtan. cap.* 19. *apud Brompton.* Mr. *Somner* tells us it ſhould be *anfealtible*, that is, a ſimple accuſation: for the *Saxons* had two ſorts, *viz. ſimplex et triplex:* that was called a ſingle accuſation when the oath of a criminal and two more was ſufficient to diſcharge him; but his own oath, and the oaths of five more were required to free him *à triplici accuſatione. Cowell, edit.* 1727.

Angaria, (From the Fr. *Angarie, i. e.* perſonal ſervice) Is a troubleſome vexatious duty or ſervice which tenants were obliged to pay their lords; and they performed it in their own perſons —— *Terram liberam ab omnibus* angariis *et exactionibus, &c. MS. Penes Eliam Aſhmole Arm.* —— *Præſtationes* angariarum *et perangariarum, et plauſtrorum et navium*, Impreſſing of ſhips. *Blount. Cowel, edit.* 1727.

Angelica veſtis, A monkiſh garment which laymen put on a little before their deaths, that they might have the benefit of the prayers of the monks. It was from them called *Angelica*, becauſe they were called *Angeli*, who by their prayers *animæ ſaluti ſuccurrebant.* And therefore where we read the word *ſuccurrendum* in our old books, it is underſtood of one who had put on the habit, and was near death: *Si quis ad ſuccurrendum metu mortis ſe loco prænominato dederit, illic recipietur. Monaſticon*, 1 *tom. p.* 632. So likewiſe, *de ſuſceptis in morte*, is meant of thoſe dying perſons who had put on the habits. *Cowel. edit.* 1727.

Angel, Signifies, in the computation of money, ten ſhillings of *Engliſh* coin.

Angild, *(Angildum)* The bare ſingle valuation or compenſation of a criminal; from the Sax. *an*, one, and *gild*, payment, mulct, or fine. *Si villanus furatus fuerit, &c. et habeas plegium, admoneas eum de* angildo. *Twigild* was the double mulct or fine; and *trigild*, the tréble, according to the rated ability of the perſon. *Cowel. Spelman.* See the laws of *Ina*, *c.* 20. and the league between King *Alured* and *Guthurn*, *c.* 6.

Anhlote, A ſingle tribute or tax. The words *anhlote* and *anſcot* are mentioned in the laws of *William the Conqueror:* and their ſenſe is, that every one ſhould pay according to the cuſtom of the country, his part and ſhare, as ſcot and lot, *&c.*—*Francigena qui tempore Edwardi propinqui mei fuerit in* Anglia *particeps conſuetudinum* Anglorum, *quod ipſi dicunt anloti et anſcoti, perſolvunt ſecundum conſuetudinem* Anglorum. *Cowel. Spelman. Leg. Will.* 1. *c.* 64.

Aniens, *(Fr.)* Void, being of no force. *F. N. B.* 214.

Annales, Yearlings, or young cattle of the firſt year—*Vituli primo anno poſtquam nati ſunt*, vituli *vocantur*; *ſecundo compoto* annales *vocantur*; *tertio* Boviculi; *quarto* Bovetti *vocantur.*— *Regulæ compoti domus de Farendon MS. Cowel, edit.* 1727.

Annals, Were maſſes ſaid in the *Romiſh* church, for the ſpace of a year, or for any other time, either for the ſoul of a perſon deceaſed, or for the benefit of a perſon living, or for both. *Aylif. Parerg.* 190.

Annats, *(Annates)* This word has the ſame meaning with firſt fruits, in *ſtat.* 25 *H.* 8. *c.* 20. The reaſon of the name is, becauſe the rate of the firſt fruits paid for ſpiritual livings is after the value of *one year*'s profit. Annates *more ſuo appellant primos fructus unius anni ſacerdotii vacantis, aut dimidiam eorum partem. Pol. Virgil. de Invent. Rer. lib.* 8. *c.* 2. Obſerve, that firſt fruits, *primitiæ* and *annates* are all one. 12 *Rep.* 45. *Cowel, edit.* 1727.

Anneal. See **Aneal.**

Anni nubiles, *(Lat.)* When a woman is under the age of 12 years, her age to marry, ſhe is ſaid to be *infra annos nubiles.* 2 *Inſt.* 434.

Annis-ſeed, Is noted among the drugs and ſpices to be garbled, in *ſtat.* 1 *Jac.* 1. *c.* 19.

Anniented, (from the Fr. *Aneantir)* Abrogated, fruſtrated, or brought to nothing. *Lit. c.* 3. *ſect.* 741.

Anniverſary days, *(Dies Anniverſarii)* Solemn days appointed to be celebrated yearly in commemoration of the deaths or martyrdom of ſaints; or the days, whereon, at the return of every year, men were wont to pray for the ſouls of their deceaſed friends, according to the cuſtom of the *Roman Catholicks*, mentioned in the ſtatute of 1 *Ed.* 6. *cap.* 14. and 12 *Car.* 2. *cap.* 13. this was in uſe among our anceſtors the *Saxons*, as you may ſee in *lib. Rames, ſect.* 134. —— *Anniverſaria dies ideo repetitur defunctis, quoniam neſcimus qualiter eorum cauſu habeatur in alia vita. Alcuinus's Divine Offices.* The *anniverſary* or yearly return of the day of the death of any perſon, which the religious regiſter'd in their *obitual* or *martyrology*, and annually obſerv'd in gratitude to their founders and benefactors, was by our forefathers called *a year-day* and *a mind-day, i. e.* a memorial day; and tho' this proceeded from one of the trading arts of the prieſts, who got many a legacy for thus continuing the memorial of their friends; yet abating the ſuperſtition of it, we muſt confeſs this practice of theirs has been a great advantage to the hiſtory of men and times, by fixing the *obits* of great and good men. *Cowel, edit.* 1727.

Anno Domini, Is the computation of time from the incarnation of our Saviour; which is generally inſerted in the dates of all publick writings; ſometimes with, and ſometimes without the year of the King's reign. As the *Romans* made their computation from the building of the city of *Rome*, and the *Grecians* by *Olympiads*; ſo Chriſtians, in remembrance of the happy incarnation of our *Saviour*, reckon their time from thence. *The day of the month, the year of our Lord and Saviour Chriſt, and the year of the King's reign are the uſual dates of deeds.* 2 *Inſt.* 675.

Annoyance, Annoiſance, or **Nuſance** (Fr. *Nuiſance*, hurt or offence) hath a double ſignification, being uſed as well for any hurt done to a publick place, as a highway, bridge, or common river, as to a private, by laying any thing that may breed infection, by incroaching, or ſuch like means; as alſo for the writ that is brought upon this tranſgreſſion, of which ſee more in **Nuſance.** The word *annoiſance* is uſed in the ſtat. 22 *H.* 8. *c.* 5. *Cowel, edit.* 1727.

Annuale, The yearly rent or income of a prebendary.

Annualia, *Annats*, or a yearly ſtipend aſſigned to a prieſt, for keeping the anniverſary, or otherwiſe for ſaying continued maſſes one year, for the ſoul of a deceaſed perſon —— *Inhibemus quoque diſtrictius ne aliquis rector eccleſiæ faciat hujuſmodi pactum cum ſuo ſacerdote, videlicet quod ipſe ſacerdos præter cætera ſtipendia poterit recipere* annualia & triennalia. *Conſt. Rob. Groſteſt Epiſcopia Lincol. in Append. ad Faſcic. pag.* 411. *Cowel, edit.* 1727.

Annua penſione, Is a writ (now diſuſed) whereby the King having due unto him an annual penſion from an abbot or prior, for any of his chaplains (whom he ſhould think fit to nominate, being as yet unprovided of ſufficient living) doth demand the ſame of the ſame abbot or prior; and alſo willeth him for his chaplain's better aſſurance, to give him his letters patent for the ſame. *Reg. Orig. fol.* 165. & 307. and *F. N. B.* 231. where you may

A N N

may ſee the names of all the abbies and priories bound to this, in reſpect of their foundation or creation; as alſo the form of the letters patent, uſually granted upon this writ.

Annuity, *Annuus redditus*, Signifies a yearly rent to be paid for term of life, or years, or in fee; and it is alſo uſed for the writ that lies againſt a man for the recovery of ſuch a rent, if it be not ſatisfied every year according to the grant. *Reg. Orig.* 158. *F. N. B.* 152.

An annuity, according to lord *Coke*, is an annual ſum of money granted to another in fee, for life, or years, which charges the perſon of the grantor only. *Co. Lit.* 144. *b.* The author of the *New Terms of Law*, defineth *annuity* to be a certain ſum of money granted to another in fee-ſimple, fee-tail, for term of life or years, to receive of the grantor or his heirs, ſo that no freehold be charged therewith, and whereof a man ſhall never have aſſiſe, or other action, but a writ of annuity.

An annuity, ſtrictly taken, is a yearly payment of a certain ſum of money granted to another in fee-ſimple, fee-tail, for life or years, charging the *perſon* of the grantor only; if payable out of lands, it is properly called a rent-charge; but if both the perſon and eſtate be made liable, as they moſt commonly are, then it is generally called an annuity. *Co. Lit.* 144. *b. Finch.* 161. 1 *Rol. Abr.* 226. *Doct. & Stud. Dial.* 2. *c.* 30.

Saint Germain, in his book ſtiled *Doctor and Student*, *dial.* 1. *cap.* 3. ſheweth divers differences between *a rent* and *an annuity*; whereof the firſt is, that every *rent*, be it rent-charge, rent-ſervice, or rent-ſeck, is going out of land, but an annuity goeth not out of any land, but chargeth only the perſon; that is to ſay, the grantor, or his heirs, that have *aſſets by deſcent*; or the houſe, if it be granted by a houſe of religion. *Lit. ſect.* 220. 2. A ſecond difference is, that for the recovery of an *annuity*, no action lieth, but only a writ of *annuity* againſt the grantor, his heirs or ſucceſſors. *Fitz. Nat. Brev.* 152. But of a rent, the ſame actions lie as do of land, as the caſe requireth. 3. The third difference is, that an *annuity* is never taken for *aſſets*, becauſe it is no freehold in law, neither ſhall it be put in execution upon a *ſtatute merchant*, *ſtatute ſtaple*, or *elegit*, as a rent may. *Doct. and Stud. cap.* 30. So alſo *Dyer* 345. *Cowel.* ed. 1727.

1. *Difference between an annuity, rent-charge, and other rents.*
2. *By what words an annuity may be granted.*
3. *Remedies for recovering annuities.*
4. *Pleadings.*

1. *Difference between an annuity, rent-charge, and other rents.*

A man ſeiſed of land grants by deed poll, or indenture, a yearly rent to be iſſuing out of the ſame land to another in fee, in tail, or for life, *&c.* with a clauſe of *diſtreſs*; this is a rent-charge; and if the grant be without a clauſe of *diſtreſs*, then it is a rent-ſeck. *Lit. ſect.* 218.

A rent-ſervice is an annual return made by the tenant, either in labour, money or proviſions, in retribution for the land that paſſes. 1 *Vent.* 161. *Co. Lit.* 142.

If a man *holds* certain *land by rent-ſervice*, and *pays* the rent *to his lord continually in another county than where the land is*, this ſhall change the nature of the rent; and therefore, where the plaintiff would have intitled himſelf to it as to an annuity, he was not ſuffer'd. *Br. Rent*, *pl.* 26.

If a man makes a feoffment in fee, or a leaſe for life, or a gift in tail, remainder over in fee, upon ſuch grants there can be no rent-ſervice reſerved at this day, the feoffor or grantor having no reverſion, and the feoffee or grantee by the ſtatute of *quia emptores terrarum* muſt hold of the capital lord; therefore if in ſuch deeds, a rent be reſerved, there muſt be a clauſe of diſtreſs inſerted; and this will make it a good rent-charge, the land being charged with a *diſtreſs* for the payment of it. *Lit. ſect.* 214, 215. 2 *Inſt.* 505. *Plowd.* 134.

If a man grants a rent out of three acres, and grants over, that if the rent be arrear, that he ſhall diſtrain for the rent in one of the acres, this is one intire rent; but it cannot be a rent-charge for the whole, becauſe the greateſt part of the land out of which it iſſues, is not chargeable with any diſtreſs for the recovery of it; and *denominatio ſumenda a majori*; therefore it is taken to be a rent-ſeck; for which, by the words of the grant the grantee may diſtrain in the third acre; for whenever the remedy, by way of charge for the rent, is not commenſurate to the rent, the rent is called *ſeck*, and the charge is only appurtenant to the rent, and does not give it it's denomination; and the reaſon is, becauſe if ſuch original grant ſhould be loſt and worn out by time, and a man were to preſcribe for it, if he were to give it the denomination of a charge, it would graſp more land than was originally intended to be charged; and therefore the law binds them down to the denomination of the rent, as ſeck, and to ſet forth the charge as an appurtenant, that by length of time no more ſhould be comprehended in the charge than was originally intended in the grant of that charge. *Co. Lit.* 147. 7 *Co.* 51. *b.*

A man in *replevin* preſcribed, that the plaintiff and his anceſtors, and thoſe whoſe eſtate, *&c.* have had *common* in land where, *&c. and that the plaintiff and his anceſtors have uſed to pay* 10*s. rent per annum* to him and his anceſtors *for the ſame common*, and ſo, *avowed for the* 10*s.* and good, notwithſtanding that he *does not preſcribe that he and his anceſtors, &c. have had the rent*, but that the other has paid it, which is all one, *per cur'*, *quod nota.* And this is not a rent but an annuity, for he cannot have aſſiſe; for *he cannot have rent out of his own land*; and yet a good preſcription, *per cur':* but he *ought to alledge ſeiſin, per cur'*, and ſo ſee preſcription to *diſtrain in his own land. Br. preſcription, pl.* 1.

If a man grants a rent out of his lands to *J. S.* and his heirs, and grants that he may diſtrain for it during his life, this is a rent-charge in *J. S.* becauſe he may diſtrain in the lands out of which it iſſues, during his own life; but it ſhall be ſeck in the hands of his heirs; becauſe by the expreſs words of the deed, the remedy was to ceaſe upon his death; *aliter*, if the diſtreſs had been limited only for years; for then the intire rent had been ſeck; becauſe the remedy being temporary is not adequate to the right, which is perpetual. *Co. Lit.* 147. *b.* 7 *Co.* 51. *b.*

If a man would that another ſhould have a rent-charge iſſuing out of his land, but would not that his perſon be charged in any manner by a writ of annuity, then he may limit ſuch a clauſe in the end of his deed; provided always, that this preſent writing, nor any thing therein ſpecified, ſhall any way extend to charge my perſon by a writ or an action of annuity, but only to charge my lands and tenements with the yearly rent aforeſaid, *&c.* then the land is charged, and the perſon of the grantor diſcharged. *Co. Lit. ſect.* 220.

2. *By what words an annuity may be granted.*

If a man grants *an annuity to another*, *to be received out of his coffers*, or *to be received out of a bag of money*, or *to be received of a ſtranger*, yet this is ſufficient to charge his perſon, and the ſubſequent words ſhall be rejected. 1 *Rol. Abr.* 227.

So, if a man grant a *rent out of his manor*, when he has not any manor; this is a good annuity. 1 *Rol. Abr.* 227.

Or, if he grant *a rent of* 20*l. per annum*, *to be received of his tenants in D.* when he has not any tenant there. 1 *Rol. Abr.* 227.

If a man grant a rent out of land, in which he has nothing, *proviſo that he be not charged for this in a writ of annuity*, it ſhall be a good annuity; for the proviſo, being repugnant, is void. *Co. Lit.* 146. *a.* 2 *Bulſt.* 149.

If a man grant *a rent-charge out of his land*, the grantee has an election to take it as a rent, or as an annuity. *Lit. ſect.* 219. 2 *Bulſt.* 148.

So if I bind my goods and lands to the payment of a yearly rent to *J. S.* this is a good rent-charge, with power

power to diſtrain, tho' there be no expreſs words either of grant or diſtreſs; or if I grant that if ſuch a rent be arrear, that *J. S.* ſhall diſtrain for it in the manor of *D.* this is a good rent-charge; for in all theſe caſes it is evidently my intention, that my land be liable to the charge. *Co. Lit.* 147. 2 *Roll. Abr.* 424. *Br. Rent*, 14.

So it is if I grant to *S. S.* that he and his heirs, or the heirs of his body, ſhall diſtrain for 40*s.* rent in my manor of *Dale*, this is a good rent-charge in fee or in tail, becauſe the power of diſtraining is in one caſe given to the heirs general, and in the other to the deſcendants of the body of *S. S.* and whoever has a power of diſtraining, has an eſtate in the rent for which the diſtreſs is given. *Co. Lit.* 14. *a. Lit. ſect.* 221. 2 *Roll. Abr.* 424. 7 *Co.* 51.

But if I grant a rent of 40*s.* out of the manor of *Dale*, and if the rent be behind, that the grantee ſhall diſtrain in my manor of *Sale*, this power of diſtreſs in the manor of *Sale* ſhall not amount to the grant of a rent-charge out of the manor of *Sale*; for though in the former caſes ſuch conſtruction is admitted to ſupport the intentions of the parties, where the grant is not explicit; yet in this caſe, the reaſon of ſuch conſtruction fails; becauſe here is a plain grant of the rent out of the manor of *Dale*, and the diſtreſs is given in the manor of *Sale*, as a means for the recovery of it; for which he had no remedy by the grant itſelf; and therefore the rule, *quod expreſſum facit ceſſare tacitum*, takes place here, that were the intentions of the parties are evident, there that conſtruction ſhall never be admitted, which the law only allows in dubious contracts, *ut res magis valeat quam pereat*; for if that manner of interpretation were admitted, the grant might be made double, and the grantor twice charged, againſt the deſign of the grant. 2 *Roll. Abr.* 425. *Co. Lit.* 147. *a.* 7 *Co.* 51.

If a man grants an annuity to another and his heirs, and does not ſay for him and his heirs, this is determinable by the death of the grantor. 2 *Hen.* 4, 13.

A man ought to grant an annuity *for him and his heirs*, otherwiſe the heir ſhall not be charged, nor can it continue after his death; contrary of the grant of a rent out of land, or a grant of a rent whereof he is ſeiſed; note the diverſity; for this charges the land, but an annuity charges the perſon only. *Br. Charge, pl.* 54.

Where a man grants an annuity to *J. S.* and his heirs, this ſhall not ſerve but during the life of the grantor, and yet there it is fee-ſimple, determinable upon the life of a man; but if he had granted it *for him and his heirs to the other and his heirs*, it is otherwiſe: But a grant out of land to *J. S. and his heirs*, is good, for the land is charged, and in the other caſe the perſon is charged, which cannot extend to the heir without expreſs words. *Br. Eſtates, pl.* 65.

If a rent be granted to *A.* and if the rent be behind, that a ſtanger ſhall diſtrain for it, for the uſe of the grantee; this is a good rent-charge in *A.* and the diſtreſs limited to a ſtranger for his benefit, is in effect making him the grantee's ſervant for that purpoſe; and what a man may do by one ſervant, he may do by himſelf or any other. 2 *Roll. Abr.* 425.

But if the diſtreſs had been limited to a ſtranger, without ſaying for the benefit of the grantee; ſo that the limitation of the diſtreſs may ſeem to be independant on the grant and without relation to it, this diſtreſs does not make it rent-charge; ſince by no words in the deed, the diſtreſs ſhall be applied to the uſe or advantage of the grantee. 2 *Roll. Abr.* 425.

If *A.* grants and confirms to *B.* a rent of 5*l.* to be taken out of his lands, which rent *B.* has of the grant of his father, though *B.* never had any ſuch rent from his father, yet this grant of *A.* ſhall be good to create a rent-charge in *B.* for it is evidently the intention of *A.* that *B.* ſhall have a rent of 5*l.* out of his land; and a miſtake or error in the deſcription of the thing referred to, ſhall not render the true deſign of the contract ineffectual and void. *Bro.* tit. *Grant*, 69, 73. 2 *Rol. Abr.* 425.

If a man grants a rent in fee, without ſaying for him and his heirs, his heirs cannot be charged in an annuity. *Co. Lit.* 144.

The ſame law, though he adds further to the grant, he obliges himſelf and his heirs to warrant the annuity to the grantee and his heirs, for this does not inlarge the grant. *Br. Annuity, pl.* 13.

If a man ſeiſed of twenty acres of land, grant a rent of 20*s. percipiendum de qualibet acra terræ ſuæ*, or out of every acre of land, this is in nature of a ſeveral grant out of every acre; for the grant ſhall be taken moſt ſtrongly againſt the grantor, and the grantee ſhall have 20*s.* out of each acre. *Co. Lit.* 147. 1 *Rol. Abr.* 228. *Kelw.* 3.

If *A.* bargains and ſells land to *B.* by indenture, and before inrollment they both join in a grant of a rent-charge to *C.* this after the inrollment ſhall be conſtrued the grant of *B.* and the confirmation of *A.* becauſe when the bargain and ſale is inrolled, it has the effect of a deed inrolled, from the making thereof; and therefore it muſt be the grant of *B.* who had the land at the time of the grant made; but if the deed had never been inrolled, then it ſhould have been the grant of *A.* and confirmation of *B.* becauſe the land never paſſed from *A.* the deed being ineffectual and void without inrollment. *Co. Lit.* 147. *b.*

If an original grant be made of a rent-charge, to commence after the death of *J. S.* it is good; for this is not like the caſe of lands, where the livery muſt carry the freehold immediately, and where the abeyance, or want of diſtinguiſhing where the freehold is, may be of prejudice to the rights of others; for if the freehold was to be granted *in futuro*, a man that had brought his *præcipe* againſt the grantor, after he had proceeded in it a conſiderable time, the writ might abate by the freehold's veſting in a ſtranger, by reaſon of a conveyance made by the grantor before the writ brought; but the grant of a rent *de novo* is not attended with this inconvenience; for no man can have a precedent right to a thing which originally was created by the grant itſelf; yet *quære* at what diſtance of time ſuch charges may be allowed to commence, whether it muſt not be after the lives of the perſons *in eſſe*; for if they be indefinite, they ſeem to have the ſame tendency to a perpetuity as any other contingent remainders or executory intereſt; and the bare affectation of a perpetuity, is ſufficient to condemn any conveyance. *Bro.* tit. *Grant* 86. 8 *Hen.* 7, 3. *Plowd.* 156. *Palm.* 29, 30. 2 *Vent.* 204.

Aſſiſe of 20*s. rent*, the deed was, I have granted to *B. & hæredibus ſuis annuum redditum* 20*s. de molendino meo de C. percipiend' de me & hæredibus meis in perpetuum*, and it was awarded that it was iſſued out of the mill, and is only an annuity, and therefore the aſſiſe lies well. *Br. Aſſiſe, pl.* 247.

Annuity was granted *ſolvend'* at ſuch and ſuch feaſts, *ſi petatur*. It was a queſtion if it be due without an actual *demand*. *Palm.* 320.

3. *Remedies for recovering annuities.*

If a man grants by his deed any annual rent to *J. S.* in fee, for life or years, out of certain lands, with clauſe of *diſtreſs*, the grantee may, at his election, either diſtrain for this rent, or have a writ of *annuity*, and thereby charge his perſon. *Lit. ſect.* 219. *F. N. B.* 152. 6 *Co.* 58. *b.*

If a man grants a rent out of his land, and by a proviſo in the deed, or by deed of defeaſance, provides that the grant, nor any thing therein contained, ſhall be conſtrued to extend to charge his perſon by writ of *annuity*; in this caſe the perſon of the grantor is not chargeable, becauſe the charge upon the perſon ariſing only from the manner of conſtruing grants, which for the conſideration given ought to be extended as far as the words will bear againſt the grantor, there can be no room for ſuch conſtruction, when by the expreſs words of the grant, the perſon of the grantor is not charged; nor no implication ſhall be admitted to overthrow an expreſs clauſe in the deed. *Lit. ſect.* 220. *Poph.* 87. 6 *Co.* 87.

Tenant *for years* of lands determinable upon the *life* of another, granted *a rent of* 10*l. per annum* to *B. B.* iſſuing out of the ſame for fifteen years, with a clauſe of diſtreſs; the life died; adjudged, that a writ of annuity may be brought by the grantee for the arrears of the rent,

becauſe the rent-charge did determine by the act of God; beſides, an intereſt was immediately veſted in the grantee, and therefore it was in his election to make it a rent-charge, and ſo to charge the land with it, or a perſonal thing to charge the perſon of the grantor in a writ of annuity. 2 *Rep.* 37.

An annuity was granted to a feme ſole *for life*, who afterwards married; there were arrears due in her life-time, and then ſhe died, ſo that the annuity was determined; adjudged, that her huſband might have an action at Common law for theſe arrears, for an annuity is more than a thing in action, for that it may be granted over. *Owen* 3.

If a man grants a rent-charge out of the manor of *Dale*, in which the grantor has no intereſt, with a proviſo, that the grant ſhall not charge his perſon, this proviſo is void; becauſe the grantor having nothing in the manor of *Dale*, could not by any act of his charge it; and conſequently the grantee having no remedy for his annuity, but againſt the perſon of the grantor, the proviſo to exempt his perſon is void, as rendering the whole grant ineffectual; and if in this caſe the grantor had been ſeiſed of the manor, and had granted a rent-charge out of it, for the life of the grantee, with a proviſo that the grant ſhould not charge his perſon, though the grantee himſelf could have no remedy but by diſtreſs, becauſe that remedy being open to him, the proviſo is good to exonerate the perſon; yet upon the death of the grantee, his executor may have an action of *debt* againſt the grantor for the arrears, becauſe the executor has no other remedy for the recovery of them; for he cannot diſtrain after the grant is determined; and therefore the proviſo to exempt the perſon is void againſt the executor, as rendering the grant uſeleſs, and ineffectual. *Co. Lit.* 146. 6 *Co.* 41. *b.* 7 *Co.* 65. *b.*

And hence it is, that if a rent be granted out of lands, with a proviſo that the perſon of the grantor ſhall not be charged, that this proviſo is void, becauſe the grantee having no diſtreſs given by the deed for the recovery of the rent, would be without any manner of remedy, if the proviſo took place. 6 *Co.* 58. *b.*

If a man by his deed grants that if *J. S.* be not yearly paid the ſum of 10*s.* that then he may diſtrain for it in his manor of *Dale*, this is a good rent-charge out of the manor, but no writ of *annuity* lies for it, becauſe there is no grant of the rent made by the grantor; yet becauſe he hath given the grantee a power to diſtrain if ſuch a yearly ſum be not paid him, the manor is thereby charged with the diſtreſs, and conſequently with the diſtreſs for which the rent is given. *Co. Lit.* 146.

Judgment in a writ of annuity granted to the plaintiff for exerciſing the office of a *ſteward*, and afterwards the ſame was behind again, whereupon the plaintiff brought a *ſcire facias* upon the judgment, to which the defendant pleaded, that pending the writ the plaintiff had refuſed to execute the office of a *ſteward*, (*viz.*) to hold a court, *&c.* tho' he was required; adjudged, a good plea, for by his refuſal the annuity was determined, and he could only have an action of debt for the arrears. *Dyer* 377.

The *biſhop of Rocheſter* brought a writ of annuity againſt the *dean and chapter of Rocheſter*, and declared for an annuity by preſcription from the *prior of St. Andrew's in Rocheſter*, which priory was diſſolved *anno* 28 *H.* 8. and about three years afterwards their poſſeſſions were given by the ſaid King to the *dean and chapter of Rocheſter*; the Ch. J. *Anderſon* was of opinion, that the annuity was determined, becauſe 'tis the nature of an annuity to charge only the perſons; and in this caſe the corporation of the *priory* were the perſons granting, which being now diſſolved the annuity is gone; but if any land had been charged with the payment, or if the *priory* had been changed into an abby, the annuity ſhould continue. *Owen* 73.

If a man ſeiſed of land in fee, and poſſeſſed of other land for years, grants a rent-charge for life out of both, with a power to diſtrain in both, if the rent be arrear, the leaſhold as well as the land of inheritance are ſubject to the diſtreſs; becauſe a man may oblige his chattles to the diſcharge of the rent; but the rent being a freehold ſhall iſſue only out of the inheritance; becauſe the leaſehold, being only a temporary and periſhing intereſt, is not a fund commenſurate to the charge; and therefore the rent ſhall iſſue out of the inheritance, which for its duration is a more compleat eſtate to ſupport the charge, and render the grant effectual. And hence it was adjudged, that tho' the grantee might diſtrain the leaſehold lands, yet he muſt avow for a rent iſſuing out of the inheritance. *Co. Lit.* 147. *Cro. Jac.* 390. 1 *Rol. Rep.* 330. *Cro. Eliz.* 607, 622.

But if a man poſſeſſed of a term of years, grants a rent out of it to another for life, tho' the eſtate be of ſhorter duration than the charge; yet becauſe it is the only fund provided by the grant, for the payment of the rent, it ſhall anſwer the grantee ſo long as it has continuance, if the life for which the rent was granted, laſts ſo long. 7 *Co.* 51. *Cro. Eliz.* 183.

An annuity was brought by the *dean and chapter of S.* againſt the *maſter of St. Bartholomew's hoſpital*, in which the plaintiffs demand an *annuity by preſcription*, to be paid to them yearly at *S.* the plaintiffs had judgment, and afterwards they brought a *ſcire facias* upon that judgment againſt the ſucceſſor of the ſaid maſter, for arrears of the ſaid annuity, which became due after the judgment was given; and adjudged good. *Cro. Eliz.* 810.

The grantor by deed granted an annuity of 5*l. per annum* to the grantee for two years, payable at *Michaelmas or ſixteen days after*; the grantee brought an *action of debt* for this five pounds, which he declared, that it was in arrear *et adhuc aretro exiſtit*; and upon demurrer to the declaration it was inſiſted, that an action of debt would not lie for it, but a writ of annuity was the proper remedy; but adjudged, that debt would lie upon the contract, it being in a grant for years and by deed. *Cro. Eliz.* 268.

Where a man hath an annuity by *preſcription*, and he brings a writ of annuity for the arrears, and recovers, he ſhall never afterwards have another writ as long as that judgment ſtands in force, becauſe the *preſcription* is altered by the judgment, and changed into a thing of a higher nature, but he ſhall have a *ſcire facias* on that judgment. 6 *Rep.* 7.

There is another remedy for the recovery of an annuity or rent-charge, and that is, when a power is given the grantee to enter and hold the lands till ſatisfied the arrears by the perception of profits, the grantee, when the rent is arrear, may in ſuch caſe enter and hold the lands till ſatisfied by the perception of the profits; tho' in this caſe it was objected, that there was no eſtate conveyed, out of which a uſe might ariſe to the grantee, upon the nonpayment of the rent; and that this grant could paſs no eſtate to the grantee, as a conveyance at Common law, becauſe the grantee could have no inheritance or freehold in the land, when the rent was in arrear for want of livery, nor any eſtate for years, for want of a certain commencement and determination; yet it was adjudged, that by the grant he had an intereſt veſted in him, when the rent was arrear; and though it be an uncertain intereſt, which, for the uncertainty of its commencement and determination, might be void by the ſtrict rules of law, if it were granted independant of any eſtate certain, yet it is good in this caſe, becauſe it is created to attend a determinate eſtate; and the nonpayment of the rent fixes the certainty of its beginning, and the ſatisfaction of the arrears, by the perception of the profits, the end and determination of ſuch intereſt; and therefore the grantee may reduce ſuch intereſt, as it riſes, into his poſſeſſion by *ejectment*, which is the proper remedy to recover the poſſeſſion. 1 *Sid.* 223, 262, 344. 1 *Lev.* 170. 1 *Keb.* 784. *Raym.* 135, 158.

Upon *nihil debet* pleaded, the plaintiff had a verdict, and it was moved in arreſt of judgment, that *debt* would not lie for theſe *arrears*, but he ought to have brought a writ of annuity, becauſe the term was not expired but the annuity ſtill continued. 4 *Rep.* in *Ognell's* caſe.

The declaration was *de placito debiti*, and the plaintiff declared for 10*s.* arrear *de annuali redditu*; after a verdict for the plaintiff it was moved in arreſt of judgment, that the declaration was ill, for as 'tis an action of debt the plaintiff cannot have judgment, becauſe it appears by the

declaration

declaration that it was an annuity; and ſo it was adjudged. 2 *Bulſt.* 15.

In a writ of annuity the parties were at iſſue upon a *preſcription*, and the jury found for the plaintiff, but *no damages*; but before judgment the plaintiff releaſed the *damages*, and had judgment to recover the annuity; and upon a writ of error brought it was aſſigned for error, that the jury had given no *damages*, which ought to be given as well in an annuity *by preſcription as by deed*; but the judgment was affirmed, becauſe 'tis an advantage for the defendant, that *damages* were not given againſt him, and the not finding damages doth not alter the judgment. 1 *Rol. Rep.* 88.

If a man grants a rent-charge to *J. S.* his heirs and aſſigns; and if it ſhall happen that the rent be behind and unpaid, that then the ſaid *J. S.* his heirs and aſſigns ſhall enter into the land and have and enjoy the rents thereof, until the arrears be fully ſatisfied; and the grantor covenants to levy a fine to the uſes of the ſaid deed; and after the fine levied the rent be arrear, the grantee may enter into the land, or make a leaſe for years to try his title in *ejectment*; becauſe by the fine there is an eſtate veſted in the conuzees, to raiſe an uſe in the grantee, of the rent-charge, when the rent is behind; and whenever the rent becomes arrear, the poſſeſſion is executed to that uſe, and conſequently the grantee hath a right to take and keep that poſſeſſion till the uſe for which it was executed be ſatisfied; and that was till the arrears of rent be paid by the perception of the profits; and therefore, though the greateſt intereſt in the land be uncertain (becauſe it is uncertain when the rent will be paid out of the profits) yet while his intereſt remains, if his poſſeſſion be diſturbed or veſted, he may reſtore it by *ejectment*, which is the proper remedy to recover the poſſeſſion; and if the grantee aſſign over the rent, the aſſignee may likewiſe enter and maintain a title in *ejectment*; for though the uſe ariſes out of the eſtate of the conuzee only, as the rent is in arrear, and till the rent be behind and unpaid, there is nothing more than a bare poſſeſſion of uſe, which in its nature is not aſſignable; yet by the conveyance of the rent it ſhall paſs, becauſe it is nothing more than a remedy or ſecurity for the rent; and therefore ſhall attend that into whoſe hands ſoever it comes. *Cro. Jac.* 510, 511, 512. 2 *Rol. Rep.* 12. *Poph.* 126, 147. 2 *Rol. Rep.* 427. 3 *Bulſt.* 250.

The plaintiff brought an annuity by *plaint* in the *grand ſeſſions in Carmarthen*, and declared, that it was granted to him for life, by the defendant, and had a verdict and judgment againſt him, and the defendant brought a *writ of error*, and the error aſſigned was, that by the ſtatutes 34 & 35 *H.* 8. all real actions brought in *Wales*, and mixt actions, ſhall be ſued by writ, and all perſonal actions by *plaint*, and that annuity is a mixt action, therefore not to be brought by *plaint: Sed per curiam*, 'Tis a perſonal action, and charges the perſon only and not the land. *W. Jones* 214.

An action of *debt* does not lie for the arrearages of an annuity, if the grantee be ſeiſed of it in fee, tail or for life. *Co. Lit.* 162. 4 *Co.* 40. *a.*

As regularly the remedies for recovery of an annuity or rent-charge are either by writ of *annuity* or *diſtreſs*, it is to be ſeen which is the moſt eligible method, and what ſhall determine the grantee's election. If *A.* grants a rent-charge to *B.* and his heirs, if the rent be arrear, not only the grantee, but his heirs *in infinitum*, may diſtrain for it; for the remedy being commenſurate to the right, muſt be of equal duration with the right; but if in this caſe the rent be arrear, and the grantee brings a writ of annuity, in order to charge the perſon of the grantor, it is no longer to be conſidered as a rent iſſuing out of the land, becauſe the writ of *annuity* has intirely turned the charge upon the perſon of the grantor; and under that denomination it muſt determine with the life of the grantor, becauſe his heirs are not chargeable. 1 *Rol. Abr.* 226. *Poph.* 87. *Hob.* 58. *Dyer* 344. *Co. Lit.* 144.

But if *A.* granted for him and his heirs to *B.* and his heirs, ſuch a rent out of his lands, in this caſe the heirs, being comprehended in the contract, are bound to make good the grant ſo far as they have aſſets by deſcent from the grantor. 2 *Rol. Abr.* 226. *Co. Lit.* 144.

4. *Pleadings.*

In *replevin*, the defendant avowed for an annuity granted to him *pro conſilio impendendo*; the plaintiff replied, that the defendant was accuſed of *treaſon* and committed to the Tower, and that he had buſineſs which required his counſel, but could not be admitted to him; and upon demurrer, judgment was given for the plaintiff, becauſe he might give counſel in priſon as well as when at large. *Dyer* 2.

An annuity was granted to an attorney *pro conſilio impenſo et impendendo*, and afterwards there being a difference between the grantor and a ſtranger, the attorney not being required to give counſel to the grantor, was of counſel with his adverſary; adjudged, that his annuity was not determined by this miſbehaviour. *Dyer* 369.

A writ of annuity was brought for an annuity *pro conſilio impenſo, &c.* the defendant pleaded in bar, that he carried a bill in Chancery, and deſired him to *ſet his hand to it*, and becauſe he refuſed, he detained the annuity; adjudged no good plea, for tho' the plaintiff was bound to give his advice, yet he was not bound to ſet his hand to every bill brought to him. *Poph.* 135.

A. granted a rent-charge to *B. B.* brought a writ of annuity, and *counts* of a rent-charge granted to him, and concludes, by force of which *he was ſeiſed in his demeſne as of freehold*; adjudged upon a writ of error, and in affirmance of the judgment, that this is only a miſtake of the law, and does not vitiate the declaration, which is good, and that this is no election to have this as a rent-charge. 2 *Bulſt.* 148.

In annuity the plaintiff declared of a grant for his life by deed, *virtute cujus ſeiſitus fuit in dominico ſuo ut de libero tenemento.* It was objected that this proves it a rent-charge, and no annuity, and ſo had made it his election to have it as a rent-charge, and cited *D.* 65. 3 *E.* 6. and 221. 5 *Eliz. ſed non allocatur*; for being an annuity for life, tho' no rent-charge, ſuch count is good; and tho' *Bendloe* took ſuch exceptions in 3 *E.* 6. yet the court notwithſtanding reſolved for the plaintiff. *Cro. Car.* 170.

Annuity brought againſt the prior of *M.* in *Southwark*, was *præcipe, &c. quod reddat* 10*l. or four gowns*, which are arrear of a certain annual rent of five marks, or one gown, *&c.* and the writ held good notwithſtanding it was in the diſjunctive with (or). *Br. Annuity, pl.* 33.

Debt upon arrears of an annuity, and *counted of a grant out of the manor of* D. and *did not ſhew where the manor is*, and yet well, becauſe the *action is found upon the deed*, and not upon the land. *Bro. Count, pl.* 92.

Annuity of 10*l.* granted to him *pro ſervitio impenſo et impendendo*, and *did not count that he had continued in his ſervice. Per Brian:* There is a *diverſity* where an annuity is *granted to be an officer certain*, as parker or bailiff, *and* where it is *general pro ſervitio, &c.* for in the caſe of ſpecial ſervice he ſhall alledge the continuance in the bailiwick or parkerſhip; for he knows what ſervice he ſhall do, and in the other caſe does not know till the defendant commands him; and therefore let him anſwer. Note the diverſity. *Br. Count, pl.* 72.

An *annuity* was granted for life *pro conſilio impenſo, &c.* and in a writ of annuity brought for the arrears, the defendant pleaded, that before any were due, he required the plaintiff to *do him ſervice*, and he refuſed, *&c.* the plaintiff replied, that before any refuſal, the defendant on ſuch a day and year did diſcharge him, the ſaid plaintiff, from his ſervice: Adjudged that the defendant's plea was not good, becauſe he ought to have ſhewed for what manner of ſervice the plaintiff was detained, and the annuity granted, and then what ſervice he required of him, and what he refuſed; neither is the replication good, for the diſcharge from the ſervice was not an abſolute diſcharge, ſo that the defendant could never afterwards require it, becauſe the annuity being granted to the plaintiff for life, he ought to continue his ſervice ſo long as the annuity continueth, but where the retainer is *for years*, then

then a discharge is peremptory and absolute. 1 *Leon.* 209.

In a writ of annuity the plaintiff declared, that whereas the King by letters patent had granted to the defendants certain privileges concerning making *allum*, &c. they the said defendants, as well for the counsel given by the plaintiff to them concerning the said letters patent, and before they were drawn, as afterwards, &c. *granted* to him an annual sum of 40*l.* for so many years, &c. the defendants confessed the annuity as aforesaid, but say it was granted to the plaintiff to be taken out of the *clear profits and gains* which should accrue to them by making allum; and averred, that no such gains did accrue to them since the grant; and upon demurrer it was adjudged a good grant of an annuity to charge their persons. *Hutt.* 33.

Rent was *granted to T. Quintin* by his father *by name of T. his son, and he brought assise of the rent by name of T. Q. of N.* and *did not say T. son of T. Q.* and yet the writ was good; *quod nota*; and yet in annuity it ought to agree with the specialty. *Br. Variance, pl.* 70.

Annuity against the parson of E. *the plaintiff counted that he and his predecessors* time out of mind *have been seised* of the said annuity of 40*s. per ann. by the hands of A. late vicar, of* E. *and of his predecessors vicars time out of mind; and that King* E. 3. *when a vicar died, presented one* J. *as parson, who was instituted and inducted, and that all the defendant's predecessors, and likewise the defendant were instituted and inducted as parsons; and that he has been seised* of the annuity *by the hands of the said parsons till the defendant withdrew it*; and the count was awarded good; for he shall be taken *as parson*, and not as vicar, so that the writ shall *not* be brought against him as *vicar*; *quod nota per judicium*; for it is agreed, that tho' there are vicars and parsons (as are in divers churches) and several patrons, yet when one is presented as parson he shall be taken as parson. *Br. Annuity, pl.* 44.

The plaintiff may count *by prescription* in writ of annuity, *if it commences before time of memory, by composition, fine, or patent of the King. Bro. Annuity, pl.* 21.

Debt upon arrears *of annuity till he was promoted to a competent benefice*, and *shewed that such a day he took feme*, and for the arrears due before, he brought the action; *Choke* demanded judgment of the court, for *this act changes the action of annuity into debt*, and therefore ought to shew places, and by the best opinion, for this default the count is not good. *Br. Count, pl.* 26.

A Writ of *Annuity.*

GEORGE *the Third, &c. To the sheriff of* W. *greeting. We command you, that you justice* A. B. *that justly, &c. he render unto* C. D. *ten pounds, &c. which are in arrear to him of an annuity, or yearly rent of, &c. which he oweth to him, as he saith, and as he can reasonably shew that he ought to render to him, that no more clamour, &c.*

Grant of an annuity. See **Grant.**

Ansel, or **Ansul.** See **Aunsel weight.** —— *De pede, police, cubito, & palma, de* ansul, *balancibus & mensuris. Thorn. Chron.*

Antejuramentum, and **Praejuramentum,** By our ancestors called *juramentum calumniæ*; in which both the accuser and the accused were to make this oath before any trial or purgation, *viz.* the accuser was to swear that he would prosecute the criminal; and the accused was to make oath on the very day that he was to undergo the ordeal, that he was innocent of the crime of which he was charged. *Leg. Athelstan. apud Lambard.* 23. If the accuser failed to take this oath, the criminal was discharged; and if the accused did not take his, he was intended to be guilty, and not admitted to purge himself. *Leg. Hen.* 1. *c.* 66.

Antistitium, A word used for monastery in our old histories. *Blount.*

Antichetarius, Signifies where a man endeavours to discharge himself of the fact of which he is accused, by recriminating and charging the accuser with the same fact. This word is mentioned in the title of a chaper in the laws of *Canutus, capite* 47.

Apatisatio, An agreement or compact made with another. *Upton, lib.* 2. *c.* 12. —— *De officio militari, viz. Concedimus per præsentes bonum & salvum conductum, ac salvam gardiam sive securitatem* apatisationis.

Apoiare, To bring to poverty. —— *Permisit suos spoliare patriam,* aporiare *vulgus. Walsingham* in *R.* 2. It hath been used sometimes to signify *shun* or *avoid.*

Apostare, To violate: *Apostare leges, apostatare leges,* wilfully to break or transgress the laws. —— *Qui leges,* apostabit *terræ suæ, reus sit apud regem. Leg. Edw. Confessoris, l.* 35. *Cowell.*

Apostata capiendo, A writ that formerly lay against one who having entered and professed some order of religion, broke out again, and wandered up and down the country, contrary to the rules of his order: It was directed to the sheriff for the apprehension of the offender, and delivery of him again to his abbot or prior. *Reg. Orig.* 71, 267.

Apothecaries, Are exempted from serving offices, &c. their medicines are to be searched and examined by the physicians chosen by the college of physicians, and if faulty shall be burnt, &c. 32 *Hen.* 8. *c.* 40. And *apothecaries* to the army are to make up their chests of medicines at *apothecaries hall,* there to be openly view'd, &c. under the penalty of 40*l.* *Stat.* 10 *Ann. cap.* 14. 10 *Geo.* 1. See **Physicians.**

Apparator, or **Apparitor,** A messenger that serves the process of the spiritual court: His duty is to cite the offenders to appear; to arrest them; and to execute the sentence or decree of the judges, &c. *Stat.* 21 *Hen.* 8. *cap.* 5. The office of an apparitor will best appear from this commission of *Walter,* archbishop of *Canterbury,* granted in the year 1316. —— Walterus *Dei gratia* Cant. *archiep. totius* Angliæ *primas, dilecto filio* Willielmo de Graftone *in* apparitoris *officio, in curia nostra* Cantuar', *videlicet, in consistorio ac decanatu nostro ecclesiæ beatæ* Mariæ *de arcubus* London, *ministranti salutem, gratiam & benedictionem. Personam tuam, eo quod de fidelitate in dicto officio per laudabile testimonium apud nos multipliciter commendaris, volentes prosequi cum favore, dictum* apparatoris *officium in curia, consistorio & decanatu prædictis perpetuo possidendum tibi conferimus per præsentes; ita tamen quod te fideliter geras in officio prædicto memorato. Volentes & tibi specialiter concedentes, ut cum ministerio dicti officii per teipsum personaliter vacare non poteris, vel absens fueris a curia, consistorio & decanatu prædictis, nihilominus per alium idoneam personam, quem ad hoc assignandum omnia & singula quæ dicto incumbent officio—facere valeas, & jugiter exercere.* Dat. apud Lambith. 8 id. Mart. 1316.

If a monition be awarded to an apparitor, to summon a man, and he upon the return of the monition avers that he had summoned him, when in truth he had not, and the defendant be thereupon excommunicated; an action on the case at Common law will lie against the apparitor for the falshood committed by him in his office, besides the punishment inflicted on him by the ecclesiastical court for such breach of trust. *Ayl. Parerg.* 70. 2 *Bulst.* 264.

Action upon the case, for that the defendant an apparitor under the bishop of *Exeter,* maliciously, and without colour or cause of suspicion of incontinency, of his own proper malice, procured the plaintiff *ex officio,* upon pretence of fame of incontinency with one *Edith* (whereas there was no such fame nor just cause of suspicion) to be cited to the Consistory court, and there to be at great charges and vexation, untill he was cleared by sentence; which was to his great discredit and cause of great expences and losses; for which the action is brought. Upon Not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that in this case an action lieth not; for he did nothing but as an informer, and by virtue of his office. But all the court held, forasmuch as it is alledged, that he did maliciously and without colour of suspicion cause him to be cited, upon pretence of fame where there was no offence committed; and it is averred, that there was not any such fame, and he is found

found guilty thereof, therefore the action well lieth. *Cro. Car.* 291.

Apparator comitatus, An officer formerly called by this name; for which the ſheriff of *Buckinghamſhire* had conſiderable yearly allowance; and in the reign of Queen *Elizabeth* there was an order of court for making that allowance; but the cuſtom and reaſon of it are now altered. *Hale's Sher. Acc.* 104.

Apparlement, (from the Fr. *parcillement*, *i. e.* in like manner) Signifies a reſemblance or likelihood; as *apparlement* of war. *Stat.* 2 *Ric.* 2. *ſt.* 1. *c.* 6.

Apparura, Furniture and implements; apparel. *Dominus clamat habere omnes carrectus ferro non ligatas, & omnes carrucas cum tota* apparura. *Placit. in Itin. apud Ceſtriam* 14 *H.* 7. *Carrucarum apparura* is plough-tackle, or all the implements belonging to a plough. *Cowell.*

Appeal, *Appellum*, (from the Fr. *appel* or *appeller*, to call, becauſe *appellans vocat reum in judicium)* Is an accuſation of another in legal form, for a crime by him committed. *Co. Lit.* 123. *b.* 287. *b.* It ſignifies in our Common law, as much as *accuſatio* with the Civilians; for as in the Civil law, cognizance of criminal cauſes is taken either upon *inquiſition* and *denunciation*, or *accuſation*; ſo in ours, cognizance is taken of criminal cauſes upon *indictment* or *appeal*; *indictment* comprehending both *inquiſition* and *denunciation*. An *accuſation* or *appeal*, is a lawful declaration of another man's crime (which by *Bracton* muſt be felony at the leaſt) before a competent judge, by one that ſetteth his name to the declaration, and undertakes to prove it upon the penalty that may enſue thereon. *Cowell.*

There were anciently ſeveral kinds of appeals, which ſeem obſolete at this day; as appeals of treaſon, which might be ſued before the parliament and other courts of law, as well as before the conſtable and marſhal, and were determinable by battle. 2 *Inſt.* 132. *Bract.* 118. 2 *Hawk. P. C.* 161.

But appeals before the parliament are taken away by 1 *H.* 4. *cap.* 14. and thoſe before other law-courts are become obſolete.

But as to the juriſdiction of the conſtable and marſhal, in relation to treaſons committed out of the realm, it ſeems to continue ſtill in force; for in the 7th year of *Charles* the Firſt, an appeal of treaſon, ſuppoſed to be committed beyond ſea, was actually commenced before the conſtable and marſhal; who, for want of ſufficient poof to clear the truth, awarded that a duel ſhould be fought between the parties, for the final determination of the matter. See *Ruſhworth's Collect. part.* 2. *vol.* 1. *p.* 112.

Appeals *de pace*, *de plagis*, and *de impriſonamento* are out of uſe, and have been turned to actions of treſpaſs for many hundred years paſt; alſo the whole learning of appeals of *arſon* ſeems obſolete at this day. *Co. Lit.* 288. *a.*

The kinds of appeals, therefore, that ſeem to require any conſideration at this day, are thoſe of death, larceny and rape, which are capital appeals, and that of mayhem, which is conſidered as a treſpaſs. 1 *New Abr.* 122.

An appeal of death, which is now chiefly in uſe, is a vindictive action which the law gives a wife againſt her huſband's murderer, and to the heir at law againſt one who kills his anceſtor, which being the ſuit of the ſubject, the King cannot pardon. 1 *New Abr.* 122.

1. *Who may have an appeal of death.*
2. *When, where, and in what manner an appeal of death muſt be brought and proſecuted.*
3. *Where an appeal of death may be abated, or not.*
4. *Pleadings in appeal of death.*

1. *Who may have an appeal of death.*

By *Magna Charta*, [*Stat.* 9 *Hen.* 3.] *c.* 34. *No man ſhall be taken or impriſoned upon the appeal of a woman for the death of any other than of her huſband.*

It being alledged by ſome, and eſpecially by *Treby* Ch. J. that an appeal was a revengeful odious proſecution, and therefore deſerved no encouragement; on which occaſion *Holt*, with great vehemency and zeal, ſaid, that he wondered any Engliſhman ſhould brand an appeal with the name of an odious proſecution; that for his part he looked upon it to be a noble proſecution, and a true badge of Engliſh liberties, and referred to the ſtatute of *Glouceſter*, and the comment thereupon in 2 *Inſt.* 12 *Mod.* 375.

At the Common law, before the ſtatute 9 *Hen.* 3. a woman as well as a man might have had an appeal of death of any of her anceſtors, and therefore the *ſon of a woman* ſhall at this day have an appeal, if he be heir at the death of the anceſtor, for the ſon is not diſabled, but the mother only, for the ſtatute ſays, *propter appellum feminæ.* 2 *Inſt.* 68.

Fleta ſays, *Fœminia autem de morte viri ſui inter* brachia *ſua interfecti, & non aliter poterit appellare*; and therewith agree the *Mirror*, *Britton* and *Bracton*. 2 *Inſt.* 68. —— 2 *Inſt.* 317. *S. P.* cites *Bracton* and *Britton*. —— *Staun. P. C.* 58. *b. S. P.*

By *inter brachia* in theſe ancient authors, is *underſtood* the wife, which the dead perſon had lawfully in poſſeſſion at his death, for ſhe muſt be his wife both *of right and in poſſeſſion*; for in an appeal, *ne unques accouple* in loyal matrimony, is a good plea. 2 *Inſt.* 68.—2 *Inſt.* 317. *S. P.* and that there muſt be no *divorce*. —— *St. P. C.* 59. *a Ne unque accouple, &c.* is a good plea in bar —— *S. P.* Accordingly, *Br. Appeal, pl.* 17. cites 50 *E.* 3. 15.—— 2 *Hawk. Pl. C.* 164. *ſ.* 36. ſays, that if the meaning of *inter brachia* be according to Sir *Edw. Coke*, it ſeems at leaſt to follow, that if the huſband were divorced from the wife at his death, tho' by a voidable ſentence, ſhe cannot maintain an appeal; yet it is generally holden, that a wife who has eloped from her huſband may have an appeal of his death; and *Stamford* ſeems to underſtand *inter brachia* to be, that the wife ought to have had the deceaſed in her view, and to have been preſent at his death, which is moſt certainly not neceſſary at this day.

The *judges* are ſo far *bound to take notice of this ſtatute*, that if a woman brings an appeal of death of her father, or of any other beſides her huſband, they ought *ex officio* to abate it, tho' the defendant takes no exception to it. 2 *Hawk. Pl. C.* 166. *cap.* 23. *ſ.* 42.

If a man be killed who has no feme nor ſon, and his daughter, ſiſter, or other couſin, who is a *feme*, *is* his *heir*, and he has an uncle or other *male couſin* who is *not heir but of the kin*, ſhe ſhall not have appeal; for the ſtatute of *Magna Charta*, *cap.* 37. is, that none ſhall be taken by appeal of a feme, unleſs of the death of her huſband, and therefore the appeal is loſt. *Br. Appeal, pl.* 63.

A feme ſhall have appeal where ſhe ſhall have no dower, as where ſhe *elopes* from her baron. *Br. Appeal, pl.* 17. cites 50 *E.* 3. 15. *per Ingleby.*

If a feme brings appeal of the death of her baron, and *convicts the defendant*, and *takes another baron before execution*, if the *defendant gets charter of pardon*, this ſhall not be allowed before the baron and feme are warned, and the feme ſhall have execution notwithſtanding the coverture. *per Skrene*; but *per Gaſcoign* Ch. J. It is not ſo, for the feme has diſabled herſelf by taking of the ſecond baron; and by the juſtices of *B. R. M.* 2 *M.* 1. She ſhall loſe her appeal by taking of the ſecond baron; for the cauſe of appeal is, that ſhe wants her baron, therefore when ſhe has another baron the cauſe ceaſes, and *ceſſante cauſa ceſſat effectus*; and the ſame it ſeems of the execution of the appellee. *Br. Appeal, pl.* 148. cites 11 *H.* 4. 48.

If ſhe has judgment of death againſt the defendant, if after ſhe takes huſband, ſhe *can never have execution* of death againſt him. 2 *Inſt.* 69. — 2 *Hawk. Pl. C.* 164. *cap.* 23. *ſ.* 38. *S. P.* But ſays it ſeems clear, that in ſuch caſe the appellee ſhall not be diſcharged without the King's pardon, and that he does not find it ſettled what ought to be done with the appellee in this caſe; but it ſeems certain, that the King cannot proceed againſt him by way of indictment, becauſe he is attainted already; and therefore

it may be probably argued, that the court may award execution of him *ex officio*, or at leaſt at the demand of the King; for otherwiſe he would ſave his life by reaſon of the attainder by which he is adjudged to loſe it.

For the death of an anceſtor who leaves no wife, the heir only can bring an appeal, and ſuch heir muſt himſelf be innocent of the fact, he muſt be heir general according to the courſe of the Common Law, and alſo heir male, and in his count muſt ſet forth how he is heir to the deceaſed. 2 *Hawk. P. C.* 165.

If an heir die, hanging an appeal commenced by him, it ſeems agreed that no other heir can proceed in ſuch appeal, or commence a new one; and it ſeems the ſtronger opinion, that if the right of bringing an appeal be once veſted in an heir, who dies without bringing any, the right of appeal is gone for ever; and if an heir die after judgment given againſt the appellant, it is queſtionable whether his heir can ſue execution. 2 *Hawk. P. C.* 166.

The huſband was killed and afterwards *the wife died within the year*, the heir ſhall not have appeal becauſe the appeal was once given to the wife, ſo that the action was once out of the blood, and therefore cannot be given to the blood again. *Keilw.* 120.

If an appeal be *commenced by an heir who dies, hanging the writ*, it ſeems to be agreed by almoſt all the books, that no other heir can afterwards proceed in ſuch appeal, or commence a new one, becauſe it is *a perſonal action*, given to the heir in reſpect of his immediate relation to the perſon killed, at the time of his death, and like other perſonal actions ſhall die with him; but ſome have held, that if the *firſt heir dies within the year* and the day, *without commencing an appeal*, the next heir may bring one; but this is doubted by others, and the generality of books ſeem to favour the contrary opinion, as more agreeable to the general tenor of the law in relation to appeal, which in no caſe, as the ſerjeant ſays he knows of, will ſuffer the right of bringing an appeal to be *transferred from one to another*, and compares it to the caſe of a wife dying within the year and day in whom the right of appeal is veſted, no heir ſhall have appeal; but that it is held by Sir *Matt. Hale*, [*Hale's Pl. C.* 182.] and ſome others, that if the firſt heir gets judgment in appeal of death and dies, his heir may have execution. But that *Stamford* [*St. P. C.* 59. *b.* cites *Trin.* 16. *H.* 7. 15.] doubts this, and ſeems contrary to many of the old books, and not eaſily reconcileable with the reaſon of the caſes in the books. But whether in this caſe the court may not award execution either *ex officio*, or at the demand of the King, may deſerve to be conſidered. Alſo if a perſon killed has *no wife* at his death, *and no iſſue but daughters*, and all *thoſe daughters die within the year* and day, it may reaſonably be argued, that the heir male may have appeal, becauſe the *right of bringing* one *never veſted* in any other before; but ſays he does not find this caſe in any of the books. 2 *Hawk. P. C.* 165, 166. *c.* 23. *ſect.* 41.

An appeal was brought by the *ſon againſt his father, of the death of the mother of the plaintiff*, and held good, for he is heir to the mother, for appeal lies as well of the death of a woman as of the death of a man. *Br. Appeal, pl.* 106.

If there be no wife of the perſon killed, then *the next heir at the Common law* ſhall have the appeal, if ſuch heir be *male*, but if ſuch heir be a female, as daughter, &c. ſhe ſhall not have it; nor ſhall the youngeſt ſon in *Borough-Engliſh* have the appeal, tho' he be inheritable to the land. *St. P. C.* 59.

An *hermaphrodite*, if the male ſex be predominant, ſhall have an appeal of death as heir; but if the female ſex doth exceed the other, no appeal doth lie for her as heir. 2 *Inſt.* 69.

An infant may bring an appeal, but he muſt proſecute it by guardian, and he ſhall be nonſuited upon ſuch guardian's non-appearance at a day whereon he is demandable; but if the infant comes into court, and ſays, that he will relinquiſh the ſuit, and the guardian inſiſts to continue it, the court may diſcharge him and aſſign another. *Moor* 461. *H. P. C.* 183.

But an ideot, or perſon born deaf and dumb, or one attainted of treaſon or felony, or outlawed in a perſonal action, ſo long as ſuch attainder or outlawry continues in force, cannot bring any appeal whatſoever. 2 *Hawk.* 168. *H. P. C.* 183. 2 *Hawk. P. C.* 162.

If the wife take another huſband either before or pending the appeal, ſhe puts an end to it for ever; and if ſhe marry after judgment, ſhe cannot pray execution. 2 *Hawk. P. C.* 164.

Serjeant *Hawkins* ſays, that infancy, old age, or the imbecillity of the plaintiff, is no good objection againſt bringing an appeal, though defendant loſes the benefit of waging battle; and ſo puts him in a worſe condition than if the appeal were brought by one capable of fighting; for ſince the defendant has proper means for his acquittal, by putting himſelf upon a trial by his country, and the imbecillity of the plaintiff is wholly owing to the act of God, and no ways leſſens the injury complained of by him, it is not reaſonable he ſhould ſuffer any diſadvantage from it. And agreeably hereto it ſeems ſettled of late times, contrary to the numerous authorities in the old books, that the parol ſhall not demur in an appeal for the non-age of the plaintiff; yet it is certain that an infant muſt proſecute ſuch ſuit by guardian; but though the guardian be ſo neceſſary in the proſecution of ſuch ſuit, yet if the infant comes into court and ſays he will relinquiſh it, notwithſtanding which the guardian will proſecute it, they may in diſcretion diſcharge ſuch guardian, and aſſign another, it not being reaſonable that an infant be bound to continue a ſuit againſt his will, which demands nothing but revenge, and will be chargeable to him. 2 *Hawk. P. C.* 161. *c.* 23. *ſect.* 30.

2. *When, where, and in what manner, an appeal of death muſt be brought and proſecuted.*

By the ſtatute of *Glouceſter*, 6 *Ed.* 1. *cap.* 9. which is conſtrued to extend only to appeals of death, *an appeal ſhall not be abated for default of freſh ſuit, if the party ſue within the year and day after the deed done*, the computation whereof, as the law is now ſettled, ſhall be made not from the day when the wound was given, but from the day when the party died; alſo the year and day ſhall be from the beginning of the day, and not from the preciſe time when the death happened, becauſe regularly no fraction ſhall be made of a day. 2 *Inſt.* 320. 3 *Inſt.* 53. 4 *Co.* 42. *b.* 2 *Hawk. P. C.* 162.

All appeals are local actions, and regularly to be tried in the county wherein the offence was committed. *Dyer* 38.

But it is ſaid, that if a perſon had died in one county, of a wound given in another, the appeal might be brought in either of them, and the trial be at the bar by a jury returned from the body of each of thoſe counties; but ſince the 2 & 3 *Ed.* 6. *cap.* 2. which enacts, *that the party may ſue an appeal in the county where the perſon felonioufly ſtricken*, &c. *ſhall die*, &c. it ſeems the trial may be from ſuch county only. 2 *Hawk. P. C.* 163.

Appeals are commenced either by writ, which is an original out of Chancery, returnable in the King's Bench only, or by bill. 2 *Hawk. P. C.* 155.

Appeals by bill may be ſued in the *King's Bench* againſt any perſon in actual cuſtody, or by having bail filed for him there. *Cro. Eliz.* 605.

If a man be brought into court either by a void writ of appeal, or by a voidable one, which is afterwards abated, he may be arraigned by bill *in cuſtodia mareſchalli*. 2 *Hawk. P. C.* 155. *Skin.* 634.

A bill of appeal lies before juſtices of *Eyre*, and before juſtices ſpecially aſſigned, and before juſtices of goal delivery, and for the ſame reaſon, as ſome ſay, before juſtices of aſſize; who by the purport of ſeveral ſtatutes are authoriſed to deliver goals without any ſpecial commiſſion againſt any priſoner in the goal, which they are to deliver, or, as it is generally holden, againſt a perſon whom they have bailed. See 2 *Hawk. P. C.* 156.

If ſome of the accomplices only be in priſon, a bill of appeal lies againſt all, which, after the trial of thoſe in the

the priſon, ſhall be removed into the King's Bench, where the reſt ſhall be proceeded againſt. 2 *Hawk. P. C.* 156.

At Common law neither plaintiff nor defendant in any appeal whatever, could make an attorney except in ſome ſpecial caſes, but now by the 3 *H.* 7. *cap.* 1. it is enacted, *that the appellant in any appeals of murder, or death of a man, where battle by the courſe of the Common law lies not, may make an attorney, and appear in the ſame, in the ſaid appeals, after they be commenced, to the end of the ſuit and execution of the ſame.* 2 *Inſt.* 313. 2 *Hawk. P. C.* 175.

But it ſeems that the appellant cannot make an attorney till he has once appeared in proper perſon, and that if the plaintiff or defendant appear or plead by attorney where they ought not, and the court receive the plea, and adjourn the cauſe, it ſeems that the appeal is diſcontinued, becauſe ſuch appearance was merely void in law. 1 *Salk.* 61. *Carth.* 394. *Skin.* 48, 670.

Where an appeal is commenced in the court below, and removed into the King's Bench, the appellee is to be arraigned *de novo* on the ſame bill of appeal, and it is not neceſſary to exhibit a new bill againſt him *in cuſtodia mareſchalli*; and if the appellant will not appear to proſecute his appeal, the appellee may ſue out a *ſcire facias* reciting the whole matter, warning him to appear at a certain day; and if he make default on that day, the court on demand will nonſuit him; but the appellant may appear *gratis*, and proſecute without any *ſcire facias.* 1 *Rol. Abr.* 131. 2 *Bulſt.* 19. *Skin.* 670. *Carth.* 394, 395.

The appellant may be nonſuited for not appearing when demanded, at any day of continuance, except a verdict hath been given againſt him; in which caſe by the 2 *H.* 4. *cap.* 7. he cannot be nonſuited. *Noy* 88. *Latch* 173. *Moor* 407. *Cro. Eliz.* 465.

3. *Where an appeal of death may be abated, or not.*

The writ in an appeal is an original iſſuing out of Chancery, returnable into the King's Bench only; before the return thereof the court of Chancery only can ſuperſede or ſet it aſide, where it appears to have iſſued *erronice* or *improvide*, by ſome error extrinſick to the writ itſelf; but for any error or defect on the face of it may be quaſhed after it is returned into the King's Bench. *Abr. Eq.* 416.

The court *ex officio* will quaſh the writ for apparent faults appearing on the face of the writ; as where the ſenſe is defective for want of a material word, or where it wants thoſe words of art which the law has appropriated for the deſcription of the offence. 2 *Hawk. P. C.* 184.

So if in a writ of appeal brought by huſband and wife, the concluſion is in the name of the wife only; or if the writ omits either the name of baptiſm, or ſurname of the appellant or appellee, being under the degree of nobility, it ſhall be abated. 2 *Hawk. P. C.* 185.

Alſo the court will abate the writ when the declaration varies from the writ in ſome material point, either as to the reign of the King, or as to the county wherein the fact is laid, *&c.* 2 *Hawk. P. C.* 184.

On the exception of the party the court will abate the writ; as if he ſhews that there are not 15 days between the *teſte* and return of the writ; but this he muſt do before he has pleaded in chief, without taking advantage of it. 1 *Salk.* 63. 1 *Vent.* 7.

If the writ or declaration miſtake either the name of baptiſm, or ſurname, or addition of the appellant or appellee, the appellee before imparlance may plead it in abatement. See 2 *Hawk. P. C.* 184.

But the omiſſion or inſufficiency of an addition, are ſalved by the appellee's coming in and pleading, without taking any advantage of ſuch defect, but by his bare appearance. 2 *Hawk. P. C.* 190.

The defendant may at the ſame time plead as many pleas in abatement as he pleaſes, together with matter in bar, and the general iſſue, if he can do it without repugnancy; and if he be ſuffered to plead any ſuch plea without pleading with it the general iſſue, the finding it againſt him doth not conclude him from pleading the general iſſue afterwards. 2 *Hawk. P. C.* 191, 192.

A man was found guilty upon an *indictment* for the murder of *B. B.* and immediately his *wife* brought *an appeal* of the death of her *huſband*, to which the defendant pleaded, that after the death of her firſt huſband ſhe had married another at *R. &c.* the plaintiff replied, and the matter depending a year, and more, all theſe proceedings were removed into *B. R.* by a *certiorari*, and the court demanded of him what he could ſay why judgment ſhould not be given againſt him upon his former conviction; he pleaded, that the appeal was ſtill depending; but it being brought in another county than where the indictment was laid, and there being no *continuances* entered from one term to another, the plaintiff in appeal was *nonſuit*, and ſo the court gave judgment upon the indictment *Dyer* 296.

A woman *poiſoned* her huſband, which is *treaſon* by the ſtatute 31 *H.* 8. the heir brought an appeal *of murder* againſt his mother; adjudged, that it did not lie becauſe it was not murder, but treaſon, and the greater offence drowns the leſs. *Dyer* 50.

There were *three brothers* and the *middle brother* was killed, the eldeſt died within the year, and no appeal brought, it was a queſtion, whether the younger ſhould have an appeal; it was not reſolved, tho' *Forteſcue*, 20 *H.* 6. 43. held he ſhould not, but the 16 *H.* 7. 15. 'tis held he ſhould. *Dyer* 69.

A man was wounded in one county, died in another, and the heir brought an appeal in the county where his anceſtor died; Upon Not guilty pleaded, it was adjudged, that the *viſne* ſhould come out of each county. *Dyer* 46.

Appeal of murder: Upon Not guilty pleaded, a ſpecial verdict was found, that the appellee was not guilty *de felonia & murdro Tho. Newman*; but ſays, that the ſaid *Thomas* and others firſt aſſaulted the appellee on his own ground near the highway, and drove him to a wall, ſo that he could go no farther; and thereupon he wounded the ſaid *Thomas* in defence of his life, of which wound he died, *&c.* It was objected againſt this verdict, that the jury did not find that the appellee was aſſaulted near the highway *ad ipſum murdrandum*, and therefore he ſhall forfeit his goods, which he ſhould not if thoſe words had been found, and this by virtue of the ſtatute 24 *H.* 8. *cap.* 5. but this verdict is void and repugnant in itſelf; firſt 'tis found, that the defendant was not guilty of the felony and murder, and afterwards ſpecial matter was found, which proves him guilty, but excuſes it. 1 *And.* 41.

In an appeal of murder brought by the *brother* for the death of his *brother Henry*; the defendant pleaded, that he was indicted for *the death* of the ſaid *Henry*, which he ſet forth; upon which he was arraigned, and confeſſed the ſame, and praying his clergy and pleaded over to the felony and murder Not guilty; and upon a demurrer to this plea, the court conſidered the ſtatute 3 *H.* 7. *cap.* 1. by which it is enacted, that if the perſon indicted ſhall be arraigned within a year, *&c. acquitted or attainted*, yet the party may have an appeal; but in this caſe the defendant was neither *acquitted or attainted*, therefore an appeal would not lie. 1 *And.* 68.

In an appeal by the *wife* for the death of her *huſband*, ſhe declared, that the defendant gave him a mortal wound *at B. &c.* of which wound he died *at W. &c.* and ſo the defendant at *B. aforeſaid*, in manner and form aforeſaid, murdered her huſband; adjudged, that the writ ſhould abate, for the *murder* ought to be laid at the place where he died, and not at the place where the *ſtroke was given.* *Cro. Eliz.* 196.

Appeal of murder againſt four, and all of them appeared at bar at the return of the writ; adjudged, that their *appearance* doth not make them *in cuſtodia mareſchalli*; unleſs there is a record *committitur mareſchallo, or that they put in bail.* So that in this caſe there being no appearance, and the plaintiff being nonſuit for a default in the writ, becauſe there was *no addition* to one of the defendants names, it was held, that ſuch *nonſuit before appearance* of the defendants, was peremptory. *Cro. Eliz.* 605.

In *Bullware's* caſe, it was held, that if a *ſtroke be in one county and the death in another*, the *appeal* may be brought

in either county; for tho' the defendant did nothing in that county where the party died, yet the death ſhall have relation to the ſtroke, and ſhall make it felony in that county where he died. 7 *Rep.* 2.

Appeal of murder brought by the *wife*; the caſe was, Sir *Charles Blunt* came to the houſe of *Clements* the deceaſed, and demanded a *dog*, and in entering the houſe, being oppoſed by *Clements*, they fought, and *Clements* was killed; and this appearing upon evidence to the coroners inqueſt; the queſtion was, whether the diſpoſitions of thoſe witneſſes ſhould be given in evidence upon this appeal; it was objected, that they ſhould not, becauſe not between the ſame parties, for the coroner is an officer for the King, but the appeal is between party and party. 2 *Rol. Rep.* 460.

Appeal of murder, removed by *certiorari* into *B. R.* and the appellant moved to waive his old declaration, and to declare *de novo in cuſtodia marſchalli*; but *per Keeling*, clerk of the crown, the appellee ſhall be arraigned upon the old declaration. 2 *Rol. Rep.* 478.

Appeal of murder; the defendant pleaded, that another time he was acquitted of the murder, but found guilty of *manſlaughter*; and now the queſtion was, whether the plaintiff in appeal might be nonſuited; and adjudged, that he might not. *Moor* 407.

An infant of the age of nine years was admitted *per guardianum*, to bring an appeal for the murder of his brother. *Moor* 461.

Appeal of murder brought by the *widow* for the death of her huſband: Upon Not guilty pleaded, the defendant was found guilty of manſlaughter; then the queſtion was, whether the burning in the hand was pardoned by the general pardon; adjudged, that it could not be pardoned, either by a general or ſpecial pardon, becauſe the conviction was at the ſuit of the party. *Moor* 571.

In an *appeal of murder* brought by the *widow*, the caſe upon the evidence was, one *Calfeild* was a priſoner in the compter upon an execution, and eſcaped; the keeper of the *compter* coming to the place where he was, and endeavouring to retake him, and he reſiſting was killed, the keeper not going back as far as he could, this was held *manſlaughter* only, becauſe the perſon ſlain was in execution for debt; but if he had been in priſon for felony and eſcaped, 'tis murder, unleſs he went back as far as he could. 1 *Rol. Rep.* 189.

An infant brought an *appeal of murder* by his *guardian*, and upon the return of the writ, the *guardian* being ſick, the court was moved to give a farther day for his appearance; but it was denied, it never being allowed in an appeal; and therefore the plaintiff being demanded, and not appearing, he was nonſuit, and the defendant diſcharged. *Latch.* 171.

The *huſband* was killed at *M.* in *Montgomeryſhire*, the *wife* brought an appeal in *Shropſhire*, being the next *Engliſh* county; and upon Not guilty pleaded, it was tried by a *Shropſhire jury*, and the plaintiff had a verdict. It was moved in arreſt of judgment, that the appeal ought to have been brought in *Montgomeryſhire* where the fact was done, and ſo it was adjudged. *Cro. Car.* 247.

Appeal of murder of her *huſband* brought by the *wife* againſt one *Coſſett:* It appeared by the evidence, that ſeveral were drinking in the room when the man was killed with a blow on the head with a quart pot, but it was not proved which of them gave the blow, but that they were all preſent and abetting to the murder: It was inſiſted, that the *abettors* were principal murderers; therefore it was material, whether *Coſſett*, againſt whom the appeal was brought, gave the ſtroke or not, ſince he was preſent and abetting: It was then moved, that they all be *indicted*, ſince in an appeal of murder the defendant could not be found guilty of *manſlaughter*, as he might upon an indictment; but nothing was done in it. *Latch.* 126.

Appeal of murder brought by the widow, and upon the return of the writ, the appellee appeared; and it was prayed, that the appellant might be admitted to proſecute *per attornatum*, and a warrant of attorney under her hand and ſeal was produced and acknowledged by her in perſon (for otherwiſe it muſt have been proved), and thereupon ſhe was admitted to proſecute accordingly, and the warrant of attorney was filed, and the appeal was arraigned at bar in *French*; and the appellee being at the bar was arraigned by the clerk of the civil pleas, and pleaded Not guilty, and was bailed *corpus pro corpore* to appear the laſt day of the term, and *de die in diem*. *T. Jones* 210.

In an appeal of murder the appellant declared, that one *Offley* did aſſault her huſband, and wounded him in the county of *Huntingdon*, of which wound he died in *Cambridgeſhire*, and that one *Lippon* was aſſiſting; the jury found, that *Lippon* gave the wound, and that *Offley* was aſſiſting: It was objected, that the declaration and the verdict muſt be certain, otherwiſe no judgment could be given; but here the verdict found another perſon gave the ſtroke, and not him againſt whom the appellant had declared. *Per curiam*, The ſame objection may be made to an *indictment*, which ought to be as certain as a *count* in appeal; but he who gives the ſtroke and he who aſſiſts, are both equally guilty: Then it was objected, that the trial was by a jury of *Cambridgeſhire*, when it ought to be of both counties. *Sed per curiam*, By the ſtatute 2 & 3 *Ed.* 6. *c.* 24. an indictment found by a jury of the county where the death happens, ſhall be as effectual in the law, as if the ſtroke had been in the ſame county where the party died. 3 *Mod.* 121.

An infant by *J. S.* his *prochein amy*, was admitted to bring an appeal of murder againſt the defendant, and this as next heir to *C. C.* who was murdered: At the day of return, *B. R.* was moved againſt the ſheriff, that he might return the writ, who acquainted the court, that the *infant*, who was the appellant, and ſome of his relations, required him to deliver the writ back to them, which he did, and that it was uſual ſo to do, for an *infant* may diſavow his guardian or his ſuit; but adjudged, that both the writ and ſuit are ſubject to the direction of the guardian, and that the infant can no more diſpoſe of the writ than he can proſecute it; 'tis true, he may be nonſuit either before or after appearance, but the appellee muſt be arraigned at the ſuit of the King; he may likewiſe diſavow the ſuit, and then the court may diſcharge the *guardian*, but 'tis a contempt in the ſheriff to deliver the writ back without any authority; and he was fined and committed, tho' the clerk in court offer'd to undertake for the fine; and the chancery being moved for a new writ of appeal, it was denied. 1 *Salk.* 176.

4. *Pleadings in appeal of death, and puniſhment for a falſe appeal.*

In *appeal of murder* the appellant muſt declare the fact; (2) in what place of the body; (3) the year; (4) the day; (5) the hour; (6) the time of the fact; (7) the town or place where the deed was done; (8) with what weapon; therefore where it was ſaid *circa horam undecimam*, &c. an appeal of murder was abated; it ſhall alſo be abated for *falſe latin*, omiſſion, or any other matter of form, *in favorem vitæ Egerton* verſus *Morgan.* 1 *Bulſt.* 69.

By the ſtatute of *Glouceſter*, *cap.* 9. if an appeal declare the deed, the year, the day, the hour, the time of the King, and the town where the deed was done, and with what weapon, it ſhall ſtand in effect.

The declaration muſt ſet forth the offence with the utmoſt certainty, and likewiſe deſcribe it by ſuch word of art as the law has appropriated to the purpoſe; therefore if the words *felonice* in any appeal, *murdravit* in an appeal of murder, *rapuit* in an appeal of rape, *cepit* in an appeal of larceny, *mayhemiavit* in an appeal of mayhem, be omitted, they cannot be ſupplied by any circumlocution.

The declaration muſt ſet forth in what part of the body the wound was given; and therefore if it only ſays, that the wound was given *circa pectus*, it is vicious; but it is certain enough by ſhewing that the wound was given in the left part of the belly or of the ſide, or in the left leg, &c. 2 *Hawk. P. C.* 177.

If the appellant wants any of thoſe requiſites required by law in a perſon who brings an appeal, it will be a good

good plea; as that a woman was never lawfully married, that *A. B.* is heir at law, and not the appellant, *&c.* 2 *Hawk.* 193.

Auterfoits convict of manſlaughter is a good plea to an appeal of murder for the ſame killing. *Carth.* 17.

A *retraxit* of an appeal is a good bar of another for the ſame thing, and ſo alſo is a nonſuit; and according to ſome opinions, ſo is a diſcontinuance after appearance, but not before. 1 *Salk.* 64. *Cro. Eliz.* 605. 1 *Sid.* 32. 1 *Bulſt.* 141. *Cro. Jac.* 283. *Yelv.* 204. 2 *Hawk. P. C.* 196.

A releaſe of all manner of actions, or of all actions criminal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, is a good bar of any appeal; but a releaſe of all perſonal actions does not bar an appeal of felony, being an action of an higher nature. *Cro. Jac.* 283. *Yelv.* 204. 2 *Hawk. P.C.* 196.

If the appellee pleads a ſpecial plea, which does not amount to a confeſſion of the fact, he muſt at the ſame time plead over to the felony, except in ſpecial caſes; as were ſuch plea would be prejudicial to him, or where ſuch plea declines the juriſdiction of the court. 2 *Hawk. P. C.* 196. *Carth.* 56.

In *an appeal* upon the death of her *huſband* againſt ſeveral defendants, who pleaded ſeveral pleas, and ſeveral iſſues being joined, the plaintiff was *nonſuit* as to one of them; adjudged, that ſhe ſhall be diſcharged, and that the others, who were not tried upon this appeal, ſhall be arraigned upon an indictment at the ſuit of the King. *Cro. Eliz.* 460.

In an *appeal of murder* brought by the *wife* againſt ſeveral perſons for the death of her huſband; it was adjudged, that both *principal and acceſſaries muſt be joined in the appeal*, and there muſt be but one *appeal*; for if more than one is brought, all but the firſt ſhall abate; and if one appeal is brought againſt ſeveral, and they all make default excepting one, yet the plaintiff muſt declare againſt them all. 4 *Rep.* 47.

In an *appeal of murder* of the death of her *huſband*, brought againſt *Margaret Oldcaſtle*, *ſpinſter*, ſhe, before the return of the *exigent*, appeared and pleaded, that ſhe was a *gentlewoman*, and not a *ſpinſter*, for in truth ſhe was the daughter of *Sir Edward George*, and her huſband was likewiſe a gentleman; adjudged this was not a ſufficient *addition*, but becauſe ſhe had appeared and brought a *ſuperſedeas* to the *exigent*, ſhe was now eſtopped to plead this *miſnomer* to the appeal. *Dyer* 188.

In *appeal of murder* brought by the *wife* for the death of her *huſband*; the appellee pleaded, that ſhe was never *lawfully married* to her huſband, but did not plead *over to the felony*; adjudged, that this plea being to be tried by the *ordinary upon his certificate*, whether the marriage was *lawful or not*, in ſuch caſe the defendant need not plead over to the *felony*; but where the plea is triable by the *Common law*, he muſt plead *over to the felony*. *Cro. Eliz.* 224.

The *wife* brought an appeal againſt the defendant for the murder of her *huſband*, and it was againſt *W. W.* late of *the pariſh of St. James*, *Weſtminſter*; the defendant in his proper perſon craved *oyer* of the writ and the return, and then *per T. S. attornatum ſuum* pleads in abatement, that there is a pariſh named *St. James's within the liberty of Weſtminſter*, but no pariſh named *St. James's*, *Weſtminſter only*; and upon demurrer to this plea, the defendant had judgment, becauſe the plaintiff by his demurrer had confeſſed there was no ſuch pariſh, therefore the plea is good; but it being pleaded *per attornatum*, it ought not to have been received; but it being received, 'tis void, and of conſequence this cauſe *being adjourned till the next term*, it was diſcontinued by that adjournment. 1 *Salk.* 59.

The *Lady Gray* brought an *appeal of murder* of her huſband againſt the *Earl of Southeſke*; and it was agreed in this caſe, that a *nonſuit* of the appellant after appearance in proper perſon is peremptory, but not before appearance; but *Kelynge*, *ſerjeant*, inſiſted, that there was no difference, becauſe the appearance of the appellant is never entered on record, for he ought always to be ready *in propria, perſona*, and is demandable every hour, and ſhall be *nonſuit* if he doth not appear, and therefore prayed, that the *Lady Gray* might be demanded. *Sid.* 32.

In an *appeal of murder*, the defendant pleaded a conviction of *manſlaughter* at the goal delivery at the *Old Bailey*, and that he was allowed his clergy, but did not ſhew *by what authority the court at the Old Bailey was held*; and now it was moved to amend it, for iſſue was not joined, and there was no demurrer: *Sed per curiam*, The appellant cannot amend, and the reaſon is the ſame why the appellee ſhould not; in this caſe, if he amends he makes a new roll, whereas in other caſes the *amendments* are all in paper, and no ſtatute extends to amendments in appeal. 4 *Mod.* 158.

In an appeal of murder againſt *John Laws*, brought by *Wilſon* the brother of the deceaſed, who counted againſt the defendant, for that he *in parochia of St. Giles in the Fields*, *&c.* on ſuch a day, *circa horam primam*, *&c.* did aſſault, *&c.* and *in et ſuper ſuperiorem partem* of his belly near his breaſt, and the middle part of his body *percuſſit, pupugit & inforavit, dans ei vulnus mortale*, *&c.* the defendant craved *oyer* of the writ and return, and then demurred in *abatement*, and pleaded over to the felony; adjudged, that *circa horam primam* is certain enough, for the law will not tie a man up to an exact minute, that *in & ſuper ſuperiorem partem* was likewiſe a ſufficient deſcription of the wound, and that *percuſſit, pupugit & inforavit, dans ei mortale vulnus*, was more certain than *dedit*; and tho' 'tis required by the ſtatute of *Glouceſter*, that a *vill* ſhould be ſet forth, yet the fact is well alledged to be done in a *pariſh*, for it ſhall be intended a *vill*, tho' there may be more than one in a pariſh; but *Trin.* 11 *Anne.* as to this laſt point it was otherwiſe; adjudged in the caſe of *Widdrington* verſus *Charleton*. 1 *Salk.* 59.

Liſle was tried at the *aſſiſes in Cumberland* for the *murder* of one *Armſtrong*, and found guilty of *manſlaughter*, and immediately the brother of the deceaſed lodged a *bill of appeal* of the murder, and prayed that it might be filed, and that the defendant might be arraigned; whereupon *Liſle* prayed the benefit of clergy, then the bill was read by the counſel, and *Liſle* appeared, to be bailed, but would not plead to it, ſo he was remanded to goal *quouſq*; *&c.* afterwards all theſe proceedings being removed by a *certiorari* into *B. R.* in *Hil.* 8 *Will.* 3. and *Liſle* being brought to the bar by *habeas corpus*, and after the *return thereof was read*, the *appellant* moved for a copy before it was filed, but it was denied till filed; and as ſoon as that was done, *Liſle* prayed his clergy, to hinder which the *appellant took exceptions to the indictment, trial and conviction*, but he was not allowed to do it, becauſe this was the *King's record*, and the *appellant was no party to it*, and it did not appear but that *Liſle* might have releaſed errors to the King; then he moved to be *bailed*, which the *appellant* oppoſed, unleſs he might be permitted to arraign the appeal, or unleſs *Liſle* would give bail to it; for if he ſhould be at large before the arraignment, the appellant could have no proceſs to bring him in again; beſides, he was found guilty of *manſlaughter*, and for that reaſon could not be bailed, which is very true, by juſtices of *oyer and terminer*, but *B. R.* may bail him, and accordingly he was bailed on the crown ſide to appear *de die in diem*; and at another day the King's ſolicitor moved for judgment againſt him upon the indictment, he prayed his clergy; adjudged, that if he had prayed it at the aſſiſes, it ought not to be denied to him there; 'tis true, it was prayed there, but not in a regular manner, becauſe he was never called by the court to judgment; ſo that it being now prayed again, the court cannot proceed to judgment without aſking him what he hath to ſay why judgment ſhould not be given; and this being now aſked by the court, his clergy was allowed, and the ordinary returned *quod legit*; whereupon he was burnt in the hand, and then moved to be diſcharged, but that was denied, for he muſt ſtill ſtand upon his recognizance, and that he ought to ſue out a *ſcire facias* againſt the appellant, if he would have the appeal diſcharged, and *nonſuit* him if he did not appear; whereupon he brought a *ſcire facias* returnable on a common day; and the ſheriff not making any return, he moved again to be diſcharged, which was denied, till he could procure a return, or get

the appellant *gratis* to appear, who afterwards appeared accordingly, and the appeal was read *de novo in French* by the appellant's counſel; and the clerk of the crown being likewiſe to arraign him upon the roll, he objected, that the appeal being commenced before the judges of *oyer and terminer at the aſſiſes*, and not determined by them, it was now *diſcontinued*, and by conſequence no appeal depending now in court; but adjudged, that it was not *diſcontinued*, becauſe by the return of the *certiorari* it was *continued*, and becauſe it came in by *certiorari* it was arraigned on the crown ſide; and it being a queſtion in what manner the *appellant* ought to appear and proſecute, it was adjudged, that every appeal muſt be commenced in perſon, but may be proſecuted *per attornatum*, for which there muſt be a ſpecial warrant of attorney filed; and that if the plaintiff appear by attorney, when he ought not, 'tis a *diſcontinuance*; and now *Liſle* moving again to be bailed, he was committed to the *marſhal* upon the appeal, and ruled, that a recognizance muſt be taken to the King, in which the bail muſt be bail body for body; but *Liſle* perceiving the opinion of the court, deſired to ſtand upon his old recognizance till another day, that he might have time to find bail and plead; which was granted, and at that day he pleaded the indictment and conviction of *manſlaughter at the aſſiſes*, and that it was removed into *B. R.* judgment being given upon it; that at the time of the conviction he was, and yet is, a clerk, and that he then prayed his clergy, and offered to read as clerk, if the court would have admitted him to it, and that *die lunæ, &c. poſt craſtinum Pur.* laſt, being demanded by this court, why judgment ſhould not be given againſt him, he prayed his clergy, which was allowed, and that he read as clerk, was burnt in the hand, *prout per recordum, &c.* with the uſual averments; and as to the felony and murder, he pleaded Not guilty. The appellant replied, That he demanded the appellee to plead at the *aſſiſes*, which he refuſed; and upon demurrer to this replication, the queſtion was upon the plea in bar, whether a *conviction of manſlaughter, on an indictment for murder, and clergy allowed*, could be pleaded in bar to an appeal precedent or concurrent with the indictment? The counſel for the appellee inſiſted that this was a caſe at Common law, and not within the ſtatute 3 *Hen.* 7. *c.* 1. becauſe that ſtatute extends only to an *appeal ſubſequent to the indictment*; but this appeal is *current with the indictment*, and precedent to the conviction, becauſe the ſeſſions being as one day in law, both the indictment and the appeal are returned as of one ſeſſions, and this makes one current with the other; but adjudged, that at Common law *auterfoits acquit or convict*, was a good plea in bar to an *appeal*, and the law would ſtill have been the ſame, if it had not been altered by that ſtatute, by which this is made no plea, *unleſs clergy be thereupon had:* Now this ſtatute extends to all appeals in general; and *praying the clergy, is having* it within the meaning of the ſtatute, becauſe by ſuch prayer the appellee hath done all in his power to do, and the default of the court, in not granting it when they ought, ſhall not turn to his prejudice; therefore this plea was adjudged good. 1 *Salk.* 60.

In an appeal of murder by *writ*, there were but eleven days between the *teſte* and return; the defendant pleaded a conviction of manſlaughter, *and clergy had*, and afterwards would have taken advantage of this defect, for there ought to be *fifteen days* between the *teſte* and *return*; but adjudged, that this is cured by his appearing and pleading in chief; for the reaſon of the *fifteen days* is, becauſe the defendant may have ſufficient time to come into court, computing twenty miles to a day's journey, according to which computation the defendant may come hither from the moſt diſtant part of *England*; therefore he ſhould have pleaded this ſpecially, before he had pleaded *in chief.* 1 *Salk.* 60.

In *appeal of murder* the counſel offered a *warrant of attorney* for the appellant, but it was diſallowed, becauſe he muſt count *in propria perſona*, then the counſel *arraigned the appeal* in *French*, and delivered the *roll* in *Latin*, and it was *per attornatum*; 'tis true, the appellant was preſent in court; but if he had not been preſent, it would not have been peremptory, becauſe 'tis only a nonſuit before appearance; but being preſent, the court allowed the words *per attornatum* to be ſtruck out of the roll, becauſe it made the declaration agreeable to the truth of the fact. 1 *Salk.* 64.

By Common law a defendant may recover damages for a falſe and malicious appeal, againſt the appellant and his abettors, by a writ of conſpiracy or action on the caſe. *Co. Lit.* 283.

And by *ſtat. Weſtm.* 2. *cap.* 12. it is enacted as followeth, "For as much as many through malice, intending to grieve others, do procure falſe appeals to be made of homicides and other felonies, by appellors having nothing to ſatisfy the King for their falſe appeal, nor to the parties appealed for their damages; it is ordained, that when any being appealed of felony ſurmiſed upon him, doth acquit himſelf in the King's court in due manner, either at the ſuit of the appellor or our lord the King, the juſtices before whom the appeal ſhall be heard, ſhall puniſh the appellor by a year's impriſonment, and the appellor ſhall nevertheleſs reſtore to the parties appealed their damages, according to the diſcretion of the juſtices, having reſpect to the impriſonment or arreſtment that the party appealed hath ſuſtained by reaſon of ſuch appeals, and to the infamy that they have incurred by the impriſonment or otherwiſe; and ſhall nevertheleſs make a grievous fine unto the King; and if peradventure ſuch appellor be not able to recompence the damages, it ſhall be inquired by whoſe abetment by malice the appeal was commenced, if the party appealed deſire it; and if it be found by the ſame inqueſt, that any man is an abettor through malice, he ſhall be diſtrained by a judicial writ at the ſuit of the party appealed, to come before the juſtices; and if he be lawfully convicted of ſuch malicious abetment, he ſhall be puniſhed by impriſonment and reſtitution of damages, as before is ſaid of the appellor."

Mr. ſerjeant *Hawkins* ſays, there is no doubt but that by the expreſs words of this ſtatute, wherever the appellant or his abettors are by the purport thereof to render damages to an appellee, they are alſo to be fined to the King and impriſoned for a year. Alſo it ſeems clear from the general purport of the books, that an appellant appearing to have brought an ill-grounded appeal, whether of felony or maihem, ſhall be fined in many caſes wherein he is not liable to render damages by the ſtatute abovementioned; as where he is nonſuit, either againſt all or part of the appellees only, whether after, or as ſome have holden, before appearance; or where the writ abates thro' the default of the appellant in wilfully ſuing by a wrong name or a vitious writ, *&c.* and even a feme covert ſuing an appeal known by her to be groundleſs, as for the death of a huſband whom ſhe knows to be alive, ſhall be fined. But it is certain that were a writ abates by the act of God, or for any other cauſe no way imputable to the appellant, he ſhall neither be fined nor amerced. Alſo it is certain, that an infant in no caſe is to be fined for a falſe appeal; but ſome have holden that he may be amerced, which is contradicted by others, who ſay that an infant in no caſe can be amerced. 2 *H. P. C.* 204.

The *form* of an appeal of *murder*.

Wilts. *Be it remembred, that at the general delivery of the goal of the lord the King, in the county of* W. *held for the ſaid county at,* &c. *in the county aforeſaid, the day,* &c. *in the firſt year of the reign of our ſovereign lord* George *the Third, by the grace of God, of* Great Britain, France *and* Ireland, *King, defender of the faith,* &c. *before Sir* F. P. *and* A. D. *Eſq;* &c. *juſtices of our ſaid lord the King, aſſigned to hold pleas,* &c. *and juſtices of the ſaid lord the King, his goal there of the priſoners in the ſame being to deliver aſſigned,* &c. J. B. *ſon and heir of* J. B. *deceaſed, in his proper perſon, by bill earneſtly appealed* R. D. *late of,* &c. *and* J. E. &c. *in the cuſtody of* W. C. *Eſq; ſheriff of the county aforeſaid, to the bar there brought in their proper perſons, of the death of the ſaid* J. B. *his father; and there are pledges of proſecuting his ſaid bill, that is to ſay,* John Doe *and* Richard Doe; *which ſaid bill follows in theſe words:* Wilts. ſſ. J. B. *ſon and heir of* J. B. *late of,* &c. *in the county of* W. *Eſq; in his proper perſon, earneſtly appeals* R. D. *late of,* &c.

&c. *gentleman, and* J. E. *late of*, &c. *in cuſtody of* W. C. *Eſq*; *ſheriff of the county of* W. *aforeſaid, being to the bar brought in their proper perſons, of the death of the ſaid* J. B. *his ſaid father; for that, that the ſaid* R. D. *not having God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the day,* &c. *in the year of the reign,* &c. *with force and arms,* &c. *at the pariſh of* &c. *in the county of* W. *aforeſaid, that is to ſay, in a certain place called,* &c. *in the King's highway there, upon the ſaid* J. B. *in the peace of God and of our ſaid lord the King then and there being, feloniouſly, wilfully, and of his malice forethought, mad an aſſault, and the ſaid* R. D. *a certain piſtol of the value of ten ſhillings, then and there charged with gun-powder and a leaden bullet, which piſtol the ſaid* R. D. *in his right hand then and there had, feloniouſly, wilfully, and of his forethought malice, directed againſt the ſaid* J. B. *he ſhot of and diſcharged, and with the ſaid leaden bullet, by force of the ſaid gun-powder out of the piſtol aforeſaid, ſo as aforeſaid directed, ſhot and diſcharged, the ſaid* J. B. *in and upon the right ſide of the breaſt of him the ſaid* J. B. *near his right ſhoulder, then and there feloniouſly, wilfully, and of his malice forethought, ſtruck, pierced and wounded, and then and there the ſaid* R. D. *with the ſaid bullet, ſo ſhot and diſcharged from the ſaid piſtol as aforeſaid, in and upon the ſaid right ſide of the breaſt of him the ſaid* J. B. *near his ſaid right ſhoulder, feloniouſly, wilfully, and of malice forethought, gave to the ſame* J. B. *one mortal wound, of the length and depth,* &c. *of which ſaid mortal wound the ſaid* J. B. *then and there inſtantly died. And the ſaid* J. E. *the ſaid day,* &c. *in the ſame year, at,* &c. *aforeſaid, in the place aforeſaid, and in the King's highway aforeſaid, there feloniouſly, wilfully and of his malice forethought, was preſent, abetting, aiding, comforting and maintaining the ſaid* R. D. *the felony and murder aforeſaid, in manner and form aforeſaid, to do and commit: and ſo the ſaid* R. D. *and* J. E. *the ſaid* J. B. *in manner and form aforeſaid, feloniouſly, wilfully, and of their malice forethought, killed and murdered, againſt the peace of our ſaid lord the King, his crown and dignity,* &c. *And as ſoon as the ſaid felons the ſaid felony and murder had committed, they fled; and the ſaid* J. B. *ſon and heir of the ſaid* J. B. *made freſh purſuit after the ſaid felons,* &c. *and if the ſaid* R. D. *and* J. E. *the felony and murder aforeſaid ſo as aforeſaid done, are willing to avow and affirm, then the ſaid* J. B. *is ready the ſaid felony and murder againſt them the ſaid* R. D. *and* J. E. *to prove, according as the court of our ſaid lord the now King here ſhall conſider thereof, and hath found pledges to proſecute his appeal,* &c.

Appeal of maihem, Is the accuſing one that hath *maimed* another: but this being generally no felony, it is in a manner but an action of treſpaſs; and nothing is recovered by it but damages. In action of aſſault and *maiming*, the court may increaſe damages, on view of the *maihem*, *&c.* and though *maihem* is not felony, in *appeals* and indictments of *maihem* the words *felonice maihemavit* are neceſſary. 3 *Inſt.* 63. *Bracton* calls *appeal of maihem appellum de plagis et mahemio*, and writes a whole chapter upon it. *Lib.* 3. *tract.* 2. *cap.* 24. In an *appeal of maihem* the defendants plead, that the plaintiff had brought an action of treſpaſs againſt him, for the ſame wounding, and had recovered, and damages given, *&c.* and this was a good plea in bar of the *appeal*; becauſe in both actions damages only are to be recovered. 4 *Rep.* 43.

In *appeal of maihem* againſt ſeveral defendants, one of them pleaded, that there was no ſuch perſon as one of the appellees, and if it ſhould be found, that there was ſuch a perſon, then he pleaded *Not guilty to the maihem*; adjudged, that the pleading over was ill, and therefore the plea *not guilty* ſhall ſtand. *Poph.* 105.

In an *appeal of maihem*, the defendant pleaded, that the ſame plaintiff had brought an action of *aſſault*, *battery* and *wounding* againſt him, and had judgment and execution, and ſatisfaction acknowledged on record for 200 marks damages in that action, and averred, that the ſtroke and wounding in the action of treſpaſs, and that in the appeal of maihem, was the ſame: upon demurrer to this plea, it was inſiſted for the plaintiff, that the plea was not good, for tho' the defendant had averred, that the ſtroke and wound was the ſame, *&c.* he had not averred, that any *damages* were given for the *maihem*, or that it was given in evidence; but adjudged, that in an action of aſſault the jury is to give damages according to the hurt which was done; and it ſhall be intended a *maihem* at that time; and therefore it was held, that this appeal did not lie. 1 *Leon.* 318.

In an appeal of maihem, the appellee pleaded in abatement to the writ, and likewiſe pleaded over to the maihem; adjudged, that he hath by this means loſt the benefit of his plea to the writ, becauſe he ought not to have pleaded over to the maihem, nor in any caſe but where his life is in danger. *Moor* 628.

Appeal of rape, Lies where a rape is committed on the body of a woman. 3 *Inſt.* 30.

By the common law, any virgin, wife or widow, might bring an appeal of rape againſt any one who had raviſhed her, though ſhe were his nief; but a lawful wife could never bring ſuch appeal without her huſband; and by the Common law, the raviſher was to ſuffer death. 2 *Inſt.* 180. *Co. Lit.* 123.

But by the ſtatute of *Weſtm.* 1. *cap.* 13. the offence of committing a rape was reduced to a treſpaſs, and puniſhable in the ſame manner with other treſpaſſes, till the making of the ſtatute of *Weſtm.* 2. *cap.* 34. by which it is enacted, *That whoever raviſhes any woman, where ſhe did not conſent before or after, ſhall have judgment of life and member; and tho' ſhe do conſent after, ſhe ſhall have judgment of attaint at the King's ſuit*; but it is obſervable, that this ſtatute does not reſtore the old Common law in relation to ſuch appeals, as it would have done if it had only repealed the ſaid ſtatute of *Weſtm.* 1. but makes a new law concerning them; from whence it follows, that all appeals of rape, which are impliedly given by this ſtatute, muſt conclude *contra formam ſtatuti.* 2 *Hawk. P. C.* 172.

In *appeal of rape*, the defendant was found guilty, and being in priſon, ſeveral exceptions were taken to the declaration, *(viz.)* for that it ſet forth, that the defendant on ſuch a day, *&c. felonice rapuit* the appellant, *& eam defloravit & carnaliter cognovit*, but did not ſay *felonice & carnaliter cognovit*; beſides, it was not averred, that ſhe did *not conſent* before nor after the fact; but thoſe points were not reſolved; however it was held, that tho' formerly the defendant might have his clergy, 'tis now taken away by the ſtatute 18 *Eliz. c.* 17. but the Queen may pardon the impriſonment, and burn in the hand. 5 *Rep.* 150.

A feme covert, without her huſband, may bring *appeal of rape:* and the *ſtatute* 11 *Hen.* 4. *cap.* 13. gives power where a woman is raviſhed, and afterwards conſents to it, for a huſband, or a father, or next of kin, there being no huſband, to bring *appeal of rape*; alſo the criminal in ſuch caſe, may be attainted at the ſuit of the King. 3 *Inſt.* 131. 6 *R.* 2. *cap.* 6. And if a woman conſent after, ſhe is diſabled to challenge any inheritance, dower, *&c. by ſtat.* 6 *R.* 2.

The ſtatute of *Weſtm.* 1. *c.* 13. enacts, that *appeal of rape* ſhall be brought within forty days; but by *ſtat. Weſtm.* 2. *c.* 34. relating to this offence, no time is limited for the proſecution, ſo that it may be brought in any reaſonable time. *H. P. C.* 186. *Appeal of rape* is to be be commenced in the county where committed; and if a woman be aſſaulted in one county and raviſhed in another, the *appeal of rape* lies in that county where ſhe was raviſhed. *H. P. C.* 186.

Form *of an* appeal of rape.

A. B. *of*, &c. *in his proper perſon, earneſtly appeals* C. D. *late of*, &c. *in the priſon*, &c. *according to the form of the ſtatute made in the parliament of the lord* Richard *the ſecond, King of* England, *in the ſixth year of his reign held, &c. for that, that is to ſay, that the ſaid* C. D. *the day and year,* &c. *at*, &c. *in the county aforeſaid,* M. B. *wife of the ſaid* A. B. *feloniouſly raviſhed, and her carnally knew, againſt the ſtatute aforeſaid,* &c. *and as ſoon*

ſoon as, &c. *and this (felony and rape aforeſaid) the ſaid* A. B. *is ready to prove againſt him the ſaid* C. D. *as the court*, &c.

Appeal of robbery, Is an action which a perſon robbed of goods may bring againſt the felon, in which there ſhall be a reſtitution of the goods, and the offender is to ſuffer ſuch puniſhment as if he were convicted at the ſuit of the King. *H. P. C.* 184. *Latch* 127.

An *appeal of robbery* is a remedy given by Common law, where a perſon is *robbed* of his goods, *&c.* to have reſtitution of the goods ſtolen; as they could not be reſtored by indictment at the King's ſuit, this *appeal* was judged neceſſary. 3 *Inſt.* 242.

In every appeal of robbery, it is neceſſary to ſet forth whoſe the goods were that were ſtolen, and what the price of them was, and that the words *felonice cepit* be made uſe of. 2 *Hawk. P. C.* 177.

They who are robbed of goods, in which they have a ſpecial property, as churchwardens, carriers, *&c.* may maintain an appeal of larceny, and may either bring it generally for their own goods, or ſpecially for the goods of *J. S. &c.* in their cuſtody. 2 *Hawk. P. C.* 167.

If a man robbed make *freſh purſuit* after, and apprehend and proſecute the felon, he may bring *appeal of robbery* at any time afterwards. *Staundf.* 62.

And if one man robs ſeveral perſons, every one of them may have an *appeal:* Likewiſe if the *robber* be attainted at the ſuit of one, he ſhall be tried at the ſuit of the reſt, ſo as their *appeals* were commenced before the attainder. *Danv. Abr.* 494. In *appeal of robbery*, the plaintiff muſt declare of all the things whereof he is *robbed*, or they ſhall be forfeited to the King; for the *appellant* can have reſtitution for no more than is mentioned in his *appeal.* 3 *Inſt.* 227.

A perſon robbed preferred an indictment againſt the robber within a week after the robbery was committed, and within a month afterwards he brought an *appeal* againſt him for the ſaid robbery; upon which he was *outlawed*, and thereupon he moved the court to have reſtitution of his goods: *Cook* vouched the year-book 21 *Ed.* 1. 16. where the reſtitution was granted upon an outlawry in an appeal for robbery; but the principal caſe was not reſolved. 2 *Leon.* 108.

Appeal of robbery againſt two acceſſaries, brought in the *county of W.* where the robbery was done, in which the plaintiff ſet forth, that the principals named in the writ, and who were attainted, did commit the robbery in the *county of W.* and that the defendants did felonioufly abet them in *London*; it ſhould have been *in ſome place in the county of W.* and for that reaſon it was adjudged, that the appeal ſhould abate. *Dyer* 38.

Adjudged, that an appeal for robbery may be brought by the party robbed twenty years after the offence committed, and that he ſhall not be bound to bring it within a year and a day, as he muſt do in an appeal of murder. 4 *Leon.* 16.

Appeal of burglary againſt *B. B.* he was found guilty, and before judgment was given *the appellant died*; it was moved, that judgment might be given for the Queen upon that verdict, and that the declaration in the appeal might ſtand inſtead of an indictment: it was not reſolved. 2 *Leon.* 83. *Brook's* caſe; but my *Lord Coke*, who reports the ſame caſe, tells us, that it was moved in arreſt of judgment, that the count was inſufficient, becauſe the appellant had ſet forth, that the defendant *burgaliter* did break and enter, which is a word of no *ſignification*, it ought to have been *burglariter* or *burgulariter*, and for that reaſon it was held ill, and that the party ſhould be diſcharged; reſolved alſo, that if the count had been ſufficient, and the defendant had been convicted at the ſuit of the party upon the appeal, he ſhall not again be impeached for the ſame offence at the ſuit of the King. 4 *Rep.* 39.

If the count or declaration in *appeal of burglary* be ſufficient, and the defendant is convicted at the ſuit of the party upon the *appeal*; he ſhall not be again impeached for the ſame offence at the King's ſuit. 4 *Rep.* 39. By *ſtatute* 21 *Hen.* 8. *cap.* 11. the like reſtitution of ſtolen goods may be had on *indictments* after attainder, as on *appeals:* and *appeals of rape* and *robbery* are now much out of uſe; but the appeal of murder ſtill continues, and is often brought.

Appeal, Is frequently uſed for the removal of a cauſe from an inferior court or judge to a ſuperior. *Cowel.*

Appealing to *Rome* was ever eſteemed ſo great an interruption to national juſtice, that even at the time the *Roman Catholick* religion took place in this kingdom, it was prohibited. By the *ſtat.* 24. *Hen.* 8. *cap.* 12. *ſect.* 1. it is enacted, that "All cauſes teſtamentary, cauſes of matrimony and divorce, rights of tithes, oblations and obventions, ſhall be heard, adjudged and determined, within the King's juriſdiction; alſo all ſpiritual prelates, paſtors, miniſters and curates, within this realm, ſhall miniſter all ſacraments, divine ſervices and other things within the realm, to all the ſubjects of the ſame; any former citations, inhibitions, ſuſpenſions, interdictions, excommunications or appeals, for any of the cauſes aforeſaid from or to the ſee of *Rome* notwithſtanding."

Sect. 3. "If any ſpiritual perſons, by occaſion of the ſaid fulminations, refuſe to miniſter the ſacraments and other divine ſervices, they ſhall have one year's impriſonment, and make fine and ranſom at the King's pleaſure."

Sect. 4. "If any perſons in any the cauſes aforeſaid, attempt or procure any foreign proceſs, inhibitions, appeals, ſentences, ſuſpenſions, interdictions, excommunications or judgments, or execute any of the ſame, or do any act to the derogation of any proceſs, ſen ence, judgment or determination, had in any courts of the King's dominions for the cauſes aforeſaid; every ſuch perſon and their fautors, comforters, abettors, procurers, executors and counſellors, being convict, ſhall incur the penalties of the ſtatute of proviſion and *præmunire*, 16. *Rich.* 2. *cap.* 5.

Sect. 5. "In caſes where the King's ſubjects have uſed to purſue any appeal to the ſee of *Rome*, and in all other caſes of appeals for any of the cauſes aforeſaid, they may have their appeals within this realm, *viz.* from the archdeacon or his official to the biſhop dioceſan."

Sect. 6. "If it be commenced before the biſhop dioceſan or his commiſſary, within fifteen days next enſuing the ſentence, to the archbiſhop of the province."

Sect. 7. "If the matter be commenced before the archdeacon of any archbiſhop or his commiſſary, the party grieved may take his appeal within fifteen days after ſentence to the court of the arches or audience of the archbiſhop, and from the ſaid court within fifteen days after ſentence to the archbiſhop of the province, to be finally determined without any farther appeal."

Sect. 8. "Every cauſe that ſhall be commenced for any of the cauſes aforeſaid before any of the archbiſhops, ſhall be before the ſame archbiſhop definitively determined without any other appeal or foreign proceſs out of this realm, otherwiſe than is by this act appointed; ſaving the prerogative of the archbiſhop and church of *Canterbury*, in all the ſaid cauſes of appeals, in ſuch wiſe as they have been accuſtomed."

Sect. 9. "In caſe any cauſe ſhall come in contention for any of the ſame cauſes in the aforeſaid courts which may touch the King, the party grieved may appeal from any of the ſaid courts, to the ſpiritual prelates of the upper houſe in the convocation next enſuing within the province, ſo that ſuch appeal be taken within fifteen days after ſentence given."

Sect. 10. "If any perſon ſhall purſue any appeal contrary to this act, or refuſe to obſerve the ſame concerning appeals and foreign proceſſes for the cauſes aforeſaid, ſuch perſons, their procurers, fautors, advocates, counſellors, and abettors, ſhall incur the penalties in the ſtatute 16 *Rich.* 2. *cap.* 5."——*Revived* 1 *Eliz. cap.* 1.

25 *Hen.* 8. *cap.* 19. *ſect.* 3. "No appeals ſhall be made out of the King's dominions to the biſhop or ſee of *Rome*, in any cauſe, beginning in any courts within the King's dominions, but all appeals, what cauſe ſoever they concern, ſhall be made as is limited for appeals in cauſes of matrimony, tithes, *&c.* by 24 *Hen.* 8. *cap.* 12.

Sect.

Sect. 4. "For lack of juſtice in the courts of the archbiſhops, it ſhall be lawful to appeal to the King's court of Chancery; and upon ſuch appeal a commiſſion ſhall be directed to perſons named by the King, like as in caſe of appeal from the admiral court, to hear and determine ſuch appeals; and ſuch ſentence as the commiſſioners ſhall decree ſhall be definitive; and no further appeals to be had."

Sect. 5. "If any perſons ſue any appeals to the biſhop or ſee of *Rome*, or procure or execute any proceſs from the ſee of *Rome* to the derogation of this act, ſuch perſons, their aiders, counſellors and abettors, ſhall incur the penalties in the act of proviſion and *præmunire*, 16 *R.* 2. *cap.* 5.

Sect. 6. "Appeals to be made from the juriſdictions of any heads of houſes and places exempt, in ſuch caſes as they might afore this act have immediately any appeal to the ſee of *Rome*, ſuch perſons may take their appeals immediately to the King in the court of Chancery; which appeals ſhall be definitively determined by authority of the King's commiſſion as above mentioned."——— *Revived* 1 *Eliz. cap.* 1.

By *ſtat.* 13 *Eliz. c.* 12. Appealing to *Rome* is made high treaſon.

There were no appeals to the pope out of *England* before the reign of King *Stephen*, when they were introduced by *Henry de Blois*, biſhop of *Wincheſter*, the pope's legate. Not but attempts had been made before that time, to carry appeals to *Rome*, which were vigorouſly withſtood by the nation; as appears by the complaint of the pope in the reign of *Henry* the Firſt, that the King would ſuffer no appeals to be made to him; and before that, in the reign of *William Rufus*, the biſhops and barons told *Anſelm* (who was attempting it) that it was a thing unheard of for any one to go to *Rome* (that is, by way of appeal) without the King's leave. And tho' this point was yielded in the reign of King *Stephen*, yet his ſucceſſor *Henry* the Second, reſumed and maintained it, as appears by the conſtitutions of *Clarendon*, which provide for the courſe of appeals within the realm, ſo as that further proceſs be not made, without the King's aſſent; and afterwards, in the parliament of *Northampton*, the conſtitutions of *Clarendon* were renewed; and in the reigns of *Richard* the Firſt and King *John*, we find new complaints of the little regard paid to thoſe appeals; for which alſo divers perſons were impriſoned in the reigns of *Edward* the Firſt, *Edward* the Second, and *Edward* the Third. *Gibſ. Cod.* 83. 4 *Inſt.* 341.

The above ſtat. of 25 *Hen.* 8. *cap.* 19. gives *appeals* from the archbiſhops courts to the *King* in *Chancery*, who thereupon appoints commiſſioners finally to determine the cauſe; and this is called the court of delegates: There is alſo a court of commiſſioners of review; which commiſſion the King may grant as ſupreme head of the church, to review the definitive ſentence on *appeal* in the court of delegates. On taking away the ſupremacy of the *pope* in this kingdom, this power was lodged in the crown, as originally belonging to it. 4 *Inſt.* 340.

The dean of *Wells* was deprived of his deanry by the commiſſary of the biſhop of *Bath* and *Wells*, from which ſentence the dean *appealed* to the archbiſhop, who affirmed it; and thereupon he exhibited an *appeal* to the King in *Chancery*, but found no relief, for the King granted the deanry to one *Turner*. But *anno.* 1 *Mar.* the deprived dean obtained another commiſſion to the delegates, and by their ſentence was reſtored to his deanry: And after the death of Queen *Mary*, 1 *Eliz. Turner* had a commiſſion of review, and he was reſtored, though it was inſiſted, there ought to be no farther *appeal*. *Dyer* 273.

In the 39th year of Queen *Elizabeth*, ſentence being given in an eccleſiaſtical cauſe, the party againſt whom had, appealed to the archbiſhop, *&c.* who affirmed the ſentence; then he *appealed* to the delegates, and they repealed both the former ſentences; on which the Queen granted a commiſſion *ad revidendum* the ſentence of the delegates, and it was held lawful. *Cro. Eliz.* 571.

The *biſhop of Winton* is made *viſitor of Magdalen college in Oxford* by the founder, and exempted from ordinary juriſdiction; Dr. *Coveney*, who was preſident of the ſaid college, was deprived by the viſitor, and from his ſentence the doctor appealed to the Queen in *Chancery*; adjudged, the appeal doth not lie, for 'tis out of the ſtatutes 24 & 25 *Hen.* 8. *cap.* 12. and he hath no remedy but an *aſſiſe*. *Dyer* 289. *Coveney's* caſe.

The words in Doctor *Coveney's* caſe laſt mentioned are, that no appeal will lie, *ex hoc ſequitur* that an *aſſiſe* will lie; but that conſequence was denied to be law *per Holt* Ch. Juſt. in the caſe of *Philips* verſus *Bury*, becauſe the head of a college cannot maintain an aſſiſe; for he hath no ſole ſeiſin, he hath not an eſtate to maintain a real action; he is only a viſible perſon of the body aggregate, but hath not the leaſt title to the rents or profits of the college till a dividend is made. 4 *Mod.* 112.

A fellow of a college was deprived, who appealed to the *biſhop of Exeter as viſitor*, who came in perſon to viſit, and Doctor *Bury*, the rector of the college, being ſummoned to appear, but he refuſing, was pronounced *contumax*, and thereupon was *deprived*; and in ejectment, and a ſpecial verdict found, the queſtion was, whether *deprivation* was examinable in *B. R.* in a collateral action? and by three judges it was; *ſed per Holt* Ch. Juſt. it is not; for where a proper court hath an original juriſdiction, no other court will examine their judgment after ſentence given; ſo it was reſolved in *Bunting's* caſe, (4 *Rep.* 29.) and ſo likewiſe in *Keen's* caſe (7 *Rep.*): Now in the principal caſe the viſitor was the proper judge, and therefore his ſentence is definitive; the college is an eleemoſynary corporation, and the members of it ſubſiſt by the charity of the founder, therefore 'tis very reaſonable, that they ſhould receive it ſubject to ſuch limitations as the founder hath impoſed: now he hath appointed a perſon to viſit them; he hath made ſuch viſitor *fidei commiſſarium*, whoſe ſentence ſhall be preſumed to be the ſentence of the founder himſelf, if he had been living, which cannot be thought unjuſt, eſpecially by thoſe to whom his charity is extended, and if not unjuſt, then not to be examined elſewhere. There are two ſorts of *corporations aggregate*, one for the publick adminiſtration of juſtice, the other for private charities; the one is to be regulated by the courts of law in *Weſtminſter*, becauſe it ſubſiſts by letters patent, and hath on other founder viſitor; but a *college* is not ſuch a corporation; the other is for private charities, and there the *founder* and his *heirs are viſitors*, where he himſelf hath appointed no particular perſon; but where he hath appointed a viſitor, then he is to ſupply any defective conſtitution in a corporation which ſubſiſts by his charity; and thoſe who are ſupported by it, muſt be regulated by ſuch particular laws as have been enjoined by him, and not by the methods and rules of the Common law, which ſeldom or never interpoſes in ſuch caſes; for it hath been the conſtant method to deny a *mandamus* to reſtore any perſon deprived from being a member of ſuch a corporation, and there is no precedent in the *old books* of any reſtitution in ſuch caſes, either to *a monk or prior*; and according to this opinion of the chief juſtice, the judgment of the other three judges was reverſed in the houſe of peers. 4 *Mod.* 106.

After an adminiſtration granted by the ordinary, the party who pretended a right to it, appealed to the archbiſhop *in curia prærogativæ ſuæ de arcubus*, and there the grant was affirmed; in ſuch caſe it muſt be remitted to that court from whence the appeal was made; but if the adminiſtration had been repealed, then the court from which the appeal was brought, hath no longer any juriſdiction of the cauſe, and that court where it was repealed may grant a new adminiſtration, for they have authority by the ſtatute ſo to do. *Latch* 85.

In a prohibition, the caſe was, *H. Pollexfen* died inteſtate, and the ordinary granted adminiſtration to his brother *Andrew*; one who pretended to be wife of the inteſtate, upon ſuggeſtion of *bona notabilia*, procured a *prerogative adminiſtration*; then *Andrew* appealed to the *delegates*, and *died* pending the appeal; then *H.* his ſon and heir gets the *prerogative adminiſtration repealed*, and *adminiſtration* was granted to him; thereupon the wife prayed a prohibition, ſuppoſing that the commiſſion of

the delegates was determined by the *death of one of the parties*; 'tis true, if one of them die *ante litis conteſtationem*, it ſhall abate; but both by the Civil and Eccleſiaſtical law the ſuit ſhall continue after the death of either party, for the commiſſion is to determine the cauſe. 1 *Vent.* 133.

Appellor, or Appellant, He who has committed ſome felony or other crime, which he confeſſes, and now appeals, that is, accuſes others who were accomplices with him, and thoſe who are ſo appealed, are called *appellées*. *Articuli cleri* Anglicani *oblati. Ed.* 2. *Reg. An.* 1316. *c.* 10. *Placet etiam domino regi, ut latrones et* appellatores, *quandocunque voluerint poſſint ſacerdotibus ſua facinora confiteri. Cowel, edit.* 1727.

Appearance, In the law ſignifieth the defendant's filing common or ſpecial bail, when he is arreſted on, or ſerved with any proceſs out of the courts at *Weſtminſter*. There are four ways for defendants to *appear* to actions; in perſon, by attorney, by guardian, and by next friend. 1 *Show. Rep.* 165.

1. *Who may, and may not, appear by attorney.*
2. *Where an attorney may be compelled to appear, and of appearing without authority.*
3. *Where appearance is good, and where not.*

1. *Who may, and may not, appear by attorney.*

By the Common law, the plaintiff or defendant, demandant or tenant, could not appear by attorney without the King's ſpecial warrant by writ or letters patent, but ought to follow his ſuit in his own proper perſon; by reaſon whereof there were but few ſuits. *Co. Lit.* 128. 2 *Inſt.* 249. But it is now the common courſe for the plaintiff or defendant, in all manner of actions where there may be an attorney, to appear by attorney, and put in his warrant without any writ. And therefore, generally, in all actions real, perſonal, and mixt, the demandant or plaintiff, tenant or defendant, may appear by attorney. *F. N. B.* 26.

But in every caſe, where the party ſtands in contempt, the court will not admit him to appear by attorney, but oblige him to appear in perſon. As if he comes in by a *cepi corpus* upon an *exigent. F. N. B.* Or, if he be outlawed. 2 *Cro.* 462, 616.

But now by the ſtatute 4 & 5 *Will. & M. c.* 18. in outlawry, except for treaſon or felony, the defendant may appear and reverſe it by attorney, without putting in ſpecial bail, unleſs where required by the court. So upon an attachment, after a return of a reſcous, he ſhall not make an attorney. *F. N. B.* 26. *H.* So if the defendant comes in upon a *cepi corpus*, he ſhall not make any attorney, till plea pleaded. *F. N. B.*

Where the preſence of the party is neceſſary, he cannot appear by attorney: as, in an appeal of maihem, the plaintiff cannot appear by attorney; for the defendant may demand oyer of the maihem. 2 *Inſt.* 313.

If a man appears by attorney, where by reaſon of a contempt, &c. he ought to appear in perſon, it is error; for the court may diſpenſe with a contempt to themſelves. 8 *Co.* 58. *b.*

In a capital caſe the party muſt always appear in perſon, and cannot plead by attorney: alſo in criminal offences, where an act of parliament requires that the party ſhould appear in perſon; and likewiſe in appeal, or on attachment. 2 *Hawk. P. C.* 141, 373.

On an indictment, information or action, for any crime whatſoever under the degree of capital, the defendant may, by the favour of the court, appear by attorney; and this he may do as well before plea pleaded, as in the proceeding after, till conviction. 1 *Lev.* 146. *Kelw.* 165. *Dyer* 346. *Cro. Jac.* 462.

If huſband and wife are ſued, the huſband is to make attorney for her. 2 *Sand.* 213.

If an ideot doth ſue or defend, he cannot appear by guardian, *prochein amie*, or attorney, but muſt appear in proper perſon; but otherwiſe of him who becomes *non compos mentis*; for he ſhall appear by guardian if within age, or by attorney if of full age. *Co. Lit.* 135. *b.* 2 *Inſt.* 390. 4 *Co.* 124.

A *corporation aggregate* of many perſons, cannot appear in perſon, but by *attorney*, and ſuch appearance is good. 10 *Rep.* 32. in the caſe of *Sutton's Hoſpital.*

The plaintiff had a verdict in *C. B.* in an action of treſpaſs, and his attorney entered *remittit damna*, as to part, and had judgment for the reſt; adjudged, that by making him attorney, he had power to remit the damages, for that need not be *in propria perſona*, as a *retraxit* muſt be. 1 *Salk.* 89.

Debt upon bond; the defendant pleaded payment at the day upon which they were at iſſue, and it was found for the plaintiff; afterwards the plaintiff *by his attorney* came into court, and *fatetur ſe in curia hic ulterius nolle proſequi*; upon which, judgment was given, that the defendant *eat inde ſine die*, &c. and upon a writ of error brought, the judgment was reverſed, becauſe a *retraxit* cannot be *per attornatum*; for it being in nature of a releaſe, it muſt be done by the plaintiff himſelf in perſon. 8 *Rep. Beecher's* caſe.

Homage and fealty are things inſeparably annexed to the perſon, and therefore cannot be done by attorney.

2. *Where an attorney may be compelled to appear, and of appearing without authority.*

An attorney is not compellable to appear for any one, unleſs he take his fee, or back the warrant; after which the court will compel him to appear. 1 *Salk.* 87.

An attorney, on ſight of a writ againſt huſband and wife, undertook to appear for them, but after would not do it; the declaration was delivered, which he received *de bene eſſe*, and judgment was entered for want of a plea; and the court ſet it aſide for irregularity, but ordered the attorney to be laid by the heels; and it was ſaid, that if an attorney undertakes to appear, and after will not do it, upon a ſummons before a judge, he ſhall be compelled to do it. 6. *Mod.* 86.

If before a writ be taken out, an attorney promiſe to appear to it, and afterwards it is taken out and ſhewed to him, he ought to appear, but that is no actual appearance; but if ſuch undertaking be after it is actually taken out, it is an appearance. 6 *Mod.* 42. *Per Holt* Ch. J.

An adminiſtrator muſt give bond to the ſheriff of penalty of 40*l.* for his appearance at the return of the writ; and the ſheriff is not obliged to diſcharge him upon the attorney's promiſe to appear; but if an attorney of this court or of the Common Pleas do make ſuch promiſe, the court will compel him to perform it. *Comb.* 299.

Where an attorney takes upon him to appear, the court looks no farther, but proceeds as if the attorney had ſufficient authority, and leaves the party to his action againſt him. 1 *Salk.* 86.

If an attorney appears, and judgment is entered againſt his client, the court will not ſet aſide the judgment, tho' the attorney had no warrant, if the attorney be able and reſponſible; for the judgment is regular, and the plaintiff is not to ſuffer when in no default; but if the attorney be not reſponſible or ſuſpicious, the judgment will be ſet aſide; for otherwiſe the defendant has no remedy, and any one may be undone by that means. 1 *Salk.* 86.

Attachment denied by the court againſt an attorney, who appeared for the plaintiff without a warrant; but ſaid an action on the caſe lies. *Comb.* 2.

An action was brought againſt *Squire*, an attorney, and two others, for appearing for the plaintiff without a warrant: the cauſe was carried down to be tried at the aſſizes; and the defendant did promiſe, that in conſideration the plaintiff would not proſecute the action, that he would pay 10*l.* and coſts of ſuit; and now an action was brought againſt the defendant upon this promiſe: the queſtion was, whether this was a void promiſe by the ſtatute of frauds, being made in behalf of another, and not in writing?

writing? Which ſtatute enacts, *that no action ſhall be brought to charge the defendant upon any ſpecial promiſe to anſwer for the debt, default, or miſcarriage of another perſon, unleſs it be in writing.* But the court were of opinion, that this cannot be ſaid to be a promiſe for another perſon, but for his own debt, and therefore not within this ſtatute. 5 *Mod.* 205.

The bailiff, who had a writ againſt the defendant, came to Mr. *Stapleton*, an attorney, and told him the defendant deſired he would back the writ, and appear for him, and afterwards upon the plaintiff's attorney's applying to him, he told him he had ſent orders to his agent to appear, and he believed he had done it. Whereupon the plaintiff's attorney delivered a declaration and ſigned judgment for want of plea. Upon motion to ſet it aſide it appeared the bailiff went of his own accord to Mr. *Stapleton*, without the direction of the defendant, and that Mr. *Stapleton* diſcovering this, had countermanded the orders for appearing, and that in fact there was no appearance. But the court refuſed to ſet it aſide, and ſaid they would oblige Mr. *Stapleton* to file common bail according to his undertaking, in order to make the proceedings regular, there being no fault in the plaintiff's attorney. *Strange* 693.

In caſe the defendant's attorney doth receive a declaration againſt his client from the plaintiff's attorney; this obliges the attorney to appear to it: And if an attorney has a warrant from the defendant to be his attorney in a ſuit depending in *B. R.* and he files common bail accordingly; it has been held, that he muſt *appear* by that warrant in all ſuits againſt the defendant in the ſame term; provided declarations are filed in the office, and copies delivered to the defendant, or his attorney, who filed the bail, before the end of the term his bail is filed. For the defendant being, after *appearance* and bail put in, ſuppoſed to be in *cuſtody of the marſhal*, the attorney that *appears* for him is bound to receive any declaration that is brought againſt him during that term. *Comp. Attorn.* Attornies ſubſcribing warrants to *appear*, are liable to a penalty of 5*l.* and attachment, upon *non-appearance*. And where an attorney promiſes to appear for his client, the court will compel him to *appear* and put in common bail, in ſuch time as is uſual by the courſe of the court; and that although the attorney ſay he hath no warrant for *appearance*: Nor ſhall repealing a warrant of attorney, to delay proceedings, excuſe the attorney for his not *appearing*, who may be compelled by the court. 1 *Lill.* 83, 84.

3. *Where appearance is good, and where not.*

J. S. had a warrant to appear for the defendant, and afterwards there was judgment againſt him; and upon a *ſcire facias* againſt the bail, the defendant ſtill appeared by his old attorney, who acted as ſuch thro' the whole cauſe, and execution was awarded againſt the bail; and now upon a writ of error brought, the record of the principal judgment being certified, it was adjudged that as ſoon as the *ſcire facias* was returned, then the plea began, and then a new warrant of attorney ought to have been entered thus; (*viz.*) That the plaintiff *ponit loco ſuo*, &c. for the warrant to appear in the principal action, is no warrant to appear in the *ſcire facias againſt* the bail, becauſe 'tis a new cauſe, and a different record. 1 *Salk.* 89.

In a *quid juris clamat*, the defendant upon a ſuggeſtion that he was old and weak, had a *dedimus* directed to the chief juſtice to make an attorney; and accordingly the appearance by attorney was held good. *Dyer* 126.

In *audita querela*, a writ was awarded out of the Common Pleas againſt the defendant *ad reſpondendum*; to which writ he appeared by attorney, and held good. *Dyer* 297.

Huſband and wife tenant in tail, remainder to the right heirs of the huſband; they had iſſue a daughter, and the huſband died; afterwards the wife ſold the lands in fee, and the daughter and her huſband joined in a fine to confirm the ſale to the purchaſer; the daughter died without iſſue; a writ of error was brought to reverſe this fine, and the wife who ſold the eſtate, and the huſband of the daughter who joined in the fine, appeared by attorney and joined *gratis* with the plaintiff in error, and their appearance by attorney was held good. *Dyer* 89. *b.*

Error in debt, &c. an error aſſigned was, that the defendant appeared by *G. D. his attorney*, and there was judgment againſt him by default, but the ſaid *G. D. was not an attorney of the court* at the time of his appearance, nor at any time in that term when the judgment was entered; the defendant pleaded *in nullo eſt erratum*, and becauſe it was plain that the defendant had only appeared by the ſaid *G. D.* but had *imparled* to another *term*, ſo that the court had admitted him to be an attorney, 'tis now againſt the record to ſay he was none, for that doth implicitly admit he was an attorney. 2 *Cro.* 521.

The defendant's attorney is to file his warrant the ſame term he *appears*, and the plaintiff the term he declares, under penalties by *ſtat.* 4 & 5 *Ann. cap.* 16.

In actions original, *appearances* muſt be entered with the filazer of the county; and if by bill, they ſhall be entered with the prothonotary: *appearances* and common bail are to be entered and filed by the defendant within eight days after the return of the proceſs, on which he was arreſted, &c. on pain of forfeiting 5*l.* to the plaintiff, for which the court ſhall forthwith award judgment and execution. 5 & 6 *W. & M. c.* 21.

If the defendant does not *appear* and find bail, the plaintiff's attorney is to call upon the ſheriff for the return of the writ, whether the defendant be arreſted, or not; and proceed accordingly. On two *nihils* returned upon a *ſcire et alias ſcire facias*, they amount to a *ſcire feci*, and the plaintiff giving rule, the defendant is to *appear*, or judgment ſhall be had againſt him by default: And where a defendant doth not plead after *appearance*, judgment may be had againſt him. *Style* 208.

Where the firſt proceſs in an inferior court is a *capias*, which ought not to be, it is ſalved and made good by *appearance*; for the defendant hath by his *appearing* admitted the writ to be legal. *Lutw.* 954.

And upon *appearance* a writ hath had its end, and the plaintiff ſhall declare: Alſo an appearance takes away all diſcontinuance, and bad proceſs before it. *Jenk. Cent.* 57.

If judgment is given by default, when the defendant doth not *appear*, the writ ought to be according to law; but if he *appears* and pleads, he ſlips his advantage of excepting thereto. *Ibid* 341.

By late ſtatutes, where a defendant is ſerved with a *copy of proceſs* in actions of debt, &c. under 10*l.* a common *appearance* ſhall be entered, or common bail filed by the plaintiff, if the defendant doth not *appear* within eight days after the return of the writ, on affidavit made of the ſervice of the proceſs. *Stat.* 12 *Geo.* 1. *c.* 26.

And a *notice* ſhall be indorſed on the copy of the proceſs, of the intent and meaning of the ſervice, for the defendant to *appear*, &c. by 5. *Geo.* 2. *c.* 17.

Form of a *notice* upon proceſs to *appear*.

A. B. *you are ſerved with this proceſs, to the intent that you may by your attorney* appear *in his Majeſty's court of* King's Bench, *at the return thereof, being the twenty-eighth day of* November *next, in order to your defence in this action.*

Appearance by guardian and next friend. Vide **Infants**, &c.

For more matter concerning appearance, *ſee* Law of Attornies and Solicitors.

Appendant, (*Appendens*) Is any inheritance belonging to another that is ſuperior or more worthy. In law it is called *pertinens*, *quaſi invicem tenens*, holding one another; a word indifferent both to things appendant, and things appurtenant; the quality and nature of the things do make the difference. *Co. Lit.* 121. *b.*

Appendants

Appendants are ever by preſcription, but appurtenances may be created in ſome caſes at this day; as if a man at this day grant to a man and his heirs, common in ſuch a moor for his beaſts levant or couching upon his manor; or if he grant to another common of eſtovers or turbary in fee-ſimple, to be burnt or ſpent within his manor; by theſe grants, theſe commons are appurtenant to the manor, and ſhall paſs by the grant thereof; in the Civil law it is called *adjunctum*. *Co. Lit.* 121. *b.*

If *A.* be ſeiſed of a manor whereunto the franchiſe of waif and ſtray, and ſuch like, are appendant, and the King purchaſeth the manor without the appurtenances; now are the royal franchiſes reunited to the crown, and not appendant to the manor; but if he grant the manor in as large and ample manner as *A.* had, *&c.* it is ſaid, that the franchiſe ſhall be appendant (or rather appurtenant) to the manor. *Co. Lit.* 120. *b.*

Concerning things appendant and appurtenant, two things are implied; firſt, that preſcription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unleſs the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant; as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal; but things incorporeal which lie in grant, as advowſons, villeins, commons, and the like, may be appendant to things corporeal, as a manor, houſe, or lands; or things corporeal to things incorporeal, as lands to an office: But yet, as hath been ſaid, they muſt agree in nature and quality; for common of turbary or of eſtovers cannot be appendant or appurtenant to land, but to a houſe, to be ſpent there; nor a leet, that is temporal, to a church or chapel, which is eccleſiaſtical. Neither can a nobleman, eſquire, *&c.* claim a ſeat in a church by preſcription, as appendant or belonging to land, but to a houſe, for that ſuch a ſeat belongeth to the houſe in reſpect of the inhabitancy thereof; and therefore, if the houſe be part of a manor, yet in that caſe he may claim the ſeat as appendant to the houſe, for the reaſon aforeſaid.

Secondly, that nothing can be properly appendant or appurtenant to any thing, unleſs the principal or ſuperior thing be of perpetual ſubſiſtence and continuance: For example, an advowſon that is ſaid to be appendant to a manor, is *in rei veritate* appendant to the demeſnes of the manor, which are of perpetual ſubſiſtence and continuance, and not to rents or ſervices, which are ſubject to extinguiſhment and deſtruction. *Co. Lit.* 122. *a.*

An advowſon is appendant to the manor of *Dale*, of which manor the manor of *Sale* is holden; the manor of *Sale* is made parcel of the manor of *Dale* by way of eſcheat, the advowſon is only appendant to the manor of *Dale*. *Co. Lit.* 122.

And where it is ſaid, that a chamber may be parcel of a corody, and paſs by the name of the corody, which may be extinguiſhed, there he that hath the corody hath but his habitation in the chamber, as a fellow in Trinity college in *Cambridge* hath in his chamber, or as one that had a corody and a chamber in a houſe of religion, he had but his habitation only; as for offices of fee whereunto land may appertain, they are of perpetual ſubſiſtence, either being *in eſſe* or in that they are grantable over. *Co. Lit.* 122. *a.*

Note; that an advowſon at one turn may be appendant, and at another time in groſs: As if the manor be divided between coparceners, and every one hath a part of the manor, without ſaying any thing of the advowſon appendant, the advowſon remains in coparcenary; and yet in every of their turns it is appendant to that part which they have: And ſo it is if they make compoſition to preſent againſt common right, yet it remains appendant: But if upon ſuch a partition an expreſs exception be made of the advowſon, then the advowſon remains in coparcenary and in groſs. *Co. Lit.* 122.

Appendant is always by *preſcription*, but then it muſt agree in quality and nature to that to which 'tis appendant, and therefore *land* cannot be *appendant* to a *meſſuage*. *Plowd.* 168. *Dyer* 130. *S. P.* 4 *Rep.* 37.

Lands may be appendant to *a grange* or to *a farm*. *Dyer* 331 and 374.

An advowſon may be appendant to *a manor*, and ſo may one *manor to another*; an *advowſon* may be likewiſe appendant to an *acre of land parcel of the manor*, or to the *demeſnes* of a manor. *Dyer* 44 and 70.

An advowſon of a *vicarage* may be appendant to a *rectory*, and therefore by a grant of the *rectory*, *& omnia hæreditamenta* to the ſame appertaining, the advowſon of the *vicarage* did paſs. *Dyer* 350.

One *office* may be appendant and incident to another office; as the office of *Exigenter of London* to the office of *Chief Juſtice* of the Common Pleas, and therefore a grant thereof made by *Queen Mary* was adjudged void. 2 *Eliz.* *Dyer* 175. So the office of county clerk is appendant and incident to the office of *ſheriff*, and a grant made thereof by *Queen Elizabeth*, was likewiſe adjudged void for that reaſon. 4 *Rep.* 32.

Tithes cannot be appendant to a *manor*, becauſe they are ſpiritual things, and therefore cannot be appendant to a manor which is *temporal*, unleſs ſome ſpecial matter be alledged. *Winchcomb's* caſe, vouched in 2 *Rep.* the biſhop of *Winton's* caſe.

Common of turbary cannot be appendant to *land*. 4 *Rep.* 37. in *Terringham's* caſe.

An advowſon in *poſſeſſion* cannot be appendant to a *reverſion* expectant upon an eſtate for life. 11 *Rep.* 46. *Liford's* caſe.

Common of turbary may be appendant to a *houſe*; and ſo *eſtovers* out of a wood, may by *preſcription* be appendant to a *houſe*; and if he alter the rooms, the *eſtovers* are ſtill appendant; but if he build new chimnies, or make a new addition to his houſe, he cannot ſpend the eſtovers in that new part, or in thoſe new chimnies. *Hob.* 39.

Waiſes and *eſtrays* may be appendant to a *leet*, and a *leet* may be appendant to a *manor*. 4 *Rep.* 36. 10 *Rep.* 64. A *fair* may be appendant to a *manor*, and a court of *pie-powders* to a *fair*. 4 *Rep.* 31.

Appenditia, The *appendages* or pertinences of an eſtate, *&c.* So *Simon* Earl of *Northampton* gave to the Knights Templars his manor of *Merton*, *in com. Oxon. cum omnibus* appenditiis *ſuis*. *Kennet's Paroch. Antiq.* 110. Hence our pentices, or pent-houſes are called *appenditia domus*, *&c.* *Cowell*, *edit.* 1727.

Appennage, Or *apennage*, (Fr.) Is derived from *appendendo*, or the German word *apanage*, ſignifying a portion. It is uſed for a child's part or portion, and is properly the portion of the King's younger children in *France*; where by a fundamental law, called *the law of apenages*, the King's younger ſons have dutchies, counties, or baronies granted to them and their heirs, *&c.* the reverſion being reſerved to the crown, and all matters of regality as to coinage, and levying taxes in ſuch territories. See *Spelman Gloſſ. in verbo* appennagium.

Appenſura, The payment of money at the ſcale, or by weight.——*Dedit regi præfato* appenſuram *novem librarum puriſſimi auri juxta magnum pondus Normannorum. Hiſt. Elien. Edit. Gale, lib.* 2. *c.* 19.

Apples. A duty is laid on all *apples* imported into *Great Britain*, to be paid before landing thereof, by *ſtatute* 10 *Geo.* 2. *c.* 27.

Applumbatio, is the incorporating ſeveral metals together. See *Bract. lib.* 2. *cap.* 2. *Fleta*, *lib.* 3. *c.* 2. *Parag.* 12.

Appodiare, Is a word uſed in old hiſtorians, and ſignifies to lean on, or prop up any thing, *&c.* *Walſingham*, *an.* 1271 *Mat. Pariſ. Chron. Aulæ Regiæ ann.* 1321. *Cowell.*

Apponere, To pledge or pawn.——*Accepta a fratre Gulielmo ſumma non modica Normanniam illi* appoſuit. *Nubrigenſis*, *lib.* 1. *c.* 2. *Cowell.*

Apportionment, (*Apportionamentum*) Is a dividing of a rent into parts, according as the land, whence the whole rent iſſues, is divided among two or more; as if a man have a rent-ſervice iſſuing out of land, and he purchaſeth part of the land, the rent ſhall be *apportioned* according to the value of the land. So if a man let lands for years, reſerving rent, and after a ſtranger recovers

part

part of the land, the rent ſhall be *apportioned*; but a rent-charge cannot be *apportioned*, nor things that are intire; as if one holds land by ſervice, to pay to his lord yearly at ſuch a feaſt, a horſe, or a roſe; there, if the lord purchaſe part of the land, this ſervice is totally extinct; becauſe ſuch things cannot be divided without hurt to the whole; yet in ſome caſes a rent-charge ſhall be *apportioned*, as if a man hath a rent-charge iſſuing out of land, and his father purchaſeth part of the land charged in fee, and dies, and this parcel deſcends to his ſon, who hath the rent-charge; there this charge ſhall be *apportioned*, according to the value of the land; becauſe ſuch portion of the land, purchaſed by the father, comes not to the ſon by his own act, but by deſcent and courſe of law. Common appendant is of common right, and ſeverable; and though the commoner, in ſuch caſe, purchaſe parcel of the land, wherein the common is appendant, yet the common ſhall be *apportioned*; but in this caſe, common appurtenant, and not appendant, by ſuch purchaſe is extinct. *Termes de la ley.* 8 *Co.* 79.

Where the leſſor recovers part of the land; or enters for a forfeiture into part thereof; the rent ſhall be *apportioned.* 1 *Inſt.* 148.

Leſſee for years leaſes for years, rendring rent, and after deviſes this rent to three perſons, this rent may be *apportioned.* *Danv. Abr.* 505.

If a leſſee for life or years under rent, ſurrenders part of the land, the rent ſhall be *apportioned:* But where the grantee of a rent-charge purchaſes part of the land, there all is extinct. *Moor, c.* 231.

A rent-charge iſſuing out of land, may not be *apportioned:* Nor ſhall things entire; as if one holds lands by ſervice to pay yearly to the lord, at ſuch a feaſt, a horſe, *&c.* 1 *Inſt.* 149.

But if part of the land out of which a rent-charge iſſues, deſcends to the grantee of the rent this ſhall be *apportioned.* *Danv.* 507.

A grantee of a rent releaſes part of the rent to the grantor, this doth not extinguiſh the reſidue, but it ſhall be *apportioned*; for here the grantee dealeth not with the land, but with the rent. *Co. Lit.* 148.

On partition of lands out of which a rent is iſſuing, the rent ſhall be *apportioned.* *Danv. Abr.* 507.

And where lands held by leaſe, rendring rent, are extended upon *elegit*, one moiety of the rent ſhall be *apportioned* to the leſſor. *Danv. Abr.* 509.

If part of the land leaſed is ſurrounded by freſh water, there ſhall be no *apportionment* of rent; but if it be ſurrounded with the ſea, there ſhall be an *apportionment* of the rent. *Dyer* 56.

A man purchaſeth part of the land where he hath common appendant, the common ſhall be *apportioned*; of common appurtenant it is otherwiſe, and if by the act of the party, the common is extinct. 8 *Rep.* 79.

Common appendant and appurtenant may be *apportioned* on alienation of part of the land to which it is appendant or appurtenant. *Wood's Inſt.* 199.

If where a perſon has common of paſture *ſans number*, part of the lands deſcends to him, this being intire and uncertain cannot be *apportioned*; but if it had been common certain, it ſhould have been *apportioned.* 1 *Inſt.* 149.

A contract may not be divided or *apportioned*, ſo as to ſubject a man to two actions. 1 *Salk.* 65.

Common appendant may be apportioned, becauſe 'tis of *common right*, and therefore, if a man purchaſe *part of the lands* to which the *common is appendant*, the common ſhall be apportioned to *that part*; but *common appurtenant* cannot be *apportioned* by the *act* of the party, and therefore by the purchaſe of part of the lands, the whole common is extinct. 4 *Rep. Terringham's* caſe. 8 *Rep.* 79. *Hob.* 25. *S. P.*

And yet it hath been adjudged, that where a man hath *common appurtenant* to ten acres of land, for all his beaſts *levant and couchant* on the ſame, and afterwards he ſells part of thoſe ten acres, that the common ſhall be apportioned, and the vendee ſhall have common on that part which he purchaſed; for theſe things are intire in ſeveral degrees, (*i. e.*) ſome things are ſo intire, that they cannot be divided by the act of the party; ſuch as *warranties*, *conditions*, *&c.* tho' they may be apportioned by act of law; but commons are not ſo ſtrictly intire, but that they may be apportioned, it being a common caſe, and therefore ought to be extended for the general good. *Hob.* 235.

Conditions, generally ſpeaking, are *intire*, and cannot be apportioned by the act of the party; as for inſtance, the maſter and ſcholars of *Corpus Chriſti* in *Oxford*, made a leaſe of lands; *proviſo*, the leſſee ſhould not alien, *&c.* without ſpecial licence; afterwards they gave the leſſee a ſpecial licence to alien, who aſſigned his term to *B. B.* and he by will deviſed the lands to his ſon, and the leſſor entered for the condition broken; adjudged, that the licence given to *B. B.* to *alien*, had deſtroyed the condition, for the leſſors would not *diſperſe with it*, *as to him*, and retain it, *as to others*; for a condition being an intire thing, cannot be apportioned by the act of the party, tho' it may be by act of law. 4 *Rep.* 119. *Damport's* caſe.

An agreement in writing between the teſtator and *J. S.* that he ſhould receive all the teſtator's rents, for which ſervice he promiſed to pay *J. S.* 100*l. per ann.* and in an action of debt brought againſt the executor, the plaintiff ſet forth, that the teſtator died three quarters of a year after this contract made, during which time the plaintiff ſerved him, and ſo demanded 75*l.* for his ſervice for three quarters of a year; the defendant pleaded to iſſue, and the plaintiff had a verdict and judgment in *C. B.* but upon a writ of error brought in *B. R.* it was reverſed, becauſe this agreement was in nature of a condition precedent, and that nothing was due without a full year's ſervice; 'tis like a leaſe for years, rendring 20*l.* rent yearly, and before the year is ended, the leſſee is evicted, the leſſor ſhall have no rent, for that cannot be apportioned in reſpect of time. 1 *Salk.* 65. *Counteſs of Plymouth* verſ. *Throgmorton.* See 2 *Salk.* 778. *the pleadings.*

Apportum, Seems to be deduced from the French *apport*, and ſignifies the revenue, gain or profit, which a thing brings in to its owner. It is alſo uſed for an augmentation given to any abbot, for his better ſupport out of the profits of a manor. —— *Ita quod proficua manerii prædicti nomine* apporti *quolibet anno præfato* A. *in ſubventionem ſuſtentationis ſuæ ſolverentur.* *Ann.* 22 *Ed.* 3. *n.* 72. *Linc.* The word was commonly uſed for a corrody or penſion: —— *Nicolaus Gwyn prior de Andover, debet xx marcas de quodam* apporto, *ad capitalem dominum ejuſdem prioris in partibus tranſmarinis, in tempore pacis debito. Ex regiſtro evidentiarum colleg. Wickham juxta Winton. MS.* —— *Rex Edwardus* 3. *reſtituit terras prioratuum alienigenarum ſalvo nobis* apporto, *quod præfectus procurator alicui domui ſuperiori ſolvere tenetur. Clauſ.* 14 *Ed.* 3. The word might at firſt ſignify any profit or emolument *apported* or brought to another; and therefore *Du Freſne* obſerves in the Cuſtomary of *Rhemes*, *apport* was the portion which the wife brought to the huſband.

Appoſal of ſheriffs, The charging them with money received upon their accounts in the Exchequer. It is uſed in *ſtat.* 22 & 23 *C.* 2.

Appraiſers Of goods are to be ſworn to make true *appraiſement*; and if they value the goods too high, they ſhall be obliged to take them at the price *appraiſed.* *Stat.* 13 *Ed.* 1.

Apprendre, (Fr.) A fee or profit; *apprendre* is a fee or profit to be taken or received. It is uſed in ſtatute 2 & 3 *Ed.* 6. *c.* 8.

Apprentice, *Apprentitius,* (French *apprentif*, from *apprendre*, to learn; whence the French *apprentiſſage*, and our *apprenticeſhip*) Signifies with us one that is bound in word or writing, to ſerve another man of trade for certain years, upon condition that the artificer or maſter ſhall in that mean time endeavour to inſtruct him in his art or miſtery. *Smith de Rep. Ang. lib.* 3. *cap.* 8. ſaith, they are a kind of bondmen, differing only, that they are ſervants by covenant, and for a time. Barriſters at law were heretofore called *apprentices of the law*, in latin *apprentitii juris nobiliores.* So ſaith Mr. *Selden* in his notes upon *Forteſcue, p.* 3. and ſo the learned Mr. *Plowden*, ſtiled himſelf. Sir *Henry Finch*, in his *Nomotechnia*, gives

himſelf the ſame title; and Sir *Edward Coke*, 2 *Inſt. fol.* 564. holds, that *apprentitii legis* are called *homines conſiliarii, & in lege periti*, and in another place——*apprentices and other counſellors of law.* As to the word *apprentitius*, as it ſignifies a young perſon, bound by indentures to a maſter, who upon ſuch covenants is to teach him his miſtery or trade, the oldeſt authority ſeems to be from a charter, dated 12 *Ed.* 3. recited in *Kennet's Parochial Antiquities*, *p.* 449. at leaſt, we have met with no mention of them, till the beginning of the next reign. Thus, *Henry de Knighton, ſub ann.* 1381. *apprentitii quoque relictis magiſtris ſuis illuc accurrebant.* And *Tho. Walſingham* in *Ric.* 2. *p.* 103. *de Londonio multi apprentitii, plures ſervi, ſumptis albis caputiis, invitis magiſtris & dominis ſunt profecti.* Vide *Selden's Notes on Forteſcue*, *p.* 2. *Orig. Jurid. fol.* 143. *a.* and the ſtatute of *Champerty*, 33 *Ed.* 1. *Cowell, edit.* 1727.

Under this head is conſidered,

1. *Who are capable of binding themſelves apprentices.*
2. *Manner of binding, and who are compellable to be bound apprentices; and of ſettling differences between maſters and apprentices.*
3. *Who may take, and are compellable to receive and provide for apprentices; and of refunding the money given with them, and delivering up their indentures.*
4. *Of ſetting up a trade; and the neceſſity of ſerving an apprenticeſhip; what trades are prohibited to be followed, and the offence and puniſhment of exerciſing a trade within the meaning of the ſtat.* 5 *Eliz.*
5. *Of aſſigning apprentices, making them free, and how they are to be taken care of if their maſters happen to die.*
6. *Offences committed by apprentices.*
7. *Settlement of apprentices.*
8. *Pleadings in actions brought by and againſt maſters and apprentices.*

1. *Who are capable of binding themſelves apprentices.*

It is ſaid, that if a married man and his wife do bind themſelves to ſerve, they ſhall be compelled thereto, according to their covenant or agreement; and that if a woman who is a ſervant ſhall marry, yet ſhe muſt ſerve out her time; and her huſband cannot take her out of her maſter's ſervice. *Dalt. c.* 58.

It ſeems clearly agreed that by the common law infants, or perſons under the age of twenty-one years, cannot bind themſelves apprentices, in ſuch a manner as to intitle their maſters to an action of covenant, or other action for departing from their ſervice, or other breaches of their indentures; which makes it neceſſary, according to the uſual practice, to get ſome of their friends to be bound for the faithful diſcharge of their offices, according to the terms agreed on. 11 *Co.* 89. *b.* 2 *Inſt.* 379, 580. 3 *Leon.* 63. *Fareſt.* 15.

But by the 5 *Eliz. cap.* 4. *ſect.* 42, 43. it is enacted in the words following, "And becauſe there hath been, and is ſome queſtion and ſcruple moved, whether any perſon being within the age of twenty-one years, and bounden to ſerve as an apprentice, in another place than in the ſaid city of *London*, ſhall be bounden, accepted and taken as an appentice; for the reſolution of the ſaid ſcruple and doubt, be it enacted by the authority of this preſent parliament, that all and every ſuch perſon or perſons, that at any time or times from henceforth ſhall be bounden by indenture to ſerve as an apprentice in any art, ſcience, occupation or labour, according to the tenour of this eſtatute, and in manner and form aforeſaid, albeit the ſame apprentices or any of them, ſhall be within the age of twenty-one years at the time of making their ſeveral indentures, ſhall be bounden to ſerve for the years in their ſeveral indentures contained, as amply and largely to every intent, as if the ſame apprentice were of full age at the time of making ſuch indentures; any law, *&c.*"

But notwithſtanding this ſtatute, it hath been held, that no action of covenant lies againſt an apprentice, for departing from his maſter's ſervice without licence, within the time of his apprenticeſhip; where the defendant pleaded, that at the time of making the indenture he was within age; and on demurrer to this plea, it was argued, that this indenture ſhould bind the infant, becauſe it was for his advantage to be bound apprentice, to be inſtructed in a trade; it was alſo urged, that he was compellable by the 5 *Eliz. ſupra*, to be bound out an apprentice; but all the court reſolved, that although an infant may voluntarily bind himſelf an apprentice, and if he continue an apprentice for ſeven years, he may have the benefit to uſe his trade; and yet neither at the Common law, nor by any words of the abovementioned ſtatute, a covenant or obligation of an infant, for his apprenticeſhip, ſhall bind him; but if he miſbehave himſelf, the maſter may correct him in his ſervice, or complain to a juſtice of peace, to have him puniſhed according to the ſtatute; but no remedy lieth againſt an infant upon ſuch covenant. *Cro. Car.* 179. *Cro. Jac.* 194. *S. P.*

By the cuſtom of *London*, an infant unmarried, and above the age of fourteen, may bind himſelf apprentice to a freeman of *London*, by indenture with proper covenants; which covenants, by the cuſtom of *London*, ſhall be as binding as if he were of full age. *Moor* 134. 2 *Bulſt.* 192. 2 *Rol. Rep.* 305. *Palm.* 361. 1 *Mod.* 271. 2 *Keb.* 687.

2. *Manner of binding, and who are compellable to be bound apprentices; and of ſettling differences between maſters and apprentices.*

A perſon cannot be bound an apprentice without deed. 1 *Salk.* 68.

And an apprentice muſt be retained by the name of an apprentice expreſly, otherwiſe he is no apprentice, tho' he be bound. *Dalt. c.* 58.

And as an apprentice can only be bound by deed, ſo it is neceſſary, according to the cuſtom of ſome places, that ſuch deed or indenture be inrolled; as in *London*, if the indentures be not inrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, *&c.* a *ſcire fac'* ſhall iſſue to the maſter, to ſhew cauſe why not inrolled; and if it was through the maſter's default, the apprentice may ſue out his indentures, and be diſcharged; otherwiſe if through the fault of the apprentice; as if he would not come to preſent himſelf before the chamberlain, *&c.* for it cannot be inrolled, unleſs the apprentice be in court and acknowledges it. 2 *Rol. Rep.* 305. *Palm.* 361. 1 *Mod.* 271.

But it hath been held, that this cuſtom does not extend to one bound 'prentice to a waterman, under twenty-one years of age; for the company of watermen are but a voluntary ſociety, and being free of that does not make one free of *London*. 6 *Mod.* 69.

By the ſtatute 5 *El. c.* 4. *ſect.* 25. an apprentice muſt be bound by deed indented.

An action was brought againſt the defendant, for inticing away and detaining the plaintiff's apprentice, who had agreed by writing to ſerve the plaintiff for ſeven years. Upon evidence it appeared, that the ſtile of the writing began, *This indenture*, &c. but in fact the parchment was not indented, but was a deed poll. On exception taken to the deed, it was inſiſted that the young man was not an apprentice, becauſe he was not bound by indenture. An infant can be bound no other way than as the ſtatute of 5 *El.* directs, which is by indenture, and nothing can make this good. The deed cannot now be indented, for that would be forgery. Therefore unleſs the plaintiff ſhews the apprentice to be of full age at the time of ſigning ſuch deed, he cannot be acconnted his apprentice, and by conſequence no action can lie for detaining the apprentice; neither can the plaintiff prove him to be his ſervant by this deed, for he has declared for an apprentice, and muſt prove him ſo to be. Therefore the plaintiff was nonſuited. *Seſſ. Ca. vol.* 1. 222.

By *ſtat.* 5 *Eliz. c.* 4. *ſect.* 39, 41. all indentures, covenants, promiſes, and bargains, for having or taking apprentices otherwiſe than by the ſtatute of 5 *El.* ſhall be clearly void in the law to all intents and purpoſes; and every

every perſon that ſhall take any apprentice contrary to the ſaid act, ſhall forfeit 10*l.* half to the King, and half to him that ſhall ſue in the ſeſſions, or other court of record; or if it is in a town corporate, then to the uſe of ſuch town as by the charter.

By the ſeveral ſtamp acts, the binding (except it be of pariſh apprentices) ſhall be on a two ſhilling and ſixpenny ſtamped paper or parchment; and the ſame ſhall not be given in evidence in any court till it be ſtamped, and the duties paid.

And by the *ſtat.* 8 *An. c.* 9. *ſect.* 32. beſides the ſaid ſtamps and duties, there ſhall be paid the duty of ſixpence for every 20*s.* of every ſum of 50*l.* or under; and the duty of one ſhilling for every 20*s.* of every ſum above 50*l.* given with any apprentice; and proportionably for greater or leſſer ſums; to be paid by the maſter.

And by *ſect.* 45. of the ſame ſtatute, where any thing, not being money, ſhall be given with ſuch apprentice, the duties ſhall be anſwered for the value thereof.

But by *ſect.* 48. this ſhall not extend to any apprentice put out at the common charge of any pariſh or townſhip, or out of any publick charity.

Sect. 35. The full ſum ſhall be inſerted in the indenture in words at length, and ſhall bear date on the day of the execution thereof; on pain that the maſter forfeit double, half to the King, and half with full coſts to him that ſhall ſue.

Sect. 36. The ſaid indentures, within the bills, ſhall be brought to the head office to be ſtamped with a ſtamp for that purpoſe, and the duties paid within one month after date.

Sect. 37. And in other places the ſaid indentures ſhall be brought either to the head office within the bills, or to a collector of the ſtamp duties out of the ſaid limits, in two months after date, and the duties thereupon ſhall be paid, and the indenture ſtamped, if it be at the ſaid head office; otherwiſe ſuch collector ſhall indorſe on the indenture, a receipt for the duties in words at length, and ſubſcribe his name thereto.

Sect. 38. And if it is within 50 miles of the limits of the bills of mortality, the indenture ſhall within three months after date, and elſewhere within ſix months, be brought to the head office to be ſtamped.

Sect. 39. And all ſuch indentures, wherein ſhall not be inſerted the full ſum directly or indirectly given, or whereupon the duties ſhall not be paid, or which ſhall not be ſtamped within the time limited, ſhall be void, and not available in any court or place, or to any purpoſe whatſoever; and the apprentice ſhall be incapable of exerciſing the ſaid trade.

Sect. 43. And no ſuch indenture ſhall be given in evidence in any ſuit to be brought by any of the parties thereunto, unleſs ſuch party on whoſe behalf the ſame ſhall be given in evidence, do firſt make oath, that to the beſt of his knowledge, the ſum therein inſerted was really and truly all that was directly or indirectly to be given with ſuch apprentice.

By the *ſtat.* 9 *An. cap.* 21. If the maſter ſhall neglect to pay the duties within the time limited, he ſhall forfeit 50*l.* half to the King, and half, with full coſts, to him who ſhall ſue.

And by the *ſtat.* 18 *Geo.* 2. *cap.* 22. *ſect.* 23, 24. If he ſhall neglect to pay the ſame as aforeſaid, he ſhall, beſides all other penalties, forfeit double duty.

But by the *ſtat.* 30 *Geo.* 2. *cap.* 19. For the relief of perſons who have omitted to pay the ſaid duties, or to inſert the ſaid ſums in words at length; upon payment of the ſaid duties on or before *Sep.* 1. 1757, and tendring the indentures to be ſtamped at the ſame time, or at any time on or before *Sep.* 29. 1757. (of which timely notice ſhall be given in the Gazette) the ſaid indentures ſhall be good and valid, and may be given in evidence.

And there is the like indemnifying clauſe in ſome act every two or three years.

By the 20 *G.* 2. *cap.* 45. *ſect.* 5. If any maſter, having forfeited the double duty, ſhall pay the ſame, and tender the indenture to be ſtamped, within two years after the determination of the apprenticeſhip, and before ſuit hath been commenced for the penalties, the indenture ſhall be valid, and the penalties diſcharged.

Sect. 6, 7. And if after the maſter ſhall have forfeited the double duty, the apprentice ſhall in the preſence of, or by writing under his hand ſigned in the preſence of one witneſs, require his maſter to pay the ſame, and the maſter ſhall not do it in three months; and ſuch apprentice ſhall at any time within two years after the determination of his apprenticeſhip pay the double duty, he may in three months after ſuch payment, demand of his maſter double the ſum contracted for in the indenture; and if not paid in three months after, may recover the ſame by action at law, with full coſts. And the apprentice immediately after payment of the ſaid double duties, (if his apprenticeſhip ſhall not be then expired) and ſignifying by writing under his hand, that he deſires to be diſcharged from his apprenticeſhip, ſhall be diſcharged accordingly, and ſhall have the ſame benefit of the time he hath ſerved as he would have had in caſe he had been aſſigned, or turned over to a new maſter.

Sect. 8. And where any proſecution ſhall be commenced againſt the maſter for the penalties, if the apprentice ſhall pay the double duty at any time in two years after the end of his apprenticeſhip, he may thereupon exerciſe his trade, and the indenture ſhall be valid, and may be given in evidence.

As to compelling perſons to be bound apprentices, by ſtatute 5 *Eliz. c.* 4. *ſect.* 35. it is enacted, "That if any perſon ſhall be required by any houſholder, having and uſing half a plow-land at the leaſt in tillage, to be an apprentice, and to ſerve in huſbandry, or in any other kind of art, miſtery or ſcience before expreſſed, and ſhall refuſe ſo to do, that then, upon complaint of ſuch houſekeeper, made to one juſtice of the peace of the county where the ſaid refuſal is or ſhall be made, or of ſuch houſholder inhabiting in any city, town corporate, or market town, to the mayor, bailiffs, or head officer of the ſaid city, town corporate, or market town, if any ſuch refuſal ſhall be there, they ſhall have full power and authority by virtue hereof, to ſend for the ſame perſon ſo refuſing; and if the juſtice, or the ſaid mayor or head officer, ſhall think the ſaid perſon meet and convenient to ſerve as an apprentice in that art, labour, ſcience, or miſtery, wherein he ſhall be ſo then required to ſerve, that then the ſaid juſtice, or the ſaid mayor or head officer, ſhall have power and authority by virtue hereof, if the ſaid perſon refuſe to be bound as an apprentice, to commit him unto ward, there to remain until he be contented, and will be bounden to ſerve as an apprentice ſhould ſerve, according to the true intent and meaning of this preſent act; and if any ſuch maſter ſhall miſuſe or evil intreat his apprentice, or that the ſaid apprentice ſhall have any juſt cauſe to complain, or the apprentice do not his duty to his maſter, then the ſaid maſter, or apprentice, being grieved, and having cauſe to complain, ſhall repair unto one juſtice of peace within the ſaid county, or to the mayor or other head officer of the ſaid city, town corporate, market town, or other place where the ſaid maſter dwelleth, who ſhall, by his wiſdom and diſcretion, take ſuch order and direction between the ſaid maſter and his apprentice, as the equity of the cauſe ſhall require; and if for want of good conformity in the maſter, the ſaid juſtice of peace, or the ſaid mayor or head officer, cannot compound and agree the matter between him and his apprentice, then the ſaid juſtice, or the ſaid mayor or other head officer, ſhall take bond of the ſaid maſter to appear at the next ſeſſions then to be holden in the ſaid county, or within the ſaid city, town corporate, or market town, if the ſaid maſter dwell within any ſuch; and upon his appearance, and hearing of the matter before the ſaid juſtices, or the ſaid mayor or other head officer, if it be thought meet unto them to diſcharge the ſaid apprentice of his apprenticehood, that the ſaid juſtices, or four of them at the leaſt, whereof one of them to be of the *quorum*, or the ſaid mayor or other head officer, with the conſent of three other of his brethren, or men of beſt reputation within the ſaid city, town corporate or market town, ſhall have power, by authority hereof, in writing under their hands and ſeals, to pronounce and declare, that they have diſcharged the ſaid apprentice of his apprenticehood, and the cauſe thereof; and the ſaid writing, ſo being made

and

and enrolled by the clerk of the peace, or town clerk, amongſt the records that he keepeth, ſhall be a ſufficient diſcharge for the ſaid apprentice againſt his maſter, his executors and adminiſtrators, the indenture of the ſaid apprenticehood, or any law or cuſtom to the contrary notwithſtanding; and if the default ſhall be found to be in the apprentice, then the ſaid juſtices, or the ſaid mayor, or other head officer, with the aſſiſtance aforeſaid, ſhall cauſe ſuch due correction and puniſhment to be miniſtred unto him, as by their wiſdom and diſcretion ſhall be thought meet."

Sect. 36. "Provided, That no perſon ſhall by force or colour of this ſtatute, be bounden to enter into any apprenticeſhip, other than ſuch as be under the age of twenty-one years."

By the ſtatute 43 *Eliz. cap.* 2. *ſect.* 5. it is enacted, "That it ſhall be lawful for the churchwardens and overſeers of the poor, or the greater part of them, by the aſſent of any two juſtices of the peace, to bind poor children apprentices, where they ſhall ſee convenient, 'till ſuch man child ſhall come to the age of twenty-four years, and ſuch woman child to the age of twenty-one years, or the time of their marriage; the ſame to be as effectual to all purpoſes, as if ſuch child were of full age, and by indenture of covenant bound him or herſelf."

By the ſtatute 1 *Jac.* 1. *cap.* 25. *ſect.* 23. this laſt-mentioned act is continued, with this further addition, "That all perſons, to whom the overſeers of the poor ſhall, according to this act, bind any children apprentices, may take and receive and keep them as apprentices; any former ſtatute to the contrary notwithſtanding."

It hath been held, that by the ſaid ſtatute 5 *Eliz.* the juſtices of the peace might bind a poor perſon to huſbandry againſt the conſent of his maſter; but that neither by that ſtatute, nor the ſtatute 43 *Eliz.* which impowers the churchwardens, *&c.* to raiſe a ſtock of money, by way of aſſeſſment on the pariſh, for that purpoſe, they could impoſe an apprentice on a tradeſman againſt his conſent, but muſt aſſeſs and raiſe money to bind him out. *Raym.* 65, 177. 1 *Sid.* 99. 1 *Lev.* 84. 1 *Vent.* 325. *S. P. cont. Carth.* 94. *Comb.* 165. 3 *Mod.* 269. 1 *Show.* 76.

As by the ſtat. 5 *Eliz.* the juſtices of peace have a power of impoſing an apprentice on a maſter, in conſequence thereof an indictment lies for diſobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for ſuch apprentice; for tho' an act of parliament preſcribes an eaſier way of proceeding by complaint, yet that does not exclude the remedy by indictment. 6 *Mod.* 163. 1 *Salk.* 381.

The juſtices of peace may diſcharge an apprentice not only on the default of the maſter, but alſo on his own default; but it hath been holden, that their juriſdiction herein extends only to ſuch apprentices as were bound to trades within the ſtatute, and were compellable by them to ſerve; for that in ſuch caſe it is but reaſonable that the contracts, which were made by their authority, ſhould be diſſolved by the ſame power, but that they cannot diſcharge any voluntary agreements made between the parties. *Skin.* 108. 5 *Mod.* 139. 2 *Salk.* 471.

Therefore where an order of ſeſſions was made to diſcharge a ſurgeon's apprentice from his maſter, for not inſtructing him in the art of ſurgery; but the maſter being a *mountebank* kept the apprentice for a tumbler on the ſtage; the order was quaſhed for want of juriſdiction in the juſtices, becauſe a ſurgeon is not one of the trades mentioned in the 5 *Eliz.* and here it was held, that the juſtices have power only over ſuch apprentices who are bound to the trades therein named, and not over apprentices to other trades. *Carth.* 366. 5 *Mod.* 138. 2 *Salk.* 471.

And yet it hath been reſolved, that the juſtices may not only diſcharge a merchant's apprentice, (which has been agreed not to be a trade within the ſtatute 5 *Eliz.*) but alſo oblige the maſter to refund part of the money which he had with him; and this doctrine of refunding ſeems to be now eſtabliſhed, as founded on great reaſon, tho' not expreſsly mentioned in the act; for the juſtices being authorized to diſcharge according to their diſcretions, where the end of the apprenticeſhip cannot be attained with one perſon, it is but juſtice the maſter ſhould return part of the money he has received with his apprentice, to place him out with a new maſter. 1 *Sand.* 314. 1 *Salk.* 67. *Skin.* 108.

The order of diſcharge muſt be under the hands and ſeals of the juſtices, according to the expreſs appointment of the ſtatute; but it is ſaid, that in a *certiorari* to remove the order, it is ſufficient in the return to take notice of the order ſo made; for it is not neceſſary to certify the diſcharge itſelf. 1 *Sand.* 316. *Carth.* 199. *Comb.* 344.

It hath been held, that an order on the maſter to return money is good, tho' it is not averred that he had any with the apprentice; for the order being to return money, is as neceſſary a proof of the receipt of it, as if it had been expreſsly alledged; and in this caſe the court ſeemed to be of opinion, that the juſtices had juriſdiction as to diſcharging and obliging the maſter to refund, as well in other trades as thoſe mentioned in the ſtatute; and that the juſtices are not obliged in their orders to ſet forth all the ſteps they take in their proceeding, there being nothing in the act which makes it neceſſary, and that there was a known and eſtabliſhed diſtinction between orders and convictions. *Trin.* 7 *Geo.* 2. *in B. R. The King* v. *Amies.*

It hath formerly been held, that the ſeſſions cannot make an original order of diſcharge; but that, according to the ſtatute, the parties ought firſt to apply themſelves to a juſtice of peace; and if he cannot compound the matter, then he is to bind the maſter to appear at the next ſeſſions; but it hath been ruled of late, [ſee the preceding caſe] and it ſeems now eſtabliſhed, that an order on an original application is good, and that the previous application to the juſtice is only diſcretionary. 1 *Sand.* 316. *Carth.* 198. 1 *Salk.* 68. 5 *Mod.* 138.

If the maſter, being bound to anſwer at the ſeſſions, does not appear, it is a forfeiture of his recognizance; but yet at the ſame time the juſtices may proceed to make an order againſt him. 1 *Salk.* 67.

An order reciting, that *Joſeph Higgin* was bound out by indenture, as the ſtatute requires, to *John Parks*, and being lame, and having the King's evil, and in the opinion of ſurgeons incurable; therefore the juſtices diſcharged the maſter from his apprentice. It was moved to confirm the order, becauſe the maſter cannot now have the end of the binding, which was, the ſervice of his apprentice; but it was anſwered, that the ſtatute only impowers the juſtices to diſcharge for miſbehaviour and not for ſickneſs, and quaſhed by the court; for the maſter takes the apprentice for better and worſe, and is to provide for him in ſickneſs and in health. *Strange* 99. *Trin.* 4 *Geo.* 1.

An apprentice was diſcharged, the maſter having *uſed him unkindly*, and refuſing to provide for and entertain him: but by the court, This is not a good ground for the diſcharge; for there is a power to oblige the maſter to receive and entertain the apprentice, and uſing him unkindly is too looſe. *Strange* 1014.

Stat. 20 *Geo.* 2. *c.* 19. *ſect.* 3. It ſhall be lawful for any two or more juſtices, upon any complaint or application by any apprentice put out by the pariſh, or any other apprentice, upon whoſe binding out no larger a ſum than five pounds were paid, touching or concerning any miſuſage, refuſal of neceſſary proviſion, cruelty, or other ill treatment of or towards ſuch apprentice, by his or her maſter or miſtreſs, to ſummon ſuch maſter or miſtreſs to appear before ſuch juſtices at a reaſonable time to be named in ſuch ſummons; and ſuch juſtices ſhall and may examine into the matter of ſuch complaint; and upon proof thereof made upon oath, to their ſatisfaction, (whether the maſter or miſtreſs be preſent or not, if ſervice of the ſummons be alſo, upon oath, proved) the ſaid juſtices may diſcharge ſuch apprentice, by warrant or certificate under their hands and ſeals; for which warrant or certificate no fees ſhall be paid.

Sect. 4. And ſuch juſtices, upon application or complaint made, upon oath, by any maſter or miſtreſs, againſt ſuch apprentice, touching or concerning any miſdemeanour, miſcarriage, or ill behaviour, in ſuch his or her ſervice (which oath ſuch juſtices are hereby impowered

ered to adminiſter) to hear, examine, and determine the ſame, and to puniſh the offender by commitment to the houſe of correction, there to remain and be corrected, and held to hard labour for a reaſonable time, not exceeding one kalendar month, or otherwiſe by diſcharging ſuch apprentice, in manner and form before mentioned.

Sect. 5. Perſons aggrieved by ſuch determination, order, or warrant of ſuch juſtice or juſtices as aforeſaid (ſave and except any order of commitment) he, ſhe, or they may appeal to the next general quarter ſeſſions of the peace to be held for the county, riding, liberty, city, town corporate, or place where ſuch determination or order ſhall be made; which ſaid next general quarter ſeſſions is hereby impowered to hear and finally determine the ſame, and to give and award ſuch coſts to any of the reſpective perſons appellant or reſpondent, as the ſaid ſeſſions ſhall judge reaſonable, not exceeding forty ſhillings; the ſame to be levied by diſtreſs and ſale, in manner before mentioned.

Sect. 6. And no *certiorari* ſhall iſſue or be iſſuable to remove any proceedings whatſoever, had in purſuance of this act, into any of his majeſty's courts of record at *Weſtminſter*.

3. *Who may take, and are compellable to receive and provide for apprentices; of refunding the money given with them, and delivering up their indentures.*

Stat. 5 *Eliz. cap.* 4. *ſect.* 25. Every perſon being an houſholder, and having and uſing half a plough-land in tillage, may take any apprentice above the age of ten years, and under eighteen, to ſerve in huſbandry till twenty-one at the leaſt, or till twenty-four, as the parties can agree.

Sect. 26. Every perſon being an houſholder, and 24 years old at leaſt, dwelling in any city or town corporate, and exerciſing any art, miſtery, or manual occupation there, may retain the ſon of any freeman, not occupying huſbandry, nor being a labourer, and inhabiting in the ſame, or in any other city or town corporate, to ſerve and be bound as an apprentice after the cuſtom and order of the city of *London*, for ſeven years at leaſt, ſo as ſuch apprenticeſhip do not expire before the apprentice ſhall be 24 years of age.

Sect. 27. But no perſon dwelling in any city or town corporate, being a merchant, mercer, draper, goldſmith, ironmonger, imbroiderer, or clothier, ſhall take any apprentice, except he is his ſon, or elſe that the father and mother of ſuch apprentice ſhall have an eſtate of inheritance or freehold of forty ſhillings a year, to be certified under the hands and ſeals of three juſtices where the lands lie, to the mayor of that city or town corporate, and to be inrolled among the records there.

Sect. 28. Every perſon being an houſholder, and 24 years old at the leaſt, and not occupying huſbandry, nor being a labourer, dwelling in any market town not corporate, and exerciſing any art, miſtery, or manual occupation, may have to apprentice the child or children of any other artificer, not occupying huſbandry, nor being a labourer, inhabiting the ſame or any other ſuch market town in the ſame ſhire.

Sect. 29. But no perſon dwelling in any ſuch market town, being a merchant, mercer, draper, goldſmith, ironmonger, or clothier, ſhall take any apprentice except he be his ſon, or elſe that his father and mother ſhall have an eſtate of inheritance or freehold of three pounds, to be certified under the hands and ſeals of three juſtices of the ſhire where the lands lie, to the head officer of ſuch market-town where ſuch apprentice ſhall be taken, there to be inrolled for a record.

Sect. 30. Any perſon uſing the art of a ſmith, wheelwright, plough-wright, mill-wright, carpenter, rough maſon, plaiſterer, ſawyer, lime-burner, brick-maker, bricklayer, tyler, ſlater, helier, tyle-maker, linen weaver, turner, cooper, miller, earthen potter, woollen weaver, weaving houſhold cloth only, fuller, otherwiſe called tucker or walker, burner of oar and wood aſhes, thatcher, or ſhingler, whereſoever he ſhall dwell, may take the ſon of any perſon as apprentice, albeit his parents have no land.

By the 8 & 9 *W.* 3. *cap.* 30. reciting, That whereas by an act made in the 43 *Eliz.* it is among other things enacted, That it ſhall be lawful for the churchwardens and overſeers of the poor of any pariſh, or the greater part of them, by the aſſent of two juſtices of the peace, whereof one to be of the *quorum*, to bind poor children apprentices where they ſhall ſee convenient; but there being doubts, whether the perſons, to whom ſuch children are to be bound, are compellable to receive ſuch children as apprentices, that law hath failed of its due execution; therefore it is enacted and declared, "That where any poor children ſhall be appointed to be bound apprentices purſuant to the ſaid act, the perſon or perſons, to whom they are ſo appointed to be bound, ſhall receive and provide for them, according to the indenture ſigned and confirmed by the two juſtices of the peace, and alſo execute the other part of the ſaid indentures; and if he or ſhe ſhall refuſe ſo to do, oath being thereof made by one of the churchwardens or overſeers of the poor, before any two of the juſtices of the peace for the county, liberty or riding, he or ſhe ſhall for every ſuch offence, forfeit the ſum of 10l. to be levied by diſtreſs; the ſame to be applied to the uſe of the poor of that pariſh or place where ſuch offence was committed; ſaving always to the perſon to whom any poor child ſhall be appointed to be an apprentice as aforeſaid, if he or ſhe ſhall think themſelves aggrieved thereby, his or her appeal to the next general or quarter ſeſſions of the peace for that county or riding, whoſe order therein ſhall be final, and conclude all parties."

Tho' by the ſtatute 8 & 9 *W.* 3. the maſter is bound under the penalty of 10l. to keep an apprentice bound to him purſuant to the ſtatute 43 *Eliz.* yet if two juſtices bind a poor girl to a merchant, and he appeals to the ſeſſions, where the order is reverſed, it being thought unfit to compel a merchant to take an apprentice; the court of King's Bench, on removing the order before them, may confirm the order of ſeſſions, (as they did in this caſe); for the ſtatute having given an appeal to the ſeſſions, they are made thereby proper judges, whether the perſon be a proper perſon to impoſe an apprentice on or not. 2 *Salk.* 491.

The churchwardens and overſeers need not aver, that the parents were not able to maintain the child, for they have a diſcretionary power by the ſtatute, of determining that. *Comb.* 289.

By the ſtat. 7 *Jac.* 1. *cap.* 3. *ſect.* 2. it is enacted, that money given to be continually employed to put out poor children apprentices, ſhall be employed in corporate towns by the corporations, and in other places by the parſon or vicar, together with the conſtables, churchwardens, and overſeers of the poor, or the moſt part of them; who ſhall have the nomination and placing of ſuch apprentices; and if they ſhall wilfully forbear or refuſe to employ the ſame accordingly, they ſhall forfeit five marks each of them ſo making default, to be divided betwixt the poor of the pariſh and the proſecutor.

Sect. 3. The party receiving money with ſuch an apprentice ſhall give ſecurity by obligation, to repay it at the end of 7 years next enſuing the date of the ſaid obligation, or within three months next after the end of the ſaid ſeven years; and if ſuch apprentice ſhall die within the ſeven years, then within one year after his death; and if the maſter, miſtreſs, or dame, happen to die within the ſeven years, then within one year after their death, ſo as the money may be employed in placing the apprentice with ſome other of the ſame trade, to ſerve out his time, at the diſcretion of the parties truſted as aforeſaid.

Sect. 4. The money ſo given ſhall be employed within three months after the receipt thereof; and if there ſhall not be apt perſons found to be apprentices in the places where it is given, it ſhall be employed in the pariſhes next adjoining by the parties that are truſted with it, in the places where it was ſo given, and there alſo bond ſhall be taken, as is before declared.

and enrolled by the clerk of the peace, or town clerk, amongſt the records that he keepeth, ſhall be a ſufficient diſcharge for the ſaid apprentice againſt his maſter, his executors and adminiſtrators, the indenture of the ſaid apprenticehood, or any law or cuſtom to the contrary notwithſtanding; and if the default ſhall be found to be in the apprentice, then the ſaid juſtices, or the ſaid mayor, or other head officer, with the aſſiſtance aforeſaid, ſhall cauſe ſuch due correction and puniſhment to be miniſtred unto him, as by their wiſdom and diſcretion ſhall be thought meet."

Sect. 36. "Provided, That no perſon ſhall by force or colour of this ſtatute, be bounden to enter into any apprenticeſhip, other than ſuch as be under the age of twenty-one years."

By the ſtatute 43 *Eliz. cap.* 2. *ſect.* 5. it is enacted, "That it ſhall be lawful for the churchwardens and overſeers of the poor, or the greater part of them, by the aſſent of any two juſtices of the peace, to bind poor children apprentices, where they ſhall ſee convenient, 'till ſuch man child ſhall come to the age of twenty-four years, and ſuch woman child to the age of twenty-one years, or the time of their marriage; the ſame to be as effectual to all purpoſes, as if ſuch child were of full age, and by indenture of covenant bound him or herſelf."

By the ſtatute 1 *Jac.* 1. *cap.* 25. *ſect.* 23. this laſt-mentioned act is continued, with this further addition, "That all perſons, to whom the overſeers of the poor ſhall, according to this act, bind any children apprentices, may take and receive and keep them as apprentices; any former ſtatute to the contrary notwithſtanding."

It hath been held, that by the ſaid ſtatute 5 *Eliz.* the juſtices of the peace might bind a poor perſon to huſbandry againſt the conſent of his maſter; but that neither by that ſtatute, nor the ſtatute 43 *Eliz.* which impowers the churchwardens, *&c.* to raiſe a ſtock of money, by way of aſſeſſment on the pariſh, for that purpoſe, they could impoſe an apprentice on a tradeſman againſt his conſent, but muſt aſſeſs and raiſe money to bind him out. *Raym.* 65, 177. 1 *Sid.* 99. 1 *Lev.* 84. 1 *Vent.* 325. *S. P. cont. Carth.* 94. *Comb.* 165. 3 *Mod.* 269. 1 *Show.* 76.

As by the ſtat. 5 *Eliz.* the juſtices of peace have a power of impoſing an apprentice on a maſter, in conſequence thereof an indictment lies for diſobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for ſuch apprentice; for tho' an act of parliament preſcribes an eaſier way of proceeding by complaint, yet that does not exclude the remedy by indictment. 6 *Mod.* 163. 1 *Salk.* 381.

The juſtices of peace may diſcharge an apprentice not only on the default of the maſter, but alſo on his own default; but it hath been holden, that their juriſdiction herein extends only to ſuch apprentices as were bound to trades within the ſtatute, and were compellable by them to ſerve; for that in ſuch caſe it is but reaſonable that the contracts, which were made by their authority, ſhould be diſſolved by the ſame power, but that they cannot diſcharge any voluntary agreements made between the parties. *Skin.* 108. 5 *Mod.* 139. 2 *Salk.* 471.

Therefore where an order of ſeſſions was made to diſcharge a ſurgeon's apprentice from his maſter, for not inſtructing him in the art of ſurgery; but the maſter being a *mountebank* kept the apprentice for a tumbler on the ſtage; the order was quaſhed for want of juriſdiction in the juſtices, becauſe a ſurgeon is not one of the trades mentioned in the 5 *Eliz.* and here it was held, that the juſtices have power only over ſuch apprentices who are bound to the trades therein named, and not over apprentices to other trades. *Carth.* 366. 5 *Mod.* 138. 2 *Salk.* 471.

And yet it hath been reſolved, that the juſtices may not only diſcharge a merchant's apprentice, (which has been agreed not to be a trade within the ſtatute 5 *Eliz.*) but alſo oblige the maſter to refund part of the money which he had with him; and this doctrine of refunding ſeems to be now eſtabliſhed, as founded on great reaſon, tho' not expreſsly mentioned in the act; for the juſtices being authorized to diſcharge according to their diſcretions, where the end of the apprenticeſhip cannot be attained with one perſon, it is but juſtice the maſter ſhould return part of the money he has received with his apprentice, to place him out with a new maſter. 1 *Sand.* 314. 1 *Salk.* 67. *Skin.* 108.

The order of diſcharge muſt be under the hands and ſeals of the juſtices, according to the expreſs appointment of the ſtatute; but it is ſaid, that in a *certiorari* to remove the order, it is ſufficient in the return to take notice of the order ſo made; for it is not neceſſary to certify the diſcharge itſelf. 1 *Sand.* 316. *Carth.* 199. *Comb.* 344.

It hath been held, that an order on the maſter to return money is good, tho' it is not averred that he had any with the apprentice; for the order being to return money, is as neceſſary a proof of the receipt of it, as if it had been expreſsly alledged; and in this caſe the court ſeemed to be of opinion, that the juſtices had juriſdiction as to diſcharging and obliging the maſter to refund, as well in other trades as thoſe mentioned in the ſtatute; and that the juſtices are not obliged in their orders to ſet forth all the ſteps they take in their proceeding, there being nothing in the act which makes it neceſſary, and that there was a known and eſtabliſhed diſtinction between orders and convictions. *Trin.* 7 *Geo.* 2. *in B. R. The King* v. *Amies.*

It hath formerly been held, that the ſeſſions cannot make an original order of diſcharge; but that, according to the ſtatute, the parties ought firſt to apply themſelves to a juſtice of peace; and if he cannot compound the matter, then he is to bind the maſter to appear at the next ſeſſions; but it hath been ruled of late, [ſee the preceding caſe] and it ſeems now eſtabliſhed, that an order on an original application is good, and that the previous application to the juſtice is only diſcretionary. 1 *Sand.* 316. *Carth.* 198. 1 *Salk.* 68. 5 *Mod.* 138.

If the maſter, being bound to anſwer at the ſeſſions, does not appear, it is a forfeiture of his recognizance; but yet at the ſame time the juſtices may proceed to make an order againſt him. 1 *Salk.* 67.

An order reciting, that *Joſeph Higgin* was bound out by indenture, as the ſtatute requires, to *John Parks*, and being lame, and having the King's evil, and in the opinion of ſurgeons incurable; therefore the juſtices diſcharged the maſter from his apprentice. It was moved to confirm the order, becauſe the maſter cannot now have the end of the binding, which was, the ſervice of his apprentice; but it was anſwered, that the ſtatute only impowers the juſtices to diſcharge for miſbehaviour and not for ſickneſs, and quaſhed by the court; for the maſter takes the apprentice for better and worſe, and is to provide for him in ſickneſs and in health. *Strange* 99. *Trin.* 4 *Geo.* 1.

An apprentice was diſcharged, the maſter having *uſed him unkindly*, and refuſing to provide for and entertain him: but by the court, This is not a good ground for the diſcharge; for there is a power to oblige the maſter to receive and entertain the apprentice, and uſing him unkindly is too looſe. *Strange* 1014.

Stat. 20 *Geo.* 2. *c.* 19. *ſect.* 3. It ſhall be lawful for any two or more juſtices, upon any complaint or application by any apprentice put out by the pariſh, or any other apprentice, upon whoſe binding out no larger a ſum than five pounds were paid, touching or concerning any miſuſage, refuſal of neceſſary proviſion, cruelty, or other ill treatment of or towards ſuch apprentice, by his or her maſter or miſtreſs, to ſummon ſuch maſter or miſtreſs to appear before ſuch juſtices at a reaſonable time to be named in ſuch ſummons; and ſuch juſtices ſhall and may examine into the matter of ſuch complaint; and upon proof thereof made upon oath, to their ſatisfaction, (whether the maſter or miſtreſs be preſent or not, if ſervice of the ſummons be alſo, upon oath, proved) the ſaid juſtices may diſcharge ſuch apprentice, by warrant or certificate under their hands and ſeals; for which warrant or certificate no fees ſhall be paid.

Sect. 4. And ſuch juſtices, upon application or complaint made, upon oath, by any maſter or miſtreſs, againſt ſuch apprentice, touching or concerning any miſdemeanour, miſcarriage, or ill behaviour, in ſuch his or her ſervice (which oath ſuch juſtices are hereby impowered

ered to adminiſter) to hear, examine, and determine the ſame, and to puniſh the offender by commitment to the houſe of correction, there to remain and be corrected, and held to hard labour for a reaſonable time, not exceeding one kalendar month, or otherwiſe by diſcharging ſuch apprentice, in manner and form before mentioned.

Sect. 5. Perſons aggrieved by ſuch determination, order, or warrant of ſuch juſtice or juſtices as aforeſaid (ſave and except any order of commitment) he, ſhe, or they may appeal to the next general quarter ſeſſions of the peace to be held for the county, riding, liberty, city, town corporate, or place where ſuch determination or order ſhall be made; which ſaid next general quarter ſeſſions is hereby impowered to hear and finally determine the ſame, and to give and award ſuch coſts to any of the reſpective perſons appellant or reſpondent, as the ſaid ſeſſions ſhall judge reaſonable, not exceeding forty ſhillings; the ſame to be levied by diſtreſs and ſale, in manner before mentioned.

Sect. 6. And no *certiorari* ſhall iſſue or be iſſuable to remove any proceedings whatſoever, had in purſuance of this act, into any of his majeſty's courts of record at *Weſtminſter*.

3. *Who may take, and are compellable to receive and provide for apprentices; of refunding the money given with them, and delivering up their indentures.*

Stat. 5 *Eliz. cap.* 4. *ſect.* 25. Every perſon being an houſholder, and having and uſing half a plough-land in tillage, may take any apprentice above the age of ten years, and under eighteen, to ſerve in huſbandry till twenty-one at the leaſt, or till twenty-four, as the parties can agree.

Sect. 26. Every perſon being an houſholder, and 24 years old at leaſt, dwelling in any city or town corporate, and exerciſing any art, miſtery, or manual occupation there, may retain the ſon of any freeman, not occupying huſbandry, nor being a labourer, and inhabiting in the ſame, or in any other city or town corporate, to ſerve and be bound as an apprentice after the cuſtom and order of the city of *London*, for ſeven years at leaſt, ſo as ſuch apprenticeſhip do not expire before the apprentice ſhall be 24 years of age.

Sect. 27. But no perſon dwelling in any city or town corporate, being a merchant, mercer, draper, goldſmith, ironmonger, imbroiderer, or clothier, ſhall take any apprentice, except he is his ſon, or elſe that the father and mother of ſuch apprentice ſhall have an eſtate of inheritance or freehold of forty ſhillings a year, to be certified under the hands and ſeals of three juſtices where the lands lie, to the mayor of that city or town corporate, and to be inrolled among the records there.

Sect. 28. Every perſon being an houſholder, and 24 years old at the leaſt, and not occupying huſbandry, nor being a labourer, dwelling in any market town not corporate, and exerciſing any art, miſtery, or manual occupation, may have to apprentice the child or children of any other artificer, not occupying huſbandry, nor being a labourer, inhabiting the ſame or any other ſuch market town in the ſame ſhire.

Sect. 29. But no perſon dwelling in any ſuch market town, being a merchant, mercer, draper, goldſmith, ironmonger, or clothier, ſhall take any apprentice except he be his ſon, or elſe that his father and mother ſhall have an eſtate of inheritance or freehold of three pounds, to be certified under the hands and ſeals of three juſtices of the ſhire where the lands lie, to the head officer of ſuch market-town where ſuch apprentice ſhall be taken, there to be inrolled for a record.

Sect. 30. Any perſon uſing the art of a ſmith, wheelwright, plough-wright, mill-wright, carpenter, rough maſon, plaiſterer, ſawyer, lime-burner, brick-maker, bricklayer, tyler, ſlater, helier, tyle-maker, linen weaver, turner, cooper, miller, earthen potter, woollen weaver, weaving houſhold cloth only, fuller, otherwiſe called tucker or walker, burner of oar and wood aſhes, thatcher, or ſhingler, whereſoever he ſhall dwell, may take the ſon

of any perſon as apprentice, albeit his parents have no land.

By the 8 & 9 *W.* 3. *cap.* 30. reciting, That whereas by an act made in the 43 *Eliz.* it is among other things enacted, That it ſhall be lawful for the churchwardens and overſeers of the poor of any pariſh, or the greater part of them, by the aſſent of two juſtices of the peace, whereof one to be of the *quorum*, to bind poor children apprentices where they ſhall ſee convenient; but there being doubts, whether the perſons, to whom ſuch children are to be bound, are compellable to receive ſuch children as apprentices, that law hath failed of its due execution; therefore it is enacted and declared, "That where any poor children ſhall be appointed to be bound apprentices purſuant to the ſaid act, the perſon or perſons, to whom they are ſo appointed to be bound, ſhall receive and provide for them, according to the indenture ſigned and confirmed by the two juſtices of the peace, and alſo execute the other part of the ſaid indentures; and if he or ſhe ſhall refuſe ſo to do, oath being thereof made by one of the churchwardens or overſeers of the poor, before any two of the juſtices of the peace for the county, liberty or riding, he or ſhe ſhall for every ſuch offence, forfeit the ſum of 10l. to be levied by diſtreſs; the ſame to be applied to the uſe of the poor of that pariſh or place where ſuch offence was committed; ſaving always to the perſon to whom any poor child ſhall be appointed to be an apprentice as aforeſaid, if he or ſhe ſhall think themſelves aggrieved thereby, his or her appeal to the next general or quarter ſeſſions of the peace for that county or riding, whoſe order therein ſhall be final, and conclude all parties."

Tho' by the ſtatute 8 & 9 *W.* 3. the maſter is bound under the penalty of 10l. to keep an apprentice bound to him purſuant to the ſtatute 43 *Eliz.* yet if two juſtices bind a poor girl to a merchant, and he appeals to the ſeſſions, where the order is reverſed, it being thought unfit to compel a merchant to take an apprentice; the court of King's Bench, on removing the order before them, may confirm the order of ſeſſions, (as they did in this caſe); for the ſtatute having given an appeal to the ſeſſions, they are made thereby proper judges, whether the perſon be a proper perſon to impoſe an apprentice on or not. 2 *Salk.* 491.

The churchwardens and overſeers need not aver, that the parents were not able to maintain the child, for they have a diſcretionary power by the ſtatute, of determining that. *Comb.* 289.

By the ſtat. 7 *Jac.* 1. *cap.* 3. *ſect.* 2. it is enacted, that money given to be continually employed to put out poor children apprentices, ſhall be employed in corporate towns by the corporations, and in other places by the parſon or vicar, together with the conſtables, churchwardens, and overſeers of the poor, or the moſt part of them; who ſhall have the nomination and placing of ſuch apprentices; and if they ſhall wilfully forbear or refuſe to employ the ſame accordingly, they ſhall forfeit five marks each of them ſo making default, to be divided betwixt the poor of the pariſh and the proſecutor.

Sect. 3. The party receiving money with ſuch an apprentice ſhall give ſecurity by obligation, to repay it at the end of 7 years next enſuing the date of the ſaid obligation, or within three months next after the end of the ſaid ſeven years; and if ſuch apprentice ſhall die within the ſeven years, then within one year after his death; and if the maſter, miſtreſs, or dame, happen to die within the ſeven years, then within one year after their death, ſo as the money may be employed in placing the apprentice with ſome other of the ſame trade, to ſerve out his time, at the diſcretion of the parties truſted as aforeſaid.

Sect. 4. The money ſo given ſhall be employed within three months after the receipt thereof; and if there ſhall not be apt perſons found to be apprentices in the places where it is given, it ſhall be employed in the pariſhes next adjoining by the parties that are truſted with it, in the places where it was ſo given, and there alſo bond ſhall be taken, as is before declared.

Sect. 5. The choice of apprentices ſhall be out of the pooreſt ſort of children, whoſe parents are leaſt able to relieve them; and no ſuch apprentice ſhall be above the age of fifteen years when he or ſhe is firſt bound.

Sect. 6. The parties appointed by this act as aforeſaid in any town or pariſh not corporate, ſhall yearly, in *Eaſter* week, or within one month after *Eaſter*, account before two or more of the next juſtices of the peace. And if there be any obligations, or money remaining in their hands, they ſhall upon ſuch account (or within ten days after) deliver the ſame unto their ſurveyors.

Sect. 7. If any party ſo truſted ſhall break the truſt repoſed in him, miſemploy the ſame money, or do any thing contrary to this act, for which there is not by this act any penalty appointed, the lord chancellor or keeper ſhall upon the petition of any perſon, award a commiſſion to ſuch as he ſhall think fit, to enquire, hear, and determine ſuch offences: And if the commiſſioners ſhall find money ſo miſemployed, they ſhall, in places not corporate, have power to rate and collect it upon the parties ſo offending, or otherwiſe upon the able inhabitants of the city, town, or pariſh ſo in default, as the ſaid commiſſioners, or the greateſt part of them, ſhall think fit, and ſhall return the ſaid commiſſion, together with the manner of executing the ſame, in the Chancery within three months next after ſuch execution thereof.

It was ſaid to be uſual in caſe of apprentices, after they are out of *their time*, to exhibit a bill to put their maſters to ſue their covenants within a certain time, or elſe to *deliver up their indentures*. *Chan. Caſes* 70. *Hill.* 17 & 18 *Car.* 2. *Baker* v. *Shelbury*.

Apprentice being *ill uſed*, brought his bill; decreed that the maſter *deliver up the indentures*, and a *bond* of 100*l.* for his honeſty, and *repay* part of the money given with the apprentice, with full coſts; the apprentice having before had a verdict in the lord mayor's court, and the maſter ordered to provide a new maſter, which he refuſed to do. *Fin. Rep.* 124. *Mich.* 26 *Car.* 2. *Lockley*, widow and executrix of *Lockley*, and *David Lockley* v. *Eldridge*.

Bill by a *merchant* againſt one that was his apprentice, for on *account of goods and money* which he was intruſted with, both *during his apprenticeſhip and after*, as his factor and agent; the defendant pleaded the *ſtatute of limitations* 21 *Jac.* the plea was allowed good as to the goods, *&c.* received during his apprenticeſhip, and till he was *made free*, but not after his apprenticeſhip ended; ſo ordered to anſwer that part of the bill but without coſts. *Fin. Rep.* 370. *Trin.* 30. *Car.* 2. *Fincham* v. *Hobbs*.

The maſter received with the apprentice 250*l.* and *died within two years*, the apprentice having for that time been employed only in inferior affairs; decreed, after debts and ſpecialties paid, that the executors *repay* the 250*l.* as a debt due on ſimple contract, *deducting* after the rate of 20*l. per ann.* for the maintenance of the apprentice during the time he lived with his maſter. *Fin. Rep.* 396. *Mich.* 30 *Car.* 2. *Soam* v. *Bowden* and *Eyles*.

A. placed his ſon clerk to an *attorney*, and gave with him 120*l.* the maſter agrees to return 60*l.* of the money, if the maſter died within a year; the maſter was *ſick* at the time, and of that ſickneſs *died within three weeks*. *Jefferies* C. decreed 100 guineas to be paid back to *A. Vern. Rep.* 460. *pl.* 437. *Newton* v. *Rouſe*.

Indentures of apprenticeſhip were decreed in the mayor's court of *London*, whither the cauſe was ſent back out of Chancery, to be *deliver'd up*, *becauſe not inroll'd*, *tho' the non-inrollment was at the inſtance of the mother*, which could not excuſe the maſter, who had covenanted to inroll the indentures; and altho' the apprentice was bound for 7 years, yet he covenanted to make him free at the end of five years. 2 *Vern.* 492. *pl.* 443. *Hill.* 1704. *Stephenſon* v. *Houlditch*.

A. puts his ſon apprentice to *B.* and gives 1000*l.* *bond for his fidelity*, and at the ſame time *B. covenants with A. to ſee the apprentice make up his caſh once a month* at leaſt. *Per Wright* K. the *meaning* is, that *B.* not only ſee the figures right, but the caſh effectually made up, ſo that *B*'s pretence that the apprentice had inſerted bank-notes, *&c.* as remaining, when he had diſpoſed of them, is no excuſe, and the bond and covenant are as one *agreement*, that the plaintiff *A.* would be anſwerable monthly, provided accounts were taken monthly, and would be *liable but for one month's imbezilment*, and decreed to *A.* to anſwer no more than *B.* proved imbeziled in the firſt month, when the imbezilment began. 2 *Vern.* 518. *pl.* 468. *Montague*, executor of *Ewer* v. *Tidcombe* and *Hoſkings*.

An apothecary *turned away his apprentice for negligence and miſdemeanors* laid to his charge; but the court decreed the maſter to *refund* 30*l. of the money* he had with him, and the rather, becauſe the *indentures were not inrolled*, ſo as the matter was not properly cognizable before the chamberlain of *London*. 2 *Vern.* 64. *pl.* 57. *Trin.* 1688. *Thorman* v. *Abell*.

A *bond* of 50*l.* given by one apprentice to another apprentice for *money won at play*, decreed to be delivered up. 2 *Vern. Rep.* 291. *pl.* 281. *Trin.* 1693. *Woodroff* v. *Farnham*.

4. *Of ſetting up a trade; the neceſſity of ſerving an apprenticeſhip, and what trades are prohibited to be followed within the meaning of the ſtatute* 5 Eliz. *and alſo the offence and puniſhment of following a trade without being qualified.*

At Common law, every perſon might follow what lawful trade he pleaſed; which being inconvenient in many inſtances, and a detriment to the publick, in permitting perſons to exerciſe trades in which they had little or no ſkill or experience; to prevent which miſchief, and the better to train up and enure perſons to labour and induſtry from their youth, and thereby make them more ſkilful and expert, the following ſtatute was made. 11 *Co.* 53. 2 *Bulſt.* 191. *Skin.* 133. 1 *Sand.* 312.

It is enacted by the 5 *Eliz. cap.* 4. *ſect.* 31. "That it ſhall not be lawful to any perſon or perſons, other than ſuch as now do lawfully uſe or exerciſe any art, miſtery or manual occupation, to ſet up, occupy, uſe or exerciſe any craft, miſtery or occupation, now uſed or occupied within the realm of *England* or *Wales*, except he ſhall have been brought up therein ſeven years, at the leaſt, as an apprentice, in manner and form aboveſaid; nor to ſet any perſon on work in ſuch miſtery, art or occupation, being not a workman at this day, except he ſhall have been apprentice, as is aforeſaid; or elſe having ſerved as an apprentice, as is aforeſaid, ſhall or will become a journeyman, or hired by the year; upon pain that every perſon willingly offending, or doing the contrary, ſhall forfeit and loſe for every default forty ſhillings for every month."

It hath been ruled, that there are many trades within the general words and equity of this act, beſides thoſe which are particularly enumerated therein; yet it ſeems agreed, and hath frequently been adjudged, that in every indictment, *&c.* it muſt be alledged, that it was a trade at the time of making the ſtatute, for the words thereof are, *any craft, miſtery or occupation, now uſed, &c.* from whence it ſeems to follow, that a new manufacture, which to all other purpoſes may be called a trade, is yet not a trade within this ſtatute. 2 *Salk.* 611. *Palm.* 528. 1 *Sid.* 175.

Alſo it ſeems agreed, that the act only extends to ſuch trades as imply miſtery and craft, and require ſkill and experience; that therefore merchants, huſbandmen, gardeners, *&c.* are not within the ſtatute; and on this foundation it hath been held, that a hemp-dreſſer is not within the ſtatute, as not requiring much learning or ſkill, and being what every huſbandman doth uſe for his neceſſary occaſions. 8 *Co.* 130. 2 *Bulſt.* 190. *Cro. Car.* 499.

It is ſaid in 2 *Bulſt.* 186. to have been adjudged, that an upholſter is not a trade within the ſtatute, as not requiring ſkill; but this hath been contradicted by a later reſolution, [2 *Lev.* 243.] wherein it is ſaid to have been reſolved, that a barber and taylor were trades within the ſtatute.

Alſo it is ſaid in 2 *Bulſt.* 190. that a pippin-monger is not within the ſtatute, becauſe there is no miſtery in buying of apples, and all his ſkill is in ſo laying his apples as to keep them from rotting; but this likewiſe hath been doubted

doubted in a late caſe, [2 *Lev.* 206.] where it was debated, whether the uſing of the trade of a coſtermonger or fruiterer be within the ſtatute; but there is no reſolution.

It is clearly agreed, that the following the common trade of a brewer, baker, or cook, is within the ſtatute, as unſkilfulneſs herein may be very prejudicial to the lives and healths of his majeſty's ſubjects; but it is at the ſame time agreed, that the exerciſing of any of theſe trades in a man's own houſe or family, or in a private perſon's houſe, is not within the reſtraint of the ſtatute. 11. *Co.* 54. *a. Cro. Car.* 499. *Hob.* 183, 211. *Moor* 886. 8 *Co.* 129. *Palm.* 542. *Lit. Rep.* 251. *Bridg.* 141.

On motion to quaſh an indictment for uſing the trade of a ſellmonger, it was urged, that this was a buſineſs which required no ſkill, but that it was only to pull the wooll from the ſkin, but *per Holt* Ch. Juſtice; If in the indictment it be averred to be a trade at the time of making the ſtatute, we will not quaſh it; for whether it was a trade then or no, or whether any ſkill be requiſite to the exerciſe of it, is a matter of fact proper for the trial of a jury. 2 *Salk.* 611.

So the court refuſed to quaſh an indictment for uſing the trade of a ſeamſtreſs, not having ſerved as apprentice; becauſe it was ſet forth in the indictment to be a trade in *England* at the time of making the act; ſo that if this trade of a ſeamſtreſs be not within the act, defendant will have the advantage of it on the trial. 2 *Salk.* 611.

But it is ſaid, that the court had quaſhed an indictment for following the trade of a merchant taylor, becauſe they did not know what was meant by it, and it ſeemed to them nonſenſe and unintelligible. 2 *Salk.* 611.

It ſeems agreed, that the following a trade within the ſtatute, muſt be ſuch whereby the party gets his livelihood; and that therefore the uſing of the trade of a brewer, baker, cook, taylor, *&c.* in one's own houſe, or in the private family of another, without any reward, is not within the ſtatute. 11 *Co.* 54 *Hob.* 183.

But in an action for uſing the trade of a clothier, not having been apprentice to that trade; where by ſpecial verdict it was found, that *A.* was a *Turkey* merchant, and exported great quantities of *Engliſh* cloth into the *Levant*; and for this purpoſe *only* he hired ſeveral cloth-workers, who had been all apprentices to the ſame trade, and kept alſo a maſter workman of that trade to inſpect their work; and that by thoſe men he made great quantities of *Engliſh* cloth, all which he tranſported; and that he the ſaid *A.* kept a dye-houſe, and hired men of that trade to dye his own cloths, and no other: It was reſolved to be within the reſtraint of the ſtatute, tho' the cloth was made for his own merchandize only, and tho' made by perſons who had been apprentices; for here they are not traders but hirelings, and he is the tradeſman who hath all the profit, as *A.* in this caſe has. *Carth.* 162. 2 *Salk.* 610. 3 *Mod.* 313.

So if a man keeps journeymen ſhoemakers to make ſhoes for tranſportation, this is an exerciſing the trade of a ſhoemaker within the ſtatute. *Carth.* 164.

But it hath been held, that this ſtatute doth not reſtrain a man from uſing ſeveral trades, ſo as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little towns and villages, becauſe their maſters kept the ſame mixed trades there before. *Carth.* 163.

If a coachmaker keeps ſervants to make his wheels, and workmen to curry his own leather, this is againſt the ſtatute, becauſe it is he only who receives all the profits of the ſeveral trades, and the wheelwright and currier are but his ſervants. *Carth.* 163, 164.

So in a caſe upon this ſtatute, proſecuted by the horners company againſt a combmaker in *London*, for uſing the trade of a horner, *viz.* in preſſing horn for making combs, which preſſing did not belong to their trade; and this was adjudged a breach of the ſtatute, for a horner is a particular trade, and a very ancient company in *London*. *Carth.* 162.

It hath been reſolved, that there is no occaſion for any actual binding, but that the following a trade for ſeven years, is a ſufficient qualification within the ſtatute. 1 *Salk.* 67. 2 *Salk.* 613.

So where an action was brought on this ſtatute, and upon Not guilty pleaded, it appeared that the defendant's father kept the ſame trade, and that he the defendant for ſeveral years had been employed by his father therein; and it was held, that he might lawfully uſe that trade, for that he had been *quaſi* an apprentice to it, which was ſufficient to ſatisfy the ſtatute. *Carth.* 163.

So if a man lives with another, that uſes a trade which the other is not qualified for uſing, ſeven years, he may ſet up the trade as well as if he had lived with one never ſo well qualified. *Caſ. in Law and Eq.* 71.

Alſo it hath been held, that the ſervice need not be in any particular country; and therefore an indictment for uſing the trade of a taylor, not having ſerved an apprenticeſhip ſeven years, was quaſhed, becauſe only ſaid, not having ſerved as an apprentice *infra regnum Angliæ aut Walliam*; for it may be he did ſo beyond ſea; and if it were any where it ſuffices. 1 *Salk.* 67.

So it hath been held, that ſerving five years to a trade out of *England* and two in *England*, is ſufficient to ſatisfy the ſtatute; but that there muſt be a ſervice of a full time either in *England* or out of *England*; and therefore ſerving five years in any country, where by the law of the country more is not required, will not qualify a man to uſe the trade in *England*. *Ca. in Law and Eq.* 70.

By the ſtatute 31 *Eliz. cap.* 5. *ſect.* 7. it is enacted, "That all ſuits for uſing a trade without having been brought up in it, ſhall be ſued and proſecuted in the general quarter ſeſſions of the peace, or aſſiſes in the ſame county where the offence ſhall be commited, or otherwiſe inquired of, heard and determined in the aſſiſes, or general quarter ſeſſions of the peace in the ſame county where ſuch offence ſhall be committed, or in the leet within which it ſhall happen, and not in any wiſe out of the ſame county where ſuch offence ſhall happen or be committed."

In the conſtruction of this ſtatute it hath been held, that it reſtrains not a ſuit in the King's Bench or Exchequer, for ſuch offence happening in the ſame county where theſe courts are ſitting; for the negative words of the ſtatute are not, that ſuch ſuits ſhall not be brought in any other court, but that they ſhall not be brought in any other county; and the prerogative of theſe high courts ſhall not be reſtrained without expreſs words. *Cro. Jac.* 178. *Hob.* 184. 1 *Salk.* 373.

But where the offence is in a different county, ſuch ſuits in theſe, or any other cou.ts out of the proper county, ſeem to be within the expreſs words of the ſtatute. *Hob.* 184, 327. *Cro. Jac.* 85.

Yet it hath been doubted, whether an action of debt, or information in the courts of *Weſtminſter-Hall*, were not to be conſtrued to be out of the meaning of the ſtatute; but it ſeems to be now ſettled, in the conſtruction of the ſtatute 21 *Jac.* 1. *cap.* 4. which provides, that no action of debt or information, or other ſuit whatever, can be brought in any court of *Weſtminſter-Hall* on any penal ſtatute, made before the ſaid ſtatute of 21 *Jac.* 1. for any offence therein excepted, for which the offender may be proſecuted in the country, unleſs ſuch offence ſhall be committed in the ſame county in which the court ſhall ſit. 1 *Sid.* 303. 1 *Keb.* 584. 2 *Lev.* 204. 1 *Salk.* 372. 5 *Mod.* 425.

But theſe ſtatutes hinder not the removal of any indictment into the *King's Bench* by *certiorari*, after which it may be tried there, or in the county by *niſi prius* 1 *Jon.* 193.

It hath been held, that quarter ſeſſions of boroughs may receive indictments on the 5 *Eliz.* as well as thoſe of the county at large, in that there is no danger of oppreſſion, becauſe a *certiorari* lies. 6 *Mod.* 220. 1 *Salk.* 317.

The plaintiff, in an action on this ſtatute 5 *Eliz.* muſt alledge in his declaration, that the defendant did not uſe the trade at the time of making the ſtatute; for tho' it cannot be preſumed that he did, after ſuch a length of time, yet as it is, the ſtatute makes him liable, and ſubjects him to a penalty; the proſecutor muſt ſhew that he has tranſgreſſed the law, and that he is intitled to his action. 1 *Sid.* 302.

It has been held, that an indictment againſt two or more, for following a joint-trade, without having ſerved a ſeven years apprenticeſhip required by the ſtatute, is naught, in that it would be abſurd to charge them jointly, becauſe the offence of each defendant ariſes from the defect peculiar to himſelf. 1 *Rol. Abr.* 8. 5 *Mod.* 180. 1 *Salk.* 382.

5. *Of aſſigning apprentices, making them free, and how to be taken care of if their maſters happen to die.*

The placing out an apprentice to a particular perſon, ariſes from an eſteem, and a good opinion of the party to whom he is ſo committed; that he will not only inſtruct him in his trade or calling, but will alſo be careful of his health and ſafety; and therefore the law has made it ſuch a perſonal truſt or confidence, which the maſter cannot aſſign, or transfer over to another; he muſt alſo have him under his own care and inſpection, and cannot ſend him abroad, tho' under the pretence of improvement; unleſs by expreſs agreement, and unleſs the nature of his buſineſs requires it, and implies ſuch a power as that of a merchant-adventurer, ſailor, *&c.* are ſaid to do; therefore it hath been adjudged, that a ſurgeon ſending his apprentice a voyage to the *Eaſt-Indies*, tho' in company with other ſurgeons, and the better to inſtruct him in the art of ſurgery, was a breach of his covenant, whereby he bound himſelf to retain, teach, keep and employ the ſaid apprentice in his own houſe and ſervice, *&c.* *Hob.* 134.

But by the cuſtom of *London*, a freeman of *London* may turn over his apprentice to another maſter, being a freeman; and ſuch ſecond maſter ſhall have the ſame benefit of the apprentice's covenants, as ſhall the apprentice of the covenants on the ſide of the maſter, as if he had been originally bound to him. *March* 3. 1 *Keb.* 250.

But it hath been held, that tho' juſtices of peace have a juriſdiction of diſcharging apprentices, an may bind them to other maſters, that they cannot turn them over; and therefore an order that an apprentice, whoſe maſter was dead, ſhould ſerve the remainder of his time with his maſter's widow's ſecond huſband, was quaſhed; becauſe the juſtices have nothing to do about turning over an apprentice; and that tho' he applied to them, that could not give them a juriſdiction. *Comb.* 324.

Order returned on a *certiorari:* It is reſolved by the juſtices at the ſeſſions, where a perſon was bound an apprentice to *Barnes* by the pariſh officers, and *Barnes* had aſſigned him to another, that the aſſignment is void, and they directed *Barnes* to take his apprentice again. But by the court; The ſeſſions had no power to judge of the validity of a deed, or to hinder a man from aſſigning his apprentice; the covenant to provide for him is well performed, if the perſon to whom he is bound aſſigns him to another to provide for him; wherefore the order was quaſhed. *Foley* 155. *Strange* 48.

The juriſdiction of the juſtices extends no farther than to compel the maſter to take care of his apprentice; but in what manner he does it, whether in his own houſe or otherwiſe, is nothing to them; but if the aſſignee of the apprentice doth not provide for him, the firſt maſter may be compelled to do it, and he may take his remedy over. *Seſſ. Ca. vol.* 1. 110.

Wherever by the cuſtom of any town, borough, *&c.* the ſerving an apprenticeſhip intitles the party to his freedom, the perſons to admit him refuſing, without ſufficient cauſe, may be compelled thereto by *mandamus.* 1 *Sid.* 107. 2 *Show.* 154.

Therefore, whereto a *mandamus* to the mayor, *&c.* of *Oxford*, to admit a perſon to be free of that city, who had ſerved ſeven years apprenticeſhip; to which it was returned, that he put himſelf apprentice ſeven years according to the cuſtom, and that he covenanted to ſerve ſeven years, and not to marry within the time, and that within the firſt two years he married, and ſo broke his covenant; and that his maſter accepted of him to ſerve for the reſidue of the time, which he did, but not as an apprentice, but rather as a journeyman; and tho' it was urged, that by his breach of covenant he loſt his right of freedom, yet the court held the contrary; and that tho' an action of covenant might lie, yet that it was no loſs of his freedom; and therefore awarded a peremptory *mandamus* to admit him. 1 *Lev.* 91. 1 *Sid.* 107. 1 *Keb.* 458, 470, 659.

So where a *mandamus* to the mayor, *&c.* of *Lincoln*, to admit *A.* to his freedom, he having ſerved an apprenticeſhip there; and the mayor returned, that *A.* (being a quaker) refuſed to take the uſual oath, according to the cuſtom of the ſaid city, but offered to take the ſolemn affirmation and declaration; and the court held this ſufficient to intitle him to his freedom, within the ſtatute 7 & 8 *W.* 3. *cap.* 34. 5 *Mod.* 402.

Alſo it is frequent for maſters to bind themſelves to make their apprentices free at the end of their time, which they perform according to their covenants. 6 *Mod.* 227, 260.

It ſeems agreed, that if a man be bound to inſtruct an apprentice in a trade for ſeven years, and the maſter dies, that the condition is diſpenſed with, being a thing perſonal; but if he be bound further, that in the mean time he will find him in meat, drink, and cloathing and other neceſſaries, here the death of the maſter doth not diſpenſe with the condition, but his executors ſhall be bound to perform it, as far as they have aſſets. 1 *Sid.* 216. 1 *Keb.* 761, 820. 1 *Lev.* 177.

But if a perſon is bound apprentice by a juſtice of peace, and the maſter happens to die before the term expired, the juſtices have no power to oblige his executor, by their order, to receive ſuch apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading *plene adminiſtravit*, which he may do, in caſe covenant be brought againſt him, and muſt maintain the apprentice, whether he hath aſſets or not. *Carth.* 231. 1 *Salk.* 66. 1 *Show.* 405.

But it is ſaid, that in this caſe of the maſter's dying, by the cuſtom of *London* the executor muſt put the apprentice to another maſter of the ſame trade. 1 *Salk.* 66. *Per. Holt.* Ch. J.

In debt on bond, conditioned for *Matthias Anderſon*'s performance of the covenants in an indenture of apprenticeſhip, whereby he was bound to the plaintiff's teſtator, who was a mariner: the defendant pleaded, that *Anderſon* ſerved faithfully to the death of the teſtator: the plaintiff replied, that ſince the death of the teſtator, *Anderſon* had abſented from her ſervice: to which there was a demurrer. And after argument at bar, *Lee* Ch. J. delivered the reſolution of the court, *viz.* that they were all of opinion, the defendant ſhould have judgment, and that the executrix could maintain no ſuch action; the binding was to the *man*, to learn *his* art, and ſerve *him*, without any mention of executrix. And as the words are confined, ſo is the nature of the contract; for it is *fiduciary*, and the apprentice is bound from a perſonal knowledge of the integrity and ability of the maſter. *H.* 8 *Ann. Horne* and *Blake.* An award that an apprentice ſhould be aſſigned, was held void; unleſs there was a cuſtom, or the concurrence of the apprentice. And they held, it was not material, that according to *Cro. Eliz.* 553. the aſſets were liable on the maſter's covenant to maintain. Therefore judgment was given for the defendant. *Strange* 1266.

Note, the words in *Cro. Eliz.* 553 are theſe: A covenant lies againſt an executor in every caſe, altho' he be not named; unleſs it be ſuch a covenant as is to be performed by the perſon of the teſtator, which they cannot perform.

But in the caſe of *K.* and *Eaſt-Bridgeford*, in *Trin.* 12 *Geo.* 2. upon a ſpecial order it was ſtated, that an apprentice upon the death of his maſter, was with his own conſent turned over by the widow (who had taken no adminiſtration) to another maſter whom he ſerved. And the court held it a good ſettlement in the pariſh, within the reaſon of thoſe caſes, where an apprentice was bound to a perſon in one pariſh, but with the conſent of his maſter ſerved with another perſon in another pariſh, and there gained a ſettlement. *Strange* 1155.

6. *Of*

6. *Of offences committed by apprentices.*

At Common law, a ſervant or apprentice, without any regard to age, may be guilty of felony in felonioufly taking away the goods of their maſter, tho' they were goods under their charge, as a ſhepherd, butler, &c. and may this day for any ſuch offence be indicted, as for felony at Common law; but at Common law, if a man had delivered goods to his ſervant to keep, or carry for him, and he carried them away *animo furandi*; this was conſidered only a breach of truſt, but not felony. 1 *Hale's Hiſt. P. C.* 505, 666.

But now by the ſtatute of 21 *H.* 8. *cap.* 7. it is enacted, "That all and ſingular ſervants, to whom any caſkets, jewels, money, goods or chattles by his or their maſters or miſtreſſes ſhall from henceforth be delivered to keep, that if any ſuch ſervant or ſervants withdraw themſelves from their maſters or miſtreſſes, and go away with caſkets, jewels, money, goods or chattles, or any part thereof, to the intent to ſteal the ſame, and defraud his or their maſters or miſtreſſes thereof, contrary to the truſt and confidence to him or them put by his or their maſters or miſtreſſes, or elſe being in the ſervice of his or their maſters or miſtreſſes, without any aſſent or commandment of his maſter or miſtreſs, imbezil the ſame caſkets, jewels, money, goods or chattles or any part thereof, or otherwiſe convert the ſame to his own uſe, with like purpoſe to ſteal it; that if the ſaid caſket, jewel, money, goods or chattles, that any ſuch ſervant ſhall go away with, or which he ſhall imbezil, with purpoſe to ſteal as aforeſaid, be of the value 40*l.* or above, that then the ſame falſe, fraudulent, or untrue act and demeanor ſhall from henceforth be deemed and adjudged felony, &c. provided it extend not to apprentices, nor to any perſon under the age of eighteen years; but every ſuch apprentice, or perſon within that age doing that act, ſhall be, and ſtand in the like caſe, as they were before the making this act.

By the act of 27 *H.* 8. *cap.* 17. Clergy was taken away in this caſe, if the indictment were laid ſpecially upon the act of 21 *H.* 8. and purſuant to the ſame, and by the act 28 *H.* 8. *cap.* 2. this act of 21 *H.* 8. was made perpetual; but by the act of 1 *Ed.* 6. *cap.* 12. theſe acts were both repealed; but again, by the act of 5 *Eliz. cap.* 10. this act of 27 *H.* 8. was re-enacted and revived; but it did not revive the act of 27 *H.* 8. for taking away clergy. But now by 12 *Ann. cap.* 7. clergy in ſuch caſe is taken from facts committed in any houſe or out-houſe, except as to apprentices under the age of fifteen years robbing their maſters 1 *Hale's P. C.* 666, 667.

In the conſtruction of this ſtatute the following opinions have been holden.

1. That it extends only to ſuch as were ſervants to the owner of the goods, both at the time they were delivered, and alſo at the time when they were ſtolen. 1 *Haw. P. C.* 92.

2. That it is ſtrictly confined to ſuch goods as are delivered to keep; and therefore that a receiver, who having received his maſter's rents runs away with them, or a ſervant, who being intruſted to ſell goods, or to receive money due on a bond, ſells the goods, &c. and departs with the money, is not within the ſtatute; but that a ſervant who receives his maſter's goods from another ſervant, to keep for the maſter, is as much guilty as if he had received them from the maſter's own hands; becauſe ſuch a delivery is looked upon as a delivery by the maſter. *Dyer* 5. *pl.* 2, 3. 3 *Inſt.* 105. 1 *Hawk. P. C.* 92.

3. That it includes not the waſting or conſuming of goods, howſoever willful it may be; nor the taking away of an obligation, or another bare *choſe* in action. 1 *Hawk. P. C.* 92.

4. That it extends not to the taking of ſuch things, whereof the actual property is not in the maſter at the time; and therefore, that if a ſervant having money or corn, &c. delivered to him, melt down the money of his own head, without the command of his maſter, into a piece of plate, or turn the corn into malt, and then run away with them, that he is not within the ſtatute; becauſe the property of theſe things is ſo far changed, by altering them in ſuch a manner, that they cannot be known again, and the maſter cannot afterwards take them, without being a treſpaſſer; but it is agreed, that if a ſervant make a ſuit of clothes of cloth, or a pair of ſhoes of leather, delivered to him by the maſter, and then he run away with them, that he is within the ſtatute; becauſe the property is no way altered; and even in the firſt caſe *Hawkins* ſeems to be of opinion, that the taking of the plate and malt is within the ſtatute; and the whole act of the ſervant, taken together, ſhould be deemed a converſion of the maſter's goods to his own uſe, with an intent to ſteal them, which brings it within the expreſs letter of the ſtatute; and on which foundation it hath been reſolved, that a ſervant who changes his maſter's money from ſilver to gold, and then runs away with it, is within the ſtatute. *Crompt.* 50. *Dalt. c.* 102. 1 *Hawk. P. C.* 92.

7. *Settlement of apprentices.*

By *ſtat.* 13 & 14 *Car.* 2. *c.* 12. On complaint by the churchwardens or overſeers within 40 days after any perſon ſhall come to ſettle in any pariſh, on any tenement, under 10*l.* a year; two juſtices (one of whom to be of the *quorum*) may remove him to the place where he was laſt legally ſettled, either as a native, houſholder, ſojourner, apprentice or ſervant, for the ſpace of 40 days at the leaſt.

By the *ſtat.* 1 *Jac.* 2. *c.* 17. the ſaid 40 days ſhall be reckoned not from the time of his coming to inhabit, but from the time of his delivering notice in writing of the houſe of his abode, and the number of his family, to one of the churchwardens or overſeers of the poor of the pariſh to which they ſhall remove.

And by the ſaid ſtatute of 3 & 4 *Will. & M. c.* 11. *ſect.* 8. if any perſon ſhall be bound an apprentice by indenture, and inhabit in any town or pariſh, ſuch binding and inhabitation ſhall be adjudged a good ſettlement, though no ſuch notice in writing be delivered and publiſhed.

By ſtatute 12 *Ann. ſt.* 1. *c.* 18. *ſect.* 2. if any perſon ſhall be an apprentice bound by indenture, to any perſon reſiding under a certificate, in any pariſh, townſhip, or place, and not afterwards having gained a legal ſettlement in ſuch pariſh, townſhip or place; ſuch apprentice, by virtue of ſuch apprenticeſhip, indenture or binding, ſhall not gain any ſettlement in ſuch pariſh, townſhip or place; but every ſuch apprentice ſhall have his ſettlement in ſuch pariſh, townſhip, or place, as if he had not been bound apprentice.

A. puts *B.* apprentice to *C.* but *B. is no party to the deed*; *B.* continued a year with *C.* adjudged, that this makes no ſettlement in the pariſh *C.* is of; becauſe 'twas no ſervice, and *B.* was no more than a boarder there for his education, which is no ſervice to make a ſettlement. 2 *Salk.* 479.

Miſſerden ſent *J. H.* his wife and children to *Pauſwick*, and the ſeſſions on the appeal diſcharged the order; then the ſame perſons were ſent by another order to *Brimſfield*, as the place of their birth; *Brimsfield* appealed, and the ſeſſions order recited the whole matter of fact; which was, that *J. H. was an apprentice by deed, to one J. S. a butcher, and there was a parol agreement to live one fortnight at his father's houſe, and another fortnight at his maſter's.* The order took notice, that he did not live 40 days at one time in one place, but concluded, that he was ſettled at *Pauſwick*, different to the former ſeſſions order. It was moved to quaſh the ſeſſions order, it being on an erroneous notion, and the concluſion will not warrant the premiſſes; for the ſtatute ſays there muſt be an inhabitancy as well as an apprenticeſhip for 40 days at leaſt; the court was of opinion to quaſh the ſeſſions order, and a rule was made to ſhew cauſe the firſt day of the next term. *Ca. of Settlements* 63. *pl.* 85.

A poor child being bound apprentice at *A.* was aſſigned over to another maſter that lived in *B.* held he ſhould gain a ſettlement at *B.* where his ſecond maſter lived. 1 *Salk.* 68. *pl.* 7. *Mich.* 13. *W.* 3. *B. R. Caſtor* v. *Aicles pariſh.*

The *ſon was bound an apprentice to his father*, and *the father gave up his indenture* to the ſon, *and bound him out to a ſervice into another pariſh for a year*, where he ſerved, *but did not cancel the indenture*, and becoming poor, the juſtices ordered him laſt legally ſettled in the pariſh where the father lived, becauſe the indenture being ſtill in force, his apprenticeſhip continued; *per cur.* The indenture not being cancelled, the obligation of the apprentice continues; and if the father ſhould get the indenture into his hands again uncancelled, and ſue the ſon thereupon, the aforeſaid agreement would not be a good plea for the ſon. 6 *Mod.* 190, 191.

Apprentice may *gain a ſettlement* by ſerving a lodger, tho' the maſter has no ſettlement there. 2 *Salk.* 553. *pl.* 21. *Hil.* 4 *Ann. B. R. Pariſh of St. Bride's* v. *St. Saviour's.*

B. was bound apprentice *for four years to J. S. and lived out theſe four years at St. Bride's* with him; *J. S. was only a lodger, and had no ſettlement there*, and the court held the apprentice was well ſettled at St. *Bride's*; for he was not a perſon removable, nor does his ſettlement depend on his maſter, as that of a wife on her huſband for a ſettlement, but he gains a ſettlement for himſelf within 14 *Car.* 2. *by* 40 *days inhabitation*; and ſo of a hired ſervant. 2 *Salk.* 533.

Where a perſon is bound apprentice by indenture, wherever this *apprentice continues* 40 *days in the ſervice* of his maſter or miſtreſs, there ſuch apprentice gains a ſettlement; and where any perſon ſerves the laſt 40 days of his apprenticeſhip, that is the place of his laſt legal ſettlement; and ſo it is likewiſe of an hired ſervant. *Ca. of Settlements* 58.

A. *removed by certificate from* B. *to* C. *takes an apprentice*, who ſerves out his time at *C.* and lives two years, cannot be removed with his maſter. 11 *Mod.* 204.

A gardener took an apprentice, but having no work for him, made an agreement with a man who lived in another pariſh, that his apprentice ſhould work with him for wages, which he accordingly did, and the maſter had the wages. *Powis* J. was of opinion at *Dorcheſter* aſſizes, *Lent* 1709, that this apprentice did not gain a ſettlement by this ſervice in the pariſh where he worked; this matter coming in queſtion before him upon a caſe ſtated. 3 *Vin.* 29. cites *MS. Caſes.*

A. was bound *apprentice to one* D. *who was an inhabitant and ſettled in All Saints*, and there *dwelt with him above a year*, the *man removed to* W. *and lived there five years, but gained no ſettlement.* The queſtion was upon a ſpecial order, whether the apprentice was to be ſettled where he was bound and lived the firſt year with his maſter, or where he lived the laſt five years with his maſter; and *per cur.* whether the maſter has a ſettlement or not, the apprentice gains a ſettlement by his ſervice. 3 *Vin.* 29. *MS. Caſes, Trin.* 9 *Ann. B. R.*

If an *apprentice* be *bound to one who has no right to take an apprentice*, yet the apprentice will gain a ſettlement under ſuch an indenture by his ſervice. 3 *Vin.* 29. *MS. Caſes, Trin.* 9 *Ann. B. R.*

A perſon was bound *apprentice to a cobler, who lived in one pariſh, and his ſtall was in another*; the *apprentice lived with his father in a third pariſh*; and it was held *per cur.* that he gained no ſettlement as an apprentice. *Caſes of Settlements* 80. *pl.* 106. *Paſch.* 1717. *the pariſh of St. Olave Jury's* caſe.

One *G.* was an *apprentice to J. S. a ſeafaring man*; who lived in the pariſh of St. *Olave Jury*; the apprentice *lived with his maſter three months, but always on ſhip board out of the pariſh. Prat* J. ſaid it does not appear that he was ſent by his maſter to *watch on ſhip board*; if it had, it had been on his maſter's buſineſs, and continuing in his ſervice, and doing his duty. The court adjudged he was not ſettled in the pariſh; for there muſt not only be an apprenticeſhip, but a reſidency. And a man is deemed to be reſident where he lodges. *Caſes of Settlements* 79. *pl.* 105.

One born in *A.* is put apprentice in *B.* where he ſerved two years, and then his *maſter died*, when he went back to *A.* and married, had children, and died; the wife and children ſhall be ſent back to *B.* 8 *Mod.* 169. 9 *Geo.* 1. *St. Giles in Reading* v. *Everſly Blackwater.*

Where one is bound apprentice by *indenture*, it cannot be *diſcharged* but by deed, or by ſeſſions, and a *hiring after* he is bound, or any conſequences ariſing upon ſuch hiring, are intirely void whilſt the indenture ſubſiſts, and till it is defeaſanced; for when an apprentice ſerves 40 days, by virtue of the indenture, he cannot gain *another ſettlement*, tho' his *maſter conſents*, becauſe he had a ſettlement by the ſervice under the indenture. Admitted *per cur.* 8 *Mod.* 236. *Paſch.* 10 *Geo. Buckington pariſh* v. *Sevington.*

One *J. W.* was bound apprentice to *J. P.* of St. *John's* pariſh in the *Devizes*, hoſier. The ſaid *J. P.* having a ſmall houſe, *the father was to find meat, drink, waſhing, and lodging, the maſter allowing* 2*s.* 6*d. per week*; the *apprentice never lodg'd with his maſter in St.* John's *pariſh, but with his father in* Biſhops Cannings. Held that the apprentice gained no ſettlement in St. *John's* pariſh by virtue of the apprenticeſhip with his maſter, in regard he never lodged in the pariſh for the ſpace of 40 days. *Caſes of Settlements* 118. *pl.* 159. *Trin.* 1724. *B. R. the chapelry of St. James in the pariſh of Biſhops Cannings* v. *Inhabitants of Devizes in the county of Wilts.*

A. bound apprentice to a butcher in *Cirenceſter*, *lived with his father for the firſt ſix years, and then came and lived with his maſter up and down for three quarters of a year.* It was objected, that it did not appear that he lived 40 days with his maſter; *per cur.* It is ſet forth that he was up and down three quarters of a year with his maſter; ſo there is room to intend he was reſident 40 days. *Caſes of Settlements* 118. *pl.* 159. *Trin.* 1724. *B. R.* In caſe of the chapelry of St. *James's* in the pariſh of *Biſhop Cannings* v. Inhabitants of St. *John's* in the *Devizes* in the county of *Wilts*, cites *The King* v. *Cirenceſter* (inhabitants)

A. was bound apprentice to *B.* who lived in St. *Olave's*, afterwards *A. by his maſter's conſent, lived with another perſon in Allhallows.* And *per cur.* He gained a ſettlement in the laſt place; for a perſon may ſerve his maſter in another place or pariſh, and although he ſerves another man, yet it is by conſent of his maſter, and the benefit accrues to the maſter. *Caſes of Settlements* 114. *pl.* 153. *The pariſh of St. Olaves Southwark* v. *Allhallows.*

A perſon was bound *apprentice to a gentleman, who made uſe of him as his huntſmen, and lived with him three quarters of a year, and then ran away*; *per cur.* Here is a living for 40 days, and ſo the perſon gains a ſettlement. It was objected, that he ſerved a gentleman, and conſequently of no trade; but *per cur.* He is put as an apprentice, and the maſter may make uſe of him in what manner he pleaſes, and therefore held a ſettlement accordingly. *Caſes of Settlements* 122. *pl.* 166. *Trin.* 1726. *The King* v. *The inhabitants of Whitchurch.*

J. S. agreed to be put out apprentice to *J. N.* and was bound for ſeven years, and 20*s.* was paid *J. S's* maſter; after *J. S.* had *ſerved three years his maſter died.* The *indentures* were *not ſtamped, nor the duty paid*; on an order of ſeſſions that it was a ſettlement, and a reference to the judges of aſſize. *Forteſcue* J. was of the ſame opinion, but it was moved to quaſh it, becauſe 3 & 4 *W. & M. ſays apprentices bound by indenture ſhall be intitled to a ſettlement*, and this indenture being not ſtamped, is as no indenture by 8 *Anne*, and ſo held the court. 4 *Geo.* 2. *B. R. Fitzgib.* 167. *Anon.*

Upon the appeal of *St. George's* againſt an order of two juſtices, whereby *Alice Wheeler*, a ſingle woman, who was likely to become chargeable to *St. James's*, *Weſtminſter*, was removed from thence to *St. George's*, as the place of her laſt legal ſettlement; and the ſeſſions ſtate the matter ſpecially, and the ſaid *A. W.* was bound by indenture a pariſh apprentice in the ſaid pariſh of *St. George*, to *George Leſter*, where ſhe lived and gained a ſettlement, by ſerving the ſpace of 40 days under the ſaid indenture; and that afterwards, and during the time of her apprenticeſhip, ſhe was by parol agreement hired out by the ſaid maſter *G. L.* to one *J. Hall* in the pariſh of *St. Mary le Bone*, and there lived and lodged above 40 days, *viz.* for the ſpace of one year and upwards, the ſaid apprenticeſhip continuing; that the ſaid *G. L.* her maſter received her wages from the ſaid *J. H.* and found her clothes; and on debate the queſtion was, whether the ſaid *A. W.* by her reſidence above 40 days in *St. Mary le Bone*,

Bone, gained a ſettlement in that pariſh or not? The ſeſſions held, that the laſt ſervice gained her no ſettlement, and conſequently ſhe was ſettled at *St. George*'s. But the court quaſhed the order, being of opinion, that there was no difference between the maſter hiring of her out, and her own act; and that it was like the caſe of a binding to *A.* and ſerving *B.* where it has been always held to be a ſettlement in *B*'s pariſh. So the order of ſeſſions was quaſhed. *Seſſ. Ca. vol.* 2. *caſe* 138. 2 *Strange* 1001. *Mich.* 8 *Geo.* 2.

Upon a ſpecial order of ſeſſions the caſe was ſtated, that an apprentice was bound to *A.* in one pariſh, but by agreement ſerved *B.* in another pariſh, and the ſeſſions ſettled him with *B.* and by the court; He gains a ſettlement in the laſt place; for a perſon may ſerve his maſter in another pariſh or place; and altho' he ſerves another man, yet it is by conſent of his maſter, and the benefit accrues to his maſter. *Stran.* 554. *Caſes of S.* 153. *Trin.* 9. *Geo.* 1. Between the pariſhes of *Allhallows on the Wall* and *St. Olave* in *Surry*.

Parker Ch. J. delivered the reſolution of the court: This is an order for the removal of one *Ferrer* from the pariſh of *Holy Trinity* to *Shoreditch:* by which it appears, that *Ferrer* was bound an apprentice to one *Truby* with intent that he ſhould ſerve *Green*; which he did for 3 years. And it has been inſiſted, that he being bound to *Truby*, who lives in *Trinity* pariſh, his ſettlement is there, and not in *Shoreditch* where his ſervice was; but we are of opinion, the juſtices have done right in ſending him to *Shoreditch*, where the ſervice actually was. It is the ſame thing as if *Truby* had turned him over to *Green*, in which caſe there would have been no queſtion but he had gained a ſettlement in *Green*'s pariſh. If the maſter removes out of one pariſh into another, the apprentice gains a ſettlement if he lives there forty days; the turning over an apprentice is like the ſigning any deed; in this caſe *Truby* was only a truſtee. There is a great deal of difference between apprentices and other ſervants; for apprentices are not preſumed to become chargeable, becauſe the trade and miſtery they learn is their eſtate; therefore the order muſt be confirmed. *Strange* 10. *Mich.* 3 *Geo.* 1. *Pariſhes of Holy Trinity* and *Shoreditch*.

Upon a ſpecial order the caſe was ſtated, that *A* was bound an apprentice, and ſerved and inhabited two years, till a commiſſion of bankruptcy was taken out againſt the maſter, at which time the apprentice, without having the indenture delivered up, or any diſcharge at the ſeſſions, hires himſelf as a common ſervant into another pariſh and ſerved a year. The ſeſſions adjudged this to be no diſſolution of the apprenticeſhip, and conſequently, that the ſettlement of the apprentice was in the firſt pariſh where he was bound. And by the court, their judgment is right. There could be no diſſolution of the contract, unleſs the indenture had been delivered up, or the ſeſſions had diſcharged him; as no doubt they would have done, if they had been applied to; and then, as the firſt contract had continuance, the apprentice had no power to hire himſelf; and the ſervice afterwards for a year was void, as to any pretence of giving him a ſettlement. That ſervice muſt be taken as a ſervice to the maſter, who by law was intitled to the wages, and therefore the order muſt be confirmed. *Strange* 582. *Eaſt.* 10 *Geo.* 1.

It was ſtated, that an apprentice was bound in the pariſh of *A.* and lived there, off and on, for three quarters of a year. Exception was taken, that it was no ſettlement, ſince he might not inhabit forty days together. But by the court: That is not neceſſary; and the order for making it a ſettlement was confirmed. *Strange* 579. *Hill.* 10 *Geo.* 1. *The King* againſt *The inhabitants of Ciranceſter*.

Upon a ſpecial order of ſettlement it was ſtated, that a poor boy was bound out apprentice by indenture, and the maſter had 20*s.* paid him; and he ſerved three years; but that the maſter never paid the duty of 6*d.* in the pound according to 8 *Ann. c.* 9. *ſect.* 39. which ſays, that if the duty be not paid, the indenture ſhall be void to all intents and purpoſes whatſoever. The caſe was referred to *Forteſcue* juſtice, who went the circuit; and he held it a ſettlement, becauſe the maſter had ſix months to pay the duty in, ſo that during thoſe ſix months a ſettlement was gained; and it ſhould not be in the power of the maſter to defeat it by matter *ex poſt facto*; and purſuant to this opinion, the ſeſſions held it a ſettlement. But upon debate in *B. R.* the order was quaſhed; for they ſaid, it was making the indenture good to one purpoſe, when the act of parliament had made it void to all intents and purpoſes whatſoever; and tho' it was a hard caſe, he could not break through the poſitive words of the act. *Str.* 903. *Eaſt.* 4 *Geo.* 2. Between the pariſhes of *Curenden* and *Layland* in *Lancaſhire*.

Upon a ſpecial order of ſeſſions it was ſtated, that *James Blyth* in 1706, was put apprentice to *St. Peter*'s for four years by indenture, and that he lived there, and ſerved the time; but inaſmuch as he was not bound for ſeven years, as 5 *Eliz. c.* 4. requires, the ſeſſions adjudged it no ſettlement; and the 41ſt ſection of the ſtatute was inſiſted on to ſupport the order, which declares, "That all indentures, covenants and bargains, of or for the having or taking any apprentice, otherwiſe to be made or taken, than is by that ſtatute ordained, ſhall be clearly void in law to all intents and purpoſes;" and one of the former regulations is that the binding ſhall be for ſeven years. And the caſe of *Curenden* and *Layland* [the preceeding caſe] was relied on, where the apprenticeſhip was for ſeven years, but the indentures never ſtampt, and held to be no ſettlement. But notwithſtanding this, the court was of opinion, there was a ſettlement, and quaſhed the order. It appears, that between the 26th and 41ſt ſections, there are many regulations, what ſort of perſons ſhall take apprentices, and what not; which are never regarded; and it would be of miſchievous conſequence now to refer this laſt ſection back to all the reſt. They ſaid the word *void* muſt be conſtrued *voidable*; as on the ſtatute *Weſt.* 2. *finis ipſo jure ſit nullus*, it is yet a diſcontinuance. *Hob.* 166. and on 23 *H.* 6. *c.* 10. You muſt plead ſpecially, and cannot avoid a bail bond on *non eſt factum*. Here the indenture has had its effect, and neither maſter nor ſervant has taken advantage of the objection; and as to the caſe of *Curenden* and *Layland*, on the 8 *Ann. c.* 9. there were words prohibiting the giving the indenture in evidence; and admitting improper evidence is always a ground to quaſh. *Stra.* 1066. *Mich.* 10 *Geo.* 2. Between the pariſhes of *St. Nicholas* and *St. Peter* in *Ipſwich*.

A. is bound to *B.* a cobler, who keeps a ſtall in one pariſh, lies in another, and the boy in a third; and the ſeſſions adjudged the ſettlement where the ſtall is, becauſe the ſervice is there. By the court; The boy has gained no ſettlement in either of the three pariſhes; for the ſtall is not ſufficient to give him one, the maſter lying in another pariſh; order quaſhed. *Stra.* 51. *Eaſt.* 3. *Geo.* 1. *The King* againſt *The inhabitants of St. Olave Jury*.

A. is bound apprentice to a ſeafaring man, and ſerved him for a quarter of a year in the day-time on land, in the pariſh of *St. Mary Colechurch*, but lay every night on ſhip-board in *Radcliff*; but the juſtices apprehending the ſettlement to be where the ſervice was, ſend him thither. *Corbit* moved to quaſh this order, and likened it to the caſe of the cobler laſt mentioned. Chief Juſtice: A man properly inhabits where he lies; as in the caſe where the houſe is in two leets, he is to be ſummoned to that in which his bed is; order quaſhed. *Strange* 60. *Trin.* 3 *Geo.* 1. Pariſhes of *St. Mary Colechurch* and *Radcliff*.

Upon a ſpecial order it was ſtated, that the *pauper* was bound to a certificate-man in *Tenterden*, and after living with him there two years, was by him aſſigned over to a pariſhioner of *Lidd*, with whom he inhabited and ſerved the remainder of the ſeven years. And the queſtion aroſe on 12 *Ann. ſt.* 1. *c.* 18. which ſays, the apprentice of a certificate-man ſhall gain no ſettlement, whether the aſſignment could give him one; and the court were all of opinion, he had gained a ſettlement in *Lidd*; for the act had not made the binding void, but has only taken away one of the conſequences of ſuch binding for the ſake of the certificated pariſh. It never intended to meddle with the caſe of a legal pariſhioner's apprentice, and when once there is an aſſignment to ſuch an one, it is the ſame as if it

it had been an original binding; the true conſtruction of the ſtatute is, that *in reſpect to the certificated pariſh*, ſuch binding and inhabitation ſhall give no ſettlement. *Str.* 1147. *Mich.* 14 *Geo.* 2. *The King* againſt *The inhabitants of Petham.*

Upon a ſpecial order of ſeſſions, the caſe was ſtated for the opinion of the court; that in 1702 one *Richard Plower* was bound apprentice to *John Emerton*, who was legally ſettled in *Ivinghoe*; that he ſerved part of his time there, and then the maſter went with all his family as a certificate-man to *Stone-Bridge*, where he purchaſed an eſtate of the value of 60l. and after ſuch purchaſe the apprentice lived with him ſix months till the apprenticeſhip expired; and becauſe the ſtatute 12 *Ann. c.* 18. provides that the apprentice of a certificate-man ſhall gain no ſettlement in the pariſh to which the maſter goes by certificate; therefore the judges adjudged the ſettlement at *Ivinghoe*, where the binding and great part of the ſervice was. And by the court, The order muſt be quaſhed; for as the apprenticeſhip expired in 1709, the ſtatute 12 *Ann.* is out of the caſe, not being made with any retroſpect; and then the caſe is no more, than that an apprentice of a certificate-man lives forty days in *Stone-Bridge*, which before that ſtatute was enough to gain him a ſettlement; but if this had been a caſe ſince the ſtatute, yet we think the ſettlement would lie in *Stone-Bridge*, for according to the caſe of *Burclear* and *Eaſtwoodhay*, *Eaſt.* 5 *Geo.* 1. in *B. R.* when a certificate-man makes a purchaſe, he immediately ceaſes to be there in nature of a certificate-man, and becomes a ſettled inhabitant; ſo that laying the ſtatute out of the caſe (as we muſt do, it being nothing to the purpoſe) in this view here is a ſervice for ſix months as an apprentice, in a pariſh where the maſter was legally ſettled, which is now more than ſufficient to give a ſettlement to the apprentice. *Stra.* 265. *Hill.* 6 *Geo.* 1. Between the pariſhes of *Ivinghoe* and *Stone-Bridge*.

Stat. 31 *Geo.* 2. *c.* 11. *ſect.* 11. Whereas by an act made in the third year of the reign of King *William* and Queen *Mary*, intitled, *An act for the better explanation and ſupplying the defects of the former laws for the ſettlement of the poor*, it is enacted, That if any perſon ſhall be bound an apprentice by indenture, and inhabit in any town or pariſh, ſuch binding and inhabitation ſhall be adjudged a good ſettlement; and whereas ſince the making the ſaid act, great numbers of perſons having been unwarily bound apprentice, by certain deeds, writings or contracts, not indented, by which binding many of them have ſuffered great loſs and damage, on account of their having been refuſed a ſettlement in ſuch town or pariſh, where they have been ſo bound and reſided forty days, and have been removed to the pariſh or place where their laſt legal ſettlement was before ſuch apprenticeſhip, where they had no encouragement to exerciſe their trades, or opportunity to gain a livelihood by their ſaid trades to which they were ſo bound apprentices: for relief therefore of ſuch apprentices, and for preventing the like miſchief for the future; Be it enacted, *&c.* That no perſon who ſhall have been an apprentice, or who ſhall hereafter be bound an apprentice by any deed, writing, or contract, not indented, being firſt legally ſtampt, ſhall be liable to be removed from the town, pariſh or place, where he or ſhe ſhall have been ſo bound an apprentice and reſident forty days, by virtue of any order of removal, granted by two juſtices of the peace of any county, riding, diviſion, city, town corporate or place; or by virtue of any order of the juſtices, at their general or quarter ſeſſions, by reaſon, or on account of ſuch deed, writing, or contract not being indented only.

8. *Pleadings in actions brought by and againſt maſters and apprentices.*

Action on the caſe by *A.* againſt *B.* for *inticing* his apprentice (*A.* being a tradeſman in *London*) to *depart* from his ſervice for ſix days, and divers times *to take money* out of the box of the ſhop, and play at cards with *B.* and that *B. cozen'd* the apprentice: the court thought *A.* might well have an action for the departure, and loſing the money is a damage to *A.* and the cozenage is but an aggravation of the offence, and for that the apprentice himſelf only ſhall have an action; but in this caſe, becauſe the damages were intire with reſpect to the cozenage as well as to the departure, *A.* could not have judgment by the better opinion of the court. *Noy* 105.

Indictment for *cauſing* an apprentice to *abſent himſelf* from his maſter, and *keeping and detaining him in that abſence.* It was moved to quaſh it, becauſe not a thing of a publick nature, being no other than an action on the caſe; but the court ſaid, it was a great offence, and would not quaſh it; but left the party to demur if he would. 12 *Mod.* 195.

An *indictment* was *for procuring an apprentice to depart unlawfully* from his maſter, *and ſeducing him to take and carry away his maſter's goods.* The defendant was found guilty; and it was moved that this was only a private injury, for which *caſe lies*, and not in its nature publick to maintain an indictment; beſides, no fact is laid to be done in purſuance of this inticing, and as to the carrying away the goods, no *venue* is laid where the goods were taken away; and judgment was arreſted. 1 *Salk.* 380.

A *common action of treſpaſs* will not lie for inticing an apprentice or ſervant from his maſter; but if one will *take away* my apprentice or ſervant *with force*, treſpaſs will lie for the maſter, declaring upon the force, *per quod ſervitium amiſit*; *per tot. cur'*. 6 *Mod.* 182.

If *a man knows that an apprentice ran away from his maſter, and he keeps and employs him*, the proper remedy is to bring an *action for ſo much money paid to the plaintiff's apprentice in wrong of the plaintiff*; *per* the Ch. J. *Barnard. Rep.* in *B. R. Paſch.* 2 *Geo.* 2. at the ſittings at *Guildhall*, *Aynſworth* v. *Wood.*

One of the age of *ſixteen years* put himſelf apprentice in *London* by indenture, with the uſual covenants, and afterwards ran away with his maſter's money, whereupon he brought an action of covenant: the defendant pleaded *nonage*; the plaintiff replied, that by the cuſtom of *London* an infant may bind himſelf apprentice, and in ſuch covenants as are comprized in this indenture, and that he ſhould be bound, *&c.* as if he was at full age, *&c.* and upon demurrer to this replication, it was objected, that this cuſtom is pleadable only in the court of *London*, and not in the Common Pleas, or elſewhere; but adjudged otherwiſe. *Moor* 135.

Covenant againſt the defendant, being an apprentice, for imbezilling his maſter's goods: the defendant pleaded *infancy* when he became bound; the plaintiff replied, that the *cuſtom of London* is, that one may bind himſelf apprentice at the age of *fourteen years*, *&c.* the defendant rejoined, that the cuſtom is, that if one may bind himſelf apprentice at that age, and the indenture is inrolled in *Guildhall*, then it ſhall bind, and traverſed the cuſtom as alledged by the plaintiff: Upon which they were at iſſue, and the court ſent to the lord mayor and aldermen, who certified by the mouth of their recorder, that the cuſtom was as the plaintiff had declared. *Palm.* 361.

Error of a judgment upon the ſtatute for uſing a trade, not having ſerved an *apprenticeſhip*, *&c.* the action was brought in *Newbury*, and the error aſſigned was, that it ought to be brought in one of the *courts at Weſtminſter*; and for that cauſe the judgment was reverſed. *Style* 383.

Covenant upon an indenture of an apprentice, wherein he bound himſelf to ſerve the plaintiff for ſeven years; the plaintiff ſet forth the *cuſtom of London*, that any perſon above *fourteen and under twenty-one*, and unmarried, might bind himſelf apprentice, *&c.* according to the cuſtom, and that the maſter might have *tale remedium* againſt him, as if he had *been twenty-one*, and alledges, that the defendant did depart from his ſervice *per quod* he loſt his *ſervice for that term*, which was not yet expired: the defendant pleaded a frivolous plea; and upon a demurrer, it was adjudged, that tho' ſuch a covenant would not bind an *infant*, either at Common law, or by the ſtatute 5 *Eliz.* yet by *cuſtom* it ſhall bind him; 'tis true, here the plaintiff declared for the loſs of the defendant's ſervice for *ſeven years*, part of which was yet to come, which had been nought after a verdict, but 'tis good upon a demurrer, becauſe the plaintiff may take

damages

damages for the departure only, and not for the loſs of the ſervice during that time. 1 *Mod.* 271.

Covenant by an apprentice, for that the defendant's teſtator had covenanted to inſtruct him (the plaintiff) in the art of a *ſadler* for ſeven years, and to find him in *meat and drink* during that term, and aſſigned the breach, for that after the death of the teſtator, the defendant, who was his executor, turned him (the plaintiff) out of doors, and out of his ſervice, *et ſic* did not find him *meat and drink*; and upon demurrer, the court inclined at firſt, that *et ſic* was not a ſufficient averment of the breach of covenant; but afterwards they held *et ſic* to be only matter of form, and that the *apprentice* remains to the executor; for tho' he might not inſtruct him, he muſt find him in meat and drink. 1 *Sid.* 216.

The plaintiff declared upon an indenture of apprenticeſhip; the defendant pleaded, that at the time of the executing the ſaid indenture he was an infant; the plaintiff replies, that by the *cuſtom of the city of London*, if one under age binds himſelf apprentice, it ſhall oblige him; and upon demurrer to this replication, it was objected, that it was ill, becauſe a *departure* from the declaration, for that is at *Common law*, and by the replication he hath enabled himſelf by a *cuſtom*; and ſo is the *abbot of Bokefaſt*'s caſe, *Keilw.* 75. *B.* but adjudged no *departure*, for the action is founded on a *covenant*, and in the replication he only anſwers the diſability in the plea. *Raym.* 16.

Covenant by an infant *per guardianum*, for that he being apprentice to the defendant by indenture, he did not keep, maintain and teach him the trade of a *woollen-draper*, as he ought by his covenant, but turned him away: The defendant pleaded an *order of ſeſſions*, by which he was diſcharged from the plaintiff for his diſorderly living, and that the order was inrolled; and upon demurrer to the plea, it was held, that the maſter might be diſcharged from his apprentice by an order of ſeſſions; but it was a queſtion, whether he ought firſt to make application *to one juſtice*, and not to the ſeſſions *per ſaltum*. 1 *Vent.* 174.

In Covenant, the plaintiff declared on the cuſtom of *London*, that time out of mind, every *freeman ſolebat* to take and apprentice, who by *cuſtom*, *&c.* are bound by their covenants faithfully to ſerve; and that he (the plaintiff) took the defendant apprentice by indenture, in which he covenanted to ſerve ſeven years, which he had not done; upon which they were at iſſue, and the plaintiff had a verdict: It was inſiſted in arreſt of judgment, that the declaration was ill, becauſe it was in the *ſolet* alone, when it ought to be in the *debet* and *ſolet*; for if he is bound to ſerve, it muſt be by the *cuſtom*, becauſe he is an *infant*; and if by the cuſtom, then it muſt be *debet & ſolet*; but adjudged, that he is bound by the *covenant*, and that the cuſtom is only *inducement*. 1 *Lev.* 12.

The teſtator covenanted to teach an apprentice his trade; and in an action of covenant againſt his executor, it was inſiſted, after a verdict for the plaintiff, that the covenant was perſonal, and did not oblige the executor; but adjudged, that it did, and if the executor is not of the ſame trade, he ought to provide another maſter, who is. 1 *Lev.* 176.

In *debt on apprentice's bond*, that if apprentice ſhould *imbezil*, *&c.* and if within twenty days after *notice* given thereof *to defendant and one A.* and *proof to them* made, *&c.* ſhewing to defendant and *A.* a *confeſſion under hand* of the apprentice is not proof ſufficient, the apprentice being not *fide dignus*, and notice and proof ought to be given them both together, and not to one at one time, and the other at another time; plaintiff ſhould ſhew in *what place he became apprentice*, and that he *was ſuch a perſon as might be apprentice by* 5 *Eliz.* and tho' the ſtatute is not pleaded, defendant ſhall take advantage thereof, becauſe it is a general ſtatute. *Cro. Eliz.* 723. *pl.* 55.

Bond was given *for the truth and honeſty* of an apprentice; the maſter pretended goods were loſt, and *got the apprentice to ſign a note* as for particulars of the goods loſt and the value of them, but let the note ſleep for two or three years without acquainting the obligor with it: A bill was exhibited againſt the maſter to be relieved againſt the bond, and an iſſue was directed on a *quantum damnificatus*, but the note not to be given in evidence; and afterwards the defendant, the maſter, who was plaintiff in the action at law, being nonſuit upon full evidence, a perpetual injunction was decreed againſt the bond for all breaches paſt before the action brought by the maſter at law. *Finch Rep.* 47.

A. a father, on putting out his ſon apprentice to *B.* was bound in a *bond of* 1000*l. penalty for his ſon's fidelity*; the ſon *imbezils* 203*l. which A. paid*, but deſired *B.* to truſt the ſon no more with caſh, or but very ſparingly. About a year after the ſon imbezilled about 300*l.* more, and ſo it ſtood for ſeveral years, when upon account it appeared he had imbezilled 2750*l.* but of this *B.* gave no notice to *A.* till two years after apprenticeſhip ended. The maſter of the Rolls decreed *A.* to pay 1000*l.* over and above the 203*l.* before paid; but Lord Ch. J. *King*, decreed the payment of ſo much as would make it in all 1000*l.* and the 203*l.* to be as part of it. 2 *P. Williams* 288.

An *indenture* of apprenticeſhip.

THIS Indenture *made the day and year*, *&c.* Witneſſeth, *That* A. B. *ſon of*, *&c. Hath of his own free and voluntary will, placed and bound himſelf apprentice unto* C. D. *of*, *&c. to be taught in the trade, ſcience, or occupation of*, *&c. which he the ſaid* C. D. *now uſeth, and with him as an apprentice to dwell, continue, and ſerve him from the day of the date hereof until the full end and term of ſeven years from thence next enſuing, and fully to be compleat and ended; during all which term of ſeven years, the ſaid apprentice his ſaid maſter well and faithfully ſhall ſerve, his ſecrets keep, his lawful commands every where gladly do; hurt to his ſaid maſter he ſhall not do, nor wilfully ſuffer to be done by others, but of the ſame to his power ſhall forthwith give notice to his ſaid maſter; the goods of his ſaid maſter he ſhall not imbezil or waſte, nor them lend without his conſent to any; at cards, dice, or any other unlawful games, he ſhall not play; taverns, or alehouſes he ſhall not frequent; fornication he ſhall not commit, matrimony he ſhall not contract; from the ſervice of his ſaid maſter he ſhall not at any time depart or abſent himſelf, without his ſaid maſter's leave; but in all things as a good and faithful apprentice ſhall and will demean and behave himſelf towards his ſaid maſter, and all his, during the ſaid term. And the maſter his ſaid apprentice the ſaid trade, ſcience, or occupation of, *&c.* which he now uſeth, with all things thereto belonging, ſhall and will teach and inſtruct, or cauſe to be well and ſufficiently taught and inſtructed, after the beſt way and manner that he can; and ſhall and will alſo find and allow unto his ſaid apprentice, meat, drink, waſhing, lodging and apparel, both linen and woollen, and all other neceſſaries fit and convenient for ſuch an apprentice, during the term aforeſaid; and at the end of the ſaid term ſhall and will give to the ſaid apprentice one new ſuit of apparel, &c.* In Witneſs, *&c.*

Appropriation, *Appropriatio*, (from the French *approprier*, i. e. *aptare, accommodare, to appropriate, to adapt, to fit, to apply*) properly ſignifieth in the law of *England*, a ſevering of a benefice eccleſiaſtical, which originally, and in nature is *juris divini & in patrimonio nullius*, to the proper and perpetual uſe of ſome religious houſe, or dean and chapter, biſhop or college; and the reaſon of the name may be this; becauſe, as parſons are not commonly accounted *domini*, but *uſufructuarii*, having no right of fee ſimple; ſo theſe by reaſon of their perpetuity, are accounted owners of the fee ſimple, and therefore are called *proprietarii*. *Cowell. Lit. tit. Diſcontinuance.*

1. *Of endowing vicarages upon appropriation; and where, and by what acts appropriation is good.*
2. *Where appropriation is not good.*

1. *Of endowing vicarages upon appropriation; and where, and by what acts appropriation is good.*

Before the time of *Richard* 2. it was lawful (as it ſeems) to *appropriate* the whole fruits of a benefice to an abby or priory, they finding one to ſerve the cure. But

it had been an original binding; the true conſtruction of the ſtatute is, that *in reſpect to the certificated pariſh*, ſuch binding and inhabitation ſhall give no ſettlement. *Str.* 1147. *Mich.* 14 *Geo.* 2. *The King* againſt *The inhabitants of Petham.*

Upon a ſpecial order of ſeſſions, the caſe was ſtated for the opinion of the court; that in 1702 one *Richard Plower* was bound apprentice to *John Emerton*, who was legally ſettled in *Ivinghoe*; that he ſerved part of his time there, and then the maſter went with all his family as a certificate-man to *Stone-Bridge*, where he purchaſed an eſtate of the value of 60l. and after ſuch purchaſe the apprentice lived with him ſix months till the apprenticeſhip expired; and becauſe the ſtatute 12 *Ann. c.* 18. provides that the apprentice of a certificate-man ſhall gain no ſettlement in the pariſh to which the maſter goes by certificate; therefore the judges adjudged the ſettlement at *Ivinghoe*, where the binding and great part of the ſervice was. And by the court, The order muſt be quaſhed; for as the apprenticeſhip expired in 1709, the ſtatute 12 *Ann.* is out of the caſe, not being made with any retroſpect; and then the caſe is no more, than that an apprentice of a certificate-man lives forty days in *Stone-Bridge*, which before that ſtatute was enough to gain him a ſettlement; but if this had been a caſe ſince the ſtatute, yet we think the ſettlement would lie in *Stone-Bridge*, for according to the caſe of *Burclear* and *Eaſtwoodhay*, *Eaſt.* 5 *Geo.* 1. in *B. R.* when a certificate-man makes a purchaſe, he immediately ceaſes to be there in nature of a certificate-man, and becomes a ſettled inhabitant; ſo that laying the ſtatute out of the caſe (as we muſt do, it being nothing to the purpoſe) in this view here is a ſervice for ſix months as an apprentice, in a pariſh where the maſter was legally ſettled, which is now more than ſufficient to give a ſettlement to the apprentice. *Stra.* 265. *Hill.* 6 *Geo.* 1. Between the pariſhes of *Ivinghoe* and *Stone-Bridge*.

Stat. 31 *Geo.* 2. *c.* 11. *ſect.* 11. Whereas by an act made in the third year of the reign of King *William* and Queen *Mary*, intitled, *An act for the better explanation and ſupplying the defects of the former laws for the ſettlement of the poor*, it is enacted, That if any perſon ſhall be bound an apprentice by indenture, and inhabit in any town or pariſh, ſuch binding and inhabitation ſhall be adjudged a good ſettlement; and whereas ſince the making the ſaid act, great numbers of perſons having been unwarily bound apprentice, by certain deeds, writings or contracts, not indented, by which binding many of them have ſuffered great loſs and damage, on account of their having been refuſed a ſettlement in ſuch town or pariſh, where they have been ſo bound and reſided forty days, and have been removed to the pariſh or place where their laſt legal ſettlement was before ſuch apprenticeſhip, where they had no encouragement to exerciſe their trades, or opportunity to gain a livelihood by their ſaid trades to which they were ſo bound apprentices: for relief therefore of ſuch apprentices, and for preventing the like miſchief for the future; Be it enacted, *&c.* That no perſon who ſhall have been an apprentice, or who ſhall hereafter be bound an apprentice by any deed, writing, or contract, not indented, being firſt legally ſtampt, ſhall be liable to be removed from the town, pariſh or place, where he or ſhe ſhall have been ſo bound an apprentice and reſident forty days, by virtue of any order of removal, granted by two juſtices of the peace of any county, riding, diviſion, city, town corporate or place; or by virtue of any order of the juſtices, at their general or quarter ſeſſions, by reaſon, or on account of ſuch deed, writing, or contract not being indented only.

8. *Pleadings in actions brought by and againſt maſters and apprentices.*

Action on the caſe by *A.* againſt *B.* for *inticing* his apprentice (*A.* being a tradeſman in *London*) to *depart* from his ſervice for ſix days, and divers times *to take money* out of the box of the ſhop, and play at cards with *B.* and that *B. cozen'd* the apprentice: the court thought *A.* might well have an action for the departure, and loſing the money is a damage to *A.* and the cozenage is but an aggravation of the offence, and for that the apprentice himſelf only ſhall have an action; but in this caſe, becauſe the damages were intire with reſpect to the cozenage as well as to the departure, *A.* could not have judgment by the better opinion of the court. *Noy* 105.

Indictment for *cauſing* an apprentice to *abſent himſelf* from his maſter, and *keeping and detaining him in that abſence.* It was moved to quaſh it, becauſe not a thing of a publick nature, being no other than an action on the caſe; but the court ſaid, it was a great offence, and would not quaſh it; but left the party to demur if he would. 12 *Mod.* 195.

An *indictment* was *for procuring an apprentice to depart unlawfully* from his maſter, *and ſeducing him to take and carry away his maſter's goods.* The defendant was found guilty; and it was moved that this was only a private injury, for which *caſe lies*, and not in its nature publick to maintain an indictment; beſides, no fact is laid to be done in purſuance of this inticing, and as to the carrying away the goods, no *venue* is laid where the goods were taken away; and judgment was arreſted. 1 *Salk.* 380.

A *common action of treſpaſs* will not lie for inticing an apprentice or ſervant from his maſter; but if one will *take away* my apprentice or ſervant *with force*, treſpaſs will lie for the maſter, declaring upon the force, *per quod ſervitium amiſit*; *per tot. cur'*. 6 *Mod.* 182.

If *a man knows that an apprentice ran away from his maſter, and he keeps and employs him*, the proper remedy is to bring an *action for ſo much money paid to the plaintiff's apprentice in wrong of the plaintiff*; *per* the Ch. J. *Barnard. Rep.* in *B. R. Paſch.* 2 *Geo.* 2. at the ſittings at *Guildhall*, *Aynſworth* v. *Wood.*

One of the age of *ſixteen years* put himſelf apprentice in *London* by indenture, with the uſual covenants, and afterwards ran away with his maſter's money, whereupon he brought an action of covenant: the defendant pleaded *nonage*; the plaintiff replied, that by the cuſtom of *London* an infant may bind himſelf apprentice, and in ſuch covenants as are comprized in this indenture, and that he ſhould be bound, *&c.* as if he was at full age, *&c.* and upon demurrer to this replication, it was objected, that this cuſtom is pleadable only in the court of *London*, and not in the Common Pleas, or elſewhere; but adjudged otherwiſe. *Moor* 135.

Covenant againſt the defendant, being an apprentice, for imbezilling his maſter's goods: the defendant pleaded *infancy* when he became bound; the plaintiff replied, that the *cuſtom of London* is, that one may bind himſelf apprentice at the age of *fourteen years*, *&c.* the defendant rejoined, that the cuſtom is, that if one may bind himſelf apprentice at that age, and the indenture is inrolled in *Guildhall*, then it ſhall bind, and traverſed the cuſtom as alledged by the plaintiff: Upon which they were at iſſue, and the court ſent to the lord mayor and aldermen, who certified by the mouth of their recorder, that the cuſtom was as the plaintiff had declared. *Palm.* 361.

Error of a judgment upon the ſtatute for uſing a trade, not having ſerved an *apprenticeſhip*, *&c.* the action was brought in *Newbury*, and the error aſſigned was, that it ought to be brought in one of the *courts at Weſtminſter*; and for that cauſe the judgment was reverſed. *Style* 383.

Covenant upon an indenture of an apprentice, wherein he bound himſelf to ſerve the plaintiff for ſeven years; the plaintiff ſet forth the *cuſtom of London*, that any perſon above *fourteen and under twenty-one*, and unmarried, might bind himſelf apprentice, *&c.* according to the cuſtom, and that the maſter might have *tale remedium* againſt him, as if he had *been twenty-one*, and alledges, that the defendant did depart from his ſervice *per quod* he loſt his *ſervice for that term*, which was not yet expired: the defendant pleaded a frivolous plea; and upon a demurrer, it was adjudged, that tho' ſuch a covenant would not bind an *infant*, either at Common law, or by the ſtatute 5 *Eliz.* yet by *cuſtom* it ſhall bind him; 'tis true, here the plaintiff declared for the loſs of the defendant's ſervice for *ſeven years*, part of which was yet to come, which had been nought after a verdict, but 'tis good upon a demurrer, becauſe the plaintiff may take

damages

damages for the departure only, and not for the loſs of the ſervice during that time. 1 *Mod.* 271.

Covenant by an apprentice, for that the defendant's teſtator had covenanted to inſtruct him (the plaintiff) in the art of a *ſadler* for ſeven years, and to find him in *meat and drink* during that term, and aſſigned the breach, for that after the death of the teſtator, the defendant, who was his executor, turned him (the plaintiff) out of doors, and out of his ſervice, *et ſic* did not find him *meat and drink*; and upon demurrer, the court inclined at firſt, that *et ſic* was not a ſufficient averment of the breach of covenant; but afterwards they held *et ſic* to be only matter of form, and that the *apprentice* remains to the executor; for tho' he might not inſtruct him, he muſt find him in meat and drink. 1 *Sid.* 216.

The plaintiff declared upon an indenture of apprenticeſhip; the defendant pleaded, that at the time of the executing the ſaid indenture he was an infant; the plaintiff replies, that by the *cuſtom of the city of London*, if one under age binds himſelf apprentice, it ſhall oblige him; and upon demurrer to this replication, it was objected, that it was ill, becauſe a *departure* from the declaration, for that is at *Common law*, and by the replication he hath enabled himſelf by a *cuſtom*; and ſo is the *abbot of Bokefaſt*'s caſe, *Keilw.* 75. *B.* but adjudged no *departure*, for the action is founded on a *covenant*, and in the replication he only anſwers the diſability in the plea. *Raym.* 16.

Covenant by an infant *per guardianum*, for that he being apprentice to the defendant by indenture, he did not keep, maintain and teach him the trade of a *woollen-draper*, as he ought by his covenant, but turned him away: The defendant pleaded an *order of ſeſſions*, by which he was diſcharged from the plaintiff for his diſorderly living, and that the order was inrolled; and upon demurrer to the plea, it was held, that the maſter might be diſcharged from his apprentice by an order of ſeſſions; but it was a queſtion, whether he ought firſt to make application *to one juſtice*, and not to the ſeſſions *per ſaltum*. 1 *Vent.* 174.

In Covenant, the plaintiff declared on the cuſtom of *London*, that time out of mind, every *freeman ſolebat* to take and apprentice, who by *cuſtom*, *&c.* are bound by their covenants faithfully to ſerve; and that he (the plaintiff) took the defendant apprentice by indenture, in which he covenanted to ſerve ſeven years, which he had not done; upon which they were at iſſue, and the plaintiff had a verdict: It was inſiſted in arreſt of judgment, that the declaration was ill, becauſe it was in the *ſolet* alone, when it ought to be in the *debet* and *ſolet*; for if he is bound to ſerve, it muſt be by the *cuſtom*, becauſe he is an *infant*; and if by the cuſtom, then it muſt be *debet & ſolet*; but adjudged, that he is bound by the *covenant*, and that the cuſtom is only *inducement*. 1 *Lev.* 12.

The teſtator covenanted to teach an apprentice his trade; and in an action of covenant againſt his executor, it was inſiſted, after a verdict for the plaintiff, that the covenant was perſonal, and did not oblige the executor; but adjudged, that it did, and if the executor is not of the ſame trade, he ought to provide another maſter, who is. 1 *Lev.* 176.

In *debt on apprentice's bond*, that if apprentice ſhould *imbezil*, *&c.* and if within twenty days after *notice* given thereof *to defendant and one A.* and *proof to them* made, *&c.* ſhewing to defendant and *A.* a *confeſſion under hand* of the apprentice is not proof ſufficient, the apprentice being not *fide dignus*, and notice and proof ought to be given them both together, and not to one at one time, and the other at another time; plaintiff ſhould ſhew in *what place he became apprentice*, and that he *was ſuch a perſon as might be apprentice by* 5 *Eliz.* and tho' the ſtatute is not pleaded, defendant ſhall take advantage thereof, becauſe it is a general ſtatute. *Cro. Eliz.* 723. *pl.* 55.

Bond was given *for the truth and honeſty* of an apprentice; the maſter pretended goods were loſt, and *got the apprentice to ſign a note* as for particulars of the goods loſt and the value of them, but let the note ſleep for two or three years without acquainting the obligor with it: A bill was exhibited againſt the maſter to be relieved againſt the bond, and an iſſue was directed on a *quantum damnificatus*, but the note not to be given in evidence; and afterwards the defendant, the maſter, who was plaintiff in the action at law, being nonſuit upon full evidence, a perpetual injunction was decreed againſt the bond for all breaches paſt before the action brought by the maſter at law. *Finch Rep.* 47.

A. a father, on putting out his ſon apprentice to *B.* was bound in a *bond of* 1000*l. penalty for his ſon's fidelity*; the ſon *imbezils* 203*l. which A. paid*, but deſired *B.* to truſt the ſon no more with caſh, or but very ſparingly. About a year after the ſon imbezilled about 300*l.* more, and ſo it ſtood for ſeveral years, when upon account it appeared he had imbezilled 2750*l.* but of this *B.* gave no notice to *A.* till two years after apprenticeſhip ended. The maſter of the Rolls decreed *A.* to pay 1000*l.* over and above the 203*l.* before paid; but Lord Ch. J. *King*, decreed the payment of ſo much as would make it in all 1000*l.* and the 203*l.* to be as part of it. 2 *P. Williams* 288.

An *indenture* of apprenticeſhip.

THIS Indenture *made the day and year*, *&c.* Witneſſeth, *That* A. B. *ſon of*, *&c. Hath of his own free and voluntary will, placed and bound himſelf apprentice unto* C. D. *of*, *&c. to be taught in the trade, ſcience, or occupation of*, *&c. which he the ſaid* C. D. *now uſeth, and with him as an apprentice to dwell, continue, and ſerve him from the day of the date hereof until the full end and term of ſeven years from thence next enſuing, and fully to be compleat and ended; during all which term of ſeven years, the ſaid apprentice his ſaid maſter well and faithfully ſhall ſerve, his ſecrets keep, his lawful commands every where gladly do; hurt to his ſaid maſter he ſhall not do, nor wilfully ſuffer to be done by others, but of the ſame to his power ſhall forthwith give notice to his ſaid maſter; the goods of his ſaid maſter he ſhall not imbezil or waſte, nor them lend without his conſent to any; at cards, dice, or any other unlawful games, he ſhall not play; taverns, or alehouſes he ſhall not frequent; fornication he ſhall not commit, matrimony he ſhall not contract; from the ſervice of his ſaid maſter he ſhall not at any time depart or abſent himſelf, without his ſaid maſter's leave; but in all things as a good and faithful apprentice ſhall and will demean and behave himſelf towards his ſaid maſter, and all his, during the ſaid term. And the maſter his ſaid apprentice the ſaid trade, ſcience, or occupation of, *&c.* which he now uſeth, with all things thereto belonging, ſhall and will teach and inſtruct, or cauſe to be well and ſufficiently taught and inſtructed, after the beſt way and manner that he can; and ſhall and will alſo find and allow unto his ſaid apprentice, meat, drink, waſhing, lodging and apparel, both linen and woollen, and all other neceſſaries fit and convenient for ſuch an apprentice, during the term aforeſaid; and at the end of the ſaid term ſhall and will give to the ſaid apprentice one new ſuit of apparel, *&c.* In Witneſs, *&c.*

Appropriation, *Appropriatio*, (from the French *approprier*, i. e. *aptare, accommodare, to appropriate, to adapt, to fit, to apply*) properly ſignifieth in the law of *England*, a ſevering of a benefice eccleſiaſtical, which originally, and in nature is *juris divini & in patrimonio nullius*, to the proper and perpetual uſe of ſome religious houſe, or dean and chapter, biſhop or college; and the reaſon of the name may be this; becauſe, as parſons are not commonly accounted *domini*, but *uſufructuarii*, having no right of fee ſimple; ſo theſe by reaſon of their perpetuity, are accounted owners of the fee ſimple, and therefore are called *proprietarii*. *Cowell. Lit. tit. Diſcontinuance.*

1. *Of endowing vicarages upon appropriation; and where, and by what acts appropriation is good.*
2. *Where appropriation is not good.*

1. *Of endowing vicarages upon appropriation; and where, and by what acts appropriation is good.*

Before the time of *Richard* 2. it was lawful (as it ſeems) to *appropriate* the whole fruits of a benefice to an abby or priory, they finding one to ſerve the cure. But

that King redreſſed that evil by a good law, whereby he ordained, that "In every licence to be made in the Chancery, of the appropriation of any pariſh church, it ſhall be expreſly contained, that the dioceſan of the place, upon the appropriation of ſuch churches, ſhall ordain according to the value of ſuch churches, a convenient ſum of money to be paid and diſtributed yearly of the fruits and profits of the ſame churches, by thoſe that will have the ſame churches in proper uſe, and by their ſucceſſors, to the poor pariſhioners of the ſaid churches, in aid of their living and ſuſtenance for ever; and alſo that the vicar be well and ſufficiently endowed." *Stat.* 15 *Rich.* 2. *c.* 6. And by the ſtatute of 4 *Hen.* 4. *c.* 12. it is enacted, that "From henceforth, in every church appropriated, there ſhall be a ſecular perſon ordained vicar perpetual, canonically inſtituted and inducted, and covenably endowed by the diſcretion of the ordinary, to do divine ſervice, and to inform the people, and to keep hoſpitality there: And no religious ſhall in any wiſe be made vicar in any church appropriated."

From henceforth] This ſtatute extendeth not to appropriations made before this time. 2 *Rol. Rep.* 127.

There ſhall be a ſecular perſon ordained perpetual] In the caſe of *Bonſey* and *Lee*, *Trin.* 1684; it was decreed, that where there is no vicarage endowed, the impropriator of the ſmall tithes is bound to maintain a prieſt; and upon an information by the attorney general for that purpoſe, the King may aſſign to the curate ſuch an allowance or proportion of the ſmall tithes as he ſhall think fit: but otherwiſe it is, where the vicar is endowed, tho' but of never ſo ſmall matter. 1 *Vern.* 247.

Covenably endowed] So that without endowment, the appropriation was not good. 12 *Co.* 4.

By the diſcretion of the ordinary] Before this, it could not be done but with the conſent of the *patron*; but there was no neceſſity of the licence of the *King* (as in the caſe of appropriation) becauſe no damage accrued to the crown. 2 *Rol. Abr.* 334.

No religious ſhall in any wiſe be made vicar in any church appropriated] But if the benefice was given *ad menſam monachorum*, and ſo not appropriated in the common form, but granted by way of union *pleno jure*; in that caſe, it was ſerved by a monk of their own body, who was removable at their own pleaſure. This is the foundation of *ſtipendiary curacies*, where the impropriators are bound to provide divine ſervice, but may do it by a curate, not inſtituted, but only licenſed by the biſhop. So the monks ſerved them; and becauſe the acts of diſſolution gave the lands to the King *in ſuch manner and form* as the monks held them, they who derive from the crown have reckoned themſelves under no reſtraint to preſent a vicar to the biſhop for inſtitution. But tho' the Canon law is clear, that ſuch benefices as were united *menſæ monachorum* might be ſerved by monks, without inſtitution; yet the law alſo was, that in caſe ſuch cures were ſupplied by *ſeculars*, they muſt have inſtitution; and there being now no ſupply but by ſeculars, it ſeems to follow, that by law no benefices can be now ſerved by ſtipendiary curates, without inſtitution: but the received practice is otherwiſe. *Gibſ.* 717.

The act of endowment by the biſhop might be made, either in the act of appropriation, or by a ſubſequent act and a ſeparate inſtrument; which is mentioned in this place, that in ſearching for endowments in the regiſtries of biſhops, or the court of augmentations, neither the one nor the other ſhould be neglected; for altho' a ſeparate act or inſtrument of endowment may not be found, yet it is poſſible the endowment may have been made in the act of appropriation. *Gibſ.* 719.

If the body corporate be now in being to which the church is appropriated, as all the old cathedrals are; or if the impropriation were, at the diſſolution of the monaſtery, given to any cathedral or collegiate church that now is; the moſt probable place to find the endowment of it is in the archives of that church: if not, perhaps it may be found in the augmentation office. But it is to be feared, that moſt of the endowments are now loſt, at leaſt to us, by being carried to *Rome* at the diſſolution of monaſteries. *Johnſ.* 239.

Upon the making an appropriation, an annual penſion was reſerved to the biſhop and his ſucceſſors, commonly called an *indemnity*, and payable by the body to whom the appropriation was made. The ground of which reſervation, in an ancient appropriation in the regiſtry of the archbiſhop of *Canterbury*, is expreſſed to be, for a recompence of the profits which the biſhop would otherwiſe have received during the vacation of ſuch churches. *Gibſ.* 719.

A vicarage by endowment becomes a benefice diſtinct from the parſonage. As the vicar is endowed with ſeparate revenues, and is now enabled by the law to recover his temporal rights without aid of parſon or patron; ſo hath he the whole cure of ſouls transferred to him, by inſtitution from the biſhop. It is true, in ſome places, both the parſon and the vicar do receive inſtitution from the biſhop to the ſame church, as it is in the caſe of *ſinecures*; the original of which was thus: the rector (with proper conſent) had a power to intitle a vicar in his church, to officiate under him; and this was often done; and by this means, two perſons were inſtituted to the ſame church, and both to the cure of ſouls, and both did actually officiate. So that however the rectors of *ſinecures*, by having been long excuſed from reſidence, are in the common opinion diſcharged from the cure of ſouls (which is the reaſon of the name) and however the cure is ſaid in the law books to be in them *habitualiter* only; yet in ſtrictneſs of law, and with regard to their original inſtitution, the cure is in them *actualiter*, as much as it is in the vicar. *Gibſ.* 719.

The parſon, by making the endowment, acquires the patronage of the vicarage. For in order to the appropriation of a parſonage, the inheritance of the advowſon was to be transferred to the corporation to which the church was to be appropriated; and then, the vicarage being derived out of the parſonage, the parſon of common right muſt be patron thereof. So that if the parſon makes a leaſe of the parſonage, (without making a ſpecial reſervation to himſelf of the right of preſenting to the vicarage) the patronage of the vicarage paſſeth as incident to it. But it was held in the 21. *Ja.* that the pariſhioners may preſcribe for the choice of a vicar. And before that, in the 16 *Ja.* in the caſe of *Shirley* and *Underhill*, it was declared by the court, that tho' the advowſon of the vicarage of common right is appendant to the rectory, yet it may be appendant to a manor; as having been reſerved ſpecially upon the appropriation. *Gibſ.* 719.

All *appropriations to priories* or other religious houſes, which were under the value of 200*l. per annum*, were given to the King by the Statute 27 *H.* 8. as well as thoſe appropriations to abbies above the value of 200*l. per annum* were given to him by the ſtatute 31 *H.* 8. for the ſtatute 27 *H.* 8. gives him the *churches*, *chapels*, *advowſons and patronages* of theſe monaſteries, *&c.* which muſt be underſtood the *churches* appropriate as well as the advowſons and churches which were preſentative, for the words *eccleſia* and *rectoria* are *ſynonymous*; beſides, the ſtatute gives the King all thoſe monaſteries whereof the *poſſeſſions* did not exceed 200*l. per annum*, ſo that whatever contributed to the yearly revenue was given to the King; now 'tis plain, that a great part of their poſſeſſions and yearly profits did conſiſt in *appropriations*, for it was eaſy for them to get advowſons, and as eaſy afterwards to get them *appropriated*, and *appropriations*, tho' they were only ſo *in reputation*, paſſed to the King by both theſe ſtatutes; ſo adjudged 11 *Rep.* 13. in *Priddle* and *Napier*'s caſe, and in *Hob.* 306. *Wright* and *Gerard*'s caſe, and 148. *Colt* and the biſhop of *Coventry*'s caſe.

The *abbot of S.* held the parſonage of *J.* appropriate, which came as ſuch to *H.* 8. by the ſtatute of diſſolutions, *&c.* the King granted it in fee to *B.* under which grant the plaintiff claimed; the defendant had obtained a preſentation to the church of *L.* from the King, ſuppoſing it to be void by lapſe, and to deſtroy the *appropriation*, he ſet forth the original of it, which was *anno* 22 *Ed.* 4. with a condition, that *a vicarage ſhould be perpetually endowed*; and alledged, that their never was any

vicarage

vicarage endowed, and therefore the appropriation was void, and by conſequence the rectory could not come to King *H.* 8. as appropriate to the abbot of *S.* but adjudged, that ſince it had been taken to be appropriate ever ſince the reign of *Ed.* 4. and a *vicar* had ever ſince been inſtituted and inducted, it ſhall be preſumed that the vicarage was endowed originally. 12 *Rep.* 4. *Grimes* verſus *Smith.* 2 *Cro.* 210. *Hunſton* verſus *Cocket*, *S. P. Lea.* 15. *Staffford*'s caſe, *S. P.*

King *Ed.* 1. *anno* 12 of his reign, granted to the *biſhop of St. David*'s, and his ſucceſſors, thirty-four churches in his dioceſe in *Wales*, ſo as he or they might appropriate them, or any of them, to the *church of St. David*'s, or make new prebends in any of the ſaid churches; afterwards the biſhop with the aſſent of the *king*, and the *dean and chapter of St. David*'s created a *collegiate church* out of one of the *thirty-four churches* ſo granted to him as aforeſaid, and made *thirteen prebendaries*, and appropriated *thirteen of the ſaid churches* to the ſaid *prebendaries*; King *Edward* 3. confirmed the premiſſes, *&c.* adjudged, that theſe *appropriations* were well made, and that this was a good *college* and given to the King by the ſtatute 1 *Ed.* 6. for tho' there was no *endowment of a vicar*, which ought to be upon every *appropriation*, yet that ſtatute gives the commiſſioners power to eſtabliſh a *vicar* in every college, which was formerly a parochial church. 4 *Rep.* 107. in *Adams* and *Lambert*'s caſe. *Mich.* 10 *Eliz. Dyer* 267. *S. P.*

King *Ed.* 1. being ſeiſed of the manor of *Kimbolton*, to which the advowſon of the church was appendant, granted the ſaid manor *cum pertinentiis* to *H. B.* in tail; after the death of the tenant in tail, his iſſue in tail, *anno* 4 *Ed.* 3. granted the ſaid advowſon to the *prior of Stonely*, who, after the death of the incumbent had the ſame *appropriated* to him and his *convent*; and ſo it continued till the diſſolution *anno* 27 *H.* 8. then the King granted the impropriation to another in fee; afterwards, *anno* 37 *Eliz.* one *Beard* obtained from the *Queen* a preſentation to this church, ſuppoſing ſhe had a title *by lapſe*, for that the church was not lawfully appropriated to the *prior of Stonely*; and the reaſon was, becauſe the iſſue in tail had nothing in it, and by conſequence he could not grant it to the *priory*, becauſe it did not paſs to his anceſtor by the grant of the manor *cum pertinentiis*; adjudged, that tho' the advowſon in ſtrictneſs of law did not paſs by the words *cum pertinentiis*, yet becauſe of the long and continued poſſeſſion in the *prior and convent*, it ſhall be *intended* there was a lawful grant thereof made by the King to *H. B.* and all ſhall be preſumed to be done which might make this ancient appropriation good, and it ſhall not be drawn in queſtion after ſo many ſucceſſions of ages, during all which time it hath been taken, that the church was rightfully appropriated to the priory. 12 *Rep.* 5. *Priddle* verſus *Beard & al'*. 12 *Rep.* 3. *Lord St. John of Bletſoe* and *Dean and chapter of Glouceſter*, *S. P.*

2. *Where appropriation is not good.*

King *Ed.* 6. being patron of the church of *B.* which was then *full of an incumbent*, granted the ſame to the *biſhop of Coventry*, *&c.* and that after the avoidance it ſhall be *appropriate* to the ſaid biſhop and his ſucceſſors; the biſhop made a leaſe thereof for ſixty years, to commence upon the next avoidance, which leaſe was confirmed by the *dean and chapter*; adjudged, that this *leaſe was void*, becauſe the biſhop had nothing in the parſonage during the life of the incumbent; and the reaſon was, becauſe the appropriation was made to him by theſe words, *(viz.)* that *after the next avoidance* he ſhould hold the church *in proprios uſus*, by which it appears, that an appropriation cannot be made to a church which is full but by ſpecial words. *Mich.* 8 *Eliz. Dyer* 244. *Biſhop of Coventry* and *Litchfield*'s caſe, and *Jobſon* and *Michael*'s caſe, *S. P.*

In *quare impedit* againſt the *biſhop* and the *dean and chapter of Worceſter*, to preſent to the church of *Dean*; the biſhop pretended, that he claimed nothing but as ordinary, and that the dean and chapter pleaded a plea, to which the plaintiff demurred, and the caſe upon the pleadings was thus: King *Ed.* 6. was ſeiſed of the advowſon of the ſaid church in fee, and in the firſt year of his reign, the church being then *full of an incumbent*, granted the ſame to the *dean and chapter*, and their ſucceſſors, and gave them licence to retain it *in proprios uſus*, upon the next avoidance; and by the ſame grant did *appropriate* and incorporate it to them; and the incumbent died, then King *Ed.* 6. preſented one *Chamberlaine*, who was admitted, inſtituted and inducted, then the King died, and after his death Queen *Mary* granted the advowſon to *B. B.* in fee, who granted over to *Tho. Grendon*, and from him it deſcended to *Roger Grendon*, the plaintiff: In this caſe it was adjudged, that none is capable of an *appropriation*, but a *body ſpiritual*, *corporate* or *politick*, which hath a ſucceſſion; for the effect of an appropriation is to make ſuch a ſpiritual body perpetual incumbent, and to have the rectory with cure of ſouls, and for that reaſon he muſt be a ſpiritual perſon; that the ordinary, patron and King ought to be aſſenting to every appropriation where a common perſon is patron; but that the King where he is patron may make an appropriation without the aſſent of the biſhop; and laſtly, that an *appropriation* may be made, even when the *church is full*, but not by ſuch words, as in this caſe, but by apt and proper words, ſuch as theſe, *viz*, that the parſon, who is a ſpiritual perſon, may, after the death of the incumbent, *retain the glebe and the fruits of the church to his proper uſe*, and not by ſuch words as in this caſe, *(viz.)* that the parſon, after the death of the incumbent, *may retain the advowſon* to his own uſe. *Plow. Com.* 496. *Grendon*'s caſe.

An appropriation cannot regularly be granted over, neither can it endure longer than the body ſpiritual to which it was at firſt appropriated, becauſe by the appropriation not only the *glebe and tithes* do paſs, which might be granted away if that could be granted over, but it alſo giveth the perſon, to whom the appropriation is made, a ſpiritual function; it makes him parſon of the church, and ſupplieth inſtitution and induction, which being the higheſt parts of a truſt, cannot for that reaſon be aſſigned over, and therefore every inſtrument of appropriation runs thus, (*viz.*) that they and *their ſucceſſors* ſhall be parſons, and not they and *their aſſigns*; for by the uſual words, that they ſhall hold the church *to their own uſe*, they are made parſons. *Hob.* 307. *Wright* verſus *Gerard.*

Appropriations have been judged an abuſe and robbery of the church and prieſts. See *Kennet's Parochial Antiquities* 433.

The form of a *grant* of *appropriation.*

SCiatis quod nos dedimus, &c. Decano et capitulo eccleſiæ cathedralis, &c. advocation' rectoriæ eccleſiæ parochialis de, &c. habend. et tenend. &c. iiſdem decano et capitulo et ſucceſſoribus ſuis in perpetuum. Et ulterius ſciatis per præſentes quod nos de gratia noſtra ſpeciali ac authoritate noſtra regia ſuprema et eccleſiaſtica, qua nunc fungimur, pro nobis hæredibus et ſucceſſoribus noſtris concedimus et licentiam damus prædict. decano et capitulo et ſucceſſoribus ſuis quod rectoriam et eccleſiam prædict. quando per mortem, reſignationem, vel deprivationem, aut per aliquem alium modum quemcunque vacare contigerit, immediate in ſuos proprios uſus tenere ſibi et ſucceſſoribus ſuis in perpetuum poſſint et valeant abſque moleſtatione et impedimento noſtro, hæredum aut ſucceſſorum noſtrorum, ac hoc abſque aliqua præſentatione, inductione ſive admiſſione alicujus incumbentis ad eandem rectoriam extunc impoſterum fiend', ac ulterius.

An appropriation by the patron or firſt founder, is thus: *Ego* A. B. *de, &c. conceſſi eccleſiam et advocationem meam de* H. *cum terris et decimis omnibus ad eam pertinentibus, decano de, &c.*

See title Vicar.

Appropriare ad honorem, To bring a manor within the extent or liberty of ſuch an honour. *Petrus de Aſherugge Seneſchallus honoris ſancti Walerici* appropriavit *dictum manerium ad honorem ſancti Walerici.*——Paroch. Antiq. p. 336.

Appropriate communiam, To diſcommon, *i. e.* to ſeparate and incloſe any parcel of land, that was before open common. So *A. D.* 1299. the prior and convent of *Burcheſter* granted to the rector of *Aſhcrugge* and the *bonn hommes* of that place, *quod ſibi poſſint* appropriare, *& includere pro voluntate ſua tres acras de communi paſtura in* Blakethorn, *&c.* Paroch. Antiq. p. 336.

Approve, (*Approbare,*) To augment, or, as it were, to examine to the utmoſt. For example, to approve land is to make the beſt benefit of it by increaſing the rent, *&c.* *Stat.* 9 *Hen.* 6. *c.* 10. 2 *Inſt.* 474.

Approyare, To approve, occurs in old records, as, *Approyare vaſta* —— and *vaſtis approyatis. Cowell, edit.* 1727.

Approvcamentum, *Improvement* —— *Cum omnibus* approveamentis, *et aliis pertinentiis ſuis.* Mon. Angl. 2 part, fo. 607.

Approvement, Is where a man hath common in the lord's waſte, and he makes an incloſure of part of the waſte for himſelf, leaving ſufficient common with egreſs and regreſs for the commoners. *Reg. Jud.* 8, 9. If there be not ſufficient common left for the tenant, he may have a writ of aſſiſe, and ſhall recover treble damages. *Stat.* 3 & 4 *Ed.* 6. *c.* 3. and a commoner may break down an incloſure, if the lord doth incloſe part of the common, and not leave ſufficient room in the reſidue; but if any, upon juſt title of *approvement*, do make a hedge or ditch for that purpoſe, which afterwards is thrown down in the night by perſons unknown, the towns adjoining may be diſtrained to make ſuch hedge, *&c.* for which there is a *nocſtanter* writ. *Stat.* 13 *Ed.* 1. *c.* 46. 2 *Inſt.* 474. *Approvement* is to be only by incloſure; and the lord may not by the ſtatutes of *approvement* dig pits for gravel or coal, *&c.* 1 *Rol. Abr.* 90, 405. 9 *Rep.* 112. Approvement may be made between neighbour and neighbour, tho' one of them dwell in another town, if the commons join together; and if the lord hath common in the tenant's ground, the tenant may *approve.* 2 *Inſt.* 475. The common is to be common appendant or appurtenant, to be ſubject to *approvement*, and not common in groſs to a certain number. The word *approvement* is alſo uſed for the profits of lands themſelves. *Cromp. Juriſd.* 152. and the ſtatute of *Merton*, 2 *H.* 8. makes mention of land newly approved. *F. N. B.* 71.

Stat. 20 *Hen.* 3. *c.* 4. Whenſoever feoffees bring an aſſiſe of *novel diſſeiſin* for their common of paſture, and it is ſo cognized before the juſtices, that they have as much paſture as ſufficeth for their hold, and that they have free egreſs and regreſs from their hold unto the paſture, then let them be contented therewith, and they on whom they have complained ſhall go quit, for that they have made their profit of their lands, waſte, woods, and paſtures; and if they alledge that they have not ſufficient paſture, or not ſufficient egreſs and regreſs as appertaineth to their hold, then let the truth be inquired by aſſiſe; and if it be found by aſſiſe, that the ſame deforceors have diſturbed them of their egreſs or regreſs, or that they have not ſufficient paſture, then they ſhall recover their ſeiſin by the view of inqueſt, ſo that by their diſcretion and oath, the plaintiffs ſhall have ſufficient paſture, and egreſs and regreſs, and the diſſeiſors ſhall be amerced, and yield damages. And if it be found by the aſſiſe, that the plaintiffs have ſufficient paſture, and ſufficient egreſs and regreſs, let the other make their commodity of the reſidue, and go quit.

Stat. Weſt. 2. 13 *Ed.* 1. *cap.* 46. the ſtatute of *Merton*, provided between the lord and his tenant, ſhall hold place between lords of waſte, woods, and paſtures, and neighbours; ſaving ſufficient paſture to their tenants and neighbours, ſo that the lords of ſuch waſtes, woods, and paſtures, may make improvements of the reſidue. And this ſhall be obſerved for ſuch as claim paſture as pertaining to their hold: But if any claim common of paſture by ſpecial feoffment or grant, for a certain number of beaſts, or otherwiſe than he ought to have of common right; he ſhall have ſuch recovery as he ought by form of the grant made unto him, by occaſion of a wind-mill, ſheepcote, dairy, enlarging of a court or courtilage. No man ſhall be grieved by aſſiſe of *novel diſſeiſin* of common of paſture.

And whereas ſometimes it chanceth, that one having right to improve, doth levy a ditch or an hedge, and ſome by night, or when they hope not to be eſpied, do overthrow the hedge or ditch, and it cannot be known by verdict of the aſſiſe or jury, who did overthrow the hedge or ditch, and men of the towns near will not indict ſuch as be guilty; the towns near adjoining ſhall be diſtrained, to raiſe up the hedge or ditch again at their own coſt, and to yield damages. And where one uſurpeth common in the time that heirs are within age, or a woman is covert, or whilſt the paſture is in the hands of tenants in dower, or of other particular eſtates; they who have ſuch entry from time in which the writ of *mortd' anceſtor* runneth, if they had no common before, ſhall have no recovery by writ of *novel diſſeiſin* if they be deforced.

Stat. 3 & 4 *Ed.* 6. *c.* 3. *ſect.* 4. All ſuch perſons as ſhall bring *aſſiſe* upon an article of the ſtatutes *Mert.* 20. *H.* 3. *cap.* 4. and *Weſt.* 2. 13 *Ed.* 1. *cap.* 46. and have judgment to recover, ſhall have their damages treble.

Sect. 5. And where there have been built upon commons houſes, with ground under the quantity of three acres incloſed, and in ſome places there is incloſed a garden, orchard, or pond, out of ſuch waſtes, which exceed not two acres, the ſaid two former acts ſhall not extend to any ſuch houſes.

Sect. 6. If there be above three acres incloſed, then the houſe and three acres ſhall remain, as it now doth, and the overplus of the ſaid three acres may be laid open by the owner of the waſtes.

See title **Incloſure,** and *Stat.* 29 *Geo.* 2. *c.* 36. by which commons may be incloſed for planting timber, with the conſent of lords and tenants.

Appover, or in Latin, *probator*, is one who being indicted of treaſon or felony, for which he is in priſon, confeſſes the indictment; and being ſworn to reveal all the treaſons and felonies he knows, enters before a coroner his appeal againſt all his partners in the crime within the realm. *Hale's P. C.* 192. 3 *Inſt.* 129. *Staund. P. C.* 14.

All perſons may be approvers, except peers of the realm, perſons attainted of treaſon or felony, or outlawed, infants, women, perſons *non compos*, or in holy orders. 3 *Inſt.* 129. *Hal. P. C.* 192.

The court is not bound of right to admit any perſon whatſoever to be an approver, nor will any perſon be admitted, unleſs he be actually indicted of treaſon or felony, and confeſſes the indictment; neither ſhall a perſon indicted of felony continue to be an approver after an appeal exhibited againſt him for the ſame felony; neither ſhall the appellee of an approver be himſelf an approver; for it would falſify the appeal of the firſt approver, in ſuppoſing that he had omitted ſome of his partners, but alſo, becauſe it would cauſe an infinite delay; for the appellee of ſuch an approver might as well become an approver of others, and ſo on. 3 *Inſt.* 139. *Staund. P. C.* 144. 2 *Hawk. P. C.* 205.

A man can only approve others of the very ſame crime with that for which he is indicted, and therefore no man can approve another with having been an acceſſary to himſelf, becauſe it is an offence of which it is not poſſible that he himſelf can be guilty; but inaſmuch as an approver is ſworn to reveal all the treaſons and felonies he knows, if he accuſe perſons of crimes different from his own, ſuch accuſation ſeems a reaſonable ground to carry on a proſecution againſt them for ſuch crimes, tho' it be not of itſelf ſufficient to put them on their trials. 2 *Inſt.* 629. *Fitz. Coron.* 127. 2 *Hawk. P. C.* 206.

If it appear either by the confeſſion of the approver, or by the return of the ſheriff, or the teſtimony of perſons of credit, that there are no ſuch perſons as ſome of thoſe appealed *in rerum natura*, or in the realm, or in the county whereof they are named in the appeal, he ſhall be hanged, unleſs the court in mercy ſpare him. 2 *Hawk. P. C.* 206.

The juſtices of the King's Bench, and juſtices of goal delivery, and juſtices in *eyre*, may admit a man to be an

an approver, becauſe ſuch juſtices may aſſign a coroner to take the appeal; but juſtices of the peace cannot admit a man to be an approver, becauſe they cannot aſſign a coroner. 3 *Inſt.* 130. *H. P. C.* 194.

As ſoon as a perſon has confeſſed the indictment with an intent to become an approver, he puts it in the diſcretion of the juſtices, either to give judgment and award execution againſt him, or to reſpite him till he hath convicted his partners; if the juſtices think fit to admit him to be an approver, they will aſſign a coroner to receive his appeal, and will take his oath to diſcover all the treaſons and felonies he knows, and will aſſign him a certain number of days to make his appeal in, during which he ſhall be at liberty, and ſhall have from the King a penny a day; alſo he muſt make his appeal before the coroner on each day during the time limited, and muſt at laſt repeat it *verbatim* in court, and if the coroner record his failure of making his appeal on any of the days, or the leaſt variation in his repeating it in court, he ſhall have judgment of death. 3 *Inſt.* 129. *H. P. C.* 144. 2 *Inſt.* 629. 2 *Hawk. P. C.* 207.

The coroner may award proceſs againſt the appellee to the ſheriff of his own county, till he come to the exigent, from the award whereof he ſeems to be reſtrained by *Magna Charta, cap.* 17. The King's Bench and juſtices in *eyre*, and juſtices of goal delivery, may award proceſs into any county to apprehend and try the appellee; but it ſeems queſtionable, whether *juſtices* of goal delivery can award proceſſes of outlawry in a foreign county, as the King's Bench and juſtices of oyer clearly may. 2 *Hawk. P. C.* 208.

It is at the election of the appellee, either to put himſelf on his country, or wage battle with the approver; and if ſeveral perſons be appealed by one approver, every one of them has his election, either to put himſelf on his country, or to wage battle with the approver, who muſt fight them all, or at leaſt till one of them have vanquiſhed him; after which he cannot maintain his appeal againſt the reſt; but if a perſon appealed of the ſame felony by ſeveral approvers vanquiſh one of them, he ſhall be diſcharged againſt all the reſt. 2 *Hawk. P. C.* 208.

If the King pardon either the approver or appellee, hanging the appeal, the approvement ceaſes, and the appellee ſhall be diſcharged; in the firſt caſe, becauſe by the pardon the felony is extinct, and the approver is no longer liable to be condemned; in the ſecond, becauſe the approvement is in truth the ſuit of the King, and therefore as much in his power as an indictment. *Hal. P. C.* 201. 3 *Inſt.* 130. *Staund. P. C.* 149.

Neither the approver's confeſſing his appeal to be falſe, nor the conviction of the appellee, exclude them from the benefit of the clergy. 2 *Hawk. P. C.* 208.

If an approver convict all the appellees, whether by battle or verdict, the King *ex merito juſtitiæ* is to pardon him as to his life, and alſo give him his wages from the time of the appeal to the time of the conviction; but anciently he was not ſuffered to continue in the kingdom. It is recited by 5 *H.* 4. *cap.* 2. "That divers notorious felons, for ſafeguard of their lives, had become provers to the intent in the mean time, by brokeage and great gifts to purſue and have their pardons, and then after their deliverance, had become more notorious felons than they were before; and thereupon it is enacted, That if any perſon pray or purſue, or cauſe to be prayed or purſued, for any ſuch felon ſo attainted by his own confeſſion, to have any charter of pardon, the name of him that purſues ſuch charter, be put in the ſame charter, making mention that the ſame charter is granted at his inſtance; and if he to whom ſuch charter is granted become a felon again, the party who purſued the charter ſhall forfeit 100*l.*

By ſtat. 5 *Ann. cap.* 31. *ſect.* 4. it is enacted, That if any perſon being out of priſon ſhall committ burglary, or ſhall be guilty of the felonious breaking and entering any houſe in the day-time, and after diſcover two who ſhall have committed ſuch burglaries or felons, ſo as they be convict, ſuch diſcoverer ſhall have 40*l.* and ſhall be entitled to a pardon of all burglaries and felonies, except murder and treaſon; which pardon ſhall be a bar to any appeal for the ſame.

Approvers. In Stat. 9 *Hen.* 6. *c.* 10. bailiffs of lords in their franchiſes are called *approvers*. But by the ſtatute 2 *Ed.* 3. *c.* 12. *approvers* are ſuch as are ſent into counties to increaſe the farm of hundreds and wapentakes, which were formerly ſet at a certain rate to the ſheriffs, who likewiſe demiſed them to others, the county court excepted. *Cowel.*

Approvers of the King, *(Approbatores regis)* Are thoſe that have the letting of the King's demeſnes in ſmall manors, to his beſt advantage. *Stat.* 51. *Hen.* 3. *ſt.* 5. And in the ſtat. 1. *Ed.* 3. *c.* 8. the ſheriffs did call themſelves *King's approvers*, that is, the collectors of the King's profits. *Cowel.*

Appuare, To take to his own uſe or profit, viz. *Domini vaſtorum & boſcorum, &c.* Appruare *ſe poſſunt de vaſtis, &c. Weſt.* 2. *c.* 50. *Cowel.*

Appurtenances, *(Pertinentia)* Derived from the Fr. *appertenir*, to belong to, ſignify things both corporeal and incoporeal appertaining unto another thing as principal: as hamlets to a chief manor; and common of paſture, piſcary, *&c.* alſo liberties and ſervices of tenants. *Brit. cap.* 39. If a man grant common of eſtovers to be burnt in his manor, theſe are *appurtenant* to the manor; for things appurtenant may be granted at this day. *Co. Lit.* 121. Common *appurtenant* may be to a houſe, paſture, *&c.* outhouſes, yards, orchards, and gardens are *appurtenant* to a meſſuage; but lands cannot properly be ſaid to be *appurtenant* to a meſſuage. 1 *Lill. Abr.* 91. And the meſſuage cannot be *appurtenant* to another. *Ibid.* Lands cannot, according to the right ſenſe of the words *cum pertinentiis*, be *appurtenant* to the houſe; but the word *pertinens* may be taken in the ſenſe of uſually letten or occupied with the houſe. *Plowd.* 170. Lands ſhall paſs in a leaſe or deviſe of a houſe with the *appurtenances*, as pertaining to the ſame, when it hath been uſed and occupied with it ten years or more; which is judged a ſufficient time to make it *appertaining* to the houſe. *Cro. El.* 704. Lands, a common, *&c.* may be *appurtenant* to a houſe, though not a way. 3 *Salk.* 40. Grant of a manor, with the words *cum pertinentiis*, 'tis ſaid will paſs all things belonging to the manor. *Owen's Rep.* 31.

Adjudged, that where a man hath a thing appertaining to a houſe or mill, the moſt durable thing is the land, being the foundation on which 'tis built, therefore tho' the houſe or mill falls by the act of the owner or another, yet becauſe the moſt durable part remains, he may build it again without the loſs of the appendancy or appurtenance, but then it muſt be built upon the old foundation. 4 *Rep.* 86. *Lutterell's* caſe.

So a *deviſe* of an *houſe*, with the *appurtenances*, and the deviſee claimed ſome *land in the field* by virtue of this deviſe; and adjudged that he might have it, if it had been uſed with the houſe for the ſpace of *ten years*, or more, for that ſhall be ſufficient time to make it appertaining to the houſe. *Cro. Eliz.* 704. *Yates* verſus *Clanrickard. Moor* 221. *Higham* verſus *Horwood, S. P.* 1 *Leon.* 34. *S. C. Godbolt* 40. *S. C. Cro. Eliz.* 16. 6 *Rep.* 64. *a. contra.* 3 *Leon.* 214. *Chard* verſus *Tuck, S. P. Cro. Eliz.* 89. *S. P.*

Three *coparceners* of a manor to which a *leet* did appertain; the King purchaſed two parts of the manor *with the appurtenances:* Adjudged, that the *leet* is not extinguiſhed, but remains appendant to the other third part; for the King had not all the *leet* by the alienation of the two ſiſters, but ſhall hold court with the third. 1 *And.* 26.

Treſpaſs for entering his cloſe, and taking and carrying away his hay; the defendant juſtified under a title to the land where the hay did grow; for that there was a chapel diſſolved in the reign of *Edw.* 6. and the poſſeſſions thereof (of which this land was parcel) deſcended to the Queen, who in the 32d year of her reign made a leaſe thereof by the name of all that chapel *de A. fundatum in eccleſia de B. cum pertinentiis*, under which leaſe the defendant claimed *the tithes*; and upon a demurrer

to this plea it was objected, that it was ill, becauſe 'tis not ſaid, that the tithes did grow on the lands belonging to the chapel: *Sed per curiam*, By the grant of the chapel *cum pertinentiis* all the tithes belonging to it ſhall paſs. 2 *Rol. Rep.* 150. *Grubham* verſus *Grate*.

A copyholder *for life*, who had right of *common* in the lord's waſte, purchaſed the *freehold*, which was granted to him *with the appurtenances*; adjudged, that by making it a *freehold*, the common which was annexed to the cuſtomary eſtate was deſtroyed, and that by his own act, and that it ſhall not be revived by thoſe general words in the grant *cum pertinentiis*, without ſome ſpecial words to paſs it again. 2 *Cro.* 253. *Marſham* verſ. *Hunter*. *Poſtea* Common. *(E. 2.) S. C. Cro. Eliz.* 794. *contra*.

In replevin, *&c.* the defendant avowed, that *G. D.* was ſeiſed of an houſe in *C.* in fee, and of ſeveral lands, *&c.* to the ſame *appertaining*, whereof the *locus in quo* was parcel; exception was taken to this avowry, becauſe *land* cannot properly be ſaid to *appertain to an houſe*; 'tis true, it may paſs by ſuch words in a *deed*, but in pleading it ought not to be ſo alledged; and ſo it was adjudged. *Cro. Eliz.* 919. *Willmott* verſus *Carne*.

Certain lands came to *H.* 8. upon the diſſolution of a priory, who demiſed the ſame to *B. B.* for years; the leſſee built an houſe upon theſe lands, which afterwards came to Queen *Elizabeth*, and ſhe granted all that meſſuage, and the lands *thereunto belonging:* Adjudged, that tho' the houſe was not built on the lands when demiſed by *H.* 8. but afterwards, and before the Queen granted the ſame, yet the grant is good, and the *lands may be properly ſaid to be appertaining to a houſe, when they have been let and enjoyed with the houſe a convenient time. Cro. Car.* 120, 168. *Jennings* verſus *Lake*. *Poſtea, pl.* 8. *S. P.*

In ejectment, *&c.* the caſe was, a *copyholder in fee* of a tenement called *Heyſham's*, built a *new building on ſix foot of the waſte*, which he did by *encroachment*, and afterwards the lord of the manor made *a leaſe of the ſix foot* ſo built on by the copyholder for 100 years; this leaſe was made *anno* 33 *Eliz.* and afterwards the copyholder *anno* 1 *Jac.* ſurrendered the ſaid tenement called *Heyſham's*, to the uſe of *B. B.* and his heirs, and *anno* 5 *Jac.* aſſigned all his term in the ſaid ſix foot to the ſaid *B. B.* who by indenture *anno* 19 *Jac.* made a leaſe of the ſaid tenement called *Heyſham's*, *with the appurtenances*, to *E. W.* for ſeventy years: Adjudged, that the *new building on the ſix foot of waſte ground* did not paſs by the word *appurtenances*; for it being built *anno* 33 *Eliz.* and it being not found that it had been uſed altogether with the tenement, or reputed as parcel thereof, nothing paſſed but what was parcel of the tenement at that time; but in a *deviſe* it might have been otherwiſe. *Cro. Car.* 12. *Brian* verſus *Witherland*.

By the later authorities, lands will not paſs by the word *appurtenances*, but only ſuch things which do properly belong to the houſe; as where a man was ſeiſed of two houſes and of eighty acres of land belonging to one of them, known by a *particular name*, and made a feoffment of the houſe and eighty acres to *B. B.* who made another feoffment to the ſaid feoffor, by which he took back the ſame houſe and lands, and *forty acres more by another name*; and about ten years afterwards he deviſed this houſe and all the *lands thereunto appertaining*, to his youngeſt ſon; adjudged, that tho' *he uſed thoſe forty acres with the houſe for ten years and more*, yet it would not paſs by theſe words *thereunto appertaining*, becauſe they were conveyed to him by a new name. *Palm.* 375. *Loftus* verſus *Baker*. *Godb.* 352. *S. C.* reported by the name of *Knight*'s caſe. *Cro. Car.* 57. *Hearn* verſus *Allen*, *S. P. Hutt.* 85. *S. C. Lit. Rep.* 8. *S. C.*

Upon a demurrer to an *Engliſh bill*, in the Exchequer, it was held by *Hale* chief baron, that *return of writs* may be claimed by preſcription as appertaining to a *manor*, but more eſpecially it may as appertaining to an *honour*, becauſe thoſe have larger incidents than *manors*, and that where the pernor of the profits is ſued, the plaintiff need not ſhew how he claims this privilege; but in a *quo warranto*, where the defendant muſt make a title, he muſt ſhew how he claims it. *Hardres* 423. *Counteſs of Pembroke* verſus *Lord Burlington*.

The teſtator had a *houſe* and a *kiln* built upon diſtant parts of a *cloſe*, and alſo two mills to make oatmeal adjoining to the ſaid cloſe, which were *uſed with the houſe for ſeveral years*, but were lately divided; then he ſold the houſe *with the appurtenances* and part of the cloſe to one, and deviſed the *mills with the appurtenances* to another: Adjudged, that the *kiln* did not paſs, for by the grant of the houſe *with the appurtenances*, nothing paſſed but what properly belonged to the houſe. 1 *Lev.* 131. *Archer* verſus *Bennet*.

Treſpaſs for digging turfs in his ſoil, the defendant juſtified by a grant of the lord of the manor to *T. S. and his heirs, to dig turfs* there to be burned in his *houſe*, and that *T. S.* granted the houſe *cum pertinentiis* to the defendant and his heirs: Adjudged, that the *turbary* paſſed by theſe words, without being ſpecially named, as *common appurtenant* may, becauſe it paſſed with the lands to which 'tis appurtenant. 3 *Lev.* 165. *Solmes* verſus *Bullock*.

In a ſpecial verdict in ejectment the caſe was, That 1 *Auguſt* 1606. *King James* was ſeiſed in fee in right of the crown of a *pool of water* and three gardens, in the pariſh of *St. Margaret*, *Weſtminſter*, and that a *water-work* was then erected in the ſaid gardens, and that the *pool was uſed with the water-work* till 12 *March* 11 *Jac.* and then the King by letters patent did grant the gardens and water-works with the *appurtenances*, *& omnia ſtagna, gurgites, &c.* to the premiſes *appertaining*; the queſtion, whether the ſoil paſſed by the words *ſtagnum* or *gurgites*, or either of them; if it did, then whether it paſſed as *appertaining* to the water-work, built *anno* 6 *Jac.* and paſſed away with the *pool as appertaining to it*, *anno* 11 *Jac.* or as appertaining to the gardens; which ſeems in a ſhort time to gain a *reputation*, *as appertaining*, *&c.* Adjudged, that by the word *ſtagnum* the water and ſoil paſſeth; and as to the word *appertaining*, a thing may be ſaid to be appertaining in relation to the *extent of the grant*, or in relation to the *nature of the thing granted*; and firſt as to the *extent of the grant*, as where an *ancient meſſuage* is granted with the *lands thereunto belonging*; now, if ſome lands were of *late years* occupied with that meſſuage, it may be a queſtion, whether thoſe lands paſs by the word *appertaining*, but 'tis a queſtion only what was intended to paſs, and that relates to the extent of the grant; but in the principal caſe the word *appertaining* relates to the thing granted, and without which it could not be uſed, and in ſuch caſe 'tis *appertaining* immediately, and as ſoon as 'tis annexed to it; and therefore the jury having found that the water-work could not work *ſine ſtagno prædict'*, they find that the water and ſoil, which is comprehended by the word *ſtagnum*, was neceſſary for the work, and it could not work without it. *Vaugh.* 107. 110. *Price* verſus *Braham*.

Aquage, *Aquagium*, *quaſi* aquæ agium, *i. e.* aquæ ductus, aquæ gangium, aquæ iter, *a water-courſe.*——*Non liceat alicui de cætero facere dammas vel fordas, aut alia impedimenta in aliquibus landeis, water-gangiis, foſſatis, ſive* aquagiis *communibus in mariſco prædicto.* Ordinatio Mariſci de Romney facta tempore *H.* 3. *& Ed.* 1. *Spelman.* See **Watergage.**

Arabant *ad curiam domini*, Was intended of thoſe who held by the tenure of plowing and tilling the lands of the lord, infra *curiam*, i. e. *Manerium ſuum. Spelm. Gloſſ. verb.* arabant.

Aralia, *Plur.* Arable grounds, *Domeſday* tit. *Eſſex. Rex. hundred. de Cheremesford.*——*Silva* 20 *porc. decem acr. prati* 2 *noncul. quatuor* aralia 23 *porc.* 50 *oves* 24 *caponei*, *&c. Cowell. Spelman.*

Arace, To raſe, from the French *arracher*, *evellere*. *Jacob.*

Araho, *In araho conjurare*, *i. e.* To make oath in the church, or ſome other holy place; for according to the *Ripuarian* laws, all oaths were made in the church upon the relicks of ſaints. *Spelman.*

Aratrum terræ, As much land as can be tilled with one plough.——*Hoc manerium eſt* 30 *aratrorum. Thorn. anno* 616. *Aratura terræ* is the ſervice which the tenant is to do for his lord in ploughing his land.

Arbitrator, (Lat.) Is a private extraordinary judge between party and party, choſen by their mutual conſents, to determine controverſies between them. *Weſt. Symb. part.* 2. tit. *Compromiſe*, *ſect.* 21. And *arbitrators* are ſo called, becauſe they have an *arbitrary* power; for if they obſerve the ſubmiſſion, and keep within due bounds, their ſentences are definitive, from which there lies no appeal. 1 *Rol. Abr.* 251. The award of *arbitrators* is definitive, and being choſen by the parties, they are not tied to ſuch formalities of law as judges in other caſes are; and yet they have as great power as other judges to determine the matters in variance; but their determination muſt be certain, and it is to be according to the expreſs condition of the bond by which the parties ſubmit themſelves to their judgment. 1 *Nelſ. Abr.* 234. *Dyer* 356. The *chancery* will not give relief againſt the award of the *arbitrators*; except it be for corruption, *&c.* and where their award is not ſtrictly binding by the rules of law, the court of equity can decree a performance. *Chan. Rep.* 279. 1 *Vern.* 24.

1. *What things may be ſubmitted to arbitration; and of the ſubmiſſion and revocation thereof.*
2. *Who may ſubmit to arbitration; and of the arbitrators and their powers.*
3. *Things eſſential to a good award.*
4. *What ſhall be deemed a good award in general.*
5. *Pleadings in awards.*

1. *What things may be ſubmitted to arbitration; and of the ſubmiſſion and revocation thereof.*

All perſonal actions and things of an uncertain nature may be determined by arbitrament. So a debt on a ſpecialty or record, tho' certain, may be ſubmitted and transferred by an award, *amongſt other things*, but not by itſelf. 1 *Lev.* 192. But freehold, or inheritance of lands cannot be determined by arbitrament; and therefore, there cannot be a partition by an award; for freehold doth not paſs without livery. 1 *Rol. Abr.* 242. So the intereſt of an eſtate for years cannot be transferred by an award; for it is a chattel real. 1 *Rol. Abr.* 242. *contr. Dyer* 183. *a. in marg.* 2 *Leon.* 104. *Cro. Eliz.* 223.

If a man be bound to ſtand to an award, and the arbitrators make an award, that *land ſhall be conveyed*; if the party refuſes the conveyance, he forfeits the obligation. 1 *Rol. Abr.* 244. So, if an award be, that one ſhall pay ſo much in ſatisfaction of a ſpecialty; though the ſpecialty is not thereby diſcharged, yet if he commences an action upon the ſpecialty afterwards, he forfeits his obligation. 1 *Rol. Abr.* 242. 2 *Cro.* 447.

An annuity is not determinable by award, for it is reckoned in nature of a freehold, and therefore cannot paſs without the deed of the party. 9 *Hen.* 6. 60. 14 *Hen.* 4. 19. 3 *Hen.* 4. 6. 1 *Rol. Abr.* 266.

Partition cannot be made by award, for a freehold cannot paſs without livery and ſeiſin. 1 *Rol. Abr.* 242.

It has been doubted, whether leaſes for years, being chattles real, could be transferred by award; therefore it ſeems ſafeſt when the controverſy relates to theſe, that the parties be bound in mutual obligations to perform the award, and then if the arbitrators award that one ſhall aſſign, transfer, *&c.* the leaſe to the other, if he refuſes, he forfeits his obligation. 1 *Rol. Abr.* 242. 9 *Co.* 78. 6 *Co.* 41.

Cauſes criminal are not arbitrable, becauſe they ought to be puniſhed for the common good. *Weſt. Symb. part* 2. *ſect.* 33.

Alſo cauſes matrimonial ſeem not arbitrable, becauſe marriage ought to be free, and religion diſallows the ſevering thoſe whom the church hath joined. *Weſt. Symb. part.* 2. *ſect.* 33. 1 *Rol. Abr.* 252. But the damages a perſon ſuſtained by a promiſe of marriage, or any thing relating to a marriage portion, may be ſubmitted. 16 *Ed.* 4. 2.

Debts due by ſpecialty cannot be diſcharged by naked award; but if the ſubmiſſion were by bond the award would be a good bar, for one ſpecialty may be diſſolved by another. 1 *Hen.* 7. 16. *b. Dyer* 51. 6 *Co.* 44.

A certain and fixed debt is not diſcharged by an award, but the end and deſign of an arbitration is to reduce uncertain debts and duties to a certainty; and to award a man a certain debt is to give him no more, nor do any greater thing for him than was done before, for now he can have but an action, and that he might have before, and to give him leſs than he had before is to do him a manifeſt injuſtice, which the arbitrator cannot do. *Cro. Jac.* 99, 447, 647. 3 *Hen.* 4. 4. 4 *Hen.* 7. 6. 10 *Hen.* 7. 4. 1 *Rol. Abr.* 264.

It is held clearly, that all chattles perſonal, and perſonal actions, ſuch as treſpaſs, conſpiracy, maintenance, *&c.* may be determined by arbitration, and the right transferred by naked award, though the ſubmiſſion were not by deed; for theſe being transferrable by the party himſelf without any ſolemnity, whatever the parties themſelves could do, may be done by the arbitrators, who are their ſubſtitutes, and ſtand in their place; and if on theſe ſubmiſſions without deed, the arbitrators award one party a ſum certain, he may bring an action of debt for it; but if the award be of doing ſome other thing, which is beneficial to him, he muſt have his action on the caſe. 22 *Hen.* 6. 39. 9 *Co.* 78. 1 *Roll. Abr.* 242.

The arbitrators cannot make an award of matters different from thoſe which were ſubmitted; therefore if the ſubmiſſion be of ewes with lamb, and after the ſubmiſſion the lambs are yeaned, they cannot arbitrate concerning the lambs. 1 *Keb.* 600. *Weſt. Sym. part* 2. *ſect.* 32.

The ſubmiſſion is the authority given by the parties in controverſy to the arbitrators, to determine and end their grievances; and this being a contract or agreement muſt not be taken ſtrictly, but largely, and according to he intent of the parties ſubmitting. *Weſt. Symb. part* 2. *ſect.* 1, 2.

This ſubmiſſion may be by word or deed; if the ſubmiſſion be by word, there is no remedy to enforce the party to perform the award, but reciprocal actions on the caſe, and an action of debt will lie, if money be awarded, for it is in nature of a ſimple contract. 5 *Ed.* 4. 7. 1 *Keb.* 600. 2 *Keb.* 238. 3 *Keb.* 64.

If the ſubmiſſion be without deed, it may be revoked without deed, and the party ſhall loſe nothing, for *ex nuda ſubmiſſione non oritur actio.* 21 *Hen.* 6. 10. 8 *Co.* 81, 82.

If there be a ſubmiſſion *of all actions and complaints*; cauſes of action are ſubmitted. 1 *Rol. Abr.* 245.

If there be a ſubmiſſion of *actions perſonal, ac ſectis et querelis*; actions real are ſubmitted. 1 *Rol. Abr.* 246.

If there be a ſubmiſſion *of all matters between them two*; an action by one of them and his wife againſt the other, is not ſubmitted. 1 *Rol. Abr.*

If there be a ſubmiſſion *of all debts*; ſpecialties and judgments for them may be releaſed. 2 *Sand.* 190.

By a ſubmiſſion *of all actions*, cauſes of action are not ſubmitted. 1 *Rol. Abr.* 245.

But by a ſubmiſſion *of all actions perſonal, ſuits and complaints*, actions real are not ſubmitted; for *perſonal* refers to the whole. 1 *Rol. Abr.* 246.

By a ſubmiſſion by *A.* and *B.* of the one part, and *C.* of the other, *of all matters between them*, an action by *A.* alone againſt *C.* is ſubmitted; for it ſhall be taken diſtributively. 1 *Rol. Abr.* 246.

By a ſubmiſſion of *A. of all matters*, a debt, due from the wife of *A.* as executrix, is ſubmitted. 2 *Cro.* 447.

Submiſſions are likewiſe general; as of all controverſies, debts, dues, *&c.* and here the arbitrators are not obliged to determine all matters diſcloſed, but their arbitration of ſome things will be good, tho' they leave other things undone; but where the ſubmiſſion is ſpecial or conditional, *ita quod* an award be made of all controverſies depending, they ought to determine all matters whereof they have notice, becauſe here by the expreſs words of the authority, I do not own his determination, unleſs all matters in controverſy are ſettled; and therefore to determine

termine one without the others, is to act contrary to the authority; but if upon ſuch a ſubmiſſion, the arbitrators make an award but of one thing, it ſhall be intended there were no others to make an award of, unleſs the other ſide ſhew there was, and that the arbitrators had notice thereof. *Cro. Eliz.* 839. *Cro. Jac.* 200, 355. 8 *Co.* 98. *Dyer* 216. 1 *Rol. Abr.* 257. 1 *Sand.* 32. 1 *Brownl.* 63.

Alſo a ſubmiſſion may be made a rule of court, purſuant to the ſtatute 9 & 10 *W.* 3. and it is ſaid, that although the ſubmiſſion be by bond, yet the party may have it made a rule of court; in which caſe, it is ſaid, he may proceed on the bond, and likewiſe have an attachment for not performing the award. 1 *Salk.* 73.

By the ſtatute 9 & 10 *W.* 3. *cap.* 15. it is enacted, "That it ſhall and may be lawful for all merchants and traders, and others deſirous to end any controverſy, ſuit or quarrel, for which their is no other remedy but by perſonal action, or ſuit in equity by arbitration, to agree that their ſubmiſſion of the ſuit to the award or umpirage of any perſon or perſons ſhould be made a rule of any of his majeſty's courts of record which the parties ſhall chooſe, and to inſert ſuch their agreement in their ſubmiſſion, or the condition of the bond or promiſe, whereby they oblige themſelves reſpectively to ſubmit to the award or umpirage of any perſon or perſons; which agreement being ſo made and inſerted in their ſubmiſſion, or promiſe, or condition of their reſpective bonds, ſhall or may, upon producing an affidavit thereof made by the witneſſes thereunto, or any one of them, in the court of which the ſame is agreed to be made a rule, and reading and filing the ſaid affidavit in court, be entered of record in ſuch court, and a rule ſhall thereupon be made by the ſaid court, that the parties ſhall ſubmit to, and finally be concluded by the arbitration or umpirage which ſhall be made concerning them by the arbitrators or umpire, purſuant to ſuch ſubmiſſion; and in caſe of diſobedience to ſuch arbitration or umpirage, the party refuſing or neglecting to perform and execute the ſame, or any part thereof, ſhall be ſubject to all the penalties of contemning a rule of court, where he is a ſuitor or defendant in ſuch court, and the court, on motion, ſhall iſſue proceſs accordingly, which proceſs ſhall not be ſtopped or delayed in its execution, by any order, rule, command or proceſs of any other court, either of law or equity; unleſs it ſhall be made appear on oath to ſuch court, that the arbitrators or umpire miſbehaved themſelves, and that ſuch award, arbitration or umpirage, was procured by corruption or other undue means: *And* that any arbitration or umpirage, procured by corruption or other undue means, ſhall be judged and eſteemed void and of none effect, and accordingly be ſet aſide by any court of law or equity; ſo as complaint of ſuch corruption or undue practice be made in the court where the rule is made for ſubmiſſion to ſuch arbitration or umpirage, before the laſt day of the next term after ſuch arbitration or umpirage made and publiſhed to the parties."

An arbitration bond had theſe words, *and if the obligor ſhall conſent that his ſubmiſſion ſhall be made a rule of court, that then, &c.* Upon motion to make this ſubmiſſion a rule of court, it was objected, that theſe words did not imply his conſent, but if he would forfeit his bond, he need not let it be made a rule of court; yet becauſe this clauſe could be inſerted for no other purpoſe, the court took theſe conditional words to be a ſufficient indication of conſent. 1 *Salk.* 72.

If one of the parties revokes the ſubmiſſion, or hinders the arbitrators from proceeding to the award, the court will grant an attachment. 1 *Salk.* 73.

But if the party dies, there is no remedy by attachment againſt his repreſentative, for the contempt dies with him. 2 *Vern.* 444.

If the party excepts to the award, tho' it be affirmed, an attachment will not be granted; for the non-performance of it, while the matter was *ſub judice*, was no contempt. 1 *Salk.* 73.

Alſo the party muſt be required perſonally to perform the award, and ſuch perſonal demand muſt be made out by affidavit; otherwiſe the court will not grant an attachment. 1 *Salk.* 83.

On motion to ſet aſide an award, becauſe the arbitrators went on without giving the party time to be heard, or produce a witneſs, *Holt* ſaid, that the arbitrators being judges of the party's own chooſing, he ſhall not come and ſay, that they have not done him juſtice, and put the court to examine it; *aliter* when they exceed their authority. 1 *Salk.* 73.

But awards have been frequently ſet aſide, eſpecially in equity, where the arbitrators have appeared to have been miſtaken, or have been guilty of corruption or partiality; as if they have an intereſt in the thing in controverſy. 2 *Vern.* 251.

So where there are three arbitrators, and two of them by fraud or force exclude the other, or if they have private meetings, and admit one of the parties, and give no notice to the other. 2 *Vern.* 514.

So, where they awarded 495*l.* againſt one of the parties for calling the other, who was a butcher, a *bankrupt knave*, to repair his honour, as they called it. 3 *Chan. Rep.* 76. 2 *Vern.* 251. See 1 *Vern.* 157.

So, where the ſubmiſſion was to arbitrators, and they had power to chooſe an umpire, which they did, by throwing *croſs and pile* who ſhould name him, and for this the court ſet aſide the award. 2 *Vern.* 485.

If there be a ſubmiſſion to an award, it may be revoked before the award made. 1 *Sid.* 281.

If two ſubmit on one part, and one on the other; one of thoſe two may revoke without the other. 1 *Rol. Abr.* 331.

If there be a ſubmiſſion by a *feme ſole*, who marries before an award made, it will be a revocation. So, if the woman and *B.* ſubmit to one part, and the woman marries, it will be a revocation as to *B.* alſo. 1 *Rol. Abr.* 331.

But if there be a ſubmiſſion, and a bond is given to ſtand to an award, if the obligor revoke, he forfeits his bond. 1 *Rol. Abr.* 331. So if a ſubmiſſion be revoked, it is of no avail 'till notice of the revocation to the arbitrators. 1 *Rol. Abr.* 331.

If the arbitrators are made commiſſioners by order of the *Chancery* to determine the difference, it is no revocation of the ſubmiſſion of the parties. 1 *Rol. Abr.* 331.

If the ſubmiſſion be by deed, it is of its own nature countermandable, though made irrevocable by the expreſs words of the deed, for the arbitrators being conſtituted and put in the place of the parties, by their conſent, to act for them, they can no longer act than they have ſuch conſent. 8 *Co.* 82. 1 *Sid.* 281. 1 *Brownl.* 62. 2 *Brownl.* 290.

But when a man obliges himſelf to ſtand to an award, if the party revokes it according to his power, he hath forfeited his obligation; for the making the award becomes impoſſible by his own default, and therefore the obligation is ſimple; but if it be without obligation he forfeits nothing. 8 *Co.* 82, 83. 1 *Brownl.* 62.

If ſeveral plaintiffs or defendants ſubmit themſelves to an award, one cannot revoke the ſubmiſſion without the other, for joint acts are conſidered as the acts of one perſon, and there can be no revocation without the act of that perſon that made the ſubmiſſion. 38 *Hen.* 6. 6. 1 *Brownl.* 62.

If a feme ſole ſubmits to arbitration, and afterwards marries, this is a revocation of the ſubmiſſion; and if it be by bond the bond is forfeited. 2 *Keb.* 865. 1 *Jones* 388.

If one have judgment in an ejectment, and then they ſubmit the controverſy to arbitration, but before any award be made he ſues out execution, it is a forfeiture of the bond, for he is the cauſe no award can be made. *T. Jones* 134.

In debt upon a bond to perform an award, and *oyer* of the condition, the defendant pleads *non ſubmiſit*, the plaintiff need not aſſign a breach; for the defendant puts the whoſe ſtreſs of his cauſe upon a matter antecedent to the alledging a breach; for if there was no ſubmiſſion there could be no award, and conſequently no breach of it. 1 *Sid.* 290.

A R B

2. *Who may ſubmit to arbitration; and of the power of the arbitrators and umpire.*

Perſons that cannot contract, cannot ſubmit to arbitration, therefore femes covert, perſons compelled by threats and impriſonment, perſons profeſſed in religion, cannot ſubmit. 9 *Ed.* 3. 23. 10 *Hen.* 6. 14, 19. *Latch.* 27.

The huſband may ſubmit the chattles he hath in right of his wife to an award, for he may diſpoſe of them. *Style* 351. *March* 77, 78.

If the huſband ſubmits to arbitration the chattles the wife has as executrix or adminiſtratrix, this ſhall bind the wife, becauſe the wife cannot perſonate any one without the huſband during coverture. 21 *Hen.* 7. 29. 1 *Rol. Rep.* 269. *Cro. Jac.* 447.

If an infant ſubmit to arbitration, he may execute or avoid it at his election, as he may all other his contracts. 13 *Hen.* 4. 12. 10 *H.* 6. 14. *March* 111, 141. 1 *Jones* 164. 1 *Lev.* 17. 1 *Rol. Abr.* 730.

Perſons attainted or outlawed cannot ſubmit to arbitration, for they have no property, and cannot by the law controvert any thing. 3 *Hen.* 6. 26. 5 *Hen.* 7. 16.

A dean without the chapter, a mayor without his commonalty, the maſter of a college or hoſpital without his fellows, cannot ſubmit to an award, for the ſubmiſſion has the force of a contract, and they cannot contract without them. 21 *Ed.* 4. 13.

If one party and the deputy or attorney of the other party ſubmit to an award, this is well enough, for the act of my deputy is my own act. *Dyer* 21. 1 *Rol. Abr.* 244. 2 *Mod.* 228.

If ſeveral perſons do a treſpaſs, and one of the wrongdoers and the party to whom it is done ſubmit to arbitration, and an award is made, the other perſons ſhall take advantage of it by way of extinguiſhment of the treſpaſs; the ſame law where the party releaſes to one of them; for in both caſes a ſatisfaction really is, or is preſumed to be made, and a man cannot receive a double compenſation for the ſame wrong. 1 *Salk.* 70. *Carth.* 412. 20 *Hen.* 6. 12. *a.* 41. *a.* *Rol. Abr.* 268.

The arbitrators are perſons indifferently choſen, to determine the matters in controverſy according to their own minds, whether they be matters of law or fact; infants, perſons excommunicate, outlawed, *&c.* may be arbitrators; for every perſon muſt uſe his own diſcretion in the choice of his judges, and being at liberty to chuſe whom he likes beſt, cannot afterwards object the want of honeſty or underſtanding to them, or that they have not done him juſtice. *Weſt. Symb.* 2. *part*, *ſect.* 27.

The arbitrators are perſons truſted with the authority, and it is not within their power to aſſign it; therefore if an award be to ſtand to the determination of a ſtranger, this is void; but if the award be, that an arbitrament made by *J. S.* ſhall ſtand, this is good, becauſe it is their own award, though it refers to the act of another; but though the arbitrators cannot transfer their power, yet they may award that others ſhall do a miniſterial act in ſubſerviency to their award; for what is done by ſuch perſons, is done by them as ſervants and inſtruments of the arbitrators, and is the act of the arbitrator himſelf; as that ſuch a conveyance ſhould be made as counſel ſhould direct; ſuch coſt paid as the prothonotary ſhould tax, is a good award. 5 *Co.* 78. 1 *Rol. Abr.* 251. *Cro. Eliz.* 726. *Palm.* 146. 2 *Rol. Rep.* 214. 1 *Sid.* 258. *Hard.* 45.

Neither *natural* or *legal diſabilities* do hinder any one from being an arbitrator; if they are incompetent judges, the fault is in thoſe that chuſe them. They are called arbitrators, becauſe they have an arbitrary power, if their judgment be according to the ſubmiſſion. If they obſerve their commiſſion, and keep within their juriſdiction, their ſentences are definitive, from which there lies no appeal. 3 *Vin.* 41.

A *bond* is given to *J. S.* to ſtand to his award by the parties in difference, being *J. D.* and *J. R.* adjudged by the court that it was good; tho' it was objected that the referee would make an unreaſonable award, to intitle himſelf to the penalty of the bond. *Comb.* 100.

Submiſſion was *to the plaintiff himſelf and another*; an this being objected in arreſt of judgment was held good *per cur.* *Comb.* 218.

Dolben J. ſaid, he remembered a caſe where a gentleman's ſteward brought an action in his maſter's name, and defendant entered into rule by conſent *to pay what the plaintiff ſhould think fit*; and my Lord *Hale* held it to be a good ſubmiſſion. *Comb.* 218. 4 *Mod.* 226. ſays *Dolben* J. cited it as Serjeant *Ward*'s caſe, and that it was thus, *viz.* The ſerjeant took a horſe from the archbiſhop of *Canterbury*'s ſteward for a deodand, and that the archbiſhop brought his action; and it coming to trial at the aſſiſes in *Kent*, the ſerjeant by rule of court referr'd it to the archbiſhop to ſet the price of the horſe, which he did; and the ſerjeant afterwards moved the court to ſet aſide the award, becauſe the ſubmiſſion was to the plaintiff himſelf; but it was denied by my Lord *Hale* and the whole court.

If ſeveral perſons on the one part, and ſeveral on the other ſubmit generally to any award, the arbitrators have not only power to determine matters between them jointly, but ſeverally and diſtinctly alſo; and an award between one only of the one ſide and another of the other ſide is good; for this is not doing leſs than the commiſſion warrants, ſince their is an attorney in it to determine matters diſtinctly between them, for the ſubmiſſion is of all matters, ſo that it contains as well all things ſeverally between each of them, as jointly between them all, and perhaps there may be no cauſe of award between the others. 2 *Rich.* 3. 18. 2 *Keb.* 886. 12 *Ed.* 25. *Latch* 208. 1 *Rol. Rep.* 298. 1 *Brownl.* 112. *Yelv.* 203. 3 *Bulſt.* 6. *Cro. Car.* 433. *Style* 471. 1 *Rol. Abr.* 261.

The arbitrators cannot make their award by parcels at ſeveral times, for when they have made an award they have executed their authority, and can do no more; and therefore if two ſubmit all debts, treſpaſſes, *&c.* and the arbitrators one day make an award of the debts, and of the treſpaſſes another day, this is not good as to the treſpaſſes, but they may deliberate of one thing one day, and of another the other day, and then make an intire award of the whole; alſo an award made in the night is good, for the party's attendance is not requiſite; but where an act cannot be done without perſonal attendance of a third perſon, it cannot be in the night. 1 *Rol. Abr.* 250. *Cro. Eliz.* 676.

If there be a ſubmiſſion to arbitration, and if they cannot agree before the firſt of *May*, then the ſubmiſſion is made to *J. S.* to be the umpire, the award to be made before a certain day then next to come; if the arbitrators never diſcourſe about the matter, ſo as there is no diſagreement between them, yet if they make no award before the day, the umpire may determine the matter; for theſe words, *if they cannot agree*, are not to be taken literally, but only that if they do make no award, that then, *&c.* 1 *Rol. Abr.* 261.

If the condition of an obligation be to ſtand to the award of certain perſons, *A.* and *B.* and *J. S.* being umpire for both parties, in this caſe an award by *A.* and *B.* is good; for *umpire*, in the common ſignification of the word, denotes a perſon that is to make an end of the matter, if the others cannot. 1 *Rol. Abr.* 261, 262.

Where there were *four arbitrators choſen*, who were *to make their award* to be delivered in writing *on or before the* 20*th of* July, *and if they could not agree, then to ſuch umpire as they ſhould name, ſo as the umpirage be made before the* 25*th of* July *following*. The *arbitrators made no award on or before the* 20*th of* July, *but on the* 18*th of* July *three of the arbitrators, and to which the fourth agreed on the* 21*ſt of* July, *by their writing dated the* 18*th of* July *nominated* J. S. *umpire*; *who before the* 25*th of* July *made an award ſuper præmiſſis*; reſolved, that here was no compleat nomination till the agreement of the fourth arbitrator with the other three, *viz.* on the 21ſt of *July*, and the writing is not to have effect till that time, and it is no writing by intendment till ſealed, tho' it be dated before. And if they had nominated the umpire before the time expired of making their arbitrament, yet it is good enough when no arbitrament is made by them with-

in the time; and judgment for the plaintiff. *Cro. Car.* 263. *pl.* 10.

Debt upon a bond for performance of an award of *J. S.* and *J. N. ſo that they make it before or upon the 1ſt day of* July, *and if not, then to the umpirage of* J. D. *ſo as he make it on or before the 2d day of* July; the arbitrators made no award, but *J. N. made his umpirage on the 1ſt day of* July; and upon demurrer it was objected, that it was made before the time allotted by the ſubmiſſion, becauſe the arbitrators had all the whole day, *(viz.)* the 1ſt day of *July* to make their award, and cited the caſe of *Rol. Abr.* 262. *pl.* 6. *Sed per curiam*, This umpirage is good, for the parties have expreſly given the umpire the 1ſt day for executing his authority; and they did not think the reaſon of the reſolution of the caſe cited to be of any force, *viz.* that the court would be in confuſion to adjudge which ſhould be good in caſe the arbitrators and the umpire had made ſeveral awards; for the award of the arbitrators, if they had made any, ſhould be adjudged good, but if they had not, then the umpirage ſhould bind, and there would be no confuſion upon concurrence of authority as to the time; for the umpire had not an abſolute but only a conditional concurrence, *viz.* if the arbitrators make no award within the time, and they thought the caſe in *Rol. Abr.* was not good law. 2 *Jo.* 167, 168.

If the condition of an obligation be to ſtand to the award of *A. B. C.* and *D. ita quod* the ſaid award before ſuch a day be made in writing by the ſaid *A. B. C.* and *D.* or any two of them, under their hands, *&c.* any two of the arbitrators, without the reſt, may make an award; for though by the firſt part they are bound to ſtand to the award of thoſe four, yet their power is divided by the ſubſequent words, and the *ita quod* is but an explanation of the condition, and the whole makes but one ſentence. *Yelv.* 203. See 1 *Vent.* 50. 2 *Keb.* 57. *Cro. Jac* 400.

If the arbitrators and umpire have the ſame time allotted them to make their award in the ſubmiſſion, as to the umpire it is not abſolutely void; for if one of the arbitrators die, or abſolutely refuſe to meddle, then the umpire may determine the matters; otherwiſe not; for two different judges cannot have a concurrent juriſdiction of the ſame thing; and a diſagreement between the arbitrators at their firſt meeting, gives no power to the umpire to interpoſe, becauſe, though they do not agree at their firſt meeting, they may at the next. 2 *Sand.* 131. 1 *Sid.* 428, 455. 1 *Rol. Abr.* 261. 1 *Sid.* 428. *Godb.* 241. 2 *Sand.* 132.

The arbitrators may chooſe the umpire before their own time is expired, for that is no relinquiſhing the arbitration, but a prudent proviſion in caſe they ſhould diſagree; and therefore an award by them at any time before their time expired is good, and an award by the umpire in that time is void. 1 *Rol. Abr.* 261. *Cro. Car.* 263. 2 *Sand.* 132.

If the arbitrators have time to the 10th of *June*, and if they agree not, to nominate one to determine it by the ſaid 10th; here if the arbitrators chooſe an umpire, that determines their power; for it ſeems plainly the deſign of the parties, that either one or the other may determine it by that time, and not that both ſhall have concurrent juriſdictions. 1 *Rol. Abr.* 261. 1 *Sid.* 428. *Godb.* 241. 2 *Sand.* 132.

If the arbitrators make an award of part, during their time, the umpire cannot make an award of the reſt, unleſs the ſubmiſſion be, that if the arbitrators make an award of part, or of none, then the umpire may make an accord of the part remaining, or the whole. 1 *Rol. Abr.* 262.

Umpire by the ſubmiſſion was to make his award *the ſame day as was limited to the arbitrators*, if the arbitrators did not make theirs; 'tis not good. 2 *Vern.* 100. *pl.* 95.

Submiſſion was ita quod *the award be made by the arbitrators on or before the 21ſt of* May, *and if* not made before that day, *then to ſtand to the award of an umpire*, &c. the *arbitrators* made no award, *but choſe an umpire on the 20th of* May, who awarded, that the defendant ſhould pay to the plaintiff 40*l.* before the 11th of *June* following; it was objected, that they had no power to chooſe an umpire on the 20th of *May*, becauſe the arbitrators themſelves had power till the end of the 21ſt of *May* to make their award; *ſed non allocatur*; for the arbitrators not having made any award, the award of the umpire is good; and judgment for the plaintiff. *Lutw.* 541, 544.

An *award made by the umpire*, was (amongſt other things) *that the defendant ſhould deliver to the plaintiff ſeveral goods particularly named, and that if any of thoſe goods ſhould be loſt, then the defendant to pay the value of them, to be appraiſed by the arbitrators and umpire*; it was moved, that the umpire was void, becauſe of the umpire's reſerving to himſelf and the two arbitrators (who were elected to determine the matters before him) to make a valuation of the goods loſt or miſlaid. *Trevor* Ch. J. and *Blencow*, held that this was a thing judicial, and not merely miniſterial, and therefore the award was void; but *Powell* J. was of another opinion. *Lutw.* 550, 554.

If the condition of an obligation be to ſtand to the award of *A.* and *B.* ſo as the ſaid award be made before ſuch a day; and if they make no award, then to ſtand to the award of ſuch umpire as the ſaid *A.* and *B.* ſhall nominate, ſo as the ſaid umpire do make his award before another day, and the arbitrators before the firſt day make no award, but afterwards name *C.* to be umpire, who thereupon immediately refuſes, and the arbitrators afterwards nominate *D.* who before the laſt day makes an award; this is a good award; for the nomination of *C.* to be umpire did not make him ſo; but when he refuſed, it amounted to no more than a bare propoſal to him; and the form of pleading always is *ſuſcepto ſuper ſe onere arbitri*; ſo that it is the acceptance makes him umpire. 2 *Vent.* 113, 114.

If the condition of an obligation be, that whereas *A.* and his ſon, of one part, *&c.* have ſubmitted to the award of *B.* and *C. ita quod*, *&c.* 1 *May*; and if they make none, to the award of ſuch umpire as they ſhould chuſe to be made before the 1 *June*; and the arbitrators make no award, but chooſe an umpire who makes an award, but *quoad* the ſon awards nothing; this is a void award; for though the *ita quod* be in the clauſe referring to the arbitrators, and the award is made by the umpire, yet the *ita quod* relates by conſtruction to the umpire as well as to the arbitrators. 1 *Lev.* 139, 140.

Submiſſion to two, and an umpire in caſe they ſhould differ; the arbitrators meet, and *one* of them *declared himſelf not clear*; the other was for the appellant, upon which the *umpire made his award.* The queſtion was, whether the umpire had any power in this cauſe, for it was not come to him till the arbitrators differed; which they had not yet, and might ſtill make their award; but the objection was over-ruled. 3 *Vin.* 97.

It is ſettled that arbitrators cannot proceed on a reference, after they have once named an umpire, for then their authority ceaſes, tho' the time for making the award is not expired. *Rep. of Pract. in C. B.* 116.

3. *Things eſſential to a good award.*

Here we muſt obſerve, that the courts of juſtice have of late been more liberal in the conſtruction of awards than formerly, and many of the niceſt diſtinctions to be met with in the books, are by no means to be admitted as precedents in expounding awards at this day; and this the courts do in furtherance of juſtice, and for quieting of controverſies; however, as an award is a judgment, and can only be expounded by itſelf, without the aid of any averment of matters *dehors* to explain the meaning of the arbitrators, it is neceſſary that in making it *five* things ſhould be obſerved. Firſt; That it be according to the very *ſubmiſſion* in reſpect of the perſons and the things ſubmitted: For to award a thing to be done *by* a ſtranger, and ſometimes *to* a ſtranger, who is not party to the ſubmiſſion, or to make an award upon another thing that is not ſubmitted, is void: But where the award is of ſeveral things, part within the ſubmiſſion, and part out of it, it is voidable for that which is out of the ſubmiſſion, and good for the reſidue. Secondly; It ought

to

to be *equal*, and not on one ſide only; for it muſt appoint either party to give or do ſomething beneficial or advantageous. Thirdly; The performance of the award muſt be *poſſible* and *lawful*. Fourthly; There muſt be a *means* by law to attain unto the thing awarded: This is chiefly meant where ſubmiſſion is without bond. Fifthly; It ought to be *certain* and *final*, and make an end of all controverſies ſubmitted; or if it is good only in reference to part of the things ſubmitted, it muſt be final as to that part, or elſe it will be void. 21 *Ed.* 4. 39. *b.* 10 *Co.* 57. *Dyer* 242. *Weſt's Symb.* 2 *part*, *p.* 167. *ſect.* 44. 5 *Rep.* 78. 1 *Rep.* 98. 10 *Rep.* 131, 132. 1 *Rol. Abr.* 242, 243, 244, 245, 247, 248, 249, 252, 253. 1 *Inſt.* 206. *a.* & *b.* *Noy's Max.* 110. Theſe things being obſerved, an award ſhall not be unravelled in a court of equity, unleſs there was corruption in the arbitrators. 1 *Chan. Rep.* 279.

Firſt, *An award ought to be according to the ſubmiſſion.*

If an award be made of any other thing than what is contained in the ſubmiſſion, it is void; for no acts are my own, or binding to me, unleſs done by me or by commiſſion from me. *Plow.* 396. *Dyer* 242.

If arbitrators award to do an act to a ſtranger, this is good; for the ſtranger is put by the arbitrators in the place of the party, and they have power to award this act, ſince it is not impoſſible or unequal, and it is relating to the ſubmiſſion. *Mo.* 3, 359. 10 *Co.* 131. 3 *Leon.* 62. 1 *Rol. Abr.* 248. *Hard.* 46. 1 *Leon.* 316.

But an award that an act ſhould be done by a ſtranger, is void; becauſe he is not within the ſubmiſſion. *Hard.* 46.

Debt upon an obligation to ſtand to the award of *J. S. of all controverſies* between them; *J. S. awarded, that the defendant ſhould deliver to the plaintiff ſix Kentiſh cloths, which were bartered by J. D. for the thread of the plaintiff*; it was objected to be out of the ſubmiſſion; the court ſaid, it ſhall be intended to be in controverſy, if the contrary be not ſhewn, and that they were in the hands of the defendant; and judgment for the plaintiff. *Cro. Eliz.* 177. *pl.* 5.

A ſubmiſſion was *of controverſies between the plaintiff and defendant and his wife, for divers ſums of money laid out for the defendant at her requeſt, dum ſola fuit.* The *award* was, that the defendant ſhould pay the plaintiff 340*l.* for all monies laid out by him for the wife, *dum ſola fuit*; and all the ſuits between them ſhould ceaſe. Action was brought in the Common Pleas upon this award; and judgment for the plaintiff; but upon a writ of error, the court of *B. R.* held the award void, it being *to pay* 340*l. for all ſums laid out for the feme (omitting the words*, viz. *at her requeſt)* and ſo is more than was ſubmitted; and ſo judgment was reverſed. *Cro. Jac.* 639.

An award was made 8th *Feb. de & ſuper præmiſſis, that the defendant, within a week after* the award, *ſhould pay the plaintiff* 7l. 10s. *in ſatisfaction of all demands*; *and that upon payment thereof*, each ſhould releaſe to the other all demands; after the ſubmiſſion, and before the award, a new controverſy did ariſe, *(viz.)* on the 6th *Feb.* for that the defendant did break and enter the plaintiff's cloſe called *B.* whereof the arbitrators had notice; after argument, it was reſolved, *per tot. cur'*, That the award was good; and a diverſity taken where the award is in ſatisfaction of all demands till the award, or a releaſe of all demands till the award, this is ill: but where the *award* is *general, without limitation to what time, and made de & ſuper præmiſſis, it ſhall be intended till the time of the ſubmiſſion*, which is good; and judgment for the plaintiff. 3 *Lev.* 168.

If two ſubmit to an award all actions, and the arbitrators award a releaſe of all actions till the time of the award, ſome books have ſaid, that this is void for the whole, becauſe it extends to things partly in the ſubmiſſion and partly to things out of it, and it is one intire act; for ſay they, to do that act they are not obliged, becauſe not within the ſubmiſſion; and to do an act relating only to things contained in the ſubmiſſion, is another act from what is awarded; others have ſaid, that this is not void, unleſs there are ſhewn on the other ſide, cauſes of action ariſing between the time of making the award, otherwiſe none ſhall be intended; and then the releaſe only relates to the things in ſubmiſſion. 10 *Co.* 131, 132. 1 *Rol. Rep.* 45, 162, 270. 1 *Rol. Abr.* 242. *Cro. Eliz.* 809. *Cro. Jac.* 353, 447. *Poph.* 137. 1 *Sid.* 365. 2 *Mod.* 169.

But it has been reſolved, and ſeems now ſettled, that the act is not intire; for he may releaſe all actions to the time of the ſubmiſſion; for though there is one deed of releaſe awarded, yet that deed relates to ſeveral things that are dividable in their own nature one from another, and ſo it ſhall be good for what is in the ſubmiſſion, and void for the reſidue. 3 *Lev.* 188. 2 *Mod.* 169. 1 *Salk.* 74. 3 *Lev.* 413. 2 *Lev.* 3.

Submiſſion was *of all actions, &c. between the plaintiff and defendant.* In debt on the bond, the defendant pleaded no award; the plaintiff replied, and ſet forth an *award of all actions between the plaintiff and defendant and his wife, and that the defendant pay the plaintiff* 20*l. in ſatisfaction of law charges due to him by the defendant's wife, as executrix of &c.* It was moved in arreſt of judgment, that the ſubmiſſion ſhould have been of all actions between the plaintiff and the defendant and his wife; but it was held, that it was good as it is, becauſe upon the defendant's inter marriage with his wife, who was the widow and executrix of her former huſband, the plaintiff had an immediate demand on him; and the court being of that opinion, held the award good; and ſo the judgment was confirmed. 8 *Mod.* 212.

Submiſſion was *of all debts, treſpaſſes, and injuries.* The *award was* for the defendant to pay, *&c.* and *to releaſe all actions, debts, duties, treſpaſſes and demands.* It was objected, that the words (duties and demands) extend further than the words in the ſubmiſſion, and ſo the award exceeds the ſubmiſſion, and therefore void. *Doderidge* and *Whitlock* J. held the award well made, and according to the ſubmiſſion. *Jones* J. thought the award more large than the ſubmiſſion. But the breach being aſſigned in the non-payment of the money according to the award, the whole court agreed that this is within the ſubmiſſion, and ſo good; and judgment for the plaintiff. 3 *Bulſt.* 311.

The arbitrators cannot bind a man's liberty or right to real things, where perſonal things are ſubmitted; and therefore if they award ſervice for two years, or a releaſe of the right of lands in ſatisfaction for a treſpaſs, this is void; for no body can be ſuppoſed to ſubmit more than his perſonal eſtate to anſwer a perſonal injury, for that only might be taken in execution for it by the common law; but his perſonal eſtate may be bound to anſwer it; therefore if the arbitrators award a horſe, money, or wine in ſatisfaction for a treſpaſs, this is good; for here a new perſonal duty is raiſed inſtead of the former, and to ſatisfy out of the perſonal eſtate is neceſſarily implied in the ſubmiſſion; for this is a means neceſſary to quiet the matters. 9 *Ed.* 4. 44. 1 *Rol. Abr.* 243. 6 *Mod.* 221. 1 *Salk.* 76. 1 *Rol. Abr.* 243. *cont.*

If two ſubmit all quarrels concerning tithes in a place certain, and the arbitrator awards that one ſhall pay to the other 20*l.* and the other ſhould releaſe to him all actions, this ſhall be intended all actions concerning tithes, unleſs the contrary appear on the other ſide, and the actions may be ſevered; and this ſhall be good for the acts in the ſubmiſſion, and void for the reſt. *Palm.* 167. 1 *Rol. Rep.* 362. *Cro. Jac.* 66.

A ſubmiſſion was *of all debts, ſums of money, claims, and demands, &c.* The *award was, that the plaintiff releaſe to the defendant all bonds, ſpecialties, judgments, executions and extents.* It was objected, that this exceeds the ſubmiſſion; *ſed non allocatur*; for debts, ſums of money, and demands, whether due by bond, judgment, execution, or extent, are within the ſubmiſſion, and conſequently the arbitrators may award a releaſe of them. 2 *Saund.* 188.

Upon a ſubmiſſion to ſtand to an award touching all *matters in difference* between the parties, the *award was, that they make general releaſes to each other of all demands.* Upon error brought, it was inſiſted, that the word *(demands)* is of a larger ſignification than the word *(differences.)* But *Roll* Ch. J. anſwered, that if the releaſe be more large in words, yet it is good enough; for it ſhall be *intended* only of all matters in debate between the parties,

ties, and the court will not intend other matters, unleſs ſhewn in pleading; and to this the judges agreed, and judgment for the plaintiff, *niſi*, &c. *Sty.* 170.

Where the *ſubmiſſion* is general and conditional to end all *controverſies*, an *indictment for a battery* is not a controverſy between the parties, within the meaning of the ſubmiſſion, for that is the King's ſuit; and if the arbitrators award the ceaſing of ſuch a proſecution, it would be void, becauſe it would be to *obſtruct juſtice*. Reſolved, *Freem. Rep.* 204. *pl.* 208.

A ſubmiſſion of all debts and demands, and a releaſe of all judgments, executions and extents awarded, is a good award. 2 *Sand.* 190.

A ſubmiſſion of all matters between the plaintiff and another, and an award made of things that the party hath in right of his wife, is good; for theſe things are comprehended under the words *all matters*. 10 *Hen.* 6. 18. 3 *Bulſt.* 65.

A ſubmiſſion of all injuries; an award of all debts, duties and treſpaſſes, a good award; for whatever is againſt law is an injury. 3 *Bulſt.* 312, 313.

A ſubmiſſion of all actions now depending, and an award of all actions, good; for it ſhall be intended actions depending. *Cro. Eliz.* 66, 858.

There is a controverſy between *A.* and *B.* on one part, and *C. D.* and *E.* on the other part, and *C.* for himſelf, and *D.* and *E.* ſubmits the matter, and promiſes to ſtand to the award; if the award be that *C.* ſhall pay ſo much in ſatisfaction of the controverſy, it ſhall bind him, though it concerns *D.* and *E.* who are ſtrangers to the ſubmiſſion, inaſmuch as the thing awarded, is to be done by him, and not by the ſtrangers to the ſubmiſſion. 1 *Rol. Abr.* 244.

Debt upon a bond of ſubmiſſion, dated the 13 *January*, of all quarrels depending, &c. the defendant pleaded *nullum arbitrium*; the plaintiff replied, and ſhewed an award made 14 *April de & ſuper premiſſis*, that defendant ſhould pay him 20*l.* &c. in full ſatisfaction of all demands till the day of the award; and upon demurrer to this replication it was objected, that the bond only extended to all *quarrels and demands then depending*; but the plaintiff had judgment, becauſe it ſhall not be intended that there were any new demands between them between the date of the bond and the day of the making the award. *Hob.* 191.

If there be a controverſy between the parſon and his pariſhioners, whether tithes ſhall be paid in *ſpecie* or not, and they ſubmit all controverſies, and the arbitrators award that they ſhall pay ſo much a year for tithes, this is good; for that was the debate on the award. 1 *Rol. Abr.* 254.

If the ſubmiſſion be of all controverſies to the time of the ſubmiſſion, and the award be that one of them ſhould deliver up an obligation made ſince the ſubmiſſion, in ſatisfaction of all matters, &c. this is good; becauſe the bond is given only in ſatisfaction. 1 *Rol. Abr.* 246.

An award may be good, though part of it be made of a thing not within the ſubmiſſion; as if an award be to pay 1000*l.* and to procure a perſon to be bound to pay 22*l. per ann.* the plaintiff muſt lay the breach in not paying the 1000*l.* for as to the other part it is wholly void. See 1 *Leon.* 304, 305. *Cro. Jac.* 149. *Poph.* 134. 10 *Co.* 131. 5 *Co.* 78.

So to an award, which was that one ſhall ceaſe all ſuits, and that he ſhall procure a *ſtranger* to the ſubmiſſion to be bound in a bond with him to make a feoffment, &c. of his manor of *D.* all which was out of the ſubmiſſion: Now in this caſe the firſt thing was good, *(viz.)* to ceaſe all ſuits; but the ſecond was illegal, and out of the ſubmiſſion; yet the award being good in part, ought to be performed. 2 *Bulſt.* 39.

The ſubmiſſion was to four arbitrators, and to the *umpirage* of the fifth, and all five made the award; adjudged good, and that they might all join in making it; but it had been otherwiſe, if the ſubmiſſion had been divided, *(viz.)* to the arbitration of four, and *if they did not agree*, then to an umpire; for in ſuch caſe they could not all join in making the award. 1 *Bulſt.* 184.

Debt upon bond, for performance of an award; the defendant pleaded, that the ſubmiſſion was of all *actions depending between* him and the plaintiff, and the arbitrators awarded, that he (the defendant) ſhould *releaſe all ſuits* to the plaintiff, which he averred he had done; the plaintiff in his replication confeſſed, that ſuch an award was made, but that the arbitrators farther awarded, that the defendant ſhould *pay the plaintiff* 15*l.* on ſuch a day, *at the houſe of W. R. a ſtranger*, which he had not paid; and traverſed, that they awarded *only* as the defendant had alledged in his plea: There was an ill rejoinder, to which there was a demurrer; and it was objected, that both the plea and the award were naught, becauſe the ſubmiſſion was of *all ſuits depending*, and the arbitrators awarded a releaſe of *all ſuits generally whether depending or not*, which releaſe is not good; and if ſo the award is not good for the 15*l.* but adjudged, that tho' it was void in part, yet that did not make the whole award void: Then it was objected againſt the replication, that the plaintiff had traverſed, that the arbitrators made ſuch an award *only* as the defendant had ſet forth in his plea, when in truth, what is not expreſly alledged, ſhall never be traverſed; but adjudged, that the traverſe was good, for when the defendant alledged, that the award was for him to *releaſe all ſuits*, that ſhall be intended the *whole award*; but when the plaintiff had ſhewed, that ſomething more was awarded, he muſt traverſe what was alledged by the defendant, and after ſuch a traverſe he muſt conclude to the country. 2 *Bulſt.* 33.

If the arbitrators award on one ſide an act contained in the ſubmiſſion, and on the other ſide an act out of it, this is a void award for the whole; for this is unequal, becauſe there is ſomething on the one ſide awarded only, and nothing on the other; for what they intended to balance it with on the other, appears to be void. *Poph.* 134. *Cro. Jac.* 149. 3 *Mod.* 372.

If the arbitrators award 10*l.* to one of the parties, and 5*l.* to a ſtranger, this is good as to the party himſelf, and void for the ſtranger. 2 *Saund.* 293.

An award may be good, though made of leſs than is contained in the ſubmiſſion; as if the ſubmiſſion be of all actions, treſpaſſes, demands and controverſies, and the award be made of ſome only, this is good; for no more ſhall be ſuppoſed to be made known to the arbitrator; and if there be other cauſes of action in being, and they be made known to the arbitrator, they muſt be ſhewn on the other ſide; and this as well where the ſubmiſſion is conditional by *ita quod*, as where it is abſolute; for the award being made *de præmiſſis* ſhall be ſuppoſed to ſettle all things. *Hob.* 49. 8 *Co.* 98. *Cro. Jac.* 278, 235. 1 *Sand.* 32. 1 *Brownl.* 63. 2 *Brownl.* 310. 1 *Sid.* 12. 1 *Sand.* 32. *Dyer* 216, 242. *Hard.* 45.

The ſubmiſſion was to four arbitrators, and the award was made by three of them, and yet adjudged good by all the judges in the *Exchequer-Chamber*; for it ſhall be taken to be a ſubmiſſion to four, or any three of them, becauſe the ſubmiſſion was conditional, (viz.) *ſo that they, or any three* of them, made the award, &c. *Bridgm.* 90.

The bond of ſubmiſſion was of all ſuits, &c. and it was dated on the 29*th of December*, and the award was to be made before the 6*th day of January* following; and accordingly on the 5*th day of January* the award was made *de & ſuper præmiſſis*, by which the defendant was awarded to pay 72*l.* to the plaintiff, and that each of them ſhould *releaſe* the other of all ſuits *before the* 28*th of December* laſt paſt: After a verdict for the plaintiff, it was moved in arreſt of judgment, that the award was void, becauſe there might be ſuits depending between the parties *on the* 29*th of December*; but adjudged, that the award being made *de & ſuper præmiſſis*, it ſhall not be intended, that any new action ſhould ariſe between the parties, *after the* 28*th and before the* 29*th of December*. *Cro. Car.* 157.

If the award be conditioned to be delivered in writing under hand and ſeal, the circumſtances muſt be obſerved, or the award is void; and therefore if it be delivered under the ſeal only, it is not ſufficient. *Dyer* 243. 2 *Rol. Rep.* 24. 1 *Bulſt.* 110. 1 *Rol. Abr.* 245. *Cro. Jac.* 277.

If two ſubmit all actions till the ninth of *June*, *ita quod arbitrium fiat de præmiſſis*, and an award is made of all actions till the ſeventh, ſome have ſaid this is leſs than the

the ſubmiſſion, and void; but the better opinion is, that this is well enough, eſpecially, unleſs there be ſhewn on the other ſide an action ariſing between the ſeventh and ninth. 1 *Rol. Rep.* 362. 2 *Rol. Rep.* 12, 193. *Cro. Car.* 216, 217.

Debt upon bond for performance of an award to be made by arbitrators choſen by the plaintiff and defendant, and one *Nathaniel Hilliard*, to determine all controverſies between them, or either of them, *&c.* the defendant pleaded no award; the plaintiff replied and ſet forth an award, and amongſt other things, that the parties ſhould ſign *mutual releaſes*; and upon demurrer to this replication it was objected, that the award was void, for by the bond of ſubmiſſion it muſt be intended, that there were ſome controverſies between *all the parties*, but *Hilliard* is not appointed to do any thing; and yet he will take advantage of this releaſe, if he ſhould be concerned in intereſt with the plaintiff or defendant; but it was held, that the ſubmiſſion being to determine all controverſies between the parties, or *either of them*, by theſe words it muſt be intended, than an award ſhould be made between *ſome of them*, tho' it might not be between them all, therefore *either of them* in this place ſhall be taken ſeverally and not jointly; and ſo is *Hungate*'s caſe, if the words had been *between any of them*, it had been no queſtion. 2 *Lutw.* 1625.

The bond of ſubmiſſion was of all *controverſies depending*, &c. The award was, that all ſuits *now depending between the parties ſhall ceaſe*, and that the defendant ſhould pay to the plaintiff 10*l.* in full of all demands, and ſhould releaſe all demands to the plaintiff *to the time of the award*; and that upon payment of the 10*l.* to the plaintiff he ſhould execute a releaſe to the defendant; adjudged, upon a writ of error in *B. R.* on a judgment for the plaintiff in *C. B.* that an award that *all ſuits*, &c. *ſhall ceaſe*, *is final*, for if the ſuit fails he has no remedy to come at his right; that an award of a *releaſe of all demands to the time of the award*, is good, becauſe no new demands ſhall be intended to ariſe after the ſubmiſſion and before the award made; therefore 'tis a good performance of it to tender a releaſe of all demands to the time of the ſubmiſſion, for if there were any new demands afterwards, thoſe are not within the ſubmiſſion; and laſtly, if the plaintiff would not receive the 10*l.* becauſe he muſt then give a releaſe; in ſuch caſe, upon the tender and refuſal of the money, he is as much obliged to give a releaſe as if he had actually received it. 1 *Salk.* 74.

The ſubmiſſion was of all demands, ſo as the award was made before the 10*th day of* December, *&c.* Upon *nullum arbitrium* pleaded, the plaintiff replied, and ſhewed an award made on the 9*th day of* December, *&c.* that the defendant ſhould pay to the plaintiff 14*l.* at ſeveral days, and that upon the *laſt day of payment* the parties ſhould give to each other *general releaſes*; it was objected, that nothing could be releaſed, but what was before the 10*th day of* December, that being the day on which the bond was dated; but here every thing was to be releaſed between the parties *before the laſt day of the payment of* 14*l.* to which they never ſubmitted, and therefore the award was void; adjudged, that it was good, for it ſhall not be intended that there were any matters in controverſy between them after the date of the bond, and before the laſt day of payment of the money. *Hutt.* 29.

Secondly, *An award ought to be* equal, and not on one ſide only.

Awards muſt not be on one ſide only; this muſt be underſtood thus; that all controverſies being between two parties, that which is awarded to be done to one muſt be an advantage to both, ſo as to end the controverſy, and diſcharge one as well as give ſatisfaction to the other; for if it doth not, it is manifeſtly unjuſt; and therefore whenever it appears to the court that, notwithſtanding the award, the thing remains a duty as before, and is not diſcharged, that apparently is an award on one ſide, and conſequently is void; not that where one party is by the award to have ſomething paid him, or the like, and not the other, that that award ſhould be naught; for perhaps nothing may be due to him, and he might be the only treſpaſſor in the caſe. 1 *Rol. Abr.* 253. 8 *Co.* 98.

Thus in caſe of a treſpaſs ſubmitted, the arbitrators award that one ſhall pay the other 3*l.* this is void, becauſe only on one ſide; for it is not ſaid for what, and ſo the treſpaſs is not diſcharged, and then the other party hath no advantage by the award; but if it were awarded *de et ſuper præmiſſis*, it would be well enough; likewiſe if the award had been that he ſhall pay 3*l.* for a treſpaſs, it had been good, and yet one only was to do an act, but then the treſpaſs by that award had been diſcharged. 1 *Rol. Abr.* 253, 254. *Hob.* 49.

The ſubmiſſion was of *all ſuits and demands*, &c. and in an action of debt brought on the bond, the defendant pleaded *nullum arbitrium*; the plaintiff replied, ſhewing an award *de et ſuper præmiſſis*, that whereas there was a ſuit depending between them for 20*l.* which ſum the defendant *promiſed to pay*, the arbitrator did award, that it being long due, the defendant ſhould pay the plaintiff 22*l.* adjudged, that this was a good award on both parties, for the one received his debt, and the other, by paying it, was diſcharged of his promiſe. 9 *Rep.* 97.

Submiſſion was *of all ſuits* between the parties *then depending in the ſpiritual court, concerning tithes*; the *award was, that the defendant ſhould pay to the plaintiff* 40*s. on ſuch a day for the* tithes, *&c.* adjudged, that the award was void, becauſe there was not any thing awarded for the defendant to have, or that he be freed from the ſuit, and ſo he has no advantage thereby. *Cro. Eliz.* 904.

Upon a ſubmiſſion of all treſpaſſes, duties, and demands, the *award was, that the defendant ſhould pay to the plaintiff, in ſatisfaction of all treſpaſſes done to him by the defendant before the day of the ſubmiſſion, ſo much.* In debt upon this award defendant demurred to the declaration, and inſiſted that the award was void, it being of one ſide; for the plaintiff was to do nothing. But adjudged good; for *by the payment of the money he is acquitted* of all treſpaſſes done to the plaintiff, and it is a good bar againſt him, and it ſhall not be intended that the arbitrators had notice that the defendant had any cauſe of action againſt the plaintiff, unleſs ſhewn on the defendant's part; and judgment for the plaintiff, *Houghton hæſitante.* *Cro. Jac.* 354.

If an *award* be, *that an obligor in a ſingle obligation ſhall pay the debt*, this is no award, unleſs it be provided that he be diſcharged; for payment in that caſe is no diſcharge. *Hob.* 49. *pl.* 55.

But if the *award* be, *that the one ſhall pay* 10*l. for treſpaſs*, it is good; for a *ſatisfaction implies a diſcharge*, and that is the reaſon of the judgment in *Baſpool*'s caſe. *Hob.* 49.

A. and *B.* ſubmit all actions had by *A.* againſt *B.* and all actions by *B.* againſt *A.* and the arbitrators awarded that *A.* ſhall go quit of all actions had by *B.* againſt him, this is naught; becauſe they ſay nothing as to the other actions. 7 *Hen.* 6. 40. 1 *Rol. Abr.* 253.

An award that one ſhould have ſuch trees, and that the other ſhould give him ſecurity to pay 16*l.* is void, becauſe it is not certain what ſecurity; and then that part of the award being void, the other part muſt be void too; for elſe it would be an advantage to one only. *Cro. Jac.* 314.

If one party alone be ordered to do ſomethiug, and nothing elſe appears to the court, it ſhall be preſumed that he alone was the wrong doer, and the award is good, if it appears that he is by the award diſcharged of all actions that might be brought againſt him for that wrong; but when it appears that they deſign both parties ſatisfaction for the wrong done each of them, there if the ſatisfaction deſigned one be not well awarded, the whole ſhall be void for the partiality. 1 *Rol. Abr.* 253.

A naked award is no good plea in treſpaſs, unleſs ſomething be awarded to the plaintiff in amends; for if there be no treſpaſs there is nothing about which an award can be made; and if there be one, and they do not award ſatisfaction, they do not act according to the deſign of their inſtitution, for they are not indifferent, and ſo their is no good award. 1 *Brownl.* 63. *Cro. Eliz.* 904. 1 *Rol. Abr.* 251.

An award *that one ſhall pay* money, and *the other ſhall execute a releaſe* to him who paid it, is a void award; but this muſt be intended where the ſubmiſſion is by word;

for in ſuch caſe the award is void, becauſe it is of one ſide; for *when the money is paid, the other hath no remedy to enforce the execution of a releaſe*; for he cannot have an action on the caſe, and the reaſon why it will not lie upon an award is, becauſe that is in nature of a judgment. *Poph.* 134.

Award was, *that the defendant pay the plaintiff* 10l. *and that the plaintiff pay the defendant the expences at making the award, and upon all this being done, each ſhall give the other a general releaſe.* It was objected, that the award was void becauſe nothing is awarded to the defendant but the releaſe, and that is not to be made till all be perform'd, which cannot be, becauſe the award of the expences at the making the award, which the plaintiff is to pay, is ſubſequent matter, and out of the ſubmiſſion; but *Hale* Ch. J. inclined that the releaſe ſhall be made upon the performance of what is well awarded, and not ſtay till that be performed, which is void, and ſo the award may be good. *Sed adjornatur.* 2 *Lev.* 3.

If treſpaſs be of beaſts taken and detained, and they arbitrate that the owner ſhall have the beaſts again, this is void; for it is againſt natural juſtice to give him his own again without ſatisfaction for the unjuſt taking and detention. 1 *Rol. Abr.* 251.

An award that one ſhall go to *Rome* or *Paul*'s not good, becauſe to no body's advantage. 1 *Rol. Abr.* 252.

An award that two ſhall intermarry, no good award; for that ought to be at the parties choice; and the bodies of the parties are not ſubmitted to the power of the arbitrators. 9 *Ed.* 4. 44. 1 *Rol. Abr.* 252.

If the award give ſatisfaction for ſlanderous words ſpoke of a man about a crime which it appears was pardoned, that award is void; for if the crime be pardoned, no harm could come to him by ſpeaking them, therefore the award is unequal. 1 *Sid.* 178.

Award was, *that the defendant ſhould be bound with ſureties, ſuch as the plaintiff ſhall approve, in the ſum of* 150l *to be paid to him at ſuch a time, and that then they ſhould ſeal mutual releaſes.* It was moved that the ſureties are ſtrangers to the ſubmiſſion, and ſo the defendant not bound to procure them; and *per cur.* The award is void, it being ſuch as the plaintiff ſhould approve; whereas if he does not like the ſecurity given, then he is not to ſeal a releaſe, and then the award is only of one ſide. 3 *Mod.* 272.

H. and *W.* ſubmit to the award of *J. S. who awards that* H. *ſhall pay to* W. 15l. *which he adjudged the ſaid* W. *to have ſuſtained in coſts and damages, by reaſon of a ſuit without cauſe commenced by* H. *againſt* W. *and that all ſuits and differences between them, depending before the date of the bond ſhall ceaſe.* It was argued, that it does not appear that any difference was between the parties except *the ſuit on which the* 15l. *coſts were awarded*, which *was H.'s own ſuit*, and ſo no benefit to him to ſtay it, and pay 15*l.* coſts. It was anſwered, that other differences might be intended, tho' not ſet forth, and that this award ſtops *H.* from applying for coſts, which *W.* might be ſubject to in the action mentioned in the award; and the court inclined that the award was good; *ſed adjornatur.* 2 *Vent.* 221.

If an award be, that if one will make his law that he did not treſpaſs, that then he ſhall go quit, not good; for that cannot be pleaded in bar of an action; for it ſuppoſes contrary to the ſubmiſſion, that there was no treſpaſs; neither can it be averred that the award was for the ſame treſpaſs the action was brought for; for it ſuppoſes no treſpaſs. 43 *E.* 3. 28. 19 *Hen.* 6. 37. 1 *Rol. Abr.* 251. *Dyer* 356.

There are controverſies between *A.* and *B.* and *A.* and *C.* as attorney to *B.* ſubmit to an award; the arbitrators award ſo much money to *A.* and that *A.* and *C.* ſhall releaſe to each other, to the uſe of each other, this is void, becauſe the award is on one ſide, for *B.* cannot take advantage of the releaſe, for that is to the uſe of *C.* *Carth.* 412.

The award may be beneficial to the party, though a thing is awarded to be done to a ſtranger to the ſubmiſſion; as if the arbitrators award that one of the parties ſhall pay money to the ſervant of the other. 3 *Leon.* 62.

If an award be to pay ſo much money in diſcharge of all actions, a releaſe ſhall be intended to be awarded, unleſs the contrary be ſhewn on the other ſide. 2 *Rol. Rep.* 1.

Award was, *that the defendant ſhould pay the plaintiff* 7l. 15s. (but did *not ſay in ſatisfaction of all demands*) *and that both of them ſhould be at equal charge at the payment of the* money, *&c.* and upon a demurrer to this plea it was objected that the award was void, it being only of one ſide; for the money was not awarded to be paid in ſatisfaction or diſcharge of any thing; and judgment for the plaintiff, *per tot. cur'*. *Lutw.* 281, 283.

Two ſubmit to an award. Nothing was awarded as to one, but only that all actions ſhall ceaſe; yet the court held this to be a good award. *Comb.* 212.

A ſubmiſſion to award was of all matters in controverſy by rule of court; and award was made, that ſo much money ſhould be paid on one ſide, and nothing was awarded of the other ſide; and moved to ſet it aſide as being an award only *ex parte*. *Per Holt*, The common exceptions againſt an award will not hold here, it being an award upon ſubmiſſion by rule of court; for tho' there be no releaſe awarded of one ſide, yet the ſubmiſſion was of all matters in controverſy; and we will not grant an attachment before they tender a releaſe; for if one comes to have aid of the court, he ſhall do that which is fair and equitable before he has it. 12 *Mod.* 234.

Thirdly, *The performance of the award muſt be poſſible and lawful.*

If the arbitrators award a thing impoſſible *ex natura rei*, it is void; as if they award a ſum of money to be paid at a day paſt, it is void. 8 *Ed.* 4. 1. *b.* But if they award a thing which cannot be done, but is not in the nature of the act itſelf contradictory or repugnant; this may be a good award; for there is no conſtruction to be made of the award, but by the words thereof. 1 *Rol. Abr.* 248.

If an award be, that one ſhall make a feoffment to another of an acre, and immediately after deliver the charters, this is good, becauſe they may be delivered in the ſame inſtant. 1 *Rol. Abr.* 248. *Moor* 3, 359.

If *A.* and *B.* merchants of a ſhip on the one part, and *C.* and *D.* part-owners with all other part-owners, and mariners of the ſhip, on the other part, ſubmit to the award of *J. S.* of all matters concerning a prize taken, by way of repriſal, and *A.* and *B.* enter into an obligation, and *C.* and *D.* in another obligation to perform the award, and *J. S.* awards that *A.* and *B.* the merchants, ſhall pay 1000*l.* to *C.* and *D.* for the uſe of them, and the reſidue of the part-owners and mariners; this is a good award, for if *A.* and *B.* do not pay the money, the part-owners and mariners may have an action of debt againſt them in as much as all have ſubmitted to the award, and if they pay the money to *C.* and *D.* to the uſe of them, and the reſidue of the part-owners and mariners, though it be not divided how much each ſhall have, yet in as much as they have jointly ſubmitted, it may be jointly awarded to be paid to them; and tho' it be to be paid to *C.* and *D.* for the uſe of them and the reſidue of the part-owners and mariners; and it was objected, that the reſidue of the part-owners and mariners had no remedy for their part, but by action, yet this is a good award; for it is a good award to award that one ſhall enter into an obligation to pay a ſum, which is but a thing in action, and the reſt of the part-owners and mariners may have remedy, at the leaſt in Chancery, againſt *C.* and *D.* if not at Common law. *Mich.* 24 *Car. B. R.* Between *Wood and others plaintiffs, and Thompſon and Clement defendants, adjudged, upon demurrer.* 1 *Rol. Abr.* 249.

Upon a *ſubmiſſion between the parſon and pariſhioners, as to tithes*, &c. *the award was, that when the pariſhioners clip the ſheep, they ſhould give notice to the parſon, ſo that he or his ſervants may be there. Hutton* J. thought it unreaſonable for the pariſhioners to be ſeeking every where after the parſon; but *Crooke* J. held it good, and that the parſon is always reſident on the parſonage; and judgment was given accordingly for the plaintiff. *Palm.* 30.

An award that a ſtranger ſhall do an act is void, becauſe another in his natural freedom is not ſuppoſed within my power. 1 *Leon.* 316. 3 *Leon.* 62. *Hard.* 46.

An

An award to levy a fine is good; for though it is an act of the court, yet by the law and publick juſtice of the kingdom, it is not to be refuſed to any man; but if the award be to command the juſtices to do it, this is no good award; for the parties in effect pray leave to agree from the King himſelf, which is quite different from the nature of a command. 1 *Rol. Abr.* 249.

An award to pay ſo much *apud domum J. S.* good; for he is not bound to pay it in the houſe, but as near as he can to it, or it ſhall be intended a common inn; and if the party will not let him pay there, it has been ſaid that the endeavour is ſufficient; for they cannot award any thing that will make the party a treſpaſſer. 1 *Rol. Abr.* 249. 1 *Rol. Rep.* 6. *Cro. Car.* 226. 2 *Bulſt.* 39. 3 *Lev.* 153.

An award that one of the parties ſhould diſcharge the other of a bond in which both were bound to a ſtranger, this is a good award; for it ſhall be intended that the money was to be paid at a day to come; and therefore he might then tender it and acquit the other; and if the day of payment be paſt, he may pay the penalty and compel the other to give a releaſe in a court of equity. 1 *Jones* 431. *Cro. Car.* 541.

An award that one of the parties ſhall *do a thing out of his* power, as to deliver up a deed which is in the cuſtody of *J. S.* is void; agreed *per cur'*. 12 *Mod.* 585.

If an arbitrator awards a thing againſt law, this is void. 1 *Rol. Abr.* 249.

An *award was, that intereſt ſhould be paid* to the plaintiff *for money, &c.* defendant demurred, for that the award was void, becauſe it was for payment of intereſt, and uſury is a thing unlawful; but it was anſwered, that it ſhall not be taken for uſury, but rather for damages for forbearance of the money; but admitting it was for intereſt in the proper ſignification of the word, yet 'tis good; for by the ſtatutes, *&c.* contracts for intereſt-money are not void, ſo as they did not exceed ſo much as is limited by thoſe laws; and the opinion of the court was, That the award was good; for an *arbitrament ſhall not be taken abſolutely upon the bare words.* No judgment was given. *Win.* 114, 120.

An award that one of the parties ſhall diſcharge the other from his undertaking to pay a debt to a third perſon, a good award; for by the award he is ſet in the place of the other perſon, and the creditor upon payment is compellable in equity to give a releaſe. 1 *Mod. Rep.* 9.

An award the tenth day of the term to ſtay the ſuit and judgment given in the action that term; in an action for non-performance; and *non aſſumpſit* pleaded; it was moved in arreſt, that every judgment given was of the firſt day of the term, and ſo the award to ſtay the ſuit then was altogether impoſſible; but it was held, that though this might have been a good objection upon a ſpecial demurrer, where it is ſhewn for cauſe, yet now the court muſt give judgment on this record only; and it doth appear on this record when judgment was given on the other. *Yelv.* 35.

If *A.* and *B.* ſubmit to the award of *J. S.* and he awards that *A.* ſhall pay to *B.* 30*l.* within two months next following, and that upon payment they ſhall give mutual releaſes to one another, and within the ſaid two months *B.* dies, the money ſhall be paid to his executor, who thereupon muſt releaſe; for the award creates a duty. 2 *Vent.* 249.

Award to pay 450l *to an infant, and that guardian ſhall give bond that infant at his full age convey the lands* in queſtion, was ſet aſide becauſe unreaſonable; *per Finch* C. 1 *Chan. Caſes* 280. *Trin.* 28 *Car.* 2. *Cavendiſh*'s caſe.

A. and *B.* where partners; *A. in behalf of himſelf and partner, referred all differences, &c. between them and the plaintiff to J. S. and promiſed to perform his award; J. S. awarded, that all ſuits proſecuted by the plaintiff againſt the defendant ſhould ceaſe, and that he pay the plaintiff, &c.* Exception was taken, becauſe the ſubmiſſion was only of matters concerning the partnerſhip, where the award is, that all ſuits ſhall ceaſe; and alſo that it was of all ſuits between the plaintiff and partner, and the award is, that all ſuits proſecuted againſt the defendant only ſhall ceaſe; and likewiſe that *B.* the other partner, is no party to the ſubmiſſion. *Sed non allocatur*; for no difference ſhall be intended, but what concerned the plaintiff and defendant, as the defendant was concerned with *B.* in trade only, unleſs the contrary appears, and if ſo it ſhould be ſhewn on the other ſide; and it ſhall be likewiſe intended, that all ſuits ſhall ceaſe only between the plaintiff and defendant, and that was an award on both ſides, becauſe it has the effect of a releaſe; and alſo *A.* the defendant may undertake for *B.* his partner, and having promiſed that he ſhould perform the award on his part (tho' *B.* be not bound) yet if *B.* refuſes, it is a breach of *A*'s promiſe, and ſo the plaintiff had judgment upon the firſt argument. 2 *Mod.* 227.

Fourthly, *There muſt be a* means *by law to attain unto the thing awarded.*

If it be awarded, that a perſon ſhall procure a ſtranger to do a thing, and he hath no *means* by law to compel the ſtranger to do it, the award is void; but if he has any means to compel the ſtranger to do it, either by the Common law or in Chancery, he is bound hereby. 1 *Rol. Abr.* 248.

So an award that he ſhall be bound with ſureties, is void as to the ſureties. 1 *Rol. Abr.* 248. But the party himſelf may be awarded to pay any thing, tho' he hath it not. 1 *Rol. Abr.* 248.

Though a man may bind himſelf by obligation upon condition to cauſe a ſtranger to infeoff the obligee, this is his folly; but an arbitrator is a judge intended to be indifferent, and therefore he ſhall not award that a man ſhall do a thing which does not lie in his power; for he has no means to compel the ſtranger to be bound. *Br. Arbitrament, pl.* 39.

If the award be, that he ſhall levy a fine before the juſtices *de banco* before ſuch a day, it is good, though this cannot be done without the act of the court. 1 *Rol. Abr.* 248. But if the award be, that one ſhall command the juſtices *de banco* to make him to levy a fine before a certain day, this is void, becauſe it is not in his power. 1 *Rol. Abr.* 249.

Fifthly, *An award ought to be* certain *and* final; *and make an end of all controverſies.*

An award is in nature of a judgment, it ought to be wholly deciſive, for if it doth not determine the matter, it becomes a new controverſy; therefore if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain ſum, this is a void award, and the party is not obliged to give bond to the value of the land; for then the ſenſe of the award muſt be ſupplied by averment; now if it hath the credit of a judgment, there can be no interpretation made of the award, but by the words of the award itſelf; for if it receives its meaning from any matters out of the award, the mind of the arbitrators is only gueſt at, and not expreſs'd; but the parties intended to be obliged only by what the arbitrators themſelves declared to be their award, and the bond to be according to the value, they cannot aſſign their power to any perſon to aſſeſs the value. 5 *Co.* 77. *Cro. Eliz.* 432. 1 *Rol. Abr.* 263. *Moor* 359. 1 *Rol. Rep.* 271. *Dyer* 242. *Yelv.* 78.

So if the arbitrators award that one party ſhall give ſecurity to the other, for the payment of 16*l.* this is not a good award, becauſe it doth not appear what ſecurity, whether by bond or otherwiſe. *Cro. Jac.* 314.

An award was, that the defendant ſhould pay the plaintiff 3*l.* 10*s.* but it was not ſaid for what; *per Hobart* Ch. J. This can imply nothing, nor can it be holpen by any averment. But if another action were brought for the treſpaſs, no doubt this award may be pleaded with an averment; he ſays there was no judgment in this caſe, for tho' he was and is clear of that opinion, and the reſt concurr'd, yet there was ſome varying after, and ſo it hung, and he thinks it was compounded; for he heard no more of it. *Hob.* 49, 50.

An *award was to pay money, but expreſs'd no place where* it ſhould be paid. Reſolved, that in law this ſhould have a reaſonable conſtruction, and the party ought to have a reaſonable time for the payment; but *Foſter* conceived it not good, becauſe in ſuch caſe the bond of ſubmiſſion would

would be immediately forfeited, becauſe there was neither time nor place where the money ſhould be paid; but in anſwer to this were cited 3 *H.* 7. and 16 *E.* 4. where it is ſaid, that if an arbitrator awards that one party ſhall pay ſo much ſuch a day, and keeps the award in his pocket till the day be paſt, yet the bond ſhall not be forfeited; and ſo it was adjudged by all the other juſtices. 2 *Brownl.* 211.

An *infant ſubmitted* himſelf to an arbitrament, and the *award* was, that the infant ſhould pay 5*l. for quit rents, and other ſmall things*, and it doth *not appear what thoſe ſmall things were; ſo that it might be for ſuch things for which the infant by the law was not chargeable*, and therefore it is void for the uncertainty; *per Heath* J. and *Bramſton* Ch. J. but by *Bramſton*, if it had appear'd certainly that the things had been ſuch for which the infant is by the law chargeable, perhaps it had been good. *Mar.* 144, 145.

The *award* was, *that one ſhall keep and enjoy the goods*, paying ſo much money to the other. It was objected, that this was void, becauſe they have not awarded, that the money ſhall be paid, but that they ſhall have the goods, paying, *&c.* But *Windham* J. held the award good, for tho' it is not expreſsly to pay, yet it ſhall be *taken according to the intent*, which without doubt was, that money ſhould be paid. *Sid.* 54. *pl.* 20.

If the condition of an obligation be to ſubmit to an award all controverſies between *A.* and *B.* and an award is made that *A.* ſhall permit *B.* to enjoy certain leaſes of lands purchaſed from *J. S.* and that *B.* ſhall pay the rents, and perform the covenants, and deliver to *A.* a true copy of the leaſes, and pay the arrears to the time of the purchaſe from *J. S.* this is a good award as to the rents and covenants, though not particularly ſpecified; for it is true, an award is to be interpreted by its own words, and not by any matter out of the aw.rd which doth not appear in the words; but when the words of an award have relation to things certain out of the award, theſe things may be averred; for that is the expreſs mind of the arbitrators, which they have expreſsly referred to; but as to the arrears the award is void, becauſe they have not referred to any matter that falls within the conuzance of *B.* for he cannot compel *A.* or *J. S.* to ſet the time of the purchaſe; and an award of what cannot be certainly done is not a certain determination. 1 *Rol. Abr.* 264.

If an award be, that one ſhall acquit the other of an obligation of 200*l. aut eo circiter*, and the party is bound in an obligation of 105*l. aut eo circiter*, this is a good award. 1 *Rol. Abr.* 263.

If an award be, that one ſhall pay the other 6*l.* on the twenty-firſt of *May*, and the other ſhould releaſe his right in certain lands *prædict' primo die Maii*, omitting *viceſimo*, not good, becauſe there was not any former day before mentioned, and ſo the mind of the arbitrators not underſtood. 1 *Rol. Abr.* 263.

Award was, *that one ſhould pay to the other for taſk-work and day-work, but did not mention how much.* This is void by reaſon of the uncertainty; and the *averment* that the taſk-work and day-work amounted to ſo much, will not help it. 2 *Saund.* 292, 293.

An *award was, that the defendant ſhould pay two-thirds of all the plaintiff's coſts to his attorney or bailiff, in & circa ſectam prædictam.* It was objected to be uncertain; for tho' an award to pay coſts to be taxed by the prothonotary has been allowed, 1 *Sid.* 358. yet here no perſon is named who is to tax the coſts, and therefore an award to pay coſts of ſuit in an inferior court is void, 1 *Salk.* 75. and here it is to pay coſts to the bailiff, and therefore is like the caſe in 3 *Lev.* 413. to pay all reaſonable expences in ſuch a ſuit, which was held to be void. *Sed non allocatur*; for an award to pay coſts in ſuch a ſuit is ſufficient, without ſaying any thing more; for they may be aſcertained. *Comyns's Rep.* 329, 330.

If *A.* and *B.* merchants, and *C.* and *D.* with all the other owners and mariners, ſubmit to the award of *J. S.* concerning a ſhip taken by way of reprizal, and *A.* and *B.* enter into an obligation on one ſide, and *C.* and *D.* on the other, and 1000*l.* is awarded to *C.* and *D.* to the uſe of themſelves and the reſt of the owners and mariners, that is a good award, though every man has not a certain allotment, for *C.* and *D.* ſubmit jointly in the name of the reſt; and therefore an award of any thing to them as one perſon, without ſubdiviſion, is good; and *C.* and *D.* being intruſted for the reſt, they are bound to make a reaſonable diviſion; if not at Common law, at leaſt in Chancery. 1 *Rol. Abr.* 249.

If an award be made that *A.* ſhall pay *B.* his days work, and taſk-work, and *B* ſhould then pay 25*l.* to *A.* and then they ſhould make each other general releaſes, this is a void award, and cannot be helped by averment that he paid ſuch a certain ſum for days work and taſk-work, becauſe the award is void in itſelf, by not ſettling the certain ſum; and if that is void upon which the ſubſequent payment and releaſes are to be made, the whole award muſt be void. 2 *Sand.* 293.

Submiſſion was *of all differences, &c. concerning a piece of ground uſed as a wharf, and all erections thereon, which were nuſances to the plaintiff's houſe.* The defendant pleaded No award; the plaintiff replied, and ſet forth the award; by which it was awarded *that the defendant ſhould enjoy the wharf, and that the erections ſhould be pull'd down within* 58 *days from the date of the award.* And upon demurrer it was objected againſt the replication, by reaſon of thoſe omiſſions; but *per cur.* The day of the making the award is the day of the date; and by 3 juſtices, The erections ſhall be pull'd down by him on whoſe ground they ſtand; but as to this laſt point, *Holt* Ch. J. ſeem'd *e contra.* 1 *Salk.* 76.

Award was *to pay* 20*l.* the *one moiety in hand* preſently, *and the other moiety within ſix months after* the date of the award, this is good, and ſhall refer to the time of the award made or given up, altho' without any date; and in this caſe by the ſubmiſſion they are not bound to make any award in writing. 3 *Bulſt.* 311.

An award that one ſhall pay part of the charge of the voyage, and allow his part of the loſs, that ſhall come to the ſhip upon account, this is good; for it may be reduced to certainty. 1 *Rol. Abr.* 251.

If the ſubmiſſion be of 200 acres, called *Kelſtorne Ling*, and the award be concerning the waſte lands in the town of *K.* this award is void, and cannot be helped out with an averment; ſo if money be awarded to be paid by one, and it is ſaid in ſatisfaction of what he owes the other, that cannot be averred. *Dyer* 242. 1 *Rol. Abr.* 263. 231.

If an award be that one of the parties ſhall pay to the other ſo much as is due in conſcience, this is a void award. *Style* 28.

Five pounds awarded for quit rents, void for the uncertainty. *March* 144.

If *A.* commits a nuſance to *B.* by erecting ſcaffolds on his own ground, and the arbitrators award that the ſcaffolds ſhall be removed, it muſt be underſtood that they are to be removed by *A.* on whoſe grounds they are; for tho' any perſon may by law remove a nuſance, yet the arbitrators, who are judges of equity as well as law, muſt be underſtood to intend it of him who committed the nuſance, and therefore the award not void for uncertainty. 6 *Mod.* 244.

An award to pay the charges of ſuch a ſuit is good, becauſe it is the intent of the arbitrators it ſhould be reduced to a certainty by the attorney's bill, who is the only perſon can know the certainty. *Cro. Car.* 383. 2 *Vent.* 242. 3 *Lev.* 18. 1 *Sid.* 12.

An award was, that one of the parties, he or his executors ſhould releaſe; and my lord *Holt* inclined to think that it may be conſtrued that *he and his executors* ſhould releaſe. 1 *Salk.* 69.

An award is made of 40*l.* and mutual releaſes; but if it ſhall appear to the arbitrators that one of them ſtands obliged, *&c.* that then ſo much ſhall be deducted, this makes the whole award void; for it is uncertain how much will be due; but if the award had been that if any bill of debt appears, that ſhould be deducted, that it ſeems would be a good award; and though he awards mutual releaſes, which would make a final end of all, yet it appears that was to be after payment; and therefore

that

that part of the award ſhall not ſtand alone, for that is contrary to the intent of the award; ſo if the arbitrators make an award with *a proviſo* at the end of it, that if they do ſuch an act the whole award ſhall be void; for the award ought in preſent to be certain. *Cro. Jac.* 584.

The award was, that one of the parties ſhould pay unto the other a certain ſum on ſuch a day, and that in conſideration thereof, the other ſhould acquit him of a bond, in which they were both bound to a third perſon in an hundred pounds *or thereabouts*; it was objected, that this award was uncertain, it being made to diſcharge a man of an hundred pounds, *or thereabouts*; but adjudged good, becauſe it doth not lie in the power of the arbitrator to know the *very ſum*; but if an award is made, that one ſhall be bound in a bond to another, and doth not ſhew in what ſum, 'tis void for the uncertainty. *March* 18.

Debt upon bond, for performance of an award; the defendant pleaded no award made; the plaintiff replied and ſhewed an award for the defendant to pay 20*s.* upon condition, that each ſhould acquit the other, *&c.* and that the defendant ſhould pay the charge of a ſuit now depending, and the plaintiff gave the defendant a bill of the charges amounting to 40*s.* which the defendant had not paid: and upon a demurer, it was objected, that this award was void, becauſe it was conditional, *viz.* upon condition that each ſhould acquit the other; beſides, it doth not aſcertain the charges, but refers them to the bill; but adjudged, that an award upon condition to acquit, is an award to acquit, and that the charges are aſcertained by the bill delivered. 3 *Lev.* 18.

An award may be good for part only, but then it muſt be final as to that part. 19 *Hen.* 6. 36. 8 *Ed.* 4. 10.

An award that all ſuits ſhall ceaſe is a final award; ſo an award that one of the parties ſhall not ſue an obligation; for this amounts to an extinguiſhment of the debt. An award that a ſuit in Chancery ſhall be diſmiſſed, is a final award; ſo if the arbitrators award a *retraxit*, or an award that one ſhall not proſecute nor proceed in ſuch a term, ſeems to be good; but an award that one of the parties ſhall be nonſuit is not good, becauſe the party may begin again, ſo that each party ſhall diſcontinue their actions which they have againſt each other; for this is not a final determination. 2 *Mod.* 227. 1 *Lev.* 58. 1 *Rol. Abr.* 54. 1 *Salk.* 75. 6 *Mod.* 282.

The award was, that the defendant ſhould pay to the plaintiff ſo much money, and whereas the plaintiff had alledged, that the defendant was indebted to him in ſeveral ſums of money, which the defendant alledged he had paid; if the ſaid defendant, at, or before the feaſt of St. *Andrew* next, ſhould prove to the arbitrators, or either of them, that he had paid any of the ſums, that then ſo much ſhould be deducted out of the 9*l.* now awarded; it was objected in arreſt of judgment, that this award was void, becauſe it was not final, but left the matter in ſuſpence; it was not adjudged. *Hob.* 218.

If the arbitrators award that *A.* ſhall beg *B.*'s pardon in ſuch a manner and at ſuch a place as *B.* ſhall appoint; as to this part the award is void, for the arbitrators ought to have made a final determination of the matter themſelves, and not to have left the manner and place of begging pardon, which is a kind of ſatisfaction, and makes the moſt conſiderable part of the judgment of *B.* 1 *Salk.* 71.

When the arbitrators award a thing not ſubmitted, with a reſervation to themſelves of a future power of judging of the matter, and they award a thing within the ſubmiſſion, this is good for the thing within the ſubmiſſion; for as to that it is final, and void for the reſidue. *Palm.* 146. *Cro. Jac.* 315, 584.

If they arbitrate that all controverſies ſhall ceaſe, except that concerning one bond, this is final; for as to the bond, they arbitrate that it ſhall continue in force. *Cro. Jac.* 277, 400.

The award was, that within four days next enſuing the parties ſhould execute general and mutual *releaſes* of all demands, *&c.* before the date of the bond; *proviſo, that if either of them ſhall not be contented with the award within twenty days after*, &c. that then upon *payment of* 10*s. to the other, by him who thinks himſelf grieved, the award ſhall be void*; adjudged, that this award was not final, becauſe within *four days* in which they were to execute releaſes, the parties had power to defeat it by the payment of 10*s.* to each other. *Poph.* 15.

A conditional award not good, becauſe not final to determine matters in difference; the ſame law where any thing is referred to the arbitrator's future judgment or expoſition. 1 *Sid.* 59. *Cro. Ja.* 508. *Hob.* 218. *Palm.* 110.

If the arbitrators award general releaſes within four days after the award, and if in ten days after the releaſes ſo made the party diſlike the award, upon payment of ten ſhillings, the award ſhall be diſcharged; here the award is good; and the proviſo to make void the award after ſuch releaſes, is altogether void and repugnant; for if the obligation be once forfeited by nonperformance of the award, it can never be diſcharged by the award itſelf; but if the arbitrators award general releaſes within four days after the award; and if ten days after the award made the parties diſlike the award, *&c.* the award ſhall be void; this award is not good, becauſe not final and deciſive; for the parties may diſlike the award within the four days. *Poph.* 15, 16. 2 *Rol. Rep.* 189.

The award was, that the defendant ſhould *give bond* to the plaintiff, that he the ſaid plaintiff and *his wife* ſhould have and enjoy ſuch lands in controverſy then between them; adjudged, this award was void, becauſe it was to give bond, not mentioning in what ſum; and becauſe it was, that *the wife* ſhould enjoy the lands, and ſhe was no party to the ſubmiſſion. *Cro. Eliz.* 432.

An award to give ſuch a releaſe *as counſel*, &c. *ſhould adviſe*, is good, for this is only a miniſterial, and not a judicial act. *Style* 219.

An award to pay all coſts, *which ſhould be taxed by a prothonotary*, &c. not good, becauſe not final. *Sid.* 358.

4. *What ſhall be deemed a good award in general.*

Debt upon bond, for performance of an award; the arbitrators awarded, that the defendant ſhould enjoy ſuch a houſe, of which the plaintiff had a leaſe for years, *and that the defendant ſhould pay to him yearly* 20*s. during the term*; afterwards *an action of debt* was brought on this bond, for that the 20*s.* was in arrear for one year; and adjudged, that the action did lie, for it was part of the award. *Cro. Eliz.* 211.

And yet where the *award* was, that the *obligor ſhall make a leaſe to the obligee*, rendring rent, and a leaſe was made accordingly, and afterwards the obligee did not pay the rent, it was held, that an action did not lie upon this bond for the arrears of rent, becauſe the obligor had another remedy, *(viz.)* by *diſtreſs*, and that the making the leaſe was the effect of the award; but if it had been that the obligee ſhould make a leaſe, and that for ſuch leaſe the obligor ſhould pay ſuch a certain ſum, there the obligee may recover it upon this bond. *Bendl.* 4.

The controverſy was between the parties, concerning a *leaſe of lands*; the award was, that one of them ſhall *have the lands*; adjudged, that this was a good award of the *intereſt of the leaſe*; but if it had been, that he ſhould permit the other to *enjoy the term*, this would not be an award of the *intereſt*. *Cro. Eliz.* 223.

Debt, *&c.* to perform an award, which was, that the now plaintiff ſhould not proſecute or proceed in ſuch an action, and in *ſuch a term*; this was adjudged a good award, and that the entering of a *continuance* from that term to another, by his attorney, was no breach of the award. 2 *Cro.* 525.

An award is to receive a liberal conſtruction, and to be governed by the intent of the arbitrators, where no inconvenience will enſue; therefore if the arbitrators award a thing to be done, without ſaying within what time, the party ſhall have reaſonable time; becauſe they muſt intend all things neceſſary to the doing the thing they award. 2 *Brownl.* 311.

If the award be to pay money to *J. S.* if he dies, the money ſhall be paid to his executors; a ſubmiſſion of all actions, and an award of a releaſe of all actions, except a bond, this is an award that the bond ſhall ſtand. 2 *Vent.* 249. 1 *Rol. Abr.* 257. *Cro. Jac.* 277. *Yelv.* 203.

An award that one ſhall enjoy ſuch a houſe and pay the rent, or elſe the award for enjoying the houſe to be void, is a good award; for the award is abſolute, unleſs upon his own fault; and the thing is reſerved to the future judgment of the arbitrators. *Cro. Jac.* 423. 1 *Rol. Abr.* 250.

The condition of the bond of ſubmiſſion was, that the parties ſhould put themſelves to the arbitrament of *G. D.* of all matters between them *till the 9th day of March* 18 *Jac.* and the award was, that each of them ſhould *releaſe* to the other all matters, *&c.* till the 9th day of *March*, *&c.* It was objected, that by this releaſe the *bond* upon which the action was brought, was diſcharged; but adjudged a good award, for tho' it was void as to that part, it was good for the reſt. *Winch.* 1.

Debt, *&c.* on bond, for performance of an award; the defendant pleaded *Nullum arbitrium*; the plaintiff replied, and ſhewed the award, by which the arbitrator amongſt other things, awarded *intereſt* to be paid to him for money, *&c.* and upon demurrer to this replication, it was objected, that the award was void, becauſe it was for payment of *intereſt*, and *uſury* is a thing unlawful; but the award was adjudged good, for it ſhall not be taken for uſury, but rather for damages for forbearance of the money; but admitting it was for *intereſt* in the proper ſignification of the word, yet 'tis good; for by the ſtatutes, *&c.* contracts for intereſt-money are not void, ſo as they did not exceed ſo much as is limitted by thoſe laws. *Winch.* 114.

If a battery is ſubmitted, and the award is, that one ſhall releaſe, and the other pay him 10*l.* the releaſe muſt only be underſtood of the battery, and muſt be firſt performed before the 10*l.* ſhall be paid. 3 *Bulſt.* 111, 117. 21 *H.* 7. 28.

If an award be, that one ſhall make a leaſe to the other, rendring rent; the leaſe is made, but the rent not paid, the obligation is not forfeited; for the award did not reach to the payment of the rent, which muſt be recovered by diſtreſs or action of debt; but if the award had been that he ſhould pay the rents at ſuch ſet times, the obligation would have been forfeited if they had not been paid; and in ſuch caſe it is a ſum in groſs, and payable without demand; for the party muſt offer it to ſave his obligation. *Moor* 3. *Cro. Eliz.* 211. *cont. Cro.* 423.

It is an eſtabliſhed rule, that an award may be good in part, though void as to the other parts of it; and that the party is obliged to perform that which is well awarded, and excuſed as to that only which is void; but if an award is good as to one part, and void as to what is awarded to the other party, the award is void in the whole. 8 *Co.* 98. 1 *Sand.* 32. 1 *Rol. Rep.* 362. 1 *Rol. Abr.* 256. 1 *Lev.* 58. 1 *Leon.* 72. 1 *Rol. Abr.* 244. *Hob.* 218. 2 *Lev.* 3. 3 *Lev.* 413.

If the arbitrators award one thing on the one part, and the time expires before they award any thing on the other part, this is altogether void, and contrary to their authority; becauſe it doth not finally determine the things contained in the ſubmiſſion equally on both parts. 36 *H.* 6. 12. 7 *H.* 6. 40.

If it be provided by the ſubmiſſion, that the award ſhould be notified or delivered to the parties in writing, it is no award till notified or delivered, becauſe it is not according to the power in the ſubmiſſion. 8 *Ed.* 4. 11, 21. 1 *H.* 7. 5. 1 *Vent.* 193.

The parties who ſubmitted to an award were jointly bound in a bond, conditioned to pay 50*l. to G. D.* and the award was, that one of them ſhould acquit and diſcharge the other from it; it was inſiſted for the defendant, that this award was void, becauſe it was to acquit and diſcharge the plaintiff of a bond made to a *ſtranger* to the ſubmiſſion, and it was not in his power to procure ſuch a diſcharge; but adjudged, that the defendant might very well diſcharge the plaintiff from this bond, if the money was to be paid at a future day, not yet come, and ſo the bond not forfeited; as in this caſe it ſhall be intended that it was not. *Cro. Car.* 389.

If ſeveral perſons of the one part, and ſeveral of the other part, ſubmit themſelves to arbitrament, provided the arbitrator deliver the award to the parties, or one of them, he is not obliged to deliver the award to one of each party; but it is ſufficient to deliver it to any of the ſaid parties. *Dyer* 218.

But if two on the one part, and one of the other ſubmit to an award, *ita quod arbitrium fiat & deliberetur utrique partium prædict'*, the delivery of the award to one on the one part, and to the other of the other part, is not ſufficient; for each party is each an intire party; for each, by non-performance, incurs the penalty, and each provides in order to his performance, that it ſhould be made known to him; if the ſubmiſſion be by two, ſo that it be delivered to one only, that is to be underſtood to both; and a delivery to one only, is not good. 5 *Co.* 103. *Moor* 642. *Cro. Eliz.* 885.

If two men ſubmit to an award, ſo that it be *paratum deliberare partibus* ſuch a day, it need not be averred that it is *paratum deliberare*, *&c.* at that day, for the publication of the award itſelf is ſufficient. *Hard.* 399. *Cro. Car.* 541.

If the ſubmiſſion be general, that the award ſhall be delivered before ſuch a day, it may as well be delivered by word as by deed, and therefore *non deliberavit in ſcriptis* in ſuch caſe is no good plea. *Dyer* 218. 1 *Salk.* 75.

Debt upon an award by word only, is within the ſtatute of 21 *Jac.* 1. *cap.* 16. of limitations, and muſt be ſued within ſix years; otherwiſe it is of an award by ſpecialty. 2 *Keb.* 462.

Debt on a bond for performance of an award, which was, that all ſuits ſhould ceaſe depending between the parties, and that the defendant ſhould pay the plaintiff 20*l. at the houſe of G. D.* It was objected, that this award was void, becauſe it was to do a thing *upon the land* of another, which he cannot lawfully do, if he ſhould be denied entrance; but adjudged, that the award is good, becauſe he was not to pay the money *in the houſe* of another man, but *at the houſe*, and it might be that the houſe was adjoining to the highway; but if it was not, he might come as near the houſe as he could without being a treſpaſſer, and there tender the money; or he might get leave to come near, or into the houſe. 10 *Rep. in Oſborne*'s caſe.

Debt upon bond, for performance of an award; the defendant pleaded no award made; the plaintiff replied, and ſet forth the award, and aſſigned the breach; the defendant demurred to the replication, that the award was, that one ſhould pay, and the other ſhall give ſuch a general releaſe, *&c. as counſel ſhall adviſe*; ſo as here the counſel is made the arbitrator, for a judicial act is referred to him; adjudged, that was a miniſterial, and not a judicial act, to refer the form of the releaſe to counſel, and ſo the plaintiff had judgment. *Style* 217.

If there be an obligation to ſtand to an award, each ought to perform it on his part, at the peril of his obligation. 21 *Hen.* 7. 28. *b.*

If money be awarded and not paid, the party may either have his firſt action or action of debt; for if there be payment, the firſt wrong was determined; but otherwiſe he cannot plead the award as a determination and bar of the wrong; for ſince the award of arbitrators doth not bind any man's property, as judgments at law do, it is fit the party when he pleads it in bar, ſhould ſhew an execution at the time appointed. 4 *Hen.* 6. 1. *a.* 25. *b.* 1 *Rol. Abr.* 267. See 1 *Salk.* 69, 76. *Carth.* 117.

Though an award cannot be made, part at one time and part at another, yet it may be performed part at one time and part at another, for the nature of the thing may require performance at different times and places. 18 *Ed.* 4. 10.

An award for one party to deliver a releaſe or bond to the other, if that one party delivers it to *A.* who delivers it to *B.* who tenders it to the other party, who refuſes, this is a good performance of the award. 2 *Leon.* 110, 181.

Debt upon bond for performance of an award between the plaintiff and the defendant and his *wife*, *&c. or any of them*, ſo as the award, *&c.* and *ready to be delivered* to the parties on or before ſuch a day: The defendants pleaded no award made; the plaintiff replied, and ſet forth an award, by which the defendant was to pay to the plaintiff

plaintiff 16*l.* *in recompence of all charges in ſuch a ſuit*, and that the plaintiff ſhould *releaſe* to the defendant all *demands to the time of making the ſubmiſſion*, and that the defendant ſhould releaſe to the plaintiff *all demands to the time of making the award*; adjudged, that tho' this laſt part of the award was void in law, becauſe the *releaſe* would over-reach the *bond of ſubmiſſion*; yet becauſe there were other matters awarded on both ſides which were good, that made the award ſo too, and that it was good, tho' nothing was awarded as to the defendant's wife, becauſe the words of the ſubmiſſion were, to an award to be made between the parties and the wife of the defendant, *or any of them*. *Hardr.* 399.

If the ſubmiſſion be of a Chancery ſuit, and the arbitrators award that the ſuit ſhall ſtay, and that one be quit againſt the other for all matters in the bill, it is a ſufficient performance to ſay that the other *ſtetit quietus*; and tho' he did not procure an actual diſcharge; but where one by deed is obliged to quit another of ſuch a debt or ſuch a ſuit, it is not ſufficient to ſave him harmleſs, but he muſt procure an actual diſcharge; but the award here being *quod ſtaret quietus*, means no more than that the party ſhould be acquitted by force of the award itſelf, and not that another diſcharge ſhould be procured; and in this caſe, if a new bill be exhibited, yet that is no diſturbance to forfeit, without proceſs iſſuing out as the *ſubpœna*, for till proceſs the party is not actually moleſted. 1 *R l. Rep.* 7, 8. 2 *Bulſt.* 93 *to* 96. *Cro. Jac.* 340.

Debt upon bond, for performance of an award, which was, that one of the parties ſhould diſcharge the other from his undertaking to pay a debt to *W. R.* who *was no party to the ſubmiſſion*, and ſo not compellable to give a diſcharge; and for this reaſon it was objected, that the award was void; but adjudged, that he was compellable in equity to give *a releaſe*, and ſo the award was good. 1 *Mod.* 9.

Debt upon bond conditioned to perform an award; Upon *Nullum arbitrium* pleaded, the plaintiff replied, and ſhewed an award, and aſſigned the breach, and had judgment; and it was moved in arreſt of judgment, that this award was void, becauſe it was, that the defendant ſhould pay to the plaintiff ſuch *coſts as the prothonotary* ſhould tax in ſuch an action now depending, *&c.* whereas a prothonotary is not to tax coſts but upon a nonſuit or a verdict; beſides, the arbitrators cannot award, that he ſhall do any act in his private capacity, nor is there any means to compel him, if they did; but adjudged, that the award is good, for the prothonotary is a publick officer, and 'tis as well as if they had awarded one of the parties to execute ſuch a conveyance as the counſel of the other ſhall adviſe; or that he ſhall pay ſuch an attorney's bill. *Sid.* 358.

But if a man ſubmits a rent-charge to arbitration, and the arbitrators award *quod ſtaret quietus* of the rent, he who hath the rent ought to releaſe the ſame to the other, in performance of this award, for to be quit of the rent ſuppoſes the demand not in being. 2 *Buſt.* 96.

An award that the plaintiff ſhall not proſecute or proceed in a ſuit the ſame term, the entry of a continuance is no breach of this award, for otherwiſe the party can never afterwards go on in the action. *Cro. Jac.* 525.

An award is made to infeoff *J. S.* *J. S* comes and deſires the party to infeoff *J. M.* and him to the uſe of himſelf; this is a good performance of the award, for though the conſtruction of the ſenſe of the award is to be taken on the expreſs words, yet what is a performance of the award is to be taken according to the intent of the abitrators. 3 *Bulſt.* 65.

An award reciting, that ſeveral differences had been between the parties concerning an houſe, and arrears of rent, they (the arbitrators) *to make a final end of all*, did award that the defendant ſhould pay to the plaintiff 4*l.* *for all the ſaid arrears of rent*; and upon demurrer to this replication, it was objected, that the award was not mutual, becauſe it was not of all differences; but adjudged good, becauſe to pay 4*l.* *for all arrears of rent is mutual*; for 'tis in ſatisfaction of the arrears, and the defendant is diſcharged thereof. 1 *Lev.* 132.

Debt upon bond, for performance of an award, *ſo as it be ready to be delivered to the parties* on or before ſuch a day; the defendant pleaded, no award made; the plaintiff replied, and ſhewed an award *ready to be delivered to the defendant*, that he ſhould pay to the plaintiff 5*l.* and aſſigned the breach in not paying it; and upon demurrer to this replication, it was objected, that the plaintiff ought to ſhew, that it was *ready to be delivered to both parties*, and not to the defendant only; but adjudged, it ſhall be intended to be ready to be delivered to both, and that the defendant ought to have pleaded this matter at firſt. 1 *Lev.* 133.

Debt upon bond, for performance of an award; upon *Nullum arbitrium* pleaded, the plaintiff replied, and ſet forth the award, which was, that the defendant, *&c.* ſhould pay the plaintiff ſo much, *in, or at the dwelling-houſe of J. S.* in *H.* and upon demurrer to the replication, the plaintiff had judgment, for tho' *J. S.* is a ſtranger, yet the defendant may pay the money at the door of his houſe, if he cannot get leave to go in. 3 *Lev.* 453.

Debt upon bond for performance of an award, dated the *1ſt of Decemb.* 35 *Car.* ſo as it be made before the *laſt day of Hillary term*, *&c.* Upon *Nullum arbitrium* pleaded, the plaintiff replied, and ſet forth an award made 8 *Feb. de et ſuper præmiſſis*, that the defendant within *a week after the award*, ſhould pay the plaintiff 7*l.* 10*s.* *in ſatisfaction of all demands*; and that upon payment thereof each ſhould give the other a *general releaſe of all demands*; and averred, that no new controverſy did ariſe within a *week after the award*; the defendant rejoined, and confeſſed the award, but ſaid, that after the ſubmiſſion and before the award, a new controverſy did ariſe, *(viz.) on* 6 *Feb.* for that the defendant did break and enter the plaintiff's cloſe called *B.* whereof the arbitrators had notice, and ſo they made no award; and upon demurrer it was objected, that this award was void, becauſe it was for payment of money in ſatisfaction *of all demands generally*, which extends to the time of the award made, and ſo out of the ſubmiſſion; beſides, the *releaſe* in this caſe muſt refer to the time when it was given, and by conſequence ſhall releaſe the laſt cauſe of action, which was not within the ſubmiſſion, and even the bond of ſubmiſſion itſelf; but adjudged, that if the award had been for payment of money in ſatisfaction of all demands till the award, or a releaſe of all demands till the award, it had been ill; but here it was general, and made *de & ſuper præmiſſis*, and it ſhall be intended *till the time of the ſubmiſſion*, and this is *Slainy* and *Wild*'s caſe, 2 *Cro.* 352. So a releaſe of all demands generally (without ſaying to what time) ſhall be intended to the time of ſubmiſſion. 3 *Lev.* 168.

In aſſumpſit, *&c.* the defendant pleaded in bar, a ſubmiſſion of all demands to the award of *J. S.* ſo as it be made and *ready to be delivered* by ſuch a day; then he ſets forth, that on ſuch a day, before the day appointed by the ſubmiſſion, *J. S.* made an award, that the *defendant or his executors ſhould releaſe* to the plaintiff, *&c.* which he, this defendant, was always ready to do: Adjudged, that this award was good, for being pleaded to be made before the day, it ſhall be intended to be always after *ready to be delivered*, *&c.* and tho' 'tis awarded, that the defendant ſhould give a releaſe, and no time appointed when it ſhould be given, yet the law will ſupply the time, *(i. e.)* it muſt be done in convenient time after a requeſt, if that is neceſſary; and if 'tis not neceſſary, then in convenient time after a tender of the releaſe, and the award, that *he or his executors*, in the disjunctive, ſhall *releaſe*, is good, for it may extend to executors, and bind them. 1 *Salk.* 169.

An award, that a *ſuit in Chancery ſhould be diſmiſſed*; it was objected, that this was void, becauſe not final, for the party may diſmiſs his bill and begin again; ſo that 'tis like an award, that one of the parties ſhall be *nonſuit*, which is ill; but adjudged, that a *nonſuit* is not final in the nature of the thing, but a diſmiſſion ſhall be intended a perpetual ceſſation. 1 *Salk.* 75.

Debt upon bond for performance of an award, in which the arbitrators had taken notice, that there was 72*l.* in controverſy, and they awarded only 50*l.* in ſatisfaction, and general releaſes to be given; and upon a demurrer, this being objected, that 50*l.* could not be in ſatisfaction for

for the 72*l.* it was adjudged, that the award was good, becauſe the arbitrators might conſider other matters between the parties; beſides, it doth not appear that 72*l.* was due, but that it was in controverſy. 2 *Mod.* 303.

5. *Pleadings in awards.*

If the arbitrators award money to be paid at a day to come, this is a good plea in bar in action of treſpaſs before the day, becauſe it is *debitum in præſenti*, though *ſolvendum in futuro*; and if he might have an action of treſpaſs before the day, and recover, he may have an action of debt after the day, and ſo a double ſatisfaction for the ſame thing. 49 *Ed.* 3. 3. 1 *Rol. Abr.* 267.

In *debt* on bond to perform an award, *ſo as the ſame be delivered in writing*; the defendant *pleaded*, *quod non deliberavit in ſcriptis*, &c. the plaintiff *replied*, and ſet forth, *the award in writing, but did not directly anſwer the plea of delivering it in writing, but only by way of argument*; and upon demurrer, all the juſtices were againſt the plaintiff. 2 *Mod.* 269.

Submiſſion was to ſtand to the award of *J. S. Ita quod, the award be written, ſigned, and ſealed by the ſaid* J. S. an *award was made, and ſealed by the ſaid* J. S. *but not ſigned.* All the juſtices held this good notwithſtanding, for *ſealing is a ſigning* thereof in law; but otherwiſe, if the words had been that it ſhould be wrote and ſigned by the hands of *J. S.* for there it ought to be actually ſubſcribed. *Palm.* 97.

The condition of a bond was to ſtand to the award of *P. Ita quod it be publiſhed and ſeal'd with the ſeal of* P. *before Mich.* The *plaintiff ſhewed that* P. *made an award, which was delivered to the defendant before Mich. and that he had it in court ſealed with the ſeal of* P. But the plea was ruled to be ill, becauſe he did *not ſhew that the award was ſealed at the time of the delivery.* *Palm.* 121.

There is a difference between an accord with ſatisfaction and an award, for in an accord a man muſt plead preſent ſatisfaction, and it is no plea in bar to plead an accord with ſatisfaction at a day to come; for in all perſonal injuries the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cauſe of complaint, and therefore a preſent ſatisfaction is a good plea; but where the wrong-doer promiſes a future ſatisfaction, the injury continues till ſatisfaction is made, and conſequently there is a cauſe of complaint in being, and if the treſpaſs were now barred by this plea, he can have no remedy for the future ſatisfaction, for that ſuppoſes the injury ſtill to have continuance; but where perſons ſubmit to arbitration, the arbitrators are judges of the injury; and if they award money payable at a day to come, that is a good award, and may be a good plea in bar to an action of treſpaſs brought in the mean time, becauſe this thereby becomes the immediate debt attainable by law. 5 *Ed.* 4. 7. *Plowd.* 5. *b.*

A *ſubmiſſion* was *of all controverſies*, &c. to *A.* and *B. ſo as the award be made under their hands and ſeals on or before the 5th of* December *following, ready to be delivered at the ſhop of* G. H. *in the* Exchange, London. In *debt* upon the bond the *plaintiff ſhewed, that they made their award under their hands and ſeals at the* Caſtle *at* York, *then and there ready to be delivered at the ſhop of the ſaid* G. H. *in the* Exchange, London. *Doderidge* and *Haughton* J. held this a void publication, and not according to the ſubmiſſion; but *Montague* Ch. J. *e contra*, and held that the publiſhing it there, and alledging that it was *adtunc & ibidem* ready to be delivered at the ſhop in the *Exchange*, was ſufficient; *curia adviſare vult.* *Cro. Jac.* 577.

It was formerly held, that in an award of a releaſe, a horſe, a quart of wine, to enter into an obligation, or any other collateral matter in ſatisfaction, without performance, was no good plea in bar; for were it a good plea in bar, he could have no remedy afterwards to compel the party to do the thing awarded, for by the bar the treſpaſs would be nullified. 1 *Rol. Abr.* 266. 1 *Salk.* 76.

But it has been ſince held, in an action on the caſe upon a ſpecial promiſe made by the defendant, to deliver a parcel of hops to the plaintiff on ſuch a day and place, on a certain price agreed on, &c. to which the defendant pleaded in bar, that after the promiſe made, both he and the plaintiff referred all matters, and that the arbitrators awarded that the defendant ſhould releaſe the plaintiff, and that he ſhould releaſe the defendant of all actions and demands whatſoever; and alledged, that from the time of the award hitherto, he was always ready, and yet is, to releaſe the plaintiff according to the award, &c. and upon demurrer to this plea after ſeveral debates, it was adjudged that this award was no bar to the action, becauſe nothing was awarded but only mutual releaſes from each other; ſo that the award itſelf is no bar, but the thing awarded, when executed, would be a bar; and a difference was taken where any thing is awarded in ſatisfaction, there the award itſelf is a bar before it is performed; but where nothing is awarded but releaſes on both ſides, there, when the award is executed, the releaſe will likewiſe be a bar: and the court held, that the defendant may bring his action againſt the plaintiff for not releaſing according to the award, and therein ought to recover all his damages and coſts loſt in the action againſt him. *Carth.* 378.

Debt on an arbitration bond; *the plaintiff declared of an award made* May *the 28th in ſuch a year, ready to be delivered up the 29th day of the ſame* May; the defendant *pleaded no award*; the plaintiff *replied an award made by the umpire the 28th of* May *ready to be delivered the ſame day.* Upon demurrer it was objected, that the plaintiff had ſet forth double matter, that the award ſet forth in the declaration, and that in the replication, could not be intended to be the ſame; but *Roll* Ch. J. anſwered, That the iſſue to be tried is not to be taken upon the day of the award made, and ſo requires no anſwer, and ſo cannot be double; and judgment, *niſi*, &c. for the plaintiff. *Sty.* 41.

Debt on a bond of award, upon *nullum arbitrium* pleaded, the plaintiff *replied*, and ſhewed *an award* made; the defendant *rejoined, that there were other things ſubmitted, and ſo no award.* Adjudged upon demurrer, that this is a *departure*; for defendant ſhould have pleaded this ſpecial at the firſt. *Sid.* 180.

The above caſes muſt be underſtood where the action was brought before the time for performing the award was expired; for if an award be to pay money at a day to come, and the money be not paid at the day, and afterwards an action of treſpaſs be brought, this is no good plea in bar; for no man can plead this in bar without ſhewing he has paid the money; for it is againſt natural juſtice to make one default and wrong an excuſe for another; but if the party tender it at the day, and the other refuſe it, then it is a good plea in bar, it being his own fault, and he hath ſtill a remedy for the money. *Keilw.* 121. 1 *Rol. Abr.* 267. *Dyer* 75. *Hob.* 49. *Raym.* 450. 1 *Salk.* 69.

If in an action of debt upon an award the plaintiff declares, that the arbitrators did make an award that the defendant ſhould pay unto the plaintiff 10*l.* this is a good declaration, tho' nothing is ſhewn to have been awarded on the other ſide; for 'tis ſufficient for the plaintiff to ſet forth that part of the award which intitles him to his action; and if the defendant will impeach the award for any thing, he muſt ſhew it ſpecially on his own part. 1 *Leon.* 72.

In an action of debt upon a bond conditioned for the performance of an award, the defendant pleaded, that the arbitrators did make an award that the defendant ſhould pay to the plaintiff 310*l.* and ſhould give to him the general releaſe, and pleaded that he had paid the money and given a releaſe accordingly; but did not ſhew what on the part of the plaintiff was awarded to be done; and the plaintiff replied without ſhewing the other part of the award in his replication, and took iſſue that the defendant had not paid the money; and the defendant put in an inſufficient rejoinder, upon which the plaintiff demurred; and *per cur'*, The plaintiff cannot have judgment, becauſe the award as ſet forth and agreed in pleading is void; but if the plaintiff would have helped himſelf, he ought to have ſhewn the other part of the award before he had taken iſſue. 1 *Sand.* 326.

Debt

Debt upon bond for performance of an award, *&c. ſo it be made and ready to be delivered* to the parties *on or before ſuch a day*; the defendant *pleaded no award made, &c.* the plaintiff *replied*, and ſet forth *the award, but did not aver, that it was ready to be delivered* to the parties, and for that reaſon *adjornatur*; but afterwards the court held that he need not, for *that was ſupplied by ſetting forth the award itſelf.* *Hard.* 399.

Debt upon bond; the defendant demanded oyer of the condition, which *was for the performance of the award of A. P. ſo as it be made on or before the 27th of June, &c. and if not, then to ſtand to the umpirage of, &c.* the defendant *pleaded no award made before the 27th of June*; the plaintiff *replied*, and ſhewed, *that the umpire made an umpirage, and aſſigned a breach, which was ill*; and the defendant demurred. *Keeling* Ch. J. held that judgment ſhould be for the defendant, tho' his bar is ill; for the condition upon the oyer is part of the declaration, and ſo it appears by the replication, that there is no cauſe of action; but all the other juſtices *e contra*, and that a bar ſo ill in ſubſtance cannot be cur'd by the replication, for it ſeems to admit that no award was made on the 27th of *June*, becauſe it ſets forth an umpirage made after that day; but ſuch implication cannot cure the bar, for if an award was made on that day, then the umpirage is void in itſelf; *adjornatur* to be mediated by friends, it being between two brothers. *Sid.* 336.

If in debt upon an obligation conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*; and the plaintiff replies, and ſhews the award, he muſt alſo ſhew the breach, without which he hath no cauſe of action, for the obligation is guided by the condition; and though the defendant can make no anſwer to the breach, yet it ought to appear to the court that the plaintiff hath cauſe of action. *Yelv.* 152. *Cro. Jac.* 220. 1 *Sand.* 102.

But if in debt upon bond to perform an award, and *oyer* of the condition, the defendant pleads *non ſubmiſit*, the plaintiff need not aſſign a breach, for the defendant puts the whole ſtreſs of his cauſe upon a matter antecedent to the alledging a breach, for if there be no ſubmiſſion there could be no award, and conſequently no breach of it. 1 *Sid.* 290.

In *debt* on bond for performing an award, and *no award pleaded*; the plaintiff *replied, that ante exhibitionem billæ, viz. 24th of June, the arbitrators made award*; the defendant demurred generally: It was agreed by all, that if the demurrer had been ſpecial, judgment ſhould have been for the defendant, becauſe the *plaintiff ought to have replied, that the arbitrators made their award before the day limited for it*; but becauſe the demurrer was general, the plaintiff had judgment. *Nota*, The 24th of *July* was within the ſubmiſſion. *Sid.* 370.

If in debt upon an obligation conditioned for the performance of an award, the defendant ſhews that the arbitrators did make an award, that the defendant before ſuch a day ſhould pay to the plaintiff 100*l.* otherwiſe ſhould procure one *A.* being a ſtranger, to be bound to the plaintiff for the payment of 12*l. per annum* to the plaintiff for his life; and the defendant pleads that he hath performed the ſaid award, and the plaintiff replies, that the defendant hath not paid the ſaid 100*l.* without ſaying, nor hath procured *A. &c.* yet this is a good replication, for the award as to that part is merely void, and therefore the plaintiff need not take notice thereof. 1 *Leon.* 304. *Owen* 153.

An *award* was *that the defendant ſhould pay* 3100*l. to the plaintiff, and that they ſhould give each other general releaſes*; *in debt upon the ſubmiſſion bond, the defendant in his plea confeſſed, that the award was, that he ſhould pay ſo much, and execute a general releaſe, and then averred performance*; the plaintiff *replied, and tendered an iſſue upon non-payment*; the *defendant waived the iſſue, and pleaded an inſufficient rejoinder*; and becauſe *neither the plaintiff nor defendant had ſet forth that the plaintiff was to execute a releaſe to him, and ſo the award as pleaded was of one ſide only*, it was held, that the plaintiff could not have judgment; but the court looking upon it to be a trick in pleading, they would not give judgment for the defendant, but gave the plaintiff liberty to diſcontinue upon payment of coſts; but afterwards it appearing on an *Engliſh* bill in the Exchequer, that there was male practice of the plaintiff with the arbitrators, and it being likewiſe a caſe of great extremity upon the defendant, the money awarded being 1100*l.* more than the very penalty of the bond, *ubi revera* there was nothing due to the plaintiff, but he was indebted to the defendant; the defendant was relieved againſt the bond. *Saund.* 326.

Debt upon bond for the performance of an award, *&c.* the defendant *pleaded no award* made, *&c.* the plaintiff *replied*, and ſhewed *an award made, and ready to be delivered to the parties*; the defendant *rejoined, that the award was not tendered to him on the day, & hoc paratus eſt verificare*; and upon a demurrer, this rejoinder was held ill, becauſe it *was a departure* from the plea, for that was no award made; but the rejoinder was, that the award was not tendered, which implies that it was made; beſides, this rejoinder was ill concluded, for the replication ſets forth, that the award was ready to be delivered to the parties; the rejoinder ſays it was not, which is a negative and affirmative, and that is a plain iſſue; therefore he ſhould have concluded to the contrary, and not have averred the rejoinder. 2 *Saund.* 188, 189.

In an action of debt upon an award, it is not neceſſary for the plaintiff in his declaration to lay time or place where the award or ſubmiſſion were made; but if the defendant denies either, the plaintiff may reply, that the award or ſubmiſſion was made at ſuch a place. 2 *Brownl.* 137.

If there be a ſubmiſſion to the award of *J. S.* ſo that the ſaid award be made under his hand and ſeal at or before the 5th day of *September* following, ready to be delivered at the ſhop of *J. N.* in the *Exchange, London*; and in an action of debt upon an award made thereupon, the plaintiff declares that the ſaid *J. S.* under his hand and ſeal the 4th day of *September* following, *apud caſtrum eborum*, did make an award *adtunc & ibidem parat'* to be delivered at the ſhop of the ſaid *J. N.* in the *Exchange, London*; this is no good declaration, for the parties are not bound to take cognizance of the delivery elſewhere than at the place appointed. *Cro. Jac.* 577.

Debt upon bond for performance of an award, *ſo as it be ready to be delivered to the parties at ſuch a day and place*; the defendant *pleaded no award made*; the plaintiff *replied*, and ſet forth an *award delivered to the parties before the day, and at another* place, than mentioned in the ſubmiſſion; and upon demurrer, *Hale* Ch. J. held the replication ill, becauſe it being only the execution of an authority, it ought to be made at the ſame day and place; but the others *e contra*, and adjudged for the plaintiff, becauſe the award was delivered to the parties themſelves. 2 *Liv.* 68.

Bond was *for performing an award de præmiſſis vel aliqua parte inde*; the defendant *pleaded no award made de præmiſſis*. On demurrer it was objected, that it was *not ſaid nec de aliqua parte inde*, for if a bond be to perform an award of two or either of them, it is not ſufficient to plead that thoſe made no award, without adding *nec aliquis eorum*; but if an award is to be made of the manors of *D.* and *C.* or either of them, and the award is made of *D.* only, it is well enough; but as to the firſt part it was anſwered, that *nullum fecerunt arbitrium de præmiſſis* is well enough; for that it implies *nec de aliqua parte inde*, eſpecially *if the contrary is not ſhewn in the replication*, and therefore it ſhall never be intended that an award was made of ſome part; *curia adviſare vult.* 2 *Mod.* 27, 28.

If in debt upon an obligation conditioned for the performance of an award, ſo as, *&c.* the defendant pleads no award made, and the plaintiff replies, that *ante exhibitionem billæ, ſcilicet* the 24 *June* (which was a day within the ſubmiſſion) the arbitrators made an award, *&c.* and the defendant demurs generally, the plaintiff ſhall have judgment; for though the plaintiff ought to have replied, that the arbitrators made their award before the day limited to them; yet this is form only, and helped by a general demurrer. 1 *Sid.* 370.

If in debt upon a bond conditioned for the performance of an award, ſo as it be made, *&c.* and ready to be deli-

for the 72*l.* it was adjudged, that the award was good, becauſe the arbitrators might conſider other matters between the parties; beſides, it doth not appear that 72*l.* was due, but that it was in controverſy. 2 *Mod.* 303.

5. *Pleadings in awards.*

If the arbitrators award money to be paid at a day to come, this is a good plea in bar in action of treſpaſs before the day, becauſe it is *debitum in præſenti*, though *ſolvendum in futuro*; and if he might have an action of treſpaſs before the day, and recover, he may have an action of debt after the day, and ſo a double ſatisfaction for the ſame thing. 49 *Ed.* 3. 3. 1 *Rol. Abr.* 267.

In *debt* on bond to perform an award, *ſo as the ſame be delivered in writing*; the defendant *pleaded*, *quod non deliberavit in ſcriptis*, &c. the plaintiff *replied*, and ſet forth, *the award in writing, but did not directly anſwer the plea of delivering it in writing, but only by way of argument*; and upon demurrer, all the juſtices were againſt the plaintiff. 2 *Mod.* 269.

Submiſſion was to ſtand to the award of *J. S. Ita quod, the award be written, ſigned, and ſealed by the ſaid* J. S. an *award was made, and ſealed by the ſaid* J. S. *but not ſigned.* All the juſtices held this good notwithſtanding, for *ſealing is a ſigning* thereof in law; but otherwiſe, if the words had been that it ſhould be wrote and ſigned by the hands of *J. S.* for there it ought to be actually ſubſcribed. *Palm.* 97.

The condition of a bond was to ſtand to the award of *P. Ita quod it be publiſhed and ſeal'd with the ſeal of* P. *before Mich.* The *plaintiff ſhewed that* P. *made an award, which was delivered to the defendant before Mich. and that he had it in court ſealed with the ſeal of* P. But the plea was ruled to be ill, becauſe he did *not ſhew that the award was ſealed at the time of the delivery. Palm.* 121.

There is a difference between an accord with ſatisfaction and an award, for in an accord a man muſt plead preſent ſatisfaction, and it is no plea in bar to plead an accord with ſatisfaction at a day to come; for in all perſonal injuries the law gives damages as an equivalent; and when the party accepts of an equivalent, there is no injury or cauſe of complaint, and therefore a preſent ſatisfaction is a good plea; but where the wrong-doer promiſes a future ſatisfaction, the injury continues till ſatisfaction is made, and conſequently there is a cauſe of complaint in being, and if the treſpaſs were now barred by this plea, he can have no remedy for the future ſatisfaction, for that ſuppoſes the injury ſtill to have continuance; but where perſons ſubmit to arbitration, the arbitrators are judges of the injury; and if they award money payable at a day to come, that is a good award, and may be a good plea in bar to an action of treſpaſs brought in the mean time, becauſe this thereby becomes the immediate debt attainable by law. 5 *Ed.* 4. 7. *Plowd.* 5. *b.*

A *ſubmiſſion* was *of all controverſies*, &c. to *A.* and *B. ſo as the award be made under their hands and ſeals on or before the 5th of* December *following, ready to be delivered at the ſhop of* G. H. *in the* Exchange, London. In *debt* upon the bond the *plaintiff ſhewed, that they made their award under their hands and ſeals at the* Caſtle *at* York, *then and there ready to be delivered at the ſhop of the ſaid* G. H. *in the* Exchange, London. *Doderidge* and *Haughton* J. held this a void publication, and not according to the ſubmiſſion; but *Montague* Ch. J. *e contra*, and held that the publiſhing it there, and alledging that it was *adtunc & ibidem* ready to be delivered at the ſhop in the *Exchange*, was ſufficient; *curia adviſare vult. Cro. Jac.* 577.

It was formerly held, that in an award of a releaſe, a horſe, a quart of wine, to enter into an obligation, or any other collateral matter in ſatisfaction, without performance, was no good plea in bar; for were it a good plea in bar, he could have no remedy afterwards to compel the party to do the thing awarded, for by the bar the treſpaſs would be nullified. 1 *Rol. Abr.* 266. 1 *Salk.* 76.

But it has been ſince held, in an action on the caſe upon a ſpecial promiſe made by the defendant, to deliver a parcel of hops to the plaintiff on ſuch a day and place, on a certain price agreed on, &c. to which the defendant pleaded in bar, that after the promiſe made, both he and the plaintiff referred all matters, and that the arbitrators awarded that the defendant ſhould releaſe the plaintiff, and that he ſhould releaſe the defendant of all actions and demands whatſoever; and alledged, that from the time of the award hitherto, he was always ready, and yet is, to releaſe the plaintiff according to the award, &c. and upon demurrer to this plea after ſeveral debates, it was adjudged that this award was no bar to the action, becauſe nothing was awarded but only mutual releaſes from each other; ſo that the award itſelf is no bar, but the thing awarded, when executed, would be a bar; and a difference was taken where any thing is awarded in ſatisfaction, there the award itſelf is a bar before it is performed; but where nothing is awarded but releaſes on both ſides, there, when the award is executed, the releaſe will likewiſe be a bar: and the court held, that the defendant may bring his action againſt the plaintiff for not releaſing according to the award, and therein ought to recover all his damages and coſts loſt in the action againſt him. *Carth.* 378.

Debt on an arbitration bond; *the plaintiff declared of an award made* May *the 28th in ſuch a year, ready to be delivered up the 29th day of the ſame* May; the defendant *pleaded no award*; the plaintiff *replied an award made by the umpire the 28th of* May *ready to be delivered the ſame day.* Upon demurrer it was objected, that the plaintiff had ſet forth double matter, that the award ſet forth in the declaration, and that in the replication, could not be intended to be the ſame; but *Roll* Ch. J. anſwered, That the iſſue to be tried is not to be taken upon the day of the award made, and ſo requires no anſwer, and ſo cannot be double; and judgment, *niſi*, &c. for the plaintiff. *Sty.* 41.

Debt on a bond of award, upon *nullum arbitrium* pleaded, the plaintiff *replied*, and ſhewed *an award* made; the defendant *rejoined, that there were other things ſubmitted, and ſo no award.* Adjudged upon demurrer, that this is a *departure*; for defendant ſhould have pleaded this ſpecial at the firſt. *Sid.* 180.

The above caſes muſt be underſtood where the action was brought before the time for performing the award was expired; for if an award be to pay money at a day to come, and the money be not paid at the day, and afterwards an action of treſpaſs be brought, this is no good plea in bar; for no man can plead this in bar without ſhewing he has paid the money; for it is againſt natural juſtice to make one default and wrong an excuſe for another; but if the party tender it at the day, and the other refuſe it, then it is a good plea in bar, it being his own fault, and he hath ſtill a remedy for the money. *Keilw.* 121. 1 *Rol. Abr.* 267. *Dyer* 75. *Hob.* 49. *Raym.* 450. 1 *Salk.* 69.

If in an action of debt upon an award the plaintiff declares, that the arbitrators did make an award that the defendant ſhould pay unto the plaintiff 10*l.* this is a good declaration, tho' nothing is ſhewn to have been awarded on the other ſide; for 'tis ſufficient for the plaintiff to ſet forth that part of the award which intitles him to his action; and if the defendant will impeach the award for any thing, he muſt ſhew it ſpecially on his own part. 1 *Leon.* 72.

In an action of debt upon a bond conditioned for the performance of an award, the defendant pleaded, that the arbitrators did make an award that the defendant ſhould pay to the plaintiff 310*l.* and ſhould give to him the general releaſe, and pleaded that he had paid the money and given a releaſe accordingly; but did not ſhew what on the part of the plaintiff was awarded to be done; and the plaintiff replied without ſhewing the other part of the award in his replication, and took iſſue that the defendant had not paid the money; and the defendant put in an inſufficient rejoinder, upon which the plaintiff demurred; and *per cur'*, The plaintiff cannot have judgment, becauſe the award as ſet forth and agreed in pleading is void; but if the plaintiff would have helped himſelf, he ought to have ſhewn the other part of the award before he had taken iſſue. 1 *Sand.* 326.

Debt

Debt upon bond for performance of an award, *&c. ſo it be made and ready to be delivered* to the parties *on or before ſuch a day*; the defendant *pleaded no award made, &c.* the plaintiff *replied*, and ſet forth *the award, but did not aver, that it was ready to be delivered* to the parties, and for that reaſon *adjornatur*; but afterwards the court held that he need not, for *that was ſupplied by ſetting forth the award itſelf.* *Hard.* 399.

Debt upon bond; the defendant demanded oyer of the condition, which *was for the performance of the award of A. P. ſo as it be made on or before the 27th of June, &c. and if not, then to ſtand to the umpirage of, &c.* the defendant *pleaded no award made before the 27th of June*; the plaintiff *replied*, and ſhewed, *that the umpire made an umpirage, and aſſigned a breach, which was ill*; and the defendant demurred. *Keeling* Ch. J. held that judgment ſhould be for the defendant, tho' his bar is ill; for the condition upon the oyer is part of the declaration, and ſo it appears by the replication, that there is no cauſe of action; but all the other juſtices *e contra*, and that a bar ſo ill in ſubſtance cannot be cur'd by the replication, for it ſeems to admit that no award was made on the 27th of *June*, becauſe it ſets forth an umpirage made after that day; but ſuch implication cannot cure the bar, for if an award was made on that day, then the umpirage is void in itſelf; *adjornatur* to be mediated by friends, it being between two brothers. *Sid.* 336.

If in debt upon an obligation conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*; and the plaintiff replies, and ſhews the award, he muſt alſo ſhew the breach, without which he hath no cauſe of action, for the obligation is guided by the condition; and though the defendant can make no anſwer to the breach, yet it ought to appear to the court that the plaintiff hath cauſe of action. *Yelv.* 152. *Cro. Jac.* 220. 1 *Sand.* 102.

But if in debt upon bond to perform an award, and *oyer* of the condition, the defendant pleads *non ſubmiſit*, the plaintiff need not aſſign a breach, for the defendant puts the whole ſtreſs of his cauſe upon a matter antecedent to the alledging a breach, for if there be no ſubmiſſion there could be no award, and conſequently no breach of it. 1 *Sid.* 290.

In *debt* on bond for performing an award, and *no award pleaded*; the plaintiff *replied, that ante exhibitionem billæ, viz. 24th of June, the arbitrators made award*; the defendant demurred generally: It was agreed by all, that if the demurrer had been ſpecial, judgment ſhould have been for the defendant, becauſe the *plaintiff ought to have replied, that the arbitrators made their award before the day limited for it*; but becauſe the demurrer was general, the plaintiff had judgment. *Nota*, The 24th of *July* was within the ſubmiſſion. *Sid.* 370.

If in debt upon an obligation conditioned for the performance of an award, the defendant ſhews that the arbitrators did make an award, that the defendant before ſuch a day ſhould pay to the plaintiff 100*l.* otherwiſe ſhould procure one *A.* being a ſtranger, to be bound to the plaintiff for the payment of 12*l. per annum* to the plaintiff for his life; and the defendant pleads that he hath performed the ſaid award, and the plaintiff replies, that the defendant hath not paid the ſaid 100*l.* without ſaying, nor hath procured *A. &c.* yet this is a good replication, for the award as to that part is merely void, and therefore the plaintiff need not take notice thereof. 1 *Leon.* 304. *Owen* 153.

An *award* was *that the defendant ſhould pay* 3100*l. to the plaintiff, and that they ſhould give each other general releaſes*; *in debt upon the ſubmiſſion bond, the defendant in his plea confeſſed, that the award was, that he ſhould pay ſo much, and execute a general releaſe, and then averred performance*; the plaintiff *replied, and tendered an iſſue upon non-payment*; the *defendant waived the iſſue, and pleaded an inſufficient rejoinder*; and becauſe *neither the plaintiff nor defendant had ſet forth that the plaintiff was to execute a releaſe to him, and ſo the award as pleaded was of one ſide only*, it was held, that the plaintiff could not have judgment; but the court looking upon it to be a trick in pleading, they would not give judgment for the defendant, but gave the plaintiff liberty to diſcontinue upon payment of coſts; but afterwards it appearing on an *Engliſh* bill in the Exchequer, that there was male practice of the plaintiff with the arbitrators, and it being likewiſe a caſe of great extremity upon the defendant, the money awarded being 1100*l.* more than the very penalty of the bond, *ubi revera* there was nothing due to the plaintiff, but he was indebted to the defendant; the defendant was relieved againſt the bond. *Saund.* 326.

Debt upon bond for the performance of an award, *&c.* the defendant *pleaded no award* made, *&c.* the plaintiff *replied*, and ſhewed *an award made, and ready to be delivered to the parties*; the defendant *rejoined, that the award was not tendered to him on the day, & hoc paratus eſt verificare*; and upon a demurrer, this rejoinder was held ill, becauſe it *was a departure* from the plea, for that was no award made; but the rejoinder was, that the award was not tendered, which implies that it was made; beſides, this rejoinder was ill concluded, for the replication ſets forth, that the award was ready to be delivered to the parties; the rejoinder ſays it was not, which is a negative and affirmative, and that is a plain iſſue; therefore he ſhould have concluded to the contrary, and not have averred the rejoinder. 2 *Saund.* 188, 189.

In an action of debt upon an award, it is not neceſſary for the plaintiff in his declaration to lay time or place where the award or ſubmiſſion were made; but if the defendant denies either, the plaintiff may reply, that the award or ſubmiſſion was made at ſuch a place. 2 *Brownl.* 137.

If there be a ſubmiſſion to the award of *J. S.* ſo that the ſaid award be made under his hand and ſeal at or before the 5th day of *September* following, ready to be delivered at the ſhop of *J. N.* in the *Exchange*, *London*; and in an action of debt upon an award made thereupon, the plaintiff declares that the ſaid *J. S.* under his hand and ſeal the 4th day of *September* following, *apud caſtrum eborum*, did make an award *adtunc & ibidem parat'* to be delivered at the ſhop of the ſaid *J. N.* in the *Exchange*, *London*; this is no good declaration, for the parties are not bound to take cognizance of the delivery elſewhere than at the place appointed. *Cro. Jac.* 577.

Debt upon bond for performance of an award, *ſo as it be ready to be delivered to the parties at ſuch a day and place*; the defendant *pleaded no award made*; the plaintiff *replied*, and ſet forth an *award delivered to the parties before the day, and at another* place, than mentioned in the ſubmiſſion; and upon demurrer, *Hale* Ch. J. held the replication ill, becauſe it being only the execution of an authority, it ought to be made at the ſame day and place; but the others *e contra*, and adjudged for the plaintiff, becauſe the award was delivered to the parties themſelves. 2 *Liv.* 68.

Bond was *for performing an award de præmiſſis vel aliqua parte inde*; the defendant *pleaded no award made de præmiſſis*. On demurrer it was objected, that it was *not ſaid nec de aliqua parte inde*, for if a bond be to perform an award of two or either of them, it is not ſufficient to plead that thoſe made no award, without adding *nec aliquis eorum*; but if an award is to be made of the manors of *D.* and *C.* or either of them, and the award is made of *D.* only, it is well enough; but as to the firſt part it was anſwered, that *nullum fecerunt arbitrium de præmiſſis* is well enough; for that it implies *nec de aliqua parte inde*, eſpecially *if the contrary is not ſhewn in the replication*, and therefore it ſhall never be intended that an award was made of ſome part; *curia adviſare vult.* 2 *Mod.* 27, 28.

If in debt upon an obligation conditioned for the performance of an award, ſo as, *&c.* the defendant pleads no award made, and the plaintiff replies, that *ante exhibitionem billæ, ſcilicet* the 24 *June* (which was a day within the ſubmiſſion) the arbitrators made an award, *&c.* and the defendant demurs generally, the plaintiff ſhall have judgment; for though the plaintiff ought to have replied, that the arbitrators made their award before the day limited to them; yet this is form only, and helped by a general demurrer. 1 *Sid.* 370.

If in debt upon a bond conditioned for the performance of an award, ſo as it be made, *&c.* and ready to be deli-

vered to the parties, or to ſuch of them who ſhall deſire the ſame; the defendant pleads *nullum fecerunt arbitrium*, and the plaintiff replies and ſets forth the award, and ſhews a breach, but doth not ſay that it was ready to be delivered to the defendant, yet this is a good replication; for when the award is made it is ready to be delivered to parties, or ſuch of them who deſire it, ſo that it muſt be deſired; and if denied, the party muſt plead that matter ſpecially. 3 *Mod.* 330.

Debt upon bond, the defendant craved oyer of the bond and condition, which was to perform an award, *ſo as it be in writing under the hand and ſeal of the arbitrator*, and upon *nullum arbitrium pleaded*, the plaintiff *replied*, and ſet forth *an award under the ſeal of the arbitrator*; the defendant *rejoins no award under hand and ſeal, according to the condition of the bond*, and upon demurrer to the rejoinder, the defendant had judgment; for *per cur.* The plaintiff ought to have replied an award under the hand as well as the ſeal of the arbitrator, for he muſt plead it formally as well as produce it. 2 *Mod.* 77.

If in debt upon an obligation conditioned for the performance of an award in writing, or by word of mouth, the defendant pleads no award made, and the plaintiff replies, that at the time of the bond and award he had an action againſt the defendant for ſcandalous words, and the arbitrator *ore tenus* did declare and publiſh his award in manner following, *viz.* That the defendant ſhould pay to the plaintiff 12 *guineas*, and all ſuch money as he had expended *circa projecutionem placitat' præd'*, &c. this is a good award, and well ſet forth, although the award doth not mention any ſuit before; for he that ſets forth a parol award is not tied to the very words, but it is ſufficient to ſhew the aſſent and ſubſtance of what was awarded by word of mouth. 2 *Vent.* 242.

Debt upon bond for performance of an award; upon *nullum arbitrium pleaded* the plaintiff *replied, that he was poſſeſſed of a mill, to which the defendant pretending title, brought an ejectment, and had judgment by default*; and the diſpute was, whether the defendant ſhould have it, or the plaintiff ſhould keep it, and thereupon they ſubmitted to the award, &c. and afterwards, but *before the time for making the award, the defendant brought an* habere facias poſſeſſionem *upon the ſaid judgment, and the mill was delivered to him, and* ſic non ſtetit arbitrio, &c. Upon demurrer to this replication, it was inſiſted for the defendant, that tho' he had the poſſeſſion, yet that matter is ſtill arbitrable; *ſed per cur.* A particular controverſy is ſet forth in this pleading, and the defendant by his own act having taken away the ſubject matter, has alſo taken away the poſſibility to make an award of it. 2 *Jo.* 134.

A man cannot plead generally the award performed, but he ought to ſet forth the award, and ſhew how he hath performed it. *Moor* 3. *pl.* 9.

In pleading a countermand to a ſubmiſſion to arbitrate, it need not be alledged, that the party gave notice to the arbitrators, for without that it is no countermand, and therefore if no notice be given, iſſue may be joined upon the point *quod non revocavit*. 8 *Co.* 82.

If the ſubmiſſion be by word, though the award be by deed, the party may wage his law; for though a deed cannot be diſſolved without deed, yet a verbal contract may be diſſolved by word only, and this in its original is a verbal contract. *Co. Lit.* 295. 2 *Sand.* 65.

In *debt* upon bond to perform an award; the plaintiff pleads an award *that the defendant ſhould pay to* the plaintiff ſo much, &c. and he *tendered it accordingly, and that the plaintiff refuſed*; the plaintiff *replied, that the umpire awarded the money to be paid in ſatisfaction of all controverſies, and that the defendant did not tender it, and concludes to the country*; and upon demurrer it was inſiſted, that the plaintiff having alledged new matter in his replication, he ought not to have concluded to the country, for by that means he had *deprived the defendant of his traverſe to the new matter*, and therefore cannot have judgment, eſpecially ſince it does not appear by the pleading whether the award was good or not; and of this opinion were *Jones* Ch. J. and *Charleton*, but *Windham* and *Levinz e contra*, becauſe the defendant having *admitted the award to be good*, and taking upon him to plead performance, he ſhall not afterwards be admitted to traverſe it to prove it no award; but if the award was not in ſatisfaction of all controverſies, and ſo an award of one part only, the defendant ſhould have pleaded at firſt no award, but to admit him now to a traverſe to prove it no award, would be a departure; court divided. 3 *Lev.* 164.

If in debt on a bond for performance of an award, the defendant pleads no award, and the plaintiff ſets forth an award with a *profert in cur'*. and the defendant craves *oyer*, and then demurs for variance between the award ſet out in the replication and the oyer, and the variances appear material, the defendant muſt have judgment; otherwiſe if the variance had been as to thoſe parts in which the award was void; and though in debt on an award the plaintiff need not ſet forth more than makes for him, yet it is otherwiſe in debt on a bond, for there the plaintiff muſt reply the whole award; and if ſuch replication be without a *profert*, the defendant may reply *nul tiel accord*. 1 *Salk.* 72.

In *debt on bond to perform an award in writing or by word of mouth*; the defendant *pleaded no award*; the plaintiff *replied, that at the time of the bond and award he had an action for ſcandalous words againſt the defendant, and that the arbitrators did* declare and publiſh their *award* thus, viz. *that the defendant ſhould pay the plaintiff* 12 *guineas, and all ſuch monies as he had expended in and about the proſecution of the plea aforeſaid, and that the parties ſhould give mutual releaſes to the date of the ſaid bond*, &c. It was objected, that the award is void, becauſe it does *not mention any ſuit before to refer the (plea aforeſaid) unto.* But *per cur.* If the award had been in writing with ſuch form of expreſſion, it would not be good, but *in ſetting out an award by parol, it is ſufficient to ſhew the effect* and ſubſtance *of what was awarded* by word of mouth, and it is ſufficiently ſhewn that this award was made concerning the action of ſlander; and judgment for the plaintiff. 2 *Vent.* 242.

And it was alſo held, that the *plaintiff need not ſhew that there was cauſe of action*; for that is left to the arbitrators, and they have power to award charges thereupon, though in point of law there was no cauſe of action, becauſe the parties have made them their judges. 2 *Vent.* 242, 243.

If an award be made, that certain buildings erected on a wharf, which were a nuſance to the plaintiff, ſhould be pulled down within thirty-eight days from the date of the award, &c. and upon *nul agard* pleaded, the plaintiff ſets forth an award, but without date; yet this is well enough, for the date ſhall be computed from the making the award, as a deed takes its date from the delivery, though actually dated on another day. 1 *Salk* 76.

Submiſſion was, *ita quod* the award be made, &c. by the arbitrators, and if not, then *ita quod it be made de præmiſſis* by the umpire, *either in writing or by word of mouth, before two witneſſes, at or before*, &c. the defendant pleaded *nullum arbitrium*; the plaintiff replied, and ſhewed an award by the umpire by word of mouth, but did *not aver that it was made before witneſſes*; and therefore judgment was given for the defendant. *Lutw.* 536.

In *debt* on bond to perform an award, the defendant *pleaded no award*; the plaintiff *replied*, and ſet forth *an award with a profert in curia*, and *there were ſeveral material omiſſions*; the defendant craved *oyer*, and demurred for the variance between the award in the replication and the *oyer*; *per Holt* Ch. J. In debt upon bond to perform an award, if *nul agard fait* be pleaded, and the plaintiff replies an award, &c. and iſſue is thereupon, and there is a material variance between the award given in evidence and the award ſet forth in the replication, it is againſt the plaintiff; but if the variance be only by omiſſion of that which is void, it is no material variance, being no material part of the award; but becauſe the variances are by omiſſions that are material, judgment muſt be for the defendant. 1 *Salk.* 72.

A R B

Form of a *submiſſion* by rule of court.

WHEREAS *divers diſputes and controverſies have ariſen, and are now depending, between* A. B. *of*——*in the county of*——*yeoman, of the one part, and* C. D. *of*——*in the ſaid county, yeoman, of the other part, touching and concerning*——: *Now for the ending and deciding thereof, it is hereby mutually agreed by and between the ſaid parties, that all matters in difference between them for, touching and concerning all and every the matters and things herein above ſpecified and particularly mentioned, ſhall be referred and ſubmitted to the arbitrament, final end and determination of* A. A. *of*——*in the ſaid county, gentleman,* B. A. *of*——*in the ſaid county, yeoman, and* C. A. *of*——*in the ſaid county, yeoman, or any two of them, arbitrators indifferently elected by the ſaid parties, ſo as the ſaid arbitrators, or any two of them, do make and publiſh their award in writing, ready to be delivered to the ſaid parties, or ſuch of them as ſhall deſire the ſame, on or before the*——*day of*——*next enſuing the date hereof: and it is hereby mutually agreed by and between the ſaid parties, that this ſubmiſſion ſhall be made a rule of his Majeſty's court of King's Bench at* Weſtminſter. *In witneſs whereof the ſaid parties to theſe preſents have hereunto ſet their hands this*——*day of*——*in the*——*year*, &c.

Arbitration bond.

KNOW *all men by theſe preſents, that I* A. B. *of*——*in the county of*——*gentleman, am held and firmly bound to* C. D. *of*——*in the ſaid county of*——*yeoman, in*——*pounds of good and lawful money of* Great Britain, *to be paid to the ſaid* C. D. *or to his certain attorney, his executors, adminiſtrators, or aſſigns: to which payment well and truly to be made, I bind myſelf, my heirs, executors, and adminiſtrators, firmly by theſe preſents, ſealed with my ſeal, and dated the*——*day of*——*in the*——*year of the reign of our ſovereign lord* George *the Third, of* Great Britain, France *and* Ireland, *King, defender of the faith, and ſo forth, and in the year of our Lord*——.

The condition of the above obligation is ſuch, that if the above bound A. B. *his heirs, executors, and adminiſtrators, and every of them, for and on his and their parts and behalfs, do and ſhall well and truly ſtand to, obey, abide, perform, obſerve and keep the award, order, arbitrament, final end and determination of* A. A. *of*——*eſquire, and* B. A. *of*——*gentleman, arbitrators indifferently named, elected, and choſen, as well for and on the part and behalf of the above bound* A. B. *as of the above named* C. D. *to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, judgments, executions, extents, accounts, debts, dues, ſum and ſums of money, quarrels, controverſies, treſpaſſes, damages and demands whatſoever, both in law and equity, or otherwiſe howſoever, which at any time or times heretofore have been had, made, moved, brought, commenced, ſued, proſecuted, committed, omitted, done or ſuffered by or between the ſaid parties, ſo as the ſaid award be made in writing, and ready to be delivered to the ſaid parties, on or before the*——*day of*——*now next enſuing; then this obligation to be void, otherwiſe of force.*

If the parties have a mind to make their ſubmiſſion a rule of court, then this may be added.

And the above bound A. B. *doth agree and deſire, that this his ſubmiſſion be made a rule of his Majeſty's court of King's Bench at* Weſtminſter, *purſuant to the act of parliament in ſuch caſe made and provided.*

Condition to ſtand to the award of three arbitrators, or any two of them, and an umpire appointed.

THE *condition of this obligation is ſuch, that if the above bound* A. B. *his heirs, executors, and adminiſtrators, for and on his and their parts and behalfs, ſhall and do well and truly ſtand to, obey, abide, obſerve, perform, fulfil, and keep the award, order, arbitrament, final end and determination of*——*or any two of them, arbitrators indifferently elected and named, as well by and on the part and behalf of the ſaid* A. B. *as by and on the part and behalf of the above named* C. D. *to arbitrate, award, order, judge and determine of and concerning all and all manner of action and actions, cauſe and cauſes of action and actions, ſuits, bills, bonds, ſpecialties, covenants, contracts, promiſes, accounts, reckonings, ſums of money, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages and demands whatſoever, at any time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed or depending by or between the ſaid parties; ſo as the award of the ſaid arbitrators, or any two of them be made and ſet down in writing, under their or any two of their hands and ſeals, ready to be delivered to the ſaid parties in difference, on or before the*——*day of*——*now next enſuing; then this obligation to be void, otherwiſe of force. And if the ſaid arbitrators ſhall not make ſuch their award of and concerning the premiſſes, within the time limited as aforeſaid, then if the ſaid* A. B. *his heirs, executors, and adminiſtrators, for and on his and their part and behalf, do and ſhall well and truly ſtand to, obſerve, perform, fulfil and keep the award, determination, and umpirage* [if the umpire be named] *of*——*being a perſon indifferently named and choſen between the ſaid parties, for umpire*; [if not named] *of ſuch perſons as the ſaid arbitrators ſhall indifferently chooſe for umpire in and concerning the premiſſes; ſo as the ſaid umpire do make and ſet down his award and umpirage in writing, under his hand and ſeal, ready to be delivered to the ſaid parties in difference, on or before the day of*——*now next enſuing: then this obligation to be void, otherwiſe of force.*

And the above bound A. B. *doth agree and deſire, that this his ſubmiſſion be made a rule of his Majeſty's court of King's Bench at* Weſtminſter, *purſuant to the act of parliament in ſuch caſe made.*

Form of an *award.*

TO *all to whom theſe preſents ſhall come, we* A. B. *of*——*and* C. D. *of*——*do ſend greeting.*

Whereas there are ſeveral accounts depending, and divers controverſies have ariſen, between——*of*——*yeoman, of the one part, and*——*of*——*yeoman, of the other part; And whereas, for the putting an end to the ſaid differences, they the ſaid*——*and*——*by their ſeveral bonds or obligations bearing date*——*laſt paſt, are reciprocally become bound each to the other, in the penal ſum of*——*to ſtand to, abide, perform, and keep the award, order and final determination of us the ſaid*——*ſo as the ſaid award be made in writing and ready to be delivered to the parties in difference on or before*——*next enſuing, as by the ſaid obligations and conditions thereof may appear: Know ye, that the ſaid arbitrators, whoſe names are hereunto ſubſcribed, and ſeals affixed, taken upon us the burden of the ſaid award, and having fully examined and duly conſidered the proofs and allegations of both the ſaid parties, do make and publiſh this our award between the ſaid parties in manner following; that is to ſay, firſt, we do award and order, that all actions, ſuits, quarrels, and controverſies whatſoever, had, moved, ariſen, and depending, between the ſaid parties in law or equity, for any manner of cauſe whatſoever touching the ſaid premiſſes, to the day of the date hereof, ſhall ceaſe and be no farther proſecuted; and that each of the ſaid parties ſhall pay and bear his own coſts and charges in any wiſe relating to, or concerning the premiſſes. And we do alſo award and order, that the ſaid*——*ſhall deliver or cauſe to be delivered to the ſaid*——*at*——*within the ſpace of*——&c. *And further, we do hereby award and order, that the ſaid*——*ſhall on or before*——*pay or cauſe to be paid unto the ſaid*——*the ſum of*——*we do alſo award and order,* &c. *And laſtly we do award and order, that the ſaid*——*and*——*on payment of the ſaid ſum of*——*ſhall in due form of law, execute each to the other of them, or to the others uſe, general releaſes, ſufficient in the law for the releaſing by each to the other of them, his heirs, executors, and adminiſtrators, of all actions, ſuits, arreſts, quarrels,*

vels, controverſies, and demands whatſoever, touching or concerning the premiſſes aforeſaid, or any matter or thing thereunto relating, from the beginning of the world, until the ——— day of ——— laſt paſt, (viz. *the day of the date of the arbitration bonds*). *In witneſs whereof we have hereunto ſet our hands and ſeals the ——— day of ———.*

Form of an *umpirage*.

(Recite the arbitration bonds, as before) *Now know ye, that I ——— umpire indifferently choſen by ——— having deliberately heard and underſtood the griefs and allegations and proofs of both the ſaid parties, and willing (as much as in me lieth) to ſet the ſaid parties at unity and good accord, do by theſe preſents arbitrate, award, order, decree, and judge as followeth; that is to ſay,* &c.

Arbitrement, *(Arbitrium)* Is the ſentence or determination pronounced by *arbitrators*, and publiſhed when they have heard all parties. And *arbitrement* is either general, of all actions, demands, quarrels, *&c.* or ſpecial, of ſome certain matters in controverſy: It may be alſo abſolute, or conditional. 8 *Rep.* 98. To every *arbitrement* five things are incident, 1. Matters of controverſy. 2. Submiſſion. 3. Parties to the ſubmiſſion. 4. *Arbitrators.* 5. Giving up the *arbitrement*. *Hardr.* 44. *Dyer* 216. *Arbitrators* can't refer *arbitrements* to others, if the ſubmiſſion be not ſo: but an *arbitrement* that one ſhall releaſe to another, by advice of a certain perſon, this is good; becauſe 'tis a reference only for the execution of it. *Jenk. Cent.* 129. Submiſſion to *arbitrement* are uſually by bond; and the parties who bind themſelves are obliged to take notice of the award, at their peril: but things relating to a freehold; debts due on bond; or on certain contracts; criminal offences, *&c.* are not *arbitrable*. See title **Arbitrator.**

Arca cyrographica, *ſive cyrographorum Judeorum*, This was a common cheſt with three locks and keys, kept by certain Chriſtians and Jews, wherein all the contracts, mortgages, and obligations belonging to the Jews were kept, to prevent fraud; and this by order of K. *Rich.* 1. *Hoveden's Annals, p.* 745. *Cowel, edit.* 1727.

Arceonis, *Arcus ephippiarius*, Fr. *Ancon de ſelle de cheval*; Engliſh, *Saddle-bow.* ——— *Bertramus le Wyle tenet terras in Braham Com. Bedf. de domino rege per ſerjantiam reddendi per annum unum par* arceonum *ad ſellam*; *et Prior de* Neunham *tenet terram in Surrey de domino rege, in capite per ſerjantiam reddendi per annum unum par arceonum dealbatum ad ſellam. Tenur. p.* 37. *Cowel.*

Archbiſhop, *(Archiepiſcopus)* Is the chief biſhop of the province, who next and immediately under the King, hath ſupreme power, authority and juriſdiction, in all cauſes and things eccleſiaſtical. *Godol.* 12. At firſt, the title of *archbiſhop* ſeemeth to have been only a name of honour; whence in ſome countries, eſpecially in *Italy*, ſeveral are diſtinguiſhed with that title, who indeed take place of, but have no power or authority over other biſhops. *Bower's Hiſt. Popes, vol.* 1. *p.* 110. *Metropolitan*, was a title given to the biſhop of the *chief city* of a province. As was likewiſe that of a *primate*; he being *primus*, or the firſt of the province; for ſuch was the original ſignification of that word in an eccleſiaſtical ſenſe; but in proceſs of time, the title of *primate* was reſtrained to the biſhops of ſome great cities. *id. ib.* A *patriarch* was the chief biſhop over ſeveral kingdoms or provinces, as an archbiſhop is of ſeveral dioceſes. *Godol.* 20.

The ancient *Britons* are believed to have had at leaſt one archiepiſcopal ſee before the time of *Auſtin* the monk, viz. *Caerleon*, or (as ſome will have it) at *Landaff*. *Johnſ.* 35. *Godol.* 17. And upon the pope's granting unto *Auſtin* a power to erect a metropolitical ſee at *York*, (with ſubordination nevertheleſs to himſelf as primate,) Dr. *Warner* obſerveth, that the reaſon of this preference with regard to *York* was, becauſe formerly under the *Romans*, *York* hath been an archbiſhoprick, as well as *London* and *Caerleon*. 1 *Warn. Eccl. Hiſt.* 50.

But at this day, the eccleſiaſtical ſtate of *England* and *Wales* is divided only into two provinces or archbiſhopricks, to wit, *Canterbury* and *York*. Each archbiſhop hath within his province biſhops of ſeveral dioceſes. The archbiſhop of *Canterbury* hath under him within his province, of ancient foundations, *Rocheſter*, *London*, *Wincheſter*, *Norwich*, *Lincoln*, *Ely*, *Chicheſter*, *Saliſbury*, *Exeter*, *Bath* and *Wells*, *Worceſter*, *Coventry* and *Litchfield*, *Hereford*, *Landaff*, *St. David's*, *Bangor*, and *St. Aſaph*; and four founded by King *Henry* 8. erected out of the ruins of diſſolved monaſteries, viz. *Glouceſter*, *Briſtol*, *Peterborough* and *Oxford*. The archbiſhop of *York* hath under him four, *viz.* the biſhop of the county palatine of *Cheſter*, newly erected by King *Hen.* 8. and annexed by him to the archbiſhoprick of *York*; the county palatine of *Durham*; *Carliſle*; and the *Iſle of Man*, annexed to the province of *York* by King *Hen.* 8. but a greater number this archbiſhop anciently had, which time hath taken from him. 1 *Inſt.* 94.

Canterbury was once the royal city of the kings of *Kent*; and was given by King *Ethelbert*, on his converſion to chriſtianity, to *Auſtin* the firſt archbiſhop thereof, about the year of our Lord 598. *Godol.* 13, 17.

If we conſider *Canterbury* as the ſeat of the metropolitan, it hath under it twenty-one biſhops (as hath been ſaid); but if we conſider it as the ſeat of a dioceſan, ſo it comprehends only ſome part of *Kent* (the reſidue being in the dioceſe of *Rocheſter*), together with ſome other pariſhes diſperſedly ſituate in ſeveral dioceſes; it being an ancient privilege of the ſee, that the places where the archbiſhop hath many manors or advowſons, are thereby exempted from the ordinary, and are become peculiars of the dioceſe of *Canterbury*, properly belonging to the juriſdiction of *Canterbury*. *Godol.* 14.

The archbiſhop of *Canterbury* is ſtiled primate and metropolitan of *all England*, albeit there is another archiepiſcopal province within the realm; partly, becauſe when the popes had taken into their own hands, in a great meaſure, the archiepiſcopal authority, they inveſted the archbiſhops of *Canterbury* with a legatine authority, throughout both the provinces; and partly, becauſe the archbiſhop of *Canterbury* hath ſtill the power, which the popes in times paſt uſurped, and which by act of parliament was again taken from the popes, of granting faculties and diſpenſations in both the provinces alike. Yea further, the archbiſhop of *Canterbury* anciently had primacy, not only over all *England*, but over *Ireland* alſo, and from him the *Iriſh* biſhops received their conſecration; for *Ireland* had no other archbiſhop till the year 1152; for which reaſon it was declared, in the time of the two firſt *Norman* Kings, that *Canterbury* was the metropolitan church of *England*, *Scotland*, and *Ireland*, and of the iſles adjacent; the archbiſhop of *Canterbury* was therefore ſometimes ſtiled *a patriarch*, and *orbis Britannici pontifex*; inſomuch that matters recorded in eccleſiaſtical affairs did run thus, viz. *anno pontificatus noſtri primo, ſecundo, &c. Godol.* 20.

At general councils abroad, the archbiſhop of *Canterbury* had the precedency of all other archbiſhops. *Godol.* 21. At home, he has the privilege to crown the Kings of *England*. *God.* 13. He is ſaid to be *inthroned*, when he is veſted in the archbiſhoprick; whereas biſhops are ſaid to be *inſtalled*. *God.* 21.

He hath prelates to be his officers: thus, the biſhop of *London* is his provincial dean; the biſhop of *Wincheſter*, his chancellor; the biſhop of *Lincoln* anciently was his vice-chancellor; the biſhop of *Saliſbury* his precentor; the biſhop of *Worceſter*, his chaplain; and the biſhop of *Rocheſter* (when time was) carried the croſs before him. *God.* 14.

He may retain and qualify eight chaplains; which is more by two, than any duke or biſhop is allowed to do by ſtatute. *God.* 21.

The archbiſhop of *Canterbury* hath the precedency of all the clergy; next to him the archbiſhop of *York*; next to him the biſhop of *London*; next to him the biſhop of *Durham*; next to him the biſhop of *Wincheſter*; and then all the other biſhops of both provinces after the ſeniority of their conſecration; but if any of them be a privy counſellor, he ſhall take place next after the biſhop of *Durham*. 1 *Inſt.* 94. 1 *Ought. Ord. Jud.* 486.

It is the right of the *archbiſhop* of *Canterbury* to call the biſhops and clergy of his province to convocation, upon the King's writ: he hath a juriſdiction in caſes of appeal, where

where there is a ſuppoſed default of juſtice in the ordinary; and has a ſtanding juriſdiction over his ſuffragans: He confirms the election of biſhops, and afterwards conſecrates them, *&c.* and he may appoint coadjutors to a biſhop that is grown infirm: He may confer degrees of all kinds; and cenſure and excommunicate, ſuſpend or depoſe, for any juſt cauſe, *&c.* 2 *Roll. Abr.* 223. He hath power to grant diſpenſations in any caſe, formerly granted by the ſee of *Rome*, not contrary to the law of God: But if the caſe is new and extraordinary, the King and his counſel are to be conſulted. *Stat.* 25 *H.* 8. He may retain eight chaplains; and during the vacancy of any ſee, he is guardian of the ſpiritualties. *Stat. Ibid.* and 21 *H.* 8.

The firſt archbiſhop of *York* that we read of, was *Paulinus*, who by pope *Gregory*'s appointment was made archbiſhop there, about the year of our Lord 622. *Godol.* 14.

The province of *York* anciently claimed and had a metropolitan juriſdiction over all the biſhops in *Scotland*, whence they had their conſecration, and to which they ſwore canonical obedience, until about the year 1466. when *George Nevil* being at that time archbiſhop of *York*, the biſhops of *Scotland* withdrew themſelves from their obedience to him; and in the year 1470, pope *Sixtus* the Fourth created the biſhop of *St. Andrews* archbiſhop and metropolitan of all *Scotland*. *God.* 14, 18.

The archbiſhop of *York* hath the privilege to crown the Queen conſort, and to be her perpetual chaplain. *Chamberlain's Preſent State* 65.

He alſo, in like manner as the archbiſhop of *Canterbury*, is ſaid to be *inthroned*, when he is veſted in the archbiſhoprick. *God.* 21.

He alſo hath the title of *Grace* and *Moſt reverend father in God*; whereas biſhops have the title of *Lord*, and *Right reverend father in God*. *Chamb.* 65. And he writes himſelf *by divine providence*. *God.* 13.

The archbiſhop of *Canterbury* is the firſt peer of the realm, and hath precedency, not only before all the other clergy, but alſo (next and immediately after the blood royal) before all the nobility of the realm: And as he hath the precedency of all the nobility, ſo alſo of all the great officers of ſtate. *God.* 13.

The archbiſhop of *York* hath the precedency over all dukes, not being of the blood royal; as alſo before all the great officers of ſtate except the lord chancellor. *God.* 14.

And every other biſhop, in reſpect of his barony, hath place of all the barons of the realm, under the degree of viſcount. *God.* 13.

Archdeacon, *(Archilevita, archidiaconus)* Is one that hath eccleſiaſtical dignity and juriſdiction over the clergy and laity next after the biſhop throughout the dioceſe, or in ſome part of it only. *Archdeacons* had anciently a ſuperintendant power over all the parochial clergy in every deanery in their precincts, they being the chiefs of the deacons; though they have no original juriſdiction; but what they have got is from the biſhop, either by preſcription or compoſition; and Sir *Simon Degg* tells us, that it appears an *archdeacon* is a meer ſubſtitute to the biſhop; and what authority he hath is derived from him, his chief office being to viſit and inquire, and *epiſcopo nunciare*, *&c.* In ancient times *archdeacons* were employ'd in ſervile duties of collecting and diſtributing alms and offerings; but at length by a perſonal attendance on the biſhops, and a delegation to examine and report ſome cauſes, and commiſſions to viſit the remoter parts of the dioceſes, they became as it were overſeers of the church; and by degrees advanced into conſiderable dignity and power. *Lanfranc*, archbiſhop of *Canterbury*, was the firſt prelate in *England* who inſtituted an *archdeacon* in his dioceſe, which was about the year 1075. And an *archdeacon* is now allowed to be an ordinary, as he hath a part of the epiſcopal power lodged within him; he viſits his juriſdiction once every year; and he hath a court, where he may inflict penance, ſuſpend, or excommunicate perſons, prove wills, grant adminiſtrations, and hear cauſes eccleſiaſtical, *&c.* ſubject to appeal to the biſhop of the dioceſe. It is one part of the office of an *archdeacon* to examine candidates for holy orders; and to induct clerks within his juriſdiction, upon receipt of the biſhop's mandate. 2 *Cro.* 556. 1 *Lev.* 193. *Wood's Inſt.* 30.

As deacons were all originally the attendants and ſervants of their ſeveral biſhops in church affairs; ſo it is certain, that about the end of the third century, there was in ſeveral dioceſes one choſen out from among the reſt, who had the title of archdeacon: And by degrees this office became univerſal; and they who had it, being always near the biſhop, ſo improved their advantage, that in proceſs of time they began to ſhare with the biſhop in his authority. *Johnſ.* 57. *Gibſ.* 969.

But as the archdeacons in their original inſtitution, had no relation to the dioceſe, but only to the epiſcopal ſee; ſo it was by ſeveral ſteps and degrees that they attained to the power they now enjoy. At their firſt inſtitution, their proper buſineſs was, to attend the biſhop at the altar, to direct the deacons and other inferior officers in their ſeveral duties for the orderly performance of divine ſervice, to attend the biſhop at ordinations, and to aſſiſt him in the management of the revenues of the church; but without any thing that could be called juriſdiction in the preſent ſenſe of the word, either in the cathedral or out of it. *Gibſ.* 969.

Archdeaconries are commonly given by biſhops, who do therefore prefer to the ſame by collation: But if an archdeaconry be in the gift of a layman, the patron doth preſent to the biſhop, who inſtitutes in like manner as to another benefice; and then the dean and chapter do induct him, that is, after ſome ceremonies, place him in a ſtall in the cathedral church to which he belongeth, whereby he is ſaid to have a place in the choir. *Watſ. c.* 15.

Archdeacons by the 13 & 14 *Car.* 2. *c.* 4. are to read the common prayer and declare their aſſent thereunto, as other perſons admitted to eccleſiaſtical benefices; and alſo muſt ſubſcribe the ſame before the ordinary: But they are not obliged by the 13 *Eliz.* to ſubſcribe and read the thirty-nine articles; for altho' an archdeaconry be a benefice with cure, yet it is not ſuch a benefice with cure as ſeems to be intended by that ſtatute, but only ſuch benefices with cure as have particular churches belonging to them. *Watſ. c.* 15. And they are to take the oaths at the ſeſſions, as other perſons qualifying for offices.

By the canon law the archdeacon is ſtiled *the biſhop's eye*; and hath power to hold viſitations (when the biſhop is not there); and hath alſo power under the biſhop of examining clerks to be ordained, as alſo of inſtitution and induction; likewiſe of excommunication, injunction of penances, ſuſpenſion, correction, inſpecting and reforming irregularities and abuſes among the clergy; and a charge of the parochial churches within the dioceſe: In a word, according to the practice of, and latitude given by the canon law, to ſupply the biſhop's room, and (as the words of that law are) in all things to be the biſhop's vicegerent. *God.* 61.

The judge of the archdeacon's court (where he doth preſide himſelf) is called the official. *Wood's Inſt.* 30.

By the ſtatute of the 24 *Hen.* 8. *c.* 12. an appeal lieth from the archdeacon's to the biſhop's court.

Upon motion for a prohibition to ſtay a ſuit in the biſhop's court, upon ſuggeſtion that the party lived within a peculiar archdeaconry; it was reſolved by the court, That where the archdeacon hath a peculiar juriſdiction, he is totally exempt from the power of the biſhop, and the biſhop cannot enter there, and hold court; and in ſuch caſe, if the party who lives within the peculiar be ſued in the biſhop's court, a prohibition ſhall be granted; for the ſtatute intends that no ſuit ſhall be *per ſaltum*: But if the archdeacon hath not a peculiar, then the biſhop and he have a concurrent juriſdiction, and the party may commence his ſuit either in the archdeacon's court or the biſhop's, and he hath election to chooſe which he pleaſeth: and if he commence in the biſhop's court, no prohibition ſhall be granted; for if it ſhould, it would confine the biſhop's court to determine nothing but appeals, and render it incapable of having any cauſes originally commenced there. *L. Raym.* 123.

Archery, A ſervice of keeping a bow, for the uſe of the lord to defend his caſtle.——Johannes *de, &c. qui tenet de dom. reg. in capite per ſerjantiam* archeriæ. *Co. Litt. ſect.* 157. *Cowell. Archery* to be uſed by all men under the age of 40 years, 3 *H.* 8. *c.* 3. 6 *H.* 8. *c.* 2. 33 *Hen.* 8. *c.* 9.

Arches court, (*Curia de arcubus*) Is the chief and moſt ancient conſiſtory that belongeth to the archbiſhop of *Canterbury*, for the debating of ſpiritual cauſes; and it is ſo called from the church in *London*, dedicated to the Bleſſed Virgin, commonly called the church of *St. Mary le Bow*, where this court is held; and the church is named *Bow-Church*, from the faſhion of the ſteeple; the top of which is compoſed of ſtone pillars, built archwiſe, like ſo many bent bows. The judge of this court is termed *The dean of the* arches, or *The official of the* arches court. Dean of the arches, becauſe with this officialty is commonly joined a peculiar juriſdiction of thirteen pariſhes in *London*, termed *Deanery*, being exempt from the authority of the biſhop of *London*, and belonging to the archbiſhop of *Canterbury*; of which *Bow* is one, and the principal, becauſe the court is there kept: Others conceive that he was firſt called *Dean of the arches*, becauſe the *official* to the archbiſhop being many times employ'd abroad in embaſſies for the king and realm; the *dean of the arches* was his ſubſtitute in this court, and by that means became confounded. The juriſdiction of this judge is ordinary, and extendeth itſelf through the whole province of *Canterbury*; ſo that upon any appeal made, he forthwith, and without any further examination of the cauſe, ſends out his citation to the appellee, and his inhibition to the judge from whom the appeal was made. See *Hiſt. de Antiquit. Eccleſ. Britan.* and 4 *Inſt. fol.* 337.

The perſon who adminiſters juſtice in the court of arches, is the official principal of the archbiſhop; who was called *Officialis de arcubus*, and the court itſelf *Curia de arcubus*, or *Bow-Church*, (ſo called from the ſteeple being raiſed at the top with ſtone pillars archwiſe); by reaſon of the archbiſhop's having ordinary juriſdiction in that place, as the chief of his peculiars in *London*; and being the church where the dean of thoſe peculiars (commonly called the dean of the arches) held his courts; and becauſe theſe two courts were held in the ſame place, and the dean of the arches was uſually ſubſtituted in the abſence of the official while the offices remained in two perſons, and the offices themſelves have in many inſtances been united in one and the ſame perſon, as they now remain; by theſe means a wrong notion hath obtained, that it is the dean of the arches, as ſuch, who hath juriſdiction throughout the province of *Canterbury*; whereas the juriſdiction of that office is limited to the thirteen peculiars of the archbiſhop in the city of *London*; and the juriſdiction throughout the province, for receiving appeals, and the like, belongs to him only as official principal. *Gibſ.* 1004. *Johnſ.* 257.

In like manner the right of juriſdiction in every dioceſe of the province, during the vacancies of the ſees, tho' veſted by patent in the ſame perſon, belongs not to him as dean of the arches, but as vicar general of the archbiſhop. *Gibſ.* 1004.

And the ſame perſon is likewiſe judge of the peculiars, that is, of all thoſe pariſhes, fifty-ſeven in number, which tho' lying in other dioceſes, yet are no ways ſubject to the biſhop or archdeacon, but to the archbiſhop. *Johnſ.* 257.

The court of the arches is very ancient, and ſubſiſted long before the time of King *Henry* the Second; for *Alexander* the Third, then biſhop of *Rome*, did by his edict to the dean of the arches and *Robert Kilwarby*, then archbiſhop of *Canterbury*, abrogate and aboliſh the then ancient ſtatutes of this court, and ſet up others in their ſtead; and it was there ſaid, that thoſe ancient ſtatutes were then by length of time become not legible. *Conſet.* 4.

This court (as alſo the court of peculiars, the admiralty court, the prerogative court, and the court of delegates for the moſt part) is now held in the hall belonging to the College of Civilians, commonly called Doctors Commons. *Floy.* 21.

From this court the appeal is to the King in Chancery; by the 25 *Hen.* 8. *c.* 19.

Archipresbyter, An eccleſiaſtical officer, ſo called, becauſe he was in ſome certain matters and cauſes ſet or appointed over the prieſts or *preſbyters*, and ſuch as were of the ſacerdotal office; eſpecially in the abſence of the biſhop. *God. Rep. Can.* 56.

Archives, (*Archiva*, a derivative from *arca*, a cheſt) The *Rolls*, or any place where ancient records, and charters, and evidences are kept; alſo the *Chancery* or *Exchequer office*; alſo the private repoſitory in *libraries*. *Cowell.*

Ardeſiae, Were a ſort of tiles of a blue colour, like our *Corniſh* ſlate. *Cowell.*

Areche, Is an old word, ſignifying to divulge; from whence we derive the word *reckon*. *Cowell.*

Arentare, To rent out, or ſet at a certain rent.—— *Ricardus de Armeſtone Ballivus Manerii de Kingesford, malitioſe & per violentiam dictos religioſos de eadem piſcaria ejecit, et ipſam domino ſuo* arentari *fecit in* 12 *ſol. quos idem dominus per* 6 *annos recepit. Conſuetud. Domus de Farendon MS. f.* 53. *Cowell.*

Arereiſment, Surpriſe, affrightment. —— To the great *arereiſment* and ertenyſement of the Common law. *Rot. Parl.* 21 *Ed.* 3. *Cowell.*

Argentarius miles, Is mentioned in *Gerv. Tilbury: Et dicitur qui ab inferiori ſcaccario ad ſuperius defert loculum examinandi* argenti, *ubi videtur* miles *poni pro gregario ſamulo. Cowell.*

Argentum album, Silver coin, or current money. By domeſday tenure, ſome rents to the King were paid *in argento albo*, common ſilver pieces of money, other rents *in libris urſis & penſatis*, in metal of full weight and purity. So the King's manor at *Brehul, Com. Buc. reddebat per annum* 28 *libras de* albo argento *et pro foreſta* 12 *libras urſas & penſatas. Paroch. Antiq. p.* 165. Hence in the next age, the rent which was paid in money was called *blanch-fearm*, and afterwards *white-rent*; and what they paid in proviſion was termed *black-mail. Cowell.*

Argentum Dei, God's money; that is money given in earneſt upon the making any bargain. It is ſtill called *God's penny* in the North: I meet but with this in one authority of taking ſuch money in hand as an earneſt of a remaining ſum. —— *Adam de Holt vendidit quintam partem Manerii de Berterton Henrico Scot, & cepit de prædicto Henrico tres denarios de* argento dei, *præ manibus. Placit. apud Caſtr.* 2. *Ed.* 3. Hence *arles*, earneſt; and *arles-penny*, now uſed in *Yorkſhire*, where they likewiſe call ſervants vails *arles. Cowell.*

Argumentoſus, Is a word mentioned by our hiſtorian *Neubrigenſis*, and ſignifies ingenious: *in picturis quoque opera* argumentoſa *vocamus. Lib.* 1. *cap.* 14. *Apes* argumentoſæ, *&c. Cowell, edit.* 1727.

Ariconium, *Kencheſter* near *Hereford. Cowell, edit.* 1727.

Arierban, Is the edict of the King, commanding all his tenants to come into the army: if they refuſe, then to be deprived of their eſtates; from the Sax. *here*, *exercitus*, and *ban*, *edictum. Cowell, ib.*

Arietum levatio, An old ſportive exerciſe, which ſeems to have been the ſame with running at the *quintan*, or *quintal*. See **Quintan.** *Cowell, ib.*

Arma dare, To dub or make a knight, *an. dom.* 1144. 10 *Steph. Ego Brientius filius comitis, quem bonus rex Henricus nutrivit, & cui* arma dedit *& honorem.* So *arma capere*, to be made a knight. *A. D.* 1278. 31 *Ed.* 3. *A die quo dictus comes (i. e. Henricus de Lacy)* arma *militaria a domino Henrico Rege data noſtro cepit.* See *Kennet's Parochial Antiquities, p.* 101, 289. *Quem etiam præmature militem fecit donatum chlamyde coccinea, gemmato baltheo, enſe Saxonico, cum vagina aurea.* Malmſ. lib. 2. cap. 2. *de Ethelſtano.* So in *Hoveden, part.* 1. *poſt hæc in hebdomada pentecoſtes, filium ſuum Henricum apud* Weſtm. *armis militaribus honoravit.* And in *Walſingham, page* 507. *die dominica in virgilia purificationis, Edwardus juvenis ſuſcepit* arma militaria. 'Tis true, the word *arma* in theſe places ſignifies only a ſword, but ſometimes a knight was made by giving him the whole *armour:* Thus we read, *Lanfrancus Dorobernenſis epiſcopus eum lorica induit, & galeam*

leam capiti imposuit; eique & regis filio militiæ cingulum in nomine dei cinxit. Ordericus vitalis, lib. 8. de Henrico, &c. Cowell, ib.

Arma deponere, Was enjoined when a man had committed an offence. *L L. Hen. 1. cap. 68. Cowell, ib.*

Arma libera, Where a sword and a lance which were usually given to a servant, when he was made free. *Cowell, ib.*

Arma moluta, Sharp weapons that cut, and are not blunt, which only break or bruise, *Bract. lib. 3. tract. 2. ca. 23.* and *Standf. pl. cor. 78, 79. Bracton's* words are these, Arma moluta *plagam faciunt, sicut gladius & hujusmodi: ligna vero & lapides, brusuras, orbes & ictus, qui judicari non possunt ad plagam, ad hoc ut inde venire possit ad duellum.* And *Fleta, lib. 2. c. 33. par 6.* calls them *arma emolita. Cowell.*

Arma mutare, Was a ceremony used to confirm a league or friendship. *Cowell, edit. 1727*

Arma reversata, This was when a man was convicted of treason or felony. Thus, *Knighton*, speaking of *Hugh Spencer, Primo vestierunt eum uno vestimento cum* armis reversatis. *lib. 3. pag. 2546. Cowell, ib.*

Armigeri, Not only a title of dignity, belonging to such as bear arms, but the common appellation of servants, especially in convents. I suppose the better sort of servants; yet they were such as wore liveries in the priory of *Burcester.*—— *Et in blodeo panno empto pro* armigeris *& valictis prioris de Johanne Bandye de* Magnatue. *Pannario erga natale domini hoc anno 7 lib. 15. fol. 11. Ken. Paroch. Antiquit. p. 576.* This is the same servile office, which by Sir *Henry Spelman* is called *quædam species* armigerorum in the abby of *Battle, Com. Suss.* where the abbot and convent granted *Hugoni Francey* armigero *suo*, a yearly prestation or wages, and a customary livery. *Cowell, ib.*

Armour or **Arms,** *(Arma)* In the understanding of law, are extended to any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another. *Crompt. Justice of Peace, fol. 65.* So that *armorum appellatio non ubique scuta & gladios, & galeas significat, sed & fustes & lapides.* Arms are also what we call in Latin *insignia*, ensigns of honour. *Cowell.* As to the original of arms, or ensigns of honour, it was to distinguish commanders in war; for the antient defensive armour being a coat of mail, *&c.* which covered the persons, they could not be distinguished, and therefore a certain badge was painted on their shields, which was called *arms*; but not made hereditary in families till the time of King *Rich. 1.* on his expedition to regain *Jerusalem* from the *Turks:* And besides shields with *arms*, they had a silk coat drawn over their armour, and afterwards a stiff coat, on which their arms were painted all over, now the herald's coat of *arms. Sid. Rep. 352.*

By *stat. 7. Ed. 1.* men shall come peaceably to all parliaments without force and arms.

All men shall have arms according to their ability, and view of *arms* shall be made twice in the year. *St. 13 Ed. 1. st. 2. c. 6.* Men shall not come *armed* before the justices. *Stat. 2 Ed. 3. c. 3.* Going and riding armed is an offence. *St. 25 Ed. 3. st. 5. c. 2.* Launcegays prohibited, and riding armed. *7 R. 2. c. 13. 20 R. 2. c. 1.*

Servants and labourers shall use bows and arrows on *Sundays*, &c. and not bear other arms. *St. 12 Ric. 2. c. 6.* Imbezelling the King's armour felony. *St. 31 Eliz. c. 4.* Armour may be exported. *12 Car. 2. c. 4. sect. 10.* Unless prohibited by proclamation. *12 Car. 2. c. 4. sect. 12.* Importing arms or ammunition prohibited. *1 Jac. 2. c. 8.*

Armiscare, Is a sort of punishment decreed or imposed by the judge. *Malmsb. lib. 3. pag. 97. Walsingham, pag. 430.* At first it was to carry a saddle at his back in token of subjection, *viz. Nudis vestigiis equestrem sellam ad satisfaciendum humeris feret.* Thus *Brompton* tells us, that in the year 1176, the King of the *Scots* promised *Henry* the Second at *York, Lanceam et sellam suam super altare sancti Petri, ad perpetuam hujus subjectionis memoriam offerre. Cowell, edit. 1727.*

Arnaldia, *Arnoldia,* A sort of disease, that makes the hair fall off, like the *alopecia*, or like distemper in foxes. —— *Deinde uterque rex incidit in ægritudinem quam* arnaldiam *vocant, in qua ipsi ad mortem usque laborantes capillos suos deposuerunt. Rog. Hoveden. Ric. 1. p. 693. et Brompton, col. 1201.*—— *Cum autem Rex per aliquot dies ibi moram fecisset, gravissimam incurrit ægritudinem, quæ vulgo* arnoldia *vocatur, ex ignotæ regionis constitutione cum ejus naturali complexione minus concordante. Gaufridi Vinesaulf, Ricardi Regis Iter Hieros. cap. 4. l. 3. Cowell, ib.*

Arnalia, *Arable lands,* mentioned in Domesday, tit. *Essex. Jacob.*

Aromatarius, *(Lat.)* A word often used for a *grocer*, but held not good in law proceedings. *1 Vent. 142. Jacob.*

Arpen, or **Arpent,** *(Fr.)* An acre or furlong of ground; the most ordinary one called *L'arpent de France*, is one hundred perches square, after eighteen foot to the perch; some account it but half an acre. This word is often found in *Domesday, Quatuor* arpenni *vineæ noviter plantatæ*, tit. *Middlesex* —— *Septem acras terræ et unum* arpentum *quæ me contingebant per eschaietam. Ex Reg. Priorat. de Wormsley, fol. 7. b.* where *arpen* seems to be some quantity less than an acre. Hence *arpentator* is used for a measure of lands. *Cowell, edit. 1727.*

Arquebus, (Fr. *Arquebuse*) A short hand gun, a caliver or pistol; mentioned in some of our antient statutes. *Law. Fr. Dict.*

Arrack. The same duty and excise payable for brandy and foreign spirits, and no more, shall be paid for arrack imported from the *East Indies*; and the like allowance to be made on exportation, *&c. Stat. 7 Geo. 2. c. 14.*

Arraiatio peditum, The arraying of foot soldiers. *Pat. 1 Ed. 2. p. 1. m. 3. Cowell, edit. 1727.*

Arraiers. See **Arrayers.**

Arraign, or **Arrain,** (From the French *Arranger, i. e.* To set a thing in order, or in its place,) hath the same signification in law: for he is said to *arraign* a writ of *novel disseisin*, who prepares and fits it for trial before the justices of the circuit. *Old Nat. Br. fol. 109. Littleton, (pag. 78.)* useth the word in the same sense, *viz. The lessee arraigneth an assise of novel disseisin.* To *arraign the assise* is to cause the tenant to be called, to make the plaint, and to set the cause in such order, as the tenant may be forced to answer thereto. *Coke on Littl. fol. 262. b.* Also a prisoner is said to be *arraigned*, when he is indicted and brought forth to his trial. *Arraigned* within the verge upon murder. *Staundf. Pl. Cor. fol. 150.* The manner of this *arraignment* you may read in Sir *Thomas Smith de Rep. lib. 2. c. 23.* The learned *Spelman* is of opinion it should be written *arrame*, from *arramare*, and that from the old French *arramir, i. e. jurare, promittere, solemniter profiteri.* But this must be a mistake: for in the *Register* we find no such word as *arramare*; but in all the writs of assise 'tis *arrainavit:* and so it is in the Year-Books, and in *Fitzh. Nat. Brev.* The true derivation is from the Fr. *arraisonner, i. e. ad rationem ponere, viz.* to call a man to answer in form of law; and this comes from the barbarous *Lat. adrationare, i. e. placitare*; so that when a criminal is *arraigned*, 'tis *ponere eum ad rationem. Cowell, edit. 1727.*

When an offender comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus* directed to the goaler of another prison; the first thing that follows thereupon is his arraignment. *2. Hal. H. 216.* Now arraignment is nothing else but the calling the offender to the bar of the court, to answer the matter charged upon him: And the word in *Latin* is no other than *ad rationem ponere*, and in old French *ad reson*, or abbreviated *a resn*; for as the ancient word *disrain* or *derayn* imports in Latin *disrationare*, to disprove, or evince the contrary of any thing that is or may be affirmed, so *arraigne* is *ad rationem ponere*, to call to account or answer. *2 Hale's Hist. 216.* The prisoner on his arraignment, tho' under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles or bonds, unless there be a danger of escape, and then he may be brought with irons. *2 H. H. 219.* And there is no necessity that a prisoner at the time of his

his arraignment, hold up his hand at the bar, or be commanded ſo to do; for this is only a ceremony for making known the perſon of the offender to the court; and if he anſwers that he is the ſame perſon it is all one. 2 *Hawk.* 308.

By the Common law, if a principal is acquitted or is pardoned, or dies, the acceſſary ſhall not be arraigned. But See *Stat.* 1. *Ann. c.* 9. and title **Acceſſary.**

If in action of ſlander for calling one thief, the defendant juſtifies that he ſtole goods, and iſſue is thereon taken; if it be found for the defendant in *B. R.* and for felony in the ſame county where the court ſits, or before juſtices of aſſiſe, *&c.* he ſhall be forthwith *arraigned* upon this verdict of 12 men, as on an indictment. 2 *Ha. H. P. C.* 151.

The pleas upon arraignment are either the general iſſue, Not guilty, plea in abatement, or in bar; and the priſoner may demur to the indictment; alſo he may confeſs the fact, but then the court has nothing more to do than to proceed to judgment againſt him. If he ſtands mute, and doth not put himſelf upon trial, he ſhall ſuffer the penance of *pain fort & dure*, in caſes of felony, *&c.* 3 *Inſt.* 217.

Array. Arrayed in barbarous Latin is *arraiatus*, *i. e.* well appointed or provided; and that comes from the old French word *arraye*, or *arroye*. Thus we read in *Thorn's Chron. Gentes ſufficienter munitas & arraiatas*: And in *Knighton*, *lib.* 3. *Rediit tota fortitudo*, *&c. diſtincta & bene* arraiata. So that it ſignifies, in a particular manner, military order; but now a ranking or ſetting forth a jury of men impanelled upon a cauſe. 18 *Hen.* 6. *cap.* 14. Hence the verb *to array* a panel. *Anno.* 3. *H.* 5. *cap.* 5. and *Old Nat. Br.* 157. that is, to ſet forth the men empanelled one by another; the *array* ſhall be quaſhed. *Ibidem.* By ſtatute every *array* in aſſiſe ought to be made four days before. *Brook*, tit. *Pannel*, *numb.* 10. to challenge the *array* of the panel, is at once to except againſt all the perſons arrayed or impanelled, in reſpect of partiality, *&c.* 1 *Inſt.* 156. To *array* ſignifies likewiſe, to lead and conduct perſons armed, *&c.* 14 *Car.* 2. *cap.* 3.

Arrayers, *(Arraiatores)* Is uſed in the ſtat. 12 *Ric.* 2. *c.* 6. for ſuch officers as had the care of the ſoldiers armour, and did ſee them duly accoutred in their kinds. Such were the commiſſioners of *array*, appointed by King *Charles* I. in the year 1642; and *Edward* III. in the firſt year of his reign, appointed ſuch commiſſioners to *array* men againſt the *Scots: Edw. Dei gratia rex Angliæ, dominus Hiberniæ et dux Aquit. Dilectis et fidelibus ſuis Johanni de Occleſtthorp et Johanni de Fenton, electoribus et* arraiatoribus *hominum in wapentachio de Barkeſton, ſalutem. Cum ad repellendam Scotorum maliciam qui regnum noſtrum hoſtiliter ſunt ingreſſi, homicidium, depredationes, incendia et alia mala——citia perpetrando verſus partes Marchiæ Scotiæ, &c. Inde Scoti cum toto poſſe ſuo, ut pro certo didicimus, prope civitatem noſtram Karleoli iſta die Martis ſe congregare proponunt, &c. Nos conſiderantes periculum, &c. omnes homines defenſibiles et potentes ad pugnandum ejuſdem wapentachii tam milites quam alii, &c. Teſte me ipſo apud North-Alverton* 13 *die Junii, anno regni noſtri primo. Cowell. ed.* 1727.

Arrearages, *(Arreragia)* From the Fr. *arriere*, *retro*, behind, is taken for money unpaid at the due time, as rent behind; the remainder due on an account, or of a ſum of money remaining in the hands of an accountant. When arrears of rent are preſumed in law to be ſatisfied, ſee title **Acceptance.**

Arrectatus, Suſpected, accuſed. *Offic. Coronat. Si autem aliquis arrectatus fuerit de morte alicujus periclitantis, capietur et impriſonetur.* From the old Norman *rette. Weſt. c.* 1. *Quaunt Clerk eſt priſe pour* rette *de felonie.* ——*Ceus queux ſont endites de tiel* rette *per ſolemne inqueſt. Spelman.*

Arrenatus, Arraigned, accuſed.——*Stephanus Rabaz, Vic. Leiceſt.* arrenatus *et ad rationem poſitus de hoc quod, &c. Rot. Parl.* 21 *Ed.* 1.

Arrentare, Is a word often mentioned in our hiſtories, and it ſignifies, to rent, viz. *Nec terræ vel tenementa eorum ea occaſione* arrententur. *Charta Ed.* 1. And in the *Monaſticon*, 2 *tom. p.* 273. viz. *Reddendo nobis per annum* 56 *ſolidos ad quos vaſta et aſſarta ſua in diverſis foreſtis* arrentanda *aſſignatos* arrentabantur. And in *Conſuetud. dom. de Farendon, MS. fo.* 53 *Ricardus de Armeſtone ballivus manerii de Kingesford, malitioſe et pur violentiam dictos religioſos de eadem piſcaria ejecit, et ipſam domino ſuo* arrentari *fecit in* 12 *ſol. quos idem dominus per ſex annos recepit. Cowell, ed.* 1727.

Arrentation, (From the Spaniſh *arrendare*) Is as much as *ad certum redditum dimittere*; and it ſignifies the licenſing the owner of lands in the foreſt, to encloſe them with a low hedge and ſmall ditch, according to the aſſize of the foreſt under a yearly rent: *Saving the arrentations* is a ſaving power to give ſuch licences. *Ordin. Foreſt.* 34 *Ed.* 1. Rents for purpreſtures *arrented. Stat.* 22 *Car.* 2. *c.* 6.

Arreſt, *(Arreſtum)* Is derived from the French word *arreſter*, to ſtop or ſtay, and ſignifies a reſtraint of a man's perſon, depriving him of his own will and liberty, and binding him to become obedient to the will of the law: And it may be called the beginning of impriſonment. *Cowell.*

Arreſt is either *civil* or *criminal.*

1. *Arreſt in civil caſes.*
2. *Arreſt in criminal caſes.*

1. *Arreſt in civil caſes.*

An arreſt in a civil cauſe is the apprehending or reſtraining one's perſon by proceſs in execution of the command of ſome court, or officer of juſtice. *Wood's Inſt.* 575.

Magna Charta, *c.* 29. None ſhall be taken, impriſoned, or diſſeiſed of his freehold, but by judgment of his peers, or according to the law of the land.

Stat. 3 *Ed.* 1. *c.* 35. Whereas great men and their bailiffs uſed to attach others paſſing thro' their juriſdiction with their goods, compelling them to anſwer upon contracts, covenants and treſpaſſes, done out of their juriſdiction; this practice is hereby prohibited, on pain of the offenders forfeiting double damages to the party grieved, and being amerced by the King.

Stat. 50 *Ed.* 3. *c.* 5. Clerks attending divine ſervice in churches, church-yards, and other ſacred places, ſhall not be arreſted by authority royal, or the command of other temporal lords, upon pain of grievous forfeiture, ſo that colluſion or feigned cauſe be not found in the ſaid clerks.

Stat. 1 *Ric.* 2. *c.* 15. If any miniſter of the King or other, do arreſt any perſon of holy church, in churches or churchyards, or in other places, while they are attending divine ſervice, he ſhall be impriſoned and ranſomed at the King's will, and make ſatisfaction to the party ſo arreſted, provided that the ſaid people of holy church ſhall not hold them within the churches or ſanctuaries, by fraud or colluſion in any manner.

Stat. 23 *Hen.* 6. *c.* 10. No ſheriff, under-ſheriff, or bailiff, ſhall take any reward for arreſting, or for the omitting to arreſt any man; and upon every arreſt, the ſheriff ſhall have for his fee but twenty pence, the bailiff who makes the arreſt four pence, and the goaler to whom he is committed four pence.

No ſheriff or his officer ſhall take any obligation, by colour of his office, of a priſoner in his cuſtody, but only to himſelf, by the name of his office, and upon condition written, that the priſoner ſhall appear at the day contained in the writ or warrant in the court or place required, and if he take any other obligation, he ſhall forfeit his office: nor ſhall he take more than four pence for making ſuch obligation, precept, or warrant: And if the ſaid ſheriffs return *cepi corpus*, or *reddidit ſe*, they ſhall be chargeable to have the bodies of the ſaid perſons at the days of the returns of the ſaid writs, *&c.* as before the making this act. *Ibid.*

Stat. 23 *H.* 8. *c.* 15. If any perſon commence or ſue in any court of record, or other court, any action, bill or plaint of treſpaſs, upon the ſtatute of 5 *Ric.* 2. *c.* 7. or any action, bill, or plaint of debt or covenant, upon ſpecialty, or upon any contract, or upon any action of the caſe, or upon any ſtatute, for any perſonal wrong, and the

the plaintiff after appearance of the defendant be nonſuited, or verdict paſs againſt him, then the defendant ſhall recover his coſts; for which he ſhall have ſuch proceſs, as the plaintiff might have in caſe he had recovered.

Perſons ſuing *in forma pauperis*, ſhall not be compelled to pay coſts by virtue of this act, but ſhall be puniſhed at the diſcretion of the juſtices or judge, before whom the action is brought. *ib.*

Stat. 8 *Eliz. c.* 2. If any one ſhall, maliciouſly and without juſt cauſe, procure any perſon to be moleſted and troubled by attachments and arreſts, by proceſs of *latitat*, *alias* and *pluries capias*, ſued out of the King's Bench, and the defendant ſhall be arreſted or appear, and put in bail, then if the plaintiff do not within three days after ſuch bail had and taken, declare againſt the defendant, or after his declaration, diſcontinue or become nonſuit, the court ſhall award to the defendant ſo arreſted, vexed or troubled, his coſts, damages and charges thereby ſuſtained.

If any perſon ſhall be attach'd or arreſted by proceſs, out of the marſhalſea or of any court in the city of *London*, or in any city, borough, town corporate, or other place, having the privilege of holding a plea in perſonal actions, and do not in all courts, having their continuance *de die in diem*, declare within three days after the appearance of the defendant, or bail put in, and where ſuch courts are otherwiſe kept, declare at the next court after the appearance, *&c.* and proſecute his ſuit with effect, *&c.* the defendant ſhall have his coſts, damages and charges. *ib.*

And if any perſon ſhall maliciouſly, or for vexation and trouble, cauſe any one to be arreſted or attached in a fictitious name, or without the conſent of the perſon at whoſe ſuit the defendant is arreſted, ſuch offender convicted by preſentment, indictment, or two witneſſes, ſhall ſuffer ſix months impriſonment, without bail or mainprize, and pay to the party ſo arreſted or attached, treble the coſt, charges and expences he ſhall be put to, and ſhall forfeit to the perſon in whoſe name the ſuit was brought, if there be any ſuch, the ſum of ten pounds. *ib.*

Stat. 4 *Jac.* 1. *c.* 3. Perſons to whom coſts or damages are given, by this act may recover the ſame by action, *&c.* in any court of record, againſt the offender, his executors and adminiſtrators, in which action, no eſſoin, protection, *&c.* ſhall be allowed.

Stat. 43 *Eliz. c.* 6. If any ſheriff or other perſon, having authority, or taking upon him to break writs, do make a warrant, as upon any writ, proceſs, or ſuit, or for the arreſt or attaching of any perſon to appear in courts at *Weſtminſter* or elſewhere, not having before an original writ or proceſs warranting the ſame; upon conviction thereof before a judge of aſſiſe, or the judges of the court out of which the proceſs iſſued, ſuch offender may by the ſaid judges, be committed to the county gaol where he was examined, until he pay ten pounds to the party grieved, with coſts, and twenty pounds to the King.

Stat. 4 *Jac.* 1. *c.* 3. In any action whatever, where the plaintiff or defendant ſhould have coſts, if judgment had been given for him, and ſuch plaintiff or defendant after appearance become nonſuit, or judgment paſs againſt him, there the defendant ſhall recover his full coſts, to be levied as is directed by 23 *Hen.* 8. *cap.* 15.

Stat. 13 *Car.* 2. *c.* 2. *ſect.* 2. Perſons arreſted by any proceſs out of the King's Bench or Common Pleas, in which the certainty or true cauſe of action is not expreſſed, and in which the defendant is bailable, by 23 *Hen.* 6. *cap.* 10. ſhall not be compelled to give bond, with ſureties for their appearance, in any penal ſum exceeding forty pounds.

Sect. 3. And ſuch bail-bonds, after appearance entered by attorney, ſhall be diſcharged, and no amerciaments ſhall be ſet or eſtreated upon the ſheriff or other officer, concerning ſuch appearance; and unleſs the plaintiff in a perſonal action or *ejectione firmæ*, declare before the end of the term next follwing the appearance, a nonſuit may be entered, and the defendant ſhall have judgment to recover coſts, according as is provided by the 23 *Hen.* 8. *c.* 15.

Sect. 4. Provided this act do not extend to any writ of *capias utlagat.* attachment, upon *reſcous*, or for contempt, or attachment at the ſuit of any privileged perſon, altho' there be no particular certainty of the cauſe of action expreſſed in the writ, but ſuch ſecurity ſhall be taken by the ſheriff, *&c.* in theſe caſes as heretofore.

Stat. 22 & 23 *Car.* 2. *c.* 20. No under ſheriff, bailiff, ſerjeant, or other officer, having a perſon in his cuſtody, by virtue of any proceſs, ſhall cauſe him to be carried to any tavern, or other publick houſe, without his conſent, ſo as to charge ſuch priſoner with any ſum of money, for wine, ale, victuals, *&c.* but what he ſhall voluntarily call for; nor ſhall demand or receive more for ſuch arreſt or waiting than by law he ought, until ſuch priſoner have procured an appearance, found bail, agreed with his adverſary, or be ſent to gaol; nor ſhall take any other reward for keeping ſuch priſoner out of the gaol, than what he ſhall voluntarily give; nor ſhall exact more for a night's lodging or other expences, than is reaſonable, or ſhall be ſo adjudged by the next juſtice of the peace; nor ſhall cauſe ſuch perſon to pay for any proviſions or other things, but what he ſhall particularly and freely call for.

Every under ſheriff, gaoler, *&c.* to whom a priſoner ſhall be committed, ſhall ſuffer him to ſend for beer and food where he pleaſes, and to uſe ſuch bedding, linen, and other things, as he thinks fit, without detaining or paying for the ſame; nor ſhall take more than the uſual fees for his commitment or diſcharge; or more than ſhall be allowed by three juſtices of peace of the county or place, *quor. un.* for chamber rent, or by the two lord chief juſtices and lord chief baron in *London*, *Middleſex*, and *Surry*. *ib.*

The rates of fees ſigned by the chief juſtices and chief baron, or two of them, *&c.* ſhall be hung up in every priſon, and regiſtered by every clerk of the peace; and no other or greater fees ſhall be taken, than ſhall be ſo eſtabliſhed. *ib.*

Priſoners for debt, and felons, ſhall not be kept in the ſame room, on pain that every ſheriff and gaoler offending in this particular, ſhall looſe their reſpective offices. *ib.*

Stat. 29 *Car.* 2. *c.* 7. No perſon on the Lord's day, ſhall ſerve or execute any writ, proceſs, warrant, order, judgment, or decree, except in caſes of treaſon, felony, or breach of the peace; but ſuch ſervice ſhall be void, and the perſon ſerving or executing the ſame, ſhall be liable to anſwer ſuch damages, as if he had done the ſame without any writ, proceſs, warrant, order, judgment, or decree.

Stat. 6 *Geo.* 1. *c.* 21. *ſect.* 53. No high ſheriff, under ſheriff, their deputies or agents, ſhall make out any warrant, before they have in their cuſtody the writs upon which ſuch warrants ought to iſſue, on forfeiture of 10*l.*

Sect. 54. Every warrant to be made out upon any writ out of the King's Bench, Common Pleas, or Exchequer, before judgment, to arreſt any perſon, ſhall have the ſame day and year ſet down thereon as ſhall be ſet down on the writ itſelf, under forfeiture of 10*l.* to be paid by the perſon who ſhall fill up or deliver out ſuch warrant.

Stat. 12 *Geo.* 1. *cap.* 29. *ſect.* 1. No perſon ſhall be held to ſpecial bail upon any proceſs iſſuing out of any ſuperior court, where the cauſe of action ſhall not amount to 10*l.* nor out of any inferior court, where the cauſe of action ſhall not amount to 40*s.* and in all caſes where the cauſe of action ſhall not amount to 10*l.* in a ſuperior court, or to 40*s.* in any inferior court (and the plaintiff ſhall proceed by way of proceſs againſt the perſon) he ſhall not arreſt the body of the defendant, but ſhall ſerve him perſonally, within the juriſdiction of the court, with a copy of the proceſs; and if ſuch defendant ſhall not appear at the return of the proceſs, or within four days after, it ſhall be lawful for the plaintiff, upon affidavit being made and filed, of the perſonal ſervice of ſuch proceſs (which affidavit ſhall be filed *gratis*) to enter a common appearance, or file common bail for the defendant, and to proceed thereon, as if ſuch

defendant had enter'd his appearance, or filed common bail.

Sect. 2. In all caſes where the plaintiff's cauſe of action ſhall amount to 10*l.* or 40*s.* as aforeſaid, affidavit ſhall be made and filed of the cauſe of action (which affidavit may be made before any judge or commiſſioner of the court, out of which ſuch proceſs ſhall iſſue, or elſe before the officer who ſhall iſſue ſuch proceſs, or his deputy) and for ſuch affidavit 1*s.* over and above the ſtamp-duties, ſhall be paid, and no more; and the ſum ſpecified in ſuch affidavit, ſhall be indorſed on the back of ſuch writ or proceſs, for which ſum ſo indorſed the ſheriff, *&c.* ſhall take bail, and for no more: but if any writ or proceſs ſhall iſſue for 10*l.* or upwards, and no affidavit or indorſement ſhall be made, as aforeſaid, the plaintiff ſhall not proceed to arreſt the body of the defendant, but ſhall do in like manner, as is by this act directed in caſes where the cauſe of action does not amount to 10*l.* or 40*s.* as aforeſaid.

Continued by 5 *Geo.* 2. *cap.* 27. *from the end of that ſeſſion for ſeven years, and made perpetual by* 21 *Geo.* 2. *cap.* 3.

Stat. 21 *Geo.* 2. *cap.* 22. *ſect.* 1. No ſheriff, bailiff or other officer ſhall convey any perſon by him arreſted by virtue of any proceſs or warrant, to any tavern, alehouſe or other publick victualling or drinking-houſe, or to the houſe of ſuch officer, or of any tenant or relation of his, without the free conſent of the perſon ſo arreſted; nor charge him for wine, beer, victuals or other things, ſave what he ſhall call for of his own accord; nor ſhall take any greater ſum than is by law allowed for ſuch arreſt, detaining or waiting, till the perſon arreſted ſhall have given an appearance or bail, or agreed with the perſon at whoſe ſuit he ſhall be arreſted, or till he ſhall be ſent to gaol; nor ſhall take any reward for keeping the perſon arreſted out of priſon; nor ſhall carry any ſuch perſon to priſon within 24 hours from the time of arreſt; nor ſhall take any greater ſum for his lodging or diet, or other expences, than ſhall be allowed by ſome orders for aſcertaining ſuch expences within their reſpective counties.

Sect. 2. Every ſheriff, and other perſons, entruſted with the execution of proceſs, ſhall deliver a printed copy of the ſaid clauſe to every bailiff or officer by them employed to execute warrants, and when ſuch officer ſhall give ſecurity upon his entering into office, ſhall require him to make it part of the condition, that he will deliver a copy of the ſaid clauſe to every perſon whom he ſhall arreſt by virtue of any warrant, and carry to any houſe, and permit him or any friend of his to read it, before any liquor or meat be called for; and in caſe any officer ſhall carry to any houſe any perſon in his cuſtody, and permit any liquor or victuals to be called for, before ſuch clauſe be read to or by the priſoner, ſuch neglect, beſides the breach of ſuch ſecurity, ſhall be accounted a miſdemeanor in the execution of the proceſs.

Sect. 3. Every ſheriff, gaoler, *&c.* ſhall permit every perſon ſo arreſted to ſend for beer or other food from what place they pleaſe, and alſo to have ſuch bedding and other things as they ſhall think fit, without purloining or detaining the ſame, or requiring them to pay for the uſe thereof, or putting any difficulty upon them relating thereto.

Stat. 3 *Geo.* 2. *c.* 27. *ſect.* 6. If any perſon ſhall be arreſted by virtue of any proceſs or warrant, and ſhall refuſe to be carried to ſome ſafe dwelling houſe of his own appointment, ſo as ſuch dwelling-houſe be in a city or market-town, if ſuch perſon ſhall be there arreſted; or if out of a city or market-town, then within three miles from the place where the arreſt ſhall be made, and ſo as ſuch houſe be not the houſe of the perſon arreſted, provided it be within the ſame county and liberty, it ſhall be lawful for the officer to carry the perſon ſo refuſing to gaol by virtue of ſuch proceſs.

Stat. 5 *Geo.* 2. *cap.* 27. *ſect.* 1. In all caſes where the cauſe of action ſhall not amount to 10*l.* in any ſuperior court, or to 40*s.* in any inferior court, the defendants (a copy of proceſs having been ſerved) ſhall appear at the return thereof, or within eight days after, and the affidavit of ſervice of ſuch proceſs may be made before any judge or commiſſioner of the court, out of which ſuch proceſs ſhall iſſue, or before the proper officer for entring common appearances, or his deputy; and is to be filed *gratis*.

Sect. 2. No attorney, or other perſon, ſhall have more than 5*s.* for making and ſerving a copy of ſuch proceſs iſſuing out of any ſuperior court, or more than 1*s.* for making and ſerving a copy of ſuch proceſs, iſſuing out of any inferior court.

Sect. 3. In particular franchiſes the proper officer ſhall execute ſuch proceſs.

Sect. 4. Upon every copy of ſuch proceſs, to be ſerved upon any defendant, ſhall be written an *Engliſh* notice to ſuch defendant, of the intent of ſuch ſervice, to the effect following, *viz.*

A. B. *you are ſerved with this proceſs, to the intent that you may by your attorney appear in his Majeſty's court of* at the return thereof, *being the* day *of* (as the caſe ſhall be) *in order to your defence in this action.*

for which notice no fee ſhall be demanded.

Sect. 5. Where the cauſe of action ſhall not amount to 10*l.* in any ſuperior court, or to 40*s.* in any inferior court, no ſpecial writ, nor proceſs ſpecially expreſſing the cauſe of action, ſhall be iſſued; and every attorney or officer of ſuch courts ſuing forth or iſſuing any ſuch proceſs, ſhall forfeit 10*l.* to the perſon aggrieved. *Made perpetual by* 21 *Geo.* 2. *cap.* 3.

Seamen in the King's ſervice privileged from arreſts for debts under 20*l.* 1 *Geo.* 2. *c.* 14. *ſect.* 15. 14 *Geo.* 2. *c.* 38. *ſect.* 3.

Soldiers or marines not liable to arreſts for a debt of leſs than 10*l.* 30 *Geo.* 2. *c.* 6. *ſect.* 64. 30. *Geo.* 2. *c.* 11. *ſect.* 37.

Pears of the realm, and members of parliament may not be *arreſted*, unleſs it be in criminal caſes; but the proceſs againſt them is to be ſummons, diſtreſs infinite, *&c.* 12 *Will.* 3. *c.* 3.

The execution of writs, which comes to the ſheriff, or his under ſheriff, ought to be executed by bailiffs of hundreds, tho' now the uſe is to put in ſpecial bailiffs with them. A ſpecial bailiff is an officer of the ſheriff, to execute ſome particular writ, *&c.* and for that time only. This arreſt is the arreſt of the ſheriff, and if he ſuffers a priſoner to eſcape, an action lies againſt the ſheriff. And if the priſoner is reſcued, the return of the reſcous ſhall be, *that it was done to the ſheriff himſelf.* The ſtatute of the 27 *Eliz. cap.* 12. does not extend to ſpecial bailiffs, ſo that in effect, the deſign of that ſtatute is evaded, and to looſe a reſtraint laid upon thoſe who are uſually a great grievance to the people; however the ſheriff ſhall anſwer for the miſdemeanors of his bailiffs, if they offend in their office, tho' he may have his remedy over againſt them. *Wood's Inſt.* 127, 128.

A bailiff ſworn, and commonly known, need not, (tho' they demand it) ſhew his warrant, but a ſpecial bailiff is bound to ſhew it upon demand. *ib.*

An arreſt without ſhewing the warrant, and without telling at whoſe ſuit, until the other demanded it, was held legal; and that this need not be done until the party obeyed and demanded the ſame. *Cro. Jac.* 485.

Where the huſband is arreſted for the debt or treſpaſs of the wife, he muſt appear or give bail both for himſelf and his wife, as the caſe requires; but if a writ be againſt huſband and wife, and the wife only is arreſted, upon the entering a common appearance, ſhe ſhall be diſcharged. *Inſt. Leg.* 171.

It is not ſufficient for a bailiff to ſay, *I arreſt you at the ſuit of*, &c. but he muſt lay hold of the defendant, or touch him, otherwiſe, 'tis no arreſt. 1 *Salk.* 79.

If an action be entred in either of the counters in *London*, a ſerjeant may arreſt the party without the ſheriff's warrant. *Trin.* 22 *Car. B. R.* For the entry of the action there, is a warrant in law for the arreſt, and the ſerjeants are attendants at the compters, and may take notice of ſuch entries, it being the cuſtom of the city, uſed time out of mind. *Pract. Reg.* 72.

By *Glynn* Ch. J. *Mich.* 1658. if one be arreſted by the ſheriff of the county, within a liberty, without a *non omittas*,

mittas, yet the arreſt is good; for the ſheriff is ſheriff of the whole county, but the bailiff of the liberty may have his action againſt the ſheriff, for entring of his liberty. But upon a *quo minus*, a ſheriff may enter any liberty, and execute it *impune*. *Pract. Reg.* 72.

Generally, the bailiff cannot juſtify the breaking open a houſe to arreſt a man, but where the officer took the defendant by the hand as he held it out of a window, it was deemed a good arreſt, and that the bailiff might afterwards juſtify breaking open the houſe for his priſoner. 1 *Vent.* 306.

An arreſt may be by night or day. 9 *Rep.* 66.

If the perſon arreſted make reſiſtance, or aſſault the officer, he may juſtify the beating of him, and if the party be killed, 'tis juſtifiable. *D. and Stud. dial.* 2. *chap.* 41. But if the officer be killed in doing his duty, 'tis murder, malice being implied in this caſe, and that notwithſtanding the proceſs be erroneous. 9 *Rep.* 67, 68.

Corporations and companies muſt be made to appear by *diſtringas*, and cannot be arreſted. *Finch.* 353. 3 *Salk.* 46.

Perſons attending upon any courts of record, on buſineſs there, are to be free from arreſts. 3 *Inſt.* 141.

A clerk of the court ought not to be *arreſted* for any thing which is not criminal, becauſe he is ſuppoſed to be always preſent in court to anſwer the plaintiff. 1 *Lill.* 94.

The King cannot command any one by word of mouth to be *arreſted*; but he muſt do it by writ, or order of his courts, according to law: nor may the King *arreſt* any man for ſuſpicion of treaſon, or felony, as his ſubjects may; becauſe if he doth wrong, the party cannot have action againſt him. 2 *Inſt.* 186.

Every one is bound by the Common law to aſſiſt not only the ſheriff in the execution of writs, and making *arreſts*, &c. but alſo his bailiff that hath his warrant to do it. 2 *Inſt.* 193.

A bailiff upon an *arreſt* ought to ſhew at whoſe ſuit, out of what court the writ iſſues, and for what cauſe, &c. but this is when the party *arreſted*, ſubmits himſelf to the arreſt. 9 *Rep.* 68, 69.

Genner, a bailiff, having a warrant againſt *Sparks*, went to him in his yard, and being at ſome diſtance, told him he had a warrant, and ſaid he arreſted him. *Sparks* having a fork in his hand, keeps off the bailiff from touching him, and retreats into his houſe, and this was moved as a contempt; *et per cur.* The bailiff cannot have an attachment, for here was no arreſt, nor reſcous, bare words will not make an arreſt; but, if the bailiff touched him, that had been an arreſt, and the retreat a reſcous, and the bailiff might have purſued, and broke open the houſe, or might have had an attachment or a reſcous againſt him; but as this caſe is, the bailiff has no remedy, but an action for the aſſault, for the holding up of the fork at him, when he was within reach, is good evidence of that. 1 *Salk.* 79.

2. *Arreſt in criminal caſes.*

In theſe caſes a perſon may be apprehended and reſtrained of his liberty, not only by proceſs out of ſome court, or warrant from a magiſtrate, but frequently by a conſtable, watchman or private perſon, without any warrant or precept; and a private perſon may be fined and impriſoned for not apprehending notorious offenders.

All perſons whatſoever, who are preſent when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and impriſoned for their neglect, unleſs they were under age at the time. 2 *Hawk.* 74.

And for this cauſe, by the common law, if any homicide be committed, or dangerous wound given, whether with, or without malice, or even by miſadventure or ſelf-defence, in any town, or in the lanes or fields thereof, in the day time, and the offender eſcape, the town ſhall be amerced, and if out of a town, the hundred ſhall be amerced. 3 *Inſt.* 53.

And ſince the ſtatute of *Wincheſter*, *c.* 5. which ordains that walled towns ſhall be kept ſhut from ſun-ſetting to ſun-riſing; if the fact happen in any ſuch town by night, or by day, and the offender eſcape, the town ſhall be amerced. 3 *Inſt.* 53.

And, as private perſons are bound to apprehend all thoſe who ſhall be guilty of any of the crimes above mentioned in their view, ſo alſo are they, with the utmoſt diligence, to purſue and endeavour to take all thoſe who ſhall be guilty thereof, out of their view, upon a hue and cry levied againſt them. 3 *Inſt.* 117.

By the vagrant act 17 *Geo.* 2. every private perſon may apprehend beggars and vagrants.

And every private perſon is bound to aſſiſt an officer, requiring him to apprehend a felon.

As to what are ſufficient cauſes of ſuſpicion of treaſon or felony, to juſtify a private perſon in apprehending the ſuſpected perſon, it is held, 1. That the common fame of the country is ſufficient to juſtify the arreſt, but then it ought to appear upon evidence, in an action brought for ſuch an arreſt, that ſuch fame had ſome probable ground. 2 *Hawk.* 76.

2. The living a vagrant, idle and diſorderly life, without having any viſible means to ſupport it. *ibid.*

3. The being in company with one known to be an offender at the time of the offence, or generally, at other times, keeping company with perſons of ſcandalous reputations. *ib.*

4. The being found in ſuch circumſtances as induce a ſtrong preſumption of guilt, as coming out of a houſe wherein murder has been committed, with a bloody knife in one's hand, or being found in poſſeſſion of any part of goods ſtolen, without being able to give a probable account of coming honeſtly by them. *ib.*

5. The behaving one's ſelf in ſuch a manner as betrays a conſciouſneſs of guilt; as where a man being charged with treaſon or felony, ſays nothing to it, but ſeems tacitly, by his ſilence, to own himſelf guilty; or where a man accuſed of any ſuch crime, upon hearing that a warrant is taken out againſt him, doth abſcond. *ib.*

Tho' it is held, that no cauſes of ſuſpicion whatever, let the number or probability of them be never ſo great, will juſtify the arreſt of an innocent man, by one who does not, himſelf, believe him guilty, whether he make ſuch arreſt of his own head, or in obedience to the commands of a conſtable. *ib.*

And it is holden by ſome, that none of the above mentioned cauſes will juſtify the arreſting a man for the ſuſpicion of crimes, unleſs a crime was actually committed; but out of this rule, the apprehending a perſon upon hue and cry, or ſuch as attempt to commit a robbery, or felony, may very well be excepted; for any one may lay hold of a perſon, whom he ſees upon the point of committing treaſon, or felony, or doing an act which would manifeſtly endanger the life of another, and detain him, till it may be reaſonably preſumed, he has changed his purpoſe. 2 *Hawk.* 77.

As to arreſts for inferior offences, no private perſon can arreſt another for a bare breach of the peace after it is over; but it is held, that a private man may arreſt a night-walker, or a common cheat going about with falſe dice, and actually caught playing with them, in order to have him before a juſtice of peace; and the arreſt of any other offenders, by private perſons, for offences in like manner ſcandalous, and prejudicial to the publick, ſeems juſtifiable. 2 *Hawk.* 77.

As to arreſts by conſtables, by their own authority, it ſeems difficult to find any caſe wherein a conſtable is impowered to arreſt a man for a felony committed or attempted, in which a private perſon might not as well be juſtified in doing it: But the chief difference between the power and duty of a conſtable, and a private perſon in reſpect of ſuch arreſts, ſeems to be this; that the former has the greater authority, to demand the aſſiſtance of others, and is liable to the ſeverer fine for any neglect of this kind, and has no ſure way to diſcharge himſelf of the arreſt, of any perſon apprehended by him, for felony, without bringing him before a juſtice of peace, in

order

order to be examined; whereas a private perſon, having made ſuch an arreſt, needs only to deliver his priſoner into the hands of the conſtable. 2 *Hawk.* 80.

As to the juſtifying ſuch arreſts by conſtables, by virtue of a warrant from a juſtice of peace, it ſeems clear, that ſuch an arreſt, unlawfully made by a conſtable without a warrant, cannot be made good by a warrant taken out afterwards; alſo it hath been holden, that if a conſtable, after he hath arreſted the party by force of any ſuch warrant, ſuffer him to go at large upon his promiſe to come again at ſuch a time, and find ſureties, he cannot afterwards arreſt him by force of the ſame warrant; however, if the party return and put himſelf again under the cuſtody of the conſtable, the conſtable may lawfully detain him, and bring him before the juſtice, in purſuance of the warrant. 2 *Hawk.* 80. *Dyer* 244. *b.*

A conſtable cannot juſtify any arreſt by force of a warrant from a juſtice of peace, which expreſly appears on the face of it, to be for an offence whereof a juſtice of peace hath no juriſdiction, or to bring the party before him at a place out of the county for which he is a juſtice; but it ſeems that he both may, and ought to execute a general warrant, to bring a perſon before a juſtice of peace, to anſwer ſuch matters as ſhall be objected againſt him, on the part of the King, for that the officer ought to preſume, that the juſtice hath a juriſdiction, which he takes conuſance of, unleſs the contrary appear, and it may often endanger the eſcape of the party, to make known the crime he is accuſed of: But it ſeems to be very queſtionable, whether a conſtable can juſtify the execution of a general warrant, to ſearch for felons or ſtolen goods, becauſe ſuch warrant ſeems to be illegal on the very face of it; for, that it would be extreamly hard, to leave it to the diſcretion of a common officer, to arreſt what perſons, and ſearch what houſes he thinks fit; and if a juſtice cannot legally grant a blank warrant for the arreſt of a ſingle perſon, leaving it to the party to fill it up; ſurely he cannot grant ſuch a general warrant, which might have the effect of a hundred blank warrants. 2 *Hawk.* 82.

Yet, perhaps, 'tis the better opinion at this day, that any conſtable, or even private perſon, to whom a warrant ſhall be directed from a juſtice of peace, to arreſt a particular perſon for felony, or any other miſdemeanor within his juriſdiction, may lawfully execute it, whether the perſon mentioned in it be, in truth, guilty or innocent, and whether he were before indicted of the ſame offence or not, and whether any felony were, in truth, committed or not? for, however the juſtice himſelf may be puniſhable for granting ſuch a warrant, without ſufficient grounds, it is reaſonable that he alone be anſwerable for it, and not the officer, who is not to examine or diſpute the reaſonableneſs of his proceeding. *ib.*

As to arreſts by the command of a juſtice of peace: a juſtice of peace may, by word of mouth, authoriſe any one to arreſt another, who ſhall be guilty of an actual breach of the peace in his preſence, or ſhall be engaged in a riot in his abſence. 2 *Hawk.* 83. *Dalt. c.* 117.

And a juſtice of peace may lawfully grant a warrant for apprehending, or arreſting perſons charged with treaſon, felony, premunire, or any other offence againſt the peace; and generally, wherever a ſtatute gives one or more juſtices of peace a juriſdiction over any offence, any one juſtice of peace may, by his warrant, cauſe ſuch offenders to be arreſted and brought before him. 2 *Hawk.* 84.

A juſtice of peace may juſtify the granting a warrant for the arreſt of any perſon upon ſtrong grounds of ſuſpicion of felony, or miſdemeanor, but he ſeems to be puniſhable, as well at the ſuit of the King, as of the party grieved, if he grant any ſuch warrant groundleſly, or maliciouſly, without ſuch a probable cauſe as might induce a candid and impartial man to ſuſpect the party to be guilty. 2 *Hawk.* 84.

Every warrant ought to be under the hand and ſeal of the juſtice of peace, and ſpecify the day it was made out: if it be for the peace or good behaviour, it is adviſable to ſet forth the ſpecial cauſe upon which it is granted, but if it be for treaſon or felony, or other offences of an enormous nature, it is ſaid, that it is not neceſſary to ſet it forth, and it ſeems to be rather diſcretionary than neceſſary to ſet it forth in any caſe. 2 *Hawk.* 85.

It may be directed to the ſheriff, bailiff, conſtable, or to any indifferent perſon by name, who is no officer, for, tho' the juſtice may authoriſe any one to be his officer, whom he pleaſes to make ſuch; yet it is moſt adviſable to direct to the conſtable of the precinct wherein it is to be executed; for that no other conſtable, and *a fortiori* no private perſon, is compellable to ſerve it. 2 *Hawk.* 85.

A bailiff or conſtable, if they be ſworn, and commonly known to be officers, and act within their own precinct, need not ſhew their warrant to the party, notwithſtanding he demand the ſight of it; but that theſe and all other perſons whatſoever making an arreſt, ought to acquaint the party with the ſubſtance of their warrant; and all private perſons to whom ſuch warrants ſhall be directed, and even officers, if they be not ſworn and commonly known; and even theſe, if they act out of their own precincts, muſt ſhew their warrants if demanded. 2 *Hawk.* 86.

The ſheriff having ſuch warrant directed to him, may authoriſe others to execute it; but every other perſon, to whom it is directed, muſt perſonally execute it, yet, it ſeems, that any one may lawfully aſſiſt him. 2 *Hawk.* 86.

If a warrant be generally directed to all conſtables, no one can execute it out of his own precinct; but if it be directed to a particular conſtable by name, he may execute it any where within the juriſdiction of the juſtice. 2 *Hawk.* 86.

Where one is authoriſed to arreſt a perſon who ſhelters himſelf in a houſe; if enterance be denied, the officer may juſtify the breaking open the doors in the following inſtances.

1*ſt.* Upon a *capias*, grounded on an indictment for any crime whatſoever, or upon a *capias* from the King's Bench or Chancery, to compel a man to find ſureties for the peace or good behaviour, or even upon a warrant from a juſtice of peace for ſuch purpoſe. *ib.*

2*dly.* Upon a *capias utlagatum*, or *capias pro fine*, in any action whatſoever. *ib.*

3*dly.* Upon the warrant of a juſtice of peace, for the levying of a forfeiture in execution of a judgment, or conviction for it, grounded on any ſtatute which gives the whole, or but part of ſuch forfeiture to the King, and authoriſes the juſtice of peace to give ſuch judgment or conviction for it. *ib.*

4*thly.* Where a forcible entry or detainer is either found by inquiſition before juſtices of peace, or appears upon their view. *ib.*

5*thly.* Where one known to have committed a treaſon or felony, or to have given another a dangerous wound, is purſued either with, or without warrant by a conſtable, or private perſon; but where one lies under a probable ſuſpicion only, and is not indicted, it ſeems the better opinion at this day, that no one can juſtify the breaking open doors in order to apprehend him. *ib.*

6*thly.* Where an affray is made in a houſe, in the view or hearing of a conſtable, or where thoſe who have made an affray in his preſence, fly to a houſe, and are immediately purſued by him, and he is not ſuffered to enter, in order to ſuppreſs the affray in the firſt caſe, or to apprehend the affrayer in either caſe.

7*thly.* Wherever a perſon is lawfully arreſted for any cauſe, and afterwards eſcapes and ſhelters himſelf in a houſe. *ib.*

Alſo it is enacted by the 3 & 4 *Jac.* 1. *par.* 35. that upon any lawful writ, warrant or proceſs awarded to any ſheriff or other officer, for the taking of any popiſh recuſant, ſtanding excommunicated for ſuch recuſancy, it ſhall be lawful, if need be, to break any houſe. 2 *Hawk.* 87.

But it hath been reſolved, that where juſtices of peace are by virtue of a ſtatute, authoriſed to require perſons to come before them to take certain oaths preſcribed by ſuch ſtatute, the officer cannot lawfully break open the doors. 2 *Hawk.* 87.

Arreſt of judgment, To move in *arreſt of judgment*, is to ſhew cauſe why judgment ſhould be ſtayed, notwithſtanding a verdict given; for in many caſes, though there be a verdict, no judgment can be had; and the cauſes of *arreſt of judgment* are, want of notice of trial; where the plaintiff before trial treats the jury; the record differs from the deed pleaded; for material defect in pleading; where perſons are miſnamed; more is given and found by the verdict, than laid in the declaration; or the declaration doth not lay the thing with certainty, *&c.* and here all matters of fact are to be made out by proper affidavits. *Comp. Attorn.* 329, *&c.* Judgment may be arreſted for good cauſes in criminal caſes, as well as civil; if the indictment be inſufficient, *&c.* 3 *Inſt.* 210. Four days are allowed to move in *arreſt of judgment*; and the defendant hath all the term wherein the verdict was given to ſpeak any thing to arreſt it, if the plaintiff hath not given the four days rule, and ſigned his judgment; after which he is put to his writ of error. 2 *Lill.* 93. On motion in *arreſt of judgment*, if the court be divided, two judges againſt two, the plaintiff muſt have his judgment; unleſs a rule be made at firſt to ſtay all proceedings, until the court otherwiſe order, *&c.* 2 *Lill. Abr.* 118. See **Jeofails** and **Judgment.** *Arreſt of enqueſt* is to plead in arreſt of taking the enqueſt, upon the former iſſue, and to ſhew cauſe why an enqueſt ſhould not be taken. *Jacob.*

Arreſtandis bonis ne diſſipentur, A writ which lies for a man whoſe cattle or goods are taken by another, who during the conteſt, doth or is like to make them away, not being of ability to render ſatisfaction. *Reg. Orig.* 126.

Arreſtando ipſum qui pecuniam recepit, &c. Is a writ that lieth for apprehending a perſon who hath taken the King's preſt-money to ſerve in the wars, and hides himſelf when he ſhould go. *Reg. Orig.* 24. *Cowell.*

Arreſto facto ſuper bonis mercatorum alienigenorum, A writ which lies for a denizen againſt the goods of *aliens* found within this kingdom, in recompence of goods taken from him in a foreign country, after denial of reſtitution. *Reg. Orig.* 129. This the ancient civilians called *clarigatio*; but by the moderns it is termed *repriſalia. Cowell.*

Arretted, *Arrectatus, quaſi, ad rectum vocatus,* Is where a man is conven'd before a judge, and charged with a crime. *Staundf. Pl. Co.* 45. And it is ſometimes uſed for imputed or laid unto; as no folly may be *arretted* to one under age. *Littleton*, cap. *Remitter*. *Chaucer* uſeth the verb *arretteth*, that is, lays blame, as it is interpreted. *Bracton* ſays, *ad rectum habere malefactorem, i. e.* to have the malefactor forth coming, ſo as he may be charged, and put to his trial. *Bract. lib.* 3. *tract.* 2. *cap.* 10. And in another place, *rectatus de morte hominis*, charged with the death of a man; hence it may with ſome reaſon ſeem, that the word is the ſame with *rectum.*

Arrows. By an ancient ſtatute, all heads of *arrows* ſhall be well brazed, and hardened at the point with ſteel, on pain of forfeiture and impriſonment; and to be marked with the mark of the maker. *Stat.* 7 *Hen.* 4. *c.* 7. Patten-makers ſhall not uſe *aſp*, that arrows may be cheap. 4 *Hen.* 5. *c.* 3.

Arrpennes, *Arpennus*, The ſame with *arpennis*, an *arpen*, or *arpent.*

Arrura, —— In the black book of *Hereford*, *de operationibus* arruræ, ſignifies days works of plowing; for ancient cuſtomary tenants were bound to plough certain days for their lord. *Una arrura*, one day's work at the plough: And in *Wiltſhire*, *earing* is a day's ploughing. *Paroch. Antiq. p.* 41.

Arſon, (from *ardeo*, to burn) Is houſe-burning, which is felony at Common law. 3 *Inſt.* 66. It muſt be maliciouſly and voluntarily, and an actual burning; not putting fire only into a houſe, or any part of it, without burning: but if part of the houſe is burnt; or if the fire doth burn, and then goeth out of itſelf, it is felony. 2 *Inſt.* 188. *H. P. C.* 85. The burning of a frame of a houſe, is not accounted houſe-burning, becauſe the frame of a houſe cannot come under the word *domus*, which is neceſſary in every indictment for *arſon:* and it muſt be the houſe of another; for if a man burns his own houſe only, though with intention to burn others, it is not felony, but a great miſdemeanor, puniſhable with fine, pillory, *&c.* If a houſe is fired by negligence or miſchance, it cannot amount to *arſon.* 3 *Inſt.* 67. *H. P. C.* 85. Where one burns the houſe of another, if it be not wilful and malicious, 'tis no felony, but only treſpaſs: Therefore if *A.* ſhoot unlawfully in a gun, at the cattle or poultry of *B.* and by means thereof ſets another's houſe on fire, this is not *arſon*; for though the act he was doing was unlawful, yet he had no intent to burn the houſe. 1 *Hale's Hiſt. P. C.* 569. By *ſtat.* 25 *H.* 8. *c.* 11. burning of houſes, or barns wherein any corn is, is felony without benefit of clergy. And the *ſtat.* 22 *&* 23 *Car.* 2. *c.* 7. makes it felony to ſet barns, ſtables, ſtacks of corn, hay, *&c.* on fire in the night time, or any outhouſes or buildings: but the offender may be tranſported for ſeven years. By 6 *Annæ*, *cap.* 31. ſervants through negligence or careleſsneſs ſetting on fire any dwelling houſe or outhouſe, ſhall forfeit 100*l.* to be levied by warrant of two juſtices, and paid to the churchwardens of the pariſh, to be diſtributed to the ſufferers by the fire; or on default ſhall be ſent to the houſe of correction, and there kept at hard labour eighteen months, *&c.* By 9 *Geo.* 1. *c.* 22. (made perpetual by 31 *Geo.* 2. *c.* 24.) ſetting fire to any houſe, barn, or out-houſe, or to any hovel, cockmow, or ſtack of corn, ſtraw, or wood, is made felony without benefit of clergy.

Form of an indictment for *arſon* or *houſe-burning.*

THE *jurors, &c. upon their oaths preſent, that* A. B. *late of, &c. on the day, &c. in the year, &c. with force and arms, between the hours, &c. came into the houſe of* C. D. *of, &c. aforeſaid, in the ſaid county, gentleman, (the ſaid houſe being in the ſame county) and with a lighted candle, which the ſaid* A. B. *then and there held in his hand, &c. of his malice forethought, did feloniouſly ſet on fire the ſaid houſe, by which it was then and there intirely burnt down; and ſo the ſaid* A. B. *on the ſaid day of, &c. in the ſame year above mentioned, at, &c. aforeſaid, in the ſaid county, voluntarily and of his forethought malice, feloniouſly did ſet on fire and burn down the houſe aforeſaid, in the manner and form above mentioned, againſt the peace of our ſaid lord the King, &c.* See title **Burning.**

Arſer in le maine, Burning in the hand; is the puniſhment of criminals that have the benefit of clergy. *Termes de la ley.*

Arſura, The trial of money by fire after it was coined. In *Domeſday* we read, *Reddit* 50*l. ad* arſuram, which is meant of lawful and approved money, whoſe allay was tried by fire. *Cowell, ed.* 1727.

Art and part, Is a term uſed in *Scotland* and in the North of *England*; when one charged with a crime, in committing the ſame, was both a contriver of and acted part in it.

Arthel, A *Britiſh* word, and more truly written *arddel*, ſignifying to avouch; as if a man were taken with ſtolen goods in his hands, he was to be allowed a lawful *arthel* (or vouchee) to clear him of the felony. It was part of the law of *Howel Dda*; according to whoſe laws every tenant holding of any other than of the prince or lord of the fee, paid a fine *pro defenſione regia*, which was called *Arian ardbel.* The privilege of *arthel* occaſioning a delay and exemption of criminals from juſtice, proviſion was made againſt it by ſtat. 26 *Hen.* 8. *c.* 6. *Cowell, ed.* 1727. *Jacob.*

Articles of religion, By whom and how to be ſubſcribed, ſee ſtat. 13 *El. c.* 12. *ſect.* 1. 13 *&* 14 *Car.* 2. *c.* 4. For the penalty for maintaining doctrine againſt the 39 articles, ſee ſtat. 13 *El. c.* 12. *ſect.* 2.

Articuli cleri, *Articles of the clergy*, Are ſtatutes containing certain *articles* relating to the church and clergy, and cauſes eccleſiaſtical. 19 *Ed.* 2. and 14 *Ed.* 3.

Articulus, An *article* or complaint, exhibited by way of libel, in a court chriſtian: ſometimes the religious bound themſelves to obey the ordinary, without ſuch formal proceſs: As *ann. dom.* 1300. the prior and convent

of *Burceſter* ſubmitted themſelves to the official of *Lincoln*, *&c.* —— *Quod poſſint eos et eorum ſucceſſores per omnem cenſuram eccleſiaſticam ad omnium & ſingulorum præmiſſorum obſervationem abſque* articuli, *ſeu libelli, petitione, & quocunque ſtrepitu judiciali compellere. Paroch. Antiq. p.* 344. *Cowell.*

Artificers, Are taken for ſuch as are maſters of their arts, or whoſe calling and employment doth conſiſt chiefly of bodily labour: And if *artificers* or workmen conſpire not to do any work but at certain prices, *&c.* they are liable to penalties by the ſtatute 2 & 3 *Ed.* 6. *c.* 15. A ſtranger *artificer* in *London*, *&c.* ſhall not keep above two ſtrangers ſervants; but he may have as many *Engliſh* ſervants and apprentices as he can get. *Stat.* 21 *Hen.* 8.

Stat. 5 *Geo.* 1. *cap.* 27. *ſect.* 1. If any perſon ſhall contract with, entice or ſolicit any artificer in wool, iron, ſteel, braſs, or other metal, clockmaker, watchmaker, or any other artificer of *Great Britain*, to go into foreign countries out of the King's dominions, and ſhall be convicted thereof upon indictment or information, in any of the courts at *Weſtminſter*, or at the aſſiſes or quarter ſeſſions, he ſhall be fined any ſum not exceeding 100*l.* for the firſt offence, and ſhall be impriſoned three months, and till the fine be paid; and if any perſon having been once convict ſhall offend again, he ſhall be fined at the diſcretion of the court, and impriſoned twelve months, and till the fine be paid.

Sect. 2. No perſon ſhall be proſecuted for the ſaid offences, unleſs the proſecution be begun within twelve months after the offence.

Sect. 3. If any of the King's ſubjects, being ſuch artificers, ſhall go into any country out of his Majeſty's dominions, to exerciſe or teach the ſaid trades to foreigners; and if any of the King's ſubjects in any ſuch foreign country, exerciſing any of the ſaid trades, ſhall not return into this realm within ſix months after warning given by the ambaſſador, miniſter, or conſul of *Great Britain*, in the country where ſuch artificer ſhall be, or by any perſon authoriſed by ſuch ambaſſador, *&c.* or by one of the ſecretaries of ſtate, and from thenceforth inhabit within this realm; ſuch perſon ſhall be incapable of taking any legacy, or of being an executor or adminiſtrator, and of taking any lands, *&c.* within this kingdom by deſcent, deviſe or purchaſe, and ſhall forfeit all lands, goods, *&c.* within this kingdom to his Majeſty's uſe, and ſhall be deemed an alien, and out of his Majeſty's protection.

Sect. 4. Upon complaint made upon oath before any juſtice of peace, that any perſon is endeavouring to ſeduce any ſuch artificer, or that any ſuch artificer hath contracted, or is preparing to go out of his Majeſty's dominions for the purpoſes aforeſaid; ſuch juſtice may ſend his warrant to bring the perſon complained of before him, or before ſome other juſtice; and if it ſhall appear by the oath of one witneſs, or by confeſſion, that he was guilty of any of the ſaid offences, ſuch juſtice may bind him to appear at the next aſſiſes or quarter ſeſſions; and if ſuch perſon ſhall refuſe to give ſecurity, the juſtice may commit him to gaol till the next aſſiſes or quarter ſeſſions, and until he ſhall be delivered by due courſe of law; and if any ſuch artificer ſhall be convict upon indictment of any ſuch promiſe, contract or preparation to go beyond the ſeas for the purpoſes aforeſaid; he ſhall give ſuch ſecurity to the King, not to depart out of his Majeſty's dominions, as ſuch court ſhall think reaſonable, and ſhall be impriſoned till ſecurity be given.

Sect. 5. If any of the above offences ſhall be committed in *Scotland*, the ſame ſhall be proſecuted in the court of juſticiary or the circuits there.

Arundinetum, A ground or place where reeds grow. 1 *Inſt.* 4. And is mentioned in the book of *Domeſday.*

Arvil-ſupper, A feaſt or entertainment made at funerals in the North part of *England: arvil bread* is the bread delivered to the poor at funeral ſolemnities. *Cowell.* And *arvil*, *arval*, *arſal*, are uſed for the burial or funeral rites; as,

Come bring my jerkin Tibb, I'll to the arvil,
Yon man's dea ſuy ſeawe, it makes me marvil.

Yorkſh. Dial. p. 58. *Cowell, ed.* 1727.

Arura, *Pro aratura,* Ploughing: *Una arura,* one day's work at the plough.——*Tenet in bondagio et debet unam aruram in yeme, et unum ſurculaturam. Paroch. Antiq. p.* 401. Hence in *Wiltſhire*, to *ear* is to plough, and an *earing* is a day's ploughing. In which ſenſe the word occurs in many parts of the Old Teſtament, as *Gen.* xlv. 6. *Deut.* xxi. 4. 1 *Sam.* viii. 8. 12, *&c. Cowell.*

Aſcenſorium, Steps by which one aſcends. *Brevis eſt ſcala, non laborioſa, tribus tantum diſtincta* aſcenſoriis, *Petrus Bleſenſis. Cowell.*

Aſceſterium, (*Archiſterium, arciſterium, aciſterium, alcyſterium, architrium*) is a Greek word, and ſignifies a monaſtery. It often occurs in our old hiſtories *Du Freſne.*

Aſſach, or **Aſſath,** Was a cuſtom of purgation, uſed of old in *Wales*, by which the party accuſed did clear himſelf by the oaths of 300 men. It is mentioned in Ancient *MSS.* and prevailed till the time of *Hen.* 5. when it was abrogated. 1 *Hen.* 5. *cap.* 6. *Spelman. Cowell.*

Aſſart, (*Aſſartum*) Is derived from the Fr. *aſſartir*, to make plain, according to *Manwood. Aſſartum eſt quod redactum eſt ad culturam. Fleta, lib.* 4. *cap.* 21. And the word *aſſartum* is by *Spelman* derived from *exertum*, to pull up by the roots; for ſometimes 'tis wrote *eſſart.* Others derive it from *exaratum*, or *exartum*, which ſignifies to plough or cut up. *Manwood*, in his *Foreſt Laws*, ſays it is an offence committed in the foreſt, by pulling up the woods by the roots, that are thickets and coverts for the deer, and making the ground plain as arable land: this is eſteemed the greateſt treſpaſs that can be done in the foreſt to vert or veniſon, as it contains in it waſte and more; for whereas waſte of the foreſt is but the felling down the coverts which may grow up again, *aſſart* is a plucking them up by the roots and utterly deſtroying them, ſo that they can never afterwards ſpring up again. And this is confirmed out of the Red Book in the *Exchequer*, in theſe words——Aſſarta *vero dicuntur quæ apud Iſidorum occiſiones nuncupantur, quando foreſtæ nemora vel dumeta, paſcuis & latibulis ferarum opportuna, ſucciduntur: quibus ſucciſis & radicitus avulſis, terra ſubvertitur & excolitur.*—— But this is no offence if done with licence; and a man may by writ of *ad quod damnum* ſue out a licence to *aſſart* ground in the foreſt, and make it ſeveral for tillage. *Reg. Orig.* 257. Hence lands are called *aſſarted:* and formerly *aſſart rents* were paid to the crown for foreſt lands *aſſarted. Stat.* 22 *Car.* 2. *c.* 6. *Aſſartments* ſeem to be uſed in the ſame ſenſe in *Rot. Parl.* Of *aſſart* you may read more in *Cromp. Juriſd. p.* 203. and *Charta de Foreſta, anno* 9 *Hen.* 3. *c.* 4. *Manwood, part* 1. *p.* 171. *Cowell.*

Aſſault and battery. *Aſſault* is derived from the old Latin word *aſſultus*, that is, *a leaping on*, or from the French verb *aſſailer*, *to attack*, and ſignifies an attempt or offer, with force and violence, to do a corporal hurt to another; as by ſtriking at him without a weapon; or preſenting a gun at him, at ſuch a diſtance to which the gun will carry; or pointing a pitch-fork at him, ſtanding within the reach of it; or by holding up one's fiſt at him; or by any other ſuch like act, done in any threatning manner. 1 *Hawk.* 133. *Battery*, (from the French *battre*, to ſtrike, or from the Saxon *batte*, a club) ſeems to be, when any injury whatſoever, be it never ſo ſmall, is actually done to the perſon of a man, in an angry, or revengeful, or rude, or inſolent manner; as by ſpitting in his face, or any way touching him in anger, or violently juſtling him out of the way, and the like. 1 *Hawk.* 134.

Any injury whatſoever, be it never ſo ſmall, being actually done to the perſon of a man, in an angry or revengeful, or rude or inſolent manner, as by ſpitting in his face, or any way touching him in anger, or violently juſtling him out of the way, are batteries in the eye of the law. 6 *Mod.* 149, 172. 1 *Mod.* 3. 3 *Lev.* 404. 1 *Hawk. P. C.* 134.

But

But to lay one's hand gently on another, whom an officer has a warrant to arreſt, and to tell the officer that this is the man he wants, is not a battery. 2 *Rol. Abr.* 546. 1 *Hawk. P. C.* 134.

So if two by conſent play at cudgels, and one happens to hurt the other, as their intent was lawful and commendable, in promoting courage and activity, it does not ſeem to amount to battery. *Dalt. c.* 22. *Bro. Coron.* 229.

If *A.* lays his hand on his ſword, and ſays, that *if it were not aſſize time I would not take ſuch language from you*, that is no aſſault; for it is plain he did not deſign to do him any corporal hurt at that time, and a man's intention muſt operate with his act in conſtituting an aſſault. 1 *Mod.* 3.

It ſeems agreed, that at this day no words whatſoever, be they never ſo provoking, can amount to an aſſault, notwithſtanding the many ancient opinions to the contrary. 1 *Hawk. P. C.* 134.

Every battery includes an aſſault; therefore if the defendant be found guilty of the battery, it is ſufficient. *Salk.* 384. 1 *Hawk. P. C.* 134.

So if one ſoldier hurts another by diſcharging a gun in exerciſe, this cannot amount to a battery, though if it be done without ſufficient caution, he is liable to an action at the ſuit of the party injured. *Hob.* 134. 2 *Rol. Abr.* 548.

1. *In what caſes aſſault and battery may be juſtified, and pleadings.*

2. *How aſſault and battery are puniſhed.*

1. *In what caſes aſſault and battery may be juſtified, and pleadings.*

A perſon may juſtify an aſſault, in defence of his perſon, or of his wife, or maſter, or parent, or child within age; and even a wounding may be juſtified in defence of his perſon, but not of his poſſeſſions. 3 *Salk.* 46.

And where a man in his own defence beats another who firſt aſſaults him, he may take advantage thereof, both upon an indictment and upon an action; but with this difference, that on an indictment he may give it in evidence upon the plea of Not guilty, but on an action he muſt plead it ſpecially. 1 *Hawk.* 134.

If an officer, having a warrant againſt one who will not ſuffer himſelf to be arreſted, beat or wound him in the attempt to take him, he may juſtify it; ſo if a parent in a reaſonable manner chaſtiſe his child, or maſter his ſervant, being actually in his ſervice at that time, or a ſchoolmaſter his ſcholar, or a gaoler his priſoner, or even a huſband his wife; or if one confine a friend who is mad, and bind and beat him, *&c.* in ſuch manner as is proper in his circumſtances; or if a man force a ſword from one who offers to kill another; or if a man gently lay his hands on another, and thereby ſtay him from inciting a dog againſt a third perſon; if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to diſpoſſeſs me of my lands or goods, or the goods of another delivered to me to be kept for him, and will not deſiſt upon my laying my hands gently on him and diſturbing him; or if a man beat, wound or maim one who makes an aſſault upon his perſon, or that of his wife, parent, child, or maſter; or if a man fight with, or beat one who attempts to kill any ſtranger; in theſe caſes it ſeems the party may juſtify the aſſault and battery. See 1 *Hawk. P. C.* 130. and the ſeveral authorities there cited.

And on an indictment the party may plead Not guilty, and give the ſpecial matter in evidence; but in an action on the caſe he muſt plead it ſpecially. 6 *Mod.* 172.

In battery the plaintiff declared, that on ſuch a day the defendant aſſaulted and beat his *wife*, this action was brought by the *huſband* after the death of his *wife*, and it being a perſonal wrong, is dead with the perſon; and if ſhe had been living, the huſband alone could not have the action, becauſe damages would ſurvive to the wife. *Yelv.* 89.

In an action of aſſault, the plaintiff declared *quod cum* the defendant ſuch a day, *&c.* him the aforeſaid plaintiff did beat, which is only a recital, and not an expreſs allegation that the defendant did beat him, and for his purpoſe the caſe of *Sheriff* and *Bridges* was cited, *Mich.* 39. *Eliz.* where ſuch a declaration was held ill; but yet the declaration in the principal caſe was held good. *Paſch.* 12. *Jan. Godb.* 251. *Shorley's* caſe. 2 *Bulſt.* 215. reported by the name of *Sherland* verſus *Heaton*, where the declaration was held ill; but if it had been *quod cum* the plaintiff being *in pace domini regis*, *&c.* the defendant did aſſault him, this had been good, becauſe 'tis relative to the *quod cum*, which always preſuppoſeth ſome ſubſequent matter.

In an action of battery the defendant pleads, that he was maſter of a ſhip, and that the plaintiff being his carpenter and ſervant in the ſhip, neglected his duty and gave him ſaucy language, and therefore *moderate caſtigavit*; plaintiff replies *non moderate caſtigavit*; and iſſue joined; verdict was given for the plaintiff; and in an arreſt of judgment it was inſiſted, that a *non moderate caſtigavit* was not a pertinent negative, the proper iſſue being *immoderate caſtigavit*; but the court held it well enough, eſpecially after verdict. 1 *Sid.* 444. 2 *Keb.* 623. 1 *Vent.* 70.

In *aſſault and battery*, the defendant pleaded Not guilty, and afterwards, before the record of *niſi prius* was ſealed, he would confeſs the action; but adjudged, that it came too late, tho' all the pronotaries were of a contrary opinion. *Hob.* 221.

Aſſault, *&c.* the defendant pleaded, that *tempore quo*, *&c.* he was ſeiſed of ſuch rectory in fee, and that the corn growing in the place was ſevered from the nine parts, and that he came into the ground to carry away the *tithes*, and in defence thereof, and to hinder the plaintiff from taking it, he ſtood there to defend it, and if any hurt was done it was of his own wrong; the plaintiff replied, *de injuria ſua propria abſque tali cauſa*; and upon demurrer to this replication the plaintiff had judgment, becauſe by his declaration he did not claim any thing in the ſoil or in the corn, but only damages for the aſſault, *&c.* which is collateral to the *title*; but if he had claimed *a title*, *&c.* and the defendant had pleaded any matter to deſtroy ſuch title, there the plaintiff muſt reply ſpecially, and not plead generally *abſque tali cauſa*. *Yelv.* 157.

In battery, *&c.* the action was laid in *London*, when in truth it was done at *Uxbridge*; the defendant pleaded, that on ſuch a day and year, the plaintiff at *B.* in the county of *S.* made an aſſault upon the defendant, and pleaded *de injuria ſua propria*, and traverſed, that he was guilty in *London*; this was adjudged a good plea. *Goldſ.* 5.

In an action of aſſault and battery, and wounding, it was laid with a *mutilavit & ſiniſtr' brach' fregit ita quod uſum ſiniſtri brachii amiſit*; to this the defendant pleaded *de ſon aſſault demeſne*; and on demurrer it was ſhewn for cauſe, that this being a heinous battery, and amounting to a mayhem, he ſhould have ſhewed to the court, that the aſſault was with ſuch violence, that he could not otherwiſe defend himſelf but by maiming the plaintiff; and the pleading ſhould have been, that plaintiff *mayhemaſſet & vulneraſſet* the defendant *niſi*, *&c.* But the court held the plea good, and that it was a matter upon evidence, whether the aſſault were proportionable to the battery; for if it were not, the iſſue would be for the plaintiff; although the plaintiff did make the firſt aſſault, it will not juſtify every beating, but it muſt be ſuch a one as may draw a probable danger and fear upon the perſon upon whom it is made. 1 *Sid.* 246. 1 *Keb.* 884, 921, *S. C.* See *Cro. Jac.* 251. 3 *Lev.* 251. 3 *Lev.* 403. 1 *Lutw.* 925. 2 *Inſt.* 316. 2 *Hawk. P. C.* 159.

In aſſault, *&c.* the defendant pleaded *ſon aſſault demeſne*; the plaintiff replied, that he was ſervant to Mr. *Sandys* to look after his horſes, and that the defendant *would have beaten* one of them, but that the plaintiff laid his hands on the defendant in *defence of the horſe*, and thereupon the defendant aſſaulted him: the defendant rejoined, that he was ſervant to Mr. *Ridler*, who was ſeiſed in fee of a cloſe called *Davis Cloſe*, which *was well fenced*, and that he ſeeing one *Payton*, another of Mr. *Sandys's* ſervants,

attempting

A S S

attempting to leap over the fence on horſeback, forbid him, and endeavoured to hinder him; and that the plaintiff coming to aſſiſt *Payton* aſſaulted the defendant, who defended himſelf, and traverſed, that he was guilty, *&c.* but in *Davis Grove*, *&c.* and upon demurrer, it was objected to the replication, that the plaintiff *did not poſitively alledge*, that the defendant *did beat him*, but only, that *he would have beaten him*; but notwithſtanding this exception, the defendant had judgment. *Nota*; in this caſe the plaintiff juſtified as a ſervant in defence of his maſter's goods, and the defendant juſtified in defence of his maſter's poſſeſſion; and it was held, that a ſervant may juſtify a *battery* in defence of his perſon, but not of his goods. 2 *Lutw.* 1481.

In aſſault, *&c.* the defendant pleaded *ſon aſſault demeſne*, and the plaintiff replied, that he was ſtanding at his gate, and that the defendant being on horſe-back offered to ride over him, whereupon he *molliter* aſſaulted the plaintiff in defence of himſelf, *quæ eſt eadem*, *&c.* and on demurrer to this replication it was adjudged to be ill, becauſe he thereby had confeſſed that he had made the firſt aſſault; for he ſhould have pleaded *molliter manus impoſuit* to hinder the riding over him. 1 *Lev.* 282. 1 *Sid.* 441. 1 *Mod.* 36. 2 *Keb.* 597.

In treſpaſs for aſſault and battery, the defendant juſtifies by a *molliter impoſuit manus* for due correction of the defendant as his ſervant, and pleads over, that ſince that time the plaintiff *exoneravit & relaxavit* (without ſaying *per ſcriptum*) to the defendant the ſaid matter; to this plea it was demurred for doubleneſs ſpecially; and the opinion of the court was, that it was double; for though the releaſe be not ſufficiently pleaded, yet it is pleaded ſo as iſſue be taken upon it, which will make it double. 1 *Sid.* 175. 1 *Keb.* 661. *S. C.*

Aſſault, battery and wounding; the defendant pleaded, that he was conſtable of *B.* and for ſuch a miſdemeanor done by the plaintiff he laid his hands on him and put him into the ſtocks *quæ eſt eadem tranſgreſſio*; and upon demurrer to this plea, it was adjudged for the plaintiff, becauſe the defendant did neither plead Not guilty, nor juſtify the *wounding*; but if he had pleaded, that the hurt which the plaintiff had was of his wrong, this had anſwered all. *Cro. Eliz.* 93.

In aſſault, *&c.* the defendant juſtified by a *molliter manus impoſuit* on the plaintiff, who *entered his cloſe*; and upon a demurrer, it was adjudged no good plea, becauſe the plaintiff did not ſhew what eſtate he had in the cloſe, or that he did endeavour to turn the defendant out. *Moor* 846.

In *aſſault*, *battery* and *wounding*; the defendant pleaded *ſon aſſault demeſne*; and upon a demurrer to this plea it was adjudged ill, becauſe the defendant cannot juſtify the *wounding* by this plea; but this may be ſtill a queſtion, for the ground of the action is the treſpaſs, to which this is a proper plea. *Sid.* 246.

Aſſault, *battery* and *wounding*, *&c.* the defendant as to the wounding, pleads Not guilty, and as to the reſt, he juſtified by virtue of a *ca. ſa.* againſt the plaintiff, and a warrant thereon, and that he to arreſt the plaintiff *molliter manus impoſuit* on him, and that he did take and impriſon him, *quæ quidem mollis impoſitio manuum*, is the ſame aſſault and battery of which the plaintiff complained; and upon demurrer it was objected, that *molliter manus imponere* was too ſoft a juſtification for *battery*; the defendant ought to have pleaded Not guilty as to that; and that it was ſo adjudged in *Stony* and *Calvert*'s caſe, *Hill.* 2 *W.* 3. *Rot.* 759. in *C. B.* 'Tis true *Serjeant Levinz*, who reports the principal caſe, tells us, that *molliter manus imponere* is a *battery*, if the defendant hath nothing to excuſe himſelf for ſo doing, and that moſt of the precedents are as this is; tho' in ſome the battery is particularly anſwered, and that would be the ſurer way of pleading. 1 *Lutw.* 925.

2. *How aſſault and battery are puniſhed.*

The wrong-doer is ſubject both to an action at the ſuit of the party, wherein he ſhall render damages; and alſo to an indictment at the ſuit of the King, wherein he ſhall be fined according to the heinouſneſs of the offence. 1 *Hawk.* 134.

An aſſaulting or threatning a counſellor at law, or attorney employed in a cauſe againſt a man; or a juror giving verdict againſt him; or his adverſary for ſuing him, *&c.* is puniſhable on an indictment, by fine and impriſonment, for the contempt. 1 *Hawk.* 58.

Stat. 8 & 9 *W.* 3. *cap.* 11. [intituled, *An act for the better preventing frivolous and vexatious ſuits*] enacts that, where there are ſeveral defendants to any action of aſſault, *&c.* and one or more acquitted, the perſon ſo acquitted ſhall recover coſt of ſuit, unleſs the judge certify that there was a reaſonable cauſe for making ſuch perſon a defendant or defendants to ſuch action.

Stat. 9 *Ann. cap.* 16. Aſſaulting a privy counſellor in the execution of his office, is felony without benefit of clergy.

Stat. 6 *Geo.* 1. *c.* 23. *ſect.* 11. If any perſon ſhall wilfully and maliciouſly aſſault any perſon or perſons in the publick ſtreets or highways, with an intent to tear, ſpoil, cut, burn or deface, and ſhall tear, ſpoil, cut, burn, or deface the garments or cloaths of ſuch perſon or perſons, then all and every perſon and perſons ſo offending, being thereof lawfully convicted, ſhall be adjudged to be guilty of felony; and the courts before whom ſuch offender ſhall be tried ſhall have full power and authority of tranſporting ſuch felons for the ſpace of ſeven years.

Stat. 7 *Geo.* 2. *cap.* 21. Aſſaulting with intent to rob is made felony and tranſportation.

Indictment for an aſſault.

THE *jurors for our lord the King upon their oaths preſent, that* ——— *of* ——— *in the ſaid county* ——— *on the* ——— *day of* ——— *in the* ——— *year of the reign of our ſovereign lord* George *the Third*, &c. *at* ——— *aforeſaid in the county aforeſaid, in and upon* ——— *then and there being in the peace of God and of our ſaid lord the King, with force and arms an aſſault did make, and him the ſaid* ——— *then and there did beat, wound and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the ſaid* ——— *and to the evil example of all others offending in the like kind, and againſt the peace of our ſaid lord the King, his crown and dignity.*

Aſſay of weights and meaſures, (From the Fr. *Eſſay*, *i. e.* a proof of trial) Is the examination of weights and meaſures, by clerks of markets, *&c.* *Reg. Orig.* 279. —— *Ac aſſiſam et* aſſayam *panis, vini et cerviſiæ. Paten.* 37 *H.* 8. Tho. Marrow. *Cowell.*

Aſſayer of the King, (*Aſſayator Regis*) An officer of the King's mint, for the trial of ſilver; he is indifferently appointed between the maſter of the mint and the merchants that bring ſilver thither for exchange. *Anno* 2 *H.* 6. *cap.* 12. Veſſels of gold ſhall be *aſſayed.* 28 *Ed.* 1. *c.* 20. and 18 *Car.* 2. *c.* 5. —— *Mandatum eſt* Will. Hardel *clerico quod convocatis in præſentia ſua omnibus moneteriis, aſſayatoribus, cuſtodibus, operariis et aliis miniſtris de Cambiis Regis* London & Cantuar. *per viſum et teſtimonium illorum provideat, quod tot & tales operarii ſint in prædictis cambiis, qui ſufficiant ad operationes Regias faciendas, ne Rex pro defectu hujuſmodi miniſtrorum dampnum incurrat.* Clauſ. 17 *Hen.* 3. *n.* 8.

Aſſayers, Of plate made by *goldſmiths*, &c. Theſe are for *aſſaying* and marking thereof; of whom with their fees, and how the *aſſay offices* are regulated by ſtatute, ſee 12 *G.* 2. *c.* 26. and title **Goldſmiths.**

Aſſayſiare, A word uſed in old charters for to take fellow judges. Henricus *Dei gratia Rex Angl. &c. dilecto et fideli ſuo* Nicholao de la Tour *ſalutem. Sciatis quod conſtitui-*

conſtituimus vos juſticiarium noſtrum una cum hiis quos vobis duxeritis aſſayſiandos *ad aſſiſam novæ diſſeiſinæ capiendam.* ——Cartular. Abbot. Glaſton MS. f. 57. *Cowell.*

Aſſecurare, *(Abſecurare)* To make ſecure by pledges, or any ſolemn interpoſition of faith. In the charter of peace between *Hen.* 2. and his ſons, this word is mentioned. *Hoveden, anno* 1174.

Aſſembly unlawful, From the Fr. *aſſembler, i. e. aggregare,* to flock together. It is the meeting of three or more perſons to do an unlawful act, altho' they do it not: as to aſſault, or beat any perſon; enter into houſes, or lands, *&c. Weſt. Symb. part.* 2. *ſect.* 65. Their meeting and abiding together makes the crime, where they do not execute their intentions: if the intention be to redreſs public grievances, and be executed, 'tis adjudged treaſon. 3 *Inſt.* 9. In the reign of King *Ed.* 6. a law was made declaring it treaſon for twelve perſons, or more, to *aſſemble* together to attempt to kill any of the King's council, or to alter the laws, *&c.* and that it ſhould be felony to attempt to deſtroy parks, pull down houſes, incloſures, *&c.* if they continued together an hour after proclamation made by a juſtice of peace, mayor, or ſheriff: but this was ſoon repealed, though it ſeems to have given riſe to the late riot act; which ordains, that where twelve perſons, or more, *unlawfully aſſembled,* continue together an hour after proclamation to depart, they ſhall be guilty of felony. *Stat.* 1 *Geo.* 1. *c.* 6. See **Religious aſſembly,** and **Riot.** *Jacob.*

Aſſent or **Conſent.** To a legacy of goods, the aſſent of the executor is neceſſary, before the legatee may take the ſame; but to a deviſe of lands that are freehold, it is not required.

The *aſſent* of an executor to a deviſe of a *legacy,* or of any *perſonal thing,* is ſo neceſſary, that if the legatee to a deviſe take the thing without the delivery and aſſent of the *executor,* he may have an action of treſpaſs againſt them. *Keilw.* 128. *Dyer.*

But ſuch an *aſſent* will not make a deviſe of a *perſonal thing* good, which is void in itſelf; as for inſtance, the teſtator having *a term of years, as executor* to another, deviſed it to *a ſtranger,* and made his ſon executor, and died; the *deviſee* enter'd by the aſſent of the ſon, and afterwards he, as executor to his father, re-entered upon the *deviſee*; and adjudged, that his entry was lawful, becauſe the deviſe to this *ſtranger* was void, for an executor cannot deviſe that to another which *he hath as executor,* becauſe he hath it not in his own right, but for the uſe of his teſtator; therefore an aſſent to a void deviſe muſt be alſo void. *Plowd. Comm.* 525.

The Common law takes notice of the *aſſent* of the executor to the legacy, and doth give him time to conſider of the value of the goods, and ſtate of the debts of the teſtator, that he may pay a legacy with ſafety; the executor being to pay debts before legacies. *Perk.* 570.

No property can be transferred to the legatee without the aſſent of the executor; but if the executor doth once aſſent to the legacy, the legatee hath ſuch a property veſted in him that he may take it, though the executor revokes his *aſſent* afterwards. And there may be an *aſſent* implied, as well as *expreſs*; as if the executor offers the legatee money for what is bequeathed him; or directs others to the legatee to buy it, *&c. Plowd.* 543. 4 *Rep.* 28.

In treſpaſs, *&c.* the caſe was, that the teſtator being poſſeſſed of lands, which he held upon ſeveral leaſes, ſome of which were in the dioceſe of the *archbiſhop of York,* and ſome in *peculiars,* deviſed all thoſe leaſes to his ſon, and made his daughter executrix, who was then an *infant*; the mother took out adminiſtration *durante minore ætate* of the executrix in the *peculiar,* where her huſband died, and granted the reſidue of the term of the lands there to the plaintiff; the queſtion was, whether the *aſſent of an adminiſtratrix, durante minore ætate,* was good to the deviſe of a term, or whether the aſſent of the executrix herſelf, tho' an *infant,* was neceſſary; the chief juſtice *Anderſon* held, that an infant at the age of eighteen might aſſent; but the court doubted, whether the aſſent of an adminiſtratrix was good or not. *Cro. Eliz.* 719.

The teſtator being poſſeſſed of a *term of years,* deviſed the ſame to his daughter *for ſo many years as he ſhould live,* remainder to *J. S.* and made his daughter's huſband *executor,* and died; the executor ſome time afterwards declared, that if his wife was dead his eſtate in the lands was ended; adjudged, that this was a ſufficient aſſent to make him take the term, in right of his wife, as a *deviſee*; but if he had not made ſuch a declaration, he might have taken it as executor, and not as a deviſee, and by conſequence might have enjoyed it, if he had ſurvived his wife. *March* 137. Adjudged, that the ſpiritual court may compel an executor to aſſent to a legacy, and ſo may a court of equity. *March* 97.

Aſſeſſors, Thoſe that *aſſeſs* publick taxes. Two inhabitants in every pariſh were *aſſeſſors* for the royal aid, to rate every perſon according to the value of his eſtate. *Stat.* 16 & 17 *Car.* 2. There are aſſeſſments of pariſh duties, for raiſing money for the poor; repairing of highways, *&c.* made and levied by rate on the inhabitants; as well as aſſeſſments of publick taxes, *&c.* See **Aſſiſors.**

Aſſets. All thoſe goods and chattels which belonged to the teſtator at the time of his death in any part of the world, and which do come to the hands of the executor, ſhall be *aſſets* (from the French *aſſez,* enough) or *ſufficient* goods and chattels to make the executor chargeable (as far as the ſaid goods and chattels extend) to a creditor or legatee. 6 *Rep.* 47. *Terms de la ley.*

Aſſets are real or perſonal; where a man hath lands in fee ſimple, and dies ſeiſed thereof, the lands which come to his heir, are *aſſets* real: and where he dies poſſeſſed of any perſonal eſtate, the goods which come to the executors, are aſſets perſonal: *Aſſets* are alſo divided into *aſſets per deſcent,* and *aſſets enter maines*; aſſets by deſcent is where a perſon is bound in an obligation, and dies ſeiſed of lands which deſcend to the heir, the land ſhall be *aſſets,* and the heir ſhall be charged as far as the land to him deſcended will extend: *Aſſets enter maines,* is when a man indebted makes executors, and leaves them ſufficient to pay his debts and legacies; or where ſome commodity or profit ariſeth to them in right of the teſtator, which are called *aſſets* in their hands. *Termes de la ley.*

1. *What ſhall be aſſets by deſcent in the hands of an heir; and what not.*
2. *What ſhall be aſſets in the hands of an executor or adminiſtrator.*
3. *Pleadings in caſes of real and perſonal aſſets.*

1. *What ſhall be aſſets by deſcent in the hands of an heir; and what not.*

Where the anceſtor enters into a bond, and dies ſeiſed of lands *in fee,* which *deſcend* to his heir as ſuch, thoſe lands are *real aſſets* and liable to ſatisfy the debts of the anceſtor, and they are called aſſets by deſcent; and formerly the law was, that if the heir had ſold or aliened the land before the bond was put in ſuit, the debt was loſt; to prevent which, by ſtatute 3 & 4 *Will. & M. c.* 14. *ſect.* 5. it is enacted, that "where any heir at law ſhall be liable to pay the debt of his anceſtor in regard of any lands or tenements deſcending to him, and ſhall alien the ſame before any action brought, ſuch heir at law ſhall be anſwerable for ſuch debt in an action of debt, to the value of the land by him aliened; in which caſes all creditors ſhall be preferred as in actions againſt executors; and ſuch execution ſhall be taken out upon any judgment obtained againſt ſuch heir, to the value of the land, as if the ſame were his own debt, ſaving that the lands, *bona fide* aliened before the action brought, ſhall not be liable."

Sect. 6. "Where any action of debt upon ſpecialty is brought againſt any heir, he may plead *riens per diſcent* at the time of the original writ brought, or the bill filed; and the plaintiff may reply, that he had lands, tenements or hereditaments, from his anceſtor before the original writ brought or bill filed; and if upon iſſue joined it be found for the plaintiff, the jury ſhall inquire of the value of the lands deſcended, and thereupon judgment ſhall be given and execution awarded; but if judgment be given

attempting to leap over the fence on horſeback, forbid him, and endeavoured to hinder him; and that the plaintiff coming to aſſiſt *Payton* aſſaulted the defendant, who defended himſelf, and traverſed, that he was guilty, *&c.* but in *Davis Grove*, *&c.* and upon demurrer, it was objected to the replication, that the plaintiff *did not poſitively alledge*, that the defendant *did beat him*, but only, that *he would have beaten him*; but notwithſtanding this exception, the defendant had judgment. *Nota*; in this caſe the plaintiff juſtified as a ſervant in defence of his maſter's goods, and the defendant juſtified in defence of his maſter's poſſeſſion; and it was held, that a ſervant may juſtify a *battery* in defence of his perſon, but not of his goods. 2 *Lutw.* 1481.

In aſſault, *&c.* the defendant pleaded *ſon aſſault demeſne*, and the plaintiff replied, that he was ſtanding at his gate, and that the defendant being on horſe-back offered to ride over him, whereupon he *molliter* aſſaulted the plaintiff in defence of himſelf, *quæ eſt eadem*, *&c.* and on demurrer to this replication it was adjudged to be ill, becauſe he thereby had confeſſed that he had made the firſt aſſault; for he ſhould have pleaded *molliter manus impoſuit* to hinder the riding over him. 1 *Lev.* 282. 1 *Sid.* 441. 1 *Mod.* 36. 2 *Keb.* 597.

In treſpaſs for aſſault and battery, the defendant juſtifies by a *molliter impoſuit manus* for due correction of the defendant as his ſervant, and pleads over, that ſince that time the plaintiff *exoneravit & relaxavit* (without ſaying *per ſcriptum*) to the defendant the ſaid matter; to this plea it was demurred for doubleneſs ſpecially; and the opinion of the court was, that it was double; for though the releaſe be not ſufficiently pleaded, yet it is pleaded ſo as iſſue be taken upon it, which will make it double. 1 *Sid.* 175. 1 *Keb.* 661. *S. C.*

Aſſault, battery and wounding; the defendant pleaded, that he was conſtable of *B.* and for ſuch a miſdemeanor done by the plaintiff he laid his hands on him and put him into the ſtocks *quæ eſt eadem tranſgreſſio*; and upon demurrer to this plea, it was adjudged for the plaintiff, becauſe the defendant did neither plead Not guilty, nor juſtify the *wounding*; but if he had pleaded, that the hurt which the plaintiff had was of his wrong, this had anſwered all. *Cro. Eliz.* 93.

In aſſault, *&c.* the defendant juſtified by a *molliter manus impoſuit* on the plaintiff, who *entered his cloſe*; and upon a demurrer, it was adjudged no good plea, becauſe the plaintiff did not ſhew what eſtate he had in the cloſe, or that he did endeavour to turn the defendant out. *Moor* 846.

In *aſſault*, *battery* and *wounding*; the defendant pleaded *ſon aſſault demeſne*; and upon a demurrer to this plea it was adjudged ill, becauſe the defendant cannot juſtify the *wounding* by this plea; but this may be ſtill a queſtion, for the ground of the action is the treſpaſs, to which this is a proper plea. *Sid.* 246.

Aſſault, *battery* and *wounding*, *&c.* the defendant as to the wounding, pleads Not guilty, and as to the reſt, he juſtified by virtue of a *ca. ſa.* againſt the plaintiff, and a warrant thereon, and that he to arreſt the plaintiff *molliter manus impoſuit* on him, and that he did take and impriſon him, *quæ quidem mollis impoſitio manuum*, is the ſame aſſault and battery of which the plaintiff complained; and upon demurrer it was objected, that *molliter manus imponere* was too ſoft a juſtification for *battery*; the defendant ought to have pleaded Not guilty as to that; and that it was ſo adjudged in *Stony* and *Calvert*'s caſe, *Hill.* 2 *W.* 3. *Rot.* 759. in *C. B.* 'Tis true *Serjeant Levinz*, who reports the principal caſe, tells us, that *molliter manus imponere* is a *battery*, if the defendant hath nothing to excuſe himſelf for ſo doing, and that moſt of the precedents are as this is; tho' in ſome the battery is particularly anſwered, and that would be the ſurer way of pleading. 1 *Lutw.* 925.

2. *How aſſault and battery are puniſhed.*

The wrong-doer is ſubject both to an action at the ſuit of the party, wherein he ſhall render damages; and alſo to an indictment at the ſuit of the King, wherein he ſhall be fined according to the heinouſneſs of the offence. 1 *Hawk.* 134.

An aſſaulting or threatning a counſellor at law, or attorney employed in a cauſe againſt a man; or a juror giving verdict againſt him; or his adverſary for ſuing him, *&c.* is puniſhable on an indictment, by fine and impriſonment, for the contempt. 1 *Hawk.* 58.

Stat. 8 & 9 *W.* 3. *cap.* 11. [intituled, *An act for the better preventing frivolous and vexatious ſuits*] enacts that, where there are ſeveral defendants to any action of aſſault, *&c.* and one or more acquitted, the perſon ſo acquitted ſhall recover coſt of ſuit, unleſs the judge certify that there was a reaſonable cauſe for making ſuch perſon a defendant or defendants to ſuch action.

Stat. 9 *Ann. cap.* 16. Aſſaulting a privy counſellor in the execution of his office, is felony without benefit of clergy.

Stat. 6 *Geo.* 1. *c.* 23. *ſect.* 11. If any perſon ſhall wilfully and maliciouſly aſſault any perſon or perſons in the publick ſtreets or highways, with an intent to tear, ſpoil, cut, burn or deface, and ſhall tear, ſpoil, cut, burn, or deface the garments or cloaths of ſuch perſon or perſons, then all and every perſon and perſons ſo offending, being thereof lawfully convicted, ſhall be adjudged to be guilty of felony; and the courts before whom ſuch offender ſhall be tried ſhall have full power and authority of tranſporting ſuch felons for the ſpace of ſeven years.

Stat. 7 *Geo.* 2. *cap.* 21. Aſſaulting with intent to rob is made felony and tranſportation.

Indictment for an aſſault:

THE *jurors for our lord the King upon their oaths preſent, that* ——— *of* ——— *in the ſaid county* ——— *on the* ——— *day of* ——— *in the* ——— *year of the reign of our ſovereign lord* George *the Third*, &c. *at* ——— *aforeſaid in the county aforeſaid, in and upon* ——— *then and there being in the peace of God and of our ſaid lord the King, with force and arms an aſſault did make, and him the ſaid* ——— *then and there did beat, wound and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the ſaid* ——— *and to the evil example of all others offending in the like kind, and againſt the peace of our ſaid lord the King, his crown and dignity.*

Aſſay of weights and meaſures, (From the Fr. *Eſſay*, *i. e.* a proof of trial) Is the examination of weights and meaſures, by clerks of markets, *&c. Reg. Orig.* 279. —— *Ac aſſiſam et* aſſayam *panis, vini et cerviſiæ. Paten.* 37 *H.* 8. Tho. Marrow. *Cowell.*

Aſſayer of the King, (*Aſſayator Regis*) An officer of the King's mint, for the trial of ſilver; he is indifferently appointed between the maſter of the mint and the merchants that bring ſilver thither for exchange. *Anno* 2 *H.* 6. *cap.* 12. Veſſels of gold ſhall be *aſſayed.* 28 *Ed.* 1. *c.* 20. and 18 *Car.* 2. *c.* 5. —— *Mandatum eſt* Will. Hardel *clerico quod convocatis in præſentia ſua omnibus monetariis, aſſayatoribus, cuſtodibus, operariis et aliis miniſtris de Cambiis Regis* London & Cantuar. *per viſum et teſtimonium illorum provideat, quod tot & tales operarii ſint in prædictis cambiis, qui ſufficiant ad operationes Regias faciendas, ne Rex pro defectu hujuſmodi miniſtrorum dampnum incurrat.* Clauſ. 17 *Hen.* 3. *n.* 8.

Aſſayers, Of plate made by *goldſmiths*, &c. Theſe are for *aſſaying* and marking thereof; of whom with their fees, and how the *aſſay offices* are regulated by ſtatute, ſee 12 *G.* 2. *c.* 26. and title **Goldſmiths.**

Aſſayſare, A word uſed in old charters for to take fellow judges. Henricus *Dei gratia Rex Angl. &c. dilecto et fideli ſuo* Nicholao de la Tour *ſalutem. Sciatis quod conſtitui-*

conſtituimus vos juſticiarium noſtrum una cum hiis quos vobis duxeritis aſſayſiandos *ad aſſiſam novæ diſſeiſinæ capiendam.* —Cartular. Abbot. Glaſton MS. f. 57. *Cowell.*

Aſſecurare, *(Abſecurare)* To make ſecure by pledges, or any ſolemn interpoſition of faith. In the charter of peace between *Hen.* 2. and his ſons, this word is mentioned. *Hoveden, anno* 1174.

Aſſembly unlawful, From the Fr. *aſſembler, i. e. aggregare,* to flock together. It is the meeting of three or more perſons to do an unlawful act, altho' they do it not: as to aſſault, or beat any perſon; enter into houſes, or lands, *&c. Weſt. Symb. part.* 2. *ſect.* 65. Their meeting and abiding together makes the crime, where they do not execute their intentions: if the intention be to redreſs public grievances, and be executed, 'tis adjudged treaſon. 3 *Inſt.* 9. In the reign of King *Ed.* 6. a law was made declaring it treaſon for twelve perſons, or more, to *aſſemble* together to attempt to kill any of the King's council, or to alter the laws, *&c.* and that it ſhould be felony to attempt to deſtroy parks, pull down houſes, incloſures, *&c.* if they continued together an hour after proclamation made by a juſtice of peace, mayor, or ſheriff: but this was ſoon repealed, though it ſeems to have given riſe to the late riot act; which ordains, that where twelve perſons, or more, *unlawfully aſſembled,* continue together an hour after proclamation to depart, they ſhall be guilty of felony. *Stat.* 1 *Geo.* 1. *c.* 6. See **Religious aſſembly,** and **Riot.** *Jacob.*

Aſſent or **Conſent.** To a legacy of goods, the aſſent of the executor is neceſſary, before the legatee may take the ſame; but to a deviſe of lands that are freehold, it is not required.

The *aſſent* of an executor to a deviſe of a *legacy,* or of any *perſonal thing,* is ſo neceſſary, that if the legatee to a deviſe take the thing without the delivery and aſſent of the *executor,* he may have an action of treſpaſs againſt them. *Keilw.* 128. *Dyer.*

But ſuch an *aſſent* will not make a deviſe of a *perſonal thing* good, which is void in itſelf; as for inſtance, the teſtator having *a term of years, as executor* to another, deviſed it to *a ſtranger,* and made his ſon executor, and died; the *deviſee* enter'd by the aſſent of the ſon, and afterwards he, as executor to his father, re-entered upon the *deviſee*; and adjudged, that his entry was lawful, becauſe the deviſe to this *ſtranger* was void, for an executor cannot deviſe that to another which *he hath as executor,* becauſe he hath it not in his own right, but for the uſe of his teſtator; therefore an aſſent to a void deviſe muſt be alſo void. *Plowd. Comm.* 525.

The Common law takes notice of the *aſſent* of the executor to the legacy, and doth give him time to conſider of the value of the goods, and ſtate of the debts of the teſtator, that he may pay a legacy with ſafety; the executor being to pay debts before legacies. *Perk.* 570.

No property can be transferred to the legatee without the aſſent of the executor; but if the executor doth once aſſent to the legacy, the legatee hath ſuch a property veſted in him that he may take it, though the executor revokes his *aſſent* afterwards. And there may be an *aſſent* implied, as well as *expreſs*; as if the executor offers the legatee money for what is bequeathed him; or directs others to the legatee to buy it, *&c. Plowd.* 543. 4 *Rep.* 28.

In treſpaſs, *&c.* the caſe was, that the teſtator being poſſeſſed of lands, which he held upon ſeveral leaſes, ſome of which were in the dioceſe of the *archbiſhop of York,* and ſome in *peculiars,* deviſed all thoſe leaſes to his ſon, and made his daughter executrix, who was then an *infant*; the mother took out adminiſtration *durante minore ætate* of the executrix in the *peculiar,* where her huſband died, and granted the reſidue of the term of the lands there to the plaintiff; the queſtion was, whether the *aſſent of an adminiſtratrix, durante minore ætate,* was good to the deviſe of a term, or whether the aſſent of the executrix herſelf, tho' an *infant,* was neceſſary; the chief juſtice *Anderſon* held, that an infant at the age of eighteen might aſſent; but the court doubted, whether the aſſent of an adminiſtratrix was good or not. *Cro. Eliz.* 719.

The teſtator being poſſeſſed of a *term of years,* deviſed the ſame to his daughter *for ſo many years as he ſhould live,* remainder to *J. S.* and made his daughter's huſband *executor,* and died; the executor ſome time afterwards declared, that if his wife was dead his eſtate in the lands was ended; adjudged, that this was a ſufficient aſſent to make him take the term, in right of his wife, as a *deviſee*; but if he had not made ſuch a declaration, he might have taken it as executor, and not as a deviſee, and by conſequence might have enjoyed it, if he had ſurvived his wife. *March* 137. Adjudged, that the ſpiritual court may compel an executor to aſſent to a legacy, and ſo may a court of equity. *March* 97.

Aſſeſſors, Thoſe that *aſſeſs* publick taxes. Two inhabitants in every pariſh were *aſſeſſors* for the royal aid, to rate every perſon according to the value of his eſtate. *Stat.* 16 & 17 *Car.* 2. There are aſſeſſments of pariſh duties, for raiſing money for the poor; repairing of highways, *&c.* made and levied by rate on the inhabitants; as well as aſſeſſments of publick taxes, *&c.* See **Aſſiſors.**

Aſſets. All thoſe goods and chattels which belonged to the teſtator at the time of his death in any part of the world, and which do come to the hands of the executor, ſhall be *aſſets* (from the French *aſſez,* enough) or *ſufficient* goods and chattels to make the executor chargeable (as far as the ſaid goods and chattels extend) to a creditor or legatee. 6 *Rep.* 47. *Terms de la ley.*

Aſſets are real or perſonal; where a man hath lands in fee ſimple, and dies ſeiſed thereof, the lands which come to his heir, are *aſſets* real: and where he dies poſſeſſed of any perſonal eſtate, the goods which come to the executors, are aſſets perſonal: *Aſſets* are alſo divided into *aſſets per deſcent,* and *aſſets enter maines*; aſſets by deſcent is where a perſon is bound in an obligation, and dies ſeiſed of lands which deſcend to the heir, the land ſhall be *aſſets,* and the heir ſhall be charged as far as the land to him deſcended will extend: *Aſſets enter maines,* is when a man indebted makes executors, and leaves them ſufficient to pay his debts and legacies; or where ſome commodity or profit ariſeth to them in right of the teſtator, which are called *aſſets* in their hands. *Termes de la ley.*

1. *What ſhall be aſſets by deſcent in the hands of an heir; and what not.*
2. *What ſhall be aſſets in the hands of an executor or adminiſtrator.*
3. *Pleadings in caſes of real and perſonal aſſets.*

1. *What ſhall be aſſets by deſcent in the hands of an heir; and what not.*

Where the anceſtor enters into a bond, and dies ſeiſed of lands *in fee,* which *deſcend* to his heir as ſuch, thoſe lands are *real aſſets* and liable to ſatisfy the debts of the anceſtor, and they are called aſſets by deſcent; and formerly the law was, that if the heir had ſold or aliened the land before the bond was put in ſuit, the debt was loſt; to prevent which, by ſtatute 3 & 4 *Will. & M. c.* 14. *ſect.* 5. it is enacted, that "where any heir at law ſhall be liable to pay the debt of his anceſtor in regard of any lands or tenements deſcending to him, and ſhall alien the ſame before any action brought, ſuch heir at law ſhall be anſwerable for ſuch debt in an action of debt, to the value of the land by him aliened; in which caſes all creditors ſhall be preferred as in actions againſt executors; and ſuch execution ſhall be taken out upon any judgment obtained againſt ſuch heir, to the value of the land, as if the ſame were his own debt, ſaving that the lands, *bona fide* aliened before the action brought, ſhall not be liable."

Sect. 6. "Where any action of debt upon ſpecialty is brought againſt any heir, he may plead *riens per diſcent* at the time of the original writ brought, or the bill filed; and the plaintiff may reply, that he had lands, tenements or hereditaments, from his anceſtor before the original writ brought or bill filed; and if upon iſſue joined it be found for the plaintiff, the jury ſhall inquire of the value of the lands deſcended, and thereupon judgment ſhall be given and execution awarded; but if judgment be given againſt

againſt ſuch heir by confeſſion of the action, without confeſſing the aſſets deſcended, or upon demurrer or *nihil dicit*, it ſhall be for the debt and damages without any writ to inquire of the tenements deſcended."

Sect. 7. "Every deviſee made liable by this act ſhall be chargeable in the ſame manner as the heir at law, notwithſtanding the lands deviſed ſhall be aliened before action brought."

By the Common law, a truſt of lands, deſcending upon an heir, was not aſſets even in equity; but now by *ſtat.* 29 *Car.* 2. *c.* 3. it is enacted, that "if any *ceſtui que* truſt die, leaving a truſt in fee ſimple to deſcend to his heir, ſuch truſt ſhall be taken to be aſſets by deſcent, and the heir ſhall be chargeable with the obligation of his anceſtors, by reaſon of ſuch aſſets, as fully as if the eſtate in law had deſcended to him; provided that no heir ſhall, by any kind of plea or confeſſion of the action, or ſuffering judgment by *nient dedire*, or any other matter, be chargeable to pay the condemnation out of his own eſtate, but execution ſhall be ſued of the whole eſtate, ſo made aſſets in his hands by deſcent, in whoſe hands ſoever it ſhall come after the writ purchaſed.

"Eſtate *pur auter vie* ſhall be aſſets in the hands of the heir, if it come to him by reaſon of a ſpecial occupancy; and where there is no ſpecial occupant, it ſhall go to the executors or adminiſtrators of the party that had the eſtate thereof by virtue of the grant, and ſhall be aſſets in their hands."

The father bound himſelf and *his heirs* in a bond, and died, leaving iſſue two ſons; the eldeſt of them entered on the lands as heir at law to the father, and he died without iſſue, and then the youngeſt ſon entered; and in an action of debt brought againſt him upon this bond, it was adjudged, that he ſhould be charged with aſſets as heir to his father, notwithſtanding the intermediate deſcent of the lands to his elder brother. *Dyer* 368.

So where the father ſettled his lands to the uſe of himſelf for life, remainder to his *eldeſt ſon in tail male*, reverſion to his own right heirs, and died, leaving iſſue two ſons; the eldeſt, who was tenant in tail, entered, and had iſſue one ſon, and died, which ſon died without iſſue, ſo that the eſtate tail was ſpent, then the *youngeſt ſon* of the father entered; adjudged, that theſe lands ſhall be aſſets in his hands to anſwer the father's debts; and the ſole queſtion was, whether he ſhould be charged as heir to his father, without naming the intermediate deſcent to his elder brother and nephew. 3 *Lev.* 286.

A leaſe was made, rendring rent to the leſſor, his *heirs or aſſigns*; the leſſor died, and his executor received the rents for ſeveral years after the death of the leſſor, this ſhall not be aſſets, becauſe it belonged to the heir. *Dyer* 361.

A reverſion in fee expectant upon an *eſtate-tail* ſhall not be aſſets, becauſe 'tis in the power of the tenant in tail in poſſeſſion to bar it when he will; but when the eſtate-tail is ſpent, then 'tis aſſets by deſcent. 6 *Rep.* 58. *b.* Therefore where the jury found, that the heir had ſeveral lands and *tenements* by deſcent, the verdict was uncertain, becauſe it may be true, and yet the heir may not have aſſets, becauſe a reverſion expectant upon an eſtate-tail is a *tenement*, and yet that is not aſſets. 6 *Rep.* 58.

Where a copyhold of inheritance deſcends to an heir, this ſhall not be aſſets, becauſe 'tis an inheritance *created by cuſtom*, and the deſcent is directed by the Common law; but it doth not allow any other collateral qualities which do not concern ſuch deſcent, and which are proper to other inheritances at Common law. 4 *Rep.* 22. *a.*

The father being ſeiſed of lands in fee, deviſed them to his ſon and heir in fee *upon condition*, that he ſhould pay his debts within a year; and if he failed, that then his executors ſhould have all, and pay his debts; 'tis true, the heir had a fee ſimple by this deviſe, but being obliged by this *condition* to pay his father's debts, he hath the lands as a *purchaſer*, and therefore they ſhall not be aſſets by deſcent. *Cro. Car.* 161.

Feoffment of a manor, excepting and *reſerving black acre* to himſelf for life only, *habend'* except before excepted, to the uſe of *A.* in tail. Reſolved, there is no limitation of uſe of black acre, ſo it *reſults and deſcends*, and is aſſets. *Lev.* 287.

Mortgagor and mortgagee; the mortgagor died, and the *heir of the mortgagor and mortgagee join in a ſale* of thoſe lands; quære, whether the *money that comes to the hands of the heir by this ſale* ſhall be aſſets to charge him in equity; and *per Finch*, lord keeper, It ſhall not, no more than he ſhall be charged at law after alienation *bona fide*. *Freem. Rep.* 303. *pl.* 369.

Where the *heir takes by a will with a charge* as paying 20 *l. &c.* he does not take by deſcent, but by purchaſe, and therefore this is no aſſets; *per North* Ch. J. and *Atkins* J. 2 *Mod.* 286.

If one *demiſes lands to* A. *and his heirs during the life of* J. S. or if *tenant for life grants his eſtate to* A. *and his heirs*, and *A. dies*, his heir ſhall take only as ſpecial occupant, and he ſhall not be charged hereby as heir in an action of debt. 10 *Rep.* 98.

Lands in Ireland are aſſets to ſatisfy a bond debt in *England*, but it is otherwiſe of lands in *Scotland*. *Arg. Vern.* 419. cites it as reſolved in *Evans* and *Aſcough's* caſe. *Latch* 234. and 6 *Rep. Dowdale's* caſe.

Lands were purchaſed by A. but *conveyed to* A. *and* B. but *B.* to take nothing. *A.* dies, *B.* decreed to convey to the heirs of *A.* Theſe lands, being truſt lands, are no aſſets in equity, though the truſt be decreed in equity. *Chan. Ca.* 12.

If *ceſty que truſt* binds himſelf and his heirs in a *bond*, this *truſt* is not aſſets to the *heir*, tho' queſtioned in Lord Chancellor *Hide's* time, but clearly the *truſt of a leaſe for years* is aſſets to charge an executor in equity. 3 *Chan. Rep.* 37.

If the equity of redemption of a *mortgage in fee*, ſince the ſtatute of frauds and perjuries, ſhould be aſſets in equity to ſatisfy *bond debts*, was the queſtion; the lord chancellor inclined that it was; but reſpited his decree till the maſter had reported a ſtate of the caſe. *Vern. Rep.* 411.

The heir claiming under a voluntary ſettlement ſells the land; the purchaſor before his purchaſe had notice that there was a bond, but there was no original filed; and before the commencement of the ſuit he had covenanted to pay the reſidue of his purchaſe. On a bill filed, the queſtion was, if the money in the purchaſor's hands is liable to the payment of this bond debt; and the court thereupon inclined to diſmiſs the plaintiff's bill. 2 *Vern.* 44.

A. ſeiſed in fee, demiſed to truſtees for raiſing 1500 *l.* a year for his wife's jointure, *who re-demiſed* to him for *a leſſer term*, paying a pepper-corn. This term ſo redemiſed, being raiſed only for a particular purpoſe, ſhall not be aſſets for payment of other debts than the inheritance would have been liable to; *per* two juſtices, the maſter of the Rolls, and Lord Ch. *Jefferies*. 2 *Vern.* 52.

A. having *a leaſe for three lives to him and his heirs* from the church, *mortgaged it for* 99 *years, if the three lives lived ſo long*, and died after the mortgage was forfeited; decreed this mortgage term, which would not have been aſſets at law, to be ſold for the payment of debts. *Arg.* 2 *Vern. Rep.* 54. *pl.* 50.

Reverſionary lands purchaſed in the names of A. *and* B. after the death of *C.* who has an eſtate for life in the lands, were decreed to go towards ſatisfaction of judgments. 2 *Chan. Rep.* 145, 146.

Where a *leaſe for years is to wait on the* inheritance, it *ſhall be aſſets* as to debts, *as well where the intereſt of the leaſe is in the hands of a ſtranger, and not in the owner of the inheritance, as when it is in* ceſty que truſt *of the inheritance, and the intereſt of the inheritance in a ſtrange truſtee*; *per* Lord Keeper. 2 *Chan. Caſ.* 152.

Upon a queſtion if the *equity of redemption of a mortgage for years of an eſtate in fee* be aſſets, the lord chancellor's preſent opinion was, if there was a ſurplus beyond the mortgages, it ſhould be aſſets to anſwer *bond debts*. *Vern. Rep.* 410.

A. ſeiſed in *fee, mortgages for* 99 *years*. The *equity of redemption* has always in this court been adjudged aſſets. *Arg.* 2 *Vern.* 55.

The judgment againſt an heir, who has *a reverſion in fee* deſcended to him, is only of aſſets *quando acciderint*; and the creditor cannot by bill in equity compel the heir to ſell the reverſion, but muſt expect till it falls. 2 *Vern.* 134.

A. on

A. on ſale of lands takes a *bond* from the purchaſor *to pay* any ſum of money not exceeding 500*l. as A. ſhould by will appoint. Per cur. A.* having power to diſpoſe of the 500*l.* it muſt be look'd on as part of his eſtate, and decreed it to be aſſets liable to the plaintiff's debts. 2 *Vern. Rep.* 319.

In *debt* upon bond brought *againſt* the defendant as *heir* to his father, *&c.* and *riens per deſcent* pleaded, the plaintiff replied aſſets, and iſſue was taken thereupon; and the evidence was, that the obligor, the defendant's *father*, *deviſed to the defendant, his* ſon and *heir, certain meſſuages in Exchequer alley in fee*, but *chargeable with an annuity* or rent-charge payable *to the defendant's mother*; and it was held by *Holt* Ch. J. that theſe meſſuages deſcended to the defendant, and were aſſets; for (by him) the *difference* is, *where the deviſe makes an alteration of the limitation of the eſtate* from that which the law would make by deſcent; and where the deviſe *conveys the ſame eſtate* as the law would make by deſcent, but charges it with incumbrances. In the former caſe, the heir takes by purchaſe, in the latter by deſcent. *Ld. Raym. Rep.* 728.

A. having *a power to charge* 3000*l. on his eſtate for ſuch purpoſes as he ſhould think fit*, by deed appoints the 3000*l.* as a collateral ſecurity for quiet enjoyment of an eſtate he had ſold; but the appointment to be void, if no incumbrance appears; *A. deviſed it to his daughter*; the creditors of *A.* brought a bill to have the 3000*l.* applied to payments of debts, and decreed accordingly; *per Wright* Lord Keeper. 2 *Vern.* 465.

A. being ſeiſed of the *truſt of an advowſon in groſs in fee*, dies indebted by ſpecialties, *&c.* the creditors bring a bill againſt the heir at law and the truſtees of the advowſon, and pray a ſale of the advowſon. The heir at law inſiſted that the advowſon was not aſſets: it was argued for the plaintiff, that an advowſon is aſſets at law; that it is an eſtate of inheritance, deſcendable, valuable, and ſaleable, *&c.* but for the heir at law it was argued, that an advowſon is not aſſets at law *in an action of debt*, and cited *Anderſon* Ch. J. in Sir *Edward Clear* and *Peacock's* caſe, *Cro. El.* 359. tho' otherwiſe *in a formedon* to bar the warranty; and that the reaſon of the difference ſeems to be, that the aſſets to make the warranty a bar in a *formedon*, are to be conſidered according to the *groſs value*, *&c.* whereas upon a judgment in debt againſt the heir, the aſſets are to be extended according to the *annual value*, and there is no annual value of an advowſon, and therefore cannot be extended; tenant by *elegit* is to hold *quouſque* he is ſatisfied, according to the yearly value, *&c.* and how can that be when there is no yearly value, and when is it that the debt ſhall be ſaid to be ſatisfied, and the party have the advowſon? That there are other circumſtances of inheritances which are not aſſets at law, as copyhold, eſtates *pur auter vie*, before the ſtatute of frauds, *&c.* Farther, in a *formedon*, the bar and ſatisfaction by warranty and aſſets deſcended, is not by holding the aſſets and profits to be taken, but the thing itſelf, *i. e.* the aſſets are delivered in ſatisfaction abſolutely, according to the groſs value; whereas in debt the lands, *&c.* are always found and delivered *clari valoris*, *&c.* To this it was replied, as to the objection and inſtance of the copyhold, that is not aſſets, becauſe in the eye and notion of law it is but an eſtate at will, tho' cuſtom has now fixed and made it in ſome reſpects an eſtate of inheritance, but yet the tenure is *ad voluntatem domini*; and another reaſon, becauſe the lord may not have a tenant put upon him contrary to his will, *&c.* and as to the caſe of eſtates *pur auter vie*, the heir took not properly by deſcent, but as ſpecial occupant, *&c.* and as to the diſtinction of an advowſon's being aſſets in a *formedon*, and not in an action of debt, it is founded upon the ſingle authority of what *Anderſon* ſaid *obiter*, and wherein, as to the point then in judgment, the whole court was againſt him. *Co. Lit.* 374. *b.* is general that it is aſſets. It is true, it is there mentioned with reference to warranty to create a bar in *formedon*; but the reaſon there given, and the books that were cited, prove it to be aſſets generally, becauſe valuable, and ſhew how it may be valued annually; and if a value, as admitted, may be put upon it in groſs, as in the caſe of warranty, why may it not by proportion admit of a yearly value? As ſuppoſe an advowſon worth 20*l.* then one twentieth may be ſaid to be the annual value, and the objection of it's producing no annual profits will not hold, becauſe that proves likewiſe that no value ought at all to be put upon it; and the ſole difficulty here is the manner of valuing or charging; but that is no difficulty in this court, which will decree a ſale of aſſets deſcending, as a more ready and compendious method of ſatisfaction; and even at law, ſince the ſtatute of *W.* 3. againſt fraudulent deviſes, if the heir aliens the aſſets, he is chargeable according to the groſs value, *&c.* wherefore, *&c.* Lord Chancellor, as to the point of the advowſon being aſſets, *&c.* held, that if it be not aſſets at law this court would not make it ſo, becauſe that would be to alter the law, *&c.* and ſeem'd, that as a groſs value (as it is admitted) may be put upon it, ſo it may be capable of a valuation *per annum*, *&c.* At another day Lord Chancellor delivered his judgment, and held that the advowſon was aſſets, and accordingly decreed it to be ſold, *&c.* he held that it was a rule, that all lands, tenements and hereditaments were extendable; and that an advowſon was ſo in the caſe of the King; he cited Sir *William Jones* 24. an advowſon was a thing valuable, and lay in tenure, and might be held by knight's ſervice, *&c.* he referred to *Fleta* and *Briton*. The 23d of *March* following, this decree was affirmed in the houſe of Lords, *Eyres* Ch. J. of *C. B. Price* J. and *Comyns* B. being the only judges in town, attended; and being aſked their opinion, whether an advowſon in groſs was aſſets in ſuch caſe at law, declared it was; and the houſe did not divide. 3 *Vin.* 145, 146. cites *MS. Rep.*

If a *reverſion upon a leaſe for life, with rent reſerved*, deſcends to the heir, it is good aſſets. *Br. Aſſets per deſcent, pl.* 23.

An *annuity* is no aſſets, for it is only a *choſe en action*; *quod nota bene. Br. Aſſets per Deſcent, pl.* 26.

If a *manor deſcends to an infant*, and after a *tenancy eſcheats*, ſuch land eſcheated ſhall be aſſets by deſcent. *Finch* 17. *b.*

2. *What ſhall be aſſets in the hands of an executor or adminiſtrator.*

All goods and chattels, debts, *&c.* that are recovered by the executor by *action*, after the death of the teſtator, ſhall be accounted aſſets; but not before they are recovered. For if the executor do never recover, or get a debt into his poſſeſſion, he ſhall never be charged; provided he hath uſed his utmoſt endeavour to recover it, and cannot do it. 1 *Rep.* 98. *Office of Ex. ch.* 6. *p.* 92.

Damages recovered for goods taken away in the life of the teſtator, ſhall be aſſets. *Lit.* 192. 1 *Inſt.* 124. *a.*

If an obligee or creditor is made executor, the debt is aſſets; but he may pay himſelf before any other in equal or inferior degree. 1 *Inſt.* 264. *Office of Ex. ch.* 2. *p.* 43, 63.

If an executor of his own wrong, to whom 20*l.* is owing, doth ſeize goods to the value of 20*l.* intending to pay himſelf a debt of that value, this ſhall be aſſets in his hands to make him chargeable to any creditor or legatee. 5 *Rep.* 30.

Tho' a plantation be an inheritance, yet being in a foreign country, it is a chattel to pay debts, and a thing that is teſtamentary. *Vent.* 358.

A man *mortgaged* his eſtate for a term of years; adjudged, that the equity of *redemption* is aſſets, and ſo is a *term for years* to attend the inheritance; ſo, if the mortgagor pays the money to the heir of the mortgagee, he ſhall not take it as heir, but it ſhall be aſſets in his hands. 3 *Leon.* 32.

Where a *debt due* to the teſtator is *certain*, as 'tis always by bond, there a *releaſe* of that debt makes it aſſets in the hands of the executor, becauſe it ſhall be intended, that he would not have made the releaſe unleſs the money had been paid to him, or unleſs he had otherwiſe been ſatisfied; therefore where an *infant* was executor, and the adminiſtrator during his minority had received 600*l.* due to the teſtator, and when the infant executor came of age, and had proved the will, he releaſed the *adminiſtrator*

tor of all actions; it was adjudged in an action of debt brought againſt him, that the 600*l.* which was certain, and which was now releaſed, ſhall be aſſets in his hands; for it ſhall be intended, that he received it from the adminiſtrator, otherwiſe he would not have given him a releaſe. *Owen* 36.

There was a bond of 100*l.* made to the teſtator for performance of covenants, which afterwards were broken, and the executor put the bond in ſuit, and pending the action, ſubmitted himſelf to arbitration, and the obligor was awarded to pay the executor 70*l.* and that upon payment of the money he ſhould releaſe the bond; all which was done; and in an action brought againſt him, it was adjudged, that he ſhall be anſwerable for aſſets to the value of 100*l.* for ſo was the bond; and tho' he was compelled by the award to releaſe the bond, yet it was his own act to ſubmit to the arbitration. 3 *Leon.* 51.

Judgment was had againſt one *Vaughan*, who afterwards died inteſtate, having firſt made a *fraudulent gift* of his goods to his daughter, who by virtue thereof gave them to the defendant, and having gotten the goods in his poſſeſſion, took out *adminiſtration* to the ſaid inteſtate; afterwards a *ſcire facias* was brought againſt him as executor to *Vaughan*, and this was to have execution of the ſaid judgment, who pleaded *riens inter maines*; and all this matter being found ſpecially, the plaintiff recovered againſt him; for by his intermeddling with the goods, he was an *executor de ſon tort*, becauſe the gift to the daughter being fraudulent and void, as to creditors, ſhe could not give him any authority to poſſeſs them, therefore he was a treſpaſſer, and they were aſſets in his hands, and his ſubſequent adminiſtration did not purge that wrong; therefore a creditor may ſue him as *executor de ſon tort*, or he might have ſued him as adminiſtrator. *Cro. Eliz.* 810.

Executor *durante minore ætate* of an *infant*, who after came of age, and proved the will, and left ſeveral goods of the teſtator in the hands of the ſaid *executor*, yet theſe ſhall be adjudged aſſets in his hands; now he had proved the will, tho' he never had *the poſſeſſion*, becauſe he might have recovered them of the executor after he came of age. 1 *Rol. Abr.* 921.

Leaſe for eighty years, if the leſſee ſhould live ſo long, the remainder at his deceaſe to his executors or aſſigns for forty years; the leſſee died inteſtate, and his wife took out letters of adminiſtration; and in an action of treſpaſs brought by her, againſt one who claimed under another leaſe, it was adjudged, that this term was veſted in the leſſee, and then his adminiſtratrix ſhall have it, and that it ſhall be aſſets in her hands. *Cro. Eliz.* 666.

Debt againſt an executor, who pleaded *plene adminiſtravit*; the plaintiff replied, aſſets *die impetrationis brevis*, upon which they were at iſſue, and the proof for the plaintiff was, that on the ſame day 100*l.* was paid to the defendant in the prerogative court, and that preſently, by the order of the ſaid court, the ſame was paid by the defendant to another creditor of his teſtator; adjudged, that becauſe the money was once in the hands of the defendant as executor, *&c.* it ſhall be accounted aſſets, tho' paid over to another creditor; but the defendant might have helped himſelf, upon pleading this matter ſpecially, but not upon *plene adminiſtravit*. *Dyer* 20.

The leſſor covenanted with the teſtator to make him a *leaſe for years* of ſuch lands, but he died before the leaſe was made, and afterwards the leſſor made *the leaſe to his executors:* Now it was adjudged, that the *term* ſhall be aſſets in their hands, for tho' it commenced in their time, and after the death of the teſtator; yet, becauſe the covenant was made *to him*, and by virtue thereof the leaſe was granted *to them*, it ſhall be aſſets. 1 *Rep.* 91. *Chapman's* caſe, cited in *Shelley's* caſe.

If an executor *ſurrenders a term of years* (which he had as *executor*) to him who hath the reverſion in fee, tho' 'tis merged and extinct as to him, yet it ſhall ſtill remain aſſets in the executor to ſatisfy debts and pay legacies; and ſo it had been, if the executor himſelf had purchaſed the inheritance in reverſion. 1 *Rep.* 87. in *Corbett's* caſe.

The teſtator being poſſeſſed of ſeveral goods, made *M. R.* his executrix, and died; the executrix made a *fraudulent gift* of the goods, but continued in the poſſeſſion of them, and afterwards ſhe married the defendant, and died; and in an action of debt brought againſt him as *executor de ſon tort*, the queſtion was, whether goods were aſſets in his hands, *he having paid debts and legacies*; adjudged that they were; 'tis true, the gift, tho' fraudulent, is good againſt all but creditors; but if in reſpect to them 'tis void (as certainly it is), then the executrix had a good title to them, notwithſtanding her fraudulent gift; and if ſo, then her huſband having poſſeſſed the goods, and *paid legacies*, *&c.* he is liable as *executor of his own wrong*, and they are aſſets in his hands. *Cro. Eliz.* 405.

Money decreed in a court of equity by reaſon of any executorſhip, and *money* ariſing by ſale of lands by executors, and even *damages* recovered by an executor, ſhall be aſſets, and ſo ſhall the *intereſt of money* lent by the executor, if it was the teſtator's money; 'tis true, it hath been argued to the contrary, becauſe the teſtator lends the money at his own peril; therefore he being to bear the loſs, 'tis reaſonable he ſhould have the profit; but now 'tis held otherwiſe. *Moor* 858.

A woman, who was an executrix, was poſſeſſed of a term for years; afterwards ſhe married, and then the huſband purchaſed the reverſion; adjudged, that the term was extinguiſhed as to her, if ſhe ſhould ſurvive her huſband, but that it ſhall be aſſets in his hands in reſpect to all others. *Moor* 54.

A *copyholder* made a leaſe for years of his copyhold lands by *licence*; the leſſee died, this ſhall be aſſets in the hands of his executor or adminiſtrator; but 'tis clearly ſo, if the leaſe was made for *one year*, becauſe that is a leaſe warranted by common law, and not cuſtomary. *Poph.* 188.

Deviſe of land *to his executor to ſell*, or a deviſe of lands *to be ſold by his executors*, and with the money ariſing by ſuch ſale to pay the teſtator's debts, there the money received by ſuch ſale ſhall be aſſets; but where the *lands are deviſed to be ſold for the payment of debts and legacies*, with the money ariſing by ſuch ſale, and with his perſonal eſtate, and the *reſidue thereof* (after the ſame are paid) *is given* to his executor; in ſuch caſe the perſonal eſtate ſhall be aſſets, and ſhall be applied as far as it will go for the payment of the debts, and the lands ſhall not be charged any farther than to ſatisfy what the perſonal eſtate falls ſhort; and this is in favour of the heir. *Hard.* 405.

Upon a *bill of review*, the queſtion was, whether a copyhold eſtate deviſed to be ſold by the executor to *pay debts*, and afterwards ſold accordingly, ſhall be aſſets *at law and in equity*, or in *law only*, for if only *in law*, then a decree to make them aſſets in equity, without a trial firſt at law, is erroneous; and it was held, that the decree could not be reverſed, becauſe it doth not appear, whether upon the proof, at the hearing the cauſe, it was matter of law or equity; and after a decree, it ſhall be intended that the court adjudged upon the whole proof. *Hard.* 174.

The teſtator being poſſeſſed of a leaſe for a long *term for years*, deviſed it to his wife for life, then to his eldeſt *ſon* for life, and to the heirs male of his body, and made his wife executrix, and died very much in debt; the executrix proved the will, and paid ſo many of the debts as the ſtock of the teſtator did amount unto, and then ſhe *aſſented* to the deviſe of the *ſaid leaſe*, and made one *Crofts* her executor, and ſhe died; afterwards *Crofts* entered into articles with the plaintiff to *ſell the leaſe* to him for a valuable conſideration, and was decreed to convey it accordingly, becauſe the leaſe was aſſets in his hands notwithſtanding the *aſſent* of the executrix to the deviſe thereof; 'tis true, by ſuch *aſſent* it was ſo veſted in the ſon, that if he had ſold the leaſe the ſale had been good, but it not being ſold, it ſhall now remain in *Crofts* as a truſt for the creditors of the firſt teſtator. 1 *Chan. Rep.* 256.

Goods taken from the teſtator in his life-time are not aſſets till recovered by the executor, and in his *poſſeſſion*; neither is *a debt due to him upon bond* any aſſets till recovered, becauſe it is but a *choſe* in action. *Owen* 36.

So where the teſtator deviſed *lands to be ſold* by his executor, and that the money ariſing by ſuch ſale ſhould be diſtributed amongſt his daughters *when they ſhould be of*

full

full age; the executor ſold the lands purſuant to the power given him by the will; adjudged, that the money ſhall not be aſſets in his hands in the mean time to ſatisfy debts, becauſe *'tis limited to a particular uſe*. 1 *Leon*. 87.

The teſtator *pawned* his own goods, and his executor redeemed them with his own money, and retained them till he was ſatisfied; adjudged, that the property was altered by the *retainer*, he having paid to the value, and therefore the goods ſhall not be aſſets in his hands. *Keilw*. 63.

The teſtator made a leaſe of his houſe, *&c.* rendring *rent* to himſelf, his *heirs or aſſigns*, and died: after his death, his executor received the rent ſeveral years, and in an action brought againſt him, wherein the iſſue was, whether he had aſſets or not, all this matter was found ſpecially; but adjudged no aſſets, becauſe the rent belonged to the heir. *Dyer* 361.

The plaintiff who was an executor, and the defendant ſubmitted themſelves to an award, and the arbitrators awarded the defendant to pay the plaintiff 300*l*. afterwards a creditor of his teſtator attached this money in the defendant's hands, for the debt owing by the teſtator; but adjudged, that this was not aſſets till the executor had received it, and therefore the attachment was not good. 1 *Lev*. 306.

J. S. took a bond in *truſt* for another, and died; adjudged, this is not aſſets in the hands of his executor: ſo where the obligee *aſſigned* over a bond, and covenanted nor to revoke it, and died; this is not aſſets in the hands of his executor. 1 *Salk*. 79.

Leſſee for years died, his executor entered and received the profits; adjudged, that they are received by him as tertenant, and appropriated to the uſe of the leſſor, but what is over and above the rent ſhall be aſſets. 1 *Salk*. 79.

In an attachment upon a prohibition, the caſe was, the inteſtate died ſeiſed of a meſſuage, which he held *for three lives*; the adminiſtrator was ſued in the ſpiritual court for a diſtribution, and to exhibit an inventory, which he did, but omitted the term for *three lives*; and the queſtion was, whether an eſtate *pur auter vie* was diſtributable, according to the ſtatute 22 & 23 *Car*. 2. By virtue of the ſtatute 29 *Car*. 2. *cap*. 3. and adjudged, that 'tis not diſtributable; for it remains a freehold notwithſtanding the ſtatute, which ſubjects it to the payment of debts, but not legacies, unleſs expreſsly given out of it. 2 *Salk*. 464.

3. *Pleadings in caſes of real and perſonal aſſets.*

Debt againſt an heir upon the bond of his anceſtor; he pleaded *riens per deſcent* in fee ſimple from his father but *ſixteen acres of land*, and demanded judgment if he ſhould be farther charged than to the value of thoſe lands; and judgment was given accordingly, that he ſhould be no farther charged; but it was likewiſe adjudged, that if he had not confeſſed the action, and ſhewed the *certainty of the aſſets deſcended* to him, but had pleaded *riens per deſcent* only; or if a judgment had been againſt him by confeſſion, or by any defect in pleading, in ſuch caſe the plaintiff ſhall have judgment and execution of all his lands, or a *ca. ſa.* to take his body, as if it had been his own debt. *Plow. Com*. 440.

Debt againſt the heir upon a bond of his anceſtor, and the plaintiff had judgment by *nihil dicit*; and upon a *ſci. fa.* to have execution, the defendant pleaded *riens per deſcent* in fee ſimple at the time of the writ brought, or after; adjudged, that after a judgment by *nihil dicit*, or confeſſion, *&c.* the heir comes too late to plead *riens per deſcent*, *&c.* for he ought to have pleaded that firſt. *Dyer* 344.

But *anno* 1 *Car*. both theſe caſes were denied to be law, (*viz.*) the teſtator obtained a judgment againſt *G. D.* and made his wife executrix and died; ſhe alſo having made an executor died; then *G. D.* the creditor died, and the executor of the wife brought a *ſcire facias* againſt his heirs, who pleaded *riens per deſcent &c.* of *G. D.* and it was found, that he had two acres and a half by deſcent, *&c.* it was thereupon moved, that there might be a general judgment againſt the defendant, as well of his own lands as of thoſe he had by deſcent, becauſe his plea was falſe; but adjudged, that execution ſhall be only of a moiety of thoſe lands which were found to deſcend to him, for it ſhall be no otherwiſe againſt him than it would have been againſt his anceſtor, even if the judgment had been by *nil dicit*, or by confeſſion; but in the principal caſe, the lands deſcending from *G. D.* to the heir, ſubject to the payment of a *judgment*, come to him with a charge, and therefore he cannot be ſued as *heir*, becauſe he comes in as a *purchaſer*. *Poph*. 193.

In a *formedon*, the defendant pleaded in bar a warranty with aſſets; the plaintiff replied *riens per deſcent*; upon which they were at iſſue, and the jury found that the anceſtor of the defendant, whoſe warranty was pleaded in bar, was ſeiſed of the lands in nature of *gavelkind*, and by his will deviſed them to two ſons, equally to be divided between them, and to their heirs, and that the defendant was his eldeſt ſon; adjudged that this was not aſſets by deſcent. 1 *Leon*. 315.

Debt againſt an executor upon a bond of the teſtator; the defendant pleaded, that his teſtator became bound to the plaintiff in a ſtatute of 2000 *l*. conditioned, that whereas the ſaid plaintiff had covenanted to aſſure ſuch lands to the uſe of himſelf for life, remainder to the right heirs of the teſtator, that if he performed the ſaid covenant, then the ſtatute ſhould be void, and aſſigned the breach in non-performance; and averred, that he had aſſets *die impetrationis billæ*, but did not ſay *nec unquam poſtea*, *&c.* and this was adjudged an incurable fault. 2. *Cro*. 131.

The teſtator made *two executors*, who lived in ſeveral counties; one of them poſſeſſed all the goods, but yet in an action brought againſt him he could not plead *plene adminiſtravit*, becauſe aſſets in the hands of one executor is aſſets in the hands of both; and the jury in *one county* may *find aſſets* in another, for 'tis their *finding aſſets* which is the ſubſtance, and the *place* is but ſurpluſage; for if the defendant plead *plene adminiſtravit* at *Saliſbury*, the jury may find aſſets at *Exeter*, becauſe 'tis a thing tranſitory. *Keilw*. 51. 6 *Rep*. 46.

But in finding aſſets, the jury muſt always find to what *value*, otherwiſe 'tis void, becauſe the plaintiff muſt recover only according to the value of the aſſets found, which muſt be certain; therefore to find aſſets generally, without ſaying to what value, is void. 1 *Rol. Rep*. 58.

Where an executor is ſued upon a *promiſe* to pay a legacy, in ſuch caſe the plaintiff need not *aver*, that the defendant hath aſſets in his hands at the *time of the promiſe made*, becauſe it ſhall be intended, that he had aſſets at that time, for otherwiſe he would not have promiſed to pay the money. 2 *Cro*. 602.

Debt againſt Sir *John Chicheſter* as executor of *Windham*, who was executor of *Lutterell*, upon a bond of the ſaid *Lutterell*; the defendant pleaded, that *Lutterel*, who was the firſt teſtator, was indebted to *Windham* in 100*l*. upon a ſtatute, and that after the death of *Lutterell* his goods, of the value of 100*l*. *came to the hands of Windham* as his executor, *which he adminiſtred and retained*, to ſatisfy his own debt, and that beyond the ſaid goods he had nothing in his hands; the plaintiff replied, that *Windham* had aſſets of the goods of *Lutterell* beyond the ſaid 100*l*. *in London*; upon which they were at iſſue, and the cauſe was tried there; and a verdict for the plaintiff, that *Windham*, at the time of his death, had goods and chattles of *Lutterell &c.* It was objected, that this was an immaterial iſſue, becauſe *Windham* might *adminiſter* all the goods of *Lutterell which came to his hands*, and yet *Lutterell* might have more goods, which might come to the defendant *Chicheſter* after the death of *Windham*, and which never came to the hands of *Windham*; and therefore, the defendant having ſaid nothing of any goods of *Lutterel's* which came to him after the death of *Windham*, his plea is ill; but adjudged, that this exception came too late after a verdict. *Dyer* 185.

Aſſumpſit &c. againſt an executor, upon the promiſe of his teſtator, but the plaintiff in his declaration did not *aver*, that the defendant had aſſets; and adjudged, that the declaration was good, and that he need not make any ſuch averment. *Cro. Eliz*. 52.

The defendant demurred to a bill in equity, becauſe it was brought to diſcover aſſets before any ſuit commenced at law againſt him, for if an action had been brought againſt him as executor, &c. he might have confeſſed the action or paid the debt, but now he may be doubly vexed. *Hard.* 115.

Debt againſt an executor, who pleaded *plene adminiſtravit*, the plaintiff replied aſſets *die exhibitionis billæ originalis*, (*viz.*) ſuch a day; this iſſue was tried in *Middleſex*, and the *bill of* Middleſex *being the original*, the plaintiff at the trial was required to produce it, (when in truth it ought to be given in evidence) and becauſe he did not produce it he was nonſuited; and upon a motion for a new trial he could not prevail, for he ought to have tendered a *bill of exceptions to the evidence*. *Sid.* 226.

Debt againſt an executor, who pleaded *plene adminiſtravit*; the plaintiff replied aſſets *die exhibitionis billæ, viz.* on the 23*d of October*, which was the firſt day of *Michaelmas term*; now, if it appear upon the evidence, that the bill was not filed till *fourteen days* afterwards, or within the term, whatever the defendant paid after the 23*d of October*, and before the bill filed, ſhall be aſſets, if it was paid in diſcharge of any debts of equal degree with the debt for which the action was now brought. *Sid.* 432.

Aſſewiare, To draw or drain out water from marſhy grounds.——*Quod ipſi mariſcum prædictum* aſſewiare, *et ſecundum legem mariſci Wallis includere, et in culturam redigere.*——*Et mariſcum illum ſic* aſſewiatum, *incluſum et in culturam redactum tenere.* Mon. Angl. 2 vol. f. 334.

Aſſidere, or **Aſſidare,** To tax equally. *Proviſum eſt generaliter quod prædicta quadrageſima hoc modo* aſſideatur *et colligatur. Mat. Par. ann.* 1232. Sometimes it ſignifies to aſſign an annual rent, to be paid out of a particular farm; as *Manerium rex Stephanus dedit et* aſſedit *eis centum marcis. Cowell, ed.* 1727.

Aſſign, *Aſſignare,* Hath two ſignifications, one general, as to appoint a deputy, or ſet over a right unto another; in which ſenſe *Britton* ſaith (*fol.* 122.) this word was firſt brought into uſe for the favour of baſtards, becauſe they cannot paſs under the name of heirs; therefore were and are compriſed under the name of *aſſignees*. The other ſignification is ſpecial, as to *point at*, or ſet forth; ſo we may ſay to *aſſign errors*, *Old N. B. fol.* 19. that is, to ſhew where the error is committed; *to aſſign falſe judgment*, *Id. fol.* 17. that is, to declare how and where the judgment is unjuſt; *to aſſign a falſe verdict*, *Id. fol.* 112. and *to aſſign a perjury*, *anno* 9 *R.* 2. *c.* 3. to *aſſign the ceſſor*, *Old Nat. Brev. fol.* 1341. to ſhew how the plaintiff had ceſſed or given over; to *aſſign waſte* is to ſhew wherein eſpecially the waſte is committed. *Reg. Orig. fol.* 72. *Aſſign* in a general ſignification is uſed 20 *E.* 1. and 11 *H.* 6. *cap.* 2. in theſe words, *juſtices aſſigned to take aſſizes*; and the ſubſtantive *aſſignment* hath the ſame ſignification, *Weſt Symbol. par.* 1. *b.* 2. *ſect.* 496. As the *aſſignment af a leaſe*, is the ſetting over the intereſt of the leſſee to another; in which ſenſe is uſed alſo the word *aſſignee*, *aſſignatus*, for one that is appointed or deputed by another, to do any act, or perform any buſineſs, or enjoy any commodity; and ſuch an *aſſignee* may be either by deed or in law; *aſſignee by deed*, is he that is appointed by a perſon; as when a leſſee of a term aſſigns the ſame to another, he is his *aſſignee by deed:* An *aſſignee in law*, is he whom the law ſo makes, without any appointment of the perſon. *Dyer, fol.* 6. *nu.* 5. So the executor is *aſſignee in law* to the teſtator, who dies poſſeſſed of a leaſe made to him and his *aſſigns*. *Perkins* (tit. *Grants*) ſaith, that an *aſſignee* is he that occupieth a thing in his own right, and *deputy* is he that doth it in the right of another. *Cowell.*

Aſſignee. See **Aſſign** and **Aſſignment.**

Aſſignment, Is the appointing, or transferring, or ſetting over a right to another. He that aſſigns is called the *aſſignor*, and he to whom the thing is aſſigned is named the *aſſignee*. *Termes de la ley.*

1. *What things are aſſignable, and not aſſignable.*
2. *Who ſhall be an aſſignee; and who not.*
3. *Where aſſignee ſhall be bound by the covenant of the aſſignor.*
4. *Where aſſignee ſhall not be bound by the covenant of the aſſignor.*

1. *What things are aſſignable, and not aſſignable.*

Adjudged, that where leſſee *for years* of the *crown* is put out of his eſtate by a ſtranger, yet he may aſſign the term, tho' he is not in poſſeſſion; becauſe the reverſion being in the crown, he cannot lawfully be put out of poſſeſſion, but at his own will. *Cro. Eliz.* 275.

Adjudged, that a *duty*, which is not naturally *a debt* but by *circumſtances* only; as a debt upon a bond to ſave another harmleſs, or for performance of covenants, which are not debts till the party is damnified, or the covenants broken, yet theſe bonds may be aſſigned to the crown for a debt; but execution ſhall not be taken againſt the obligors, until a *ſci. fa.* is brought againſt them to ſhew cauſe why ſuch an aſſignment ſhould not be made. 2 *Leon.* 55.

A leaſe was made for years to commence after the death of the tenant for life then in poſſeſſion; and after his death a ſtranger entered, and the leſſee aſſigned his leaſe; adjudged, that the aſſignment was good, notwithſtanding the entry of the ſtranger; but if the leſſee himſelf had firſt entered, and had afterwards been put out, he could not have made an aſſignment till he had reentered. *Cro. Eliz.* 15.

Adjudged, that a bond may be aſſigned to the Queen, without enrolling it, and where the obligee is not indebted to her; but it cannot be aſſigned to a ſubject unleſs for a debt due by the aſſignor to the aſſignee. 4 *Leon.* 9, 90.

Judgment in an action of debt againſt a *leſſee for years*, who *after the judgment aſſigned his term*, and then, after a year, he who had obtained the judgment brought a *ſci. fa.* to have execution; adjudged, that if the aſſignment was made *bona fide*, it ſhall be good, and the term not liable to this execution; but if the leſſee for years had not aſſigned the term *bona fide*, but only in fraud to defeat the execution, and the aſſignee had *bona fide* aſſigned it to another, it ſhould not be liable to this execution in the hands of the aſſignee. *Godb.* 161.

Leaſe for years to commence after the death of a leſſee for life, who was *diſſeiſed*, but yet by that diſſeiſin the intereſt of the leſſee for years is not turned into a *right*, but remains as it did before the diſſeiſin, and therefore may be aſſigned. 2 *Brownl.* 224.

The vendor ſold a manor to another in fee; *proviſo*, that he, his heirs and aſſigns might dig ore in parcel of the waſte; the vendor afterwards aſſigned his intereſt to *G. D.* for twenty-one years, who aſſigned it to two more; adjudged, that this aſſignment was good. *Godb.* 17.

Bonds and ſpecialties may be *aſſigned* over, and therefore where *A.* was indebted to *B.* and *B.* was indebted to *C.* in ſuch caſe *B.* may aſſign the bond of *A.* to *C.* ſo where there is a bond for the performance of covenants in a leaſe, if the leſſee aſſigns the leaſe, he may likewiſe aſſign the bond; but this muſt be before any of the *covenants are broken*; but if any of the covenants are broken and the leſſee afterwards aſſigns the leaſe and bond, and the aſſignee puts the bond in ſuit, 'tis maintenance. *Godb.* 81.

Caſe againſt the defendant for aſſigning *counterfeit bills* of publick faith to the plaintiff to the value of 800*l.* upon demurrer to the declaration it was inſiſted for the defendant, that the plaintiff had declared of an *aſſignment of papers*, which could not be, for thoſe are things in action which are not aſſignable; but adjudged, that the ordinance of parliament gave authority to aſſign ſuch papers. *Style* 348.

The

The *conuſee of a ſtatute* extended the lands, and after the *liberate* returned he *aſſigned* his intereſt, but the conuſor ſtill continued in poſſeſſion; the queſtion was, whether this intereſt was aſſignable? it was inſiſted that it was, for before the actual entry of the conuſee, 'tis like an *intereſſe termini*, or the intereſt of one who hath a leaſe to commence *in futuro*; but adjudged, that it was not *aſſignable*, becauſe by the *return of the extent, an intereſt* was veſted in the conuſee, and by the *return of the liberate* it muſt be intended that he had the actual poſſeſſion, for the ſheriff returns *quod liberari feci*, ſo that the eſtate of the conuſee is turned into a right which may be granted; but it cannot be *aſſigned*, for the conuſor continuing in poſſeſſion makes a diſſeiſin. 2 *Salk.* 563.

'Tis enacted by the ſtatute 7 *Jac. that a debtor to the King ſhall not aſſign any debts to him, but ſuch as did originally grow due to the debtor:* afterwards there was a debtor to the huſband in 2000*l.* by a ſtatute; the huſband made his wife executrix, and died; ſhe married again one *G. D.* who was indebted to the King, and then the huſband and wife aſſigned this ſtatute to the King in ſatisfaction of the debt due to him; adjudged, that the *aſſignment* was good, for tho' the ſecond huſband had the *ſtatute in right of his wife*, and by conſequence the debt was not *originally* due to him; yet becauſe he might *releaſe* the ſtatute 'tis the ſame thing as if it had been *originally* taken in his name. 2 *Cro.* 324.

Grant of a releaſe for life *pro concilio impendendo* to the grantee and his aſſigns, payable yearly at the four feaſts, *&c.* this grant was aſſigned to another, who demanded the rent on the land; adjudged, this aſſignment was good. 7 *Rep.* 28.

Lands were *ſettled to raiſe* money for *daughters portions*; one of them *married J. S. and died before her portion paid*; *J. S. took adminiſtration* to her, *and aſſigned all his intereſt to W.* his ſon by a former venter. *J. S.* died, and *W.* ſued in equity for the money; it was inſiſted; that tho' *choſes en action* might on a conſideration be aſſigned here by the party that had the intereſt, and the aſſignee might recover them, and that the aſſignor's releaſe afterwards, unleſs without notice, and on conſideration paid to the releaſee, would not hurt the aſſignee, yet the aſſignment being by an adminiſtrator, and not by him that had it in his own right, this had never been good; for there might be a creditor of the inteſtate's to ſatisfy, *&c.* Lord Keeper thought there was a conſiderable difference between an aſſignment of the party and of the adminiſtrator, where the adminiſtrator was a ſtranger and had no precedent, and no colour of right, but merely by the adminiſtration; but that here the adminiſtration was *pro forma* only; for here *J. S.* had a right to the money, as a portion or proviſion for his wife, and every man has not ready money to give his daughters, but their portions are to be provided for by this means, and therefore it is reaſonable to advance or promote the eſtabliſhing of them, ſo as they may be diſpoſed by the huſband, (who ſettles a jointure) as money itſelf may be; and ſo decreed for the plaintiff. *Chan. Ca.* 170.

Bonds are aſſignable *in Holland*, and therefore aſſignments of bonds there, according to their cuſtom, are allowable here; by the Lord Keeper. *Chan. Ca.* 232.

One was to receive a proportion of damages from the town of *Hamborough*, and it was *ſtipulated, that* the *town ſhould pay* ſo much *to the parties that had ſuffered*; one whereof aſſigned his part or *proportion of the reparation* to another, notwithſtanding which, he afterwards received the money to his own uſe, whereupon the aſſignee brought covenant againſt him, and the words of the deed were only *aſſignavit* and *tranſpoſuit*; and tho' the thing in its nature was not aſſignable, yet it was enough to bind the aſſignor to ſuffer the aſſignee to enjoy it. 12 *Mod.* 554.

A *bare power* is not aſſignable, but where it is coupled with an intereſt it may be aſſigned; agreed *per cur.* as where a leaſe was made with power for leſſor, his heirs and aſſigns, to cut down, grub up and ſell trees; and leſſor granted ſome of the trees to *J. S.* who with his ſervants entered and cut them down; and it was objected, that this was a power annexed to the reverſion only, and not aſſignable: and that he might have juſtified under the leſſor, but not in his own right. But the court held, that an action doth lie in this caſe, both againſt the leſſor and his aſſignee acting under his power, for the leſſor might ſever the trees from the reverſion; whereupon judgment was given for the defendant. 2 *Mod.* 317.

Arrears of rent, *&c.* is a *choſes en action*, and not aſſignable. See *Skin.* 6.

It has been doubted if a *leaſe for years before entry* and poſſeſſion be aſſignable. See *Show.* 291.

The Lord *Montjoy* ſeiſed of the manor of *Cauford* in fee did, by deed indented and inrolled, *bargain and ſell* the ſame to *Brown* in fee, in which indenture this clauſe was contained; provided always, that the ſaid *Brown* did *covenant and grant to and with* the ſaid Lord *Montjoy* his heirs and aſſigns, that the Lord *Montjoy*, his heirs and aſſigns, *might dig for ore in the lands* (which were great waſte) parcel of the manor, *and to dig turf alſo for the making of allum.* Reſolved, that notwithſtanding this grant, *Brown* and his heirs and aſſigns might dig alſo; and like to the caſe of common *ſauns nombre. Co. Lit.* 164. *b.*

J. G. being *poſſeſſed of a term of* 2000 *years deviſed the eſtate to M. his wife for* 50 *years if ſhe ſo long live* and from and after her *deceaſe to B. his ſon for* 50 *years, if he ſhould ſo long live*, and from and *after* his deceaſe, *to C. and D. his two grandchildren, for and during the reſidue and remainder of the ſaid term*; *C.* aſſigns his intereſt in the life time of *M.* and *B.* and the queſtion was, whether this was ſuch an intereſt veſted in the life-time of *M.* and *B.* as was aſſignable in their life-time; it was argued, that it was a contingent intereſt till after the deceaſe of *M.* and *B.* and if ſo, altho' it be ſuch an intereſt veſted as cannot be defeated by the firſt deviſees, and ſuch as may be releaſed in their life-time, yet it cannot be aſſigned over; and ſeems to be the ſame caſe to this purpoſe, as *Matthew Manning's* caſe and *Lampett's* caſe; on the other ſide it was inſiſted, that there is but one part of the term carved out, *viz.* 50 years and 50 years, and the remainder of the term reſted in the deviſor, which he had power to deviſe as he thought fit, and the deviſee might aſſign over; and in *Manning* and *Lampett's* caſes, the whole term was deviſed to the party for life, and was in him during his life, and nothing but a poſſibility in the executory deviſee; and the Maſter of the Rolls was of that opinion, that this was an aſſignable intereſt, and that the moiety paſſed by the aſſignment, and decreed accordingly. 2 *Freem. Rep.* 238.

A poſſibility, right of entry, or thing in action, or cauſe of ſuit, or title for a condition broken, cannot be granted or aſſigned over by law; for if this were permitted, it would promote maintenance, and prove prejudicial to ſuch as, being able to contend with thoſe with whom the original contract was, might find themſelves depreſſed by a powerful adverſary. *Co. Lit.* 214. 1 *Rol. Abr.* 376. *Skin.* 6, 26.

But though a bond, being a *choſe en action*, cannot be aſſigned over ſo as to enable the aſſignee to ſue in his own name, yet he has by the aſſignment ſuch a title to the paper and wax, that he may keep or cancel it. *Co. Lit.* 232.

Alſo in equity a bond is aſſignable for a valuable conſideration paid, and the aſſignee alone becomes entitled to the money; ſo that if the obligor, after notice of the aſſignment, pays the money to the obligee, he will be compelled to pay it over again. 2 *Vern.* 595.

An aſſignee muſt take it ſubject to the ſame equity that it was in the hands of the obligee; as if on a marriage treaty the intended huſband enters into a marriage-brokage bond, which is afterwards aſſigned to creditors, yet it ſtill remains liable to the ſame equity, and is not to be carried into execution againſt the obligor. 2 *Vern.* 428.

An *office of truſt* is not grantable or aſſignable to another: and therefore it was adjudged, that the office of a *filazer*, which was an office of truſt, could not be aſſigned, and if it could not be aſſigned it cannot be extended upon a ſtatute. *Dyer* 7.

One, who had goods to the *value of* 30*l. and no more*, was indebted to one in 5*l.* and to another in 10*l.* and aſſigned all his goods to him to whom he owed 5*l.* to the intent,

intent, that after he was ſatisfied, he would be kind to the debtor for the reſt; adjudged, that becauſe there was fraud in part, the aſſignment ſhall be void for the whole; but one judge was of opinion, that it ſhall be only void for the reſidue after the 5*l.* paid. *Godb.* 161.

A leaſe was made to the huſband and wife, and the children *between them begotten, at the aſſignment of the huſband*; they had then but *one child*, and afterwards many more; the wife died, and the huſband aſſigned the leaſe to his *ſecond ſon*, who was born after the making the leaſe, and for that reaſon it was void; becauſe the power which the huſband had aſſigned, extended only to ſuch children which he had at the time of the making the leaſe. 1 *Leon.* 287.

Adjudged, that ſome things in reſpect of their nature are not aſſignable, or to be granted over; as for inſtance, if the donee in tail holdeth of the donor by *fealty*, he cannot aſſign it over to another, becauſe *fealty* is incident to, and inſeparable from, the reverſion; ſo if the *founder of a college* grant his foundation, tho' it be to the King, the grant is void, becauſe 'tis inſeparable from his blood. 11 *Rep.* in *Magdalen College's* caſe.

Leſſee for ſix years of a *tavern in London* made an under-leaſe thereof for three years, in which it was covenanted between them, that the under-leſſee ſhould in every month during the ſaid three years *account with the leſſor for all the wine ſold in that tavern*, and ſhould pay to him *per tun*; afterwards the leſſor *aſſigned* the reſidue of the other three years to another, and he required the under-leſſee to accompt, who refuſing, he brought an action of covenant againſt him; who pleaded, that he had accompted to the aſſignee of the three years: and upon demurrer to this plea, it was adjudged againſt the defendant, becauſe this being a *collateral covenant*, and not one which did go with the land, it did not paſs by the aſſignment of the three years. *Godb.* 120.

If there be a deviſe of a term to *A.* for life, remainder to *B. B.* cannot in the life time of *A.* aſſign his intereſt, becauſe he has not a bare poſſibility, for *A.* may outlive the number of years. 10 *Co.* 47.

Several things are aſſignable by acts of parliament, which ſeem not aſſignable in their own nature; as promiſſary notes, by the 3 & 4 *Ann. c.* 9. bail-bonds by the ſheriff, by 4 & 5 *Ann. c* 16. a judge's certificate for taking and proſecuting a felon to conviction, by 10 & 11 *W.* 3. *c.* 23. a bankrupt's effects by the ſeveral ſtatutes of bankruptcy.

2. *Who ſhall be an aſſignee, and who not.*

Under the word *aſſigns*, the aſſignee of an aſſignee *in perpetuum*, the heir of an aſſignee, or the aſſignee of an heir, ſhall take. *Co. Lit.* 384. *b.* So, if a man covenant with another, *his executors and aſſigns*, the aſſignee of an aſſignee, and his executors, and the aſſignee of an executor or adminiſtrator of every aſſignee are included, and ſhall have covenant. 5 *Co.* 17. *b.* But if an obligation be, *to pay ſuch perſons as he ſhall name by his will or writing*; there muſt be an expreſs nomination, and his executor ſhall not take as aſſignee. *Mo.* 855.

Leaſe to *A.* and *B.* for 99 years, if *&c.* rendring a *heriot*; *A* takes *huſband* and dies; agreed *per* 3 juſtices, that the huſband is aſſignee within the word (aſſigns) in the leaſe. 2 *Lutw.* 1367.

A. covenants for himſelf, his executors, adminiſtrators and aſſigns, *to permit and ſuffer* a thing to be done; this cannot extend but only to aſſignees after the covenant entred into. 2 *Vent.* 278.

A *deviſee* is an aſſignee *in law*; *per cur.* 2 *Show.* 59.

Where a *power is coupled with an intereſt*, an aſſignee of an executor of an aſſignee may take as aſſignee. 2 *Show.* 57.

Condition in a leaſe was, that neither he nor his aſſigns ſhould *alien without licence*; the leſſee died inteſtate; the *adminiſtrator* was bound by this condition; cited *per Walmſley* J. to have been ſo adjudged. *Cro. El.* 757. *pl.* 24.

The leſſee covenanted, that if he, his executors or *aſſigns*, did alien, then it ſhould be lawful for the leſſor to enter; he made his wife executrix, and died, ſhe married again, and then huſband and wife aliened the term; adjudged, that this ſecond huſband was an *aſſignee in law* of the firſt. *Dyer* 7.

The vendor covenanted with the vendee, that if he paid to him, or to his heirs or *aſſigns* 100*l.* before ſuch a day, that he and his heirs would ſtand ſeiſed of the lands to the uſe of the vendee and his heirs; before the day of payment came, the vendor having iſſue a ſon, made his will, and his wife executrix, and died; the widow renounced the executorſhip; adjudged, that the word *aſſigns* ſhall be intended aſſigns *in fact*, (*viz.*) aſſigns of the eſtate of the vendor, who had an eſtate aſſignable, and the law will never ſeek for an *aſſignee in law* (as an executor is) where there is an *aſſignee in fact*, as in this caſe the ſon was; but if the vendor had made a *feoffment in fee*, and not ſold his eſtate by a *covenant to ſtand ſeiſed* (as in this caſe), and if there had been a condition in ſuch feoffment, that the feoffee ſhould pay the purchaſe-money to the feoffor, his heirs or *aſſigns*, there, becauſe he had departed with his whole eſtate by the feoffment, and had nothing left but a naked condition, which could not be aſſigned over; the law will conſtrue what perſon is moſt apt and capable of receiving the money, as his *aſſignee in law*, and that is his executor, becauſe he repreſents the perſon of the teſtator in all goods and chattles, and in ſuch caſe the feoffor cannot have an *aſſignee in fact*. 5 *Rep.* 97.

Leſſee for years made an aſſignment of *part of his term*, and the *aſſignee covenanted to repair*; afterwards the leſſee *deviſed the reverſion* of the whole term to another, and died, and the deviſee brought an action of covenant againſt the *aſſignee*; adjudged, that this deviſe of the reverſion was an aſſignee to take the benefit of this covenant or condition within the ſtatute 32 *H.* 8. of conditions. *Godb.* 161.

An aſſignee of an aſſignee, an executor or adminiſtrator of an aſſignee, or an aſſignee of an executor, are comprehended under the word *aſſigns*, and theſe ſhall have an action of covenant for a breach of any covenant which runs with the land. 5 *Rep.* 16. *Spencer's* caſe.

Leſſee for years covenanted for himſelf and his *aſſigns*, that he would not *lop the trees, &c.* afterwards the leſſee died inteſtate, and adminiſtration was granted to *W. R.* who lopped the trees, *&c.* adjudged, that it was a breach of the covenant, for an adminiſtrator is an aſſignee as well as an executor. *Moor* 44.

Feoffment in fee, reſerving *rent*, *ſuit of court* and *relief*, and that if the feoffee, his *heirs or aſſigns*, ſhould be ſued for more ſervices than were reſerved, *&c.* that then they might diſtrain in the manor of *D.* and keep the diſtreſs till they ſhould be ſatisfied for the damages which they had ſuſtained, *&c.* afterward the feoffee made a feoffment, *&c.* to *W. R.* the queſtion was, if *W. R.* might diſtrain in the manor of *D.* to have recompence for damages, *&c.* and adjudged, that he might by virtue of the word aſſigns; but if that word had been left out, the word *heirs* would warrant the diſtreſs as an aſſignee. *Moor* 179.

Leſſee for life made a leaſe for ſeventeen years, who in the next year aſſigned the term to *B.* who made a leaſe to *W. R.* for fourteen years, rendring rent on certain days, and if it be behind for three days after, being lawfully demanded, and not paid, the leaſe ſhall be void; he in the reverſion for 17 years, granted all his eſtate and intereſt by deed parol to one *Rowland*, who demanded the rent, and entered for non-payment; one queſtion was, whether at *Common Law*, without the help of the ſtatute 32 *H.* 8. *of conditions*, the aſſignee of him in reverſion could take the ſame advantage of this leaſe, being void, as the *aſſignee of the term* himſelf might have done, who granted the leaſe for 14 years? and adjudged, that he might by the *grant of all his eſtate*, if it had been in writing, and that by the *ſtatute* 32 *H.* 8. the grantee of the reverſion of a term ſhall have the benefit of a condition annexed to a leſſer term derived out of a larger. *Moor* 525.

Leſſee for twenty years made a leaſe for four years to *W. R.* in which he covenanted to deliver up the land peaceably to the leſſor, his executors, adminiſtrators or aſſigns,

aſſigns, at the end of the term; afterwards the leſſor for twenty years granted the reverſion of that term (after the expiration of the four years) to the plaintiff, to whom the leſſee for four years attorned, and afterwards an action of covenant was brought againſt him by the aſſignee of the reverſion, and the breach aſſigned was, that he had not delivered up the land peaceably at the end of the four years; the defendant confeſſed both the leaſes of twenty years and four years, but pleaded, that before the aſſignment of the reverſion to the plaintiff, he the ſaid defendant had aſſigned over the term for four years to another; and upon demurrer adjudged, that the *aſſignee of a reverſion of a term* ſhall take advantage of a covenant againſt the leſſee of an inferior term, by virtue of the ſtatute 32 *H.* 8. *Moor* 527. *Mathuris* verſus *Weſtoray*.

Leſſee for ninety years covenanted with the leſſor, that he would not alien, *&c.* unleſs to his wife, or her *aſſigns*, during her life; in this caſe the queſtion was, that ſince the huſband could not alien to his wife, becauſe *during the coverture* he cannot give any thing to her, whether, if he *deviſed* it to her for life, ſuch a *deviſee* was an *aſſignee* within this covenant? The point was not reſolved. 2 *Bulſt.* 292.

Huſband and wife were ſeiſed of lands to them and the *heirs of* the huſband, and they made a leaſe thereof to the defendant, who covenanted with them and the *heirs of the huſband to repair*; afterwards the huſband and wife aſſigned the reverſion to the plaintiff, who, as *aſſignee to the huſband alone*, brought an action of covenant againſt the leſſee for not *repairing*, without averring, that the wife was dead; it was objected, that the plaintiff having an eſtate from both huſband and wife he ſhould have brought the action as aſſignee to both; but adjudged, that it was well brought as aſſignee to him who had the inheritance. *Cro. Car.* 285.

Leſſee for years covenanted for himſelf a nd*aſſigns to pay the rent* ſo long as he or they ſhall be in poſſeſſion of the lands demiſed; he afterwards aſſigned his term to another; the leaſe expired, and the aſſignee continued in poſſeſſion; the rent became due after the term ended, and the leſſor brought an action againſt the aſſignee; adjudged, that though he is not an aſſignee ſtrictly within the rules of law *after the term was ended*, yet he ſhall be ſuch an aſſignee as ſhall be liable to perform the covenant for payment of rent. *Style* 407.

Leaſe for years, reſerving rent; the leſſor *aſſigned the reverſion*, and the aſſignee brought an action of covenant againſt the leſſee; the queſtion was, whether it ought to be brought *in the county where the lands lie*; it was argued, that the action is tranſitory, becauſe the ſtatute 32 *H.* 8. *cap.* 34. which gives the action of covenant to an *aſſignee of the reverſion*, ſaith, that he ſhall have in *like manner as the leſſor might:* Now, if it had been brought by the leſſor, it had been tranſitory. On the other ſide it was argued, that the ſtatute did not give the remedy as a mere *choſe in action*, which is tranſitory; but knit it to the reverſion, and that by the words, that the aſſignee of the reverſion ſhall have action *in like manner as the leſſor might*; *that the like remedy in ſubſtance. Adjornatur.* 1 *Vent.* 10.

Leaſe to *B. G.* for eighty years, if he ſhould ſo long live, remainder after his death to his *executors or aſſigns* for forty years; afterwards the leſſee died *inteſtate* and adminiſtration was granted to his widow, who by virtue thereof claimed the term of forty years, and being diſturbed, ſhe brought an action on the caſe; adjudged, that an *adminiſtrator* is not an *aſſignee*, for he is appointed by the *ordinary*, and *aſſigns* muſt be by the act of the party himſelf and not by a ſtranger. *Owen* 125.

In a *warrantia chartæ*, *&c.* there was a demurrer, and it was adjudged, that the word *heirs* doth not imply *aſſignees*, becauſe he is heir who comes to a thing by deſcent, which is the act of God, by the death of the anceſtor; but an aſſignee is he who comes to the thing by the act of the party; and ſometimes an aſſignee, though appointed by the party, hath his authority from another as an executor. 1 *And.* 299.

The condition of a bond was, that the obligor ſhould pay 20 *l.* to ſuch perſon, or his *aſſigns*, as the obligee ſhould by her laſt will *appoint*; in an action of debt brought againſt the obligor by the executor of the obligee, he pleaded, that the obligee did not appoint any perſon to receive the money; the plaintiff replied, that ſhe made her will, by which they were appointed her *executors*; and upon demurrer to this replication, it was adjudged, that this money is not payable to the plaintiffs as *executors*; for though it is true, that where a teſtamentary thing is to be done to a man or his *aſſigns*, it muſt be done to the *executor* where there is no *actual aſſignee*, becauſe the word *aſſigns* ſtands indifferent as well to *aſſigns in fact as in law*; yet in this caſe the word *aſſigns* muſt neceſſarily intend *aſſigns in fact*, and not in *law*, as an executor is, and the rather, becauſe the word to *pay* carrieth a property with it, (*viz.*) that the money muſt be paid to the proper uſe of that perſon who ſhall be appointed to receive it. *Hob.* 9.

Upon a *fine* the uſe of lands was *limited to* A. *for* 80 *years, with a power to* A. *and his aſſigns to make leaſes for three lives to commence after the determination of the ſaid term.* A. *aſſigns over to* B. B. *dies*, and makes C. *his executor, who aſſigns over to* D. *who made the leaſe for life*, which was the eſtate in *queſtion*. And the queſtion was, whether or no D. was ſuch an aſſignee of A. as had power to make this leaſe? or whether it ſhould extend only to the immediate aſſignees of A. and the doubt in this cauſe was the greater, becauſe here was a deſcent upon an executor, who made the eſtate over to him, who makes the leaſe, and the caſe in *Hob.* 9. *Peaſe* v. *Styleman*, [the preceding caſe] was cited, where an executor or an adminiſtrator in ſome caſes ſhall not be ſaid to be a ſpecial aſſignee; but all the court ſeemed to incline to the contrary; and that *D.* ſhall be ſaid an aſſignee well enough to this purpoſe, and ſo ſhall any perſon that comes to the eſtate under the firſt leſſee, though there be 20 meſne aſſignments; and afterwards, in *Mich.* following, judgment was given accordingly. *Freem. Rep.* 476.

3. *Where aſſignee ſhall be bound by the covenant of the aſſignor.*

The aſſignee of a term is bound to perform all the covenants annexed to the eſtate; as if *A.* leaſes lands to *B.* and *B.* covenants to pay the rent, repair houſes *&c.* during the ſaid term, and *B.* aſſigns to *J. S.* the aſſignee is bound to perform the covenants during the life of the firſt leſſee, though the aſſignee be not named, becauſe the covenant runs with the land, being made for the maintenance of a thing in *eſſe* at the time of the leaſe made. 1 *Rol. Abr.* 521. *Cro. Eliz.* 457. *Moor* 399. 5 *Co.* 24.

But if *A.* leaſes for years to *B.* and *B.* for himſelf, his executors and adminiſtrators, covenants with *A.* to build a wall upon a part of land demiſed, and after *B.* aſſigns, the aſſignee is not bound by this covenant; for the law will not annex the covenant to a thing not in *eſſe*. 5 *Co.* 15.

But if *B.* had covenanted for him and his aſſigns to build the wall, *&c.* this would have bound the aſſignee, becauſe it is to be done upon the land, and the aſſignee is to have the benefit thereof. 5 *Co.* 15.

The leſſee covenanted for himſelf, his executors and adminiſtrators, to leave fifteen acres every year for paſture, without plowing it, and afterwards he *aſſigned* his leaſe to the defendant, againſt whom an action of covenant was brought for not leaving fifteen acres in paſture, *&c.* and upon a demurrer to the declaration it was inſiſted for the defendant, that he was not bound by this *covenant*, becauſe he was not *aſſignee* of the leſſee, who had covenanted only for his *executors and adminiſtrators*, and not for his *aſſigns*, for they were not named in the covenant; but adjudged, this covenant binds them, though not named, becauſe it is *for the benefit of the eſtate*; but it had been otherwiſe if it had been to do a collateral act, as to build *de novo*, or the like, for in ſuch caſes the aſſigns of the covenantor are not bound, unleſs named. 2 *Cro.* 125.

Where the *executor of a leſſee aſſigns the term*, debt will not lie againſt him for rent incurred after the aſſignment, becauſe there is neither *privity of contract* between the leſſor and the executor, *before the aſſignment*, nor *privity of eſtate*, after the aſſignment, and this was *Verton* and *Sydalis's*

dalis's caſe; but where the *leſſee himſelf* aſſigns his leaſe, in ſuch caſe the *privity of contract* ſtill remains between him and the leſſor, though the *privity of eſtate* is gone by the aſſignment, and therefore, notwithſtanding that aſſignment, he ſhall be chargeable *during his life*, but after his death the *privity of contract* is likewiſe determined. 3 *Rep.* 24.

If leſſee for years covenants for him and his aſſigns to rebuild and finiſh a houſe within ſuch a time, and after the time expired, the leſſee aſſigns over the premiſſes, the houſe not being built and finiſhed according to the covenant; this covenant ſhall not bind the aſſignee, becauſe it was broke before the aſſignment; *aliter* if broke after; as if the leſſee had aſſigned before the time expired. 1 *Salk.* 199.

Alſo though the covenant be for him and his aſſigns, yet if the thing to be done be merely collateral, and no way concern the thing demiſed, the covenant ſhall not bind the aſſignee; as if it be to build an houſe upon other land of the leſſor or to pay a collateral ſum. 5 *Co.* 15.

So if a man demiſes ſheep or other perſonal thing for a certain time, and the leſſee covenants for him and his aſſigns at the end of the term, to deliver ſuch ſheep, *&c.* or the price of them, and the leſſee aſſigns them over, the aſſignee ſhall not be bound by the covenant; for it is but a perſonal contract, and there is not ſuch privity as between leſſor and leſſee of land and his aſſigns. 5 *Co.* 16. *b.* 17. *a.*

The ſtatute 32 *H.* 8. *enables grantees of reverſions to enter for conditions broken, and to bring actions of covenant*, &c. *and alſo enables the tenants of particular eſtates as for life*, &c. *to have actions of covenant againſt their grantees*; the queſtion was, if a leſſee for life covenant for himſelf, his *executors and adminiſtrators*, to build a wall on the lands, and afterwards he aſſigns the eſtate to *W. R.* whether he or the grantee of the reverſion may have an action of covenant againſt *W. R.* the aſſignee, if the wall is not built; and adjudged, that he may, though the word *aſſigns* was not in this covenant, but only *executors and adminiſtrators*; for by the acceptance of the poſſeſſion he had made himſelf ſubject to all the covenants which run with the land, and are inherent to it. Such as *paying rent*, *repairing*, *building walls*, &c. and to ſuch he is bound without the ſpecial word *aſſigns*, but not to any collateral covenants. *Moor* 159.

Leſſee for *forty years* made a leaſe for *three years* to one *Calice*, wherein he covenanted, that he would keep a wine cellar and ſell wine there, and accompt every month, upon requeſt, to the leſſor *or his aſſigns* for all wines ſold, and would pay him 30*s.* for every ton ſold; then the leſſor granted the reverſion to *W. R.* who required *Calice* the leſſee *to accompt*, *&c.* and upon his refuſal brought an action of debt upon the bond for performance of covenants; and upon demurrer it was objected, that the grantee of the reverſion could not have this action, becauſe *to accompt* is a collateral benefit, and therefore not within the ſtatute 32 *H.* 8. for the money ariſing upon the accompt is not *a rent*, or a thing incident to the reverſion; on the other ſide, it was argued, that though it is not a rent, yet it is an advantage inherent to the thing demiſed, ſo that the grantee of the reverſion is aiding by the ſtatute, for though this payment is collateral, yet it paſſes to the aſſignee by the word aſſigns. *Moor* 243.

In a ſpecial verdict in an action of debt for rent, the jury found, that the leſſor being ſeiſed both of freehold and copyhold lands made a leaſe of both to *W. R.* rendring rent, and that *W. R.* the leſſee *aſſigned the term* to the defendant; and afterwards by a grant of the freehold and ſurrender of the copyhold, conveyed the *reverſion to the plaintiff*, but firſt he made a releaſe to *W. R.* *the leſſee* of all demands; and in an action of debt for rent brought by the *grantee of the reverſion* againſt the *aſſignee of the term*, the queſtion was, whether the rent was *extinguiſhed* by this *releaſe*, and adjudged that it was not, becauſe the *releaſe* was made *after* the aſſignment of the term; it is true, it was made *before* the grant of the reverſion, but it being after the aſſignment of the term, the leſſor in ſuch caſe had his election, either to charge the *leſſee or aſſignee*, and it ſhall be intended that he would have charged *the aſſignee* for rent incurred after the releaſe given to the leſſee. *Moor* 544.

If leſſee for years, for himſelf, his executors and adminiſtrators, covenants with his leſſor to leave fifteen acres every year for paſture, *abſque cultura*, and afterwards the leſſee aſſigns; the aſſignee, though not named, muſt perform the covenant; becauſe it is for the benefit of the eſtate, according to the nature of the ſoil; but a collateral covenant, as to build *de novo*, *&c.* ſhall not bind him, unleſs named. *Cro. Jac.* 125.

If *A.* demiſes to *B.* ſeveral parcels of land, and the leſſee covenant, for him and his aſſigns, to repair, *&c.* and after the leſſee aſſigns to *D.* all his eſtate in parcel of the land demiſed, and *D.* does not repair that to him aſſigned, the leſſor may have an action of covenant againſt *D.* the aſſignee. 1 *Rol. Abr.* 522.

If a man leaſes for years, and the leſſee covenants for him and his aſſigns, to pay the rent ſo long as he and they have the poſſeſſion of the thing let, and the leſſee aſſigns, and the term expires, and the aſſignee continues the poſſeſſion afterwards; an action of covenant will lie againſt him for rent behind after the expiration of the term; and tho' he is not an aſſignee ſtrictly according to the rules of law; yet he ſhall be accounted ſuch an aſſignee as is to perform the covenants. *Style* 407.

If *A.* leaſes to *B.* and *B.* covenants to repair, *&c.* and he aſſigns to *J. S.* who dies inteſtate, the premiſes being out of repair, the leſſor may bring covenant againſt his adminiſtrator as aſſignee, and declare that he made a leaſe to *B. &c. cujus ſtatus et reſiduum termini annorum, &c. devenit, &c. per aſſignationem* to the adminiſtrator. *Carth.* 519.

In covenant *&c.* for non-payment of rent, the plaintiff declared, that the *lady Purbeck* was ſeiſed of lands in fee, and that ſhe demiſed the ſame to the defendant, who covenanted to pay, *&c.* and that afterwards the ſaid lady, by indenture, for *the conſideration therein mentioned, granted the reverſion to the plaintiff*, to which grant the defendant *attorned*, and for rent arrear this action was brought in the county where the lands lie, as it ought, and by the *grantee of the reverſion againſt the leſſee*, with a *profert hic in curia Indenturam*, but it was entered *in hæc verba*; the defendant pleaded, that he *aſſigned* his term to *J. S.* before the plaintiff had any intereſt in the lands, but did not ſet forth, that the plaintiff *accepted the rent from the aſſignee, or that he had any notice of the aſſignment*; and upon a demurrer to this plea, it was adjudged ill, becauſe the action lies by the grantee of the reverſion againſt the leſſee, even after the aſſignment of the term, and this upon his expreſs covenant to pay the rent: but becauſe the plaintiff did not declare *to whoſe uſe the grant of the reverſion was*, nor upon *what conſideration*, but only generally, upon conſideration in the indenture mentioned, the judgment was ſtayed. 3 *Lev.* 233.

Debt for rent againſt an executor, who pleaded an aſſignment of the term, and an *acceptance* of the rent of the aſſignee by the leſſor; the parties were at iſſue upon the acceptance, and the plaintiff had a verdict, but he could never get judgment, becauſe part of the rent became due pending the action. *Palm.* 524.

An action of debt was brought by the leſſor againſt the *adminiſtrator of the leſſee*, who pleaded, that before any rent became due, he aſſigned the term to another; and upon a demurrer to this plea it was adjudged, that the *adminiſtrator* ſhould be charged in an action of debt in the *detinet*, upon the contract of his inteſtate, and ſhou'd pay as far as he had aſſets, though he had aſſigned over the term, becauſe the *privity of contract* ſtill remained between the leſſor and ſuch adminiſtrator of the leſſee: and this was *Helier* and *Caſbard*'s caſe. *Sidd.* 266.

Leaſe for *ninety-nine years*, if *three lives* ſo long ſhould live; this leaſe was aſſigned to the defendant, there being a rent reſerved upon it, and the reverſion after the determination of the eſtate for lives was granted to the plaintiff, who brought an action of debt againſt the *aſ-*

ſignee

ſignee of the term, for the rent; and upon a demurrer to the declaration the plaintiff had judgment, not upon the merits, but becauſe the defendant did not argue his demurrer; the fault in the declaration was, that ſince the plaintiff was intitled to the rent as a *grantee of the reverſion*, he ought to be ſo named in the writ, which he was not. 1 *Lutw.* 478.

4. *Where aſſignee ſhall not be bound by the covenant of the aſſignor.*

A leaſe was made to one, who afterwards died inteſtate, and an action of debt was brought againſt the defendant as adminiſtrator, for rent arrear after the *death of the inteſtate*; the adminiſtrator pleaded, that before any rent became due he *aſſigned the term* to another, and that the leſſor had notice thereof, aud had afterwards *accepted rent of the aſſignee*; and upon demurrer to this plea it was adjudged, that the adminiſtrator was no longer chargeable after he had made *this aſſignment*. *Cro. Eliz.* 715.

Leaſe for years made by a *prebendary*, rendring rent, the leſſee died, and his executor aſſigned the term, and in an action of debt brought againſt that exccutor for rent incurred *after the aſſignment*, it was adjudged, that ſuch action would not lie; 'tis true, the executor would have been chargeable if he had not made this *aſſignment*; not upon any *privity of contract*, for there was none between him and the leſſor, but upon a *privity in law*, as having the eſtate of the leſſee, if he had not aſſigned it to another, but by the aſſignment the privity of eſtate was gone from him. *Cro. Eliz.* 555.

Leaſe of a *ſtock of cattle*, and the leſſee covenanted for himſelf and his *aſſigns*, to deliver them at the end of the term in as good a condition as he found them, or to pay ſo much money; afterwards the leſſee aſſigned both the term and the ſtock to another; adjudged, in an action brought againſt the *aſſignee*, that he was not bound by this covenant of his leſſee, becauſe 'tis a *perſonal contract* between him and the leſſor, and therefore it binds only the leſſee, and thoſe who repreſent him, which are his *executors and adminiſtrators*, but not his *aſſigns*, becauſe there is no privity of contract between them and the leſſor. This is the third reſolution in 5 *Rep.* 16. *b. Spencer*'s caſe.

Leſſee for years covenanted with the leſſor to pay yearly during the term, 20*s.* *to the church wardens* of the pariſh church of *S.* and to repair the houſes, *&c.* he afterwards aſſigned the term; and in an action brought againſt the aſſignee for non-payment of the yearly rent, there was judgment againſt him; but upon a writ of error it was reverſed, becauſe the covenant for payment of this rent being not to the *leſſor himſelf* but to the *churchwardens*, *&c.* 'tis for that reaſon a mere *collateral covenant*, and therefore the aſſignee is not chargeable with it. 2 *Cro.* 439.

Leaſe for years rendring rent, the leſſee died, his *executrix aſſigned the term* to another; and in an action of debt for rent brought againſt the *aſſignee*, he pleaded that before any rent became due he aſſigned the term to another; adjudged, that the action did not lie, becauſe when the executor of the leſſee made an aſſignment of the term, the *privity of contract* was gone, for there could be none between the leſſor and the *aſſignee of the executor* of the leſſee; and when that *aſſignee had made a further aſſignment* to another, then the *privity of eſtate* was likewiſe gone, ſo that there was nothing to ſupport the action. 3 *Lev.* 295.

Leſſee for years covenanted to *repair*, *&c.* and afterwards he aſſigned the term, and the leſſor likewiſe *aſſigned the reverſion*; adjudged, that the *aſſignee of the reverſion* ſhall maintain an action of *covenant* againſt the *leſſee* himſelf, or againſt the aſſignee for not *repairing*, becauſe this is a covenant which runs with the land, and not a collateral covenant. 2 *Cro.* 399.

Leaſe for years, rendring rent, the leſſor aſſigned the *reverſion* to the plaintiff, who brought an action of debt for rent; the defendant pleaded, that the leſſor demiſed the land *prout*, *&c.* and that by the ſame deed he covenanted with the leſſee, that if he ſhould be at any charge for iſſues loſt, in ſuch caſe he ſhould *retain* ſo much of the rent as he ſhould be forced to pay; then he ſet forth, that iſſues were loſt, and that the ſheriff levied ſo much, *&c.* and that he retained the like ſum of the rent; and upon demurrer to this plea, the queſtion was, that this action being brought by the *aſſignee of the reverſion* againſt the *aſſignee of the term*, whether ſuch an aſſignee could have any remedy upon this covenant by way of *retainer*; and adjudged, that he might, both at Common-law, and by the ſtatute 32 *H.* 8. becauſe it was a covenant which runs with the land. *Cro. Car.* 97, 137.

Feoffments, *&c.* in which the feoffor covenanted *to make farther aſſurance*; afterwards the feoffee aſſigned his intereſt to the plaintiff, who brought an action of covenant againſt the feoffor for not levying a fine to make a farther aſſurance; adjudged, that the *aſſignee* ſhould have the benefit of this covenant, becauſe it runs with the lands. *Cro. Car.* 361, 503.

Covenant by the aſſignee of the reverſion for rent arrear after the aſſignment of the leaſe on which the rent was reſerved; the defendant pleaded, that *before any rent was due*, the leſſor had *releaſed* to him (the defendant) all *covenants and demands*; and upon a demurrer to this plea it was held, that this *releaſe*, after the aſſignment made by the leſſor, did not bar the aſſignee from this action of covenant, becauſe it was a covenant which runs with the reverſion. *T. Jones* 102.

An aſſignee of a reverſion brought an *action of debt for rent*; the defendant pleads, that before any rent became due, he aſſigned the term to another; and upon demurrer to this plea, the plaintiff had judgment, becauſe the defendant did not ſet forth in his plea, that he gave *notice* to the plaintiff that he had aſſigned the term; *Twiſden* of a contrary opinion. *Raym.* 162.

Covenant, *&c.* againſt the defendant as *aſſignee* of one *John Vaux*, and the breach aſſigned was, that neither the ſaid *John Vaux* in his *life-time*, nor the defendant ſince his death, (whoſe aſſignee he is) had kept the *fences*, *&c.* in repair; the defendant pleads, that he and the aſſigns of *John Vaux* had kept the fences in repair, and upon this they were at iſſue, and the plaintiff had a verdict, but could never get judgment, becauſe an action of *covenant* doth not lie againſt an *aſſignee* for a breach of that covenant *in the life-time of the aſſignee*; and this breach being aſſigned for a default done, as well in the life-time of the aſſignor, as by the defendant *ſince his death*, and intire damages given, it muſt be wrong. 1 *Lutw.* 360.

In a ſpecial verdict in ejectment, the caſe was, *leaſe for years*, upon condition, that the leſſee ſhould not aſſign the term to any but to his kindred, without licence of the leſſor; afterwards the leſſor *granted the reverſion* to *T. P.* and the leſſee aſſigned the term to one who was not of kindred to him; the better opinion was, that this was a *collateral condition*, according to *Pennant*'s caſe, and that 'tis ſuch a condition as is within the ſtatute 32 *H.* 8. *cap.* 34. of which the *grantee of the reverſion* may take any advantage for the breach thereof. *Raym.* 850.

The leſſee covenanted for himſelf and his *aſſigns*, *to rebuild and finiſh a houſe before ſuch a time*, which he did not do, but after the time was expired, he aſſigned the term; adjudged, that this covenant will not bind the aſſignee, becauſe it was broken before the aſſignment made. 1 *Salk.* 199.

In a ſpecial verdict in debt, the caſe was, the leſſor being ſeiſed in fee made a leaſe to *T. S.* for ſeven years; the leſſee re-demiſes the lands to the leſſor for the whole ſeven years, reſerving the rent of 20*l.* *per annum*; the leſſor died, his widow entered as guardian to the ſon and heir of the leſſor, and receives the profits, and the rent not being paid, *T. S.* the leſſee brought an action of debt againſt her as *executrix de ſon tort*, in the *debet* and *detinet*; it was admitted, that an action of debt would lie upon the contract where the whole term is aſſigned, and that there might be an executor *de ſon tort* of a term of years; but *per curiam*, It will lie againſt one in the *debet* and *detinet*, as executor *de ſon tort*, where there is no term at all, as in this caſe; for when the leſſee aſſigned the whole term back to the leſſor, this was a ſurrender in law; and if ſo, then

then it lies upon the contract of the teſtator only, and by conſequence 'tis wrong againſt the defendant in the *debet* and *detinet*. 2 *Mod.* 174.

An *aſſignment of chambers* in an inn of court.

THIS Indenture *made the day*, &c. *in the year of our Lord*, &c. *between* A. B. *of*, &c. *Eſq*; *of the one part, and* C. D. *of*, &c. *Gent. of the other part: Whereas in and by a certain writing made and dated*, &c. at Lincoln's Inn, *the benchers of the ſaid inn did order, that the ſaid* A. B. *ſhould have a leaſe of all that chamber up one pair of ſtairs, number*, &c. *belonging to* Lincoln's Inn *aforeſaid, for the term of twenty-one years, to commence at*, &c. *under the yearly rent of*, &c. *as by the ſaid recited writing or order may more fully appear: And whereas, in purſuance of their ſaid order, a leaſe of the ſaid chamber hath been ſince made and granted to the ſaid* A. B. *for the ſaid term of twenty-one years*, &c. *Now this indenture witneſſeth, that the ſaid* A. B. *for and in conſideration of the ſum of two hundred pounds of lawful money of* Great Britain, *to him in hand paid by the ſaid* C. D. *at and before the ſealing and delivery hereof, the receipt whereof he doth hereby acknowledge, Hath granted, bargained, ſold, aſſigned and ſet over; and by theſe preſents doth grant, bargain, ſell, aſſign and ſet over unto the ſaid* C. D. *his executors, adminiſtrators and aſſigns, All that the chamber aforeſaid with the appurtenances, and all the eſtate, right, title, intereſt, property, claim and demand whatſoever of him the ſaid* A. B. *of, in and to the ſame, or any part thereof: To have and to hold the ſaid chamber with the appurtenances, to the ſaid* C. D. *his executors, adminiſtrators, and aſſigns, from henceforth, for and during all the reſt and reſidue of the ſaid term of twenty-one years, therein to come and unexpired. And the ſaid* A. B. *doth by theſe preſents, for himſelf, his executors and adminiſtrators, covenant and grant to and with the ſaid* C. D. *his executors, adminiſtrators and aſſigns, in manner following; (that is to ſay) that he the ſaid* A. B. *hath good right, full power and lawful authority, to grant and aſſign the ſaid chamber and premiſſes above-mentioned, in manner and form aforeſaid: And that the ſame is free and clear of all former grants, aſſignments, incumbrances, arrears of rent, and all other duties payable to the ſaid ſociety of* Lincoln's Inn, *or any of the officers or miniſters thereof, or otherwiſe howſoever: And alſo that he the ſaid* C. D. *his executors, adminiſtrators, and aſſigns ſhall and lawfully may at all times hereafter, during the reſt and reſidue now to come and unexpired of the ſaid term of twenty-one years, peaceably and quietly have, hold, occupy, poſſeſs and enjoy the ſaid chamber and premiſſes above mentioned, and hereby granted and aſſigned, without any let, ſuit, trouble, eviction, ejection, claim or demand, of or by the ſaid* A. B. *his executors, adminiſtrators or aſſigns, or any other perſon or perſons whatſoever: And further, that he the ſaid* A. B. *his executors and adminiſtrators ſhall and will from time to time, and at all times hereafter, upon the reaſonable requeſt, and at the coſts and charges of the ſaid* C. D. *make, do and execute, or cauſe to be made, done and executed, all and every ſuch further acts and aſſurances, for the better aſſigning and aſſuring of the ſaid chamber and premiſſes to the ſaid* C. D. *as by him the ſaid* C. D. *or his counſel learned in the law, ſhall be reaſonably deviſed, adviſed or required. In witneſs whereof the parties above-named have hereunto put their hands and ſeals the day and year above written.*

Form of an *aſſignment* of a bond.

TO *all people to whom theſe preſents ſhall come, greeting: Whereas* A. B. *of*, &c. *in and by one bond or obligation, bearing date*, &c. *became bound to* C. D. *of*, &c. *in the penal ſum of*, &c. *conditi oned for the payment of*, &c. *and intereſt at a day long ſince paſt, as by the ſaid bond and condition thereof may appear: And whereas there now remains due to the ſaid* C. D. *for principal and intereſt on the ſaid bond, the ſum of*, &c. *Now know ye, that the ſaid* C. D. *for and in conſideration of the ſaid ſum of*, &c. *of lawful* Britiſh *money to him in hand paid by* E. F. *of*, &c. *the receipt whereof the ſaid* C. D. *doth hereby acknowledge, he the ſaid* C. D. *Hath aſſigned and ſet over; and by theſe preſents doth aſſign and ſet over unto the ſaid* E. F. *the ſaid recited bond or obligation, and the money thereupon due and owing, and all his right and intereſt of, in and to the ſame. And the ſaid* C. D. *for the conſideration aforeſaid, Hath made, conſtituted and appointed, and by theſe preſents doth make, conſtitute and appoint, the ſaid* E. F. *his executors and adminiſtrators, his true and lawful attorney and attornies irrevocable, for him and in his name, and in the name and names of his executors and adminiſtrators, but for the ſole and proper uſe and benefit of the ſaid* E. F. *his executors, adminiſtrators and aſſigns, to aſk, require, demand, and receive of the ſaid* A. B. *his heirs, executors, and adminiſtrators, the money due on the ſaid bond; and on non-payment thereof, him the ſaid* A. B. *his heirs, executors and adminiſtrators, to ſue for, and recover the ſame; and on payment thereof to deliver up and cancel the ſaid bond, and give ſufficient releaſes and diſcharges thereſor, and one or more attorney or attornies under him to conſtitute; and whatſoever the ſaid* E. F. *or his attorney or attornies, ſhall lawfully do in the premiſſes, the ſaid* C. D. *doth hereby allow and affirm. And the ſaid* C. D. *doth covenant with the ſaid* E. F. *that he the ſaid* C. D. *hath not received, nor will receive, the ſaid money due on the ſaid bond, or any part thereof; neither ſhall or will releaſe or diſcharge the ſame, or any part thereof; but will own and allow of all lawful proceedings for recovery thereof; he the ſaid* E. F. *ſaving the ſaid* C. D. *harmleſs, of and from any coſts that may happen to him thereby. In witneſs*, &c.

Aſſimulare, To put highways together: It is mentioned in *Leg. H.* 1. *c.* 8. *De via regia, viz. tanta vero debet eſſe, ut inibi duo carri ſibi poſſint obviare, et bubulci de longo ſtumbli ſui poſſint* aſſimulare, &c. *Cowell.*

Aſſiſa cadere. To be nonſuited. In what caſes ſuch nonſuit is ſuffered, ſee *Fleta, lib.* 4. *c.* 15. and *lib.* 5. *c.* 6.

Aſſiſa, *Capi in modum* aſſiſæ, that is, when the defendant pleads to the aſſiſe without taking any exception to the count, declaration, or writ. *Cowell.*

Aſſiſa cadit, That is, when there is ſuch a plain and legal inſufficiency, that the complainant can proceed no farther in it. *Fleta, lib.* 4. *c.* 15. *Cowell.*

Aſſiſa cadit in juratam, Is where the thing in controverſy is ſo doubtful, that it muſt neceſſarily be tried by a jury. *Fleta, lib.* 4. *c.* 15. *Bracton, lib.* 2. *c.* 7.

Aſſiſa continuanda, Is a writ directed to the juſtices aſſigned to take an *aſſiſe*, for the *continuance* of the cauſe, in caſe where certain records alledged cannot in time be procured by the party that would uſe them. *Reg. of Writs, fo.* 217.

Aſſiſa panis et cervifiæ, The power or priviledge of *aſſiſing* or adjuſting the weights and meaſures of bread and beer; as the weight of bread preſcribed by the magiſtrate is ſtill called the *ſize* or *aſſize* of bread: So half a cruſt or farthing-bread is in *Cambridge* called a *ſize* of bread; and a ſervitor is there a *ſizor*, or one who is to live upon ſuch an aſſized allowance: Hence to *ſize, i. e.* to match cloths, ſilks, &c. or to get ſome of the ſame *aſſize* or proportion: Hence *ſize* for height and ſtature. *Sizely* in the North is proud and coy. *Cowell, ed.* 1727.

Aſſiſa proroganda, Is a writ directed to the juſtices of *aſſize*, to ſtay proceeding by reaſon of the King's buſineſs, wherein the party is employed. *Reg. of Writs, fol.* 208, & 221. *Cowell, ed.* 1727.

Aſſiſe, (Fr. *Aſſis*) According to our antient books, is defined to be an aſſembly of knights, and other ſubſtantial men, with the bailiff or juſtice in a certain place, and at a certain time appointed. *Cuſtom. Normand. cap.* 24. This word is properly derived from the Latin verb *aſſideo*, to ſit together; and is alſo taken for the court, place or time, when and where the writs and proceſſes of aſſiſe are handled or taken. And in this ſignification *aſſiſe* is general; as when the juſtices go their ſeveral circuits with commiſſion to take all aſſiſes; or ſpecial, where a ſpecial commiſſion is granted to certain perſons, (formerly oftentimes done) for taking an *aſſiſe* upon one or two diſſeiſins only. *Bract. lib.* 5. *Cowell.*

Concerning

Concerning the general *aſſiſe*, all the counties of *England* are divided into ſix circuits, and two judges are aſſigned by the King's commiſſion to every circuit, who hold their *aſſiſes* twice a year in every county, (except *Middleſex*, where the King's courts of record do ſit, and where his courts for his counties palatine are held) and have five ſeveral commiſſions. 1. *Of oyer and terminer*, directed to them and many other gentlemen of the county, by which they are empowered to try treaſons, felonies, &c. and this is the largeſt commiſſion they have. 2. *Of gaol-delivery*, directed to the judges and the clerk of *aſſiſe* aſſociate, which gives them power to try every priſoner in the gaol committed for any offence whatſoever, but none but priſoners in the gaol; ſo that one way or other they rid the gaol of all the priſoners in it. 3. *Of aſſiſe*, directed to themſelves only and the clerk of *aſſiſe*, to take *aſſiſes* and do right upon writs of *aſſiſe* brought before them by ſuch as are wrongfully thruſt out of their lands and poſſeſſions: which writs were heretofore frequent, but now men's poſſeſſions are ſooner recovered by ejectments, &c. 4. *Of niſi prius*, directed to the judges and clerk of *aſſiſe*, by which civil cauſes grown to iſſue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cauſe of action ariſes; and on return of the verdict of the jury to the court above, the judges there give judgment. 5. *A commiſſion of the peace*, in every county of the circuits; and all juſtices of the peace of the county are bound to be preſent at the *aſſiſes*; and ſheriffs are alſo to give their attendance on the judges, or they ſhall be fined. *Bacon's Elem.* 15, 16, &c.

There is a commiſſion of the peace, *oyer and terminer* and gaol-delivery of *Newgate*, held ſeveral times in a year, for the city of *London* and county of *Middleſex*, at *Juſtice-Hall* in the *Old Baily*, where the lord mayor is the chief judge. In *Wales* there are but two circuits, *North* and *South Wales*; for each of which the King appoints two perſons learned in the laws to be judges. *Stat.* 18 *Eliz. cap.* 8. If juſtices ſit by force of a commiſſion, and do not adjourn the commiſſion, it is determined. 4 *Inſt.* 265. The conſtitution of the juſtices of *aſſiſe*, was begun by *Hen.* 2. though ſomewhat different from what they now are: And by *Magna Charta*, juſtices ſhall be ſent through every county once a year, who with the knights of the reſpective ſhires ſhall take aſſiſes of *novel diſſeiſin*, &c. in their proper ſhires, and what cannot be determined there, ſhall be ended by them in ſome other place in their circuit; and if it be too difficult for them, it ſhall be referred to the juſtices of the bench, there to be ended. 9 *Hen.* 3. *cap.* 12. Juſtices of *aſſiſe*, &c. are to hold their ſeſſions in the chief towns of the county; and their records to be ſent into the *Exchequer*. 6 *R.* 2. 9 *Ed.* 3. By *ſtat.* 21 *Geo.* 2. *c.* 12. the ſummer *aſſiſes* in *Buckinghamſhire* ſhall be held at the town of *Buckingham*. *Aſſiſe* is likewiſe uſed for a *jury*, by whom *aſſiſes* of *novel diſſeiſin* are tried. *Lit.* cap. *Rents.* The panels of *aſſiſes* ſhall be arrayed, and a copy indented delivered by the ſheriff, &c. if demanded, on pain of 40*l.* by ſtatute 6 *Hen.* 6. *cap.* 2. And aſſiſe is taken for a *writ* for recovery of poſſeſſion of things immoveable, whereof any one and his anteſtors have been diſſeiſed. Likewiſe in another ſenſe, it ſignifies an ordinance or ſtatute. *Reg. Orig.* 279. *Lit.* cap. *Rents. Termes de la ley.* And there are four writs of *aſſiſe*: An aſſiſe of *novel diſſeiſin*, an aſſiſe of *mortd'anceſtor*, an aſſiſe of *darrein preſentment*, and an aſſiſe of *juris utrum*. *Co. Lit.* 155. *a.*

Aſſiſe of novel diſſeiſin, (*Aſſiſa novæ diſſeiſinæ.*) Lies where tenant in fee-ſimple, fee-tail, or for term of life, is put out and diſſeiſed of his lands, or tenements, rents, common of paſture, common way, or of an office, toll, &c. *Glanv. lib.* 10. *c.* 2. *Bract. lib.* 4. *tract.* 1. *Britt. c.* 70. *Reg. Orig. fo.* 197. *F. N. B. fo.* 177, 178, 179.

An aſſiſe of *novel diſſeiſin* is a remedy *maxime feſtinum*, for the recovery of lands or tenements, of which the party was diſſeiſed. 2 *Inſt.* 410. And it is called *novel diſſeiſin*, becauſe the juſtices in *eyre* went their circuits from ſeven years to ſeven years; and no aſſiſe was allowed before them, which commenced before the laſt circuit, which was called an *ancient* aſſiſe; and that which was upon a *diſſeiſin* ſince the laſt circuit, an aſſiſe of *novel diſſeiſin*. *Co. Lit.* 153. *b.*

An aſſiſe is called *feſtinum remedium*. 1. Becauſe the tenant ſhall not be eſſoined. 2. Shall not caſt a protection. 3. Shall not pray in aid of the King. 4. Shall not vouch any ſtranger, except he be preſent, and will enter preſently into warranty; ſo of receipt. 5. The parol ſhall not demur for the nonage of the plaintiff or defendant. 8 *Co.* 50. *Booth* 262.

1. *In what caſes an aſſiſe lieth.*

2. *Who may have an aſſiſe, and againſt whom, and where it lieth.*

3. *Proceedings and pleadings in aſſiſe.*

1. *In what caſes an aſſiſe lieth.*

An aſſiſe lies for any thing a *præcipe quod reddat* may be brought for at Common law; therefore it lies for an office. 2 *Inſt.* 8 *Co.* 47. *b.*

It lies for one ſeiſed of lands, tenements, rents in fee-ſimple, tail, or for life, and for tenant by *elegit*, ſtatute merchant, ſtaple, or tenant by recognizance in nature of a ſtatute ſtaple. It lies of tithes, penſions, and other eccleſiaſtical duties in temporal hands, but of a rent iſſuing out of tithes barely, no aſſiſe lies. See *Co. Lit.* 159. 32 *Hen.* 8. *c.* 7. *Vaugh.* 204.

There were at firſt but two forms of writs of aſſiſe of *novel diſſeiſin*, either an aſſiſe *de libero tenemento*, or *de communia paſturæ*.

The aſſiſe *de libero tenemento* did lie of houſes, land, rent, or other things which lay in *render*, but for profits *apprender*, which conſiſted *in capiendo, colligendo, habendo, recipiendo & exercendo*, no aſſiſe lay, but a *quod permittat*, in which there was great delay, and they who had but an eſtate for life could not maintain that writ. 2 *Inſt.* 411. But now by the ſtatute *Weſt.* 2. *c.* 25. a ſpeedy remedy is given in theſe caſes *de proficuis*, &c. *in certo loco capiend'*, &c.

There were but *two writs of aſſiſe at common law, (viz.)* an aſſiſe of *common of paſture* for cattle, and an *aſſiſe of novel diſſeiſin*, the laſt of which doth lie for ſeveral things, viz. *lands, rents, offices, tithes*, and generally for every thing of which a *præcipe quod reddat* did lie, and in ſome caſes where ſuch *præcipe* did not lie; as for inſtance, *de uno croſto*, becauſe it may be put in view to the recognitors, *i. e.* to the jury. 2 *Bulſt.* 214.

An aſſiſe will lie in ſome caſes where treſpaſs *vi & armis* will not; as where a tenant holds of his lord, by rendring rent and ſervices, and the lord enters, and ſo often diſtrains, tho' nothing is due, that the tenant is diſturbed in the manuring his lands; in ſuch caſe he may have an aſſiſe *de ſovent foits diſtreſs*; but he cannot have *treſpaſs vi & armis* againſt his lord, becauſe he is prohibited by the ſtatute of *Marlbridge, cap.* 3. See *Bevill's* caſe. 'Tis true, there was no remedy at Common law for theſe profits *apprender in alieno ſolo*, for an aſſiſe in ſuch caſes was given by the ſtatute *Weſtm.* 2. *cap.* 15. and ever ſince it lieth of *eſtovers*, to be taken in the woods of another, of *nuts and acorns* to be taken in ſuch woods, of a *corody* of the ſeveral ſorts of *tolls*; all which a man may likewiſe have in his own lands, and yet, if he be diſſeiſed of them he may have an aſſiſe; ſo of *pontage, paſſage, pannage*, and ſuch like things. 8 *Rep.* 47.

It lies where men are diſſeiſed of their offices of profit, and therefore an aſſiſe was brought, wherein the demandant counted *de officio magiſtri ludorum pilarum palmarum domini regis Angliæ*, the office of maſter of the King's tennis plays, that is, of the tennis plays of the King's houſhold, and only when the King himſelf plays in perſon; for the grant of the office ſhall have a reaſonable conſtruction, and the aſſiſe ſhall be *de officio cum pertinentiis*, where a man is diſſeiſed of the whole office, but where only of part, he ſhall have an aſſiſe of that part, and no more. 8 *Rep.* 46.

In aſſiſe for a *cellar*, the tenant pleaded in abatement, that the demandant had *entered* at the *laſt continuance*; the jury found a ſpecial verdict, that the demandant had entered,

entered, but it was at the requeſt of the tenant, and only to view the antiquity of the cellar; adjudged, that by ſuch entry the writ was not abated. *Plowd. Com.* 92.

An aſſiſe was brought of the office of a *filazer* of the court of Common Pleas, and the demandant counted *de libero tenemento*, and alledged ſeiſin, by taking money for a *capias*, and the *poſt* was put in *view* where the officer ſate. *Dyer* 114.

An aſſiſe was brought of the office of *clock-keeper* of *Weſtminſter*, and it was adjudged to be well brought; but then the demandant muſt aver, that it was an *ancient office*, and prove it at the trial, otherwiſe he muſt be nonſuited. *Brownl.* 28.

An aſſiſe was brought of the office of *ſadler to the Queen*, granted to the demandant by the King; and it was adjudged, that it would not lie, becauſe the King could not make ſuch an officer for the *Queen*; and becauſe there was no place mentioned in the patent where the perſon ſhould exerciſe and enjoy this office, and therefore it could not be put in *view* to the recognitors; ſo if the King granted the office of *uſher* to the prince of *Wales*, an aſſiſe will not lie. 1 *Brownl.* 28.

An aſſiſe lieth of the office of *regiſter of the admiralty*, and the demandant laid a preſcription to it, viz. *quod quilibet hujuſmodi perſona*, which ſhould be named by the admiral, ſhould be regiſter of the admiralty for life. *Dyer* 153.

It lieth of offices of *woodward*, *park-keeper*, and *keeper of chaſes*, *warrener*, *&c.* but theſe are not at Common law; but by the ſtatute of *Weſtm.* 2. becauſe they are of profits to be taken *in alieno ſolo*; it likewiſe lieth of all other offices and bailiwicks in fee. 8 *Rep.* 47.

In an aſſiſe of a *new office*, it ought to be ſhewed what profits belong to it; but it is otherwiſe of an ancient office, becauſe it is preſumed, that the profit thereof is ſufficiently known. 8 *Rep.* 45.

If a maſter of an hoſpital is deprived of his office by a lay patron, without cauſe, he may have an aſſiſe, becauſe he hath no other remedy; but if ſuch a maſter is *eccleſiaſtical*, and deprived by the *ordinary* without cauſe, he ſhall not have an aſſiſe, becauſe he may appeal to the viſitor. 11 *Rep.* 99.

Error of a judgment in an aſſiſe of the office of a *park-keeper*, which was granted in *reverſion* to the demandant, and afterwards the *park* itſelf was granted to another, who entered and kept out the reverſioner after the death of the tenant for life, for which he brought an aſſiſe, and after the verdict, and before judgment, entered into the park, and there did hunt and killed a deer, and this entry was aſſigned for error, for that it had abated the writ, and made the judgment erroneous; but the court was not of that opinion. 1 *Bulſt.* 5, 6.

Aſſiſe of the *ſuperſedeas office*; the King's counſel came into court, and ſaid to the judges, *the King doth greet you well*, and as to the *aſſiſe*, it concerned the King and his prerogative, and that they were no farther to proceed therein, and ſo delivered to them a writ *de non ulterius proſequendo rege inconſulto*, which the court received, and yet the counſel for the defendant argued againſt the writ, which at firſt the court doubted whether they might or not; but they agreed, that after the writ was allowed, they could not proceed upon the aſſiſe without a *procedendo ad loquelam*, and likewiſe a *procedendo ad judicium*. 3 *Bulſt.* 32.

Aſſiſe, *&c.* for that the defendant *levavit quandam domum ad nocumentum*, *&c.* and ſhewed that he had a *windmill*, and that the defendant had built his houſe ſo near that it hindered the mill: the jury found, that he *levavit domum*, and that *two foot* of it did hinder the plaintiff's mill; it was inſiſted, that only the *two foot* ſhall be abated, and not the whole houſe; but the Chief Juſtice *Hobart* was of opinion that could not be, for *levavit domum* is when an entire houſe is built from the ground; if it had been *erexit domum*, then the two foot and no more might have been abated, becauſe *erexit* is when *part* of an houſe is ſet up; but the better opinion was, that only the two foot ſhall be abated. *Godb.* 233.

And though ejectment is now the common action for thoſe things, which were formerly recovered in aſſiſe; yet in ſome caſes an aſſiſe will lie where ejectment will not, as in the caſe before mentioned, *de uno croſto*; neither will an ejectment lie *de piſcaria*, becauſe the ſheriff cannot deliver poſſeſſion of it, but an aſſiſe will lie of it, for though it is *proficuum capiend' in alieno ſolo*, yet it may be put in view to the recognitors. *Cro. Car.* 354.

In aſſiſe for the office of one of the four clerks of the *privy ſignet*, it was ruled, that where it is brought for a thing againſt *common right*, the demandant ought to ſet forth his title ſpecially; but where 'tis brought for *lands*, there 'tis ſufficient to ſay *de libero tenemento*: that when an aſſiſe is arraigned, 'tis not enough to demand the *recognitors*, and to read the writ and the count in *French*; but the clerk ought to read the *count in Latin*, as 'tis entered on record, for till then the court is not poſſeſſed of it; and if 'tis not read in *Latin* it may be a queſtion whether the aſſiſe is diſcontinued; but before this aſſiſe was taken, it was excepted againſt the writ, becauſe it was *octavas* inſtead of *octabis*, and becauſe it was returnable *coram nobis apud Weſtm'*, when it ought to have been *coram nobis ubicunq*; for the one is the form in the common pleas, and the other in *B. R.* but adjudged, that *octavas* is more near the grammar than *octabis*, and that *coram nobis apud Weſtm'* was well enough; and the court held, that if a *clerk of the ſignet* abſented in his waiting month, it was a forfeiture of his office; ſo if the reverſion is granted to him, and he doth not come when it is void, that is likewiſe a forfeiture; and if a grant is *poſt mortem vel forisfacturam* of him in poſſeſſion, and afterwards he forfeits it, the grantee of the reverſion may enter without a *ſcire facias*. *Sid.* 73, 80.

Aſſiſe for the office of the *marſhal of B. R.* *Mr. Lenthal* and others, and the counſel being ready to arraign it in *French*, the *recognitors* did not appear, but the writ was read, which may be returnable any day, as well as on a return day; neither did the demandant appear; whereupon the aſſiſe was adjourned to another day, and then was arraigned, and the tenant prayed, that the demandant might come in and count, who not being ready prayed another day, which was denied; for this is *feſtinum remedium*, and the tenant in law is bound to plead *inſtanter*, which he cannot do where there is no court, therefore the demandant was nonſuited; but he may bring a new aſſiſe. 1 *Salk.* 82.

In an aſſiſe for *tithes*, the writ was *de libero tenemento*, and the count was *de portione decimarum* in *R.* without mentioning the certainty of the tithes; and this was adjudged good, becauſe the taking of part ſhall be a diſſeiſin of the whole. *Dyer* 83.

Where an aſſiſe is brought for a *mill*, it ſhall be *de molendino* generally, without expreſſing in certainty the nature of the mill, as *griſt mill*, *fulling mill*, *&c.* becauſe the mill is the ſubſtance, and the other are but additions to ſhew the quality of the mill. 4 *Rep. Lutterel's* caſe.

In aſſiſes for a *rent-charge*, *rent-ſervice*, or *rent-ſeck*, brought by tenant for life, in fee or in tail, the writ muſt be general *de libero tenemento* in *R.* but if 'tis of a *rent-charge* or *ſeck*, all the lands muſt be named in the writ, but not in aſſiſe for rent-ſervice. *Dyer* 31.

Aſſiſe, *&c.* for *rent-charge*, in which the caſe was, huſband and wife were ſeiſed of two manors, which by fine they conveyed *(inter alia)* to the conuſee by the name of two manors, *&c.* and he by the ſame fine rendered back to them an *yearly rent of* 50 *l.* and to the heirs of the wife, and alſo rendered the two manors to them for their lives, the remainder over in tail; the huſband and wife died, the *rent* deſcended to the plaintiff as ſon and heir of the wife, and he had judgment in the aſſiſe; upon which a writ of error was brought, and the error aſſigned was, that the fine was of two manors *(inter alia)* which words import, that other lands beſides the manors did paſs; if ſo, the aſſiſe brought againſt the tenant of the manors only is not good, becauſe all the tenants of the lands compriſed in the fine ought to be named, and this was adjudged good cauſe of error. *Cro. Eliz.* 226.

An aſſiſe lieth of *a rent*, *(viz.)* *a rent ſeck of* 40 *l. per ann.* was granted, iſſuing out of an houſe called the *unicorn in L.* payable at *Michaelmas* and *Lady-day at the houſe* of the grantee in *L.* *&c.* and 6*d.* was given in the name of the ſeiſin; now in this caſe the rent was iſſuing out

out of one houſe, and to be paid at another, yet the demand *at the houſe where it was iſſuing*, and none being there to pay it, was adjudged a diſſeiſin, for which the aſſiſe was brought. *Cro. Car.* 365.

Error of a judgment in an aſſiſe for *rent arrear*, in which the demandant counted, that the rent was deviſed to him for life, iſſuing out of ſeveral tenements, naming them, and that the *teſtator died*, and the lands deſcended to *B. G.* and that he was ſeiſed of the ſaid rent by the hands of the ſaid *B. G.* until afterwards he was diſſeiſed by him, *&c.* the errors aſſigned were, that the aſſiſe being brought for the arrears of rent due upon a deviſe, the demandant had omitted to ſhew when the teſtator died; for which reaſon the certainty of what was in arrear could not be known; neither did he ſet forth, or the jury find, that the rent was demanded on the lands, for a demand of the perſon off the land was adjudged not to be good; and for theſe reaſons the judgment was reverſed. *Cro. Car.* 374.

An aſſiſe lieth *de cellaria*, *de alneto*, *de bullaria*, *de ſalina*, *&c.* for though theſe and the like are incertain in the count, yet becauſe they may be made certain in the evidence at the trial, it ſhall be good. *Cro. Car.* 399.

An aſſiſe lieth of *common of paſture*, where the commoner hath a freehold in it, and the lord or other people feed it ſo hard, that all the graſs is eat up where the common ſhould be taken; but then he muſt count and ſet forth how long the land was fed, and alledge *per quod proficuum ſuum per totum tempus ibidem amiſit*; for if 'tis only a ſmall feeding, an aſſiſe doth not lie, but in ſuch caſe the commoner may diſtrain the cattle damage-feaſant. 9 *Rep.* 112.

Error to reverſe a judgment in an aſſiſe of *novel diſſeiſin* in an inferior court, in which the demandant counted, that the tenant did diſſeiſe him *de uno muro lapideo*, and had built an houſe in the place of it, and all this matter was aſſigned for error; and adjudged, that he ought to have brought an *aſſiſe of nuſance*, and not an aſſiſe of *novel diſſeiſin*. *Style* 145.

Afterwards the demandant brought a new aſſiſe for the ſame office, and it being arraigned on the firſt day of term, the tenant made default, being demanded, *ideo capiatur aſſiſa per defaltum*; then the demandant counted and ſhewed the King's patent, which was read, but the jury being not yet ſworn, day was given till *Wedneſday* following, at which time the tenant may appear and give what evidence he can, but he cannot after this default plead either in bar or abatement, nor challenge; and the cauſe coming on to tryal, the demandant proved ſeiſin by compounding and taking 20 *s.* of a priſoner, who was committed by the houſe of commons to the tenant *Norfolk*, who was then in poſſeſſion of the office, and by going to the lobby and laying his hands on the mace whilſt it was on the ſhoulder of *Norfolk*; and this was held ſufficient ſeiſin and diſſeiſin, and the demandant had a verdict. 2 *Lev.* 120.

Aſſiſe for the office of *ſerjeant at mace to the houſe of commons*; at the trial the demandant made a title by a grant from *King James*, reciting a former grant, and this to commence after the determination thereof; adjudged, that this *recital was not* evidence, whereupon the demandant went to the *rolls*, and had leave of the *maſter of the rolls* to bring the patent into court, which was done; then he was to prove ſeiſin, which he did, by proving that he went to the houſe of commons and demanded his place, but received no fees; but that in an action on the caſe for diſturbing him in his office he had recovered 300 *l.* damages, and that this by *Hale* Ch. J. was held a *ſufficient ſeiſin*, the damages being recovered in ſatisfaction of his fees whilſt he was out of poſſeſſion; but by other judges it was denied: whereupon the matter was intended to be found ſpecially, but the demandant, rather than agree to it, became nonſuit. 2 *Lev.* 108.

2. *Who may have aſſiſe, and againſt whom, and where it lieth.*

As the writ of aſſiſe reſtores the party to the actual ſeiſin of his freehold, for ſo are the words of the writ, *viz. facias tenementum illud ſeiſiri*, *&c.* conſequently the party that brings the writ muſt found it upon an actual ſeiſin, which he has been diveſted of, for otherwiſe this remedy is not commenſurate to his caſe. See 2 *Rol. Abr.* 463.

Therefore if there be lord and tenant by rent-ſervice, and the lord grants the ſervices to another, and the tenant attorns by a penny, this being given by way of attornment, is not ſufficient ſeiſin to ground an aſſiſe on; *ſecus* if the penny had been given by way of ſeiſin of the rent. *Lit. Sect.* 565. *Co. Lit.* 315. 4 *Co.* 9. 10 *Co.* 127.

If the leſſor dies, and after the leſſee for years is ouſted, the heir of the leſſor ſhall have an aſſiſe of *novel diſſeiſin*, and not of *mort d'aunceſtor*, for the leſſee's continuing in poſſeſſion after the death of the leſſor, was in right of the heir. See 1 *Rol. Abr.* 270, 271. *Kelw.* 110.

If a man leaſes for years, the remainder over in fee, and after the tenant for years is ouſted of his term, he in the remainder may have an aſſiſe, becauſe the freehold was in him at the time of the *diſſeiſin*. *Kelw.* 109.

An aſſiſe muſt be brought in the county where the land lieth, and not elſewhere; for if 'tis brought in a foreign county, though by the aſſent of the parties, 'tis erroneous. *Dyer* 267.

Tenant by ſtatute, or by *elegit*, may have an aſſiſe, tho' they have but a chattle intereſt, and they muſt count *ut de libero tenemento*, and not *de termino*, and in ſuch caſe *antient demeſne* is a good plea. 5 *Rep. Alden's* caſe: but now the law is held to be otherwiſe, becauſe in an aſſiſe brought by a tenant in *elegit*, the judgment is not to recover the poſſeſſion of the land, but only to have execution done on the former judgment. *Hob.* 47.

Tenants in common ſhall each have a ſeveral aſſiſe for his moiety, or part, becauſe they are ſeiſed by ſeveral titles; but *twenty jointenants* ſhall have but one *aſſiſe* in all their names, becauſe they have but one joint title; ſo if there are three jointenants, and one of them releaſeth all his right to one of his companions, and then the other two are diſſeiſed of the whole, they ſhall have but one *aſſiſe* in both their names for the two parts, becauſe they had a joint title to it at the time of the diſſeiſin, and he to whom the releaſe was given ſhall have an aſſiſe in his own name, becauſe of that part he is *tenant in common*. 1 *Inſt.* 196.

In aſſiſe, which came on to be tried at the aſſiſes, the recognitors were at the bar and ready to be ſworn, and the defendant came into court, and confeſſed the ſeiſin and diſſeiſin as the demandant had declared; whereupon he demanded judgment, and he had it, which was entered, *quod recuperet ſeiſinam per viſum recognitorum*; and upon this a writ of error was brought, and the error aſſigned was, becauſe none of the jury were ſworn, or had the view, and they were not recognitors before they were ſworn; adjudged, that tho' they ſhould have the view of the land, yet if they know it well enough, the aſſiſe may be taken without the view; the judgment was affirmed. 2 *Bulſt.* 160.

A diſſeiſor made a leaſe of years, and being about to leave the realm, he ordered the leſſee to keep the poſſeſſion againſt the diſſeiſee till he returned, which he did, and paid the rent to the uſe of the diſſeiſor; the better opinion was, that in this caſe the leſſee was ſuch a diſſeiſor, that an aſſiſe might be brought againſt him. *Dyer* 141.

The Queen granted the cuſtody of a *park* to one for life, with *all the profits and commodities* to the ſaid office belonging, to which the *herbage* and *pawnage* of the park did belong; and afterwards granted the park to *T. S.* and his heirs; the grantee felled ſome trees, and carried them away: now this being an injury done to the keeper in reſpect of the *pawnage*, he cannot bring treſpaſs, but an aſſiſe or action on the caſe; he cannot bring an aſſiſe, for that doth not lie, becauſe he cannot have ſeiſin of the pawnage of the trees, for thoſe are gone; therefore he may bring an action on the caſe, and recover damages; but he may have an aſſiſe for the *herbage*. 2 *And.* 7.

The taking of 3 *d.* of *A.* for a *capias* againſt *B.* is a ſufficient ſeiſin of the office of *Filizer de Banco*. 1 *Rol. Abr.* 270.

If one by the houſe of commons be committed to *A.* who before and long after was in poſſeſſion of the office of

of ſerjeant at arms to the houſe, and the priſoner compounds with *B.* for the fees, and gives him twenty ſhillings; this is a good ſeiſin of the office by *B.* for he cannot be diſſeiſed thereof but at his election; adjudged and held likewiſe, that proving that *B.* being in the *lobby* of the *houſe of commons*, took hold of the door of the houſe, and laid his hands upon the mace, (then being in the hands of *A.*) to take it, but hindered by *A.* was good evidence both of a *ſeiſin* and *diſſeiſin*. 2 *Lev.* 108.

The ſerjeant of the mace to the *houſe of commons*, in an action upon the caſe for a diſturbance, recovered damages; and whether this was a ſufficient ſeiſin, the damages being recovered in ſatisfaction of the fees, and he then being out of poſſeſſion of his office, was doubted; ſome of the judges inclining one way, and ſome the other; and it was intended to have been found ſpecially; but the plaintiff being unwilling to ſtand to it was nonſuit. 1 *Lev.* 108.

3. *Proceedings and pleadings in aſſiſe.*

The firſt proceſs in this action is an original writ iſſued out of Chancery, directed to the ſheriff, commanding him to return a jury, who are called the recognitors of the aſſiſe. An aſſiſe is *feſtinum remedium*, and to be arraigned on the day the writ is returnable, on which day the defendant is to count, and the tenant is to appear and plead inſtantly, unleſs the court thinks proper to allow him an imparlance, which is ſaid cannot be without ſhewing good cauſe. *Style Reg.* 88.

When the plaintiff counts, the defendant may plead in abatement, and over in bar, or may plead the general iſſue *nul tort nul diſſeiſin*. *Booth* 214.

If the tenant pleads a plea, which ſhews that the aſſiſe ſhould not be taken, and ſuch plea is triable by a jury, the recognitors of the aſſiſe may try it, and then the aſſiſe is ſaid *tranſire in jurata*; and the aſſiſe and record adjourned into the Common Pleas. *Booth* 313, 314.

In aſſiſe for a rent-charge or ſeck, the demandant muſt make a title in his plaint; otherwiſe in an aſſiſe of land, for there poſſeſſion without any other title is ſufficient. *Jenk.* 42.

In an aſſiſe for a portion of tithes, the demandant in his plaint muſt make a title, for the ſeiſin only is not ſufficient, no more than in the caſe of a rent or other profit in the ſoil or fee of another, which commences againſt common right; for in all theſe caſes of neceſſity the commencement thereof muſt be alledged by him who will make title thereto, whether he be privy or a ſtranger; for it is againſt reaſon to charge the inheritance or freehold of another, without ſhewing ſome ſubſtantial foundation thereof. *Dyer* 58.

In an aſſiſe for an office, the demandant in his plaint muſt ſet forth a title. 3 *Mod.* 273.

By *Weſtm.* 2. *cap.* 25. a certificate of aſſiſe is given, which is a writ for the party grieved, by a verdict or judgment given againſt him in an aſſiſe, when he had ſomething to plead, as a record or releaſe, which could not have been pleaded by his bailiff; or when the aſſiſe was taken againſt himſelf by default, to have the deed tried, and the record brought in before the juſtices, and the former jury ſummoned to appear before them at a certain day and place, for a further examination and trial of the matter. See *Booth* 215, 287. 4 *Co.* 4. *b.* 2 *Inſt.* 26.

If a flat bar be pleaded to the aſſiſe, and iſſue is joined thereupon, the jury never inquire of the *ſeiſin* or *diſſeiſin*, but of the matter pleaded in bar, and of damages if the plea be found againſt the defendant. *Booth* 214.

But if the defendant pleads a colourable plea, then they are to inquire of the *ſeiſin* and *diſſeiſin*, which is called the taking the aſſiſe at large. See *Booth* 214, 215.

Alſo if an infant pleads a flat bar, and the bar is found againſt him, yet the aſſiſe ſhall be taken at large, becauſe the law not allowing the parol to demur in this action, which was *feſtinum remedium*, the *ſeiſin* and *diſſeiſin* was inquired of, that the infant's whole title might appear before the court. 1 *Rol. Abr.* 275.

Adjudged, that in *aſſiſe*, if the tenant *plead in abatement*, he muſt likewiſe plead over in bar at the ſame time, and that no *imparlance* ſhall be allowed without ſome ſpecial cauſe; and if there are ſeveral tenants, thoſe who do not appear on the firſt day, the *aſſiſe* ſhall be taken againſt them. 1 *Salk.* 85.

In an aſſiſe for an office newly erected and conſtituted, the demandant in his plaint muſt ſhew what fee or profit is granted for the exerciſe thereof; for this office cannot have a fee or profit appurtenant to it as an ancient office may; and for an office without fee or profit no aſſiſe lies. 8 *Co.* 49.

But in an aſſiſe for an ancient office, the demandant in his plaint need not ſhew what fee or profit is belonging to it, for it ſhall be intended there is ſome fee or profit. 8 *Co.* 49.

It is a common learning, that in an aſſiſe the plaint need not be ſo certain as in other writs, becauſe the judgment is to recover *per viſum recognitorum*; and if the plaint be but ſo certain that the recognitors may put the demandant in poſſeſſion, it is ſufficient. *Dyer* 84.

In an aſſiſe of rent in *D.* the tenant cannot plead that in the ſaid county there are two *D's*, without any addition to diſtinguiſh them, becauſe the plaintiff ſhall recover *per viſum juratorum*. *Jenk.* 33.

Form of a writ of *aſſiſe of novel diſſeiſin.*

GEORGE *the Third*, &c. *To the ſheriff of* W. *greeting.* A. B. *hath complained to us, that* C. D. *unjuſtly and without judgment hath diſſeiſed him of his free tenement or freehold in*, &c. *within thirty years now laſt paſt; and therefore we command you, that if the ſaid* A. *makes you ſecure in proſecuting his claim, then that you cauſe the ſaid tenement to be reſeiſed of the chattels which in it were taken, and the ſame tenement with its chattels to be in peace, until the next aſſizes, when our juſtices into thoſe parts ſhall come: and in the mean time do you cauſe twelve free and lawful men of that venue or neighbourhood to view the ſaid tenement, and their names to be impanelled, and ſummon them by good ſummoners, that they be before our ſaid juſtices at the ſaid aſſiſes, ready to make recognizance thereof; and put by ſureties and ſafe pledges the ſaid* C. *or his bailiff, if he ſhall not be found, that he then be there to hear that recognizance; and have you there the ſummoners, and the names of the pledges, and this writ. In witneſs*, &c.

A count or declaration, with a plea, iſſue and judgment, in an aſſiſe.

Middleſex. THE *aſſiſe come to recogniſe, whether* C. D. *unjuſtly and without judgment did diſſeiſe* A. B. *of his freehold in*, &c. *within thirty years now laſt paſt*, &c. *and whereupon the ſaid* A. *by* T. E. *his attorney complains, that he the ſaid* C. *diſſeiſed him of one meſſuage, twenty acres of land, and*, &c. *with the appurtenances, in*, &c. *and for his title to the tenements and aſſiſe aforeſaid, the ſaid* A. *ſaith, that* T. B. *father of him the ſaid* A. *long before the obtaining of the ſaid original writ of aſſiſe, was ſeiſed of the tenements aforeſaid with the appurtenances, in his demeſne as of fee; and being ſo ſeiſed thereof, the day and year*, &c. *at*, &c. *aforeſaid, by his indenture, made between him the ſaid* T. *of the one part, and*, &c. *of the other part, which other part thereof, with the ſeal of the ſaid* T. *affixed thereto and by him ſigned, the ſaid* A. *here brings into this court, the date whereof is the ſame day and year above, he for himſelf, his heirs and aſſigns, did covenant, grant, &c.* [here reciting a deed of covenants to levy a fine of the tenements, among other things, and the fine levied accordingly] *to the uſe of* A. *and his heirs, &c. by virtue of which fine ſo levied, the ſaid* A. *into the ſaid tenements with the appurtenances entered, and was thereof ſeiſed in his demeſne as of fee, until the aforeſaid* C. D. *him the ſaid* A. *thereof unjuſtly, and without judgment did diſſeiſe as aforeſaid; and this he is ready to verify; whereupon he prays the aſſiſe, &c. And the ſaid* C. *by, &c. his attorney, comes, &c. and ſaith, that he has nothing in the ſaid tenements with the appurtenances, to put in view of the recognitors of the ſaid aſſiſe, and in the plaint or declaration aforeſaid ſpecified, nor had at the day of bringing the original writ of aſſiſe aforeſaid, or ever after, nor any injury or diſſeiſin did to the ſaid* A. *and of this he puts*

A S S

puts himſelf upon the aſſiſe; and the ſaid C. *does likewiſe: therefore let the aſſiſe thereof between them be taken, &c.* [Here follows the verdict of the recognitors or jury, for the plaintiff *A.*] *Therefore it is conſidered, that the ſaid* A. *do recover againſt the ſaid* C. *his ſeiſin of the tenements aforeſaid, with the appurtenances, and alſo, &c. and the ſaid* C. *is in mercy, &c. and hereupon the ſaid* A. *prays the writ of the Lord the King, to be directed to the ſheriff of the county aforeſaid, to cauſe to be delivered to himſelf full ſeiſin of the tenements aforeſaid with the appurtenances; and it is granted to him, returnable here, &c.*

Aſſiſe of mort d'anceſtor, (*Aſſiſa mortis anteceſſoris*) Is a writ that lieth where a man's father, mother, brother, ſiſter, uncle, aunt, *&c.* died ſeiſed of lands, tenements, rents, *&c.* that were held in fee, and after their deaths a ſtranger abateth. *Reg. Orig.* 223. It is good as well againſt the abator, as any other in poſſeſſion of the land: but it lies not againſt brothers or ſiſters, *&c.* where there is privity of blood between the perſon proſecuting and them. *Co. Litt.* 242. And it muſt be brought within the time limited by the ſtatute of Limitations, or the right may be loſt by negligence, if the anceſtor were ſeiſed the day that he died, of any lands, or other eſtate in fee-ſimple, altho' a ſtranger entereth and diſſeiſeth him of that land the day that he dieth, ſo that he dieth not ſeiſed of the ſaid land; yet the perſon who is his heir ſhall have the *aſſiſe of mort a'anceſtor*, becauſe the writ doth not ſuppoſe that the *anceſtor* died ſeiſed; but ſaith *parati ſacramento recogn. ſi* W. B. *pater, &c. fuit ſeiſitus die quo obiit, &c.* and the ſame is ſufficient, altho' he dieth not ſeiſed. *Fitz. Nat. Br.* 433. If a man be beyond ſea in pilgrimage, and dieth there; or if he enter into religion, *&c.* his heir ſhall have a writ of *aſſiſe of mort d'anceſtor*, and it ſufficeth that the *anceſtor* was ſeiſed the day he went out of the land, although it was not the day of his death. *Ibid.* 434, 435.

By the ſtatute of *Glouceſter*, if tenant by curteſy alien his wife's inheritance, and dieth, the heir of the wife ſhall have an *aſſiſe of mort d'anceſtor*, if he have not aſſets by deſcent from the tenant by the curteſy, and the ſame ſhall be as well where the wife was not ſeiſed of land the day of her death as where ſhe was ſeiſed thereof. 6 *Ed.* 1. *New Nat. Br.* 489. A warden of a college, *&c.* ſhall have *aſſiſe of mort d'anceſtor*, of rent where his predeceſſor was ſeiſed. And a man may have *aſſiſe of mort d'anceſtor* of rents againſt ſeveral perſons in ſeveral counties; having in the end of the writ ſeveral ſummons againſt the tenants: and the proceſs in this writ, is ſummons againſt the party; and if he makes default at the day of the *aſſiſe* returned, then the plaintiff ought to ſue out a reſummons; and if he makes default again, the aſſiſe ſhall be taken, *&c. Br. aſſiſ.* 88. In a *mort d'anceſtor*, if the tenant ſays, the plaintiff is not next heir, and this is found againſt him, the points of the writ ſhall be inquired of: and in this caſe, the *aſſiſe* may find, that though the plaintiff be the next heir, yet he is not next heir as to this land; for this is in regard of their inquiry at large. *Br. Mort. d'An'* 47. 1 *Danv. Abr.* 584. Damages ſhall be recovered in the *aſſiſe of mort d'anceſtor*; but it lieth not of an eſtate in tail, only where the *anceſtor* was ſeiſed in demeſne as of fee. *Bro. Aſſiſ.* If a man be barred in *aſſiſe* of *novel diſſeiſin*, upon ſhewing a deſcent, or other ſpecial matter, he may have *mort d'anceſtor*, or writ of *entry ſur diſſeiſin, &c.* 4 *Rep.* 43.

Form of a writ of *aſſiſe of mort d'anceſtor.*

GEORGE *the Third, &c. To the ſheriff of* W. *greeting. If* A. B. *ſhall make you ſecure, that he will proſecute his claim, then ſummon, &c. twelve free and lawful men of the neighbourhood of, &c. that they be before our juſtices at the firſt aſſiſes, when into theſe parts they ſhall come; or before our juſtices at* Weſtminſter, *on the day, &c. or before our truſty and beloved, &c. and thoſe whom to them we ſhall aſſociate, at a certain day and place, which the ſaid juſtices ſhall cauſe you to know (or to be known to you) ready upon oath to recogniſe, if* W. B. *father of the ſaid* A. *&c. was ſeiſed in his demeſne as of fee, of one meſſuage, and one yard land with the appurtenances in* D. *the day which he died; and whether he died, &c. and if the ſaid* A. B. *be his next heir; and in the mean time, let them ſee the ſaid meſſuage and land, and do you cauſe their names to be impanelled; and ſummon by good ſummoners* C. D. *who now holdeth the ſaid meſſuage and lands, that he be there to hear the recognition; and have you there the ſummoners, and this writ. Witneſs, &c.*

Aſſiſe of darrein preſentment, (*Aſſiſa ultimæ præſentationis*) A writ lying where a man and his anceſtors have preſented a clerk to a church, and after, the church being void, a ſtranger preſents his clerk to the ſame church, whereby the perſon having right is diſturbed. *Reg. Orig.* 30. And a man ſhall have *aſſiſe of darrein preſentment*, although he nor his anceſtors did preſent to the laſt avoidance: as if tenant for life or years, or in dower, or by the curteſy, ſuffer an uſurpation into a church, *&c.* and die; he in reverſion, who is heir unto the anceſtor who laſt preſented, ſhall have *aſſiſe of darrein preſentment*, if he be diſturbed: but if a man preſent, and then grant the advowſon unto another for life, and he ſuffer one uſurpation, or two or three uſurpations; now at the next avoidance, he in the reverſion ſhall not have an *aſſiſe of darrein preſentment*, if he is diſturbed to preſent. 10 *Ed.* 3. In this caſe he is put to his *writ* of *right*. If a diſturber preſent to an advowſon, and the patron bring an *aſſiſe of darrein preſentment*, and pending the writ the incumbent dieth, if the diſturber preſent again and dies, yet the patron ſhall have an *aſſiſe of darrein preſentment*, upon the firſt diſturbance againſt the heir of the diſturber by journey's accounts. *New Nat. Br.* 71. A perſon preſents to an advowſon, and the incumbent dies, and the ordinary doth preſent another by lapſe; on that incumbent's death, the right patron ſhall preſent; and if he be diſturbed, he ſhall have an *aſſiſe of darrein preſentment*, notwithſtanding the mean preſentment: but one cannot make title to a preſentment in time of war. *Ibid.* A tenant in tail of an advowſon may have this writ, as well as tenant in fee thereof, and is not put to a *quare impedit*; and 'tis ſaid a leſſee for years may bring it, if he hath preſented before, altho' he hath no freehold; for this *aſſiſe* is not like an *aſſiſe* of *novel diſſeiſin*. *F. N. B.* 31. Though he who will generally bring the *aſſiſe of darrein preſentment* ought to have the ſame eſtate or part thereof, which he had at the time of the firſt preſentment; therefore if ſuch leſſee for years of an advowſon preſents, and after his eſtate is enlarged for life, or in fee, and then the church becomes void, he ſhall not have this writ, becauſe he hath a new eſtate by enlargement, and no part of his former eſtate. *Kelw.* 118. *Mallor. Qu. imped.* 162. By *Magna Charta*, 9 *H.* 3. *c.* 13. theſe *aſſiſes of darrein preſentment* are to be always taken before the juſtices of the bench, and there ſhall be determined. In *aſſiſe of darrein preſentment*, the proceſs is ſummons and reſummons, *habeas corpus, &c.* and if the writ is in *Middleſex*, at the return thereof the *aſſiſe* ſhall be there arraigned at the bar, and the tenant demanded; if the tenant doth not appear, a re-ſummons ſhall be awarded; and if upon that he appeareth not, the *aſſiſe* is to be taken againſt him by default, *&c.* in this *aſſiſe*, ſix of the jury ought to have the view of the church, to the intent that they may put the plaintiff in poſſeſſion, if he recovers; and the judgment is to recover the preſentation and damages, and the value of the church for half a year; and if ſix months be paſt, two years value of the church ſhall be recovered, by *ſtat. Weſt.* 2. 13 *Ed.* 1. *cap.* 5.

Form of a writ of *aſſiſe of darrein preſentment.*

GEORGE *the Third, &c. To the ſheriff of* W. *greeting. If* A. B. *ſhall make you ſecure, &c. then do you ſummon by good ſummoners, twelve free and lawful men of the venue or neighbourhood of* D. *that they be before our juſtices, &c. ready to recogniſe upon their oaths, what patron in the time of peace preſented the laſt parſon or incumbent, who is dead, to the church of, &c. which is vacant, as 'tis ſaid, and the advowſon whereof the ſaid* A. *ſaith belongs to him; and in the mean time let them view that church, and*

do you cauſe their namos to be returned, and ſummon C. D. *who deforced him of that advowſon, that he be there to hear, &c. and have you then there the ſummoners and this writ. Witneſs, &c.*

Aſſiſe de utrum, (*Aſſiſa utrum*) Lieth for a parſon againſt a layman, or a layman againſt a parſon, for lands or tenements, where it is doubtful, whether they be lay fee, or free alms belonging to the church. *Bract. lib.* 4. It is a writ of the higheſt nature that a parſon can have: and if a parſon, prebendary, &c. loſe by default in a real action, he may have this writ; for it is his writ of right. 6 *Rep.* 8. There are the four kinds of *writs of aſſiſe*, uſed in actions poſſeſſory; and are called *petit aſſiſes* in reſpect of the grand *aſſiſe:* for the law of fees is grounded upon two rights, one of *poſſeſſion*, the other of *property*; and as the *grand aſſiſe* ſerves for the right of property, ſo the *petit aſſiſe* ſerveth to ſettle the right of poſſeſſion. *Horn's Mir.* At the Common law there are but two forms of writs of *aſſiſe*, viz. *aſſiſe de libero tenemento*, and *aſſiſe de communia paſturæ.* 8 *Rep.* 45. The *aſſiſe* of *novel diſſeiſin*, &c. and *de communia paſturæ*, were inſtituted by *Hen.* 2. in the place of duels: and therefore *Glanvil* tells us, *that Magna Aſſiſa eſt regale beneficium clementia principis de conſilio procerum populis indultum, a quo vitæ hominum, & ſtatus integritati tam ſalubriter conſulitur, ut in jure, quod quis in libero ſolo tenemento poſſidet, retinendo, duelli caſum homines declinare poſſunt ambiguum, &c. Glanvil, lib.* 2. *cap.* 7.

Aſſiſe of the foreſt, (*Aſſiſa de foreſta*) Is a ſtatute touching orders to be obſerved in the King's *foreſt. Manwood*, 35. The ſtatute of view of frankpledge, *anno* 18 *Ed.* 1. is called the *aſſiſe of the King:* And the ſtatute of bread and ale 51 *Hen.* 3. is termed the *aſſiſe of bread and ale*; and theſe are ſo called, becauſe they ſet down and appoint a certain meaſure or order, in the things they contain. There is further an aſſiſe of nuſance, *aſſiſa nocumenti*, where a man maketh a nuſance to the freehold of another, to redreſs the ſame: and beſides *Littleton's* diviſion of *aſſiſes*, there are others mentioned by other writers, viz. *aſſiſe at large*, brought by an infant to enquire of a diſſeiſin, and whether his *anceſtor* were of full age, good memory, &c. when he made the deed pleaded, whereby he claims his right. *Aſſiſe in point of aſſiſe*, (*aſſiſa in modum aſſiſæ*) which is when the tenant as it were ſetting foot to foot with the demandant, without any thing further, pleads directly to the writ, no wrong, no diſſeiſin. *Aſſiſe out of the point of aſſiſe*, is when the tenant pleadeth ſomething by exception; as a foreign releaſe, or foreign matter triable in a foreign county; which muſt be tried by a jury, before the principal cauſe can proceed. *Aſſiſe of right of damages* is where the tenant confeſſeth an *ouſter*, and referring it to a demurrer in the law, whether it were rightly done or not, is adjudged to have done wrong; whereupon the defendant ſhall have a writ of *aſſiſe* to recover damages. *Bract. lib.* 4. *F. N. B.* 105. *Aſſiſes* are likewiſe awarded *by default* of tenants, &c.

Aſſiſers, (*Aſſiſores*) *Sunt qui aſſiſas condunt, aut taxationes imponunt.*——In *Scotland*, (according to *Skene*) they are the ſame with our jurors; and their oath is this:

We ſhall leil ſuith ſay,
And no ſuith conceal, for nothing we may,
So far as we are charg'd upon this aſſiſe,
Be God himſelf, and be our part of paradiſe,
As we will anſwer to God, upon
The dreadful day of dome.

Aſſiſus, Rented or farmed out for ſuch an *aſſiſe*, or certain aſſeſſed rent in money or proviſions. *Terra aſſiſa* was commonly oppoſed to *terra dominica*; this laſt being held in demain, and occupied by the lord, the other let out to inferior tenants. So among the lands of the Knights Templars, belonging to their preceptor of *Sandford, Com.* Oxon. *Apud Covele de dono* Matildis *reginæ habentur quatuor hidæ quarum duæ ſunt in dominico, & duæ hominibus apud, &c. Kennet's Paroch. Antiq.* 141. And hence comes the word to *aſſeſs*, or allot the proportion and rates in taxes and payments by *aſſeſſors. Cowell.*

Aſſithment, A wiregild or compenſation, by a pecuniary mulct: From the prepoſition *ad*, and the Sax. *fithe*, vice: *Quod vice ſupplicii ad expiandum delictum ſolvitur. Cowell.*

Aſſnaſare, from the Sax. *Aſnaſan, impingere:* It ſignifies to carry his pike ſo careleſsly that a man is killed with it: *Si quis haſtam humero geſtarit in quam alius forte fortuna impegerit, æquum eſſe videtur capitis æſtimationem ſine omni mulcta ei imperare.* Leges Alfred. c. 39. *Si autem oculos* aſnaſſet, *reddat weram ejus, &c.* c. 38. See **Poſſibilitas.** *Cowell.*

Aſſociation, (*Aſſociatio*) Is a writ or patent ſent by the King, either at his own motion, or at the ſuit of a party plaintiff, to the juſtices appointed to take aſſiſes, or of *oyer* and *terminer*, &c. to have others *aſſociated* unto them. And this is uſual where a juſtice of aſſiſe dies; and a writ is iſſued to the juſtices alive to admit the perſon *aſſociated:* Alſo where a juſtice is diſabled, this is practiſed. *F. N. B.* 185. *Reg. Orig.* 201, 206, 223. The clerk of the aſſiſe is uſually *aſſociate* of courſe; in other caſes, ſome learned ſerjeants at law are appointed. It has been holden, that an *aſſociation* after another *aſſociation* allowed and admitted, doth not lie; nor are the juſtices then to admit other *aſſociation* in that writ afterwards, ſo long as that writ and commiſſion ſtand in force. *Br. Aſſiſe* 386. *Mich.* 32 *Hen.* 6. The King may make an *aſſociation* unto the ſheriff, upon a writ of *rediſſeiſin*, as well as upon aſſiſe of *novel diſſeiſin*, &c. *New Nat. Br.* 416, 417.

Aſſociation of parliament. In the reign of King *William* the Third, the parliament entered into a ſolemn *aſſociation* to defend his Majeſty's perſon and government againſt all plots and conſpiracies; and all perſons bearing offices civil or military, were injoined to ſubſcribe the *aſſociation*, to ſtand by King *William*, on pain of forfeitures and penalties, &c. by *ſtat.* 7 & 8 *W.* 3. *cap.* 27.

Aſſoile, (*Abſolvere*) To deliver from excommunication. *Staunf. Pl. Cr.* 72. The defendant ſhall remain in priſon till the plaintiff is *aſſoiled*; that is, delivered from his excommunication: And in *ſtat.* 1 *Hen.* 4. *cap.* 10. mention being made of *King Ed.* 3. it is added, whom God *aſſoil. Cowell.*

Aſſumpſit, (from the Lat. *aſſumo*) Is taken for a voluntary promiſe, by which a man aſſumes or takes upon him to perform or pay any thing to another: It comprehends any verbal promiſe, made upon conſideration; and the civilians expreſs it diverſly, according to the nature of the promiſe, calling it ſometimes *pactum*, ſometimes *promiſſionem*, or *conſtitutum, &c. Cowell. Termes de la ley.* See title **Actions** VI.

1. *In what caſes an* aſſumpſit *lies.*
2. *What acts or words will make an* aſſumpſit.
3. *What ſhall be deemed a good conſideration to create an* aſſumpſit.
4. *Where the conſideration ſhall be deemed to be executed, or continuing.*
5. *Where* aſſumpſit *cannot be maintained, the conſideration being againſt law.*
6. *Pleadings.*

1. *In what caſes an* aſſumpſit *lies.*

Indeb. aſſump. by an *under-officer againſt his colonel for his pay*; and here proof was admitted of the hand of a perſon proved beyond ſea; and *per Holt* Ch. J. If one *recovers money to the uſe of another*, an *indeb.* is a proper remedy for it; but if in this caſe there were any *legal deduction* to be made by the colonel, the remedy had been *account*; for where one receives money, and has no way to diſcharge himſelf of it but by payment over, an *indeb.* will lie. 12 *Mod.* 521.

A *goldſmith's bill for* 450l. *payable to* A. *was brought to the bank by* G. *who deſir'd* M. *the caſhier, to give him a ſpecie*

a ſpecie bank-note payable to A. *for the ſaid bill.* *M.* refuſed, unleſs *A.* would promiſe to pay the 450*l.* to the bank, in caſe *S.* the goldſmith did not; which *A.* agreeing to, M. *gave* G. *a bank-bill for that ſum.* *G.* gave the bank-note to *C.* for a debt he owed him, and *C.* received the money at the bank. *S.* refuſed to pay his bill. *Holt*, Ch. J. held, that the plaintiffs might have a ſpecial action, but not a general *indeb. aſſump.* for this was not money lent, nor laid out for defendant's uſe, but it was a buying of the bill of *S.* with a warranty of it from the defendant; and the plaintiffs were nonſuit. 2 Lord *Raym.* 753. See title **Actions** VI.

Plaintiff can maintain no action here *on a judgment in* France, but an *indebitatus aſſumpſit*, or an *inſimul computaſſet*, *&c.* for the debt is to be conſidered here only as a debt by ſimple contract. 2 *Vern.* 540.

Where money is over-paid, this action will lie for the ſurplus. *Arg.* 11 *Mod.* 147.

Indeb. aſſump. lies *by a prothonotary againſt an attorney*, for fees for work done for defendant as attorney. *Holt's Rep.* 20.

An *indebitatus aſſumpſit* will not lie *on a ſpecial agreement*, till *the terms of it are performed*; but when that is done, it raiſes a duty for which a general *indebitatus aſſumpſit* will lie. *Gib.* 303.

Indeb. aſſump. for that the defendant was *indebted* to him in 20*l.* *for nouriſhing* E. L. *an infant*, by the plaintiff, *at the requeſt of the defendant*, he promiſed to pay. It was objected, that this will raiſe a debt, and ſo *indeb. aſſump.* will not lie; but *per tot. cur. contra*, and judgment for the plaintiff. 2 Lord *Raym.* 842.

Indeb. aſſump. *for meat, drink, and lodging found for a third perſon*; and moved in arreſt of judgment that it would not lie, but a ſpecial action upon the caſe; but *per cur. it lies* againſt him *upon the contract*, and the plaintiff had judgment. 6 *Mod.* 77.

2. *What acts or words will make an aſſumpſit.*

If *A.* delivers an obligation to *B.* to re-bail to *A.* *A.* ſhall have an action on the caſe, without an expreſs *aſſumpſit*; *per Anderſon.* *Leon.* 297. *pl.* 406.

Every contract executory implies an *aſſumpſit* to pay money at the day agreed, or immediately, if no time be limited; but it is not ſo of an *indeb. aſſump.* becauſe the cauſe does not appear. Said by *Popham* to be the opinion of all the juſtices of *England.* *Mo.* 667.

The plaintiff declared, that T. *was indebted to him, and appointed* J. S. *the defendant, to whom he delivered* 50*l.* *to pay it to the plaintiff in part of the ſaid debt*, whereupon *the plaintiff came to* J. S. *and demanded the* 50*l.* *who anſwered that he was buſy then, but if he would come ſuch a day he would pay him.* The plaintiff came at the day, but *J. S.* refuſed to pay him. *Per Popham Ch. J.* When *T.* delivered the money to *J. S.* to deliver to the plaintiff, an agreement is included thereby to deliver it to him, which will charge him in *aſſumpſit* to him that ought to have the money; and *Tanfield* agreed, that when there is any precedent matter which cauſed the delivery, as here it was by a debt, the delivery is not countermandable; but here is another conſideration beſides the debt, *viz.* the coming to the defendant's houſe to fetch the money, to which *Yelverton* agreed; whereupon it was adjudged for the plaintiff. *Dyer* 272.

Wherever one *acts as bailiff* he promiſes to render account; *per Holt*, Ch. J. 1 *Salk.* 9.

If two men ſubmit to the *award* of a third perſon, the two do alſo thereby promiſe expreſsly to abide by the determination; for agreeing to refer is a promiſe in itſelf. 6 *Mod.* 35.

There is no ſuch thing as a *contract*, or promiſe *in law*, though there is ſuch expreſſion in ſome of the books. *Per Holt and Powel.* 6 *Mod.* 250.

Aſſumpſit, in conſideration that the plaintiff *venderet et deliberaret to* D. *his father*, at the inſtance of defendant, 200 hog-lambs *to the uſe of defendant*, that defendant would pay ſo much money as ſhould be agreed between the plaintiff and *D.* After judgment for the plaintiff, it was aſſigned for error, that the contract was the contract of the defendant himſelf, ſo that the action ſhould have been debt, and not *aſſumpſit*; but all the juſtices *e contra*; for the count was, that he ſold to *D.* to the uſe of *B.* the defendant, whereas the uſe is only a confidence, which gives no property to the defendant in law; ſo that debt lay not againſt the defendant, but *aſſumpſit.* *Mo.* 701.

Aſſumpſit, in conſideration the plaintiff would ſell, and *deliver* to the defendant, *pannos laneos pro funeralibus of a clerk, he promiſed to pay him* for them, *cum inde requiſitus eſſet*; and alledged he ſold and delivered divers cloths to him, *viz.* thirty-one yards of black cloth for 19*l.* and ſo received other parcels, amounting to 160*l.* Upon *non aſſumpſit* found for the plaintiff, error was brought in the Exchequer Chamber, and the judgment reverſed, becauſe debt properly lay, and not *aſſumpſit, this matter proving a perfect ſale and contract.* *Mo.* 711.

Action upon the caſe upon *aſſumpſit* lies *upon every contract executory*, as well as an action of debt. Adjudged. *Mo.* 667.

Aſſumpſit, for the *plaintiff and defendant accounted together for monies received by the defendant, who was found in arrears* 10*l.* *and in conſideratione inde promiſed to pay* it the 19th of *March* following, *&c.* it was aſſigned for error, that here is no conſideration; for the being found in arrears is not any cauſe to make a ſpecial promiſe, nor is any thing done on the plaintiff's ſide, whereon this promiſe ſhould be grounded, *viz.* forbearing the ſuit, *&c. ſed non allocatur*; for *the debt itſelf*, without other ſpecial cauſe, *is ſufficient* to ground the action. *Cro. Jac.* 69.

It lies for monies received by him of a coal-meter as lord-mayor, which was due to the chamberlain; and adjudged that if *I pay money* in ſatisfaction of a duty, and as a duty, and *he to whom it is paid has no title to receive it*, and ſo the duty is not ſatisfied, he to whom it is paid is indebted to me, and I ſhall maintain an action. 2 *Sid.* 4.

Indebitatus aſſumpſit for phyſick, wares, &c. *provided and delivered for the daughter of defendant at his requeſt*; *adjudged* for the plaintiff, for it is for wares, *&c.* delivered (for) not (to) the daughter; and ſo being after verdict, ſhall be intended delivered the defendant for the daughter, and debt lies for this; as if the father deſires one to find phyſick for his daughter, debt lies againſt the father, and ſo an *indebitatus aſſumpſit.* *Raym.* 67.

An agreement was *to pay* 5*s.* *per combe for corn, or as much as the plaintiff ſhould ſell any of his other corn for at the next market.* It was found that the plaintiff ſold his corn at the next market at *C.* for 5*s.* 6*d.* *per combe.* The plaintiff had judgment; for after the agreement aſcertained by ſale at the next market, the plaintiff has election to bring a general *indebitatus aſſumpſit*, or a ſpecial action on the caſe; but before ſuch certainty it muſt be ſpecial. 2 *Keb.* 240.

Indebitatus aſſumpſit was brought by the plaintiff *pro naulo.* Upon *non aſſumpſit* the plaintiff had judgment; and it was aſſigned for error, that freight was uſually contracted by a charter-party; and if ſo, a general *indebitatus aſſumpſit* would not lie for a debt by ſpecialty. But judgment was affirmed; for it doth *not appear that there was any deed* in the caſe, and it ſhall not be intended that there was. *Vent.* 100.

If *A.* ſells a horſe to *B.* for 10*l.* and there being divers other dealings between them, they come to an account upon the whole, and *B.* is found in arrear 5*l.* *A.* muſt bring an *inſimul computaſſet*, for he can never recover upon an *indebitatus aſſumpſit*; *per tot' cur'.* 2 *Mod.* 44.

A. promiſed *B.* that *in conſideration he would marry his kinſwoman, he would give her* 100*l.* adjudged, that an *indebitatus aſſumpſit* will not be; for it is not a debt, but a collateral promiſe. *Vent.* 268.

Exception was taken that an *indebitatus aſſumpſit* lies not *on ſale of copyhold land.* *Sed non allocatur*; it lying as well on that as on a bargain and ſale of other land. *Contra* on *aſſignment of a judgment*, &c. 3 *Keb.* 625.

In *indebitatus aſſumpſit* for *ſcavage duty*, plaintiff declared *upon the cuſtom of London*, that all perſons expoſing foreign goods to ſale, which had been entered at the cuſ-

tom

do you cauſe their namos to be returned, and ſummon C. D. *who deforced him of that advowſon, that he be there to hear, &c. and have you then there the ſummoners and this writ. Witneſs, &c.*

Aſſiſe de utrum, *(Aſſiſa utrum)* Lieth for a parſon againſt a layman, or a layman againſt a parſon, for lands or tenements, where it is doubtful, whether they be lay fee, or free alms belonging to the church. *Bract. lib.* 4. It is a writ of the higheſt nature that a parſon can have: and if a parſon, prebendary, *&c.* loſe by default in a real action, he may have this writ; for it is his writ of right. 6 *Rep.* 8. There are the four kinds of *writs of aſſiſe*, uſed in actions poſſeſſory; and are called *petit aſſiſes* in reſpect of the grand *aſſiſe:* for the law of fees is grounded upon two rights, one of *poſſeſſion*, the other of *property*; and as the *grand aſſiſe* ſerves for the right of property, ſo the *petit aſſiſe* ſerveth to ſettle the right of poſſeſſion. *Horn's Mir.* At the Common law there are but two forms of writs of *aſſiſe*, viz. *aſſiſe de libero tenemento*, and *aſſiſe de communia paſturæ.* 8 *Rep.* 45. The *aſſiſe* of *novel diſſeiſin, &c.* and *de communia paſturæ*, were inſtituted by *Hen.* 2. in the place of duels: and therefore *Glanvil* tells us, *that Magna Aſſiſa eſt regale beneficium clementia principis de conſilio procerum populis indultum, a quo vitæ hominum, & ſtatus integritati tam ſalubriter conſulitur, ut in jure, quod quis in libero ſolo tenemento poſſidet, retinendo, duelli caſum homines declinare poſſunt ambiguum, &c. Glanvil, lib.* 2. *cap.* 7.

Aſſiſe of the foreſt, *(Aſſiſa de foreſta)* Is a ſtatute touching orders to be obſerved in the King's *foreſt. Manwood*, 35. The ſtatute of view of frankpledge, *anno* 18 *Ed.* 1. is called the *aſſiſe of the King:* And the ſtatute of bread and ale 51 *Hen.* 3. is termed the *aſſiſe of bread and ale*; and theſe are ſo called, becauſe they ſet down and appoint a certain meaſure or order, in the things they contain. There is further an aſſiſe of nuſance, *aſſiſa nocumenti*, where a man maketh a nuſance to the freehold of another, to redreſs the ſame: and beſides *Littleton's* diviſion of *aſſiſes*, there are others mentioned by other writers, viz. *aſſiſe at large*, brought by an infant to enquire of a diſſeiſin, and whether his *anceſtor* were of full age, good memory, *&c.* when he made the deed pleaded, whereby he claims his right. *Aſſiſe in point of aſſiſe, (aſſiſa in modum aſſiſæ)* which is when the tenant as it were ſetting foot to foot with the demandant, without any thing further, pleads directly to the writ, no wrong, no diſſeiſin. *Aſſiſe out of the point of aſſiſe*, is when the tenant pleadeth ſomething by exception; as a foreign releaſe, or foreign matter triable in a foreign county; which muſt be tried by a jury, before the principal cauſe can proceed. *Aſſiſe of right of damages* is where the tenant confeſſeth an *ouſter*, and referring it to a demurrer in the law, whether it were rightly done or not, is adjudged to have done wrong; whereupon the defendant ſhall have a writ of *aſſiſe* to recover damages. *Bract. lib.* 4. *F. N. B.* 105. *Aſſiſes* are likewiſe awarded *by default* of tenants, *&c.*

Aſſiſers, *(Aſſiſores) Sunt qui aſſiſas condunt, aut taxationes imponunt.*——In *Scotland*, (according to *Skene*) they are the ſame with our jurors; and their oath is this:

We ſhall leil ſuith ſay,
And no ſuith conceal, for nothing we may,
So far as we are charg'd upon this aſſiſe,
Be God himſelf, and be our part of paradiſe,
As we will anſwer to God, upon
The dreadful day of dome.

Aſſiſus, Rented or farmed out for ſuch an *aſſiſe*, or certain aſſeſſed rent in money or proviſions. *Terra aſſiſa* was commonly oppoſed to *terra dominica*; this laſt being held in demain, and occupied by the lord, the other let out to inferior tenants. So among the lands of the Knights Templars, belonging to their preceptor of *Sandford, Com.* Oxon. *Apud Covele de dono* Matildis *reginæ habentur quatuor hidæ quarum duæ ſunt in dominico, & duæ hominibus apud, &c. Kennet's Paroch. Antiq.* 141. And hence comes the word to *aſſeſs*, or allot the proportion and rates in taxes and payments by *aſſeſſors. Cowell.*

Aſſithment, A wiregild or compenſation, by a pecuniary mulct: From the prepoſition *ad*, and the Sax. *ſithe*, vice: *Quod vice ſupplicii ad expiandum delictum ſolvitur. Cowell.*

Aſſnaſare, from the Sax. *Aſnaſan, impingere:* It ſignifies to carry his pike ſo careleſsly that a man is killed with it: *Si quis haſtam humero geſtarit in quam alius forte fortuna impegerit, æquum eſſe videtur capitis æſtimationem ſine omni mulcta ei imperare.* Leges Alfred. c. 39. *Si autem oculos* aſnaſſet, *reddat weram ejus, &c.* c. 38. See **Poſſibilitas.** *Cowell.*

Aſſociation, (*Aſſociatio*) Is a writ or patent ſent by the King, either at his own motion, or at the ſuit of a party plaintiff, to the juſtices appointed to take aſſiſes, or of *oyer* and *terminer, &c.* to have others *aſſociated* unto them. And this is uſual where a juſtice of aſſiſe dies; and a writ is iſſued to the juſtices alive to admit the perſon *aſſociated:* Alſo where a juſtice is diſabled, this is practiſed. *F. N. B.* 185. *Reg. Orig.* 201, 206, 223. The clerk of the aſſiſe is uſually *aſſociate* of courſe; in other caſes, ſome learned ſerjeants at law are appointed. It has been holden, that an *aſſociation* after another *aſſociation* allowed and admitted, doth not lie; nor are the juſtices then to admit other *aſſociation* in that writ afterwards, ſo long as that writ and commiſſion ſtand in force. *Br. Aſſiſe* 386. *Mich.* 32 *Hen.* 6. The King may make an *aſſociation* unto the ſheriff, upon a writ of *rediſſeiſin*, as well as upon aſſiſe of *novel diſſeiſin, &c. New Nat. Br.* 416, 417.

Aſſociation of parliament. In the reign of King *William* the Third, the parliament entered into a ſolemn *aſſociation* to defend his Majeſty's perſon and government againſt all plots and conſpiracies; and all perſons bearing offices civil or military, were injoined to ſubſcribe the *aſſociation*, to ſtand by King *William*, on pain of forfeitures and penalties, *&c.* by *ſtat.* 7 & 8 *W.* 3. *cap.* 27.

Aſſoile, (*Abſolvere*) To deliver from excommunication. *Staunf. Pl. Cr.* 72. The defendant ſhall remain in priſon till the plaintiff is *aſſoiled*; that is, delivered from his excommunication: And in *ſtat.* 1 *Hen.* 4. *cap.* 10. mention being made of *King Ed.* 3. it is added, whom God *aſſoil. Cowell.*

Aſſumpſit, (from the Lat. *aſſumo*) Is taken for a voluntary promiſe, by which a man aſſumes or takes upon him to perform or pay any thing to another: It comprehends any verbal promiſe, made upon conſideration; and the civilians expreſs it diverſly, according to the nature of the promiſe, calling it ſometimes *pactum*, ſometimes *promiſſionem*, or *conſtitutum, &c. Cowell. Termes de la ley.* See title **Actions** VI.

1. *In what caſes an* aſſumpſit *lies.*
2. *What acts or words will make an* aſſumpſit.
3. *What ſhall be deemed a good conſideration to create an* aſſumpſit.
4. *Where the conſideration ſhall be deemed to be executed, or continuing.*
5. *Where* aſſumpſit *cannot be maintained, the conſideration being againſt law.*
6. *Pleadings.*

1. *In what caſes an* aſſumpſit *lies.*

Indeb. aſſump. by an *under-officer againſt his colonel for his pay*; and here proof was admitted of the hand of a perſon proved beyond ſea; and *per Holt* Ch. J. If one *recovers money to the uſe of another*, an *indeb.* is a proper remedy for it; but if in this caſe there were any *legal deduction* to be made by the colonel, the remedy had been *account*; for where one receives money, and has no way to diſcharge himſelf of it but by payment over, an *indeb.* will lie. 12 *Mod.* 521.

A *goldſmith's bill for* 450l. *payable to* A. *was brought to the bank by* G. *who deſir'd* M. *the caſhier, to give him a ſpecie*

a ſpecie bank-note payable to A. *for the ſaid bill. M.* refuſed, unleſs *A.* would promiſe to pay the 450*l.* to the bank, in caſe *S.* the goldſmith did not; which *A.* agreeing to, M. *gave* G. *a bank-bill for that ſum. G.* gave the bank-note to *C.* for a debt he owed him, and *C.* received the money at the bank. *S.* refuſed to pay his bill. *Holt*, Ch. J. held, that the plaintiffs might have a ſpecial action, but not a general *indeb. aſſump.* for this was not money lent, nor laid out for defendant's uſe, but it was a buying of the bill of *S.* with a warranty of it from the defendant; and the plaintiffs were nonſuit. 2 Lord *Raym.* 753. See title **Actions** VI.

Plaintiff can maintain no action here *on a judgment in* France, but an *indebitatus aſſumpſit*, or an *inſimul computaſſet*, *&c.* for the debt is to be conſidered here only as a debt by ſimple contract. 2 *Vern.* 540.

Where money is over-paid, this action will lie for the ſurplus. *Arg.* 11 *Mod.* 147.

Indeb. aſſump. lies *by a prothonotary againſt an attorney*, for fees for work done for defendant as attorney. *Holt's Rep.* 20.

An *indebitatus aſſumpſit* will not lie *on a ſpecial agreement*, till *the terms of it are performed*; but when that is done, it raiſes a duty for which a general *indebitatus aſſumpſit* will lie. *Gib.* 303.

Indeb. aſſump. for that the defendant was *indebted* to him in 20*l.* *for nouriſhing* E. L. *an infant*, by the plaintiff, *at the requeſt of the defendant*, he promiſed to pay. It was objected, that this will raiſe a debt, and ſo *indeb. aſſump.* will not lie; but *per tot. cur. contra*, and judgment for the plaintiff. 2 Lord *Raym.* 842.

Indeb. aſſump. *for meat, drink, and lodging found for a third perſon*; and moved in arreſt of judgment that it would not lie, but a ſpecial action upon the caſe; but *per cur. it lies* againſt him *upon the contract*, and the plaintiff had judgment. 6 *Mod.* 77.

2. *What acts or words will make an aſſumpſit.*

If *A.* delivers an obligation to *B.* to re-bail to *A. A.* ſhall have an action on the caſe, without an expreſs *aſſumpſit*; *per Anderſon. Leon.* 297. *pl.* 406.

Every contract executory implies an *aſſumpſit* to pay money at the day agreed, or immediately, if no time be limited; but it is not ſo of an *indeb. aſſump.* becauſe the cauſe does not appear. Said by *Popham* to be the opinion of all the juſtices of *England. Mo.* 667.

The plaintiff declared, that T. *was indebted to him, and appointed* J. S. *the defendant, to whom he delivered* 50*l.* *to pay it to the plaintiff in part of the ſaid debt*, whereupon *the plaintiff came to* J. S. *and demanded the* 50*l.* *who anſwered that he was buſy then, but if he would come ſuch a day he would pay him.* The plaintiff came at the day, but *J. S.* refuſed to pay him. *Per Popham Ch. J.* When *T.* delivered the money to *J. S.* to deliver to the plaintiff, an agreement is included thereby to deliver it to him, which will charge him in *aſſumpſit* to him that ought to have the money; and *Tanfield* agreed, that when there is any precedent matter which cauſed the delivery, as here it was by a debt, the delivery is not countermandable; but here is another conſideration beſides the debt, *viz.* the coming to the defendant's houſe to fetch the money, to which *Yelverton* agreed; whereupon it was adjudged for the plaintiff. *Dyer* 272.

Wherever one *acts as bailiff* he promiſes to render account; *per Holt*, Ch. J. 1 *Salk.* 9.

If two men ſubmit to the *award* of a third perſon, the two do alſo thereby promiſe expreſsly to abide by the determination; for agreeing to refer is a promiſe in itſelf. 6 *Mod.* 35.

There is no ſuch thing as a *contract*, or promiſe *in law*, though there is ſuch expreſſion in ſome of the books. *Per Holt and Powel.* 6 *Mod.* 250.

Aſſumpſit, in conſideration that the plaintiff *venderet et deliberaret to* D. *his father*, at the inſtance of defendant, 200 hog-lambs *to the uſe of defendant*, that defendant would pay ſo much money as ſhould be agreed between the plaintiff and *D.* After judgment for the plaintiff, it was aſſigned for error, that the contract was the contract of the defendant himſelf, ſo that the action ſhould have been debt, and not *aſſumpſit*; but all the juſtices *e contra*; for the count was, that he ſold to *D.* to the uſe of *B.* the defendant, whereas the uſe is only a confidence, which gives no property to the defendant in law; ſo that debt lay not againſt the defendant, but *aſſumpſit. Mo.* 701.

Aſſumpſit, in conſideration the plaintiff would ſell, and *deliver* to the defendant, *pannos laneos pro funeralibus of a clerk, he promiſed to pay him* for them, *cum inde requiſitus eſſet*; and alledged he ſold and delivered divers cloths to him, *viz.* thirty-one yards of black cloth for 19*l.* and ſo received other parcels, amounting to 160*l.* Upon *non aſſumpſit* found for the plaintiff, error was brought in the Exchequer Chamber, and the judgment reverſed, becauſe debt properly lay, and not *aſſumpſit, this matter proving a perfect ſale and contract. Mo.* 711.

Action upon the caſe upon *aſſumpſit* lies *upon every contract executory*, as well as an action of debt. Adjudged. *Mo.* 667.

Aſſumpſit, for the *plaintiff and defendant accounted together for monies received by the defendant, who was found in arrears* 10*l.* *and in conſideratione inde promiſed to pay* it the 19th of *March* following, *&c.* it was aſſigned for error, that here is no conſideration; for the being found in arrears is not any cauſe to make a ſpecial promiſe, nor is any thing done on the plaintiff 's ſide, whereon this promiſe ſhould be grounded, *viz.* forbearing the ſuit, *&c. ſed non allocatur*; for *the debt itſelf*, without other ſpecial cauſe, *is ſufficient* to ground the action. *Cro. Jac.* 69.

It lies for monies received by him of a coal-meter as lord-mayor, which was due to the chamberlain; and adjudged that if *I pay money* in ſatisfaction of a duty, and as a duty, and *he to whom it is paid has no title to receive it*, and ſo the duty is not ſatisfied, he to whom it is paid is indebted to me, and I ſhall maintain an action. 2 *Sid.* 4.

Indebitatus aſſumpſit for phyſick, wares, &c. *provided and delivered for the daughter of defendant at his requeſt*; *adjudged* for the plaintiff, for it is for wares, *&c.* delivered (for) not (to) the daughter; and ſo being after verdict, ſhall be intended delivered the defendant for the daughter, and debt lies for this; as if the father deſires one to find phyſick for his daughter, debt lies againſt the father, and ſo an *indebitatus aſſumpſit. Raym.* 67.

An agreement was *to pay* 5*s.* *per combe for corn, or as much as the plaintiff ſhould ſell any of his other corn for at the next market.* It was found that the plaintiff ſold his corn at the next market at *C.* for 5*s.* 6*d.* *per combe.* The plaintiff had judgment; for after the agreement aſcertained by ſale at the next market, the plaintiff has election to bring a general *indebitatus aſſumpſit*, or a ſpecial action on the caſe; but before ſuch certainty it muſt be ſpecial. 2 *Keb.* 240.

Indebitatus aſſumpſit was brought by the plaintiff *pro naulo.* Upon *non aſſumpſit* the plaintiff had judgment; and it was aſſigned for error, that freight was uſually contracted by a charter-party; and if ſo, a general *indebitatus aſſumpſit* would not lie for a debt by ſpecialty. But judgment was affirmed; for it doth *not appear that there was any deed* in the caſe, and it ſhall not be intended that there was. *Vent.* 100.

If *A.* ſells a horſe to *B.* for 10*l.* and there being divers other dealings between them, they come to an account upon the whole, and *B.* is found in arrear 5*l.* *A.* muſt bring an *inſimul computaſſet*, for he can never recover upon an *indebitatus aſſumpſit*; *per tot' cur'. 2 Mod.* 44.

A. promiſed *B.* that *in conſideration he would marry his kinſwoman, he would give her* 100*l.* adjudged, that an *indebitatus aſſumpſit* will not be; for it is not a debt, but a collateral promiſe. *Vent.* 268.

Exception was taken that an *indebitatus aſſumpſit* lies not *on ſale of copyhold land. Sed non allocatur*; it lying as well on that as on a bargain and ſale of other land. *Contra* on *aſſignment of a judgment*, &c. 3 *Keb.* 625.

In *indebitatus aſſumpſit* for *ſcavage duty*, plaintiff declared *upon the cuſtom of London*, that all perſons expoſing foreign goods to ſale, which had been entered at the cuſ-

tom

tom houſe, ſhall pay ſo much for ſhewing them. It was moved in arreſt of judgment, that there ought to be a contract, either expreſs or implied, to maintain an *aſſumpſit*, and therefore it would not lie for this duty; and the cuſtoms of the city being confirmed by parliament, this is a duty by record. *Sed non allocatur*; for there are multitudes of precedents in ſuch like caſes. *Vent.* 298.

Indebitatus aſſumpſit, for that the defendant being indebted to him in a certain ſum *for wares ſold and delivered to a ſtranger at the defendant's requeſt, the defendant did promiſe to pay, &c.* After a verdict for the plaintiff, it was moved, that this was only a collateral promiſe, and that an *indebitatus aſſumpſit* would not lie; for the debt was due from him to whom the goods were ſold. *Wilde* and *Jones* held that the action lay, but *Rainsford*, Ch. J. contra. But the plaintiff had judgment. *Vent.* 311.

An *indebitatus aſſumpſit* will lie for meat and drink for a baſtard child; *per Pemberton*, Ch. J. 2 *Show.* 184.

Indebitatus aſſumpſit lies not againſt a man where he has received money of the plaintiff *to lay out to a particular purpoſe*, and he has laid out part thereof accordingly; for then he ought to be called to account for the ſame by action of *account*; but if none were laid out, there an *indebitatus aſſumpſit* lies to recover back the money again. So if it were expended to another purpoſe; for there the ſum is certain, and may be demanded as a debt. 2 *Show.* 301.

A. promiſes *B.* that when A. *receives* 100*l.* *which* C. *owes* A. *that he will pay* B. 20*l.* *indebitatus aſſumpſit* lies not. Otherwiſe if the money had been *originally the money of* B. *Skin.* 196.

Indebitatus aſſumpſit lies for a *cuſtomary fine, ſuper mortem domini*. *Show.* 35.

Indebitatus aſſumpſit lies *upon a perſonal contract* for a ſum in groſs, as *pro rebus venditis*; *per Holt*, Ch. J. *Show.* 36.

Indebitatus lies for *fees for being knighted*. *Show.* 78.

Indebitatus aſſumpſit lies for money *paid by miſtake*, on an account or *deceit*; but not for money *paid knowingly on illegal conſideration*, as an uſurious bond. *Salk.* 22.

Indebitatus aſſumpſit will lie *in no caſe but where debt lies*, therefore it lies not on a *wager*, nor upon *a mutual aſſumpſit*, nor againſt the *acceptor of a bill of exchange*; for his acceptance is but a collateral engagement: but lies againſt the *drawer* himſelf; for he was really a debtor by the receipt of the money. 1 *Salk.* 23.

Indebitatus aſſumpſit lies not on *collateral engagements*. See the preceding caſe; and 1 *Salk.* 23. *Butcher* and *Andrews*, which was an *indebitatus aſſumpſit* againſt the father, *for money lent the ſon at the father's requeſt*, and ſo judgment was arreſted; for this was a collateral promiſe. But *per Holt* Ch. J. if it had been *for ſo much money paid by the plaintiff at the requeſt of the defendant the father to the ſon*, it might have been good; for then it would be the father's debt, and not the ſon's. *Carth.* 446.

Holt, Ch. J. ſaid, that *Keyling* would allow an *indebitatus* againſt *a receiver or factor*, but *Hale* would not; and that by his conſent it ſhould go as far as it had gone, but not a ſtep farther. 12 *Mod.* 324.

Indeb. aſſumpſit, for a fine impoſed by a corporation, for not holding the office of ſheriff in the city of *York*. It was objected, that the action does not lie; for no privity or aſſent can be implied, when a fine is impoſed on a man againſt his will, nor is there any precedent conſideration; neither do they ſhew any right to this fine, nor who impoſed, *&c.* *Holt*, Ch. J. thought it time to have theſe actions redreſſed, and that it was hard that cuſtoms, by-laws, and rights, to impoſe fines, ſhould be left to a jury. *Et adjornatur.* 5 *Mod.* 444.

An *officer* (as regiſter in Chancery, *&c.*) *receives his fee for doing the duty of his office* (as to make entries, *&c.*) and neglects the doing it; ſuch acceptance of his fee amounts by implication of law to a promiſe and agreement, and if the party, or ſuitor, pay coſt for irregularity, an action lies; except where ſuch officer is an officer in the Chancery (as in the principal caſe) the court of Chancery will not ſuffer this matter to be examined by any other court, but will determine it itſelf, as in all like caſes, in a ſummary way: *Arg.* and ſo held by L. C. *King*. 2 *P. Williams*, 657.

3. *What ſhall be deemed a good conſideration to create an* aſſumpſit.

Conſideration is defined, a cauſe, or occaſion meritorious, that requires a mutual recompence in fact or in law. Therefore if a man promiſes ſo much money at a day to come, to build a houſe, or a church, without conſideration, this is a naked promiſe, and will not oblige. *Hard.* 72. *Dyer* 366. *b.* *Doct. & Stud.* 211, 213, 215. *Kelw.* 50. 1 *Rol. Abr.* 9, 10.

Idle and inſignificant conſiderations are looked upon as none at all; for wherever a perſon promiſes without a benefit ariſing to the promiſer, or loſs to the promiſee, it is looked upon as a void promiſe. 2 *Bulſt.* 269.

A. was indebted to *B.* and *B.* to *C.* the defendant, and *C.* in conſideration that the plaintiff would procure *B.* to make a letter of attorney to *C.* to ſue *A.* promiſed to pay the plaintiff 10*l.* It was objected, that this was no conſideration; for the defendant by this letter, of attorney, gets nothing but his labour and trouble; *ſed non allocatur*; for it is not ſo much the profit which redounds to the defendant, as the labour of the plaintiff in procuring the letter of attorney, that is to be reſpected. 4 *Leon.* 113.

Arbitrators being about to award that R. *the defendant ſhould deliver up to the plaintiff two ſeveral obligations to be cancelled, wherein the plaintiff was bound to the defendant, he (the defendant) in conſideration that the article ſhould be left out of the award, promiſed that himſelf would deliver them up gratis*, &c. but did not, and afterwards put the bonds in ſuit; whereupon the plaintiff brought his action, and ſet forth this matter, and that the ſaid clauſe was omitted *ad ſpecialem inſtantiam ipſius querentis*; and judgment was given for him. 3 *Leon.* 105.

If the plaintiff declares, that in conſideration the defendant was indebted to him in 20*l.* the defendant did aſſume and promiſe to deliver ſeveral cattle to *J. S.* to the uſe of the plaintiff, and that the defendant had not delivered the cattle accordingly, *&c.* the conſideration is void, becauſe it does not appear that the debt was to be diſcharged thereby; and if not, the plaintiff notwithſtanding might bring his action for the money, ſo that the promiſe is but *nudum pactum*. *Style* 330.

If *A.* in conſideration that *B.* will deliver to him a recognizance to read over, aſſumes and promiſes within ſix days, to re-deliver the ſame to *B.* or to pay him 1000*l.* this is a good promiſe, upon which *B.* may have an action againſt *A.* for the conſideration is ſufficient. 1 *Leon.* 297. *Cro. Eliz.* 138.

If *D.* demiſes certain lands to *B.* rendring rent, and *B.* aſſigns to *D.* after which rent becomes due, and *D.* in conſideration that *A.* will ſhew him a deed, by which it may appear that ſuch rent is due, aſſumes and promiſes to *A.* forthwith to pay the ſame; if *A.* does ſhew *D.* the indenture of leaſe, by which it appears that ſuch rent is due, *A.* ſhall have an action upon this promiſe againſt *D.* for when any thing, though never ſo ſmall, is to be done by the plaintiff, it will be a conſideration ſufficient to ground an action. *Cro. Eliz.* 67, 150. S. C.

A. being in priſon at the ſuit of *B.* upon account, the gaoler ſuffers him to eſcape, and being at liberty, promiſeth to *B.* that if he will permit him to be at large, and further if he does ſuch an act, he will pay to him 10*l.* which he doth not pay; whereupon *B.* brings *aſſumpſit* againſt him; it was adjudged, that the action would not lie; for that both the conſiderations ought to be proved, and *A.* was at large before. 4 *Leon.* 3.

R. *was indebted to* B. *in* 14*l.* *and* A. *was indebted to* R. *in* 50*l.* A. *in conſideration that* R. *allowed him* 14*l.* *and promiſed him to diſcharge him of ſo much parcel of the ſaid* 50*l.* *promiſed to pay to the ſaid* B. *the plaintiff, the ſaid* 14*l.* *Per tot. cur. (Anderſon abſente)* the conſideration is good; for *A.* was diſcharged of ſo much againſt *R.* and *R.* might alſo plead payment of the 14*l.* by the hands of the defendant. *Goldſb.* 49.

Aſſumpſit

Aſſumpſit for *rent* upon leaſe for years behind, and demanded; the defendant *promiſed* the plaintiff, *that if he could ſhew him a deed, that the rent was due, he would pay him* the rent and arrearages; *the plaintiff ſhewed him the indenture of leaſe*, by which the rent was due for four years. It was moved in arreſt of judgment, that the ſhewing of the deed was no conſideration; but it was adjudged for the plaintiff; for when a thing is to be done by the plaintiff, be it never ſo ſmall, it is ſufficient ground of an action, and the ſhewing of the deed is a cauſe to avoid a ſuit. *Cro. Eliz.* 67.

Conſideration that *A.* would not proceed to diſprove a will in the prerogative court, *&c.* is good. *Leon.* 118.

Love or *friendſhip* are not conſiderations to ground actions upon. 2 *Leon.* 30.

Conſideration that *A.* huſband of the executor, (and with whoſe teſtator the plaintiff was bound in a bond and had paid the money) *might have and enjoy the goods of teſtator*, he aſſumed to pay the plaintiff, *&c.* it is void; as if it had been, that defendant might enjoy his own goods. *Leon.* 173.

If *A.* is lord of a manor, and a controverſy ariſes between *A.* and *B.* concerning a certain copyhold which *B.* claims to hold of the ſaid manor, whereupon they ſubmit to the judgment and award of *J. S.* and in conſideration that *A.* had promiſed to abide thereby, *B.* aſſumes and promiſes, that if the ſaid *J. S.* ſhall adjudge the copy inſufficient, that then he the ſaid *B.* will forthwith deliver up to *A.* the poſſeſſion thereof; this is a good conſideration, the promiſe being reciprocal, and to avoid variances and ſuits. 1 *Leon.* 103. 4 *Leon.* 31.

If the father of *A.* and *B.* lying ſick, declares his intention to deviſe a rent of 4*l. per ann.* to his younger ſon, during his life, and thereupon *A.* the eldeſt ſon, in conſideration that the father will not charge his lands therewith, aſſumes and promiſes to *B.* to pay the ſaid rent; whereupon the father forbears to charge the land, and dies, and the land deſcends to *A.* diſcharged of the ſaid rent; this is a good conſideration. 1 *Leon.* 192.

If *B.* the daughter of *A.* be heir apparent to *C.* and *D.* promiſes to *A.* the mother, in conſideration that ſhe would conſent and agree that the ſaid *B.* her daughter ſhould marry his ſon, that he would give to the ſaid *A.* 100*l.* upon which *A.* conſents, and the marriage takes effect; this is a good conſideration; for nature has given the power of diſpoſing to parents, and in nature their children are bound to obey them. 1 *Rol. Abr.* 19. *Moor* 857.

If *A.* being on a treaty with *B.* for the purchaſe of certain lands from *B.* comes to *B.*'s wife, and promiſes her, in conſideration that ſhe would not hinder the bargain, that he would give her 10*l.* or a riding ſuit, this is a good conſideration, and the huſband and wife may have an *aſſumpſit* on this promiſe. 1 *Rol. Abr.* 21, 22.

If *B.* in conſideration that *A.* at the ſpecial inſtance and requeſt of *B.* would permit *B.* to have and to hold a meſſuage and land, then in the occupation of *B. una cum proficuis et commoditatibus inde provenientibus* to his own uſe, promiſes to pay him 13 *s.* at *Michaelmas* after, for rent for the premiſſes; and alſo at the ſaid feaſt to deliver the poſſeſſion of the premiſſes to *A.* in as good repair as it was at the time of the demiſe; this is a good conſideration to maintain an action, tho' it does not appear that *A.* had any eſtate therein at the time of the promiſe, and though it appears that *B.* was then in poſſeſſion thereof. 1 *Rol. Abr.* 23.

But if *A.* in conſideration that *B.* will make an eſtate at will to him, ſuch as counſel ſhall deviſe, promiſes, *&c.* this is no good conſideration, for that he may preſently after the eſtate made determine it. 1 *Rol. Abr.* 23.

Aſſumpſit. *The father* having three ſons, *had an intent to charge his lands with* 4*l. per annum to each of his younger ſons* for their lives, but the *eldeſt ſon deſired him not to charge the lands, and promiſed to pay them duly* 4*l. per annum*, to which the two younger *ſons being preſent agreed*; and he promiſed them to pay it: All the court held clearly that it is a good conſideration. *Cro. El.* 163.

Aſſumpſit, for that *iſſue being joined in ejectment between him and the now defendant and another*, and *intended to be tried at the next aſſizes*, in conſideration that the plaintiff and his leſſee would forbear to inforce their title, and make a ſlender defence, *he promiſed to pay, &c.* upon *non aſſumpſit* pleaded, the jury *found* quod aſſumpſit, *but that there were two iſſues join'd* between the parties, *and that the defendants had not join'd, but that one had pleaded the general iſſue, and the other a ſpecial plea, on which iſſue was joined, and the promiſe in conſideration of making a ſlender defence in both iſſues*; but adjudged for the plaintiff, becauſe the common parlance is, that the parties have join'd iſſue, and is as proper where two iſſues are join'd as only one. *Moor* 351.

A. in conſideration *B.* would ſell him four cows for 10*l.* promiſed *to pay the* 10*l. at Eaſter* following, *and if he fail'd, that he would pay him* 100*l. when required. B.* ſold him the cows, but *A.* fail'd of payment at *Eaſter. B.* brought an action for the 100*l.* and recover'd; and on error brought, the conſideration was held good, and the judgment affirmed. *Cro. Eliz.* 747.

If *A.* having ſeveral young children, lies ſick, and *B.* in conſideration that *A.* after his death will commit the education of his children, and the diſpoſition of his goods, during their minority, to him, aſſumes and promiſes to *A.* to procure certain lands to be aſſured to one of the children; whereupon *A.* appoints *B.* overſeer of his will, and that his goods ſhould be under the diſpoſition of *B. A.* dies, and *B.* by virtue thereof, takes poſſeſſion of the ſeveral goods of *A.* if *B.* does not procure ſuch lands to be aſſured accordingly, yet ſhall the executor of *A.* have no action againſt *B.* for here is no conſideration, inaſmuch as the power which *B.* had given him was only *pro educatione liberorum*, and not profit to himſelf; and though ſuch overſeers do too often make their advantage, yet that is contrary to their truſt, and ſuch a fraud as the law will not preſume. 3 *Leon.* 88.

If there be certain controverſies between *A.* and *B.* and they ſubmit to the award of *J. S.* who among other things is about to award that *B.* ſhall deliver up to *A.* two ſeveral obligations, wherein *A.* was bound to *B.* whereupon *B.* in conſideration, that upon the requeſt of *A.* the clauſe in relation to the delivery up of the obligations ſhall be left out of the award, aſſumes and promiſes to *A.* to deliver them up to *A. gratis, &c.* this is a good conſideration, the clauſe being omitted *ad ſpecialem inſtantiam ipſius* A. 3 *Leon.* 105.

Aſſumpſit, for that the *defendant's brother was indebted to the plaintiff in* 8*l.* and made *M.* his wife executrix, leaving aſſets, and that *he intended to ſue the executrix to recover the* 8*l. ſecundum debitum legis curſum*, and the *defendant, in conſideration the plaintiff would forbear the executrix, promiſed to pay, &c.* It was moved in arreſt of judgment, that this debt ſhall be intended ſtrongeſt againſt the plaintiff, to be a debt upon a ſingle contract, with which an executrix is not chargeable, and to ſtay this ſuit is not any conſideration; and of this opinion were all the court. But *if he had declared that he intended to have brought an* aſſumpſit *againſt her*, (as this declaration does not warrant it, becauſe he intends to recover the debt itſelf, which cannot be in action on the caſe) *or* that he intended *to ſue in chancery for it*, (which cannot be intended here, becauſe of the words *ſecundum debitum legis curſum*) then perhaps this action would have lain; for the conſideration of ſtaying the ſuit is good, but as it is here it is not good. Judgment for the defendant. *Cro. Eliz.* 804.

Conſideration *quod conaretur procurare J. S.* to permit the defendant to have the poſſeſſion and profit of ſuch an houſe, is good. Conſideration that executor will take 150*l.* for 200*l.* due to teſtator, is good. *Yelv.* 11.

Promiſe againſt *promiſe* is a good conſideration; *per cur'*.

Defendant granted to the plaintiff 1000 *trees, to be cut within three years.* The *plaintiff cut ſome*, and the *defendant promiſed him, in caſe he would cut no more within the three years, he ſhould have licence to cut the reſidue after*

the three years, whereupon the defendant deſiſted; this is a good conſideration; admitted by the pleadings. *Yelv.* 195.

If *A.* pawns goods to *B.* upon condition of redemption at a day certain, and after the day the goods being not redeemed, *B.* ſays he will ſell them, upon which *D.* ſays, if he will ſtay the ſale of them but for three days, he will pay the money and have the goods; if *B.* does ſtay the ſale accordingly, *B.* may have an action againſt *D.* upon this agreement; for this was in nature of a ſale; and if *D.* had paid the money, he might have brought a *detinue* for the goods. 1 *Rol. Rep.* 215.

If *A.* and *B.* are both ſolicitors for the office of under-ſheriff, and *A.* in conſideration that *B.* will deſiſt, aſſumes and promiſes to *B.* that if he the ſaid *A.* obtains the ſaid office, that he the ſaid *A.* will pay unto *B.* 20*l.* for a horſe, *&c.* this is a good conſideration. *Cro. Jac.* 612.

A. has lands in *D.* of which pariſh *B.* is rector, and *B.* in conſideration that *A.* will plant his land with hops, and ſo better the tithes, aſſumes and promiſes to allow him 40*s.* for every acre ſo planted; and whether this is a good conſideration, becauſe the tithes cannot be bettered by the planting of the hops, but by the growing of them, *dubitatur*. *Winch* 80.

If *A.* together with *B.* is bound to *C.* for the proper debt of *B. &c.* and *A.* pays the money, and *B.* dies, and makes *D.* his executor, and *D.* in conſideration that *A.* will forbear to ſue him till ſuch a time, aſſumes and promiſes to repay him; this conſideration is good, though *D.* was liable in equity only. 1 *Sid.* 89.

Cook Ch. J. ſaid, he had never ſeen it otherwiſe, but that when *one draws money from another*, this ſhould be a good conſideration to raiſe a promiſe. 3 *Bulſt.* 162.

If the *conſideration puts the other to charge, tho' it be no way profitable to the promiſer*, yet this ſhall be a good conſideration to raiſe a promiſe; *per Dodderidge* J. to which *Coke* C. J. agreed. 3 *Bulſt.* 162.

Aſſumpſit againſt an adminiſtratix, on a promiſe to pay a debt of her inteſtate's for wares had of the plaintiff, in conſideration he would *let two ſurvey the account*, is good. *Het.* 8, 11.

B. *was bound to the plaintiff in* 40*l. for payment of* 20*l.* R. *the defendant was bound to H. by obligation, dated the* 5*th of February* 1721, *in* 100*l. for payment of* 55*l. on the* 5*th of February following*. The ſaid ſums being due, and not paid, *the defendant on the* 1*ſt of Feb.* 1724, *in conſideration the plaintiff would forbear the* 20*l. till* 1727, *and would compound with the ſaid H. for the* 50*l. and intereſt then due, and deliver the ſaid bonds into his hands, promiſed to pay him the ſaid* 20*l. and* 50*l. and all the intereſt which he ſhould pay or compound for*; all which the plaintiff had perform'd, and the defendant had not paid him, *&c.* It was objected, that the conſideration as to the 20*l.* is not good; for that the defendant had not any benefit thereby, nor is it alledg'd that he gave notice what he had paid for the compoſition; but it was reſolved, that it being *alledg'd that he paid ſo much, and requir'd it*, and it was not paid upon requeſt, it was ſufficient; and judgment for the plaintiff, and affirm'd on error. *Cro. Car.* 272.

If *A.* in conſideration that *B.* an infant hath promiſed to permit *A.* to carry away ſo much of his graſs, *&c.* aſſumes and promiſes to pay *B.* 6*l.* the conſideration is good, and *B.* may maintain an action againſt *A.* upon this promiſe, notwithſtanding *B.* may avoid his promiſe. 1 *Mod.* 25.

If *A.* and *B.* are churchwardens of *D.* and *C.* at the proſecution of *A*, and *B.* is excommunicated for not paying the tax for the reparation of the church of *D.* and *C.* in conſideration that the biſhop, at the requeſt of *A.* and *B.* would abſolve him, aſſumes and promiſes to pay unto *A.* and *C.* ſo much; if *C.* is accordingly abſolved, *A.* and *B.* may have an action upon this promiſe againſt *C.* for it cannot be intended but the abſolution was at the inſtance of *A.* and *B.* and by reaſon of the promiſe to pay them the money. 1 *Vent.* 297.

If *B.* is indebted to *A.* in 20*l.* and *C.* is indebted to *B.* in the like ſum, and *C.* promiſes *A.* in conſideration that he is content to accept the ſaid ſum by the hands of *C.* and ſtay for this for four days, that he will pay him the ſaid ſum, this is a good conſideration, for *A.* to maintain an action upon the caſe againſt *C.* 1 *Rol. Abr.* 29.

Debtor pays a ſmall part of a debt, and deſires a general releaſe, and promiſes in conſideration thereof to pay the reſidue when God ſhould enable him, and the defendant did ſeveral times after renew his promiſe to the plaintiff; afterwards a great eſtate fell to the defendant. *Quære*, If a good conſideration here? *Mar.* 151, 152.

The count was, that whereas he, *at the inſtance and requeſt of the defendant, had taken pains to reconcile differences betwixt the defendant and J. S. and others, the defendant promiſed to pay to the plaintiff* 100*l.* at a certain day. It was objected, that this was no more than a voluntary curteſy; but *Glyn* Ch. J. held *e contra*; for this was undertaken at the inſtance of the defendant, and here was a continued conſideration until the pains taken were paſt; and judgment, *niſi, &c. Sty.* 465.

The defendant in conſideration of 5*s.* promiſed to pay 40 *s.* if he ever play'd a game call'd *even or odd* for money or wine; this is a good conſideration. *Raym.* 13.

Every promiſe ought to have a conſideration; and that ought to be either *benefit to him that makes it*, or *diſadvantage to the plaintiff*; *per Reeve* J. *Mar.* 203.

Aſſumpſit, *&c. to pay for a horſe a barley corn a-nail doubling it on every nail*; and the plaintiff averr'd, that there were 32 nails in the horſe's ſhoes, and doubling it on every nail, it came to 500 quarters of barley. On *non aſſumpſit* pleaded, the Ch. J. at the trial directed the jury to give the value of the horſe, which was 8*l.* in damages; and ſo they did. 1 *Lev.* 111.

If *A.* is indebted 20*l.* to *B.* and dies, and his executor, in conſideration that *B.* will forbear him for a reaſonable time, promiſes to pay him the debt; this is a good conſideration to have an action; with an averment, that he forbore for a certain time. 1 *Rol. Abr.* 26.

Aſſumpſit, for that he *was poſſeſs'd of ſeveral tickets for ſeamens wages, and had an order from the treaſurer of the navy for paying them*; and that the defendant being *an under-officer, promiſed that if the plaintiff would not trouble the treaſurer in procuring another order, he would pay, &c.* It was moved in arreſt of judgment, that the plaintiff had not ſhewed any title to the tickets, as that he was executor or adminiſtrator, *&c.* or by any aſſignment, *&c.* but *per Twiſden* J. *(abſentibus aliis)* it is good enough, after a verdict eſpecially, ſince he declared he had an order from the treaſurer to receive the money, which he could not have granted, unleſs he had a title to it. Judgment for the plaintiff. *Sid.* 392.

Aſſumpſit, for that *W. R. defendant's teſtator being indebted to A.* a ſtranger, *who aſſign'd* the debt *to* B. *the plaintiff*, and authorized him to receive it. S. *the defendant, the executor, promiſed* B. the plaintiff *to pay it to him, in conſideration he would accept him for his debtor.* Adjudged on demurrer for the defendant, there being no conſideration of forbearance, but to accept him for his debtor, which he is not, he being ſtill debtor to the firſt creditor, and the authority to receive is determined by the death of *W. R.* the teſtator, and differs from the caſe of *Ruſſel* v. *Haddock*, where he who had the authority to receive the debt forbore. *Lev.* 262.

Aſſumpſit to a *vicar*, in conſideration of *preaching*, is good. *Sid.* 409.

In aſſumpſit, *for that the lord* O. *was indebted to him in* 250l. *and that the defendant had money of the ſaid lord's ſufficient in his hands to pay the ſaid debt, and that it was mutually agreed between them that the plaintiff ſhould accept* 200l. *in ſatisfaction of his debt, and that the defendant would pay the money on ſuch a day, and that in conſideration the one would perform his part, the other would perform his part.* Upon *non aſſumpſit* the plaintiff had a verdict, but judgment *quod nil capiat*, becauſe this was no good conſideration. 2 *Jo.* 87.

J. S. *is indebted to* A. *in* 12*l. and* B. *is indebted to* J. S. *in a like ſum, and* B. *promiſes* A. *that if* A. *at his requeſt, would procure an order from* J. S. *in writing to* B. *to*

to pay the money to A. *which* B. *owed* J. S. *then* B. *will pay to* A. *the money. Per cur.* The procuring the note at *B.*'s the defendant's requeſt, by *A.* the plaintiff, is a ſufficient conſideration. 2 *Vent.* 71.

Where the *doing a thing will be a good conſideration, a promiſe to do* that thing will be ſo too; *per Holt* Ch. J. 12 *Mod.* 459.

Parting with my note to the defendant is a good conſideration. 7 *Mod.* 12, 13.

If *A. undertakes* to do a thing *without hire*, as to take brandies out of one cellar, and to lay them down in another cellar, no action lies for the non-feaſance; but if he *enters on the doing it*, action lies for a *miſ-feaſance*, if it be through his own neglect, or *miſmanagement*, becauſe it is a deceit; but not if by meer accident; *per Holt.* 1 *Salk.* 26.

4. *Where the conſideration ſhall be ſaid to be executed, or continuing.*

A conſideration altogether executed and paſt, is not good to maintain an *aſſumpſit*; but if it were moved by a precedent requeſt, it is good, and doth amount to a promiſe; for it is not reaſonable that one man ſhould do another a kindneſs, and then charge him with a recompence; for this would be obliging him whether he would or no, and a bringing him under an obligation without his own concurrence. 1 *Rol. Abr.* 11, 12.

Therefore if the ſervant of *A.* be arreſted in *London* for a treſpaſs, and *J. S.* who knows *A.* bails him, and after *A.* for his friendſhip promiſes to ſave him harmleſs, and *J. S.* comes to be charged, yet this is no conſideration to ground an *aſſumpſit* on, becauſe the bailing, which was the conſideration, was paſt, and executed before. *Dyer* 272. 2 *Rol. Abr.* 11. 2 *Leon.* 225. *Owen* 144.

But it had been otherwiſe if the maſter had before requeſted him to become bail for his ſervant, and the bailing had been after. *Dyer* 172.

So if a man requeſts another to labour for his pardon, *&c.* and after he has done his endeavour, if the other ſays, in conſideration that he has laboured for his pardon at his own charge, he promiſes to pay him ſo much, *&c.* this is a good conſideration. 1 *Rol. Abr.* 11. *Style* 465. *Dyer* 355.

Aſſumpſit, for that the defendant leaſed lands to the plaintiff, rendring rent, and after ſome years of the term expired, promiſed, that *in conſideration the plaintiff had occupied* the land, *and paid his rent, to ſave him harmleſs againſt all perſons for the occupation for the time paſt and to come*; and that afterwards *H.* diſtrained the plaintiff's cattle on the land. It was objected, that payment of the rent could be no conſideration, becauſe he occupied the land for it, and alſo the conſideration was paſt. But the plaintiff had judgment to recover his damages. *Lev.* 102.

If one comes to a *ſerjeant at law* for his counſel, and the ſerjeant *adviſes* him, and *afterwards the client, in conſideration of ſuch counſel, promiſes to pay him* 20*l.* an action lies for it; *per Wray* Ch. J. and ſo *Popham ſaid it* had been adjudged in the Exchequer. 2 *Lev.* 111.

If a *phyſician*, who is my friend, *hearing that my ſon is ſick, goes to him in my abſence*, and helps, *and recovers him, and I* being informed thereof *promiſed him, in conderation as above, to give him* 20*l.* an action will lie for the money. 2 *Leon.* 111.

Aſſumpſit in conſideration he had bought of the defendant three parcels of land upon the 10*th of* December, *the defendant afterwards*, viz. *the* 19*th of* December, *promiſed to make ſuch ſufficient aſſurance* thereof before ſuch a day.

It was moved after verdict, that the conſideration was executed; but adjudged for the plaintiff, for the aſſurance was the ſubſtance of the ſale. *Cro. Eliz.* 138.

A precept iſſued to a bailiff to *attach goods* of *J. S.* which he did, and *delivered them to the then plaintiff*, to deliver at the next court, and *B.* the *defendant*, in conſideration thereof, *aſſumed to ſave him harmleſs*. This conſideration was a thing executed before the promiſe, and ſo not good. See 3 *Leon.* 326.

If *A.* ſerves *B.* for a year, but has nothing for his ſervice, and afterwards at the end of the year, *B.* for his good and faithful ſervices, aſſumes to pay him 10*l. A.* may have an action upon the caſe, upon this promiſe againſt *B.* for the conſideration is good. 1 *Leon.* 225.

If *A.* leaſes lands to *B.* for a certain term of years rendring rent, and after ſome of the years expired, and the rent paid, *A.* in conſideration that *B.* had occupied the land, and paid his rent, aſſumes to ſave him harmleſs againſt all perſons for his occupation paſt and to come; if afterwards the cattle of *B.* are diſtrained *damage-feaſant*, he may have an action upon this promiſe againſt *A.* for the occupation, which is the conſideration, continues. 1 *Leon.* 102.

If there be a communication between *A.* and *B.* concerning a marriage to be had between *A.* and the daughter of *B.* upon which *B.* offers him 200*l.* with his daughter in marriage; but they cannot agree upon the day of payment, and afterwards *A.* ſteals away the daughter of *B.* and marries her, without the conſent or knowledge of *B.* and after *B.* agrees thereto, and in conſideration of this marriage aſſumes to pay 100*l.* to *A.* this is a good promiſe, upon which *A.* may have an action againſt *B.* for the natural affection of the father, and the advancement of the daughter makes this a conſideration continuing. 2 *Leon.* 111.

In conſideration that he had paid money for the defendant, and obtained a releaſe of his debt, was held a continuing conſideration, becauſe the benefit of it was continuing to the party. 2 *Keb.* 99.

Aſſumpſit, in conſideration *that N. the plaintiff had paid for* B. *the defendant, and at his requeſt*, 10*l.* at ſuch a day, (which was *a year before*) he promiſed to repay it, *cum inde requiſitus eſſet.* It was objected, that this conſideration was for a thing paſt, and therefore not good. *Sed non allocatur*; for the payment being laid to be at his requeſt, the conſideration continues, and ſo is the common courſe. *Cro. Eliz.* 282.

Aſſumpſit, in *conſideration that the plaintiff had ſubmitted himſelf to the award of* J. S. *the defendant, adtunc et ibidem, promiſed to pay the plaintiff* 10*l.* The defendant demurred, becauſe the conſideration was executed; but adjudged for the plaintiff, becauſe *adtunc et ibidem* make the ſubmiſſion intendable at the time of the promiſe. *Mo.* 367.

Aſſumpſit, &c. in *conſideration the plaintiff had delivered to the defendant twenty ſheep, he promiſed to pay him* 5*l. at the time of his marriage*, and alledged in fact, that he was married, *&c.* The whole court held, that becauſe the conſideration was in the preter tenſe, *(deliberaſſet)* and ſo the conſideration paſt, it is no cauſe of action; and therefore judgment was ſtaid. *Cro. Eliz.* 442.

Aſſumpſit, in conſideration *that he had given certain money*, is ill, becauſe it might be that he had given it before the promiſe. *Palm.* 560.

Aſſumpſit, in conſideration that he, at the defendant's requeſt, by deed *dedit et conceſſit to the defendant the next avoidance of the church of* D. *the defendant promiſed to pay the plaintiff* 100*l.* Reſolved, that the grant being at his requeſt, it was a ſufficient conſideration, tho' it was divers years paſt, eſpecially it being to the defendant himſelf; otherwiſe peradventure, if it had been to a ſtranger. *Cro. Eliz.* 715.

A. *put his ſon to board with* J. S. *the plaintiff for three years, at* 8 *l. a year, and died within the year. M. his widow, in conſideration of natural affection to her ſon, and* in conſideration *that the ſon ſhould continue during the reſidue of the three years with the plaintiff, promiſed to pay* 6*l.* 13*s.* 4*d. for the boarding the ſon for the time paſt, and* 8*l. for every year after* of his continuance with the plaintiff. The court agreed, that natural affection of itſelf is not ſufficient to ground an *aſſumpſit*, without an expreſs *quid pro quo*; but that is good here, becauſe it is not only in conſideration of affection, but that her ſon ſhould afterwards continue at his table, which is good, as

well for the money due before, as for what ſhould afterwards become due. *Cro. Elz.* 755.

The defendant, in conſideration *that the plaintiff had lent him* 30 *l. before at his requeſt, promiſed to lend the plaintiff* 30 *l. for a year, or give him* 40 *s.* But this being a conſideration paſt and executed, it was adjudged for the defendant. *Cro. El.* 885.

Aſſumpſit, for that the defendant requeſted the plaintiff to give his credit for one R. *to* F. *for two tons of wine, value* 50 *l.* and the *plaintiff gave bond to* F. *of* 100 *l. for the payment thereof*; upon which he was ſued, *and forced to pay* 70 *l.* at ſuch a day; *in conſideration whereof, the defendant promiſed to pay the* 70 *l. ſuch a day*, &c. It was objected, that this was upon a conſideration paſt, and ſo not good; but becauſe *R.* had credit given him by *F.* at the defendant's requeſt, upon the plaintiff's undertaking, and the plaintiff was damnified by reaſon thereof, the court held the conſideration to be ſufficient, and not paſt, and gave judgment for the plaintiff. *Cro. Jac.* 18.

A. ſold a horſe to *B.* for 5 *l.* and *C.* the defendant being preſent, ſaid, that in conſideration of the ſale, if *B* did not pay him, he would ſee him paid. It was moved in arreſt of judgment, that it was *not expreſsly alledged that the ſale was made at* C.*'s requeſt, and this promiſe is laid to be after the ſale made*, and therefore, *per tot. cur.* judgment was given againſt the plaintiff. *Bulſt.* 120.

An *exchange* was made between two of ſo much *French* money, for ſo much *Engliſh*, in conſideration whereof one promiſed the other to pay him ſo much. In action upon this promiſe it was ruled, that the conſideration was good; but, becauſe the *promiſe was made after the exchange was paſt* and executed, the judgment was reverſed in the Exchequer Chamber. 2 *Bulſt.* 73.

Gale *requeſted* Clobery *to deliver to* J. S. 600 *l. worth of wine*, which he delivered accordingly. Afterwards Gale *promiſed* Clobery, *in conſideration that he at his requeſt had delivered ſo much to* J. S. *that he would pay him if* J. S. *did not.* *J. S.* paid only 300 *l.* and adjudged by all the juſtices of *England*, that action lies by *Cl.* againſt *G.* *Palm.* 442. cites it as the caſe of *Gale* v. *Clobery*, in error.

In *aſſumpſit*, *by a ſervant*, ſhe counted that having ſerved the defendant and his wife faithfully, he after his wife's death, *in conſideration of the ſervice done to him and his wife, promiſed to pay her* 13 *s.* 4 *d.* It was objected, that the conſideration is not good, becauſe it is not alledged that ſhe at his requeſt ſerved him, and alſo, that the promiſe was after the ſervice performed; but judgment was for the plaintiff. *Hutt.* 84.

Aſſumpſit, &c. the plaintiff declared, that on ſuch a day, *&c.* he *ſold ſo much barley to the defendant, part whereof he delivered immediately, and the reſt by agreemeut he was to deliver afterwards, and afterwards on the ſame day the defendant promiſed to pay* ſo much by ſuch a day. It was objected, that the promiſe was after the ſale, and ſo being made upon a conſideration executed, it is not good; but *per cur.* it is good enough, being made on the ſame day, and no diviſion ſhall be made thereof in this caſe. *Lat.* 150.

Caſe, for that *in conſideration the father would ſurrender a copyhold to the defendant, he promiſed to give to* M. *and* S. *his two daughters* 20 *l. apiece.* M. *alone brought action for* 20 *l.* It was moved in arreſt of judgment, that the plaintiff had declared upon a joint promiſe which concerned both, and the action was brought by *M.* alone, whereas *S.* ought to be joined; but adjudged, that they had diſtinct intereſts, and by conſequence the action is well brought by one of them. *Sty.* 461.

In *aſſumpſit* the plaintiff declared, that whereas the plaintiff at his own charges *had buried the defendant's child, the defendant promiſed to pay him his charges*; and though no requeſt was laid, judgment was given for the plaintiff. *Raym.* 260.

In *caſe* the plaintiff *counted*, that *for* ſuch *conſideration* (which was not executory, but) *executed, the defendant aſſumed*, &c. the defendant *traverſed the conſideration executed.* Upon demurrer it was agreed *per cur.* that a conſideration executed cannot be traverſed; and judgment was given for the plaintiff, none coming for the defendant. *Rol. Rep.* 401.

The count was *for work and labour done for the defendant*, but did *not ſay that it was done at the defendant's requeſt.* The plaintiff had judgment by *nil dicit*; but upon error brought, this matter was aſſigned; but *adjornatur.* 2 *Barnard, Rep. in B. R. pl.* 55.

5. *Where aſſumpſit cannot be maintained, the conſideration being againſt law.*

As all conſiderations are deemed inſignificant and void, that are not of ſome benefit to the promiſor, or loſs to the promiſee; ſo if they are wicked and ill in themſelves, or unlawful, by being prohibited by ſome act of parliament, they are void; therefore, if an officer, who, by the duty of his office, is obliged to execute writs, promiſes, in conſideration of money paid him, to ſerve a certain proceſs, an *aſſumpſit* will not lie on this promiſe; for the receipt of the money was extortion, and the conſideration is unlawful. 1 *Rol. Abr.* 16.

So if an exeeutor ſues execution by *elegit*, and *B.* a ſtranger, as a friend to the executor, in conſideration that the ſheriff would forthwith execute the ſaid *elegit*, and of ſix-pence to him by the ſheriff paid, promiſes to pay him 60 *l.* upon which the ſheriff executes the writ, yet no action lies, becauſe the conſideration is againſt law; for the ſheriff ought to do his duty without reward, and this 60 *l.* is no diſcharge of the fees due to the ſheriff, being given by a ſtranger, and not expreſſed for them. 1 *Rol. Abr.* 16.

But if a man brings a *capias* that he has againſt *A.* to the ſheriff, and prays him that he will make *J. S.* his ſpecial bailiff, and promiſes him that if he will make his ſpecial bailiff, that if *A.* eſcapes from the bailiff, that he will bring no action for the eſcape againſt him; this is an *aſſumpſit* upon which an action lies, if he brings any action againſt the ſheriff for the eſcape. 1 *Rol. Abr.* 16. 1 *Leon.* 132. 3 *Leon.* 227. *Cro. Eliz.* 178.

So where the ſheriff takes goods in execution upon a *fieri facias*, and a ſtranger promiſes the officer to pay him the debt in caſe he would reſtore them, this is a lawful conſideration; for by the *fieri facias*, he may ſell goods, and this in effect is doing no more. 1 *Salk.* 28.

Aſſumpſit, *&c.* for that *defendant being arreſted at the plaintiff's ſuit, in conſideration that the plaintiff would permit him to go at large, and would give authority to the bailiff to that purpoſe, he promiſed to appear at the return of the proceſs, or would give the plaintiff* 10 *l.* It was moved in arreſt of judgment, that the promiſe was void, being contrary to the ſtatute of 23 *H.* 6. but *Gawdy* and *Clench* held it good, being made to the plaintiff, who had authority to diſpenſe with his appearance; but if it had been made to the ſheriff himſelf, or any other to his uſe, it had been within the equity of the ſtatute. *Cro. E.* 190.

Aſſumpſit, for that a precept was awarded to a bailiff to attach the goods of S. *and he attached him by two quarters of corn, and delivered them to the plaintiff, to deliver them at the next court, and the defendaut aſſumed to ſave him harmleſs.* It was the opinion of the court, that the conſideration was void, and againſt law; for attachment cannot be of corn out of ſacks, but if it might, it ought to be kept by the bailiff, and not delivered out of his hands. *Cro. El.* 230.

A. *entered into a bond of* 200 *l. to* B. afterwards A. *gave all her goods to* R. *for payment of her debts*; the *defendant pretending, that the bond was read to* R. *as a bond of* 100 *l. only, promiſed to the plaintiff that if he, and two witneſſes, would depoſe before the mayor of* L. *that the bond was read to the obligor as a bond conditioned for payment of* 200 *l. that he would pay the money.* The plaintiff, and two other perſons, did depoſe before the mayor of *L.* accordingly. Adjudged, that it was a lawful oath, and a good conſideration. *Cro. E.* 469.

Aſſumpſit, &c. *for that* B. *being outlawed, after a judgment againſt him by the plaintiff, the defendant, in conſide-*

ration the plaintiff would forbear to proceed upon the *capias utlagatum*, promiſed that if the ſaid *B.* did not pay the debt he would. After verdict, it was moved, that the conſideration was againſt law, becauſe the proceſs was at the ſuit of the King; but *Gawdy*, *Fenner*, and *Yelverton* held the conſideration good; for the proceſs is at the ſuit of the party, as well as of the King; but *Popham*, *e contra*. Judgment for the plaintiff *niſi*, &c. *Cro. El.* 909.

If *A.* in conſideration of ſome benefit, promiſes not to ſet up, or follow the ſame trade with the plaintiff in ſuch a town, this is a good promiſe; but if the promiſe were not to ſet up, or follow the ſame trade in any part of the kingdom, it would be void. See 1 *Rol. Abr.* 16, 17.

If *A.* being a clerk promiſes *B.* in conſideration that *B.* will procure him to be rector of a donative church, with cure of ſouls, to pay 10 *l.* to *B.* this is no good conſideration to maintain an action; for this is ſimony, and an offence againſt the laws of God and man. 1 *Rol. Abr.* 18.

If *A.* levies a plaint in the court of *Stepney* againſt *B.* upon which a precept is directed to *C.* the bailiff there, to attach the goods of *B.* and thereupon *C.* attaches certain of the goods of *B.* and *A.* in conſideration that *C.* will deliver thoſe goods to him to deliver at the next court, aſſumes and promiſes to ſave *C.* harmleſs, &c. the conſideration is void, being againſt law; for the bailiff ought not to deliver them to the plaintiff. *Cro. Eliz.* 230.

If *A.* being ſeiſed of lands in fee, enters into recogniſance to *B.* and after makes a feoffment of thoſe lands to *C.* who, in conſideration that *B.* will aſſign to him the recogniſance, aſſumes and promiſes to pay him 80 *l.* this is a good promiſe; for the conſideration being to aſſign to the ter-tenant, it operates by way of diſcharge, and is clearly lawful; otherwiſe of an aſſignment to a ſtranger. *Cro. Eliz.* 551.

If *A.* brings *B.* to a common inn, of which *C.* is hoſt, and affirms to *C.* that he hath arreſted *B.* by virtue of a commiſſion of rebellion, and in conſideration that *C.* will keep *B.* as a priſoner by the ſpace of one night, aſſumes and promiſes to ſave *C.* harmleſs, &c. if *B.* recovers againſt *C.* in an action of falſe impriſonment, *C.* may have an action againſt *A.* upon this promiſe; for though the conſideration, *viz.* the keeping of *B.* was unlawful, yet becauſe it did not appear to *C.* to be ſo, the promiſe to ſave him harmleſs was good. *Hut.* 55.

But if it appears, that the act which is to be done is unlawful; as if *A.* in conſideration that *B.* will beat *C.* promiſes to ſave *C.* harmleſs, the conſideration is void. *Hut.* 56.

H. was in *execution* at the ſuit of *D.*——*B. came to* M. the *gaoler*, and promiſed him, that *in conſideration he would permit* H. *to go at large, that* H. *ſhould pay the debt into court by a certain day to ſatisfy* D. *and* that he would *ſave the gaoler harmleſs*. *M.* brought *aſſumpſit*. But *per tot. cur.* The promiſe is void, becauſe the conſideration is againſt law. *Yelv.* 197.

If an *informer* takes upon him to *compound* contrary to the ſtatute of 18 *Eliz.* 5. though it be *prohibited*, yet the promiſe is good; and though he cannot withdraw the ſuit, yet he may forbear the proſecution; *per Montague*, Ch. J. 2 *Rol. Rep.* 103.

The plaintiff and defendant were both *ſuitors to the ſheriff of* Middleſex, *to obtain the office of under-ſheriff* for ſuch a year. The defendant, *in conſideration the plaintiff would deſiſt his ſuit, promiſed* the plaintiff that *if he obtained the ſaid office, to pay* to the plaintiff 20 *l. for a gelding delivered by the plaintiff*; all the court held the conſideration to be good and valuable; and adjudged for the plaintiff in *C. B.* and that judgment affirmed. *Cro. J.* 612.

If *A.* is in execution at the ſuit of *B.* and *C.* in conſideration that the gaoler will permit *A.* to go at large, aſſumes and promiſes to him that *A.* ſhall pay the debt at a certain day, and that he the ſaid *C.* will ſave the gaoler harmleſs, the promiſe is void; becauſe the conſideration is againſt law. *Yelv.* 197.

If the father of *A.* was indebted to *B.* and *A.* promiſes *B.* that if he will bring two witneſſes before a juſtice of peace, who upon their oaths will depoſe, that the father of *A.* was ſo indebted to *B.* that then he will pay it; if *B.* does produce his witneſſes, &c. he may have an action upon this promiſe againſt *A.* for the conſideration is not unlawful, nor the oath profane; adjudged by two judges againſt *Vaughan*, who thought it was within the ſtatute againſt prophane ſwearing. 1 *Mod.* 166. *Cro. Eliz.* 469, 470.

If *A.* obtains a judgment againſt *B.* in the Marſhal's court, and afterwards, in conſideration of money in hand paid, aſſumes and promiſes to aſſign this judgment to *C.* this is a good promiſe; for it is lawful ſo to do, and the intent muſt be that it ſhall be aſſigned according to common uſage, *viz.* by a letter of attorney, ſo that *C.* may take out execution in the name of *A.* which may be done without any maintenance. 1 *Sid.* 212.

If I *requeſt another to enter into* B.'*s land, and in my name to drive out the beaſts, and impound them, and promiſe to ſave him harmleſs*, this is a good *aſſumpſit*, and yet the act is tortious; *per Hobart, Hutton and Winch. Win.* 49.

Aſſumpſit, for that the *defendant having a ſci. fa. againſt the goods of* J. L. *and delivered it to the ſheriff, and affirmed to the plaintiff that the cloth in the ſhop of* C. L. *were the goods of* J. L. *and liable to this execution, and* required the plaintiff to execute the writ, and *if he would ſeize the ſaid cloth, he promiſed, when required, to give bond to the ſheriff in any reaſonable ſum, to indemnify both him and the plaintiff* for entering and ſeizing the ſaid goods. It was objected, that this promiſe was grounded upon a conſideration very unlawful, *(viz.) to ſave* a man *harmleſs for taking* another man's *goods in execution*. But the court held the conſideration good, and that the defendant requiring the ſheriff to execute the writ, it was reaſonable he ſhould indemnify him; and a promiſe to give a bond in a reaſonable penalty, without mentioning any certain ſum, is good. *Cro. J.* 652.

There is a diverſity where one aſſumes to do a *thing unlawful, which cannot by any means be made lawful, as to kill a man*, or to burn a houſe, &c. and where it is to do a *thing unlawful, which in time may be made lawful*; as where it is to make a *feoffment of the land of a ſtranger*, or of an alien, or a corporation, &c. In theſe caſes he is bound to make them, and therefore at his peril muſt obtain lawful liberty to make them; *per Walter*, Ch. B. *Lit. Rep.*

If *A.* obtains a judgment againſt *B.* and thereupon takes out an *elegit*, and delivers it to the under-ſheriff, who by virtue thereof ſeizes certain goods of *B.* and afterwards the under-ſheriff, in conſideration that *A.* will take out a new *elegit*, and deliver it to him, he promiſes to cauſe and procure the ſaid goods to be found by inquiſition, and to deliver the ſame to ſuch perſon as *A.* ſhall appoint, &c. this promiſe is againſt law, being to do a thing againſt the duty of his place, by which he is bound to return an indifferent jury; and though part of the promiſe was to do a lawful act, yet ſince that depended upon the other part, which was illegal, the whole is naught. 2 *Jones* 284.

Aſſumpſit, &c. in which the plaintiff declared, that he is a *bailiff*, and having *arreſted* J. S. *on a warrant*, the *defendant promis'd*, that *in conſideration the plaintiff would permit the ſaid* J. S. *to be in his houſe, he would deliver him to the plaintiff the next morning*. It was moved in arreſt of judgment, that the promiſe was againſt law, and void; for leaving a priſoner in another's houſe and cuſtody is an eſcape. But *per cur.* They will not intend that the plaintiff was abſent from *J. S.* and judgment for the plaintiff. *Sid.* 132.

An *attorney being employed to take out execution on a recognizance* againſt the defendant, *he promiſed to pay him*, &c. the defendant demurred to the declaration, for that the conſideration is void, as ariſing *ex turpi cauſa*, it being contrary to his truſt, and oath of an attorney, to forbear where he is employed to ſue; but *per cur.* It ſhall be *intended the attorney had authority from his client* to forbear, or to *uſe ſuch means as he might think* requiſite to get the debt, and to forbear generally, without ſaying how long,

is good; for it ſhall be taken to be a perpetual forbearance. *Sid.* 294.

A queſtion ariſing between *A.* the defendant, a cuſtom-houſe officer, and *C.* a merchant, plaintiff, what the cuſtom of goods imported did amount to, and what ſum *B.* had paid; *A.* the defendant, *in conſideration* C. *the plaintiff would pay to him* 100 l. (which in truth was leſs than the cuſtom did amount unto) *promiſed that if* B. *had paid no more*, C. *ſhould pay no more*; and averr'd that *B.* had paid no more; yet the defendant had complain'd to the commiſſioners, and the plaintiff was compell'd to pay more. After a verdict for the plaintiff, *it was objected that* here was no conſideration, for *C.* was compellable to pay what was due; *and this agreement amounted to no more than to cheat the King, as* B. *had done.* But *per cur.* Payment of what is due, without any ſuit or trouble, is a good conſideration; and the acceptance of leſs than is due by the officer, and agreement that the merchant ſhall pay no more, is a good agreement between them; for *the officer ſhall anſwer to the King for the reſidue out of his own pocket.* *Lev.* 128.

A *bailiff had taken* J. S. *in execution by a ca. ſa.* and the *defendant, in conſideration he would permit* J. S. *to ſtay at the houſe of* J. D. *in* H. *till ſuch a day, promis'd to ſave him harmleſs from all eſcapes.* It was inſiſted, that the conſideration was illegal, becauſe *J. S.* was in execution; and thereupon the court ſtaid judgment on the firſt, but on laſt day of the term gave judgment for the plaintiff; *Hale* Ch. J. ſaying, that a long vacation coming on he would delay the judgment no longer, but directed that a writ of error be brought, if thought well of. 2 *Lev.* 17.

C. an *under-ſheriff having ſeized goods on an elegit*, ſued out by the plaintiff, *promiſed the plaintiff, that in conſideration he would, at* C.*'s requeſt, ſue out another* elegit, *to procure the goods to be found by inquiſition, and deliver them to any perſon to be appointed by the plaintiff.* The court held the promiſe not lawful; for, 1ſt, the ſeizure upon the firſt *elegit*, without an inquiſition, was not good; ſo that this promiſe is to make good the tort of the defendant; 2dly, it is the duty of the ſheriff to return an indifferent jury, but this promiſe engages him contrary to the duty of his office; and tho' one part of the promiſe is lawful, yet ſince that depended upon the other part, which was illegal, the whole is naught; and judgment for the defendant. 2 *Jo.* 24.

In conſideration the *plaintiff would deliver the defendant's cattle out of pound*, he promiſed to pay or ſave him harmleſs; it was held, that this conſideration was not unlawful, tho' the cattle were duly impounded, becauſe it was not a *malum in ſe.* 2 *Show.* 329.

Aſſumpſit, in conſideration the *officer would reſtore goods taken on a* fi. fa. to pay the debt, is a good conſideration. 1 *Salk.* 28.

6. *Pleadings.*

The plaintiff muſt ſet forth every thing eſſential to the giſt of the action, with ſuch certainty, that it may appear to the court that there were ſufficient grounds for the action; for if any thing material be omitted, it cannot appear to the court whether the damages given by the jury were in proportion to the demand, or whether the party was at all intitled to a verdict. And therefore in an action upon the caſe, the plaintiff cannot declare *quod cum* the defendant was indebted to the plaintiff in ſuch a ſum, and that the defendant, in conſideration thereof, *ſuper ſe aſſumpſit*, to pay, &c. without ſhewing cauſe of the debt. 10 *Co.* 77.

So, if in an *aſſumpſit* the plaintiff declares that, in conſideration *quod procuravit J. S.* to ſurrender a meſſuage, &c. the defendant *ſolveret* to the plaintiff 10 *l.* the declaration is not good; for there is no promiſe laid, *ſuper ſe aſſumpſit*, or *agreavit* being omitted; and there is nothing here that imports a promiſe or contract. 1 *Sid.* 246.

Caſe, for that one *B. was indebted to him in* 10 l. *for work*, &c. *and died inteſtate, and that defendant adminiſtred*, and that the *defendant did promiſe, that if the plaintiff would forbear till Michaelmas he would pay him*, and ſhews that he did forbear the debt, &c. after verdict, it was objected, that the conſideration was uncertain, becauſe the plaintiff did not *ſet forth what ſhould be paid, nor to whom, but generally, that the defendant would pay him*; and that the conſideration was that *parceret* indefinitely. *Sed non allocatur*; for it ſhall be intended of the debt, which is the *ſubjecta materia*; and that it was alledg'd generally, that he forbore, and did not ſhew how; but by *Dodderidge* J. iſſue ſhall not be taken whether he forbore or not, but you ſhall ſhew how he ſued you. 2 *Rol. Rep.* 488.

Aſſumpſit was, that *in conſideration that the plaintiff* daret diem ſolutionis, *the defendant* ſuper ſe aſſumpſit; and becauſe he *doth not ſay* in facto, *that he had given day*, it was adjudged that no ſufficient conſideration was alledged; *but* if the conſideration were *quod cum indebitatus*, &c. the ſame had been a good conſideration without any more; for that implies a conſideration in itſelf. *Godb.* 13.

The count was, *that* W. *the defendant's brother, on his death-bed call'd the defendant, whom he made his executor, and deſired him to pay the plaintiff's debt in two months time; and that in conſideration thereof he promiſed to do it.* The court held that there was no conſideration ſet forth; for it is *not ſaid, that in conſideration that* W. *made the defendant his executor*, &c. 3 *Leon.* 129.

Super ſe aſſumpſit on an *inſimul computaſſet* was left out, and a difference was endeavoured to be taken where the law raiſes the promiſe, and where it is a ſpecial promiſe; and that in the firſt it ſhould not be needful; but the court held it neceſſary in both; for the law does not create a promiſe in any caſe in pleading, but gives ſufficient evidence to a jury to find a promiſe. But in this action the law requires no greater certainty in the allegations, than the nature of the thing requires; therefore if a contract be made in general terms, the declaration may likewiſe be general; hence a *quantum meruit for diverſa veſtimenta & omnia alia materialia adinde ſpectantia*, is good. 2 *Keb.* 97. 1 *Sid.* 306.

So if in an *aſſumpſit* the plaintiff declares that, in conſideration the plaintiff would find and provide for a ſick man all ſuch neceſſaries as he ſhall want, the defendant aſſumed and promiſed to pay, &c. and avers that he had found him neceſſaries amounting to ſuch a ſum, &c. this is a good declaration, without ſhewing in particular what thoſe neceſſaries were; for that would make the record too prolix. 3 *Bulſt.* 31.

The count was, that in conſideration that *quædam pars domus*, &c. *was in decay, and the plaintiff would repair the ſame, defendant promiſed to pay*, &c. and declar'd, that *eandem partem domus prædictæ reparavit*; it was moved, that *quædam pars domus* was too general in the count, and that he ought to have ſhew'd ſpecially what part in certain, as hall, chamber, &c. *ſed non allocatur.* 2 *Leon.* 53.

Aſſumpſit, in *conſideration that at the requeſt of the defendant, he would deliver as many quarters of malt to* J. S. *to his uſe, as he would receive or have before 1ſt Auguſt, the defendant promis'd to pay* tales denariorum ſummas, &c. *before the ſaid 1ſt day of Auguſt*, and *alledges he delivered ſo many quarters, each of ſuch value*; tho' he doth not promiſe any ſum certain, but *tales denariorum ſummas*, without ſaying what, yet it was held good; for *per Wray*, when the plaintiff *ſhews the value of every quarter*, it is intended he ſhall pay according to the rate; and judgment for the plaintiff. *Cro. El.* 149.

Aſſumpſit, for that *in conſideration he by his ſervant had delivered to the defendant two bills of* 300 *French crowns, amounting to* 80 l. *to be received at Roan in Normandy to his uſe, the defendant promiſed to pay him* 61 l. it was moved that there is no conſideration; for *it appeareth not how he ſhall recover them*, if he be denied payment, *nor that they were bills made to the plaintiff, nor what benefit he may have by them*; but adjudged in *C. B.* to be a good conſideration, and well alledg'd; and the court of *B. R.* held ſo too; *ſed adjornatur.* *Cro. Eliz.* 155.

If in an *indebitatus aſſumpſit*, the plaintiff declares that the defendant was indebted to the plaintiff in 10 *l.* for the feeding and agiſtment of beaſts, and for wheat, *& aliis mercimoniis per prædict'* the defendant *habit' & recept'*, this is a good declaration; for though it be not ſufficient to

to ſay that he was indebted generally, becauſe that may be for rent upon leaſes or debts upon ſpecialties, yet this is certain enough; for as well the wares and merchandiſes, as the paſturing and wheat, are perſonal things, for which an *aſſumpſit* may be brought. *Hob.* 5.

So in an *aſſumpſit* the plaintiff declares *pro opere & labore* generally, without ſetting forth what ſort or manner of work or labour it was; and though it was objected that it ſhould be ſet forth particularly, ſo that it may appear to the court to be lawful work, yet the court held it well enough; and that the only reaſon why the plaintiff is obliged to ſhew wherein the defendant is indebted is, that it may appear to the court that it is not a debt on record or ſpecialty, but only upon ſimple contract; and any general words, by which that may be made to appear, are ſufficient. *Carth.* 276.

If in an *aſſumpſit* the plaintiff declares, that whereas the defendant had received 24 *l.* of ſeveral perſons, to the uſe of the plaintiff, in conſideration thereof the defendant did aſſume and promiſe to pay, *&c.* this is a good declaration, without ſhewing of what perſons in particular he received the money, becauſe the conſideration is executed, and not traverſable. *Moor* 854.

Aſſumpſit. The plaintiff declares, that *in conſideration the defendant ſhould enjoy ſuch goods, &c. he would pay* the party 25 *l.* the jury upon *non aſſumpſit* found, that he promiſed to pay, if he enjoyed ſuch goods, *&c.* and it was adjudged for the defendant, becauſe the plaintiff *declared of an abſolute promiſe*, and the jury *found a conditional promiſe*. *Cro. Eliz.* 149.

The count was, that in conſideration the plaintiff *reſpectuaret the defendant pro ſolutione debiti prædicti per ſpatium unius ſeptimanæ tunc proxime ſequentis*, to pay the debt to the ſaid plaintiff *modo ſequenti*, viz. *one moiety within one week after, and the other moiety at the end of the ſaid week*, and counts that he did forbear by the ſpace of a week. It was objected that the conſideration was not ſufficient, *without ſaying that he had forborn for a week next following*, as laid in the count. *Sed non allocatur*; for it ſhall be intended. It was alſo objected, that the declaration is *repugnant*, by ſetting forth that the conſideration was the *forbearing for a week, and that he promiſed to pay within a week. Sed non allocatur*; for the week in the *aſſumpſit* ſhall be conſtrued to be the week after the week in the conſideration. 2 *Leon.* 112.

Aſſumpſit, for that the *defendant was poſſeſſed of divers goods of the plaintiff's, and in conſideration the plaintiff would forbear the goods, the defendant promiſed to deliver them within ſix months.* It was ſaid, there was no conſideration; for he does *not ſhew what goods they were*, and ſo uncertain; but *per cur.* There needs not any certainty to be ſhewn of them; for he is not to recover the goods in ſpecie, but damages for them; and adjudged for the plaintiff. *Cro. El.* 387.

If in an *aſſumpſit* the plaintiff declares, *quod cum* there were ſeveral reckonings and accounts between the plaintiff and defendant; and at ſuch a day, *&c. inſimul computaverunt* for all debts, reckonings and demands; and the defendant upon the ſaid account was found to be in arrear the ſum of 20 *l.* in conſideration whereof the defendant promiſed to pay, *&c.* this is a good declaration, without ſhewing it was *pro mercimoniis*, or otherwiſe, wherefore he ſhould have an account; for an account may be for divers cauſes, and ſeveral matters and things may be included and comprized therein, which *in pede computi* are reduced to a ſum certain, and thereupon being indebted to the plaintiff, it is ſufficient to ground an action. *Cro. Car.* 116.

If in a *quantum meruit* for meat, *&c.* the plaintiff declares upon a promiſe, to pay ſo much *quantum rationabiliter valerent*, this is a good declaration, though general; and though objected that it ought to have been *valebant*. 3 *Mod.* 190.

J. S. was indebted to *T.* the plaintiff in 100 *l.* and *in conſideration that* T. *would abate* 10 *l. of the debt, and forbear the* 90 *l. reſidue till Michaelmas*, the defendant *promiſed to pay the* 90 *l. then, if* J. S. *did not*; and alledg'd that he had abated the 10 *l.* and forbore the 90 *l.* till *Michaelmas*. It was demurr'd, becauſe he did *not ſhew how he abated him the* 10 *l. ſo as the court might take conuſance whether it was a ſufficient diſcharge*; and of that opinion was the whole court. *Cro. El.* 477.

In conſideration the plaintiff would relinquiſh ſuch a ſuit, the defendant promiſed, *&c.* after judgment for the plaintiff, it was aſſign'd for error, that the plaintiff ought to have *averr'd that the action, which he was to diſcharge, was actionable*, which not being done, was held to be error, and the judgment revers'd in the Exchequer-Chamber. *Cro. El.* 561.

Aſſumpſit, *in conſideration he would permit the defendant to enjoy ſuch lands for a year, he promiſed to give the plaintiff* 10 *l. for that year*; and alledges in fact that the defendant enjoy'd it by his permiſſion; but becauſe it was *not ſhewed what right or title he had to the land to licenſe the defendant* to enjoy it, it was holden there was no good conſideration or cauſe of action. *Cro. El. pl.* 28.

Aſſumpſit againſt an executor, *for that his teſtator was indebted* 33 l. *to the plaintiff, and in conſideration the plaintiff would forbear to ſue him till he the defendant ſhould get execution upon ſuch a judgment, he promiſed to pay* the money *upon requeſt*. It was objected, that it did *not appear the teſtator was indebted, or that the defendant had aſſets*; but adjudged that the action is grounded upon the promiſe of the defendant, and it ſhall be intended that he was indebted, otherwiſe the executor would not promiſe. *Cro. J.* 593.

If in an *aſſumpſit* the plaintiff declares, that the defendant in conſideration of, *&c. inter alia*, did aſſume to pay, *&c.* that is no good declaration, becauſe he ought to ſet forth the whole promiſe which is intire. *Allen* 5.

If in an *aſſumpſit* the plaintiff declares, that in conſideration the plaintiff had promiſed to deliver a cow to the uſe of the defendant, the defendant did aſſume and promiſe, *&c.* this is a good declaration, without any averment of the delivery of the cow, becauſe there is promiſe for promiſe. *Hob.* 88.

The defendant *promiſed to give the plaintiff* 40 l. *to cure him of the pox; however, he promiſed to give him* 10 l. *for his endeavour to cure him*; and in an action brought for this 10 *l. the plaintiff ſet forth that he endeavoured to cure him, but alledged no place where*; upon a traverſe to the endeavour, and iſſue join'd, the plaintiff had a verdict; but the judgment was arreſted. 2 *Rol. Rep.* 312.

The plaintiff declared upon a *promiſe to pay him ſuch fees as ſhould be due to him as his attorney in the proſecuting a ſuit for him in C. B.* and ſuch money as he ſhould lay out in ſoliciting a ſuit for him in Chancery; upon *non aſſumpſit* pleaded, the plaintiff had a verdict; and upon error brought, the error aſſigned was, that the plaintiff did *not ſhew particularly what ſums* of money *he had laid out for the defendant, nor to whom paid.* But adjudged, that it was not neceſſary ſo to do; and that if he ſhould bring any other action for his fees, or money laid out, the defendant might plead this recovery in bar. *Sty.* 428.

A. and *B.* agreed to run a horſe-race, and the winner to have of the other 200 *l.* The count was, *whereas the plaintiff had promiſed to perform on his part, the defendant had promiſed to perform on his*; this was adjudged to be good, and ſufficiently certain. *Hard.* 103.

In conſideration the *plaintiff would forbear to take his courſe for the monies, the defendant promiſed that he would pay them*; it was objected, that the words are uncertain, and that he ſhould have ſaid (his courſe in law), and not generally (his courſe). But *Roll* Ch. J. held the conſideration certainly enough ſet forth, tho' the Latin be not very proper; and judgment for the plaintiff, *niſi, &c. Sty.* 264.

If in a *quantum meruit* for medicines, the defendant pleads, that he had paid the plaintiff *tot & tantas denariorum ſummas*, as the ſaid medicines were worth, without ſhewing what ſum in certain he hath paid; this is no good plea. *March* 77.

If in an *aſſumpſit* the plaintiff declares, that the defendant did aſſume and promiſe to pay to the plaintiff ſo much money, and alſo to carry away certain wood before ſuch a day; the defendant as to the money cannot plead that he

he paid it, and as to the carriage of the wood *non aſſumpſit*, for the promiſe being intire cannot be apportioned. *March* 100.

Aſſumpſit, for that the *plaintiff and* H. *were bargaining for a horſe*, and the *defendant promiſed, that if they agreed on the price he would pay the money*, and that he agreed for ſo much, but the defendant did not pay it; it was aſſign'd for error, that here was no conſideration; for 'tis not that he ſhould ſell or deliver the horſe, ſo the plaintiff hath no loſs, nor the defendant any benefit; but judgment affirm'd; for it ſhall be *intended after a verdict, that upon this promiſe the horſe was delivered; and that* the promiſe was the inducement thereto. 1 *Lev.* 103.

If the plaintiff declares upon an *indebitatus aſſumpſit*, and upon a *quantum meruit*, and the defendant pleads, that after the ſaid ſeveral promiſes made, and before the action brought, the plaintiff and defendant came to an account concerning divers ſums of money, and that the defendant was found in arrear to the plaintiff 30 *l.* and thereupon, in conſideration that the defendant promiſed to pay the ſaid 30 *l.* the plaintiff likewiſe promiſed to releaſe and acquit the defendant of all demands, this is a good plea; for by the account the firſt contract is merged. 2 *Mod.* 43, 44.

The defendant cannot plead that he revoked his promiſe; as if *A.* is in execution at the ſuit of *B.* and *J. S.* deſires *B.* to let him go at large, and that he will ſatisfy him; to which *B.* agrees; though *J. S.* before any thing is done in purſuance of this promiſe and agreement, comes to *B.* and tells him, that he revokes his promiſe, and that he will not ſtand to it; yet ſuch revocation cannot be pleaded in bar to the action. 1 *Rol. Abr.* 32.

In *aſſumpſit* the plaintiff declared, that in conſideration *that he had done the defendant multum & gratiſſimum ſervitium*, he promiſed to pay the plaintiff 10 *l.* and alſo in conſideration that he had done him *multa beneficia*, he promis'd, *&c.* it was moved in arreſt of judgment, that neither of theſe conſiderations were ſufficient, eſpecially the laſt, becauſe there *ought to have been ſome ſervice particularly expreſs'd*; and the court for that reaſon held it merely void, and judgment *quod querens nil capiat, &c.* *Vent.* 27.

If in an *aſſumpſit* the plaintiff declares, that in conſideration the plaintiff would ſolicit a buſineſs for the defendant, which he had with *J. S. & finem adinde poneret*, the defendant did aſſume, *&c.* and that he had ſolicited and employed much care and pains, *&c.* but before he could *finem inde ponere*, the defendant countermanded him, the action lies; though it was objected, that ſuch employment is always countermandable; and if the plaintiff had beſtowed pains, and in part done the thing before the countermand, he might have had a *quantum meruit* for what he had done, but not an *aſſumpſit* for the whole; yet it was reſolved by the court, that if after part done the defendant countermands it, the plaintiff ſhall have an action for the whole, and upon the trial the jury ought to give as much in damages as the buſineſs done deſerves. 3 *Lev.* 244.

If *A.* being poſſeſſed of a horſe and lends him to *B.* and *B.* aſſumes and promiſes to re-deliver the horſe to *A.* by a day, before which day the true owner of the horſe *contra voluntatem* takes him from *B.* this matter, by reaſon of the precedent property, is *quaſi* an eviction of the horſe from the poſſeſſion of *B.* and ſhall diſcharge *B.* of his promiſe. *Yelv.* 22.

Aſſumpſit, for that the defendant *promiſed to give him ſo much pro opere ſuo facto*; it was moved in arreſt of judgment, that here is nothing to found an *aſſumpſit* upon; for *(opus factum)* may be any neighbourly kindneſs, and ſo the declaration too general; but adjudged, that *'tis the ſame as pro labore ſuo*, which hath been held good, and being *after a verdict, it ſhall be intended that ſuch labour as implied a conſideration was given in evidence.* *Sid.* 425.

In action *againſt an heir on the bond of his anceſtor, ſetting forth that the defendant, in conſideration the plaintiff would forbear to ſue for ſuch a time, promiſed to pay him*; the plaintiff ought to *ſhew that the anceſtor was bound*, or otherwiſe he cannot have judgment; and it ſhall not be intended after verdict. *Vent.* 159.

Caſe, *&c.* for that the *plaintiff pretended a title to certain goods in the poſſeſſion of* S. P. *and claimed them to be his own, and intending to remove them, the defendant, in conſideration that the plaintiff would ſuffer them to continue there, promiſed to ſee them forth-coming*, and not imbeziled, *&c.* it was objected, that here was no good conſideration, becauſe the plaintiff did *not ſet forth any property* in the goods, but only that he pretended to, and claimed them as his own. *Sed non allocatur*; for after a verdict it ſhall be intended that he proved that they were his own. *Vent.* 211.

Aſſumption, The day of the death of a ſaint; ſo called *quia ejus anima in cœlum* aſſumitur. *Du Freſne.*

Tandem clara dies, reginæ aſſumptio *cœlis,*
Regi parentis adeſt. ——

Aſſurance of lands, Is where lands or tenements are conveyed by deed: And there is an *aſſurance* of ſhips, goods and merchandize, *&c.* *Stat.* 6 *Geo.* 1. See **Inſurance.**

Aſter, and **homo aſter**, A man that is reſident. *Britton* 151.

Aſtrarius haeres, (from *aſtre*, the hearth of a chimney) Is where the anceſtor by conveyance, hath ſet his heir apparent and his family in a houſe in his life-time. *Dicitur ille cui anteceſſor in vita ſua per chartam hæreditatem reſtituit.* 1 Inſt. 8.

Aſtzihilthe, or **Attrahilthet**, Is a Saxon word, and denotes, ſay the laws of St. *Edward, c.* 30. *Hi qui pacem regis habent, vel manu vel brevi, &c. Qui ſi nimis confidens in pace quam habet, per ſuperbiam alicui forisfecerit, damnum reſtauret et iterum tantundem quod* Angli *vocant* aſtrihilthet. See *Hoveden, p.* 606. *Cowell.*

Aſtrum, A houſe or place of habitation, from *aſtre*, which *Spelman* renders the hearth of a chimney.—— *Præceptum fuit vicecom. quod replegiet corpus* Willielmi J. *quod* Richardus S. Valentio *cepit et captum tenuit, qui* Richardus *venit et advocat captionem ut de villano ſuo, et quod cepit ipſum in* aſtro *ſuo in quo natus fuit, &c.* Placit. Hillar. 18 Ed. 1. *Villanis autem in veteribus* aſtris *ſuis commorantibus non competit hujuſmodi remedium.* Fleta, lib. 2. c. 2. paragr. 8. *de nativis.*

Ategar, A ſort of weapon among the *Saxons.* *Flor. Wigorn. ſub. an.* 1040, and from him *Hoveden ſub eodem anno.——In manu ſiniſtra clipeum, cujus umbo clavique erant deaurati, in dextra lanceam, quæ lingua Anglorum* ategar *appellatur.* It ſeems to have been a hand-dart from the Sax. *ateon*, to fling or throw, and *gar*, a weapon. *Spelman.*

Ath, Atha, Athe, An oath. *Spelman.*

Athes, Adaa, A power or privilege of exacting and adminiſtring an oath, in ſome caſes of property and right; from the Saxon *ath, juramentum, oath.* It is mentioned among the privileges granted by *Hen.* 2. to the monks of *Glaſtonbury.* *Cartular. Abbat. Glaſton. MS. fo.* 14, 37.

Athetſwan, An hoggard, or one who looks after hogs.

Atia. See **Odio et atia.**

Atilia, Utenſils or country implements: *Remaneant duo equi carectarii cum carecta et triginta ſex boves cum quatuor carucis et* atiliis. *Cowell.*

At large, *Ad largum.* See **Verdict at large.** *Lit. fo.* 98. To vouch at large. *O. N. B. fo.* 108. To make title at large. *Kitchen, fo.* 68. See **Bar.**

Atrebati, *Berkſhire.*

Atrium, Signifies a court before a houſe, and ſometimes a church-yard. *Cowell. Spelman.*

Attach, *(Attachiare*, from the Fr. *attacher)* Signifies to take or apprehend by commandment of a writ or precept. *Cowell. Lambard* in his *Eirenarch. lib.* 1. *c.* 16. maketh this difference between an arreſt and an attachment; that an arreſt proceedeth out of lower courts by precept, and an attachment out of higher courts by precept or writ; and that a precept to arreſt hath theſe formal

mal words, *duci facias*, &c. and a writ of attachment theſe words, *præcipimus tibi quod attachies talem, et habeas eum coram nobis*, &c. whereby it appeareth, that he who arreſteth, carrieth the party arreſted to another higher perſon to be diſpoſed of forthwith, and he that attacheth, keepeth the party attached, and preſenteth him in court at the day aſſigned in the attachment. *Cowell.*

Attachiamenta bonozum, A diſtreſs taken upon goods or chattels, where a man is ſued for a perſonal eſtate or debt, by the legal *attachiators* or bailiffs, as ſecurity to anſwer an action. It was a privilege granted to the abbot and convent of *Oſeney*, to have the *attachments* of the goods of their tenants quit-claimed or releaſed, &c. *Ken. Paroch. Antiq. p.* 196.

Attachiamenta de ſpinis et boſco, The privilege granted to the officers of a foreſt to take to their own uſe, thorns, bruſh, and wind-fall, within ſuch precincts or liberties committed to their charge. So *John Fitz Nygel*, foreſter of *Bernwood*, *A. D.* 1230.——*Debet habere feodum in boſco domini regis*; *videlicet* attachiamentum *de* ſpinis, *de* boſco *ſuo*, *et de* boſco *qui vento proſtituitur.* Paroch. Antiq. p. 209.

Attachment, (from *attach)* Is a proceſs that iſſues at the diſcretion of the judges of a court of record, againſt a perſon for ſome contempt, for which he is to be committed, and may be awarded by them upon a bare ſuggeſtion, or on their own knowledge, without any appeal, indictment or information; for though by the ſtatute of *Magna Charta*, none are to be impriſoned *ſine judicio parium vel per legem terræ*; yet this ſummary method of proceeding being abſolutely neceſſary to the furtherance and execution of juſtice, ſeems to have been long practis'd, and is certainly now eſtabliſhed as part of the law of the land. *Lamb. Eiren. lib.* 1. *c.* 16. 1 *New Abr.* 180. See *Weſt.* 2. *c.* 3.

1. *In what caſes an attachment is to be granted.*
2. *Proceeding upon an attachment.*

1. *In what caſes an attachment is to be granted.*

All courts of record have a diſcretionary power over their own officers, and are to ſee that no abuſes be committed by them, which may bring diſgrace on the courts themſelves; therefore if a ſheriff or other officer ſhall be guilty of a corrupt practice in not ſerving a writ; as if he refuſe to do it, unleſs paid an unreaſonable gratuity from the plaintiff, or receive a bribe from the defendant, or give him notice to remove his perſon or effects, in order to prevent the ſervice of any writ; the court which awarded it may puniſh ſuch offences in ſuch manner as ſhall ſeem proper by attachment. *Dyer* 218. 2 *Hawk. P. C.* 142.

But if there be no palpable corruption, nor extraordinary circumſtance of wilful negligence or obſtinacy, the judgment whereof is to be left to the diſcretion of the court; it ſeems not uſual to proceed in this manner, but to leave the party to his ordinary remedy againſt the ſheriff, either by action, or by rules to return the writ, or by an *alias* and *pluries*, which if he have no excuſe for not executing, an attachment goes of courſe. *Hob.* 62, 264. *Noy* 101. *F. N. B.* 38. *Finch* 237. 5 *Mod.* 314, 315.

Alſo ſheriffs and other officers are liable to an attachment for an oppreſſive or illegal practice in the execution of a writ; as uſing needleſs force, violence or terror, treating perſons under an arreſt baſely and inhumanly, extorting money from them, &c. or making an arreſt without due authority, or by colour of a blank warrant, filled up without the privity or ſubſequent agreement of the ſheriff. 11 *Hen.* 6. 42. *Noy* 101. *Moor* 770. 2 *Rol. Abr.* 278.

Alſo an attachment is grantable for a corrupt practice, in not executing a writ effectually; as if a ſheriff, having levied a debt on an execution, imbezils the money. 2 *Hawk. P. C.* 143.

Alſo an attachment is grantable in diſcretion for a falſe return to a writ, but this is not uſually done without ſome viſible corruption, or extraordinary circumſtances of malice, hardſhip, or oppreſſion. 2 *Hawk. P. C.* 143.

Attornies are liable to an attachment, and have been puniſhed in this manner in numberleſs inſtances; as for proſecuting or defending a ſuit without directions from the party; for baſe and unfair dealings towards their clients in the way of buſineſs; as for protracting ſuits by little ſhifts, demanding money for buſineſs never done, detaining their clients writings, or their money recovered and received by them; for barely attempting to forge a writ, or other matter of record, for giving directions to a ſheriff what perſons they ſhall return on a panel, or for endeavouring to impoſe on the court, &c. 2 *Hawk. P. C.* 144, 145.

Alſo all other officers of courts of record are in like manner puniſhable for diſobeying the commands of ſuch courts, or for executing them oppreſſively, or otherwiſe miſdemeaning themſelves in their offices. See 2 *Hawk. P. C.* 145.

Gaolers are puniſhable in this ſummary way, for groſs miſbehaviours in their offices, by the courts to which they more immediately belong; alſo by diſobeying a *habeas corpus* iſſuing out of a court which has authority to award it, and by the court of King's Bench, for uſing priſoners barbarouſly and inhumanly. 2 *Hawk. P. C.* 151.

A *judgment-creditor* brought a *ſci. fa.* againſt the *principal*, after the death of the *bail*, who had paid the debt, and had a releaſe and ſatisfaction acknowledged; adjudged, that theſe proceedings were undue, and in contempt of the court, and therefore an attachment was granted againſt the creditor. 2 *Bulſt.* 68.

In debt upon a ſingle bill, the defendant pleaded payment, upon which they were at iſſue, and a verdict and judgment for the plaintiff; afterwards the defendant brought an *audita querela*; and upon an averment of payment of the money, he was bailed out of execution; but upon a motion to the court by the judgment-creditor it was adjudged, that this *audita querela* would not lie, becauſe the defendant was bailed *out* of court; and therefore he was taken in execution again by a rule of court, and an attachment was granted againſt the attornies who proſecuted the *audita querela*, and got the defendant bailed. 1 *Bulſt.* 140.

In ejectment to be tried at the bar, the defendant pleaded *infancy* on purpoſe to put off the trial; but it was found by proof on oath, and by ſearching the regiſter, that the party was thirty-ſix years old, and thereupon an attachment was granted againſt him. 2 *Bulſt.* 67.

The plaintiff had a verdict, but before the judgment was entered, he arreſted the defendant, for no other cauſe, but that he might have him in cuſtody when the judgment was entered; and this appearing to the court by *affidavit*, there was an attachment granted againſt him. *Style* 211.

The plaintiff arreſted the defendant by proceſs out of the court of King's Bench, directed to the ſheriff of *Wilts*, and carried him to *Marlborough*, where he arreſted him again by a *ſerjeant of that town*, by proceſs out of the *corporation court*, and proceeded againſt him in that court, and not upon the *latitat*, upon which he was firſt arreſted; adjudged, that this was a contempt of the court, and thereupon an attachment was granted againſt him, and an *habeas corpus cum cauſa* to bring up the defendant. *Style* 239.

The court of King's Bench, as it has a ſuperintendancy over all inferior courts, may grant an attachment againſt the judges of ſuch courts, for oppreſſive, unjuſt, or irregular practice, contrary to the obvious rules of natural juſtice; as for denying a defendant a copy of the declaration, or going on to trial without giving him notice, or time to make his defence, or for compelling him to give exorbitant bail, or for taking unreaſonable diſtreſſes, or for taking money for vitious pleading, for proceeding after a prohibition, *certiorari*, &c. 1 *Salk.* 210. 1 *Keb.* 484. *Palm.* 564. 6 *Mod.* 90.

An attachment is the proper remedy for diſobedience of the rules of court; as of thoſe made in ejectment, arbitrament, &c. So where a defendant in account, being

ing adjudged to account before the auditors, refuſes to do it, unleſs they will allow matter diſallowed by the court before, or where one refuſes to pay coſts taxed by the maſter, whoſe taxation the law looks upon as a taxation by the court. 1 *Mod.* 21. 1 *Salk.* 71.

But an attachment is not uſually granted for diſobedience of a rule of *niſi prius*, unleſs it be firſt made a rule of court; nor for diſobedience of a rule made by a judge at his chamber, unleſs it be entered; nor for diſobedience of any rule without perſonal ſervice. 1 *Salk.* 84.

Alſo an attachment is proper for abuſes of the proceſs of the court; as for ſuing out execution where there is no judgment, bringing an appeal for the death of one known to be alive, making uſe of the proceſs of a ſuperior court, as a ſtale to bring a defendant within the juriſdiction of an inferior court, and then dropping it, uſing ſuch proceſs in a vexatious, oppreſſive, or unjuſt manner, without colour of ſerving any other end by it. 2 *Hawk. P. C.* 154.

An attachment was granted againſt an attorney, who was *a mayor of* Newbury, for iſſuing out an execution upon a judgment obtained in the corporation-court, after *a writ of error* delivered to him, and allowed; but he proving, that he was informed by counſel, that the record was not well removed by reaſon of a defect in the writ of error, he was diſcharged. *Style* 321.

A juſtice of peace proceeded upon an indictment of forcible entry, after a *certiorari* delivered, and fined the party; the rule was, that he ſhould be examined upon interrogatories, and return the *certiorari*, and reſtore the fine. *Style* 395.

A witneſs who attended the court in a cauſe there to be tried, was arreſted, whereupon a *ſuperſedeas* was granted to diſcharge him, and an attachment againſt the perſon who arreſted him. *Style* 395.

Attachment againſt the defendant upon *affidavit* made, that he, being ſerved with a rule of court, to ſhew cauſe why an information ſhould not be filed againſt him, ſaid, *he did not care a fart for the rule of court*, though it was inſiſted for him, that he ſhould have a rule to ſhew cauſe why the attachment ſhould not be granted; but it was held, that he ſhall anſwer in cuſtody, for it is to no purpoſe to ſerve him with one rule who had deſpiſed the firſt, ſo he was brought in, and bound in a recognizance to anſwer interrogatories. 1 *Salk.* 84.

Upon an *affidavit* made, that the defendant had committed *waſte*, a writ of *eſtrepement* was directed to the ſheriff, and executed; the court was moved for an attachment, but it was not granted, becauſe it appeared that waſte was done upon *affidavit*, which was only the opinion of him who made it, when it ſhould have appeared, either by pleading, or upon the return of the ſheriff. *Winch.* 15.

The plaintiff was by rule of court of *B. R.* put into poſſeſſion of certain lands; the defendant, in contempt of the *rule*, diſturbed him in the poſſeſſion; and upon a motion for an attachment it was denied, becauſe it appeared, that the plaintiff was only *diſturbed*, and not put out of poſſeſſion, nor his cattle drove off the land. *Style* 277.

Upon a motion for an attachment, for that the defendant had put one out of poſſeſſion, who was put in by virtue of an *habere facias poſſeſſionem*; it was denied, becauſe it was inſiſted on by the defendant, that he came in by an elder judgment, and an extent upon it. *Style* 318.

An attachment will not lie againſt a corporation, but if it is granted *niſi cauſa*, and afterwards the corporation will not reſtore a member, in ſuch caſe the court will grant reſtitution. *Raym.* 152.

Libel in the ſpiritual court for tithes in the year 1610, to which the defendant pleaded a *modus*, and thereupon a prohibition was granted, and afterwards the ſame perſon libelled for tithes in the year 1611; adjudged, that if the libel had been for the ſame tithes after the prohibition granted, in ſuch caſe an attachment ſhould be againſt him for his contempt, or the defendant might have a ſpecial action on the caſe. 2 *Bulſt.* 289.

2. *Proceeding upon an attachment.*

Attachments are uſually granted on a rule to ſhew cauſe, unleſs the offence complained of be of a flagrant nature, and poſitively ſworn to; in which laſt caſe the party is ordered to attend, which he muſt do in perſon, as muſt every one againſt whom an attachment is granted; and if he ſhall appear to be apparently guilty, the court in diſcretion, on conſideration of the nature of the crime, and other circumſtances, will either commit him immediately, in order to anſwer interrogatories to be exhibited againſt him, concerning the contempt complained of, or will ſuffer him to enter into recognizance to anſwer ſuch interrogatories; which if they be not exhibited within four days, the party may move to have the recognizance diſcharged; otherwiſe he muſt anſwer them, tho' exhibited after the four days; but in all caſes, if he fully anſwer them, he ſhall be diſcharged as to the attachment, and the proſecutor ſhall be left to proceed againſt him for the perjury, if he thinks fit; but if he deny part of the contempts only, and confeſs other part, he ſhall not be diſcharged as to thoſe denied, but the truth of them ſhall be examined, and ſuch puniſhment inflicted as from the whole ſhall appear reaſonable; and if his anſwer be evaſive as to any material part, he ſhall be puniſhed in the ſame manner as if he had confeſſed it. 2 *Hawk. P. C.* 141. 1 *Salk.* 84. 6 *Mod.* 73. 2 *Jones* 178.

Attachment *foreign*, is an *attachment* of the goods of foreigners, found in ſome liberty, to ſatisfy their creditors within ſuch liberty. *Carth. Rep.* 66. And by the cuſtom of ſome places, as *London*, *&c.* a man may *attach* money, or goods, in the hands of a ſtranger. But a foreign *attachment* cannot be had when a ſuit is depending in any of the courts at *Weſtminſter*; which makes the matter not to be meddled with by any other court. *Cro. Eliz.* 691. And nothing is *attachable* but for a certain and due debt: though by the cuſtom of *London* money may be attached before due, as a debt; but not levied before due. *Sid.* 327. 1 *Nelſ. Abr.* 282, 283.

Foreign attachments in *London*, upon plaint of debt, are made after this manner: A. *oweth* B. 100*l.* *and* C. *is indebted to* A. 100*l.* B. *enters an action againſt* A. *of* 200*l.* *and by virtue of that action a ſerjeant* attacheth 100*l.* *in the hands of* C. *as the money of* A. *to the uſe of* B. *which is returned upon that action.* The *attachment* being made, and returned by the ſerjeant, the plaintiff is immediately to fee an attorney before the next court holden for the *Compter*; or the defendant may then put in bail to the *attachment*, and nonſuit the plaintiff: four court days muſt paſs before the plaintiff can cauſe *C.* the *garniſhee*, in whoſe hands the money was *attached*, to ſhew cauſe why *B.* ſhould not condemn the 100*l.* *attached* in the hands of *C.* as the money of *A.* the defendant in the action (though not in the *attachment*) to the uſe of *B.* the plaintiff: and the garniſhee *C.* may appear in court by his attorney, wage his law, and plead that he hath no money in his hands of the defendant's, or other ſpecial matter; but the plaintiff may hinder his waging of law, by producing two ſufficient citizens to ſwear that the garniſhee had either money or goods in his hands of *A.* at the time of the *attachment*, of which affidavit is to be made before the lord mayor, and being filed, may be pleaded by way of eſtoppel: then the plaintiff muſt put in bail, that if the defendant come within a year and a day into court, and he can diſcharge himſelf of the money condemned in court, and that he owed nothing to the plaintiff at the time in the plaint mentioned, the ſaid money ſhall be forth-coming, *&c.* if the garniſhee fail to appear by his attorney, being warned by the officer to come into court to ſhew cauſe as aforeſaid, he is taken by default for want of appearing, and judgment given againſt him for the goods and money attached in his hands, and he is without remedy either at common law or in equity; for if taken in execution, he muſt pay the money condemned, though he hath not one penny, or go to priſon; but the garniſhee appearing to ſhew cauſe why the money or goods *attached* in his hands ought not

not to be condemned to the uſe of the plaintiff, having feed an attorney, may plead as aforeſaid, that he hath no money or goods in his hands of the party's againſt whom the attachment is made, and it will then be tried by a jury, and judgment awarded, *&c.* but after trial, bail may be put in, whereby the *attachment* ſhall be diſſolved, but the garniſhee, *&c.* and his ſecurity will then be liable to what debt the plaintiff ſhall make out to be due, upon the action: and an *attachment* is never thoroughly perfected, till there is a bail, and ſatisfaction upon record. *Privileg. Lond.*

1. *Where attachment lieth for debt and other things by the cuſtom of* London, *and where not.*
2. *Pleadings.*

1. *Where attachment lieth for debt and other things by the cuſtom of* London, *and where not.*

A citizen of London was indebted to a *foreigner* upon bond, and the foreigner was indebted to the *citizen* upon a ſimple contract; the foreigner died, and upon oath made by the *citizen*, that his debt was a juſt debt, he levied a plaint in *London* againſt the *executor of the foreigner*; and upon four defaults recorded, he had judgment, and then he attached the debt in his own hands, finding ſureties, that if the debt was not diſproved by the executor within a year and a day, or the judgment reverſed, that then he ſhould be diſcharged of ſo much of the debt which he owed on the bond; the queſtion was, whether this cuſtom did extend to foreigners, as well as to *citizens*; it was not reſolved. *Dyer* 199.

Debt upon bond for one hundred marks, conditioned to pay 50 *l.* on ſuch a day, *&c.* the defendant pleaded *a tender* upon the day, upon which they were at iſſue, but afterwards he pleaded, that after the laſt continuance the one hundred marks were attached in his hands in *London*, at the ſuit of another, *&c.* And upon demurrer to this plea the court at firſt doubted, whether an attachment was good pending an action in the courts at *Weſtminſter*; but afterwards they held, that the one hundred marks were attachable after the laſt continuance. *Cro. Eliz.* 101, 691.

In an action on the caſe the plaintiff had judgment againſt the defendant, and he owing 60 *l.* to one *G. D.* he entered a plaint againſt him in *London*, and attached the 60 *l.* in the hands of the ſaid defendant, againſt whom the plaintiff had recovered as aforeſaid, and had execution according to the cuſtom; afterwards the plaintiff brought a *ſci. fa.* againſt the defendant, to ſhew cauſe why he ſhould not have execution upon the judgment which he had recovered, to which the defendant pleaded the *execution upon the attachment*; and upon demurrer to that plea it was adjudged againſt the defendant, becauſe a duty which accrueth by matter of *record*, cannot be attached by the *cuſtom of* London; for judgments obtained in the King's courts ſhall not be defeated or avoided by ſuch particular cuſtoms, they being of ſo high a nature, that they cannot be reached by attachment. 1 *Leon.* 29.

Debtor and creditor being both citizens of *London*, the debtor delivered ſeveral goods to the *Exeter* carrier then in *London*, to carry and deliver them at *Exeter*, and the creditor attached them in the hands of the *carrier* for the debt due to him from his debtor; adjudged, that the action ſhould be diſcharged, becauſe the *carrier* is privileged in his perſon and goods, and not only in the goods which are his own, but in thoſe of other men of which he is in poſſeſſion, for he is anſwerable for them. 1 *Leon.* 189.

Upon a plaint affirmed in the court of the city of *Exeter* againſt the defendant; the money due to the plaintiff was attached in the hands of *G. D.* upon a ſuggeſtion, that he owed money to the defendant; thereupon the ſaid *G. D.* appeared to the attachment, and pleaded *nil debet* to the defendant; and upon demurrer to this plea there was judgment againſt him, becauſe he ought to have pleaded not only *nil debet*, but alſo that *he had no goods* of the defendant's in his hands, whereupon *G. D.* brought a writ of error, *&c.* and the judgment in *Exeter* was reverſed; for it was adjudged, that *nil debet* alone was a good plea. 1 *Leon.* 321.

The debtor owed the creditor 100 *l.* and *G. D.* owed the *debtor* 12 *l.* the debtor died inteſtate, and the ordinary granted adminiſtration to *W.* afterwards the creditor affirmed *a plaint in* London againſt the *ordinary* for the 100 *l.* and upon his ſuggeſtion that by the default of the ordinary (being returned *nihil habet*,) the 12 *l.* was attached in the hands of *G. D.* and after the fourth default of the ordinary, it being returned *non eſt inventus*, the plaintiff recovered againſt *G. D.* afterwards the adminiſtrator brought an action of debt againſt him for this 12 *l.* to which he pleaded in bar this cuſtom of foreign attachment; and upon a demurrer to this plea the adminiſtrator had judgment, becauſe no action did lie againſt the *ordinary* after adminiſtration granted, neither could the adminiſtrator have any action againſt *G. D.* the debtor of the inteſtate. *Dyer* 247.

A ſum of money was to be paid at *Michaelmas*, and it was attached before that day; adjudged, that a *foreign attachment* cannot reach a debt *before it is due*; therefore, though the judgment on the attachment was after *Michaelmas*, yet the money being attached before it was due, it is for that reaſon void. *Cro. Eliz.* 184.

In treſpaſs for taking a dyer's furnace, it was found, that upon a plaint levied, the ſheriff attached it, being faſtened to a wall of the houſe, and delivered it to the defendant, againſt whom the action was now brought; adjudged, that it being fixed to the wall, it could not be attached. *Cro. Eliz.* 374.

An executor ſubmitted to an award, and the arbitrators awarded, that the defendant ſhould pay the executor 350 *l.* This money is not attachable in his hands by any creditor of his teſtator, though it is aſſets in his hands when he recovered, becauſe it was not due to the teſtator *tempore mortis*, and the cuſtom of foreign attachments extends only to ſuch debts. 1 *Vent.* 111.

2. *Pleadings.*

The plaintiff ſet forth the *cuſtom* to be, that the debt ought to be affirmed upon the oath of the party *in curiâ Guildhall*, and then he alledged, that he had made oath *in curia vicecomitis in computatorio*, *&c.* the cauſe was ended by agreement. *Dyer* 199.

Caſe by adminiſtrator, in which the caſe was, that *Tenant* was indebted to the inteſtate by *bond*, and the inteſtate was indebted to *Heydon* upon a contract, and that he (the adminiſtrator) intending to put the bond in ſuit againſt *Tenant*, he promiſed, that if the adminiſtrator would forbear, *&c.* he the defendant would pay, *&c.* afterwards *Heydon* brought an action of debt upon the contract againſt the adminiſtrator in *London*, and the money which *Tenant* owed to the inteſtate was attached in *Tenant*'s hands; and now the adminiſtrator brought an action on the promiſe againſt *Tenant*, who pleaded all this matter; and upon a demurrer it was inſiſted for the plaintiff, that this debt was not attachable by a *foreign attachment*, becauſe the promiſe being to pay at a day to come, reſts altogether in *damages*, and nothing is attachable but a certain and due debt: *ſed per curiam*, this debt is attachable, for it is a due and certain debt before the promiſe made, becauſe the promiſe was to pay the debt due to the inteſtate by bond; but it might have been otherwiſe if the debt had ariſen upon a promiſe. 1 *Roll. Rep.* 105.

If a man ſue another in the *mayor's court*, *&c.* and a third perſon is indebted to the defendant as much as he owes the plaintiff, and the money is attached in the hands of this third perſon, and condemned, and afterwards judgment is given againſt him, yet at any time before execution the plaintiff may reſort to the defendant again, who is his principal debtor, and get judgment and execution againſt him. *Dyer* 182.

A foreign attachment was pleaded to an action of debt; the plaintiff in that action replied, that he was not indebted to the defendant in any ſum by which he might be attached to appear; and this was held a good replication, becauſe

becauſe it is iſſuable whether he was indebted or not, for if he was not indebted, then he could not be attached. *Cro. Eliz.* 598.

Debt was brought in *C. B.* upon a bill penal of 13*l.* 13*s.* 4*d.* they pleaded in bar a foreign attachment in *London*, made by one *Moulton of* 13*l. in his hands*; and upon demurrer to this plea it was adjudged ill, becauſe it did not appear that the 13*l. attached* was part of the debt of 13*l.* 13*s.* 4*d.* due to the plaintiff in the original action; but the chief reaſon was, becauſe it appeared in the plea, that the attachment was made after the return of the original in the *C. B.* and ſo pending that action in that court, which ought not to be. *Cro. Eliz.* 691.

Action of debt, &c. the defendant pleaded in bar, that there was a *cuſtom in London* to attach the debt before the day of payment came; *et per curiam*, ſuch a cuſtom may be good, but to have judgment to recover the debt before the day of payment is come, cannot be a good cuſtom, becauſe the debtee himſelf could not recover in ſuch caſe, and therefore he who made the attachment ſhall not. This cuſtom was pleaded, that the debtee in perſon, or *by his attorney*, may ſwear that the debt is due; but this cannot be good as to the attorney: it was agreed, that goods might be attached by a foreign attachment, and that the value thereof ought to be found before judgment; but that this plea was ill, becauſe the defendant did not aver it, *viz. et hoc paratus eſt verificare. W. Jones* 406.

In action of debt on bond, the defendant pleaded in bar the *cuſtom of London*, wherein the caſe was thus: *viz. John North*, the now defendant, owed *Winſkell* 55*l.* and *Winſkell* owed *John North* 53*l.* who being dead, and his widow being adminiſtratrix, commenced this action againſt *Winſkell*, and ſet forth, that he levied a plaint in the counter againſt the adminiſtratrix, for this 55*l.* (but did not ſet forth, that it was due to him at the time of the plaint levied;) that ſhe was ſummoned by a *ſerjeant at mace* to appear at the next court, who returned that ſhe *nihil habuit* within the city by which ſhe might be attached, and ſhe not appearing, *Winſkell* affirmed *ore tenus*, that he owed *John North* 53*l.* (but did not ſet forth, that it was within the juriſdiction of that court) and prayed, that ſhe might be attached by that money in his own hands to appear, which was done accordingly, and ſhe not appearing in four courts, afterwards, *Winſkell* at the fifth court prayed execution of the ſaid debt of 53*l.* ſo attached in his hands, and made oath, that *John North* owed him that money, and that his adminiſtratrix detained it from him, and thereupon he had judgment to recover the ſaid 53*l.* in part of the 55*l.* due to him, and found pledges to reſtore, if the debt ſhould be diſproved by the adminiſtratrix within a year next enſuing, and averred, that the debt for which he was now ſued was parcel of the ſaid 53*l.* which could not be, becauſe the 55*l.* was due to himſelf, and that the bond upon which the adminiſtratrix had declared againſt him was given to her to ſecure part of the debt of 53*l.* due from him to the ſaid *John North*, which is contradictory to what he had averred before; beſides, upon a demurrer to this plea, it was held, that the debt muſt be due to *Winſkell* before he made the attachment; and he having ſet forth that it was not due before that time, he cannot levy a plaint for a debt before 'tis due, and by conſequence cannot have a foreign attachment to compel an appearance to ſuch a plaint. 2 *Lutw.* 977.

Ruled, that money owing on a judgment obtained in the King's court, cannot be attached. 1 *Mod.* 103.

The plaintiff brought an action of debt in *London* againſt the *Hambrough company*, who not appearing upon a ſummons, and a *nihil* returned, an attachment was granted to attach the debts owing to the company in the hands of ſeveral perſons; and this being removed by *certiorari* into *B. R.* it was objected, that the debts owing to a *corporation* are not attachable; but a *procedendo* was granted, for they are proper judges below, whether this is within the *cuſtom of London*; if there is no ſuch cuſtom, and they rule that there is, the party grieved may have his remedy at law; ſo let them proceed according to their cuſtom, at their peril. 1 *Mod.* 212.

Debt upon bond, conditioned to pay 50*l.* before ſuch a day; the defendant pleaded the cuſtom of *London* of foreign attachmnet, *viz.* that where a man is indebted to another, and that man hath money due to him from one in *London*, that the creditor may attach it before it is due to him, and that ſuch a creditor of the now plaintiff did attach 50*l.* in the defendant's hands before it was due to the plaintiff, and gave ſecurity, according to the cuſtom, to repay the debt, if it ſhould be diſproved within a year and a day, and that on ſuch a day, (which was after the date of the bond) he paid the 50*l.* to the creditor, upon a *ſci. fa.* brought againſt him (the defendant) according to the cuſtom; and upon a demurrer to this plea in bar, it was inſiſted, that a cuſtom to attach money before it was due, could not be good; but adjudged, that it was, for though it might be attached as a debt, it could not be levied before it was due; and ſo the cuſtom was laid. *Sid.* 327.

The caſe referred by the *Ch. Juſt. Holt* at a trial before him, for the opinion of the judges was thus: *ſſ. Maſters* owed money to *Gosfreight*, and died, and the defendant *Lewis* afterwards received 250*l.* due to *Maſters* the inteſtate; *Gosfreight* contended the adminiſtration, and before it was granted, he levied a plaint in the ſheriff's court againſt the *archbiſhop of Canterbury*, for the debt due to him from *Maſters* the inteſtate, becauſe till adminiſtration granted, the ordinary did repreſent his perſon: upon this plaint there was a *nihil* returned, and upon *four ſummons*, there was a *ſcire facias* and judgment againſt the *archbiſhop*; and this money was attached in the hands of the defendant *Lewis*, as a debt due from the archbiſhop to the inteſtate, and it was afterwards condemned and paid to *Gosfreight*; then adminiſtration was granted to the plaintiff *Maſters*, who brought an *indebitus aſſumpſit* againſt *Lewis*; and upon *non aſſumpſit* pleaded, the queſtion referred was, whether this payment to *Gosfreight* was a good diſcharge to *Lewis* by virtue of the cuſtom of *London of foreign attachment*; and adjudged, that it was not, becauſe the plaint was levied againſt the *archbiſhop*, who was neither *debtor or debtee*, therefore could neither ſue nor be ſued: the reaſon why money is attachable in the hands of the garniſhee is to make the real debtor appear, upon whoſe appearance the garniſhee is diſcharged, and then the debtor muſt put in bail to render his body, or pay the condemnation money; but the archbiſhop cannot be compelled to do either, and therefore he is not within the cuſtom, nor the defendant *Lewis* neither, becauſe he was never indebted to the *archbiſhop*, and therefore could not be compelled to appear, by levying a plaint againſt the *archbiſhop*, to whom nothing was due; the plaintiff had judgment. 5 *Mod.* 75, 92.

The caſe was: *Wallis* owed *Snell* 500*l.* and *Parker* owed *Wallis* 220*l.* which he aſſigned to *Snell* in part of his debt; *Wallis* being alſo indebted to *Lewis* in 250*l.* he levied a plaint againſt *Wallis* in the ſheriff's court of *London*, ſuggeſting, that *Parker* owed him 220*l.* which *Lewis* attached in the hands of *Parker*, and *Snell became bail for Wallis* at the ſuit of *Lewis*, and afterwards brought an *habeas corpus*, and removed the plaint into *B. R.* and was alſo bail for *Wallis* there, and *Lewis* declared againſt him there: afterwards *Wallis* came before a judge of *B. R.* and declared, that he never conſented that *Snell* ſhould be bail for him, either upon the attachment, or upon the *habeas corpus*, and all was done without his knowledge; whereupon he prayed a *procedendo* to the action in *London*, which the judge granted, it being confidently affirmed to him, that no bail could be put in upon a foreign attachment, unleſs the *lord mayor* was preſent, nor then, if the defendant did not conſent; and upon this *procedendo Wallis* confeſſed the action below at the ſuit of *Lewis*, and he had judgment, and *Snell*, who was his bail, was taken in execution, and paid the money to *Lewis*. *Et per curiam*, after *Wallis* had aſſigned to *Snell* the debt due to him from *Parker*, it then became the right and property of *Snell*, and *Wallis* was then no more than a truſtee for *Snell*; if ſo, then *Snell* being bail to the *foreign attachment*, it was *quaſi* for *Wallis*, and by his aſſent, and that being done, both the foreign attachment, and all proceedings on it, are at an end; for the deſign of a foreign attachment is only to compel the defendant in the original action to appear, and after bail was put

put in upon the *habeas corpus*, and *Lewis* had declared in *B. R.* then the court was poſſeſſed of the cauſe, and it ſhall never be reſtored afterwards to the inferior court by any ſuggeſtion of the defendant, as it was done in this caſe by *Wallis*; therefore a *ſuperſedeas* was awarded to the *procedendo*, *quia improvide*, *&c.* by which the judgment, and all the proceedings in the ſheriff's court were *coram non judice*, and reſtitution was ordered to be made to *Snell*, and *Lewis* was left to proceed upon the action removed by the *habeas corpus*. *T. Jones* 222.

Where a *foreign attachment* is pleaded to an action, the cuſtom is to ſet forth, that he who levied the plaint ſhall have execution of the debt owing by himſelf, and by which he was attached, if the plaintiff in the original action ſhall not diſapprove it within a year and a day; now if the plaintiff in the action below doth not ſet forth ſuch conditional judgment given by the court, 'tis wrong, becauſe he doth bring his caſe within the cuſtom. 2 *Lutw.* 985.

In aſſumpſit, *&c.* there was evidence given, that the debt was attached by the cuſtom of *London* before the action brought, and that it was condemned there before the plea pleaded; and this evidence was given upon the general iſſue *non aſſumpſit*, and it being inſiſted for the defendant, that this ſhould relate ſo as to defeat the plaintiff's action; it was adjudged, that where there is an attachment and condemnation before the action brought, it may be given *in evidence* upon the general iſſue becauſe there is an alteration of the property; but if the attachment be only before the action brought, and the condemnation afterwards, the *attachment* may be pleaded in *abatement*, and the *condemnation* may be pleaded in *bar*, but ſhall not be given in evidence on the general iſſue, becauſe by the *condemnation* the property is altered, but not before. 1 *Salk.* 280.

In aſſumpſit, the defendant in diſcharge of the note upon which the action was brought, produced the record of a *foreign attachment*, wherein the ſaid debt was attached and condemned, and *Trevor*, *Ch. Juſt. of C. B.* held this a good diſcharge; but if the plaintiff could have ſhewed an original precedent to the attachment, ſo that it might appear that the court was poſſeſſed of the action before the attachment, the plaintiff might have recovered, notwithſtanding the debt was attached and condemned; but in this caſe the declaration was between the time of the attachment and the condemnation. 1 *Salk.* 291.

W. R. broke, and went beyond ſea; but before he went he aſſigned his goods to three perſons for the equal benefit of his creditors; two of theſe aſſignees being his creditors, ſet up a truſtee for them to attach the goods in *London:* now upon an attachment there always goes a *ſcire facias* by way of *garniſhment*, to which theſe two aſſigns, who were creditors, would not appear, but the third aſſignee, who was no creditor, offered to appear and plead, but the judge of the court refuſed his plea, unleſs he would appear for the other two, and thereupon moved for a prohibition, and the court inclined againſt the cuſtom to compel one garniſhee to appear for the reſt; but the *common ſerjeant* ſaid, that if he put in bail, and wage his law alone, that would diſſolve the attachment. *Mod. Ca. Smyth* v. *Mayor of* London.

Attachment of the foreſt, Is one of the three courts held there. *Manwood* 90, 99. The lower court is called *the attachment*; the middle one, the *ſwainmote*; the higheſt, *the juſtice in Eyre's ſeat*. The *court of attachment* ſeemeth to be ſo called, becauſe the *verderors* of the foreſt have therein no other authority, but to receive the *attachments* of offenders againſt *Vert* and *Veniſon*, taken by the reſt of the officers, and to enroll them, that they may be preſented and puniſhed at the next *juſtice ſeat*. *Manwood* 93. And this *attaching* is by three means; 1. By goods and chattels. 2. By the body, pledges, and mainpriſe. 3. By the body only. This court is kept every forty days. See *Crompton*, in his *Court of the foreſt*.

Attachment of privilege, Is where a man by virtue of his privilege calls another to that court, whereto he himſelf belongs, and in reſpect thereof is privileged, there to anſwer ſome action. *N. B. of entries* 431. For the diverſity of *attachment*, ſee *Reg. Orig.* verbo *Attathiamentum*, *in indice*.

Attainder, (*attincta* and *attinctura*) Is when a man hath committed treaſon, *&c.* and after conviction ſentence is paſſed on him: or where a perſon is *attainted* of treaſon, and condemned by parliament. Acts of *attainder* of criminals have been paſſed in ſeveral reigns, on the diſcovery of plots and rebellions, from the reign of king *Charles* the ſecond, when an act was made for the attainder of ſeveral perſons guilty of the murder of king *Charles* the firſt, to this time; among which, that for attainting Sir *John Fenwick*, for conſpiring againſt king *William*, is the moſt remarkable; it being made to attaint and convict him of high treaſon on the oath of one witneſs, juſt after a law had been enacted, that no perſon ſhould be tried or *attainted* of high treaſon, where corruption of blood is incurred, but by oath of two lawful witneſſes, unleſs the party confeſs, ſtand mute, *&c.* *Stat.* 7 *&* 8 *W.* 3. *cap.* 3. But in the caſe of Sir *John Fenwick*, there was ſomething extraordinary; for he was indicted of treaſon, on the oath of two witneſſes; though but one only could be produced againſt him at his trial.

The 8 *Will.* 3. *cap.* 5. requires Sir *George Barclay*, major general *Holmes*, and other perſons, to ſurrender themſelves to the lord chief juſtice, or ſecretaries of ſtate; or to be *attainted*. By the 13 *W.* 3. the pretended *prince of Wales* is under attaint of treaſon, *&c.* And by the 1 *Geo.* 1. *cap.* 16. the late duke of *Ormond*, and others, are attainted. And beſides theſe acts of *attainder*, we have lately had *bills for inflicting pains and penalties*; as thoſe againſt the late *biſhop of Rocheſter*, *&c.* Stat. 10 *Geo.* 1.

Attainders of the archbiſhop of *York*, and others, 11 *R.* 1. *c.* 1. confirmed, 20 *R.* 2. *c.* 6.

Reverſal of attainders, 1 *H.* 4. *c.* 5.

The attainder of *Owen Glandourdy* confirmed, 9 *H.* 6. *c.* 3.

Of *John Cade*, 29 *H.* 6. *c.* 1. 31 *H.* 6. *c.* 2.

Of *Elizabeth Barton*, and others, 25 *H.* 8. *c.* 12.

Attainder of treaſon by common law, ſhall be of as much force as by parliament, 33 *H.* 8. *c.* 20.

Queen *Katherine Howard*, *&c.* attainted, 33 *H.* 8. *c.* 21.

Attainder of Sir *William Sheriton*, a great coiner, 2 *&* 3 *Ed.* 6. *c.* 17. his reſtitution, 3 *&* 4 *Ed.* 6. *c.* 13.

Of *Thomas* Lord *Seymour*, 2 *&* 3 *Ed.* 6. *c.* 18.

Of the duke of *Northumberland*, and others, 1 *Mar. ſt.* 2. *c.* 16.

Of the earl of *Weſtmorland*, and others, confirmed, 13 *El. c.* 16. 18 *El. c.* 4.

Of Lord *Paget*, and others, confirmed, 29 *El. c.* 1.

No paſt attainder of treaſon ſhall be reverſed after the execution of the party, 29 *Eliz. cap.* 1.

Confirmation of the atttainder of Sir *Francis Engleſield*, 25 *El. c.* 5.

Attainder of the traitors in the gunpowder treaſon, 3 *Ja.* 1. *c.* 2.

Of *Oliver Cromwell*, and others, 12 *Car.* 2. *c.* 30.

Pains and penalties of certain regicides, *&c.* 13 *Car.* 2. *ſt.* 1. *c.* 15.

Reverſal of the Earl of *Strafford*'s attainder, 13 *&* 14 *Car.* 2. *c.* 29.

Attainder of *Thomas Doleman*, and others, 17 *Car.* 2. *c.* 5.

Attainder of the Duke of *Monmouth*, 1 *Ja.* 2. *c.* 2.

Of the traitors in the aſſaſſination plot, 8 *W.* 3. *c.* 5. 9 *W.* 3. *c.* 4. 10 *&* 11 *W.* 3. *c.* 13. 1 *Ann. ſt.* 1. *c.* 29.

Of the pretended prince of *Wales*, 13 *W.* 3. *c.* 3.

Of Lord *Bolingbroke*, 1 *Geo.* 1. *c.* 16. enabled to take certain manors, *&c.* according to a ſettlement by a private act, 11 *Geo.* 1.

Of the Earl of *Mar*, and others, 1 *Geo.* 1. *ſt.* 2. *c.* 32.

Of the Earls of *Mariſchall*, *Seaforth*, and others, 1 *Geo.* 1. *ſt.* 2. *c.* 42. diſability of the Earl of *Seaforth*, removed, 8 *Geo.* 2. *c.* 22.

Of *Thomas Foſter*, junior, and *Will. Mackentoſh*, eſquires, 1 *Geo.* 1. *ſt.* 2. *c.* 53.

Of *Plunkett*, *&c.* 9 *Geo.* 1. *c.* 15.

Of the Earl of *Kellie*, and others, for rebellion, 19 *Geo.* 2. *c.* 16.

Huſband and wife were tenants in *ſpecial tail*; they had iſſue a ſon, the huſband was attainted of treaſon, and died, the wife continued in poſſeſſion as tenant in ſpecial tail, and the ſon was reſtored by act of parliament, and made inheritable to his father, *ſaving to the king all advantages which he might have by the attainder*; the wife died; adjudged, that the father had not any eſtate forfeitable, for the *wife* being likewiſe tenant in *ſpecial tail*, the eſtate ſurvived to her, and was not impeached by the attainder, and ſhe dying, the ſon is then inheritable to the eſtate tail, which might certainly have been barred by a common recovery ſuffered by the wife, and in ſuch caſe the king would have been bound. 1 *Leon.* 157.

Grandfather, *father*, and *ſon*; the *grandfather* was *tenant in tail*, the *father* was attainted of treaſon; here, though the blood is corrupted, yet the ſon would formerly inherit *per formam doni*; but ſince the ſtatute 26 *H.* 8. which gives the forfeiture of the *lands of tenant in tail* for treaſon, the law is otherwiſe, and by the attainder of the tenant in tail, the iſſue in tail is barred. 8 *Rep.* in *Digley*'s caſe.

There was a gift of the caſtle and manor of *Mulgrave* to a man and the *heirs of his body*, which by ſeveral *meſne deſcents* came to Sir *Ralph Bigod*, who *anno* 6 *H.* 8. made a feoffment thereof to the uſe of his laſt will, and died, and the right of the land, together with *the intail*, after the will performed, *deſcended to Sir* Fran. Bigod, *who made a feoffment of the caſtle and manor to the uſe of himſelf, and* Katherine *his wife, and the heirs of their two bodies*; they had iſſue a ſon and a daughter; then the ſtatute 26 *H.* 8. *cap.* 13. was made, by which the lands of tenant in tail were made forfeitable for treaſon, and three years after Sir *Francis Bigod* was attainted of treaſon, and executed, and notwithſtanding the ſaid general act of parliament, *anno* 26 *H.* 8. of forfeiture of lands by tenant in tail for treaſon, a ſpecial act was made for the attainder of Sir *Francis*, and the forfeiture of his lands: *anno* 6 *Eliz.* his ſon was reſtored in blood by the parliament, and died without iſſue, and his daughter married *Roger Ratcliffe*; the *queen* ſuppoſing ſhe had a right to the intailed lands by virtue of the attainder of Sir *Francis Bigod*, *anno* 34th of her reign, granted the ſaid manor and caſtle to *Edmund* Lord *Sheffield*, and the heirs male of his body, between whom and *Roger Ratcliffe*, the grandſon of Sir *Francis Bigod*, there was a ſuit in the Exchequer concerning the title of the lands; and it was adjudged, that Sir *Francis Bigod*, who had the eſtate-tail in poſſeſſion, had alſo a right to a *remainder of the old eſtate-tail*, veſted in him at the time of his attainder, which was forfeited to the king by virtue of thoſe ſtatutes and his attainder, and by conſequence it was veſted in the queen, and her grant of the eſtate to the Lord *Sheffield* was good, under which grant 'tis enjoyed at this day. *Hob.* 334.

There were two brothers, the youngeſt was attainted of treaſon, and executed, leaving iſſue one ſon; the elder brother *having ſome cauſe for a petition of right* to certain lands in the king's hands before the attainder, died without iſſue, and then the ſon of his younger brother was his heir in blood, and he was reſtored in blood in parliament by theſe words, *viz.* that he and his heirs ſhall be enabled only in blood as ſon and *heirs of his father*, and ſhall have and enjoy all ſuch lands which ſhall deſcend, remain or revert from any *collateral anceſtor of his ſaid father*; but that the ſaid act ſhall not extend to any lands which were in the king's hands, or any other perſon by the attainder; the queſtion was, whether by theſe clauſes he was enabled to have the *petition of right* as heir to his uncle, who was his father's elder brother? and adjudged that he was, for it appears, that the intention both of the king and the parliament was liberal to the ſon, who was thus reſtored. *Dyer* 274.

Covenant to ſtand ſeiſed to the uſe of himſelf for life, remainder to *Thomas Palmer*, the eldeſt ſon of his brother *John Palmer* for life, remainder to the eldeſt ſon of Sir *Thomas Palmer* in tail male, remainder to his own right heirs; afterwards the covenantor was attainted of treaſon, and executed before the birth of any ſon of *Thomas*; adjudged, that this attainder was a bar to the after-born ſon, and that the fee ſimple was veſted in the crown, diſcharged of all remainders. *Moor* 815.

Three of the *Regicides*, *viz. Corbett*, *Okey*, and *Berkſted*, were brought from the tower to the bar by *habeas corpus*, *&c.* and by a *mittimus* out of Chancery, directed to the chief juſtice *et ſociis*; the tranſcript of the act of parliament (by which they were attainted of high treaſon) was certified by *Brown*, *the clerk of the parliament*, and ſent to *B. R.* under the great ſeal, encloſed in wax like a *ſubpœna*, and the priſoners being ſeverally demanded, what they could ſay why execution ſhould not be awarded, they ſaid they were not the ſame perſons mentioned in the act of attainder, upon which the attorney general joined iſſue, and the ſheriff of *Middleſex* returned a jury within an hour, (ſitting the court) and they were found by verdict to be the ſame perſons; then they objected, that this court could not award execution, becauſe they had no record of their offence before them, and that there was no addition to their names; but theſe exceptions being over-ruled they had ſentence, and were executed at *Tyburn*, on *Saturday*, 19 *April*, 14 *Car.* 2. *Sid.* 72.

T. S. having an eſtate for three lives, was attainted on the ſtatute 8 & 9 *Will.* 3. of treaſon for counterfeiting *the coin*, by which ſtatute *corruption of blood* is ſaved; and for that reaſon it was a queſtion, whether the lands were forfeited to the king, which were given to Baron *Lovell* as forfeited, who brought a bill in the Exchequer to redeem, and had a decree, from which there was an appeal to the houſe of lords, where the judges held, that in treaſon the lands came to the king as an *immediate forfeiture*, which was a diſtinct penalty from *corruption of blood*, for the *corruption* may be ſaved, and the forfeiture ſtill remain. 1 *Salk.* 85.

A man being convicted of *felony*, and in *Newgate*, and there being a judgment againſt him in debt upon a *ca. ſa.* directed to the ſheriffs of *London*, they ſerved it upon his body in *Newgate*, and afterwards he was pardoned; the queſtion was, if the execution was lawful? and if it was, whether it was not diſcharged by the pardon; and adjudged, that the ſheriff might chooſe whether he would ſerve it or not, becauſe by the attainder for felony the king had an intereſt in the body of the felon, and ſuch an intereſt as would privilege the felon againſt any action or execution of a ſubject; but if the ſheriff will ſerve the execution, then the felon ſhall be in execution for the debt, but ſtill ſubject to the judgment for the felony, and if he eſcapes, the gaoler ſhall be anſwerable both to the king and to the party; and if he eſcapes after a pardon, or is diſcharged by the gaoler, he ſhall be anſwerable for the debt; ſo that the attainder doth not extinguiſh the debt of a ſubject, nor the pardon neither, for by the pardon the execution is revived. *Moor* 178.

In an action of debt, the defendant pleaded, that after the debt became due he was attainted of felony, and upon a demurrer, this was adjudged an ill plea; and one of the judges cited the Lord *Northampton*'s caſe, who after he was pardoned, was compelled to pay his debts. *Moor* 753.

Adjudged, that an attainder of felony makes a forfeiture of the eſtate to the lord only by way of eſcheat *pro defectu tenentis*, and the not deſcending is the conſequence of the corruption of blood. 1 *Salk.* 85.

Attaint, *(Attincta)* Is a writ that lieth after judgment againſt a jury that have given a falſe verdict in any court of record, in an action real or perſonal, where the debt or damages amount to above 40*s.* *Cowell.* It is called *attaint*, becauſe the party endeavours thereby to ſtain or *taint* the credit of the jury with perjury, by whoſe verdict he is grieved: And if the verdict be found falſe, then the puniſhment by the Common law was, that the jury *Amittant liberam legem, forisfaciant bona et catalla, quod terræ et tenementa in manus regis capiantur, uxores et liberi ejicerentur, domus proſternantur, arbores extirpentur, prata arentur, et corpora ſua carceri mancipentur:* But if it paſs againſt

againſt him who brought the attaint, then he ſhall be impriſoned and ranſomed at the King's will. See *Co. Lit.* 294. *b. Glanv. lib.* 2. *c.* 19. *F. N. B.* 109, 110. *Fortescue, c.* 26. *Smith de Rep. Anglor. lib.* 3. *c.* 2.

By the ſtatute 23 *Hen.* 8. *c.* 3. the ſeverity of the Common law is mitigated, where a petit jury is *attainted*; And now there is a pecuniary penalty appointed; and alſo a fine, *&c.* to be impoſed by the court. *Co. Lit.* 294.

1. *Statutes concerning attaint.*
2. *Who ſhall have an attaint.*
3. *In what caſes an attaint doth lie, and where not.*
4. *Proceedings, pleadings and evidence in attaint.*

1. *Statutes concerning attaint.*

Stat. 3 *Edw.* 1. *cap.* 38. Attaints ſhall be granted upon inqueſts in plea of land, or any thing touching freehold.

Stat. 14 *Edw.* 2. *cap.* 2. In attaint, if the firſt jurors which ſhall be living appear not at the firſt grand diſtreſs, or be returned to have nothing, by their abſence there ſhall be no delay made of the taking of the jury.

Stat. 1 *Edw.* 3. *c.* 6. In a writ of treſpaſs, an attaint ſhall be granted by the Chancellor, without ſpeaking to the King, as well upon the principal as upon the damages. And in all caſes of attaints, the juſtices ſhall not let to take the attaints for the damages not paid.

Stat. 5 *Edw.* 3. *c.* 6. Niſi prius ſhall be granted in attaints, but no eſſoin of the King's ſervice, or protection; and five days by the year ſhall be given before the juſtices of the Common bench at leaſt.

Stat. 5 *Edw.* 3. *cap.* 7. Writs of attaint ſhall be granted, as well in pleas of treſpaſs moved without writ as by writ, before juſtices of record, if the damages adjudged do exceed 40 *s.*

Stat. 28 *Edw.* 3. *cap.* 8. An attaint ſhall be granted as well upon a bill of treſpaſs, as upon a writ of treſpaſs, without having regard to the quantity of the damages.

Stat. 34 *Edw.* 3. *cap.* 7. An attaint ſhall lie as well in plea real as perſonal; and it ſhall be granted to the poor (who ſhall make affidavit, that they have nothing whereof to make fine, ſaving their countenance) without fine, and to all others by eaſy fine.

Stat. 11 *Hen.* 6. *cap.* 4. The plaintiff in attaint ſhall recover againſt all the jurors, tenants, and defendants, the coſts and damages which he ſhall ſuſtain (by delays from falſe pleas or any of the jury or parties, or otherwiſe) in that ſuit.

Stat. 15 *Hen.* 6. *cap.* 5. No ſheriff, bailiff, or coroner, in writs of attaint of plea of land, or detenue of deeds concerning lands of the yearly value of 40 *s.* or more, or of plea perſonal, whereof the judgment to recover extends to 40 *s.* or more, ſhall impanel any but ſuch as inhabit within their bailwicks, and have freehold or inheritance (not ancient demeſne within the five ports, or gavelkind) worth 20 *l. per ann.* and ſhall not return againſt them leſs iſſues than 40 *s.* at the firſt writ of diſtreſs; 100 *s.* at the ſecond; and double afterwards; on pain to forfeit 10 *l.* to the King, and as much to the plaintiff; and none but perſons of that worth ſhall be impanelled upon attaints, if challenge thereof be made by the plaintiffs. And if any of the defendants plead a foreign plea, and fail thereof, the juſtices ſhall give judgment againſt them, as if the grand jury upon the articles of the writ had paſſed againſt them: howbeit, the reſt of the defendants ſhall not be prejudiced thereby; neither ſhall this act extend to cities or boroughs.

Sect. 2. If there ſhall not be in the county (under the degree of a baron) enough of that worth to fill the panel, then ſhall the ſaid officers impanel and return the moſt ſufficient perſons there under that worth upon the like pain.

Stat. 18 *Hen.* 6. *cap.* 2. Owners of inheritance or freehold lands in gavelkind of 20 *l. per ann.* may alſo be impanell'd upon attaints, notwithſtanding the ſtatute of 15 *Hen.* 6. *cap.* 5.

Stat. 11 *Hen.* 7. *cap.* 21. *ſect.* 2. An attaint may be ſued by bill in the huſtings of *London*, upon any falſe verdict given in any of the courts of that city; and thereupon the mayor ſhall award a precept to every alderman, or his deputy, to preſent unto the ſaid mayor at the next huſtings, the names of four indifferent and diſcreet citizens out of each of their wards, each of them being in eſtate 100 *l.* at leaſt, out of which the mayor and ſix aldermen, or more, ſhall impanel forty-eight, whom the mayor ſhall cauſe to be ſummoned, together with the tenants or defendants in the attaint, to appear at the next huſtings: and if upon default of appearance, or otherwiſe, there ſhall be a *tales*, the panel ſhall be ſupplied out of the reſt preſent, or by other ſuch citizens at the diſcretion of the mayor and ſix aldermen; and all pleas in ſuch attaints ſhall be tried there by inqueſts of the ſame city, and not elſewhere. And in an attaint there, no challenge ſhall be for lack of ſufficiency in eſtate; provided that the judgment in ſuch attaint ſhall not extend to lands or tenements, nor to other puniſhment of the petit jury, or other proceſſes, than ſuch as are limited by this act; and in ſuch an attaint, if the petty jury be attainted, judgment ſhall be againſt the defendant as at the Common law; and againſt the petty jury, to forfeit each of them 20 *l.* or more, at the diſcretion of the court, to ſuch uſe as other penalties forfeited before them, and to ſuffer ſix months impriſonment, or leſs, at the like diſcretion of the court, and to be for ever diſabled to be a juror. But if the verdict be affirmed, aud the grand jury ſhall inquire into the corruption of the petty jurors; and if any of them be found to have taken any reward, *&c.* he ſhall forfeit ten times the value thereof to the plaintiff, and ſhall ſuffer impriſonment, and diſability to be a juror as aforeſaid; the like forfeitures alſo and impriſonment ſhall be inflicted on the tenant or defendant that ſhall give ſuch reward or promiſe. And if a debt, coſt, or damages are recovered in the firſt action (whereupon the attaint is brought) and that verdict found falſe, the plaintiff in ſuch attaint may ſue an action of debt for reſtitution of ſuch debts, coſts and damages, by writ or plaint, in any of the King's courts. And in ſuch attaint, if the plaintiff be nonſuit, or the firſt verdict affirmed, the plaintiff ſhall be impriſoned, and make fine (to the uſe of the city) at the diſcretion of the court; and where there are two or more plaintiffs, if any of them die, or be nonſuit, and albeit all the tenants or defendants, and ſome of the petty jury die, yet ſhall not the attaint abate, ſo that two of that jury remain in life. And the grand jurors, that make default, ſhall forfeit for the firſt default 40 *s.* for the ſecond 5 *l.* and for every other afterwards 10 *l.* And likewiſe proceſs ſhall be made againſt the jurors and parties in this attaint, as is uſually made in attaints at the Common law, and ſhall be returnable at every huſtings. And the attaint ſhall not remain to be taken after the firſt ſummons returned, for the default of the tenant or defendant, or any of the petit jury; neither ſhall any protection or eſſoin be allowed in the ſame; provided, that on attaints in the ſaid city upon any record, wherein the trial was *per mediatatem linguæ*, the mayor and aldermen ſhall impanel half ſtrangers, worth 100 *l.* apiece.

Stat. 23 *Hen.* 8. *cap.* 3. *ſect.* 2. Upon every untrue verdict betwixt party and party, before judges of record (where the thing in demand extendeth to the value of 40 *l.* and concerneth not life) the party grieved ſhall have an attaint againſt the petty jury, and againſt the party that hath the judgment thereupon. And the proceſſes ſhall be ſummons, reſummons, and diſtreſs infinite, as well againſt the petty jury as againſt the grand jury; who ſhall be of the accuſtomed number, and have lands of the yearly value of twenty marks out of ancient demeſne. And upon the diſtreſs, which ſhall be delivered of record, open proclamation ſhall be made in court; and the diſtreſs ſhall be awarded fifteen days before the return thereof, and ſhall be made upon the land of every of the grand jury, as uſed in other diſtreſſes. And if the defendant, or petty jury, or ſome of them, appear not, the grand jury ſhall be taken againſt them that make default.

And

And if any of the petit jury appear, the plaintiff ſhall aſſign the falſe ſerment, whereunto the petty jury ſhall have no other anſwer (if they be the ſame perſons, and the writ, proceſſes, return, and aſſignment be good) but that they made true ſerment, which ſhall be tried by 24 of the grand jury; unleſs the plaintiff hath before been nonſuit, or diſcontinued his ſuit, or had judgment againſt the ſame jury for the ſame verdict. And the defendants may plead that they gave a true verdict, or any other matter, which may bar the attaint; but notwithſtanding ſuch plea, the grand jury ſhall nevertheleſs enquire whether the firſt jury gave a true verdict or no.

Sect. 3. If the petty jury be found to have given an untrue verdict, they ſhall each of them forfeit 20 *l.* to be divided betwixt the King and the plaintiff.

Sect. 4. The petty jury ſhall incur ſeverally fines, at the diſcretion of the juſtices, and be ever after diſabled to give teſtimony in any court. And if the defendant's plea in bar be found againſt him, the plaintiff ſhall have judgment to be reſtored to that he loſt, with his reaſonable coſts and damages.

Sect. 5. Outlawry in action perſonal or excommunication ſhall be no plea againſt the plaintiff in attaint; and in the aforeſaid proceſs ſuch day ſhall be given as in dower, but no eſſoin or protection allowed. And if the grand jury appear not, ſo that the petty jury's verdict remains untried, the defaulters ſhall upon the firſt diſtreſs forfeit 20 *s.* upon the ſecond 40 *s.* and upon every default after 5 *l.* the like penalty is alſo to be inflicted upon the *tales*. And the attaint is maintainable ſo long as any two of the petty jury are alive.

Sect. 6. An attaint ſhall alſo lie for a perſonal thing under the value of 40 *l.* in manner aforeſaid; ſave only that in ſuch caſe the grand juror is to have lands worth five marks *per ann.* (out of ancient demeſne) or to be worth an hundred marks in goods; and the forfeitures of each petty juror ſhall be but 5 *l.*

Sect. 7. For want of ſufficient jurors in one county, a *tales* ſhall be awarded into another county, at the diſcretion of the juſtices. And an attaint ſhall alſo lie for him that is aggrieved by untrue verdict of any inheritance in deſcent, reverſion, or remainder. And if the plaintiff be nonſuit, or diſcontinue, he ſhall be fined at the diſcretion of the juſtices.

Sect. 8. All attaints ſhall be hereafter taken in the King's Bench or Common Pleas, and not elſewhere; and *niſi prius* ſhall be granted upon the diſtreſs at the diſcretion of the juſtices. Alſo any of the petty jury may appear, and anſwer by attorney. And the moieties of the forfeitures ſhall be recovered by the King and parties reſpectively by *capias ad ſatisfaciendum*, or *fieri facias*, or *elegit*, or action of debt, againſt each of the petty jury, their executors or adminiſtrators having then ſufficient goods of the teſtator's not adminiſtred. And judgment and execution of reſtitution to the plaintiff, and of diſcharge of reſtitution to the tenant or defendant, ſhall be given and had, as hath been uſed. And the nonſuit or releaſe of one plaintiff ſhall not prejudice his companions, but they may be ſummoned and ſevered.

Sect. 9. In every writ of attaint upon this act, after the *teſte*, theſe words ſhall be inſerted, *per ſtatutum uſque annum* 23 *H.* 8. *Dei gratia*, &c.

Sect. 11. This act ſhall not be prejudicial to the ſtatute of 11 *H.* 7. *cap.* 21. but every man for an untrue verdict in *London*, may bring an attaint upon this or that ſtatute, at his pleaſure. *Made perpetual*, 13 *Eliz. cap.* 25.

Stat. 37 *Hen.* 8. *cap.* 5. *ſect.* 3. Citizens of *London*, being worth four hundred marks in goods, may be impanelled and returned by the ſheriffs of *London* upon attaints there. And the juſtices ſhall hereafter ſit upon attaints in *London* at *Guildhall*, or ſome other convenient place in that city, and not elſewhere; neither ſhall the citizens there be compellable to appear upon any ſuch attaint in any other place, notwithſtanding the ſaid ſtatute of 23 *Hen.* 8. *cap.* 3.

2. *Who ſhall have an attaint.*

He who had a *reverſion* after the death of a tenant for life, might have an *attaint* at Common law, upon a *falſe verdict* given againſt the tenant for life; and now by the ſtatute 1 *R.* 2. *cap.* 3. he may have it in the life-time of the tenant for life. *Dyer* 1.

Treſpaſs againſt the defendant, who pleaded, that he, with another, committed the treſpaſs, &c. and averred, that it was the ſame, &c. and that the plaintiff did releaſe him; now, if it ſhould be found againſt the defendant, and damages given, yet he who was no party to the iſſue may have an *attaint* as well as his fellow. *Hob.* 66.

Attaint was brought upon the ſtatute 23 *H.* 8. againſt the *executors of Sir John Barker*, whereas the verdict was in a cauſe between him and one *Auſtin*, and the ſtatute gives an attaint between *the parties*, and doth not mention *heirs or executors*, yet this attaint was held good; ſo an executor ſhall have reſtitution upon the ſtatute 21 *H.* 8. tho' that ſtatute doth not mention executors. 1 *And.* 24, 25.

Where *treſpaſs* is brought *againſt baron and feme*, and the plaintiff *recovers*, the *baron alone ſhall not have attaint*, for it ſhall be brought according to the record. *Br. Baron and Feme, pl.* 22.

Succeſſors of a parſon ſhall have error or attaint of judgment againſt the predeceſſor. *Br. Attaint, pl.* 110.

If a man has *iſſue a ſon by one venter, and a daughter by another*, and *intails the lands to him and his ſecond feme, and the heirs of their two bodies*, and *recovery is had againſt them* by falſe oath, the attaint is given to the ſon and not to the daughters; *per Forteſcue. Br. Attaint, pl.* 40.

So, *per Forteſcue*, where a man has two ſons in *burgh engliſh*, and loſes by falſe verdict, and dies, the attaint is given to the eldeſt ſon, and ſo the daughter and the youngeſt ſon ſhall falſify the recovery by him, which *Yelverton* utterly denied. *Ibid.*

If a man brings bill *quod reddat T.* 40 l. *quas domino regi & prædicto T. debet upon the ſtatute* 23 *Hen.* 6. *cap.* 10. and the *jury paſs againſt the defendant falſely*, attaint lies for the defendant; for the *King is not merely party*; for the *party may diſcontinue or releaſe without the King*, notwithſtanding that the King ſhall recover the moiety; and therefore the attaint was demanded; *quod nota*; and ſo it is admitted, that *if the King was meerly party* attaint does not lie. *Br. Attaint, pl.* 130.

It was ſaid, that upon *information* made by the King, which paſſed upon iſſue tried, the King nor the informer ſhall not have attaint; for the *informer is not fuly party*; and when the defendant has anſwered, the attorney of the King replies for the King, and no further mention is after made of the informer; and therefore the one or the other ſhall not have attaint, but was awarded to anſwer to the points of the writ, and *could not have day of continuance without iſſue. Br. Attaint, pl.* 127.

None ſhall have attaint but he that may be reſtored to the thing loſt by the judgment; *per Bramſtone* Ch. J. *Mar.* 210.

3. *In what caſes an attaint doth lie, and where not.*

It lies upon a *falſe verdict* given in caſes of *felony*, 6 *Rep.* in the caſe of pardons; but where the Queen is ſole party, and the jury find for her, no *attaint* lies; *aliter* where the ſuit is *tam pro domino rege quam pro ſeipſo.* 4 *Leon.* 46.

In a writ *de valore maritagii*, iſſue was joined upon the *tenure*, and found for the plaintiff, and damages to 40 *s.* and coſts to 20 *s.* but the jury did not find the *value of the marriage*, which they ought to have done; and if they had found exceſſive damages, an attaint lieth againſt them, and this defect of the verdict ſhall not be ſupplied by a writ of *enquiry* of the value, becauſe that would prevent the party of his remedy by attaint. 10 *Rep.* 118.

In debt on bond for performance of covenants, one of which was, that in conſideration the plaintiff would have a new mill upon the lands demiſed to him by the defendant,

dant, and bring a water-courſe to it, he the ſaid defendant leaſed the ſaid land to the plaintiff, and the plaintiff aſſigned the breach in ſtopping the water-courſe; upon which they were at iſſue, and found for the plaintiff; the defendant brought an attaint, and the falſe oath was found. It was moved in arreſt of judgment, that here was no *iſſue* and conſequently *no verdict*, *and ſo no falſe oath*, and then no cauſe of attaint; for the *iſſue was upon the ſtopping the water-courſe*, which is no cauſe of action upon the party's own ſhewing; for there was *no expreſs covenant that the plaintiff ſhould enjoy* the water-courſe; beſides, the defendant in the action might have alledged this matter in arreſt of judgment, and ſo he ſhall not be helped by an attaint; neither does it appear that execution was taken out, and this attaint being brought upon the ſtatute 23 *Hen.* 8. *cap.* 3. *which gives this remedy to the party grieved*, and becauſe before execution the defendant is not a party grieved, it doth not lie; but as to theſe objections the court ſaid nothing; but the reporter adds a *quære*, if the plaintiff be not *pars gravata*, becauſe he is ſubject to the judgment, and liable to the execution. *Lem.* 278. *tl.* 377.

Where the *evidence given* to the jury is *falſe in part*, tho' it be *in a point not material*, yet this is ſufficient excuſe for their not giving him credit in any other part of his evidence, and ſo had no cauſe to find their verdict upon this oath againſt the party againſt whom it was given. *Cro. Eliz* 309, 310.

It lies againſt a jury, for *finding the bond of Edward* the bond of *Edmond*. *Palm.* 286.

The jury may be attainted two ways; 1ſt, where they *find contrary to evidence*; 2dly, where they find *out of the compaſs of the allegata*. But to attaint them for finding contrary to evidence is not eaſy, becauſe they may have evidence of their own conuſance of the matter by them, or they may find upon diſtruſt of the witneſſes, or their own proper knowledge; but if they find upon evidence that does not prove the *allegata*, there it is eaſy to ſubject them to an attaint, becauſe it is manifeſt that what is ſo found is an evidence not correſponding to their iſſue, and this was the only curb they had over the jurors; for the judge being beſt maſter of the *allegata*, if they did not follow his direction touching the proof, they were then liable to the danger of an attaint; and therefore *ſince the judges*, from the difficulty of attainting the jury, *have granted new trials*, whereby *jurors* have been freed from the fear of attaint, they *have taken a great liberty in giving verdicts*; but ſince *the attaint is only diſuſed, and not taken away*, 'tis neceſſary that a certain matter ſhould be brought before them; and therefore in *treſpaſs*, the quantity and value of the thing demanded muſt be ſo conveniently deſcribed, that if the jury find *damages* beyond ſuch quantities and value, it may be *apparently exceſſive*, and they ſubject to the attaint; and ſo *on ſpecial contracts*, they muſt be ſet forth ſo preciſely, that *if evidence be given of another contract*, and not in the allegations, *and yet the jury find for the plaintiff*, *they may be ſubject to an attaint*; and were it otherwiſe, if the plaintiff had a jury to his turn, and the judge ſhould direct that the plaintiff be nonſuit, yet, if the plaintiff would ſtand the trial, the judge muſt give poſitive directions to find for the defendant, there would be no means of compelling the jury to find according to the direction of the judge, if they were not under the terror of an attaint, if they did otherwiſe; ſo this is the only curb that the law has put in the hands of the judges to reſtrain jurors from giving corrupt verdicts. *Gilb. H. C. B.* 128.

Where a jury finds a thing which is *out of the iſſue*, there a verdict is void, becauſe they are ſworn to try the iſſue between the parties, according to the evidence given; ſo that whatſoever they try beſides the iſſue, is not *per juratores*; and therefore if that matter ſo tried is falſe, 'tis no perjury, nor doth an attaint lie againſt them. *Hob.* 53.

In ejectment the plaintiff had a verdict for the land, and the defendant brought an *attaint*, and pending the writ, a feoffment was made of the land; adjudged, that the *attaint* is extinguiſhed and gone; for tho' 'tis collateral to the right of the land, for no land is demanded by an attaint, and 'tis only to reform the erroneous proceedings, *viz.* the falſe oath; yet becauſe by a verdict in attaint the land ſhall be deveſted and the right removed, the attaint is barred and extinct by the feoffment. 1 *Rep.* 111.

4. *Proceedings, pleadings and evidence in attaint.*

The writ of *attaint* muſt be returnable in *B. R.* or *C. B.* and not elſewhere. *Co. Lit.* 294.

By the aforeſaid ſtatute 23 *Hen.* 8. *c.* 3. the proceſs in attaint ſhall be ſummons, reſummons, and diſtreſs infinite againſt the party and petit jury, and alſo againſt the grand jury.

At the return of the writ of attaint, by the ſaid ſtatute 23 *Hen.* 8. if any of the petit jury appear, the plaintiff ſhall aſſign the falſe oath of the verdict untruly given. And by the ſame ſtatute, if the defendant, or any of the petit jury appear not on diſtreſs, the grand inqueſt ſhall be taken by default.

The petit jury can plead no plea, but ſuch as may excuſe them of the falſe oath. 1 *Rol. Abr.* 285.

The petit jury cannot plead that the plaintiff in the *attaint* was tenant after the *attaint* purchaſed. 1 *Rol. Abr.* 285.

Attaint was brought *upon appeal of Maihem*. The defendant *pleaded releaſe of execution meſne between judgment and execution*, and *one of the petit jury pleadded arbitrement by ſubmiſſion made between the plaintiff and defendant*, and a good plea; *per Danby*; for he *may plead releaſe* made *by the plaintiff to the defendant*, *and all pleas which go in excuſe of the falſe oath* and the puniſhment ordained for it; and ſo ſee that it is admitted there, that attaint lies upon appeal of *Maihem*, and ſee now the new ſtatute 23 *H.* 8. of attaints; and ſee if this ſtatute does not ſerve to have appeal of *Maihem* upon, though the law was otherwiſe before. *Br. Attaint. pl.* 12.

In attaint the petit jury cannot *aſſign error in the original*; for *it is not party to the record*, but ought to anſwer to the falſe oath. *Br. Attaint. pl.* 93.

Attaint *by two* upon aſſiſe paſſed againſt them, and *one of the petit jury pleaded outlawry in one of the plaintiffs before the day of the aſſiſe*; and held that he cannot have it; for he *cannot have plea but in maintenance of his verdict*, *or in bar*, and not *plea to the writ*, as to ſay that the writ is *brought pending another writ of attaint of the ſame matter*, *or that the feme plaintiff was covert baron*, her baron not named, *&c.* *Br. Attaint. pl.* 85.

In *attaint at the diſtringas*, *one of the petit jury ſaid that the defendant is dead*, and a good plea for him; *per cur.* for now the plaintiff cannot have judgment againſt him, nor be reſtored. *Br. Attaint. pl.* 2.

In attaint upon a writ of treſpaſs, one of the petit jury pleaded a *concord between the plaintiff in the attaint and the defendant*, and this was held a good plea in 13 *Ed.* 4. by the better opinion; and in all actions founded upon tort, as treſpaſs, conſpiracy, maintenance, *&c.* where nothing certain is demanded, nor to be recovered, beſides a damage, concord is a good plea. *Dyer* 75.

Attaint is given to the party grieved by the ſtatute 23 *H.* 8. *c.* 3. and it was brought againſt the defendant upon a falſe verdict in an aſſiſe, who died pending the writ; but it was ruled, that the *attaint* ſhould not abate by his death. *Dyer* 139.

An *attaint* as well as a writ of error ſhall follow the nature of the action upon which 'tis founded; ſo that if ſummons and ſeverance lies in the firſt action, it ſhall do ſo likewiſe in the *attaint*, but this is not a *ſuperſedeas* as a writ of error is; adjudged likewiſe, if damages are recovered againſt ſeveral in an action of conſpiracy, all of them muſt join in an *attaint*, and the nonſuit of one of them ſhall not hurt the reſt. 6 *Rep.* 25.

But adjudged, that where an aſſiſe was brought againſt *three coparceners*, who all pleaded that there was no tenant of the freehold named in the writ, and the jury found that two of them were diſſeiſors and tenants, *&c.* and that the *third had nothing*, *&c.* and afterwards they all three joined in an *attaint*, and after appearance the third ſiſter, who was acquitted as aforeſaid by the ſaid ver-

dict, was now nonsuited in the *attaint*, in that case the *attaint* was abated, because she had no cause to bring an *attaint*, for there was no verdict against her. 1 *Leon.* 317.

In *attaint* the parties and the jury appeared and demanded *oyer* of the record upon which the *attaint* was founded, which record being in the Common Pleas, they had it, and thereupon the plaintiff assigned the false oath; the defendants pleaded, that they made a good and lawful oath; upon which they were at issue, and in the same term the record was removed by a writ of error into the King's Bench; adjudged, that notwithstanding it was thus removed, the court of Common Pleas might proceed, if the process for the grand jury were returned. *Dyer* 284.

So that court may write to other inferior courts to have the record certified to try a thing depending before them; for the *Common Pleas* hath a jurisdiction to hold plea, either in error or attaint, upon a judgment or false oath given in other courts. *Dyer* 250.

Judgment was given in the Exchequer, and an *attaint* was brought in *London*, and before execution the record was removed by *certiorari* into the King's Bench, and the plaintiff prayed execution upon it, and had it; for an *attaint* is not a *supersedeas* as a writ of error is, nor doth a *supersedeas* lie in *attaint*. *Dyer* 82.

In ancient times it was held, that where a man recovered a debt upon a bond, the judgment was, that the bond should be damned, that is, cancelled; but now, since *attaints* and writs of error are so frequent, the judges have thought it dangerous to cancel deeds, either where the plaintiff recovers, or where the verdict and judgment is against him, because in both cases it may be reversed by a writ of error or *attaint*. 6 *Rep.* 45.

Attaint was brought in the Common Pleas against a jury, for a verdict given in the King's Bench, whereupon the record was removed from that court to the *Common Pleas*, and there the verdict was affirmed; adjudged, that the plaintiff in the action shall have execution according to the verdict, for the record is in the King's Bench, and nothing but the *tenor* thereof in the Common Pleas; but if the verdict had been set aside, and execution had been put upon it before it was set aside, then the court of Common Pleas might have awarded restitution to the party grieved. *Cro. Eliz.* 371.

Upon a *certificate* from a judge, that the jury gave a verdict against his opinion, the judgment was stayed; but upon motion to the court for judgment, it was granted, and accordingly it was entred; for the party may have an *attaint* against the jury, and there is no other remedy for him. *Style* 138.

The testator had a verdict upon a *quo minus* brought by him in the *Exchequer*; an *attaint* was brought against his executors; adjudged, that it lieth against executors by the equity of the statute 23 *H.* 8. *cap.* 3. which was in mitigation of the Common law, for it lies against any one who hath the benefit of the thing recovered; and in this case the executors pleaded a *concord* made between the plaintiff and their testator; upon which plea the plaintiff demurred; and it was adjudged, that in all actions founded upon a *wrong*, as *trespass*, *conspiracy*, &c. where nothing certain is demanded, nor any thing to be recovered but damages, there *concord* is a good plea. *Dyer* 202.

The plaintiff had a verdict in an action of trespass, and the defendant brought an *attaint*, and one of the jury pleaded an *accord*, with satisfaction between the plaintiff and the defendant in the action, and adjudged a good plea; for the writ of *attaint* is not grounded alone upon the record, where the matter is made certain, but upon matter of fact, for the supposition of the falsity of the oath is matter of fact. 6 *Rep.* 44. in *Blake*'s case.

Adjudged, that the plaintiff in *attaint* may not produce more witnesses, nor give farther matter in evidence than what was deposed in the first action, but the defendant in *attaint* may give matter in evidence to enforce the first verdict, and the plaintiff shall have time to disprove it, if he can. *Dyer* 59.

In an *attaint*, more evidence cannot be given to *attaint* the first jury than was given to the first jury; for no default was in the first jury, if it was not shewn to them. 1 *Rol. Abr.* 285.

In an *attaint* the plaintiff cannot give in evidence a record which was not given to the petit jury; for they were not bound to find it; it was not shewn to them. 1 *Rol. Abr.* 285.

In assise, issue was taken whether lands were contained in letters patent or not, which by the Common law were not contained, tho' by the statute of 4 *H.* 8. they were contained. The justice of assise would not suffer that statute, it not being pleaded, to be given in evidence to the jury; whereupon they found that the land was not contained: hereupon an *attaint* was brought, and the *court would not suffer that statute to be given in evidence to the grand jury, which was not given in evidence to the petit jury.* *Hob.* 227.

The judgment in attaint was so severe, that they *allowed all manner of evidence in support of their verdict*; but *against the verdict they admitted none that was not given at the former trial*, because the jury might give in their verdict, not only on the evidence given in court, but on their own knowledge; and therefore whatever other ways they came to the knowledge of [as to] the fact, they might give in evidence for the support of their verdict; but the evidence not offered on the trial can never be brought against them, because such evidence might have alter'd their judgment, had it been given; and the want of that light, which the party neglected to offer, cannot convict them of falsity, which, if it had been offered, might have founded a different verdict. *Gilb. H. C. B.* 71.

Form of a writ of *attaint* in trespass in the King's Bench.

GEORGE *the Third, &c. To the sheriff, &c. If* S. *of* L. *shall make you secure, &c. then summon, &c. twenty-four lawful knights of the venue of* N. *that they be before us at* B. *on the octave of St.* Hilary, *ready by oath to recognize whether the jurors, by whom a certain inquisition was lately taken before us at* B. *by our writ between* J. *and* M. *his wife, and the aforesaid* S. *touching a certain trespass to the said* M. *by the aforesaid* S. *committed, as it was said, have made a false oath, as the same* S. *grievously complaining to us hath shewed, and in the mean time that you diligently inquire who were the jurors of the first inquisition, &c. And have them then before our justices aforesaid, &c. or before us, &c.*

Attainted, *Attinctus*, Is used in our Common law, particularly for such as are found guilty of some crime or offence, especially felony or treason: however a man is said to be *attainted* of disseisin. *Cowell. West.* 1. *cap.* 24 & 26. *an.* 3 *Ed.* 1. A man is *attainted* by two means; by appearance, or by process. *Staundf. Pl. Cor. fol.* 44. *Attainder* by appearance is by confession, by battle, or by verdict. *Id. fol.* 122. *Confession*, whereof *attaint* groweth, is double: one at the bar before the judges, when the prisoner upon his indictment read, being asked whether *Guilty* or *Not guilty*, answers *Guilty*, never putting himself upon his country; the other is, before the coroner in sanctuary, where he was in former times upon his confession constrained to abjure the realm; and therefore this kind of *attaint* was called *attainder by abjuration*. *Id. fol.* 182. *Attainted by battle* is, when the party is appealed by another, and chusing to try the truth by combat, rather than by jury, is vanquished. *Id. fol.* 44. *Attainder by verdict* is, when the prisoner at the bar, answering to the indictment *Not guilty*, had an inquest of life and death passing upon him, and is by their verdict found guilty. *Id. fol.* 108 & 192. *Attainder by process*, otherwise called *attainder by default*, or *utlary*, is, where a party flieth, and is not found until he have been five times publickly called in the county, and at last outlawed upon his default, pronounced or returned outlawed. *Id. fol.* 44. The same author, *fol.* 108. makes a difference between *attainder* and *conviction*; and with this agrees the statute 34 & 35 *Hen.* 6. *cap.* 14. and 1 *Ed.* 6. *cap.* 12. in

12. in these words; that then every such offender being thereof duly convicted or *attainted* by the laws of this realm, &c. add hereto 2 & 3 *Ed.* 6. *cap.* 23. and *Staundf.* *fol.* 66. saith, a man by our ancient laws was said to be convicted presently upon the verdict *Guilty*; but not to be *attainted*, till it appeared he was no clerk, or being a clerk and demanded of his ordinary, could not purge himself; whereby it appeareth, that *attainder* is larger than *conviction*, *conviction* being only by the jury; and *attainder* is not before judgment. *Perkins*, *Grants*, *nu.* 27, 29. Yet it appears by *Staundford*, *fo.* 9. that conviction is sometimes called *attainder*; for there he says, the verdict of the jury do either acquit or *attaint* a man: and so it is in *Westm.* 1. *cap.* 14. and likewise in many ancient writers. *Et si quis aliter quam sic fecerit, & de hoc convictus fuerit* & attaintus, *ponatur in carcere.* Du Fresne. *Britton*, *fo.* 75. uses the participle *attaint* in the sense we say *attainted* unto. This ancient law touching the purgation and conviction of clerks, is altered by 23 *Eliz. cap.* 2. as you may read further in **Clergy.**

Attal sarisin. The inhabitants and miners of *Cornwall* called an old deserted mine, that is given over, by this name of *attal sarisin*, *i. e.* the leavings of the *Sarisins*, *Saxons*, or *Saxons*. *Cowell*, *ed.* 1727.

Attegia, (from the Lat. *ad* and *tego*) A little house. 'Tis mentioned in *Ethelwerd*, *lib.* 4. *Hist. Angl. cap.* 3. —— *Pellunt ingenuos passim*, attegias *figunt in oppido.* *Cowell*, *ib.*

Attendant, *Attendens*, Signifies one that oweth a duty or service to another, or in some sort dependeth upon him. For example; there is *lord*, *mesne*, and *tenant*; the *tenant* holdeth of the *mesne* by a penny; the *mesne* holdeth over by two pence: The *mesne* releaseth to the *tenant* all the right he hath in the land, and the tenant dieth; his wife shall be endowed of the land, and she shall be *attendant* to the heir of the third part of the penny, not of the third part of the two pence; for she shall be endowed of the best possession of her husband. And *Kitchin*, *fo.* 109. saith, that where the wife is endowed by the guardian, she shall be *attendant* to the guardian, and to the heir at his full age; with whom agrees *Perkins* in *Dower*, 424. *Cowell.*

Attermining, (from the Fr. *terminer*, to limit, to bound) Is used for a time or term granted for payment of a debt. *Ordinatio de libertatibus perquirendis*, *an.* 27 *Ed.* 1. And in the stat. *West.* 2. it seems to signify the purchasing or gaining a longer time for payment of debts. —— *Atterminent querentes usque in proximum parliamentum.* *West.* 2. *c.* 24. *Cowell.*

Attile, (*Attilium*, *attillamentum*) The rigging or furniture of a ship. This word is mentioned in *Fleta*, *lib.* 1. *c.* 25. *Batallus* (that is, the boat) *cum omni onere et* attillamento. *Cowell.*

Attillamentum. See **Attile.**

Attornare rem, To *atturn* or turn over money and goods, *viz.* to assign or appropriate them to some particular use and service. *Ken. Paroch. Antiq. p.* 283.

Attornato faciendo vel recipiendo, A writ to command a sheriff or steward of a county court, or hundred court, to receive and admit an *attorney*, to appear for the person that owes suit of court. *F. N. B.* 156. Every person that owes suit to the county-court, court-baron, &c. may make an *attorney* to do his suit. *Stat.* 20 *Hen.* 3. *c.* 10.

Attorney, (*Attornatus*) Is a person appointed by another to do any thing in his stead, and is as much as *procurator* or *syndicus* in the Civil law. *Cowell.* *West* in his *Symb. part.* 1. *lib.* 2. *sect.* 559. defines *attornies* thus: *Attornies* are such persons as by the consent, commandment, or request of another, do take heed, see to and take upon them the charge of other men's business in their absence.——But the person here treated of is an attorney at law, who is appointed to prosecute and defend for his client, and is considered as an officer belonging to the courts of justice; concerning whom are several statutes and adjudications.

Before the statute of *West.* 2. *c.* 10. [13 *Ed.* 1. *A. D.* 1285] all *attornies* were made by letters patent under the great seal, commanding the justices to admit the person to be his *attorney*. These patents, where they were obtained, seem to have been inrolled by a proper officer, called the clerk of the warrants; and also the courts inrolled those patents on which any proceedings were. If such letters patent could not be obtained, the persons were obliged to appear each day in court in their proper persons. *Gilb. H. C. B.* 32, 33.

The said statute of *West.* 2. gives to all persons a liberty of appearing, and appointing an *attorney*, as if they had letters patent; and therefore the clerk of the warrants received each person's warrant, and upon the warrant it equally appeared to the court, that he had appointed such a one his attorney to the end of the cause, unless revoked; so that on each act there is no occasion of the plaintiff's and defendant's presence, as was used before that time. This authority continues till judgment; and for a year and a day, and afterwards to sue out execution, and for a longer time, if they continue execution; but if not, the judgment is supposed to be satisfied; and to make it appear otherwise, the plaintiff must again come into court, which he either does by a *scire fac'*, or an action of debt on the judgment. *Gilb. H. C. B.* 33.

1. *Statutes concerning attornies.*

2. *Orders of the judges in relation to attornies.*

1. *Statutes concerning attornies.*

Stat. 20 *Hen.* 3. *cap.* 10. Every freeman that oweth suit to the county, tithing, hundred, or wapentake, or to a court-baron, may make an *attorney* to his suit for him.

Stat. West. 2. *c.* 10. 13 *Ed.* 1. Every person may make a general *attorney* to sue for him in all pleas in the circuit of the justices, but such *attornies* shall not be exempted from serving on juries.

Stat. 12 *Edw.* 2. *cap.* 1. The tenants in writs of *novel disseisin* may make *attornies:* yet they may plead by bailiffs if they will, as they have used to do.

Stat. 15 *Edw.* 2. *stat.* 1. Parties to fines, as well demandant or plaintiff as tenants or defendants, that will acknowledge their right of lands unto other in pleas of *warrantia chartæ*, *covenant*, &c. before the fines pass, shall appear personally, so that their age, idiocy, or other default (if any be) may be discerned: provided that if any, by age, impotence, or casualty, is not able to come in court, one of the justices shall go to the party and receive his cognizance, and shall take with him a knight or man of good fame. Barons of the Exchequer and justices shall not admit attornies, but in pleas that pass before them, and where they be assigned. Reserved to the Chancellor his authority in admitting attornies, and to the Chief Justices.

Stat. 7 *Ric.* 2. *cap.* 14. They who shall depart the realm with the King's licence, being of good fame, may, before their departure, leave a patent from the chancellor (with the advice of the justices) enabling them to make general attornies to answer for them in writs of *præmunire facias*, and all other writs and plaints, in which patent particular mention shall be made of writs and plaints of *præmunire facias.* And those attornies may make attornies under them.

Stat. 4 *Hen.* 4. *cap.* 18. All attornies shall be examined by the justices; and by their discretion put into the roll. And those that are by them approved, shall swear truly to serve in their offices, and to make no suit in a foreign county. And the other attornies shall be put out by the like discretion of the justices; and their masters shall have notice thereof, lest they be prejudiced thereby. And as any die or cease, the justices shall appoint others, being virtuous, learned, and sworn, as aforesaid. And if any attorney be found notoriously in fault, he shall forswear the court, and be never admitted into any other court. The treasurer and barons of the Exchequer shall pursue the like course there, at their discretion.

Stat.

Stat. 4 *Hen.* 4. *cap.* 19. No officer of a lord of a franchiſe, which hath return of writs, ſhall be an attorney in the ſame franchiſe.

Stat. 7 *Hen.* 4. *cap.* 13. Impotent perſons that are outlawed may make their attorney, by permiſſion of any juſtice, or of the Chief Baron: howbeit, in the writ of *capias ad ſatisfaciendum*, the common law ſhall hold place.

Stat. 33 *Hen.* 6. *c.* 7. [*A. D.* 1455.] It is recited, that not long before, within the city of *Norwich*, and the counties of *Suffolk* and *Norfolk*, there were but ſix or eight attornies at moſt, in which time great tranquillity reigned there; but that now in the ſaid city and counties, there were above fourſcore attornies, the greater part of whom having nothing elſe to live upon, ſpent their time in fomenting and encouraging little trifling and vexatious ſuits, to the no ſmall damages of the ſaid city and counties. Wherefore it was enacted, that from thenceforth there ſhould be but ſix common attornies in *Norfolk*, ſix in *Suffolk*, and two in the city of *Norwich*, who ſhould be approved by the Chief Juſtices; and that the election and admiſſion of all other attornies by the Juſtices, above the ſaid number, ſhould be void; and if any other ſhould preſume to practiſe, he ſhould forfeit twenty pounds.

Stat. 32 *Hen.* 8. *c.* 30. 18 *Eliz. c.* 14. Every attorney ſhall cauſe his warrant to be entered of record, in ſuch ſuits as he is concerned, the ſame term the iſſue is entered, on pain of forfeiting ten pounds for every default, and of being impriſoned at the diſcretion of the Juſtices.

Stat. 29 *or* 28 *Eliz. cap.* 5. *ſect.* 21. If any perſon ſhall be ſued upon a penal law in the King's Bench, Common Pleas or Exchequer, where ſuch perſon is bailable, or by leave of the court may appear by attorney; in every ſuch caſe the perſon ſo ſued may, at the day contained in the firſt proceſs, appear by attorney of the ſame court.

Stat. 31 *Eliz. cap.* 10. *ſect.* 20. The above clauſe ſhall extend only to natural-born ſubjects and denizens.

Stat. 3 *Jac.* 1. *cap.* 7. *ſect.* 1. An attorney, ſolicitor, or ſervant to any, ſhall not be allowed any fees given to counſel, or for copies, unleſs he have tickets thereof ſigned by the hand of them that receive ſuch fees; and he ſhall alſo give unto his client true bills of all the charges of ſuit under his own hand, before he can charge his client with the payment thereof. And if he delay his client's ſuit for gain, or demand by his bill allowance for money which he hath not diſburſed, the client ſhall recover againſt him his coſts and damages, and he ſhall be for ever after diſabled from being an attorney or ſolicitor.

Sect. 2. None ſhall be admitted attornies in courts of record, but ſuch as have been brought up in the ſame courts, or otherwiſe well practiſed in ſoliciting of cauſes, and found ſkilful, and of honeſt diſpoſition; and none but ſuch ſhall be hereafter ſuffered to ſolicit cauſes in the courts aforeſaid. And an attorney ſhall not admit any other to follow a ſuit in his name, on pain that each of them ſhall forfeit 20*l.* to be divided betwixt the King and party grieved; and the attorney ſhall be excluded.

Stat. 12 *Geo.* 1. *cap.* 29. *ſect.* 4. If any perſon convicted of forgery, or of wilful and corrupt perjury, ſhall practiſe as an attorney, ſolicitor or agent, in any ſuit or action, in any court of law or equity within *England*, the judges of the courts where ſuch ſuit or action is brought ſhall, on complaint or information thereof, examine the matter in a ſummary way in open court; and if it ſhall appear to the ſatisfaction of ſuch judges, that the perſon complained of hath offended contrary to this act, the judges ſhall cauſe ſuch offender to be tranſported for ſeven years, to one of his Majeſty's plantations in *America*, in ſuch a manner, and under ſuch penalties, as felons are by law to be tranſported.

Stat. 2 *Geo.* 2. *cap.* 23. *ſect.* 1. No perſon ſhall be permitted to act as an attorney, or to ſue out proceſs, *&c.* in the name of any other perſon, in his Majeſty's courts of King's Bench, Common Pleas, or Exchequer, or dutchy of *Lancaſter*, or in the courts of great ſeſſions in *Wales*, or the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*, or in any other court of record in *England*, where attornies have been accuſtomably admitted and ſworn, unleſs ſuch perſon ſhall take the oath herein after appointed, and ſhall alſo be admitted and inrolled in ſuch of the ſaid courts where he ſhall act as an attorney, in the manner herein after directed.

Sect. 3. No perſon ſhall be permitted to act as ſolicitor, or to ſue out proceſs, *&c.* in the name of any other perſon, in any court of equity, either in the court of Chancery, court of equity in the Exchequer Chamber, court of the Dutchy Chamber of *Lancaſter* at *Weſtminſter*, or courts of the Counties Palatine of *Cheſter*, *Lancaſter*, or *Durham*, or in any other inferior court of equity in *England*, unleſs he take the oath hereby appointed to be taken by ſolicitors in equity, and ſhall be admitted and inrolled in the ſaid courts of equity where he ſhall act as a ſolicitor.

Sect. 4. The Maſter of the Rolls, two of the Maſters in Chancery, the Barons of the Exchequer, the Chancellor of the Dutchy, and the Judges of the other courts of Equity, ſhall, before they admit any perſon to take the oath, examine and enquire touching his capacity; and if the ſaid Maſter of the Rolls, *&c.* ſhall be ſatisfied, that ſuch perſon is duly qualified, then the ſaid Maſter of the Rolls, *&c.* ſhall adminiſter to ſuch perſon the oath to be taken by ſolicitors, and ſhall cauſe him to be admitted a ſolicitor in ſuch court of equity, and his name to be inrolled as ſuch, without any fee, other than 1*s.* for adminiſtring ſuch oath; which admiſſion ſhall be written on parchment in *Engliſh*, and in a common hand, and ſigned by a Maſter of the Rolls, *&c.* whereon a treble 40*s.* ſtamp ſhall be firſt impreſſed, and ſhall be delivered to the perſon admitted.

Sect. 5. No perſon ſhall be permitted to act as an attorney, or to ſue out proceſs, *&c.* in the name of any other perſon, in any courts of law, unleſs ſuch perſon ſhall have been bound, by contract in writing, to ſerve as a clerk for five years, to an attorney duly ſworn and admitted, in ſome of the ſaid courts; and ſuch perſon, during the ſaid term of five years, ſhall have continued in ſuch ſervice; and alſo unleſs ſuch perſon, after the expiration of the ſaid five years, ſhall be examined, ſworn, admitted and inrolled, in the ſame manner as herein required.

Sect. 6. The judges of the ſaid courts ſhall, before they admit ſuch perſon to take the oath, examine and enquire touching his capacity to act as an atrorney; and if ſuch Judge ſhall be ſatisfied that the perſon is duly qualified, he ſhall adminiſter in open court to ſuch perſon the oath hereby directed to be taken by attornies, and ſhall cauſe him to be admitted an attorney in ſuch court, and inrolled, without any fee, other than 1*s.* for adminiſtring the oath, which admiſſion ſhall be written on parchment in *Engliſh*, in a common legible hand, and ſigned by the Judge, whereon the lawful ſtamp ſhall be firſt impreſſed, and ſhall be delivered to the perſon admitted.

Sect. 7. After the firſt of *December* 1730, no perſon, who ſhall not before that day have been admitted, ſhall be permitted to act as a ſolicitor, or to ſue out proceſs, *&c.* in the name of any other perſon, in any courts of equity, unleſs ſuch perſon ſhall have been bound by contract in writing, to ſerve as a clerk for five years to a ſolicitor, duly ſworn, and admitted in one of the ſaid courts of equity, and during the ſaid term ſhall have continued in ſuch ſervice; and alſo unleſs ſuch perſon, after the expiration of the ſaid five years, ſhall have been examined, ſworn, admitted and inrolled, in manner as hereby before required.

Sect. 8. The Maſter of the Rolls, two of the Maſters in Chancery, the Chancellor of the Dutchy of *Lancaſter*, and the Judges of the other courts of Equity, ſhall, before they admit any perſon to take the oath, examine touching his capacity to act as ſolicitor in courts of equity; and if the Maſter of the Rolls, *&c.* ſhall be ſatisfied that he is qualified, the ſaid Maſter of the Rolls, *&c.* ſhall adminiſter in open court to ſuch perſon, the

oath

oath hereby directed to be taken by ſolicitors, and after ſhall cauſe him to be admitted a ſolicitor in ſuch court of equity, and his name to be inrolled as ſuch, without any fee, other than 1 *s.* for adminiſtring the oath; which admiſſion ſhall be written on parchment in *Engliſh*, in a common hand, and ſigned by the Maſter of the Rolls, *&c.* whereon a treble 40 *s.* ſtamp ſhall be impreſſed, and ſhall be delivered to the perſon admitted.

Sect. 9. Nothing in this act ſhall exclude any perſon from being admitted an attorney in any of the courts of law aforeſaid, who hath, on or before the twenty-fifth of *March* 1729, been bound by contract in writing to ſerve as clerk to an attorney, or perſon practiſing as ſuch in ſome of the courts of law aforeſaid, for four years; or from being admitted as a ſolicitor in the courts of equity, who hath, on or before the ſaid twenty-fifth of *March* 1729, been bound, by contract in writing, to ſerve as clerk to a perſon practiſing as a ſolicitor in any of the ſaid courts of equity, for four years; ſo as ſuch writing, in caſe any money has been paid in reſpect of ſuch clerkſhip, hath the legal ſtamp, and ſhall be regiſtered in the ſtamp-office.

Sect. 10. It ſhall be lawful for any attorney in any of the ſaid courts of law, or ſolicitor in any of the ſaid courts of equity, with the conſent and permiſſion of any attorney in any of the ſaid other courts, ſuch conſent being in writing, ſigned by ſuch attorney, and in the name of ſuch attorney, to ſue out proceſs, *&c.* or to proſecute, or defend any action, or proceeding in ſuch court, notwithſtanding ſuch perſon is not ſworn or admitted an attorney of ſuch court.

Sect. 11. Nothing in this act ſhall extend to authorize any judge of any court of record, to admit any greater number of attornies, than by the antient uſage of ſuch court hath been allowed.

Sect. 12. If any attorney or ſolicitor, to whom any perſon hath been bound as a clerk for five years, or four years, ſhall die before the expiration of the term; or if ſuch contract ſhall, by conſent, be vacated; or if ſuch clerk be diſcharged by any rule or order of the court wherein ſuch attorney or ſolicitor ſhall practiſe; then, if ſuch clerk ſhall by contract be obliged to ſerve, and ſhall ſerve accordingly as clerk, to any other attorney or ſolicitor, during the reſidue of the ſaid term, ſuch ſervice ſhall be deemed good.

Sect. 13. Every perſon, who ſhall be admitted an attorney in the ſaid courts, ſhall, before he is admitted, take and ſubſcribe the oath following, inſtead of the oath heretofore taken.

I A. B. *do ſwear, that I will truly and honeſtly demean myſelf in the practice of an attorney, according to the beſt of my knowledge and ability. So help me God.*

Sect. 14. Every perſon who ſhall be admitted a ſolicitor in Chancery, or in any of the other courts of equity, ſhall, before he be admitted, take the oath following, *viz.*

I A. B. *do ſwear, that I will truly and honeſtly demean myſelf in the practice of a ſolicitor, according to the beſt of my knowledge and ability. So help me God.*

Sect. 15. No attorney or ſolicitor ſhall have more than two clerks at the ſame time, bound by contract in writing.

Sect. 16. It ſhall be lawful for the prothonotaries of the Common Pleas, and the ſecondary of the King's Bench, and the prothonotaries of the reſpective courts of the Counties Palatine, and the great ſeſſions in *Wales*, to have three clerks at the ſame time; and ſuch clerks having ſerved a clerkſhip to any of the ſaid prothonotaries, or ſecondary, for five years, may be examined, admitted and inrolled, attornies of any of the courts of law aforeſaid.

Sect. 17. If any ſworn attorney, of any of the ſaid courts of law, ſhall knowingly and willingly permit any other to proſecute or defend any action in his name, not being a ſworn attorney or ſolicitor, the perſon convicted thereof ſhall be diſabled to act as an attorney, and his admittance ſhall be void.

Sect. 18. The chief clerk of the King's Bench, the clerk of the warrants in the Common Pleas, the prothonotaries of the Counties Palatine, and of the great ſeſſions in *Wales*, or their deputies, and ſuch officers of the ſaid inferior courts of law, as the judges of the ſaid courts ſhall appoint, ſhall, without fee, inroll the name of every perſon who ſhall be admitted in the ſaid courts, purſuant to this act and the time when admitted, in alphabetical order; and the ſenior clerk of the Petty-Bag Office in Chancery, the King's Remembrancer of the Exchequer, the chief clerk of the Dutchy Chamber of *Lancaſter*, the regiſters of the courts of equity in the Counties Palatine, and of the great ſeſſions of *Wales*, or their deputies, and ſuch officers of the inferior courts of equity, as the judges of thoſe courts ſhall appoint, ſhall, without fee, inroll the name of every perſon admitted a ſolicitor in the ſaid courts, and the time when admitted, in alphabetical order; to which rolls all perſons ſhall have free acceſs without fee.

Sect. 19. The admiſſion of an attorney may be written on parchment without any ſtamp, in caſe he hath, on or before the firſt of *June* 1729, been ſworn and admitted an attorney of any of the ſaid courts.

Sect. 20. Any perſon who ſhall be admitted an attorney in the King's Bench, Common Pleas, Exchequer, Counties Palatine, and great ſeſſions in *Wales*, may be ſworn, admitted, and inrolled a ſolicitor in all or any of the ſaid courts of equity, without any fee for the oath, or any ſtamp on the parchment whereon ſuch admiſſion ſhall be written, if the Maſter of the Rolls, two Maſters of the Chancery, the Barons of the Exchequer, the Chancellor of the Dutchy of *Lancaſter*, and the Judges of the ſaid other courts of equity, ſhall, upon examining ſuch perſon, be ſatisfied that he is duly qualified.

Sect. 21. Any perſon who ſhall be admitted a ſolicitor in any of the ſaid courts of Chancery, Exchequer, Dutchy of *Lancaſter*, Counties Palatine, and great ſeſſions in *Wales*, may be ſworn, admitted, and inrolled a ſolicitor in all or any of the ſaid other courts of equity, or in any inferior court of equity, without fee for the oath, or ſtamp on the parchment, in caſe the Maſter of the Rolls, *&c.* ſhall be ſatisfied that he is duly qualified.

Sect. 22. No attorney or ſolicitor of any of the ſaid courts ſhall commence or maintain any action for fees, diſburſements at law, or in equity, till the expiration of one month after he ſhall deliver to the party, or left for him at his dwelling-houſe, or laſt place of abode, a bill of ſuch fees, *&c.* written in a common hand, and in *Engliſh* (except law-terms and names of writs) and in words at length (except times and ſums); which bill ſhall be ſubſcribed with the proper hand of ſuch attorney or ſolicitor; and upon application of the party chargeable by ſuch bill, or of any other perſon in that behalf authorized, to the Lord Chancellor, or the Maſter of the Rolls, or to any of the courts aforeſaid, or to a Judge or Baron of any of the ſaid courts, in which the buſineſs contained in ſuch bill, or the greateſt part thereof in value ſhall be tranſacted; and upon the ſubmiſſion of the ſaid party, or ſuch other perſon authorized, to pay the ſum that upon taxation ſhall appear to be due, it ſhall be lawful for the Lord Chancellor, *&c.* to refer the ſaid bill (though no action or ſuit ſhall be then depending in ſuch court touching the ſame) to be taxed by the proper officer, without any money being brought into court; and if the attorney or ſolicitor, or the party chargeable by ſuch bill, having due notice, neglect to attend ſuch taxation, the officer may proceed to tax the bill *ex parte*, (pending which reference and taxation, no action ſhall be proſecuted, touching the ſaid demand) and upon taxation of ſuch bill, the party ſhall pay to the attorney or ſolicitor, or to any perſon by him authoriſed, that ſhall have been preſent at the taxation, or as the court ſhall direct, the ſum which ſhall be found due, which payment ſhall be a diſcharge of the bill; and in default thereof the party ſhall be liable to an attachment, or proceſs of contempt, or ſuch other proceeding, at the election of the attorney or ſolicitor, as ſuch party was before liable to; and if on

ſuch taxation it ſhall be found, that the attorney or ſolicitor ſhall have been over-paid, he ſhall refund to the party entitled, or to any perſon by him authoriſed, if preſent at the ſettling thereof, or otherwiſe as the court ſhall direct, all the money that the officer ſhall certify to have been over-paid; and in default thereof, the attorney or ſolicitor ſhall in like manner be liable to an attachment, or proceſs of contempt, or ſuch other proceeding, at the election of the party, as he would have been ſubject to, if this act had not been made; and the ſaid courts are required to award the coſts of ſuch taxation, to be paid by the parties according to the event of the taxation, *viz.* if the bill taxed be leſs by a ſixth part than the bill delivered, then the attorney or ſolicitor is to pay the coſts; but if it be not leſs, then the court in their diſcretion ſhall charge the attorney or client in regard to the reaſonableneſs or unreaſonableneſs of ſuch bills.

Sect. 23. If any perſon in his own name, or in the name of any other, ſhall ſue out any writ or proceſs, or proſecute or defend any action, ſuit or proceeding, in any court of law or equity aforeſaid, as an attorney or ſolicitor, for gain or reward, without being admitted and inrolled, he ſhall, for every ſuch offence, forfeit 50 *l.* to the uſe of the proſecutor; and is made incapable to maintain or proſecute any action or ſuit, in any court of law or equity, for reward.

Sect. 24. The penalties incurred by offenders againſt this act, may be recovered by action of debt, *&c.* in any of the courts of record at *Weſtminſter*, or of the Counties Palatine, or of great ſeſſions in *Wales*, for offences committed within the juriſdiction of ſuch courts, or at the aſſizes, or quarter ſeſſions of the peace, where ſuch offence ſhall be committed, by any perſon who ſhall ſue for the ſame within twelve months after the offence, with treble coſts; and no ſuch ſuit or information ſhall be removed before judgment, or ſtayed by *certiorari*, *&c.*

Sect. 25. Nothing in this act ſhall extend to the examination, ſwearing, admiſſion or inrolment of the ſix clerks of the court of Chancery, or the ſworn clerks in their offices, or the waiting clerks belonging to the ſaid ſix clerks, or the curſitors, or the clerks of the Petty-Bag Offices, or the clerks of the King's coroner, and attorney in the court of King's Bench, or the filazers of the ſaid court, or the filazers of the court of Common Pleas at *Weſtminſter*, or the attornies of the court of the Dutchy Chamber of *Lancaſter*, or of the court of Exchequer at *Cheſter*, or of the courts of the lord mayor and ſheriffs of *London*.

Sect. 26. Nothing in this act ſhall extend to the examination, *&c.* of the attornies or clerks of the offices of the King's remembrancer, treaſurer's remembrancer, pipe, or office of pleas, in the court of Exchequer at *Weſtminſter*; but the ſaid attornies and clerks ſhall be approved, ſworn, admitted, and practiſe in the ſaid court of Exchequer, or may practiſe in any other of the courts of record before mentioned; in and with the conſent of ſome ſworn attorney of ſuch court; ſuch conſent to be in writing, and ſigned by ſuch attorney; and it ſhall be lawful for any perſon who ſhall be admitted an attorney or ſolicitor in any of the ſaid ſeveral courts, to practiſe and ſolicit in the ſaid reſpective offices, in the ſame manner as heretofore has been done.

Sect. 27. Nothing herein contained ſhall extend to the examination, *&c.* of ſolicitors of the treaſury, cuſtoms, exciſe, poſt-office, ſalt, or ſtamp-duties, or of any other branch of his Majeſty's revenue, or of the ſolicitor of the city of *London*, or of the aſſiſtant to the council for the affairs of the admiralty and navy.

Sect. 28. This act ſhall continue in force from the firſt day of *June* 1729, for nine years, and to the end of the next ſeſſion of parliament.

Made perpetual by 30 *Geo.* 2. *c.* 19. *ſect.* 75.

By ſtat. 5 *Geo.* 2. *c.* 18. *ſect.* 2. No attorney, ſolicitor, or proctor, in any court whatſoever, ſhall be capable to continue or be a juſtice of the peace, within any county for that part of *Great Britain* called *England*, or the principality of *Wales*, during ſuch time as he ſhall continue in the buſineſs and practice of an attorney, ſolicitor, or proctor.

6 *Geo.* 2. *cap.* 27. *ſect.* 1. Perſons qualified as mentioned in the act may, on or before the laſt day of *Michaelmas* term 1733, be ſworn, admitted, and inrolled attornies in the ſeveral courts.

Sect. 2. Any perſon admitted an attorney in any of the courts of record at *Weſtminſter*, ſhall be capable of being admitted to practiſe as an attorney in an inferior court of record, provided he be qualified according to the cuſtom of ſuch inferior court.

Stat. 12 *Geo.* 2. *c.* 23. *ſect.* 4. And be it enacted, that, from and after the twenty-fourth day of *June* in the year of our Lord 1739, the not ſubſcribing the name of the attorney's clerk in court, or ſolicitor, on any warrant that ſhall be made out upon any writ, proceſs, or execution, ſhall not vitiate the ſame; but ſuch writ, proceſs, and execution, and all proceedings thereon, ſhall be as valid and effectual, notwithſtanding ſuch omiſſion, as if the ſaid recited act for regulating attornies and ſolicitors had not been made; provided the writ whereon ſuch warrant is made out be regularly ſubſcribed or indorſed according to the ſaid act; and every ſheriff or ſheriffs, or other officer, who ſhall make out any warrant upon any writ, proceſs, or execution, and ſhall not ſubſcribe or indorſe the name of the attorney, clerk in court, or ſolicitor, who ſued out the ſame, ſhall forfeit the ſum of 5 *l.* to be aſſeſſed as a fine upon ſuch ſheriff, or other officer, by the courts out of which ſuch writ, proceſs, or execution ſhall iſſue; one moiety thereof to be paid to his Majeſty, his heirs and ſucceſſors; and the other moiety to the perſon or perſons aggrieved by ſuch omiſſion.

Sect. 5. And be it further enacted by the authority aforeſaid, that from and after the ſaid twenty-fourth day of *June* 1739, it ſhall and may be lawful to and for every attorney, clerk in court, and ſolicitor, to write his bill of fees, charges, and diſburſements, with ſuch abbreviations as are now commonly uſed in the *Engliſh* language; any thing in any former law to the contrary notwithſtanding.

Sect. 6. And be it further enacted by the authority aforeſaid, that from and after the ſaid twenty-fourth day of *June* 1739, the ſaid act of the ſecond of his preſent Majeſty, for the better regulating of attornies and ſolicitors, or any clauſe, matter, or thing therein contained, ſhall not extend to any bill of fees, charges and diſburſements, that are now, or ſhall hereafter become due from any attorney or ſolicitor, to any other attorney, or ſolicitor, or clerk in court; but that every ſuch attorney, ſolicitor, or clerk in court, may uſe ſuch remedies for the recovery of his fees, charges, and diſburſements againſt ſuch other attorney or ſolicitor, as he might have done before the making of the ſaid act.

Sect. 7. And be it further enacted, that in caſe any perſon ſhall, from and after the ſaid twenty-fourth day of *June* 1739, commence or defend any action, or ſue out any writ, proceſs, or ſummons, or carry on any proceedings in the court commonly called *the County Court*, holden in any county, and in that part of *Great Britain* called *England*, who is not or ſhall not then be legally admitted an attorney or ſolicitor, according to the ſaid act in the ſecond year of the reign of his preſent Majeſty; that ſuch perſon ſhall for every ſuch offence forfeit the ſum of twenty pounds, to be recovered with coſts, by any other perſon who ſhall ſue for the ſame within twelve months next after ſuch offence ſhall be committed, in any of his Majeſty's courts of record.

Sect. 8. And be it enacted by the authority aforeſaid, that any perſon, being one of the people called *quakers*, who may have ſerved, or ſhall hereafter ſerve, a clerkſhip with an attorney or ſolicitor, and ſhall be qualified as by the ſaid act before is required, ſhall, upon taking his ſolemn affirmation, inſtead of the oaths thereby directed to be taken, before ſuch judges, and others, who are hereby authoriſed and required to adminiſter the ſaid affirmation, be admitted and enrolled as an attorney or ſolicitor, as if he had taken the ſaid oaths; any thing in the ſaid act to the contrary notwithſtanding.

Sect.

Sect. 9. And be it further enacted by the authority aforeſaid, that from and after the twenty-fourth day of *June* 1739. no attorney or ſolicitor who ſhall be a priſoner in any gaol or priſoner, or within the limits, rules, or liberties of any gaol or priſon, ſhall, during his confinement in any gaol or priſon, or within the limits, rules, or liberties of any gaol or priſon, in his own name, or in the name of any other attorney or ſolicitor, ſue out any writ or proceſs, or commence or proſecute any action or ſuit in any courts of law or equity; and that all proceedings in ſuch action ſhall be void and of none effect; and ſuch attorney or ſolicitor, ſo commencing or proſecuting any ſuch ſuit as aforeſaid, ſhall be ſtruck off the roll, and incapacitated from acting as an attorney or ſolicitor for the future; and any attorney or ſolicitor permitting or impowering any ſuch attorney or ſolicitor as aforeſaid to commence or proſecute any action or ſuit in his name, ſhall be ſtruck off the roll, and be incapacitated from acting as an attorney or ſolicitor for the future.

Sect. 10. Provided nevertheleſs, and it is hereby further enacted by the authority aforeſaid, that nothing in this act contained ſhall extend, or be conſtrued to extend, to prevent any attorney or ſolicitor ſo confined as aforeſaid, from carrying on, or tranſacting any ſuit or ſuits commenced before the confinement of ſuch attorney or ſolicitor as aforeſaid; any thing in this act contained to the contrary notwithſtanding.

Stat. 22 *Geo.* 2. *c.* 46. *ſect.* 3. And for the better preventing unqualified perſons from being admitted attornies and ſolicitors, and for rendering the ſaid act of 2 *Geo.* 2. more effectual for the purpoſes thereby intended; Be it enacted by the authority aforeſaid, that every perſon who ſhall, from and after the firſt day of *July* 1749, be bound by contract in writing to ſerve as a clerk to any attorney or ſolicitor, as by the ſaid act is directed, ſhall within three months next after the date of every ſuch contract, cauſe an affidavit to be made, and duly ſworn, of the actual execution of every ſuch contract, by every ſuch attorney or ſolicitor, and the perſon ſo to be bound to ſerve as a clerk as aforeſaid; and in every ſuch affidavit ſhall be ſpecified the names of every ſuch attorney and ſolicitor, and of every ſuch perſon ſo bound; and their places of abode reſpectively, together with the day of the date of ſuch contract; and every ſuch affidavit ſhall be filed within the time aforeſaid, in the court where the attorney or ſolicitor, to whom every ſuch perſon reſpectively ſhall be bound as aforeſaid, hath been inrolled as an attorney or ſolicitor, with the reſpective officer or officers, or his or their reſpective deputy or deputies, in the reſpective courts herein after-mentioned, who ſhall make and ſign a memorandum, or mark of the day of filing every ſuch affidavit, at the back, or at the bottom thereof.

Sect. 4. And be it further enacted, that no perſon, who ſhall after the ſaid firſt of *July* become bound as aforeſaid, ſhall be admitted or inrolled an attorney or ſolicitor in any court in the act mentioned, before ſuch affidavit, ſo marked by the proper officer as aforeſaid, ſhall be produced and openly read in ſuch court, where ſuch perſon ſhall be admitted and inrolled an attorney or ſolicitor.

Sect. 5. And it is hereby enacted and declared, that the ſeveral perſons following ſhall be deemed and taken to be the proper officers for filing ſuch affidavits, in the reſpective courts herein after-mentioned (that is to ſay) in the High Court of *Chancery*, the ſenior clerk of the Petty-Bag Office, or his deputy; in the Court of *King's Bench*, the chief clerk of that court, or his deputy; in the Court of *Common Pleas*, the clerk of the warrants of that court, or his deputy; in the court of *Exchequer*, the King's remembrancer of that court, or his deputy; in the court of the Dutchy Chamber of *Lancaſter* at *Weſtminſter*, the chief clerk of that court, or his deputy; and in the ſeveral Counties Palatine of *Cheſter*, *Lancaſter*, and *Durham*, the reſpective prothonotaries of the ſaid Counties Palatine, and their reſpective deputies; and in the ſeveral courts of the great ſeſſions of *Wales*, the reſpective prothonotaries of the ſaid courts and their reſpective deputies.

Sect. 6. And be it further enacted, that every ſuch officer or officers, or their reſpective deputy or deputies, filing ſuch affidavit as aforeſaid, ſhall keep a book, wherein ſhall be entered the ſubſtance of ſuch affidavit, ſpecifying the names and places of abode of every ſuch attorney or ſolicitor, and clerk, or perſon bound as aforeſaid, and of the perſon making ſuch affidavit, with the date of the articles, or contract in ſuch affidavit to be mentioned, and the days of ſerving and filing every ſuch affidavit reſpectively; and every ſuch officer or officers, or his or their deputy or deputies, ſhall be at liberty to take, at the time of filing ſuch affidavit, the ſum of two ſhillings and ſix-pence, and no more, as a recompence for his trouble in filing ſuch affidavits, and preparing and keeping ſuch books as aforeſaid, and which ſaid books ſhall and may be ſearched, in office hours, by any perſon or perſons whatſoever, without fee or reward.

Sect. 7. And be it further enacted, that from and after the ſaid firſt day of *July* no attorney or ſolicitor ſhall take, have or retain any clerk who ſhall become bound by contract in writing as aforeſaid, after ſuch attorney or ſolicitor ſhall have diſcontinued or left off, or during ſuch time as he ſhall not actually practice as, or carry on the buſineſs of, an attorney or ſolicitor.

Sect. 8. And be it further enacted, that every perſon who ſhall, from and after the ſaid firſt day of *July*, become bound, by contract in writing, to ſerve any attorney or ſolicitor, as by the ſaid act is directed, ſhall, during the whole time and term of ſervice, to be ſpecified in ſuch contract, continue and be actually employed by ſuch attorney or ſolicitor, or his or their agent or agents, in the proper buſineſs, practice, or employment of an attorney or ſolicitor.

Sect. 9. Provided always, and it is hereby enacted, if any ſuch attorney or ſolicitor, to or with whom any ſuch perſon ſhall be bound, ſhall happen to die before the expiration of ſuch term, or ſhall diſcontinue or leave off ſuch his practice as aforeſaid, or if ſuch contract ſhall by mutual conſent of the parties be cancelled, or in caſe ſuch clerk ſhall be legally diſcharged by any rule or order of the court wherein ſuch attorney or ſolicitor ſhall practiſe, before the expiration of ſuch term, and ſuch clerk ſhall in any of the ſaid caſes be bound by another contract, or other contracts in writing, to ſerve, and ſhall accordingly ſerve, in manner herein before mentioned, as clerk to any other ſuch practiſing attorney or attorneys, ſolicitor or ſolicitors as aforeſaid reſpectively, during the reſidue of the ſaid term of five years; then ſuch ſervice ſhall be deemed and taken to be as good, effectual, and available, as if ſuch clerk had continued to ſerve as clerk for the ſaid term, to the ſame perſon to whom he was originally bound, ſo as an affidavit be duly made and filed of the execution of ſuch ſecond or other contract or contracts, within the time, and in like manner, as is before directed concerning ſuch original contract.

Sect. 10. And be it further enacted, that every perſon, who from and after the ſaid firſt day of *July* ſhall become bound as a clerk as aforeſaid, ſhall, before he be admitted an attorney or ſolicitor according to the ſaid act, cauſe an affidavit of himſelf, or ſuch attorney or ſolicitor to whom he was bound as aforeſaid, to be duly made and filed with the proper officer herein before for that purpoſe appointed, that he hath actually and really ſerved, and hath been employed by ſuch practiſing attorney or attornies, ſolicitor or ſolicitors to whom he was bound as aforeſaid, or his or their agent or agents, during the ſaid whole term of five years, according to the true intent and meaning of this act.

Sect. 11. And whereas divers perſons, who are not examined, ſworn, or admitted to act as attornies or ſolicitors in any court of law or equity, do, in conjunction with, or by aſſiſtance or connivance of certain ſworn attornies and ſolicitors, and by various ſubtile contrivances, intrude themſelves into, and act and practiſe in, the office and buſineſs of attornies and ſolicitors, to the great prejudice and loſs of many of his Majeſty's ſubjects, and the ſcandal of the profeſſion of the law; Be it therefore enacted, That from and after the 29th day of *September*, which

ſhall

ſhall be in the year of our Lord 1749, if any ſworn attorney or ſolicitor ſhall act as agent for any perſon or perſons not duly qualified to act as an attorney or ſolicitor as aforeſaid, or permit or ſuffer his name to be any ways made uſe of upon the account or for the profit of any unqualified perſon or perſons, or ſend any proceſs to ſuch unqualified perſon or perſons, thereby to enable him or them to appear, act or practiſe in any reſpect as an attorney or ſolicitor, knowing him not to be duly qualified as aforeſaid, and complaint ſhall be made thereof in a ſummary way to the court from whence any ſuch proceſs did iſſue; and proof made thereof upon oath, to the ſatisfaction of the court, that ſuch ſworn attorney or ſolicitor hath offended therein as aforeſaid; then, and in ſuch caſe, every ſuch attorney or ſolicitor ſo offending ſhall be ſtruck off the roll, and for ever after diſabled from practiſing as an attorney or ſolicitor; and in that caſe, and upon ſuch complaint and proof made as aforeſaid, it ſhall and may be lawful to and for the ſaid court to commit ſuch unqualified perſon, ſo acting or practiſing as aforeſaid, to the priſon of the ſaid court, for any time not exceeding one year.

Sect. 12. And whereas frequent delays, inconveniencies, and unneceſſary expences ariſe and happen, as well to pariſhes as private perſons, by the miſmanagement and unſkilfulneſs of perſons employed as ſolicitors or agents at the ſeſſions held for the ſeveral counties, ridings, diviſions, cities, towns corporate, and other places of this kingdom, who have never been regularly bred to the law, and being ignorant of the forms and operations thereof, offenders againſt the laws of the land have frequently eſcaped with impunity: for remedying therefore of theſe inconveniencies, Be it enacted by the authority aforeſaid, That from and after the 29th day of *September*, which will be in the year of our Lord 1749, no perſon whatſoever ſhall act as a ſolicitor, attorney, or agent, or ſue out any proceſs at a general quarter-ſeſſions of the peace, for any county, riding, diviſion, city, town corporate, or other place within this kingdom, either with reſpect to matters of a criminal or civil nature, unleſs ſuch perſon ſhall have been heretofore admitted an attorney of one of his Majeſty's courts of record at *Weſtminſter*, and duly inrolled purſuant to an act made in the ſecond year of his preſent Majeſty's reign (intitled, an act for the better regulation of attornies and ſolicitors); or unleſs ſuch perſon ſhall hereafter be admitted an attorney, and inrolled as aforeſaid by virtue of this act, or ſuch other law as ſhall be then in being, and unleſs ſuch perſon ſhall continue ſo entred upon the roll at the time of ſuch acting in the capacity aforeſaid; but all and every perſon or perſons reſpectively, who ſhall ſo act, not being admitted and inrolled as aforeſaid, ſhall be ſubject and liable to a penalty of fifty pounds; to be recovered by action of debt, bill, plaint, or information, in any of the the courts of record at *Weſtminſter*, by any perſon or perſons who ſhall ſue for the ſame within twelve months after the offence committed, with treble coſts of ſuit; and if any attorney or attornies ſhall permit and ſuffer any perſon or perſons whatſoever, not being admitted and inrolled as aforeſaid, to make uſe of his or their name or names reſpectively, in the courts of general or quarter-ſeſſions aforeſaid, ſuch attorney or attornies reſpectively ſhall be ſubject and liable to a like penalty of fifty pounds, to be recovered in manner aforeſaid.

Sect. 13. Provided always, that nothing herein contained ſhall extend, or be conſtrued to extend, to deprive the attornies of the dutchy of *Lancaſter*, or of the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*, from acting within their reſpective juriſdiction.

Sect. 14. And, to the end that juſtice may be impartially adminiſtred in the ſeveral general or quarter-ſeſſions of this kingdom, Be it further enacted by the authority aforeſaid, That no clerk of the peace or his deputy, nor any under-ſheriff or his deputy ſhall, from and after the ſaid 29th day of *September*, act as a ſolicitor, attorney or agent, or ſue out any proceſs, at any general or quarter-ſeſſions of the peace to be held for ſuch county, riding, diviſion, city, town corporate, or other place within this kingdom, where he ſhall execute the office of clerk of the peace, or deputy clerk of the peace, under-ſheriff or deputy, on any pretence whatſoever; but if any clerk of the peace or his deputy, or any under ſheriff or his deputy, ſhall preſume to act as ſolicitor, attorney, or agent as aforeſaid, ſuch clerk of the peace or his deputy, under-ſheriff or his deputy reſpectively, ſhall be ſubject and liable to a like penalty of fifty pounds, to be recovered in manner aforeſaid.

Sect. 15. And whereas ſeveral perſons have been bound by articles in writing to attornies of one of his Majeſty's courts at *Weſtminſter*, to ſerve them as their clerks for the term of five years, which attornies have died before the expiration of the ſaid five years, and after their deaths ſuch perſons ſo bound have ſerved the remainder of the ſaid term with ſome other attornies of the ſaid court, but have neglected to enter into articles with the ſaid other attornies for the remainder of the term of five years; and therefore doubts have ariſen, whether ſuch perſons could be admitted attornies of any of his Majeſty's courts, by reaſon that ſuch ſervice was not ſtrictly in purſuance of the direction of the before-mentioned act; Be it therefore enacted and declared by the authority aforeſaid, That all ſuch perſons, who ſhall have been ſo bound as aforeſaid for the term of five years, to attornies of any of his Majeſty's courts at *Weſtminſter*, which ſaid attornies ſhall have died before the determination of the ſaid term, if ſuch perſons ſhall afterwards, and before the 25th day of *March* 1749, have ſerved the reſidue of the ſaid term of five years with other attornies of one of his Majeſty's ſaid courts, tho' without entring into any articles; ſuch perſons having ſo ſerved during the term of five years, ſhall and may be admitted attornies in any of his Majeſty's courts at *Weſtminſter*; any thing in the ſaid act contained to the contrary in any wiſe notwithſtanding.

Sect. 16. And be it further enacted by the authority aforeſaid, that any perſon, who ſhall have been admitted a ſworn clerk in the office of the ſix clerks of the court of *Chancery*, or ſhall have been bound by contract in writing, to ſerve as a clerk for and during the ſpace of five years, to a ſworn clerk in the ſaid office, and for and during the ſaid term of five years ſhall have continued in ſuch ſervice, or ſhall have continued in ſuch ſervice for the ſpace of three years or more, and ſhall have been admitted a writing clerk, and acted as ſuch during the reſidue of the ſaid term of five years, may be examined, ſworn, admitted, and inrolled as a ſolicitor, in the ſame manner as ſolicitors in courts of equity are by the ſaid act required to be examined, ſworn, admitted, and inrolled; any thing in the ſaid act to the contrary notwithſtanding.

Sect. 17. Provided alſo, and it is hereby further enacted, that if any ſworn clerk in the ſaid ſix clerks office, with and to whom any perſon hath been, or ſhall be bound by contract in writing as aforeſaid, to ſerve as a clerk for the term of five years, ſhall happen to die before the expiration of the ſaid term of five years; or if ſuch contract ſhall, by mutual conſent of the parties, be vacated; or in caſe ſuch clerk be legally diſcharged by any rule or order of the ſaid court of *Chancery*, before the expiration of the ſaid term of five years; then, and in any of the ſaid caſes, if ſuch clerk ſhall by contract in writing be obliged to ſerve, and ſhall accordingly ſerve as a clerk to any other ſworn clerk in the ſaid ſix clerks office, or to any ſolicitor who ſhall be ſworn, admitted, and inrolled, purſuant to the ſaid act of the ſecond year of his preſent Majeſty, during the reſidue of the ſaid term of five years; then ſuch ſervice ſhall be deemed and taken to be as good and effectual, as if ſuch clerk had continued to ſerve as clerk for the term of five years to the ſame perſon to whom he was originally bound by contract in writing as aforeſaid.

Sect. 18. Provided always, and it is hereby further enacted by the authority aforeſaid, That no ſworn clerk in the ſaid ſix clerks office ſhall have more than two clerks at one and the ſame time, including the clerk who ſhall be entred on the roll kept by the Maſter of the Rolls or his ſecretary, for that purpoſe.

Sect. 19. Provided alſo, and it is hereby further declared and enacted by the authority aforeſaid, That nothing in this act contained ſhall extend to the taking or binding, examination, ſwearing, admiſſion, or inrolment of the attornies, or clerks of the officers of the King's remembrancer, treaſurer's remembrancer, fine or office pleas in the court of *Exchequer* at *Weſtminſter* for the time being; but the attornies and clerks of the ſaid reſpective offices ſhall and may be taken, bound, approved, ſworn, admitted, and practiſe in the ſaid court of *Exchequer*, in like manner as they uſually have been, and might have done before the making of this act, and may practiſe in any other of the courts of record before-mentioned, in the name and with the conſent of ſome ſworn attorney of ſuch court, ſuch conſent being in writing, and ſigned by ſuch attorney as aforeſaid, in the manner as they have uſually been, and might have done before the making of this act; any thing herein contained to the contrary notwithſtanding.

Stat. 23 *Geo.* 2. *c.* 26. *ſect.* 15. And whereas by an act of parliament made and paſſed in the ſecond year of the reign of his preſent Majeſty, (intituled an act for the better regulation of attornies and ſolicitors) it was enacted, That from and after the firſt day of *December* 1730, any perſon who ſhould be ſworn, admitted, and inrolled to be an attorney in any of his Majeſty's courts of King's Bench, Common Pleas, Exchequer, counties palatine of *Cheſter*, *Lancaſter*, and *Durham*, and great ſeſſions in *Wales*, as is therein directed, might be ſworn, admitted, and inrolled to be a ſolicitor in all or any of the courts of equity in the ſaid act ſpecified, without any fee for the oath, or any ſtamp to be impreſſed on the parchment, whereon ſuch admiſſion ſhould be written, if the Maſter of the Rolls, two Maſters of the Chancery, the Barons of the court of Exchequer, the Chancellor of the dutchy of *Lancaſter*, and the judges of the courts of equity, in the ſaid act mentioned, for the time being, or any of them reſpectively, ſhould, upon examination of ſuch attorney touching his fitneſs and capacity to act as a ſolicitor in courts of equity, be ſatisfied that ſuch attorney is duly qualified to be ſo admitted; but there being no proviſion made in the ſaid in part recited act, for admitting perſons (who had been, or ſhall be ſworn, admitted, and inrolled ſolicitors of any of the courts of equity in the ſaid act mentioned) attornies of any of his Majeſty's courts of law therein mentioned, although ſuch ſolicitor ſhould be duly qualified in all other reſpects; wherefore, and to ſupply ſuch omiſſion, Be it enacted by the authority aforeſaid, That from and after the ſecond day of *May* 1750, any perſon who hath been already, or who at any time or times hereafter ſhall be ſworn, admitted, and inrolled a ſolicitor in any of his Majeſty's courts of equity at *Weſtminſter*, in ſuch manner as by the ſaid act is directed, may be ſworn, admitted, and inrolled to be an attorney of his Majeſty's courts of King's Bench or Common Pleas at *Weſtminſter*, without any fee for the oath, or any ſtamp to be impreſſed on the parchment whereon ſuch admiſſion ſhall be written (his having been ſworn, admitted, and inrolled a ſolicitor in any of the courts of equity aforementioned notwithſtanding) if the judges of the ſaid courts of King's Bench or Common Pleas for the time being, or any of them reſpectively, ſhall, upon examining ſuch ſolicitor touching his fitneſs and capacity to act as an attorney in the ſaid reſpective courts, be ſatisfied that ſuch ſolicitor is duly qualified to be ſworn, admitted, and inrolled an attorney, purſuant to the ſaid in part recited act, and other the laws now in force concerning attornies and ſolicitors.

2. *Orders of the judges in relation to attornies.*

In the reign of Queen *Anne*, the following orders were made by the judges in relation to attornies, viz.

De termino ſancti Michaelis anno regni dominæ Annæ, *nunc Reginæ* Angliæ, *&c. tertio.*

Whereas divers complaints have been made to us, that many attornies and clerks of the ſeveral courts at *Weſtminſter* are not admitted of the inns of court, or Chancery, according to ancient courſe and uſage, by which they might be reſorted to, and buſineſs of law better managed, to the greater eaſe of the Queen's ſubjects: the neglect whereof is to the great detriment and decay of the ſocieties of the law, and divers inconveniencies do thereupon daily happen; for prevention whereof, and to eſtabliſh a remedy for the future,

It is ordered by the judges of the ſeveral courts of *Queen's Bench* and *Common Pleas*, and the barons of the court of *Exchequer* at *Weſtminſter*, that all attornies and clerks of the ſaid courts, not already admitted into one of the inns of court, or Chancery, ſhall procure themſelves to be admitted into one of the ſaid inns of court, (if thoſe honourable ſocieties ſhall pleaſe to admit them) or into one of the inns of *Chancery*, before the end of *Trinity term* now next enſuing, and take chambers there, (if conveniently they may be had) or elſe, that they take lodgings in ſome convenient place near the ſaid inns, and leave notice in writing, with the butler or porter of ſuch inn, whereof they are admitted, where their lodgings or habitations are; (except ſuch perſons who are, or ſhall be hereafter, inhabitants or houſekeepers in *London*, *Weſtminſter*, *Southwark*, or the ſuburbs thereof, and liberty of the Tower of *London* and *St. Katherine*'s there) and ſuch who are ſworn attornies of any courts within the ſaid cities, towns and liberties.

And it is further hereby ordered, that for the future no perſon whatſoever ſhall be ſworn an attorney, or admitted or entered a clerk of any of the ſaid courts, or offices thereunto belonging, (except the perſons before excepted) unleſs firſt admitted of one of the inns aforeſaid, and bring and produce at the time of his being ſworn an attorney, or admitted or entred a clerk as aforeſaid, a certificate under the hand of the treaſurer, or principal of the inn whereof he is admitted, which they are reſpectively to give without being paid any thing for the ſame, teſtifying ſuch his admiſſion; which certificate every attorney or clerk, ſo ſworn of the ſaid court of *Queen's Bench*, ſhall deliver to the ſecondary of the ſaid court; and every attorney or clerk ſo ſworn of the ſaid court of Common Pleas, ſhall deliver to the clerk of the warrants of the ſaid court; and every clerk of the ſaid court ſo admitted or entred, ſhall deliver to the reſpective prothonotaries, of whoſe office he ſhall be admitted; and every attorney ſo ſworn of the ſaid court of Exchequer, or clerks ſealed in any of the offices belonging to the ſaid court, ſhall deliver to the Queen's remembrancer, or his deputy for the time being, to be by the ſaid reſpective officers filed, before the name of ſuch attorney ſhall be entred into the roll of attornies, or ſuch clerk admitted, entred, or ſealed as aforeſaid; unto which file of certificates the reſpective treaſurers and principals of the ſaid inns of court and *Chancery* ſhall or may from time to time reſort, as they ſhall ſee cauſe, without paying any thing for the ſame.

And it is further ordered, that no attorney already ſworn, or clerk already admitted, entred or ſealed, or which hereafter ſhall be ſworn, admitted, entred or ſealed, and which are or ſhall be admitted into any of the ſocieties aforeſaid, ſhall put himſelf out of the ſociety whereof he is, or ſhall be admitted, until he be admitted of ſome other of the ſaid ſocieties, and deliver to the treaſurer, or principal of ſuch ſociety whereof he firſt was a member, a certificate in writing, ſigned by ſuch treaſurer, or principal, teſtifying his being admitted of ſuch other ſociety, (except ſuch perſon ſhall totally leave off the practice of the law as an attorney, or clerk in any of the ſaid courts.)

And whereas by the uſage, cuſtom, or orders of the inns of *Chancery*, the members thereof were obliged to, and did come into commons, and continue therein, according to the orders of ſuch ſociety, to their great eaſe in tranſacting their cauſes one with another, and much benefit to their clients. But of late, moſt, or a great number of the ſaid attornies and clerks, have neglected to come into commons, or continue therein, according to the reſpective orders of the ſaid inns of *Chancery*, to the great decay and detriment of theſe ſocieties;

It is further ordered, that from the end of this preſent *term* the attornies and clerks which now are, or ſhall be admitted into any of the inns of *Chancery*, do and ſhall come into and continue in commons for the time or times, as by the orders of ſuch ſociety, whereof they are or ſhall be admitted, is, are or ſhall be ordered, limited or appointed for them ſo to do. And in caſe any attorney or clerk aforeſaid ſhall offend againſt this rule or any part thereof, ſuch attorney ſhall be put out of the roll of attornies, and ſuch clerk ſo offending ſhall be diſcharged and diſplaced from ſuch offices to which he belongs, until he or they give obedience to this order; and the ſecondary of the ſaid court of *Queen's Bench*, and the reſpective prothonotaries and clerk of the warrants of the court of *Common Pleas*, and the Queen's remembrancer of the court of *Exchequer*, or his deputy for the time being, and all other officers whom it may concern, are hereby required to give obedience to this order, and ſee that the ſame (as to themſelves) be truly obſerved.

And for the more effectual and better putting in execution this order, and that it may procure the good hereby deſigned and intended;

It is hereby further ordered, that the reſpective treaſurers, and the principals of the inns of *Chancery*, and the ancients, rulers and governors of the ſame, do and ſhall from time to time, by ſuch ways and means as they ſhall ſee fit and convenient, procure and get a liſt of the names of ſuch attornies and clerks of the ſaid reſpective courts, who are not admitted of any of the ſaid inns of court or *Chancery*; which liſt the ſaid treaſurers and principals, ancients, rulers, and governors ſhall yearly, in *Michaelmas* term, deliver unto the right honourable the lords chief juſtices, and lord chief baron of the ſaid reſpective courts for the time being, to the intent the offenders againſt this order may be compelled to give obedience to the ſame.

And it is alſo hereby further ordered, that the ſaid treaſurers, principals, ancients, rulers, and governors, in like manner, procure and get a liſt of the names of ſuch perſons as take upon them to practiſe as attornies or clerks, in any of the ſaid courts, who are neither ſworn attornies, or admitted, entred, or ſealed clerks, in any of the offices of the ſaid courts; which liſt is to be delivered as above, to the intent that ſuch offenders may be proceeded againſt in ſuch manner as ſhall be thought fit.

J. Holt,	*Jo. Blencowe,*
Tho. Trevor,	*H. Gould,*
Edw. Ward,	*R. Tracy,*
Ed. Nevill,	*Tho. Bury,*
John Powell,	*Ro. Price,*
Littleton Powis,	*J. Smith.*

For other matters relating to attornies, *viz.* their privileges; how puniſhable for miſdemeanors, offences, and errors; their remedies for their fees and diſburſements; the regularity of their proceedings, *&c. &c.* ſee a ſmall treatiſe intitled, *The Law of Attornies and Solicitors*, ſold by the Bookſellers, Price 3*s.* 6*d.*

Attorney of the dutchy court of Lancaſter, (*Atturnatus curiæ ducatus Lancaſtriæ*) Is the ſecond officer in that court; and ſeems for his ſkill in law to be there placed as *aſſeſſor* to the Chancellor, and choſen for ſome ſpecial truſt repoſed in him, to deal between the King and his tenants. *Cowell.*

Attorney of the court of wards and liveries, (*Atturnatus regis in curia wardorum et liberaturarum*) Was the third officer in that court: At his admiſſion into the office, he took an oath before the maſter of the ſaid court, well and truly to ſerve the King, *&c.* But the court of *wards and liveries* being taken away by *ſtat.* 12 *Car.* 2. *c.* 24. this office is alſo gone. *Cowell, ed.* 1727.

Attorney general, Is a great officer under the King, made by letters patent. It is his office to exhibit informations, and proſecute for the crown in matters criminal; and to file bills in the *Exchequer*, for any thing concerning the King in inheritannce or profits; and others may bring bills againſt the King's attorney. His proper place in court, upon any ſpecial matters of a criminal nature, wherein his attendance is requir'd, is under the judges, on the left hand of the clerk of the crown: But this is only upon ſolemn and extraordinary occaſions; for uſually he does not ſit there, but within the bar in the face of the court. *Jacob.*

Attornment, *Attornamentum*, (from the Fr. *tourner*, to *turn*) Signifies the tenant's acknowledgment of a new lord; as when one is tenant for life, and he in reverſion grants his right to another, it is neceſſary that the tenant for life agree thereto, which is called *attornment*; without which nothing paſſes by the grant; for otherwiſe he that buyeth any lands or tenements which are in the occupation of a third perſon, cannot get the poſſeſſion. But ſee 27 *Hen.* 8. *c.* 16. The words uſed in *attornment* are ſet down by *Littleton*, lib. 3. c. *Attornment*, viz. *I agree to the grant made to you, &c.* or, more uſually, *Sir, I attorn to you by force of the ſame grant*, or, *I become your tenant*, or elſe deliver unto the grantee a penny by way of *attornment*. In the ſame place may be ſeen divers other caſes, whereunto *attornment* appertaineth, and that it is the tranſpoſing thoſe duties the tenant owed to his former lord unto another, and is either by word, or by act, *&c.* *Attornment* is alſo voluntary or compulſory, by the writ termed *per quæ ſervitia*. *Old Nat. Brev. fo.* 155. Or ſometimes by diſtreſs. *F. N. B. fo.* 147. Laſtly, *attornment* may be made to the lord himſelf, or to his ſteward in court. *Kitchin, fo.* 70. There is alſo *attornment in deed*, and *attornment in law*. 6 *Co.* 113. *Attornment in law* is an act, which tho' it be no expreſs *attornment*, yet in intendment of law is all one. *Cowell.*

Attornment, ſays chief baron *Gilbert*, is the conſent of the tenant to the grant of the ſeigniory or the reverſion, putting him into the poſſeſſion of ſervices due from ſuch tenant. *The reaſons are* threefold, 1ſt, *from the ancient feudal law*; when the ſeigniories ſubſiſted in their ancient clans, they uſed to be continually contending with each other, and it was frequent in thoſe times to make peace upon amicable conceſſions to each other; but if upon ſuch grants they ſhould have ſubjected any feudaries to the other lord, it might have been to the infinite prejudice of ſuch tenants; for tho' ſuch contending lords might agree, yet the grudge might continue to the tenants, and therefore the policy of that old law was, *that their fealty was not to be carried over to any other without their conſent*, from whom they might expect oppreſſion rather than protection; 2dly, *that the tenant might know to whom the rents and ſervices were due*, and to diſtinguiſh the lawful diſtreſs from the tortious taking of his cattle; and this reaſon was ſo prevalent, that when the law gave a free alienation in reſpect of the ſuperior lord, yet the tenant's right of *attornment* continued unaltered; 3dly, *that by the tenant's lawful payment of ſuch ſeigniory or reverſion, he might be put into poſſeſſion of ſuch ſeigniory or reverſion*; and that, by the payment of ſuch rents, and doing ſuch ſervices, which anciently lay in going to the wars with their lords, and plowing their grounds, all men might know in whom ſuch rights were veſted; and here the moſt general rule is, that the tenant cannot alter the grant, but only *attorn* to it, and by ſuch *attornment* can make no variation in the grant itſelf; for the tenant has no right to the reverſion, and therefore cannot alter the diſpoſition of it one way or the other, but he has right to the poſſeſſion, and therefore can put whom he pleaſes into that poſſeſſion which he has in him. *Gilb. Treat. of Tenures*, 75, 76.

Attornment was a large head in our Common law; but much of this learning is now of very little uſe; for it is enacted by

Stat. 4 *Ann. c.* 16. *ſect.* 9. that *all grants or conveyances by fine or otherwiſe, of any manors or rents, or of the reverſion or remainder of any meſſuages or lands, ſhall be good without attornment of the tenants.*

Sect. 10. *Provided that no ſuch tenant be damaged by payment of rent to any ſuch grantor or conuſor, or by breach of any condition for non-payment of rent, before notice given him of ſuch grant by the conuſee or grantee.*

11 Geo. 2. cap. 19. ſect. 11. *Attornment of tenants to* ſtrangers, claiming title *to the eſtate of their landlords, ſhall be abſolutely null and void to all intents and purpoſes whatſoever, and the poſſeſſion of their reſpective landlord and landlords, leſſor or leſſors, ſhall not be deemed or conſtrued to be any wiſe changed, altered, or affected, by any ſuch attornment or attornments; provided always, that nothing herein contained ſhall extend to vacate or affect any attornment made purſuant to, and in conſequence of, ſome judgment at law, or decree, or order of a court of equity, or made with the privity and conſent of the landlord or landlords, leſſor or leſſors, or to any mortgagee, after the mortgage is become forfeited.*

Attrapper, *(Fr.)* Taken, ſeized. *Law Fr. Dict.*

Avage, or *Aviſage*, Is a rent or payment which every tenant of the manor of *Wrettel* in *Eſſex*, upon St. *Leonard*'s day, the 6th of *November*, pays to the lord, *viz.* for every pig not a y ar old, a halfpenny; for every yearling pig, one penny; for every hog above a year old, two pence, for the privilege of pawnage in the lord's woods. *Cowell, ed.* 1727.

Avant-ward, The van-guard, or front in an army.—*Cum exercitus in hoſtem pergit, ipſi per conſuetudinem faciunt* avant-warde, *et in reverſione* redre-warde. *Hæ conſuetudines erant Walenſium.* T. R. E. in Arcenefeld. lib. *Domeſday. Cowell.*

Avantagium, Profit or advantage.——*Walterus Cantuar. archiepiſc. ad feodi firmam tradidit Johanni de Boſeham, terras vocatas le Wardland, in villa de Wymbledone,—cum omnibus ſuis utilitatibus ac* avantagiis *inde provenientibus. Dat.* 24 Feb. 11 Ed. 2. Regiſt. eccl. Chriſti Cantuar. MS. *Cowell, ed.* 1727.

Auca, A gooſe. *Similes pennis* aucarum. *Malmſ. p.* 159.

Auctionarii, *Auxionarii*, Sellers, regrators, retailers.—*Dicunt etiam quod in domibus illis apud Sheles, ſunt manentes piſtores et braciatores* auxionarii *et* auxionatrices *panis, cerviſiæ, et aliarum rerum.* Placit. Parl. 18 Ed. 1.

Audience court, *(Curia audientiæ Cantuarienſis)* Is a court belonging to the archbiſhop of *Canterbury*, having the ſame authority with the court of arches, though inferior to it in dignity and antiquity. It is held in the archbiſhop's palace; for in former times the archbiſhops were wont to try and determine a great many eccleſiaſtical cauſes in their own palaces; but before they pronounced their definitive ſentence, they committed the matter to be argued by men learned in the law, whom they named their auditors; and ſo in time it grew to be the buſineſs of one ſpecial man, who at this day is called *Cauſarum negotiorumque* audientiæ *Cantuarienſis auditor officialis.* And to the office of auditor was formerly joined the Chancery of the archbiſhop, which meddleth not with any point of contentious juriſdiction; that is, deciding of cauſes between partyand party, but only ſuch as are of office, and eſpecially ſuch as are *voluntariæ juriſdictionis*, as the granting the cuſtody of ſpiritualties, during the vacancy of biſhopricks, inſtitutions to benefices, diſpenſations, *&c.* but this is now diſtinguiſhed from the *audience.* The auditor of this court anciently by ſpecial commiſſion was *vicar general* to the archbiſhop, in which capacity he executed eccleſiaſtical juriſdiction of every dioceſe becoming vacant within the province of *Canterbury. Cowell.* 4 *Inſt.* 337.

The archbiſhop of *Canterbury* had formerly his court of audience, in which at firſt were diſpatched all ſuch matters whether of voluntary or contentious juriſdiction, as the archbiſhop thought fit to reſerve for his own hearing. They who prepared evidence, and other materials to lay before the archbiſhop, in order to his deciſion, were called *auditors.* Afterwards this court was removed from the archbiſhop's palace, and the juriſdiction of it was exerciſed by the maſter or official of the audience, who held his court at the conſiſtory place at *St. Paul*'s. But now the three great offices of official principal of the archbiſhop, dean or judge of the peculiars, and official of the audience are, and have been for a long time paſt, united in one perſon under the general name of *Dean of the arches*, who keepeth his court in Doctors Commons hall. *Johnſ.* 254.

The archbiſhop of *York* hath in like manner his court of audience. *Johnſ.* 255.

Audiendo et terminando, A writ, or rather a commiſſion to certain perſons, when any inſurrection or great riot is committed in any place, for the appeaſing and puniſhment thereof. *F. N. B.* 110. See **Oyer and terminer.**

Audita querela, Is a writ that lieth againſt him, who having taken a ſtatute-merchant, or a recognizance, in the nature of a ſtatute-ſtaple, or a judgment or recognizance of another, and craving, or having obtained execution of the ſame from the mayor and bailiffs, before whom it was entred, at the complaint of the party who entred the ſame, upon ſuggeſtion of ſome juſt cauſe, why execution ſhould not be granted; as a releaſe or other exception. This writ is granted by the Lord Chancellor of *England*, upon view of the exception ſuggeſted, to the juſtices of either bench, willing them to grant ſummons to the ſheriff of the county where the creditor is, for his appearance at a certain day before them. *Old Nat. Brev. fo.* 66. *F. N. B. fo.* 102. To writs of execution the defendant cannot plead; ſo that if there be any matter ſince the judgment to diſcharge him of the execution, he is to have *audita querela*; upon which the juſtices ſhall hear the complaint and do right: And *audita querela* cannot be brought on a releaſe, until judgment is entred of record. 1 *Mod.* 111.

An *audita querela* is a writ to be relieved againſt an unjuſt judgment or execution, by ſetting them aſide for ſome injuſtice of the party that obtained them, which could not be pleaded in bar to the action; for if it could be pleaded, it was the party's own fault, and therefore he ſhall not be relieved, to the end that proceedings may not be endleſs. 1 *New Abr.* 193.

1. *Where audita querela lies to avoid execution on judgments, ſtatutes, recognizances, and other ſecurities, and where not.*

2. *Where audita querela lies by bail, and where not.*

3. *Proceedings and pleadings in audita querela.*

1. *Where audita querela lieth to avoid execution on judgments, ſtatutes, recognizances, and other ſecurities; and where not.*

Audita querela lieth as well upon *matter of fact* ſuggeſted by the party, as upon writings and records; as for inſtance, an *audita querela* was brought to avoid an execution for 500*l.* in which the plaintiff ſuggeſted, that after the judgment the money was paid to *Sir John Hawkins* in diſcharge of the ſaid judgment, whereupon a *ſci. fa.* grounded on this *audita querela* was awarded to the ſheriff, who returned, that *Sir John Hawkins* was dead; then the plaintiff ſuggeſted, that his wife was executrix, and ſo a new *ſci. fa.* was awarded againſt her, who appeared and pleaded, that the ſaid 500*l.* was not paid in diſcharge of the judgment; upon which they were at iſſue, and the jury found, that *illæ quingent' libræ ſolutæ fuerunt* to the ſaid *Sir John Hawkins* by *G. D. to have the judgment aſſigned to him*; adjudged, that by the finding, that *illæ quingent' libræ ſolutæ fuerunt, &c.* it ſhall be intended to be the ſame ſum for which the judgment was obtained, and that it was ſufficient for the plaintiff's iſſue, and the reſt was but *ſurpluſage*; but becauſe this *audita querela* was an original out of Chancery, and the ſheriff had returned that *Sir John Hawkins* was dead, his executrix muſt not be charged without a new *audita querela*; therefore this was abated, but the plaintiff, who was in execution, was bailed. *Cro. El.* 634.

The debtor being taken in execution, he brought an *audita querela*, and ſuggeſted, that after the judgment he had paid the whole debt; adjudged, againſt the opinion of *Popham chief juſtice*, that this being a ſuit in equity as well as at law, it being only a commiſſion to the judges to examine the matter, that this is a good ſuggeſtion; for if the money is paid, 'tis unreaſonable the party ſhould lie in execution. 2 *Cro.* 29.

The cogniſor of a ſtatute being taken in execution brought an *audita querela* in Chancery, and ſuggeſted, that the ſtatute was void, and thereupon he found ſureties, who

who entred into recognizance, that he ſhould *appear*, &c. & *ad ſtandum juri* & *ad proſequendum cum effectu*, and ſo he was diſcharged; afterwards it was adjudged, that this ſuggeſtion was inſufficient to diſcharge the cognifor of this ſtatute, and thereupon the cogniſee of the ſtatute brought a *ſci. fa.* upon the *recognizance againſt the ſureties*, and aſſigned the breach, that the cogniſor of the ſtatute had not paid the condemnation-money, nor rendred himſelf to priſon; it was objected in behalf of the ſureties, that their *recognizance* was only for the *appearance* of the cogniſor, &c. and that there was not a word in it, that he ſhould render himſelf, or pay the condemnation-money; but it was adjudged, that it being for his appearance & *ad ſtandum juri*, &c. thoſe words muſt be *intended*, that if he be condemned he ſhould ſatisfy the condemnation-money, or render himſelf again in execution for the debt; for the other words of the recognizance, viz. *to appear and proſecute with effect*, are only, that he would not ſuffer a *nonſuit* or uſe any delay; and if the words *ad ſtandum juri* ſhould not import, that he ſhould pay the money if he were condemned, then the ſtatute 11 *H.* 6. would be eluded, which was made to remedy the miſchief, that thoſe who were in execution ſhould not be delivered upon ſuggeſtions without good ſureties, which muſt be intended not only to appear, but to ſatisfy the party if he be condemned, &c. 2 *Cro.* 67.

The plaintiff obtained a judgment in an action of aſſault, and 200 *l.* damages, and had the body of the bail in execution, who brought an *audita querela*, ſuggeſting, that the principal had paid the money, and therefore prayed he might be diſcharged; but it was not allowed without an *affidavit* of payment of the money. *Moor* 850.

If an infant acknowledges a recognizance, ſtatute-merchant or ſtaple, or recognizance in nature of a ſtatute-ſtaple, he cannot avoid this without an *audita querela* brought before his full age, becauſe his nonage ought to be tried by inſpection. 2 *Inſt.* 673.

If *A.* being within age becomes bail for *B.* and after two *ſcire fa.* and *nihil* returned, judgment is given againſt *A.* &c. he may have an *audita querela* and avoid the recognizance, and ſo the judgment thereupon of conſequence ſhall be avoided. *Yelv.* 155.

But if *A.* being within age enters into a bond, who procures *C.* without any warrant, to appear for *A.* and confeſſes a judgment thereupon, yet *A.* ſhall not have an *audita querela*, but he muſt take his remedy by action of *diſceit* againſt the attorney. *Cro. Jac.* 694.

If tenant in tail acknowledges a ſtatute and dies, and the conuzee ſues execution againſt the heir, he may avoid it by aſſiſe, without being put to his *audita querela*. 1 *Rol. Abr.* 304.

So if a diſſeiſor acknowledge a ſtatute, and the diſſeiſee enters, the conuſee extends the land, the diſſeiſee is not put to his *audita querela* to avoid the extent; the conuſor having only a tortious and unlawful ſeiſin of the land, and conſequently no power to charge it. 1 *Rol. Abr.* 304.

But if *A.* be tenant for life, remainder to *B.* his ſon in tail, and *A.* enters into a recognizance to *C.* and dies; *C.* brings a *ſci. fac.* and *B.* is returned heir and tertenant, and warned, but makes default; he can have no *audita querela* to avoid this execution, becauſe he had a day given him in court to ſet aſide the recognizance, and it was his folly not to appear when warned. *Raym.* 19. 1 *Sid.* 54.

If a ſtatute be acknowledged to two, of which one is an infant, and they make a defeazance, and after ſue execution contrary to it, an *audita querela* ſhall be brought againſt both; for it does not appear within the deed that he was an infant; alſo the deed of an infant is only voidable, and peradventure he will affirm it. 1 *Rol. Abr.* 312.

An executor obtained a judgment in *accompt*, and the defendant was taken in execution for the arrears; afterwards the will of the teſtator was made void in the ſpiritual court, for that he was an *ideot*, and ſo not capable to make a will, and the record was removed out of that court into Chancery, and ſent from thence into the King's Bench, where the action of *accompt* was brought, and thereupon the defendant brought an *audita querela*; it was made a queſtion, whether it would lie; but we are told in *Dr. Drurie's* caſe, that it was adjudged in the Exchequer-Chamber, that it would lie. *Dyer* 203.

The cogniſor of a ſtatute, after it was acknowledged, made a feoffment of *part of* the lands to the cogniſee, and then he conveyed the *other part* to his ſon and *his wife* for her jointure, &c. the cogniſee ſued forth execution, and the ſon alone brought an *audita querela*, without his wife; adjudged, that it did lie, and that the cogniſee, by purchaſing part of the lands, had deſtroyed his ſtatute. *Dyer* 193, 194.

Where a ſtatute or recogniſance is acknowledged before one who hath power to take it, and afterwards the cogniſor makes a feoffment of the land to another, and the cogniſee taketh out execution, in ſuch caſe the feoffee may have an *audita querela*, and avoid the execution. *Dyer* 93.

A ſtatute-ſtaple was acknowledged, and the cogniſor being ſeiſed of lands in *two counties*, afterwards made a feoffment of his lands in one county to *two*, and of his lands in the other county, to another; the cogniſee ſued out execution, and extended the lands of one of the two in one county only, and thereupon the *feoffee of thoſe lands* brought an *audita querela*, and had a *ſcire facias* returnable by the ſheriff of the other county where his other lands were, to make the *feoffee of thoſe lands* contributory; to which he pleaded in abatement, that the plaintiff had omitted the lands of *one of the two feoffees* in the firſt county; adjudged, that this was an ill plea, for the plaintiff is not bound to take notice of all the lands of the cogniſor which were liable to the ſtatute. *Dyer* 331.

In *audita querela*, the caſe was this; the conuſee gave a defeaſance, that if he ſued execution of the lands the conuſor had in *Kent*, the ſtatute ſhould be void; the conuſee, contrary to his defeaſance, extended the land in that county; and it was adjudged this writ well lay to avoid the execution and vacate the ſtatute; for the defeaſance was no way repugnant to the ſtatute, becauſe the conuſee might ſtill extend the lands of the conuſor in any other county, and take his body and goods. *Moor pl.* 1097.

If *A.* enters into a ſtatute to *B.* and pays the money at the day aſſigned, upon which the ſtatute is cancelled, and after *B.* forges a new ſtatute in the name of *A.* in this caſe *A.* may relieve himſelf by *audita querela*; for the forged ſtatute having all the eſſentials of a true one, the court was obliged to look on it as ſuch till the contrary appeared, which the conuſor could not ſet forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injuſtice of the pretended conuſee. *F. N. B.* 104.

If the conuſee of a ſtatute, upon agreement with the conuſor, delivers up the ſtatute in lieu of an acquittance, and after ſues execution, and the conuſor prays a re-extent, becauſe that the land was extended too low, and has it granted him, he ſhall never avoid the extent by *audita querela*; becauſe by his praying the re-extent he admits the ſtatute good and executory. 1 *Rol. Abr.* 313.

If upon an *elegit* the ſheriff takes an inquiſition, and there are ſeveral lands found ſubject to the extent, and ſeveral values found, and the ſheriff returns, that he has delivered ſome of the lands in particular for the moiety, where it appears according to the values found, that an equal moiety is not delivered to the party who recovered, but more than a moiety; yet this is not void, nor is it a diſſeiſin by the entry, but only voidable by *audita querela*. 1 *Rol. Abr.* 305.

If a man in execution upon a judgment for debt or damages, be delivered out of execution by the ſheriff or gaoler who hath him in execution, with the aſſent of him at whoſe ſuit he is in execution, and after, by colour of this judgment, he takes him again and puts him in priſon, an *audita querela* lies upon this matter, and thereupon he ſhall be delivered. 1 *Rol. Abr.* 307.

But if *A.* be in execution at the ſuit of *B.* and after *A.* eſcapes with the conſent of the ſheriff, and after *A.* returns to the priſon, and the ſheriff keeps him in priſon upon the ſaid execution, *A.* ſhall not be diſcharged by *audita*

audita querela, for *B.* has it ſtill in his election to have him in execution at his ſuit, and ſhall not be compelled to take his remedy againſt the ſheriff for this voluntary eſcape, who perhaps may be worth nothing. 1 *Rol. Abr.* 307.

If a ſtatute be made to baron and feme, and they make a defeaſance, and ſue execution contrary to it, the *audita querela* ſhall be brought againſt both, although the defeaſance be void as to the wife; for this action is in lieu of an anſwer of the execution, which is ſued by both; and this is all one as if the baron alone had made the defeaſance, which would have been a ſufficient diſcharge. 1 *Rol. Abr.* 312.

If a ſtatute be acknowledged to a feme ſole and *J. S.* and after the feme takes huſband, and *J. S.* releaſes, and after execution is ſued, the *audita querela* may be brought againſt the baron and feme and *J. S.* 1 *Rol. Abr.* 312.

If two executors ſue execution for damages recovered by the teſtator, where one hath releaſed, an *audita querela* lies againſt both. 1 *Rol. Abr.* 312.

If *A.* conuſee of a ſtatute releaſes to the tenant all right, intereſts, and demands, together with all ſuits and executions, and afterwards ſues execution, the tertenant ſhall have an *audita querela* to ſet aſide this execution. *Cro. Eliz.* 40. 1 *And.* 133.

So in treſpaſs or other action, if it be found for the plaintiff by *niſi prius*, and after, before the day in bank, the plaintiff releaſes to the defendant, and after judgment is given for the plaintiff, the defendant ſhall have an *audita querela* upon this matter; becauſe he could plead the releaſe at the day in bank. 1 *Rol. Abr.* 307.

If a conuſee of a ſtatute gives a deed of defeaſance to the conuſor, and afterwards ſues execution, contrary to the form of the defeaſance, the conuſor may have an *audita querela*, becauſe the defeaſance precludes the execution, if the terms or condition of it be performed by the conuſor; and he may have the *audita querela*, though the condition be broken, becauſe the conuſee extended before his time; and therefore the execution being unjuſtly ſued, muſt conſequently be an injury to the conuſor. 1 *Rol. Abr.* 307.

A *ſtatute-merchant* was acknowledged in *London*, which had but *one ſeal* to it, when by the ſtatute 13 *Ed.* 1. *de Mercatoribus*, it ought to have *two ſeals*, and execution being taken upon this ſtatute, the cogniſor brought an *audita querela*; it was objected, that *a writ of error* was the proper remedy in this caſe; but adjudged that the *audita querela* did lie, for where a ſtatute is erroneouſly acknowledged, 'tis for that reaſon no record, and therefore *a writ of error* will not lie, but an *audita querela* is the proper remedy to avoid the execution. *Cro. Eliz.* 233.

An *infant* entered into a ſtatute, and afterwards brought an *audita querela*; adjudged, that it did lie in *B. R.* or in the court of Common Pleas, and upon inſpection he was adjudged within age, therefore he had a *ſci. fa.* againſt the cogniſee. *Cro. E.* 208.

Audita querela upon a *ſtatute-merchant* was brought in the court of Common Pleas; but upon a ſtatute-ſtaple, it muſt be brought in the court of Chancery, or by *ſci. fa.* directed to the ſheriff *quod ſit in cancellaria*. 1 *Leon.* 140.

The cogniſor of a ſtatute-ſtaple was taken in execution, and whilſt he was in priſon the money was brought into court; thereupon he brought an *audita querela*, and moved to be bailed, which was granted, and the money to lie in court till the *audita querela* was determined; but the cogniſor put in bail to anſwer the coſts of ſuit. 1 *Leon.* 141.

An action of detinue was brought for a ſtatute merchant; the defendant pleaded *garniſhment*, the plaintiff recovered againſt the garniſhee, and had judgment; now tho' the judgment was erroneous, yet the defendant delivered the ſtatute to the plaintiff, who afterwards ſued out execution; then the garniſhee brought a writ of error, in which the judgment was reverſed, and he was reſtored to all that he loſt; but that would not avoid the execution, but he might be helped in an *audita querela*. 5 *Rep.* 90.

Audita querela brought by ſeveral concerning perſonal things, the *nonſuit* of one ſhall not prejudice the other, becauſe the writ is only by way of diſcharge of the perſon, and therefore the default of one ſhall not hurt the reſt. 6 *Rep.* 25.

An *adminiſtrator durante minore ætate of an infant executor*, had judgment in an action of debt brought by him for money due to the teſtator, and the defendant being in execution, the infant executor came of full age; it was moved, that he might be diſcharged out of priſon, becauſe the authority of the adminiſtrator being now determined by the executor's coming of age, he could not acknowledge ſatisfaction, tho' the priſoner ſhould pay the money; but the court were of opinion, that the judgment was ſtill in force, and that the party might be relieved by an *audita querela*. *Godb.* 104.

Two entered into a recogniſance, and cogniſee *extended* the lands of one of them by *elegit*, and took the body of the other by a *ca. ſa.* who brought an *audita querela*, and was relieved; becauſe the land of the other being extended, that ſhall be *intended* a full ſatisfaction for the debt. 5 *Rep. Blomfield*'s caſe.

Upon a judgment in treſpaſs, the plaintiff extended lands in *ancient demeſne*, by virtue of an *elegit*, but the defendant was relieved by an *audita querela*. *Hob.* 47.

In *trover* by an adminiſtrator for the goods of the inteſtate; the defendant pleaded, that the letters of adminiſtration were repealed in the ſpiritual court, *per debitam legis formam*, and granted to another; adjudged no plea, becauſe he might be relieved by an *audita querela*, which is the moſt proper remedy. *Yelv.* 125.

If the principal be taken in execution upon a judgment, and after a *ſcire facias* returned according to the courſe of the court, judgment is given againſt the bail, and thereupon he is taken in execution; and after the principal is delivered upon an *audita querela*, becauſe the recoveror had acknowledged ſatisfaction, *&c.* in this caſe, though the recogniſance was forfeited by the bail, by not bringing in the principal at the time appointed by law; yet inaſmuch as the judgment and execution againſt the bail depends upon the judgment againſt the principal, and he was but a ſecurity for the payment of the money, of which the recoveror is ſatisfied, the bail ſhall be diſcharged. 1 *Rol. Abr.* 308.

If *A.* and *B.* are bound in an obligation jointly and ſeverally, and judgment given againſt each on ſeveral actions brought, and both taken in execution, and after *A.* eſcapes, yet *B.* ſhall not be delivered upon an *audita querela*; for though the obligee may have an action againſt the ſheriff for the eſcape, yet till he is actually ſatisfied, the other ſhall not have an *audita querela*, for perhaps the ſheriff is worth nothing. 5 *Co.* 86.

If *A.* leaſes *Black-Acre* for years to *B.* and then acknowledges a ſtatute to *C.* and afterwards another to *D.* then *C.* takes a leaſe of the reverſion and the rent from *A.* by which he has ſuſpended the execution of the ſtatute during the term, and conſequently laid the land open to the extent of *D.* the ſecond conuſee, who ſues execution; if therefore *C.* ſhould extend the reverſion and rent during his own leaſe, *B.* the leſſee is not obliged to pay him the rent, but may avoid the extent by plea without *audita querela*, becauſe *C.* hath ſuſpended the execution of his ſtatute, the firſt in date, by the acceptance of the leaſe from the conuſor. 1 *Rol. Abr.* 304.

If a ſtatute is erroneouſly acknowledged, as before one that has no authority; or if a ſtatute-merchant hath but one ſeal, an *audita querela* lies, and not a writ of error, for this is no record; but if a ſtatute is well acknowledged, and the execution erroneous, a writ of error lies. *Cro. El.* 233, 319, 810.

If a ſtatute be delivered to *B.* to keep in an indifferent hand, upon certain conditions between the conuzor and the conuzee; if *B.* before the conditions performed, delivers it to the conuzee, and he ſues execution, the conuzor at his election may either have an *audita querela* upon this matter, or a writ of *diſceit* againſt *B.* *F. N. B.* 104.

If the conuzor is taken in execution upon a ſtatute, and the conuzee covenants to diſcharge him from the ſtatute, the conuzor ſhall not thereupon have an *audita querela*, but muſt take his remedy by action of covenant. *Cro. Jac.* 218.

If a man makes a feoffment, upon condition to re-infeoff him, and after the feoffee, to the intent to deceive him, falſly and by covin between him and *B.* acknowledges a recognizance to *B.* and after re-infeoffs him, the feoffee may have an *audita querela* upon this matter; for this is grounded upon the matter of record, as well as upon the matter of deceit, which is *in pais.* 1 *Rol. Abr.* 310.

If a man acknowledges a ſtatute, which is uſuriouſly entred into, and the conuſee ſues execution, the conuzor ſhall have an *audita querela* upon this matter. 1 *Rol. Abr.* 310.

The cogniſee of a ſtatute took out a *ca. ſa.* againſt the cogniſor, upon which he was taken in execution; but there being a *defeaſance on the ſtatute*, which was not performed by the cogniſee, therefore the cogniſor brought an *audita querela*, and was bailed. 1 *Brownl.* 39.

There was a judgment againſt a debtor, who afterwards ſold the lands, and being unable to pay the money, the judgment creditor brought a *ſci. fa.* againſt him, and had judgment therein by default, and by virtue of an *elegit* extended the lands of the purchaſer; but the whole being not extended, the purchaſer had no remedy but by an *audita querela*, ſetting forth the ſpecial matter. 1 *Brownl.* 39.

Two were taken in execution for debt, and afterwards one of them *eſcaped*; adjudged, that an action of debt lies againſt the ſheriff for this eſcape; and that after the debt is recovered againſt him, the other, who was ſtill in execution, ſhall have an *audita querela*, and be diſcharged from his impriſonment; for the body can be no ſatisfaction for the debt, becauſe 'tis taken only to *enforce ſatisfaction*, and the debt being already ſatisfied by the ſheriff, the body of the other ſhall no longer remain in priſon. 2 *Bulſt.* 320.

There was judgment for the king and the informer, upon an information for *recuſancy*; it was moved to ſtay execution, for that the defendant had conformed; but adjudged, that the court cannot judicially take notice of his *conformity*, and that he hath no remedy but an *audita querela*, for that lies where he cannot plead, but not againſt the king; therefore the *audita querela* doth not hinder the execution as to the king, but he may have it againſt the informer. 2 *Bulſt.* 324.

Judgment againſt the defendant in treſpaſs, and damages to 14 *l.* and coſts to 5 *l.* 10 *s.* which judgment was affirmed on a writ of *error*, and coſts to 5 *l.* 10 *s.* for delay of execution: Now, after the judgment in treſpaſs, and before the judgment on the writ of error, the plaintiff *releaſed* all executions and demands, and notwithſtanding that releaſe he ſued out execution, as well upon the firſt as the ſecond judgment, for the damages and coſts, upon which the defendant in the action brought an *audita querela*, and ſet forth all this matter, and the *releaſe*, and iſſue was taken upon the *releaſe* which was found againſt him; it was inſiſted in arreſt of judgment, that this releaſe would not help the plaintiff in the *audita querela*, becauſe it was given before the laſt judgment in the writ of error, and not pleaded, and execution being now on that judgment, he ſhall not have the benefit of the *releaſe*, which was given before it; but adjudged, that the execution was for the damages and coſts upon the firſt judgment in treſpaſs, as well as for the increaſe of coſts upon the judgment in the writ of error, and he had no time to plead the releaſe to that judgment, becauſe it came before it; and though the execution is intire for the whole, yet ſince the *releaſe* diſcharges the firſt judgment and damages, the plaintiff in the *audita querela* ſhall have the benefit of it. 2 *Cro.* 337.

In a *ſcire facias*, in the nature of an *audita querela*, the plaintiff ſet forth, that Sir *William Blackſtone* was ſeiſed of lands in *D.* and *of other lands* in the poſſeſſion of the defendants, and that he acknowledged a ſtatute, and that the lands which were in the poſſeſſion *of the plaintiff* were taken in execution, whereupon he brought this action *ex gravi querela*, to be relieved againſt the defendants by way of *contribution*; adjudged, that though the action was brought generally againſt the defendant, without alledging, that they were tenants *tempore brevis*, and alſo without alledging, that he himſelf was the tenant; yet being *ex gravi querela*, it ſhall be *intended*, that he was then tenant. 3 *Bulſt.* 305.

After a ſtatute was acknowledged, the cogniſor made a feoffment of lands liable to the ſtatute to two ſeveral perſons, and the cogniſee ſued out execution againſt one of them alone, whereon he brought an *audita querela*, in which he ſet forth this matter, and that his lands were delivered to the cogniſee by *liberate*; it was objected in arreſt of judgment, that the declaration was not good, for that the plaintiff did not ſet forth all the extent in ſpecial; and alſo the execution of the *liberate*; for his ſaying, that the lands were delivered to the cogniſee by *liberate*, was not an expreſs allegation, that the plaintiff was turned out of poſſeſſion, or of any manner of grievance; but adjudged, that it was a ſufficient averment, that he was turned out of poſſeſſion. *Winch.* 20.

Judgment againſt the defendant, who was afterwards taken by virtue of a *ca. ſa.* and *eſcape*; the ſheriff did not *return the ca. ſa.* at the day, *&c.* and thereupon an *alias ca. ſa.* iſſued againſt the defendant, upon which he was retaken by the ſheriff, and thereupon the defendant brought an *audita querela*, and it was held good. *Moor* 57.

If *A.* hath lands in ſeveral counties, and enters into a recognizance to *B.* and after acknowledges a ſtatute to *C.* upon which *C.* extends the lands in one county, and after *B.* ſues execution upon the recognizance, and hath the moiety of the ſame lands delivered to him, but ſued no execution of the moiety of the lands in the other county, *A.* hath no reaſon to complain, becauſe *B.* hath taken in execution only a moiety of his lands, but *C.* may have an *audita querela* againſt *B.* becauſe it is prejudicial to him. 2 *And.* 170. *Yelv.* 12. *Noy* 47.

If *A.* brings an *audita querela* againſt *B.* and declares, that whereas *B.* had recovered againſt *A.* 200 *l.* debt, *&c.* and thereupon the ſaid *A.* was outlawed, and upon a *capias utlagatum* taken, and in execution at the ſuit of the ſaid *B.* and after from the ſaid execution was delivered, and ſuffered to go at large, *&c.* and yet *B.* hath taken out execution upon the ſaid judgment, and endeavours, *&c.* the defendant may plead and ſhew, how that after the ſaid enlargement, and before the purchaſe of the *audita querela*, the outlawry was ſet aſide, and made void, and ſo conclude *quod non habetur tale recordum.* 8 *Co.* 141.

If *A.* hath judgment againſt *B.* for coſts and damages, and releaſes to *B.* all executions, and after *B.* brings a writ of *error*, and thereupon the judgment is affirmed, and further coſts given for the delay of execution, and *A.* takes *B.* in exeeution for the whole, upon an *audita querela*, *B.* ſhall be diſcharged *quoad* the damages and firſt coſts, but not *quoad* the ſecond coſts. *Cro. Jac.* 337.

If *A.* as adminiſtrator recovers damages in trover againſt *B.* and after his adminiſtration is repealed, and granted to another, upon a ſurmiſe that *A.* intends and endeavours to ſue execution, *B.* may have an *audita querela*; for by the repeal of the adminiſtration the power of *A.* is abſolutely determined. 2 *Sand.* 148.

Audita querela was brought before judgment entered; it was agreed by the court, that it could not be done; but if 'tis brought the *day in bank*, though the judgment is not entered, the court will compel, that the judgment be entered as of that term, ſo that they ſhall not plead *nul tiel record.* 1 *Mod.* 111.

Judgment againſt the *principal*, and a *ſcire facias* brought againſt the *bail*; judgment thereon, then the *bail* brought a *writ of error*, and the judgment on the *ſcire facias* was affirmed; then the *principal* brought another writ of error upon the judgment obtained againſt him,

him, and it was reverſed, and thereupon the bail brought an *audita querela*; and it was objected, that it did not lie, becauſe the judgment on the *ſci. fa.* was collateral to the judgment in the *principal* action of debt. *Sed per curiam*, the reverſal of that judgment ſhall likewiſe reverſe the judgment on the *ſci. fa.* and though the judgment on the *ſci. fa.* was affirmed upon the writ of error brought, yet that affirmance only removed the errors aſſigned; ſo the *audita querela* will lie, and the bail is diſcharged. 2 *Rol. Rep.* 254.

The caſe was, four perſons made an aſſault and battery on the plaintiff, who brought an action againſt one of them in *C. B.* and had a verdict and judgment, and the party was taken in execution for the damages; afterwards he brought another action of aſſault, *&c.* in *B. R.* againſt the other three, and had judgment likewiſe againſt them; then the party againſt whom the firſt judgment was had in *C. B.* paid the damages, and ſatisfaction was acknowledged; and afterwards one of the three, againſt whom the laſt judgment was had, was taken in execution, and all three brought an *audita querela*; the queſtion was, whether it would lie or not, becauſe the two who were not taken in execution were not grieved? *Et per curiam*, the *audita querela* will lie by all three, for though the plaintiff may have ſeveral actions for the ſame aſſault, he can have but one ſatisfaction; as where two are bound in a bond jointly and ſeverally, and the obligee ſues one in *C. B.* and recovers, and afterwards ſues the other in *B. R.* and recovers againſt him, yet if one of them make ſatisfaction, the other ſhall have an *audita querela* to avoid the execution. *W. Jones* 377.

The cogniſor of a *recognizance* in 2000 *l.* to one acknowledged a ſtatute of 100 *l.* to another; the *cogniſee of the ſtatute* extended the lands of the cogniſor in *D.* who had alſo other lands not extended; afterwards the *cogniſee of the recogniſance* extended a moiety of the ſame lands which had been before extended and delivered in execution to the cogniſee of the *ſtatute*, who thereupon brought an *audita querela*, upon which he was relieved, and had judgment, which was affirmed in *error* becauſe he was in poſſeſſion of the lands by a lawful title by virtue of an extent, and therefore thoſe lands were only liable to the execution of the recogniſance *pro rata*; ſo that the cogniſor of the recogniſance ought to have included all the other lands of the cogniſor in his execution, which were not extended by the cogniſee of the ſtatute. *Yelv.* 12.

The judgment *creditor* took out execution by *elegit*, and extended the lands of the debtor; afterwards he *aſſigned* theſe lands to others, and then he gave the *debtor* a releaſe of all judgments and executions, whereupon he brought an *audita querela*; and upon demurrer, it was objected, that this writ being brought againſt the judgment creditor was wrong, for it ought to be brought againſt the aſſignees of the extent; but adjudged good, for he being a party to the judgment, his releaſe had diſcharged it. *Cro. Car.* 155, 214.

The debtor being taken in execution, the creditor conſented, that he might come to him at ſuch a *tavern*, which was out of the rules, and without a keeper, or a rule of court; accordingly they met together at the place, and not agreeing, the creditor took him again in execution, whereupon he brought an *audita querela*, and was relieved, becauſe the execution was diſcharged by the priſoner's going at large, and he could not be retaken by law. *Style* 117.

The judgment creditor extended the lands of his debtor *in one county* by *elegit*, which were delivered to him in execution, and enjoyed by him ſix years; then he made his wife executrix, and died, and ſhe brought a *ſci. fa.* upon the judgment directed to the ſheriff of another county, where the debtor had other lands; and upon two *nihils* returned, ſhe had judgment and execution againſt the debtor for the ſame debt, who brought an *audita querela*, and was relieved; for after an *elegit* returned, and the lands are extended, the party cannot have another *elegit*. *Style* 454.

Scire facias againſt *executors*, the ſheriff returned *nulla bona*, *&c.* afterwards, upon a *teſtatum*, that they had waſted the goods of the teſtator, a new *ſci. fa.* with a *fi. fa.* iſſued againſt them, upon which there were *two nihils* returned, and thereupon judgment was given againſt them *de bonis propriis*; but, becauſe they were never *ſummoned*, nor had any manner of notice of theſe proceedings, they were relieved by an *audita querela*. *Style* 372.

The cogniſor entered into a recogniſance of 1000 *l.* to two perſons, and afterwards he gave them the manor of *Dale*, *&c.* one of the cogniſees ſued out execution, and took the cogniſee in *London*, who ſuppoſing that by the gift of this manor the recogniſance was diſcharged, brought an *audita querela*; adjudged, that it will not lie, becauſe the body, and not the land of the cogniſor was the debtor, for the land was not liable to the debt, but at the election of the cogniſee; but if the cogniſor had made a *feoffment to the cogniſee* of part of the land, and to a *ſtranger* of another part, and had reſerved part to himſelf, in ſuch caſe the cogniſee ſhall not have execution againſt the *ſtranger*, becauſe he being one of the feoffees, the lands in poſſeſſion of the other feoffee, who is the ſtranger, are not chargeable with the execution; for the cogniſee himſelf cannot be contributory for his part with the ſtranger, towards the charge of the execution, becauſe he cannot be contributory to himſelf. *Plowd. Com.* 72.

The father and ſon were bound jointly in a ſtatute merchant, and their lands extended, they brought a joint *audita querela*, and held not good, for it ought to be ſeveral, becauſe their grievance by the execution was ſeveral. *Owen* 106.

An *infant* acknowledged a recogniſance in the nature of a *ſtatute-ſtaple*, and afterwards, when he came of full age he brought an *audita querela* to avoid it; but adjudged, that it did not lie, becauſe his age is not to be tried by inſpection of the court, which could not be after his full age; the law had been the ſame if he had died within age, therefore he ought to bring the *audita querela* before he is of full age. *Dyer* 232.

The cogniſor of a ſtatute had lands in *two counties*, which were chargeable by the *ſtatute*, afterwards he made two feoffments, by which he conveyed part of theſe lands to one of the feoffees, and the reſidue to the other feoffee, and the cogniſee having taken out an *extent* againſt the lands of one of the feoffees, that very feoffee levied a fine of the ſame lands to the uſe of *G. D.* the purchaſer, who brought an *audita querela* againſt the other feoffee to have contribution; it was inſiſted for him, that an *audita querela* demands nothing, for 'tis only a *commiſſion* to the judges to hear the complaint of the party; and 'tis a rule in law, that a purchaſer for a valuable conſideration ſhall not be charged, but only *pro rata*; but adjudged, that this *audita querela* did not lie by the purchaſer, becauſe the land was clogged with the *extent* before he bought it, *et tranſit terra cum onere*, ſo that he is not the party grieved. 2 *Bulſt.* 15.

2. *Where audita querela lieth by bail, and where not.*

Judgment againſt the *principal*, and upon a *ſcire facias* againſt the *bail* there was a *nihil* returned, and thereupon judgment was againſt the bail, who moved for an *audita querela*, for that he was *within age*; it was objected, that he ought in the firſt place to bring a writ of error to reverſe the judgment againſt the *principal*; becauſe, whilſt that was in force, the bail muſt be chargeable; but it was anſwered, that it might be in vain to bring a writ of error, becauſe there might be no error in that judgment; therefore, if the bail could not have an *audita querela*, they were without a remedy, though he was ſtill an *infant*; for they could not plead his infancy to the *ſcire facias*, and thereupon an *audita querela* was granted. *Yelv.* 155.

Judgment againſt the *principal*, who died without paying the money, or rendring himſelf to priſon; afterwards a *ſci. fa.* was brought againſt the *bail*, and the plaintiff had

had judgment againſt them, whereupon they brought an *audita querela*, and had relief, becauſe they could not by law be taken in execution, till ſome default be returned againſt the *principal* upon a *capias* awarded againſt him; and there being no ſuch proceſs againſt him while he was living, 'tis now impoſſible for him to yield his body to priſon, being dead. *Goldſb.* 174.

There was a judgment againſt the principal, and afterwards another judgment upon a *ſci. fa.* againſt the bail, and upon a writ of error brought the laſt judgment was affirmed; afterwards the principal judgment was reverſed upon a writ of error, and thereupon an *audita querela* was brought by the bail; it was objected againſt it, for that the *reverſal of the principal judgment* was not a *reverſal of the judgment upon the ſci. fa.* that being a collateral judgment, and ſtanding by itſelf; but adjudged, that it depends on the firſt judgment, and 'tis that which brings the charge on the bail, which being now diſcharged, the bail ought to be ſo in like manner. 2 *Cro.* 645.

After an eſcape made by the *principal*, there was a judgment againſt the *ſureties*, and they were taken in execution; upon which they brought an *audita querela*, and ſuggeſted they would bring the money into court, or give ſufficient ſecurity to pay to the obligee, and ſo prayed that they might be bailed; but adjudged, that if the *audita querela* had been grounded on a ſpecialty, or other matter in writing, or on record, the court would grant a *ſuperſedeas* to diſcharge them, if they were not in execution, and would bail them if they were; but upon this ſuggeſtion, which is only matter of fact, they would neither grant a *ſuperſedeas* in one caſe, nor bail them in the other. 2 *Brownl.* 108.

3. *Proceedings and pleadings in audita querela.*

In an *audita querela*, the proceſs is a *venire facias*, *diſtringas*, *alias*, *pluries*, and if *non eſt inventus* be returned, or *that he hath nothing*, the plaintiff ſhall have a *capias* againſt the defendant. *F. N. B.* 104. *Dyer* 297. *b.*

And if the plaintiff be in execution, a *ſcire facias* goes; if not, a *venire*. *Mo.* 811. 1 *Salk.* 92. So, if the *audita querela* be founded upon a record. 1 *Salk.* 92. And if there be a default by the defendant upon a *ſcire feci*, or two *nichils* returned, the plaintiff ſhall have judgment. 1 *Salk.* 93. But, where an *audita querela* is ſued *quia timet*, and the party is at large, there ſhall never be a *ſcire facias*. 1 *Salk.* 92.

An *audita querela* ſhall be granted out of the court, where the record, upon which it is founded, remains, or it may be returnable in the ſame court. *F. N. B.* 105. *b.* And therefore if a man recover in *B. R.* or *C. B.* the defendant having a releaſe after judgment, and before execution, ſhall ſue the *audita querela* out of *B. R.* or *C. B.* where the record is. *F. N. B.* 105. So, if a recognizance be acknowledged in *C. B.* and execution be ſued upon it after releaſe, the defendant ſhall ſue the *audita querela* out of *C. B. F. N. B.* 105. But an *audita querela* may be by original, and upon a judgment in *C. B.* It goes out of Chancery returnable in *C. B. F. N. B.* 105.

The writ of *audita querela* ſhall be allowed only in open court. 1 *Bulſt.* 140. 2 *Bulſt.* 97. 2 *Show.* 240.

Upon a motion for an allowance of an *audita querela*, it was held, that bail muſt be given in court, and not elſewhere, unleſs in caſes of neceſſity, to be allowed by the court, and then it may be put in before two judges. *Palm.* 422.

G. A. and *M. A.* were jointly and ſeverally bound to one *Tatnell*, in a bond of 700 *l.* the obligee ſued both, and obtained two judgments, and both of them were outlawed, and one of them was taken upon the *capias utlagatum*, and the ſheriff voluntarily ſuffered him to *eſcape*; whereupon *Tatnell* the obligee brought an *action of debt* againſt the ſheriff for this eſcape, and recovered. *and received ſatisfaction*, and yet he proceeded againſt the other, who thereupon brought an *audita querela*, in which he ſet forth all this matter; but upon a demurrer to the declaration there was judgment againſt him, becauſe *the time when and place where* ſatisfaction was made by the ſheriff was not ſpecially ſet forth. 1 *Mod.* 170.

Adjudged, that where the plaintiff in *audita querela* gets judgment, he ſhall have reſtitution of his goods, though they were taken in execution before the writ brought, and though there is no ſuch thing mentioned in the judgment. *Sid.* 74.

Judgment in replevin for the avowants; afterwards one of them *releaſed*, and thereupon an *audita querela* was brought; and a motion was made, that it might be allowed, in order that the execution might be *ſuperſeded*, and the releaſe being produced, but the witneſſes to it being in the country, it was offered to prove their hands; but that was not allowed, ſince the witneſſes themſelves were living and in health; and they would not allow the *audita querela*, unleſs the releaſe was proved, nor ſcarce then; becauſe it appeared by *affidavits*, that the perſon who executed this releaſe was joined with the other avowants by practice, and without the conſent. *Sid.* 351.

In *audita querela* the party appeared upon the *ſcire facias*, and demurred, for that the *ſcire facias* bore date the *twenty-third day of October*, and the *audita querela* the *third day of November* following; but adjudged, that this *ſcire facias* is in nature of a *meſne proceſs*; 'tis only to bring in the defendant to anſwer, and the judgment muſt be given upon the *audita querela*, therefore this being only a fault in *meſne proceſs*, 'tis cured by the defendant's appearance; 'tis true, ſuch a fault would not be cured by an appearance of the defendant, where the *ſcire facias* is brought upon a judgment, becauſe in ſuch caſe 'tis *quaſi* an original, and the judgment is given on the *ſci. fa.* 1 *Vent.* 7.

Judgment in debt againſt two defendants, one of them was taken in execution, and afterwards diſcharged out of cuſtody by the plaintiff himſelf, the other brought an *audita querela* againſt the plaintiff, praying, that he might likewiſe be diſcharged from the judgment *quia timet*; and after two *ſcire facias's* and two *nihils* returned, he moved for a *ſuperſedeas* (which ſhews that an *audita querela* is no *ſuperſedeas* of itſelf) but it was denied; becauſe a *ſcire facias* is improper where the ſuit is *quia timet*, and the party at large; he ſhould bring a *venire*, and have a diſtreſs infinite; but if he had been in execution, he might either have a *ſcire facias* or *venire*. 1 *Salk.* 92.

Adjudged, that where the party hath ſome matter which he might have pleaded to the *ſci. fa.* in his diſcharge, and two *nihils* are returned, and judgment againſt him, the court will relieve him upon motion, without putting him to bring an *audita querela*. 1 *Salk.* 93.

A writ of *audita querela*.

GEORGE *the third, &c. To our juſtices aſſigned to hold pleas before us, greeting. We having received information, by the grievous complaint of* A. B. *that whereas* C. D. *in* Eaſter *term, &c. and now hath to the damage of the ſaid* A. *&c. wherefore the ſaid* A. *hath beſought us to provide him relief, and being unwilling that the ſaid* A. *ſhould be any ways injured, and deſirous that what is right and juſt ſhould be done in this caſe: We command you, that in order to hear the complaint of the ſaid* A. *you call before you the aforeſaid parties, and ſuch others as it ſhall ſeem meet to you to convene; and having heard the aforeſaid parties, and their ſeveral reaſons, you cauſe to be done full and ſpeedy juſtice to the ſaid parties, which of right, and according to the laws and cuſtoms of our kingdom, you ſhall ſee ought to be done. Witneſs, &c.*

Auditor, *(Lat.)* Is an officer of the king, or ſome other great perſon, who examines yearly the accounts of all under officers, and makes up a general book, which ſhews the difference between their receipts and charge, and their ſeveral allowances, commonly called *allocations*:

As the *auditors* of the *Exchequer* take the accounts of thoſe receivers who collect the revenues. 4 *Inſt.* 106. Receivers general of fee-farm rents, *&c.* are alſo termed *auditors*, and hold their *audits* for adjuſting the accounts of the ſaid rents at certain times and places appointed. And there are *auditors* aſſigned by the court to *audit* and ſettle accounts in actions of account, and other caſes, who are proper judges of the cauſe, and pleas are made before them, *&c.* 1 *Brownl.* 24.

Auditor of the Receipts, An officer of the *Exchequer*, that files the tellers bills, and having made an entry of them, gives the lord treaſurer, *&c.* weekly a certificate of the money received: He makes debentures to the tellers, before they pay any money, and takes their accounts: he alſo keeps the *black book* of receipts, and the treaſurer's key of the treaſury, and ſees every teller's money locked up in the treaſury. 4 *Inſt.* 107.

Auditors of the Impreſt, Are officers in the *Exchequer*, who have the charge of *auditing* the great accounts of the King's cuſtoms, naval and military expences of the *mint*, *&c.* and any money *impreſſed* to men for his Majeſty's ſervice. *Pract. Excheq.* 83.

Auditores, Is the ſame with *audientes*, *i. e.* the catechumens, or thoſe who were newly inſtructed in the myſteries of the Chriſtian religion before they were admitted to baptiſm; and *auditorium* is that place in the church where they ſtood to hear, and be inſtructed. 'Tis what we now call *navis eccleſiæ:* and in the primitive times, the church was ſo ſtrict in keeping the people together in that place, that the perſon who went from thence in ſermon-time was excommunicated: it was ſo declared by the fourth council of *Carthage*, *c.* 24. *Cowell edit.* 1727.

Avenage, (from the Lat. *avena*, oats) A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of ſome other duties. *Cowell*, *ib.*

Avenor, *(avenarius*, from the Fr. *avoine*, *i. e.* oats) Is an officer belonging to the King's ſtables, that provides oats for his horſes: he is mentioned 13 *Car.* 2. *cap.* 8. *Cowell*, *ib.*

Aventure, *Adventures* or trials of ſkill at arms, and ſignifies military exerciſes on horſeback.——*Aſſiſa de armis* 36 *Hen.* 3. *Brady's Appen. Hiſt. Eng.* 250. And 'tis mentioned in *addit. Mat. Paris*, *p.* 149. *Quod nulli conveniant ad turniandum, vel burdandum, nec ad alias quaſcunque aventuras. Cowell*, *ib.*

Aventure, (properly *adventure)* A *miſchance*, cauſing the death of a man: as where a perſon is ſuddenly drowned, or killed by any accident, without felony. 1 *Inſt.* 391.

Avera, *(quaſi overa*, from the Fr. *oeuvre* and *ouvrage velut operagium)* Signifies a day's work of a plowman, formerly valued at 8 *d.* It is found in *Domeſday.* 4 *Inſt.* 269.

Average, *(averagium)* Is ſaid to ſignify ſervice which the tenant owes to his lord by horſe or carriage: but it is commonly uſed for a contribution that merchants and others make towards their loſſes, who have their goods caſt into the ſea for the ſafeguard of the ſhip, or of the other goods and lives of thoſe perſons that are in the ſhip during a tempeſt. It is in this ſenſe called *average*, becauſe it is proportioned and allotted after the rate of every man's goods carried. *Stat.* 32 *Hen.* 8. 14 *Car.* 2. By the laws of the ſea, in a ſtorm, when there is an extreme neceſſity, the goods, wares, guns, or whatſoever elſe is on board the ſhip, may (by conſulting the mariners) be thrown over board by the maſter, for the preſervation of the ſhip; and it ſhall be made good by *average* and contribution. Stat. 49 *Ed.* 3. But if the maſter takes in more goods than he ought without leave of the owners and freighters, and a ſtorm ariſeth at ſea, and part of the freighters goods are thrown over board, the remaining goods are not ſubject to *average*; but the maſter is to make good the loſs out of his own eſtate: and if the ſhip's geer or apparel be loſt by ſtorm, the ſame is not within the *average*. *Leg. Rhod.* If goods are caſt over board before half the voyage is performed, they are to be eſtimated at the price they coſt: but if they are ejected afterwards, then at the price the reſt are ſold at the port of arrival. *Leg. Oleron.* Where goods are given to pirates by way of compoſition to ſave the reſt, there ſhall be *averages*, by the civil law. *Moor* 297.—— *Average* is likewiſe a ſmall duty, paid to maſters of ſhips when goods are ſent in another man's ſhip, for their care of the goods, over and above the freight. *Paying ſo much freight for the ſaid goods, with primage and* average *accuſtomed.* Words in bills of lading. *Cowell, ed.* 1727.

Average of Corn Fields, The ſtubble or remainder of ſtraw and graſs left in corn fields after the harveſt is carried away. In *Kent* called the *gratten*, and in other parts the *roughings*, *&c. Cowell*, *ib.*

Averare, To carry goods in a waggon, or upon loaded horſes, a duty required of ſome cuſtomary tenants. *Spelman.*

Aver Corn, Is a reſerved rent in *corn*, paid by farmers and tenants to religious houſes: and ſignifies by *Somner* corn drawn to the lord's granary, by the working cattle of the tenant. 'Tis ſuppoſed that this cuſtom was owing to the Saxon *cyriac ſceat*, church ſeed, a meaſure of *corn*, brought to the prieſt annually on St. *Martin's* day, as an oblation for the firſt-fruits of the earth: under which title the religious had corn rent paid yearly; as appears by an inquiſition of the eſtate of the abbey of *Glaſtonbury*, *anno dom.* 1201. *Cowell*, *ib.*

Averland, Seems to have been ſuch lands as the tenants did plough and manure *cum averiis ſuis*, for the proper uſe of a monaſtery, or the lords of the ſoil. *Mon. Angl.*

Aver Penny, (or *average peny)* Money paid towards the King's *averages* or carriages, or to be freed thereof.--- Aver penny *hoc eſt, quietum eſſe de diverſis denariis pro averagiis domini regis. Raſtal.*

Aver Silver, A cuſtom or rent formerly ſo called. *Cowell.*

Averia, Cattle: *Spelman* deduces the word from the Fr. *ouvrer*, to work, as if chiefly working cattle: though it ſeems to be more probably from *avoir*, to have or poſſeſs; the word ſometimes including all perſonal eſtate, as *Catalla* did all goods and chattels. This word is uſed for oxen or horſes of the plough; and in a general ſenſe any cattle.——*Homines per averia ſua, viz. equos & boves et affros graviter diſtrixit. W. Thorn. in Ed.* 2. 'Tis uſed in the ſame ſenſe in *W.* 2. *Ca.* 18. *Averia elongata*; ſee *Elongata. Cowell.*

Averiis Captis in Withernam, A writ for the taking of cattle to his uſe, who hath cattle unlawfully diſtrained by another, and driven out of the county where they were taken, ſo that they cannot be replevied by the ſheriff. *Reg. Orig.* 82. If the cattle are put into any ſtrong place in the ſame county, the ſheriff may take the *poſſe comitatus*, and break into it, to make the replevin. 1 *P. & M.* But when they are driven out of the county, he hath no authority to purſue them. *Cowell.*

Averland. *Item cellarius libere ſolebat capere omnia ſterquilinia ad ſuum opus in omni vico, niſi ante oſtia eorum qui habebant averland. Mon. Angl.* 302. It ſeems to have been ſuch land as the tenants did plough and manure, *cum averiis ſuis*, for the proper uſe of a monaſtery or lord of the ſoil. *Quod autem nunc vocatur averland, fuit terra ruſticorum, ib.* This land was ſubject to *averages*, or the lord's carriages. *Cowell, edit.* 1727.

Averium ponderis, full weight, or *aver de pois*,— *de quolibet panno ſine grano, et de qualibet libra de averio ponderis, tres denarios. Cart.* 3 *Ed.* 2.

Averment, *Verificatio*, (from the French *averrer*, that is, *verificare)* Is an offer of the defendant, to make good or juſtify an exception pleaded in abatement, or bar of the plaintiff's action: and it ſignifies the act as well as the offer of juſtifying the exception; and not only the form, but the matter thereof. *Co. Lit.* 362. *Cowell. Averment* is either general or particular; a general averment is the concluſion of every plea to the writ, or in bar of replications and other pleadings (for counts and avowries in nature of counts need not be averred) containing matter affirmative, with theſe words, *et hoc paratus eſt verificare, &c.* Particular averments are, as when the life of tenant for life, or tenant in tail are averred. *Co. Lit.* 362.

had judgment againſt them, whereupon they brought an *audita querela*, and had relief, becauſe they could not by law be taken in execution, till ſome default be returned againſt the *principal* upon a *capias* awarded againſt him; and there being no ſuch proceſs againſt him while he was living, 'tis now impoſſible for him to yield his body to priſon, being dead. *Goldſb.* 174.

There was a judgment againſt the principal, and afterwards another judgment upon a *ſci. fa.* againſt the bail, and upon a writ of error brought the laſt judgment was affirmed; afterwards the principal judgment was reverſed upon a writ of error, and thereupon an *audita querela* was brought by the bail; it was objected againſt it, for that the *reverſal of the principal judgment* was not a *reverſal of the judgment upon the ſci. fa.* that being a collateral judgment, and ſtanding by itſelf; but adjudged, that it depends on the firſt judgment, and 'tis that which brings the charge on the bail, which being now diſcharged, the bail ought to be ſo in like manner. 2 *Cro.* 645.

After an eſcape made by the *principal*, there was a judgment againſt the *ſureties*, and they were taken in execution; upon which they brought an *audita querela*, and ſuggeſted they would bring the money into court, or give ſufficient ſecurity to pay to the obligee, and ſo prayed that they might be bailed; but adjudged, that if the *audita querela* had been grounded on a ſpecialty, or other matter in writing, or on record, the court would grant a *ſuperſedeas* to diſcharge them, if they were not in execution, and would bail them if they were; but upon this ſuggeſtion, which is only matter of fact, they would neither grant a *ſuperſedeas* in one caſe, nor bail them in the other. 2 *Brownl.* 108.

3. *Proceedings and pleadings in audita querela.*

In an *audita querela*, the proceſs is a *venire facias*, *diſtringas*, *alias*, *pluries*, and if *non eſt inventus* be returned, or *that he hath nothing*, the plaintiff ſhall have a *capias* againſt the defendant. *F. N. B.* 104. *Dyer* 297. *b.*

And if the plaintiff be in execution, a *ſcire facias* goes; if not, a *venire*. *Mo.* 811. 1 *Salk.* 92. So, if the *audita querela* be founded upon a record. 1 *Salk.* 92. And if there be a default by the defendant upon a *ſcire feci*, or two *nichils* returned, the plaintiff ſhall have judgment. 1 *Salk.* 93. But, where an *audita querela* is ſued *quia timet*, and the party is at large, there ſhall never be a *ſcire facias*. 1 *Salk.* 92.

An *audita querela* ſhall be granted out of the court, where the record, upon which it is founded, remains, or it may be returnable in the ſame court. *F. N. B.* 105. *b.* And therefore if a man recover in *B. R.* or *C. B.* the defendant having a releaſe after judgment, and before execution, ſhall ſue the *audita querela* out of *B. R.* or *C. B.* where the record is. *F. N. B.* 105. So, if a recognizance be acknowledged in *C. B.* and execution be ſued upon it after releaſe, the defendant ſhall ſue the *audita querela* out of *C. B.* *F. N. B.* 105. But an *audita querela* may be by original, and upon a judgment in *C. B.* It goes out of Chancery returnable in *C. B.* *F. N. B.* 105.

The writ of *audita querela* ſhall be allowed only in open court. 1 *Bulſt.* 140. 2 *Bulſt.* 97. 2 *Show.* 240.

Upon a motion for an allowance of an *audita querela*, it was held, that bail muſt be given in court, and not elſewhere, unleſs in caſes of neceſſity, to be allowed by the court, and then it may be put in before two judges. *Palm.* 422.

G. A. and *M. A.* were jointly and ſeverally bound to one *Tatnell*, in a bond of 700 *l.* the obligee ſued both, and obtained two judgments, and both of them were outlawed, and one of them was taken upon the *capias utlagatum*, and the ſheriff voluntarily ſuffered him to *eſcape*; whereupon *Tatnell* the obligee brought an *action of debt* againſt the ſheriff for this eſcape, and recovered. *and received ſatisfaction*, and yet he proceeded againſt the other, who thereupon brought an *audita querela*, in which he ſet forth all this matter; but upon a demurrer to the declaration there was judgment againſt him, becauſe *the time when and place where* ſatisfaction was made by the ſheriff was not ſpecially ſet forth. 1 *Mod.* 170.

Adjudged, that where the plaintiff in *audita querela* gets judgment, he ſhall have reſtitution of his goods, though they were taken in execution before the writ brought, and though there is no ſuch thing mentioned in the judgment. *Sid.* 74.

Judgment in replevin for the avowants; afterwards one of them *releaſed*, and thereupon an *audita querela* was brought; and a motion was made, that it might be allowed, in order that the execution might be *ſuperſeded*, and the releaſe being produced, but the witneſſes to it being in the country, it was offered to prove their hands; but that was not allowed, ſince the witneſſes themſelves were living and in health; and they would not allow the *audita querela*, unleſs the releaſe was proved, nor ſcarce then; becauſe it appeared by *affidavits*, that the perſon who executed this releaſe was joined with the other avowants by practice, and without the conſent. *Sid.* 351.

In *audita querela* the party appeared upon the *ſcire facias*, and demurred, for that the *ſcire facias* bore date the *twenty-third day of October*, and the *audita querela* the *third day of November* following; but adjudged, that this *ſcire facias* is in nature of a *meſne proceſs*; 'tis only to bring in the defendant to anſwer, and the judgment muſt be given upon the *audita querela*, therefore this being only a fault in *meſne proceſs*, 'tis cured by the defendant's appearance; 'tis true, ſuch a fault would not be cured by an appearance of the defendant, where the *ſcire facias* is brought upon a judgment, becauſe in ſuch caſe 'tis *quaſi* an original, and the judgment is given on the *ſci. fa.* 1 *Vent.* 7.

Judgment in debt againſt two defendants, one of them was taken in execution, and afterwards diſcharged out of cuſtody by the plaintiff himſelf, the other brought an *audita querela* againſt the plaintiff, praying, that he might likewiſe be diſcharged from the judgment *quia timet*; and after two *ſcire facias's* and two *nihils* returned, he moved for a *ſuperſedeas* (which ſhews that an *audita querela* is no *ſuperſedeas* of itſelf) but it was denied; becauſe a *ſcire facias* is improper where the ſuit is *quia timet*, and the party at large; he ſhould bring a *venire*, and have a diſtreſs infinite; but if he had been in execution, he might either have a *ſcire facias* or *venire*. 1 *Salk.* 92.

Adjudged, that where the party hath ſome matter which he might have pleaded to the *ſci. fa.* in his diſcharge, and two *nihils* are returned, and judgment againſt him, the court will relieve him upon motion, without putting him to bring an *audita querela*. 1 *Salk.* 93.

A writ of *audita querela*.

GEORGE *the third, &c. To our juſtices aſſigned to hold pleas before us, greeting. We having received information, by the grievous complaint of* A. B. *that whereas* C. D. *in* Eaſter *term, &c. and now hath to the damage of the ſaid* A. *&c. wherefore the ſaid* A. *hath beſought us to provide him relief, and being unwilling that the ſaid* A. *ſhould be any ways injured, and deſirous that what is right and juſt ſhould be done in this caſe: We command you, that in order to hear the complaint of the ſaid* A. *you call before you the aforeſaid parties, and ſuch others as it ſhall ſeem meet to you to convene; and having heard the aforeſaid parties, and their ſeveral reaſons, you cauſe to be done full and ſpeedy juſtice to the ſaid parties, which of right, and according to the laws and cuſtoms of our kingdom, you ſhall ſee ought to be done. Witneſs, &c.*

Auditor, *(Lat.)* Is an officer of the king, or ſome other great perſon, who examines yearly the accounts of all under officers, and makes up a general book, which ſhews the difference between their receipts and charge, and their ſeveral allowances, commonly called *allocations*:

As the *auditors* of the *Exchequer* take the accounts of thoſe receivers who collect the revenues. 4 *Inſt.* 106. Receivers general of fee-farm rents, *&c.* are alſo termed *auditors*, and hold their *audits* for adjuſting the accounts of the ſaid rents at certain times and places appointed. And there are *auditors* aſſigned by the court to *audit* and ſettle accounts in actions of account, and other caſes, who are proper judges of the cauſe, and pleas are made before them, *&c.* 1 *Brownl.* 24.

Auditor of the Receipts, An officer of the *Exchequer*, that files the tellers bills, and having made an entry of them, gives the lord treaſurer, *&c.* weekly a certificate of the money received: He makes debentures to the tellers, before they pay any money, and takes their accounts: he alſo keeps the *black book* of receipts, and the treaſurer's key of the treaſury, and ſees every teller's money locked up in the treaſury. 4 *Inſt.* 107.

Auditors of the Impreſt, Are officers in the *Exchequer*, who have the charge of *auditing* the great accounts of the King's cuſtoms, naval and military expences of the *mint*, *&c.* and any money *impreſſed* to men for his Majeſty's ſervice. *Pract. Excheq.* 83.

Auditores, Is the ſame with *audientes*, *i. e.* the catechumens, or thoſe who were newly inſtructed in the myſteries of the Chriſtian religion before they were admitted to baptiſm; and *auditorium* is that place in the church where they ſtood to hear, and be inſtructed. 'Tis what we now call *navis eccleſiæ:* and in the primitive times, the church was ſo ſtrict in keeping the people together in that place, that the perſon who went from thence in ſermon-time was excommunicated: it was ſo declared by the fourth council of *Carthage*, *c.* 24. *Cowell edit.* 1727.

Avenage, (from the Lat. *avena*, oats) A certain quantity of oats paid by a tenant to his landlord as a rent, or in lieu of ſome other duties. *Cowell*, *ib.*

Avenor, *(avenarius*, from the Fr. *avoine*, *i. e.* oats) Is an officer belonging to the King's ſtables, that provides oats for his horſes: he is mentioned 13 *Car.* 2. *cap.* 8. *Cowell*, *ib.*

Aventure, *Adventures* or trials of ſkill at arms, and ſignifies military exerciſes on horſeback.——*Aſſiſa de armis* 36 *Hen.* 3. *Brady*'s *Appen. Hiſt. Eng.* 250. And 'tis mentioned in *addit. Mat. Paris*, *p.* 149. *Quod nulli conveniant ad turniandum, vel burdandum, nec ad alias quaſcunque aventuras. Cowell*, *ib.*

Aventure, (properly *adventure)* A *miſchance*, cauſing the death of a man: as where a perſon is ſuddenly drowned, or killed by any accident, without felony. 1 *Inſt.* 391.

Avera, *(quaſi overa*, from the Fr. *oeuvre* and *ouvrage velut operagium)* Signifies a day's work of a plowman, formerly valued at 8 *d.* It is found in *Domeſday.* 4 *Inſt.* 269.

Average, *(averagium)* Is ſaid to ſignify ſervice which the tenant owes to his lord by horſe or carriage: but it is commonly uſed for a contribution that merchants and others make towards their loſſes, who have their goods caſt into the ſea for the ſafeguard of the ſhip, or of the other goods and lives of thoſe perſons that are in the ſhip during a tempeſt. It is in this ſenſe called *average*, becauſe it is proportioned and allotted after the rate of every man's goods carried. *Stat.* 32 *Hen.* 8. 14 *Car.* 2. By the laws of the ſea, in a ſtorm, when there is an extreme neceſſity, the goods, wares, guns, or whatſoever elſe is on board the ſhip, may (by conſulting the mariners) be thrown over board by the maſter, for the preſervation of the ſhip; and it ſhall be made good by *average* and contribution. Stat. 49 *Ed.* 3. But if the maſter takes in more goods than he ought without leave of the owners and freighters, and a ſtorm ariſeth at ſea, and part of the freighters goods are thrown over board, the remaining goods are not ſubject to *average*; but the maſter is to make good the loſs out of his own eſtate: and if the ſhip's geer or apparel be loſt by ſtorm, the ſame is not within the *average*. *Leg. Rhod.* If goods are caſt over board before half the voyage is performed, they are to be eſtimated at the price they coſt: but if they are ejected afterwards, then at the price the reſt are ſold at the port of arrival. *Leg. Oleron.* Where goods are given to pirates by way of compoſition to ſave the reſt, there ſhall be *averages*, by the civil law. *Moor* 297.—— *Average* is likewiſe a ſmall duty, paid to maſters of ſhips when goods are ſent in another man's ſhip, for their care of the goods, over and above the freight. *Paying ſo much freight for the ſaid goods, with primage and* average *accuſtomed.* Words in bills of lading. *Cowell, ed.* 1727.

Average of Corn Fields, The ſtubble or remainder of ſtraw and graſs left in corn fields after the harveſt is carried away. In *Kent* called the *gratten*, and in other parts the *roughings*, *&c. Cowell*, *ib.*

Averare, To carry goods in a waggon, or upon loaded horſes, a duty required of ſome cuſtomary tenants. *Spelman.*

Aver Corn, Is a reſerved rent in *corn*, paid by farmers and tenants to religious houſes: and ſignifies by *Somner* corn drawn to the lord's granary, by the working cattle of the tenant. 'Tis ſuppoſed that this cuſtom was owing to the Saxon *cyriac ſceat*, church ſeed, a meaſure of *corn*, brought to the prieſt annually on St. *Martin*'s day, as an oblation for the firſt-fruits of the earth: under which title the religious had corn rent paid yearly; as appears by an inquiſition of the eſtate of the abbey of *Glaſtonbury*, *anno dom.* 1201. *Cowell*, *ib.*

Averland, Seems to have been ſuch lands as the tenants did plough and manure *cum averiis ſuis*, for the proper uſe of a monaſtery, or the lords of the ſoil. *Mon. Angl.*

Aver Penny, (or *average peny)* Money paid towards the King's *averages* or carriages, or to be freed thereof.--- Aver penny *hoc eſt, quietum eſſe de diverſis denariis pro averagiis domini regis. Raſtal.*

Aver Silver, A cuſtom or rent formerly ſo called. *Cowell.*

Averia, Cattle: *Spelman* deduces the word from the Fr. *ouvrer*, to work, as if chiefly working cattle: though it ſeems to be more probably from *avoir*, to have or poſſeſs; the word ſometimes including all perſonal eſtate, as *Catalla* did all goods and chattels. This word is uſed for oxen or horſes of the plough; and in a general ſenſe any cattle.——*Homines per averia ſua, viz. equos & boves et affros graviter diſtrixit. W. Thorn. in Ed.* 2. 'Tis uſed in the ſame ſenſe in *W.* 2. *Ca.* 18. *Averia elongata*; ſee *Elongata. Cowell.*

Averiis Captis in Withernam, A writ for the taking of cattle to his uſe, who hath cattle unlawfully diſtrained by another, and driven out of the county where they were taken, ſo that they cannot be replevied by the ſheriff. *Reg. Orig.* 82. If the cattle are put into any ſtrong place in the ſame county, the ſheriff may take the *poſſe comitatus*, and break into it, to make the replevin. 1 *P. & M.* But when they are driven out of the county, he hath no authority to purſue them. *Cowell.*

Averland. *Item cellarius libere ſolebat capere omnia ſterquilinia ad ſuum opus in omni vico, niſi ante oſtia eorum qui habebant averland. Mon. Angl.* 302. It ſeems to have been ſuch land as the tenants did plough and manure, *cum averiis ſuis*, for the proper uſe of a monaſtery or lord of the ſoil. *Quod autem nunc vocatur averland, fuit terra ruſticorum, ib.* This land was ſubject to *averages*, or the lord's carriages. *Cowell, edit.* 1727.

Averium ponderis, full weight, or *aver de pois,*— *de quolibet panno ſine grano, et de qualibet libra de averio ponderis, tres denarios. Cart.* 3 *Ed.* 2.

Averment, *Verificatio*, (from the French *averrer*, that is, *verificare)* Is an offer of the defendant, to make good or juſtify an exception pleaded in abatement, or bar of the plaintiff's action: and it ſignifies the act as well as the offer of juſtifying the exception; and not only the form, but the matter thereof. *Co. Lit.* 362. *Cowell. Averment* is either general or particular; a general averment is the concluſion of every plea to the writ, or in bar of replications and other pleadings (for counts and avowries in nature of counts need not be averred) containing matter affirmative, with theſe words, *et hoc paratus eſt verificare, &c.* Particular averments are, as when the life of tenant for life, or tenant in tail are averred. *Co. Lit.* 362.

The uſe of an averment is to aſcertain that to the court which is generally or doubtfully alledged, that ſo the court may not be perplexed *of whom, or of what* it ought to be underſtood. *Heath's Max.* 42. cites *Co. Lit.* 352. *b.* The proper uſe of an averment conſiſts in this, *viz.* to add matter to the plea to make doubtful things clear, which otherwiſe ſhall be intended againſt the pleader. *Arg. Mo.* 376. *pl.* 506.

1. *Where averment is neceſſary, and what is a ſufficient averment.*
2. *Where averment is not neceſſary.*
3. *Averments as to deeds, records, the life of a perſon, and to ſupply defects in wills.*

1. *Where averment is neceſſary, and what is a ſufficient averment.*

Caſe, for that Queen *Elizabeth* was ſeiſed in fee of the manor of *S.* and granted to him 30 acres, parcel of the ſaid manor, by a copy of court-roll; and that ſhe granted four acres other parcel thereof, to the defendant; and alledged, that the *copyholders of the thirty acres, time out of mind, had common in the four acres for certain cattle from the 1ſt of Auguſt to All-Saints, and that the defendant on the 1ſt of May in ſuch a year incloſed the ſaid four acres with hedges and ditches, per quod he could not have his common.* After verdict for the plaintiff, it was moved that the plaintiff ſet forth that the incloſure was made on the 1ſt of *May*, but did *not aver that it continued till the 1ſt of Auguſt*, and ſo no cauſe of action appears; but it was ſaid, that if there is any thing which implies an averment, it is ſufficient; now here the *per quod he could not have common* is a ſufficient averment, that the incloſure continued till the 1ſt of *Auguſt* and after; for otherwiſe he could not loſe his common; beſides, the jury have found him guilty, which he could not be, unleſs the incloſure had continued. But *Dodderidge* J. ſaid, that the *per quod* is an inference out of the precedent declaration, and does not amount to an averment; but *Ley* Ch. J. held, that it amounted to an averment; but all the court agreed, that after verdict for the plaintiff, the judgment was not to be arreſted for the matter aforeſaid. 2 *Rol. Rep.* 379.

Error of judgment in *aſſumpſit*, in which the plaintiff declared, that *in conſideration he would renounce an adminiſtration at the requeſt of C. and permit the defendant to adminiſter, that the ſaid defendant would diſcharge the plaintiff of two bonds*, and *alledged that he did renounce* the adminiſtration, and ſuffer the defendant to adminiſter, but that the defendant had not diſcharged him of the two bonds. It was held by *Berkley* J. (the other judges being abſent) to be error, becauſe he did not *aver that he renounced* the adminiſtration *at the requeſt of C.* for perhaps he might be compell'd to renounce by a ſentence in the ſpiritual court, or of right the wife (as the defendant was) ought to adminiſter; *adjornatur. Mar.* 55. *pl.* 86.

In falſe impriſonment in *London*, the *defendant pleaded that* J. S. *ſued forth a* latitat *the laſt day of* Trin. *term, directed to the ſheriff of* R. *by virtue whereof the ſheriff* made his warrant to the defendant, who thereupon *took the plaintiff, which is the ſame impriſonment*, abſque hoc *that he is guilty in* London, *vel aliter vel alio modo*; the plaintiff replied, *that the writ was truly proſecuted to ſuch a day after the impriſonment:* Upon demurrer it was adjudged for the plaintiff, becauſe though the *teſte* of the writ is upon record, and the plaintiff cannot aver againſt it, yet great inconveniencies will be, if the plaintiff cannot ſet forth the very time of purchaſing the writ, and the relation of the *teſte* is only to prevent fraud, and not juſtify a *tort. Raym.* 161.

In replevin the defendant made cogniſance as bailiff to baron and feme, he being *ſeiſed in right of the feme for rent in aretro exiſten'*; the plaintiff demurr'd ſpecially; for that the *life of the wife was not averr'd.* But *Hale* Ch. J. held, that the rent in *aretro exiſten'* is *quaſi* an averment, and after verdict, or upon a general demurrer, had been good; and *Twiſden* and *Wild* held it good enough on a ſpecial demurrer, which *Hale* doubted, and judgment was for the avowant. 2 *Lev.* 88.

In *debt on judgment* the defendant *pleaded* in abatement, that a *writ of error* was ſued ſuch a day upon the judgment, which writ of error is *ſtill depending* undetermined, *&c.* the plaintiff replies, *that the original in debt was ſued before the writ of error was ſued, as appears by the teſte of the original.* The defendant rejoins, *that the original bore teſte ſuch a day, which was before the writ of error was ſued; but that in fact the original was not ſued out until ſuch a day*, which was *after the writ of error* was ſued; the plaintiff demurs, ſuppoſing that the defendant was eſtopped by the *teſte* of the original; and of that opinion was *Treby* Ch. J. but *Powell* J. was of the contrary opinion, and ſaid, that if a man is arreſted, and afterwards a writ is ſued with a *teſte* antedated, in falſe impriſonment, this may be avoided by pleading; *adjornatur. Lord Raym. Rep.* 212.

Debt was brought *upon a penal law, which by the ſtatute ought to be ſued within a year*; the defendant *pleaded the ſtatute, and that one year was elapſed before the ſuing the action, &c.* the plaintiff *replied, that he ſued an original* teſte *ſuch a day, which was within the year*; the defendant *rejoined, that tho' the writ bore* teſte *within the year, yet it was ſued after the year.* The plaintiff demurred; and adjudged by the whole court, that none ſhall be admitted to aver that an original was ſued at any time contrary to the *teſte*; *per Treby* Ch. J. cited as adjudged. *Ld. Raym. Rep.* 212.

A *neceſſary implication amounts to* an expreſs averment; *arg. Gib.* 123.

Indictment was *that the defendant knowing the will of J. S. to have been proved in the prerogative court, cited the executor before himſelf*, being chancellor of *D. to prove the will there, in order to extort money from the ſaid executor.* Lord Ch. J. *Parker* and the court, held, that it being laid that the defendant *knew it*, that knowledge muſt have been by a ſight of the probate of the will; cited by Mr. Juſtice *Lee. Gib.* 264, 265.

In an appeal of death of his brother brought againſt *G. D.* of *H.* in the county of *W.* as principal, and *R. H.* as acceſſary, whereas the name of the principal was *W. D.* the acceſſary pleaded, that there was no ſuch perſon *in rerum natura* as *G. D.* at the day of the writ brought, or after; adjudged, that if there was a man of that name in another county, yet if he was not of the ſame town mentioned in the writ, in ſuch caſe the appellee may aver in favour of life, that he is not the ſame perſon, and may traverſe the *return of the ſheriff. Dyer* 348.

The reverſioner in fee expectant of an *eſtate for life*, deviſed a rent to another, and died, and ſeveral years afterwards the *deviſee made his executor*, and died; the *executor* diſtrained for rent, but in his avowry he *did not aver*, that the lands remained in the ſeiſin of the tenant, who ought to pay it, or in ſome other perſon, who claimed under him by purchaſe or deſcent; neither did he aver, that the rent incurred *after the death of the tenant for life*, both which were adjudged good exceptions, upon a demurrer to the avowry, eſpecially the laſt; for if a reverſioner grants a rent-charge, it ſhall not begin till after the death of him who has the particular eſtate. *Cro. E.* 547.

Error of a judgment obtained in a court of *piepowder*, for that the plaintiff in his replication had not concluded with *hoc paratus eſt verificare*, nor demanded his debt and damages as he ought to have done; and for theſe cauſes it was reverſed. *Cro. Eliz.* 256.

Lands ſowed with woad were ſold, and the vendor promiſed, that if the vendee ſhould be prohibited by proclamation, or otherwiſe, to ſow woad, then he would return ſo much of the purchaſe-money; afterwards the vendee brought an action on the caſe againſt the vendor, and ſet forth this matter, and that proclamation was made, that no man ſhould ſow woad within four miles of *any market and clothing town*, and that his land was within four miles of a *market town*, but did not aver that it was a *clothing town* likewiſe; and upon demurrer it was adjudged, that he ought to have made ſuch an averment. *Goldſb.* 7.

Debt againſt huſband and wife, as executrix of *G. D. &c. of London, taylor*; the defendant pleaded in bar, a judgment

judgment which was obtained againſt her in the King's Bench, as executrix of *G. D. of London*, barber ſurgeon; and upon demurrer to this plea, it was objected againſt the defendant, that ſhe did not aver that *G. D. taylor, and G. D. ſurgeon, was one and the ſame perſon*, and tho' it was ſaid that the plea might be good to a common intent, for they ſhall be intended the ſame perſon; yet it was adjudged, that it ſhall not be ſo intended; for where a thing is indifferent, there a common intent may prevail, but not where 'tis more ſtrong on the one ſide than the other; and here 'tis ſo ſtrong, that a taylor and ſurgeon being different occupations, they can never be intended the ſame perſon. *Goldſ.* 111.

By the opinion of *Anderſon* Ch. Juſt. where the teſtator intended to deviſe lands *to the heirs of G. D.* and the writer by *miſtake* wrote *to G. D. and his heirs*, this may be helped by an averment, becauſe what the teſtator intended is written, *and more*, therefore the deviſe ſhall be good *to the heirs of G. D.* but he himſelf ſhall take nothing by the will; but if the deviſe had been intended *to G. D. and his heirs*, and by miſtake it had been written *to the heirs of G. D.* there an averment ſhall not help; becauſe 'tis not the will of the teſtator in writing, and then 'tis to increaſe that which is defective in the will, and in ſuch caſe averments are never allowed, tho' they are uſually allowed to take away any ſurpluſage. *Godb.* 131.

Where the plaintiff libels in the ſpiritual court out of the proper dioceſe, for a legacy, if it doth not appear in the libel itſelf, that the ſuit is out of the proper dioceſe, the defendant may aver that it was ſo; in like manner where a ſuit is in the court of admiralty for a thing done upon the land, the defendant may aver, that it was done *infra corpus comitatus*. *Godb.* 214.

The father having two ſons, both of one name, levied a fine of lands to the uſe of *W.* his ſon and his heirs; in this caſe the judges cannot take notice to which of his ſons the land doth belong; but if the party averreth, that the conniſor had two ſons named *W.* the elder, and *W.* the younger, and that his intent was to levy the fine to *W.* the younger, this averment is good, it being of matter of fact not apparent in the fine, but out of it, and therefore it ſhall be tried by a jury: but if a man, by deed executed under his hand and ſeal, giveth goods to one of the ſons of *G. D.* who hath ſeveral ſons at that time, there an averment ſhall not be allowed which ſon he meant; becauſe, the deed itſelf being void for incertainty, it cannot be made good by an averment. 5 *Rep.* 155.

Debt upon this bill, viz. *Memorandum, that I* W. R. *do bind myſelf to* M. M. *to pay him all ſuch monies as my brother oweth him.* In witneſs, *&c.* and afterwards it was thus written, *the brother oweth* M. M. 40*l.* and it being ſo averred in the declaration, the plaintiff had judgment; for tho' the ſum was uncertain in the body of the bill, yet by the averment the debt is made certain. *Cro. El.* 563, 758.

In an action on the caſe for theſe words, viz. *Thy ſon hath robbed me*, the plaintiff cannot maintain the action, without averring, that the defendant had no more ſons; but if the words had been ſpoken to the *ſon* inſtead of the *father* or *to the wife*, viz. *Thy father hath robbed me*, there needs no averment, becauſe a ſon can have but one father, and a huſband but one wife. 2 *Cro.* 443.

Caſe, &c. wherein the plaintiff declared upon a promiſe made by the defendant to pay to the plaintiff 84*l. out of the money due for the freight of a ſhip:* upon *non aſſumpſit* pleaded, the plaintiff had a verdict; it was moved in arreſt of judgment, that the declaration was ill, becauſe the plaintiff had not averred, that *there was money due for the freight of the ſhip*; adjudged, that this was parcel of the promiſe, and that it ought to have been averred; and likewiſe the plaintiff ought to have laid a demand made of the money. *Style* 220.

In debt for 15*l.* 8*s.* 8*d.* the plaintiff declared on *a deed*, reciting, that ſeveral ſuits were likely to ariſe between the *vicar of Shettlehampton* and the plaintiff, concerning a *modus* in the ſaid pariſh, and that the vicar had already ſued the plaintiff in the ſpiritual court concerning the ſame, which *modus* likewiſe concerned all the pariſhioners, and that the defendant, being a pariſhioner, agreed to pay to the plaintiff and bear his *proportionable part of all the charges of the ſuit*, and all other ſuits by the vicar touching that matter; then he ſets forth, that between ſuch a time, *&c.* he had expended 350*l.* in defence of ſuits by the vicar concerning that *modus*, and that the defendant had lands in the pariſh of the yearly value of 53*l.* and averred, that his ſhare of the ſaid charge amounted to 15*l.* 8*s.* 8*d.* of which he had notice, *&c. licet ſæpius requiſit', &c.* had not paid it, *&c.* The defendant pleaded *non eſt factum*, and the plaintiff had a verdict; it was objected, that an *action of debt* would not lie on this agreement, but *covenant*, becauſe the ſum to be paid was uncertain; but the plaintiff had judgment; for tho' a ſum at firſt is uncertain, yet when 'tis reduced to a certainty by an averment, an action of debt will lie for it, as well as covenant. 3 *Lev.* 429.

2. *Where averment is not neceſſary.*

In an action upon the ſtatute 32 *H.* 8. againſt buying pretended titles, if the plaintiff declares, that the defendant, or any of his anceſtors, or any other perſon under whom he claims, were not in poſſeſſion of the land, nor received the rents, *&c.* by the ſpace of a year, *&c.* he need not aver, that the title is pretended, becauſe the ſtatute makes it ſo; and therefore 'tis impertinent to aver a thing which clearly appears both by the ſtatute and the declaration. *Plow. Com.* 87.

In replevin, the defendant made conuſance, as bailiff to *Thomas Lord Howard*, and ſet forth, that the prioreſs of the late diſſolved priory of *Holliwell*, by deed, bearing date 4 *Novem.* 29 *H.* 8. and then enrolled, granted the manor of *P.* of which ſhe was ſeiſed, *&c.* to *G. D.* and his heirs, who entred, and ſo derives a title to the defendant under that grant; the plaintiff in bar to the avowry ſhewed, that after the making and inrolling the ſaid deed, the ſaid prioreſs leaſed the ſaid lands to *R. H.* for 99 years, and ſo conveyed a title to himſelf under the leaſe, and *averred*, that the deed mentioned by the defendant, was *primo deliberat' on the fourth of Novemb.* 31 *H.* 8. and traverſed, that the prioreſs granted it to *G. D.* on the *4th of Novemb.* 29 *H.* 8. and upon demurrer, it was adjudged, that ſuch an averment could not be made againſt a deed inrolled. 2 *Leon.* 121.

Ejectment, *&c.* of a rectory; it was objected againſt the declaration, it was inſufficient, becauſe the plaintiff had not *averred*, that the parſon was *living*, only by implication; but becauſe it was, *quod præd'* W. R. *rector eccleſiæ præd' fuit & adhuc eſt ſeiſitus de & in rectoria præd' in dominico ſuo ut de feodo in jure eccleſiæ*, the declaration was adjudged good. *Dyer* 304.

Where a man is to take a benefit by an *act of parliament*, there in pleading he muſt *aver, that he is not a perſon excepted*; but where he claims no benefit by it, but only to keep that which he had before, in ſuch caſe 'tis not neceſſary to make ſuch averment. *Plow. Com.* 488.

Aſſumpſit, &c. wherein the plaintiff declared, that in conſideration he had paid to the defendant 40*l.* for the debt of *G. D.* the defendant promiſed to deliver him all the bonds, *&c.* wherein *G. D.* ſtood bound to the defendant: Upon *non aſſumpſit* pleaded, the plaintiff had judgment; but it was inſiſted for the defendant in arreſt of judgment, that the plaintiff ſhould have averred, that the defendant had bonds in which *G. D.* was bound to him; but adjudged, that he need not make any ſuch averment; becauſe he is not to recover the bonds, but damages for detaining them. *Cro. El.* 133.

Falſe impriſonment in London, the defendant pleaded a judgment had againſt the plaintiff in the court at *Sandwich in Kent*, and that by virtue of *ca. ſa.* he impriſoned the plaintiff at *Sandwich*, and traverſed, that there was any ſuch record, *&c. et hoc paratus eſt verificare per recordum:* Now it is abſurd to offer a proof by record, when he alledged that there was no record; but yet the replication might be good without any ſuch averment, it being in the *negative*, which needs no averment; for if upon traverſe of the record the plaintiff had concluded to the country, viz. *ex hoc petit quod inquiratur per patriam*,

triam, then the defendant might have rejoined *quod habetur tale recordum, & hoc paratus eſt verificare per recordum, &c.* *Cro. El.* 418.

Error of a judgment in replevin, wherein the avowant ſet forth, that the tenant in tail made a leaſe of the lands for three lives, *rendring rent*, and that the reverſion deſcended to him as heir in tail, and the rent being in arrear he diſtrained, *&c.* and avowed the taking, *&c.* and averred, that at the time of the demiſe the lands had been formerly demiſed, and that the rent reſerved was *verus & antiquus redditus:* Upon demurrer to this avowry, it was adjudged, that the averment, that the lands were formerly demiſed, was not ſufficient, for he ought to have averred, that they had been lett for eleven years next before the leaſe made; becauſe the ſtatute 32 *H.* 8. limits the leaſes to be made by tenant in tail, that they ſhould be made only of ſuch lands which had been commonly lett by the *greater part of twenty years next before the leaſe made*; alſo the averment, that the rent was *verus & antiquus redditus*, is not ſufficient, for it may be ſo, yet the circumſtances of the ſtatute may not be obſerved; for that requires, that the uſual rent, or more, muſt be reſerved, which hath been paid for the greater part of twenty years preceding: Now the rent which hath been paid for ſeven years may be *verus & antiquus redditus*; but that is not the rent intended by the ſtatute, for the reaſon before mentioned. *Cro. El.* 707.

In a *præcipe quod reddat*, the ſheriff returned, the defendant ſummoned at the church-door, purſuant to the ſtatute 31 *Eliz.* when in truth he was not ſummoned; and he not appearing, a *grand cape* was awarded againſt him, and judgment given by default; upon which he brought a writ of error, and aſſigned for error, and averred, that he was never ſummoned; but the court would not allow this averment; for ſince the ſheriff returned him ſummoned, there could be no error in awarding the *grand cape* upon the ſummons, and the default recorded; but if in truth he was not ſummoned, he may either have an action againſt the ſheriff for his falſe return, or a writ of *diſceit*. *Cro. El.* 371, 397.

Aſſumpſit, &c. brought againſt an *adminiſtrator* in an inferior court; the plaintiff had a verdict; and it was objected againſt him, that he did not aver that the defendant had *aſſets* after the debts paid: adjudged, that he need not make any ſuch averment, for that ought to come on the other ſide. *Plowd. Com. Woodward*'s caſe.

Leaſe for years of ſeveral meſſuages *dated in November, and to commence at Michaelmas next* following, in which the leſſee covenanted to repair all the ſaid meſſuages, *except ſuch which the leſſor ſhould appoint to be pulled down during the term*; in an action of debt on a bond, brought by the leſſor againſt the defendant, for non-performance of covenants, he pleaded performance, *&c.* the plaintiff replied, and ſhewed the breach in not repairing one meſſuage, parcel of the demiſed premiſſes, and *averred, that the ſaid meſſuage was not appointed to be pulled down during the term*; and upon this they were at iſſue, *viz.* whether the defendant had repaired it or not; and it being found for the plaintiff, it was moved in arreſt of judgment, that the *averment* was inſufficient; for the leaſe being *dated in November*, and the term being to commence not before *Michaelmas following*, the houſe might be appointed to be pulled down before the commencement of the term, and if ſo, the defendant is not bound to repair it; therefore this averment doth not come up to the exception; but adjudged, that this averment was ſuperfluous, for it had been ſufficient to aſſign the breach in not repairing, *&c.* without averring, that it was not appointed to be pulled down; for if *A.* had been ſo appointed, it ought to be ſhewed on the defendant's part, becauſe it tends to his advantage; for if any ſuch appointment had been made, it would diſcharge him of his covenant, as to that houſe appointed to be pulled down. 1 *Leon.* 17.

A man purchaſed lands with his proper money, which were held *in capite*, and it was to himſelf and an infant, and *to their heirs*; adjudged, that this purchaſe could not be averred to be by *colluſion* to take away wardſhip, which might accrue after his death, becauſe he was never ſole tenant, and no feoffment that he can make, can be averred to be by colluſion, if he make none; yet no benefit can accrue to the King by his death: adjudged likewiſe, that where the father makes a feoffment, for the advancement of his wife and children, or for payment of his debts, it cannot be averred to be a *covin*, ſo as to give the King cauſe to ſeiſe the land; adjudged likewiſe, that where the King's tenant conveys his lands, either for life, for years, or in tail to his children, or where a ſtranger is joined to the heir in tail, or where a remainder is limited in fee, or where an eſtate is declared by *will*; that in all ſuch caſes *covin* may be averred for the King, but only for *a third part*; becauſe the teſtator is enabled by the ſtatutes 32 & 34 *H.* 8. to convey two parts at his pleaſure. 8 *Rep.* 164.

There was a grant of an office for life, with an authority to nominate under-officers, and by the ſame deed an annuity was granted to him who had the office fyr the ſupport of the under-officers; the grantor died, and becauſe his ſon did not pay the annuity, a writ of annuity was brought againſt him, in which the plaintiff declared upon this grant; and upon a demurrer to the declaration, the plaintiff had jugment, whereupon the defendant brought a writ of error, and aſſigned for error, that the plaintiff had not averred in his declaration, that he had exerciſed this office; adjudged, that in all caſes, where an intereſt or eſtate doth commence upon a *condition precedent*, which is to be performed by the plaintiff, or any other, there the performance muſt be averred, becauſe he hath no intereſt 'till ſuch condition is performed; but when the intereſt paſſes immediately, as in this caſe it did, to the grantee of the office, which intereſt may be defeated by matter done afterwards; therefore the plaintiff may declare generally, without averring any performance; but the defendant, who is to take advantage of the non-performance, ought to ſhew it; but if the matter by which ſuch intereſt may be defeated, appears to the court to be matter of law, and that the action cannot be ſupported without averring the performance of the conſideration or condition, there the plaintiff muſt aver the performance. 7 *Rep.* 10.

Tenant in fee, in conſideration of natural love and affection, covenanted to ſtand ſeiſed, *&c.* of lands to the uſe of himſelf for life, and after his deceaſe to the uſe of his *wife for life*, and afterwards to other uſes, *&c.* The queſtion was, if any uſe did ariſe to the wife; adjudged, that a *conſideration may be averred* if it ſtands, and is not repugnant to the deed itſelf; but admitting a conſideration, other than that which is expreſſed in the deed, cannot be averred, yet there is an expreſs conſideration in itſelf; for when he limits the lands to the uſe of his *wife for her life*, that implies a ſufficient conſideration in itſelf, and needs not any averment; ſo where the father, who was tenant by knight-ſervice, made a feoffment to an infant, who was then his ſon and heir apparent, it need not be averred, that it was by colluſion, becauſe 'tis apparent that it was ſo. 7 *Rep.* 40.

3. *Averment as to deeds, records, the life of a perſon, and to ſupply defects in wills.*

One cannot avoid a ſtatute-merchant, obligation, releaſe, *&c.* againſt the party himſelf named in it, by averring a delivery *thereof upon condition*, unleſs he ſhews a writing of the condition. *Br. Faits, pl.* 10.

But 'tis otherwiſe *in detinue* againſt a ſtranger, where the thing is bailed into an indifferent hand; *nota* the diverſity; for there it is averrable, contrary againſt the party himſelf. *Br. Faits, pl.* 10.

A. has two ſons named *W.* and levies *a fine to W.* averment that this was to *W. the younger ſon*, is good; but in gift of goods to one of the ſons of *J. S.* no averment can be. 8 *Rep.* 155.

Againſt a *conſideration* alledged in a deed, or an *uſe declared*, no averment to the contrary can be received; ſo of *indentures upon fines* and recoveries, where the fines and recoveries purſue them, cites 1 *El. Dy.* 169. *Altham*'s caſe, 8 *Co.* 148. Counteſs of *Rutland*'s caſe, 5 *Co.* 25, 26.

Nihil eſt tam naturale quam quidlibet diſſolvi eo modo quo ligatur. Contract by contract, deed by deed, record by record, parliament by parliament. *Jenk.* 166. *pl.* 20.

No *averment debtors* can make that good which is *apparent, on conſideration of the deed, to be void, as feoffment to A. and his heirs*; no averment can be that it was the intention of the parties, that the feoffee ſhould not have eſtate but to him, and the *heirs of his body.* 8 *Rep.* 155.

Buying of debts is maintenance at Common law, and puniſhable by indictment or information; but it is not pleadable in bar of an obligation; for the condition of the obligation was to pay a ſum of money not for debts bought, and this *buying is collateral* to the condition. So a *bond* for payment of a ſum of money upon condition, *in the caſe of ſimony*, the ſimony may be pleaded againſt ſuch bond by virtue of the 31 *Eliz. cap.* 1. *So* for *uſury*, 13 *Eliz. cap.* 8. *So* againſt a *bond* given *to the ſheriff or gaoler*, contrary to the ſtatute of 23 *H.* 6. *cap.* 10. Theſe ſtatutes give averment in ſuch caſes, but there is no ſtatute which gives ſuch averment in the caſe of maintenance. *Jenk.* 108.

It was agreed, that if a caſe be within the *ſtatute of gaming*, the defendant may aver againſt his own deed. *Comb.* 328.

Two manors were known by the name of *W.* and ſometimes diſtinguiſhed with an *alias*; an *annuity* of 200 *l. per ann.* is *granted* out of the manor of *W.* one of them is but 80 *l. per ann.* and the other of more than the annuity. It is a good averment in law, that the greater manor ſhould be liable to the rent-charge. *Chan. Rep.* 138.

If one has *two manors known by the name of W.* and *levies a fine* of his manor of *W.* he ſhall by averment *aſcertain* which of them it was; *per cur'*. 6 *Mod.* 235.

Stat. 4 & 5 *Ann. cap.* 16. *In debt on ſingle bill, debt, or* ſcire facias *upon a judgment, the defendant may plead payment in bar; in debt upon bond, if the defendant before action brought hath paid the principal and intereſt, due by the defeaſance or condition, he may plead payment in bar.*

Bill to have the benefit of a marriage-ſettlement, and covenants therein contained, *&c.* The caſe was; *Rooke upon his firſt marriage ſettled lands upon himſelf for life*, remainder *to his wife for life for her jointure*, remainder *to the firſt and other ſons in tail male*, remainder *to the heirs female of the body of the wife, and the heirs of the bodies of ſuch heirs female*, remainder *to the right heirs of the huſband, with a covenant* that he was ſeiſed in fee, and had good right to make ſuch ſettlement, and *that the perſons ſhould enjoy* according to the limitation in the ſettlement, *&c.* The wife *dies without a ſon, leaving only one daughter*, who is the plaintiff. *Rooke after the death of his wife*, being ſeiſed of a remainder in tail, *viz.* to the heirs female of his body, *levies a fine, and ſuffers a recovery*, to bar the iſſue female, *&c.* *Harcourt* C. ſaid that here are no articles precedent to the ſettlement, and he cannot admit parol evidence of inſtructions to controll the deeds; for that would introduce ſtrange incertainty in deeds; that there is no relief in equity in this caſe upon the general covenant, to enjoy according to the limitation in the ſettlement, tho' tenant in tail doth levy a fine and ſuffer a recovery to bar the iſſue female and the remainder. Bill diſmiſs'd with coſts. Per *Harcourt. Chan. M. S. Rep.* cited in 3 *Vin.* 366.

A man *makes a leaſe for years the* 10*th of May*, and then the *leſſor bargains and ſells this to another by deed inrolled, bearing date the* 10*th of April*, and it was *entered to be conveyed the* 10*th of April before, but in truth* it was *delivered, and acknowledged, and inrolled afterwards*; and it was held, that the leſſee was without remedy at the Common law, for he cannot plead that it was acknowledged or delivered after the date of the day of acknowledging; and ſo was the opinion of *Rhodes*; *Periam*, *Windham*, and *Anderſon* being abſent; for he cannot aver that it was inrolled or acknowledged at another day than it is recorded, becauſe it is contrary to the record, for it is entered, that it was acknowledged the 10th of *April*, and then if ſuch a plea ſhould be admitted, it would ſhake moſt of the aſſurances in *England.* *Ow.* 138.

Upon the ſtatute of 13 *Eliz. againſt uſury*, and 27 *Eliz. againſt frauds, altho' fines be levied*; yet where there is uſury, or fraud, or covin, they may be averred ſo to be againſt any act whatſoever. *Jenk.* 254.

Where *D.* has *appeared as* an *attorney for A.* in an action brought by *A.* againſt *B. it cannot be aſſigned* for error, *that D. was not* an *attorney*, or that there *is no ſuch perſon in rerum natura*; for it is againſt the record; and the admittance of him for an attorney by the court makes him an attorney, if he was not an attorney before this admittance; in a writ of error brought in this ſuit, and error aſſigned *ut ſupra*, the defendant in the writ of error in this caſe pleads *in nullo eſt erratum:* this does not confeſs that he was not an attorney; but this plea *eſt quaſi* a demurrer, that this is not an error at all; adjudged and affirmed in error. *Jenk.* 232.

In *ſcire facias* againſt *C.* to repeal a ſpecial livery granted to him upon his coming of age. Upon demurrer, the queſtion was, whether the attorney general could aver *againſt an inquiſition returned into the petit bag, tho' not taken before the eſcheator*, but put in by another; and it was reſolved that he could not; for this cannot be tried by a jury, but upon an examination in court, and there to be redreſſed. *Jo.* 389.

Where a *ſtatute* is recited, there one may not aver that there is no ſuch record; for generally an averment, as this is, doth not lie againſt a record; for a record is a thing of ſolemn and high nature, but an averment is but the allegation of the party, (21 *Car. B. R.*) and not ſo much credit in law to be given to it. *Lil. P. R.* 155.

If a *juſtice of peace records a force on view*, you ſhall not aver againſt it. 12 *Mod.* 44.

Matter of record ſhall not be avoided *by a collateral averment*; held *per cur'*. *Skin.* 407.

Whether the *bail* ſhall be admitted to aver againſt the record in the original action, *viz.* that defendant was not *in cuſtodia Mar. in Hill. term, anno* 7 *W.* 3. as the declaration ſet forth; now if he was not in cuſtody in that term, as defendants in their plea averr'd, then this bail cannot be taken to be in the ſame action; the court inclin'd againſt the plea; but the *ſcire facias* was quaſh'd for other matter, and ſo the point in law was not determined. *Carth.* 403.

Averment lies not againſt the *proceedings of a court of record.* 2 *Hawk. P. C. c.* 1. *ſect.* 14.

Maſter in Chancery certified that writings were not delivered in, but the clerk in court offered to prove that they were delivered in; but the court would not ſuffer an averment againſt the maſter's certificate. 3 *Vin.* 368.

He that *claims eſtate from tenant for life, or in tail, or from parſon of a church*, ought to aver his life. *Br. Eſtate, pl.* 18.

In a *quare impedit* the plaintiff declared, that *W.* was ſeiſed of the advowſon in groſs, and granted it to the plaintiff and others, *to the uſe of the grantor for life, and afterwards to the uſe of* R. *his ſon in tail*; *proviſo, that if the grantor died*, R. *being within the age of* 23 *years*, that then *the grantees and their heirs ſhould be ſeiſed to themſelves and their heirs, until* R. *ſhould arrive to that age.* The grantor died, *R.* being then 14 years old, and no more, ſo that the grantees were poſſeſs'd of the ſaid advowſon, *&c.* and afterward the church became void, and ſo it belong'd to them to preſent. Exception was taken againſt this declaration, becauſe the plaintiff had *not averr'd the life of* R. *upon whoſe life his intereſt did depend*; but it was anſwer'd, *per Pickering* ſerj. that the declaration is good enough; for tho' the life of *R.* is not expreſsly averr'd, yet an averment is ſtrongly implied, for the plaintiff ſets forth that the father died, his ſon being of the age of 14 years and no more, by force whereof he was poſſeſſed of the advowſon, and being ſo poſſeſſed the church became void; now he could not have been ſo poſſeſſed, if *R.* had not been then alive, and that is as ſtrong as an averment. And the court diſallowed the exception; for ſeiſin ſhall be intended to continue till the contrary appears. 2 *Leo.* 50.

In *dower* or *appeal*, the life of the husband, or of the party killed, may be averred *in any place*; *per tot cur'*. *Bulst.* 43.

Jointenants in fee of a manor intermarried, and afterwards levied a fine thereof to *G. D.* who rendered back again to them in general tail; they had issue three daughters, then the husband died, and the widow married a second husband, and he and his wife levied another fine, and took back the manor in special tail; then the second husband made a lease for years of the manor, and the lessee distrained a copyholder for rent, who brought a replevin, and the defendant avowed the taking, *&c.* but did not *aver the life of the lessor*, and for that reason the avowry was adjudged void. *Cro. Eliz.* 524.

The testator devised all his lands to *T. S.* but his (the testator's) name was not mentioned in any part of his will, yet adjudged, that by an averment of his name, and proof that it was his will, it was good. 2 *Leon.* 85.

The testator had issue *two sons and one daughter then living*, and he devised his lands to his youngest son, and the heirs of his body, remainder to the *heirs of the body of the eldest* son, remainder in fee to the daughter, afterwards the youugest son died without issue, leaving both his father and elder brother, then the elder brother died, leaving issue; adjudged, that the issue of the elder brother cannot take by this devise, because he himself could not take by the name of *heir* in the life-time of his father, who being now dead, the eldest son produced witnesses on oath, to prove that his father had declared his meaning concerning his will, *viz. that as long as his eldest son had any children, his daughter should not have the land*; but there being nothing like it to be collected out of the words of the will, this proof was rejected. 2 *Leon.* 70.

So where Sir *Thomas Cheney* devised several lands to his sons *Henry* and *John* in tail, upon condition *that he*, or they, or any of them, shall not *alien*, remainder to the next heir male of Sir *Thomas*, the testator in tail male; afterwards, *Henry*, his eldest son, suffered a common recovery to the use of himself and his heirs, and then sold the lands; adjudged, that no proof or any collateral averment shall be allowed, which cannot be collected out of the words of the will, whether the testator intended to restrain *Henry*, and the heirs of his body, as well as *John*, and the heirs of his body, not to alien. 5 *Rep.* 68.

The husband devised lands to his wife *for life* generally; adjudged, this cannot be averred to be for her jointure, and in bar of her dower, because a devise imports a consideration in itself, and an averment shall not be allowed where the intention of the testator cannot be collected out of the words of the will. 4 *Rep.* 44.

The testator had a son and a grandson both named *Robert*, and *anno* 29 *Car.* 2. he devised his lands to his *son Robert and his heirs*, and a legacy to his *grandson Robert*; afterwards *Robert* the son died in the life-time of his father, who then republished his will, and declared his intention to be, that *Robert*, *his grandson*, should take by his will, instead of *Robert* his son; adjudged by three judges, that a new publication is equivalent to a new writing the will, and though the *grandson* is not within the words of the *written will*, yet he may be averred to be a *son*, for so he is with a distinction by the adjective *grand*; but this judgment was reversed in *B. R.* because no parol averment shall carry the lands to one, when by the words of the will they *are* devised to another; 'tis true, a new *publication* may be equivalent to a new writing the will, but that must be where the words in the written will are apt and proper, and do not disagree with the words in the new publication, which they do in this case, for the *word son* in the written will can never be construed to be *grandson* in the new publication, because they are names of different appellation. 1 *Mod.* 267.

Where the husband devised lands to his wife for her *provision and maintenance*, this may be averred to be for her *jointure*, though that word is not in the will, because 'tis consistent with the other words in it; but where a widow brought a writ of dower, and the tenant pleaded, that her late husband made a will, and devised the lands to her during her widowhood, and averred this was in recompense of her dower; this averment was rejected, because there was nothing to be collected out of the words of the will to that purpose. 1 *Lut.* 374.

Averrare. See *Averare.*

Augea, A cistern for water.——*Episcopus B. concedit civibus W. unum caput pro conductu aquatico cum augeis suspiralibus, et cæteris machinis, sub et super terraneis. A. D.* 1451. *Reg. eccl. Well. M. S. Cowell.*

Augmentation, *(Augmentatio)* The name of a court erected 27 *Hen.* 8. for determining suits and controversies relating to monasteries and abbey lands. The intent of this court was, that the King might be justly dealt with touching the profits of such religious houses as were given to him by act of parliament. It took its name from the *augmentation* of the revenues of the crown, by the suppression of religious houses: and the office of *augmentation*, which hath many curious records, remains to this day, though the court hath been long since dissolved. *Cowell. Termes de la ley.*

Augusta, *London. Cowell.*

Avisage, See *Avage.*

Avirunatus, Is mentioned in the *Monasticon, tom.* 1. *p.* 850. and it signifies *an oar, viz. debet homo super pedes suos quo profundeas poterit intrare, et dum ultra ire nequiverit, avirunatum unum octo pedibus longum introrsus de diverso lanceando propellere, et a loco quo avirunatus ille transnatare desierit spatio* 40 *pedum per chordam debet mensurari, ibique signum in aquam infigi. Cowell.*

Avisamentum, Advice, counsel.——*De avisamento et consensu consilii nostri concessimus,* was the common form of our king's grants.

Avis Sancti Martini, *i. e. Cornix,* a *crow*, or *rook*; so called, because this bird appears about the feast of St. *Martin: Si a sinistra in dextram avis Sancti Martini volaverit, &c.* Pet. Blesensis, Epist. 65.

Aula, A court-Baron. Aula *ibidem tenta* 4 *die Augusti. &c.* Aula *ecclesiæ* is that which we now call *navis ecclesiæ: in medio* aulæ *majoris ecclesiæ decenter sepultus est.* Eadem, lib. 6. p. 141.

Aulneger. See *Alneger.*

Aumone, (*Fr. aumône*, that is *alms*) Tenure in *aumone*, is a tenure *per liberam Eleemosynam. Brit.* 164. As where lands are given to some church, or religious house, upon condition that some service or prayers shall be offered at certain times, for the good of the donor's soul. *Cowell.* See *Frank-Almoine.*

Aumonier, *French Aumônier.* See *Almoner.*

Auncell-weight, *(quasi hand sale weight*, or from *ansa*, the handle of the balance) An ancient manner of *weighing*, by the hanging of scales or hooks at each end of a beam or staff, which, by lifting up in the middle with one's finger or hand, discovered the equality or difference between the *weight* at one end, and the thing *weighed* at the other. This method of *weighing* being subject to great deceit, was prohibited by several statutes, and the even balance commanded in its stead, as 25 *Ed.* 3. *st.* 5. *c.* 9. 34 *Ed.* 3. *c.* 5. 8 *Hen.* 6. *c.* 4. and 22 *Car.* 2. *c.* 8. But notwithstanding it is still used in some parts of *England:* and what we now call the *stilliards*, a sort of hand-weighing among butchers, being a small beam, with a *weight* at one end (which shews the pounds by certain notches) seems to be near the same with the *auncell-weight. Cowell. Jacob.*

Auncient demeasne, See *Ancient demesne.*

Aunciatus, that is, Antiquated. *Sicut charta eorum auntiata est, et libertas anterior. Brompt. lib.* 2. *c.* 24. *par.* 6.

Avoidance, as opposed to plenarty, is where there is a want of a lawful incumbent on a benefice, during which vacancy the church is *quasi viduata*, and the possessions belonging to it are in *abeyance. God. Intro.* 42.

1. *What acts make an avoidance.*
2. *In what cases the patron must have notice of the avoidance.*

1. *What acts make an avoidance.*

Avoidance happeneth several ways: First, the most usual and known means, by which any spiritual promotion doth become void, is by the *act of God, viz.* by the death of the incumbent thereof. And such avoidance doth commence from the day of the death of such incumbent. And the patron is obliged to take notice of it at his peril, and not to expect an intimation from the ordinary. *Watſ. c.* 1. Secondly, by resignation; which is the *act of the incumbent.* And this being necessarily made into the hands of the ordinary, and not valid but as admitted by him; the voidance consequent upon it is to be notified by the ordinary to the patron. *Gib.* 792. Thirdly,——by cession, or the acceptance of a benefice incompatible; which also is the act of the *incumbent.* In which case, the benefice, if of the yearly value of 8 *l.* or above, is void by act of parliament, and no notice is needful; if under 8 *l.* a year, it is void by the common law, and the patron may either present his clerk immediately, and require admission, or may sue in the court christian for sentence of deprivation, and wait for the notice to be given thereupon; or the ordinary himself may *ex mero officio* proceed to deprivation, and then give notice. In like manner, when a parson possessed of ecclesiastical benefices of any kind is promoted to a bishoprick, and there is no dispensation to hold them in commendam with the bishoprick; in such case, upon the consecration of the bishop, they become void, and *the right of presentation belongs to the crown. Gibſ.* 792. *Watſ. c.* 22. But by law in *Ireland*, no person can take any dignity or benefice there, till he has resigned all his preferments in *England;* by which resignation the king is prevented of the presentation. Which is said to have been agreed in the case of the bishops of *Durham* and *Salisbury*, upon the promotion of Dr. *Rundle* to the bishoprick of *Derry* in the year 1735. Fourthly, by deprivation; which is the *act of the ordinary*: which voidance being created by sentence in the ecclesiastical court, must be notified to the patron; but takes not place presently, if an appeal is depending. Fifthly, By *act of the law*; as in case of simony; not subscribing the articles or declaration; or not reading of the articles, or the Common Prayer. All which being voidances by act of parliament, are to be understood (with regard to the times of the commencement of such voidances, aud the notice of them) according to the directions and limitations of the respective acts. *Gibſ.* 792.

By the Stat. 25 *Ed.* 3. *ſt.* 3. *cap.* 8. "Whereas the prelates have shewed and prayed remedy, for that the secular justices do accroch to them cognisance of voidance of benefices of right, which cognisance, and the discussing thereof, pertaineth to the judges of holy church, and not to the lay judge; the king will and granteth, that the said justices shall from henceforth receive such challenges made, or to be made, by any prelate of holy church in this behalf, and moreover thereof shall do right and reason."

And the distinction which hath obtained is this: If it come in question, whether the church be full of an incumbent or not, the same shall be tried by the certificate of the bishop, who best knows of the institution; but if the issue to be tried be, whether the church be void or not, the same shall be tried by a jury at the common law, unless the issue to be tried be upon some special act of avoidance, for then the same shall be tried by the certificate of the bishop, so as the special cause of the avoidance be spiritual. *Gib.* 793. *Hughes, c.* 13. 1 *Burn E. L.* 78.

If a clerk is *instituted* to a benefice of the yearly value of 8 *l.* and before induction accepts another benefice with cure, and is instituted, the first benefice is void by the statute 21 *H.* 8. for he who is *instituted* only, is properly said to have accepted a benefice within the words of the act. 4 *Rep.* 78.

The patron granted the *next avoidance to two jointly* and severally; adjudged, that this grant is not good, because an interest cannot be divided; so where there was a grant of the next avoidance to three, *habendum* to them and to each of them jointly and severally, the first presented the third, and adjudged good; but if the *bishop* had refused to admit the presentee, he might have failed in a *quare impedit*, because the severance in the *habendum* is void in law; but 'tis otherwise in case of an *authority*, for that may be divided. *Goldſ.* 142.

But if he is *inducted* into a second benefice, the first is void *in facto et jure*, and not voidable only, *quoad* the patron, and until he presents another; and in such case the patron ought to take notice of the avoidance at his peril, and present within the six months. *Cro. Car.* 258.

Deprivation by a declaratory sentence in the ecclesiastical court is an avoidance of a benefice, and by the common law there are several causes of *deprivation*, as *conſcientia criminis, debilitas corporis, defectus ſcientiæ, malitia plebis, grave ſcandalum, irregularitas perſonæ. Dodderidge's Parſon's Law.*

In a special verdict in ejectment the case was, One *Higden* was incumbent of *Wringleton*, in the county of *Somerſet*, being a benefice of cure &c. and *accepted the rectory of Elme* in the said county, being a benefice with cure, &c. and was inducted, &c. and thereupon the patron of *Wringleton*, within two months, presented the plaintiff to that church; *Higden*, upon his acceptance of *Elme*, did *ſubſcribe to the thirty-nine articles*, according to the statute of *Eliz.* but did not *read them in the church within two months* after his induction, pursuant to the statute; the question was, whether his not reading the articles, as aforesaid, had excluded him not only from *Elme*, but from *Wringleton*, for it was insisted, that if he was *ipſo facto* deprived of *Elme*, *by not reading the articles*, then his induction into *Elme* was void, and as if it had never been, and by consequence he never accepted a second living, and if so, then the first is not void, but he still must continue incumbent thereof; but adjudged, that by *his ſubſcribing the articles*, upon his admission and institution into *Elme*, he was perfect incumbent thereof *pro tempore, viz.* to the time allowed him to *read the articles*, which is two months, &c. and if so, then he accepted *Elme*, and by that means he lost *Wringleton*, and by *not reading the articles* within two months after his induction into *Elme*, he lost that likewise. *Vaugh.* 120.

2. *In what cases the patron must have notice of the avoidance.*

Two *patrons* had a right to present *by turns*; one of them presented, and his clerk was instituted and inducted, and died; then the other presented, and his clerk being instituted and inducted, was afterwards *deprived* by the bishop (without giving notice to him who had the next turn) who collated his clerk, and afterwards he who had the next turn sold his moiety; the court inclined that by the *collation* the next turn was lost, but clearly if it had been by usurpation, but yet it was adjudged, that upon the *deprivation* the patron ought to have notice of it. *Goldſb.* 142.

So in cases of *refuſal by the biſhop to inſtitute a clerk* for any cause of disability, he must give *notice* to the patron of such *refusal*, and for what cause, that the patron may present another; for if he hath no notice of it, he shall not be prejudiced by any lapse. 5 *Rep.* 58.

But if he refuses to institute a layman presented to him by the patron, in such case he need not give notice to the patron, because it is notorious to the patron himself when he presented him, that he was incapable to take the benefice; but if such a layman had been inducted, this makes a *plenarty de facto*, and he must be *deprived* by a declaratory sentence before the patron can present another; and of such deprivation the bishop must give notice to the patron. *Dyer* 293.

Where

Where the *avoidance* is by the *death of the incumbent*, or by his being made a *biſhop*, in ſuch caſes the patron is to take *notice* of it at his peril; and the ſix months, in which he is to preſent another, ſhall be accounted from the *death of the one*, and the *creation of the other*; but if the avoidance be by *reſignation*, which is the act of the party himſelf, or by *deprivation*, which is the act of the law, in both thoſe caſes, the patron muſt have notice, and the ſix months ſhall be accounted from the *time of the notice*, and not from the *reſignation* or *deprivation*. *Dyer* 327.

Where the *avoidance* is by an act of *parliament*; as for inſtance, if a man hath one benefice with cure, *&c.* and take another with cure, *&c.* without any diſpenſation to hold two, in ſuch caſe the firſt is void by the act 21 *H.* 8. *cap.* 13. if it was above the value of 8 *l.* and the patron is now bound to take notice of ſuch avoidance, becauſe he is virtually a party to the *act*; but it was not ſo before that act of parliament was made, for then ſuch avoidance of the firſt benefice was by the eccleſiaſtical law, of which the patron was not bound to take notice; but yet he might take notice of it, and preſent, if he would. 4 *Rep.* 75.

Where the patron himſelf took *notice* of a *deprivation*, which was obtained at his own proſecution, for not *reading the thirty nine* articles; yet in ſuch caſe, *lapſe* ſhall not incur, without an actual notice of the deprivation given to him by the biſhop; for 'tis he, and no other perſon, who is required by the law to give notice, and it muſt not be a general notice, but it muſt be particular, and the cauſe be expreſſed for which he was *deprived*. 6 *Rep.* 29.

Where the biſhop *refuſeth* to inſtitute a cletk, he muſt give notice of ſuch refuſal to the patron himſelf, if he is within that county where the church is become void; but if he is not in that county, then notice muſt be given at the door of that church; but where 'tis doubtful who is patron, and upon *jus patronatus* awarded, 'tis found, that ſuch a one is patron, though it may happen he is not the true patron, yet if he gives him notice, and no preſentation is made within ſix months after ſuch notice, the biſhop may collate to the church; and though that collation ſhall not bind the true patron, yet the biſhop ſhall be excuſed from being a diſturber. 1 *Leon.* 32.

Avoirdupois, of *Averdupois*, (*Fr. avoir du poids*, *i. e. habere pondus*, *aut juſti eſſe ponderis*) ſignifies a weight different from that which is called Troy-weight, which contains but twelve ounces in the pound, whereas this containeth ſixteen. And in this reſpect it is probably ſo called, becauſe it is of greater weight than the other. It alſo ſignifieth ſuch merchandizes as are weighed by this weight, and not by *Troy-weight*, and is mentioned in divers ſtatutes; as in the ſtatute of York, 9 *Ed.* 3. in *proœmio*. 27 *Ed.* 3. *ſt.* 2. *c.* 10. 2 *Ric.* 2. *c.* 1. *Averium ponderis*, full weight or *averdupois*. *Cart.* 3 *Ed.* 2. *Cowell*, *edit.* 1727. See *Weights*.

Avolta, *i. e. Concameratio*, *Tholus*. It is mentioned in *Mat. Paris in vitis abbatum St. Albani*, *viz. eadem quoque capella in arduum ſurgens ſuper eam crepidinem* (for *concamerati onem*,) *quæ vulgo* avolta *dicitur*, *domitorii diminutionem ſupplet*. *Cowell*, *ib.*

Avowee, *Advocatus*. See *Advowee*. *Brit. c.* 29. ſaith, That avowee is he to whom the right of advowſon of any church appertaineth, ſo that he may preſent in his own name, and is called *avowee*, to diſtinguiſh him from thoſe who ſometimes preſent in another's name; as a guardian, who preſenteth in the name of his ward: and alſo to diſtinguiſh him from thoſe which have lands, whereto an advowſon appertaineth, but only for term of their lives, of years, or by intruſion, or by diſſeiſin.

Avowry, Is where a man takes diſtreſs for rent, or other thing, and the party on whom taken ſues forth a *replevin*, then the taker ſhall juſtify his plea for what cauſe he took it; and if in his own right, he muſt ſhew the ſame, and *avow* the taking; which is called his *avowry*. But if he took it in the right of another, then when he has ſhewed the cauſe, he ſhall make cogniſance of the taking, as bailiff or ſervant to him in whoſe right he did it. *Termes de la ley*. The learning of *avowries* is abridged, and the intricacies of proceſs in *replevin*, *&c.* much remedied in caſes of diſtreſſes for rent, by the following ſtatutes.

Stat. 7 *Hen.* 8. *cap.* 4. *ſect.* 3. Every avowant, and other perſon, that makes avowry or conuſance, or juſtifies as baily, in replevin or ſecond deliverance, for rent, cuſtom or ſervice, if the plaintiff be barred, ſhall recover damages and coſts. *To the ſame effect is* ſtat. 21 *H.* 8. *cap.* 19. *ſect.* 3.

Stat. 21 *Hen.* 8. *cap.* 19. *ſect.* 3. Whereſoever tenements be holden by rents, cuſtoms or ſervices, if the lord diſtrain upon the ſame tenements for ſuch rent, *&c.* and *replevin* be ſued, the lord may avow, or his bailiff or ſervant make coniſance, or juſtify the diſtreſſes upon the ſame tenements, as in tenements within his fee, alledging in the ſaid avowry, *&c.* the ſame tenements to be holden of him, without naming of any perſon certain to be tenant of the ſame, and without making avowry, juſtification, or coniſance, upon any perſon certain. And in like manner upon writ of ſecond deliverance.

Sect. 4. The ſaid plaintiffs and defendants in writs of *replegiare*, or ſecond deliverance, ſhall have like pleas and like aid prayers (pleas of diſclaim only excepted) as tho' the avowry, *&c.* had been after the order of the common law.

Sect. 5. Such perſons as by common law may join to the plaintiffs or defendants in *replegiare*, or ſecond deliverance, as well without proceſs, as by proceſs, ſhall from henceforth join unto the ſaid plaintiffs or defendants, and have like pleas and advantages, (diſclaim only excepted) as they might have done by the common law.

Stat. 17 *Car.* 2. *cap.* 7. *ſect.* 2. When any plaintiff in *replevin* ſhall be nonſuit before iſſue joined in any of the King's courts at *Weſtminſter*, the defendant making a ſuggeſtion in nature of an avowry or coniſance for ſuch rent, to aſcertain the court of the cauſe of diſtreſs, the court upon his prayer ſhall award a writ to the ſheriff, to enquire upon the oaths of twelve men, touching the ſum in arrear at the time of ſuch diſtreſs taken, and the value of the goods diſtrained, and thereupon notice of fifteen days ſhall be given to the plaintiff or his attorney, of the ſitting of ſuch enquiry: and upon the return of ſuch inquiſition, the defendant ſhall have judgment to recover againſt the plaintiff the arrearages of ſuch rent, in caſe the goods diſtrained ſhall amount unto that value; and in caſe they ſhall not, then ſo much as the value of the ſaid goods will amount unto, together with his coſts, and ſhall have execution as the law ſhall require. And in caſe ſuch plaintiff ſhall be nonſuit after coniſance or avowry made, and iſſue joined, or if the verdict ſhall be given againſt ſuch plaintiff, then the jurors ſhall, at the prayer of the defendant, inquire concerning the arrears, and the value of the goods diſtrained; and thereupon the avowant, or he that makes coniſance, ſhall have judgment for ſuch arrearages, or ſo much thereof as the goods diſtrained amount unto, together with his coſts.

Sect. 3. If judgment in any of the courts aforeſaid be given upon demurrer for the avowant, or him that maketh coniſance for rent, the court ſhall, at the prayer of the defendant, award a writ to enquire of the value of ſuch diſtreſs; and upon the return thereof judgment ſhall be given for the avowant, *&c.* for the arrears alledged to be behind in ſuch avowry or coniſance, if the goods diſtrained ſhall amount to that value; and in caſe they ſhall not, then for ſo much as the goods amount unto, together with coſts.

Sect. 4. In all caſes aforeſaid, where the value of the cattle diſtrained ſhall not be found to the full value of the arrears diſtrained for, the party to whom ſuch arrears were due, his executors or adminiſtrators, may from time to time diſtrain again for the reſidue of the arrears. *Made to extend to* Wales *and Counties Palatine*. 19 *Car.* 2. *cap.* 5.

Stat. 11 *Geo.* 2. *cap.* 19. *ſect.* 92. It ſhall be lawful for all defendants in replevin to avow or make coniſance generally, that the plaintiff in replevin, or other tenant of the lands whereon ſuch diſtreſs was made, enjoyed the ſame under a grant or demiſe at ſuch a certain rent, during the

time wherein the rent diſtrained for incurred, which rent was then, and ſtill remains due; or that the place where the diſtreſs was taken, was parcel of ſuch certain tenements held of ſuch honour, lordſhip, or manor, for which tenements the rent, relief, heriot, or other ſervice, diſtrained for, was at the time of ſuch diſtreſs, and ſtill remains due; without further ſetting forth the grant, tenure, demiſe, or title of ſuch leſſors, or owners of ſuch manor; and if the plaintiff in ſuch action ſhall be nonſuit, *&c.* the defendant ſhall recover double coſts. See titles **Diſtreſs** and **Replevin.**

Aures, A puniſhment by the Saxon laws of cutting off the ears, inflicted on thoſe who robbed churches, or were guilty of any other theft. *Fleta, lib.* 1. *c.* 38. *p.* 10. and this puniſhment alſo extended to many other crimes as well as theft. *Upton de militari officio, pag.* 140. *Cowell.*

Auricularius, A ſecretary.——*Quem ſibi* amicularium et auricularium *conſtituerat. Mon. Angl. p.* 120. *Cowell.*

Aurum Reginae, The queen's gold. *Rot. Parl. ann.* 52 *H.* 3. See **Queen-Gold.**

Auſcultare. Formerly perſons were appointed in monaſteries to hear the monks read, and direct them how, and in what manner they ſhould do it with a graceful tone or accent, to make an impreſſion on the hearers, which was required before they were admitted to read publickly in the church; and this was called *auſcultare, viz.* to read or recite a leſſon.——*Quicunque lecturus vel cantaturus eſt aliquid in monaſterio, ſi neceſſe habeat ab eo, (viz. cantore) priuſquam incipiat, debet* auſculare. *Lanfrancus in decretis pro ordine Benedict. c.* 5.

Auſturcus and *Oſturcus,* A goſhawk; from whence we uſually call a faulconer, who keeps that kind of hawks, an *oſtringer.* In ancient deeds there has been reſerved, as a rent to the lord, *unus auſturcus.*

Auter Droit, Is where perſons ſue, or are ſued in another's right; as executors, adminiſtrators, *&c.*

Autefoits acquit, Is a plea by a criminal that he was heretofore *acquitted* of the ſame treaſon, or felony: for one ſhall not be brought into danger of his life, for the ſame offence, more than once. 3 *Inſt.* 213. There is alſo a plea of *auterfoits convict,* and *auterfoits attaint*; that he was heretofore convicted, or attainted, of the ſame felony. In appeal of death, *auterfoits acquit,* or *auterfoits attaint,* upon indictment of the ſame death, is no plea. *H. P. C.* 244. But in other caſes where a perſon is attainted, it is to no purpoſe that he ſhould be attainted a ſecond time. And conviction of manſlaughter, where clergy is admitted thereon, will bar any ſubſequent proſecution for the ſame death. 2 *Hawk. P. C.* 377.

Authority. That power of acting which one man has, being transferred to another, is called an authority, and this the law allows of; for as a contract is no more than the conſent of a man's mind to a thing, if ſuch conſent or concurrence appears, it would be very unreaſonable to oblige him to be preſent at the execution of every contract, ſince it may be as well performed by any other perſon delegated for that purpoſe. 11 *Hen.* 4. 71. 2 *Rol. Abr.* 8. *Co. Lit.* 52.

But ſuch delegation or authority muſt be by deed, that it may appear, that the attorney or ſubſtitute had a commiſſion or power to repreſent the party; alſo that it may appear that the authority was well purſued. *Co. Lit.* 48. *b.* 2 *Rol. Abr.* 8. *Salk.* 96.

1. *What ſhall be deemed a good authority, and how it differs from an intereſt.*
2. *Where an authority ſhall be deemed to be well purſued and executed.*
3. *Where an authority cannot be transferred, and when it ſhall be determined and revoked.*
4. *Where an authority muſt be ſtrictly purſued.*

1. *What ſhall be deemed a good authority, and how it differs from an intereſt.*

If *A.* by letter of attorney conſtitutes and appoints, and in his ſtead and place puts *B.* to ſurrender a certain copyhold, this authority is ſufficient, and as full as if it ſaid for him and in his name, *&c.* 1 *Brownl.* 94.

If a man ſigns and ſeals a leaſe of *ejectment* indented, but does not deliver it, and at the ſame time ſeals and delivers a letter of attorney, in which he recites, *Whereas by indenture of leaſe, bearing ſuch a date, &c. hath demiſed to* B. *ſuch land habendum: now theſe preſents witneſs that he makes* J. S. *his lawful attorney, to deliver the ſaid indenture upon the land as his deed*; though, according to the proper ſignification of the words, the leaſe ought to be taken to be delivered by him, and this letter of attorney void, to deliver it again; for this cannot be an indenture if it was delivered; yet all parts of the letter of attorney being laid together, and the intent of the parties, and proof being made that the leaſe was not delivered, but only ſigned and ſealed, it appears that this was only an improper expreſſion of his intent, by calling it an indenture and a demiſe; for if he had intended that this was an indenture ſealed and delivered, this letter of attorney to deliver it upon the land need not have been made. 1 *Rol. Abr.* 328.

If the authority in a letter of attorney be *ad petend', recipiend' et recuperand'* a certain debt, it is ſufficient to arreſt, *&c.* becauſe neceſſary, in order to recover. 1 *Rol. Rep.* 390. *Palm.* 394. *Godb.* 359.

If a ſteward makes a deputy *hac vice* to make a ſurrender of a copyhold, *et ulterius ad faciend' quantum in ſe eſt*; by virtue of theſe laſt words, the deputy may take a conditional ſurrender. *Cro. El.* 48.

An authority may be delegated by deed indented, tho' the attorney be not party to the deed; becauſe the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore, ſince a man may take an eſtate in remainder, though he is no party to the deed, *a fortiori* one not party to the deed may receive a naked authority or power by it. 2 *Rol. Abr.* 8, 9.

A deviſe to another *to have the diſpoſing, ſelling, and letting his land*; ſo a deviſe to his ſon, *but that his wife ſhall take the profits*; ſo a deviſe, that his executor ſhall have the *overſight and dealing of his lands*; ſo a deviſe to an infant in tail, but that *G. D.* ſhall have the *overſight* of his will, and the education of his ſon till of age, and, *to receive, ſet, and let for him*; theſe and ſuch like words give the deviſee an *authority*, but *no intereſt. Dyer* 26. *b.* 2 *Leon.* 221. 3 *Leon.* 78, 216. *Moor* 635. S. P. *Cro. Eliz.* 674, 678, 734.

Where *goods* are deviſed to a *particular purpoſe*, there the deviſee hath no *intereſt* in them; as for inſtance, the teſtator deviſed ſeveral legacies, and after thoſe were paid, then he deviſed the reſidue to his wife *to diſpoſe for the good of his ſoul, and payment of his debts*, and made her ſole executrix; adjudged, that by this deviſe ſhe had no *intereſt* in the reſidue, for it was deviſed for a *particular purpoſe, viz.* to pay the teſtator's debts. *Dyer* 331.

The law makes a difference where *lands are deviſed to executors to ſell*, and where the deviſe is, that *his lands ſhall be ſold by his executors*; for in the firſt caſe an *intereſt* paſſes to the executors, becauſe the lands are expreſsly deviſed to them, but in the other caſe they have only an authority to ſell. *Goldſ.* 2. *Dyer* 219. *Moor* 61. *Keilw.* 107. *b.* 1 *And.* 145.

The teſtator deviſed, that his executors ſhould receive the *iſſues and profits* of his lands till his ſon came of age, *to pay his debts and legacies, and to breed up his younger children*; the teſtator died, ſo did the executor, during the minority of the ſon, having firſt made *J. S.* his executor; adjudged, that this executor of an executor may diſpoſe of the *iſſues and profits* for the purpoſes mentioned in the will during the infancy of the ſon; becauſe the firſt executor had not only a bare *authority*, but an *intereſt* veſted in him. *Dyer* 210.

Where the teſtator gives another authority *to ſell his lands*, he may ſell the inheritance, becauſe he gave him the ſame power he had himſelf, and in ſuch caſe the purchaſer ſhall be in by the deviſe. 2 *Rep.* 53.

An *authority* may be *apportioned* or *divided*, but an *intereſt is inſeparable* from the perſon, and where an act, which is in its nature indifferent, will work *two ways*,

Where the *avoidance* is by the *death of the incumbent*, or by his being made a *biſhop*, in ſuch caſes the patron is to take *notice* of it at his peril; and the ſix months, in which he is to preſent another, ſhall be accounted from the *death of the one*, and the *creation of the other*; but if the avoidance be by *reſignation*, which is the act of the party himſelf, or by *deprivation*, which is the act of the law, in both thoſe caſes, the patron muſt have notice, and the ſix months ſhall be accounted from the *time of the notice*, and not from the *reſignation* or *deprivation*. *Dyer* 327.

Where the *avoidance* is by an act of *parliament*; as for inſtance, if a man hath one benefice with cure, *&c.* and take another with cure, *&c.* without any diſpenſation to hold two, in ſuch caſe the firſt is void by the act 21 *H.* 8. *cap.* 13. if it was above the value of 8 *l.* and the patron is now bound to take notice of ſuch avoidance, becauſe he is virtually a party to the *act*; but it was not ſo before that act of parliament was made, for then ſuch avoidance of the firſt benefice was by the eccleſiaſtical law, of which the patron was not bound to take notice; but yet he might take notice of it, and preſent, if he would. 4 *Rep.* 75.

Where the patron himſelf took *notice* of a *deprivation*, which was obtained at his own proſecution, for not *reading the thirty nine* articles; yet in ſuch caſe, *lapſe* ſhall not incur, without an actual notice of the deprivation given to him by the biſhop; for 'tis he, and no other perſon, who is required by the law to give notice, and it muſt not be a general notice, but it muſt be particular, and the cauſe be expreſſed for which he was *deprived*. 6 *Rep.* 29.

Where the biſhop *refuſeth* to inſtitute a cletk, he muſt give notice of ſuch refuſal to the patron himſelf, if he is within that county where the church is become void; but if he is not in that county, then notice muſt be given at the door of that church; but where 'tis doubtful who is patron, and upon *jus patronatus* awarded, 'tis found, that ſuch a one is patron, though it may happen he is not the true patron, yet if he gives him notice, and no preſentation is made within ſix months after ſuch notice, the biſhop may collate to the church; and though that collation ſhall not bind the true patron, yet the biſhop ſhall be excuſed from being a diſturber. 1 *Leon.* 32.

Avoirdupois, or *Averdupois*, (*Fr. avoir du poids, i. e. habere pondus, aut juſti eſſe ponderis*) ſignifies a weight different from that which is called Troy-weight, which contains but twelve ounces in the pound, whereas this containeth ſixteen. And in this reſpect it is probably ſo called, becauſe it is of greater weight than the other. It alſo ſignifieth ſuch merchandizes as are weighed by this weight, and not by *Troy-weight*, and is mentioned in divers ſtatutes; as in the ſtatute of York, 9 *Ed.* 3. in *proœmio.* 27 *Ed.* 3. *ſt.* 2. *c.* 10. 2 *Ric.* 2. *c.* 1. *Averium ponderis*, full weight or *averdupois*. *Cart.* 3 *Ed.* 2. *Cowell, edit.* 1727. See *Weights.*

Avolta, *i. e. Concameratio, Tholus.* It is mentioned in *Mat. Paris in vitis abbatum St. Albani, viz. eadem quoque capella in arduum ſurgens ſuper eam crepidinem* (for *concamerati onem,*) *quæ vulgo* avolta *dicitur, domitorii diminutionem ſupplet. Cowell, ib.*

Avowee, *Advocatus.* See *Advowee. Brit. c.* 29. ſaith, That avowee is he to whom the right of advowſon of any church appertaineth, ſo that he may preſent in his own name, and is called *avowee*, to diſtinguiſh him from thoſe who ſometimes preſent in another's name; as a guardian, who preſenteth in the name of his ward: and alſo to diſtinguiſh him from thoſe which have lands, whereto an advowſon appertaineth, but only for term of their lives, of years, or by intruſion, or by diſſeiſin.

Avowry, Is where a man takes diſtreſs for rent, or other thing, and the party on whom taken ſues forth a *replevin*, then the taker ſhall juſtify his plea for what cauſe he took it; and if in his own right, he muſt ſhew the ſame, and *avow* the taking; which is called his *avowry*. But if he took it in the right of another, then when he has ſhewed the cauſe, he ſhall make cogniſance of the taking, as bailiff or ſervant to him in whoſe right he did it. *Termes de la ley.* The learning of *avowries* is abridged, and the intricacies of proceſs in *replevin*, *&c.* much remedied in caſes of diſtreſſes for rent, by the following ſtatutes.

Stat. 7 *Hen.* 8. *cap.* 4. *ſect.* 3. Every avowant, and other perſon, that makes avowry or conuſance, or juſtifies as baily, in replevin or ſecond deliverance, for rent, cuſtom or ſervice, if the plaintiff be barred, ſhall recover damages and coſts. *To the ſame effect is* ſtat. 21 *H.* 8. *cap.* 19. *ſect.* 3.

Stat. 21 *Hen.* 8. *cap.* 19. *ſect.* 3. Whereſoever tenements be holden by rents, cuſtoms or ſervices, if the lord diſtrain upon the ſame tenements for ſuch rent, *&c.* and *replevin* be ſued, the lord may avow, or his bailiff or ſervant make coniſance, or juſtify the diſtreſſes upon the ſame tenements, as in tenements within his fee, alledging in the ſaid avowry, *&c.* the ſame tenements to be holden of him, without naming of any perſon certain to be tenant of the ſame, and without making avowry, juſtification, or coniſance, upon any perſon certain. And in like manner upon writ of ſecond deliverance.

Sect. 4. The ſaid plaintiffs and defendants in writs of *replegiare*, or ſecond deliverance, ſhall have like pleas and like aid prayers (pleas of diſclaim only excepted) as tho' the avowry, *&c.* had been after the order of the common law.

Sect. 5. Such perſons as by common law may join to the plaintiffs or defendants in *replegiare*, or ſecond deliverance, as well without proceſs, as by proceſs, ſhall from henceforth join unto the ſaid plaintiffs or defendants, and have like pleas and advantages, (diſclaim only excepted) as they might have done by the common law.

Stat. 17 *Car.* 2. *cap.* 7. *ſect.* 2. When any plaintiff in *replevin* ſhall be nonſuit before iſſue joined in any of the King's courts at *Weſtminſter*, the defendant making a ſuggeſtion in nature of an avowry or coniſance for ſuch rent, to aſcertain the court of the cauſe of diſtreſs, the court upon his prayer ſhall award a writ to the ſheriff, to enquire upon the oaths of twelve men, touching the ſum in arrear at the time of ſuch diſtreſs taken, and the value of the goods diſtrained, and thereupon notice of fifteen days ſhall be given to the plaintiff or his attorney, of the ſitting of ſuch enquiry: and upon the return of ſuch inquiſition, the defendant ſhall have judgment to recover againſt the plaintiff the arrearages of ſuch rent, in caſe the goods diſtrained ſhall amount unto that value; and in caſe they ſhall not, then ſo much as the value of the ſaid goods will amount unto, together with his coſts, and ſhall have execution as the law ſhall require. And in caſe ſuch plaintiff ſhall be nonſuit after coniſance or avowry made, and iſſue joined, or if the verdict ſhall be given againſt ſuch plaintiff, then the jurors ſhall, at the prayer of the defendant, inquire concerning the arrears, and the value of the goods diſtrained; and thereupon the avowant, or he that makes coniſance, ſhall have judgment for ſuch arrearages, or ſo much thereof as the goods diſtrained amount unto, together with his coſts.

Sect. 3. If judgment in any of the courts aforeſaid be given upon demurrer for the avowant, or him that maketh coniſance for rent, the court ſhall, at the prayer of the defendant, award a writ to enquire of the value of ſuch diſtreſs; and upon the return thereof judgment ſhall be given for the avowant, *&c.* for the arrears alledged to be behind in ſuch avowry or coniſance, if the goods diſtrained ſhall amount to that value; and in caſe they ſhall not, then for ſo much as the goods amount unto, together with coſts.

Sect. 4. In all caſes aforeſaid, where the value of the cattle diſtrained ſhall not be found to the full value of the arrears diſtrained for, the party to whom ſuch arrears were due, his executors or adminiſtrators, may from time to time diſtrain again for the reſidue of the arrears. *Made to extend to* Wales *and Counties Palatine.* 19 *Car.* 2. *cap.* 5.

Stat. 11 *Geo.* 2. *cap.* 19. *ſect.* 92. It ſhall be lawful for all defendants in replevin to avow or make coniſance generally, that the plaintiff in replevin, or other tenant of the lands whereon ſuch diſtreſs was made, enjoyed the ſame under a grant or demiſe at ſuch a certain rent, during the

time wherein the rent diſtrained for incurred, which rent was then, and ſtill remains due; or that the place where the diſtreſs was taken, was parcel of ſuch certain tenements held of ſuch honour, lordſhip, or manor, for which tenements the rent, relief, heriot, or other ſervice, diſtrained for, was at the time of ſuch diſtreſs, and ſtill remains due; without further ſetting forth the grant, tenure, demiſe, or title of ſuch leſſors, or owners of ſuch manor; and if the plaintiff in ſuch action ſhall be nonſuit, *&c.* the defendant ſhall recover double coſts. See titles **Diſtreſs** and **Replevin.**

Aures, A puniſhment by the Saxon laws of cutting off the ears, inflicted on thoſe who robbed churches, or were guilty of any other theft. *Fleta, lib.* 1. *c.* 38. *p.* 10. and this puniſhment alſo extended to many other crimes as well as theft. *Upton de militari officio, pag.* 140. *Cowell.*

Auricularius, A ſecretary.——*Quem ſibi* amicularium et auricularium *conſtituerat. Mon. Angl. p.* 120. *Cowell.*

Aurum Reginae, The queen's gold. *Rot. Parl. ann.* 52 *H.* 3. See **Queen-Gold.**

Auſcultare. Formerly perſons were appointed in monaſteries to hear the monks read, and direct them how, and in what manner they ſhould do it with a graceful tone or accent, to make an impreſſion on the hearers, which was required before they were admitted to read publickly in the church; and this was called *auſcultare, viz.* to read or recite a leſſon.——*Quicunque lecturus vel cantaturus eſt aliquid in monaſterio, ſi neceſſe habeat ab eo, (viz. cantore) priuſquam incipiat, debet* auſculare. *Lanfrantus in decretis pro ordine Benedict. c.* 5.

Auſturcus and *Oſturcus,* A goſhawk; from whence we uſually call a faulconer, who keeps that kind of hawks, an *oſtringer.* In ancient deeds there has been reſerved, as a rent to the lord, *unus auſturcus.*

Auter Droit, Is where perſons ſue, or are ſued in another's right; as executors, adminiſtrators, *&c.*

Autefoits acquit, Is a plea by a criminal that he was heretofore *acquitted* of the ſame treaſon, or felony: for one ſhall not be brought into danger of his life, for the ſame offence, more than once. 3 *Inſt.* 213. There is alſo a plea of *auterfoits convict,* and *auterfoits attaint*; that he was heretofore convicted, or attainted, of the ſame felony. In appeal of death, *auterfoits acquit,* or *auterfoits attaint,* upon indictment of the ſame death, is no plea. *H. P. C.* 244. But in other caſes where a perſon is attainted, it is to no purpoſe that he ſhould be attainted a ſecond time. And conviction of manſlaughter, where clergy is admitted thereon, will bar any ſubſequent proſecution for the ſame death. 2 *Hawk. P. C.* 377.

Authority. That power of acting which one man has, being transferred to another, is called an authority, and this the law allows of; for as a contract is no more than the conſent of a man's mind to a thing, if ſuch conſent or concurrence appears, it would be very unreaſonable to oblige him to be preſent at the execution of every contract, ſince it may be as well performed by any other perſon delegated for that purpoſe. 11 *Hen.* 4. 71. 2 *Rol. Abr.* 8. *Co. Lit.* 52.

But ſuch delegation or authority muſt be by deed, that it may appear, that the attorney or ſubſtitute had a commiſſion or power to repreſent the party; alſo that it may appear that the authority was well purſued. *Co. Lit.* 48. *b.* 2 *Rol. Abr.* 8. *Salk.* 96.

1. *What ſhall be deemed a good authority, and how it differs from an intereſt.*
2. *Where an authority ſhall be deemed to be well purſued and executed.*
3. *Where an authority cannot be transferred, and when it ſhall be determined and revoked.*
4. *Where an authority muſt be ſtrictly purſued.*

1. *What ſhall be deemed a good authority, and how it differs from an intereſt.*

If *A.* by letter of attorney conſtitutes and appoints, and in his ſtead and place puts *B.* to ſurrender a certain copyhold, this authority is ſufficient, and as full as if it ſaid for him and in his name, *&c.* 1 *Brownl.* 94.

If a man ſigns and ſeals a leaſe of *ejectment* indented, but does not deliver it, and at the ſame time ſeals and delivers a letter of attorney, in which he recites, *Whereas by indenture of leaſe, bearing ſuch a date, &c. hath demiſed to* B. *ſuch land habendum: now theſe preſents witneſs that he makes* J. S. *his lawful attorney, to deliver the ſaid indenture upon the land as his deed*; though, according to the proper ſignification of the words, the leaſe ought to be taken to be delivered by him, and this letter of attorney void, to deliver it again; for this cannot be an indenture if it was delivered; yet all parts of the letter of attorney being laid together, and the intent of the parties, and proof being made that the leaſe was not delivered, but only ſigned and ſealed, it appears that this was only an improper expreſſion of his intent, by calling it an indenture and a demiſe; for if he had intended that this was an indenture ſealed and delivered, this letter of attorney to deliver it upon the land need not have been made. 1 *Rol. Abr.* 328.

If the authority in a letter of attorney be *ad petend', recipiend' et recuperand'* a certain debt, it is ſufficient to arreſt, *&c.* becauſe neceſſary, in order to recover. 1 *Rol. Rep.* 390. *Palm.* 394. *Godb.* 359.

If a ſteward makes a deputy *hac vice* to make a ſurrender of a copyhold, *et ulterius ad faciend' quantum in ſe eſt*; by virtue of theſe laſt words, the deputy may take a conditional ſurrender. *Cro. El.* 48.

An authority may be delegated by deed indented, tho' the attorney be not party to the deed; becauſe the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore, ſince a man may take an eſtate in remainder, though he is no party to the deed, *a fortiori* one not party to the deed may receive a naked authority or power by it. 2 *Rol. Abr.* 8, 9.

A deviſe to another *to have the diſpoſing, ſelling, and letting his land*; ſo a deviſe to his ſon, *but that his wife ſhall take the profits*; ſo a deviſe, that his executor ſhall have the *overſight and dealing of his lands*; ſo a deviſe to an infant in tail, but that *G. D.* ſhall have the *overſight* of his will, and the education of his ſon till of age, and, *to receive, ſet, and let for him*; theſe and ſuch like words give the deviſee an *authority*, but *no intereſt. Dyer* 26. *b.* 2 *Leon.* 221. 3 *Leon.* 78, 216. *Moor* 635. S. P. *Cro. Eliz.* 674, 678, 734.

Where *goods* are deviſed to a *particular purpoſe*, there the deviſee hath no *intereſt* in them; as for inſtance, the teſtator deviſed ſeveral legacies, and after thoſe were paid, then he deviſed the reſidue to his wife *to diſpoſe for the good of his ſoul, and payment of his debts*, and made her ſole executrix; adjudged, that by this deviſe ſhe had no *intereſt* in the reſidue, for it was deviſed for a *particular purpoſe, viz.* to pay the teſtator's debts. *Dyer* 331.

The law makes a difference where *lands are deviſed to executors to ſell*, and where the deviſe is, that *his lands ſhall be ſold by his executors*; for in the firſt caſe an *intereſt* paſſes to the executors, becauſe the lands are expreſsly deviſed to them, but in the other caſe they have only an authority to ſell. *Goldſ.* 2. *Dyer* 219. *Moor* 61. *Keilw.* 107. *b.* 1 *And.* 145.

The teſtator deviſed, that his executors ſhould receive the *iſſues and profits* of his lands till his ſon came of age, *to pay his debts and legacies, and to breed up his younger children*; the teſtator died, ſo did the executor, during the minority of the ſon, having firſt made *J. S.* his executor; adjudged, that this executor of an executor may diſpoſe of the *iſſues and profits* for the purpoſes mentioned in the will during the infancy of the ſon; becauſe the firſt executor had not only a bare *authority*, but an *intereſt* veſted in him. *Dyer* 210.

Where the teſtator gives another authority *to ſell his lands*, he may ſell the inheritance, becauſe he gave him the ſame power he had himſelf, and in ſuch caſe the purchaſer ſhall be in by the deviſe. 2 *Rep.* 53.

An *authority* may be *apportioned* or *divided*, but an *intereſt is inſeparable* from the perſon, and where an act, which is in its nature indifferent, will work *two ways*,

the one by an *authority*, and the other by an *intereſt*, the law will attribute it to the *intereſt*; as for inſtance, where a man is ſeiſed of three acres holden *in capite*, to the uſe of ſuch perſon, and of ſuch eſtate as he ſhall deviſe, and afterwards he, by his laſt will, deviſed *all his lands* to *G. D.* in fee, this ſhall only paſs two parts, *viz.* two acres and no more; but where an *intereſt and authority* meet, if the party declare, that the thing ſhall take effect by virtue of his *authority*, there it ſhall prevail againſt the *intereſt*; therefore, if the teſtator had recited his power, and relied upon it, the three acres would have paſſed by his expreſs declaration; nay, if he had not made ſuch a declaration, yet if the act itſelf doth import, that it muſt neceſſarily work by his *power*, or be void, the law will adjudge it to take effect according to the meaning of the party; therefore it was reſolved in Sir *Edward Cleer*'s caſe, that he being ſeiſed of three acres of equal value, ſettled two of them in jointure upon his wife, and afterwards made a *feoffment* of the third acre *to the uſe of ſuch perſon to whom he ſhould deviſe the ſame*, and then deviſed it to *G. D.* that this deviſe was good by virtue of his *authority* to deviſe, or elſe the whole had been void. 6 *Rep.* 17.

Six carpenters came to a tavern, and called for a quart of wine, which they drank, but refuſed to pay for it *upon requeſt*; and in an action of treſpaſs brought againſt them, it was adjudged, that where an *authority is given by law*, as it was in this caſe (it being lawful for the defendants to enter into the tavern) and if they abuſe that *authority* (which they did in not paying for the wine) they ſhall be treſpaſſors *ab initio*; but where an *authority* is given to one by the *act of the party*, and he abuſes it, he ſhall be puniſhed according to the injury he hath done, but ſhall not be a treſpaſſor *ab initio*. 8 *Rep.* 146.

Deviſe of his *land* to his ſon, and that his wife *ſhall take the profits* till he comes of age; this is only an *authority*, and no *intereſt* in the wife. 2 *Leon.* 221.

So where the huſband deviſed, that if his wife *Elizabeth* ſhall think fit to bring up his children, and find them neceſſaries, that then ſhe ſhall have his lands till his eldeſt ſon comes of age, and the wife died before her ſon came of age; adjudged, that this was not only a bare truſt or confidence, but an intereſt veſted in her, tied to a condition to educate his children. *Cro. Eliz.* 252.

Deviſe of land to his ſon, *when he ſhould be of age*, and that his executor ſhould *have the overſight and dealing* of his lands and goods till that time; the executor made a leaſe at will, rendring rent at *Lady-day*, *&c.* the ſon died before that day; adjudged, that the executor had only an *authority*, and that the eſtate was in the ſon by deſcent. *Moor* 774.

2. *Where an authority ſhall be deemed to be well purſued and executed.*

Here it is neceſſary to take notice of a difference in the old books, between a naked authority and an authority coupled with an intereſt; for if a man deviſe that his executors ſhall ſell his land, this gives but a naked authority; and the lands, till the ſale is made, deſcend to the heir at law; and in this caſe all muſt join in the ſale; and if one die, it being a bare authority cannot ſurvive to the reſt. *Co. Lit.* 181, 112, 113.

But if a man by will give land to executors to be ſold, and one of them die, the ſurvivors may ſell; for the truſt being coupled with an intereſt, ſhall ſurvive together with it. *Co. Lit.* 113. *b.* 181. *b.*

Alſo, if lands be deviſed to *A.* for life, and that after his deceaſe his lands ſhall be ſold by his executors, and he makes three or four executors, and during the life of *A.* one of the executors dies, and then *A.* dies, the ſurviving executors may ſell, becauſe the land could not be ſold before, and the plural number of executors remains. *Co. Lit.* 112. *b.*

But it is ſaid, that if a will had given ſuch power to certain perſons, naming them by their names; as to *J. S. J. N. J. D.* and one of them died, the ſurvivors could not ſell; for the words of the will in that caſe could not be ſatisfied. *Co. Lit.* 113.

If *A.* being ſeiſed in fee of a reverſion in twenty acres expectant upon an eſtate for life, and of other twenty in poſſeſſion, and for the performance of his own and his father's will, deviſes all his lands and tenements to his executors, and wills that they ſhould take the profits thereof for ten years, and that after the expiration thereof, the ſame ſhould be ſold by his executors, or by one of them, and dies, and after the tenant for life dies, and then one of the executors dies, the other two may ſell the twenty acres; for as they may perform his will, ſo they may ſell in order thereto. 2 *And.* 59. *Owen* 155. *Moor* 341. *Cro. Eliz.* 524. S. C.

The plaintiff having obtained a decree in Chancery for 1000*l.* the defendant procured the plaintiff's ſon to give him (the defendant) a releaſe, upon payment of one hundred marks in ready money, and upon giving ſecurity to pay one hundred more in a little time; all this was done, and the ſon gave the releaſe in his own name, when he had only a letter of attorney from his father to compound and agree the ſuit with the defendant; and this releaſe was adjudged to be void. *Moor* 818.

At common law, if one of the executors who were impowered to ſell lands refuſed, the others could not ſell; but now, by 21 *H.* 8. *cap.* 4. notwithſtanding part of thoſe, to whom ſuch power is deviſed, refuſed, the reſt may ſell; and ſo may ſuch of thoſe to whom land is deviſed to be ſold, who are willing, though the others refuſe, by a favourable conſtruction of that ſtatute; but they cannot in either caſe ſell it to the executor that refuſed; for he is privy to the will, and executor ſtill. *Co. Lit.* 113, 181.

My Lord *Coke* obſerves, that it is ſafeſt in giving ſuch power by deviſe, to limit it to the ſurvivors or ſurvivor, or thoſe that prove the will, *&c.* and when an eſtate is deviſed to executors to be ſold, it is adviſeable to appoint that the profits taken by them before the ſale be aſſets; for otherwiſe they ſhall not. *Co. Lit.* 113.

If a man deviſes lands to his executors to ſell, and dies, the executors may ſell part of the land at one time, and part at another time, as they can find purchaſers. *Co. Lit.* 113.

A. by indenture deviſed to *B. habend' a die datus* (which was the tenth of *June*) *indentur' prædict'* for his life, with a letter of attorney to make livery, the attorney makes livery the 23d of *July* following; and the livery was held to be void, becauſe the eſtate for life being by the indenture to commence the tenth of *June*, the attorney had no authority to change the commencement of the eſtate; and therefore having not purſued his authority, by not giving livery, to let the freehold commence according to the deed, what he did afterwards was without any authority, and conſequently void; but in this caſe, if the deed had not been delivered till after the day of the date, and the attorney had given livery at the time of the delivery of the deed, this had been a good livery, becauſe the deed of feoffment was to govern the livery, but the deed itſelf had no effect till the delivery; and therefore the attorney making the livery at the time the deed of feoffment began to operate, which was to govern it, ſeems to have well enough executed his authority. *Cro. Jac.* 153. *Mo. pl.* 876. *Cro. Eliz.* 873. *Lit. Rep.* 144.

If a letter of attorney be to make livery upon condition, ſo as to make a conditional feoffment, and the attorney delivers ſeiſin abſolutely, the livery is not good; becauſe the attorney had no authority to create an abſolute fee-ſimple; and therefore ſuch abſolute feoffment ſhall not bind the feoffor, becauſe he gave no ſuch authority. 2 *Rol. Abr.* 9.

But if the letter of attorney had been to make livery abſolutely, and the attorney had made it upon condition, this ſeems a good execution of his power, and the feoffment good; becauſe when the attorney had once delivered ſeiſin, he has fully executed his power; and the condition annexed to it, being without authority, is void; and therefore ſhall not deſtroy the operation of the livery. 2 *Rol. Abr.* 9.

Aſſumpſit, *&c.* in which the plaintiff declared, that in conſideration that he would procure *T. S.* then in priſon, *to be diſcharged*, the defendant promiſed to repay all ſuch ſums

ſums of money as he (the plaintiff) ſhould diſburſe in that behalf, &c. the defendant confeſſed the promiſe, but pleaded, that before the plaintiff had laid out any money, he (the defendant) revoked his promiſe, and countermanded the plaintiff, that he ſhould not do any thing towards the diſcharge of the perſon; the plaintiff replied *proteſtando*, that the defendant did not countermand, *pro placito* he demurred; it was inſiſted for the defendant, that he might countermand the authority given by him to the plaintiff; for he who gave the authority is the ſole actor, and the other is at no prejudice, for he is no more than a ſervant to him who gave him the authority; but in a *contract* 'tis otherwiſe, for there *both parties are actors*. *Sed per curiam*, He cannot countermand it, for probably the plaintiff might have agreed with the gaoler, and made himſelf debtor by promiſe to him. 2 *Rol. Rep.* 21, 39.

If a warrant of attorney be given to make livery to one, and the attorney makes livery to two; or if the attorney had authority to make livery of *Black-Acre*, and he made livery of *Black-Acre* and *White-Acre*, though the attorney has in theſe caſes done more, yet there is no reaſon that ſhall vitiate what he has done purſuant to his power, ſince what he did beyond it is a perfect nullity and void. *Perk. ſect.* 189.

If a letter of attorney be given to two jointly to take livery, and this feoffor makes livery to one in the abſence of the other, in the name of both, this is void; becauſe they being appointed jointly to receive livery, and to be conſidered but as one. *Co. Lit.* 49. *b.* 2 *Rol. Abr.* 8.

But if a feoffment be made to *A.* and *B.* and the feoffor gives a letter of attorney to deliver ſeiſin, and *J. S.* gives livery to *A.* in the abſence of *B.* in the name of both, this is a good livery; for though the intire poſſeſſion be delivered to one only, yet they being jointenants by the deed of feoffment, ſuch livery to one makes no alteration or change in the poſſeſſion; becauſe if the livery had been made to both, each had been placed in the whole poſſeſſion; beſides that, every man being preſumed to accept a gift for his advantage, *A.* is looked upon as the attorney of *B.* to receive the poſſeſſion for him; and therefore the livery to *A.* enures to the benefit of *B.* till he diſagrees to it. *Co. Lit.* 49. 2 *Rol. Abr.* 8.

But if a letter of attorney be made to three *conjunctim & diviſim*, and two only make livery, this is not good, becauſe not purſuant to their authority; for the delegation was to them all three, or to each of them ſeparately; yet if the third was preſent at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; becauſe when they all three are upon the land for that purpoſe, and two make livery in preſence of the third, there is his concurrence to the act, though he did not join in it actually, ſince he did not diſſent to it. *Dyer* 62. 1 *Rol. Abr.* 329. *Co. Lit.* 181. 1 *Rol. Rep.* 299. *Yelv.* 26.

Deviſe to *Bernard for life*, and after his deceaſe *to the iſſue of his body* by a ſecond wife, and for default of ſuch iſſue, remainder over, *provided, that Bernard may make a jointure upon ſuch ſecond wife for life*; *Bernard*, during the life of his firſt wife, ſuffered a recovery to the uſe of himſelf and his heirs; then the wife died, and he married again, and covenanted to ſtand ſeiſed to the uſe of himſelf and his ſecond wife for their lives, remainder to the heirs of their bodies, &c. the queſtion was, that admitting *Bernard* had only an *eſtate for life*, (but he had an *eſtate-tail*) then it being forfeited by the recovery, whether his power to make a jointure did ſtill remain, and if it did, whether it was well executed? They who argued for the affirmative, did admit, that a power *coupled with an intereſt* in the ſame perſon, would be deſtroyed by a *fine*, *feoffment*, or *recovery*; becauſe ſuch power is to be executed upon his own eſtate, and with that he had parted, by *levying a fine*, &c. but in the principal caſe, the power was not to be executed out of the eſtate of *Bernard*; for it was to charge the reverſion by making a *jointure*, which is not to take place till after his *eſtate for life* is determined, and ſo 'tis collateral to his eſtate, and ſuch collateral powers are not deſtroyed by *feoffments*, *fines*, &c. but adjudged, that the power was deſtroyed by the *recovery*; otherwiſe the execution of it was well enough. 2 *Lev.* 58.

If *A.* be diſſeiſed of *Black-Acre* and *White-Acre*, and gives a letter of attorney to enter into both, and make livery, if the attorney enters into one acre only, and makes livery *ſecundum formam chartæ*, this is not good, becauſe the attorney has not purſued his authority; for the eſtate of the diſſeiſor cannot be defeated without an entry into both acres; and till the eſtate be deſeated, the attorney cannot execute his power in the manner it was delegated; and therefore what he did in this caſe was void. *Co. Lit.* 52. 2 *Rol. Abr.* 9.

If a letter of attorney be given to *A.* to make livery of lands already in leaſe, the attorney may enter upon the leſſee in order to make livery; becauſe, whilſt the leſſee continues in poſſeſſion, the attorney cannot deliver ſeiſin of it; and therefore to execute the power given him by the letter of attorney, it is neceſſary he ſhould have a power to enter upon the leſſee. *Co. Lit.* 52. *Poph.* 103. *Dyer* 131. *a.* 340. *a.*

If the King grants a warrant to four officers of the Exchequer, by which he authoriſes them, or any of them, to pay out of the King's treaſure, the coſts and expences of any man who ſhall be employed in the ſervice of the King; and two of the four give a warrant for the payment of a certain ſum to *J. S.* this is a good warrant, though neither all four nor one only did it. 11 *Co.* 92. 1 *Rol. Abr.* 328, 329.

So if a judgment be aſſigned to the King in ſatisfaction of a debt due to the King, with a proviſo, that if the barons of the Exchequer, or any two of them revoke it, that it ſhall be void; and after three of the barons revoke it (there being four in all) this is a good revocation. 5 *Co.* 91. 1 *Rol. Abr.* 328.

But if the words had been, that if the barons, or any two of them, jointly or ſeverally revoke it, &c. there three of them could not revoke it; for this is neither jointly nor ſeverally. 5 *Co.* 91. 1 *Rol. Abr.* 328.

But if a ſheriff makes a warrant to four or three, or a *capias* jointly or ſeverally to arreſt one, two of them may arreſt the party, for the greater expedition of juſtice. *Co. Lit.* 181. *Palm.* 52. 2 *Rol. Rep.* 137.

Where the *mayor* and *commonalty* of *London* had conſtituted *J. S.* their bailiff to receive their rents, and to make demand of them, and to make entry, ſuch general authority is not ſufficient to authorize a bailiff to take advantage, and demand a rent accrued due after the authority given; for it is a new right attached, and there ought to be a ſpecial authority for that purpoſe. *Skin.* 413.

If the lord gives licence to a copyholder for life, to leaſe the copyhold for five years, the copyholder may leaſe it for three years; for this is comprehended within the licence, inaſmuch as he hath given him licence to leaſe for more years. 1 *Rol. Abr.* 330.

So if the lord gives licence to a copyholder for life, to leaſe the copyhold for five years if the copyholder *tamdiu vixerit*, and he leaſes it for five years generally without limitation, this is a good execution, and purſuant to the licence; for the leaſe is determinable by his death, by a limitation in law; and therefore as much is implied by law, as if he had made an actual limitation. 1 *Rol. Abr.* 330, 331. *Cro. Jac.* 436. *S. C.*

3. *Where an authority cannot be transferred, and when it ſhall be determined and revoked.*

One who has an authority to do any act for another, muſt execute it himſelf, and cannot trrnsfer it to another; for this being a truſt and confidence repoſed in the party, cannot be aſſigned to a ſtranger whoſe ability and integrity were not ſo well thought of by him for whom the act was to be done; therefore an executor having authority to ſell, cannot ſell by attorney. 9 *Co.* 77. *b.* 1 *Rol. Abr.* 330.

So if a leſſee for life hath power to make leaſes, rendring the ancient rent, he cannot make them by letter of attorney. 2 *Rol. Rep.* 303.

If

If *A.* lends *B.* a horſe to ride to *York*, *B.* cannot let his man ride him; for the licence is a matter of pleaſure annexed to the perſon of *B.* and cannot be transferred; adjudged upon a demurrer, in an action of treſpaſs, for immoderately riding the plaintiff's mare; where the defendant pleaded, that the plaintiff *licentiam eidem dedit equitare*; and that the defendant and his ſervant *alternatim* had rid upon the ſaid mare. 1 *Rol. Abr.* 330. 1 *Mod.* 110.

The authority given by letter of attorney muſt be executed during the life of the perſon that gives it; becauſe the letter of attorney is to conſtitute the attorney my repreſentative for ſuch a purpoſe, and therefore can continue in force only during the life of me that am to be repreſented; and hence it is, that if *J. S.* make a letter of attorney to deliver ſeiſin after my death, it is void; becauſe he cannot deliver ſeiſin during my life; for that were plainly without any authority from me; nor can he do it after my death, for the former reaſon. 2 *Rol. Abr.* 9. *Co. Lit.* 52.

But if any corporation aggregate, as mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver ſeiſin, this authority does not determine by the death of the mayor or dean, but the attorney may well execute the power after their death; becauſe the letter of attorney is an authority from the body aggregate, which ſubſiſts after the death of the mayor or dean, and therefore may be repreſented by their attorney; but if the dean or mayor be named by their own private name, and die before livery, or be removed, livery after ſeems not good. *Co. Lit.* 52. 2 *Rol. Abr.* 12.

If the leſſor by deed licenſes his leſſee for years or life, to alien, who is reſtrained by condition not to alien without licence, and the leſſor dies before the leſſee aliens, yet this is no countermand of the licence; for the licence exempts the leſſee out of the penalty of the condition, and it was executed on the part of the leſſor as much as it could be. *Co. Lit.* 52. *b.*

4. *Where an authority muſt be ſtrictly purſued.*

A commiſſion was directed to *eight perſons* by name, and *ſeven of them* only made the return; it was inſiſted, that it was good, and the Earl of *Leiceſter*'s caſe in *Plow. Com.* 393. was cited to prove it; where a commiſſion was granted to *fifteen perſons*, to take an indictment, and authority was given to them, or four of them, or more, whereof *two to be of the quorum*, and the indictment was taken by *eight of them*, whereof *two were of the quorum*, and it was held good; but in the principal caſe it was adjudged, that the *authority* given to theſe eight perſons was *joint*, and not ſeveral, and ought ſtrictly to be purſued. 1 *Bulſt.* 107.

The huſband was attainted, and the King granted a commiſſion under the ſeal of the *court of augmentations*, to certain perſons to aſſign to the wife the *third part of the lands* of the huſband, by virtue of which the commiſſioners aſſigned her the *third part of the rent of an houſe*, which the King confirmed, and ſhe accepted; adjudged, that this aſſignment of dower was not good, becauſe the commiſſioners had not purſued their authority; for that was to *aſſign lands*, and they had aſſigned *rents iſſuing out of the lands*, and if ſo, then the confirmation made by the King is void. *Dyer* 263.

The defendant being a *recuſant convict*, departed above five miles from his habitation, againſt the ſtatute 1 *Jac. cap.* 1. he pleaded, that two juſtices gave him *licence under their ſeals*, to come to *London* for ſix months; it was objected, that he had not purſued the ſtatute, becauſe that directs the licence to be under the hands and ſeal, and with conſent of the biſhop, *&c.* Judgment againſt the defendant. 1 *Rol. Rep.* 108.

Conveyance, *&c.* was made to the uſe of *T. P.* for life of ſeveral manors, lands, *&c.* with a power to make leaſes *of the premiſſes, or any part thereof*, ſo that ſuch rent be reſerved, or more, upon every leaſe which had been before reſerved within the ſpace of two years; afterwards he made a leaſe of part of the lands, which had not been leaſed *within two years before*; adjudged a good leaſe, and that any rent might be reſerved upon it, becauſe he had a general power to make leaſes *of all the premiſſes*; and this reſtrictive clauſe ſhall not be applied to ſuch lands which were in leaſe for two years laſt, but to ſuch lands which were in leaſe within two years before. 2 *Rol. Rep.* 263.

In treſpaſs, the caſe was, *Martin* made a leaſe to *Warren*, excepting the trees, in which leaſe *Warren* covenanted, that *Martin* and his aſſigns ſhould have power to ſell the trees and root them up, he or *they repairing* the hedges where they ſtood; *Martin* ſold ſome of the trees to the defendant, who with his ſervants entred and cut them down, for which *Warren* the plaintiff brought treſpaſs; and upon demurrer it was objected, that the defendant did not ſhew, that he *repaired the hedges* when he cut down the trees; for this, being a qualified power, ought to be ſet forth at large, and that it was a power annexed to the reverſion, and not aſſignable to any other perſon: *Sed per curiam*, A bare power is not aſſignable; but here is an *intereſt* annexed to the power, *viz.* that *Martin* might ſever the trees from the reverſion; and where *a power is coupled with an intereſt*, *'tis aſſignable.* 2 *Mod.* 317.

In replevin, &c. the caſe upon the pleading was, a fine was levied to the uſe of *T. P.* for life, remainder to his executors, *&c.* for eighty years, with power to him and his aſſigns, to make leaſes in poſſeſſion or reverſion for twenty-one years, reſerving the ancient rent, and determinable upon three lives; *T. P.* deviſed this term to *J. N.* and died; afterwards *J. N.* died, and ſo the term came to his executor, who aſſigned it to *W. R.* and that aſſignee made a leaſe of the lands, *&c.* and *whether an aſſignee of an executor of an executor of the leſſee for life could execute this power, or not*, was the queſtion; it was objected, that he could not, becauſe this power was collateral to the eſtate, and therefore could not run with the land; but adjudged, that this power was coupled with an *intereſt*, and annexed to the eſtate; and that the tenant for life having deviſed the term, his deviſee was an aſſignee, and the power was in him, and conſequently it muſt be in his executor, and by the ſame reaſon in the aſſignee of the executor of that executor. 1 *Vent.* 338, 339.

Adjudged, where a man hath power to charge lands with a ſum not exceeding 3000 *l.* he may charge it with that ſum, and the *intereſt*, becauſe the ſum carries intereſt of courſe, for none will lend it without *intereſt*. 2 *Salk.* 538.

Autumn, Is the decline of the ſummer. Some computed the years by *autumns*; but the *Engliſh-Saxons* by winters. *Tacitus* ſays, that the ancient *Germans* knew the other diviſions of the year, but did not know what was meant by *autumn*. *Lindewood* tells us when the ſeveral ſeaſons of the year begin, in theſe lines,

Dat Clemens Hiemem, *dat* Petrus *ver* Cathedratus,
Æſtuat Urbanus, autumnat Bartholomæus.

Autumnalia, Thoſe fruits of the earth which are ripe in *autumn* or harveſt.

Auxilium ad filium militem faciendum et filiam maritandam, A writ formerly directed to the ſheriff of every county where the King or other lord had any tenements, to levy of them an aid towards the knighting of a ſon, and the marrying of a daughter. *F. N. B.* 82. See **Aid.**

Auxilium curiae, A precept or order of court for the citing or conveying of one party, at the ſuit and requeſt of another, to warrant ſomething. *Vocat inde ad warrantiam* Johannem Sutton *de* Dudley *chevaler* & Iſabellam *uxorem, ut habeat eos hic in* Octabis S. Michaelis, *per* auxilium curiæ. *Kennet*'s *Paroch. Antiq.* 477.

Auxilium facere alicui in curia regis, To be another's friend and ſolicitor in the King's court; an office undertaken by ſome courtiers for their dependants in the country.——*Sciant præſentes & futuri, quod ego* Bernardus de S. Walerico *conceſſi* Rogero de Berkley *& hæredibus ſuis* auxilium *& conſilium meum in curia domini mei regis* Angliæ. *Paroch. Antiq.* 126.

Auxilium regis, The King's aid, or money levied for the King's uſe and the publick ſervice; as where taxes are granted by parliament. *Cowell.*

Auxilium vicecomiti, A cuſtomary aid or duty anciently payable to ſheriffs out of certain manors, for the better ſupport of their offices. *Prior de* Kime *com.* Linc. *tenet duas carucatas terræ in* Thorpe *per ſervitium xl. denariorum per annum ad* auxilium vicecomitis. *Mon. Angl. 2 tom. p.* 245. An exemption from this duty was ſometimes granted by the King: And the manor of *Stretton* in *Warwickſhire* was freed from it by charter. 15 *H.* 3. *m.* 4. *Cowell. Jacob.*

Await, Seems to ſignify what we now call *way-laying*, or lying in *wait* to execute ſome miſchief. *Stat.* 13 *Ric.* 2. *c.* 1. It is ordained that no charter of pardon ſhall be allowed before any juſtice, for the death of a man ſlain by *await*, or malice prepenſed, *&c.*

Award, (from the Fr. *agard)* Is the judgment and arbitration of one or more perſons, at the requeſt of two parties who are at variance, for ending the matter in diſpute without publick authority; and may be called an award becauſe it is impoſed on both parties to be obſerved by them. *Dictum quod ad cuſtodiendum ſeu obſervandum partibus imponitur. Spelman.* See title **Arbitrator.**

Awm, or **Aume,** (Teut. *ohm*, i. e. *cadus vel menſura)* A meaſure of Rheniſh wine, containing forty gallons; mentioned in the ſtatute 1 *Jac.* 1. *c.* 33. and 12 *Car.* 2. *c.* 4. This word is otherwiſe called *awame*, as you may read in a very old printed book, viz. *the rood of* Rheniſh wine *of Dordreyght is ten* awames, *and every* awame *is fifty gallons.* Item, *the rood of* Antwerp *is fourteen* awames, *and every* awame *is thirty-five gallons Cowell, edit.* 1727.

Axe, and **Axen,** Comes from the Saxon verb *axian*, to demand, and from hence we have our *Engliſh* word *aſk*. In *Somerſetſhire*, and ſome other counties of *England*, in the country dialect, the word *axe* is made uſe of for *aſk*.

Ayde. See **Aid.**

Azalous, A ſort of poor horſe or jade. Affri, azaldi, *et alii equi minoris valoris amovendi ſunt a foreſta de* Englewode. Clauſ. 4 Ed. 3.

Azorium, Azure-colour.——*Qui ibidem fodientes lapidem non modicum inventum revolverunt, ſub quo locellum ligneum conſpicati, convocatis priore ac conventu ipſum aperuit interius undique depictum, medietas cum vermiculo, altera medietas cum* azorio, *et literas, &c.* Abbat. Glaſton. MS. *Cowell, edit.* 1727.

B.

Baard, An ancient ſort of veſſel or tranſport ſhip. ——Willielmus *filius* Willielmi Bek, *tenet terram ſuam in* Levyngburn *per ſerjantiam inveniendi ad transfretationem domini regis unam navem, quæ vocatur* baard, *verſus Vaſconiam ſumptibus ſuis propriis.* Tenures, p. 62. *Cowell, edit.* 1727.

Baca, A hook or link of iron, or ſtaple.——*In axibus emptis & carrectis axandis novem denarios in colariis,* bacis *& ſellis ad idem emptis xiii. den.*——Conſuetudin. domus de Farendon, MS. penes *Wh. Kennet*, f. 20.

Baccinium, or **Bacina,** A baſon or veſſel to hold water to waſh the hands.——*Non torpeta, non nountergia, non* baccinia, *& nil omnino per violentiam exigatur.* Simeon Dunelm. *anno* 1126. Mon. Angl. tom. 3. p. 191.—— Petrus *filius* Petri Picot *tenet medietatem heydenæ per ſerjantiam ſerviendi de* bacinis.——This was a ſervice of holding the *baſon*, or waiting at the *baſon*, on the day of the King's coronation. *Lib. Rub. Scaccar. f.* 137. *Jacob.*

Bacheleria, The commonalty, as diſtinguiſhed from baronage.——*Feſtivitate* S. Edmundi *regis & confeſſoris, in quindenam* S. Michaelis *apud* Weſtmonaſterium, *per dominum regem regaliter celebrata, communitas* bacheleriæ Angliæ *ſignificavit domino* Edwardo *filio regis, &c.* Annal. Burton. p. 426. *ſub an.* 1259.

Bachelor, (*Baccalaureus*, from the Fr. *bachelier*, viz. *tyro*, a learner:) In the univerſities there are *bachelors of arts &c.* which is the firſt degree taken by ſtudents before they come to greater dignity; and thoſe that are called *bachelors* of the companies of *London*, are ſuch of each company, as are ſpringing towards the eſtate of thoſe that are employed in council, but as yet are inferiors; for every of the twelve companies conſiſts of a *maſter*, two *wardens*, the *livery*, (which are aſſiſtants in matters of council, or ſuch as the aſſiſtants are choſen out of) and the *bachelors*. The word *bachelor* is uſed 13 *R.* 2. and ſignifies the ſame with *knight-bachelor*. By 3 *Ed.* 4. *c.* 5. it is a knight, and not a knight banneret, or *knight of the bath. Anno* 28 *Ed.* 3. a petition was recorded in the *tower*, beginning thus: *A noſtre ſeigneur le roy monſtrant votre* ſimple bachelor, *Johan de Bures, &c. Bachelor* was anciently attributed to the admiral of *England*, if he were under a baron. In *Pat.* 8 *R.* 2. we read of a *baccalarius regis:* and touching the farther etymology of this word, *Baccalaurei (teſte Renano) a* bacillo *nominati ſunt, quia primi ſtudii authoritatem quæ per exhibitionem* baculi *concedebatur jam conſecuti fuiſſent, &c.*

Backberinde, *(Sax.)* ſignifieth bearing upon the back, or about a man. *Bracton* uſeth it for a ſign or circumſtance of theft apparent, which the civilians call *furtum manifeſtum*; for, dividing *furtum* into *manifeſtum et non manifeſtum*, he defineth the former thus; *furtum vero manifeſtum eſt, ubi latro deprehenſus eſt ſeiſitus de aliquo latrocinio, ſcil.* handhabend, & backberind, *& inſecutus fuerit per aliquem cujus res illa fuerit.* Bract. lib. 3. tract. 2. cap. 32. *Manwood* remarks it as one of the four circumſtances in caſes, wherein a foreſter may arreſt the body of an offender againſt vert or veniſon in the foreſt: By the aſſiſe of the foreſt of *Lancaſter* (ſays he) *taken with the manner*, is when one is found in the King's foreſt in any of theſe four degrees, *ſtable-ſtand, dog-draw, back-bear*, and *bloody-hand.* Manw. 2 part, Foreſt Laws.

Baco, Is a bacon hog, as often uſed in old charters. *Blount.*

Bactile, A candleſtick properly ſo called, when formerly made *ex baculo* of wood or a ſtick. Hugo *epiſcopus* Dunelmenſis *fecit in eccleſia coram altari tria ex argento* bactilia, *in quibus lumina die noctuque perpetuo ardentia lucerent.* Coldingham, Hiſt. Dunelm. apud Wartoni Ang. Sac. P. 1. p. 723.

Badger, (from the Fr. *bagage*, a bundel, and thence is derived *bagagier*, a carrier of goods) ſignifies with us one that buys corn or victuals in one place, and carries them to another to ſell and make profit by them: and ſuch a one is exempted in the *ſtat.* 5 & 6 *Ed.* 6. *cap.* 14. from the puniſhment of an ingroſſer within that ſtatute. But by 5 *Eliz. c.* 12. *badgers* are to be licenſed by the juſtices of peace, in the ſeſſions; whoſe licences will be in force for one year, and no longer; and the perſons to whom granted muſt enter into recognizance, that they will not by colour of their licences foreſtall, or do any thing contrary to the ſtatutes made againſt foreſtallers, ingroſſers, and regrators. If any perſon ſhall act as a *badger* without licence, he is to forfeit 5*l.* one moiety to the King, and the other to the proſecutor, leviable by warrant from juſtices of peace, *&c.*

Bag, An uncertain quantity of goods and merchandize, from three to four hundred.

Baga, A bag or purſe. —— *Carta decani eccleſiæ* Litchfield, *in Mon. Angl. tom.* 3. *pag.* 337. *ducentas marcas pecuniæ in quadam* baga *de Whalley.*

Bagavel, The citizens of *Exeter* had granted to them by charter of King *Edw.* 1. a collection of a certain tribute or toll upon all manner of wares brought to that city to be ſold, towards the paving of the ſtreets, repairing of the walls, and maintenance of the city, which was commonly called in Old Engliſh *bagavel, bethugavel*, and *chippinggavel.* Antiq. of *Exeter.*

Bahadum, A cheſt or coffer; it is mentioned in *Fleta, lib.* 2. *cap.* 21.

Bajardour, (Lat. *bajulator)* A bearer of any weight or burden.——*Offerebunt duos inciſores in ſua lapicidina, & cariagium petræ uſque ad navim, & de navi uſque duos* bajardours *ſervituros ad eccleſiam.* Petr. Bleſ. Contin. Hiſt. Croyland. p. 120.

Bail, *Ballium*, (from the French *bailler*, *tradere*, to deliver) Is uſed in our common law for the freeing or ſetting at liberty of one arreſted or impriſoned upon any action, either civil or criminal, on ſurety taken for his appearance at a day and place certain. *Bract. lib.* 3. *tract.* 2. *c.* 8. *num.* 8 & 9. The reaſon why it is called *bail*, is becauſe by this means the party reſtrained is *delivered* into the hands of thoſe that bind themſelves for his forthcoming, in order to a ſafe keeping or protection from priſon: And the end of bail is to ſatisfy the condemnation and coſts, or render the defendant to priſon. *Cowell.*

Bail in civil cauſes. Under this head is conſidered,

1. *Who are authorized to take bail.*

2. *In what actions common or ſpecial bail is required.*

3. *Of putting in bail.*

4. *Proceedings againſt the bail, and what they may plead in their diſcharge.*

1. *Who are authorized to take bail.*

When the ſheriff arreſts any one, he is not only authorized, but obliged to take bail, otherwiſe an action on the caſe lies againſt him.

This the ſheriff is obliged to by the following act:

Stat. 23 *Hen.* 6. *c.* 9. "The king conſidering the great perjury, extortion, and oppreſſion which be and have been in this realm by his ſheriffs, under ſheriffs, and their clerks, coroners, ſtewards of franchiſes, bailiffs and keepers of priſons, and other officers in divers counties of this realm, hath ordained by authority aforeſaid, in eſchewing of all ſuch extortion, perjury, and oppreſſion, that no ſheriff ſhall let to farm, in any manner, his county, nor any of his bailiwicks, hundreds, nor wapentakes; nor that the ſaid ſheriffs, under ſheriffs, bailiffs of franchiſes, nor any other bailiff, ſhall return, upon any writ or precept to them directed to be returned, any inqueſts in any panel thereupon to be made, any bailiffs, officers, or ſervants to any of the officers aforeſaid, in any panel by them ſo to be made; nor that any of the ſaid officers and miniſters, by occaſion or under colour of their office, ſhall take any other thing by them, nor by any other perſon to their uſe, profit, or avail, of any perſon by them or any of them to be arreſted or attached, nor of none other for them, for the omitting of any arreſt or attachment to be made by their body; or of any perſon by them or any of them, by force or colour of their office, arreſted or attached, for fine, fee, ſuit of priſon, mainprize, letting to bail, or ſhewing any eaſe or favour to any ſuch perſon ſo arreſted, or to be arreſted, for their reward or profit, but ſuch as follow; that is to ſay, for the ſheriff 20*d.* the bailiff which maketh the arreſt or attachment, fourpence, and the gaoler, if the priſoner be committed to his ward, fourpence: and that the ſheriff, under ſheriff, ſheriff's clerk, ſteward or bailiff of franchiſes, ſervant of bailiff or coroner, ſhall not take any thing by colour of his office, by him nor by any other perſon to his uſe, of any perſon for the making of any return or panel, and for the copy of any panel but fourpence. And the ſaid ſheriffs, and all other officers and miniſters aforeſaid, ſhall let out of priſon all manner of perſons by them or any of them arreſted, or being in their cuſtody, by force of any writ, bill, or warrant in any action perſonal, or by cauſe of indictment of treſpaſs, upon reaſonable ſureties of ſufficient perſons having ſufficient within the counties where ſuch perſons be ſo let to bail or mainprize, to keep their days in ſuch place as the ſaid writs, bills, or warrants ſhall require. Such perſon or perſons which be or ſhall be in their ward by condemnation, execution, *capias utlagat'*, or *excommunicatum*, ſurety of the peace; and all ſuch perſons which be or ſhall be committed to ward by ſpecial commandment of any juſtice, and vagabonds refuſing to ſerve according to the form of the ſtatute of labourers only excepted. And that no ſheriff, nor any of the officers or miniſters aforeſaid, ſhall take or cauſe to be taken, or make any obligation for any cauſe aforeſaid, or by colour of their office, but only to themſelves, of any perſon, nor by any perſon which ſhall be in their ward by the courſe of the law, but by the name of their office and upon condition written, that the ſaid priſoners ſhall appear at the day contained in the ſaid writ, bill, or warrant, and in ſuch places as the ſaid writs, bills, or warrants ſhall require. And if any of the ſaid ſheriffs, or other officers or miniſters aforeſaid, take any obligation in other form by colour of their offices, that it ſhall be void; and that he ſhall take no more for the making of any ſuch obligation, warrant, or precept by them to be made, but fourpence. And alſo that every of the ſaid ſheriffs ſhall make yearly a deputy in the King's courts of his Chancery, the King's Bench, the Common Pleas, and in the Exchequer, of record, before that they ſhall return any writs, to receive all manner of writs and warrants to be delivered to them: and that all ſheriffs, under ſheriffs, clerks, bailiffs, and gaolers, coroners, ſtewards, bailiffs of franchiſes, or any other officers or miniſters, which do contrary to this ordinance in any point of the ſame, ſhall loſe to the party in this behalf indamaged or grieved, his treble damages; and ſhall forfeit the ſum of 10*l.* at every time that they or any of them do the contrary thereof in any point of the ſame; whereof the King ſhall have the one half, to be employed to the uſe of his houſe, and in no otherwiſe, and the party that will ſue, the other half. And that the juſtices of aſſiſes in their ſeſſions, juſtices of the one bench and the other, and juſtices of peace in their county, ſhall have power to enquire, hear, and determine of office without ſpecial commiſſion, of and upon all them that do contrary to theſe ordinances in any article or point of the ſame. And if the ſaid ſheriffs return upon any perſon *cepi corpus*, or *reddidit ſe*, that they ſhall be chargeable to have the bodies of the ſaid perſons at the days of the returns of the ſaid writs, bills, or warrants, in ſuch form as they were before the making of this act.

"Provided always, that the warden of the King's gaol of the *Fleet*, and the King's palace at *Weſtminſter* for the time being, ſhall not be indamaged nor prejudiced by this ordinance in the duty of his office."

The ſheriff took a bond of the defendant being in cuſtody *to appear* on ſuch a day in *B. R. and alſo adtunc & ibidem ad reſpondendum the plaintiff in placito tranſgreſſionis, &c.* It was objected, that the ſtatute 23 *Hen.* 6. requires only a bond for appearance, and not to anſwer the plaintiff in a plea of treſpaſs, which is another thing, and therefore the bond muſt be void; but adjudged that the bond was good, for there was *nothing in it but what was compriſed in the writ*; for that was to command the ſheriff *quod habeat corpus* of the defendant, *&c.* ſuch a day *ad reſpondendum* to the plaintiff. *Godb.* 136.

The condition of a bond to the ſheriff, on arreſt on a *latitat* was, that if the defendant perſonally appear in *B. R.* at *Weſtminſter*, and there to anſwer, *&c.* it was moved, that this differed from the form in the ſtatute, and therefore void; but as to the word (perſonally) the juſtices held it ſurpluſage, and well enough, notwithſtanding that, becauſe as the caſe is, the appearance of the defendant ouht to be in perſon upon a *latitat*, for he is ſuppoſed to be *in cuſtodia mareſchalli*; and ſo it has been adgudged in *C. B.* where the appearance of the party arreſted is *de jure* perſonal, *&c. contra* where perſonal appearance is not requiſite. And as to the other words (there to anſwer,) *Wray* put a difference, that in ſuch caſe the bond is well enough; for it is in effect only, that he ſhall appear *eo animo ut reſpondeat*; but if the words had been (appear and anſwer) it is a void condition; for it may be the plaintiff will never declare againſt him; but *Gawdy* and *Ayliff* J. *e contra*, and held the bond void by reaſon of the words aforeſaid, but would not give judgment againſt the plaintiff; but *ex gratia curiæ* ſuffer'd him to diſcontinue. 2 *Lev.* 78.

A man was *bound to his creditor*, who was not ſheriff nor ſheriff's officer, *to appear at his ſuit in B. R.* on ſuch a day, *and then and there make anſwer, &c.* but did not appear: all the judges agreed clearly, that this bond was not within the ſtatute 23 *Hen.* 6. and gave judgment for the plaintiff accordingly. *Goldſb.* 66.

Debt on a bond to a ſheriff, that *if the defendant did perſonally appear in B. R. &c.* that then, *&c.* the defendant

dant pleaded, that he was taken by a *latitat* by the plaintiff (ſheriff,) who took this obligation for his deliverance, and that the obligation was not according to the ſtatute. All the juſtices, except *Anderſon* (who was abſent) held, that if it were in ſuch an action where a man may appear by attorney, it is void. At another day it was held by three judges againſt *Anderſon* Ch. J. that a *man ought to appear in perſon upon a* latitat. *Ow.* 90.

An officer by proceſs out of the county-court *attached the goods* of the defendant to anſwer a plaint levied there for a debt; *K. redelivered the goods, and took the defendant's bond to appear* at the day, *or otherwiſe to deliver the goods back again.* It was agreed *per tot. cur.* that this was out of the ſtatute of 23 *H.* 6. becauſe that relates only to thoſe whoſe bodies are taken and impriſon'd, and not where their goods are attach'd; and judgment accordingly. *And.* 267.

In *debt* upon bond, the defendant *pleaded that the plaintiff was ſheriff, and took the bond upon arreſt for the inlargement of the priſoner*, and that where the ſtatute appoints the ſheriff to take bonds of perſons ſufficient, the defendant ſaid that himſelf was not ſufficient, becauſe *no freeholder*, and demanded judgment of the obligation; upon demurrer the plea was held ill, becauſe the *ſheriff is the judge of the ſufficiency*, and inſufficiency is to his own damage only, he being to be amerced for not bringing in the body, and has no remedy beſides the bond. *Mo.* 636.

The ſheriff took a *bond to appear at Weſtminſter*; the *term was adjourned to St. Alban's*, and the *defendant appear'd there*; the bond is not forfeited; but *Popham* Ch. J. was of opinion, that the bond was void, becauſe of the word *(Weſtminſter)* in the condition; for there is no ſuch name in the writ for appearance. *Mo.* 430.

A ſheriff brought debt upon bond conditioned, that *if* H. L. *ſhould perſonally appear before the Queen's Majeſty and her council of her court of requeſts, &c. forthwith to anſwer all contempts as ſhall be then laid to his charge*; that then, *&c.* the defendant pleaded the ſtatute 23 *Hen.* 6. and that the ſheriff, *colore præcepti* under the ſeal of the Queen of the court of requeſts, took and impriſon'd the ſaid *H. L.* and detained him till the defendant and the ſaid *H. L.* became bound as aforeſaid: and upon demurrer it was adjudged for the defendant, becauſe the bond is void by that ſtatute. 2 *And.* 122.

In *caſe* the plaintiff declared that he ſued forth a *latitat* and delivered it to the ſheriff to arreſt *J. S.* and acquainted the ſheriff of his cauſe of action, and that he intended to declare in debt, and that he *did arreſt him, and afterwards let him go abſque aliqua ſecuritate inventa*; and at the day *returned cepi corpus & paratum habeo, &c.* which was falſe, *&c.* the defendant *pleaded, that J. S.* being arreſted, *put in ſureties* for his appearance *J. N.* and *J. D.* two ſufficient perſons in the county, who were bound to him in 40*l.* *&c.* and pleaded the ſtatute, and that *by reaſon thereof he let him at large*, abſque hoc *that he let him at large without any ſecurity found, prout &c.* adjudged that the traverſe was good, and that the ſtatute commands him to let the priſoner go upon bail, and that he is compelled to take bail, but their *ſufficiency is left to his diſcretion*; and tho' the return was falſe, viz. *paratum habeo*, when he was at large, yet that is but a contempt to the court, and finable; but the party ſhall take no advantage of ſuch return. *Cro. E.* 624.

Debt upon bond of 40*l.* the defendant pleaded the ſtatute 23 *H.* 6. that he was arreſted at the ſuit of *J. S.* and that he together with one *M.* gave this bond for his appearance, when *neither of them had any thing in the county, or were inhabitants there*, and ſo the bond was void; but all the court held that it was good, for *the ſtatute doth not make any bonds void, but thoſe which oppreſs the people*, and if the ſheriff takes *bond with one ſurety*, it is good enough. *Cro. Eliz.* 852.

In an action of debt upon an *obligation dated 25th of Sept.* the defendant *pleads that a ca. ſa. was awarded againſt B. who was taken upon it the 30th of Sept. and that obligation was made for the enlargement of B.* The plaintiff demurred, and had judgment, becauſe it appears that the obligation was *made before the arreſt*, and therefore it could not be avoided by 23 *Hen.* 6. *cap.* 10. but he ought to

have pleaded that with a *primo deliberat'* of the arreſt; and it was agreed by *Yelverton* and *Fenner*, that if a *capias* be awarded againſt *B.* and before the arreſt the ſheriff takes an obligation of him for his enlargement when he ſhall be arreſted, that by ſpecial pleading it may be avoided by 23 *H.* 6. *Noy* 43.

A *capias* was directed to the ſheriff to arreſt *G. R.* to anſwer the plaintiff *in placito debiti* of 300*l.* the condition of the *bond* of appearance *was to anſwer the plaintiff* in placito debiti *only*, (leaving out the 300*l.*) upon an action of debt brought by the ſheriff on this bond, and a demurer, it was adjudged, that the bond and condition was good, for the ſtatute 23 *Hen.* 6. does not preſcribe any ſtrict form, but that it ought to be made to the ſheriff by his name of office, and to expreſs the day and place of appearance, and tho' it vary in other circumſtances, it is not material; neither doth the ſtatute reſtrain him to any ſum or ſecurity, tho' generally 40*l.* hath been held ſufficient to excuſe him for an eſcape, yet that is left to his diſcretion. *Cro. Jac.* 286.

Upon a *fieri facias* the ſheriff took a *bond to pay the money in court at the return of the writ*, and this was adjudged good, for the ſtatute extends only to ſuch bonds, which are made when the defendant is in cuſtody. 10 *Rep.* 99.

A bond was made to *Neale* who was ſheriff of *Warwickſhire*, and it was *vicecomiti com. prædict'*, and *Warwick* was in the margin; *per Dodderidge*, this was held no good bond, for he ought to be named ſheriff, and of that county. 2 *Rol. Rep.* 365.

But though the ſheriff is obliged to take bail, yet if the plaintiff diſlikes the ſecurity, and does not take an aſſignment of the bail-bond, he may have him brought up; for the ſheriff having arreſted the party, muſt return a *cepi corpus*, on which return it is a breach of duty in him not to bring him up, for which the court amerces him as one of their officers. 1 *Vent.* 85. 1 *Mod.* 33, 57, 244.

But if the writ be not returned, and the court makes an order that the ſheriff ſhall return his writ in four days, as is uſual, there the diſobedience is to the pronounced order of the court, and conſequently a contempt of the court, for which an attachment lies.

If the ſheriff returns *cepi* on a meſne proceſs, *& paratum habeo*, he ſhall be only amerced, if he does not bring in the body, tho' he ſhall be attached if he does not return his writ; and the reaſon is, becauſe the ſheriff is bound to bail the party; and therefore if the ſheriff is miſtaken in his ſureties, he is not to ſuffer in his liberty; and the returning his writ is in his own power; but it may not be in his power to bring in the body which he was obliged to bail. 1 *Rol. Abr.* 807, 808. *Cro. Eliz.* 824, 852. *Noy* 39.

And if the plaintiff takes an aſſignment of the bail-bond, the ſheriff is not amerciable; for, by accepting of the bond, the plaintiff has waived the benefit of the amercement, and may now ſue it in his own name; though formerly he could ſue in the ſheriff's name; and if the ſheriff releaſed the action, he had his remedy in a court of equity. 1 *Salk.* 99. 6 *Mod.* 122.

But now by 4 & 5 *Ann.* for amendment of the law, it is enacted, "That if any perſon ſhall be arreſted by any writ, bill, or proceſs, out of any of her majeſty's courts of record at *Weſtminſter*, at the ſuit of any common perſon, and the ſheriff or other officer takes bail from ſuch perſon againſt whom ſuch proceſs is, the ſheriff or officer, at the requeſt and coſts of the plaintiff in ſuch action or ſuit, or his lawful attorney, ſhall aſſign to the plaintiff in ſuch action, the bail-bond or other ſecurity taken from ſuch bail, by indorſing the ſame, and atteſting it under his hand and ſeal, in the preſence of two or more credible witneſſes, which may be done without any ſtamp, provided the aſſignment ſo endorſed be duly ſtamped before any action be brought thereon; and if the ſaid bail-bond, or other ſecurity taken for bail, be forfeited, the plaintiff in ſuch action, after ſuch aſſignment made, may bring an action and ſuit thereupon, in his own name; and the court where the action is brought may, by rule or rules of the court, give ſuch relief to the plaintiff and defendant in the original action, and to the bail upon the

ſaid

ſaid bond or other ſecurity taken from ſuch bail, as is agreeable to juſtice and reaſon; and that ſuch rule or rules of the ſaid court ſhall have the nature and effect of a defeaſance to ſuch bail-bond or other ſecurity for bail."

If the plaintiff accepts of an aſſignment of the bail-bond, the defendant may put in the ſame bail to the action that were bail to the writ; and the plaintiff cannot except againſt them. See 1 *Salk.* 97, 99. *Fareſt.* 62, 117.

By the 4 *W. & M. cap.* 4. "The judges in each court, or any two of them, whereof the chief to be one, may, by commiſſion under the ſeals of their reſpective courts, appoint commiſſioners to take recognizances of bail in ſuits depending before them, and upon affidavit of the true taking of them, ſuch recognizances ſhall be as effectual as if they were taken before themſelves; the cognizers, unleſs they live in *London* or *Weſtminſter*, or within ten miles, may juſtify before the commiſſioners in the country."

Before this ſtatute, bail was always taken *de bene eſſe* before a judge, as it may, and muſt be ſtill, if the cognizors live within ten miles of *London or Weſtminſter*; the commiſſioners are obliged by rule of court to keep a book, wherein are the names of the plaintiff and defendant, and bail, and the perſon who tranſmits the ſame, and who makes affidavit that the recognizance was duly acknowledged in his preſence; on ſuch affidavit, the judges make a conditional *allocatur*, and the bail are to ſtand abſolute, unleſs the plaintiff except againſt them within twenty days; and if he except the bail may juſtify by affidavit taken before the commiſſioners in the country. 1 *New Abr.* 207.

If one is arreſted in *London* by a ſerjeant of the mace, upon a plaint of debt entered in any of the counters, the ſerjeant cannot take bail, but the judge in court muſt. *Cro. Car.* 196. 1 *Rol. Abr.* 561. *S. C.* 1 *Jones* 226. *S. C.*

2. *In what actions ſpecial or common bail are required.*

It muſt be obſerved, that regularly after judgment, no bail is to be taken; for the plaintiff having aſcertained his right, and proved his demand, the defendant muſt pay the condemnation-money; for which purpoſe a writ of execution iſſues, to which the ſheriff can take no bail. 1 *New Abr.* 208.

But if one in execution brings an attaint, he may have a writ to the juſtices, commanding them to let him to mainprize. *F. N. B.* 106. 2 *Rol. Abr.* 112.

If an *audita querela* is founded upon a releaſe or record, the plaintiff may be bailed. *Dyer* 365. 1 *Rol. Rep.* 132.

But if upon a ſurmiſe of a matter of fact only, it is otherwiſe. 1 *Rol. Rep.* 132.

If one *condemned* by falſe verdict *in debt* or damages *ſues an* attaint, he ſhall have a ſpecial writ to bail him, upon ſureties taken, that if the attaint paſs againſt him he ſhall render himſelf to priſon, or ſatisfy the debt. *F. N. B.* 206.

One taken on an *attachment* iſſued out of Chancery is not bailable, and ſuch bond is void; *per tot. cur.* clearly. 3 *Lev.* 208.

If an *audita querela* be *grounded on a releaſe or record*, the party may be bailed; but *not on a ſurmiſe of a matter in fact*, as of an arbitrament or uſury; *per Coke* Ch. J. *Rol. Rep.* 133.

A perſon taken in *withernam* upon a *homine replegiando*, upon pleading *non cepit*, may be bailed. 2 *Salk.* 582.

One taken in *execution* is *not* bailable by law, *unleſs* an *audita querela* be brought, *(Hill.* 21 *Car. B. R.)* for bail is put in to ſecure the plaintiff, that the defendant ſhall perform the judgment of the court; aud now the law hath determined that matter; and what remains now is only for the defendant to perform the judgment, and for the not performing it he lies in execution. *Lil. P. R.* 172.

When the *action* is *only for damages*, there the party is not held to bail, *unleſs in mayhem, or ſome notorious battery*; and the reaſon is, there is no certain ſum for which the caution can be aſcertained; but in mayhem, and where by the injury it is apparent that the damage will exceed the ſum of 10*l.* there the judge may by ſpecial writ hold to bail. *Gilb. H. C. B.* 30.

On a *bottomry bond for payment of money inter alia*, the court inclined to think the defendant ſhould give bail. *Rep. of Pract. in C. B.* 34.

The defendant had been arreſted and held to ſpecial bail, and afterwards *render'd in diſcharge* of his bail, and the *plaintiff proceeded againſt the defendant as a priſoner, and recovered judgment.* In action of *debt brought upon that judgment*, and the former bail being vacated by the render, the court held that the plaintiff might well hold the defendant to bail in this action, he not now having bail in the firſt action. *Rep. of Pract. in C. B.* 77.

Motion in the treaſury for bail in an *action for meſne profits, after a recovery in ejectment*, upon the leſſor of the plaintiff's affidavit, that the meſne profits amounted to 89*l.* bail was order'd for 80*l.* this is a cauſe of action which is *bailable or not, at the diſcretion of the court or a judge. Barnes's Notes in C. B.* 87.

If in an *homine replegiando* an *elongatus* is returned, and the defendant taken upon *a withernam*, though this is no execution, yet the defendant ſhall not be bailed, unleſs he will confeſs the taking and having the party in cuſtody. *Raym.* 475. See 3 *Mod.* 121. 1 *Sid.* 210.

But if in an action for a falſe return of an *elongatus* againſt the ſheriff, it is found for the plaintiff, he may be bailed. *Raym.* 475.

The old rule in the *compleat attorney* is, that if the defendant be arreſted by meſne proceſs, as *capias*, *alias* or *pluries*, and the plaintiff holdeth him not ſufficient to anſwer to debt or damages contained in the writ, the ſame amounting to 20*l.* or upwards; that in this caſe the plaintiff, upon the return of the writ, by entring a *ne recipiatur* with philacer, out of whoſe office the *capias* did iſſue, may have ſpecial bail to be put in to his action, which the defendant muſt put in before ſome judge of the court where the cauſe depends, who will accept of ſuch bail as the validity or weight of the cauſe doth require, or in his diſcretion ſhall be thought fit. 1 *New Abr.* 280. *Comp. Attor. printed in* 1667.

This was the rule that both the courts of King's Bench and Common Pleas went by, but was afterwards ſunk to 10*l.* which has been long the ſtanding rule of the courts. 1 *New Abr.* 209.

And now by the 12 *Geo.* 1. *cap.* 39. it is enacted, that where the cauſe of action ſhall not amount to the ſum of 10*l.* in a ſuperior court, or 40*s.* in an inferior court, the plaintiff ſhall only ſerve the defendant with a copy of the proceſs, and ſhall not arreſt his perſon; and that in all caſes where the plaintiff's cauſe of action ſhall amount to the above ſum or upwards, affidavit ſhall be made and filed of ſuch cauſe of action, and the ſum or ſums ſpecified in ſuch affidavit ſhall be indorſed on the back of ſuch writ or proceſs; for which ſum or ſums ſo endorſed, the ſheriff, or other officer, ſhall take bail, and for no more.

In an attachment of privilege, which is a *capias* in the firſt proceſs, the defendant is held to bail for any ſum though never ſo ſmall; for this being a *capias* in the firſt proceſs, without ſummons, does not ariſe from a ſuſpicion of a *nihil* returned, but ariſes from a debt due to the officers of the court, by the acts of the court; and therefore another officer ought not to appear without ſeeing a ſecurity given for ſuch debt. 1 *Sid.* 63.

In an action brought upon the ſtatute 13 *Eliz.* of fraudulent conveyances, a rule was ſhewn by the juſtices that it was the practice in *B. R.* that in all actions brought *upon penal ſtatutes* the defendant ſhall only put in common bail. *Yel.* 53.

After judgment for the plaintiff it was aſſigned for *error, that no bail was entered for the defendant.* It was ſhewn to the court, that the *attorney was dead, but had been paid his fees for entring it*, and that this appeared by his own book; and the plaintiff prayed that the bail might be *entered*, and ſo it was *by order of the court* in this caſe, and between other parties. *Rol. Rep.* 372.

In *treſpaſs againſt* A. *and* B. *verdict was for the defendants.* It was moved in arreſt, for that *no bail was entered for* B. for every defendant is ſuppoſed to be *in cuſtodia*

cuſtodia mareſchalli; and in this caſe the *venire facias* was to try the iſſue between the plaintiff and the defendants, whereas *B.* was no party in court, therefore he cannot have judgment, and it appearing that there was no fraud in the plaintiff, the judgment for this reaſon was arreſted; but if *B.* had appeared at the ſuit of any other perſon in the ſame term, it had been ſufficient. *Poph.* 145.

An *executor*, though *ſued by an attorney of* B. R. ſhall not be compelled to put in ſpecial bail, notwithſtanding his *privilege* as to other perſons ſued by him; and upon ſearch no precedent could be found where ſuch pretended privilege had prevailed. 3 *Bulſt.* 316, 317.

If, where ſpecial bail is required, the plaintiff's attorney doth (before any bail put in) *deliver a declaration to the defendant's attorney*, unleſs it be only to ſhew ſuch a cauſe of action as requires bail, he ſhall not afterwards compel the defendant to put in good bail, but common bail ſhall ſerve. *Lil. P. R.* 86.

After the *roll is marked to have ſpecial bail*, common bail ought not to be filed; but if the roll be not marked for ſpecial bail, nor the *cauſe of action expreſſed in the writ*, common bail may be entered: (*Hill.* 22 *Car. B. R.*) for nothing appears to the court that ſpecial was required, and then common bail is to be filed of courſe. *Lil. P. R.* 174.

In *caſe againſt baron and feme*, the *feme appeared*, but the *baron would not*; and bail being inſiſted upon, it was prayed, that ſhe might be delivered on common bail; but *Glyn*, Ch. J. ſaid, that if there be cauſe to have ſpecial bail, ſhe muſt lie in priſon till the huſband appears, and puts in bail for her; for ſhe cannot put in bail for herſelf, ſhe being covert baron. *Sty.* 475.

An executor of an executor brought *debt upon bond* for 2000*l.* and upon motion, that the plaintiff might accept common bail, becauſe the bond was only *for performance of covenants*, the court ordered that bail ſhould be accepted *according to the breach aſſigned*, and not according to the penalty. It was held in this caſe, that where *execntors are defendants* they need not find ſpecial bail becauſe *in auter droit*. *Sid.* 63.

In *ſcand. magnatum*, the court upon motion ordered ſpecial bail to be given. *Raym.* 74.

The defendant *ſhipped goods at* Braſil, *without paying the cuſtoms, but promiſed to pay them at* Liſbon, *but came to* London *directly* without touching at *Liſbon*, and offering to ſell the goods here, the *Portugal ambaſſador complained to the privy council*, and he ſtill refuſing to pay them, they committed him; and being brought by a *habeas corpus*, he moved to be bailed, but it was oppoſed, becauſe it might cauſe a breach between the two crowns; but the court inclined that he ſhould be bailed, and if the matter could be proved, he might be indicted, but they prayed time to inſpect the return before the filing it, and therefore he was remanded. *Sid.* 143.

Caſe for affirming that he was of full age, and by that means had borrowed large ſums on mortgages, when *in facto* he was under age; it was moved, that he might put in ſpecial bail, but denied; for ſpecial bail ſhall *not be given by virtue of the ſtatute of* 13 Car. 2. cap. 2. *but where it was required to be given by the rules of the court*, and the *ac-etiam* will not compel ſpecial bail, unleſs the cauſe expreſsly appears to be for real value, as debt, trover, *&c.* but *where ſpecial damages may ariſe* as in this caſe or other caſes, by reaſon of a ſpecial declaration, ſpecial bail ſhall not be required. *Sid.* 183.

On motion to have a *ſpecial latitat, viz. with an ac-etiam*, where the party intended to declare in treſpaſs only, and this was upon a ſurmiſe that there was *a great mayhem*, the court ſaid, that upon affidavit thereof they would make one with an *ac-etiam*, and ſo there ſhall be ſpecial bail. *Sid.* 276.

In an action *upon a replevin bond*, common bail ſhall be filed. 1 *Salk.* 99.

Action againſt *maſter of a ſhip for imbeziling goods* he had on board, and he was held to ſpecial bail; but if it were for negligent keeping, common bail would have done; *per Holt.* 12 *Mod.* 251.

Defendant ſhewed the *compoſition act*, and that the plaintiff's debt, according to the compoſition he had made with the reſt of his creditors, was under 10*l.* and that the plaintiff would be bound, though a *non ſubſcriber*; yet the defendant was held to ſpecial bail, becauſe *non conſtat* that the plaintiff will be bound, for he may deny the abſconding, *&c.* ſo that this would be to determine the merits of the cauſe, *viz.* that he was bound by the compoſition; *aliter*, if the plaintiff had ſubſcribed, or had been *ſummoned before a judge*, and the matter had received a determination. 1 *Salk.* 99.

Where the action is only for damages, there regularly the party is not to be held to ſpecial bail; for there is no certain ſum for which bail can be aſcertained. 1 *New Abr.* 209.

But in actions of *aſſault* and *battery*, *ſcandalum magnatum*, and for other perſonal wrongs, in which it is apparent the damages will exceed the ſum of 10*l.* the court, or any judge of the court, may and do, on good cauſe ſhewn, give leave to the plaintiff to ſue out a writ with the clauſe of *ac-etiam billæ*, to hold the defendant to ſpecial bail. 1 *Sid.* 307. 1 *Roll. Abr.* 335. 1 *Lev.* 39. 1 *Brownl.* 90. 1 *Sid.* 183. *Raym.* 74.

So upon an affidavit of a great *mayhem*, and that he intended to declare in *treſpaſs*, the court ordered a ſpecial *latitat*, with an *ac-etiam*, and that ſo there ſhould be ſpecial bail. 1 *Sid.* 276.

In debt upon a bond, for performance of covenants, the court will order bail according to the breaches aſſigned. 1 *Sid.* 63.

In an action of debt on a bond, though the defendant ſays it was by *dureſs*, or on an uſurious contract, yet there ſhall be ſpecial bail; for the merits of the cauſe ſhall not be determined on motion; neither will the court put a ſlur upon the plaintiff's cauſe, which ought to come down fairly to trial, without prejudice. 1 *Salk.* 100.

So in an action for money won at play, if the contract be lawful, as being under 100*l.* the defendant muſt put in ſpecial bail. 1 *Salk.* 100.

On a penal ſtatute the defendant is not held to bail, becauſe the penalty on a ſtatute is in the nature of a *fine* or *amercement* ſet on the party, for an offence committed, and therefore no perſon ought to ſuffer any inconvenience by reaſon of ſuch law, till he is convicted of the offence. *Yel.* 53. 2 *Brownl.* 293.

An heir, executor or adminſtrator, ſhall not be held to ſpecial bail; for the demand is not on the perſons, but on the aſſets of the deceaſed; and it would be unreaſonable to ſubject their perſons to an execution for the debt of another. 2 *Brownl.* 293. 3 *Bulſt.* 316.

So if there be a judgment againſt an executor for the debt *de bonis teſtatoris*, and for the damages only *de bonis propriis*; he may bring *error*, and have a *ſuperſedeas*, without giving ſureties according to 3 *Jac.* 1. *c.* 8. for though the words of the ſtatute are general, yet it muſt be intended where judgment is againſt the defendant himſelf, upon his own bond, or where the judgment is general againſt the executors; for it would be unreaſonable they ſhould find ſureties to pay the whole out of their own eſtate. *Cro. Jac.* 352. *Cro. Car.* 39. *Lit. Rep.* 2, 3.

Neither is an executor, adminiſtrator or heir, upon the removal of a cauſe out of an inferior court, obliged to put in bail. 2 *Lev.* 204. 1 *Sid.* 418. 1 *Lev.* 945. 268. 2 *Jones* 82. 1 *Salk.* 98. *S. P. cont. Lit. Rep.* 81.

But if there be a *devaſtavit* ſuggeſted, which can only be on an action of debt on a judgment, they muſt find ſpecial bail. 1 *Lev.* 145. 1 *Sid.* 63. 1 *Salk.* 98.

An attorney, or other officer, whoſe attendance is required in the court to which he belongs, ſhall not be held to ſpecial bail. 1 *Mod.* 19.

If baron and feme are ſued, the huſband muſt put in bail for both, but if the huſband does not appear upon the arreſt, the wife muſt file common bail before ſhe can be diſcharged; for otherwiſe the plaintiff could not proceed to obtain judgment. *Goldſb.* 127. *Cro. Eliz.* 370.

B A I

Cro. Jac. 445. *Style* 475. 1 *Mod.* 8. 6 *Mod.* 17, 105.

In an action for *money won at play*, *Gould* and *Turton* were for denying special bail, for since the plaintiff played upon a trick they would not help his security; but *per Holt*, the practice has been otherwise, and the contract if under 100*l.* is lawful, and the plaintiff ventured his money against it, and to say they were not to better his security, would as well prove there should be no bail in an *indebitatus assumpsit*, &c. 1 *Salk.* 100.

One *summoned* before a judge, to *shew cause* why common bail should not be taken, *did not come*, whereupon a day was given him for to come, or else that common bail should be filed; he *comes before the day*, and *consents* to common bail, which was accordingly filed; and *at the day came to make oath* of a debt above 10*l.* but *per cur.* he ought not to be received, bail being regularly filed. 12 *Mod.* 324.

It was moved to have leave for the charging of *M.* being a prisoner in *Newgate*, with a *scandalum magnatum* and *ac-etiam billæ* of 100*l.* in order to hold him to special bail, for saying the *D.* of *S.* was a cheat, and has cheated the king and the army; *Holt* said, this being a poor man, to charge him thus will be a perpetual imprisonment to him, and special bail has been often demanded in these actions, yet it has been frequently denied; but he was ordered to find two that would swear themselves worth 25*l.* each, and himself to be bound in 100*l.* 12 *Mod.* 420.

It has been held once, that if the *plaintiff* had been *non-prossed in a former action*, that if he began again he should have but common bail; but this has not been abided by; *per cur'.* 12 *Mod.* 501.

If *upon examination before a judge* one do *not make out a good cause of action*, common bail shall be ordered; *per Holt*, *Ch. J.* 12 *Mod.* 526.

If one has *several causes of action*, each whereof is too small for special bail, he cannot join them to inforce special bail; *per cur'.* 12 *Mod.* 527. *Per Holt*, *Ch. J.* when, upon contest about common or special bail, it does *appear that the plaintiff has misconceived his action*, and that if any action lies it is of another sort, there common bail ought to be accepted. 12 *Mod.* 579.

Where the plaintiff *was nonsuit for want of a declaration*, and *afterwards brought another action for the same cause*, *Holt*, *Ch. J.* said, he had known it held by the court, that he should have but common bail to the said action. Ld. *Raym. Rep.* 679.

In an *action of covenant* brought by the patentee of *Drury-Lane* playhouse against defendant, for not performing dances upon the stage according to articles, whereby *plaintiff swore himself damnified* 100*l.* Defendant moved in the treasury for a common appearance, but did not obtain a rule, the plaintiff having sworn to a certain damage. *Barnes's Notes in C. B.* 57.

Action was brought *upon a lease dated in* 1727, *for two years rent due since the year* 1733, *when defendant became a bankrupt*. Defendant moved for a common appearance, and produced his *certificate allowed*, confirmed, and inrolled. Upon hearing counsel on both sides, neither the possession, nor the legal interest of the estate being in the defendant, a common appearance was ordered to be accepted. *Barnes's Notes in C. B.* 60.

In an action of *debt upon bond attested by one witness only*, plaintiff had been *nonsuited on non est factum* pleaded, the witness not making sufficient proof of the execution of the bond. Plaintiff brought a *new action on the same bond*. Defendant moved for a common appearance, and obtained a rule to shew cause, which was discharged on hearing counsel on both sides. Note; *defendant did not in his affidavit deny the execution of the bond. Barnes's Notes in C. B.* 68.

Plaintiff made affidavit, that the defendant had *seized and detained his ship to his damage*, and a *capias ad respondendum was thereon indorsed for bail without a judge's order*. Rule for common appearance and *supersedeas* was made absolute; for the *damages in this case are uncertain*, and the plaintiff was not intitled to bail without a judge's order; in debt *assumpsit*, trover, bail is of course; but in *trespass and detinue*, at discretion; for *words*, no bail, unless *slander of title*. *Barnes's Notes in C. B.* 78, 79.

An action was brought for a *malicious prosecution for forgery*. Upon an affidavit the plaintiff had obtained a judge's order for holding defendant to bail for 200*l.* The defendant being arrested and held to bail accordingly, applied to the judge who made the order; the judge, not being fully satisfied, directed the defendant to apply to the court; whereupon he moved to be discharged on entring a common appearance, and by affidavits shewed, that the plaintiff was *acquitted on a flaw in the indictment, and not on the merits*. *Per cur'.* Let the plaintiff shew cause why a common appearance should not be taken. *Rep. of Pract. in C. B.* 148.

Action was brought for 50*l.* *penalty given by act of parliament for defendant's practising as an attorney, not being duly admitted*, wherein the defendant was held to bail. Rule to shew cause why common appearance, and *supersedeas* was made absolute. This is for a fine or amercement, and is in the nature of a *qui tam*. *Barnes's Notes in C. B.* 80.

Upon the removal of a cause by *habeas corpus* out of any inferior court into the courts above, though the sum be under 10*l.* the party must file special bail; so that the plaintiff may not be in a worse condition than he was in the court below; and the reason hereof is, that those inferior jurisdictions being confined, they cannot follow the debt out of their own jurisdiction; and therefore it is requisite that they should be bail who live within their precincts. 1 *Salk.* 98.

If a cause be removed by *habeas corpus* out of the *Marshalsea*, or any other inferior court, and the bail there offer to be bail to the action in the court above, the plaintiff is compellable to take them, because he might, but did not, except to them below. 1 *Salk.* 97.

But it is otherwise where a cause comes out of *London*, for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff had not the liberty of excepting against them, and the clerk is not responsible for their deficiency in the court above, tho' he was in *London*. 1 *Salk.* 97.

If a cause is removed out of an inferior court by *habeas corpus*, and new bail found, and after in the same term it is remanded by *procedendo*, the old bail shall stand; for when a cause is remanded the same term in which it was removed, no record is made thereof. *Cro. Jac.* 263.

Otherwise where it is remanded in another term. *Cro. Jac.* 263.

But where a replevin by plaint was sued in the sheriff's court of *London*, and pledges there found *de retorno habend' si*, &c. and this plaint was removed according to their custom into the mayor's court, and after into the *King's Bench* by *certiorari*; and there *oyer* of the *certiorari* being demanded, the party declared in *B. R.* and upon this a return awarded; and upon an *elongat'* returned a *scire facias* went against the pledges in the sheriff's court of *London*: the question was, whether this case being removed by *certiorari*, the pledges in the inferior court were discharged; and it was held that they were not. *Skin.* 244.

If a man *arrested in a franchise sues writ of privilege, and removes the body and the cause*, and after *does not come to prove his cause of privilege*, the plaintiff in the franchise may have *procedendo*, and therefore it seems that there the *first sureties remain*; *contra if he had been dismissed by allowance of the privilege*, for then his sureties are discharged; but it seems, that when they remove the body and the cause, they do not remove any sureties, but then there is not any record against them, and then it seems, that the privilege being allowed the sureties are discharged; *contra* where the privilege is not allowed; for then the prisoner and the cause was always remaining with those of the franchise. *Br. Procedendo, pl.* 13. *cites* 31 *H.* 8.

Where a cause is removed by *habeas corpus*, it is *the course of C. B. to take recognizance of bail before an action brought*; and the court said, they ought to take notice of the course of *C. B. Cro. Jac.* 98.

B A I

Bail was given in an inferior court, and upon a *habeas corpus* brought, *Popham* Ch. J. took bail; afterwards a *procedendo was awarded, and judgment againſt the principal* in the inferior court, which was *affirmed on a writ of error*; and upon a *ſci fa.* againſt *the bail below*, it was adjudged, that they *were diſcharged, altho' the bail taken by the Ch. J. was not filed*, for that could not be till the term; *but* it was agreed by all, that *if the procedendo had not been delivered to the ſheriff before the taking of the bail by Popham*, it would have been a *ſuperſedeas* to the firſt writ, and *the bail in the inferior court muſt have ſtood.* *Yelv.* 120.

Sci. fa. againſt the defendant, being *bail in an inferior court, who pleaded, that* after the firſt action brought and bail put in, *the cauſe was removed by hab. corp. into B. R. and bail put in there and accepted*, and afterwards the cauſe was remanded by *procedendo*, and then judgment was given againſt the principal; all the court held the bail in this caſe charged, for when the record is remanded by *procedendo*, it is as if it never had been removed, but if it be removed, and *bail filed in this court, and* afterwards *in another term it is remanded*, there it is otherwiſe, for there the court is poſſeſſed of the cauſe. *Cro. Jac.* 363.

In all caſes but that of *devaſtavit*, where bail is found below in an inferior court, and the cauſe is removed by *hab. corp.* ſpecial bail ſhall be found here, *tho' the cauſe of action be of a leſs ſum than ſpecial bail* by the courſe of the court ought to be found for; *per cur'*. *Lev.* 268.

If an *habeas corpus* be returned into any of the courts above, tho' the ſum be under 10*l.* they will hold him to bail, that ſo the plaintiff may not be in a worſe condition than he was below, where the defendant was held to bail. *Gilb. Hiſt. C. B.* 31.

Debt for 99*s.* upon a plaint in an inferior court, and bail put in; afterwards the *cauſe was removed* by *habeas corpus* into *B. R.* and there the *plaintiff declared as in debt upon a bond for* 6*l.* The queſtion was, whether the bail put in here upon a *habeas corpus* ſhould be liable; and adjudged that they ſhould not, for it was another cauſe of action than that to which they were bail. 3 *Salk.* 55.

If a man is arreſted in an inferior juriſdiction, bail *out of the inferior juriſdiction* will not do, becauſe their proceſs cannot reach ſuch bail; *per Holt* Ch. J. 12 *Mod.* 643.

The *defendant condemned a ſhip for want of being regiſtred in England*, and *plaintiff brought trover* and converſion *in London*, which was *removed by habeas corpus*. *Holt* Ch. J. ſaid, that tho' it was upon a *habeas corpus*, they might inquire into the cauſe of action, and if they ſaw occaſion, order ſpecial bail; for otherwiſe the inferior court might be made uſe of to oppreſs people, by laying great actions upon them there; and here if the defendant has acted as judge, and the matter was within his cognizance, his ſentence, whether right or wrong, binds till it be reverſed; and if it were in the admiralty of *France* it would be ſo, and the only remedy in ſuch caſe is to appeal. 7 *Mod.* 9.

By the ſtat. 3 *Jac.* 1. *cap.* 8. it is enacted, "That no execution ſhall be ſtayed or delayed, upon or by any writ of error, or *ſuperſedeas* thereupon, to be ſued for the reverſing of any judgment given, or to be given, in any action or bill of debt, upon any ſingle bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract ſued in any of the courts of *Weſtminſter*, counties palatine, or great ſeſſions in *Wales*; unleſs ſuch perſon or perſons in whoſe name or names ſuch writ ſhall be brought, with two ſufficient ſureties, ſuch as the court (wherein ſuch judgment is or ſhall be given) ſhall allow of, ſhall firſt before ſuch ſtay made, or *ſuperſedeas* awarded, be bound unto the party for whom any ſuch judgment is or ſhall be given by recognizance, to be acknowledged in the ſame court, in double the ſum adjudged to be recovered by the ſaid former judgment, to proſecute the writ of error with effect; and alſo to ſatisfy and pay (if the ſaid judgment be affirmed) all and ſingular the debts, damages and coſts adjudged, or to be adjudged upon the former judgment; and all coſts and damages to be alſo awarded for the ſame delaying of execution."

If *A.* becomes bail for *B.* in an inferior court, and there judgment is given for *B.* and thereupon the plaintiff brings a writ of error, and that judgment is reverſed, and judgment given for the plaintiff againſt *B.* the bail is liable; for when the firſt judgment is reverſed, it is as if that judgment had never been, and as if at the firſt the principal had been condemned in the inferior court. *Cro. Jac.* 94.

If error be aſſign'd in *matter of law*, then the uſe is to take bail of the party; but if the error be upon matter in *fact*, then the uſe is not to take bail before the matter in fact be tried; ſaid by *Coke* Ch. J. to be a rule obſerved in taking bail upon a writ of error brought. 3 *Bulſt.* 62.

If an *executor* brings a writ of error, he ſhall not find bail, within the ſtatute 3 *Jac.* 1. *cap.* 8. to anſwer the principal debt; but he *ſhall find bail to anſwer the double coſts upon the ſtatute* 13 *Car.* 2. *cap.* 2. if 'tis found againſt him; ſo held in the cauſe mentioned by *Twiſden*. *Sid.* 183.

W. was *indicted and convicted of deer-ſtealing, &c. at the ſeſſions*, and brought error in *B. R.* it was moved to bail him till the error determined, but denied; for *per cur'*, tho' the plaintiff in *audita querela* may be bailed, yet one *in execution* who brings a writ of error ſhall not. *Sid* 286.

Perſons *in execution for a fine to the King* brought *hab. corp.* and a writ of error, and aſſigned errors, and pray'd to be bail'd, but the court would not; but it was ſaid to be uſual in the Crown office to bail in ſuch caſes. *Sid.* 320.

Upon a writ of error brought in *B. R. to reverſe an outlawry* in this court, the queſtion was, if bail ought to be put in before the allowance of it by the ſtatute of 31 *Eliz. cap.* 3. and it was reſolved, that in all writs of error it ought, and ſo the words muſt be intended, or otherwiſe that part of the ſtatute will be of no effect, if it ſhould be extended only to caſes where the error is for want of proclamation; for it doth not appear at the time of the allowance of the writ of error, what errors the party will aſſign. *Freem. Rep.* 162.

Debt on *bond*. The *condition was for payment of money and performance of covenants*; judgment thereupon, on which error was brought; and it was ruled, that it is not within the ſtatute 3 *Jac. cap.* 8. which requires bail to be put in, in caſe of debt or contract. *Comb.* 105.

One in *execution upon a judgment for uſury, brought* a writ of *error* in *B. R.* and moved to be bailed, but it was denied, tho' there was no apparent error in the record, and tho' it was formerly the practice to bail in ſuch caſe; for *per curiam*, we ought not to enlarge a priſoner in execution; but it is otherwiſe upon an *audita querela*, *per Holt*. Ch. J. 3 *Salk.* 58.

If *A.* brings a writ of error upon a judgment obtained againſt him, according to the 3 *Jac.* 1. *B.* enters into a recognizance conditioned that *A.* ſhall proſecute his writ of error with effect, and if judgment ſhall be affirmed, that he ſhall pay the condemnation, *&c.* and after the judgment is affirmed, *B.* cannot render *A.* the principal; for this manucaption is not to render the body, but to pay the debt. *Cro. Jac.* 402.

If judgment be affirmed upon a writ of error in the Exchequer-Chamber, no execution ſhall go againſt the bail in the original action for the coſt *occaſione dilationis executionis*, and the party might have compelled the defendant in error to put in bail, purſuant to the ſtatute 3 *Jac.* 1. 1 *Rol. Abr.* 335. *Cro. Jac.* 630. *Noy* 18.

In debt on a bond in *C. B.* and judgment for the plaintiff, error was brought in *B. R.* and bail put in according to the ſtatute, and judgment affirmed thereupon; error was brought in parliament, and the clerk of the errors refuſed to allow the writ, unleſs the party would give a new recognizance. It was objected, that it was required by 3 *Jac.* 1. but *per cur'*, The firſt recognizance does not include payment of coſts to be aſſeſſed in the houſe of Lords, and theſe coſts ought to be paid, and therefore

therefore a new recognizance ought to be given within the intent of the ſtatute; and it is not the buſineſs of this court, to examine whether bail was put in upon the firſt writ; for the want of that does not hinder the proceſs of the writ of error, but only makes it no *ſuperſedeas*. 1 *Salk.* 97.

If there is a judgment in *B. R.* and the defendant is taken in execution, and after brings error in the Exchequer-chamber, and the record is removed, he cannot be bailed in *B. R.* becauſe there is no record there; nor can he be bailed in the Exchequer-chamber, for they have authority only to affirm or reverſe the judgment. *Cro. Jac.* 108. *Cro. E.* 731.

Upon a writ of error in *Ireland*, the record being removed in *B. R.* the court took bail here, and ſent directions to have the defendant ſet at liberty there. *Palm.* 286.

In debt upon a bail-bond in *C. B.* judgment was given for the plaintiff, and error brought in *B. R.* and bail put in according to the ſtatute, and judgment affirmed, and thereupon *error was brought in parliament*; it was inſiſted, that bail in this caſe was not requirable by the ſtatute 3 *Jac.* 1. but *per cur.* The firſt recognizance does not include payment of coſts to be aſſeſſed in the houſe of lords, and therefore a new recognizance ought to be given within the intent of the ſtatute. 1 *Salk.* 97.

Note; by the *ſtatute* 3 *Jac.* 1. *cap.* 8. when a writ of error is brought *on a judgment had upon a bond to pay money (only)* there ſpecial bail ought to be given; and after a year a *ſcire facias* ought to precede the *levari*, or *fieri facias*. 11 *Mod.* 2.

In error brought on a judgment *in caſe on a bottomree bond*, it was moved that the plaintiff in error might put in ſpecial bail; *Holt* Ch. J. ſaid, this is not a bond only for the payment of money, for if he does not go the voyage, he forfeits the penalty; for his going the voyage, return, and payment of the money, are all conditions; and inclined, that it did not require ſpecial bail; *ſed adjornatur.* 11 *Mod.* 260.

Sheriff brought *debt upon bond*, and *judgment* was had *by nil dicit without oyer of the condition*, and a writ of error was brought upon the judgment, and a *ſuperſedeas* taken out; it was moved to ſet aſide the *ſuperſedeas*, becauſe the plaintiff in error had not put in bail, according to 3 *Jac.* 1. *cap.* 8. on the other ſide it was ſaid, that the bond was for appearance, and ſo out of the ſaid ſtatute; to which it was anſwered, that it *appeared upon record to be an obligation for payment of money*, and that the court muſt confine themſelves to the record, and judge upon that only; but *per tot. cur.* it was held that they ought to *examine into it by affidavit*, for otherwiſe the plaintiff in error would be obliged to put in bail contrary to the intent of the ſtatute, becauſe the declaration was only upon the penalty, without mention of the condition. 3 *Vin.* 463. cites *MS. Rep.*

A. gave *bond to B.* conditioned that *C. ſhould pay B.* 20l. *C. gave bond to A. reciting the bond given by A. to B.* and then follows this condition, viz. *that if the money be paid by C. according to the condition of the ſaid bond* (given by *A.*) *then this obligation to be void, otherwiſe, &c. A. brought an action on the laſt bond*, and had judgment, whereupon *C. brings a writ of error*. The queſtion was, whether ſpecial bail was to be put in by the plaintiff in error by the ſtatute of 3 *Jac.* 1. *cap.* 8. *Per Parker* Ch. J. this bond ſtands only as a ſecurity for damages, and may be diſcharged without one penny to the plaintiff, and there is *no difference between this bond and a bond to ſave harmleſs*, and therefore out of the meaning of the act; and *Prat* J. thought this caſe, tho' poſſibly within the words of this act, yet is out of the meaning of it, which is plainly this, *viz.* that where a recovery does neceſſarily import a debt due, there this act takes place; but not where a recovery may or may not import a debt due, and the reaſon is, that delay in the latter caſe is not eſteemed ſo prejudicial as in the former; *ſed adjornatur.* 11 *Mod.* 281.

The filing of common bail is neceſſary, that it may appear that the court had conuſance of the cauſe. 1 *New Abr.* 213.

If a priſoner be diſcharged for want of being declared againſt within two terms, or upon non-proſſing the plaintiff, or if he ſurrender himſelf in diſcharge of his bail, and is not charged within two terms; in all theſe caſes he muſt file common bail, that it may appear by the acts of the court, that he was actually in court when diſcharged. See 1 *Salk.* 98, 99.

By the rules of *B. R.* no attorney ſhall be compelled to appear or file common bail for any defendant, unleſs ſuch attorney hath by a note in writing under his hand undertaken ſo to do, and ſuch note produced by the plaintiff's attorney; but if any attorney hath accepted a warrant to appear for the defendant (which warrant be in no wiſe revoked) or hath ſubſcribed the ſame, and do not cauſe bail to be filed accordingly, ſuch attorney ſhall be compelled to file common bail of the proper term, and take a declaration and plead to the ſame, or in default of pleading, judgment may be entered by default, if rules for pleading have been given; for that the default of the defendant or his attorney ſhall not tend to the plaintiff's prejudice. *Cro. Jac.* 620.

In an action upon a replevin bond, common bail ſhall be filed. 1 *Salk.* 99.

A judgment in ejectment againſt the caſual ejector is erroneous, unleſs a *latitat* was ſued out, and common bail filed for him. 2 *Show.* 249.

3. *Of putting in bail.*

By the printed rules of the courts, every attorney who ſhall appear for any defendant in any action, in which ſpecial bail is not required, ſhall duly file common bail for ſuch defendant, of the term of which he appears, and give notice thereof to the plaintiff or his attorney; and that where ſpecial bail is required and put in *de bene eſſe*, before any judge or commiſſioner on a *cepi corpus*, the defendant's attorney ſhall forthwith give notice thereof in writing to the plaintiff or his attorney, and of the names of ſuch bail, with their additions and places of habitation; and if no exception be taken to ſuch bail, and entred in the judge's book within twenty days after ſuch notice then upon oath thereof made, for which no fee is to be taken, ſuch bail ſhall be filed; and if ſpecial bail ſhall be put in before any judge *de bene eſſe*, on any writ of *habeas corpus* or *certiorari*, and no rule for better bail, or exception taken, or entred in the judge's book, againſt the bail ſo put in, within 28 days after putting in ſuch bail; that then ſuch bail ſhall be filed by the defendant's attorney after the end of the ſaid 28 days. 1 *Salk.* 98. 6 *Mod.* 24, 25.

It is ſaid, that after exception to bail, there is no ſet time to juſtify or exchange them for better, but it muſt be in convenient time. 6 *Mod.* 24, 25.

If the plaintiff accepts the bail, he may take away the bail-piece from the judge's chamber, and file it for his own expedition; but after 20 days then it becomes abſolute, and the defendant takes it away and files it. *Comb.* 263.

An *infant* being *in execution* upon a condemnation in debt *brought a writ of error*; his *father and his brother were his bail*; it was the opinion of the juſtices, that they two only ſhould enter into the *recognizance, that the infant ſhall appear*, and that *if the judgment be affirmed, that they ſhould pay the money, and not that they ſhall render the body of the infant* again to priſon; for that when once he is diſcharged of the execution, he ſhall never be in execution again. 3 *Lev.* 113.

One in execution for debt on a judgment in C. B. *brought a writ of error* in *B. R.* and prayed to be bailed; all the court held, that if there be any *error apparent* he ſhall be bailed, and the *ſureties ſhall be bound to anſwer the debt if the judgment be affirmed*, and *not to deliver the body in execution*, and the clerks ſaid that all the precedents in the court are ſo: and *Gawdy* ſaid, that in the 4 & 5 *Eliz.* all the precedents were altered, for before that time it was a doubt, but then the law was reſolved as above. *Dyer.* 139.

But where one is in execution *on a ſtatute merchant*, and he *ſues an audita querela*, and thereupon is bailed, his *ſureties ſhall be bound to render his body* to be impriſoned, as he was before; *per Gawdy*, and this was agreed *per tot. cur'*. *Dyer* 139.

Note, that in this caſe of bailing of a priſoner, the conſtant rule obſervable in *B. R.* is this, that where the *return* of the ſheriff is *to be at a day to come*, as *Octavis Michael. proxime ſequent'*, *and the priſoner is bailed* (being bailable) *before the day* of the return, *the bail* then to be taken *ought to be in a ſum of money*, *and not* to be *body for body*; the reaſon of this is, *for that before the return*, *he is not preſent in court*; *but* if the priſoner be bailed *after the day of the return*, *and* when he *is preſent in court*, the *bail is* then to be *de die in diem*, and in this caſe the bail to be taken *body for body*, becauſe the priſoner is preſent in court; and this was agreed by the court to be the conſtant rule and courſe of the court, and *Man* ſecondary did affirm the conſtant rule of the court to be ſo. *Bulſt.* 45.

Error of judgment in debt, becauſethe *entry* of the bail was *ſub pœna executionis in adjudicatione executionis*, and ſo entred for the execution only, and not for the judgment, whereas it ought to have been *ſub pœna condemnationis*; the court held it to be well enough, for the bail being once taken, ſtands as well for the judgment as the execution; and ordered it ſhould be amended, and made *ſub pœna executionis judicii*. *Cro. J.* 272.

A *latitat* was *againſt A. and B.* for a conſpiracy: *both were taken*; *A. put in bail to* the action *in Mich. term*, *and B. in Hil. term*; the plaintiff prayed, that the bail be taken off the file of *Mich.* term, and put upon the file of this *Hil.* term, becauſe otherwiſe it would be error; for there can be *no proceeding upon a joint action upon bail put in in ſeveral terms by two*; *quod Clench* deputy-ſecondary affirmed. *Lat.* 183.

In *B. R.* though the bail of the defendant be taken and entred the laſt day of the term, and the bail be put in at any time the ſame term, this is well enough by the courſe of the *King's Bench*; though in ſtrictneſs of law the defendant is anſwerable but from the bail as *in cuſtodia mareſchalli*, and not before. 1 *Rol. Abr.* 333. *Hob.* 70. *S. C.*

If in trover commenced in *Hilary* term, the converſion is alledged to be the 3*d of February* in the ſame term, and bail is filed the laſt day of the term, yet this is well enough, for the action ſhall not be ſaid to be depending until the bail is filed. 1 *Vent.* 135.

If there be an original and *capias* in one county, and bail thereupon filed, and the plaintiff after declares in another county, and thereupon obtains judgment, by this variation the bail are diſcharged, and not liable to the damages upon this declaration. 3 *Lev.* 235.

If *A.* arreſts *B.* in an action of 200*l.* and bail is put in thereto, and afterwards *A.* delivers two declarations, one for 200*l.* and another for 500*l.* the bail ſhall be only liable for the 200*l.* 2 *Show.* 335.

One may *depoſit a ſum of money in lieu of bail* if the court pleaſe, and they may thereupon order the plaintiff to wave other bail, (22 *Car. B. R.* and *Trin.* 23 *Car. B. R.*) if the ſum depoſited be ſufficient to ſatisfy the plaintiff in caſe the trial paſs for him; for then the plaintiff can ſuffer no inconveniency by it, for the court may order him to take the money depoſited for his ſatisfaction after ſuch trial had. *Lil. P. R.* 173.

Till bail put in, the defendant is not in court to plead any thing, nor is the plaintiff obliged to declare againſt him. 3 *Lev.* 343.

There was a queſtion if bail be put in one term, and *new bail* is *added the next term after*, if this ſhould be a bail as of the firſt term, or only of the term when added? The clerks differed, but the court was of opinion it *was only bail of that term when the additional bail was put in*; for they ſaid it was not bail till compleated and accepted, and making the additional to be bail of the firſt term, might do a wrong to a third perſon, who might be a purchaſer after the firſt, and before the additional bail was put in; *per cur'*. 1 *Salk.* 100.

The cauſe returned upon a *habeas corpus* was *a writ of excommunicato capiendo*, which recited a *ſignificavit* of an excommunication of *D.* a quaker, *for teaching ſchool without a licence*; the defendant was bailed, whilſt the return was under conſideration; and the entry was *traditur in ballium & interim curia vult adviſare*, and the condition of the recognizance was *to appear the firſt day of term*, *and ſo from day to day*, *and if this court ſhould adjudge the return good*, *then to render his body to priſon*. 1 *Salk.* 105.

V. was *arreſted by the name of J. V. eſquire*, who *pretended himſelf to be Earl of Buckingham*, and upon a motion the queſtion was, how he ſhould put in bail ſo as not to eſtop him; the court held, this being in a civil action he need not join in the bail-bond, and then there is nothing to eſtop him; and in a criminal action the court allowed the Earl of *Banbury* in an indictment not to join, but to find others who gave bail for him, by the name of *G. K.* eſquire; for their act could not conclude him. 1 *Salk.* 3.

If a writ be returnable in one term, defendant ought to put in bail in that term, *ſcilicet*, *at any time before the eſſoin day* of the next term, and till then it is irregular to proceed upon the *bail-bond*; but one in the mean time might take *an aſſignment upon it* and a warrant. 6 *Mod.* 226.

A. brings a bill of *Middleſex* with an *ac-etiam* for 40*l.* and recovers 100*l.* and the court held, that the bail ſhould not be liable for more than the *ac-etiam*, which was the meaſure of his undertaking; and *per Holt* Ch. Juſt. he is not liable at all, for his recognizance is to anſwer the condemnation, and ſince that could not be, he is bound to nothing; and the *clerk*, ſecondary, affirmed, that there was a rule of court, that where the plaintiff recovers a greater ſum than is laid in the action, the bail ſhall not be chargeable *in iſta actione*. 1 *Salk.* 102.

If a writ be taken out in the name of *A.* and the officer takes a bail-bond to appear at the ſuit of *B.* and after there is a *reddidit ſe* by the ſame name, though this be *vitium ſcriptoris* in not making the bail-bond according to the writ, yet it cannot be amended, for the bail muſt be according to the bail-bond, and not according to the writ. 6 *Mod.* 309.

Bail was put in before a judge, and *excepted againſt*, *and other bail added.* The *laſt bail juſtified before a judge*, *without giving notice to the plaintiff's attorney.* The *firſt bail juſtified in court*, and the defendant moved to ſtrike off the additional bail, ſhewing by *affidavit that the additional bail had voluntarily got himſelf added* in the bail-piece, *on purpoſe to have the defendant in his power*, *and ſurrender her* when he thought proper. The court ordered the additional bail to be ſtruck off. *Rep. of Pract. in C. B.* 17.

The bail may *enter into recognizance at different times*, *and* before different judges; but the firſt is *de bene eſſe*, and no compleat bail is given till the laſt is taken, and the firſt is of no value till the laſt is taken, and ſo there is no relation to the taking of the firſt; for then the bail and entry is intire and perfect, and not before. 8 *Mod.* 188.

Notice of bail (on an arreſt, *&c.*) ought to be not only by a note given of the parties *names*, who are to be bail, but *alſo of their addition*, *trade*, *ſubſtance*, *and place of abode*, that ſo they may be the more eaſily inquired after by the plaintiff or his attorney. 11 *Mod.* 2.

By the ſtatute 4 *W. & M. cap.* 4. *ſ.* 2. *The juſtices and barons reſpectively ſhall make ſuch rules for juſtifying ſuch bails*, *as to them ſhall ſeem meet*, *ſo as the cognizors be not compelled to appear in perſon in the courts (unleſs they live in* London *or* Weſtminſter, *or within ten miles thereof) but the ſame is to be determined by affidavits taken before the commiſſioners who are impowered to examine bail upon oath.*

If the plaintiff accepts the bail, he may take the bail-piece from the judge's chamber, and *file* it for his own expedition, but after 20 days then it becomes abſolute, and the defendant takes it away, and files it. *Comb.* 263.

Per cur. In London the plaintiff *never excepts* againſt bail; but there is an *officer who receives bail*, and if he takes inſufficient bail, upon complaint made to the *aldermen*, he muſt either pay the debt, or the profits of his office are ſequeſter'd till the debt be ſatisfied; and when a *cauſe is removed up higher*, the bail and clerk below are diſcharged; and if the bail given below are offered here, they may be excepted againſt. 12 *Mod.* 249.

The plaintiff muſt except *within twenty days after bail put in, and notice thereof*, and of the place of their abode, otherwiſe the bail ſhall be filed. Upon a *cepi corpus* he has twenty days, and upon a *hab. corpus* twenty-eight. 1 *Salk.* 98.

Where a cauſe is removed out of an inferior court by *habeas corpus*, if the *bail below offer themſelves to be bail above*, the plaintiff is compellable to take them, becauſe he might, but did not, except againſt them below. *Aliter* where a cauſe comes *out of London*; *per Holt* Ch J. 1 *Salk.* 97.

After exception againſt bail they *muſt juſtify themſelves*, or the plaintiff muſt *withdraw his exception*, before he can proceed to trial, ſo as to charge them; *per cur'*. 12 *Mod.* 385.

The *commiſſioners* are to take bail, but are obliged by rule of court to *keep a book* wherein are the names of the plaintiff and defendant, and bail, and the perſon who tranſmits the ſame, and who makes affidavit that the recognizance was duly acknowledged in his preſence, and on ſuch affidavit the judges make a conditional allocatur, and the bail are to ſtand abſolute, unleſs the plaintiff excepts againſt them within twenty days, and if he excepts, the bail may *juſtify by affidavit before the commiſſioners* in the country. *Gilb. H. C. B.* 32.

Bail cannot be juſtified *before a judge in his chamber*, except it be by conſent, or for neceſſity in vacation; but in the latter caſe they ought to be juſtified *again in term*, and upon that the defendant is compelled to accept a declaration to go to trial at the aſſiſes, if it be an iſſuable term; and upon putting in bail it is not enough to give *notice* of their being put in, but it *ought to be of their names, places of abode, and trade or vocation*, that the plaintiff may know how to enquire after them; and *after exception* to bail *there is no ſet time to juſtify*, or change them for better, but it muſt in convenient time. 6 *Mod.* 24, 25.

All the clerks ſaid that they knew the *ſheriff amerced after the aſſignment of the bail-bond*; but *Holt* Ch. J. ſaid he had known it denied *per reliquos juſticiarios*. 6 *Mod.* 122.

If one *accepts of an aſſignment*, and the *ſame are given as bail to an action that were bail to the ſheriff*, he cannot deny them; *but per Holt*, If the ſame that were bail (before) become bail to the action, and *he excepts againſt them, and they do not juſtify, he may go on with amercements againſt the ſheriff*. 6 *Mod.* 122.

Upon *a writ of error*, where bail is put in, the defendant in error has 20 days to except, and he need not give the plaintiff notice that he excepts; but he cannot take out execution without giving the plaintiff a four days rule to put in better bail; but in all other caſes he muſt give notice; *per Clarke*, ſecondary. 1 *Salk.* 98.

Bail was put in *upon* bringing a *writ of error*; the courſe is, that the other ſide ſhall have *twenty days to except againſt them*, which *exception muſt be entered in the book of the clerk of the errors*, and then he who excepts *takes out a rule to put in better bail, and ſerves the attorney on the other ſide with it*, but ſuch rule needs not to be ſerved within twenty days. 3 *Salk.* 56.

Upon a motion to ſtay proceedings on a bail-bond, the court declared it ſhould be a ſtanding *rule* of practice, *that in all caſes of exception to bail, ſuch exception ſhould be made in the filazer's book, or on the bail piece with the commiſſioner before it is tranſmitted, and afterwards above in the filazer's book, or on the bail-piece. Rep. of Pract. in C. B.* 55.

Affidavit of juſtification by bail, that they were ſeverally *worth the ſum* wherein they were bound by their recognizances, *after all their juſt debts paid* and ſatisfied, was held to be inſufficient, not being in common form; the word (juſt) ought to be omitted. *Barnes's Notes* 57.

The defendant became bail to the ſheriff for the appearance of W. R. *at the return of the writ, bail was filed above, but excepted to*, and that *exception entered on the bail piece*; afterwards, *without any complete juſtification, the plaintiff delivers his declaration generally, and proceeded to iſſue, trial, and judgment*, and *then brings this action*; to which the defendant *pleaded comperuit ad diem*, and in order to maintain that plea, the court was now moved for leave to ſtrike out the exception on the bail-piece, that it might be filed, inſiſting that the *proceeding generally* was *a waver of the exception*; and the court ordered them to ſhew cauſe. *Rep. of Pract. in C. B.* 155, 156.

It being doubtful whether Sunday ſhould be reckoned as one day in notice to juſtify bail, it was determined *per cur.* that for the future Sunday ſhall not be counted one (it not being a proper day to enquire after bail upon), but *two days notice muſt be given, of which Sunday ſhall not be one*; upon motion for defendant to juſtify bail, notice was ſerved Saturday *June* 23, to juſtify bail Monday 25; the notice being inſufficient, the bail were not ſuffered to juſtify. *Notes in C. B.* 220.

4. *Of putting in bail by a wrong name, and the offence of perſonating bail.*

In ejectment bail *was put in for the defendant by the name of Parkes*, but the declaration and *all the proceedings were by the name of Parkhurſt*. After verdict for the plaintiff the judgment was arreſted, becauſe it did not appear that the defendant was *in cuſtodia mareſchalli*; for *Parkhurſt* and *Parkes* cannot be intended the ſame perſon. *Cro. Eliz.* 223.

The plaintiff having recover'd againſt the principal, and ſued *ſci. fa.* againſt the bail, and having judgment againſt him, whereupon he was taken; the bail complained to the court that he was not the man, but perſonated by another, and which he proved by divers witneſſes; and it was confeſs'd by the defendant and thoſe that procured the bail. It was awarded that a *vacat* ſhould be made *of that bail quoad* him, *and of the judgment on the ſcire facias. Cro. Jac.* 256.

Stat. 21 *Jac.* 1. *cap.* 26. enacts, that *it is felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of other perſon not privy or conſenting thereto, provided that it ſhall* not corrupt *the blood, or take away dower.*

R. offered himſelf to bail in an action before Juſtice *Whitlock*, affirming upon oath he was a ſubſidy-man, and aſſeſs'd 4*l.* for goods in the ſubſidy-book; but afterwards, upon further examination, he confeſs'd he was not a ſubſidy-man, and alſo confeſs'd he had been bail in other actions, and had ſworn he was a ſubſidy-man, whereas now he confeſs'd he was not. He was by the judgment of the court *committed to priſon, and to ſtand upon the pillory, with a paper* mentioning his cauſe, *viz. for falſe bail. Cro. Car.* 146.

Stat. 4 & 5 *W. & M. cap.* 4. *ſ.* 4. enacts, that *any perſon repreſenting or perſonating another before commiſſioners appointed to take bail, ſhall be adjudged guilty of felony.*

5. *Of the proceedings againſt the bail, and what they may plead in their diſcharge.*

The act of the court in delivering the defendant to bail being of record, intitles the plaintiff to a *ſcire facias*, when it appears that the defendant has not ſatisfied the judgment; hence it appears that there muſt be a *capias* returned againſt the principal before the *ſcire facias* is to iſſue againſt the bail. 1 *New Abr.* 216. 1 *Rol. Abr.* 308, 333. *Moor* 432. *Cro. E.* 597. *Goldſ.* 174.

But though on the return of the *capias* the plaintiff is intitled to *ſcire facias*, and the recognizance in ſtrictneſs is forfeited, yet if the defendant render himſelf at any time before, or on the day of the return of the ſecond *ſcire facias* againſt the bail, where two *nihils* are returned, or on or before the day of the return of the firſt *ſcire facias*,

B A I

facias, where a *ſcire facias* is returned *ſedente curia*, and notice of ſuch render is given to the plaintiff or his attorney, the bail ſhall be diſcharged. 1 *Salk.* 101.

If an action of debt be brought on the recognizance, if the defendant renders himſelf in cuſtody within eight days in full term, after the day of the return of the proceſs againſt the bail, they ſhall be diſcharged. 1 *Rol. Abr.* 600, 897. 1 *Jones* 29. *Winch* 61, 62. *Godb.* 354. *Raym.* 14. 2 *Show* 77.

If the defendant dies before the return of a *capias ad ſatisfaciendum* againſt him, his bail pleading the ſame, may be diſcharged. 1 *Rol. Abr.* 336. 1 *Jones* 29. *Winch* 61, 62. *Cro. Jac.* 97. *Godb.* 354. *Moor* 175.

Upon a writ of error brought, the bail enter'd into a recognizance, conditioned, that if the judgment is affirmed to pay the money, *&c.* and a *ſci. fa.* being brought on this recognizance, it was objected againſt the *ſci. fa.* that it was *not returnable on any return-day, but on a day certain*; and it not being grounded on any bill, or thing in nature of a bill, it ought to be returnable on a return-day; but if the *ſci. fa.* had recited the condition of the recognizance, then it had been in nature of a bill, and well, but here it is a writ, and therefore ill; and all the clerks ſaid, that ſo was the conſtant uſage, and the court ſtayed the judgment. *Lev.* 246.

M. the defendant and two others entred into a *recognizance for the good behaviour of M.* afterwards *M. was indicted, for that he* being ſo bound, *did aſſault* J. S. *and ſo had forfeited his recognizance*; but this indictment was quaſhed, becauſe he ought to have been proſecuted by *ſcire facias*, and not by indictment. *Raym.* 196.

A writ of *error* was brought *by the bail to reverſe two judgments in* Ireland, *viz. that againſt the principal, and that againſt the bail.* The court held, 1ſt, That the writ was abated in the whole. 2dly, That the record of the judgment againſt the principal was not removed by this writ, and ſo it was ſaid it had been reſolved formerly in one *Booth's* caſe, which was cited by the Ld. Ch. J. and remembered by *Jones* Attorney General; but the queſtion was, how the defendant in the writ of error ſhould proceed to have the fruit of his judgment againſt the bail, the record being removed hither, and ſo they could not grant out execution in *Ireland?* And it was propoſed by *Hale* Ch. J. to take out *ſci. fa. into* Middleſex *upon the recognizances which are now here, and upon the return of them to grant execution in* Ireland. *But* afterwards *it appearing that thoſe judgments were not made records here*, by reaſon they were not entered upon the rolls, they ſaid *they would ſend a certificate to the judges in* Ireland, *that nothing was removed here before them, and thereupon they might grant execution*; but upon the judgment againſt the principal, the party might have execution there, for that record was never removed. *Freem.* 416, 417.

There muſt be *ſeven days excluſive betwixt the teſte and return of every* ca. ſa. *to warrant a* ſci. fa. *againſt the bail, and* the *capias* ought to be *delivered to the ſheriff* of the county, *or his under ſheriff, four days excluſive* (and none of them muſt be Sunday) before the return thereof, for the defendant cannot render himſelf but to the ſheriff or under-ſheriff, and in the county where he is ſheriff or under-ſheriff. *Lil. P. R.* 249.

If *A.* as bail, enters into a recognizance that *B.* upon eight days warning *comparebit* to any action that ſhall be brought by *C. necnon* that if *B.* ſhall be condemned in the ſaid action, and does not pay, *&c.* that then he will anſwer the condemnation, and *C.* does bring an action againſt *B.* and he is condemned, and does not pay, *&c.* in debt upon this recognizance, it muſt be averred that he gave *B.* eight days warning to appear, *&c.* for *A.* is bound only to anſwer the condemnation in ſuch action, upon which eight days warning was given, for that is the foundation of the whole; and there is no reaſon that *B.* by his voluntary appearance without warning ſhould prejudice his bail. *Cro. Jac.* 45. *Yelv.* 52.

If a defendant gives judgment with a ſtay of execution until a certain day, the plaintiff may, notwithſtanding ſuch ſtay of excution, ſue forth a *capias ad ſatisfaciendum* to the ſheriff of the county where the action is laid, and returnable before the day, to make out a *teſtatum* againſt the defendant; but no ſuch *capias ad ſatis faciendum* ſhall be ſued forth to warrant a *ſcire facias* againſt the bail, becauſe it is to the prejudice of a third perſon. 1 *New Abr.* 217.

Where the *ſci. fa.* is againſt the bail, it ſhould be *in ea parte*; but where it is againſt the defendant himſelf, it ſhould be *in hac parte.* 2 *Salk.* 599.

Judgment in ſci. fa. *againſt the bail was reverſed upon a writ of error, becauſe there was no warrant of attorney; for ſuch a warrant in the principal action is no warrant to the ſci. fa.* becauſe theſe are diſtinct actions; therefore there ought to be a particular warrant of attorney to this *ſci. fa.* againſt the bail, and it ought to be *entered upon the return of the ſci. fa.* for then the ſuit commences. 2 *Salk.* 603.

In *C. B.* there is *but one ſcire facias* againſt the bail, and upon a *nihil* returned there is execution; *but in* B. R. *the courſe is to have two ſcire facias's* againſt the bail, *(viz.)* a *ſci. fa. and an alias ſci. fa.* but both muſt *not be ſued out together, as formerly*; for the firſt ſhall be duly returned before the *alias ſci. fa.* is ſued out, which muſt bear teſte on the day of the return of the firſt, and there muſt be *fifteen days incluſive between the teſte of the firſt and the return of the* alias; now the court was moved to ſet aſide a judgment obtained againſt the bail upon two *ſcire facias's* brought againſt them, becauſe it did not appear that the judgment was had on the return of two *nihils*, and it was referred to the maſter to examine this matter. 8 *Mod.* 227.

If the *firſt ſci. fa.* againſt the bail *bears teſte the ſame day on which the* ca. ſa. *is returnable*, it is good; for in many caſes the law takes notice of the *fraction* of a day; and here it ſhall be taken that the *ca. ſa.* was returned before the *ſci. fa.* was ſued out, which might very well be, though both were on the ſame day. 2 *Ld. Raym. Rep.* 1567, 1568.

The bail *cannot join in a writ of error to reverſe the judgment againſt the principal, and alſo the other judgment againſt the bail*; but the bail alone ſhall have error to reverſe the judgment againſt themſelves, and the principal another writ to reverſe the firſt judgment. And a writ brought by the bail to reverſe the firſt and ſecond judgment was held ill. *Jo.* 396.

If the plaintiff does not declare againſt the principal within two terms after bail put in, the bail will be diſcharged, as likewiſe the principal on filing common bail. *Cro. Jac.* 620. *Salk.* 98, 99. *Comb.* 295.

But if, after bail put in, and before the plaintiff hath declared, the defendant obtains an injunction, and this is continued for ſeveral terms, and after diſſolved, and the plaintiff ſoon after declares and gets judgment and brings a *ſcire facias* againſt the bail, they cannot plead that no declaration was delivered or filed againſt the principal within two terms after the action commenced and bail entered, for there was no default in the plaintiff that he did not declare ſooner. 3 *Mod.* 274.

J. S. acted as attorney for the plaintiff in the original action, and after judgment in that action took out a *ſcire facias*, and proceeded to judgment againſt the bail without any new or ſecond warrant; on a writ of error, as well of the principal judgment, as upon that againſt the bail, the court held, that any body might have taken out the *ſcire facias*; but as to the further proceedings they were irregular, the attorney's authority determined with the firſt judgment, and therefore reverſed the judgment. 1 *Salk.* 89.

If judgment be given againſt the principal, and after, upon a *ſcire facias* againſt the bail, judgment be alſo given againſt them, theſe judgments are ſeveral; and they ſhall not join in a writ of error no more than tenant for life, and he in reverſion, or the tenant and vouchee may join. *Cro. Car.* 300. 1 *Jones* 325. *Godb.* 440. *S. C.*

If the condition of a recognizance be, that the principal ſhall ſurrender himſelf, or pay the money; and the breach aſſigned is that he hath not ſurrendered himſelf; this is naught, for he might have paid the money, and then the condition is not broken. *Skin.* 100.

Judgment

Judgment on a *ſci. fa.* againſt the *bail*, who *brought* a writ of *error as well upon the judgment againſt the principal, as upon the judgment on the ſci. fa.* but it was quaſhed, becauſe they were not parties to the original judgment. 5 *Mod.* 397.

It was ruled *per Holt* Ch. J. that the *ancient courſe was, that a bail-bond could not be put in ſuit till a rule was had to amerce the ſheriff*, for not having the body at the return of the writ; and the courſe now is, to *ſtay proceedings* on the bail-bond, *if there is no retnrn of a cepi corpus.* 3 *Salk.* 56.

If one who becomes bail has *a warrant of attorney to indemnify him*, yet he cannot enter it up, and take out execution upon it, tlll ſome proceſs is gone out upon the bail-bond, whereby he has an injury done him. 11 *Mod.* 2.

There ought not to be a ſtay of proceedings on a bail-bond, upon *bringing principal, intereſt, and coſts into court*, after notice of trial, unleſs it be brought in ſuch time as the plaintiff may not be delay'd of his trial; *per cur'.* 6 *Mod.* 25.

If the defendant in the *ſcire facias* will *confeſs judgment, and enter into a rule to pay the debt, or to deliver up the principal within four days after the judgment ſhall be affirmed*; in ſuch caſe the proceedings on the *ſci. fa.* ſhould be ſtayed. 8 *Mod.* 130.

A motion to ſtay proceedings in an action of *debt on a recognizance*, becauſe *a writ of error was brought* upon the original judgment; the court were unanimous, that the plaintiff might proceed to judgment, but execution to ſtay till the error was determined. *Rep. of Pract.* in *C. B.* 24.

A motion to ſtay proceedings on a bail-bond. The caſe was, one *H.* being *defendant in the original action, was arreſted on a teſtatum capias into Suffolk out of London*, and *by miſtake the bail was taken and filed with the filazer of Suffolk*, but ſhould have been filed with the filazer of *London.* The court held the proceedings on the bail-bond regular, and would not ſtay them, but upon payment of coſts, and the defendant's giving the plaintiff judgment on the bond to the ſheriff, to ſtand as a ſecurity for the plaintiff's debt, and the original defendant's accepting a declaration, and pleading thereto, and taking notice of trial after term; but the defendant not conſenting to theſe terms, no rule was made. *Rep. of Pract. in C. B.* 44.

Proceedings on the bail-bond were ſtay'd, the plaintiff having *declared on the original action*, and thereby had concluded himſelf. *Rep. of Pract. in C. B.* 81.

But if in a joint action againſt two, *J. S.* is bail for one of them, and there is judgment againſt the principals; in a *ſcire facias* againſt *J. S.* the bail, it is ſufficient to alledge, that the defendant, for whom he was bound, did not pay the money, and if the other had paid it, he ſhould have pleaded it. 2 *Show.* 147.

A. and *B.* are bail to an action in *B. R.* where judgment is given againſt the principal, who brings a writ of error in the *Exchequer-Chamber*, pending which the bail brings in the principal, or the principal renders himſelf to priſon; though the recoveror cannot pray him in execution, nor can the court put him in execution, becauſe the writ of error is a *ſuperſedeas* to it; yet this is a good diſcharge of the bail; for the marſhal ought to keep him in priſon as a pledge, till the judgment be affirmed or diſ-affirmed, as he does upon mean proceſs for want of bail. 1 *Rol. Abr.* 334, 335. *Moor* 853. *Cro. Jac.* 402. 3 *Bulſt.* 191. 1 *Rol. Rep.* 392. *Raym.* 130. 3 *Mod.* 87.

If the principal ſurrenders himſelf, or the bail render him up, this will diſcharge the bail, and may be pleaded to the *ſcire facias*; but ſuch ſurrender or render are not ſufficient, unleſs the plaintiff or his attorney have notice of it; and this is required, that the plaintiff may, if he pleaſes, charge him in execution; alſo, that he may not be at any further trouble or charge in proceeding againſt the bail. 1 *Rol. Abr.* 337. *Moor* 888. 1 *Leon.* 58. 2 *Bulſt.* 260.

In a *ſci. fa.* againſt the bail, they pleaded the *death of the principal on the day of the judgment*; the court held they might plead it, becauſe in ſuch caſe they cannot have a writ of error to reverſe the judgment. *Cro. E.* 199.

The plaintiff recovered in debt in *B. R.* and *immdiately upon the awarding a ca. ſa. the defendant died*; it was a quære if in ſuch caſe an action of debt lieth againſt the ſpecial bail; the executor having nothing, a *ſci. fa.* doth not lie againſt the bail; and in *C. B.* the court was divided in that caſe. *Godb.* 354.

The *bond* was *that if the defendant be convicted in the ſaid action, and does not pay the ſaid condemnation-money or render his body to the priſon, that he would pay the debt.* In *ſcire facias* againſt the bail he pleaded, that before any *ca. ſa.* ſued the defendant died, and judgment was given againſt the plaintiff; but *Hobart* was at one time againſt the judgment when it was moved, becauſe he took it that the defendant in the original action ought in convenient time after the judgment to have offered himſelf, or that otherwiſe the recognizance was forfeited; but the three other judges *e contra*, becauſe the ſtatute is in the disjunctive, *viz.* to render his body to priſon, or to pay, and the one by death of the party, being the act of God, becomes impoſſible, and this being before any *capias* ſued, which is a demand in law, he is diſcharged; and afterwards on view of precedents adjudged for the bail. *Jo.* 29.

If the principal *dies before the return of the capias*, the bail are diſcharged; but if he dies after the return of the *capias* and before the return of the *ſci. fa.* they are not diſcharged, for the *ſci. fa.* is as it were but a writ of grace; *per cur'. Freem. Rep.* 338.

A bail-bond is entred into *to appear the firſt day of Michaelmas term*; *the defendant dies the 10th of November, and the 12th of November the bond is aſſigned over*, and ſued; and upon a motion the ſuit was ſtay'd, paying of coſts; for the plaintiff was at no damage upon the defendant's not appearing the firſt day of the term, for if he had appeared and filed bail, the plaintiff could not have tried his cauſe that term; ſo that the defendant dying within the term, the bail ought (as well upon the bail-bond, as if they had been put in court to the action) to be diſcharged. 2 *Lil. P. R.* 254.

The principal died before the return of the ſecond *ſci. fa.* againſt the bail, and after a *capias* returned againſt the principal, and it was urged, that ſince the bail would have been diſcharged by rendering the principal at any time before the ſecond *ſci. fa.* returned, and that they were now deprived of that advantage by the *act of God*, it were reaſonable to diſcharge them; but *per cur'*, It cannot be, for it is indulgence to allow a render after a *capias* returned in diſcharge of them; and their *recognizance* is *forfeited upon the capias returned againſt the principal* and the court will only diſcharge the bail after, where they render, but not where they cannot; but the death of the party *before a capias returned*, had been a good plea to the *ſci. fa.* and ſo was the rule. 12 *Mod.* 601.

Sci. fac. againſt the bail, who *pleaded that the principal died before the return of the capias &c.* and upon a ſpecial demurrer, this was adjudged ill, for it *ſhould be* that he died *before the return of any capias*, that it may appear he was not alive at the return of the firſt *capias*, for if he was, the recognizance is forfeited. 3 *Salk.* 57.

If *A.* ſues *B.* in three actions, and *B.* puts in three ſeveral bails, the plaintiff recovers in all, and the defendant renders himſelf, on which one of the bail only enters an *exoneratur*, though the rendring is a diſcharge in *poſſe* as to all, yet it is not compleat and actual as to all, till an *exoneratur* entered upon all. 1 *Salk.* 98.

If the bail plead a render of the principal, they muſt conclude their plea *prout patet per recordum*; for this is not to be tried *per pais*, but by the record. *Latch* 149. *Noy* 82. *Poph.* 185. *S. C. Hob.* 210.

Alſo in pleading a render of the principal, the bail muſt ſay *quod venit hic in curia & in eadem curia reddidit ſe, & per eandem curiam commiſſus fuit*; but it being here laid to be done the ſecond of *February*, (being *Candlemas day*, and ſo *dies non juridicus)* it judicially appears there could be no court that day, and ſo the render and commitment void. 3 *Bulſt.* 192.

In

In a *ſcire facias* againſt bail, they cannot plead that the plaintiff hath arreſted the principal in the *ſtannary court, per quod* they could not have his body, for they might have removed him by *habeas corpus*. *Moor* 406.

So in a *ſcire facias* againſt bail, they cannot plead that before the return of the ſecond *ſcire facias* the plaintiff proſecuted a *teſtatum capias* againſt the principal, directed to the ſheriff of, *&c.* who took the principal in execution upon the ſaid judgment, *&c. adhuc habet & detinet*; for the recognizance was forfeited before. 2 *Jones* 75. 2 *Mod.* 312. 1 *Vent.* 314, 315. *S. C.*

In an action upon the recognizance of the bail, they *pleaded the death of the principal ante emanationem brevis*; *Parker* Ch. J. held this an *immaterial plea*; for death before the iſſuing out of the *capias* is death before the return of it; but if it be found that the principal did not die before the iſſuing out of the *capias*, it is plainly nothing to the purpoſe, for notwithſtanding this, he may die before the return of it; and the others being of the ſame opinion, the plaintiff would have had his judgment, had not another objection been ſtarted. 10 *Mod.* 267, 269.

The plea of the death of the principal *before the return of a capias* is good, but the pleading his death generally, without confining it to ſome time, is not good; *per Pratt* J. 10 *Mod.* 306.

One *T. S. was arreſted at the ſuit of* H. *the plaintiff*, and *S. the defendant became bail to the ſheriff for the appearance of* the ſaid *T. S. at the return of the writ*; *but before any further proceedings* H. *died*, yet his *attorney took out an aſſignment of the bail-bond, and proceeded to judgment and execution* againſt the bail; and now the court was moved to ſet aſide theſe proceedings as irregular, and the matter being ſo reported by the maſter, they were ſet aſide. 8 *Mod.* 240.

The principal died *after a* ca. ſa. *returned, but before the return* of the ſecond *ſci. fa.* the bail are chargeable, becauſe it was their omiſſion that they did not ſurrender him, he being alive at the return of the *ca. ſa.* 2 *Lord Raym. Rep.* 1452.

A man condemned in debt renders himſelf to the court and *prays his ſureties may be diſcharged*, and the plaintiff was demanded, for the court ſaid he may elect either body, or to take his goods in execution; but *by this* offer *the ſureties were diſcharged. Cro. El.* 22.

After judgment againſt the *principal*, he *came into court and rendered himſelf, and prayed that the court in diſcharge of his bail would record his render, which was granted*; and the court demanded of the plaintiff, whether he would have execution of the body, who replied he would not, thereupon the court awarded that the ſureties be diſcharged. *Lev.* 58.

Upon a *capias* againſt the principal after a judgment in debt, and *non inventus* returned, a *ſci. fa.* was awarded againſt the bail, which was *returned nihil*; and *upon a ſecond* ſci. fa. *againſt them*, the *principal was brought in*, and the bail prayed that he might be in execution; but the court ordered it to be obſerved as a rule, that if a *ca. ſa. be awarded returnable the next term, whereon* nihil *is returned*, the principal ſhall never afterwards render himſelf in their diſcharge; *but if* it be *returnable de die in diem*, then the body might be brought in upon the firſt *ſci. fa.* and that there ſhall be *fifteen days between the teſte and return of the ſcire facias*, ſo that there may be convenient time to ſeek the principal. *Cro. Eliz.* 738.

The render ought to be *in the court where the judgment is*; *per cur'*. *Cro. J.* 98.

The *plaintiff by practice with the principal would charge the bail*, and diſcharge the principal upon oath (the practice being very flagrant, and both principal and bail being in execution, the bail firſt, and afterwards the principal) the bail was diſcharged by the court. 1 *Bulſt.* 43.

If the principal after judgment *renders himſelf* in diſcharge of his bail, it is ſtill at the *election of the plaintiff to take out execution either againſt him or his bail*; but if he takes and arreſts the bail, tho' he has not full ſatisfaction, he ſhall never afterwards charge the principal. *Cro. Jac.* 320.

After judgment againſt the principal a *ca. ſa.* iſſued againſt him, which was *returned*; *but before it was filed a* ſci. fa. *iſſued againſt the bail. One of them brought an action againſt the principal, and he being taken* upon the proceſs, and brought into court, the bail prayed that he might be delivered in execution for the debt upon the judgment, which was done accordingly, and the plaintiff was inforced by the court of neceſſity to pray the body of the principal to be committed in execution for his debt. 2 *Bulſt.* 260, 261.

Bail in criminal cauſes. Bail in criminal cauſes is regularly to be allowed in all ſuch caſes wherein it ſeems doubtful, whether the perſon accuſed be guilty of the offence or not; in which caſe it may be allowed and taken by that perſon who has cognizance of the crime, and therefore being judge of the offence, may, if he thinks fit, bail the offender. 2 *Inſt.* 189. 2 *Hawk. P. C.* 93.

Under this head is conſidered,

1. *Who may or may not be bailed.*
2. *What perſons are authorized to take bail.*
3. *Of ſufficient, inſufficient, and exceſſive bail.*
4. *Of granting bail where it ought to be denied, and denying it where it ought to be granted.*
5. *Of bail by writ of habeas corpus.*

1. *Who may or may not be bailed.*

At the Common law, bail was allowed in all caſes but homicide; but now the ſtatute of 3 *Ed.* 1. *c.* 15. directeth what offenders ſhall be bailed, and what not. *Hal. P. C.* 97. It is true, the ſaid ſtatute only preſcribeth, who ſhall or ſhall not be let to bail by the *ſheriff*; but by the 1 & 2 *P. & M. c.* 13. it is enacted, that no juſtice or juſtices of the peace ſhall let to bail or mainpriſe any perſon not repleviſable by the ſaid ſtatute of 3 *Ed.* 1. *c.* 15. Which ſtatute is as follows:

Stat. 3 *Ed.* 1. *c.* 15. "For as much as ſheriffs and others, who have taken and kept in priſon perſons detected of felony, and incontinent, have let out by replevin ſuch as were not repleviſable, and have kept in priſon ſuch as were repleviſable, becauſe they would gain of one party and grieve the other; and for as much as before this time it was not determined which perſons were repleviſable and which not, but only thoſe that were taken for the death of a man, or by commandment of the King, or of the juſtices, or for the foreſt; it is provided, and by the King commanded, that ſuch priſoners as before were outlawed and they which abjured the realm, provers, and ſuch as be taken with the manner, and thoſe which have broken the King's priſon, thieves openly defamed and known, and ſuch as be appealed by provers, ſo long as the provers be living (if they be not of good name) and ſuch as be taken for houſe-burning feloniouſly done, or falſe money, or for counterfeiting the King's ſeal, or perſons excommunicated, taken at the requeſt of the biſhop, or for manifeſt offences, or for treaſon touching the King himſelf, ſhall be in no wiſe repleviſable by the common writ, nor without writ; but ſuch as be indicted of larceny by inqueſts taken before ſheriffs or bailiffs by their offices, or of light ſuſpicion, or of petit larceny, that amounteth not above the value of twelve pence, if they were not accuſed of ſome other larceny aforetime, or accuſed of receipt of thieves or felons, or of commandment, or force, or of aid in felony done, or accuſed of ſome other treſpaſs, for which one ought not to loſe life or member, and a man approved by a prover after the death of the prover (if he be no common thief nor defamed) ſhall be henceforth let out by ſufficient ſurety, whereof the ſheriff will be anſwerable, and that without giving aught of his goods. And if the ſheriff, or any other, let any go at large by ſurety that is not repleviſable, if he be ſheriff or conſtable, or any other bailiff of fee, which has keeping of priſons, and thereof be attainted, he ſhall loſe his fee and office for ever. And if the under-ſheriff, conſtable, or bailiff of ſuch as have fee for keeping priſons, do it contrary to the will of his lord, or any other bailiff being not of fee, they ſhall have three years impriſonment, and make fine at the King's pleaſure. And if

B A I

if any withhold priſoners repleviſable, after that they have offered ſufficient ſurety, he ſhall pay a grievous amercement to the King. And if he takes any reward for the deliverance of ſuch, he ſhall pay double to the priſoner, and alſo ſhall be in the great mercy of the King."

Sheriffs and others] The words *(ſheriffs and others)* intend ſheriffs and gaolers that have cuſtody of gaols, ſo as this act *extends not to any of the King's juſtices, or judges of any ſuperior courts of juſtice*; firſt, for that they being ſuperiors are not comprehended in the general words, as often hath been obſerved; 2dly, (who have taken and kept in priſon) which judges do not; 3dly, becauſe in thoſe days priſoners were commonly bailed by the King's writ *de homine repleg'*, and then alſo by the writ *de odio & atia*, both which were directed to the ſheriff. 2 *Inſt.* 185, 186.

Felony] In thoſe days *felony comprehended* in it as well *treaſon*, as homicide, rape, or burglary, robbery, arſons, and all larcenies and thefts. 2 *Inſt.* 186.

And have kept in priſon] Here it is proved, that it is an *offence* as well *to bail a man not bailable, as to deny a man bail that ought to be bailed*; and the reaſon is yielded wherefore the ſheriffs and others did ſo offend, becauſe they would gain of the one, and grieve the other, *viz.* either for avarice, or for malice. 2 *Inſt.* 186.

Not determined] It was not certainly determined what people were repleviſable and what not, within the general words of the writ *de homine repleg'*. 2 *Inſt.* 186.

Repleviſable] This word *(repleviſable)* proves that this act intends what perſons were to be replevied by the common writ *de homine replegiando*, which was directed to the ſheriff under whoſe cuſtody the priſoners are, and of whom this act ſpeaks, and ſo it appears by the Regiſter; and replevy, or plevy, is applied to the ſheriff to take pledges and bail to the higheſt courts of record; and the writ *de manucaptione* directed to the ſheriff is grounded upon this act, in which writ not only *replegiare* but *manucapere* alſo is uſed. 2 *Inſt.* 186.

Death of a man] Here our act firſt ſets down, what perſons were not bailable for certain offences by the common writ *de homine repleg'*, and they are in number four; but *by the ancient law* of the land, in *all caſes of felony, if the party accuſed could find ſufficient ſureties, he was not to be committed to priſon*; but afterwards it was provided, that in caſe of *homicide*, the offender was not bailable. 2 *Inſt.* 186.

By commandment of the King] The words *(by command of the King)* are as much as to ſay (as ſome affirm) *by the King's courts of juſtice*; for all matters of judicature and proceedings in law are diſtributed to the courts of juſtice, and the King does judge by his juſtices, 8 *H.* 4. *fol.* 19. and 24 *H.* 8. *cap.* 12. and regularly no man ought to be attached by his body, but either by proceſs of law, that is, (as has been ſaid) by the King's writs, or by indictment, or lawful warrant, as by many acts of parliament is manifeſtly enacted and declared, which are but expoſitions of *Magna Charta*; and all ſtatutes made contrary to *Magna Charta*, which is *lex terræ*, from the making thereof until 42 *E.* 3. are declared and enacted to be void; and therefore if this act of *Weſtm.* 1. concerning the extra-judicial commandment of the King, be againſt *Magna Charta*, it is void; and all reſolutions of judges concerning the commandment of the King, are to be underſtood of judicial proceedings. 2 *Inſt.* 187.

Or of his juſtices] The words *(or of his juſtices)* intend, upon any cauſe, whereof they are judges, appearing to them. 2 *Inſt.* 187.

Or for the foreſt] And all theſe four are particularly excepted out of the common writ *de homine replegiando*, that the ſheriff in his county court, which is not a court of record, ſhall not replevy any of theſe four that are committed; for example, tho' the party be committed by the perſonal command of the King, albeit the commitment be unlawful, yet the ſheriff ſhall not deal therein

by the writ *de homine replegiando*; but the ſuperior courts at *Weſtminſter*, upon a *habeas corpus*, &c. ſhall do juſtice to the party in all theſe four caſes; ſo as *Stamford*, being well conſidered, impugneth not in any ſort this opinion; for his opinion extends only to the county court upon the writ *de homine replegiando*, and not to the ſuperior courts. 2 *Inſt.* 187.

Outlawed] Perſons outlawed are attainted in law, and therefore are not repleviſable, or to be bailed; for if a man be arraigned of homicide, and pleads Not guilty, and is found guilty, and for difficulty of clergy is reprieved, it was reſolved by the juſtices, that he was not bailable; for the intendment of the law in bails is *quod ſtat indifferenter*, whether he be guilty or no; but when he is convict by verdict or confeſſion, then he muſt be deemed in law to be guilty of the felony, and therefore not bailable at all; *a fortiori*, when the party is attainted in law. 2 *Inſt.* 187, 188.

And yet if the party upon the *cap. utlag.* plead *miſnomer*, or alledge error, &c. he may be bailed. 2 *Inſt.* 188.

Abjured the realm] Perſons having abjur'd, are alſo attainted upon their own confeſſion, and therefore not bailable at all by law. 2 *Inſt.* 188.

Provers] The reaſon whereof provers or approvers be not bailable, is; for provers do firſt confeſs the felony to be done by themſelves, and therefore they are not bailable, becauſe it appears that they be guilty of the fact. 2 *Inſt.* 188.

Taken with the manner] For in this caſe *non ſtat indifferenter*, as hath been ſaid, whether he be guilty or no, being taken with the manner, or *mainer*, that is, with the thing ſtolen, as it were in his *hand*, anciently called *handhabend*; the like is anciently called *backberind*, as a bundle or fardle at his back, which *Bracton* uſes for a manifeſt theft, *furtum manifeſtum*; and ſo doth *Britton*. 2 *Inſt.* 188.

Broken the King's priſon] Here are two offences, 1ſt, his breaking of the priſon; for it is preſumed, that he that is innocent will never break priſon; and 2dly, his flying, *quia fatetur facinus, qui judicium fugit*. 2 *Inſt.* 188.

Appealed by provers] The appeal of the approver is forcible againſt the appellee, becauſe the approver confeſſes him guilty of the ſame felony, and therefore it ſerves in nature of an indictment againſt the appellee ſo long as the approver lives, unleſs the appellee be of good fame; but yet the general words do receive qualification; for albeit the prover be alive, yet if the approver waive in his appeal, the appellee ſhall be bailed, if no other appeal be againſt him. 2 *Inſt.* 188.

Houſe-burning] Burning of houſes, &c. was felony by the Common law, as it appeareth by this act, and by our ancient authors, viz. *Glanvil*, *The Mirror*, *Bracton*, *Britton*, and *Fleta*; and this ſeemeth to be the law before the Conqueſt. 2 *Inſt.* 188.

Falſe money] This appears to be treaſon by the Common law. 2 *Inſt.* 188.

Counterfeiting the King's ſeal] This was alſo treaſon by the Common law, as it appeareth by the ſaid ancient authors; and both theſe were declared to be high treaſon at the Common law by the ſtatute of 25 *Ed.* 3. *cap.* 1. See more hereof in the third part of the *Inſt.* 2 *Inſt.* 189.

Perſons excommunicate] That is, he that is certified into Chancery by the biſhop to be excommunicated, and after is taken by force of the King's writ of *excommunicato capiendo*, (which is ſo called of words in the writ called a *ſignificavit*) is not bailable, for in ancient time men were excommunicated but for hereſies, *propter lepram animæ*, or other heinous cauſes of eccleſiaſtical conuſance, and not for ſmall or petty caſes; and therefore in thoſe caſes the party was not bailable by the ſheriff or gaoler without the King's writ; but if the party offered ſufficient caution *de parendo*

parendo mandatis eccleſiæ in forma juris, then ſhould the party have the King's writ to the biſhop to accept his caution, and to cauſe him to be delivered, and if the biſhop will not ſend to the ſheriff to deliver him, then ſhall he have a writ out of the Chancery to the ſheriff for his delivery: or if he be excommunicated for a temporal cauſe, or for a matter whereof the eccleſiaſtical court hath no conuſance, he ſhall be delivered by the King's writ without any ſatisfaction. 2 *Inſt.* 189.

One taken by an *excommunicato capiendo* upon the ſtat. 5 *Eliz. cap.* 23. and brought to the bar by *hab. corp.* was bailed, by the opinion of all the juſtices, *contra Williams. Bulſt.* 122. *Paſch.* 9 *Jac. Anon. Ibid. Yelverton* J. ſaid that ſo it was reſolved in one *Keyſer*'s caſe, where he was taken by a writ *de excommunicato capiendo*, brought hither by a *habeas corpus*, and upon cauſe ſhewed, he was bailed by the court *de die in diem*; but neither the ſheriff, nor any juſtice of the peace in the county can bail ſuch a one, but the court here may well bail one, as in the caſe before, *de die in diem.*

Manifeſt offences] Or for open or manifeſt offences; for, as has been ſaid, bail is *quando ſtat indifferenter*, and not when the offence is open and manifeſt. 2 *Inſt.* 189.

One was *found guilty* of felony, but it being *doubted whether clergy was allowable* or not, he was reprieved without judgment; and the juſtices held, that he is not bailable, becauſe by his being convicted, he is more than one vehemently ſuſpected; and the intendment of the law in bails is *quod ſtat indifferenter*, if he be guilty or not, till trial, *&c. D.* 179. *a. pl.* 42. *Paſch.* 2 *Eliz. Anon. Jenk.* 219. *pl.* 88. *S. P.* And as to him that is convicted, two juries have paſſed upon him, and it is evident that he is guilty; by all the judges of *England.*

Treaſon] For by the Common law, a man accuſed or indicted of high treaſon, or of any felony whatſoever, was bailable upon good ſurety; for at the Common law, the gaol was his pledge or ſurety that could find none; and this appears by *Glanvil*, who ſays, *Is qui accuſatur, ut prædiximus, per plegios ſalvos & ſecuros ſolet attachiari, aut ſi plegios non habuerit, in carcerem detrudi*; ſo as a man by the Common law was bailable for any offence until he were convicted; and this ſeems to be the old law of the land before the Conqueſt, viz. *Ingenuus quiſque fidejuſſores, qui eum (ſi quando in crimen vocetur) jus ſuum cuique tribuere quam paratiſſimum fore præſtent, fidiſſimos adhibeto.* 2 *Inſt.* 189.

In no wiſe repleviſable] That is, the ſheriffs ſhall not replevy them by the common writ *de homine replegiando*; nor without writ, that is, *ex officio*; but all or any of theſe may be bailed in the King's Bench, *&c.* 2 *Inſt.* 189.

Larceny] This act divides larceny into two kinds, *viz.* grand and petit; grand larceny is when the thing ſtolen is above the value of 12*d.* and petit larceny is, when it is of the value of 12*d.* or under, and the things ſtolen are to be reaſonably valued; for the ounce of ſilver, at the making of this act, was at the value of 20*d.* and now it is of the value of 5*s.* and above. 2 *Inſt.* 189, 190.

Sheriffs] That is, *of ſheriffs in their tournes, or lords in their leets*, or thoſe that have infang-thief, and out-fang-thief, *&c.* 2 *Inſt.* 190.

Let out by ſufficient ſurety] That is to be underſtood where the indictment was taken before the ſheriff in his tourn, for here he was judge of the cauſe, for other priſoners could not be bailed without writ; and if the ſheriff, having ſufficient ſurety offered to him, refuſed to bail him, he ſhould have a writ *de manucaptione* directed to the ſheriff to take pledges of him; and if the *bailiff of a hundred* (which is *intended of a ſteward in a leet*) refuſed to take pledges of one indicted before him, the priſoner ſhould have had a writ *de manucaptione* to the ſheriff to take pledges of him, and all this appears by the writ *de manucaptione*; but ſince this time this writ of *manucaptione* is taken away by the ſtatute of 28 *Ed.* 3. 2 *Inſt.* 190.

Without giving aught of their goods] For neither the ſheriff, nor other of the King's officers, could take any thing for doing his office. 2 *Inſt.* 190.

If he be ſheriff, &c. of fee] So that at this time there were ſheriffwicks in fee, and conſtablewicks and bailiwicks in fee, which had the keeping of priſons; theſe, being attainted of letting to bail of any priſoner not bailable, ſhould loſe the fee and bailiwick for ever; and upon office found, the King ſhould have the inheritance of the office in him to be grantable over. 2 *Inſt.* 190.

And if the under ſheriff] Note; the action of the under-ſheriff, or under-bailiff, without the aſſent of his ſuperior, is no forfeiture of the fee, or bailiwick of his ſuperior, tho' in many other caſes the ſuperior ſhall anſwer for his deputy. 2 *Inſt.* 191.

If any withhold priſoners repleviſable] Here it appeareth that to deny a man plevin that is pleviſable, and thereby to detain him in priſon, is a great offence, and grievouſly to be puniſhed. 2 *Inſt.* 191.

By ſtat. 1 & 2 *P. & M. c.* 13. *ſect.* 2. No juſtice or juſtices of peace ſhall let to bail or mainprize, any perſons forbidden to be repleviſed or bailed by ſtat. 3 *Ed.* 1. *c.* 15.

Upon an aſſembly of all the juſtices and barons of the Exchequer at Serjeants-Inn in Fleet-Street, this term, it was reſolved by them, and ſo agreed to be hereafter put in execution in all circuits; that if a man taken for felony be examined by a juſtice of peace, and it appeareth that the felon is not bailable by law, and yet the juſtices commit him to gaol as upon ſuſpicion of felony, not making mention for any cauſe for which he is not bailable, whereby he is brought before another juſtice of peace not knowing of any matter why he ought not to be bailed, whereupon they bail him, theſe juſtices ought to be fined by the ſtatute of 1 & 2 *Ph. & Mar.* for they offend if they bail him, who by the ſtatute of *Weſtm.* 1. is not bailable, and therefore they at their peril ought ſo to inform themſelves, before the bail taken, of the matter, that they may be well ſatisfied that ſuch a one is bailable by law; and therefore obſerve well the ſtatute of *Weſtm.* 1. *cap.* 18. who is bailable and who is not by the law. *Poph.* 96. *pl.* 1. *Trin.* 37 *Eliz.*——2 *Hawk. Pl. C.* 90. *cap.* 15. *ſ.* 12. *S. P.* and cites *S. C.*——And *ibid. ſ.* 15. ſays, that the offence of denying or obſtructing bail, where it ought to be granted, ſeems to be a miſdemeanor not only by the Statute, but alſo by the Common law, and puniſhable thereby as an offence againſt the liberty of the ſubject, not only by action at the ſuit of the party wrongfully impriſoned, but alſo by indictment at the ſuit of the King. But *ibid. ſ.* 14. ſays, It ſeems clear, that he who has power to bail another, is not bound to demand of him to find ſureties, and to forbear committing him till he ſhall refuſe to find them, but may well juſtify his commitment, unleſs the party himſelf ſhall offer his ſureties.

One indicted and found guilty of the *death of a man by miſadventure*, as by caſting a ſtone over a houſe, and by chance killing a man, woman, or child, is not bailable. *Coke of Bail, &c. c.* 5. cites 3 *Ed.* 3. *Corone* 354.

So if one indicted be found guilty of the death of a man *ſe defendendo*, he ought not by law to be bailed; for according to *Bracton*'s rule, *Invenientur culpabiles. Coke of Bail, &c. c.* 5.

One indicted of *conſpiracy*, *viz.* that he with others conſpired falſely to *indict another of murder or felony*, by means whereof he was indicted, and afterwards convicted, ſhall not be bailed. *Coke of Bail, &c. cap.* 5. and ſays, that this was the reſolution of all the judges, upon the queſtion demanded by King *Ed.* III. himſelf, as appears 27 *Aſſ.* 1.

One indicted for *burglary* may be bailed. *Coke of Bail, &c. c.* 5. cites 29 *Aſſ.* 44.

One indicted or appeal'd of *robbery* may be bailed. *Coke of Bail, &c. c.* 5. cites 44 *Ed.* 3. 3.

One indicted or appeal'd of *rape* may be bailed; yet that was no felony at Common law, till the ſtat. *Weſtm.* 2. *cap.* 34. *Coke of Bail, &c. c.* 5. cites 44 *Ed.* 3. 38.

Appeal

Appeal in *B. R.* againſt *R.* for *ſtealing eight pigs*, and it was awarded that the defendant ſhall remain, without being let to mainpriſe, becauſe it was reported to the court by a ſolicitor, that he *was not of good fame*, and he ſaid that he bought pigs of two men; and it was held by the juſtices, that if he could *bring in any proof that he bought them*, that then *he ſhould go by mainpriſe*; and the ſame if thoſe, of whom he ſaid he bought them, would come and teſtify that they ſold them to the appellee. *Br. Corone, pl.* 162.

A man was *taken by capias utlagatum in felony by name of J. S. gent.* who *ſaid that* his name *is yeoman, and not gentleman, and ſo is not this perſon who is outlawed*, and had the plea; and becauſe it was *in appeal, ſcire facias* was awarded againſt the appellant, if he could ſay any thing againſt this plea, and the defendant *was let to bail. Br.* Utlagary, *pl.* 42.

The intendment of law in bails *is*, that it ſtands indifferent whether he be guilty or not, till trial, *&c. Dyer* 179.

If a perſon be committed *by her Majeſty's commandment from her perſon, or by order from the council-board*, or if any *one or two of her council commit one for high treaſon*, ſuch perſons ſo in the caſe before committed, may not be delivered by any of her courts without due trial by the law, and judgment of acquittal had; nevertheleſs the judges may award the Queen's writ, to bring the bodies of ſuch perſons before them; and if upon return thereof the cauſes of their commitment be certified to the judges, as it ought to be, then the judges in the caſes before mentioned ought not to deliver him, but to remand the priſoner to the place from whence he came, which cannot conveniently be done, unleſs notice of cauſe in generality, or elſe ſpecially, be given to the keeper or gaoler that ſhall have the cuſtody of ſuch priſoner; and to this all the judges and barons, *&c.* did ſubſcribe their names, and deliver'd one to the lord chancellor, and one to the lord treaſurer. *And.* 298.

If a man be indicted as *principal of the death of a man*, he is not to be bailed; but if indicted as acceſſary before or after, he is bailable. *Coke of Bail, &c. c.* 5.

If one be *appealed by an approver*, and be of good and honeſt fame, he may be bailed during the life of the approver. *Coke of Bail, &c. c.* 5.

One indicted for *putting out eyes*, or *cutting out of tongues*, may be bailed. *Coke of Bail, &c. c.* 5.

The defendant was indicted for *murder*, and the trial coming on, the *proſecutor alledged, that there had been great labouring of the jury*, and therefore did *non proceed*, ſuſpecting a partial jury, but brought an appeal; and tho' by the appeal the indictment ſtill continued, and was not gone, yet the delay being occaſioned by the proſecutor, the party was bailed; but by *Crooke* J. If the labouring the jury had been prov'd, peradventure he would not be bailable. *Bulſt.* 85.

The jury on an indictment of *murder* found a *ſpecial verdict*, whereupon the *court were divided*, two againſt one, and thereupon the priſoner moved to be bailed, but all the court denied it; and as for the verdict, there was a *curia adviſare*, and the matter adjourned, and the priſoner carried away in cuſtody. *Bulſt.* 89.

A precedent was ſhewn, where a man was indicted for *high treaſon*, and bailed. *Bulſt.* 85.

If the court of *B. R. commits a man*, or if *the chief juſtice* of *B. R.* commits a man, he is not bailable by any, tho' no cauſe be declared, and peradventure there is a cauſe which touches the ſtate, and which is not convenient to be known. *Rol. Rep.* 134.

The defendant was found *guilty of manſlaughter on the coroner's inqueſt*, and moved to be bailed, becauſe there *was no indictment*, but denied; and *per Coke* and *Haughton*, the ſtatute of *Weſtm.* is, that no bail ſhall be taken, but that muſt be *intended no ordinary bail*; and the ſtatute of Queen *Mary* is, that bail ſhall be taken where the party is bailable by law in manſlaughter, ſo that it appears he is not bailable at all if he confeſs the fact, or if it is *notorious. Rol. Rep.* 268.

Bail was allowed in *murder*, becauſe the priſoners were in *danger of ſtarving*, and no trial could ſoon be had, tho' it was againſt the ſtatute, but it may have a favourable conſtruction *at the diſcretion of the judges. Lat.* 12.

The court did take bail for a priſoner againſt whom an *appeal of murder* was brought, becauſe he *did not fly* for the murder ſuppoſed, *and* had been *formerly indicted for this murder, and acquitted* upon the indictment *(Mich.* 22 *Car. B. R.)* upon which *preſumptions* they conceived he was not guilty, elſe they would not have bailed him. *Lil. P. R.* 173.

A woman who had been twice indicted of *witchcraft* before, and acquitted, being indicted a third time, moved to be bailed, inſiſting that the *proſecution was for malice*, and ſhe was bailed accordingly to appear at the next aſſizes. *Sty.* 116.

A. and *C.* to whom *A.* was *ſecond in a duel*, were formerly indicted for killing a man, and found guilty of *manſlaughter* only by the grand inqueſt, and being brought to the bar to be arraigned for it, were denied to be bailed. *Sty.* 371.

Roll Ch. J. ſaid, he doubted whether one indicted of *perjury* may be bailed, tho' the clerks of the criminal ſide ſaid he might. *Sty.* 368.

One committed by the council of ſtate and the parliament, for publiſhing a *ſeditious pamphlet*, was denied to be bailed. *Sty.* 397.

One indicted on *ſuſpicion of robbery* was outlawed, and *taken on the outlawry*, and *brought writ of error*, and being brought to *B. R.* by *habeas corpus*, prayed to be bailed, and took two exceptions to the indictment; 1ſt, That he was in priſon, and knew nothing of the outlawry; 2dly, That the charge is too general, and nobody proſecutes; but *per Roll* Ch. J. he cannot be bailed. *Sty.* 418.

One brought out of *Wales* by *habeas corpus*, moved to be bailed, becauſe they had no gaol-delivery there; and by *Roll* Ch. J. he was bailed to the next aſſizes. *Sty.* 418.

A perſon accuſed of *high treaſon*, and not within the *habeas corpus* act, is not *de jure* to be bailed by this court. *Raym.* 381. *Trin.* 32 *Car.* 2. *B. R.* in a memorandum there, cites it as reſolved in Ld. *Stafford*'s caſe.

The defendant being indicted for *murder* at the quarter ſeſſions, and the indictment being removed into *B. R.* by *certiorari*, the defendant appeared, and pleaded Not guilty, and he moved to be bailed, which the court granted, being ſatisfied by *ſeveral affidavits* that there was good reaſon for it. 2 *Jo.* 222.

The court of *B. R.* has power to bail in all caſes of *treaſon. Skin.* 163. cites the opinion of the judges in the houſe of Lords, 1678, in *Zachary Crofton*'s caſe.

B. R. may bail *in caſes where they cannot try the party bailed*; perſons taken here for *offences committed in Ireland* are bailed here to appear in *Ireland*, tho' they cannot be tried here. *Skin.* 163.

So any *lord of parliament committed for high treaſon* by a juſtice of peace, or ſecretary of ſtate, may be bailed in *B. R.* tho' he cannot be tried there. *Skin.* 163.

Per cur', We are not bound to bail a man committed for *ſuſpicion of murder*, where 'tis expreſſed that a man was killed, tho' the coroner's inqueſt find it but manſlaughter; but we ought to have the examination before us, and if it appears to be a caſe of hardſhip, we may bail. *Comb.* 298.

'Tis not proper for juſtices of peace to give copies of examinations about murder, and where it is found *homicide by the coroner*, yet he ought to commit the criminal. *Comb.* 298.

Two were committed by warrant from the ſecretary of ſtate *for high treaſon, in aſſiſting the eſcape of Sir James Montgomery*, who was *committed by the ſecretary of ſtate for high treaſon*; but becauſe it was *not expreſs'd* in the commitment *what was the ſpecies of Sir James Montgomery's treaſon*, and theſe perſons are to be charged with the ſame ſpecies of treaſon, therefore the court held that they were bailable. *Comb.* 343.

An indictment was found againſt *B.* at the ſeſſions at *N.* for *petty treaſon*, and murder of her huſband; ſhe was brought to the bar, and moved to be bailed, and it appearing

pearing upon affidavits of the fact, that the profecution was malicious, and nothing being done, either upon this indictment or the coroner's inqueſt, and the man being dead above a year, ſhe was bailed. 5 *Mod.* 323.

The Lord *Mohun* having been bailed by *Holt* Ch. J. appeared upon the laſt day of the term; and he being in court, it was prayed that he ſtand committed, there being *an indictment of murder found againſt him by the grand jury*; this was oppoſed by his council, becauſe he being bailed by the Ch. J. and he having all the informations before him, and the ſame witneſſes being ſworn upon the indictment as upon the inquiſition before the coroner, there would be the ſame reaſon for him to ſtand upon the firſt bail, as there was at firſt to admit him to bail; but it was anſwered, that there would be a *difference* between *an inquiſition found before a coroner* where the depoſitions are in writing, and examinable, and *an indictment* for murder, *found before a grand jury* where the evidence is ſecret, and they are ſworn not to diſcover it; and *there may be more evidence given to a grand jury than* was given to *the coroner*, *and more* evidence may be alſo given *upon the trial than* was given *to the grand jury*, for the *party may conceal part of* his evidence *to prevent practices*; and the court ſeemed to incline ſtrongly, to commit him upon what had been ſaid; but when it was added, that there would be a ſeſſions of parliament within two or three days, they *committed him*; and it was ſaid, that if the *lords in parliament* pleaſed, they *might remove the judgment by certiorari, and admit him to bail there*. *Skin.* 683.

The defendant was indicted for *murder*; the court would not bail him, tho' the *evidence upon the reading did not ſeem ſufficient* to prove him guilty; for *per Holt*, Allowing bail may diſcourage the proſecution, and it is not fit the court ſhould declare their opinion of the evidence beforehand. 1 *Salk.* 104.

One charged with *buggery* is not bailable, *per Holt* Ch. J. 12 *Mod.* 435.

A man brought to this court by *hab. corp.* upon a *commitment by a juſtice of the peace*, who had cognizance of the cauſe, is not bailable till the order is quaſhed, becauſe till then he is in execution. 11 *Mod.* 45.

A motion was made for a *habeas corpus* to bring up the body of the defendant, charged with *picking a pocket*, and offered to bring unexceptionable bail, and to ſend down a tipſtaff to inquire of his reputation; *per Holt* Ch. J. Tho' we have diſcretionary power, yet it being certified *(ſworn)* that he was *charged with the fact*, I think we ought to refuſe to bail him; which (on conſulting his companions) he accordingly did. 11 *Mod.* 261.

It was doubted, whether perſons committed by rule of court are intitled to the benefit of the *habeas corpus* act; and it was reſolved by two judges, viz. *Eyre* and *Forteſcue*, *(abſente Powis & diſſentiente Pratt)* that none are intitled to make their prayer, but ſuch as are committed by warrant of a juſtice of peace, or ſecretary of ſtate, and not thoſe committed by rule of court; for *that* is not in the meaning of the act of parliament, *(a commitment by warrant.)* 10 *Mod.* 429.

2. *What perſons are authorized to take bail.*

By the Common law, according to ſome opinions, the ſheriff, without any writ, might *ex officio*, as principal conſervator of the peace, bail any perſon arreſted on ſuſpicion of felony; and it is certain, that by the Common law he might bail any perſon who was indicted before him at his torn for felony, or any other crime that is bailable. See 2 *Hawk. P. C.* 93.

Alſo bail is grantable by a ſheriff by virtue of the following writs; 1. By that of *odio & atia*, by which a perſon committed for the death of a man might, on an inqueſt taken by the ſheriff, if he were found to have done the fact by miſadventure or *ſe defendendo*, be mainprized by 12 men, upon the writ *de ponendo in ballium*; but this ſeems obſolete at this day. *Co. Bail and Mainprize*, *c.* 10. 2 *Hawk. P. C.* 93. 1 *Hawk. P. C.* 76.

2dly, By writ of mainprize, which of late has been diſuſed, but ſeems ſtill in force, and may be brought by perſons bailable, as thoſe who are impriſoned for a ſlight ſuſpicion of felony or indicted of larceny, before the ſteward of a leet, or of a treſpaſs before juſtices of the peace, *&c. Regiſter* 269. *H. P. C.* 103, 104. 2 *Hawk. P. C.* 93.

3dly, That of *homine replegiando*, whereon if he return that the plaintiff is eſloigned, he may by *capias* of *withernam* impriſon the defendant, whether he be a peer or commoner, till the plaintiff ſhall be replevied. *F. N. B.* 66. *Regiſt.* 78, 79.

It ſeems clear, that wherever juſtices of the peace have power to hear and determine any offence which is bailable within the ſtatute *Weſtm.* 1. any one of ſuch juſtices ſeems conſequently to have power to bail any perſon indicted at the ſeſſions for ſuch offence, becauſe every ſuch juſtice is a judge of the court which is to determine it. *H. P. C.* 105. *Coke, Bail and Mainprize, cap.* 6. *Lamb.* 347. 2 *Hawk. P. C.* 103.

Alſo every juſtice of the peace has a diſcretionary power of admitting perſons to bail who have given a dangerous wound. 2 *Hawk. P. C.* 103.

But the power of juſtices of admitting to bail, is chiefly regulated by acts of Parliament, to which purpoſe it is recited by 1 *R.* 3. *cap.* 3. "That divers perſons had been daily arreſted and impriſoned for ſuſpicion of felony, ſometime of malice, and ſometime of a light ſuſpicion, and ſo kept in priſon without bail or mainprize, to their great vexation and trouble; and thereupon it is enacted, That every juſtice of the peace, in every ſhire, city or town, may by his or their diſcretion let ſuch priſoners and perſons ſo arreſted to bail or mainprize, in like form as though the ſame priſoners or perſons were indicted thereof of record before the ſame juſtices at their ſeſſions."

But this ſtatute, ſo far as it gives ſuch power to a ſingle juſtice, is repealed by 3 *Hen.* 7. *cap.* 3. which enacteth, "That juſtices of the peace, or two of them at the leaſt, whereof one to be of the *quorum*, have power to bail any perſon mainpernable by law, to their next general ſeſſions, or to the next general gaol-delivery, as well within franchiſe as without; and that the ſame juſtices, or one of them, ſhall certify the ſame to ſuch ſeſſions or gaol-delivery, on pain of 10*l.*"

But theſe ſtatutes have been often abuſed, by juſtices of the peace bailing perſons in the name of two juſtices, where one only was preſent, and for offences not bailable; therefore,

It is enacted by 1 & 2 *Ph. & Mar. cap.* 13. "That no juſtice ſhall bail any perſon for offences declared to be irrepleviſable by *Weſtm.* 1. and that no perſon arreſted for manſlaughter or felony, or ſuſpicion thereof, ſhall be let to bail or mainprize by any juſtices of the peace, if it be not in open ſeſſions, except it be by two juſtices at the leaſt, and one to be of the *quorum*, and the ſame juſtices to be preſent together at the time; which bailment or mainprize they ſhall certify in writing, ſubſcribed or ſigned by them at the next general gaol-delivery; and ſuch juſtices, before ſuch bailment for felony, ſhall take the examination of the priſoner, and the information of them that bring him, of the fact and circumſtances thereof, and ſhall put in writing ſo much thereof as ſhall be material, before they make the bailment, and ſhall certify ſuch examination and bailment to the next general gaol-delivery, and ſhall have authority to bind all ſuch by recognizance or obligation, as to declare any thing material to prove the ſaid offences, to appear at the next general gaol-delivery, and to give evidence, *&c.* and ſhall certify the ſaid evidence and bonds, *&c.* before the time of the trial; and if any juſtice of *quorum* ſhall offend againſt this act, he ſhall be fined in diſcretion by the juſtices of gaol-delivery, or proof by examination before them, *&c. But it is provided*, That juſtices in *Middleſex*, and in cities, boroughs, and towns corporate, ſhall have authority to bail priſoners in ſuch manner as was before accuſtomed, and alſo ſhall take examination and bonds as aforeſaid upon every bailment-bond and examination at the next general gaol-delivery."

The authority given to one juſtice of the peace by 1 *Ric.* 3. to admit perſons to bail for felony, being repealed by 3 *H.* 7. and 1 & 2 *Ph. & Mar.* one juſtice of the peace cannot admit perſons to bail, unleſs it be for an offence directly tending to the breach of the peace, the reſtraint whereof is the chief end of his office, or for an offence by ſtatute put under the conuzance of one juſtice, or for an offence indictable at the ſeſſions. 2 *Hawk. P. C.* 105.

But though the ſtatute of *Ph. & Mar.* has preſcribed the ſtatute of *Weſtm.* 1. as a pattern for juſtices to follow in relation to bail, and it therefore follows, that a perſon under an actual arreſt for any crime, declared to be irrepleviſable by that act, cannot be bailed by any juſtice; yet if a perſon at large be only accuſed of ſuch crime on a ſlight ſuſpicion, before a juſtice of the peace, it ſeems that the juſtice ought not to commit him, but ought to take ſurety from him to appear before a proper court. 2 *Hawk. P. C.* 105.

Alſo the ſtatute of 1 & 2 *Ph. & Mar.* expreſly mentioning the bailing of perſons for manſlaughter, as well as for other felonies, it is clear, that juſtices of the peace may by force thereof ſafely bail any perſon impriſoned on a ſlight ſuſpicion of a fact appearing to be no higher an offence than manſlaughter; and much more if it appear to amount to no more than homicide by miſadventure, or in ſelf-defence; but the juſtices ought to be cautious the offence does not amount to murder; alſo that there be no violent preſumptions that the party did the fact; for if any ſuch appear, the party ought not to be bailed, though the offence amount to no more than homicide by miſadventure or ſelf-defence. 2 *Hawk. P. C.* 105. 1 *Rol. Rep.* 268. *H. P. C.* 99. *Dalt. c.* 114. *Lamb.* 346. 2 *Inſt.* 314.

Juſtices of gaol-delivery not being within the reſtraint of the ſtatute of *Weſtm.* 1. may bail perſons convicted before them of homicide by miſadventure, or ſelf-defence, the better to enable them to purchaſe their pardon. *Cromp.* 154. *a. H. P. C.* 101. *F. N. B.* 246. *S. P. C.* 15.

Alſo it ſeems that in diſcretion they may bail a perſon convicted before them of manſlaughter, upon ſpecial circumſtances, as if the evidence againſt him were ſlight, or if he had purchaſed his pardon. *H. P. C.* 101. *Cromp.* 153.

Alſo if an appellee plead an excommunication in diſability of the plaintiff, it ſeems they may bail him till the plaintiff ſhall be abſolved; for otherwiſe the appellee might lie in priſon for ever, without having any opportunity of coming to his trial. 2 *Hawk. P. C.* 106. 1 *Salk.* 61.

And whereas ſuch juſtices have power to admit perſons to bail, it ſeems that they may do it after their ſeſſions is over, as well as during their ſeſſions. 2 *Hawk. P. C.* 106.

The court of King's Bench, by the plenitude of its power, may in diſcretion admit perſons to bail, though committed by other courts for crimes not bailable by thoſe courts, on conſideration of the nature and circumſtances of the caſe. *Vaugh.* 157. 6 *Mod.* 73. 2 *H. P. C.* 112.

But here it muſt be obſerved, that with reſpect to the nature of the offence, although this court is not tied down by the rules preſcribed by the ſtat. of *Weſtm.* 1. yet it will in diſcretion pay a due regard to the rules preſcribed by it, and not admit a perſon to bail who is expreſly declared to be irrepleviſable, without ſome particular circumſtances in his favour. 2 *Inſt.* 185, 186, 189. *H. P. C.* 104. 1 *Salk.* 61. 3 *Bulſt.* 113. 2 *Hawk. P. C.* 113, 114. 5 *Mod.* 454.

And therefore if a perſon be attainted of felony, or convicted thereof by verdict general or ſpecial, or notoriouſly guilty of treaſon or manſlaughter, *&c.* by his own confeſſion or otherwiſe, he is not to be admitted to bail without ſome ſpecial motive to induce the court to grant it. *Kelynge* 90. *Dyer* 79. 1 *Bulſt.* 87. 2 *Hawk. P. C.* 114.

As where a perſon taken by a *capias utlagatum* on an appeal of felony, by the name of *J. S. gentleman*, pleads that his name is *J. S.* yeoman, and not gentleman, and ſo he is not the ſame perſon that was outlawed; in which caſe, the court in diſcretion may bail him, for until the plea be determined, it appears not whether he were the perſon intended or not. 2 *Hawk. P. C.* 114.

So if a man is convicted of felony upon evidence, by which it plainly appears to the court that he is not guilty of it; in which caſe even the juſtices of gaol-delivery may bail him. *Cromp. Juſtice* 154. 2 *Hawk. P. C.* 114.

Or where a proſecution is unreaſonably delayed, or where the priſoner may be in danger of loſing his life, either by famine or dangerous diſtemper, *&c.* unleſs he be bailed. 5 *Mod.* 455. 1 *Sid.* 78. 1 *Bulſt.* 85. *Palm.* 558. 1 *Keb.* 305. *Latch* 12. *Cro. Jac.* 356. *Co. Lit.* 289.

The court of King's Bench hath always admitted perſons to bail impriſoned by the King's ſpecial command, or by order of the privy council, where the commitments expreſſed the crime or cauſe for which the party was committed, or the like circumſtances, on which in diſcretion it will grant bail on other commitments. 5 *Mod.* 78. 1 *Sid.* 143. *Palm.* 559.

But it was formerly holden by many, and at length adjudged in Sir *John Corbet's* caſe, that perſons committed by the ſpecial command of the King, ſignified by warrant from the lords of the privy council, were not bailable without the King's conſent, unleſs there appeared ſome extraordinary circumſtances in the caſe, it being to be preſumed that the King would not exert his prerogative in ſuch a manner, without ſome good reaſon for the ſafety of the ſtate, not fit to be divulged; but this being thought to be a great ſtrain of the prerogative, and to make the liberty of the ſubject precarious, and contrary to the purport of *Magna Charta*, and many other ſtatutes, which declared, that no man ſhall be impriſoned but by due proceſs of law, *&c.* occaſioned the petition of rights 13 *Car.* 1. and the 16 *Car.* 1. *cap.* 10. by which it ſeems now eſtabliſhed, that where commitments by the privy council do not with convenient certainty expreſs the crime alledged againſt the party, he ought to be bailed. 33 *Hen.* 6. 28. *b.* 1 *And.* 298. 1 *Rol. Rep.* 134, 192, 219. *Con. Moor* 839. 1 *And.* 158. *F. N. B.* 66. *S. P. C.* 72. See *Ruſhworth's Collections, part* 1. *fo.* 458.

The great regard which is ſo juſtly due, and which has always been paid, to the proceeding of either houſe of parliament, who are the guardians of the liberty of the ſubject, make it ſomewhat doubtful in what caſes the court of King's Bench will diſcharge or bail a perſon committed by either of thoſe houſes. See *Cro. Car.* 507, 579, 593. 2 *Hawk. P. C.* 110.

Hence no precedent can be found, where the court of King's Bench has bailed a priſoner, ſitting the parliament, on a commitment, which on the return of it ſtands indifferent whether it be ſtrictly legal or not. 2 *Hawk. P. C.* 110.

And therefore in the Lord *Shaftſbury's* caſe, who upon his *habeas corpus* in the *King's Bench* was returned to have been committed by the houſe of lords, for a high contempt committed againſt the houſe; the court would not take notice of any exceptions againſt the form of the commitment; as that was it too general, and did not expreſs the nature of the contempt, or in what place it was committed, *&c.* for that it ſhall be preſumed that it was ſuch for which the lords might lawfully make ſuch an order, and no other court ſhall preſcribe to them in what form they ought to make it. 1 *Mod.* 144, 145, *&c.*

But a perſon committed for a contempt by the order of either houſe of parliament may be diſcharged by the court of *King's Bench* after a diſſolution or prorogation of the parliament, whether he were commited during the ſeſſions or afterwards; for that all the orders of parliament are determined by a diſſolution or prorogation, and all matters before either houſe muſt be commenced a-new at the next parliament, except only in the caſe of a writ of error; and if the ſubject ſhould be deprived of his liberty till the next parliament, which perhaps may not meet again in many years, no one could ſay when his impriſonment would end. 2 *Hawk. P. C.* 111. 1 *Keb.* 871, 887, 889. 1 *Sid.* 245. 1 *Lev.* 165. 1 *Mod.* 155, 157.

And though the court of King's Bench may in their diſcretion bail a lord upon an impeachment of high treaſon,

B A I

ſon, after a diſſolution or prorogation of the parliament, yet may they refuſe it, not as a matter out of their power, but as a thing which they are not bound to do, and improper on conſideration of the whole circumſtances of the affair. *Raym.* 381. Lord *Stafford*'s caſe.

The Earl of *Shaftſbury* was impeached for being reconciled to the church of *Rome*, by the convention that was turned into a parliament 1 *W. & M.* and lay in the *Tower* till the next parliament, which being adjourned for two months, he moved to be diſcharged on the act of oblivion wherein neither his crime nor his perſon were excepted, but clearly within the act of pardon; the court held, that it ſhould be pleaded with proper averments, which could not be done here, becauſe there was nothing before the court upon which to ground ſuch plea; and that as to the bailing him, this being a ſhort adjournment, the application for that purpoſe ſhould be to the parliament. *Carth.* 131, 132. 1 *Show.* 100.

In former days, and particularly at the time when Sir *Edward Coke* was chief juſtice, ſeveral perſons committed to the *Fleet* by the lord chancellor were bailed by the court of King's Bench, upon exceptions to the generality of the form of the commitments. 1 *New Abr.* 225.

Alſo one *Glanvil*, who was generally committed by the command of the lord chancellor, without ſetting forth any cauſe of ſuch command, ſeems to have been bailed upon examination of the merits of the decree, for diſobeying whereof he was in truth committed; whereby it appeared that the decree related to a matter before adjudged at the Common law; which was thought contrary to the purport of 27 *Ed.* 3. *cap.* 1. and 4 *H.* 4. *cap.* 23. But this proceeding being reſented by the lord chancellor, the ſaid *Glanvil* was afterwards recommitted by him for the ſame matter, and yet was afterwards on another *habeas corpus* bailed the ſecond time by the court of *King's Bench.* 1 *Rol. Rep.* 111, 219. *Moor* 838. 2 *Bulſt.* 301. *Cro. Jac.* 343. 3 *Bulſt.* 115. 1 *Rol. Rep.*

But as there have been no ſuch proceedings of late days, the diſuſe of them has certainly leſſen'd, if not wholly removed the force of theſe reſolutions, eſpecially as it is now eſtabliſhed, that a court of equity can give relief after a judgment at law; for otherwiſe it would have no power of moderating the rigour of the law, it being in many caſes very doubtful what the law is before it be determined; the ſuperior courts therefore will put the moſt favourable conſtruction on one another's proceedings, and not intend that they acted beyond their juriſdiction. 2 *Hawk. P. C.* 111, 112.

The court of King's Bench having the ſupreme controul of all inferior courts, may in diſcretion admit perſons to bail committed by ſuch courts, upon conſideration of the whole circumſtances of the caſe; as the length of the impriſonment, the enormity, or dangerous tendency, or notoriety, or ſmall conſequence of the offence, or obſtinacy of the offender, or the dignity of the court by which he was committed, and other ſuch like circumſtances; of which the court will receive information by ſuggeſtion or affidavit, being conſiſtent with the return of the *habeas corpus*. *Vaugh.* 157. 6 *Mod.* 73. 2 *Hawk. P. C.* 112.

The courts of Common Pleas and Exchequer, at any time during term, and the Chancery, either in term or vacation, may by the Common law award a *habeas corpus* for any perſon committed for a crime under the degree of felony or treaſon; and thereupon diſcharge him, if it ſhall plainly appear by the return that the commitment was illegal, or bail him if it ſhall appear doubtful. 2 *Inſt.* 53, 55, 615. 4 *Inſt.* 290. *Vaugh.* 154. 2 *And.* 297. *Daliſon* 81. 3 *Leon.* 18. 2 *Jones* 13, 14. 2 *Mod.* 198.

3. *Of ſufficient, inſufficient, and exceſſive bail.*

No perſon ſhall be bailed for felony by leſs than two, and it is ſaid not to be uſual for the *King's Bench* to bail a man on a *habeas corpus*, on a commitment for treaſon or felony, without four ſureties; the ſum in which the ſureties are to be bound, ought to be never leſs than 40*l.* for a capital crime; but it may be higher in diſcretion, on conſideration of the ability and quality of the priſoner and the nature of the offence; and the ſureties may be examined on oath concerning the ſufficiency, by him that takes the bail; and if a perſon be bailed by inſufficient ſureties, he may be required either by him who took the bail, or by any other who hath power to bail him, to find better ſureties, and on his refuſal may be committed; for inſufficient ſureties are as none. 2 *Hawk. P. C.* 88. *H. P. C.* 97.

But juſtices muſt take care that, under pretence of demanding ſufficient ſurety, they do not make ſo exceſſive a demand, as in effect amounts to a denial of bail; for this is looked upon as a great grievance, and is complained of as ſuch by 1 *W. & M. ſeſſ.* 2. by which it is declared, that exceſſive bail ought not to be required. 2 *Hawk. P. C.* 89.

If the party bailed by inſufficient ſureties, do not appear according to the condition of the recognizance, the juſtice, *&c.* who bailed him is fineable by the juſtices of aſſiſe; but if he appear, it ſeems that the perſon who bailed him is excuſed. *S. P. C.* 333. *H. P. C.* 97.

By the declaration of rights 1 *Will. ſeſſ.* 2. *c.* 2. exceſſive bail ought not to be required.

4. *Of granting bail where it ought to be denied, and denying it where it ought to be granted.*

The bailing a perſon not bailable by law, is puniſhable at Common law, as a negligent eſcape, or as an offence againſt the ſeveral following ſtatutes. 2 *Hawk. P. C.* 89.

By the ſtatute of *Weſtm.* 1. *cap.* 15. it is enacted, "That if the ſheriff or any other let any go at large by ſurety that is not repleviſable, if he be ſheriff or conſtable, or any other bailiff of fee, which hath keeping of priſons, and be thereof attainted, he ſhall loſe his fee and office for ever; and if the under-ſheriff, conſtable or bailiff of ſuch as have fee for keeping of priſons, do it contrary to the will of his lord, or any other bailiff, being not in fee, they ſhall have three years impriſonment and make fine at the King's pleaſure."

Alſo it is enacted by 27 *Ed.* 1. commonly called the ſtatute *de finibus levatis*, *cap.* 3. "That the juſtices aſſigned to take aſſiſes, *&c.* when they deliver the gaols, *&c.* ſhall enquire if ſheriffs, or any other, have let out by replevin priſoners not repleviſable, or have offended in any thing contrary to the form of the ſaid ſtatute of *Weſtm.* 1. and whom they ſhall find guilty, they ſhall chaſten and puniſh in all things according to the form of the ſaid ſtatute."

And it is further enacted by 4 *E.* 3. *cap.* 2. "That at the time of the aſſignment of keepers of the peace, mention ſhall be made, that ſuch as ſhall be indicted or taken by them, ſhall not be let to mainprize by the ſheriffs, nor by none other miniſters, if they be not mainpernable by law, nor that none who are indicted ſhall be delivered but by the common law; and that the juſtices aſſigned to deliver gaols, ſhall have power to enquire of ſheriffs, gaolers and others, in whoſe ward ſuch perſons indicted ſhall be, if they make deliverance, or let to mainprize any ſo indicted, which be not mainpernable, and to puniſh the ſaid ſheriffs, gaolers and others, if they do any thing againſt the ſaid act."

And it is enacted by 1 & 2 *P. & M. cap.* 13. "That no juſtice or juſtices of the peace ſhall let to bail or mainprize, any perſon or perſons, which for any offence or offences by them or any of them committed, be declared not to be repleviſed or bailed, or be forbidden to be repleviſed or bailed by the abovementioned ſtatute of *Weſtm.* 1. *cap.* 15. and that the juſtices of gaol-delivery of the place where ſuch juſtices of the peace ſhall be guilty of ſuch offence, upon due proof thereof, by examination before them, ſhall for every ſuch offence ſet ſuch fine on every ſuch juſtice, as the ſame juſtices of gaol-delivery ſhall think meet."

Juſtices of the peace, before they bail a man under commitment, muſt at their peril inform themſelves of the cauſe for which he was committed; for if he were in truth committed for a cauſe not bailable by law, it is no excuſe that they did not know that he was committed

for

for ſuch cauſe. *Poph.* 96. *Dalt. c.* 114. 2 *Hawk. P. C.* 90.

It is clearly agreed to be an offence by the Common law, as well as by Statute, and puniſhable by indictment, as well as by action, to deny or delay, or obſtruct bail where it ought to be granted. 14 *H.* 7. 7. *H. P. C.* 97. *Dalt.* 114. 2 *Hawk. P. C.* 90.

But it ſeems alſo clear, that he who has power to bail another, is not bound to demand of him to find ſureties, and to forbear committing him till he ſhall refuſe to find them, but may well juſtify his commitment, unleſs the party himſelf ſhall offer his ſureties. *H. P. C.* 97. 2 *Hawk. P. C.* 90.

The principal ſtatutes relating to this offence, are the above-mentioned ſtatute of *Weſtm.* 1. *cap.* 15. and the ſtatute *De finibus, cap.* 3. and 31 *Car.* 2. *cap.* 2. commonly called the *Habeas corpus* act; by the firſt whereof it is enacted, "That if any withhold priſoners repleviſable after that they have offered ſufficient ſurety, he ſhall pay a grievous amercement to the King; and if he take any reward for the deliverance of ſuch, he ſhall pay double to the priſoner, and ſhall alſo be in the great mercy of the King."

And by the latter of the ſaid ſtatutes it is enacted, "That juſtices of aſſiſe ſhall inquire if ſheriffs, or any other, have offended in any thing contrary to the ſaid ſtatute of *Weſtm.* and whom they ſhall find guilty, they ſhall puniſh in all things according to the form of the ſaid ſtatute."

5. *Of bail by writ of* habeas corpus.

If bail cannot otherwiſe be obtained, the law hath provided a remedy in moſt caſes by the *habeas corpus* act, 31 *Car.* 2. *c.* 2.

By this act it is recited, "That great delays had been uſed, by ſheriffs, gaolers, and other officers, to whoſe cuſtody the King's ſubjects had been committed for criminal, or ſuppoſed criminal matters, in making return of writs of *habeas corpus*, or by ſtanding out an *alias* and *pluries*, and ſometimes more; and by other ſhifts to avoid their yielding obedience to ſuch writs, contrary to their duty and the known laws of the land; whereby many ſubjects had been detained in priſon in ſuch caſes where by law they were bailable, *&c. And thereupon it is enacted*, "That whereſoever any perſon ſhall bring an *habeas corpus* directed to any perſon whatſoever, for any perſon in his cuſtody, and the ſaid writ ſhall be ſerved upon the ſaid officer, or left at the gaol or priſon with any of the under-officers, under-keepers, or deputy of the ſaid officers or keepers, or deputies; the officer, *&c.* ſhall within three days after ſuch ſervice thereof (unleſs the commitment were for treaſon or felony, plainly and eſpecially expreſſed in the warrant of commitment) upon payment or tender of the charges of bringing the ſaid priſoner, to be aſcertained by the judge or court that awarded the ſame, and endorſed on the ſaid writ, not exceeding 12*d. per* mile; and on ſecurity given by his own bond, to pay the charges of carrying back the priſoner, if he ſhould be remanded; and that he will not make any eſcape by the way; make return of ſuch writ, and bring, or cauſe to be brought, the body of the party ſo committed or reſtrained, unto or before the lord chancellor or lord keeper, or the judges or barons of the court from which the ſaid writ ſhall iſſue, or ſuch other perſons before whom the ſaid writ is made returnable, according to the command thereof; and ſhall then likewiſe certify the true cauſes of his detainer or impriſonment, unleſs the commitment be in a place beyond twenty miles diſtant, *&c.* and if beyond the diſtance of twenty, and not above one hundred miles, then within the ſpace of ten days; and if beyond the diſtance of one hundred miles, then within the ſpace of twenty days."

And it is further enacted, *ſect.* 3. "That all ſuch writs ſhall be marked in this manner, *per ſtatutum tricesimo primo* Caroli *ſecundi regis*, and ſhall be ſigned by the perſon that awards the ſame; and if any perſon ſhall be or ſtand committed or detained as aforeſaid, for any crime, unleſs for treaſon or felony, plainly expreſſed in the warrant of commitment, in the vacation time, it ſhall be lawful for ſuch perſon ſo committed or detained, (other than perſons convict or in execution by legal proceſs) or any one in his behalf, to complain to the lord chancellor or lord keeper, or any juſtice of either bench, or baron of the exchequer of the degree of the coif; and the ſaid lord chancellor, *&c.* juſtice or baron, on view of the copy of the warrant of the commitment, or otherwiſe on oath that it was denied, are authorized and required, on requeſt in writing, by ſuch perſon, or any in his behalf, atteſted and ſubſcribed by two witneſſes who were preſent at the delivery of the ſame, to grant an *habeas corpus* under the ſeal of the court whereof he ſhall be one of the judges, to be directed to the officer in whoſe cuſtody the party ſhall be, returnable *immediatè* before the ſaid lord chancellor, *&c.* juſtice or baron; and on ſervice thereof, as aforeſaid, the officer, *&c.* in whoſe cuſtody the party is, ſhall within the times reſpectively before limited, bring him before the ſaid lord chancellor, juſtice or baron before whom the writ is returnable; and in caſe of his abſence, before any other of them, with the return of ſuch writ, and the true cauſe of the commitment and detainer; and thereupon, within two days after the party ſhall be brought before them, the ſaid lord chancellor, juſtice or baron before whom the priſoner ſhall be brought, as aforeſaid, ſhall diſcharge the ſaid priſoner from his impriſonment, taking his recognizance with one or more ſureties, in any ſum according to their diſcretion, having regard to the quality of the priſoner and nature of the offence, for his appearance in the King's Bench the term following, or in ſuch other court wherein the offence is properly cognizable, as the caſe ſhall require, and then ſhall certify the ſaid writ, with the return thereof, and the recognizance into ſuch court, unleſs it be made appear to the ſaid lord chancellor, *&c.* that the party ſo committed is detained upon a legal proceſs, order, or warrant, out of ſome court that hath juriſdiction of criminal matters, or by ſome warrant ſigned and ſealed with the hand and ſeal of any of ſaid juſtices or barons, or ſome juſtice or juſtices of the peace, for ſuch matters or offences for which by law the priſoner is not bailable."

But it is provided, ſect. 4. "That if any perſon ſhall have wilfully neglected, by the ſpace of two whole terms after his impriſonment, to pray a *habeas corpus* for his enlargement, he ſhall not have a *habeas corpus* to be granted in vacation time, in purſuance of this act."

And it is further enacted, ſect. 5. "That if any officer, *&c.* ſhall neglect or refuſe to make the returns aforeſaid, or to bring the body of the priſoner, according to the command of the writ, within the reſpective times aforeſaid, or ſhall not within ſix hours after demand, deliver a true copy of the commitment, *&c.* he ſhall forfeit for the firſt offence 100*l.* for the ſecond 200*l.* and be made uncapable to hold his office."

And it is further enacted, *ſect.* 6. "That no perſon who ſhall be ſet at large upon a *habeas corpus*, ſhall be again impriſoned for the ſame offence, by any perſon whatſoever, other than by the legal order and proceſs of ſuch court wherein he ſhall be bound by recognizance to appear, or other court having juriſdiction of the cauſe; on pain of 500*l.*

And it is further enacted, *ſect.* 7. "That if any perſon, who ſhall be committed for treaſon or felony, plainly and ſpecially expreſſed in the warrant of commitment, upon his prayer or petition in open court, the firſt week of the term, or the firſt day of the ſeſſions of *oyer* and *terminer*, or general gaol-delivery, to be brought to his trial, ſhall not be indicted ſome time in the next term, ſeſſions of *oyer* and *termtner*, or general gaol-delivery, after ſuch commitment, the juſtices of the ſaid courts ſhall, upon motion in open court, the laſt day of the term or ſeſſions, ſet at liberty the priſoner upon bail; unleſs it appear upon oath, that the witneſſes for the King could not be produced the ſaid term, *&c.* and if ſuch priſoner upon his prayer, *&c.* ſhall not be indicted and tried the ſecond term or ſeſſions, he ſhall be diſcharged from his impriſonment."

And it is further enacted, *ſect.* 10. "That it ſhall be lawful for any priſoner, as aforeſaid, to move and obtain his *habeas corpus*, as well out of the Chancery or Exchequer, as the King's Bench or Common Pleas; and if the ſaid lord chancellor or lord keeper, or any judge or judges, baron or barons, for the time being, of the degree

degree of the coif, of any of the courts aforeſaid, in the vacation time, upon view of the copy of a warrant of commitment or detainer, or on oath made that ſuch copy was denied, ſhall deny any writ of *habeas corpus* by this act required to be granted, being moved for as aforeſaid, they ſhall ſeverally forfeit to the party grieved the ſum of 500*l.*"

But it is provided, *ſect.* 18. "That after the aſſiſes proclaimed for that county where the priſoner is detained, no perſon ſhall be removed from the common gaol upon any *habeas corpus* granted in purſuance of this act; but upon ſuch *habeas corpus* ſhall be brought before the judge of aſſiſe in open court, who thereupon ſhall do what to juſtice ſhall appertain: *But it is provided neverthleſs, par.* 19. that after the aſſizes are ended, any perſon detained may have his *habeas corpus* according to the direction of this act."

Where a perſon actually preſent in court is bailed for a crime puniſhable with loſs of life or member, it ſeems to be in the diſcretion of the court to take recognizance from each of the bail, either in a certain ſum, or body for body, or both ways; however ſuch recognizance of body for body, doth not make the bail liable to the ſame puniſhment with the priſoner, but only to be fined, *&c.* 2 *Jones* 210. 1 *Lev.* 106. 1 *Sid.* 211. 4 *Inſt.* 178.

But for a crime of an inferior nature, it ſeems that the recognizance ought to be only in a certain ſum of money, and not body for body. 2 *Hawk. P. C.* 115.

It was moved that the defendant might be bailed upon the *hab. corp.* act, for *want of proſecution within a term. Per cur.* The *grand ſeſſions held at Cheſter*, where the cauſe ariſes, *is in nature of a term*, and if this *prayer* had been *enter'd there*, we might have bailed him (upon motion) the firſt day of this term; but the prayer being here upon the firſt day, that can give him no advantage; the diſcretion of bailing, which the court had before, is now reſtrained by that act; and where it ſaith (witneſſes,) yet if *one witneſs only* be *ſick*, it is within the act; and the words of the act being *(upon oath made)* an affidavit was taken in court *viva voce*; but this was afterwards waived, and the priſoner was *bailed by the conſent of the attorney general. Comb.* 6.

C. was brought by *hab. corp.* the laſt day of *Mich.* term, and prayed to be diſcharged or bailed, having *enter'd his prayer the firſt day of Trin. term laſt, and was indicted in that term*, and now *this term was indicted again for the ſame ſpecies of treaſon, but never tried on either of* them. The attorney general inſiſted, that the *firſt indictment was for a foreign treaſon*, but *the ſecond was for a treaſon in England*; but by *Holt* Ch. J. the commitment and *both indictments are for the ſame ſpecies of treaſon, tho' the overt-acts are differently laid*; but the *laſt indictment agrees exactly with the commitment*; beſides, the prayer relates to the commitment; ſo that the party ought to be tried for the treaſon for which he is committed, within two terms; and the deſign of the act was to prevent a man's lying under an accuſation for treaſon *&c.* above two terms; to which *Eyre* J. agreed; but both declared they would give no opinion in the caſe, but bailed him by virtue of their diſcretionary power. 12 *Mod.* 66.

The defendant was committed to *Newgate* by the privy council, for *aiding col. D. to eſcape out of the tower, where he was committed for high treaſon*; and being brought here by *hab. corp.* was bailed; becauſe tho' the commitment was for high treaſon, yet there was *no proſecution, and a ſeſſions was paſt.* 1 *Salk* 103.

One committed for treaſon or felony ought to enter his prayer the firſt week of the term, or day of the ſeſſions next after his commitment, or he ſhall not have the benefit of the *hab. corp.* act; but *if an act of parliament* be made which *takes away the power of bailing for a time*, he *need not then enter his prayer*; for that is thereby diſpenſed with; *but* then *he ought to enter it the firſt week of the term, or day of the ſeſſions, after the expiration of that act of parliament*; and for want thereof, the benefit of the *hab. corp.* act was denied; but becauſe the defendant had *been long in priſon*, and his *trial* had been *delayed*, and affidavit was made that *his life was in danger*, the court bailed him. 1 *Salk.* 103, 104.

In an *act for ſuſpenſion* of the *hab. corp.* act of 31 *Car.* 2. *cap.* 2. were theſe words, *viz.* 'That *no judge or juſtices ſhall bail or try, &c. without leave from the King ſigned by ſix privy counſellors.* It was inſiſted, that the *hab. corp.* act was not ſuſpended, nor is *B. R.* reſtrained by theſe words *(judges or juſtices,)* becauſe the power and juriſdiction cannot be taken away but by plain and poſitive words expreſſing the ſame, nor do they extend to the lord chancellor, *&c.* and that a ſtatute which deprives a man of his liberty ſhall not be conſtrued ſo favourably as other acts of parliament; and the caſes of Lord *Ayleſbury*, *Fitzpatrick*, and Sir *William Windham* were cited, who were bail'd during former ſuſpenſions of this act. But it was anſwered, that thoſe words muſt certainly relate to this court, becauſe before the act of ſuſpenſion was, no judge or juſtice could bail for high treaſon, and therefore thoſe words muſt relate to this court, which is compoſed of judges; that the Lord *Ayleſbury*'s caſe was not parallel to this, the *hab. corp.* being ſuſpended only as to him, and them that were then committed on *ſuſpicion of treaſon, or treaſonable practices*, but not ſuch as were committed expreſsly for high treaſon; that if the judges are reſtrained, the court muſt be ſo too, becauſe it is compoſed of judges; and that it is to be obſerved, that this act is penn'd in the moſt general words that could be thought on, and that the law-makers could have no other intention than to reſtrain the judges from bailing either in or out of court; and this ſeems to be the plain conſtruction of the act; therefore if this court can neither bail the priſoners or try them, it will be to no purpoſe to grant our *hab corp.* and ſo it was denied, and the rather becauſe it was denied in *Layer*'s caſe; for the court would not try him till they had an order from the King, as the act directs. 8 *Mod.* 98.

Sir *William Windham* was committed to the tower for high treaſon by Mr. ſecretary *Stanhope*, and being now brought into court the third day before the end of the term, by the deputy lieutenant of the tower, upon a *hab. corp.* to him directed, it was prayed by Mr. ſerjeant *Pengelly* that the return to this writ might be filed.

The return was read, and the warrant was as follows, viz.

> "*James Stanhope*, Eſq; one of his Majeſty's moſt honourable privy council, and principal ſecretary of ſtate.
>
> THESE *are in his Majeſty's name to authorize and require you to receive into your cuſtody the body of Sir* William Windham, *bart. herewith ſent you for high treaſon, and you are to keep him ſafe and cloſe, until he ſhall be delivered by due courſe of law; and for your ſo doing this ſhall be your warrant. Given at Whitehall the 7th of October* 1715.
>
> James Stanhope.
>
> To the lieutenant of the tower of London, or his deputy."

Then Mr. ſerjeant *Pengelly* inſiſted, that Sir *W. W.* ought to be admitted to bail upon this warrant of commitment by Mr. ſecretary *Stanhope*, dated the 7th of *October* laſt, and this becauſe of the length of time of his impriſonment, without any proſecution againſt him; that eight or nine months and four terms had interven'd, and nothing done; that there was another inducement of great weight, in his apprehenſion, from the frame and form of the warrant; and as to the generality of the commitment, beſides the ill ſtate and condition of his health, the danger his life would be expoſed to without a proſecution; that he had been there always ready to have anſwer'd any proſecution, or any thing that might have been objected againſt him; and nothing had been done by him to delay and protract the proſecution; that Mr. Attorney general had had four full terms; that Sir *W.* had omitted taking advantage of the *hab. corp.* act, by not making his prayer the firſt term after his commitment, which he might have done. Upon theſe circumſtances, where there had been a long default of proſecution, nothing proceeded from Sir *W. W.* It was the right of

every *Engliſh* ſubject to pray to be admitted to bail; that every perſon committed for capital offences muſt be tried in a convenient time, or in default of a proſecution, he ought to be diſcharged upon bail. All commitments before conviction were for ſafe cuſtody only: and the ſame rule of juſtice, the ſame adminiſtration of law that puniſhed offenders, provided for them a courſe to eaſe their impriſonment, and to diſcharge themſelves from the imputation of their offence.

That this court had full power, in theſe caſes, to bail; it had been exerciſed in ſeveral inſtances; and would obſerve in general how this was at common law. It was the liberty of every perſon who was accuſed, tho' indicted of treaſon, or of any felony whatſoever, to be bailed upon good ſecurity; ſo that a man was then bailable for high treaſon. *Co.* 2 *Inſt.* *Ha. Pl. Cor.* 99, 104. An accuſation was of no force to deprive a man of his liberty; he was either bailable by the ſheriff *ex officio*, or by the writ *de homine replegiando*; but tho' the ſtatute of *Weſtm.* 1. *cap.* 15. which was made 3 *Ed.* 1. took away this power of the ſheriff to bail *ex officio*, or upon the writ *de homine replegiando*; yet it had been always held, that the court of *B. R.* was excepted out of this act. The ſame power which it had at Common law ſtill remain'd; this was agreed in both the authorities before mentioned, and was confirmed by conſtant experience. Hence it was that this court was intruſted with the liberty of all perſons whatſoever; they were to inquire into the reaſons of the confinement of any perſon.

That after this, in proceſs of time, when commitments grew more frequent and general, the ſame conſtant experience held good as to the power of this court. There were then commitments by the council-board, the ſtar-chamber, and other courts, by the immediate warrant and command of the King, and by the lords and others of his Majeſty's privy council; and this was for ſome time, and during the reigns of King *James* I. and King *Charles* I. it was in ſome meaſure ſubmitted to. Then came the ſtatute of the 16 *Car.* 1. an act made to prevent any of theſe inconveniences; it was thereby *(cap.* 10*)* provided, that every perſon ſo committed, reſtrained of his liberty, or ſuffering impriſonment, upon demand or motion made by his counſel, or other employ'd by him for that purpoſe, unto the judges of the court of *B. R.* or *C. B.* in open court, ſhould, without delay upon any pretence whatſoever, *&c.* have forthwith granted unto him a writ of *habeas corpus:* then the act directed what was to be done by the ſheriff or other officers upon this writ, and upon making a return, and certifying the true cauſe of the detainer and impriſonment, the court, within three days after ſuch return made and deliver'd in open court, were to proceed to examine and determine whether the cauſe of ſuch commitment appearing upon the ſaid return were juſt and legal or not, and ſhould thereupon do what to juſtice ſhould appertain, either by delivering, bailing, or remanding the priſoner; ſo that upon this act, the remedy which the party had, prevented any long delay. The cauſe of the impriſonment was to be juſt and legal, and this upon the form of the commitment as well as upon the ſubſtance of it; and tho' the cauſe were juſt and legal, yet the court was obliged either to deliver or bail the party, if the warrant was not formal and good; that by the expreſs words of this act it did not appear, that it was in their diſcretion either to diſcharge or bail, and this act did not give the court any new power.

That before the *habeas corpus* act, there were inſtances of the court's inquiring into the nature of the commitment, and letting the party to bail. 2 *Sid.* 179. Sir *Robert Pye*'s caſe. The caſe was this; Sir *R. Pye* and *Ma. Fincher*, being committed to the tower, moved by their counſel for an *habeas corpus*; and this being granted and returned, it was moved that they might be bailed, they having been a long time impriſoned, without any proſecution made againſt them. And it was then ſaid by the court, that tho' they had been impriſoned for ſuſpicion of treaſon, they could not deny to them bail, in caſe the counſel of the commonwealth that then was, did not proceed againſt them; for it was the birth-right of every ſubject, to be tried according to the law of the land, and ought not to periſh in priſon; whereupon they were bailed. He ſaid, that a man ought not to periſh under an accuſation or commitment. There was alſo *Zach. Croſton*'s caſe, 1 *Keb.* 305, 306. 1 *Sid.* 78. *Trin.* 14 *Car.* 2. The books ſay, that after he had been in the tower, being committed there for high treaſon by the lords of the council, *March* 23, 1660, he was brought into court upon an *alias habeas corpus* the beginning of that term; and upon the King's ſerjeant offering to indict him that term, he was removed, and by rule brought up the laſt day of the term; and through the delay of the proſecution, and no indictment being againſt him, he was admitted to bail. That it was ſaid in *Keble*, *Cornwelling*'s caſe was only by length of time; ſo that in this caſe it appeared, that bailing of the party was the event of it. He ſaid, that there were later inſtances than theſe, where bail had been the event of a long impriſonment. *Yates*'s caſe, *Hill.* 2 *W. & M. Show.* 190, 191. *B. R. Yates* was committed to the priſon of *Hull* for high treaſon, and it was moved that he might enter his prayer here, that he might be tried; but it was denied by the court, becauſe it muſt be at the aſſizes for the place; yet becauſe of the length of time to the aſſizes, it not being for that county till the ſummer, to prevent his impriſonment during that time, he was bailed. Perſons muſt be tried in a reaſonable time; and Sir *Barth. Shower* there inſiſted, that otherwiſe by a commitment to *Dover*, *Canterbury*, or any place where the aſſizes were but rare, a man might be a priſoner a year or two; ſo that in theſe extraordinary inſtances, as well as in the nature of the thing, this court had taken ſecurity to the government, and let the priſoner out upon bail; that a man was not to be confined ſix or eight months by way of puniſhment; that this here was a much harder caſe; eight or nine months had been endured, and no cauſe ſhewn, or a ſtep taken towards a proſecution.

That after this there were other inſtances, as lord *Ayleſbury*'s caſe, *Hill.* 8 *W.* 3. that he having neglected to make his prayer in proper time, and having lain a long time in priſon, and the King delaying to try him, the court thought fit to bail him. That in the caſe of *The King* v. *Gage & al'* for the murder of *Conway Seymour*, Ld. Ch. J. *Holt* ſaid, that there are many caſes omitted out of the *hab. corp.* act, and that before this act there was a rule at Common law, that perſons in priſon, in convenient time, muſt be bailed; and that trials for capital offences ought to be recent; and that the court would conſider of the circumſtances, if the party were to be admitted to bail. He ſaid, that to be continued in cuſtody a long vacation, when the commitment was ſo long ſince, would be very hard; but the court would regard a proper time for theſe proſecutions; that here was not the leaſt preparation or attempt made towards carrying on a proſecution. That tho' there was no time expreſsly limited by the ſtatute of King *Charles* 1. for theſe proſecutions; yet it was apprehended, that now by the *habeas corpus* act of the 31 *Car.* 2. there was a full obligation upon the diſcretion of the court to admit priſoners to bail, tho' upon this act there is no limited time for a proſecution. The words are, *viz.* "If any perſon ſhall be committed for high treaſon or felony, *&c.* upon his prayer or petition in open court, the firſt week of the term, or the firſt day of the ſeſſions of *oyer* and *terminer*, *&c.* to be brought to his trial, ſhall not be indicted ſome time in the next term or ſeſſions, *&c.* after his commitment, the judges of *B. R.* juſtices of *oyer* and *terminer*, *&c.* ſhall the laſt day of the term or ſeſſions ſet at liberty the priſoner, upon bail, unleſs oath be made that the King's witneſſes could not be produced the ſame term or ſeſſions; and if any ſuch perſon, *&c.* ſhall not be indicted and tried the ſame term or ſeſſions, *&c.* after his commitment, *&c.* he ſhall be diſcharged from his impriſonment." He agreed that this was a proper meaſure for the court to go by. What the parliament have thought a reaſonable time, ought to govern the diſcretion of the court. By this act the King did declare that to be an obligation upon himſelf and his courts of juſtice; and he conſented by that law, that if there was no proſecution in that time, the priſoner ſhould be bailed the firſt term, without an affidavit of the King's witneſſes being then out of the way, and diſcharged the

ſecond

ſecond term, if not tried: that tho' the party did not make his prayer in due time to be within the act, yet the rule of juſtice was the ſame to all perſons.

That in the preſent caſe, as there had been no attempt to ſhew any reaſon for a delay of the proſecution, notwithſtanding the length of time, this neglect had been ſufficient to have induced the diſcretion of the court to bail Sir *W. W.* yet he ſaid further, that from the form here of this warrant he ought to be admitted to bail; firſt, for that there was great incertainty in it, (a perſon generally for high treaſon) without the particular ſpecies of treaſon had been expreſſed, the court will not continue Sir *W. W.* longer in cuſtody; by law, the warrant ought to expreſs the ſpecies of treaſon. It was not ſufficient to commit a man for treaſon generally, or elſe at that rate it would be in the power of the perſon who makes the warrant, whenever he thinks a matter is a treaſon, to commit the party for it. The Lord *Coke* had laid it down as a rule, 2 *Inſt.* 591. that a *mittimus* muſt contain the cauſe, tho' not ſo certainly as an indictment ought, yet with ſuch convenient certainty as it might appear judicially to the court what the offence was, whether for high treaſon againſt the perſon of the King, or for counterfeiting the Great ſeal, or for counterfeiting the King's money. So it was in the caſe of petit treaſon; it was not ſufficient to ſay in a warrant, that it was for petit treaſon generally, but it muſt be expreſſed for the death of ſuch an one his maſter, *&c.* if it were in the caſe of felony, it muſt not be for felony generally, but it ought to ſay for the death of ſuch an one, or for burglary, or for robbery, or for the ſtealing of an horſe, or the like, that it might appear judicially to the court, that it was an offence for which he ought to ſuffer death; for in a caſe of ſo high a nature, concerning the life of a man, the convenient certainty ought to be ſhewn to the court, and this not only for the ſake of the party in priſon, but for the benefit of the King, in caſe there ſhould be a breach of priſon, if any one ſhould aſſiſt him to make his eſcape; therefore in the firſt place, as the ſpecies of the treaſon ought to be ſet forth, ſo it muſt in caſes of felony, or elſe the felony might be only ſtealing of charters of land, or wood growing, or the like, which a juſtice of peace might apprehend to be felony, tho' in law they were not ſo. And a farther reaſon Lord *Coke* gave, was, that if a man were indicted of treaſon, or indicted or appealed for felony, the *capias* thereupon which iſſued to apprehend the party did comprehend the cauſe of that indictment, *&c. a fortiori* the *mittimus* whereby the party was to be arreſted, having no ground of record as the *capias* has, muſt, purſuing the effect of the *capias*, comprehend the cauſe in convenient certainty. With this agreed *Ha. Pl. C.* 109. he ſaid, that upon this point there had been an inſtance in this court expreſly for this cauſe, *Mich.* 7 *W.* 3. *Kendal, Roe & al'*, of which there was a ſhort report 5 *Mod.* 78, 85. the caſe was this; They were committed to a meſſenger by Sir *W. Trumball*, one of the ſecretaries of ſtate, for aiding and aſſiſting Sir *James Montgomery* to make his eſcape, he having before been committed for high treaſon, without mentioning what ſpecies of high treaſon he was charged with, and upon debate they were admitted to bail, becauſe the particular ſpecies was not mentioned. It was held not ſufficient to commit them for aiding and aſſiſting a perſon charged with high treaſon in his eſcape, without a particular deſcription of the treaſon in the perſon committed, and it not appearing to the court that the cauſe was ſufficiently aſcertained they admitted them to bail. Sir *Barth. Shower*, of counſel with the priſoners, ſaid, that if Sir *James Montgomery* had been committed for ſuch a cauſe generally, for which the priſoners there ſtood committed, in aiding and aſſiſting him in the making his eſcape, he ought to have been bailed, and this was denied by the court. The reaſon given in that book (5 *Mod.*) was a general rule, that if the warrant had expreſſed the ſpecies of treaſon, they had been guilty of the ſame particular ſpecies; this was not for the ſake of the party, but for the better cuſtody of him by the gaoler. But he ſaid, that upon his general return here, as it is, it was entirely in the diſcretion of the magiſtrate to make what he will to be high treaſon; he may not confine himſelf to the particulars within the ſtatute of 25 *Ed.* 3. So that, for the ſatisfaction of the court, the particular ſpecies of treaſon ought to be mentioned, whether it be for compaſſing the death of the King, the levying war againſt him, *&c.* or elſe a man may be continued in cuſtody only upon the apprehenſion of the magiſtrate. He ſaid, that this caſe of *Kendal* and *Roe* was a very ſtrong and poſitive opinion; that the ſtatute of K. *Ch.* 1. and experience ever ſince, had confirmed this opinion, and from the expreſs words of this ſtatute the court ought to examine, whether the cauſe of commitment were juſt and legal, not from the circumſtances of the fact only, but from the form and frame of the warrant; that in the ſtatute of *Car.* 2. the words were ("Committed for high treaſon or felony plainly and ſpecially expreſſed in the warrant of commitment") this muſt go to the ſpecific offence; you cannot ſay a man is committed for felony, without ſpecifying the act.

He ſaid, that there was a further inſtance which would move the diſcretion of the court in this matter, and that was Sir *W. W.*'s ill ſtate of health, and the condition he had been in during his confinement; and longer confinement without a proſecution would expoſe his life to great danger; that he would not enter into the expreſſions of the terms of his indiſpoſition; there were affidavits of that from his phyſicians; that he had for ſome years been under this indiſpoſition, an inflammation in his lungs; that his phyſicians did ſay it had affected him in ſuch a manner already, that a remedy might come too late without the air of the country; that there was alſo this circumſtance in the family, his father died of the ſame diſtemper in the lungs about the ſame age; that the danger might ſtill be increaſed by two or three months longer confinement this hot ſeaſon of the year, and then there would be no need to carry on a proſecution or indictment againſt him. That Sir *W. W.* had done every thing that ſignified his obedience; he would not attempt or do any thing that might give offence; that this was no ſurprize; on the other ſide, he had given all opportunities he could to their carrying on a proſecution; and that upon theſe circumſtances he hoped that the court would exerciſe their diſcretion, in granting him an enlargement upon ſecurity; that there were preſent four noble perſons to be his bail; that he ſhould anſwer any accuſation againſt him, and for his good behaviour in general, which would be a better ſecurity to the government than to keep him in cuſtody.

Then Mr. *Jeffrys*, of counſel for Sir *W. W.* prayed the affidavits might be read; which being done, he obſerved, that from the firſt affidavit it appeared that Sir *W. W.* had this inflammation in his lungs from his youth; that his father died of it about the age he was now of; that in 1710 he was forced to leave this town, and go into the country; that in 1714 the cough returned upon him very violently; that his ſickneſs and indiſpoſition now was to be imputed to his want of air and exerciſe; that Dr. *Herney*, the phyſician of the Tower, was of opinion, that if his diſorder ſhould increaſe upon him this hot ſeaſon of the year, it might endanger his life.

Then the affidavits of two of his ſervants were read, how his indiſpoſition had been during his confinement, *&c.* upon which Mr. *Jeffrys* proceeded, and ſaid, that they did not pretend to move for a diſcharge of the commitment; that Sir *W. W.* was very willing to give teſtimony of his innocence, and therefore now only prayed to be bailed.

Then he took notice of the form of the warrant, *viz.* I ſend you herewith the body of Sir *William Windham* for high treaſon, to be ſafely and cloſely kept, until he ſhall be delivered by due courſe of law, *&c.* and ſaid that the liberty of all the ſubjects of *England* were concerned in this matter, and that here was a commitment without oath. That my Lord *Coke*, 2 *Inſt.* 51. on his reading upon the ſtatute of *Magna Charta* ſaid, that where there was any witneſs againſt an offender, he might be taken and impriſoned by lawful warrant, and committed to priſon; that the ſtatute of 25 *Ed.* 3. *cap.* 4. took notice and recited the ſtatute of *Magna Charta*, and then enacted, that none ſhould be taken by petition or ſuggeſtion made

made to our lord the King, or to his council, unleſs it were by indictment or preſentment, or by proceſs made by writ original at the Common law; that in this caſe there did not appear ſo much as a bare ſuggeſtion. Here was a commitment without any fact made out, without any proof of a crime, that our liberties from that time forward would be at the diſpoſal of the ſecretaries of ſtate; we ſhould be but tenants at will to them. He ſaid, that from the generality of the crime in the warrant it was void, becauſe the crime was not ſpecified; it did not appear what this offence was; that it was very well known the ſpecies of high treaſon were very different; that the judgment was very different: in ſome caſes it was to be drawn, hang'd and quarter'd; in others, as counterfeiting the coin, the quartering is not part of the ſentence. The ſpecies of treaſon to be expreſſed in the warrant was not for the benefit of the party only, but was alſo for the benefit of the crown, that it might be known what ſort of crime it was, and what judgment was due; that it was ſaid 2 *Inſt.* 52. that it was for the King's benefit, and that the priſoner might be the more ſafely kept.

That if the lieutenant of the Tower ſhould have permitted Sir *W. W.* to have made his eſcape, could he be charged with high treaſon? what ſort of judgment muſt there be given here? there was no ſuch thing as a judgment in law generally for treaſon.

That in the caſe of *Kendal* and *Roe*, *Mich.* 7 *W.* 3. three things were objected, 1ſt, Whether the ſecretary of ſtate had power to commit; but this was over-ruled. 2dly, Whether the commitment could be to a meſſenger. And this not prevailing; it was, 3dly, inſiſted upon, that the ſpecies of treaſon which Sir *James Montgomery* was committed for ought to have been ſet forth, and upon this they were admitted to bail.

That there was another matter of weight here as to the manner of the commitment; he was to be ſafely and cloſely kept, and the lieutenant of the Tower has done this very fully; that there was a form and proper concluſion to all warrants; that Ld. *Coke* took notice of this form, and of the concluſion, that if the party behaved himſelf ill in cuſtody, he might be ſo cloſely kept for the ſafer cuſtody of him; but that the magiſtrate had only power to commit the party, not to direct any ſuch thing concerning his confinement.

That this caſe here was the ſame as Ld. *Ayleſbury*'s caſe; he ſaid, he had ſome particular reaſon to know it very well, he was committed 21 *May* 1695, and he continued in cuſtody till *Hill.* term following; that this term, when he came to make his prayer according to the *habeas corpus* act, he was told he was not within it, for that he ought to have made his prayer the firſt week in the term after he was committed, the act of ſuſpenſion not reaching this caſe.

Mr. *Reeves* argued of the ſame ſide, that here was ſufficient to make the court exerciſe their power of bailing; firſt, the length of time of the impriſonment, and no proſecution; there was beſides this, the ſtate and condition of Sir *W. W.*'s health; his life would be in danger by a longer continuance in cuſtody; then there was the form and generality of the warrant; that either of theſe reaſons was ſufficient, but when all three concurred, that caſe would be the ſtronger.

That firſt, as to the length of time, Sir *W. W.* was committed the 7th of *October* laſt; that between eight and nine months had paſſed, and during that time there had been no proſecution; that tho' there was no time limited by law for a proſecution, yet it ought to be on foot in ſome reaſonable time, and here was not any reaſon given why Sir *W. W.* had not been proſecuted.

That as to the *habeas corpus* act, it appeared from it that perſons were to be kept in cuſtody but for ſome convenient time, and he would ſubmit it, whether this act did not ſay what ſhould be a ſufficient time. It was enacted, that if any perſon committed, *&c.* ſhould enter his prayer the firſt week of the term, *&c.* to be brought to trial, and ſhould not be indicted that term, *&c.* he was to be ſet at liberty upon bail the laſt day of the term *&c.* that in this caſe Sir *W. W.* had neither enter'd his prayer the firſt term after his commitment, or the ſecond, or third, but at the end of the fourth; that if he had come with his prayer the firſt term, the courts of juſtice muſt have bailed him; and it muſt be ſubmitted whether the court now in their diſcretion ought not to do it. Then as to his health; as to the circumſtances of this caſe, the nature of Sir *W. W.*'s indiſpoſition, the great danger he is under, the inflammation in his lungs, it being a diſtemper his father died of about the ſame age, and the dangerous ſymptoms now upon him; theſe things too muſt be ſubmitted to the court; that as to the form and generality of the warrant, the caſe of *Kendal* and *Roe* was in point, that if the warrant were ill, the party ought to be admitted to bail. There was a commitment generally for high treaſon, "Receive and take into your cuſtody *Kendal* and *Roe* for high treaſon." And if this were good, could then what came afterwards make that warrant a bad one, by deſcribing the ſpecies of treaſon? If the general part be good, the other could never make it bad. Then it ſaid "for aiding and aſſiſting Sir *James Montgomery* to make his eſcape, being in cuſtody for high treaſon"; now this might be a treaſon for compaſſing the King's death, levying of war againſt him, *&c.* in which caſe perſons aiding and aſſiſting knowingly, would have been guilty of high treaſon; but if the offence were harbouring a jeſuit, counterfeiting of money, coining of money, *&c.* that the aiding and aſſiſting the offender to make his eſcape would not be high treaſon; that the court there did not go into any examination to ſupply the defect of the warrant, but they took it upon the face of the warrant; and becauſe there was not a ſufficient charge of high treaſon, and purely upon the generality of the warrant, *Kendal* and *Roe* were admitted to bail.

Then to apply this, if there were a caſe of high treaſon for which he might be committed, the court will bail him. He might be committed for counterfeiting of the coin; and if ſo, would not the court after four terms bail him? ſurely the court would have done it: That the court could not take any notice of what he was committed for, but from what was expreſs'd in the warrant; and tho' the warrant were good, yet upon the uncertainty of it he ought to be bailed: That upon the *habeas corpus* act it did ſeem to be the opinion of the parliament, that the ſpecies of treaſon ought to be expreſſed. What was elſe the meaning of the words "plainly and ſpecially expreſs'd in the warrant of commitment?" No one was to have the benefit of this act to be bail'd, if in the warrant the treaſon or felony were plainly and ſpecially mentioned.

That as this caſe was, he hoped they had a very ſtrong one; that there were four noble perſons of great fortune who would have the cuſtody of this gentleman, and that he ſhould appear at all times; that this was as ſafe a cuſtody as that of a ſingle perſon, the gaoler; that from the circumſtances of his health, and the expoſition of the warrants, the court might exerciſe their diſcretion of bailing.

Then Sir *Joſeph Jekyll* (King's chief ſerjeant at law) ſpoke on the behalf of the crown, and ſaid, that there was no doubt but the court had a power of bailing; they had it at Common law, and it was not taken away by any ſtatute; that gives no reaſon in this caſe for the length of time, which only holds when there is a failure of proſecution, *&c.* which did always ſuppoſe the innocence of the party; the commitment on the 7th of *October* laſt, at which time many perſons were involved in the rebellion, and the proſecution of theſe perſons, had taken up the time of thoſe who had the honour to ſerve the crown; ſo that it was not a neglect, nor to be imputed to thoſe engaged in the proſecution, becauſe he might have accelerated the proſecution, and called upon the crown to have been brought to his trial by the *habeas corpus* act; ſo that the reaſon turns upon them; that the length of time was owing to his neglect, that he did not make his prayer in proper time.

That as to the *habeas corpus* act, it was reaſonable the court ſhould copy after it; but when that act came to be conſidered, it would appear directly otherwiſe than as the objection had been made; that act was deſigned for thoſe that would take the benefit of it, and not to aſſiſt thoſe that would not, nor was any reaſon to be drawn from the ſtatute to induce the bailing, for it took away the benefit

from thoſe who did not claim it, and never deſigned to grant the ſame advantage to thoſe that did not deſire it, as to thaſe that did.

That all the caſes which had been cited, except that of *Kendall* and *Roe* and *Yeates*, *Show.* 190, 191. went upon the general length of time only; but whether this and the preſumption of the party's innocence were not anſwered by the publick buſineſs that the King's counſel had been concerned in, he would ſubmit to the court.

That as to the liberty of the ſubject, which had been thown in, that was to be regarded only as a popular way of talking; but they, who had the honour to ſerve the crown, had more reaſon to do it, againſt the rebellion that was raiſed to deſtroy the liberties of *England*, as well as the perſon of the King.

That theſe warrants were legal warrants, and this objection was made in *Crofton*'s caſe, but not allowed; that the *habeas corpus* act inſiſted upon in this matter, ſaying "the treaſon or felony muſt be plainly and ſpecially expreſſed in the warrant," (there plainly and ſpecially) muſt be the ſame thing; it was never the deſign of the ſtatute to conſider the difference of high treaſon; they were of the ſame conſequence in law; they were all capital offences; it was the ſame crime in law, and therefore the ſpecies need not be expreſſed. That as to the diſcretion of the magiſtrate, it was for him to judge of accuſations that come before him; where was the extending and amplifying of his power, if he were left to diſtinguiſh between offences; all treaſons were in a written law, they were all enumeraed in the ſtatute of 25 *Ed.* 3. or in ſubſequent ſtatutes, otherwiſe there would be leſs power left to the magiſtrate than there was in a judge upon an accuſation before him; that as to the caſe of *Kendal* and *Roe*, that was plainly different, for there was a commitment for having aided and aſſiſted Sir *J. M.* in his eſcape, being committed for high treaſon; it ought to have been particular as to the ſpecies of treaſon, becauſe the crime committed by *Kendal* and *Roe* was for ſecondary treaſon, and this depended ſolely and intirely upon the firſt warrant of commitment, and therefore ſuch a particularity might be neceſſary to bring theſe perſons to be puniſhed for the high treaſon, and yet not ſo in the principal caſe; for if Sir *J. M.* had been before the court, that would have been ſome doubt whether the treaſon muſt be ſpecified; but that in the caſe of *Kendal* and *Roe* for ſecondary treaſon, it would be ſo no further than the treaſon expreſſed in the warrant, ſo that there may be a difference between that and the preſent caſe.

That as to the matter of the ſtate of Sir *W. W.*'s health, the court muſt go according to law and juſtice; it was a tender and compaſſionate point to intermeddle with; he ſaid they were on the harſher ſide in this caſe, from what it would be in the caſe of another perſon; it did not appear to be any chronical diſtemper; it did not return by fits. That Sir *W. W.* did not apply upon the *habeas corpus* act, but thought then the indiſpoſition he lay under not a ſufficient ground; that he was not now in worſe condition than he had been.

Then Mr. Attorney general ſaid, that as to the objections which had been made concerning the liberty and property of the ſubject, that they would be at the pleaſure of a ſecretary of ſtate; and as to the warrant of commitment, that it was not ſaid that he was charged upon oath; this latter objection had been over-ruled oftentimes, and if there ſhould be a miſtake in the warrant, that would not make the liberty of all the ſubjects of *England* at the diſcretion of a ſecretary of ſtate.

As to the length of time ſince this commitment, it had been ſaid, that where the ſtatute of *habeas corpus* was ſilent, the court would bail by Common law, but length of time was only good reaſon in diſcretion; he argued, that there was a rebellion in the kingdom at the time of that commitment, and ſince the rebellion had been quell'd, all perſons concerned for the crown, and who ſhould have taken care for this proſecution, had been employed. That Sir *W. W.* might himſelf, if he had thought fit, have demanded a proſecution; that he knew ſo much of a proſecution againſt Sir *W. W.* that as far as the matter appeared unto him, it muſt be in *Somerſetſhire*, and tho' one aſſizes had lapſed, yet what was before ſaid was a ſufficient anſwer to it.

That as to the legality of the warrant not mentioning the ſpecies of the treaſon, this exception was taken in *Z. Crofton*'s caſe, 1 *Sid.* 78. and not allowed, and the bill of rights in *Ruſh.* collections, was only that warrants without cauſe ſhewn were illegal. That the officer which commits muſt judge of the treaſon, whether it were generally or ſpecially committed; and if it were ſpecified in the warrant, that it was for treaſon in conſpiring the death of the King, that might be proved by levying a war, and what light could he have more than now; ſo that ſuch a ſpecifying did not make it more certain, or more for the advantage of the party, and the warrant was not traverſable. That as to the time in *Crofton*'s caſe, there was a year and half's confinement; that there had been many inſtances of ſuch commitments as theſe; and the caſe of *Kendal* and *Roe*, if it had been an illegal commitment, they muſt have been diſcharged without bail; that in that caſe it did appear that Sir *J. M.* was dead, and that he being not to be convicted, there could be no conviction of thoſe that let him eſcape, and they were bailed without debate, chiefly for that reaſon; the warrant indeed was only juſt touched upon. That moſt of the things which had been ſaid, were inſiſted upon in Mr. *Harvey*'s caſe this term, and diſallowed.

That as to the ſtate of Sir *W. W's.* health; if he had known any thing of that being inſiſted upon, he would have ſent the phyſician of the tower to ſee him, but as far as it appeared, he ſaid Sir *W. W.* looked very well; that the aſſizes were not far off, and then might apply for a trial, or enter his prayer, and be diſcharged.

Mr. Solicitor general obſerved, that in the *habeas corpus* act there were three ſections, wherein mention was made of the cauſes to be contained in warrants of commitment: the firſt had the words "*felony or treaſon* plainly expreſſed in the warrant of commitment"; the ſecond had the words "*high treaſon or felony* plainly and ſpecially expreſſed in the warrant of commitment"; that the third had the words "*petty treaſon or felony* plainly and ſpecially expreſſed in the warrant of commitment"; and by comparing all theſe three together, it appeared that the parliament did not intend any other, but that it ſhould only appear whether the offence was high treaſon or felony. Then to conſider the caſe at Common law, he ſaid that this act had not altered the law, but the return upon the commitment will have the ſame conſtruction as at Common law. To what purpoſe ſhould the ſpecies of treaſon be ſet forth? There was no neceſſity to mention the overt act, yet if any thing more than high treaſon was to be ſet forth, it muſt be the overt act; it would be of no uſe to the priſoner, nor of any uſe to the court; that it ſhould appear that the court had juriſdiction, without aſſigning the overt act.

That as to the objection about the power of the ſecretary of ſtate, he ſaid there was no doubt but he had a power to commit; in the caſe of *Kendal* and *Roe*, this objection was ſcouted at; and my Ld. Ch. J. *Holt* there ſaid, that it was more for delight than neceſſity; that by a reſolution in *Leonard's Rep.* it appeared, that the court took this difference, that where one was committed by one of the privy council, the cauſe of committing ought to have been ſet down in the return, but contrary where the party was committed by the whole council, there no cauſe ought to have been alledged; that this was offered, to ſhew that the ſecretary of ſtate had power to commit; that theſe words *(plainly and ſpecially)* were ſufficiently anſwered by a warrant for high treaſon only, without any particular ſpecies of treaſon; for ſuppoſe it had been laid for high treaſon in compaſſing the King's death, of which there were divers overt acts, would the priſoner hereby be better informed? In *Z. Crofton*'s caſe there was another reaſon given, for it was ſaid that the King need not diſcover the particulars, for it might be inconvenient to him, and no one could know what the conſequence of this might be.

That in the great caſe of an *habeas corpus*, 3 *Car.* in the caſe of Sir *John Corbet*, Sir *Edward Hampden*, *& al'*, upon the general return of a commitment *per ſpeciale mandatum domini regis*; it was agreed, that if there had been

been any particular deſcription of the offence, it had been ſufficient. In 27 *H.* 7. a commitment *pro ſuſpicione feloniæ* was by all ſides allowed to be good. So it was in the time of *H.* 8. *pro homicidio facto.* So 30 *Eliz. Brown's* caſe, *pro ſuſpicione proditionis.* That in *Vaug.* 142, 143. *Buſhell's* caſe, this return was taken for granted; that was on a commitment of *Buſhell* and al', for having acquitted *Pen* and *Mead* on an indictment for a riot, *&c.* and it is there ſaid by my Ld. Ch. J. *Vaughan*, that it might have been objected, that as the return of an *habeas corpus* for treaſon or felony had been good, ſo the return there was ſufficient, and he wondered it had not been mentioned; and it was not objected to either at the bar or at the bench; but it was obſerved, that there was a difference between the two caſes; for upon a general commitment for treaſon or felony, the priſoner (the cauſe appearing) might preſs for his trial, which ought not to have been denied or delayed, and upon his indictment and trial, the particular cauſe of his commitment muſt appear; as to the caſe of *Kendall* and *Roe* he ſaid, that the judgment of the court was not upon the ſpecies of treaſon being not ſet forth; my Ld. Ch. J. *Holt* gave no opinion as to that matter, but an objection was there made, that Sir *J. M.* was not charged to be guilty of high treaſon; now he muſt be guilty of this, to make the others guilty of high treaſon in aiding and aſſiſting him to make his eſcape; he added, that it was not ſaid in that caſe, that a general commitment for high treaſon was not good.

As to the length of time, he ſaid that was to be conſidered upon the *habeas corpus* act, whether it was not a good deal owing to Sir *W.*'s own neglect, by not applying to the court ſooner, when that act had chalked out a method; for upon entering his prayer in proper time, if he had not been indicted that term, upon motion in open court the laſt day of that term, he muſt have been diſcharged: that theſe were conditions put upon the party, of which if he would have the benefit, he muſt follow what was by them preſcribed. That there had been attempts upon the government, every body knew; it was not neceſſary to ſpecify that; could it be ſaid the warrant was void for want of this; ſurely it was legal and juſt, and the ſecretary in doing what he had done, had but done his duty.

On the reply Mr. ſerjeant *Pengelly* ſaid, that the Attorney general had not given any reaſon for his delay of a proſecution; that it was not inſiſted upon that they had any witneſſes, or that any of thoſe witneſſes were out of the way or abſent, to obſtruct the carrying on a proſecution; that, this being ſo, it was plain from the *hab. corp.* act, there was no other excuſe to be given to the court, *viz.* that the witneſſes could not be found, or were not in the way, or by reaſon of ſome abſence; if Mr. Attorney general had been pleaſed to have given any account of that, it might have given ſome ſatisfaction in the caſe. That upon every commitment for high treaſon, there muſt be expreſs evidence of that fact, and this ſhews that every thing muſt then be in a readineſs to make out the ſubſtance of the commitment; it deſtroyed all preſumption of the witneſſes being out of the way; they ought to have proceeded freſhly; that their delay of not ſuing for an *hab. corp.* could not be imputed to their prejudice, but it might evidence how much they were preſſed at that time, as that Mr. Attorney general ſhould happen not to think of this particular caſe; that Sir *W. W.* was not to be involved in the caſe of thoſe that were in the rebellion; whatever they deſerved, whether a recent proſecution or not, he was not within the act made for their trial; his was a partieular caſe; his confinement was to be anſwered for by default of their proſecution; that he was not to be neglected, becauſe others of an inferior quality were to be tried; that others of a leſs quality had been proceeded againſt in the country, and a perſon of his quality had been neglected tho' in town, always ready to be brought to juſtice, and that tho' there was no pretence of a proſecution againſt him, he muſt now go down into *Somerſetſhire*; that it was not ſaid there was ever an intention to proſecute him; that this looked like a wilful looking over his caſe, and if this proſecution in *Somerſetſhire* ſhould not ſucceed, yet it might be a ſatisfaction to ſome people. He ſaid, that the liberty of a gentleman of quality ought not to be reſtrained upon ſuch ſuggeſtion, or a report that Mr. Attorney general would proſecute; impriſonment was only for ſafe cuſtody; the clauſe of the *habeas corpus* act, if their prayer was not entered in due time, took away only the remedy the party might have againſt the judge or officer as to any penalty upon that act, but it was never intended to prevent his being bailed; this was the conſequence, that the party ſhould not have the benefit of that act, ſo as to bring an action for the penalty. It was a waver of the penalty, but ſtill he did not forfeit his liberty; it gave him leave to get his liberty ſooner than he elſe could, nor took away any benefit he had at Common law; that Sir *W. W.* ſtood clear ſtill to have the advantage of that ſtatute; that Mr. Attorney had no interruption either in *Mich.* or *Hill.* term, eſpecially in this town; there were two terms compleat; that the *hab. corp.* act ſaid, that two terms were a reaſonable time for a proſecution, but his client had laid two terms more; this was a double time, and a double puniſhment; it doubled the inconvenience upon the proſecuted: for by law the proſecution ought to be freſh. That as to the form of the warrant, he ſaid that they (the King's counſel) had not given any inſtance where it had been adjudged good. The event of *Croſton's* caſe was againſt them, when he was brought up upon his *hab. corp.* he was remanded for two or three days, and at the end of the term he was let to bail; the court thought that a general commitment was not ſufficient to continue him in cuſtody. That there was great reaſon why the ſpecies of high treaſon ſhould be mentioned; was there any inſtance of a commitment for felony generally held to be good, and allowed? If a commitment for murder or felony were not good, could there be any difference, why it ſhould not be ſo too in caſe of high treaſon? for as treaſon is the genus, ſo is felony. He ſaid, the reaſon of this was, becauſe the court of *B. R.* which was a ſuperior court, might have ſome controul over the actions of inferior magiſtrates, and ought to have ſatisfaction ſhewn them; that it was a crime of that nature for which a perſon ought to be committed, and in order to this, there muſt be ſome convenient certainty in their warrants as to the ſpecies of treaſon; the fact imported it, as if a man were taken in actual rebellion. That particular ſpecies aroſe immediately from that fact; ſhall an inferior magiſtrate be truſted with the examination of facts, and yet make the court a general certificate without having the ſpecies, tho' it were not neceſſary to ſet forth the overt act?

As to the caſes in *Ruſhworth*, and the ſeveral inſtances inſiſted upon, as for ſuſpicion of treaſon, ſo for ſuſpicion of felony, ſo *pro homicidio*, he ſaid that theſe were not law, and that there were at that time ſeveral commitments made, when the ſecretaries of ſtate pleaſed, without the particular ſpecies of the treaſon; that the certificate of the judges in *Ruſhworth* was made only to excuſe themſelves; that they had not ſet any perſons at liberty, but where the cauſe of the commitment had not been certified or returned to them; that as to the caſe of *Kendal* and *Roe*, my Lord Ch. J. *Holt* ſaid, It was a ſtrong objection, that the particular ſort of treaſon was not mentioned, and this was inſiſted upon at the bar in *Montgomery*'s caſe.

That as to the caſe in *Vaugh.* it was ſtrong for him; for upon ſuch a general commitment for treaſon or felony, the priſoner (the cauſe appearing) might preſs for his trial, which ought not to be denied or delay'd; which ſhews, that if this commitment be allow'd, yet the party ought to be proſecuted immediately, and this proſecution ought not to be deferr'd.

That if Mr. Attorney general deſired any recognizance or bail to be given, Sir *W. W.* ſhould ſubmit to it, and would be forthcoming to appear at any time, which would be a far greater ſecurity than his commitment.

Mr. *Jeffrys* by way of reply alſo ſaid, that Sir *W.* had been ſo cloſe kept, that he had not uſe of pen, ink, or paper for two months, ſo that he could not apply for any enlargement from his impriſonment.

That

That as to the caſe of *Kendal* and *Roe*, no anſwer had been given to it; for tho' Sir *James Montgomery* was dead, yet his death could not alter that caſe; as to the ſaying by Mr. Solicitor, that the objection about the power of a ſecretary of ſtate to commit, was there ſcouted at by the court, it was there mentioned by my Ld. Ch. J. *Holt*; and tho' their power be now agreed to, yet they were but formerly clerks of the council, and are but of late grown to be great miniſters of ſtate. The Attorney general has ſaid, that we ſhould ſtay till next term; ſo much he knew of a proſecution; ſo that as yet he does not know it with any certainty. The *hab. corp.* act ſays, that there ought to be oath made that the witneſſes cannot be produced. Mr. Attorney did not ſay that he had directions to proſecute, or that he would proſecute.

Mr. *Reeves* by way of reply further added, that it was not ſaid how long time Mr. Attorney had direction to proſecute in *Somerſetſhire:* there had been already an aſſizes in *Somerſetſhire*; there was a conſiderable time between *October* and that aſſizes, and two terms had ſince interven'd. Sir *W.*'s commitment was in this town, and if he had enter'd his prayer in time, he would have been intitled to be bail'd long ſince: That if Mr. Attorney did intend to try him in *Somerſetſhire*, he would have an opportunity to do it after his being bailed as well as now; but as to Sir *W.*'s own caſe, it was of far greater conſequence; for if he were kept in cuſtody, he would be in danger of his life; but the proſecution might nevertheleſs go on; and as to the crown, there could be no inconvenience.

As to the caſe of *Kendal* and *Roe*, that had been anſwer'd: it was there determined that it was an ill commitment. The judgment of the court there was, that ſuch a general commitment was a reaſon for the court to bail; tho' not a void commitment; that this was what they now inſiſted upon. Take it to be a good commitment, the party ſtill ought to be bailed; this did not ſhew that it was an illegal commitment. As for that which was ſaid further, that Sir *James Montgomery* was dead, this was not taken notice of by the court; but judgment was given upon the form of the commitment; that as to the objection, that it ought to have been there averr'd that Sir *James Montgomery* committed high treaſon, this made the preſent caſe the ſtronger.

That as to the reaſon given for a delay of the proſecution by the rebellion, it did not appear that Sir *W. W.* was in cuſtody for an act done in the rebellion, or for any other act of high treaſon whatſoever.

That for the length of time, the generality of the warrant of commitment, tho' not a void warrant, their being ready to give bail to appear in *Somerſetſhire*, after ſo long being in cuſtody, he hoped the diſcretion of the court would be induced to bail him.

Then Sir *W. W.* himſelf ſpoke; that for two months after his having been committed, he was ſo cloſely confined that he could not enter his prayer, if he had known it was neceſſary; that no-body was allowed to come to him till the *habeas corpus* act was ſuſpended, not even his wife; and afterwards only the duke of *Somerſet* and his lady, and his own wife; that there had been 16 or 17 in the tower, and all the warrants of commitment contained the patticular ſpecies of treaſon except 2 or 3; that he had lately had an opportunity to look upon the *habeas corpus* act, and there was a clauſe in it, that no perſon which ſhould be ſet at liberty upon an *habeas corpus*, *&c.* ſhould be again committed or impriſoned for the ſame offence; then how could that be made appear, but only by the ſpecies of offence expreſs'd in the firſt warrant? That his commitment was before any of the reſt that were in the tower.

That as to the proſecution in *Somerſetſhire*, there had been three quarter ſeſſions and one aſſizes already paſſed; that if Mr. Attorney would ſay upon his honour, that he had evidence upon oath to find a bill againſt him, he would be content to lie by the next vacation.

The Ch. J. then ſaid, that the caſes which had been mentioned were ſoon found out; and that his brother *Pengelly* had had, he did believe, a very full account of them; that as to what Sir *W. W.* had mention'd concerning his confinement, it would be proper that affidavits ſhould be filed of it that night, that they might have time and opportunity to lay before the court the matter of facts as well as the matter of law; and the laſt day of the term let Sir *W. W.* be brought here again.

Then a requeſt being made to the court, that counſel and a ſolicitor might have leave to have acceſs to Sir *W. W.* the Ch. J. ſaid, that as to the counſel and ſolicitor's going to him, that would be proper to be mention'd to the ſecretaries of ſtate.

Major *Doyley*, the lieutenant of the Tower, being aſked concerning the nature of the confinement, ſaid that no-body had been let in to Sir *W. W.* but by particular warrants; no perſon whatſoever, or any letter, was to be admitted to go to or from him. Upon which the Ch. J. aſked the lieutenant about Sir *W. W.*'s being able to ſend any meſſage, what he could do as to that; and the lieutenant anſwer'd, no-body but (ſuch an one), and that not without communicating the meſſage to one of the ſecretaries of ſtate. Then the Ch. J. ſaid to the lieutenant, Let us have theſe warrants brought up with you. If any anſwer be put in as to the nature and circumſtances of Sir *W.*'s health, let theſe affidavits be filed by to-morrow night. Let us look upon theſe caſes that have been mentioned, when they were, and how they are, *viz. Yate*'s caſe, Ld. *Montgomery*'s caſe, *Zach. Crofton*'s caſe, and the caſe of *Kendal* and *Roe*.

Then a rule was made for the lieutenant of the Tower to bring up Sir *W. W.* again the laſt day of the term; which being done, the Ch. J. delivered the opinion of the court, *viz.*

That Sir *W. W.* being brought up there from the Tower by a *habeas corpus*, the return to it was, that he was charged there by a warrant under the hand and ſeal of Mr. Secretary *Stanhope*, (in the words as above.)

That it was directed to the governor of the Tower of *London*, or his lieutenant.

That it had been pray'd that Sir *W. W.* might be let out upon bail; and to induce the court to do this, ſeveral reaſons had been offered to the court; that it had been admitted on all ſides, that the court had power to bail upon a commitment for high treaſon, tho' there were a good and proper commitment; yet as for the circumſtances of the caſe, that the firſt thing inſiſted upon or objected, was from the form of the warrant; and there the firſt objection was, that he was to be kept in ſafe and cloſe cuſtody; that this was more than by law could be juſtified; it was only a ſafe cuſtody for the party, ſo to be taken care of, that he might not make his eſcape. He ſaid this was advanced without any authority, or one ſingle inſtance, and againſt 40 precedents; that there had been many occaſions when this exception might have been taken; that in *Kendal* and *Roe*'s caſe ſome notice was taken of this exception; but it was there allowed as proper to be done. What had been the conſequence, if the impriſonment had been more cloſe than by law it ought to have been? that is not the conſequence that the court ſhould diſcharge the priſoner.

That the next objection that was made, that this warrant was not ſaid to be made upon oath, and this was preſſed in a pretty ſtrong manner, that if people might be committed in this manner, it was making them for their liberties tenants at will to the ſecretaries of ſtate. But in the firſt place, he ſaid it was a hard way of arguing, that becauſe no oath was expreſs'd in the warrant, therefore he was committed without oath; and if the oath were not expreſs'd in the warrant, it was not neceſſary. This was alſo preſs'd, without one ſingle authority; that many commitments had been in that form; many had been brought before the court in that form. In ſome of them mention had been made of this thing, but it was not taken to be of any weight; but on the contrary, *Trin.* 2 *W. & M.* this matter was particularly inſiſted upon, that a warrant of commitment without oath was illegal, and it was over-ruled. This was *Farguſon*'s caſe. In the caſe of *Kendal* and *Roe*, it was inſiſted upon, and not allowed; that there might be an impriſonment in many caſes without an oath; that this matter was lately

under

under conſideration in the houſe of lords, and the judges were aſked their opinions upon it, which were delivered by my Ld. Ch. J. *King*, that warrants of commitment were good without being upon oath; that in many inſtances warrants without an oath could not be illegal. There might be many inſtances where an oath was not neceſſary; any perſon may be found with treaſonable papers about him, or may be taken in the fact. The magiſtrate that commits, muſt ſee that the party is guilty. Where a magiſtrate executed a matter within his juriſdiction, it ſhould never be preſumed that he abuſed that juriſdiction.

As for the next objection that was made, that the warrant was too general, not ſaying for what ſpecies of high treaſon the commitment was, he ſaid, that this was likewiſe advanced without any authority; none of the books cited did prove it; Ld. *Coke*, tho' he ſaid the warrant muſt contain the cauſe of commitment, did not ſay that the magiſtrate muſt go into a ſpecification of the offence; the firſt reaſon given for this was grounded upon 2 *Co. Inſt.* 591. that the warrant muſt contain the cauſe, that it might appear to the court judicially, that the offence was for high treaſon, either againſt the perſon of the King, or for what elſe; but he ſaid, he would not go over the reaſons mentioned in that book, for that they could not be ſupported in all parts. But the court did in all caſes rely upon the judgment of the magiſtrate; that it had been admitted that it was not neceſſary to ſet forth the overt act; and if it be not neceſſary to ſet forth the overt act, it muſt be left to his diſcretion, whether the offence were high treaſon or not; the court could never from thence form any judgment, whether it were high treaſon or not. In the ſame book it was allowed, that a commitment *pro alta proditione contra perſonam domini regis* would be ſufficient, but what judgment could the court form of that? one ſpecies was for compaſſing the King's death, and another was for levying of war, *&c.* each was high treaſon againſt the King's perſon; could the court form any better judgment upon the one than they could upon the other? So again for levying of war, there were many ſpecies of levying of war, and there were ſome riots which were very near treaſon. Then this objection was urged further, that this certainty was required, becauſe it might be extended to others who might be aſſiſting to a perſon ſo committed in making his eſcape. But he ſaid, that this only ſhewed that the party was not ſo ſtrictly guarded as he ought to have been; but was the party therefore to be permitted to go at large? The next objection was made by Sir *W. W.* himſelf, and very plauſibly, that the *habeas corpus* act did ſuppoſe the offence ſhould be ſpecified in the commitment, (becauſe there was a clauſe in it, that no perſon which had been delivered, or ſet at large upon an *habeas corpus*, ſhould at any time thereafter be again impriſoned or committed for the ſame offence) or elſe it could not appear upon the ſecond commitment that it was for the ſame offence as the firſt was for; as to this, he ſaid it was true, the offence could not appear to be the ſame in both commitments, without being ſpecified, but this muſt ariſe upon circumſtances, and for proof the evidence of the identity of the fact did not turn upon the warrants, but upon the examination of the facts upon which the warrants were grounded. If the firſt were for high treaſon in killing the King, the next might be for compaſſing the death of the King. Here this muſt not turn upon the expreſſions of the warrant; the act is penal againſt him that made the commitments, and it will lie upon him to make out that there is a ſecond act; ſo it would be if the expreſſion in the warrant ſhould be different; as in the firſt for levying war againſt the King, this was one ſpecies of high treaſon; if the ſecond, for compaſſing the King's death, that was another ſpecies of high treaſon; yet if the fact was the ſame, the party muſt be delivered upon this act; he would be intitled to bring his action for the penalty againſt the officer, and it puts the proof upon the officer, that the ſecond commitment was not for the ſame offence with the firſt; ſo that this expoſition of the act, by ſpecifying the particular treaſon, will not anſwer the end of it, for if the ſpecies were not the ſame in both commitments, the facts might be the ſame, or, if the ſpecies were the ſame, the facts might be different.

There was a further objection, and that was the caſe of *Kendal* and *Roe*; he ſaid, that caſe was thus: they were committed for high treaſon, for aſſiſting in the eſcape of Sir *James Montgomery* who had been committed for high treaſon, and their warrant of commitment ran thus, *viz.*

> " Sir *W. Trumbal*, Knt. one of his Majeſty's moſt honourable privy council, and principal ſecretary of ſtate.
>
> THESE *are in his Majeſty's name to authorize and require you to receive into your cuſtody the bodies of* Thomas Kendal *and* Richard Roe, *herewith ſent you, they being charged with high treaſon, in having been privy to and aſſiſting the eſcape of Sir* James Montgomery *out of the cuſtody of* William Sutton, *one of his Majeſty's meſſengers in ordinary, and charged with high treaſon, you are to keep them in ſafe and cloſe cuſtody until they ſhall be delivered by due courſe of law, and for ſo doing this ſhall be your ſufficient warrant. Given at the court of* Whitehall, *24th day of* October 1695.
>
> William Trumbal.
>
> To the keeper of *Newgate*, or his deputy."

He ſaid there was an imperfect report of that caſe in 5 *Mod.* 78. and in this court there were ſeveral exceptions taken to that warrant of commitment, but they were all over-ruled; the exception there taken that the ſecretary of ſtate could not commit, was ſcouted at by the court, as Mr. Solicitor General has obſerved; another objection was, that the commitment by Sir *W. T.* ought to have ſpecified what the treaſon was, for it was inſiſted upon that there might be a ſort of high treaſon, the aſſiſting of which would not be treaſon, as the aiding, receiving, abetting and comforting a counterfeiter of the great ſeal, *Co.* 12. 81, 82. or of a counterfeiter of money. It was alſo inſinuated that Sir *James Montgomery* being dead, they could not be tried, and therefore they ought to be admitted to bail. He ſaid, this caſe did not at all turn upon the ſpecies of treaſon, but upon this, that their fact and their crime were ſpecifyed as not depending upon Sir *James Montgomery*'s crtme, but upon the words of his warrant of commitment. It was, that he was committed for high treaſon, but not charged with high treaſon. If they aided and aſſiſted him in his eſcape, their crime muſt be dependant upon him; therefore he muſt be committed for a particular ſpecies of treaſon, to make them liable to the ſame puniſhment he was ſo committed for. He ſaid that this matter turn'd upon two things; firſt, That Sir *James Montgomery* was guilty. 2dly, That he was committed for that particular offence. It was then objected very ingeniouſly by Mr. *Reeves*, that if a commitment generally for high treaſon were good, what came afterwards in it could not make it bad. He ſaid the anſwer to this was, that he that was committed for high treaſon might not be committed for the ſame ereaſon of which he was guilty, ſo that what came afterwards might make it ill. He was not committed for high treaſon generally, but for a particular treaſon, ſo that he may not be guilty of that treaſon; as it was in the caſe of felony for ſtealing fruits or apples growing, ſo that when you come to ſpecify the particular fact, the general words may loſe their force. So it was in caſe of calling one (thief), if the words went only (for ſtealing apples growing), theſe words were not actionable, tho' (thief) in general was actionable. He concluded that theſe were the objections which had been made; theſe were the reaſons which had been offered in this caſe; but then, on the contrary, it appear'd from the 2 *Inſt.* 52. that this warrant was good. It ſays, the cauſe muſt be contained in the warrant, as for treaſon, felony, *&c.* or for ſuſpicion of treaſon or felony, *&c.* So was 1 *And.* 298 *Kyſh. Coll. vol.* 1. *pa.* 507, 509, 538. that caſe was very full to the purpoſe, and upon a very particular occaſion; for it

it was, as it was ſaid by my Ld. Ch. J. *Coke*, then the Solicitor general, to be a direction for all council commitments. The occaſion was, that ſeveral perſons had been committed at ſeveral times to ſeveral priſons, without good cauſe, part of whom being brought up into the King's Bench, were according to law ſet at large and diſcharged of impriſonment, at which ſeveral great men were offended, and procured a command to the judges that they ſhould not do ſo afterwards; notwithſtanding which the judges did not ſurceaſe, but by advice amongſt themſelves made certain articles, and delivered them to the lord chancellor and lord treaſurer. The words were theſe, *viz.* That where it pleaſed their lordſhips to will divers of us to ſet down in what caſes a perſon ſent to cuſtody by her Majeſty, her council, ſome one or two of them, are to be detain'd in priſon, and deliver'd by her Majeſty's courts or judges; we think that if any perſon be committed by her Majeſty's command from her perſon, or by order from the council board, or if any one or two of her council commit, and for high treaſon, ſuch perſons ſo in the caſe before committed may not be deliver'd by any of her courts without due trial by the law, and judgment of acquittal had; nevertheleſs the judges may award the Queen's writs to bring the bodies of ſuch perſons before them; and if upon return thereof the cauſes of their commitment be certified to the judges, as it ought to be, then the judges in the caſes before ought not to deliver him, but to remand the priſoner to the place from whence he came, which cannot conveniently be done, unleſs notice of the cauſe in generality or elſe ſpecially (or, as the words are in *Ruſhworth*, in general or elſe in ſpecial) be given to the keeper or gaoler that ſhall have the cuſtody of ſuch priſoner; this was ſigned by all the judges and barons, *&c.* and they delivered one to the lord chancellor, and another to the lord treaſurer.

Mr. *Selden* in *Ruſhworth* inſiſts upon this as the opinion of all the judges, and produced the report under Ld. *Anderſon*'s own hand, and this was afterwards ordered to be entered in the council books; ſo that this was not an excuſe only made by the judges, as was objected by his brother *Pengelly*, but a direct opinion of theirs; it was their deſire to remedy the inconvenience that then was; it was an application of the judges themſelves to prevent the hardſhips that were exerciſed then upon the ſubjects. It was there put, that if the cauſe of commitment was certified, the priſoner muſt be remanded; ſo that if the cauſe appear either in general or in ſpecial in the warrant of commitment, according to this reſolution it will be well; and *Keyling* (who was a great man) in *Zach. Croſton*'s caſe, affirmed, that if the cauſe of commitment were for high treaſon generally, it was a good warrant. He ſaid, that the houſe of commons, immediately after the debates in *Ruſhworth*, came to a reſolution, that no freeman ought to be detained or kept in priſon, or otherwiſe reſtrained by the command of the King, or the privy council, or any other, unleſs ſome cauſe of the commitment, detainer, or reſtraint were expreſſed, for which by law he ought to be committed, detained or reſtrained; ſo that a commitment for high treaſon generally is good; ſo was *Vaugh.* 142. Ld. Ch. J. *Vaughan* there allowed it for law, by not denying the objection there raiſed from ſuch warrants, but by diſtinguiſhing upon it, and *Buſhel*'s caſe was final and concluſive. Theſe were the great opinions in the time of Queen *Eliz.* and in 3 *Car.* 1. when this very matter was under conſideration; they were the opinions in Ld. Ch. J. *Vaughan*'s time, and have been the conſtant practice ever ſince. So he concluded, that theſe objections, which had been made, were not of any weight as to the warrant of commitment. As for the other points, upon the length of time ſince the commitment, and the indiſpoſition of Sir *W. W.* he ſaid that as to the former, the caſes that had been cited did not come up to this caſe, and it would not be neceſſary to go through them all; but yet, though this were here a good warrant, the court were of opinion, that Sir *W. W.* ought to be bailed.

As to the affidavits concerning the indiſpoſition, he ſaid they were nonſenſe, and that the indiſpoſition muſt be a preſent indiſpoſition, not in purpoſe or expectation, but the length of time was to be conſidered; the commitment was about the middle of *October* laſt; there had been ſomething ſaid of a crime elſewhere, but nothing of that was laid before the court. Here was no oath or charge of any crime, nor was it ſaid directly that there would be certainly a proſecution elſewhere. If the act did ariſe in *Middleſex*, there had been four terms paſt; and if it aroſe in the country, there had been three quarter ſeſſions, which tho' not conſiderable in this caſe, yet there had been an aſſiſes, and yet no proſecution forwarded. There had not been any preparation towards it, nor yet was it laid certainly that there could be one.

He ſaid there was a thing that might have been a great objection againſt Sir *W. W.*'s then being bailed; that he ſhould lie ſtill ſo long, and not make any application. But the reaſon given for this was of weight in determining the diſcretion of the court; it was, that the *habeas corpus* act was ſuſpended at that time, tho' not as to this particular caſe. The gentleman might think himſelf included, and be miſtaken in it. However under theſe circumſtances he ſaid it ſeemed very reaſonable that Sir *W. W.* ſhould be bailed, and to appear here again the firſt day of next term.

That had Sir *W. W.* made his prayer the firſt day of this term, and it had appeared that the matter did ariſe in another county, the court could not have bailed him by the *habeas corpus* act; but they were not then upon that act, but at Common law; he ſaid that they were intruſted with the liberties of the ſubjects of *England*, and as they were bound on the one hand to take care of them, ſo they there were on the other hand to take care of the government, that a perſon might not eſcape juſtice, where there was a due proſecution againſt him; that he would have taken Mr. Attorney general's word, if he had ſaid at the bar that he would certainly have indicted Sir *W. W.* but there not being any thing of that in this caſe, they were all of an opinion to bail him.

He concluded that there had been a great many objections made by the counſel; but to ſtart objections againſt that which had been newly heard and determined by the court, that they might throw a greater hardſhip upon the courſe of the court, and make it look more odious in the world, where they overruled a great many objections (tho' theſe great many were made up but of a few) it was not fair, nor a practice to be ſuffered, but he hoped it would not be done any more.

The Attorney general ſaid, that he had notice of Sir *W. W.*'s bail, and did not object againſt them; and thereupon Sir *W. W.* entered into recognizance of 10,000*l.* and the duke of *Somerſet*, the lord *Rocheſter*, the lord *Tumont*, and the lord *Gower*, as his bail, in a recognizance of 5000*l.* to appear here again the firſt day of the next term.

Mich. 3 *Geo.* Sir *W. W.* appeared the firſt day of this term, and was continued according to the courſe of this court to the laſt day thereof; when he appeared again, the Attorney general ſaid, that he had his Majeſty's commands for proſecuting him for miſpriſion of treaſon, and would proceed againſt him accordingly; and to anſwer the delay of ſuch a proceeding an affidavit was read, that a material witneſs for the crown was then in *Holland*, *&c.* upon which the court declared, that the Attorney general's ſaying he would proſecute, *&c.* was a good ground for them to continue Sir *W. W.* upon bail till the next term.

Hill. 3 *Geo.* The firſt day of this term Sir *W. W.* again appeared, and was continued till the laſt day thereof; upon which day he was diſcharged; the Attorney general declaring, that he had his Majeſty's order for proſecuting Sir *W. W.* for a miſpriſion of treaſon, in concealing the high treaſon for which my Lord *Landſdown* was indicted; but the King having been pleaſed to pardon my lord *Landſdown*, and to order him to ſurceaſe the proceedings upon the ſaid indictment, he now conſented that Sir *W. W.* might be diſcharged. *Trin.* 2. *Geo.* 1. *B. R.* 3 *Vin.* 515 *to* 534.

Two lords have been committed to the tower by my lord *Townſend*, one of the ſecretaries of ſtate, for treaſonable practices againſt the government, upon the late ſuſpenſion of the *habeas corpus* act, which being expired upon

upon the 24th day of *May* laſt, they applied upon the 26th day of *May* to Mr. baron *Price* at his chambers, for an *habeas corpus* according to the 31 *Car.* 2. *c.* 2. which being granted; and they (being brought up to him from the tower) did inſiſt upon their privilege as peers to be diſcharged, a peer not being required to give bail for a miſdemeanor; but the judge being of an opinion that they ought to give him bail, elſe he could not diſcharge them, *&c.* they waved their claim of privilege, and entered into recognizance (with bail) to appear at *B. R.* the firſt day of this term, which was upon the firſt of *June*; and they appearing accordingly, it was moved by their counſel that they might be diſcharged, and continued upon their recognizance till the laſt day of the term; and my lord *Marlborough*'s caſe in the houſe of lords was quoted; but it was refuſed by the court; and *Parker* Ch. J. ſaid, that the court could not take notice of what they were committed for; that they had nothing before them but the recognizance, and they could not take notice of the warrant of commitment, or for what they ſtood committed; and that the lords muſt be continued upon their recognizance till the laſt day of the term, according to the courſe of the court, the whole term being in law accounted for as one day. The ſame day (theſe lords going immediately into the houſe of peers) debate aroſe upon this matter, and the opinion of the judges then preſent being (as it was delivered by the Ch. J. *King*) that baron *Price* and the court had done their duty, *&c.* that the judge was obliged to take bail upon the *habeas corpus* act, and ought not to have diſcharged the ſaid peers; but this debate being adjourned to inſpect their journals for precedents, *&c.* upon the 4th of *June*, the court of *B. R.* was again moved to diſcharge this recognizance, to which Mr. Attorney general conſented, ſaying, he had received his Majeſty's command to conſent to the diſcharge of the ſaid recognizance, *&c.* *The King* v. *Lord Scarſdale* and *Lord Duplin. Trin.* 2 *Geo.* 1. *B. R.* 3 *Vin.* 534.

Mr. *Harvey* having been committed for high treaſon by my lord *Townſend*'s warrant (one of the ſecretaries of ſtate) to the priſon of *Newgate*, was about the beginning of this term brought upon an *habeas corpus*; and Mr. ſerjeant *Darnel* and Mr. *Hungerford*, being of counſel for him, moved that he might be diſcharged upon bail, and they alledged the ill ſtate of health he was in, of which they produced affidavits; and further inſiſted upon the inſufficiency of the warrant of commitment; as 1ſt, that he was not charged with any offence; 2dly, that this charge againſt him muſt be upon oath, the warrant being only "Receive into your cuſtody *Edward Harvey*, herewith ſent you for high treaſon;" and 3dly, that the ſpecies of treaſon ought to have been mentioned; that Mr. *Harvey* was on the 21ſt of *Sept.* laſt committed, for treaſonable practices againſt the government, to the cuſtody of a meſſenger, and about the beginning of *May* he was ſent to *Newgate* on this warrant; that he was a member of parliament, and his attendance there was very neceſſary.

Upon this one *Claxton*, an apothecary, was examined upon oath by the Ch. Juſt. concerning the nature and danger of Mr. *Harvey*'s indiſpoſition.

To this it was anſwer'd by Mr. Attorney general, and Solicitor general, that the *habeas corpus* act was generally for high treaſon or felony, the words were "plainly and ſpecially expreſſed," not ſpecifically; that the bailing was a matter in the diſcretion of the court, and Mr. *Harvey* was not intitled to that favour till the laſt day of the term; that an offence was ſufficiently charged in the warrant, "ſent thither for high treaſon," is charging a man with high treaſon; that in the late duke of *Ormond*'s caſe, the act for his attainder was generally for high treaſon; and in caſe of commitment for murder, the warrant need not mention the particular perſon killed, nay, it was not neceſſary in an indictment. It was replied by Mr. *Harvey*'s counſel, that the ſpecies of treaſon ought to be expreſſed in the warrant. The *habeas corpus* act was, that the priſoner ſhould be bailed, except where the charge againſt him was plainly and ſpecially expreſſed, and cited *Croſton*'s caſe, 1 *Sid.* 78. and as to the late duke of *Ormond*'s caſe, the act for his attainder refers to the articles of impeachment.

Then it was ſaid by my Ld. Ch. J. *Parker*, that this was an illneſs which had been a good while upon Mr. *Harvey*, and it was proper they ſhould be ſatisfied about it, there ſeeming not to be any immediate haſte or danger; that they could not take notice of the matter about the warrants, unleſs it had been more particularly expreſs'd, and perhaps the firſt commitment was of more ſervice to Mr. *Harvey* than his liberty could have been, conſidering his examination before the ſecretary of ſtate; for then there might have been ſome reaſon for his being detained in cuſtody; that in my lord *Montgomery*'s caſe, his ſickneſs was occaſioned by his confinement; but here he knew not how Mr. *Harvey* had been kept in *Newgate*, or was kept before going thither. He ſaid he knew him very well, and that he ſeemed not to be in that ſtate of health he formerly enjoy'd. *Pratt* J. ſaid, that he did not think that an indiſpoſition was, in all caſes, a reaſon for the court to bail. And then the Ch. J. added, that a magiſtrate might be miſtaken in his opinion about the offence, but yet he was bound to ſet out all the evidence: it could not ſignify any thing to the party, whether one ſpecies of treaſon or another was expreſſed in the warrant; but there was a fault in the commitment, the court could not therefore admit him to bail. In caſes of felonies it was every day practiſed, that if, upon examination of fact, it did appear that the party ought not to be bailed, the court did order the juſtice of peace, who made the firſt warrant inſufficiently, to make a new one, to ſupply the defect of the former.

Then Mr. *Harvey*'s counſel pray'd, that his prayer might be enter'd, purſuant to the *habeas corpus* act, which was done accordingly.

About two or three days afterwards, Mr. *Harvey* was brought up again by rule, and the court were of an opinion againſt bailing him; but ordered him to be brought up again the laſt day of the term. Several affidavits were read, and particularly one of the meſſenger's, deſcribing the nature of Mr. *Harvey*'s diſorder, and the circumſtances how he came to be under it; the judges delivered their opinions *ſeriatim*, and the ſubſtance of what they delivered is as follows.

That it appeared from the affidavits, that this indiſpoſition came upon Mr. *Harvey* by his own hand; for when he was firſt in cuſtody of the meſſenger, he ſeemed to be very eaſy and well, but after he was examined by the council, he was very much dejected, and did not ſpeak for 6 hours, and the next morning ſtabb'd himſelf in the breaſt; being under theſe circumſtances, he was confined in the meſſenger's hands, and not ſent to priſon till lately; ſo that, in the firſt place, this indiſpoſition was not ſuch as to induce the court to bail him, becauſe it was occaſioned by his own act after he was in cuſtody, and he was then much better than he had been; neither was the indiſpoſition ſuch as manifeſtly endangered his life, as it might be in the caſe of an acute diſtemper; the affidavits were only that his being confined for a few days would make his caſe the more doubtful, there being then ſome ill ſymptoms upon him.

2dly, That the behaviour of this gentleman after his examination, the changing of his countenance, and ſtabbing himſelf in the manner aforeſaid, carried a ſtrong ſuſpicion of guilt, tho' it was not ſufficient to charge him with any crime.

3dly, That the delay of a proſecution, as attended with theſe circumſtances, was not ſuch as to incline the diſcretion of the court to bail him. *Crofton*'s caſe, lord *Montgomery*'s caſe, and lord *Ayleſbury*'s caſe, were much ſtronger in this point. Beſides, this gentleman was not before in a condition to be tried; and ſince he was moving towards his diſcharge, the Attorney general ought to have ſome time to prepare a charge againſt him, if he ſhould think fit.

4thly, That there was a grand jury then ſitting; that there had been a rebellion in the nation, and there was a great deal of the ſame ſpirit left; that in ſuch a time of danger to the government, the court ought to be very careful how they diſcharge a perſon committed for high treaſon.

5thly,

B A I

5thly, That there had been no precedent of this kind produced, and if the court ſhould bail this gentleman, every one who ſhould be committed for high treaſon, and ſhould be indiſpoſed by his own act, would have a right to be bailed. Their compaſſion ought to be conſiſtent with juſtice and the rules of the court. That if this indiſpoſition had been by the viſitation of God, or had been occaſioned by his confinement, it might have been of another conſideration; but here he was remanded, and ordered by rule to be brought up again on the laſt day of term, when he was bailed, but to appear again the firſt day of the next term, when he entered into a recognizance of 10,000*l.* and his bail into one of 5000*l.* each. *Trin.* 2 *Geo.* 1. *B. R. The King* v. *Harvey.*

Bailiff or **Baily**, (*Ballivus*) Saith lord *Coke*, is an old *Saxon* word, which ſignifies a keeper or protector; and though there be ſeveral officers called bailiffs, whoſe offices and employments ſeem quite different from each other, yet doth ſomething of keeping or protection belong to them all. Hence the ſheriff is conſidered as bailiff to the crown; and his county, of which he hath the care, and in which he is to execute the King's writ, is called his bailiwick; alſo his officers, who by his precept execute writs, are called bailiffs; there are likewiſe bailiffs of liberties, who are officers under lords who have franchiſes exempt from the juriſdiction of the ſheriff; there are likewiſe bailiffs of lords of manors, who collect their rents and levy their fines and amercements; alſo he is called a bailiff who hath the adminiſtration or charge of lands, goods or chattels, to make the beſt benefit for the owner, againſt whom an action of account doth lie for the profits which he hath raiſed or made, or might by his induſtry and care reaſonably have made, his reaſonable charges and expences deducted; there are likewiſe thoſe termed bailiffs, to whom the King's caſtles are committed, as the bailiff of *Dover caſtle*, &c. The chief magiſtrates in divers ancient corporations are called bailiffs; as in *Ipſwich*, *Yarmouth*, *Colcheſter*, &c. There are likewiſe officers of the foreſt which are termed bailiffs. 1 *New Abr.* 231. cites *Co. Lit.* 61. *b.* See *Co. Lit.* 168. *b.* 10 *H.* 4. 4. *Mirror*, *c.* 5. *ſect.* 2. *Bract.* 409. *Fleta*, *lib.* 2. *c.* 63. *Glanv. lib.* 1. *cap.* 9. *Kitch. Retorn. Brev.* 285. 2 *Inſt.* 453. *Co. Lit.* 172. *Manwood*, *part* 1. *p.* 113. By ſome opinions, a bailiff in *Magna charta*, *c.* 28. ſignifies any judge; but as there is but little ſaid of ſome of theſe in our books, and as what relates to others will more properly fall under other heads, it is thought proper in this place only to conſider,

1. *Sheriffs bailiffs.*
2. *Bailiffs of liberties or franchiſes.*
3. *Bailiffs to lords of manors.*
4. *Pleadings.*

1. *Sheriffs bailiffs.*

A ſheriff's bailiff is an officer appointed in every hundred to execute all writs within the hundreds, directed to the ſheriff; he is likewiſe to collect the poſt-fines, fee-farms of the King, &c. for the ſheriff, and to attend the juſtices of aſſize and gaol-delivery, and juſtices of peace in their courts. 1 *New Abr.* 232.

If an under-ſheriff takes bond from a bailiff, conditioned to ſave him harmleſs in executing all proceſſes, &c. and in an action brought on this bond, the ſheriff aſſigns for breach, that the bailiff had not executed a certain warrant ſent to him upon a proceſs directed to him out of the Exchequer, to levy iſſues upon certain land in *D.* and it is not alledged that *D.* is within his hundred, this is no breach of the condition; for the bailiff cannot execute a precept out of the hundred where he is bailiff. *Style* 18.

A ſworn bailiff, commonly known to be an officer acting within his own precinct, need not ſhew his writ to the perſon he arreſts; but when he has made his arreſt, he is to inform him of the ſubſtance of his writ, at whoſe ſuit the action is, and out of what court the proceſs iſſues; but a ſpecial bailiff is obliged to ſhew his warrant. 8 *E.* 4. 14. *a.* 14 *Hen.* 7. 9. *b.* 6 *Co.* 54. 9 *Co.* 69. *Style* 405. *Cro. Jac.* 485, 486.

A ſheriff who has a writ directed to him, may authoriſe others to execute it; but the perſon to whom he directs it, muſt perſonally execute it; yet it ſeems that one may lawfully aſſiſt him. *Dalt. c.* 117.

A bailiff caught one by the hand (whom he had a warrant to arreſt) as he held it out of a window, and the court ſaid, that it was ſuch a taking of him that the bailiff might juſtify the breaking open of the houſe to carry him away. 1 *Vent.* 306. 6 *Mod.* 173. *S. P.*

One who is arreſted by a ſheriff's bailiff is in the ſheriff's cuſtody, and if reſcued, the ſheriff may alledge that he was reſcued out of his cuſtody. 2 *Jones* 197. 1 *Lev.* 214. 2 *Lev.* 26.

A bailiff having a warrant againſt *A.* went to him in his yard, and being at ſome diſtance told him he had a warrant, and ſaid he arreſted him; *A.* having a fork in his hand, keeps off the bailiff from touching him, and retreats into his houſe; and on motion for an attachment for a contempt, the court held, that bare words will not make an arreſt; but if the plaintiff had touched him, that had been an arreſt, and the retreat a reſcous, and the bailiff might have purſued and broke open the houſe, or might have an attachment or reſcous againſt him; but as this caſe is, the bailiff has no remedy but an action for the aſſault; for the holding up of the fork at him when he was within reach, is good evidence of that. 1 *Salk.* 79. 6 *Mod.* 173.

By the 29 *Car.* 2. *c.* 7. it is enacted, That no perſon or perſons, upon the Lord's day, ſhall ſerve or execute, or cauſe to be ſerved or executed, any writ, proceſs, warrant or order, judgment or decree, (except in caſes of treaſon, felony, or breach of the peace) but that the ſervice of every ſuch writ, proceſs, warrant or order, judgment or decree, ſhall be void to all intents and purpoſes whatſoever; and the perſon or perſons ſo ſerving or executing the ſame ſhall be as liable to the ſuit of the party grieved, and to anſwer damages to him for doing thereof, as if he or they had done the ſame, without any writ, proceſs, order, judgment or decree at all.

A ſpecial verdict found that a *fieri facias* bore *teſte* the 4*th of June*, but was really ſued forth the 11*th of June*, and executed the 12*th of June*; and that the party, againſt whom it went, became a bankrupt the 6*th of June*, and a commiſſion was taken out the 17*th of June*, and *trover and converſion* was brought againſt the bailiff, who executed the writ; and the court held, that tho' the property was ſo bound, that the execution ſhould not have effect of the aſſignment of the commiſſioners, yet it was hard to puniſh the officer in *trover*, and make him a treſpaſſor for doing what he was obliged to do, and from which he could not plead to excuſe himſelf, and therefore gave judgment for the defendant. 1 *Sid.* 271. 1 *Lev.* 173. 1 *Keb.* 930, 932. *S. C.*

The ſtatute 23 *H.* 6. *cap.* 10. enacts, "That for an arreſt, or attachment, the ſheriff ſhall have 20 *d.* and the bailiff who makes the arreſt 4 *d.* and that the ſheriff or bailiff who doth contrary ſhall pay treble damages to the party grieved, and forfeit the ſum of 40 *l.* one moiety to the King, and the other to the party that will ſue; and that the juſtices of aſſiſe in their ſeſſions, juſtices of one bench and of the other, and juſtices of peace in their county, may determine the ſaid offences."

By the 1 *H.* 5. *cap.* 4. it is enacted, "That they which be bailiffs of ſheriffs by one year, ſhall be in no ſuch office for three years next following, except bailiffs of ſheriffs which be inheritable in their ſheriffwicks; and that no under ſheriff, ſheriff's clerk, receiver, nor ſheriff's bailiff, be attorney in the King's courts, during the time that he is in office with any ſuch ſheriff."

Bailiffs being officers who are to execute the King's writs, are moſt commonly puniſhed in thoſe courts out of which ſuch writs iſſue, by attachment; but it is impoſſible to ſet down all ſuch miſdemeanors and oppreſſive practices, of which the court is to determine, for which they ſhall be puniſhed; however, attachments have been granted againſt them where they have uſed needleſs force, violence and terror in making an arreſt; or where they broke open doors where by law they could not, and there was no plauſible excuſe for doing it; where they have

treated

treated the perſons arreſted baſely and inhumanly, or kept them in cuſtody till they conſented to pay money for their deliverance; or for making an arreſt without authority, by force of a blank warrant, filled up with the name of a ſpecial bailiff, by the party himſelf, without the privity or ſubſequent agreement of the ſheriff; or if a bailiff levy a debt by virtue of an execution, and keep the money in his hands, and imbezil it; but even in theſe caſes there may be ſuch circumſtances or matters of alleviation as will induce the court to excuſe, if not wholly diſcharge them. *Finch* 237. 5 *Mod.* 314. *Hob.* 62, 263, 264. *Noy* 101. *Moor* 770.

2. *Bailiffs of liberties or franchiſes.*

A bailiff of a liberty is one who hath the ſame juriſdiction with the ſheriff's bailiff, granted to him by the lord of a liberty or franchiſe. 1 *New Abr.* 234.

Theſe franchiſes proving very inconvenient, becauſe the ſheriff could not enter into them to execute the King's writs, but was to direct them to the bailiff of the liberty, who had the execution of all writs, the ſtatute *Weſtm.* 2. *cap.* 29. enacts, That if ſuch bailiffs gave no anſwer to the ſheriff, the court ſhould grant a ſpecial warrant, with a *non omittas*, which authoriſes the ſheriff to enter the franchiſe; and it being uſual to take out the *capias* and *non omittas* together, we have but little material in our books relating to this matter. 1 *New Abr.* 234.

But there are ſome caſes in which the ſheriff might enter without any clauſe of *non omittas*; as in caſe of a *quo minus*. So where the ſheriff is by *Weſtm.* 1. *cap.* 17. to make deliverance by replevin; ſo where he is judge, as in a writ of *rediſſeiſin*; ſo in *waſte*; ſo in executing a warrant for breach of the peace. *Bro. Offic.* 34. *Br. Ret.* 26. 2 *Hen.* 4. 1.

If the ſheriff executes the writ of a common perſon, without a *non omittas*, the execution is good; but the ſheriff is liable to an action to the lord, for entring into his bailiwick. *F. N. B. Finch* 54.

The bailiff of a franchiſe cannot enter into the guildable; and if he does, it is erroneous, becauſe he has no authority out of the franchiſe more than the ſheriff has in another county. *Br. Offic.* 35. *Dalt. Sher.* 464.

If there be two liberties within a county, viz. *St. Edmond de Bury* and *St. Ethelbed de Ely*, in the *com' Suffolk*, and a *capias* is directed to the ſheriff to take the body of *B.* and the ſheriff returns that he has made his mandate to the bailiff of *Ethelbed*, who has made no anſwer, the ſheriff, on a *non omittas*, ſhall enter into the liberty of *Bury*, though the bailiff of that liberty has made no default. *Offic. Brev.* 135. *Theſ. Brev.* 166.

If the bailiff of a franchiſe had made an inſufficient return, which the ſheriff returned to the court, they formerly held the ſheriff was anſwerable, and not the bailiff; for an inſufficient return is no return, and the bailiff making no return, the ſheriff ought to have ſaid *nullum dedit mihi reſponſum*; but this is altered by the 27 *H.* 8. *cap.* 24. which ſays, that the amercement for inſufficient returns made by bailiffs of franchiſes, ſhall be ſet on the bailiff's head, and not on the ſheriff's. 3 *Hen.* 7. 12. 5 *Hen.* 7. 27. See 2 *Hawk. P. C.* 142.

If the bailiff of a liberty dies after he has returned *cepi*, a *diſtringas* iſſues againſt his ſucceſſor, becauſes he takes it up under the return of his predeceſſor. *Bro. Ret. Brev.* 99. 14 *Ed.* 4. 1.

3. *Bailiffs to lords of manors.*

Bailiff of a manor may himſelf, or may command another to take cattle *damage-feaſant* upon the land; for he hath the care of all things within the manor. 1 *Rol. Abr.* 339.

But if a diſtreſs be taken for *damage-feaſant*, amends cannot be tendred to the bailiff; for he cannot deliver a diſtreſs, when it is once taken, no more than he can change the avowry of his maſter, or demand a rent upon a condition of re-entry. 5 *Co.* 76.

A bailiff of a manor, though he has no intereſt in the land, has an authority to receive rents, take fealty, pay quit rents, repair houſes and fences, and in other things act for his maſter's benefit; but he cannot do any thing to his prejudice, nor can he tile a houſe that was before thatched, nor impale a place before mounded with a hedge. See *Cro. Jac.* 178. *Owen* 28. *Hob.* 154.

A bailiff may be ſteward of the ſame manor; for thoſe are offices which are compatible. *Cro. Jac.* 178.

A bailiff hath no permanent eſtate, but is removable at the lord's pleaſure. *Cro. Jac.* 178.

A bailiff of a manor may leaſe the piſcary for years, but he cannot by any uſage make a leaſe of his maſter's land. 1 *Rol. Abr.* 339.

A bailiff may give licence to another to go over the land; for this is a treſpaſs to the poſſeſſion only, and the bailiff hath the diſpoſal of the profits of the poſſeſſion. 1 *Rol. Abr.* 339.

If a man takes cattle without any command, for ſervices due to the lord, if the lord after agree to the taking, he ſhall be adjudged his bailiff, altho' he was not his bailiff in any place before. 1 *Rol. Abr.* 685.

In debt for rent, upon a leaſe for years, the defendant pleaded that the plaintiff made *J. S.* bailiff of his manor, of which the lands in leaſe were part, and gave him power to receive the rents of the leſſee, *&c.* and alſo power to make leaſes for years; and that an agreement between the ſaid bailiff and defendant was made, that he ſhould pay 100*l.* and alſo ſurrender his leaſe to the uſe of the lord, and then he ſhould be diſcharged of the rent, which he hath done; and whether this agreement would bind the lord was doubted, and a peremptory day given to the defendant to maintain his plea, after which the reporter *nil plus inde audivit*. *Palm.* 402.

A. leaſes to *B.* for ninety-nine years, if *B. C.* or *D.* ſhall ſo long live, reſerving a heriot of 5*l.* upon the death of every of them; *A.* dies, and the bailiff of *A.* makes conuzance as bailiff generally for a heriot, but does not ſhew that *A.* had made his election; and whether this was not good and incident to the place of bailiff, or at the leaſt whether this ſhould not be intended for the benefit and advantage of the maſter till the contrary was ſhewn, *dubitatur*; and after the parties agreed. *Lit. Rep.* 33, 70, 71. *Hetl.* 12, 16, 17, *S. C.*

No bailiff can diſtrain for a fine or amercement, without a ſpecial warrant for ſo doing, which muſt be ſet forth by him in an avowry or juſtification of ſuch a diſtreſs. 3 *Mod.* 138. *Cro. Eliz.* 698, 748. *Moor* 574. 1 *Salk.* 107, 108. *Skin.* 587. 2 *Keb.* 745.

4. *Pleadings.*

In treſpaſs the *defendant juſtified as bailiff of* J. S. *to diſtrain for rent arrear*, and the *plaintiff ſaid, that riens arrear*, and a good iſſue againſt the bailiff; *contra againſt the lord himſelf*; note the diverſity. *Br. Treſpaſs, pl.* 206.

Bailiff ſhall have every *challenge to the array and polls* as his maſter ſhall have. *Br. Baille, pl.* 29. And may *ſay, that the tenements are in another vill*, but bailiff *ſhall not diſclaim in the land*, contra of attorney, and bailiff may plead, *miſnomer of his maſter*, and the *other plead triable by the aſſiſe. ib.*

If there are *two coparceners of a rent*, and the *one diſtrains and avows for himſelf, and juſtifies as bailiff of his companion*, it is not traverſable that he is not bailiff. *Br. Traverſe per, &c. pl.* 118.

In *aſſiſe*, if *J. S.* appears as bailiff of the tenant, it is not traverſable if he be *bailiff or not*. *Br. Traverſe per, &c. pl.* 345.

Replevin, the defendant made *cognizance as bailiff* to the E. of *Bedford*, *whereas in truth he was not his bailiff, but took the diſtreſs againſt his will.* It was held, that the plaintiff cannot traverſe, that he was not his bailiff, for it is not iſſuable; nor can th eearl diſavow it, for he is not party; nor can the earl have an action upon the caſe, becauſe he is not damnified; but the party whoſe cattle are taken may bring an action of treſpaſs for taking his cattle; and if the defendant juſtifies as bailiff, he may ſay *de ſon tort demeſne abſque tali cauſa*, and ſo puniſh him. *Cro. E.* 14. *pl.* 3.

In *treſpaſs* the *defendant juſtified as bailiff* to *J. S.* the plaintiff replied, that he took his cattle of his own wrong, and *traverſed his being bailiff.* *Anderſon* Ch. J. ſaid, that if one has cauſe to diſtrain my goods, and a *ſtranger of his own wrong takes my goods not as bailiff or ſervant* to the other, and I bring treſpaſs againſt him, he cannot excuſe himſelf by fathering his miſdemeanors upon me; for once he was a treſpaſſer, and his intent was manifeſt. *But if one diſtrains as bailiff, tho' in truth he is not bailiff*, if he, in whoſe right he does it, does afterwards aſſent to it, he ſhall not be puniſhed as a treſpaſſer; for the aſſent ſhall have relation to the time of the diſtreſs taken; and ſo is the book of 7 *H.* 4. and to all this *Periam* agreed. And *Anderſon* held clearly, that the taking in this caſe is not good, to which *Rhodes* agreed. *Godb.* 109, 110.

In replevin the defendant made *conuſance as bailiff to* J. S. *for damage feaſant*; the plaintiff *replied*, that one *A.* did pretend right to the land where, &c. and the defendant took them in right of the ſaid *A. abſque hoc* that he took them as bailiff to *J. S.* and upon demurrer all the juſtices held clearly, that the traverſe is good. And as to a matter which was objected, that if this traverſe ſhould be allowed, the meaning of the defendant will be drawn in queſtion, they ſaid, that the ſame is not any miſchief; for ſo it is in other caſes, as in the caſe of recaption. 2 *Leon.* 215, 216.

In an *avowry* for an *amerciament* in a court leet upon a vill, for not making a tumbrel and ſtocks, he muſt *alledge that the pain is unpaid to the lord*, becauſe if any other of the vill has paid the pain, the plaintiff is not determinable; alſo he muſt plead *the precept of the ſteward* for taking the diſtreſs, or levying the pain, *and the extract of the court*, which the plaintiff ought to have for his warrant. *Mo.* 574. *pl.* 789.

In replevin the defendant *juſtified*, for *that the place where, is the freehold of the dean of* P. *and* that *he as his bailiff took the cattle damage feaſant*; the plaintiff *replied, de injuria ſua propria abſque hoc that he is his bailiff:* it was objected, that the plaintiff could not traverſe that the defendant was bailiff, becauſe he *had confeſſed the frank tenement in the dean*, in whoſe right he juſtified. And judgment was given *per cur. viz. Croke*, *Doderidge*, and *Haughton*, that the replication is not good, and ſo againſt the plaintiff. *Rol. Rep.* 46.

In *replevin*, the defendant made *conuſance as bailiff of J. S.* for a rent-charge; plaintiff *pleaded in bar*, *that he took the diſtreſs without the privity or command of* J. S. *and that ſuch a day* after *J. S. had firſt notice* of it, *and then diſcovered the taking* aforeſaid. Defendant demurred generally; and *per cur.* the bar is ill; for he *ought to have traverſed the being bailiff*, and was ruled to replead ſo, and to amend his bar, paying coſts, and to go to trial whether bailiff or not. 3 *Lev.* 20.

An appointment of a *bailiff* of a manor.

KNOW all men *by theſe preſents, that I* W. B. *of*, &c. *eſq*; *lord of* D. *in the county of* G. *have made, ordained, deputed and appointed* J. G. *of*, &c. *my* bailiff, *for me and in my name, and to my uſe, to collect and gather, and to aſk, require, demand and receive of all and every my tenants, that have held, enjoyed, or now do, or hereafter ſhall hold or enjoy any meſſuages, lands, or tenements, from, by or under me, within my ſaid manor of* D. *all rents, and arrears of rent, heriots, and other profits, that now are, or hereafter ſhall become payable, due, owing or belonging to me, within the ſaid manor; and in default of payment thereof, to diſtrain for the ſame from time to time, and ſuch diſtreſs or diſtreſſes to impound, detain and keep, until payment be made of the ſaid rent and profits, and the arrears thereof. And I do alſo further impower and authoriſe the ſaid* J. G. *to take care of and inſpect into all and every my meſſuages, lands and woods, within the ſaid manor, and to take an account of all defects, decays, waſtes, ſpoils, treſpaſſes, or other miſdemeanors, committed or permitted within my ſaid manor, or in any meſſuages, lands or woods there; and from time to time, to give me a juſt and true account in writing thereof: And further to act and to do all other things*

that to the office of a bailiff *of the ſaid manor belongs and appertains during my will and pleaſure.* In witneſs, *&c.*

Bailiwick, *(Balliva)* Is not only taken for the county, but ſignifies generally that liberty which is exempted from the ſheriff of the county, over which the lord of the liberty appointeth a *bailiff* with ſuch powers within his precinct, as an under-ſheriff exerciſeth under the ſheriff of the county; ſuch as the bailiff of *Weſtminſter*, &c. *Stat.* 27 *Eliz. c.* 12. *Wood's Inſt.* 206.

Bailment, (from *bailler*, to deliver) Is a delivery of things, whether writings, goods, *&c.* to another, ſometimes to be delivered back to the *bailor*; that is, to him who ſo delivered them; ſometimes to the uſe of the *bailee*, that is, of him to whom they are delivered; and ſometimes alſo to be delivered to a third perſon: This delivery is called a *bailment.* *Cowel.*

1. *Of general bailment; where bailee is anſwerable, and where not.*

2. *Of ſpecial or conditional bailment.*

3. *Pleadings.*

1. *Of general bailment; where bailee is anſwerable, and where not.*

If a man deliver goods to another to be kept, or, which is all one, to be ſafely kept, the bailee undertakes to keep them only from all damages that ariſes from his own negligence; and the undertaking being only to keep them, he ought not to uſe them as though he had an intereſt in them. See hereafter the caſe of *Coggs* and *Barnard* under this title.

So *a fortiori*, if a man delivers goods to another to keep as a man would keep his own; and this is called a ſpecial bailment, in which the bailee doth undertake for no more than for his diligence in the keeping of them, and as no manner of uſe of the thing to him committed, but the naked poſſeſſion only. *Co. Lit.* 89. *a.* 4 *Co.* 83. *b.* *Doct. & Stud.* 129.

If the bailee of certain plate will not deliver it, *detinue* lies; but if he changes it, *trover and converſion* lies. *Arg. Rol. Rep.* 59, 60.

If I lend you my *horſe*, and *he die ſuddenly without* your *default*, you are diſcharged; *per Kirton. Br. Charge, pl.* 2.

In detinue, *goods were bailed at the jeopardy of the plaintiff*, and the *defendant ſhew'd how* W. *had taken the goods. Per Rede*; This is no plea, for the defendant might have action againſt the taker. *Per Keble*; The *bailor ſhall have the action, for he has the property*; and it was touched, that if goods are *robbed* from the bailee, he ſhall not be charged over, but if they are *taken by a treſpaſſor* of whom he may have conuſance, he ſhall be charged, for he has his *remedy over.* But *per Brian*; This is of *a general bailment*, but otherwiſe it is of a bailment at the peril of the bailor, for the bailee ſhall recover no *damages*, for he is not charged over to the bailor. *Br. Bailment, pl.* 8.

If on bailment of *goods for ſafe cuſtody*, the goods for want of cuſtody are *loſt or deſtroyed*, caſe or detinue lies, and bailee ſhall be charged by *ſuper ſe aſſumpſit*; *per Frowike*, Ch. J. *Kelw.* 77.

If *A. leaves a cheſt locked with* B. *to be kept, and takes the key away with him*, and acquainteth not *B.* what is in the cheſt, and the cheſt together with the goods of *B.* are ſtolen away; *B.* ſhall not be charged therewith, becauſe *A.* did not truſt *B.* with them as this caſe is; and that which hath been ſaid before of ſtealing, is to be underſtood alſo of other like accidents; as ſhipwrecks by ſea, fire by lightening, and other like inevitable accidents. And all theſe caſes were reſolved and adjudged in *B. R.* and by theſe diverſities are all the books concerning this point reconciled. *Co. Lit.* 89, *a. b.*

A. delivers money to *B. to diſpatch his buſineſs in the Exchequer*; *B.* does not do it, action of debt lies for it. *Noy, arg.* 72.

If beaſts are bailed to feed the land, and the *bailee kills the beaſts*, a general action of *treſpaſs* lies. 11 *Rep.* 82.

If I deliver 100 *l.* *to* A. *to buy cattle*, and he beſtows 50 *l.* of it in cattle, and I bring an action of debt for all, I ſhall be barred in that action for the money beſtowed and charges, *&c.* but for the reſt I ſhall recover. *Hob.* 207.

If *money is delivered to* A. *to keep generally*, without any conſideration or reward for ſo doing, if *A. is robbed*, he is diſcharged, and the owner ſhall bear the loſs. Ruled upon evidence *per* Ld. *Pemberton*. 2 *Show. pl.* 166.

The naked poſſeſſion of chattles perſonal cannot be aliened, for ſuch alienation, if admitted, would deſtroy the right of the proprietary; and if allowed to be tranſlated or handed about from one to another, by concealment or imbezilment, might be loſt and deſtroyed, and would not be returned as they ought, to the right owners. *Br. Attachment on Aſſiſe*, 20.

If the goods of *A.* are bailed by *B.* to *C. C.* muſt deliver them to *B.* for *C.* cannot pretend to remove or alter that poſſeſſion committed to him, in order to reſtore it to the right owner; for the right of the reſtitution muſt be demanded of him that did the injury, of which *C.* has no pretence to judge; and therefore it would be downright treachery in him to deliver it to any other than him from whom he had it. 1 *Rol. Abr.* 607.

But if *A.* bail goods to *B.* to which *C.* has a right, and *B.* dies, his executors are chargeable only to *C.* that has right, for the executors came to the poſſeſſion by the law, and therefore muſt deliver it to thoſe perſons in whom the law has eſtabliſhed the property; and the taking up of an executorſhip is an engagement to anſwer all debts of the deceaſed, and all undertakings that create a debt, ſo far as there are aſſets, but doth not imbark him in the perſonal truſts of the deceaſed, no more than he is obliged to anſwer for his ſeveral injuries, which no man can tell how they might have been diſcharged or anſwered by the teſtator. 1 *Rol. Abr.* 607.

If *A. bail* goods to *C.* and after *gives his whole right in them to B. B.* can't maintain *detinue* for them againſt *C.* becauſe the ſpecial property that *C.* acquires by the bailment is not thereby transferred to *B. per Holt* Ch. J. 6 *Mod.* 216.

If I bail goods *to deliver on requeſt*, yet I may ſeize them without requeſt. *Arg. Godb.* 403.

By *Manwood*; if goods be delivered to *A.* to pay to *B. A.* may ſell them. 2 *Leo.* 90.

A. lent *B. an horſe to ride from G. to N.* at 4 *s.* for two days; *B. goes out of the road* from *G.* to *N.* yet *A.* cannot take the horſe from *B.* for, for thoſe two days *B.* has a ſpecial property againſt all the world; and *A.*'s remedy for riding out of the road is by *action of the caſe*, but not to *ſeize the horſe*. *Yelv.* 172.

Snow, Mr. *Warner*'s partner, a goldſmith, having loſt 21 *lottery-tickets and a lottery-order* for 50 *l.* immediately upon the loſs of them ſends to the goldſmiths company, and gets a number of printed tickets of the loſs, with the number and deſcription of the ſeveral lottery-tickets and order, which the beadle and ſervants of the company, according to the uſage in ſuch caſes, delivered at all the goldſmiths ſhops in *London*, and ſeveral coffee-houſes in and about the *Royal Exchange*, and at the *Exchequer*, &c. and the next day he put advertiſements in ſeveral publick prints, Gazette, *&c.* Some few days after theſe tickets and order were loſt, one *Samuel Snow*, a broker, but of bad credit and reputation in his buſineſs, brings theſe tickets and the order to the defendant's ſhop, being a goldſmith in *Lombard-Street*, where the ſaid *Samuel Snow* did uſually take up money, upon pawning or leaving lottery-tickets, or other government ſecurities, as a pledge for the money ſo received; but the defendant did never give him credit for any ſum of money, without having ſome pledge in his hands for his ſecurity; and in this way of dealing, they had paid and re-paid 20,000 *l.* in three months time. The defendant *Jenkins* advances to *Samuel*, upon the delivery of theſe tickets and order, a ſum of money near to the value of them. A bill being brought by the plaintiffs for a ſatisfaction for theſe tickets and order; the defendant inſiſts upon the property, they being *payable to bearer*, and that he is a fair purchaſer, and denies expreſs notice that they were loſt by the plaintiff *Snow*, and ſays that he took the tickets and order without examining the number, and only caſt up the ſums and value of them, being left in his hands only as a pledge and by a broker, and that is the uſual way of tranſacting between goldſmiths and brokers, where money is taken up upon ſuch publick ſecurities, which are left with the goldſmith only as a pledge till the money is re-paid. *Per Parker* C. If a perſon will buy lottery-tickets, or any other publick ſecurities payable to bearer or indorſee, with *notice that they were loſt or ſtolen, and that the vendor came to them without a fair conſideration*; this will not veſt a right or property in the buyer. In this caſe, though here is not proof of expreſs notice to the buyer, yet the *printed notice left at his ſhop*, and the ſeveral *advertiſements in the printed papers*, will amount to ſufficient notice ſo as to avoid the purchaſe; and though there is no direct proof of fraud in the defendants, yet here is a very groſs neglect in not examining the tickets and order; and ſince the plaintiff did every thing in his power to retrieve the tickets and order, and it was the defendant's fault and careleſſneſs not to examine them before he bought them, and *Samuel Snow* being a broker and run away, the defendant *Jenkins* ought to make ſatisfaction to the plaintiff, and decreed accordingly, but without coſts. 4 *Vin.* 6, 7. cites M. S. *Rep. Trin.* 4 *Geo.* 1. *in Canc.*

The plaintiff, living in the country, leaves with the defendant, his banker in town, ſome *lottery-tickets and lottery-orders*, for which the *defendant gives him a note, promiſing to be accountable for them on demand.* There was no letter of attorney, or any expreſs authority given to the defendant about them. The *defendant continues to receive the intereſt, and once received* 50 l. *of the principal, which the plaintiff approved of*; but whether this 50 *l.* was by ſale of any of them, or was paid in the courſe of diſcharge by the government, or whether the defendant had any particular authority concerning this 50 *l.* did not appear. The *defendants, without any expreſs authority, ſubſcribed theſe into the S. S. company in the name of the plaintiff, and ſtock for them was made out in the books in the plaintiff's name alſo.* The plaintiff brings his bill for an account and ſatisfaction, *&c.* For the plaintiff the arguments turned upon the defendant's being only a depoſitory to receive the intereſt; that this was the only power that a banker is underſtood to have in ſuch caſes, which are common; and in regard to the 50 *l.* principal, he muſt be ſuppoſed to have had a particular order for that, as it appeared to be a particular tranſaction. As to the lottery-tickets, that he admitted himſelf to be accountable for the loſs that accrued upon them, by an offer he made to pay ſuch loſs or difference; that this was within the old rules of a loſs ariſing from the unauthoriſed act of a depoſitory; and therefore, if it was a new caſe, it was only ſo on the defendant's ſide, and the conſequences would be too extenſive to make a precedent in his favour. For the defendant it was inſiſted, that he had the legal intereſt in theſe things, as bearer, was the plaintiff's truſtee, and therefore is fully indemnified by the S. S. act, which impowers all truſtees to ſubſcribe; that his poſſeſſion of theſe things imply'd a power to diſcharge or diſpoſe of them. The law infers ſuch a power from the leaving a bond in the hands of a ſcrivener, who was agent in lending the money: he may receive it, and on payment deliver up the bond, without any expreſs authority. The caſe of *Parry* and *Stokes* lately decreed, was much ſtronger: The defendant there gave a note to transfer 150 *l.* Bank annuities to the plaintiff on demand; but when the plaintiff demands them, he ſays he has ſubſcribed them. There the only queſtion was, whether they were indeed ſubſcribed, being in the defendant's own name; but if they were ſubſcribed, it was agreed the plaintiff would be bound by it. Here the ſubſcription is in the name of the plaintiff. The laſt act deſigned to give validity, and cure all defects in the ſubſcriptions. In this caſe the company don't want its aſſiſtance, in regard to them; the ſubſcription is certainly valid, and therefore, if private perſons are bound, as to the company, the act has certainly concluded all queſtions between themſelves; for the ſame ſubſcriptions

cannot be valid in regard to one, and void as to another. But if this caſe is not within any of the acts, if the defendant is not a truſtee, but only an agent or factor, or any thing elſe, yet he is unattended with any of thoſe circumſtances which ſhould induce a court of equity to charge him with the loſs. He has been guilty of no fraud, and had good reaſon to juſtify his miſtake. The legiſlature recommended theſe ſubſcriptions; it was the opinion of moſt men, that they would be advantageous. The court ſhould take notice of the hurry people were then in. The defendant acted as well for the plaintiff as he did for himſelf; he could have no advantage from this ſubſcription, becauſe it was in the plaintiff's name. The plaintiff might have received benefit from it, ſince he proved it bore a premium: there was therefore no reaſon to charge the defendant. *Per* Maſter of the Rolls, This caſe ariſes upon the conſtruction of ſeveral acts of parliament; the S. S. act, and the ſubſcription acts, that were made to confirm and ſupply what was done upon it. He ſeemed to expreſs ſome doubts concerning the equity of thoſe acts, and enlarged much upon the conſtruction of ſome parts of them out of this caſe; but he ſaid, that every one that ſits in this court ſhould act according to law; that he ſat there *jus dicere, non dare.* This was agreeable to the rule of judging *ſecundum diſcretionem boni viri*; for *Vir bonus eſt quis? Qui conſulta patrum, qui leges juraq; ſervat.* That this caſe is not at all accompany'd with any impoſition or fraud, or deſign of profit to the defendant. The two ſorts of ſecurity depoſited, ſhould receive a diſtinct conſideration. As to the lottery-tickets, the defendants are plainly truſtees; but I don't think in all caſes, where a thing is payable to bearer, the bearer will have the legal property; as where a ticket is ſtolen: and yet in ſuch caſe, if ſuch ticket was ſubſcribed, the company would have good right from the bearer: here plainly the defendants were truſtees by being bearers, becauſe, by having the ſecurities, they had a power to receive the principal, which alſo the owner muſt know. I think this is a ſtronger caſe than that of a ſcrivener; for if he is enabled to diſcharge the debt by only having a cuſtody of the bond, without any legal property, *a fortiori* here, where the defendant is truſted with the legal property: But if the ſcrivener does deliver up the bond without payment of the money, that will not diſcharge even the debtor, but he will continue ſtill liable for the debt. The defendant's offer ſhall not bind him; for he would always ſtick to Ld. *Cowper*'s rule, that no offer ſhould prejudice the perſon offering. As to the caſe of Mr. *Lutwich* put of a perſon intruſted to deliver over a thing to another, he is in no ſenſe a truſtee, but a meer porter or carrier; he can receive nothing, and yet even this perſon would be a truſtee in regard to the S. S. company, but not ſo as to be himſelf indemnified for a ſubſcription; but he thought there was no caſe of a real truſtee that was not within the act. 'Tis plain the legiſlature intended to take in all ſorts of truſts whatſoever; if a man was anyways intruſted, tho' not a formal truſtee, he had a power to ſubſcribe; even creditors are bound by the ſubſcription of executors, which is the hardeſt caſe. And yet, tho' the defendants are truſtees, if there had been any fraud, any advantage to themſelves, I would charge them, tho' their ſubſcriptions would be valid as to the company. The courſe of dealing in theſe caſes is very well known; the hurry was very great, the defendants thought they were acting for the benefit of the plaintiff, and for a ſmall time it was for his benefit; he might have ſold them (contracted for them) at a premium. The ſecond point concerning the lottery-orders is not ſo clear to be a truſt, nor do I think I need declare any opinion whether it was a truſt or not; ſo far it reſembles a truſt, becauſe the defendants plainly had a power over the principal and intereſt, and that by the delivery of the party himſelf; he has made uſe of that power, as to the principal, by receiving the 50*l.* The aſſignment of theſe orders is with a blank. The bearer has a power to fill up that blank. The defendants had a power to make themſelves truſtees, by filling it up to themſelves, and then they would have been good truſtees in the ſenſe of the act. But tho' he had the power to make himſelf a truſtee, he has not made himſelf one; but the form of a truſtee ſeems not to be conſidered by the act, but whether the perſon was in any ſenſe intruſted. Upon the late act, I will not ſay how it will be where the company have got poſſeſſion of orders without the act of the proprietor, or any authority from him, expreſs or implied, that is a queſtion of right: but ſuppoſe here this ſubſcription is a void ſubſcription, and not within the proviſo of the late act, can the plaintiff make the defendants ſtand in the place of the S. S. company, and make that ſatisfaction which the company ought to make, without making the company parties? I think the defendant ſhould not be charged. If he has done wrong, it is without any ingredient of fraud to bring it into this court, and therefore, as a tort, ſhould be proſecuted at law. What can this court decree for a tort? Can they decree that the defendant ſhall pay to the plaintiff the intereſt of theſe annuities, till the government would have redeemed them? and ſhould we decree the payment of a certain ſum, this would be directly to decree damages for a tort, and ſuch an invaſion upon the Common law, as I hope never to ſee in this court. If this act has authenticated this ſubſcription as to the company, it has alſo as to the proprietor. Bill diſmiſſed *per Jekyll*, Maſter of the Rolls. 4 *Vin.* 7, 8, 9. cites *MS. Rep. Paſch.* 8 *Geo.* 1.

Securities were delivered by A. to B. in order that B. ſhould advance a ſum of *money upon them* the next day; but *no money was* then *advanced.* The queſtion was, whether *B.* can keep theſe ſecurities, ſo delivered to him for this particular purpoſe, in order to have a ſatisfaction for a precedent debt due to him from *A. Per* Ld. C. *Macclesfield, B.* ought not to *retain theſe ſecurities in ſatisfaction of a precedent debt* due to him from *A.* ſince they were delivered to him for another purpoſe, *viz.* as a pledge or ſecurity for another ſum of money, intended and propoſed to be advanced and lent to him; and ſince *B.* did not advance the money according to the agreement, he ought to return the pledge upon demand; and ſince he has not complied with his part of the agreement, he ſhall not retain the ſecurities which he got into his hands by ſuch a pretence and artifice, to ſecure to himſelf a ſatisfaction for a precedent debt; and gave coſts againſt the defendant. 4 *Vin.* 9. cites *MS. Rep. Trin.* 8 *Geo.* 1.

Plaintiff brought *trover* againſt defendant *for a diamond ear-ring, and other jewels*, to which the defendant pleaded Not guilty. Upon ſpecial verdict the caſe was, that plaintiff being *owner of the goods* mentioned in the declaration on the 12th of *January* 1729, *lodged them, for ſafe cuſtody only, in the hands of* Seymour *the goldſmith, incloſed in a paper and bags, and took the receipt following*; 12 *Jan. Received of Sir* John Hartop *the following jewels*, [mentioning them all] *which are ſealed up in a bag; which bag ſealed up, I promiſe to take care of for him.*" That afterwards *Seymour broke open the ſeals*, and carried the jewels to defendant's ſhop, which is an open ſhop in *London*, as a banker; that *Seymour borrowed of defendant* 300*l. upon the pledge of the jewels*, and gave him his note for that ſum. No authority is found from the plaintiff to ſell them; but he demanded them of the defendant, who, not being paid his money, refuſed to deliver them. *Seymour* was in poſſeſſion of the jewels till he pledged them as aforeſaid, which was in the year 1736. *Seymour* afterwards became a bankrupt; (but that is not material to the preſent queſtion.) The value of the jewels is found to be 750*l.* After ſeveral arguments, the Ch. J. pronounced the reſolution of the court. The general queſtion upon this ſpecial verdict is, whether, by any facts found, the plaintiff is barred from having the goods delivered to him, or from having ſatisfaction; and firſt, it is to be conſidered in what relation *Seymour* ſtands with reſpect to the plaintiff; 2dly, whether any thing that is found, diveſted the property of theſe diamonds from the plaintiff. As to the firſt delivery to *Seymour*, it was nothing more than a naked bailment for the uſe of the bailor, lodged there for ſafe cuſtody only. *Holt* Ch. J. calls it a depoſiting, *Southcote*'s caſe, 4 *Co.* in ſome reſpect the bailee has a property to keep, for the uſe of the bailor only. That upon *Seymour*'s breaking the ſeal, he was a treſpaſſor to the plaintiff, and that treſpaſs would lie againſt him; cites *Moor* 248. and *Salk.* 655.

The

The opinion of *Trevor* Ch. J. The ſecond conſideration is, how far the plaintiff is affected by any thing done by *Seymour*; whether his property is diveſted by any thing that is found. *Seymour* had the poſſeſſion originally by right, but by breaking the ſeal he became a treſpaſſor, and from thence a poſſeſſor of the goods by wrong. It is objected, that the defendant was not privy to *Seymour*'s wrong; that he lent his money innocently, and therefore, as is objected, more reaſonable the loſs ſhould fall on the plaintiff than defendant; and for this was cited *Salk.* 289. But that is not this caſe; the jewels here were ſealed up with the plaintiff's own ſeal, which reſembles the locking a box, and taking away the key. 1 *Inſt.* 19. There is no fault in the plaintiff. Then to conſider what is the law touching ſales in open ſhops; that ſales in open ſhops do not alter the property of a ſtranger, as ſales in market-overt or fairs. *Moor* 625. That a cuſtom of *London* pleaded, that every freeman might buy all manner of wares in every ſhop in *London*, is too general; for then a ſcrivener might buy plate in his ſhop, and the like, which is unreaſonable. *Cro. Jac.* 69. *Bacon*'s *Uſe of the Law* 80. 5 *H.* 7. 15. By theſe caſes it appears, that the true owner never loſt the property of his goods by ſale, unleſs in a market-overt. For the defendant it was inſiſted, that if a perſon who loſt money with the plaintiff at play, and gave him for payment a goldſmith's note, the goldſmith ſhall not be obliged to pay this note, the plaintiff being a perſon within the meaning of the gaming act. This is true; but if the plaintiff had negociated this note to a third perſon, then the caſe would have been between two perſons, ſtrangers to the proviſions of the gaming acts, and ſo thoſe acts would not take place, as between acceptor and aſſignee of the note. *Carth.* 357. *Salk.* 344. So where a bank-bill, payable to *A.* or bearer, and *A.* loſes the note, and the ſtranger who found it transfers it, for valuable conſideration, to *C.* the money being paid to bearer, diſcharges the drawer; for 'tis the very terms of the note, and by courſe of trade, the notes are looked upon as change of money for money; but there is no ſuch courſe of trade with reſpect to goods: The property does not follow the poſſeſſion, unleſs in caſes where the owner has no mark to know his own again, as in money. *Cro. Eliz.* 746. *Higgs* and *Holiday*. *Salk.* 283. *Ford* and *Hopkins*. In the preſent caſe, the owner never gave any power to ſell or diſpoſe of them, and poſſeſſion merely does not change the ownerſhip of goods, tho' it does of money. If bill or note is made payable to *A.* or bearer, if no indorſement, the vendee is without remedy againſt vendor; for theſe notes are look'd upon as lodging money for money. The next matter for conſideration is is, whether the place where the pawn is made will intitle the defendant to retain theſe jewels. On the finding, it is inſiſted, that ſales in open ſhops are the ſame as ſales in markets-overt: but by this ſpecial verdict no cuſtom is found, and unleſs it was found, rhe court cannot take notice of ſuch a cuſtom; as was determined in the caſe of *Argyle* and *Hunt*, in this court, *Trin.* 5 *Geo.* 1. where a libel in the ſpiritual court, for calling a woman *whore*, and after ſentence, applied for a prohibition, yet denied; for that the court would not take notice of the cuſtom of *London*, where 'tis actionable to call a woman a whore. *Carth.* 75. Then 'tis objected, that upon the finding of the jury, the cuſtom is to be certified. *Hob.* 86. *Cro.* 516. *Cro. Jac.* 69. But this caſe is not within the cuſtom, as ſales in market-overt; for pawns, as this is, and ſales, are quite different; and a cuſtom which extends to ſales in market-overt will not include pawns or pledges; and for that purpoſe 35 *H.* 6. *fo.* 25. is in point, where 'tis expreſsly ſaid, that the cuſtom extends to a ſale, and not to a pawn. There is no inſtance where this caſe has been allowed, with reſpect to pawns. 4 *Vin.* 9, 10, 11. cites *MS. Rep. Eaſt.* 1743. *in B. R.*

2. *Of ſpecial or conditional bailment.*

If *A.* puts his beaſts into *B.*'s paſture, on agreement to pay *B.* 6 *d. per* week for the paſturage, *B.* cannot retain the beaſts of *A.* until he hath paid him the money, unleſs this were at firſt provided by their agreement; but the only remedy that *B.* has, is upon the contract. *Cro. Car.* 271. 2 *Rol. Abr.* 92.

But if a horſe be committed to an Hoſtler, he ſhall detain him till he is paid for his meat. 2 *Rol. Abr.* 85.

So if cloth be committed to a taylor to make up into a garment, he ſhall detain the cloth until he is ſatisfied for his labour. *Cro. Car.* 271. 8 *Co.* 147.

A taylor hath cloth delivered to him to make up into a garment, which he doth accordingly; he ſhall have an action for his work, without delivering the garment; and if the taylor refuſe to deliver the garment upon requeſt, it ought to be ſhewn on the other ſide in excuſe of the action; for the taylor's action is founded upon the promiſe, and if he hath done the work and is ready to deliver the garment, he hath performed all that the law requires on his part, and on that conſideration is intitled to the benefit of the defendant's promiſe. *Palm.* 223, 224.

Detinue *againſt baron and feme*, and *counted of bailment of ſheep to the feme before the coverture*, by which the *defendant ſaid, that after he took the feme to wife, and the ſheep were bailed to him to compeſter the land, by which he commanded him to take his cattle, and he would not, wherefore the defendant took the cattle in the land, damage-feaſant*; and demanded judgment, if of ſuch taking, &c. and the opinion of *Thorpe* was, that it is a good diſcharge of the bailment, without other poſſeſſion in the plaintiff again, by which the plaintiff traverſed the commandment; *quod nota*. *Br. Detinue de Biens, pl.* 13.

Where *I bail* 10 l. *to J. N. to deliver to P.* and *J. N.* offers it, and *P. refuſes*, *I* ſhall have debt againſt *J. N.* for he ſhall not retain the 10 *l.* for the refuſal of *P.* where there is no default in me. *Br. Conditions, pl.* 53.

If a feme covert bails goods to a man, and after ſhe takes him to baron, and he dies, the feme ſhall not have action of bailment; for the bailment was diſcharged by the intermarriage, but ſhe may declare upon trover; *quod nota*; *per Fineux*. *Br. Bailment, pl.* 6.

If a man lends another his ſheep, oxen, or his cart, the borrower hath a qualified property in them, according to the purpoſes for which they were borrowed; and by force of this loan they may be uſed reaſonably for theſe purpoſes and for the time agreed on; and if they periſh in ſuch occupation, it is at the peril of the lender; but if they periſh in any other manner, the borrower muſt anſwer for them. *Doct. & Stud.* 129.

If *A.* borrows a horſe to ride to *Dover*, and he rides out of his way, and the owner of the horſe meets him, he cannot take the horſe from him; for *A.* has a ſpecial property in the horſe till the journey is determined; and being in lawful poſſeſſion of the horſe, the owner cannot violently ſeize and take it away, for the continuance of all property is to be taken from the form of the original bargain, which in this caſe was limited till the appointed journey was finiſhed. *Yelv.* 172.

But if *A.* borrows a horſe to go to *Dover*, and goes to other places, the owner may have an action on the caſe againſt him for exceeding the purpoſes of the loan; for ſo far it is a ſecret and fallacious abuſe of his property; but no general action of treſpaſs, becauſe it is not an open and violent invaſion of it. 1 *Rol. Rep.* 128.

If a man lend another his ſheep to ſtock his land, the borrower hath the bare uſe of them; but if he kill them, the owner ſhall have a general action of treſpaſs, or an action of trover at his election; for though the uſe is in the borrower, yet the property is in the lender, and the killing of the ſheep is an open violation of another's property, which is complained of in the general action of treſpaſs. *Co. Lit.* 57. 5 *Co.* 15. 1 *Lev.* 87, 88. *Cro. Eliz.* 784. 15 *Ed.* 4. 84. *Mo.* 248. *Godb.* 66, 67. *Owen* 52. *Dyer* 121. *pl.* 17.

If I ſell you a horſe for 20 *s.* I ſhall retain him, unleſs the money be actually, or conditioned to be paid at a future day, for unleſs there be *quid pro quo*, the property is not altered. 5 *Ed.* 4. 2. 6.

As to borrowing a thing periſhable, as corn, wine, money, or the like, a man muſt, from the nature of the thing, have an abſolute property in them; otherwiſe it could not ſupply the uſes for which it was lent, and therefore he is obliged to return ſomething of the ſame ſort, the

B A I

the ſame in quantity and quality with what is borrowed. *Dr. & Stud.* 129.

It is held by ſome, that if *A.* commits goods to *B.* to be kept, or, which is all one, to be ſafely kept, and they are ſtolen, that *B.* muſt anſwer the value of them to *A.* Others have made a diſtinction, that if *B.* had undertaken for a price to keep them, that then he ſhould have been bound to anſwer for them if they had been ſtolen; becauſe there is a conſideration to found the promiſe; but where no reward is agreed on, there they ſay there can be no conſideration on which the promiſe is built, and therefore a naked promiſe which affords no action; but the reaſons urged againſt this are, that where another loſes by an undertaking, I am equally bound to make good the value of my promiſe, as if I myſelf was to receive gain by the bargain; for ſince another's man's property, and poſſibly the whole fruits of a long and painful induſtry, is loſt and waſted by my undertaking to ſecure it, certainly I, from whom the damage aroſe, ought to make him ſatisfaction; for every man is preſumed to guard his own, and not eaſily to part with that which cannot be acquired without great difficulty; and therefore it muſt be preſumed, that he would have ſafely kept it, and not have committed it to me, unleſs I had undertaken to ſecure it; and if I fail in that undertaking, I am bound to a reſtitution; for I am equally obliged to a reſtitution, where another man ſuffers an injury by my means, as where I myſelf commit an injury; and had the law any other courſe in theſe caſes, it were a perfect inlet into all colluſion; for agreements and contrivances might ariſe between the men of violence and ſuch treacherous undertakers, as are not eaſy to be diſcovered. 4 *Co.* 83. *Dr. & Stud.* 129. *See the caſe of* Coggs *and* Barnard, *at the end of this diviſion.*

If a carrier, ferryman, or hoſtler be robbed, he ſhall anſwer the value of the goods; for the carrier hath his hire, which implies an undertaking for the ſafe cuſtody and delivery of them; for no man would give another money for ſecuring his own, if the party that received it were not to undertake on his part to ſecure it. 8 *Co.* 84. *Co. Lit.* 89. 1 *Sid.* 36. *Palm.* 523. 1 *Rol. Abr.* 124. 2 *Rol. Abr.* 367. 1 *Rol. Rep.* 79. *Hob.* 17, 18. *Cro. Jac.* 162, 330.

If *A.* delivers goods to *B.* to be delivered over to *C.* *C.* hath the property, and *C.* hath the action againſt *B.* for *B.* undertakes for the ſafe delivery to *C.* and hath no property or intereſt but in order to that purpoſe. 1 *Rol. Abr.* 606.

But if the bailment were not on valuable conſideration, the delivery is uncountermandable; and in that caſe, if *A.* the bailor bring trover, he reduces the property again in himſelf, for the action amounts to a countermand of the gift; but if the delivery was on a valuable conſideration, then *A.* cannot have trover, becauſe the property is altered, and in trover the property muſt be proved in the plaintiff. 1 *Bulſt.* 68.

If a man delivers goods to another, the bailee ſhall have a general action of treſpaſs againſt a ſtranger, becauſe he is anſwerable over to the bailor; for a man ought not to be charged with an injury to another, without being able to retire to the original cauſe of that injury, and in amends there to do himſelf right. 13 *Co.* 69. 14 *Hen.* 4. 28. 25 *H.* 7. 14.

If I deliver goods to *B.* and *C.* that hath right demands them of him, if *B.* either before or pending the action deliver over the goods to me, this is a good bar to the action of *C.* brought againſt *B.* for ſince *B.* hath undertaken to deliver the goods back to me, he ſhall not be chargeable for the honeſt performance of that undertaking; for *B.* that is truſted with my poſſeſſion, ſhall not remove nor alter my poſſeſſion, and therefore ſhall not be put to anſwer for that to which the law obliges him. *F. N. B.* 137. 1 *Rol. Abr.* 607.

But if I find goods and convert them, and another recover them from me, yet a ſtranger that has right ſhall have his action againſt me, and therefore two perſons claiming in trover ſhall interplead with each other; for I have by my finding the property in me till another ſhews a better right; now this property continues till the real owner appears; and if I by weak defences do not ſupport that property, that ſhall be no injury to the right of another; for the original injury begins from me, by undertaking to intermeddle with what is another's, and which I was ſure was none of my own. 1 *Rol. Abr.* 607.

If a bailee deliver the goods to another, there he ſhall have an action of detinue againſt him, becauſe he hath his poſſeſſion, and undertakes for the cuſtody; and the original bailor may have his action againſt either of them, becauſe in him is the property which both are bound to anſwer to him. 1 *Rol. Abr.* 607.

B. ſells the goods in market-overt, yet at the day bailor may ſeize the goods, becauſe the property of the goods was always in him, and not altered by the ſale in market-overt. *Godb.* 160.

A. indebted in 100*l.* to *B.* delivers goods to *C.* amounting to the value of the debt, *to ſatisfy* B. *the ſaid* 100 l. *with the goods in his hands*; *B.* has an intereſt and property in the goods. *Yelv.* 164.

A. delivers 20*l.* to *B. to the uſe of C.* a woman, *to be delivered her the day of her marriage.* Before her marriage *A.* countermands it, and calls home the money. *C.* ſhall not be aided in Chancery, becauſe there is no conſideration why ſhe ſhould have it. *Cary's Rep.* 12.

If goods be bailed to bail over on a *conſideration precedent, on his part, to whom they ought to be bailed*, the bailor can't *countermand* it; otherwiſe where 'tis *voluntary*, and without conſideration. But where *'tis in conſideration of a debt*, it is not countermandable; otherwiſe if it be *to ſatisfy the debt of another*; *per Egerton.* 1 *Leon.* 30. *pl.* 36.

If a man lend or hire his horſe, and for want of ſafe keeping he die, the other hath an action on the caſe for to repair the damage ſuſtained by the negligence; ſo if a man lend another ſheep to tath his land, and by negligence of the borrower they are drowned, an action on the caſe lies; for if a man lend another a horſe, and he put him into a ſtable that is ruinous, and the ſtable tumbles in upon the horſe and kills him, an action on the caſe lies; but if the ſtable had been ſtrong and ſubſtantial, and had fallen by violent tempeſt, then is the borrower excuſed; ſo if a man lend another a horſe, and he dies of divers diſeaſes, the borrower is excuſed. 5 *Co.* 14. *Cro. Eliz.* 777, 784. *Owen* 52. *Dyer* 121. *Godb.* 72. *Dr. & Stud.* 128.

If *A.* take a gelding to paſture, and the gelding be ſtolen, no action lies againſt *A.* unleſs he had made a ſpecial *aſſumpſit* to deliver him; for the undertaking of *A.* is to feed the gelding in the fields and in the open air, and not to keep ſafely as the hoſtler is obliged to do in his ſtable; and the law will not ſtretch men's promiſes beyond their firſt undertaking. *Moor* 543.

If a man find goods and abuſe them, or if he find ſheep and kill them, this is a converſion; but if a man find butter, and by his negligent keeping it putrifies; or if a man finds garments, and by negligent keeping they are moth-eaten, no action lies; ſo it is if a man finds goods and loſes them again; and the reaſon of the difference is this, for where a man delivers goods to another, the bailee by acceptance of the goods undertakes for the ſafe cuſtody of them; and it is to be preſumed that the owner would not have parted with them but under the confidence of that ſecurity; but where a man only finds the goods of another, the owner did not part with them under the caution of any truſt or engagement; nor did the finder receive them into his poſſeſſion under any obligation; and therefore the law only prohibits a man in this caſe from making an unjuſt profit of what is another's, but the finder is not obliged to preſerve thoſe goods ſafer than the owner himſelf did; for there is no reaſon for the law to lay ſuch a duty on the finder in behalf of the careleſs owner; for it ſeems too rigorous to extend the charity of the finder beyond the diligence of the proprietor; it is therefore a good mean to puniſh an injurious act, *viz.* the converſion of the goods to his own uſe, but not to puniſh a negligence in him that is much greater in the ownerſhip. 1 *Leon.* 123, 223. *Owen* 141. 2 *Bulſt.* 21.

A carrier is bound to the ſafe delivery of a box, though he doth not know what is in the box, unleſs he refuſes

to carry it without he be inſtructed in the particulars, for the party is not obliged to tell him. *Allen* 93.

In an *aſſumpſit*, the caſe was this; the defendant did undertake to remove a quantity of brandy from *Brook's-Market* to *Water-Lane*, and by reaſon of his neglect one of the caſks broke; and on Not guilty, a verdict was for the plaintiff; and in arreſt of judgment two exceptions were taken: 1ſt, Becauſe in the declaration he was not alledged to be a common porter. 2dly, Becauſe it was not averred that he had a reward.

But the whole court reſolved, that in this caſe the plaintiff ought to have his judgment.

Holt, Ch. J. his argument was to this purpoſe.

There are ſix ſeveral ſorts of bailments, which lay a care and obligation upon the party to whom the goods are bailed.

The firſt is a bare and naked bailment to another, to keep for the uſe of the bailor, which is called *depoſitum*.

2. A delivery of goods to another which are in themſelves uſeful to keep, and theſe are to be reſtored again in ſpecie, which is called *accommodatum*.

3. A delivery of goods for hire, which is called *locatio* or *conductio*.

4. A delivery by way of pledge, which is called *vadium*.

5. A delivery of goods to be carried for a reward.

6. Such a delivery as here in the caſe at bar, where the goods are delivered to do ſome act about them, as the carrying, and without a reward, which is called *mandatum*, by *Bracton*, *lib.* 3. 100. in *Engliſh*, an acting by commiſſion.

And though I do not think all theſe immediately neceſſary to the caſe in queſtion, yet the explanation of them will make the caſe clearer.

Then as to the firſt, if a perſon out of kindneſs keeps the goods of another, he ſhall not be anſwerable if they be ſtolen, without there be a particular default in him: and 2dly, ſuch a bailee is not chargeable for a common neglect, for it muſt be a groſs neglect for which he ſhall be liable. I muſt confeſs I have a great authority to encounter, which is *Southcott's* caſe, 4 *Rep.* 83. *b.* howſoever my Lord *Coke* in his Report goes farther than the caſe itſelf, for he there makes a difference between keeping generally, and ſafe keeping; which in the caſe itſelf is not mentioned, but in his note at the end of it; and I cannot think it to be juſtice to charge the bailee if the goods be loſt without any default of his; for why ſhould he anſwer for the wrongs of other people againſt whom he undertook not?

There never was before *Southcott's* caſe, any ſolemn determination of this matter; the firſt caſe of it was 20 *Aſſ. pl.* 28. 8 *Ed.* 2. *Fitz. Detinue* 59. both quoted in *Southcott's* caſe; but I cannot agree to the reaſons of thoſe caſes; for the neglect of the party may be as great where goods are locked up in a cheſt, as where not, and by that reaſon ought to be chargeable as much in the one caſe as in the other; and the 4 *Ed.* 4. is only a debate of two council at the bar, for ——— was not then Ch. J. and what he ſaid was only for his client, and not of authority; and the 3 *H.* 7. is only a ſudden opinion; now *Southcott's* caſe came long after, *viz.* 43 *Eliz.* and there two judges in the abſence of the other two gave that opinion, which cauſe was improved by my Lord *Coke*; but it has been the conſtant practice for as long as I knew the court, that in all the trials at the *Guildhall*, where upon evidence no default appeared in the bailee, to direct for the defendant; nor did ever any one venture, upon the authority of *Southcott's* caſe, to find the matter ſpecially; I take it that this bailee is ſo far from being charged, that though the goods be loſt by a common neglect he ſhall not be anſwerable; as if he negligently keep his own goods, and that his own and his friend's goods are loſt; now the loſs of his own is an argument of his ſincerity, and therefore he ſhall not be chargeable; this is in *Bracton* 99. and though this is an antient author, yet it is agreeable to reaſon, and is not in this point only the law of *England*, but of foreign countries, as may be ſeen in *Juſtinian's Inſt.* where I believe *Bracton* got his notion; now if there be an apparent groſs neglect, it is looked upon to be a fraud; but otherwiſe, if it be not a groſs neglect; and I know no reaſon why the bailee, upon taking goods, if it were in writing, ſhall not be charged againſt the wrong of a third perſon, as in *Hob.* 34. 2 *Cro.* 425. and 3 *Cro.* 514. and yet without writing, as in *Southcott's* caſe, to be charged, and the *Doctor and Student* 123, 112. ſays, it is for the advantage of the bailee, and that an action does not lie unleſs they be loſt through negligent keeping; ſo that I do not find ſufficient reaſon nor authority to ſupport the opinion of *Southcott's* caſe.

2. A lending *gratis* to uſe for his advantage; there the borrower is ſtrictly bound to keep it, for if he be guilty of the leaſt neglect he ſhall be anſwerable; as if I lend a horſe to go to the *North* of *England*, and he goes to the *Weſt*, and the horſe is ſtolen, he ſhall in that caſe be chargeable; for if he had gone as I directed, the horſe, perhaps, would not have been ſtolen; this ſort of bailment is mentioned in *Bracton* 99. but in this caſe, if this horſe had been in the ſtable of the bailee, and ſtolen thence without his default, as perhaps the thieves might firſt have bound the bailee, and then have taken the horſe, he ſhall not be anſwerable; but if he left the ſtable door open, he ſhall for that neglect be anſwerable; *Bracton* ſays he ought to take the utmoſt care, but in no place ſays he ſhall be charged where no default was in him.

3. As to the third bailment, where goods are hired out for a reward, *Bracton* 62. ſays, the hirer is to take all imaginable care, and to reſtore them at the time, and he is bound to ſuch a care as a diligent maſter of a family uſeth to his family, which care if he ſo uſeth, he ſhall not be bound; now the moſt diligent man is liable to be robbed, and therefore I collect, that if he be ſo careful as according to *Bracton's* definition, and be robbed, he ſhall not be liable.

4. If goods be pawned, the pawnee has a ſpecial property, which is in nature of a ſecurity to compel the pawner to pay; and if the goods be the worſe for uſing, the pawnee muſt not uſe them; as clothes, *&c.* but if they be not the worſe for uſing, he may uſe them at his peril; as jewels pawned to a lady, and ſhe keeps them in a box, and they are ſtolen, ſhe ſhall not be charged; but if ſhe goes abroad with them to a play, and there they are ſtolen, ſhe ſhall be anſwerable. 2dly, If the pawnbroker be at charge in keeping of them, as if it were a horſe, and he gives it meat, he may uſe it for his reaſonable charge he has been at. *Bracton* 99. If a creditor takes a pawn, he is bound to reſtore it upon payment; but if he, notwithſtanding all his diligence, loſe it, he ſhall howſoever recover his debt, 29 *Aſſ. pl.* 28. for the law does not lay upon him an obligation to keep againſt all accidents; but if the money be tendred, and he after detains, and then it is loſt, he ſhall then be liable, for he is then a wrong-doer, and his keeping it after is the occaſion of its being ſtolen, and he is then anſwerable at all events.

5. Goods to be carried for a reward. 1. If you deliver them to a publick or common carrier, and they are ſtolen, he muſt be liable, for the law charges him at all events; but yet the act of God, or the enemies of the Queen, may excuſe: and this is a political inſtitution by the laws of *England*, that people may be ſafe in their dealing; for otherwiſe carriers, that are frequently truſted with things of greateſt value, would be often tempted to confederate with thieves. 2dly, But he who has a particular private employment, though he has a reward, yet he is not bound againſt all events, as a factor or a bailiff, if they do to the beſt of their power; and that is *Southcott's* caſe, and he is bound no otherwiſe than as his maſter himſelf ſhould do; for it were unjuſt to charge him with what he cannot prevent.

6. To this point; here is a man not entruſted to keep, but to carry, and not to have any thing for his pains, and through his negligence miſcarries; though he be to have nothing, yet it appears there was a neglect, and for that reaſon he is chargeable; but if the goods had been miſuſed by a third perſon in the way as he carried them, and without any neglect of his, I hold that he would not then be liable, becauſe he had nothing for a reward; in *Bracton*, *lib.* 3. 100. this is called *mandatum*, and ariſeth upon the *emendatio*, in *Engliſh*, acting by commiſſion; and if he thro' his negligence ſuffers the goods to be damaged, he is liable. *Vivian's* comment upon *Juſt. Inſt.* 684. *Mandatum*

datum is there defined to be a contract, whereby any thing is committed *gratis* to be done for another; and with this agrees *Bracton*; and though this word be not uſed in any other book of the law, and this be an old authority, yet in this point he is ſupported by reaſon; and upon the whole, I am of opinion, that the defendant in this caſe is liable, for it is a deceit to the plaintiff his being negligent; for it is upon the confidence of his carefulneſs that the plaintiff intruſted him; and in *Godb.* 64. and 2 *H.* 7. for the negligent keeping of ſheep, *&c.* an action lay, for there is a conſideration, *viz.* the truſting, though no money be paid; and here he becomes chargeable by the miſchief he has done. 29 *H.* 6. 49. 33 *H.* 6. 34. 11 *H.* 4. 33. By theſe caſes, though a man promiſes to build an houſe for another, he ſhall not be bound, being *nudum pactum*; yet I doubt not, but if he had once gone about the building it, and he do it ſo ill that it falls, an action would lie; and in *Yelv.* 4. the plaintiff declared, that in conſideration that he delivered to the defendant twenty quarters of corn, the defendant aſſumed upon requeſt to deliver the corn again to the plaintiff; and it was there held, that the action lay; but this judgment was after reverſed in the *Exchequer-Chamber*; and contrary to it is a caſe in *Yelv.* 128. but in the ſame book 50. is the caſe *fol.* 4. of *Biggs* and *Riches*, confirmed and allowed good law; and there *Gaudy* and the court held it a bad reverſal, and contrary to that reverſal ſolemnly adjudged in 2 *Cro.* 667. Now if a truſt be once undertaken, and is a ſufficient undertaking, that is a ſufficient conſideration; the caſes in the *Regiſter* 110. are full in point, for there the very precedent is *quod* (the defendant) *tam negligenter, &c. carriavit quod papa illa confracta fuit*, without any mention of a reward, or that he was a common carrier; though in latter days for the greater caution they inſert theſe words, *pro quadam mercede*, ſo that he that is intruſted by commiſſion, if he enters upon the employment, and after any loſs accrueth to the owner through his neglect, he is liable tho' he receive no reward; but if any loſs accrues to the owner, not through any neglect of his, tho' he receive a reward as a factor, *&c.* yet ſhall not he be liable: ſo that upon this whole matter, I am of opinion, judgment ought to be given for the plaintiff. 1 *New Abr.* 243. *Trin.* 2 *Ann. in B. R.* Coggs *v.* Barnard. *Comyn* 133. *S. C.* 2 *Ld. Raym.* 909. *S. C.*

3. *Pleadings.*

Detinue in London upon bailment made by the plaintiff to the defendant, *&c. he ſaid that he bailed it* to him *in another county, in pledge, &c.* and no plea, *per Finch*, if he *does not traverſe the bailment in the firſt county*; and after they were at iſſue, if it was bailed in pledge or not, and the viſne was where the receipt in pledge is ſuppoſed. *Br. Traverſe per, &c. pl.* 41.

Detinue of certain charters. The *plaintiff counted of bailment* by him to the *defendant*, who *ſaid that he found the deeds by fortune in his houſe, and J. N. had brought the like writ againſt him to return them now*, and pray'd that they interplead, *abſque hoc* that the plaintiff bailed to the defendant as here; and a good plea, *per Martin*, and the bailment traverſable as here; for if he confeſſes bailment, then he charges himſelf to the plaintiff, and to the ſaid *J. N.* alſo; *quod nota*; for it was not contradicted. *Br. Traverſe per, &c. pl.* 60.

Detinue, *ſuppoſing the bailment to the defendant at B. in the county of N. to rebail, &c.* The *defendant ſaid*, that the ſame day and year, *at B. in the county of B. the plaintiff bought the goods of the defendant for* 10 l. *upon condition, that if he did not pay* the 10 *l.* ſuch a day, *that the ſale ſhall be void, and that he did not pay at the day, abſque hoc* that the plaintiff bailed them in the county of *N.* to rebail, *prout, &c.* and admitted for a good plea. *Br. Traverſe per, &c. pl.* 65.

Treſpaſs *of taking his bowl.* The *defendant ſaid, that the plaintiff delivered it to W. E. in pledge, who bailed it to the defendant, who rebailed it to W. E.* and the *plaintiff ſaid that R. C. gave it to him, and the defendant took it, abſq; hoc that he bailed it to W. E. in pledge*, and *did not traverſe the bailment by W. E. to the defendant*, and well; for the bailment of the plaintiff to *W. E.* is the effect of the bar, which binds the plaintiff. *Br. Traverſe per, &c. pl.* 373.

Detinue *by feme upon bailment made by herſelf of a cheſt of charters*; the *defendant ſaid, that they came to him as executor of the executor of the father of the plaintiff, whoſe heir ſhe is, and that he had delivered them to the baron of the plaintiff, who is dead*, abſque hoc *that the plaintiff bailed them prout, &c.* and a good plea; for the bailment of the baron with the traverſe, nor the traverſe without the plea precedent, is not good. *Br. Traverſe per, &c. pl.* 374.

In detinue, the plaintiff *counts upon ſingle bailment*, the *garniſhee may ſay that it was upon condition*, without traverſing the ſimple bailment, and if the plaintiff ſays, that it was bailed upon other condition, then he ought to traverſe the condition alledged by a garniſhee, and ſo he did, and well; *per Cur'. Br. Confeſs and avoid, pl.* 62.

If the plaintiff brings *detinue in the county of C.* and *counts upon ſingle bailment*, it is a good *plea that it was delivered in another county, upon condition, &c.* abſque hoc *that it was delivered in the place, &c.* by reaſon of the double charge, if action be brought of this again in the county; *quod non negatur. Br. Traverſe per, &c. pl.* 22.

Detinue of a box of charters, and one charter ſpecially bailed to the defendant, and he *pleaded to the bar* non detinet, *and to the charter ſpecially made title to the land, of which, &c.* abſque hoc *that the plaintiff bailed to him to rebail, &c.* and no plea, becauſe *the defendant did not confeſs any livery made by the plaintiff*; quod fuit conceſſum. *Br. Traverſe per, &c. pl.* 29.

Contra where he *confeſſes delivery* by the plaintiff, to him *to bail over, which he has done, abſque hoc* that he bailed to rebail to him; this is a good traverſe. *Br. ib.*

And *per Moil*, he may *intitle himſelf to the land and deed*, and give colour of poſſeſſion to the plaintiff, and nevertheleſs well, but not to traverſe the bailment as above. *Br. ib.*

Treſpaſs againſt *H. G.* of *a box of evidences taken*, the *defendant ſaid, that J. G. his father was poſſeſſed thereof, and gave it to the defendant, by which he was poſſeſſed, and after delivered it to A. B. to keep to the uſe of the defendant, and the defendant required him to deliver it, and he refuſed, by which the defendant took it; the plaintiff ſaid, that J. G. gave them to him*, abſque hoc *that he gave them to the defendant prout, &c.* and ſo to iſſue, and *found for the plaintiff*, who prayed judgment; and the defendant pleaded in arreſt of judgment, that the bar is anſwered, for the ſubſtance of the bar is, that the defendant bailed them to his uſe, which ought to be traverſed, and not the gift, but after a long argument *tota curia e contra. Br. Traverſe per, &c.* 200.

In *detinue of charters*, the *defendant may traverſe the bailment*, becauſe he cannot wage his law. *Br. Traverſe per, &c. pl.* 228.

But where he may wage his law, there he cannot traverſe the bailment, by all the juſtices. *Br. ib.*

If bailee brings treſpaſs, he ſhall ſay, *ad damnum* to himſelf, for he ſhall be charged over. *Br. Damages, pl.* 124.

Detinue of charters *againſt J. N. ſon and heir of J. N.* and *counted of bailment made by the plaintiff to the defendant*, who *ſaid, that he is ſon and heir of W. and not ſon and heir of J. N. per Moyle*, this is no plea, becauſe it is of *his poſſeſſion, and not brought againſt him as heir*, and ſo it is ſurpluſage, as in *treſpaſs, de ſon tort* demeſne is no plea. *Br. Traverſe per, &c. pl.* 235.

Contra in debt againſt him as heir, *or in detinue againſt him as heir. Br. ib.*

In *detinue of bailment of the plaintiff to the defendant to rebail to him*, it is a good *plea that he bailed to him to bail to J. N. which he has done*, without that *that he bailed to him to rebail to the plaintiff, prout, &c.* and a good plea, tho' the defendant may wage his law. *Br. Traverſe per, &c. pl.* 243.

Of bailment *upon condition in another county*, there he *ſhall traverſe the bailment in the firſt county. Br. ib.*

Detinue of goods, and *counted of bailment*, the *defendant ſaid, that the ſame day, &c. and at another time the plaintiff gave to the defendant the ſame goods*, abſque hoc *that he bailed them to the defendant, prout, &c.* and *per tot. cur.* except *Bryan*, it is no plea, for it is only argument. *Br. Traverſe per, &c. pl.* 275. cites 22 *E.* 4. 29.

If *A.* delivers *B. cloth* to keep, and *B. keeps it negligently*, *A.* may have either *detinue, or action on the caſe*; *per Gawdy* J. *Goldſb.* 152.

Debt was brought againſt *T.* becauſe *N. was indebted to the plaintiff, and delivered the money* to the ſaid *T. to deliver to the plaintiff*, which he did not do; *quod nota. Br. Dette, pl.* 6.

If *money is delivered to a man to buy cattle*, or to *merchandiſe with*, tho' the money be *ſealed up in a bag*, yet the property of the money is in the bailee, and the bailor cannot have action for the money, but only an account, tho' he never buys or merchandizes. 3 *Leo.* 38.

If *A.* lends money to *B.* and *B.* delivers a thing of the value to *A.* in pawn, now the *converſion is traverſable*, tho' generally converſion is not traverſable but upon ſpecial matter; *per Wray* and *Fenner* J. and ſo in the principal caſe, which was, a bag of money was delivered to *C.* by *A.* and *B.* to keep till *A.* and *B.* were agreed. *Leo.* 247.

Debt upon bill ſealed, whereby defendant acknowledged that he had received 7 *l. ad emend'* ſuch and ſuch things, and avers, that he had not bought the things, or paid the money; it was held, that plaintiff might bring either debt or account at his election. *Cro. E.* 644.

If *money* is delivered to *be re-delivered*, it cannot be known, and therefore the property is altered, and debt lies for it; but if *Portugal*, or other money which may be known, may be delivered to be re-delivered, *detinue* lies. *Ow.* 86.

Action *on the caſe*, ſuppoſing that he delivered to defendant certain wools to keep, and the defendant had *converted them to his own uſe*; *per* two juſtices, the action well lies; (tho' it was urged, that the converſion doth not *take away the property* from the plaintiff; but that he may always have *detinue)* for they held, that the converſion did take away the property, and was an offence, for which this action lies, and adjudged accordingly, *cæteris juſticiariis abſentibus. Cro. E.* 781.

Bailee, in caſe of *robbery*, where he accepted the goods to keep ſafely, is chargeable in detinue for them, becauſe he has his remedy over by *treſpaſs or appeal* to have them again. *Cro. E.* 815.

A. delivers to *B. a bag of money ſealed. B.* promiſes to deliver it on requeſt, no *aſſumpſit* lies for this, for *B.* has no benefit by it; for the money being in a bag ſealed, *B.* cannot have any uſe or employment of the money at all, and ſo has only a charge impoſed for the keeping. *Yelv.* 50.

A. delivered money *to B. to the uſe of C.* in ſuch caſe *C. may have debt or account* againſt *B.* for the ſame at his election. *Godb.* 210.

In caſe the plaintiff declared, that he *delivered a bond to the defendant, to keep and re-deliver it upon requeſt*; and afterwards the defendant tore it. The defendant *pleaded, that the plaintiff delivered it to him to be cancelled*, and which he did; and upon demurrer *Dodderidge* and *Crooke* held, that delivery to be re-delivered ought to have been traverſed; but *Coke* and *Haughton e contra*; for they held, that *the delivery is only an inducement*, but that the *tearing is the point of the action*, and therefore the delivery need not be traverſed. *Rol. Rep.* 394.

If *A.* bail the goods of *C.* to *B.* and *C.* the *owner brings detinue againſt bailee* for them, *B.* may *plead* the bailment by *A.* to him to be re-delivered by *A.* and ſo bring in *A.* as garniſhee to interplead with *C. per Holt* Ch. J. 6 *Mod.* 216.

If *A. bails goods to C.* and after *gives his whole right in them to B. B.* cannot maintain detinue for them againſt *C.* becauſe *the ſpecial property that C. acquires by the bailment is not thereby transferred to B. per Holt* Ch. J. 6 *Mod.* 216.

Bainberga, An iron armour which covered the legs in time of war. *Cowell, edit.* 1727.

Bairman, A poor inſolvent creditor, left bare and naked.——*Bairman qui debet fieri, jurabit in curia quod nihil habet ultra 5 ſolidos et quinque denarios.* Stat. Will. Reg. Scot. c. 17.

Bakers, Making bread under weight, deficient in goodneſs, *&c.* how puniſhed, *&c.* See title **Bread.**

Balcanifer, or **Baldakinifer,** A ſtandard-bearer. It is mentioned in *Mat. Par. anno* 1237.——*Ea die* balcanifer, *qui ut alii, qui ceciderunt, cruentiſſimam de ſe reliquit hoſtibus victoriam, &c.*

Balconies, Or open galleries for people to ſtand and behold things; to be to houſes in the chief ſtreets of *London* four foot wide, *&c. Stat.* 19 *Car.* 2. *c.* 23.

Bale, (*Fr.*) A pack, or certain quantity of goods or merchandize; as a bale of ſilk, cloth, *&c.* This word is uſed in the ſtatute 16 *Ric.* 2. and is ſtill in uſe.

Balinger, By the ſtatute 28 *H.* 6. *c.* 5. ſeems to have been a kind of *barge*, or water veſſel. But elſewhere it rather ſignifies a man of war.—*Tandem pene ſolus fugiens in* balengario. *Walſing. in Ric.* 2. *Hoſtes armaverunt quinque vaſa bellica qualia* balingarias *appellamus.* Ibid.

Baleuga, A territory or precinct.——*Cum tali libertate, quod per totam* baleugam *poſſit capere forisfactum ſuum. Charta Hen.* 2. recorded in the Duchy-office. See **Bannum et banleuga.**

Baleys, A rod: *Ferens in manu virgam quam vulgo* baleys *appellamus.* Mat. Par. anno 1252.

Baliſtarius, A *baliſter*, or croſs-bow man. *Gerard de la Wair* is recorded to have been *baliſtarius domini regis.* 28 & 29 *Hen.* 3. *n.* 25. So *Walterus de Moſelay com. Surr. tenet terras per ſerjantiam exiſtendi* baliſtarius *domini regis in exercitu ſuo*; *per* 40 *dies.* Ann. 32 Hen. 3.

Baliva. In the ſtatute of *Marlbridge*, 52 *Hen.* 3. *c.* 2. it is ſaid,——*ubi* balivam *habeat vel juriſdictionem.* Here *baliva* is well expounded by the ſtatute itſelf; for in this place it ſignifies juriſdiction. *Co. Lit.* 105.

Balivo amovendo, A writ to remove a *bailiff* from his office, for want of ſufficient land in the bailiwick. *Reg. Orig.* 78. for if a ſheriff chuſe one to be *bailiff* of an hundred; or if the lord of a liberty elect one to be *bailiff* of the liberty, who hath not land ſufficient in the county to anſwer the King and his people, according to the ſtatute of *Weſtm.* 2. then this writ ſhall be ſent to the ſheriff to diſcharge ſuch *bailiff*, and chuſe another in his place. *Jacob.*

Balkers, Are derived from the word *balk*, becauſe they ſtand higher, as it were on a balk or ridge of ground, to give notice of ſomething to others. *Shep. Ep. Jacob.* See **Conders.**

Ballance of trade, A computation of the value of all commodities which we buy from foreigners, and on the other ſide, the value of our own native products, which we export into neighbouring kingdoms; and the difference or exceſs between the one ſide and the other of ſuch account or computation is called the *ballance of trade*: which exceſs can be anſwered by us in nothing but our coin or bullion. The overplus of goods brought from our colonies in *America* and other foreign parts, with which we ſupply our neighbours, is computed in time of peace at leaſt to *ballance our trade. Jacob.*

Ballare, Signifies *ſcopis expurgare.* 'Tis mentioned in *Fleta, lib.* 2. *cap.* 87.

Ballaſt, Is gravel or ſand to poiſe ſhips, and make them go upright: And ſhips and veſſels taking in *ballaſt* in the river *Thames*, are to pay ſo much a tun to *Trinity-houſe, Deptford*; who ſhall employ *ballaſt-men*, and regulate them, and their lighters to be marked, *&c.* on pain of 10*l. Stat.* 6 *Geo.* 2. *cap.* 29.

Ballium, Bail; alſo a ſort of fortreſs or bulwark.—*Eam civitatem cum exteriori* ballio *caſtri bellatorum ſuorum inſultibus occupavit.* Mat. Weſt. ann. 1265.

Ban, or **bans,** (from the Brit. *ban.* i. e. *clamor*) Is a proclamation or publick notice; and publick ſummons or edict, whereby a thing is commanded or forbidden. It

It is a word ordinary among the feudiſts; and there is both *bannus* and *bannum*, which ſignifie two ſeveral things. This word *bans* we uſe here in *England*, eſpecially in publiſhing matrimonial contracts, which is done in the church before marriage, to the end that if any man can ſpeak againſt the intention of the parties, either in reſpect of kindred, precontract, or for other juſt cauſe, they may take their exception in time, before the marriage is conſummated: And in the Canon law, Bannæ *ſunt proclamationes ſponſi & ſponſæ in eccleſiis fieri ſolitæ.* But there may be a faculty or licence for the marriage, and then this ceremony is omitted; and miniſters are not to celebrate matrimony between any perſons without a licence, except the *bans* have been publiſhed three ſeveral times; upon pain of ſuſpenſion, *&c.* *Can.* 62. See *ſtat.* 7 & 8 *Will.* 3. *cap.* 35. See **Marriage**, and *ſtat.* 26 *Geo.* 2. *c.* 33.

Bancalia, Cuſhions, or like coverings of eaſe and ornament, for benches or other ſeats. —— *Prior* Elienſis *contulit unum dorſale magnum et pulchrum, cum tapetis et bancalibus ejuſdem ſectæ——de quibus jam fiunt pro magno altari et altari in choro, et* bancalia *ſuper formas in choro ſternenda in feſtis principalibus. Hiſtor. Elien. apud Whartoni Ang. Sacr. p.* 1. *p.* 649. And we find it mentioned in ſeveral places in the *Monaſticon*, as in *tom.* 1. *pag.* 222. *Septem ſcamnorum tegmina, vulgo.* bancalia, *&c.*

Bancus, A ſtall, or bench or table, on which goods are expoſed to ſale. As *Lib. Domes-day.* —— *In Eboraco Civitate.* —— *Comes de Moritonio habet ibi* 14 *manſiones, et duos bancos in macello, et eccleſiam ſanctæ crucis. Cowell, edit.* 1727.

Bandore, A muſical ſort of inſtrument with ſtrings, firſt invented by *John Roſe*, citizen of *London*, living in *Bridewell*, the fourth of Queen *Elizabeth.* See *Stow's Annal. p.* 869.

Bane, (from the Sax. *bana* a murderer) ſignifies deſtruction or overthrow: as, I will be the *bane* of ſuch a man, is a common ſaying; ſo when a perſon receives a mortal injury by any thing, we ſay, it was his *bane:* and he who is the cauſe of another man's death, is ſaid to be *le bane*, i. e. a malefactor. *Bract. lib.* 2. *tract.* 8. *c.* 1.

Baneret, (Banerettus, *miles vexillarius*) Sir *Tho. Smith*, in his *Republ. Angl. cap.* 18. ſays, is a knight made in the field, with the ceremony of cutting off the point of his ſtandard, and making it as it were a *banner*, and accounted ſo honourable, that they are allowed to diſplay their arms in the King's army as barons do, and may bear arms with ſupporters. *Camden*, in his *Britan. fol.* 109. hath theſe words, *baneretti, cum vaſſalorum nomen jam deſierat, a* baronibus *ſecundi erant: quibus inditum nomen a vexillo; conceſſum illis erat militaris vertutis ergo, quadrato vexillo (perinde ac* barones*) uti, unde* & equites vexillarii *a nonnullis vocantur, &c.* 'Tis ſaid that they were antiently called by ſummons to parliament: and that they are next to the barons in dignity, appears by the ſtatute 14 *Rich.* 2. *c.* 11. and the 5 *Rich.* 2. *ſtat.* 2. *cap.* 4. *William de la Pole* was created *baneret* by K. *Edward* the third, by letters patent, *anno regni ſui* 13. And thoſe *banerets*, who are created *ſub vexillis regiis, in exercitu regali, in aperto & ipſo rege perſonaliter præſente, explicatis*, take place of all *baronets*; as we may learn by the letters patent for creation of baronets. 4 *Inſt.* 6. Some maintain that knights banerets ought not to be made in a civil war; but *Hen.* 7. made divers *banerets* upon the *Corniſh* commotion, in the year 1495. See *Selden's Titles of Honour, fol.* 799.

Baniſhment, (Fr. *Baniſſement*) *exilium, abjuratio*, Is a forſaking or quitting of the realm; and a kind of civil death, inflicted on an offender: there are two kinds of it, one voluntary and upon oath, called *abjuration*; and the other upon compulſion, for ſome offence. *Staundf. Pl. Cr. f.* 117. By *Magna Charta*, none ſhall be outlawed or baniſhed his country, but by lawful judgment of his Peers, or according to the law of the land. 9 *H.* 3. *cap.* 29. And by the Common law no perſon ſhall be baniſh'd, but by authority of parliament; or in caſe of abjuration for felony, *&c.* but this is taken away by ſtatute. 3 *Inſt.* 115. *Stat.* 21 *Jac.* 1. *cap.* 28. See **Abjuration.**

Bank, (Lat. *Bancus*, Fr. *Banque*) In our Common law, is uſually taken for a ſeat or bench of judgment; *Bank le Roi*, the King's bench, *Bank le Common Pleas*, the Bench of the Common Pleas or the Common Bench; called alſo in Latin *Bancus Regis*, and *Bancus Communium Placitorum, Crompt. Juſt.* 67, 91. *Jus banci*, or the privilege of the bench, was antiently allowed only to the King's judges, *qui ſummam adminiſtrant juſtitiam*; for inferior courts were not allowed that privilege. There is another ſort of *bank*, which ſignifies a place where a great ſum of money is let out to uſe, returned by exchange, or otherwiſe diſpoſed of to profit. The *Bank of England* is managed by a governor and directors, eſtabliſhed by parliament, with funds for maintaining thereof, appropriated to ſuch perſons as were ſubſcribers; and the capital ſtock, which is enlarged by divers ſtatutes, is exempted from taxes, accounted a perſonal eſtate aſſignable over, not ſubject to forfeiture; and the company make dividends of the profit half yearly, *&c.* The funds are redeemable by the parliament, on paying the money borrowed: and the company of the *Bank* is to continue a corporation, and enjoy annuities, till redeemed, &c. During the continuance of the *Bank*, no body politick, *&c.* other than the company, ſhall borrow any ſums on bills payable on demand; and forging or altering *bank notes*, or tendering ſuch forged notes in payment, demanding to have them exchanged for money, *&c.* is felony. And officers or ſervants of the company, that imbezil any bank note, *&c.* wherewith they are intruſted, being duly convicted, ſhall ſuffer death as felons. *Vide* the ſtatutes 5 & 6 and 8 & 9 *W.* 3. and 7 *Anne, &c.* See alſo 1 *Geo.* 1. and 3 and 11 *Geo.* 1. *c.* 8. and 13 *Geo.* 2. *c.* 13. See *ſtat.* 24 *Geo.* 2. *c.* 4. for enabling the bank of *England* to hold general courts and courts of directors in the manner therein mentioned.

Bankers, The monied goldſmiths firſt got the name of *bankers* in the reign of King *Charles* the Second, as by the words of an act of parliament, *anno* 22 & 23 *Car* 2. appears, —— *Whereas ſeveral perſons, being goldſmiths, and others, by taking up or borrowing great ſums of money, and lending out the ſame again for extraordinary hire and profit, having gained and acquired to themſelves the reputation and name of bankers*, &c. Thus runs the ſtatute: but *bankers* of late are thoſe goldſmiths and private perſons in whoſe hands money is lodged and depoſited for ſafety, to be drawn out again as the owners have occaſion for it; and the *bankers*, inſtead of lending abroad the money thus depoſited, uſually traffick with it in *Exchange-Alley* on the ſtock, *&c.* oftentimes to their great advantage, they being generally men of great eſtates. *Jacob.*

Bankrupt, Lord *Coke* ſays, that *banque* in *French* ſignifies the ſame as *menſa* in *Latin*; and that *route* is a ſign or mark, as we ſay a cart route is the ſign or mark where the cart hath gone; and that metaphorically a *bankrupt*, or *banqueroute*, is taken for him who hath waſted his eſtate, and removed his banque, ſo that there is left but the mention thereof. 4 *Inſt.* 277. But as the firſt bankers came from *Italy*, it ſeems the more probable, that they brought their name along with them; and conſequently that the word *bankrupt*, or *banqueroute*, cometh from the *Italian, banco rotto*, the *bench* being *broken:* The word *rotto* is what remains in that country of the *Latin* word *ruptus, broken.* The *banker* himſelf was ſo called from the bench or table which he uſed, with his name inſcribed, and when he failed his *bench* was broken. *Burn* 66. *Billing.* 85.

The granting commiſſions of bankruptcy ſeems to be derived from the civil law, which conſtituted a guardian to a prodigal in the ſame manner as to a madman; and ſuch guardian the prætor appointed on the petition or application of relations, as well as creditors. But the feudal law, though it admitted of commiſſions of lunacy *ex neceſſitate*, would allow of none for prodigality, not being eſteemed injurious, becauſe ſuch prodigal could not alien his lands without leave of his lord; alſo the condition of a freeman was not to be altered without the crime of felony. But as trade and commerce encreaſed, it was found neceſſary, for the ſupport of credit, to introduce ſuch a law amongſt us, and therefore our acts of parliament have confined it to traders and creditors only. 1 *New Abr.* 246. *Digeſt. lib.* 27. *tit.* 10.

1. *Statutes concerning bankrupts.*

2. *Who may be a bankrupt, and who not; what are acts of bankruptcy, and what not.*

3. *Of the commiſſion of bankruptcy; what creditors may obtain it, and how, and when.*

4. *Of joint and ſeparate commiſſions in reſpect of partners bankrupts.*

5. *Of the appointment, qualification, fees, and duty of the commiſſioners, and of their power and authority over the bankrupt's eſtate.*

6. *Of the manner and time of chooſing the aſſignees, and their power.*

7. *Of creditors; who are ſuch; how to prove their debts, and when to come in.*

8. *Of ſetting off, ſubmitting to arbitration, and compounding debts due to the bankrupt.*

9. *Of diſtributing the bankrupt's eſtate.*

10. *Of the bankrupt's not appearing, nor diſcovering his eſtate; his privilege during his attendance; the allowances to be made him; his diſcharge and certificate.*

1. *Statutes concerning bankrupts.*

Statute 13 *Eliz. cap.* 7. *ſect.* 1. If any merchant, or other perſon uſing the trade of merchandize, by way of bargaining, exchange, re-exchange, bartry, cheviſance, or otherwiſe, in groſs or by retail, or ſeeking his trade of living by buying and ſelling, ſhall depart the realm, or begin to keep his houſe, or otherwiſe to abſent himſelf, or ſuffer himſelf willingly to be arreſted for debt or other thing, not due for money delivered, wares ſold, or other good conſideration; or will ſuffer himſelf to be outlawed, or yield himſelf to priſon, or depart from his dwelling-houſe, to the intent to defraud or hinder any of his creditors of the juſt debt of ſuch creditors, he ſhall be deemed a bankrupt.

Sect. 2. The lord chancellor, upon complaint in writing, againſt ſuch perſons being bankrupts, ſhall have power, by commiſſion under the great ſeal, to appoint ſuch perſons as to him ſhall ſeem good; who, or the moſt part of them, ſhall have power to take by their diſcretions ſuch order, with the body of ſuch perſon, by impriſonment; as alſo, with all his lands, as well copyhold as freehold, which he ſhall have in his own right, before he became bankrupt; and alſo with all ſuch lands as ſuch perſon ſhall have purchaſed for money, or other recompence, jointly, with his wife or child, to the only uſe of ſuch offender, or for ſuch uſe or title as ſuch offender then ſhall have in the ſame, which he may depart withall, or with any perſons of truſt to any ſecret uſe of ſuch offender, and alſo with his money, goods, merchandizes and debts; and cauſe the ſaid lands, *&c.* to be appraiſed to the beſt value, and by deed indented and inrolled to make ſale of the ſaid lands, *&c.* and of all deeds touching only the ſame, belonging to ſuch offender; and alſo of all fees, offices, goods and chattels; or otherwiſe to order the ſame for ſatisfaction of the creditors; to every of the creditors, a portion, rate like, according to their debts: and every direction, and other thing done by the perſons ſo authorized, ſhall begood in law againſt the ſaid offender, his wife, heirs, children, and ſuch perſons, as by ſuch joint-purchaſe with the offenders ſhall have any eſtate or intereſt in the premiſſes, and againſt all other perſons claiming by, from, or under ſuch offender, by any acts done after ſuch perſon ſhall become bankrupt, and alſo againſt the lords of the manors, whereof the ſaid copyhold lands be holden.

Sect. 3. Provided that every perſon, to whom any ſuch ſale of copyhold land ſhall be made, ſhall, before they take any profit of the ſame, agree with the lords of the manors for ſuch fines as hath been accuſtomed to be paid: And upon ſuch agreement, the lords, at the next court, ſhall not only grant unto the vendees, upon requeſt, the ſame cuſtomary lands, by copy of court-roll, for ſuch eſtate as to them ſhall be ſold, reſerving the ancient rents, cuſtoms and ſervices, but alſo admit them tenants, and receive their fealty.

Sect. 4. Such of the commiſſioners as ſhall put the commiſſion in execution ſhall, upon requeſt made by the bankrupts, not only make declaration to the bankrupt, of the employing and beſtowing of their lands, goods and debts, but alſo make payment of the overplus, if any be, to the bankrupt.

Sect. 5. If any, after ſuch act committed, and complaint thereof made to the commiſſioners, or the major part of them, by any party grieved, ſuſpecting any of the goods or debts of ſuch offender to be in the poſſeſſion of any perſon, or any perſons to be indebted to ſuch offender, do make relation thereof to the commſſioners, they ſhall have power to call before them, by ſuch proceſs or means as they ſhall think convenient, all ſuch perſons ſo ſuppoſed to have any ſuch goods or debts in their cuſtody, or ſuppoſed to be in debt to ſuch offender; and upon their appearance to examine them, as well by their oaths as by ſuch means as the commiſſioners ſhall think meet, for the knowledge of all ſuch goods and debts.

Sect. 6. If ſuch perſons, upon examination, do not diſcloſe the whole truth of ſuch things as they ſhall be examined of, or deny to ſwear, then ſuch perſons, upon proof made before the commiſſioners, by examination, or otherwiſe, ſhall forfeit double the value of all ſuch goods and debts by them concealed; which forfeiture ſhall be levied by the commiſſioners, of the lands, goods and chattels, of ſuch perſon ſo denying to ſwear, or not diſcloſing the whole truth, in ſuch manner as is before appointed for the principal offenders; the ſame forfeitures to be diſtributed for ſatisfaction of the debts of the creditors, in ſuch rate as is before declared.

Sect. 7. If any perſons fraudulently by colluſion claim or detain any debts, goods or tenements, which ſhall be appertaining to ſuch offender, other than ſuch as they prove to be due for money paid, wares delivered, or other juſt conſideration before the commiſſioners; every ſuch perſon ſhall forfeit double as much; which forfeiture ſhall be levied and employed as is before rehearſed.

Sect. 8. If the creditors of any ſuch bankrupt be ſatisfied their debts with the proper lands, goods and debts of the bankrupt, or with the ſame and ſome part of the forfeiture,s and there ſhall remain an overplus of the ſaid forfeitures of the double values; the one moiety of the overplus of the forfeitures ſhall be by the commiſſioners paid unto the Queen, and the other moiety ſhall be diſtributed amongſt the poor within the hoſpitals in every city, town or county, where ſuch bankrupt ſhall be.

Sect. 9. If any ſuch perſons which ſhall be indented, do of purpoſe withdraw themſelves from their uſual manſion-houſes, upon complaint, the commiſſioners ſhall have power to award five proclamations to be made, in the Queen's name, upon five market-days, in ſuch places near the place where ſuch bankrupt hath moſt commonly made his abode, commanding him to return with all convenient ſpeed, and to yield his body before the commiſſioners, or one of them, at ſuch time and place as by the proclamation ſhall be appointed: And if he do not according to ſuch proclamation yield his body, then the body of ſuch offender ſhall be adjudged out of the Queen's protection; and every perſon that ſhall wittingly help to hide or convey, or ſhall wittingly receive or keep ſecretly any perſon ſo demanded by proclamation, ſhall ſuffer impriſonment, or pay ſuch fine to the Queen, as to the lord chancellor (being informed thereof by the commiſſioners) ſhall ſeem meet.

Sect. 10. If the creditors of any ſuch offenders which ſo depart the realm, keep their houſes, or otherwiſe withdraw into places unknown, or ſuffer themſelves to be arreſted or outlawed, or yield their bodies into priſon purpoſely, and for the cauſes aforeſaid, be not fully ſatisfied for their debts, by the means before ſpecified, they ſhall have remedy for levying the reſidue againſt the offenders, as they might have had before the making of this act. And the ſaid creditors ſhall be only barred for ſuch part of the ſaid debts as ſhall be paid unto them as aforeſaid.

Sect.

Sect. 11. If any perſon declared a bankrupt by virtue of this act, ſhall at any time after purchaſe lands or chattels; or any lands or chattels ſhall deſcend or come to ſuch bankrupts before their debts be fully ſatisfied or agreed for; the ſaid lands and chattels ſhall by the commiſſioners be bargained, ſold, extended, delivered and uſed for payment of the ſaid creditors, in like manner as other the lands and chattels of the ſaid bankrupt.

Sect. 12. This act ſhall not extend to any lands which be aſſured by any bankrupt before he become bankrupt, ſo that ſuch aſſurance be made *bona fide*, and not to the uſe of the bankrupt himſelf only, or his heirs; and that the parties to whoſe uſe ſuch aſſurance ſhall be made, be not privy to the fraudulent purpoſe of ſuch bankrupt, to deceive his creditors.

Statute 1 *Jac.* 1. *cap.* 15. *ſect.* 2. Every perſon uſing merchandize, *&c.* who ſhall wilfully or fraudulently procure himſelf to be arreſted, or his goods, money or chattels to be attached or ſequeſtred, or depart from his dwelling-houſe, or make any fraudulent grant or conveyance of his lands or chattels, whereby his creditors may be defeated or delayed for the recovery of their debts; or being arreſted for debt, ſhall after his arreſt lie in priſon ſix months upon that arreſt, or any other arreſt or detention for debt, ſhall be adjudged a bankrupt.

Sect. 3. The like commiſſions, orders and remedies which are provided by the former act 13 *Eliz.* againſt any bankrupts therein deſcribed, or concerning their lands, goods and debts, ſhall be had againſt perſons that are herein expreſſed to be bankrupts, *&c.*

Sect. 4. It ſhall be lawful for any creditors of the bankrupt within four months after commiſſion ſued forth, and until diſtribution made by the commiſſioners, to join with the other creditors that ſhall ſue forth commiſſion for ſatisfaction of their debts; and if the creditors come not in within four months, the commiſſioners ſhall have power to diſtribute.

Sect. 5. If any perſon which ſhall be a bankrupt by intent of this ſtatute, ſhall convey to any of his children, or other perſons, any manors, lands, goods, or transfer his debts into other men's names, except the ſame ſhall be conveyed or transferred upon marriage of any of his children, both the parties married being of the years of conſent, or ſome valuable conſideration, it ſhall be in the power of the commiſſioners to ſell or diſpoſe thereof in as ample manner as if the bankrupt had been actually ſeiſed or poſſeſſed thereof.

Sect. 6. The commiſſioners may call before them the bankrupt, and if upon warning left in writing three times at the dwelling-place where the bankrupt, his wife or family, for the moſt part of his abode, did remain, within one year next before he became bankrupt, the ſaid bankrupt ſhall not appear before the commiſſioners; it ſhall be lawful for the commiſſioners to appoint to proclaim the ſaid party a bankrupt, at ſuch public places where the commiſſioners ſhall think meet, warning him to appear before them upon the commiſſion, at ſome time appointed: And if upon five proclamations, the party offending appear not before the commiſſioners, and yield his body, the commiſſioners may award a warrant to ſuch perſons as they think meet, to apprehend the body of the offender, and to bring him before the commiſſioners, whereſoever the party may be found, in place priviledged or not, to be examined.

Sect. 7. It ſhall be lawful for the commiſſioners to examine the ſaid offender upon interrogatories touching the lands, goods, debts, books of account, and ſuch other things, as may tend to diſcloſe his eſtate, or ſecret grants, and eloining of his lands, goods, money, and debts, as they ſhall think meet.

Sect. 8. If therein the offender ſhall refuſe to be examined, or to anſwer fully, it ſhall be lawful for the commiſſioners to commit the offender to cloſe impriſonment, until he ſhall better conform himſelf.

Sect. 9. If upon his examination it ſhall appear that he hath committed any wilful or corrupt perjury, tending to the damage of the creditors to the value of 10 *l.* the party ſo offending may thereof be indicted in any of the King's courts of record, and ſhall ſtand upon the pillory in ſome public place two hours, and have one of his ears nailed to the pillory and cut off.

Sect. 10. If any perſons known or ſuſpected to detain any of the lands, hereditaments, goods or debts of the bankrupt, or to be indebted to or for the benefit of the bankrupt, ſhall after lawful warning to the ſaid perſons given to come before the commiſſioners to be examined, refuſe to come, or ſhall not come at the time appointed, having no lawful impediment (ſuch as ſhall be allowed of by the commiſſioners, and which ſhall be then made known to the commiſſioners) or having knowledge of any other meeting of the commiſſioners, ſhall not appear before them at ſuch time as they may, or being come ſhall refuſe to be ſworn, and to make anſwer to ſuch interrogatories as ſhall be miniſtred; it ſhall be lawful for the commiſſioners to commit them to ſuch priſon as to them ſhall be thought meet, and all ſuch perſons as ſhall ſo refuſe to be ſworn and make anſwer; and alſo to direct their warrants to ſuch perſons as to them ſhall be thought meet, to apprehend ſuch perſons as ſhall refuſe to appear, and to bring them before the commiſſioners to be examined; and upon their refuſal to come, or to be examined, to commit the party ſo refuſing to ſuch priſon as the commiſſioners ſhall think meet, until the ſaid perſon ſhall ſubmit himſelf to the commiſſioners, and be by them examined, according to the ſaid ſtatute 13 *Eliz.* and this preſent act.

Sect. 11. Provided, that ſuch witneſſes as ſhall be ſo ſent for, ſhall have ſuch coſts as the commiſſioners ſhall think fit; to be ratably born by the creditors. And if any perſon, other than the bankrupt, either by ſubornation of others, or by his own act, ſhall wilfully and corruptly commit wilful perjury by his depoſition to be taken before the commiſſioners; the party ſo offending, and all perſons that ſhall unlawfully and corruptly procure any ſuch unlawful, wilful, and corrupt perjury, may therefore be indicted in any of the King's courts of record, and ſhall ſuffer ſuch pains as are limited by the ſtatute concerning perjury. 5 *Eliz. cap.* 9.

Sect. 12. All money which ſhall be forfeited by this act, ſhall be recovered by the creditors only, or any of them that will ſue for the ſame, by action of debt, *&c.* in any of the King's courts of record; and the money ſo recovered, the charges of ſuit being deducted, ſhall be diſtributed towards payment of the creditors.

Sect. 13. The commiſſioners of bankrupts ſhall have power to aſſign or diſpoſe all the debts due to and for the benefit of the bankrupt, to the uſe of the creditors, and the ſame diſpoſition of the debts ſhall veſt the property in the perſons to whom it ſhall be aſſigned by the commiſſioners, as fully as if the bond, judgment or contract, whereupon the debt ſhall ariſe, had been made to the perſons to whom the ſame ſhall be ſo aſſigned; and after ſuch aſſignment, neither the bankrupt, nor any other to whom ſuch debt ſhall be due, ſhall have power to recover the ſame, nor to make diſcharge thereof; neither ſhall the ſame be attached as debt of the bankrupt, or ſuch other perſon; but the party to whom the ſame ſhall be aſſigned, ſhall have remedy to recover the ſame in the name of the perſon to whom the ſame ſhall be ſo aſſigned or ordered, as the party himſelf might have had.

Sect. 14. Provided that no debtor of the bankrupt be hereby endangered for the payment of his debt *bona fide* to ſuch bankrupt, before that he ſhall know that he is a bankrupt.

Sect. 15. Such of the commiſſioners as ſhall put the commiſſion in execution ſhall, upon requeſt by the bankrupts, not only make declaration to the bankrupts, of the employing and beſtowing of their lands, hereditaments, goods, and the debts, but alſo make payment of the overplus, if any be, to the bankrupts; and the bankrupts, after full ſatisfaction of the creditors, ſhall have power to recover the reſidue of the debts.

Sect. 16. If any action ſhall be brought againſt any commiſſioner, or other perſon having authority under the commiſſion, for any matter, by force of the ſaid ſtatute, or this ſtatute, the defendants may plead Not guilty, or juſtify that the act whereof the plaintiff complained, was done by authority of the ſaid act 13 *Eliz. cap.* 7. or this act, without expreſſing any other matter of circumſtance

contained

contained in either of the ſaid acts, whereunto the plaintiff ſhall be admitted to reply, that the defendant did the fact ſuppoſed of his own wrong, without any ſuch cauſe alledged by the ſaid defendant, whereupon iſſue ſhall be joined.

Sect. 17. If after any commiſſion of bankrupts ſued forth, and dealt in by the commiſſioners, the offender happen to die, before the commiſſioners ſhall diſtribute the goods, or any of them; the commiſſioners ſhall in that caſe proceed in execution, upon the commiſſion, for the offenders goods, lands, and debts, as they might have done if the party were living.

Statute 21 *Jac.* 1. *cap.* 19. *ſect.* 1. The ſtatutes againſt bankrupts, and for relief of creditors, ſhall be in all things largely and beneficially conſtrued for relief of the creditors.

Sect. 2. Every perſon uſing the trade of merchandize, by way of bargaining, exchange, bartering, cheviſance, or otherwiſe, in groſs, or by retail, or ſeeking his living by buying and ſelling, or that ſhall uſe the trade or profeſſion of a ſcrivener, receiving other men's monies or eſtates into his truſt or cuſtody, who ſhall obtain any protection (other than ſuch perſons as ſhall be lawfully protected by privilege of parliament) or ſhall prefer unto his Majeſty, or unto any of the King's courts, any petition or bill againſt his creditors, or any of them, thereby deſiring or endeavouring to compel them to accept leſs than their juſt and principal debts, or to procure time or longer days of payment, than was given at the time of their original contracts, ſhall be adjudged a bankrupt.

Sect. 3. The like commiſſions and remedies, which are provided for by the former acts 13 *Eliz.* and 1 *Jac.* 1. *cap.* 15. againſt bankrupts, or for their lands, goods, and debts, ſhall be had againſt ſuch perſons as are herein deſcribed to be bankrupts, and againſt their lands and debts.

Sect. 4. The ſame remedies, which are provided by this act, againſt any bankrupts, or concerning their lands, goods, and debts, or the diſcovery of them, ſhall be had againſt ſuch as are declared to be bankrupts, by the ſaid former acts.

Sect. 6. After ſuch time as any perſon ſhall by the commiſſioners be lawfully declared a bankrupt, the ſaid commiſſioners ſhall have power to examine upon oath the wife of ſuch bankrupt, for the diſcovery of the eſtate of ſuch bankrupt, concealed or diſpoſed of, by ſuch wife, or by any other perſons. And the ſaid wife ſhall incur ſuch penalty for not coming before the ſaid commiſſioners, or for refuſing to be ſworn and examined, or for not diſcloſing the truth, as by the ſaid former laws is already provided againſt any other perſon in like caſes.

Sect. 7. If any bankrupt ſhall, upon his examination before the commiſſioners, be found fraudulently to have conveyed away his goods, lands, or other eſtate, to the value of 20 *l.* to the end to hinder the execution of the ſtatutes, or to defraud or hinder his creditors of the ſame, and ſhall not upon his examination diſcover unto the commiſſioners, and (if it lie in his power) deliver unto them all that eſtate ſo fraudulently conveyed away or detained, or that cannot make it appear unto the commiſſioners that he hath ſuſtained ſome caſual loſs, whereby he is diſabled to pay what he there owed, may be indicted for ſuch fraud or abuſe at the aſſiſes or general ſeſſions of the peace of the county or place where he ſhall become bankrupt: and if the bankrupt be thereof convicted, he ſhall be ſet upon the pillory for two hours, and have one of his ears nailed to the pillory, and cut off.

Sect. 8. It ſhall be lawful for the commiſſioners, or any other perſons, or officers, by them to be appointed by their warrant under their hands and ſeals, to break open the houſes, chambers, ſhops, warehouſes, doors, trunks or cheſts of the bankrupt, where the ſaid bankrupt, or any of his goods or eſtate, ſhall be reputed to be, and to ſeize upon, and order the body, goods, money and other eſtate of ſuch bankrupt, as by the ſaid former laws are appointed, by impriſonment, or otherwiſe, as to the commiſſioners ſhall be thought meet.

Sect. 9. The commiſſioners may examine upon oath, or by any other ways, any perſons for the diſcovery of the debts owing to all ſuch creditors as ſhall ſeek relief by ſuch commiſſion: and every creditor having ſecurity for his debts, by judgment, ſpecialty, or other ſecurity, or having no ſecurity, or having made attachments in *London*, or other place, of the goods of ſuch bankrupt, whereof there is no execution or extent ſerved and executed upon any the lands, goods, and eſtate of ſuch bankrupt, and before ſuch time as he ſhall become bankrupt, ſhall not be relieved upon any ſuch judgment, ſpecialty, attachments, or other ſecurity, for any more than a ratable part of their debts with the other creditors, without reſpect to any penalty contained in ſuch judgments, ſpecialty, or other ſecurity.

Sect. 10. If any lands, goods, or other eſtate of any bankrupt, ſhall be extended, after ſuch time as he is become bankrupt, under colour of his being an accountant, or indebted unto the King; it ſhall be lawful for the commiſſioners to examine upon oath, whether the ſaid debt were due to ſuch debtor or accountant upon any bargain or contract originally made, betwixt ſuch accountant and the ſaid bankrupt; and if ſuch bargain or contract was originally made with any other perſons than the ſaid debtor or accountant, or for the uſe and truſt of any other perſon, it ſhall be lawful for the commiſſioners, to diſpoſe of all ſuch lands, goods, and debts ſo extended, for the uſe of the creditors.

Sect. 11. If any perſons ſhall become bankrupt, and at ſuch time ſhall, by the conſent of the owner, have in their poſſeſſion and diſpoſition, any goods whereof they ſhall be reputed owners, and take upon them the ſale or diſpoſition as owners, the commiſſioners ſhall have power to ſell the ſame for the benefit of the creditors, as fully as any other part of the eſtate of the bankrupt.

Sect. 12. The commiſſioners ſhall have power by deed indented and inrolled within ſix months after the making, in ſome of his Majeſty's courts of record at *Weſtminſter*, to bargain, ſell and convey any manors, or hereditaments, whereof any bankrupt ſhall be ſeiſed of any eſtate in tail, in poſſeſſion, reverſion or remainder, and whereof no reverſion or remainder ſhall be in the King, of the gift or proviſion of his Majeſty, his progenitors, or ſucceſſors, for the benefit of the creditors; and all ſuch bargains, ſales and conveyances ſhall be good againſt all perſons whom the bankrupt by common recovery, or other means, might debar from any remainder, reverſion, rent, title, or poſſibility, of the ſaid manors or hereditaments.

Sect. 13. If any bankrupt ſhall convey or aſſure any lands, or eſtate, unto any perſons, upon condition, or power of redemption at a day to come, by payment of money, or otherwiſe, it ſhall be lawful for the commiſſioners, before the time of the performance of ſuch condition, to appoint, under their hands and ſeals, perſons to make tender of money, or other performance, according to the nature of ſuch condition, as fully as the bankrupt might have done; and the commiſſioners ſhall, after ſuch tender or performance, have power to ſell ſuch lands, goods and eſtates, for the benefit of the creditors, as fully as they may ſell any the eſtate of the bankrupt.

Sect. 14. No purchaſor for good conſideration ſhall be impeached, unleſs the commiſſion be ſued forth againſt ſuch bankrupt within five years after he ſhall become bankrupt.

Sect. 15. All acts againſt bankrupts ſhall extend to ſtrangers born, as well aliens as denizens, as effectually as to natural-born ſubjects, both to make them ſubject to the laws as bankrupts, as alſo to make them capable of the benefit as creditors.

Stat. 13 & 14 *Car.* 2. *cap.* 24. *ſect.* 3. No perſons who ſhall adventure any money in the *Eaſt-India* company, or *Guinea* company, or any joint ſtocks of money by them raiſed, for carrying on the trade by the ſaid *Eaſt-India* company, or *Guinea* company, to be managed, or who ſhall adventure any money in any ſtocks, for managing the fiſhing trade, or the trade called the *Royal Fiſhing Trade*, and ſhall receive their dividend of fiſh or merchandize *in ſpecie*, and ſhall ſell, or exchange the ſame, ſhall, by reaſon of ſuch adventure, ſelling or exchanging, be

be adjudged a merchant or trader within any ſtatute for bankrupts.

Sect. 4. Provided that every perſon who ſhall trade in any other way than in the ſaid royal fiſhing trade, or the trade managed by the ſaid *Eaſt-India* company, or the *Guiney* company, ſhall, by reaſon of this trading and merchandizing, be liable to commiſſions againſt bankrupts, as fully as if this act had never been made.

Stat. 10 *Ann. cap.* 15. *ſect.* 3. The diſcharge of any bankrupt, by force of any acts relating to bankrupts, from the debts by him owing at the ſame time that he did become a bankrupt, ſhall not be conſtrued to diſcharge any other perſon who was partner with the bankrupt in trade, or ſtood jointly bound, or had made any joint contract together with ſuch bankrupt.

Stat. 7 *Geo.* 1. *cap.* 31. *ſect.* 1. Every perſon, who ſhall give credit on ſecurities payable at future days to perſons who are or ſhall become bankrupts, upon good conſideration *bona fide*, for money or other thing not due before the time of ſuch perſons becoming bankrupts, ſhall be admitted to prove their ſecurities or agreements, as if they were payable preſently, and ſhall have a dividend in proportion to the other creditors, diſcounting five *per cent. per annum* from the actual payment to the time ſuch money would have become due.

Sect. 2. The bankrupt ſhall be diſcharged from ſuch ſureties, as if ſuch money had been due before the time of his becoming bankrupt.

Stat. 5 *Geo.* 2. *cap.* 30. *ſect.* 1. If any perſon, who ſhall become bankrupt, and againſt whom a commiſſion of bankrupt under the great ſeal ſhall be iſſued, whereupon he ſhall be declared bankrupt, ſhall not within forty-two days after notice in writing left at the uſual place of abode of ſuch perſon, or perſonal notice in caſe ſuch perſon be in priſon, and notice in the *London* gazette, ſurrender himſelf to the commiſſioners, and ſubſcribe ſuch ſurrender, and ſubmit to be examined upon oath, or ſolemn affirmation, and conform to the ſtatutes concerning bankrupts; and upon his examination diſcover all his effects, and how he hath diſpoſed of his effects (and all books and writings relating thereto) of which he was poſſeſſed or intereſted, or whereby ſuch perſon or his family hath, or may expect, any poſſibility of advantage (except ſuch parts as ſhall have been *bona fide* diſpoſed of in the way of his trade, and except ſuch money as ſhall have been laid out in the ordinary expence of his family) and alſo, upon ſuch examination, deliver up unto the commiſſioners ſuch part of his effects, and all books and writings relating thereto, as ſhall be in his power (his neceſſary wearing apparel, and the neceſſary wearing apparel of the wife and children of ſuch bankrupt excepted); then the bankrupt in caſe of default in not ſurrendring as aforeſaid, or in caſe he ſhall conceal, or imbezzle his eſtate, to the value of 20*l.* or any books of accounts, or writing relating thereto, with intent to defraud his creditors (and being convicted by indictment or information) ſhall be deemed guilty of felony without benefit of clergy; and ſuch felon's goods and eſtate ſhall go among the crediditors ſeeking relief under ſuch commiſſion.

Sect. 2. The commiſſioners ſhall appoint, within the ſaid forty-two days for the bankrupt to ſurrender and conform as aforeſaid, not leſs than three meetings, the laſt of which ſhall be on the forty-ſecond day limited for ſuch bankrupt's appearance; and three weeks notice ſhall be given in the gazette of the time and place of ſuch meeting.

Sect. 3. It ſhall be lawful for the lord chancellor to enlarge the time for ſuch perſon ſurrendering himſelf, and diſcovering his effects, not exceeding fifty days from the end of the ſaid forty-two days; ſo as ſuch order for enlarging the time be made ſix days before the time on which ſuch perſon was to ſurrender himſelf.

Sect. 4. Every ſuch bankrupt, after aſſignees ſhall be appointed, is to deliver upon oath, or affirmation, before one of the maſters in Chancery, or juſtice of peace, unto ſuch aſſignees, all his books of accounts and writings, not ſeized by the meſſengers of the commiſſion, or not before delivered up to the commiſſioners, and then in his power, and diſcover ſuch as are in the power of any other perſon that any ways concern his eſtate; and every ſuch bankrupt, not in priſon, ſhall, after ſuch ſurrender, be at liberty, and is required to attend ſuch aſſignees upon notice in writing in order to aſſiſt in making out the accounts of the eſtate.

Sect. 5. Every bankrupt having ſurrendered ſhall at all ſeaſonable times, before the expiration of the ſaid forty-two days, or ſuch further time as ſhall be allowed to finiſh his examination, be at liberty to inſpect his books and writings, in the preſence of ſome perſon to be appointed by the aſſignees, and to bring with him, for his aſſiſtance, ſuch perſons as he ſhall think fit, not exceeding two at one time, and to make extracts and copies to enable him to make a full diſcovery of his effects; and the ſaid bankrupt ſhall be free from arreſts in coming to ſurrender, and from actual ſurrender for the ſaid forty-two days, or ſuch further time as ſhall be allowed for finiſhing his examination, provided ſuch bankrupt was not in cuſtody at the time of ſurrender; and in caſe ſuch bankrupt ſhall be arreſted for debt, or on any eſcape warrant, coming to ſurrender, or after his ſurrender, within the time beforementioned; then on producing ſuch ſummons or notice, under the hands of the commiſſioners or aſſignees, and giving the officer a copy thereof, he ſhall be diſcharged; and in caſe any officer ſhall detain ſuch bankrupt, ſuch officer ſhall forfeit to ſuch bankrupt for his own uſe 5*l.* for every day he ſhall detain him.

Sect. 6. In caſe any bankrupt be in cuſtody at the time of iſſuing of the commiſſion, and is willing to ſubmit to be examined, and can be brought before the commiſſioners and creditors, the expence thereof ſhall be paid out of the bankrupt's eſtate: but in caſe ſuch bankrupt is in execution, and cannot be brought before the commiſſioners, then the commiſſioners ſhall attend the bankrupt in cuſtody, and take his diſcovery; and the aſſignees are required to appoint perſons to attend ſuch bankrupt in priſon, and to produce his books and writings, in order to prepare his diſcovery; a copy whereof the aſſignees ſhall apply for, and the bankrupt ſhall deliver to their order ten days before ſuch laſt examination.

Sect. 7. All bankrupts who ſhall ſurrender and conform, as by this act is directed, ſhall be allowed five *per cent.* out of the neat produce of the eſtate that ſhall be received, in caſe the neat produce of the eſtate, after ſuch allowance made, ſhall be ſufficient to pay 10*s.* in the pound, and ſo as the ſaid 5 *per cent.* ſhall not amount to above 200*l.* and in caſe the neat produce of the eſtate ſhall be ſufficient to pay 12*s.* 6*d.* in the pound, then all perſons ſo conforming ſhall be allowed 7*l.* 10*s.* *per cent.* ſo as ſuch allowance ſhall not amount to above 250*l.* and in caſe the neat produce ſhall over and above the allowance be ſufficient to pay 15*s.* in the pound, the perſons ſo conforming ſhall be allowed 10 *per cent.* ſo as ſuch 10 *per cent.* ſhall not amount to above 300*l.* and every ſuch bankrupt ſhall be diſcharged from all debts owing at the time that he did become bankrupt. And in caſe ſuch bankrupt ſhall afterwards be impleaded for any debt due before he became bankrupt, ſuch bankrupt ſhall be diſcharged upon common bail, and may plead in general, that the cauſe of action did accrue before ſuch time as he became bankrupt; and the certificate of ſuch bankrupt's conforming, and the allowance thereof, ſhall be ſufficient evidence of the trading, bankruptcy, commiſſion, and other proceedings precedent to the obtaining ſuch certificate; unleſs the plaintiff can prove the ſaid certificate was obtained unfairly, or make appear any concealment by ſuch bankrupt to the value of 10*l.*

Sect. 8. If the neat produce of ſuch bankrupt's eſtate ſhall not amount to ten ſhillings in the pound, ſuch bankrupt ſhall not be allowed the 5 *per cent.* but ſhall be allowed ſo much as the aſſignees and commiſſioners ſhall think fit, not exceeding 3 *per cent.*

Sect. 9. In caſe any commiſſion ſhall iſſue againſt any perſon, who after the 24th of *June* 1732, ſhall have been diſcharged by virtue of this act, or ſhall have compounded with his creditors, or delivered to them his effects and been releaſed by them, or been diſcharged by any act for relief of inſolvent debtors, then the body only of ſuch perſon conforming ſhall be free from arreſt and impriſonment; but the future eſtate of ſuch perſon ſhall remain liable to his creditors (the tools of trade, neceſſary houſe-

hold goods, and neceſſary wearing apparel of ſuch bankrupt and his wife and children excepted) unleſs the eſtate of ſuch perſon ſhall produce clear 15 *s.* in the pound.

Sect. 10. No diſcovery ſhall intitle ſuch bankrupt to the benefits allowed by this act, unleſs the commiſſioners, or the major part of them, ſhall under their hands and ſeals certify to the Lord Chancellor, that ſuch bankrupt hath made a full diſcovery of his eſtate, and in all things conformed himſelf according to the directions of this act, and that there doth not appear to them any reaſon to doubt of the truth of ſuch diſcovery; and unleſs four parts in five in number and value of the creditors, who ſhall be creditors for not leſs than 20*l.* reſpectively, or ſome other perſon by them duly authorized, ſhall ſign ſuch certificate; but the commiſſioners ſhall not certify till they ſhall have proof by affidavit or affirmation in writing of ſuch creditors, or of the perſons by them authorized, ſigning the certificate, and of the power by which any perſon ſhall be authorized to ſign for any creditor (which affidavit or affirmation, together with ſuch authority to ſign, ſhall be laid before the Lord Chancellor with the ſaid certificate) and unleſs ſuch bankrupt make oath, or ſolemnly affirm in writing, that ſuch certificate was obtained without fraud; and unleſs ſuch certificate ſhall, after ſuch oath or affirmation, be allowed by the Lord Chancellor, or by ſuch two of the juſtices of the King's Bench, Common Pleas, or barons of the Exchequer, to whom the conſideration of ſuch certificate ſhall be referred by the Lord Chancellor; and any of the creditors of ſuch bankrupt are to be heard, if they think fit, againſt the making ſuch certificate, and againſt the confirmation thereof.

Sect. 11. Every ſecurity to be given to the uſe of any creditor, as a conſideration to perſuade him to ſign ſuch certificate, ſhall be void; and the party ſued on ſuch contract may plead the general iſſue.

Sect. 12. Nothing in this act ſhall give any advantage to any bankrupt, who ſhall upon marriage of any of his children have given above the value of 100*l.* (unleſs he ſhall prove by his books, or otherwiſe upon his oath or affirmation before the commiſſioners, that he had remaining other eſtates ſufficient to pay every perſon, to whom he was indebted, their full debts) or who ſhall have loſt in one day the value of 5*l.* or in the whole the value of 100*l.* within twelve months next preceding his becoming bankrupt, at cards, dice, tables, tennis, bowls, billiards, ſhovel-board, or cock-fighting, horſe-races, dog-matches, or foot-races, or other game, or by bearing a ſhare in the ſtakes, or betting, or that within one year before he became bankrupt, ſhall have loſt 100*l.* by contracts for ſtock, or ſhares of any publick funds, where ſuch contract was not to be performed within one week from the making, or where the ſtock was not actually transferred.

Sect. 13. If any bankrupt, who ſhall have obtained his certificate, ſhall be taken in execution, or detained in priſon on account of any debts owing before he became bankrupt, by reaſon that judgment was obtained before ſuch certificate was allowed; it ſhall be lawful for any one of the judges of the court, wherein judgment has been ſo obtained, on ſuch bankrupt's producing his certificate allowed, to order any ſheriff or gaoler, who ſhall have ſuch bankrupt in cuſtody, to diſcharge ſuch bankrupt without fee.

Sect. 14. Upon certificate under the hands and ſeals of the commiſſioners, that ſuch commiſſion is iſſued, and ſuch perſon proved before them to become bankrupt, it ſhall be lawful for any of the juſtices of his Majeſty's courts of King's Bench, or Common Pleas, or barons of the Exchequer, and the juſtices of peace within *England* and *Wales*, and town of *Berwick upon Tweed*, and they are required upon application made, to grant their warrants for apprehending ſuch perſon, and him to commit to the common gaol of the county where he ſhall be apprehended, there to remain until he be removed by order of the commiſſioners; and the gaoler, to whoſe cuſtody ſuch perſon ſhall be committed, is required to give notice to one of the commiſſioners, of ſuch perſon being in his cuſtody, and the commiſſioners are impowered to ſeize the effects of ſuch bankrupt (the neceſſary wearing apparel of ſuch bankrupt, or of his wife or children, excepted) and his books or writings, which ſhall be then in the cuſtody of ſuch bankrupt, or of any other perſon in priſon.

Sect. 15. If any perſon ſo apprehended ſhall within the time allowed ſubmit to be examined, and conform as if he had ſurrendered, ſuch perſon ſhall have the benefit of this act, as if he had voluntarily come in.

Sect. 16. It ſhall be lawful for the commiſſioners to examine every perſon againſt whom any commiſſion ſhall be awarded, touching all matters relating to the trade and effects of ſuch bankrupt; and alſo to examine every other perſon duly ſummoned or preſent at any meeting of the commiſſioners, touching all matters relating to the perſon and effects of ſuch bankrupt, and any act of bankruptcy committed by him; and alſo to reduce into writing the anſwers of ſuch bankrupt, or other perſon, which examination the party examined is required to ſubſcribe; and in caſe ſuch bankrupt, or other perſon, ſhall refuſe to anſwer, or ſhall not fully anſwer to the ſatisfaction of the commiſſioners, all lawful queſtions put by the commiſſioners, or ſhall refuſe to ſubſcribe his examination (not having a reaſonable objection to the wording thereof, to be allowed by the commiſſioners) it ſhall be lawful for the commiſſioners by warrant to commit him to ſuch priſon as the commiſſioners ſhall think fit, there to remain without bail, until ſuch perſon ſhall ſubmit himſelf to the commiſſioners, and full anſwer make to the ſatisfaction of the commiſſioners to all ſuch queſtions as ſhall be put to him, and ſubſcribe ſuch examination as aforeſaid.

Sect. 17. In caſe any perſon ſhall be committed by the commiſſioners for refuſing to anſwer, or not fully anſwering any queſtion, the commiſſioners ſhall in their warrant of commitment ſpecify ſuch queſtion.

Sect. 18. In caſe any perſon committed by the commiſſioners warrant, ſhall bring a *habeas corpus* in order to be diſcharged, and there ſhall appear any inſufficiency in the form of the warrant, it ſhall be lawful for the court or judge, before whom ſuch party ſhall be brought by *habeas corpus*, by rule or warrant, to commit ſuch perſon to the ſame priſon, there to remain until he ſhall conform as aforeſaid, unleſs it ſhall be made appear, that he hath fully anſwered all lawful queſtions put to him by the commiſſioners; or (in caſe ſuch perſon was committed for not ſigning his examination) unleſs it ſhall appear that the party had good reaſon for refuſing to ſign the ſame. And in caſe any gaoler, to whom ſuch perſon ſhall be committed, ſhall wilfully ſuffer ſuch perſon to eſcape, or to go without the walls or doors of the priſon, ſuch gaoler ſhall for ſuch offence, being convicted by indictment or information, forfeit 500*l.* for the uſe of the creditors.

Sect. 19. The gaoler ſhall, upon requeſt of any creditor, having proved his debt, and producing a certificate thereof under the hands of the commiſſioners (which the commiſſioners are to give *gratis*) produce ſuch perſon ſo committed; and in caſe ſuch gaoler ſhall refuſe to ſhew ſuch perſon ſo committed, and being in his actual cuſtody at the time of ſuch requeſt, to ſuch creditor requeſting to ſee ſuch perſon, ſuch gaoler ſhall forfeit 100*l.* for the uſe of the creditors, to be recovered by action of debt in the name of the creditor requeſting ſuch ſight.

Sect. 20. Every perſon who ſhall (after the time allowed to ſuch bankrupt) voluntarily make diſcovery of any part of ſuch bankrupt's eſtate, not before come to the knowledge of the aſſignees, ſhall be allowed 5 *per cent.* and ſuch further reward as the aſſignees, and the major part of the creditors, in value, preſent at any meeting of the creditors, ſhall think fit.

Sect. 21. Every perſon who ſhall have accepted of any truſt, and ſhall wilfully conceal any eſtate of any bankrupt, and ſhall not, within forty-two days after ſuch commiſſion ſhall iſſue, and notice given in the Gazette, diſcover ſuch truſt and eſtate in writing to one of the commiſſioners or aſſignees, and ſubmit to be examined (if required) ſhall forfeit 100*l.* and double the value of the eſtate concealed, to the creditors.

Sect. 22. It ſhall be lawful for perſons taking bills, notes, or other ſecurity for money payable at a future day, to petition for a commiſſion, or join in petitioning.

Sect. 23. No commiſſion of bankrupt ſhall be awarded, unleſs the ſingle debt of the creditor, or of more perſons being partners petitioning for the ſame, amount to 100 *l.* or unleſs the debt of two creditors petitioning amounts to 150 *l.* or unleſs the debt of more creditors petitioning amount to 200 *l.* and the creditors petitioning ſhall, before the ſame be granted, make affidavit or ſolemn affirmation, before one of the Maſters of Chancery, of the truth of their debts, and give bond to the Lord Chancellor, in the penalty of 200 *l.* to be conditioned for proving their debts, as well before the commiſſioners, as upon a trial at law, in caſe the due iſſuing forth of the ſame ſhall be conteſted, and alſo for proving the party a bankrupt, and to proceed on ſuch commiſſion as herein is mentioned; and if ſuch debts ſhall not be really due, or if after ſuch commiſſion taken out it cannot be proved that the party was a bankrupt, then the Lord Chancellor ſhall, upon petition of the party grieved, order ſatisfaction to be made for the damages ſuſtained; and, in caſe there be occaſion, aſſign ſuch bond to the party, who may ſue for the ſame in his own name.

Sect. 24. If any bankrupt ſhall, after iſſuing of any commiſſion againſt him, pay to the perſon who ſued out the ſame, or deliver to ſuch perſon goods, or ſecurity for his debt, whereby ſuch perſon, ſuing out ſuch commiſſion, ſhall privately have more in the pound than the other creditors, ſuch payment, delivery of goods, or giving ſecurity, ſhall be deemed an act of bankruptcy, whereby ſuch commiſſion ſhall be ſuperſeded: And it ſhall be lawful for the Lord Chancellor to award to any creditors petitioning, another commiſſion; and ſuch perſon receiving ſuch goods, or other ſatisfaction, ſhall forfeit as well his whole debt, as the whole he ſhall have received, and ſhall pay back and deliver up the ſame, or the full value thereof, to be diſtributed amongſt the other creditors.

Sect. 25. The creditors, who ſhall petition for a commiſſion of bankrupt, ſhall be obliged at their own coſts to proſecute the ſame, until aſſignees ſhall be choſen; and the commiſſioners ſhall, at the meeting appointed for the choice of aſſignees, aſcertain ſuch coſts, and by writing ſhall order the aſſignees to reimburſe ſuch petitioning creditors, out of the firſt effects of the bankrupt that ſhall be got in; and every creditor ſhall be at liberty to prove his debt without paying contribution.

Sect. 26. The commiſſioners ſhall forthwith, after they have declared the perſon a bankrupt, cauſe notice thereof to be given in the Gazette, and ſhall appoint a place for the creditors to meet, (which meeting for the city of *London*, and all places within the bills of mortality, ſhall be at *Guildhall*) in order to chooſe aſſignees; at which meeting the commiſſioners ſhall admit the proof of any creditor's debt that ſhall live remote from the place of ſuch meeting, by affidavit or ſolemn affirmation, and permit any perſon duly authoriſed by letter of attorney (oath or affirmation being made of the execution thereof, either by an affidavit ſworn, or affirmation made before a Maſter in Chancery, ordinary or extraordinary, or before the commiſſioners *viva voce*; and in caſe of creditors reſiding in foreign parts, ſuch affidavits or affirmations to be made before a magiſtrate where they ſhall be reſiding, and ſhall, together with ſuch creditor's letters of attorney, be atteſted by a notary publick) to vote in the choice of aſſignees in the place of ſuch creditor; and the commiſſioners ſhall aſſign ſuch bankrupt's eſtate unto ſuch perſons, as the major part in value of ſuch creditors, according to the debts then proved, ſhall chooſe; and the aſſignees ſhall be obliged to keep books of account, wherein they ſhall enter all ſums of money, or other effects, which they ſhall have received out of the ſaid bankrupt's eſtate, to which books every creditor ſhall have free reſort.

Sect. 27. No creditor, or other perſon on the behalf of any creditor, ſhall be permitted to vote in ſuch choice of aſſignees, whoſe debt ſhall not amount to 10 *l.*

Sect. 28. Where it ſhall appear that there hath been mutual credit given, or mutual debts, between the bankrupt and any other perſon, the commiſſioners or aſſignees ſhall ſtate the account, and one debt may be ſet againſt another, and the ballance of ſuch account ſhall be claimed or paid.

Sect. 29. If any perſon ſhall before the commiſſioners, or by affidavit or affirmation exhibited to them, ſwear or affirm, that any ſum of money is due to him from any bankrupt, which is not really due, knowing the ſame to be not due, and being convicted by indictment or information, ſuch perſon ſhall ſuffer the penalties inflicted by the ſtatutes againſt wilful perjury, and ſhall be liable to pay double the ſum ſo ſworn or affirmed to be due.

Sect. 30. It ſhall be lawful for the commiſſioners immediately to appoint aſſignees, which aſſignees ſhall be removed at the meeting of the creditors for choice of aſſignees, if the major part in value of them then preſent, and of ſuch perſons authoriſed as aforeſaid, ſhall think fit; and ſuch aſſignees as ſhall be removed, ſhall deliver up the effects unto the aſſignees choſen by the creditors, and all the eſtate; and if ſuch firſt aſſignee ſhall neglect by the ſpace of ten days (after notice in writing) to make ſuch aſſignment and delivery, every ſuch firſt aſſignee ſhall forfeit 200 *l.* to be diſtributed amongſt the creditors, and to be recovered by ſuch perſon as the commiſſioners ſhall appoint to ſue for the ſame.

Sect. 31. It ſhall be lawful for the Lord Chancellor, upon petition of creditors, to make ſuch order for the choice of new aſſignees as he ſhall think juſt; and in caſe a new aſſignment ſhall be ordered, then ſuch effects of ſuch bankrupt ſhall be thereby effectually veſted in ſuch new aſſignees, and it ſhall be lawful for them to ſue for the ſame in their names, and to give acquittance for debts, as the aſſignees in the former aſſignment might have done; and the commiſſioners ſhall cauſe publick notice to be given in the two Gazettes that ſhall immediately follow the removal of ſuch aſſignees and the appointment of others.

Sect. 32. Before the creditors ſhall proceed to the choice of aſſignees, the major part in value of the creditors preſent ſhall, if they think fit, direct how, and with whom, the monies to be received out of the bankrupt's eſtate ſhall remain until the ſame be divided, to which rule ſuch aſſignees ſhall conform, as often as 100 *l.* ſhall be got in.

Sect. 33. Perſons choſen aſſignees ſhall after the expiration of four months, and within twelve months from the time of iſſuing ſuch commiſſion, cauſe twenty-one days notice to be given in the Gazette, of the time and place the commiſſioners and aſſignees intend to meet to make a dividend, at which time the creditors, who have not proved their debts, ſhall be at liberty to prove the ſame; which meeting for the city of *London*, and all places within the bills of mortality, ſhall be at *Guildhall*; and upon every ſuch meeting, the aſſignees ſhall produce accounts of their receipts and payments, and of what remain out-ſtanding, and ſhall (if the creditors preſent require the ſame) be examined upon oath, or ſolemn affirmation, touching the truth of ſuch accounts; and the aſſignees ſhall be allowed all juſt allowances; and the commiſſioners ſhall order ſuch part of the neat produce of the ſaid bankrupt's eſtate in the hands of the aſſignees as they ſhall think fit, to be divided amongſt the creditors; and ſhall make ſuch order for a dividend in writing, and ſhall cauſe one part of ſuch order to be filed amongſt the proceedings under the commiſſion, and ſhall deliver unto each of the aſſignees a duplicate of ſuch order, which order ſhall contain an account of the time and place of making ſuch order, and the ſum total of the debts prov'd, and the ſum total of the money remaining in the hands of the aſſignees, and how much in the pound is then ordered to be paid; and the aſſignees in purſuance of ſuch order, and without any deed of diſtribution, ſhall forthwith make ſuch dividend, and take receipts in a book from each creditor.

Sect. 34. It ſhall be lawful for the aſſignees, with the conſent of the major part in value of the creditors preſent at any meeting purſuant to notice in the Gazette, to ſubmit any difference between ſuch aſſignees and any perſon whatſoever, or by reaſon of any matter relating to ſuch bankrupt, to the determination of arbitrators, or otherwiſe

otherwiſe to compound the matters in difference, as the aſſignees with ſuch conſent can agree.

Sect. 35. The aſſignees are impowered, with conſent of creditors, to make compoſition with any debtors to ſuch bankrupts, where the ſame ſhall appear neceſſary.

Sect. 36. After ſuch bankrupt ſhall have obtained his certificate, and the ſame ſhall be confirmed, ſuch bankrupt ſhall be obliged to give his attendance, upon notice in writing to attend the aſſignees, in order to ſettle any account of ſuch bankrupt's eſtate, or to attend any court of record, to be examined touching the ſame, or for ſuch other buſineſs, which ſuch aſſignees ſhall judge neceſſary, for getting in the bankrupt's eſtate; for which attendance the bankrupt ſhall be allowed 2 *s.* 6 *d. per diem*; and in caſe ſuch bankrupt ſhall neglect to attend, or refuſe to aſſiſt in ſuch diſcovery, without good cauſe to be ſhewn to the commiſſioners, to be by them allowed (ſuch aſſignees making proof thereof, upon oath or ſolemn affirmation, before the commiſſioners) the commiſſioners are required to iſſue a warrant to ſuch perſons as they ſhall think proper, for apprehending ſuch bankrupt, and him to commit to the county gaol, there to remain in cloſe cuſtody until he ſhall conform to the ſatisfaction of the commiſſioners, or to the order of the Lord Chancellor, or by due courſe of law diſcharged; and ſuch gaoler is required to keep ſuch perſon in cloſe cuſtody, within the walls of the priſon, under the penalties before mentioned for ſuffering ſuch priſoners to eſcape.

Sect. 37. Within eighteen months after the iſſuing of any ſuch commiſſion, the aſſignees ſhall make a ſecond dividend, in caſe the eſtate was not wholly divided upon the firſt, and ſhall cauſe notice to be inſerted in the Gazette, of the time and place the ſaid commiſſioners intend to meet to make a ſecond dividend, and for the creditors, who ſhall not before have proved their debts, to come and prove the ſame; and at ſuch meeting every aſſignee ſhall produce upon oath or affirmation his accounts, and what upon the ballance ſhall appear to be in his hands, ſhall by like order of the commiſſioners be forthwith divided; which ſecond dividend ſhall be final, unleſs any ſuit ſhall be depending, or any part of the eſtate ſtanding out, or unleſs ſome future eſtate of the bankrupt ſhall afterwards come to the aſſignees; in which caſe the aſſignees ſhall, as ſoon as may be, convert ſuch future eſtate into money, and ſhall, within two months after, by the like order of the commiſſioners, divide the ſame.

Sect. 38. No ſuit in equity ſhall be commenced by aſſignees, without the conſent of the major part in value of the creditors preſent at a meeting purſuant to notice in the Gazette.

Sect. 39. Bankers, brokers, and factors, are declared liable to the ſtatutes concerning bankrupts.

Sect. 40. No farmer, grazier, or drover, or receiver general of taxes, ſhall be intitled, as ſuch, to the benefits given by this act, or be deemed a bankrupt.

Sect. 41. Upon petition of any perſon, the Lord Chancellor may order ſuch commiſſions, depoſitions, proceedings, and certificates, to be entered of record; and in caſe of the death of the witneſſes proving ſuch bankruptcy, or in caſe the ſaid commiſſions, or other things ſhall be loſt, a copy of the record of ſuch commiſſions or things, ſigned and atteſted as herein is mentioned, may be given in evidence to prove ſuch commiſſions, and bankruptcy, or other things; and all certificates which have been allowed, or to be allowed, and entered of record, or a true copy of every certificate ſigned and atteſted as herein mentioned, ſhall and may be given in evidence in any courts of record, and without further proof taken to be a bar and diſcharge againſt any action for any debt contracted before the iſſuing of ſuch commiſſion; unleſs any creditor of the perſon that hath ſuch certificate ſhall prove that ſuch certificate was fraudulently obtained; and the Lord Chancellor ſhall appoint a place near the inns of court, where the matters aforeſaid ſhall be entred of record, where all perſons ſhall be at liberty to ſearch; and the Lord Chancellor ſhall, by writing, appoint a proper perſon, who ſhall (by himſelf or deputy, to be approved by the Lord Chancellor by writing) enter of record ſuch commiſſions, and other things, and have the cuſtody of the entries thereof; and alſo appoint ſuch fee for his labour therein, as the Lord Chancellor ſhall think reaſonable, not exceeding what is uſually paid in like caſes; and the perſon ſo to be appointed, and his deputy, ſhall continue to enter of record all the matters aforeſaid, and to have the cuſtody of the ſame ſo long as they ſhall behave themſelves well; and ſhall not be removed, but by order in writing under the hand of the Lord Chancellor, or good cauſe therein ſpecified.

Sect. 42. There ſhall not be paid out of the eſtate of the bankrupt any monies for expences in eating or drinking of the commiſſioners, or of any other perſons, at the times of meeting of the commiſſioners or creditors: and no ſchedule ſhall be annexed to any deed of aſſignment of the perſonal eſtate of ſuch bankrupt; and if any commiſſioner ſhall order ſuch expences to be made, or eat or drink at the charge of the creditors, or out of the eſtate of ſuch bankrupt, or receive above 20*s.* each commiſſioner for each meeting, every ſuch commiſſioner ſhall be diſabled to act in any commiſſion of bankrupts.

Sect. 43. The commiſſioners ſhall not be capable of acting until they reſpectively ſhall have taken an oath to the effect following:

I A. B. *do ſwear, that I will faithfully, impartially, and honeſtly, according to the beſt of my ſkill and knowledge, execute the ſeveral powers and truſts repoſed in me as a commiſſioner in a commiſſion of bankrupt againſt* ; *and that without favour or affection, prejudice or malice.*

So help me God.

Sect. 44. Which oath any two of the commiſſioners are impowered to adminiſter to each other, and they are required to keep a memorial thereof ſigned by them among the proceedings on each commiſſion.

Sect. 45. No commiſſion of bankrupt ſhrll abate by the death of his Majeſty, his heirs or ſucceſſors, but ſhall continue in force; and if it ſhall be neceſſary to renew any commiſſion by reaſon of the death of the commiſſioners, or any other cauſe, ſuch commiſſion ſhall be renewed, and but half the fees uſually paid ſhall be paid for ſuch renewed commiſſion.

Sect. 46. All bills of fees or diſburſements demanded by any ſolicitor employed under any commiſſion of bankrupt, ſhall be ſettled by one of the maſters of Chancery, and the maſter who ſhall ſettle ſuch bill ſhall have for his care in ſettling the ſame, as alſo for his certificate thereof, 20*s.*

Sect. 49. This act ſhall continue for three years, from the twenty-fourth of *June* 1732, and to the end of the next ſeſſion of parliament. *Continued afterwards by ſeveral acts; and by* 31 *Geo.* 2. *c.* 35. *ſect.* 2. *it was continued to Sept.* 29, 1764, *and from thence to the end of the then next ſeſſion of parliament.*

Stat. 19 *Geo.* 2. *c.* 32. *ſect.* 1. From and after 29 *October* 1746, no perſon, who is and ſhall be really and *bona fide* a creditor of any bankrupt for and in reſpect of goods really and *bona fide* ſold to ſuch bankrupt, or for or in reſpect of any bill or bills of exchange really and *bona fide* drawn, negotiated, or accepted, by ſuch bankrupt, in the uſual and ordinary courſe of trade and dealing, ſhall be liable to refund or repay to the aſſignee or aſſignees of ſuch bankrupt's eſtate, any money which before the ſuing forth ſuch commiſſion was really and *bona fide*, and in the uſual and ordinary courſe of trade and dealing, received by ſuch perſon of any ſuch bankrupt before ſuch time as the perſon receiving the ſame ſhall know, underſtand, or have notice, that he is become a bankrupt, or that he is in inſolvent circumſtances.

Sect. 2. From and after the ſaid 29th *October* 1746, the obligee in any bottomree, or reſpondentia bond, and the aſſured in any policy of inſurance made and entered into upon a good and valuable conſideration *bona fide*, ſhall be admitted to claim; and after the loſs or contingency ſhall have happened before the time of the iſſuing of the commiſſion of bankruptcy againſt ſuch obligor or inſurer; and ſhall be intitled unto, and ſhall have and receive a proportionable part, ſhare and dividend of ſuch bankrupt's eſtate, in proportion to the other creditors of ſuch bankrupt,

rupt, in like manner as if ſuch loſs or contingency had happened before the commiſſion iſſued; and all and every perſon or perſons againſt whom, from and after the ſaid 30th day of *October*, any commiſſion of bankruptcy ſhall be awarded, ſhall be diſcharged of and from the debt or debts, owing by him, her or them, on every ſuch bond and policy of inſurance, as aſſigned, and ſhall have the benefit of the ſeveral ſtatutes now in force againſt bankrupts in the ſame manner to all intents and purpoſes, as if ſuch loſs or contingency had happened, and the money due in reſpect thereof had become payable, before the time of the iſſuing of ſuch commiſſion.

Stat. 24 *Geo.* 2. *c.* 57. *ſect.* 9. Whereas many abuſes have been committed by bankrupts, and perſons who with their privity have attempted to prove fictitious and pretended debts under commiſſions of bankruptcy, in order that ſuch perſons might be enabled to ſign their conſent to the certificate, for diſcharging ſuch bankrupts from their debts; for remedy whereof, and in order to prevent the ſo fraudulent and wicked practices for the future, Be it enacted, *&c.* that where any perſons ſhall fraudulently ſwear or depoſe, or, being of the people called quakers, affirm before the major part of the commiſſioners named in any commiſſion of bankruptcy, or by affidavit or affirmation exhibited to them, that a ſum of money is due to him or her from any bankrupt or bankrupts, which ſhall in fact not be really ſo due and owing, and ſhall, in reſpect of ſuch fictitious and pretended debt, ſign his or her conſent to the certificate for ſuch bankrupt's diſcharge from his debts, that in every ſuch caſe, unleſs ſuch bankrupt ſhall, before the time that ſuch major part of the ſaid commiſſioners ſhall have ſigned ſuch certificate, by writing by him to be ſigned and delivered to one or more of the ſaid commiſſioners, or to one or more of the ſaid aſſignees of his eſtate and effects, under ſuch commiſſion, diſcloſe the ſaid frauds, and object to the reality of ſuch debt, ſuch certificate ſhall be null and void to all intents and purpoſes, and ſuch bankrupt ſhall not in that caſe be intitled to be diſcharged from his debts, or to have and receive any of the benefits or allowances given or allowed to bankrupts by the ſaid act of the 5 *Geo.* 2.

Sect. 10. And where the creditor or creditors of any bankrupt reſide in foreign parts, the letter of attorney of ſuch creditor, atteſted by a notary public in the uſual form, ſhall be a ſufficient evidence of the power and authority by which any perſon thereby authorized ſhall ſign any bankrupt's certificate; any thing in the ſaid act of the 5th of *Geo.* 2. to the contrary notwithſtanding.

2. *Who may be a bankrupt, and who not; what are acts of bankruptcy, and what not.*

By the ſtatutes 13 *Eliz. c.* 7. and 21 *Jac.* 1. *c.* 19. (which ſee in the foregoing diviſion) it appears, that every perſon uſing the trade of merchandize, by way of bargaining, exchange, rechange, bartery, cheviſance, or otherwiſe, in groſs or by retail; or ſeeking his or her trade of living by buying and ſelling, being a natural born ſubject, or an alien, or being a denizen, or that ſhall uſe the trade or profeſſion of a ſcrivener, receiving other men's monies or eſtates into his truſt or cuſtody, may be a bankrupt.

Perſons dealing as bankers, brokers, and factors, being frequently intruſted with large ſums of money, and with goods and effects of very great value belonging to other perſons, are declared to be ſubject to all the ſtatutes made concerning bankrupts. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 39. in the preceding diviſion.

A ſhoemaker is within 13 *Eliz. cap.* 7. for he lives by his credit, in buying leather and ſelling it again in ſhoes, and not on his manual labour only, as labourers and huſbandmen do; for the thing bought and ſold under different forms is the leather; and though the ſhoemaker's labour is employed in the alteration of the form, yet men do not contract for the labour, but for the thing itſelf. *Cro. Eliz.* 268. *Cro. Jac.* 584. *Cro. Car.* 31. 3 *Mod.* 330.

A weaver and dyer are within the ſtatute, for they get their living by buying and ſelling, and therefore may have an action for calling them bankrupts. *Cro. Jac.* 584.

An ironmonger, who buys rod iron, or bar iron, and cauſes it to be worked up into wares, may be a bankrupt. *Good.* 11. *Stone* 120.

A ſaleſman may be a bankrupt. *Good.* 12.

A nobleman, who hath granted to him the ſole importing of cards or glaſſes, may be a bankrupt. *Stone* 120.

An officer of the court takes a leaſe of the King, of the ſole pre-emption of tin, he is a bankrupt for all debts he contracts during his term. *Stone* 120.

Trading phyſicians may be bankrupts. *Dav.* 9.

A carpenter that ſells wrought timber ſeems to be within the ſtatute, for he ſells the materials though altered by his workmanſhip, ſo that he gets his living by buying in and ſelling out the timber; but otherwiſe it ſeems it is of a meer working carpenter. 3 *Mod.* 155.

If a trader become ſecurity for another, he is a bankrupt within the ſtatute, becauſe he is truſted upon the reputation of his ſtock and dealings, as well where he is ſecurity, as where he contracts for his own debts. *Palm.* 325.

If a man buy in *England* only, and ſells in *Ireland*, he may be a bankrupt, for many merchants buy beyond ſea, and ſell in *England* only, and others buy here, and ſell beyond ſea; for it is a trading that makes a man capable of being a bankrupt. *Raym.* 375.

A gentleman of the *Temple* went from thence to *Liſbon*, where he turned factor and traded to *England*, and broke; it was inſiſted upon that the ſtatutes of bankruptcy did not extend to perſons out of the realm, the ſubject of them being caſes of arreſts, outlawries, and departing the realm; and the 21 *Jac.* 1. which extends to aliens, is to be underſtood of aliens here; but the court held him a bankrupt by reaſon of his trading hither and back again, which gained him a credit here. 1 *Salk.* 110.

There have been commiſſions of bankruptcy taken out againſt femes ſole merchants, and one was taken out on the 20th of *March* 1741, againſt *Mary Dennis* of the pariſh of St. *Botolph* without *Biſhopſgate*, linendraper, ſole trader within the city, and wife of *Peter Dennis*, citizen and watchmaker of *London*; and it appearing in the commiſſion that no part of the eſtate and effects which were delivered by her to the commiſſioners any ways belonged to her huſband, a proper aſſignment was made of her eſtate and effects, and ſhe conformed herſelf in all reſpects to the acts relating to bankrupts; and on the 17th of *July* 1742, her certificate was allowed under that deſcription. *Dav.* 23.

A member of parliament is liable to a commiſſion of bankruptcy, and accordingly on the 23d of *January* 1741, a joint commiſſion was taken out againſt *John Caſwell* and *John Mount* of *London*, bankers and partners; and Mr. *Caſwell* was then a member of parliament, *and the parliament then ſitting*; and on the 21ſt of *May* 1717, a commiſſion was taken out againſt *John Burridge* of *London*, merchant, who was alſo a member of parliament; and the author likewiſe ſets forth a reſolution of the houſe of commons, bearing date the 16th of *November* in the 9th year of King *George*, 1722, whereby it is unanimouſly declared, that no co-partner in any trade or undertaking, was intitled to the privilege of that houſe, in reſpect of any matter relating to ſuch copartnerſhip. *Dav.* 6.

The ſtatutes relating to bankrupts have been adjudged to extend to phyſicians, when they have been proved to have traded or merchandized, or to have bought and ſold goods, effects, and merchandizes, and accordingly on the 29th of *October* 1726, a commiſſion of bankruptcy was taken out againſt Doctor *John Lane*, a phyſician in *Briſtol*, and he was found a bankrupt, on his being proved a *dealer in copper and lead*. *Dav.* 9.

Private gentlemen may be bankrupts tho' never bred up to trade, but have only inveſted their money in it, in order to make better intereſt thereof, notwithſtanding they have never acted or appeared in the trade, or been known

to any perſons trading with the perſon to whom they ſo lent the money, or been perſonally concerned in the buying and ſelling any goods whatſoever. See *Dav.* 9.

A gentleman of the bar, who had a colliery and dealt in coals at *Durham*, was held ſuch a trader as might be a bankrupt. *Stra.* 514.

Adventurers in the *Eaſt-India* or *Guinea* company, or in the royal fiſhing trade, are not liable to the ſtatutes of bankruptcy on account of their ſtock in the ſaid companies or trades. *See the ſtat.* 13 & 14 Car. 2. c. 24. ſect. 3. *under the firſt diviſion of this title.*

But if a trader put money into the *Eaſt-India* company and abſcond, he is a trader within this act, becauſe ſuch goods being bought and ſold, were within the original ſtatutes touching bankrupts; for they make no diſtinction between the manner of trade, whether in companies or out of them; and though this ſtatute hath excepted the nobility and gentry for the encouragement of theſe companies, yet trades are left out. 2 *Keb.* 487. *Hugh. Abr.* 315, 316. See *Goodw.* 20. where it is ſaid to have been adjudged, that ſuch trading did bring a man within the ſtatutes before this act.

Having *Eaſt-India* ſtocks, or the dealing in them, will not make a man liable to bankruptcy, nor do they ſeem to be wares, goods or merchandizes within the intent of the clauſe of the above ſtatute of *Car.* 2. Said by Lord Chancellor *King*, in the caſe of *Colt* v. *Netterwill*, 2 *Will. Rep.* 308.

By ſeveral acts of parliament relating to the bank of *England*, the *Eaſt-India* company, the *South-Sea* company, the *Royal-Exchange* and *London* Inſurance companies, no member of any of the ſaid companies ſhall be liable to any of the ſtatutes made againſt bankrupts, on account of their ſtock in the ſaid companies.

By ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 40. No farmer, graſier, or driver of cattle, or any receiver general of taxes, ſhall be deemed a bankrupt.

But ſuch farmer, if he ſhall deal in wool, hops, or the like, ſhall be deemed a bankrupt; otherwiſe any perſon by taking a farm might avoid the ſtatutes. *Stran.* 513.

A pawn-broker, merely as ſuch, is not liable to the ſtatutes relating to bankrupts, becauſe he does not buy nor ſell for himſelf, and is only a common lender of money at intereſt, and the pledges which he ſells are for the benefit of the borrower: And on the 18th of *September* 1742 a commiſſion of bankruptcy was taken out againſt *Richard Read*, a pawn-broker; and the commiſſioners, in regard it did not at firſt appear to them that he was a trader, abſolutely refuſed to find him a bankrupt as a broker; but it afterwards being proved that he was a trader as well as a pawn-broker, the conmiſſioners thought proper to find him a bankrupt as a pawn-broker, dealer and chapman. And on or about the 17th day of *December*, 1737, a commiſſion of bankruptcy was taken out againſt *Robert Highmore*, of *Brick-Lane*, in the pariſh of *Whitechapel*, in the county of *Middleſex*, pawn-broker and chapman; and he petitioned to have ſuch commiſſion ſuperſeded, inſiſting upon it in his petition, that, as a pawn-broker, he was not liable to the ſtatutes relating to bankrupts; but afterwards it was agreed between all parties, that the commiſſion ſhould go on, and he ſubmitted to the ſame; and on the firſt day of *April* 1738, as appears by the *Gazette*, a dividend was made of his eſtate. Several commiſſions have been ſince taken out againſt pawn-brokers by the deſcription of *pawn-brokers and chapmen. Dav.* 25.

A common working taylor, who only makes clothes, is not, as has been held, liable to be a bankrupt; becauſe he only works as a ſervant for hire: But as their buſineſs is now greatly altered, and a good part of their trade conſiſts in buying and ſelling, ſo they are liable to the ſtatutes; and ſeveral commiſſions have been lately taken out againſt them by the deſcription of *taylors and chapmen. Dav.* 25.

A ſpecial verdict was found, that one *Richard Baxter* rented a farm, for which he paid three hundred pounds a year, and that he planted potatoes on part of the lands which he farmed, and bought great quantities thereof to plant there, and that, for ſeveral years paſt, he dealt with divers perſons in potatoes at ſeveral times and places, and had employed warehouſes where he had put his potatoes, and ſerved ſeveral markets therewith; and had ſold great quantities thereof for profit and for his living, *&c.*

On this ſpecial verdict two points were made; *viz.* If the jury had found enough to make *Baxter* a trader within any of the ſtatutes made againſt bankrupts; and whether a farmer who ſells potatoes, though he buys ſeveral other large quantities thereof, and gets his living thereby, is within any of the ſaid acts. It was here argued, as to the firſt point, that the jury had found enough to make him a trader within the ſtatutes of bankruptcy, for, though farmers or innkeepers, meerly as ſuch, are not within thoſe ſtatutes, yet as traders they are: And here the jury have found not only that *Baxter* was a farmer, but likewiſe a trader in potatoes, which he bought and ſold.

If a man hath ſeveral trades, and one is within, but another not within the ſtatutes, he ſhall nevertheleſs be adjudged a trader, ſo as to make him a bankrupt; and ſo ſhall a lawyer dealing in coals; and the dealing in one commodity more than another does not alter the caſe; for no perſon, except the trader himſelf, can tell in what commodity he moſtly deals; wherefore that trading which is the moſt viſible means of livelyhood is to be regarded: And in this caſe it is apparent that by dealing in potatoes *Baxter* got credit, and probably of ſeveral perſons that did not know he rented a farm; but if he did not, yet there are ſufficient words in this verdict to make him a trader, it being found that he ſold ſeveral great quantities of potatoes.

The argument on the ſecond point was this; That in *England* there are many hop-merchants who have hop-yards of their own, but ſtill ſhall be accounted traders, ſo as to ſubject them to the ſtatutes of bankrupts; and this trade of dealing in potatoes, though *Baxter* was a farmer, may be compared to the caſe where the plaintiff libelled for tythes of faggot-wood, and the defendant ſuggeſted for a prohibition, that no tythes ought to be paid for oak faggots. The plaintiff, in his prayer for a conſultation, may ſhew that the defendant had ſo ſorted the faggots, that it was impoſſible for him to take the tythes of one without the other.

It was anſwered by the other ſide, that this caſe, as found by the verdict, is not within the intention of any of the ſtatutes againſt bankrupts, becauſe it is found that *Baxter* got his livelyhood by buying and ſelling of potatoes: here if he bought ſome and had ſome of the growth of the lands which he rented, he is not a trader within any of the ſaid ſtatutes; for a farmer that bought and ſold cattle was held no trader, ſo as to make him a bankrupt; nor an innkeeper, who lays in malt and corn; neither ſhall a farmer who deals in turnips be accounted a trader.

The court being here divided, no judgment was given; but two of the judges ſeemed to be of opinion, that where a man bought great quantities of wool, or hops, though he hath a farm and ſheep of his own, and ſeveral hop-gardens, he ſhall be deemed a trader in thoſe commodities; and ſo ſhall an innkeeper, if he turn cornchandler. It is true, the jury have not found that *Baxter* got the chief part of his livelyhood by buying and ſelling potatoes; but it is not the quantity which is material, if it be in proportion to other goods that he buys and ſells; for if a perſon has an orchard, and buys ſeveral quantities of fruit of other people, though not ſo many as he hath in his own orchard, yet this ſhall make him a trader, and conſequently ſubject him to the ſtatutes of bankrupts.

The other two juſtices were of a contrary opinion, *viz.* that there was not enough found by the verdict to make *Baxter* a bankrupt. A farmer is no trader within any of the acts before mentioned, as a farmer, and notwithſtanding he was of another trade, if that is not the principal means of his livelyhood, he is not a trader within thoſe ſtatutes. It is indeed true, where buying and ſelling in any trade is the chief means of a man's livelyhood, then he is a trader within the acts of bankruptcy; but that is matter to be given in evidence, and found by the jury, which was not done in this caſe; therefore they held that it was an inſufficient verdict, becauſe the jury

did not find that *Baxter*, by buying and ſelling potatoes, got the chief part of his livelyhood, or that it did exceed his farming trade; for all that the ſtatute requires, is that trading ſhould be the chief matter to make him a bankrupt.

Upon the judges thus differing in their opinions in this caſe, the counſel for the plaintiff afterwards moved for a new *venire facias*, or that the court would give leave to amend this ſpecial verdict on the affidavit of one of the witneſſes at the trial; that *Baxter* bought potatoes ſeveral years, to the value of five hundred pounds *per annum*, and thereupon a rule was made for the other ſide to ſhew cauſe why the verdict ſhould not be amended; and they not ſhewing cauſe ſufficient, though it was inſiſted to be without precedent to amend the verdict, which is a record, by ſuch an affidavit; for being the ſame which was given in evidence before, the jury did not believe it; yet the court was of opinion, that a ſpecial verdict might be amended by notes taken by the clerk at the trial, or on proof of the certainty of what was there given in evidence; and the ſame was adjudged accordingly on payment of coſts. *Mod. Ca. in Law & Eq.* 46, 47. *Trin.* 7 *Geo.* 1.

If one covenants with the King to victual the fleet at a certain rate, and thereupon buys up a great quantity of proviſion, *&c.* tho' with the ſurplus he victuals merchants, yet being originally deſigned for the uſe of the navy, it will not make him a trader within the act; it is one act or contract only, and not a continued trading. 1 *Vent.* 270.

An innkeeper, as ſuch, can be no bankrupt, for though he buys proviſions to be ſpent in his houſe, yet he does not properly ſell them, but utter them at ſuch rates which he thinks reaſonable; and the attendance of his ſervants, furniture of his houſe, *&c.* are to be conſidered; and the ſtatutes only mention merchants that uſed to buy and ſell in groſs or by retail, and ſuch as get their living by buying and ſelling; ſo that their principal ſubſiſtence is by buying and ſelling: Now the contracts with innkeepers are not for any commodities in ſpecie, but they are contracts for houſe-room, trouble, attendance, lodging and neceſſaries, and therefore cannot come within the deſign of ſuch words, ſince there is no trade carried on by buying and bartring commodities; and though in this caſe a jury ſhould find that the innkeeper got his living by buying and ſelling, it would not bring him within the ſtatute for the reaſons aforeſaid. *Cro. Car.* 549. 1 *Jones* 437. *Criſp* and *Pratt.* *March* 35. *S. C.* 3 *Lev.* 309. *S. P.* Adjudged between *Newton* and *Trigg*, 3 *Mod.* 327. 1 *Show.* 268. 1 *Salk.* 109, 110. *Skin.* 291. *Comb.* 181. [*Notwithſtanding theſe determinations, it appears by the* London Gazette, *that many commiſſions of bankruptcy have been taken out againſt* innkeepers, *by the deſcription of* innkeepers and chapmen, *and ſuch commiſſions have been proceeded upon, and the bankrupts were allowed their certificates. Dav.*]

The buying part of a ſhip makes no trading, becauſe it is buying and ſelling within the ſtatute; but the buying part in the ſhip, and the party's employing it in carrying and re-carrying goods for himſelf, is an evidence of trade, becauſe the exportation and importation of goods is the buſineſs of a merchant; but if a man buys a part of a ſhip which he lets to freight, this is no evidence of trade, for there is no exportation or importation; but if a man repairs a ſhip, which is uſual, on the credit of the bottom, and afterwards takes a ſhare in it for his debt, and employs the ſhip in exportation, it has been held by ſome, that ſince in this he is compulſory, having no other way to obtain his debt, that it ſhall not be taken as an evidence of trading, becauſe this is only accidental, and not the way the party hath put himſelf in to get his livelyhood. 1 *Sid.* 411. 1 *Vent.* 29. 2 *Show.* 268. 2 *Keb.* 487.

A man's buying and ſelling brings him not within the ſtatutes, for they intend ſuch as gain the greateſt part of their living thereby; and therefore where a farmer bought and ſold cattle, it was adjudged that he was not a bankrupt, for a farmer is not within the ſtatutes, becauſe he only ſells the profits originally raiſed from the ground, and if he buy in commodities, and ſells them again, this is only accidental. *March* 35. *Cro. Jac.* 549.

If a man contracts a debt, while he is a trader, and after leaves off, and lives upon his eſtate in the country, and afterward abſconds for this debt, he is a bankrupt, becauſe he lived by his trade when the debt was contracted; but if a merchant leaves off his trade, and after contracts debts, and ſells off the ſurpluſage of his goods, but hath neither factor, correſpondent, nor packer, he is no bankrupt. *Palm.* 325. 1 *Vent.* 5. 3 *Leo.* 17. 1 *Sid.* 411.

If a trader gives over his trade, and then contracts debts, and then goes into trade again upon a new ſtock, it ſeems upon the petition of ſuch intermediate creditors he cannot be made a bankrupt, becauſe ſuch creditors did not truſt him upon the credit of his trade. 1 *Sid.* 411. 2 *Show.* 268. 1 *Vent.* 5.

The acts of bankruptcy, done by a perſon to make him a bankrupt, appear from the ſeveral ſtatutes in the firſt diviſion of this title, to be as follow.

1. To depart the realm.
2. To begin to keep his houſe, or otherwiſe to abſent himſelf.
3. To take ſanctuary.
4. To ſuffer himſelf willingly to be arreſted for any debt, or other thing, not grown due, for money delivered, wares ſold, or any other juſt or lawful cauſe, or good conſideration or purpoſe.
5. To ſuffer himſelf to be outlawed.
6. To yield himſelf to priſon.
7. To depart from his dwelling houſe, to the intent or purpoſe to defraud or hinder a juſt creditor or creditors of his or their juſt debt or duty. *Stat.* 13 *Eliz. c.* 7. 1 *Jac.* 1. *c.* 15. *ſect.* 2.
8. Willingly or fraudulently to procure himſelf to be arreſted, or his goods, money, or chattels, to be attached or ſequeſtered.
9. To make any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors ſhall and may be defeated or delayed for the recovery of their juſt debts. 1 *Jac.* 1. *c.* 15. *ſect.* 2.
10. Being arreſted for debt, to lie in priſon two months, after his arreſt, upon that or any other arreſt, or detention for debt.
11. To obtain privilege other than that of parliament.
12. Being arreſted for 100*l.* or more, to eſcape out of priſon.
13. To prefer to any court any petition or bill againſt any of the creditors, thereby endeavouring to inforce them to accept leſs than their juſt debts, or to procure time, or longer days of payment, than was given at the time of their original contracts. *Stat.* 21 *Jac.* 1. *c.* 19. *ſect.* 2.
14. For a bankrupt to pay, ſatisfy, or ſecure the petitioning creditor his debt. *Stat.* 5 *Geo.* 2. *c.* 30. *ſect.* 24.

1. *To depart the realm.*] A merchant departs the realm to merchandize, and becomes indebted, and to avoid arreſts, defers his return; this doth *tantamount* to a departing of the realm. *Stone* 123.

If a merchant depart the realm with the conſent of his creditors, he does not thereby commit an act of bankruptcy. *Dav.* 30.

A *capias de excommunicato capiendo* is awarded againſt one, who for fear of arreſt departs the realm, he is no bankrupt. So, if a perſon departs the realm for fear of an attachment in Chancery. *Stone* 123. *Good.* 22.

2. *To begin to keep houſe, or otherwiſe to abſent himſelf.*] If a man keeps his houſe for a long time, this does not immediately make him a bankrupt; but if he conceals himſelf within his houſe but for a day or an hour to delay or defraud his creditors, he is a bankrupt. *Palm.* 325.

If there be a proceſs out againſt a merchant, who thereupon keeps houſe to ſave himſelf from an arreſt, and after goes out to market and other places, but hearing of a new proceſs keeps houſe again, and after goes at large; *per cur'*, he is no bankrupt, becauſe he keeping in his houſe is an act of bankruptcy, for which a commiſſion might have been taken out at that time, yet by his going abroad it is afterwards purged; for though the ſtatute makes the keeping of houſe an act of bankruptcy,

yet it muſt be underſtood of a keeping in order to conceal himſelf. *Cro. E.* 13. *Godb.* 25. 1 *Lev.* 13. 1 *Sid.* 177.

If a man commits a plain act of bankruptcy, as keeping houſe, *&c.* though he after goes abroad, and is a great dealer, yet that will not purge the firſt act of bankruptcy; but if that act was not plain but doubtful, then going abroad and trading will be an evidence to explain the intent of the firſt act, for if it was not done to defraud creditors, and keep out of the way, it will not be within the ſtatutes. *Salk.* 110. *Lev.* 13, 14, 17.

If a trader abſents himſelf for fear of being arreſted by a writ *de excommunicato capiendo*, or if a decree in Chancery be made againſt him to execute a conveyance, and he keeps in, or withdraws himſelf, for fear of being attached for not performing the decree, ſuch withdrawing doth not make him a bankrupt; *contra*, if the ſubſtance of the decree had been for payment of money, becauſe in ſuch caſe his withdrawing had been to defraud or delay the payment of his debt. *Billing.* 92. *Goodw.* 22.

Keeping houſe for fear of an attachment in Chancery, is no act of bankruptcy. *Stone* 123.

An apothecary is made a churchwarden, and being indebted, keeps in the church; this is a keeping of his houſe. *Stone* 124.

If the ſteward, or the lieutenant of the tower of *London*, be a merchant, and indebted, and keep the tower; he is a bankrupt. *Stone* 124.

If a man denies himſelf to a creditor wilfully, knowing he comes for money, and with an intent to defraud and delay him of his debt, ſuch denials are taken to be acts of bankruptcy; and ſeveral perſons have been found bankrupts on ſuch accounts.

But ſuppoſing a merchant or trader in good circumſtances, engaged in buſineſs of the utmoſt importance with reſpect to his own affairs, and not knowing a creditor would come for his money, ſhould generally ſay to his ſervants, whoever comes to enquire for me to-day, tell them I am not at home, but keeps his warehouſe or ſhop open; and the next day, or a day or two afterwards, goes abroad, and to the *Exchange*, and meeting his creditor pays him the money. The queſtion is, whether this is ſuch a denial to delay or defraud his creditor, as would induce a jury to find a perſon bankrupt on that account, becauſe he may ſue him at any time for his debt; and his going abroad, and publickly dealing, ſeems, according to the Ld. Ch. J. *Holt*'s opinion in the beforementioned caſe of *Hopkins* and *Ellis*, *(Salk.* 110.*)* to be a purgation of the act of bankruptcy; and his words are theſe (*if the act was not plain but doubtful*): then going abroad and dealing will be an evidence to explain the intent of the firſt act; for if it was not done to defraud his creditors, and keep out of the way, it will not be an act of bankruptcy.

And in a petition which came on before the late Lord, Chancellor *Hardwicke*, on the 6th of *Auguſt* 1743, it was ſaid, that the being denied to a creditor was only an evidence of an act of bankruptcy; but that the abſconding was the material part of it. *Dav.* 92, 93.

If a man abſents himſelf for felony, it is not an act of bankruptcy, it not being to defraud the creditor of his juſt debt or duty due to him. *Dav.* 91.

But if a perſon who is a felon, will alſo commit an act of bankruptcy, by attempting to conceal or imbezil his goods and effects, he may be a bankrupt as well as a felon: and tho' he don't appear, or ſubmit to be examined, yet the commiſſioners will proceed in the commiſſion, and divide ſuch eſtates and effects as they can come at. *Dav.* 91.

Action againſt the defendant for a falſe return to two *fieri facias's*; and on evidence the caſe appeared to be thus, *viz.* the plaintiff ſent into *Eſſex* a writ on *meſne proceſs*, and a *fieri facias* againſt one *Ward*, and both writs were delivered to the ſheriff, and *Ward* was arreſted by virtue of the writ, about two hours before the ſheriff took his goods in execution by means of the *fieri facias*; ſoon after that arreſt, and before his goods were in execution, he was carried to *Colcheſter* to the officer's houſe, and deſired the officers that they would not let any one know that he was there; and on being told the next day, which was *Sunday*, that *Finch*, one of his creditors, aſked after him, he prayed, for God's ſake don't let him know that I am at your houſe; and upon *Finch*'s coming the next day to inquire after him, he then deſired of the officers, that *Finch* might not be permitted to ſee him. In about a week after the ſecond *fieri facias* was executed on his goods; but the ſheriff, ſuppoſing that he became a bankrupt from his firſt arreſt, on the *meſne proceſs*, delivered the effects to the aſſignees of the commiſſion of bankruptcy taken out againſt *Ward*, and returned *nulla bona* to both the writs of *fieri facias*.

Upon hearing the evidence, the chief juſtice ordered the act of King *James* 1. *cap.* 15. *ſect.* 2. which deſcribes a bankrupt, to be read, and then ſaid, that between the time of executing the two writs of *fieri facias*, he had been guilty of an act of bankruptcy, for that he had withdrawn himſelf from the place of his habitation, and had abſented; but ſerjeant *Darnell* ſaying, that that muſt be done with intent to defraud his creditors, the chief juſtice told him, his very abſenting himſelf was ſufficient evidence of the fraud deſigned. Then ſerjeant *Eyre* ſaid, it muſt be a voluntary abſenting of himſelf, and not by means of an arreſt; and the chief juſtice ſaid, ſo it was here, for that it appeared on evidence, as indeed it did, that on the *Monday* after the arreſt, he was diſcharged out of cuſtody on the writ of *meſne proceſs*, and from that time he ſecretly withdrew.

Therefore the chief juſtice told the jury, that as here appeared not to be any act of bankruptcy committed by *Ward* till after the time of the firſt execution, upon that return they muſt find for the plaintiff; and that ſince he had between the time of the two executions ſo behaved himſelf, as to make himſelf a bankrupt, by which the intereſts in his goods was veſted in the aſſignees, they ought on the laſt return to find for the defendant, which they did accordingly.

N. B. The officers who took the goods in execution were called as witneſſes for the defendant; and the counſel for the plaintiff objected to their being ſworn, becauſe they generally gave ſecurity to the ſheriff. Here the chief juſtice ſaid, *that* did not yet appear; aſked them: upon which the officers owned they had given ſecurity, but that they had delivered the goods over to the aſſignees by order of the under ſheriff, and they had a warrant from the under ſheriff, which they called a *ſuperſedeas*, for their ſo doing; and upon its being produced and read, their teſtimony was allowed, for that it appeared to be a full indemnity to them from the ſheriff for what they had done. *Gen. Syſ. Law B.* cites *MS. Rep. Philips* and *Peck* againſt *Eſſex Sheriff.*

3. *To take ſanctuary.*] As to taking of ſanctuary, in former times it was uſual for perſons to fly to a monaſtery, or ſome other religious houſe, for ſecurity, but ſuch houſes are ſince aboliſhed; and the conſtruction which is now to be put on the word *ſanctuary* is, where a perſon takes refuge in any place where the law cannot be ſo readily executed upon him, and to delay the payment of his debts to his creditors, *viz.* within the verge of the court, or, before the act of parliament deſtroyed the *mint*, in that place, or in any other particular place of refuge; and whenever a perſon abſconds, or retires to ſuch places without the conſent of his creditors, it is deemed an act of bankruptcy. *Stone* 124. *Billingh.* 93. *Dav.* 90, 91.

If a merchant abſconds, and liſts himſelf a dragooner in the King's ſervice, or buys a captain's place, this is no protection; but if a trader be preſſed into the ſervice, it ſeems otherwiſe. *Good.* 22, 23.

4. *To ſuffer himſelf willingly to be arreſted for any debt, or other thing, not grown due, for money delivered, wares ſold, or any other juſt or lawful cauſe, or good conſideration or purpoſe.*] Where the party procures himſelf to be arreſted upon a ſham debt, that is immediately an act of bankruptcy within the above clauſe. 7 *Vin. Abr.* 62. *Good.* 23.

5. *To ſuffer himſelf to be outlawed.*] As to the outlawry, if a jury on a verdict find a man to be outlawed, it muſt be

be proved to be done *in fraudem creditorum*, or to defraud his creditors. *Keb.* 11. 2 *Sid.* 69, 114, 176.

A man may be ſo unfortunate as to be outlawed, and know nothing at all of the matter, and may afterwards come and procure the outlawry to be reverſed; and if ſo, it is not an act of bankruptcy; and this was determined in the Caſe of *Radford* v. *Bildworth*, &c. above.

If an outlawry be reverſed for want of proclamations, all done in the mean time by the commiſſioners is void; but if it were reverſed for error, contrary. *Stone* 124. *Good.* 23.

6. *To yield himſelf to priſon.*] This is to be intended a voluntary yielding, and not when a man is impriſoned for non-payment of a fine, or for any refractory carriage; for although the act which cauſeth the impriſonment be voluntary, yet the impriſonment itſelf is involuntary. *Billingh.* 95. *Good.* 25.

7. *To depart from his dwelling-houſe, to the intent or purpoſe to defraud or hinder a juſt creditor or creditors of his or their juſt debt or duty.*] This departure, or removal from his dwelling-houſe, muſt, as is above obſerved, be proved to be done with an intention to defraud his creditors; for 'tis not the bare departure of a man from his dwelling-houſe that can make him a bankrupt, unleſs it be done with that intent. *Dav.* 96.

For ſuppoſing a perſon in an indifferent ſtate of health, ſhould go to *Bath*, *Briſtol*, *Scarborough*, or to any other part of *England*, for a conſiderable time, and ſtay there ſeveral months for the recovery of his health: Or if a trader in *London*, or elſewhere, ſhould go a long country journey, which is every day done in moſt trading towns in *England*, to carry on his trade and correſpondence; ſuch departure, if he is viſible, and within the reach of the laws of his country, and he leaves word with his family where he is gone, or may be ſent to, has not been deemed an act of bankruptcy; and the meaning of the departure from a perſon's houſe, in order to make it an act of bankruptcy, muſt be attended with an ill intention, and it muſt be proved to be done with a deſign to hide himſelf in ſome ſecret place in his own country, where it may be difficult to find him out, and where his creditors cannot reſort to, or have a communication with him, or know where to ſue him for the recovery of their debts, if there ſhould be occaſion. *Dav.* 96, 97.

On the 28th of *November*, *Hall* rode out of town, and returned in the evening, before which a bailiff had been at his ſhop to arreſt him: The next morning he ſent for the bailiff, and told him he went in order to get the term of the plaintiff; and now the return of the writ was out, if they would take out a new writ, he would give bail, which was done accordingly; and this was held to be an act of bankruptcy within this clauſe, in the caſe of *Maylin* v. *Erloe*. *Stra.* 809.

2. *Willingly or fraudulently to procure himſelf to be arreſted, or his goods, money, or chattels to be attached or ſequeſtered.*] *B.* was arreſted for 28 *l.* and though he had money ſufficient to pay the debt, yet choſe rather to go to priſon, in order, as he declared, to force his creditors to come to a compoſition; and *per* Lord Chancellor, This is an act of bankruptcy within this clauſe; though without ſuch intent, yielding himſelf to priſon was not an act of bankruptcy, unleſs he lay there two months. 7 *Vin. Abr.* 61, 62. *pl.* 15.

As to his cauſing his goods, money, or chattels to be attached or ſequeſtered, that may be done by ſuffering judgment to go againſt him wilfully by default, for want of pleading, or by permitting his effects by contrivance to be ſequeſtered or ſeized, or by letting a perſon attach his goods where no juſt debt is due to him, or by confeſſing a fraudulent or voluntary judgment for a ſum of money not actually due, or for a much larger ſum than is due, in order to cover his effects, and permitting execution to be taken out for ſuch larger ſum; the doing all theſe things are fraudulent, and acts of bankruptcy. *Dav.* 97.

But if a perſon is minded, before he becomes bankrupt, to give preference to one creditor before another, and confeſſes a judgment for a ſum that is actually and juſtly due, and execution is taken out on ſuch judgment for ſuch ſum, little more or leſs than is due; the confeſſing ſuch judgment is not, as has been held, an act of bankruptcy. *Dav.* 97.

A merchant hath an impropriate rectory, and the choir is not repaired; the tithes are ſequeſtered; it is no ſequeſtration within the ſtatute; for tho' this is his default in not repairing the church, yet it is not of his immediate procuring. *Stone* 124, 125. *Billingh.* 94. *Good.* 29.

So in caſes of other attachments out of any court. *Goodw.* 29.

9. *Making any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent, or whereby his creditors ſhall and may be defeated or delayed for the recovery of their juſt debts.*] If a man clandeſtinely carries or conveys away his caſh, bank-bills, goods or effects, or his ſhop-books, or books of account, or makes a fraudulent bill of ſale of his goods, with an intent to deceive his creditors of the benefit and property of ſuch goods, and to conceal his eſtate and effects, and his accounts and dealings from them; this is a fraudulent conveyance of his goods and chattels, and is an act of bankruptcy. *Dav.* 102.

Alſo if a man makes a fraudulent leaſe of his eſtate, and reſerves much leſs rent than the real value, and repoſes a ſecret truſt and confidence in ſome perſon, in order to defraud his creditors; this hath alſo been taken to be a fraudulent conveyance of his eſtate, and an act of bankruptcy. *Dav.* 102.

In trover and converſion a ſpecial verdict was found, that a merchant had made a fraudulent deed to the defendant of the goods contained in the declaration, and that afterwards he went to the *Exchange*, and appeared publickly in trade, and then abſconded; and afterwards a commiſſion being taken out, theſe goods were aſſigned by the commiſſioners; the executing of the deed does not make him a bankrupt, becauſe the jury found that he was afterwards abroad, and that then he abſconded, and that the commiſſioners pitched upon that act of bankruptcy to declare him a bankrupt; and though they have found it a fraudulent deed, yet they did not find it *in fraudem creditorum*, and it might be only a fraudulent deed in reſpect of ſome ſubſequent valuable ſale, and therefore no title was found for the plaintiff. *Hutt.* 42, 43.

10. *Being arreſted for debt, to lie in priſon two months, after his arreſt, upon that or any other arreſt, or detention for debt.*] *Billinghurſt* makes a *quære*, whether an arreſt for a fine be a detention for debt within this clauſe, for he ſuppoſes the fine, after it is once impoſed, becomes a debt, but yet it may not be within the meaning of the ſtatutes, which were made for the relief of creditors only, who had intruſted the party offending, and not for a fine judicially impoſed for ſome contempt. *Billingh.* 95.

Suppoſe (ſays he) a perſon be arreſted upon a bond before the day of payment; (for by the cuſtom of *London* a creditor may arreſt a debtor there before the day of payment, to find ſureties, 8 *Co.* 126. *a.* city of *London's* caſe:) and is in priſon two months, he conceives this caſe to be within the ſtatutes, for the debt ariſeth upon the obligation, and is a debt preſently upon ſealing and delivery of the deed; and he conceives the action for which he is arreſted muſt be an action of debt; although the end of that arreſt is not to inforce the payment of the debt, but to find ſureties, in caſe the creditor fears the debtor to be too weak for his ingagement; and in caſe the debtor upon ſuch arreſt finds not ſureties, his body is to continue in priſon, as a pledge for the debt; like law he conceives in caſe of a ſingle bill, or a debt ariſing upon a contract, for it is a debt preſently and before the day of payment. *Billing.* 96. See *Cro. Jac.* 300.

The above ſeems doubtful (ſays Mr. Serjeant *Goodin*) for though it be *debitum in præſenti*, and ſo a releaſe of all debts ſhall extend to it; yet it is not properly a debt within the words or intent of the ſtatute, for that muſt be ſuch a debt for which a cauſe of action is given; and there can be no cauſe of action properly till the forfeiture, for the obligation is guided by the condition; and the cuſtom of *London* will not help it; for the cuſtom is not

that he ſhall be arreſted for the payment of money, but to find better ſureties; and the ſtatutes only intends detention in priſon for a juſt debt really due. But the ſerjeant *ſubmits his reaſon to the judicious reader. Good.* 26.

Lying in priſon makes a man a bankrupt from the firſt arreſt, that is from the time of the firſt arreſt upon which he lies in priſon, and not where he puts in ſufficient bail, for that might be infinitely prejudicial and miſchievous, and no man could ever ſafely pay or receive from a tradeſman. *Salk.* 109. adjudged in *B. R.* and affirmed in error. *Came* v. *Coleman.*

The firſt reſolution is contradicted by this, where it was held by *Holt*, C. J. that if a defendant renders in diſcharge of his bail, and lies in priſon two months, he is a bankrupt from the firſt arreſt, and from the render only; but the commiſſion being taken out before the two months were expired, it was held ill taken out. *Salk.* 110. 2 *Show.* 519.

Yet, in order to make it a compleat act of bankruptcy, his lying in priſon two months without putting in bail ought to be proved, otherwiſe a third perſon, who may be an innocent man, may be affected thereby; and the intention or deſire of any man to be a bankrupt, or to be unjuſt, ought not to prejudice ſuch innocent perſon, unleſs an eſſential fact, which creates an act of bankruptcy, is proved againſt the perſon ſo intending to be a bankrupt. *Dav.* 94.

The lying in priſon two lunar months, makes a man bankrupt from the firſt arreſt; and although the commiſſion was taken out before the two months were expired, yet he appearing afterwards to be a bankrupt by relation to a time before the ſuing it out, it was held ſufficient. *Gen. Syſt. Law B.* 35. adjudged by Ld. Ch. J. *Raym.* at *Guildhall* in *Mich.* term 5 *Geo.* 2. 1732.

11. *To obtain privilege other than that of parliament.*] No merchant or trader whatſoever, within the deſcription of the ſtatutes againſt bankrupts, who ſhall put himſelf into the ſervice of an ambaſſador, or public miniſter, ſhall have any privilege. *Stat.* 7 *Ann. c.* 12. *ſect.* 5.

12. *Being arreſted for* 100*l. or more, to eſcape out of priſon.*] This act of bankruptcy ſeems to depend upon the ſame reaſon and law as the tenth does, *viz.* lying in priſon for debt two months, where lying in priſon for a fine, judicially impoſed, is not within that clauſe; therefore it ſhould ſeem, if the priſon be broke open by rebels, or to be accidentally on fire, that eſcaping under theſe particular circumſtances, would not make the party a bankrupt; for though his eſcape was voluntary, yet the occaſion of it was not, as in the above caſe of lying in priſon for a fine; and beſides, all acts of bankruptcy muſt be done with an intent to defraud creditors. *Gen. Syſ.* 35.

13. *Preferring to any court any petition or bill againſt any of his creditors, thereby endeavouring to enforce them to accept leſs than their juſt debts; or to procure time, or longer days of payment, than was given at the time of their original contracts.*] As to this particular act of bankruptcy, I do not know that any court of law or equity has a right to controul the will of the creditor, or to compel him to compound with his debtor againſt his conſent, it certainly being in the creditor's power to chuſe whether he will or will not remit any part of his debt to his debtor. *Dav.* 110.

14. *For a bankrupt to pay, ſatisfy, or ſecure the petitioning creditor his debt.*] This act of bankruptcy depends upon a private agreement made between a bankrupt and a creditor, to prevail on him to take out a commiſſion, in conſideration of being paid his whole debt, or more than the reſt of his creditors.

The doing this is declared, ſhall be taken to be ſuch an act of bankruptcy, that on good proof ſuch commiſſion ſhall be ſuperſeded, and the lord chancellor, *&c.* may, on any creditor's petitioning, award a new commiſſion.

And ſuch perſon ſo taking or receiving ſuch goods, or ſatisfaction, ſhall loſe his whole debt, and the money received, and ſhall pay the ſame to ſuch perſons as the commiſſioners ſhall appoint, in truſt for the bankrupt's creditors in proportion. See the *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 24. *&c.* in the firſt diviſion of this title.

If a trader, hearing that a writ of *fieri facias* was iſſued againſt him, to the intent to preſerve his goods from being levied in execution, clandeſtinely conveys them out of his houſe, and conceals them privately; that does not amount to an act of bankruptcy. Ruled by *Holt* Ch. J. in the caſe of *Cole* v. *Davis.* Ld. *Raym.* 725.

If a banker or goldſmith, who has many peoples money, will refuſe payment, yet keeps his ſhop open; and as often as he is arreſted gives bail, he may by that means give preference of payment to his friends, and when he has done he runs away, yet ſuch payment ſhall ſtand good againſt a commiſſion of bankruptcy. And this was practiſed in the caſe of *Sheppard* the banker, who was arreſted almoſt every hour in the day for ſeveral days before he went off, and yet gave bail as often, and paid his friends, and then went and rendered himſelf in diſcharge of his bail. By *Holt* Ch. J. in the caſe of *Hopkins* v. *Gary*, 7 *Mod.* 139.

A banker being called upon for money in his hand, does not, or cannot pay it; Lord Chancellor *King* held, that this does not amount to an act of bankruptcy, in the caſe of *Packhenham* v. *Bland. Select Ca. in Chan.* 42, 43.

L. having two promiſſory notes, ſigned by *A.* payable to *L.* or order four months after date: *L.* when about three months were to run, indorſed them to *M.* for goods then delivered, and *A.* abſconded about one month after; *L.* on *M.*'s going to him, procures himſelf to be denied; and then *M.* ſues out a commiſſion of bankruptcy againſt *L.* who petitioned to ſuperſede the commiſſion. Firſt objection was, that *L.* had committed no act of bankruptcy. Secondly, that *M.* was not a proper creditor. Lord Chancellor: By the late ſtatute [7 *Geo.* 1. *c.* 31.] a creditor by note, payable at a future day, may ſue out a commiſſion, as well as come in as a creditor; but the debtor's denying himſelf to ſuch a creditor, is not an act of bankruptcy; it muſt be a keeping houſe, in order to defeat or delay creditors of their debts, which could not be in the preſent caſe, becauſe *M.* had then no debt due to demand; and ſo the commiſſion ſuperſeded. It was objected, that *L.* was debtor to *M.* immediately upon the goods delivered; *ſed non allocatur*; for by Lord Chancellor, it was part of the contract that *M.* would ſtay for the money, till the notes became due. 7 *Vin. Abr.* 61. *pl.* 14.

3. *Of the commiſſion of bankruptcy; what creditors may obtain it, and how, and when.*

The granting a commiſſion of bankruptcy is not a matter diſcretionary, but *de jure*; for though the words of the act of parliament are, that the chancellor may grant, yet that *may* was in effect *muſt*, and it was ſaid, that it had been ſo reſolved by all the judges. 1 *Vern.* 152. See *ſtat.* 13 *Eliz.* under the firſt diviſion of this title.

But though the granting of the commiſſion be *ex officio*, yet it muſt be at the requeſt of perſons intereſted; for if twenty ſwear that *J. S.* is a bankrupt, yet a commiſſion cannot be awarded without a petition for that purpoſe. 1 *Vern.* 152. 2 *Chan. Ca.* 199.

A commiſſion cannot iſſue five years after the party becomes bankrupt, ſo as to affect *bona fide purchaſers.* See *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 14. under the firſt diviſion of this title.

On a ſpecial verdict found, *J. H.* appeared to be a bankrupt, and was committed two months in 1651, and committed for another fact in the year 1657; and then the term of years whereof he was poſſeſſed was ſold to the defendant by the bankrupt; in the year 1660 the commiſſioners ſold the ſame to the plaintiff. It was moved by *Baldwin* to ſtay judgment, becauſe this commiſſion ſhall relate to the firſt act in the year 1651, which was the moſt notorious, being by impriſonment; though, had the firſt act been by concealment or outlawry, he agreed the party creditor need not take notice of it, by the 21 *Jac. cap.* 19. which act ſhall not be taken favourably againſt the purchaſer, but only againſt the bankrupt himſelf, and

and cited the caſe of *Grove*, although after five years, yet the ſale of the bankrupt being after the laſt commiſſion ſued out, was adjudged void, becauſe in ſuch caſe it ſhall relate to the laſt act. But the court held that the words of the ſtatute are not after he ſhall firſt become a bankrupt; for then the earlier being bankrupt, would after five years be a perpetual *ſuperſedeas* to all tradeſmen; and if one hath ſold lands, *&c.* and then five years paſs without any act of bankruptcy, no act ſhall afterwards hurt the purchaſer: though where the bankrupt continues in poſſeſſion, any after-act is ſufficient to bind the term. *Keb.* 722. See *Lev.* 13.

No commiſſion of bankrupt ſhall abate by the death of the bankrupt. See *ſtat.* 1 *Jac.* 1. *c.* 15. *ſect.* 19. under the firſt diviſion of this title.

Nor ſhall any commiſſion of bankrupt abate by the death of the King. *Stat.* 5 *Geo.* 2. *c.* 30. *ſect.* 44.

A commiſſion of bankruptcy iſſues againſt *H.* at eleven o' clock in the morning; at three in the afternoon the commiſſioners declare him a bankrupt, and execute an aſſignment at ſix, and then have notice, that he died at ten o' clock that day. This is a dealing within the above act of parliament, and the proceedings ſhall ſtand. Lord Chancellor ſaid, he knew no particular act as diſtinct from another which can be called a dealing. It has been ſaid, that the declaring him a bankrupt was the act meant; but the declaration of the commiſſioners being only diſcretionary, and for caution, and not at all binding to any body, it is not probable that the act ſhould intend that only a dealing, which it has not any where given the commiſſioners power to do; whatever is done in purſuance of the commiſſion is a dealing in it, if never ſo minute; and the rather, for theſe being remedial laws, are to be beneficially conſtrued, in favour of the creditors; I cannot therefore put a narrow conſtrained conſtruction upon the words *dealt in*, in order to overthrow this commiſſion and all the juſt right of the creditors claiming under it. *Talb. Ca.* 184.

The debt of one petitioning creditor, or of more, being partners, muſt amount to 100 pounds, or upwards; the debt of two creditors, to 150 pounds; and the debt of three or more creditors, to 200 pounds. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 23. under the firſt diviſion of this title.

Toms and *Allen* having recovered judgment againſt one *Barnaby*, he was ſurrendered by his bail, and then charged in execution, after which the plaintiffs in that action preferred their petition to the Lord Chancellor, as creditors, for a commiſſion of bankruptcy, which iſſued, but was ſuperſeded upon the bankrupt's petition; the Chancellor being of opinion, that the body of the debtor being in execution, it was a ſatisfaction of the debt in point of law, ſo that they were not creditors who could petition. *Str.* 653. *Read. Stat. Law* 189.

A bankrupt preferred a petition to ſuperſede the commiſſion, on a ſuggeſtion, that the debts of the petitioning creditors did not amount to 200*l.* ſeveral of their debts being barred by the ſtatute of limitations. And the Lord Chancellor propoſed that this iſſue ſhould be tried at law, whether the petitioning creditors for 200*l.* were within the meaning of the act; in which trial the bankrupt was to have the benefit of the ſtatute of limitations, in the ſame manner as upon a plea of *non aſſumpſit infra ſex annos*; but the counſel for the creditors being unwilling to have this iſſue tried, the Lord Chancellor ſuperſeded the commiſſion, becauſe the ſtatute would be eluded, if the creditors, who had ſuffered it to run upon their demands, ſhould be allowed to take out a commiſſion. *Moſely* 37.

A commiſſion of bankruptcy was ſuperſeded, becauſe granted upon the petition of an aſſignee of a bond; who, though he is an equitable, yet is no legal creditor. *Str.* 899.

Perſons having bonds, notes or other ſecurities for money, payable at a future day, may petition for a commiſſion of bankrupt. *Stat.* 5 *Geo.* 2. *c.* 30. *ſect.* 22.

If *A.* being a trader, becomes indebted to *B.* in 100*l.* and then he quits his trade, and afterwards becomes indebted to *B.* in 100*l.* more, *A.* afterwards *pays* to *B.* 100*l.* without ſaying upon what account. *Holt* Ch. J. ſaid, that ſince ſo much in quantity is paid to *B.* as was due to him from *A.* when *A.* was capable of being a bankrupt, it would be too rigorous to admit *B.* to ſue out a commiſſion of bankruptcy for the old debt of 100*l.* But to this point he ſaid, he would not give an abſolute opinion, and none of the other judges contradicted it. Ld. *Raym.* 287.

It was ſaid by *Holt*, and not denied by the court, that if a man contracts debts while he is a dealer, and after leaves off his trade, and then commits an act of bankruptcy; there none of his creditors, becoming ſo ſince the leaving off his trade, can ſue out a commiſſion of bankruptcy; but if thoſe who were his creditors before his leaving off his trade ſue out ſuch a commiſſion, the other creditors may come in and join. 12 *Mod.* 159. Lord *Raym.* 287.

Indorſee of notes of one who afterwards become bankrupt, purchaſed in at an under-value, as at ten ſhillings in the pound, petitioned afterwards for a commiſſion againſt the drawer. And Ld. Ch. J. *Macclesfield* held that he was plainly a creditor, juſt as if the drawees had paid the bankrupt an under-rate for them; and his lordſhip held, that though they had been given without any conſideration, yet they are now his debts, and the legal right veſted in the indorſee; but otherwiſe in caſe of a bond aſſigned; for as much as ſuch aſſignee, not being the legal creditor, could not have taken out ſuch a commiſſion; and had the indorſement been made after the bankruptcy, it might be a queſtion, whether he would be intitled to a commiſſion, as not being a creditor for 100*l.* or capable of taking out a commiſſion, at the time of the party's becoming bankrupt. *P. Will. Rep.* 782.

In trover, by the aſſignees, under a commiſſion againſt *Albertus Barnaby*, it appeared he was a bankrupt in *January* 1724, and the debt of the petitioning creditor was a note, dated in *September* 1725, and the chief juſtice was of opinion, it was a void commiſſion; the acts of a man after an act of bankruptcy being void; ſo the plaintiffs were nonſuited. 2 *Stra.* 744.

The defendant *W.* being indebted to the plaintiff in 1730, afterwards committed an act of bankruptcy; upon which the plaintiff, being the petitioning creditor, took out a commiſſion of bankruptcy againſt the defendant, in order to over-reach, and make void as many of his conveyances and ſettlements, *&c.* as poſſible; the creditors, on a bill filed, endeavoured to prove him a bankrupt as far backward as they could; and did actually prove to the ſatisfaction of the court, that he committed an act of bankruptcy in the year 1726; then it became a queſtion, whether the commiſſion of bankruptcy, and all that was done under it, was not wrong, in regard that the debt of the petitioning creditor, on which it was grounded, was contracted ſubſequent in time to the firſt act of bankruptcy? After this matter had been argued, and time taken to conſider of it, the Lord Chancellor diſmiſſed the plaintiff's bill without prejudice; which decree was *reverſed in the houſe of lords*, by the opinion of all the judges. *Talb. Ca.* 243, 244.

But where *A.* had 100*l.* owing on ſimple contract, before an act of bankruptcy, and one is afterwards ſecretly committed, and then a bond taken; it ſhall not ſo far extinguiſh the ſimple contract, as to deprive the creditor of petitioning for a commiſſion. 2 *Stran.* 1042.

An action was brought by the plaintiff as aſſignee of a commiſſion of bankrupts, and the plaintiff's counſel were going to prove the bankruptcy, and the debt due by the defendant to the bankrupt; but Mr. *P.* the defendant's counſel objected to the commiſſion itſelf, for that the bankrupt was bound to one Mrs. *Nevil* in a bond of 100*l.* Mrs. *Nevil* died, and made Mrs. *B.* her executrix, who afterwards married one *Hammerton*; and on the bankrupt's failing, he alone petitioned, and ſued out the commiſſion of bankruptcy; whereas he inſiſted, that as this debt was due to the wife of *Hammerton* as executrix, ſhe claimed it *in auter droit*, and ought to have joined with her huſband in ſuing out the commiſſion.

Mr. *C. contra* inſiſted, that the huſband alone might have demanded the debt, and having received it, might have converted it to his own uſe, or, if he pleaſed, might

might have releaſed it, and ſuch releaſe would well have diſcharged the debt without his wife's joining in it; and therefore he concluded he might properly petition without his wife.

C. J. The petition ought to have been by the huſband and wife, for the debt due to her *in auter droit*; and though it is true, that the wife alone could not bring an action for this debt without joining the huſband, yet the huſband's joining is only for conformity; and, on the other hand, the huſband could not have brought an action without joining his wife. Suppoſe the wife had died, the huſband would not by taking adminiſtration to her have been intitled to this debt, but there muſt have been adminiſtration *de bonis non* of the firſt teſtator. If the huſband had not been the petitioning creditor, but had wanted to have proved his debt under the commiſſion, he and his wife muſt have claimed it before the commiſſioners, and therefore he held it clearly, that the commiſſion was not properly ſued out, and thereupon the plaintiff was nonſuited. *Gen. Syſ. vol.* 1. *p.* 50. cites *MS. Rep.* 8 *Geo.* 2. 1735. *B. R.* 7 *Vin. Abr.* 76. *pl.* 10. *S. P.*

An order was made, that a ſolicitor's bill ſhould be taxed by a maſter, and that all proceedings at law ſhould in the mean time be ſtayed, and whilſt the bail was under taxation, the ſolicitor ſues out a commiſſion of bankruptcy againſt his client; and on a petition to ſuperſede the commiſſion, this was adjudged to be no contempt, nor a ſufficient cauſe to ſuperſede the commiſſion, becauſe the order of reference extended only to bringing an action, and to common and ordinary proceedings. *Moſ.* 27.

The charges of taking out a commiſſion of bankruptcy ſhall be paid by the aſſignees. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 25. under the firſt diviſion of this title.

The mother of one *Hicks* employed the plaintiff, who was an attorney, to take out a commiſſion of bankruptcy againſt her ſon, ſhe being a principal creditor to him; and this was done out of affection to her ſon, in order to ſet him up a clear man in the world again; but at the ſame time that ſhe gave theſe inſtructions to the plaintiff, ſhe told him he muſt not expect to be paid by her, but muſt be ſatisfied out of the effects of the bankrupt: the attorney accordingly laid out ſeveral ſums of money in procuring this commiſſion, before aſſignees could be appointed; and when they were nominated, and had agreed to take upon them this truſt, by ſetting their hand, as parties to the deed, he was at other charges too, upon which he now brought his action againſt the defendants as aſſignees, to be ſatisfied for the whole which he had laid out; it appearing now upon the face of the evidence as it ſtood at preſent, that the aſſignees had not received effects enough of the bankrupt in the whole, to anſwer ſo much as the bill of the attorney, nor were likely to do ſo; a doubt aroſe, whether the attorney ſhould come upon the aſſignees at all, or, at moſt, for any more than the attorney had laid out after they had accepted the aſſignment, for they could not be ſuppoſed to agree to any more than they themſelves were privy to; but the counſel obſerved, that as the effects of the bankrupt are not likely to anſwer this demand, and as the taking out the commiſſion by the mother was not in an adverſary way to get in her debt, but out of friendſhip and affection to her ſon, to the prejudice perhaps of many of the creditors; ſhe ought to be anſwerable to the attorney. The fact appearing thus, the chief juſtice ſaid, It was true indeed, the attorney ought to be ſatisfied firſt for procuring the commiſſion; but yet he thought too, that it would be ſomewhat of a hard caſe, that the aſſignees ſhould be any farther liable than the effects amounted to; but then it coming out upon a farther examination, that the effects were appraiſed to more than the bill came to, though the aſſignees have not got them into their actual poſſeſſion; the court ſaid, The plaintiff's demand was clearly good againſt them, becauſe they had a right to get them wherever they can find them. But yet there was another point, upon which the chief juſtice ſaid, he thought the plaintiff muſt be nonſuited, becauſe the ſtatute 3 *Jac.* 1. *cap.* 7. requires, that every attorney ſhall deliver a bill ſigned with his own hand before he commences a ſuit for fees; now in the preſent caſe it appeareth, that the warrant of arreſt was made out before a tender of a bill, for the plaintiff firſt ſhewed the defendants the bill, and demanded the money, and upon refuſal, immediately arreſted them. Now the chief juſtice ſaid, he was of opinion the ſuit began by taking out the firſt proceſs, which muſt be intended to be before the warrant made out, and therefore the tender after was void; and this opinion the chief juſtice was of, notwithſtanding two objections made by the counſel; one, that a taking out a commiſſion was not a ſuit within the act; the other, that a court ought not to go out of the record for the commencement of the ſuit, and, upon the face of the record, the ſuit appears to be of *Michaelmas* term laſt, and the tender of the bill was the 17th of *October*; ſo upon the whole of this matter, the parties agreed the plaintiff ſhould have the whole bill paid him, without coſts. *Barnard. K. B.* 315.

Bills of fees and diſburſements, demanded by any ſolicitor, employed under a commiſſion of bankrupts, ſhall be ſettled by a Maſter in Chancery. See ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 40.

4. *Of joint or ſeparate commiſſions in reſpect of partners bankrupts.*

A joint commiſſion was taken out againſt two joint traders, bankrupts. The *commiſſioners aſſign the real and perſonal eſtate of them, or either of them*; afterwards the *ſeparate creditors take out ſeparate commiſſions againſt them*, and the *ſeparate commiſſioners aſſign the ſeparate effects and eſtate to other aſſignees.* Upon petition by the ſeparate aſſignees for liberty to ſue at law for the ſeparate eſtate, Lord Ch. *King* thought the firſt aſſignment paſſed as well the ſeparate as joint eſtate, and that the ſecond aſſignees could do nothing at law; and ſo denied the petition, but would not hinder their joining in a bill for an account in equity. 2 *Williams's Rep.* 500. *Mich.* 1728.

A petition came on before the Lord Chancellor on the behalf of *D.* There was a ſeparate commiſſion taken out againſt one *P.* only; and a petition by a creditor on the partnerſhip eſtate. The order pronounced was, that the *partnerſhip eſtate ſhould be divided amongſt the partnerſhip creditors in the firſt place*; *and if* there ſhould be *any ſurplus* of this eſtate due to the bankrupt, that *the ſurplus, together with his ſeparate eſtate, ſhould be divided amongſt his ſeparate creditors*; that on the other hand, the *ſeparate eſtate ſhould in the firſt place be divided amongſt the ſeparate creditors*; *and if* there ſhould be *any ſurplus* from that, that *that ſurplus, together with the partnerſhip eſtate, ſhould be divided among the partnerſhip creditors.* *Barnard. Rep. in B. R.* 470.

If *A. and B. joint traders* become bankrupts, and there are *joint and ſeparate commiſſions* taken out againſt them, and *A.* and *B.* before the bankruptcy become *jointly and ſeverally bound to J. S. — J. S. may chuſe under which commiſſion he will come, but ſhall not come under both.* 3 *Williams's Rep.* 405.

But if two joint traders *owe a partnerſhip debt*, and *one* of the partners *gives a bond as a collateral ſecurity* for payment of this debt; here the joint debt may be ſued for by the partnerſhip creditor, who may likewiſe ſue the bond given by one of the traders. 3 *Williams's Rep.* 408.

5. *Of the appointment, qualification, fees, and duty of the commiſſioners; and of their power and authority over the bankrupt's eſtate.*

The commiſſioners of bankrupts are verbally appointed by the Lord Chancellor, Lord Keeper, or commiſſioners of the great ſeal. They take no oath of office, and are removable at pleaſure. Upon the death, ſurrender, or removal of any of them, another by his Lordſhip's order is entered on the liſt by his ſecretary. *Gen. Syſt. B. vol.* 1. *p.* 57.

The commiſſion and power of the commiſſioners is by force of the ſeveral acts of parliament relating to bankrupts, which ought to be purſued, or elſe they are ſubject to the action of the party grieved, for he hath no other remedy. 4 *Inſt.* 277. But if in their proceedings they commit ſome miſtake, which appears to be only an error of

of their judgment, they ſhall not be liable to an action. *Comb.* 391.

The commiſſioners are to take an oath before they proceed. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 43. *under the firſt diviſion of this title.*

The commiſſioners are not to eat, *&c.* at bankrupt's or creditors expence, or take more than 20*s.* each commiſſioner for each meeting. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 42. *under the firſt diviſion of this title.*

On a petition to the Lord Chancellor in *February* 1739, in the caſe of *Edward Holiday* a bankrupt, againſt ſeveral of the commiſſioners, for taking more than 20*s.* apiece at each meeting, and likewiſe ordering great ſums of money to be charged for their eating and drinking, his Lordſhip declared them uncapable, by virtue of the above act, to be any longer as commiſſioners in the execution of the ſaid commiſſion, and that no further proceedings ought to be had thereupon; and alſo that all further proceedings on the preſent commiſſion be abſolutely ſtayed; and that the petitioners be at liberty to apply to his Lordſhip by petition, to have the commiſſion renewed, and directed to ſuch new commiſſioners to be named therein as he ſhall think fit, and for that purpoſe did order, that the ſolicitor for the petitioners, and the ſolicitor for the aſſignees, do reſpectively leave with his ſecretary to the commiſſioners of bankruptcy, the names of five perſons whom they ſhall propoſe for his Lordſhip's conſideration, in order that proper perſons may be appointed commiſſioners in ſuch renewed commiſſion; and did alſo further order, that the preſent aſſignees under the ſaid commiſſion, be removed from being aſſignees of the ſaid bankrupt's eſtate and effects; and that the ſaid bankrupt's creditors do proceed to a choice of new aſſignees in their room; and for that purpoſe, after the ſaid commiſſion ſhall be renewed, an advertiſement is to be publiſhed in the *London Gazette*, appointing a meeting of the creditors of the ſaid bankrupt for choice of ſuch new aſſignees; and after ſuch choice ſhall be made, his Lordſhip did order, that the ſurviving commiſſioners in the preſent commiſſion, or any three of them, and the ſaid aſſignees ſo hereby removed, do join with the major part of the commiſſioners to be named in the renewed commiſſion, in making an aſſignment of the ſaid bankrupt's eſtate and effects to the new aſſignees ſo to be choſen; and did further order, that forthwith, after the execution of ſuch aſſignment, the ſaid old aſſignees do reſpectively deliver over to the new aſſignees all the effects of the ſaid bankrupt, remaining in *ſpecie*, in the hands, cuſtody, or power of them, or any of them, upon oath; and alſo all books, papers, and writings in their reſpective hands, cuſtody, or power, relating to the ſaid bankrupt's eſtate or effects, upon oath; and that the ſaid old aſſignees do deliver poſſeſſion of the ſaid bankrupt's real eſtate to the new aſſignees; and did further order, that the ſaid old aſſignees petitioned againſt (naming them) do out of their own pockets pay to Mr. *Skerry*, ſolicitor for the petitioners in this matter, the coſt of the petitioners preſent application; and the coſts of renewing the ſaid commiſſion, to be taxed by Mr. *Borroughs*, one of the Maſters in Chancery, in caſe the parties ſhall differ about the ſame. 7 *Vin.* 77. *pl.* 3.

The commiſſioners are to appoint three meetings within 42 days; but the Lord Chancellor may enlarge the time. See *ſtat.* 5. *Geo.* 2. *c.* 30. *ſect.* 2, 3. *under the firſt diviſion of this title.*

When the commiſſioners are to ſign the bankrupt's certificate, ſee *ſect.* 10. *of the laſt mentioned ſtatute.*

They are to order aſſignees to pay petitioning creditors the charges of ſuing out the commiſſion. *Sect.* 25. *of the ſame ſtatute.*

They are to give notice of their meeting in the Gazette, and to admit creditors to prove their debts. *Sect.* 26. *of the ſame ſtatute.*

The commiſſioners are to give notice in the *Gazette* of the removal of aſſignees, and their appointment of others. *Sect.* 31. *of the ſame ſtatute.*

They are to give creditors certificates of having proved their debts. *ſect.* 19. They may iſſue their warrants to apprehend bankrupts not conforming. *ſect.* 14. Or not anſwering interrogatories. *ſect.* 16. They may iſſue their warrant to apprehend bankrupt, not attending or aſſiſting aſſignees in diſcovery of his eſtate. *ſect.* 36.

The commiſſioners have power over the whole eſtate, freehold and copyhold, goods, debts, chattels, and effects of the bankrupt, and may ſell his land. *Stat.* 13 *Eliz. c.* 7. *ſect.* 7.

They have no eſtate, and have only power to ſell; and to paſs the eſtate, there muſt not only be a deed indented, but the ſame muſt be inrolled alſo. 2 *Show.* 156.

They may break open houſes. *Stat.* 21 *Jac.* 1. *c.* 19. *ſect.* 8.

But they cannot break open a houſe to ſearch for the bankrupt's goods, unleſs the bankrupt's goods be in the houſe of the bankrupt. 2 *Show.* 247.

Commiſſioners of bankrupts iſſued their warrant to ſeize goods of a bankrupt on board 12 ſhips in *Topſham* bay; the goods were conſigned to perſons in *Holland*, who had not paid the bankrupt for them; the maſters refuſed to deliver the goods, notwithſtanding the warrant; and this occaſioned the commiſſioners themſelves to demand the goods in perſon, which were ſtill refuſed: the court, on motion for an order upon the maſters for their contempt, ordered them to deliver the goods upon payment of the freight money, and they to be indemnified by the creditors againſt the bill of lading, which was ſent to the conſignees. 2 *Eq. Abr.* 98. *pl.* 1.

The commiſſioners ſhall aſſign bankrupt's eſtate to aſſignees choſen by the creditors. *Stat.* 5 *Geo.* 2. *c.* 30. *ſect.* 26. And they may examine bankrupt. *Sect.* 16. *of the ſame ſtatute.*

A. was declared a bankrupt, and the commiſſioners being informed, that he was imbeziling and concealing his effects, and fraudulently conveying away and alienating his eſtate, thought it neceſſary to have him before them before the firſt day appointed in the *Gazette* for his examination; and accordingly, at the requeſt of the petitioning creditor, they ſummoned him perſonally to attend them, to be examined touching the ſaid complaint, and upon his refuſing to comply with the ſummons, they got a judge's warrant, and the bankrupt, by virtue thereof, was committed to *Newgate*; and upon his being brought before the commiſſioners purſuant to their warrant, directed to the keeper of *Newgate*, and refuſing to be examined, they re-committed him to *Newgate*, there to remain without bail or mainprize, according to the intent of the ſtatutes in that caſe made and provided; and upon the bankrupt's petition, the commiſſioners right of committing the bankrupt was (among other things) conteſted; but upon great debate of this matter, Lord Chancellor *Hardwicke* was clearly of opinion, that the commitment by the commiſſioners was legal; and therefore his Lordſhip ordered, that ſuch part of *A.*'s petition as prayed to be diſcharged out of priſon, ſhould be diſmiſſed. 2 *Eq. Abr.* 99. *pl.* 8.

Commiſſioners may examine bankrupt's wife touching his eſtate. *Stat.* 21. *Jac.* 1. *c.* 19. *ſect.* 6.

But ſhe cannot be examined againſt her huſband touching his bankruptcy, or whether he had committed any act of bankruptcy, or as to how and when he became a bankrupt; and if they commit her, and though the warrant of commitment mentioned to be, as well for refuſing to diſcover the goods, *&c.* of the bankrupt, as the time and manner of his bankruptcy, yet the commitment was held illegal, and the wife ordered to be diſcharged. 1 *Will. Rep.* 610, 611.

A. was ſummoned before commiſſioners of bankrupts, and the queſtions demanded of him were: firſt, to give an account of all matters which he knew concerning the bankrupt's eſtate: ſecondly, when and in what manner did he aid and abet the bankrupt in carrying away his effects, or imbeziling or concealing the ſame; to which he refuſed to anſwer; becauſe the firſt was too general, and the ſecond tended to accuſe himſelf, and bring him within 13 *Eliz. cap.* 7. which gave a penalty of double the value of the goods againſt him who conceals them, for which refuſal the commiſſioners committed him; and their warrant of commitment concluded, *that he ſhould be committed until he conform to the authority of the commiſſioners.* On an

an *habeas corpus*, brought by *A.* in *K. B.* the court inclined, that a witneſs was not to pay univerſal obedience to all queſtions aſked him by the commiſſioners, nor was he to anſwer to any thing which tended to accuſe himſelf; but for the concluſion of the warrant of commitment, they held clearly that he ſhould be diſcharged; for the act directs, *that he ſhall remain without bail, until he ſubmit to the commiſſioners to be examined*, which being a particular authority, and in reſtraint of liberty, ought to be conſtrued ſtrictly, and the very words of the ſtatute purſued. 5 *Mod.* 308. *Salk.* 348. *Comb.* 390. *Ld. Raym.* 99, 100.

The defendant was committed to priſon by warrant of the commiſſioners of bankrupts, *viz.* "Whereas we, *&c.* have found and adjudged, that *S. N.* did become bankrupt, *&c.* And whereas we have cauſed the ſaid *N.* to be brought before us, to the end we might examine him touching the diſcloſure and diſcovering his eſtate and effects; and it appearing to us on ſuch his examination, that the ſaid *S. N.* hath remitted and conveyed great ſums of money and effects unto parts beyond the ſeas, with intent to defraud his creditors; and the ſaid *S. N.* upon his examination before us, *&c.* hath *notoriouſly prevaricated*; we do therefore will, require, and authorize you, *&c.* to take into your cuſtody the body of the ſaid *S. N.* and him ſafely to convey to his Majeſty's priſon of the *Fleet*, and there to deliver him to the warden of the ſaid priſon, who is hereby authorized to receive the ſaid *S. N.* into his cuſtody, and him ſafely to keep without bail or mainprize, until he ſhall make a full and true diſcovery of his eſtate and effects, *&c.* or he be otherwiſe delivered by due courſe of law."

The defendant brought an *habeas corpus*, and the commitment and return to the writ being read, he moved to be diſcharged out of cuſtody, and took exceptions to the warrant; and this authority given to the commiſſioners to commit to priſon being a ſpecial authority, and a limited juriſdiction created by the ſtatute 1 *Jac. c.* 15. *ſect.* 8. they ought, in every inſtance where they commit to priſon, to ſhew they have acted within their juriſdiction, for this is not like a commitment founded upon a general authority; the defendant has not refuſed to be examined, nor does it appear he has *prevaricated* touching his *examination*; the word prevaricate is a term of a looſe and uncertain ſignification, and quite foreign to the ſtatute; neither does it appear he has *prevaricated* about the matter of his examination touching his effects; and the *prevarication* has no reſpect to the eloyning of his goods. The ſtatute enacts, that upon a commitment he ſhall be detained till he has better conformed himſelf; but this commitment is on quite different terms; *viz.* till he has made a full diſcovery of his effects, *&c.* the commiſſioners ought to keep themſelves to the form preſcribed by the ſtatute, as it is reſolved in *Yoxley*'s caſe, *Salk.* 351. who was committed by the Earl of *Nottingham*, till he ſhould be delivered by due courſe of law, for refuſing to be examined, and anſwer whether *jeſuit*, or not, according to 35 *Eliz. c.* 2. which impowers the juſtices to examine and commit him, if he refuſe to anſwer ſuch queſtions. So *Bracey*'s caſe above.

Mr. *Reeve* ſaid, that according to his notes of that caſe, *Bracey* was committed till he conform *or otherwiſe be diſcharged by due courſe of law*; which laſt words are omitted in the printed caſe.

Sir *John Strange* on the ſame ſide: the commiſſioners have ſtated in the commitment, that by his examination they find he has concealed his effects; but upon the ſtatute of the 1 *Jac.* they ought to have exhibited interrogatories in writing to the defendant, and examined him upon thoſe interrogatories; but no ſtep of that kind has been taken by the commiſſioners in this caſe, which is wrong in them; ſo that to conſtitute the offence, interrogatories ought to have been ſhewn him, and before that is done he is guilty of no crime, and therefore his commitment is illegal; and if he had miſbehaved himſelf, then he might have been ſet in the pillory, by the ſtatute 21 *Jac. cap.* 19. Eveay commitment of this, and all other of the ſame nature, ought to be very certain, and not grounded on ſlight expreſſions; and the continuance of the commitment cannot be juſtified, as may be evinced from the caſes in *Salk.* and ought to be ſtrictly taken, as depriving the ſubject of his liberty; in the caſe of the King againſt *Tracey*, *Hill.* 1. *Will.* 3. articles by way of interrogatories, ſhall be in writing.

Mr. Juſtice *Page* cited a caſe of a bankrupt in the city of *Briſtol*, committed by the commiſſioners, and there held, that the articles charged againſt the bankrupt in the interrogatories ought to be in writing; and if the bankrupt ſhould deſire time to anſwer the interrogatories, the commiſſioners ought to give him a copy of them.

Mr. *Reeve* againſt the defendant: The commiſſioners need not put the interrogatories in writing, much leſs inſert them in the warrant of commitment; but the court ſhould intend that he was examined in that manner, eſpecially it appearing by the warrant, that he was ſworn and examined. The ſubject matter of his examination is *prevaricating* to diſcover his effects, and that appears by this commitment. The ſtatute ſays, if he refuſes to be examined, or does not fully anſwer on interrogatories, then he is to be committed. Then it may be a queſtion, whether a man's being charged with prevarication does not fall within the deſcription of the act?

The court held the form of the commitment ſhould have been till he ſubmitted to be examined; every prevarication does not ſubject a man to a commitment, nor is it ſaid he prevaricated upon ſuch his examination, relating to the diſcovery of his effects, but only that he prevaricated upon his examination, which might be on ſome other matter; the commiſſioners ought to purſue their authority ſtrictly, nor can they commit in any other manner than that preſcribed by the ſtatute.

And by the *Chief Juſtice:* A man may prevaricate at his firſt examination for half an hour, yet in the concluſion he may make a full and ample anſwer, and therefore it is not at all proper to ſend a man to priſon for ſuch a piece of conduct; and nothing is more common than ſuch behaviour on trials at *niſi prius*.

The court were unanimouſly of opinion, that the commitment was void in point of form principally, as not appearing he was examined on interrogatories in writing, and the defendant was diſcharged from the commitment, but remanded on ſome civil actions depending againſt him. *Seſſ. Ca.* 264. 2 *Stra.* 880. *Nathan*'s caſe.

N. B. In anſwer to *Yoxley*'s and *Bethel*'s caſe in *Salk.* 348, 351. this is ſuch an offence as is not bailable.

J. brings his *habeas corpus*; the return was, *that he was committed by J. S. J. N. J. T.* (to whom and *others a commiſſion of bankruptcy was awarded*) *for refuſing to anſwer a queſtion* put to him concerning the bankrupt's eſtate, *&c.* and ſo *commiſſus fuit in cuſtodia*, by warrant to the officer, *virtute commiſſionis præd', et hæc eſt cauſa captionis ſeu detentionis, &c.* Three exceptions were taken to the return. Firſt, For that there did not appear a ſufficient authority, for the commiſſion is ſaid to be granted to them and others, and then they could not act without the reſt, for the return does not *expreſs any quorum, &c.* in the commiſſion. Secondly, Inſtead of *commiſſus in cuſtodia*, it ought to be *captus*, for that is the uſual form; for this is as if the commitment were by the officer that makes the return. Thirdly, *Hæc eſt cauſa captionis ſeu detentionis* is uncertain; for it ought to be *detentionis*. And upon the firſt and laſt exception the priſoner was diſcharged by the court; but told him, that he muſt anſwer directly to ſuch queſtions as were put to him, in order to the diſcovery of the bankrupt's eſtate, or elſe he was liable to be committed. And becauſe it did not appear, that thoſe that committed him were a majority or *a quorum*, *Rainſford* and *Jones* held it ill, and diſcharged him, (the other juſtices being abſent); he did not refuſe to ſwear, but had ſworn, that he had none of the bankrupt's eſtate in his hands, but would not anſwer whether any of the bankrupt's eſtate came to his hands before the commiſſion ſued out, *&c.* having received his own debt before; nor *per cur'* is he compellable to ſwear ſo upon 1 *Jac. cap.* 15. *ſect.* 10. *Vent.* 323, 324. 3 *Keb.* 837. *pl.* 74.

H. was brought into *K. B.* upon an *habeas corpus*, and the return was, that ſhe was committed by commiſſioners of bankrupts for refuſing to be examined by them, and the concluſion of the warrant of commitment was, that ſhe ſhould remain in cuſtody until ſhe ſhould be otherwiſe diſcharged by due courſe of law; and by reaſon of this con-

concluſion the court held the commitment to be ill, and diſcharged the defendant, becauſe the power given by 1 *Jac.* 1. *c.* 15. is to commit the party until he ſubmit himſelf to the commiſſioners, and ſhall be by them examined, and there is no mention made of being diſcharged by due courſe of law, and for this exception *Bracey* (committed on ſuch account) was diſcharged. 2 Ld. *Raym.* 851. *Hollingſhead*'s caſe.

E. was found to be a bankrupt by 13 *Eliz. c.* 7. and was committed to the *Fleet*; the warrant to the warden of the *Fleet* was, to retain and keep in priſon, to anſwer and to ſatisfy all ſuch matters as ſhould be objected againſt him: and the queſtion now was, if the commiſſioners may licenſe him to go at large to treat about his debts. By the court: If the warrant had been, that the party ſhould have been in execution, then he could not be enlarged; but the court adviſed them to take ſecurity, leſt he ſhould withdraw himſelf; but if one had judgment againſt a bankrupt, and upon a *habeas corpus* brought he is committed in execution without a *capias utlegat'*, then the commiſſioners cannot deal with him any more for to enlarge him. *Noy* 140. *Edward*'s caſe.

The commiſſioners may commit ſuch perſons as have the bankrupt's goods, or are indebted to him; who refuſe to come before them, or to be ſworn when preſent. See *ſtat.* 1 *Jac.* 1. *c.* 15. *ſect.* 10. under the firſt diviſion of this title. They may likewiſe examine and commit any other perſon, not anſwering interrogatories. *Stat.* 5 *Geo.* 2. *c.* 30. *ſect.* 16.

A perſon once examined by the commiſſioners of bankrupts cannot be examined again without a new commiſſion. 2 *Show.* 102.

Equity will not compel a man to diſcover what goods he really bought of a bankrupt after the bankruptcy, and before the commiſſion ſued out, where the party has no notice of the bankruptcy. 1 *Vern.* 27.

Though ſuch perſons have been examined by the commiſſioners, yet a bill for a diſcovery of the ſame matters may be filed againſt them in Chancery. 2 *Chan. Ca.* 73.

The commiſſioners ſhall declare to the bankrupt how they have diſpoſed of his effects, and ſhall alſo make payment of the overplus to the bankrupt, his heirs or executors. *Stat.* 13 *Eliz. c.* 7. *ſect.* 4.

When the commiſſioners have aſſigned the bankrupt's eſtate, and given him his certificate and diſcharge, they have executed their power. 1 *Will. Rep.* 385.

For more matter concerning the power of the commiſſioners, ſee the following diviſion.

6. *Of the manner and time of chooſing the aſſignees, and their power.*

No creditor, nor any perſon on his behalf, ſhall have a vote in the choice of an aſſignee, unleſs his debt amounts to 10 *l.* &c. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 26, 27, 28, 29, 30. under the firſt diviſion of this title.

Freehold and copyhold lands, goods and debts may be aſſigned, tho' transferred into other men's names, except *bona fide*, and on valuable conſideration. *Stat.* 13 *Eliz. c.* 7. *ſect.* 7. 1 *Jac.* 1. *c.* 15. *ſect.* 5.

Aſſignees ſhall compound with the lord for fine of copyhold lands, and be admitted. *Stat.* 13 *Eliz. c.* 7. *ſect.* 3.

If two be ſeiſed jointly, and the one becomes a bankrupt, and dies, his part ſhall be ſold, and there ſhall be no ſurvivor in this caſe; firſt, becauſe the bankrupt's moiety is bound by the ſtatutes by his being a bankrupt; ſecondly, the bankrupt had power to ſell the ſame in his life-time, and he might depart with it, and ſo within the words of 13 *Eliz. cap.* 7. the words are, "Such uſe, intereſt, right, or title, as ſuch offender or offenders ſhall have in the ſame, which he or ſhe may lawfully depart withal; thirdly, by the 1 *Jac. cap.* 15. the commiſſioners, after the bankrupt's death, may proceed in execution, in and upon the commiſſion, for and concerning the offender's lands, tenements, &c. in ſuch ſort as if the offender had been living;" which they cannot do in the caſe before, if the ſurvivorſhip take place. *Billing.* 111. *Stone* 126. See *Good.* 89.

It was agreed by the juſtices, that copyholds are within the intent and purvieu of all the ſtatutes concerning bankrupts, and may be ſold by the commiſſioners, ſome doubt whereof was made, becauſe they are named in one clauſe of 13 *Eliz.* and not in 1 *Jac. cap.* 15. or 21 *Jac. c.* 19. for the ſame being in the firſt ſtatute, and the other ſtatutes being made in further confirmation and approbation thereof, they ought to be expounded liberally, and ſhall be conſtrued accordingly, to make as ſtrong proviſion as they may againſt the bankrupt. *Cro. Car.* 550. *Hard.* 435, 436.

A copyholder ſurrenders, and before admittance *ceſtuye que uſe* becomes a bankrupt; the commiſſioners ſell the copyhold: whether ſhall the lord have two fines, *viz.* one upon the admittance which ſhould have been made to *ceſtuye que uſe*, if he had not become a bankrupt, and another upon the admittance of the perſon that comes in by ſale of the commiſſioners of bankrupts; and this is a *quære*, and it is compared to a ſurrender made by the heir before admittance, which is held to be good; but not to prejudice the lord of his fine. 4 *Rep.* 226. *Billing.* 147, 148.

If the vendee of a copyhold tender to the lord a competent fine, and the lord refuſe it; the vendee may enter. *Stone* 127. *Billing.* 148.

The commiſſioners may ſell a copyhold intailed, which by cuſtom may be intailed and cut off; otherwiſe, if there be no ſuch cuſtom. *Stone* 127. *Billing.* 148.

If there be no ſuch cuſtom, then it is in nature of a fee ſimple conditional at the Common law, and then if the condition be performed, *viz.* if the copyholder hath iſſue, &c. the commiſſioners may ſell it. *Quære. Billing.* 148.

In treſpaſs, upon Not guilty pleaded; it was found, that the land was copyhold of inheritance, held of the manor of *C.* and that there was a cuſtom in that manor, that if a copyholder in fee died ſeiſed, living his wife, ſhe ſhould have the copyhold during her life and twelve years after; then they found the ſtatute 13 *Eliz.* and the 1 *Jac.* of bankrupts, and that upon a commiſſion of bankruptcy the huſband was adjudged a bankrupt, and that being ſeiſed in fee of the ſaid copyhold, the commiſſioners made a bargain and ſale thereof to the plaintiff, for the uſe of the creditors, &c. they find that the widow, at the court held, &c. was admitted tenant *ſecundum conſuetudinem manerii*, before the plaintiff was admitted; it was held by *Berkley* and *Croke*, juſtices, that the bargain and ſale binds the copyholder, and bars his eſtate, and that he is no longer a copyholder after the bargain and ſale inrolled; and that when the bargainee is admitted by the lord, the eſtate ſhall veſt in the bargainee, and the admittance ſhall have relation to the bargain and ſale, and deveſt the eſtate, which the feme claimed by the cuſtom; and judgment accordingly. *Cro. Car.* 568. *Jo.* 451. See 2 *Vern.* 194, 195.

In a ſpecial verdict in ejectment, the caſe was, the cuſtom of a manor was that a copyholder might ſurrender for three lives *ſucceſſivè* and that an heriot was due on the death of every tenant; a copyholder ſurrendered to *W. R.* for his own life, and for the lives of *A. B.* and *C. D.* and the queſtion was, whether this was warranted by the cuſtom; and adjudged that it was, for there could be no occupancy; but *Powell*, juſtice, doubted becauſe of the ſtatute of bankrupts; *ſed per Holt*, Ch. J. That ſtatute makes no difference, for if the copyholder becomes bankrupt, and his eſtate is aſſigned by the commiſſioners, the aſſignee would have it determinable upon the life of the copyholder bankrupt, and that the heriot would be then due, but not upon the death of the aſſignee, becauſe it was ſo originally, and cannot be altered by the act of the copyholder himſelf. 3 *Salk.* 181.

If the aſſignee dies during the life of the copyholder bankrupt, there will be a caſe out of the cuſtom by the tranſmutation of the grant by the act of parliament, and yet the lord ſhall have his heriot; for it never was the intent of the ſtatute to put the aſſignee in a better condition than his principal, whoſe eſtate he has, would have been in, nor to work an alteration of tenement to the prejudice of the lord; this is ſuppoſing the copyholder ſurviving

ving ſhould not have it back again, and if he ſhall have it again upon the death of the aſſignee, during his life, then the lord by original cuſtom ought to have an heriot, and a ſubſequent act ſhall not defeat him of it; and if the copyholder had died, living the aſſignee, and thereby his intereſt determined, as ſome thought it would; *quære*, who ſhall pay the heriot? But upon this point they ſeemed cautious of delivering any opinion, but reſerved themſelves till that matter would come to be a queſtion, for they ſaid it was worth conſideration. 6 *Mod.* 68.

Though a ſurrender of a copyhold be void in law for want of a preſentment, and that might be the laches of the mortgagee in not procuring it, yet the ſurrender was a lien and bound the land in equity, and the ſurrenderor, or if he became bankrupt, the aſſignee, who ought not to be in a better caſe than the bankrupt, is plainly bound in equity by this defective conveyance; (*et come moy ſemble*, ſays the reporter, he became a truſtee for the purchaſer.) 2 *Salk.* 449. 2 *Vern.* 564.

A. purchaſed a copyhold to him and his ſon for their lives, remainder to his wife in fee, and about two years afterwards became a bankrupt, and his copyhold was ſold by the commiſſioners to the defendant; *A.* the bankrupt died (the wife died) *B.* his ſon entered and made a leaſe, *&c.* to the plaintiff, who brought ejectment; it was reſolved, that though a copyhold eſtate is liable to the ſtatutes, yet this copyhold is not, becauſe it was bought two years before the purchaſer was an innkeeper, ſo that he was not an offender when he bought the eſtate; and judgment was given for the plaintiff. *March* 34. *Billing.* 113.

The leſſor of the plaintiff was the perſon to whom the commiſſioners ſold the land for the benefit of the creditors; and adjudged for the defendant (the ſon) by all the juſtices, but *Berkley contra*; for they held that the purchaſe being before *A.* the father became a trader, and ſo long before he became a debtor, is not within the ſtatute; for the ſtatute intends ſuch perſons only as get their living by buying and ſelling, and by fraud had paſſed away their land to friends in truſt, and became indebted, and committed ſuch acts of bankruptcy; that for ſuch acts done by them after, it ſhould be within the commiſſioners power to ſell ſuch their lands. But here many years before, when he was a clear man, he procured this land to be ſettled upon his ſon (no fraud or purpoſe of being a bankrupt being found); it would therefore be a miſchievous caſe and full of inconveniencies if it ſhould be within the ſtatutes; for none might know with whom to deal by way of marriage or otherwiſe, when he is not a tradeſman, and ſettles land upon his wife and children *bona fide*, and without cauſe of being ſuſpected to be a bankrupt, and afterwards becomes a tradeſman and then a bankrupt, if this act ſhould overthrow a conveyance duly ſettled. *Jones* ſtates it, that the ejectment was brought by the ſon, and that judgment was given by all for the plaintiff, *præter Barkley*, who held for the defendant *in omnibus*. *Same caſe.*

Lord and tenant are, the tenant makes a feoffment to deceive the ward of the lordſhip, and then becomes a bankrupt; theſe lands ſhall be ſold by the commiſſioners, for although the conveyance was only fraudulent as againſt the lord, yet there was a truſt between the feoffor and feoffee. *Stone* 133.

Offices are likewiſe mentioned in 13 *Eliz. c.* 7. and made ſaleable by the commiſſioners; by which are intended offices of inheritance, *&c.* as the warden of the *Fleet* or a gaoler by inheritance, and not offices of truſt, *&c.* And by 5 & 6 *Edw.* 6. *cap.* 16. any offices which concern the adminiſtration of juſtice, or clerkſhip in any court of record, or which concerns the King's treaſure, revenue, cuſtoms, *&c.* cannot be bargained or ſold for money, but ſuch bargain and ſale is void, and both buyer and ſeller made incapable, *&c.* therefore doubtleſs ſuch offices cannot be aſſigned by the commiſſioners, in ſatisfaction of a debt of a bankrupt, nor are they comprehended within the ſaid ſtatute; there being other offices that may be ſold, and ſo the words of the ſtatute ſatisfied; and offices of truſt are indiviſibly annexed to the perſon. 9 *Co.* 48. *a.* *Good.* 87.

Goods or chattels of the bankrupt, whereſoever to be found, by 13 *Eliz. cap.* 7. are made ſaleable by the commiſſioners. *Billing.* 123.

They may ſell a bankrupt's goods in *Ireland.* *Billing.* 123. *Good.* 114.

A. hath an advowſon, the church becomes void, and then *A.* becomes a bankrupt, whether the commiſſioners may ſell it; and I ſuppoſe it may be anſwered negatively, that they cannot ſell it, for it is a thing in action, and ſo not ſaleable by the Common law; and no particular power is given by any of the acts for ſale of it, as there is for the ſale of debts due to the bankrupt; and without doubt, if the commiſſioners preſent any one for money, it is ſimony. *Billing.* 123. See *Good.* 116.

One grants an advowſon to a *feme covert* ſole merchant, the church becomes void; the huſband, in conſideration that *J. S.* enters into bond to preach twice a week, preſents him to the benefice. The *feme* becomes a bankrupt, the huſband dies, the *feme* waives the grant, the commiſſioners within ſix months ſell the preſentation and the advowſon; this is a good ſale of the advowſon, but the King ſhall preſent. *Quære.* *Good.* 116.

A man makes a leaſe of certain lands to *A. B.* for three lives, to begin after the death of *J. S.* if the three lives ſhall ſo long live. *A. B.* becomes a bankrupt, this leaſe to *A. B.* is but a poſſibility, for *J. S.* may ſurvive all the three lives, and ſo it is a thing not grantable. Yet I think the commiſſioners may ſell this within the intent of theſe words, for though *A. B.* cannot properly grant this, yet it is ſuch a thing as he may forfeit or extinguiſh. *Quære.* *Good.* 83, 84.

A leaſe for years is deviſed to *A.* if he lives ſo long, the remainder to one *B.* the commiſſioners ſhall not ſell the poſſibility. *Stone* 129.

Land is extended, and delivered to the extenders; becauſe too high, another defeats this execution, by extending of a former ſtatute, the firſt is bankrupt, the commiſſioners ſhall ſell the poſſibility. *Stone* 129.

Land is deviſed to a bankrupt, the commiſſioners may ſell, and the bankrupt ſhall not waive the deviſe. *Stone* 125. *Good.* 88.

The goods of the bankrupt lie liable to the ſale of the commiſſioners, notwithſtanding the bankrupt had ſold them in market-overt, this ſale is avoided by relation. *Lev.* 174. *Sid.* 272. 2 *Keb.* 33.

One hath a leaſe for years, upon condition to have in fee, the commiſſioners may ſell the term and poſſeſſion. *Stone* 125.

A baron uſed merchandize, and is nonſolvent, the commiſſioners ſhall not ſell his barony. *Stone* 125.

A monopoly granted to one and his aſſigns, as the ſole making of cards, *&c.* ſhall not be ſold, becauſe it is a void patent, and nothing paſſes by it. *Stone* 126.

The grant of ſole printing of law books is void, therefore not ſaleable. *Quære.* *Stone* 126.

A bankrupt becomes lunatick, and office is found, yet the land ſhall be ſold and his goods. *Stone* 128.

A merchant takes a wife after he is a bankrupt, ſhe ſhall not have dower againſt the vendee. *Stone* 126.

A *feme covert* ſole merchant inheritrix in *London*, is a bankrupt, her land ſhall be ſold, and her huſband ſhall not be tenant by the curteſy. *Stone* 126.

A rent-charge ſhall be ſold, yet it is not within the words. The ſame law of a common in groſs. *Stone* 129.

It is the cuſtom in *Surry*, that certain heir-looms ſhall go with the land, and not to the executor, the land is intailed, tenant in tail is a bankrupt, the heir-looms may be ſold from the land, and the iſſue hath no remedy. *Stone* 129.

A rent-ſeck, whereof there is no ſeiſin, ſhall be ſold. *Stone* 125.

Commiſſioners may ſell a rent or a reverſion. *Stone* 128.

A tradeſman, in conſideration of marriage, made a conveyance of lands to himſelf and wife, and afterwards became a bankrupt; it was held *per cur'*, That the wife was within the ſtatute 1 *Jac.* 1. *c.* 15. *ſect.* 5. and the providing

viding for his wife and children to be a providing for himself. *Style* 288.

Quære, Whether the commiſſioners may not, by the equity of ſtatute 21 *Jac.* 1. *c.* 19. *ſect.* 13. appoint one to enter for a condition broken? As if a trader makes a feoffment, upon condition to be performed on the part of the feoffee, the feoffee breaks the condition, and before entry the feoffor becomes a bankrupt; it ſhould ſeem the commiſſioners may take advantage hereof, for the ſtatutes ſhall be liberally expounded for relief of the creditors; if not, yet it ſeems to be comprehended within theſe words of 13 *Eliz. c.* 7. whereby power is given to the commiſſioners, "to take order and direction with the bankrupt's lands, *&c.* for ſuch uſe, intereſt, right or title, as ſuch offender or offenders ſhall have in the ſame;" which word *(title)* ſeems to include an entry for a condition broken. *Billing.* 116. *Good.* 88. See *Stone* 12.

A merchant makes a feoffment in fee upon condition, upon payment of money to re-enter, he becomes a bankrupt, the commiſſioners may tender the money at the day, and ſell the land. *Billing.* 148, 149. *Stone* 125. *Good.* 89.

The commiſſioners may ſell an eſtate tail. See *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 12. *under the firſt diviſion of this title.*

Lands purchaſed after the bankruptcy, may be ſold by the commiſſioners. *Stat.* 13 *Eliz. cap.* 7. *ſect.* 11, 12.

If after the commiſſion awarded, *&c.* and diſtribution made of all the bankrupt's eſtate, towards the ſatisfaction of the creditors, every creditor having an equal part, lands, goods, *&c.* deſcend or come to the bankrupt; whether, in ſuch caſe, they ſhall be ſubject alſo to a new ſale or diſtribution; and it ſeems that they ſhall, for the comiſſioners power is not fully executed until the creditors be ſatisfied. *Billing.* 118.

The commiſſioners may proceed when the bankrupt by fraud makes himſelf accountant to the King. See *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 10. *under the firſt diviſion of this title.*

Two merchants became bound in a ſtatute 21 *Jac.* for a true debt, which being forfeited, the cogniſee ſued forth an *extent* the 30th of *October* 3 *Car.* and extended the goods the 31ſt of *October* following, and the third of *November* the cognizors became bankrupts, and upon the ſixth of *November* the defendant brought a *liberate* upon the *extent*, and the goods were delivered to him according to the appraiſement; on the eighth of *November* a commiſſion of bankruptcy was awarded againſt the cogniſors, and the 23d of *November* the commiſſioners ſold the goods to the plaintiff, who brought trover againſt the cogniſee, and the queſtion was, if this ſale was good; it was *per tot. cur.* reſolved, That as the goods were extended before the cogniſors became bankrupts, though delivered by the *liberate* afterwards, they could not be ſold by the commiſſioners, becauſe after the *extent* they were *in cuſtodia legis*, ſo as the cogniſors had no power to give, ſell, or diſpoſe of them; beſides, the *extent* was returned before they became bankrupts, and the goods were delivered to the cogniſee by the *liberate* before the commiſſion ſued out, and when the *liberate* is brought, it ſhall have relation to the *extent*, and they be *quaſi* but one *extent*. *Cro. Car.* 148.

Goods found in the poſſeſſion of the bankrupt, ſhall be liable to the bankrupt's debts. See *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 11. *under the firſt diviſion of this title.*

A. delivered diamonds to *B.* to ſell, and then *B.* became bankrupt, upon *trover* brought by *A.* againſt the aſſignees of the commiſſioners, it appearing upon the trial before *Holt* Ch. J. that the real property of them belonged to the plaintiff; the clauſe of 21 *Jac. c.* 19. *ſect.* 10, 11. being inſiſted upon by the defendant's counſel, and it ſeeming an hardſhip on the plaintiff, it was made a caſe in *B. R.* where it was adjudged upon argument, that the general words ought to be explained by the preamble; and that the jewels being originally the plaintiff's, and that the bankrupt, having no more than a bare authority to ſell them for the plaintiff's uſe, were not liable to the bankruptcy. 2 *Will. Rep.* 318.

A bill of ſale of leaſes and perſonal eſtates was made by *A.* to *B.* and *C.* in truſt for payment of *A.*'s debts; *B.* at firſt acted in the truſt, but afterwards *C.* took the whole into his poſſeſſion, and acted alone, and became a bankrupt; upon a bill by *A.* againſt *C.* and the aſſignees of the bankruptcy for an account, Ld. Ch. *Cowper* doubted by reaſon of 21 *Jac. cap.* 19. *ſect.* 10, 11. but afterwards held this caſe not within thoſe clauſes, in regard this aſſignment to *B.* and *C.* was with an honeſt intent, *viz.* for the payment of the debts of the aſſignor, and therefore decreed the aſſignees under the commiſſion againſt *C.* to account for all the eſtate of *A.* and that the ſame ſhould not be liable to *C.*'s bankruptcy. 1 *Will. Rep.* 314, 321.

It was argued, that if a factor becomes a bankrupt, the goods bought by him as factor ſhall not be ſubject to his debts. Lord Chancellor aſked, if there is any caſe of that? and ſaid, that if a factor continues a long poſſeſſion, by which they are taken as his own, and credit given to him on that account, it would alter the caſe; for if poſſeſſion and diſpoſition be given to a perſon that becomes a bankrupt, though no intent of fraud appear, yet if it gives a falſe credit, there is the ſame inconvenience as if fraud was intended; for if the bankrupt appear the viſible owner, ſo as to gain a falſe credit, there is the ſame inconvenience; and it matters not whether it was by fraud, or only by neglect, or out of a humour. 7 *Vin. Abr.* 88. *pl.* 5. *in notes.*

It was reſolved in this caſe, that if goods of *A.* are ſeized upon a *fieri facias*, and ſold to *B. bona fide*, upon valuable conſideration, though *B.* permits *A.* to have the goods in his poſſeſſion, upon condition that *A.* ſhall pay to *B.* the money as he ſhall raiſe it by the ſale of the goods, this will not make the execution fraudulent, and in ſuch caſe a ſubſequent act of bankruptcy by *A.* will not defeat the ſale; but though the original debt was juſt, yet if the execution was fraudulent, *viz.* upon any truſt, a ſubſequent act will defeat it. Ruled by *Holt* Ch. J. *Ld. Raym.* 725.

In an action upon the caſe, brought for words ſpoken by the defendant againſt the plaintiff, the plaintiff recovered of the defendant for damages and coſts, twelve pounds; and after the execution ſued, and the money levied by the ſheriff (before the return of the writ) the plaintiff becomes a bankrupt, and the ſaid twelve pounds are aſſigned by the commiſſioners to the creditors, and the money being brought into court, the plaintiff (now a bankrupt) moves for it: and the creditors to whom the ſame was aſſigned likewiſe moved for it; and by *Jones* and *Hide* juſtices, the aſſignment was good, becauſe it was the bankrupt's debt, and forfeitable by outlawry: but *Whitlock* and *Crook* juſtices *contra*, becauſe by the ſheriff's levying of the money before the party became a bankrupt, it was *in cuſtodia legis*, and the creditors cannot give a diſcharge, nor are the parties in court, and if the judgment ſhould be reverſed, not compellable to make reſtitution; and afterwards it was judged accordingly, and that the money be delivered to the plaintiff, he acknowledging ſatisfaction; alſo it was ſaid, that the money was not the plaintiff's until paid out of court. *Cro. Car.* 166, 167.

Suppoſe a bankrupt be indebted to one in 20 *l.* and to another 10 *l.* and hath a debt of 20 *l.* due to him by bond, whether may the commiſſioners aſſign the bond to the two creditors jointly? and it was held by the court, that it was to be divided and aſſigned according to the words of the act, *viz.* to every creditor a portion, part and part alike. Then another queſtion was offered, whether the aſſignees might join in ſuit? And by *Warburton* one of the juſtices, part being aſſigned to one, and part to another, the act of parliament ſo operates upon it, that they ſhall ſue ſeverally; for he ſaid, by the cuſtom of *London* part of a debt might be attached. *Godb.* 195.

If the ſheriff takes the goods of a bankrupt in execution, though it be before the commiſſion taken out, yet it ſeems that commiſſioners may ſell them if it be executed after the party became bankrupt. *Freem.* 397. *Keb.* 930. 2 *Keb.* 34.

On motion for money out of court brought in by the ſheriff on a *vend. exponas*, *teſte* before, but after a commiſſion of bankruptcy taken out, the court ſaid, that unleſs the goods were ſeized before the party became a bankrupt, though they were ſeized before the *teſte* of the commiſſion, yet the goods were bound by the bankruptcy. 3 *Keb.* 480.

In a ſpecial verdict *in aſſumpſit*, brought by an aſſignee of a commiſſion of bankrupts, the caſe was, *T.* obtained a judgment againſt *W.* for 400*l.* and on the 19th of *June* brought a *fieri facias*, which was delivered to the ſheriff the 30th of *June* in the morning, and at night *W.* left his houſe, and became a bankrupt on the firſt of *October* following; the ſheriff levied of the goods of *W.* to the value of 400*l.* and paid the ſame to *T.* and afterwards the commiſſioners aſſigned this money to the plaintiff, who brought this action againſt *T.* It was held by all the juſtices, that the aſſignment by the commiſſioners was good, for the new ſtatute makes no difference in this caſe, becauſe before that ſtatute was made, the goods were bound from the *teſte* of the writ; but now they are bound from the delivery of them to the ſheriff, that is, they are ſo bound that the bankrupt himſelf cannot diſpoſe of them, but the commiſſioners may by the expreſs words of the ſtatute 21 *Jac. c.* 19. *(no execution thereof having been ſerved and executed)* but then all the judges (except *Levinz*, who at laſt aſſented) held clearly, that the commiſſioners could not aſſign the money, for their power is only over the bankrupt's goods, but the money for which they were ſold was never the bankrupt's money, and ſo no action would lie for it. 3 *Lev.* 69, 191.

When a judgment is once executed, the goods are *in cuſtodia legis*, and ſhall not be taken away by any *Exchequer* proceſs, or aſſignment of commiſſioners of bankrupts. 3 *Mod.* 336. *Comb.* 121. *Show.* 146. 2 *Vent.* 169, 170.

Such things as the bankrupt himſelf diſpoſed of to the ſatisfaction of ſome of the creditors, after that he became a bankrupt, may be ſold, for the ſtatute of 13 *Eliz. c.* 7. is, that the commiſſioners muſt diſtribute to the creditors ſhare and ſhare alike, *&c.* and that every ſuch bargain, ſale, *&c.* ſhall be good and effectual againſt the offenders and all perſons, *&c.* and if the debtor, after he becomes a bankrupt, may prefer one creditor before another, it would be unreaſonable, and a great defect in the law, that, after he hath utterly diſcredited himſelf by becoming a bankrupt, the law ſhould intruſt him with the diſtribution of his goods. 2 *Rep.* 25, 26.

A debtor became a bankrupt, and, after a commiſſion awarded, he ſold part of his goods to one of his creditors in ſatisfaction of part of his debt, and afterwards the commiſſioners by indenture ſold thoſe goods jointly to the plaintiffs, who were the other creditors; it was reſolved, that the ſale by the ſaid commiſſioners was good; for the intent of the ſtatutes is to relieve the creditors equally in diſtribution of the bankrupt's eſtate, and that he himſelf cannot diſpoſe of his goods after the commiſſion awarded; and if a creditor refuſes to come into the commiſſion, and the goods are ſold to others, it is likewiſe good. *Moſ.* 594. 2 *Rep.* 23. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 24. *under the firſt diviſion of this title.*

A legacy was given to *A.* before he became a bankrupt, for which he had a decree, aſſignee ſhall have the benefit of the decree. 2 *Vern.* 432.

A legacy was left to a *feme covert*, and afterwards her huſband became a bankrupt, the commiſſioners aſſigned over the legacy, and then the bankrupt died; decreed, that the wife ſurviving ſhould have the legacy. *Cha. Pre.* 121.

A man had deviſed lands which were in mortgage to be ſold, and the ſurplus of the money to be paid to his daughter; the daughter married a man who ſoon after became a bankrupt, and the commiſſioners aſſigned this intereſt of the wife's; the huſband died, and the aſſignees brought this bill againſt the wife and truſtees to have the land ſold, and the ſurplus of the money paid to them; and the court would not aſſiſt in ſtripping the wife (who was wholly unprovided for) of this intereſt, but diſmiſſed the bill at the Rolls. *Eq. Ca. Abr.* 54.

And though it was objected, that the profits were forfeited by the act which was to veſt the ſeparate right in the wife, *viz.* the bankruptcy; and when two rights concur, *fortior eſt diſpoſitio legis quam hominis*; yet the court compared it to the caſe of a leaſe, where the leſſee is reſtrained from aſſigning without conſent of the leſſor, and the aſſignment has always been held to be void; the bill was diſmiſſed with coſts. 2 *Stra.* 947.

Bond was given to the father-in-law of the future huſband for 500*l.* payable at a day certain, but not to be put in ſuit but for ſecurity of the huſband, to be paid before other creditors.

Lord Chancellor: This is a fraudulent bond on the face of it, to diſappoint creditors. *Select. Ca. in Ch.* 46.

Feme before marriage veſts her eſtate in truſtees for her ſeparate maintenance; her debts will not be diſcharged by the bankruptcy, nor her eſtate out of the reach of the creditors, but ſuch ſettlement or conveyance *quoad* the creditors ſhall be deemed void and fraudulent; *per Parker* Ch. J. in delivering the opinion of the court. 10 *Mod.* 247. *Will. Rep.* 248.

M. a *feme* ſole entered into a bond, and married *A.* who afterwards became a bankrupt; it was reſolved by the court of *K. B.* that by the bankruptcy of the huſband, the bond-debt of the wife is diſcharged, and alſo, the debts due to the wife, though unrecovered, are within the act of 4 *Ann. c.* 17. to be aſſigned by the commiſſioners of the bankruptcy. *Will. Rep.* 249. 10 *Mod.* 160, 243.

A *feme ſole* legatee of 1000*l.* payable after the death of the teſtator's wife, and at her age of twenty years, if ſhe ſhould live ſo long, at about eighteen years of age; the aſſignees of the bankrupt's eſtate brought a bill claiming the 1000*l.* which was decreed by baron *Price*, in the abſence of Lord Ch. *Cooper*; but upon an appeal to Lord Chancellor, his Lordſhip declared, that the aſſignees were in no better condition than the bankrupt himſelf, and that, had he ſued for the legacy, the court would oblige him to make a proviſion for the wife and children, and that ſo muſt the aſſignees, if they come here for equity. But as to the intereſt of the 1000*l.* that having been commonly allowed to be received by the bankrupt, ſo ought the aſſignees to receive the ſame during his life. And if the bankrupt's wife ſhould die without iſſue, then the bankrupt would have been allowed to receive the whole money; and therefore, in ſuch caſe, the aſſignees ſhould be allowed to receive it alſo. *Will. Rep.* 382, 383, 384.

Feme ſole takes a mortgage for 800*l.* and marries *B.* a tradeſman, who becomes a bankrupt; the commiſſioners aſſign all his eſtate real and perſonal, *B.* dies, the wife claims the benefit of the mortgage, and brought her bill for that purpoſe, and to have the writings from the aſſignees; the Maſter of the Rolls delivered his opinion ſolemnly, firſt for the wife, and afterwards for the aſſignees; but ſaid, that if there had been any articles before the marriage, purporting, that this money ſhould continue in the wife as her proviſion, or ſhould be aſſigned in truſt for her, this would have been a ſpecifick lien upon the mortgage, and have preſerved it from the bankruptcy. And his Honour the Maſter of the Rolls held, that if the aſſignees had in this caſe brought their bill againſt the widow, equity would hardly have lent any aſſiſtance againſt her, becauſe they claiming under the huſband could be in no better plight than the huſband would have been, and had he ſued for the money, or prayed a foreclоſure, equity would (probably) not have compelled the payment to him, without his making ſome proviſion for his wife, or at leaſt, upon her application, the court might have prevented payment to him, unleſs he made ſome proviſion for her. *Will. Rep.* 459.

In an action of trover for certain *South-Sea* bonds, the queſtion fell out upon the trial, whether, if a bankrupt's wife employs another to buy bonds with the bankrupt's money, and he accordingly does ſo, and delivers them to the wife, the aſſignees under the commiſſion may come upon the buyer? Upon which queſtion the Lord Ch. J. whom the cauſe was tried before, ordered the *poſtea* to be ſtayed; and now the court ſeemed to be of an opinion,

opinion, that the commiſſioners could not come upon the buyer, for they ſaid if they could it would be of dangerous conſequence, becauſe he only acts as an agent or ſervant to the other; however, it ſtood over. *Barnard. Rep.* 77, 118.

An eſtate was deviſed to be ſold, and the monies ariſing by ſuch ſale to be divided among ſuch of the children of *A.* as ſhould be living at *A.*'s death; *B.* one of *A.*'s children, became bankrupt, and the commiſſioners aſſigned over his eſtate, after which *B.* got his certificate allowed, and then *A.* died; decreed, that this ſhare of the money which on *A.*'s death belonged to *B.* ſhould be paid to the commiſſioners, becauſe not only the latter ſtatutes relating to bankrupts mention the word (poſſibility) but alſo becauſe 13 *Eliz. cap.* 7. *ſect.* 2. impowers the commiſſioners to aſſign all which the bankrupt might depart with; and here *B.* in the life-time of *A.* might have releaſed this contingent intereſt; beſides, the 21 *Jac. c.* 19. enacts, "that the ſtatutes relating to bankrupts ſhall be conſtrued in the moſt beneficial manner for creditors." *Will. Rep.* 385.

J. S. by will gives to his daughter *A.* then wife of one *Beavis*, his gold watch, jewels, china and houſhold goods, to be at her diſpoſal, and to do therewith as ſhe ſhall think fit; teſtator dies; *Beavis* becomes a bankrupt. This is a deviſe to the ſeparate uſe of the *feme*, and not aſſignable by the commiſſioners of the bankrupts, *&c.*

A caſe was cited before Lord Chancellor *Cooper*, *viz.* Deviſe to *feme covert* for her uſe and benefit; and held, that becauſe it was not for her ſeparate uſe, but only for her uſe and benefit, it was the huſband's; but the Maſter of the Rolls ſaid, he was much diſſatisfied with that determination, and here the intent appears to give it to the ſeparate uſe of the wife; and a married woman could not have, *&c.* to her own diſpoſal if in the power of the huſband, and the things were proper for her ſeparate uſe, and decreed for the wife. 7 *Vin. Abr.* 95. *pl.* 43.

Deviſe of 800*l.* to be inveſted in land for the benefit of the wife of *J. S.* for her life, and afterwards to her children, and the intereſt of the money to go in the mean time to ſuch perſon as would be intitled to receive the profits; *J. S.* the huſband becomes bankrupt; *per cur.* This not being a truſt created by the huſband, nor any thing carved out of his eſtate, but given by a relation of the wife's, and intended for her maintenance, it is not liable to the creditors of the huſband, and decreed the intereſt to be paid to the truſtee, to be laid out in land, and ſettled according to the will. 2 *Vern.* 96.

A. a trader, on marriage, gives bond to a truſtee to leave his wife worth 500*l.* or a third part of his perſonal eſtate, at her election; *A.* becomes a bankrupt; decreed, that the wife ſhould come in as a creditor on the 500*l.* and what ſhould be paid in reſpect thereof to be put out at intereſt, and received by the creditors during the life of the huſband; and if the wife ſurvived, then the money to be paid to her. 2 *Vern.* 662. 2 *Will. Rep.* 298.

But where a bond was given by the huſband for payment of a ſum of money to his wife, in caſe ſhe ſurvived him, and the huſband after became a bankrupt; Lord Ch. *King* held, that no part of the eſtate ſhould be deferred from being diſtributed within eighteen months, eſpecially here being neither *debitum in præſenti*, and perhaps might never be *debitum in futuro*, for ſhe might die in her huſband's life; beſides, after certificate allowed, ſhe might trade again, and become ſolvent, and able to pay the bond; but though the debt was contingent when the obligor became bankrupt, yet if the contingency happened before the diſtribution made, then ſuch contingent creditor ſhall come in for his debt. *Ex parte Caſwell, ex parte Gazalet, ex parte Bateman.* 2 *Will. Rep.* 497.

So if ſuch contingency happened before the ſecond dividend made, the creditor ſhould come in for his proportion thereof, though after the firſt dividend. By Lord Ch. *King.* 2 *Will. Rep.* 499.

Lands deviſed to his daughter, being a *feme covert*, for her ſeparate uſe, without appointing any truſtees, and it being expreſsly declared to be excluſive of the huſband, ſhall not be ſubject to the bankruptcy of the huſband, and decreed at the *Rolls* accordingly. 2 *Will. Rep.* 316, 319.

One not in debt, nor then a trader, makes a voluntary ſettlement on a child, and afterwards becomes a trader, and a bankrupt; this ſettlement is not liable to the bankruptcy. 3 *Will. Rep.* 298.

A. came to town, and hired herſelf a ſervant to do all manner of work; but it happened, that, after the ſpace of a year or two, her maſter and miſtreſs (the girl being of a lively and acute capacity) made propoſal to take her apprentice, which ſhe readily conſented to, and became bound, according to the cuſtom of the city of *London*, and in her ſaid apprenticeſhip, not only gained a full knowledge of her trade and dealing, but being induſtrious, got a ſmall ſum of money to trade withal, and ſuch a credit and reputation amongſt the merchants her maſter and miſtreſs dealt with, that ſhe was reſolved (being encouraged by them) to ſet up and carry on a trade for herſelf; but firſt of all marries one *B.* a cheeſemonger, who for ſome time carried on the trade ſeparate from her, and ſhe the trade of ſelling ſilk, alamodes, ſeparate from him; ſhe thrives, and gets money apace; he breaks or fails; whereupon it was agreed, that he ſhould be content to be maintained out of the profits of her trade like a gentleman, provided he would leave her to trade by herſelf, and not intermeddle with the ſame; this was mutually agreed upon; the ſaid *A.* for ſeveral years carried on the ſilk trade in her own name, and as a free trader bought and ſold the ſilks aforeſaid in her own name, till ſuch time as ſhe fell under a delirium or melancholy madneſs, whereupon *B.* began to inſpect into the management of the affairs, and to caſt up the accounts in the books, upon which he finds himſelf in money, ſtock, trade, and good debts, worth 8000*l.* at leaſt; he thereupon reſolves (having put his wife into a madhouſe) to leave off the trade, he not underſtanding it, to a brother-in-law, by marriage of his wife's ſiſter, which he accordingly did; and after having got a ſum for the goods of the houſe and trade, and got into his hands the monies, plate, and other things of value, beſides moſt part of the debts that were out, retires into the country, and there purchaſes 200*l. per annum* or thereabouts, letting his wife remain in a madhouſe, or ſome ſuch place, ſeveral years; at length, being informed that ſhe was pretty well recovered, by perſuaſion of his friends takes her home to his country ſeat, and uſed her ſo indifferently that ſhe comes up to *London*, and falls a trading again, and had again good buſineſs and good credit, till ſuch time as *B.* puts *A.* into the *Gazette*, and publickly forbids all perſons to give her any credit, notwithſtanding which ſhe had conſiderable dealings, and great credit given her, though a *feme covert*, as a free and ſeparate trader, till at length, through ſome loſſes and croſſes in trade, one *D.* a creditor, cauſes her to be arreſted for 400*l.* and notwithſtanding two or three *habeas corpus's* brought to remove the ſaid cauſe into the court of *King's Bench*, *D.* the plaintiff attends with his counſel the *court of King's Bench* thereon, and inſiſts on the cauſe being tried in the city, according to the cuſtom thereof, as a free and ſeparate trader; the court of *King's Bench* being pitifully inclined to help her if they could, orders the city records to be produced, which were accordingly produced; then the court told *A.* that they could not help her, the cauſe muſt be tried according to ancient cuſtom in the city, as in ſuch caſes are uſual, but would not admit the plaintiff to retard the trial; the plaintiff obtains judgment, and charges *A.* in execution, thereon *A.* brings her *habeas corpus* to turn herſelf over to the *Fleet* priſon, and there lies charged in execution at the ſuit of the ſaid *D.* for 400*l.*

Q. A. having many conſiderable debts abroad due to her on account of ſuch trading, if ſhe may not ſue for the recovery of them in her own name, to her own proper uſe, for and towards paying and ſatisfying her creditors their ſeveral juſt debts, though her huſband *B.* oppoſe it, and will not ſuffer her to make uſe of his name, having diſcharged ſeveral actions brought by *A.* on that account?

A. I am of opinion the wife, by a bill in Chancery againſt her huſband, may have relief againſt him, and he will be decreed to let his name be uſed to get in her debts by the cuſtom of *London*, contracted in her ſeparate trade.

Quære, If the creditors of the ſaid *A.* may not take out a ſtatute of bankruptcy againſt the ſaid *A.* ſo charged in execution as a free trader, though a *feme covert*, and by that means recover what debts are due to her and ſolvent?

A. I am of opinion ſuch commiſſion may be ſued out; but the other method propoſed I apprehend will be beſt, and they may be partakers with the wife againſt the huſband.

Q. Whether ſuch ſtatute, if ſo obtained, will not affect her huſband *B.*'s eſtate, ſhe having formerly by ſuch trade and dealings acquired the money that purchaſed the ſaid eſtate?

A. I apprehend it may.

Edward Northy, [*Attorney General to Queen* Anne.]

If I ſend goods to *B.* and before they are paid for *B.* dies inſolvent, I cannot have them again; but if I ſend goods to a factor to diſpoſe of to my uſe and he becomes a bankrupt, they are not liable to the debt of ſuch bankrupt. 3 *Will.* 185.

If an obligation be taken in the name of another to the uſe of a bankrupt, the commiſſioners may well aſſign that, unleſs the other party hath of his own money paid and ſatisfied debts due by the bankrupt, in conſideration of that alſo; creditors within 13 *Eliz. c.* 7. are intended for merchandizes, *&c.* and not creditors upon counterbonds; and the commiſſioners ſhall judge of that, for if they make an aſſignment to ſuch creditors, ſuch allegations afterwards come too late, for the ſtatute veſts the thing aſſigned in the party to whom, *&c.* *Noy* 142.

A leſſor and leſſee for years, the leſſor covenants with the leſſee and his aſſigns to renew, then the leſſee becomes bankrupt, and commiſſioners of bankrupts aſſign this covenant; the aſſignee brought this bill to have the defendant, the leſſor, renew to him; the caſe was referred to *Wyndham* J. and Baron *Turner*, and they certified the plaintiff ought not to be relieved, and ſo he was diſmiſſed. *Ch. Ca.* 17, 18.

A. mortgaged lands, and afterwards became a bankrupt, the title of the mortgagee ſhall not be impeached by the commiſſioners or aſſignees of the ſtatute of bankruptcy. *Finch's Rep.* 466, 467.

It has been ruled in Chancery, that the commiſſioners may aſſign an equity of redemption of a mortgage; but *quære*, for it ſeems to be againſt the ſtatute, which entitles them to the benefit of a condition that is performed, and not forfeited. *Nelſ. Chan. Rep.* 102.

A trader in *London* having money of *J. S.* (who reſided in *Holland)* in his hands, bought *S. S.* ſtock as factor for *J. S.* and took the ſtock in his own name, but entered it in his account book as bought for *J. S.* after which the trader became bankrupt; determined by the Lord *Parker*, that the truſt ſtock was not liable to the bankruptcy, and ſaid it would leſſen the credit of the nation to make ſuch a conſtruction. *Ex parte Chien*, 3 *Will.* 187. note.

Commiſſioners of bankrupt of one *S.* aſſign a bond of 80*l.* which was made to one *W.* who was former huſband to the wife of *S.* and to whom ſhe was executrix; and held *per cur.* that they could not aſſign any thing but what the bankrupt had in his own right. The power the huſband had of diſpoſing of it, does not make it his till he has diſpoſed of it. 11 *Mod.* 138.

A. was aſſignee of a commiſſion of bankruptcy iſſued out againſt one *Boſwil*, who had contracted with the defendant for goods to the value of 244*l.* but not having ready money to pay for them, offered to mortgage to him an eſtate he had in poſſeſſion, as a ſecurity for the money, and for that purpoſe left with defendant the title deeds to get the aſſignment drawn; defendant carried the deeds to an attorney to draw the aſſignment, who died without doing it; after that he carried them to a ſcrivener; but before the aſſignment was perfected, *Boſwil* became a bankrupt; *A.* now brought his bill to have the deeds delivered up for the ſelling of the eſtate to ſatisfy the creditors; defendant's counſel urged, that this was more than a pledge of the deeds, for that an aſſignment was intended to be made; that if it had been made the court would not have taken it from him without payment of the money; but it's not being made was owing to the death of the attorney, which was an accident, and this court often relieves againſt accidents; and therefore the deeds ought not to be delivered up without payment of the money. The court decreed the deeds to be brought before the maſter, and to be delivered by ſchedule to the plaintiff. But, *note*, no reaſon was given for this decree. *Cha. Prec.* 375.

The father on the ſon's marriage ſettles land on himſelf for life, remainder on his ſon for life, *&c.* and covenants, during his own life, to pay the ſon 15*l.* a year; the ſon becomes a bankrupt; the plaintiff, as aſſignee, brings a bill againſt the father, to have the benefit of this agreement, and to compel the payment of the annuity; but *per cur.* an aſſignee under a ſtatute is not intitled to have the performance of an agreement made with the bankrupt. 2 *Vern.* 194.

A. puts out 1000*l.* at intereſt to the *Eaſt-India* company, and takes bond for it in the name of *J. S.* his wife's relation, and afterwards *A.* is a bankrupt; *J. S.* is ſummoned before the commiſſioners; but before his examination tells the company, that the money was not his, but that they ſhould pay it to the perſon as ſhould bring the bond; accordingly *A.*'s wife brought the bond, and received the money; the court will not inforce *J. S.* to pay the money. *Pre. Ch.* 18.

A. was indebted to *B.* and *A.* and *B.* became bound for this money to *M. L.* in truſt for the bankrupt; a commiſſion iſſued, and this debt was aſſigned to a crediditor; *M. L.* died, and his creditors releaſed his debt; and adjudged that it lies, becauſe the intereſt of this debt was transferred to the creditor, by the ſtatute 21 *Jac. c.* 19. the bond being made to the uſe of the bankrupt, and therefore the releaſe afterwards was no bar; and ſo the bankrupt's being bound was not material, the bond being in truſt for him. *Palm.* 505.

C. poſſeſſed of a leaſe for years, contracted with the committee of the company for a new leaſe, and paid part of the fine, and by *C.*'s conſent a new leaſe was made to *M.* by the company, and to him executed, and *C.* was at the time of the treaty a bankrupt; the queſtion was, whether the commiſſioners could aſſign the leaſe to the prejudice of *M.* and *Drake*'s caſe was cited; the Lord Keeper ordered, that the plea and demurrer be ouſted, and the benefit thereof ſaved till the hearing, and he doubted of the leaſe; there were other matters for the benefit of *M.* alſo in the plea. 2 *Ch. Caſ.* 196.

Two joint traders, one of them became bankrupt; *per Holt* Ch. J. The commiſſioners cannot meddle with the intereſt of the other, for it is not affected by the bankruptcy of his companion. 3 *Salk.* 61.

If there be ſeveral joint traders, payment to one of them is payment to all; ſo if they all, except him to whom the payment was made, were bankrupts, the payment is only unavoidable as to his proportion. At *niſi prius.* 12 *Mod.* 447.

And if there be four partners, whereof three are bankrupts, and their ſhares aſſigned, and a payment was made to him that was no bankrupt, it is a payment to all the aſſignees, for now they are all partners. 12 *Mod.* 447.

If a bankrupt be outlawed after he committed an act of bankruptcy, and upon the outlawry the King leaſes the profits of his lands, and grants his chattles, and after a commiſſion of bankruptcy is taken out, this will not defeat the intereſt which the creditors have by the bankruptcy in his eſtate. *Salk.* 108.

Sale of goods by a bankrupt, after an act of bankruptcy, is not merely void; the contract is good between the parties, but it may be avoided, or not avoided, by the commiſſioners, or aſſignees, at pleaſure, therefore they may either bring trover for the goods, as ſuppoſing the contract to be void, or may bring debt, or *aſſumpſit*, for the value, which affirms the contract. 3 *Salk.* 59.

A. living

A. living in a remote part of *England* from *B.* and having dealings with him, ſends him a quantity of goods; *B.* apprehenſive he ſhould ſoon be a bankrupt, and not thinking it reaſonable that theſe goods ſhould go to the payment of other creditors, delivers a quantity of goods, which were moſtly the very ſame that were ſent him, to *C.* for the uſe of *A.*; after that, but before *A.*'s acceptance of them, *B.* breaks; the queſtion was, whether the delivery of theſe goods to *C.* for the uſe of *A.* did not veſt the property of them in *A.* ſo abſolutely as to put them out of the diſpoſal of the commiſſioners of bankruptcy; and upon this appearing by evidence at the trial to be the caſe, it was ſtated by the direction of *Parker* Ch. J. who tried the cauſe, for the opinion of the court, who all delivered their opinion *ſeriatim* this term, that the property of the goods were ſo veſted in *A.* by the delivery of the goods to *C.* for his uſe, that they were not ſubject to the diſpoſal of the commiſſioners. 10 *Mod.* 432. *Stra.* 165.

Three commiſſioners of bankruptcy appoint a dividend to be made of the bankrupt's eſtate, a creditor under the commiſſion neglects to receive of the aſſignees his proportion of that dividend, the aſſignees afterwards break and run away with the dividend that was in their hands; the creditor ſhall not be allowed to come upon the bankrupt's eſtate for that money, but muſt take his remedy againſt the aſſignees as well as he can. Cited by Lord Chancellor *Hardwick* as a caſe that had been put; but his Lordſhip ſaid, that caſe wholly depends upon the deed of diſtribution made by the commiſſioners aſcertaining the dividend; for if no ſuch deed of diſtribution had been made, the creditor would have been allowed to have come upon the bankrupt's eſtate, and would not have been confined to have taken his remedy againſt the aſſignees. *Barnard. Chan. Rep.* 419, 420.

H. and other the plaintiffs are creditors of a bankrupt, but *H.* the plaintiff was the principal creditor, and they all complain againſt the defendants, who were aſſignees of the commiſſioners, for that they have recovered judgment for 331 *l.* of the bankrupt's eſtate in the ſaid *H.*'s hands, whereas the ſaid bankrupt was indebted to him in 700*l.* and that *H.* and ſome other of the creditors, are willing to take their proportion of the ſaid 331 *l.* whoſe debts are now in danger of being loſt, if the whole ſhould be received by the defendant *K.* and others, aſſignees, *&c.* who had obtained the ſaid judgment, and therefore they exhibited a bill for relief: the defendants demurred, for that there is no equity in the bill to change the law, by which the aſſignees are enabled to recover the bankrupt's eſtate; and there is no particular charge in the bill that makes the demands of the aſſignees unreaſonable; the court decreed, that *H.* ſhould prove his debt before the commiſſioners, and pay to the defendants their proportion of the 331 *l.* and coſts, and to be diſtributed to them reſpectively. *Finch Rep.* 264, 265.

A commiſſion of bankrupt was taken out againſt *Watſon*, the commiſſioners find him a bankrupt, aſſignees were choſen, and a dividend made; afterwards ſeveral other effects of the bankrupt came to their hands; the creditors petitioned that the aſſignees might account, and make a new dividend; and accordingly the commiſſioners took the account, and certified that *Green*, *Hall*, and *Aires*, were the aſſignees; that *Green* did not appear, and ſo no account was taken as to him, but only from the other two; that *Green* had received ſeveral ſums of money, and whether the other two aſſignees ſhould be charged with his receipts, they ſubmitted to the judgment of the court; and the aſſignees ſold a real eſtate of the bankrupt; that *Aires* received part of the purchaſe-money, and let *Green* have 67 *l.* of it, and they likewiſe ſubmit whether *Aires* ſhould be chargeable with this ſum? and it ſeems reaſonable, that all the aſſignees ſhould be anſwerable for the effects come to any of their hands, for all were truſted by the creditors, and the commiſſioners veſted the effects in all jointly, and it was upon their joint credit that they were intruſted by the creditors, and it was only for their own eaſe and convenience that they let one another receive the effects. As to the 67 *l.* it is plain, that *Aires* muſt be accountable for it; he admits in his own affidavit, that on his receiving 220 *l.* reſidue of the purchaſe-money, upon *Green*'s deſire he let him have 67 *l.* to lend to ſome of the creditors; he admits then that he received the money, and therefore he is accountable tothe creditors for it, he having paid it over to another aſſignee, not for the proper purpoſe, but to lend over; and he truſted *Green* with this ſum, for he ſwears he lent it him upon his own credit, and becauſe he thought him a ſubſtantial perſon; and your Lordſhip adjudged in the caſe of *Lane* and *Wroth*, that if one executor pays over to another executor money of the teſtator he has received, this ſhall not diſcharge him of it; and in the caſe of *Stanley* and *Darrington*, the Maſter of the Rolls was of the ſame opinion, it coming before him in judgment on the Maſter's ſpecial report in 1727.

Where money is paid to one aſſignee, the other ſhall not be anſwerable; for ſince an executor or truſtee for payment of debts ſhall anſwer for no more than he himſelf received, neither ſhall an aſſignee; for executors or truſtees for payment of debts are forced upon the creditors, it is not in their power to change them; but the aſſignees are truſtees choſe by the creditors themſelves, who gave them an equal truſt, and can have them changed, and the aſſignees expreſsly covenant to anſwer only ſeverally. Nor is *Aires* to be charged with the 67 *l.* all the aſſignees ſell the eſtate, and *Aires* and *Green* came to the place appointed to receive the purchaſe-money; but *Aires* is there firſt, and receives the money, and whilſt he is counting it over, *Green* comes in and deſires to have 67 *l.* of it; if *Green* had received this 67 *l.* and *Aires* only the reſt, without doubt he ſhould not anſwer for it; and as *Green* came before the meeting was over, it ought to be conſidered, as if it had been originally received by *Green*, and as if *Aires* had never received it.

Lord Chancellor *King:* It would be of very ill conſequence, if a ſolvent aſſignee might diſcharge himſelf, by paying money over to an inſolvent one; he ought to have kept the money when he received it; and therefore Mr. *Aires* muſt account for the 67 *l.* but neither he or Mr. *Hall* are to be charged with what Mr. *Green* received. *Moſ.* 35.

W. a victualler, was greatly indebted to *M.* his brewer, and quitted that trade, and turned innkeeper, and borrowed money of *N.* his landlord, to buy goods to furniſh his houſe, and for ſecurity thereof made a bill of ſale to *N.* but kept the poſſeſſion of them; afterwards *W.* became further indebted to *M.* for drink delivered after his becoming innkeeper; but not able to go on with his trade, he agrees with *N.* to give him ſecurity by a new bill of ſale of the ſame and other goods; but before the execution, *W.* by contrivance with *M.* commits an act of bankruptcy, and *N.* not knowing of the trick, accepts a new bill of ſale; *M.* ſues out a commiſſion, and gets an aſſignment, and brought trover for theſe goods. *Holt* Ch. J. held, *quod nullus dedixit*, that if theſe goods of *W.* had been aſſigned to any other creditor, the keeping poſſeſſion of them had made the bill of ſale fraudulent as to the other creditors; but ſince the original agreement was as here, and ſo honeſtly and really made for ſecuring the defendant's money lent to *W.* for the ſaid purpoſe, the agreement was good and honeſt. *Ld. Raym.* 286.

A. being aſſignee under a commiſſion of bankruptcy, and dying indebted by bond, *&c.* the creditors of the bankrupt petitioned, that the adminiſtrator of the aſſignee might account before the commiſſioners, ſuggeſting that the adminiſtratrix had confeſſed, that ſhe believed her inteſtate, the aſſignee kept the bankrupt's money in a ſeparate bag, with a note in it, ſhewing it to be ſuch. But the adminiſtratrix denying this upon oath, and that ſhe did not believe the fact to be ſo, and likewiſe ſwearing that teſtator died indebted by ſpecialty ſeveral thouſand pounds beyond all his aſſets; whereupon Lord C. *King* ordered the petition of the new aſſignees to be diſmiſſed, and directed them to bring their bill. 2 *Will. Rep.* 546.

Aſſignees may ſue actions in their own names for the debts due to the bankrupt, for they are transferred by act of parliament, but yet it is not a debt upon record: but

as in debt upon contract defendant might have waged his law againſt the bankrupt, ſo he may againſt the aſſignees. *Cro. Jac.* 105.

Debt againſt adminiſtrator, and declared, that the inteſtate was indebted to *J. S.* 120*l.* for wares ſold, and that *J. S.* became a bankrupt, and was ſo adjudged by the commiſſioners, and this debt was aſſigned to the plaintiff being a creditor; it was inſiſted, that by the aſſignment, this is now *quaſi* a debt on record, and the plaintiff enabled to this ſuit by act of parliament, and that *ley gager* lies not; but reſolved, the action did not lie; for that debt upon a ſingle contract lies not againſt an executor or adminiſtrator; and that the aſſignment by the commiſſioners of bankrupts did not alter the law, but that againſt an aſſignee wager of law did lie; adjudged for the defendant. *Cro. Car.* 187.

Notice of the aſſignment of the debt is not neceſſary to be given to the debtor, before action brought by the aſſignees for the debt. *Lutw.* 456.

In ſpecial action on the caſe brought by the plaintiff as aſſignee of the commiſſioners of bankrupts, he need not ſhew how the perſon became bankrupt. *Carth.* 29.

When an action is brought by an aſſignee under a commiſſion of bankruptcy, it need not be ſet forth in the declaration how he became aſſignee. *Barnard. K. B.* 309.

Though in caſe of bankruptcy it was once held, that no *trover* lay but on ſpecialty, ſhewing the bailment before and converſion *meſne*, yet it has been ſince held to lie generally; *per cur'*. 3 *Keb.* 294. *pl.* 22.

Where a perſon makes payment of a debt to a creditor, ſoon after he becomes a bankrupt, and the creditor had no notice of the bankruptcy at the time he received the money, the aſſignees under the commiſſion ſhall not be allowed to recover the money back again in an *indebitatus aſſumpſit*, but only in an action of *trover*, and the reaſon is that they cannot inſiſt upon having the money by way of *contract*, but as a *tort*. *Barnard. Ch. Rep.* 207.

Sale of goods by a bankrupt after an act of bankruptcy is not merely void, the contract is good between the parties; but it may be avoided by the commiſſioners or aſſignees at pleaſure; therefore they may either bring *trover* for the goods, as ſuppoſing the contract may be void, or may bring debt or *aſſumpſit* for the value, which affirms the contract. 3 *Salk.* 59. *pl.* 2.

Action by the plaintiff as aſſignee under a commiſſion of bankruptcy, and the declaration was, that the defendant was indebted to the bankrupt, and being ſo indebted he promiſed to pay to the bankrupt, but throughout the whole declaration there was no *aſſumpſit* to the plaintiff the aſſignee.

On demurrer it was inſiſted on by the defendant, that the ſtatute had transferred the promiſe to the aſſignee, and that a promiſe before made to the bankrupt, was afterwards, in point of law, a promiſe to the aſſignee, and ought to have been declared on as ſuch.

Sed per curiam, What reaſon is there to differ this from the common caſe of an action by an executor, where you always declare on a promiſe to the teſtator, and yet the promiſe is as ſtrongly transferred to the executor as it is here to the aſſignee. *Stra.* 697.

Satur, a bankrupt, at the time of his going off left ſome plate with his wife, who, in order to raiſe money upon it, delivered it to her ſervant, who went along with the defendant to the door of Mr. *Woodward* a banker, and there the defendant took the plate into his hands, and went into the ſhop and pawned it in his own name, gave his own note to repay the money, and immediately upon receipt of it went back to the bankrupt's wife, and delivered the money to her. And in *trover* for the plate, the jury (conſidering the defendant acted only as a friend, and that it would be hard to puniſh him) found a verdict for the defendant; but upon application to the court, a new trial was granted, upon the foot of its being an actual converſion in the defendant, notwithſtanding he did not apply the money to his own uſe, and upon a ſecond trial the plaintiff obtained a verdict for the value of the plate.

N. B. A difficulty aroſe upon the motion for a new trial, which was this; there were other things beſides plate in the declaration, and as to them the verdict for the defendant was right; and yet a new trial muſt be granted upon the whole; but upon conſideration the court held, that could be no reaſon to refuſe a new trial; for if the merits as to thoſe other things were with the defendant, it would be found for him as to them. But it was agreed on all hands, that if one defendant be acquitted, and another found guilty, that defendant can have no new trial. 2 *Stra.* 813.

Trover by the plaintiff, as adminiſtratrix of *William Wilſon*, the aſſignee of the effects of *Edward Poulter*, a bankrupt, for ready money, *ad damnum* 6co*l.* Upon Not guilty, a ſpecial caſe was made for the opinion of the court.

That *Edward Poulter* on the ſeventh of *May* 1724, became a bankrupt, and a commiſſion iſſued againſt him the third of *Auguſt* following, by virtue of which he was declared a bankrupt, and the plaintiff's inteſtate choſen aſſignee, and had an aſſignment.

That on the ſixteenth of *June* 1724, the bankrupt's wife brought to the defendant 3082*l.* 3*s.* 11*d.* of the bankrupt's money, and deſired the defendant to buy ſome *India* and *South-Sea* bonds with it. That the defendant, knowing of the bankruptcy, and that the money was part of the bankrupt's effects, received the ſame, and on the ſaid 16th of *June*, and 23d of *June*, with part of the ſaid money bought twenty *South-Sea* and *India* bonds, and *John Abington*, the defendant's ſervant, by defendant's order, with other part of the money bought ten bonds more, and defendant delivered all the thirty to the bankrupt's wife. That on the ſecond of *September* 1724, the aſſignees having notice where ſome of the effects were depoſited by the wife, ſeized 22 of the bonds for the benefit of the creditors, and accepted them as part of the bankrupt's eſtate; and upon this ſtate of the caſe, the point reſerved was, whether the defendant is liable in this action to make ſatisfaction for the money with which the eight bonds that did not come to the hands of the aſſignee were purchaſed?

It was argued for the plaintiff, that here was a plain property in the plaintiff, and a converſion in the defendant; in order to make it out, there are ſome things ſtated, which ſhould be laid out of the caſe. *Firſt*, That at the time of receiving the money and buying the bonds, there was no commiſſion, the tranſaction by defendant being in *June*, and the commiſſion and aſſignment not till *Auguſt* following. But as to this it is ſtated, that he became a bankrupt the 7th of *May* before, and from that time the property of the aſſignee commences. *Secondly*, That ten of the bonds were bought by another perſon, one *John Abington*; but this is ſtated to have been done by the defendant's order, and with part of the money received by him of the bankrupt's wife, and that the defendant had the bonds of his ſervant, and delivered them to his wife, by which he has made it his own act. *Thirdly*, The ſeizing 22 of the bonds, by virtue of the commiſſion, for the benefit of the creditors, and accepting them as part of the bankrupt's eſtate; this is not ſtated to be done in affirmance, and by way of authenticating the act done by the defendant in purchaſing theſe bonds; but only to leſſen the damages, which otherwiſe muſt be given for all the money; and to ſhew, that in point of juſtice and equity, the plaintiff is intitled only to a ſatisfaction for the money with which the eight bonds, not yet brought to light, were purchaſed; for if the plaintiff had taken a verdict for the whole, ſhe muſt have been compelled in a court of equity, either to deliver up the 22 bonds, or abate for them; and it is in caſe and favour of the defendant, who had parted with the poſſeſſion, to take theſe bonds out of the hands of a third perſon, and at the ſame time allow him the benefit of the ſeizure. The purchaſe of every bond is a diſtinct act, and where that which is the produce of my money is to be come at, I have my election to ſue for the money, or the thing ſo purchaſed with my money. *Huſſey* v. *Phydal*, 12 *W.* 3. If the bankrupt ſells goods, the aſſignee may bring *trover* for the goods,

goods, or affirm the ſale and ſue for the money; and if the bankrupt does ſo in two inſtances, the aſſignee is not bound to make one uniform election for both caſes; but as they are diſtinct and independant, he may ſue one vendee for the money, and as to the other, may diſaffirm the ſale and maintain *trover*. In this caſe it is ſtated, that the bonds were purchaſed at different times, ſome upon the 16th and others upon the 23d of *June*; not that it is material what he did with the money; for as he was poſſeſſed of the money of the aſſignees, he can no otherwiſe diſcharge himſelf of it than by a payment to them. *Fourthly*, The danger that in general will attend brokers and others, if they ſhould be charged merely on account of the money's paſſing through their hands, may be laid out of the caſe; if they do not know it, it may be hard; but if they know it, they ought to be charged; and there is expreſs knowledge ſtated in this caſe, not only of the bankruptcy, but that the money was the bankrupt's effects.

If theſe things are laid out of the caſe, there will then be a plain property in this money in the plaintiff, and a converſion in the defendant; it will be no more than this: A man, knowing of the bankruptcy, and having money or goods of the aſſignee, diſpoſes of them without his authority; and it will not at all differ from the preceding caſe of *Parker* v. *Goodwin*; where in *trover* for the plate it was held, that he was liable tho' he did not apply the money to his own uſe; he was charged with the plate as having had it in his cuſtody, and not delivering it to the aſſignees; and there the plate was forth-coming; but theſe eight bonds are not. There the directions were to *pawn*, but here to *buy*. There the produce of the plate was delivered to the wife, here the produce of the money was delivered to her. In neither caſe had the defendant any advantage; if any difference, his diſadvantage was greater there than here, becauſe there he had by note ſubjected himſelf to pay the money.

It may be ſaid, he laid out the money as directed, and purſued his authority. To which it is anſwered, that nobody could give him any directions or authority but the aſſignee, and he was not privy to the tranſaction; for though in another caſe it ſhall be taken that the wife acts as a ſervant, yet that is only where the huſband himſelf has power; and though the aſſignee comes in, in privity under the bankrupt, yet that is only as to all tranſactions previous to the bankruptcy; but no act of the bankrupt ſubſequent can bind the aſſignee, there being then no privity between them.

The court, without hearing any argument of the other ſide, declared, that if the four things inſiſted on for the plaintiff were all to be laid out of the caſe, the concluſion drawn from thence, and the application of the caſe of *Parker* v. *Goodwin*, would be right; and as to the *firſt*, *ſecond*, and *fourth* things, they thought they ought to have no weight againſt the plaintiff; but as to the *third*, they were all very clear in opinion, that the ſeizing part of the bonds was an affirmance of the defendant's act in laying out the money, and that the plaintiff therefore could not avoid the act as to part, and diſavow it for the reſt. So the defendant had judgment. 2 *Stra.* 859. *Barnard. K. B.* 77, 118.

The plaintiff, as aſſignee of the effects of *Cripps* and *Quarme*, bankrupts, brings trover againſt the defendants for ſeveral parcels of ſilks. And upon the trial a caſe was made for the opinion of the court.

That the defendants were mercers and partners in *London*, and uſually dealt with *Cripps* and *Quarme*, who were alſo partners, living at *Penryn* in *Cornwall*; and on the ſeventh of *April* 1715, the defendants by their order ſent the goods in the declaration, and gave them credit in their books, they being at the ſame time indebted to them for other goods; the eighteenth of *May* following, *Cripps* and *Quarme*, without the knowledge of the defendants, ſent divers ſilks (the ſame ſent down in *April*) to Mr. *Penhallow* at *Penryn*, for the uſe of the defendants. *June* the fourth *Cripps* and *Quarme* became bankrupts: *June* the ſixth he wrote a letter to the defendants, ſignifying their affairs were in a declining condition, and thinking it not reaſonable that the laſt parcel of goods ſhould go to ſatisfy their other creditors; therefore they had not entered them in their books, but left them with *Penhallow*, who had orders to deliver them to the defendants. *June* the ninth a commiſſion of bankruptcy iſſued, and the effects were aſſigned to the plaintiff. *June* the thirteenth the defendants received the letter, which was the firſt notice they had of the delivery to *Penhallow*, and as ſoon as poſſible, they ſignified their conſent to take the goods again.

It was argued for the plaintiff, that the bankrupt had undoubtedly a good property in the goods by the ſale made the ſeventh of *April*; the queſtion now to be conſidered is, whether any thing appears to diveſt that property, before the act of bankruptcy? The goods it is true were delivered for the uſe of the defendants; but that delivery was without their knowledge. They were not obliged to accept them, and therefore before acceptance the property could not be altered, and the bankrupts might have countermanded that delivery. If inſtead of ſending them to *Penhallow*, they had kept them in their hands until an anſwer to the letter, would that have altered the property? Certainly it would not. This letter can amount to no more than a propoſal, and therefore the ſubſequent conſent (if it has any retroſpect) can only have relation to the time of the propoſal, which was two days after the act of bankruptcy. Though the delivery is ſtated to be to the uſe of the defendants, yet it does not appear to be in ſatisfaction of the precedent debt, ſo there is no conſideration, and then the delivery is fraudulent as to creditors.

It was argued for the defendants, that by the delivery to *Penhallow* the property was altered before acceptance, and the bankrupt could not countermand it, for there was a good conſideration, *viz.* in ſatisfaction of the debt; and this is explained by not entering it in their books, and their unwillingneſs that the other creditors ſhould come into an average for theſe goods; this does not take effect as a gift, but as a ſatisfaction, and therefore not countermandable. *Dy.* 49. *a.* 2 *Rol. Rep.* 39. 2 *Leon.* 30. And ſince it cannot be countermanded, the perſon to whoſe uſe they were delivered has an abſolute property in them, until diſagreement. *Rol. Abr.* 32. *pl.* 13. *Sty.* 296. *Yelv.* 164. *Cro. Jac.* 667. Here was no diſagreement, but as ſpeedy a conſent as poſſible.

An accord executory is no ſatisfaction before it is executed; it is admitted, that a delivery without conſideration may be countermanded: and this is ſuch, for the precedent debt is not merged, becauſe the party could not plead this re-delivery in bar of any action for the value of the goods, unleſs they actually were returned to the perſon who ſold them, or he ſignified his conſent; which was not done before the act of bankruptcy committed.

Ch. J. The queſtion is, whether, by the delivery to *Penhallow*, without more, the property was altered? for if that delivery was countermanded, then the act of bankruptcy intervening, before any aſſent of the defendants, will prevent the property from veſting in them. I think upon the circumſtances, that there appears a ſufficient conſideration to take away a ſubſequent power of countermanding, and that this delivery was in ſatisfaction of the debt; it is true, the bare delivery will not extinguiſh it, becauſe he had a power to diſſent; but yet, according to *Butler* and *Baker*'s caſe in 3 *Co.* the abſolute property paſſes, ſubject to a diſagreement by one of the parties; the contract does not ſtand open till agreement, but is compleat, unleſs there be an actual diſagreement; the conſequence of all this is, that the delivery to *Penhallow*, to the uſe of the defendants, being before the act of bankruptcy, and founded upon a good conſideration, tranſfers the abſolute property to them, it being ſtated that they never diſagreed. *Powys*, J. accordingly.

Eyre, J. All theſe caſes go upon the diſtinction, where the delivery is with and without conſideration, *Dy.* 49. and if the delivery is of money, debt lies. *Yelv.* 23, 24. 2 *Cro.* 687. *Raſt.* 159. If of goods, *trover*. *Buſſ.* 68. The precedent debt is a ſufficient conſideration, and it veſts before notice; for it being to his benefit, a diſagreement ſhall not be preſumed.

Forteſcue,

Forteſcue, J. Property, by our law, may be diveſted, without any actual delivery; as a horſe ſold in a ſtable; but it is otherwiſe by the Civil law. A general bailment alters no property; but this is not ſuch. It cannot be taken for a releaſe, for defect of contract; but it is properly a payment in ſatisfaction; it is more reaſonable to apply it to diſcharge the debt, and not as a gift; for a man is juſt before he is kind; and ſince he paid it in ſatisfaction, he will intend an acceptance, until the contrary appears. *Stra.* 165. *Forteſcue* 353. 10 *Mod.* 432.

A. hath one in execution for debt, and then he becomes a bankrupt; the commiſſioners aſſign the debt; if the party eſcape, whether may this aſſignee have an action of eſcape? And I conceive it may be anſwered in the affirmative; for by *Weſtm.* 2. *c.* 11. debt is given in ſuch caſe againſt the gaoler by the equity of that ſtatute (for the words extend only to accounts) and by the 1 *Jac. cap.* 15. *ſect.* 13. [*which ſee under the firſt diviſion of this title.*] So that by the aſſignment the debt is veſted to all intents and purpoſes in the grantee, as if he had been the original debtor; therefore the grantee might have had his action againſt the ſheriff; and the ſtatute ſhall be liberally expounded for the relief of creditors; eſpecially ſeeing in this caſe the aſſignee or grantee is without any remedy for the debt, if he cannot relieve himſelf againſt the ſheriff. *Billing.* 127.

He who comes in as a creditor, and hath a debt made over unto him by the commiſſioners, *&c.* ſhall be barred by the ſtatute of limitations; for neither of the ſtatutes gives the aſſignee any larger power, *&c.* than the original debtor had; alſo the ſtatute of limitations was made for quieting of men's eſtates, and avoiding of ſuits, which ſtatute ſhall not be taken away without ſpecial words. *Billing.* 129.

Caſe by the aſſignee of the commiſſioners of bankrupt; the defendant pleaded *non aſſumpſit infra ſex annos*. *Holt* moved, that the aſſignment and promiſe, which gave a new cauſe of action, are within the ſix years, and the aſſignee ſhall have a new ſix years; *cur' contra*. The ſix years ſhall be accounted from the original action, and the new promiſe is but a fiction in law. The court inclined to give judgment for the defendant; but a diſcontinuance was granted, *&c.* *Comb.* 70.

Statute of limitations was pleaded to an aſſignee of commiſſioners of bankruptcy, and reſolved by the court, that the ſtatute of bankruptcy transfers the right to the aſſignee; but it is no more than the old right, which the bankrupt had before he had committed any act of bankruptcy, and therefore the aſſignee muſt take it in the ſame plight and condition as the bankrupt himſelf had it; ſo it hath been adjudged in the caſe of *Maſon* and *Plunket*, that the aſſignee was in the ſame caſe (as to the right) with the bankrupt himſelf, and conſequently if he was barred by the ſtatute of limitations, ſo ſhall the aſſignee. 8 *Mod.* 171, 172.

Though the aſſignee of the effects of a bankrupt claims under the act of parliament, yet as the ſtatute of limitations might be pleaded againſt the bankrupt, by the ſame reaſon it is pleadable againſt ſuch aſſignee; *per* Ld. Chancellor. 3 *Will. Rep.* 144.

A doubt ariſing, whether an aſſignment over of a term by the bankrupt was abſolute, or by way of mortgage only; the queſtion at a meeting of the creditors for that purpoſe was, whether the aſſignees ſhould bring a bill to redeem this leaſehold eſtate, or not; but the majority of the creditors were of opinion not to do it; and the aſſignees being thereby diſabled from doing it by this clauſe in the ſtatute, the reſt of the creditors, who were of opinion for bringing ſuch a bill, brought a bill in their own names againſt the ſuppoſed mortgagee and aſſignees of the commiſſioners, praying to be let in to redeem. The aſſignees anſwered, that they were deſirous it ſhould be redeemed, but the ſuppoſed mortgagee oppoſed it. The queſtion now was, whether this bill was well brought? And *Parker*, J. who ſat for the Lord Chancellor, thought that it was; and that if the aſſignees refuſe to bring a bill that is for the benefit of the bankrupt's eſtate, any creditor has a right to bring ſuch bill, under peril of coſts; and decreed, that the aſſignees, in the firſt place, have liberty to redeem, and in default thereof, that the plaintiffs (the major part of the creditors) ſhall have this redemption.

But he ſaid, that in general, where there are proper perſons to get in the eſtate of another, a court of equity will not ſuffer either the creditors of the teſtator, or the creditors of a bankrupt, to bring a bill in equity, in order to get in that eſtate; but if an executor, or aſſignees under a commiſſion, will collude with a debtor, there is no doubt a creditor may bring his bill, in order to take care of that eſtate; and charge the aſſignees or executor with ſuch colluſion. *Barnard. Ch. Rep.* 32.

A bankrupt, indebted to *A.* in 20*l.* and to *B.* in 10*l.* hath a debt due to him on a bond of 20*l.* the court was of opinion, that this bond debt might be aſſigned by the commiſſioners to the creditors reſpectively, in proportion to their debts; and *per Warburton*, J. When it is ſo aſſigned, they may ſeverally ſue for the ſame, becauſe the act of parliament operates upon the aſſignment. *Godb.* 195. *pl.* 282.

One joint trader becomes a bankrupt, and the other receives 100*l.* of a joint debt; aſſignee brought *trover* for the whole money received; but reſolved, that he could only maintain an action for a moiety, for he can only have ſuch action as the bankrupt could. 2 *Show.* 103.

In *trover* by the plaintiff, as aſſignees of the effects of *Samuel Fairclough*, a bankrupt, a caſe was made for the opinion of the court.

That the bankrupt was appointed collector of the land tax for the precinct of *Aldgate*, in the city of *London*, during the year 1730; on the ſeventh of *July* 1731, he committed an act of bankruptcy, having then 190*l.* of the tax in his hands, and on the ſixteenth of *July* the commiſſioners of the land tax iſſued their warrant, upon which the goods in the declaration were ſeized the ſame day; that on the ſeventeenth of *July* a commiſſion of bankruptcy iſſued; that an aſſignment was made to the plaintiffs on the nineteenth of *July*; and that on the twenty-ſecond of *July* the defendants took away the goods and ſold them.

Upon this ſtate of the caſe, the general queſtion was, whether the plaintiffs had a property in theſe goods? for as to a converſion (ſuppoſing there was a property) the defendants did not offer to diſpute it.

For the plaintiff this caſe was conſidered two ways. *Firſt*, as if it was between private perſons; and *ſecondly*, whether there was any intervention of the prerogative.

As to the *firſt*, to make theſe goods ſeizable they muſt be his, *i. e.* bankrupt's, at the time of ſuch ſeizure. The power in 3 *Geo.* 2. *c. p.* 25. is, for the commiſſioners to ſeize the eſtate real and perſonal, of ſuch collector, *to him belonging*; and it was inſiſted, that on the ſixteenth of *July* theſe goods were not his, an act of bankruptcy being ſtated to have been before. And that though in the caſe of the crown it has been held, that it is ſufficient to come any time before the aſſignment, and there is no relation to bind the crown; yet in the caſe of a ſubject, the goods are in the aſſignee by relation from the act of bankruptcy; and all meſne acts will be avoided. *Salk.* 111. And therefore it is conſtant experience, to overreach a compleat execution at the ſuit of a ſubject, by ſhewing only an act of bankruptcy before; and 21 *Ja.* 1. *c.* 19. ſuppoſes ſo, by providing that the goods ſhall be equally diſtributed between the creditors, whereof *no execution is ſerved and executed* before an act of bankruptcy. So in *Philips* and *Thompſon*, 3 *Lev.* 69, 191. where the writ was delivered before, but not executed until after an act of bankruptcy; it was doubted, but it would have been bad, had the act of bankruptcy been before both. Bankrupts are conſidered as offenders, who have forfeited their eſtate, and are not capable of conveying any property; and therefore where, after an act of bankruptcy, and before any commiſſion, the bankrupt ſells the goods, it is in the election of the aſſignee to diſavow it, and bring *trover*; he may indeed avow it, and ſue for the money; but then the bankrupt is not conſidered as transferring any property of his own, but as acting as ſervant to the aſſignees. This ſhews there is no ſort of property remaining in the bankrupt. However, it will be ſufficient

cient if we only ſuppoſe the property to be in abeyance, as in the common caſe of inteſtacy before adminiſtration; for then the goods were not his, and conſequently not ſeizable.

Secondly, If it would be thus in the caſe of the ſubject, let us ſee if there is any intervention of the prerogative, to give it a different turn. This indeed is the main point between us; for if he is conſidered as the debtor of the crown, and the warrant of the commiſſioners to be equal to an extent, it muſt be admitted that it will be againſt us, and the crown muſt take, the warrant coming before any aſſignment. And on the other hand, if the crown is out of the caſe, it is to be preſumed it will not be diſputed but that the plaintiffs are intitled to be.

It was inſiſted for the plaintiffs, that the collector is not to be conſidered as the debtor of the crown; but the receiver general is, and ſo is the diviſion; and there is a plain reaſon for this diſtinction; the diviſion is originally charged, and can no way be diſcharged, but by a payment to the receiver general. The collector is a middle man between them, in whom the crown repoſes no confidence, and therefore leaves him to be appointed by the diviſion; and at the ſame time the crown reſerves to itſelf the appointment of the receiver general, as the perſon by whoſe act the crown may be affected. Had the act intended to turn the crown round to a remedy againſt the collector in the firſt place, it would only have provided, that what had remained after diſpoſal of the collector's effects, ſhall be levied on the diviſion by a re-aſſeſſment: but leſt ſuch a conſtruction ſhould be made, there is added an expreſs declaration, that payment to the collector is no diſcharge to the diviſion, until the money is lodged in the receiver general's hands; the plain import of which is, let the diviſion take care who it ſends the money by, for he ſhall be conſidered as their agent, and not the crown's. If the crown was in any danger of loſing the duty, there might be ſome colour to ſet up the prerogative; but here the duty is ſecured to the crown in all events by aſſeſſments and re-aſſeſſments. The receiver general is the crown's debtor, becauſe the crown can reſort to no one elſe, when the money is in his hands; but its being in the collector's hands is a circumſtance of no conſequence to the crown, or that makes the leaſt alteration; put the caſe that I am debtor to the crown, and ſend my ſervant to the *Exchequer* with the money, and he neglects to pay it in, can that ſervant be ſaid to be the debtor on whom the crown can levy the money? No; the crown conſiders me as the debtor ſtill, and as the perſon who is to ſuffer by the other's neglect. Will any body ſay, the crown is bound to take the collector for its paymaſter? The acts provide for the contrary.

Now if the crown has liberty to avow or diſavow the payment to the collector, then the diviſion's having once paid the money, and being bound to pay it again, is bettering the condition of the crown, and no eaſe but a load on the diviſion.

There is one thing more to be conſidered, and that is; ſuppoſing the crown has its election to reſort to the collector or the diviſion, and they are to be conſidered only as ſo many ſecurities to the crown; yet, whether this warrant of the commiſſioners, which came before the aſſignment, is to be conſidered as equal to an extent, which comes in time, if before the aſſignment. And it is preſumed there is a great difference between them. An extent is a matter of record, an ancient Common law proceſs, and binds from the *teſte*, notwithſtanding the ſtatute of frauds; whereas this warrant of the commiſſioners is a mere matter *in pais*, the date whereof is of no conſequence. And can it be imagined, that if the parliament had intended to make the collector debtor to the crown, that they would not have left to the crown ſo noble a remedy as an extent; or at leaſt have provided, that this warrant ſhould be equal to an extent? Whereas, having not done ſo, but only impowered the commiſſioners to iſſue a warrant, and continued the charge on the diviſion, it muſt be taken to be a proviſion in favour of the diviſions and for their re-imburſement: That whereas, without ſuch proviſion, every man who is re-aſſeſſed would have no other remedy but a ſeparate action for the money had and received to his uſe, which would certainly lie againſt the collector who receives and does not pay over; they ſhall now all have a more expeditious and leſs expenſive remedy: This is finding a proper uſe for the warrant of the commiſſioners: it falls in with the declarations in favour of the duty, that the diviſion is not diſcharged, until the receiver general has the money; and it falls in too with the different conſtitutions of the two officers, for one of which the diviſion is anſwerable, and not for the other; and therefore it is to be hoped that this action of *trover* is well brought.

Lord *Hardwick* Ch. J. This caſe has been properly divided by the bar into two points. *Firſt*, What the conſequence would be, if this is conſidered as between two ſubjects; and *ſecondly*, Whether the prerogative of the crown makes any difference: and as to the firſt of theſe, we are all of opinion, that if this was a caſe between two ſubjects, the property of theſe goods would be in the plaintiff. The commiſſioners of bankruptcy have neither by 13 *Eliz.* nor the ſtatute of *Jac.* 1. any property veſted in them, but only a power to take order about them by their diſcretion. *Jo.* 196. And when they have once executed that authority by aſſignment, the property is in the aſſignees by relation from the time of the act of the bankruptcy committed; and an execution taken after ſuch act of bankruptcy, and before the aſſignment, at the ſuit of the ſubject, will certainly be avoided, as was held in *Cole* v. *Davies*. *Hil.* 10 *W.* 3. and ſo is 3 *Lev.* 191, 69. for the execution is a *meſne* act, and as ſuch will be avoided. *Salk.* 111. The property is not in abeyance until aſſignment, but remains in the bankrupt, according to *Salk.* 108.

But then, *ſecondly*, we think here is ſuch an intervention of the prerogative of the crown as will defeat the plaintiffs in this action. For this purpoſe two things are to be conſidered; *firſt*, whether the money in the hands of the collector made him debtor to the crown for ſo much: and *ſecondly*, what effect the warrant and ſeizure will have in the preſent caſe.

And firſt we hold, that, notwithſtanding the objections made at the bar, the collector is to be conſidered as the King's ſervant, and indebted to him. It is the King's money that he has collected, and the allowance to the collector is not made by the diviſion, but by the King: and though the diviſion is liable for his imbezilments, yet that is only as ſo many ſeveral ſecurities to the crown. To what purpoſe are powers given to the commiſſioners, t ſummon any perſon they ſuſpect of imbeziling, if he not conſidered as indebted to the crown?

And as to the ſecond thing to be conſidered, *viz.* wh. effect the warrant of the commiſſioners will be of; we d. not think it is equal to an extent, ſo as to bind the goo from the date. But what we ground our judgment upo is, that, until an aſſignment, the property was in t bankrupt: That the crown's hands were upon theſe good and created a lien before the aſſignment. The crown not bound by the act relating to bankrupts, not bein named. 2 *Jo.* 202. *Bunb. Rep.* 202. And though t King is bound by an actual aſſignment, 2 *Show.* 481. y that is becauſe the property is then abſolutely transferr to a third perſon; but relations, which are but fictions law, cannot bind the crown. *Hob.* 339. And tho' t actual ſale was not until after the aſſignment, yet t goods were *in cuſtadia legis* before. *Cro. Car.* 148. Up this ſeizure, all the right which the aſſignees had, is redeem the goods on payment of the money, which a in the hands of the commiſſioners as a pledge for that pu poſe; but they have brought their action without payme or tender of the money, and conſequently muſt fail it.

The *poſtea* muſt be delivered to the defendants, and t plaintiff muſt pay the coſts of a nonſuit, which, upon a fidavit of the defendants acting as officers, were order to be treble. 2 *Stra.* 878. *Barnardiſt. K. B.* 342, 38 *Braſſey et al.* v. *Dawſon et al'.*

C. about two months before bankruptcy, having tru money, tallies, *&c.* in her hands belonging to her children, makes a declaration, declaring the truſt of what belonged to her children reſpectively, *&c.* the creditors would have

ſet this aſide. Lord Chancellor ſaid, it was a fair and honeſt proceeding; there can be no bankrupt in equity, but at law only. 10 *Mod.* 489, 490.

The bankrupt having been a very conſiderable merchant, in large dealings, committed a ſecret act of bankruptcy the 18th of *April* 1743, but afterwards appeared publickly, and acted openly as a merchant. The plaintiff, ignorant of ſuch act, had, after the act, very large dealings with him of bills of exchange, and relating to ſeveral other ſums of money, which were paid by the bankrupt to the plaintiff, and all other ſums paid by the plaintiff to the bankrupt, for inſurance of ſhips and duties at the *Cuſtomhouſe*, all which dealings appeared to be very fair and honeſt. The ſums paid by the bankrupt to the plaintiff amounted to the ſum of 3000*l.* and thoſe on the other hand charged by the plaintiff to the bankrupt, to the ſum of 712*l.* After theſe tranſactions a commiſſion iſſued againſt the bankrupt, *November* 30th 1744, and the aſſignee brought an action againſt the plaintiff for the 3000*l.* as ſo much money had and received to the uſe of the aſſignee, which was tried; and it appearing that the ſum of 3000*l.* was paid by the bankrupt after the act of the 18th of *April* 1743, the aſſignees recovered the whole at law. The defendant at law becomes plaintiff here, praying that the ſeveral ſums he paid to the bankrupt, to the amount of 712*l.* ſhould be allowed him, to be deducted out of the 3000*l.* recovered againſt him at law.

Lord Chancellor: There are two queſtions in this caſe: *Firſt*, Whether the party has a right to have ſuch deductions made him. *Secondly*, Whether he hath taken a proper method to be relieved, or whether this court can relieve as to that, which in this caſe he cannot be relieved or allowed in law: As to the

Firſt, It is certain the aſſignee may maintain an action for all ſuch monies paid by a bankrupt, and the act of bankruptcy committed ſhall over-reach alſo all records, as judgments, ſtatutes, *&c.* ſuffered afterwards, and even executions executed; nor does the law allow the dealer with the bankrupt after ſuch act any ſuch deductions, but where the dealings are fair, as they appear to be in the preſent caſe; perhaps it is one of the hardeſt caſes any intendment of law upon the ſtatute obliges the party to ſubmit to. But though this be a fiction of law, and it be a rule of law, that fiction ſhall not be made to the prejudice of any one, yet this caſe is taken out of that rule of law by another, that it is better there ſhould be a miſchief ſuffered than a general inconveniency. For the difficulty to find out the fairneſs of ſuch contracts would be otherwiſe inſurmountable; and eſpecially ſince trade is now become more general, and conſequently more intricate, particularly in this caſe, the negotiating of bills of exchange; and here the aſſignee recovering on an *indeb. aſſump.* for money paid by the bankrupt, the plaintiff in the action ſhould have inſiſted on the *tort*, and might have brought *trover*, or treſpaſs for it; for there are two caſes only wherein an *indeb. aſſump.* cannot be brought for money had and received, *viz.* for money won at play, and for money paid by a bankrupt, after the act of bankruptcy, to a creditor; nor can an *indeb. aſſump.* be maintained here; but the plaintiff might have been nonſuited, for that muſt denote a contract, when the plaintiff ſhould have ſurmiſed a fraud; and therefore, as this action was tried, it muſt have been maintained on ſome contract: Why ſhall not the bankrupt be conſidered as the agent or factor for the aſſignees in all acts fairly done? And if ſo, the aſſignees muſt allow the deductions on the one ſide, as well as inſiſt on the charges on the other; for they ſhall not be permitted to affirm the act done by the bankrupt in one part, and diſaffirm it in another, as it is proved in the caſe of *Wilſon* and *Poulter*, *Hill.* 3 *Geo.* 2. *(Stra.* 859.) Therefore the plaintiff here has right to have the deductions made. And as to the ſecond point,

It does not appear, whether the defendant at law made a ſet-off at the trial, or gave his account in mitigation of damages. It is reaſonable to imagine he gave it in mitigation of damages; and as he was not even therein, or that way relieved, he has no other means or place to ſeek redreſs from, than to fly hither.

But it is ſaid, theſe allowances ought to have been at law; and that if the party could not have them there, he ſhall not here; yet this is not concluſive; for where no intent or ſuſpicion of fraud can be imagined, favourable circumſtances ſhall take the caſe out of the ſtrict doctrine of the ſtatute, as in the caſe of *Rider* and *Bowen*, 3 *Lev.* 58. Where on an action of *trover* for 120*l.* (not in a bag) a ſpecial verdict found, that the bankrupt, after the act of bankruptcy, put his ſon apprentice to a goldſmith, and paid a ſum of money with him; and a commiſſion being after iſſued, the aſſignees brought *trover* for the money; and it was the opinion of the court, that there was no fraudulent intention in the bankrupt, and ſo declared it out of the intention of the ſtatute, though it was exactly within the words of it. So judgment for the plaintiff.

But the counſel moving, that ſome of the ſums charged by the plaintiff to the bankrupt were for money lent; *Lord Chancellor* ſaid, ſuch ſums were not to be charged, for he had not borrowed them as a factor for the aſſignees; and ſo left the decree open for a time, until the parties agreed on the proper ſums. *Gen. Syſ. Law Bank.* 163. cites *MS. Rep. Mich.* 1749, before *Hardwicke* Chancellor. *Billon* v. *Hide*, aſſignee of *Mitchell*, a bankrupt.

Commiſſioners of bankrupts have only a power, and no eſtate; and to paſs the eſtate, there muſt not only be a deed indented, but the indenture muſt be inrolled alſo; and in ſuch caſe there is no relation, for no time is mentioned within which it is to be done, ſo that it might extend to ſeven or twenty years, which would be dangerous. 2 *Jo.* 196, 197. *Vent.* 360. *Skin.* 30.

Aſſignment for a term by commiſſioners of bankruptcy was made to a creditor, who before inrolment of the deed of aſſignment made a leaſe to the defendant, and then the deed was inrolled. *Per cur.* Such a leſſee cannot maintain an ejectment, becauſe the leaſe could not have been before the inrollment; the words of the ſtatute are, "that commiſſioners may ſell by deed inrolled;" ſo without inrollment no ſale. 12 *Mod.* 3. *Elliot* v. *Danby.*

In ejectment, brought by the aſſignees of commiſſioners of bankrupt, upon the bankruptcy of Alderman *Blackwell*, in which theſe aſſignees were leſſors of the plaintiff in ejectment; and a ſpecial verdict being found, which was now to be argued, the Attorney general *Trevor* interrupted the arguing it, for that the verdict had abated the declaration; for it appeared by the verdict, that the demiſe to the plaintiff, upon which this ejectment was brought, was made by the aſſignees of the bankrupt before the inrollment of the bargain and ſale, by which the commiſſioners had aſſigned the lands to the leſſor of the plaintiff; and though the inrollment of a deed ſhall relate to the delivery of the ſame deed, to avoid *meſne incumbrances*; yet every bargain and ſale before inrollment is void, and cannot be made good by any relation, becauſe the bargainee hath no eſtate before inrollment; and if ſo, he could not grant any eſtate; and here it appears, that the leſſors of the plaintiff had not any thing at the time of the demiſe, upon which the plaintiff declared; and the court held this to be a fatal exception. *Carth.* 178. *Bennet* v. *Gundy.*

J. H. by a ſpecial verdict appeared to be a bankrupt, and was committed two months in 1651, and recommitted for another act in 1657, and them the term of years whereof he was poſſeſſed was ſold to the defendant by the bankrupt; and in 1660, the commiſſioners ſold to the plaintiff; the words of the act are, "not after he ſhall firſt be a bankrupt;" for then the earlier being a bankrupt would after five years be a perpetual *ſuperſedeas* to all tradeſmen; but if one has ſold, and then five years paſs without any act of bankruptcy, the purchaſer is ſafe, and no after-act can hurt him; but where the bankrupt continues in poſſeſſion, any after-act is ſufficient to bind the term. *Keb.* 722. *Spencer* v. *Venacre.*

The plaintiff obtained judgment in debt, and afterwards became a bankrupt; the defendant brought error in the *Exchequer-Chamber*, and there the judgment was affirmed, and the record ſent back into *B. R.* then a commiſſion

miſſion of bankruptcy was taken out, and the commiſſioners aſſigned this judgment; but the plaintiff ſued out execution, and the money was levied by the ſheriff, and brought into court, and the aſſignee moved, that it might not be delivered to the plaintiff, ſurmiſing that the judgment was aſſigned to him as before; the court thought it would be hard to ſtay the money upon a bare ſurmiſe, and for aught appeared it was the plaintiff's due; but however, becauſe it might be hazardous to deliver it to him, they conſented to detain it; ſo that the aſſignee would forthwith take out a *ſcire facias*, in order to try the bankruptcy, or otherwiſe that it ſhould be delivered to the plaintiff. *Vent.* 193. *Mod.* 93.

If there be an act of bankruptcy committed, and a creditor obtains a judgment ſubſequent to it, and then a commiſſion is taken out, the judgment is thereby avoided. 15 *Mod.* 446.

Trover. The plaintiff's title was under a bill of ſale from the ſheriff; the defendant's under an aſſignment from the commiſſioners of bankrupts. The caſe was, *A.* was arreſted at the ſuit of *J. S.* and put in bail; then ſurrendered himſelf in diſcharge of the bail, and continued in priſon two months; ſo that by 21 *Jac. cap.* 19. by relation he became a bankrupt from the time of the arreſt, which being prior to the bill of ſale, the plaintiff had no property; and of that opinion was *Holt* Ch. J. But in this caſe, the commiſſion of bankruptcy being taken out before the two months were expired, he directed the jury to find for the plaintiff. 2 *Show.* 519. *Salk.* 110.

One *Mills*, the 14th of *October*, became a bankrupt, afterwards a judgment, *&c.* and a *fi. fa.* was had againſt his goods, *&c.* which were ſeized and ſold. In *December* following, a commiſſion was taken out, and in *March* an aſſignment was made of the goods, and the aſſignees brought *trover* generally. Held, that if a man becomes a bankrupt, the property of his goods continues in him until aſſignment; but the property from the act of bankruptcy is ſo bound, that it cannot be altered until aſſignment. The aſſignee ſhall have all the goods the bankrupt had at the time of the bankruptcy being committed; the aſſignee doth come in in the place of a bankrupt, but doth not repreſent him as an adminiſtrator doth his inteſtate; and if there had been a demand proved in this caſe, the *trover* would have lain; but without proving an actual demand by the aſſignee, it was held, that the action would not lie. *Per Holt*; but *Powell*, J. *contra*. No judgment.

By the aſſignment the aſſignee had a property from the time of the bankruptcy, and there was no meſne interval of time. As where one takes out letters of adminiſtration, he has the property from the death of the inteſtate, and may declare generally, *ut de bonis ſuis propriis*, even before an adminiſtration ſued out: but *Holt* denied this, and ſaid he ought to declare ſpecially, and ſo the plaintiff might have done in the principal caſe; and he relied on the caſe of *Parry* v. *Bowyers*, and ſaid the aſſignee was in by relation from the time of the bankruptcy, ſo as to avoid all meſne acts, but not ſo as to be actually inveſted with the very property. *Salk.* 111. 7 *Vin. Abr.* 116. *pl.* 11.

An aſſignment from the commiſſioners has in many reſpects a relation from the time when the act of bankruptcy was committed; and therefore, if after ſuch an act the bankrupt diſpoſes of his effects, the aſſignment ſhall certainly over-reach it. Agreed by the Ch. J.

And he agreed too, that where a ſheriff takes goods in execution of a bankrupt, and does not deliver them over to the party before the aſſignment made, the aſſignment ſhall not have a relation to defeat that execution, becauſe there the execution was compleated. 2 *Barnard. K. B.* 343. 2 *Stra.* 981.

A leaſe for years is made, with a proviſo that leſſee ſhall not alien; the leſſee becomes a bankrupt, and the queſtion is, whether the ſale of the commiſſioners is a forfeiture? which may be anſwered in the negative, that it is not; becauſe this intereſt is tranſmitted by act of parliament, to which every man is intended party, and not by ſale of the leſſee. *Billing.* 121.

Appeal was from a decree of diſmiſſion at the Rolls upon this caſe; the defendant *Warner* made a leaſe of an inn to *A.* for years, with a proviſo in the leaſe, that the leſſee, his executors or adminiſtrators, ſhould not aſſign the term to any perſon, without the conſent of the leſſor, under his hand in writing, firſt had and obtained, with a power of re-entry in ſuch caſe to the leſſor, and that the leaſe ſhould be void. Leſſee dies, and his executor enters and enjoys the premiſſes, and afterwards becomes a bankrupt. The commiſſioners aſſign this leaſe, *inter alia*, to the aſſignees choſen by the creditors; and afterwards, in conſideration of 50*l.* they aſſign to the plaintiff *Goring*, who brought this bill to be relieved againſt this proviſo, and to ſtay proceedings in an ejectment brought by the leſſor againſt him upon this proviſo, *&c.* The defendant *Warner* by his anſwer inſiſts upon the forfeiture at law, and that the proviſo was reaſonable, and ought not to be ſet aſide in equity. *Per Macclesfield* C. I do not think that this is a breach of the proviſo or condition at law; but whether it be ſo or not, I think this is a proper caſe for relief in a court of equity. I think the aſſignment by the commiſſioners is clearly no breach of the proviſo, for that is done by authority of a ſtatute, which will ſuperſede any private agreement between the parties inconſiſtent with it; and I am inclined to think the aſſignment over by the aſſignees is not a breach of condition; for the firſt aſſignment by the commiſſioners is not a perfect and compleat aſſignment within the meaning of the ſtatute, and paſſes only the legal intereſt ſubject to a truſt, to be ſold and diſpoſed of for the benefit of the reſt of the creditors. The firſt aſſignment is only formal, and in eaſe of the commiſſioners, and in order only to make a ſale thereof for the benefit of the creditors, and their aſſignees ſtand in the place of the bankrupt, and are in effect his aſſignees; and it is unjuſt and unreaſonable, that ſuch a proviſo ſhould fruſtrate and overthrow the intent of a ſtatute made in favour of honeſt creditors, and deprive them of the advantage they may make of a beneficial leaſe. And though it was inſiſted, that the commiſſioners nor their aſſignees can be in no better a condition than the bankrupt himſelf, and conſequently cannot aſſign over without licence; I think, though that rule holds true generally, yet there may be ſome exceptions to it, and that the preſent caſe is an exception out of that rule; and decreed the plaintiff to hold and enjoy, and an injunction to ſtay proceedings at law. 7 *Vin. Abr.* 85. *pl.* 9. *Goring* v. *Warner*.

Sir *Stephen Evans* had diamonds conſigned to him by Governor *Pitt*, to ſell for his uſe: He charged them fraudulently at a leſs value than he ſold them for, and after became a bankrupt; upon which a queſtion aroſe, whether the aſſignees under the commiſſion of bankruptcy ſhould pay coſts? And reſolved they ſhould out of the eſtate; for if he had been here himſelf, he muſt have paid coſts, and the aſſignees ſtand in his place as to his eſtate: but it appearing that the paper, in which he charged them at a leſs value than what he ſold them for, was not delivered to Mr. *Pitt*, it was looked upon not as an effectual fraud, but only a preparation to it, of which he might have repented; ſo no coſts againſt the aſſignees. *Select Ca. in Ch.* 16, 17.

D. the receiver of the *New River* rent, aſſigned to the plaintiff by a bond, wherein the defendant *S.* and *G.* were bound to him in 700*l.* for payment of 350*l.* and this aſſignment was to indemnify him againſt two debts, for which *P.* ſtood bound as ſurety for *D.* and in ſatisfaction of 30*l.* he owed the plaintiff; *D.* became a bankrupt, ſo *P.* could not ſue in the name of *D.* at law, and brought his bill to have the money decreed to him in equity. Defendant *S.* inſiſted, that *D.* is indebted to him for four *New River* ſhares, and inſiſted to retain it out of the bond; and the aſſignees inſiſted to have the bond, they being juſt creditors as well as the plaintiff, and had the law, as well as equity, on their ſide. *Per Lord Keeper Wright*, the aſſignees can have no better right than the bankrupt himſelf; and as the bankrupt is bound by the aſſignment, the aſſignees under the ſtatute muſt be bound likewiſe, and ſtand in his place; but they inſiſting

D. was

D. was a bankrupt before he aſſigned the bond, he directed that to be tried at law, he ſaid he was in doubt whether *S.* might retain for his debt, and that ſtoppage ſeemed to be a good equity in ſuch caſe. 2 *Vern.* 428, 429.

The law is very clear, that the aſſignees are exactly in the ſame place as the bankrupt, and ſtand in his place to every particular, and any agreement entered into ſhall bind them; and though there may not be the ſame remedy againſt them, that is not from the nature but the neceſſity of the thing; for he ſhall make an adequate and compleat ſatisfaction as far as his fortune in the hands of the aſſignees will admit of. *Select. Ca. in Ch.* 77.

The aſſignees are bound by all acts done by the bankrupt before he becomes ſo, whether of a legal or equitable nature, if they were done upon a valuable conſideration, and without fraud; and wha ever diſpoſition of his eſtate he makes, that will affect himſelf, does equally conclude to the aſſignees, who ſtand directly in his place. 2 *Eq. Abr.* 101. *pl.* 5.

John Savage was ſeiſed of copyhold land within the manor of *Whitechurch* and *Dodington*, the cuſtom of which manor is, that the firſt wife ſhall have her free-bench in all the land the huſband was ever ſeiſed of during the coverture; that the ſecond wife ſhould have a moiety, and the third a third part, ſo long as ſhe kept her huſband above ground. *J. S.* in conſideration of marriage with *Elizabeth*, the daughter of *A.* covenanted, within two months after the marriage, to ſettle all his lands to the uſes following, *viz.* for the one part to him and his wife for life; remainder to his firſt ſon in tail male, *&c.* remainder to the firſt and every other daughter in tail female; remainder to his own right heirs: as to the other moiety to himſelf for life, remainder *ut ſupra*, to the iſſue, *&c.* provided that the lands not ſettled in jointure on his wife ſhould be charged with the payment of 300*l.* for younger children's portions: provided alſo, that the lands ſettled on the wife ſhould be in lieu of her cuſtomary eſtate. By indorſement on the articles of the ſame date with them, it was mutually agreed by all the parties, that *J. S.* ſhould have a power to charge the land, not ſettled in jointure, with 300*l.* for the payment of his debts. *J. S.* became a bankrupt, and died without performing the articles, or executing the power, and the aſſignees brought their bill againſt the heir and the younger children of *J. S.* to have 300*l.* which *J. S.* might have raiſed for the benefit of creditors; and the younger children filed their bill againſt the heir, the mother, and the aſſignees, to have their fortunes raiſed; and in this caſe, the points following were determined by *King Lord Chancellor*:

Firſt, As the jointure ſettled on the wife is not made expreſsly in lieu of her free-bench; but only mentioned in the proviſo; and ſhe being an infant at the time of making the articles, and not party to them, whether ſhe be excluded from claiming her free-bench; and it was held ſhe ſhould, and be obliged to abide by her jointure; and the caſe of *Vizet* v. *Longdon* was cited, where a ſum of money was ſettled on a woman before marriage, for her proviſion and maintenance; and the Maſter of the Rolls was of opinion, ſhe ſhould have both that and her dower; but the *Chancellor* reverſed the decree, and confined her to her ſettlement. *Secondly*, Whether the ſettlement ſhould be carried into execution; and reſolved it ſhould; for as it muſt have been ſpecifically executed againſt the covenantor, if he had not become a bankrupt, ſo the aſſignees, who ſtand in his place, ſhall make it good. *Thirdly*, Whether the power of charging the land with debts was veſted in the aſſignees; and it was compared to a power of revocation, which a man leaves unexecuted, and for which his creditors ſhall have remedy againſt the heir; but my Lord *Chancellor* decreed, that the aſſignees, who were in poſſeſſion of the land, ſhould account for all the profits; for as to the money chargeable on the eſtate, he ſaid the charging was a perſonal act, which not being done, he would ſupply the defect; the court decreed the ſettlement ſhould be ſtrictly executed, and the reverſion in fee to the aſſignees. 2 *Eq. Abr.* 101. *pl.* 8.

The plaintiffs and the defendant were all creditors of one *S.* who was a lead merchant, and who, on the 19th of *January* 18 *Car.* 2. was declared a bankrupt, and the commiſſioners aſſigned his eſtate to the plaintiff and others, in the month of *October*, *anno* 19 *Car.* 2. the defendant was then in poſſeſſion of his eſtate, and refuſing to deliver it to the aſſignees, they brought their ejectment. Now though the deed under which the defendant held the lands, was dated in *February* after *S.* was declared bankrupt, yet the plaintiffs were nonſuited. Then they brought a bill to diſcover, whether the defendant did not know, at the time of executing this deed, that *S.* had committed an act of bankruptcy, and ſo to ſet forth the fraud of obtaining the deed, and to have a new tryal; the defendant pleaded his deed, and that *S.* was really indebted at the time it was executed, and demanded judgment, whether he ſhould diſcover any thing to weaken his title, and, upon long debate, the plea was allowed. *Nelſ. Chan. Rep.* 141, 142.

The aſſignee of a bankrupt exhibits his bill againſt the defendant, to diſcover goods of the bankrupt, that came to his hands after the bankruptcy. The defendant, by way of plea, ſets forth, that he had no goods of the bankrupt's, or that ever were his, but what he bought for full and valuable conſideration, and *bona fide*; and that at the time of the ſale and payment of his money, he had no notice either of the commiſſion, or of any act of bankruptcy committed by the bankrupt. On long debates, the plea was allowed by the Lord *North*, and to take what remedy they could before the commiſſioners, or at law. *Hutchins*, counſel for the defendant, cited a former precedent, but it was not produced. 2 *Chan. Ca.* 135.

A. purchaſes of a man, who had committed an act of bankruptcy, but without notice thereof: Afterwards a commiſſion is taken out, and there being a term ſtanding out in truſtees, the aſſignee brings a bill againſt them and the purchaſer to have the term aſſigned to him; and bill diſmiſſed. 2 *Vern.* 599.

A. puts out 1000*l.* at intereſt to the *Eaſt-Indaia* company, and takes bond for it in the name of *J. S.* his wife's relation, and afterwards *A.* is bankrupt; *J. S.* is ſummoned before the commiſſioners, but, before his examination, tells the company, that the money was not his, but that they ſhould pay it to the perſon as ſhould bring the bond; and accordingly *A.*'s wife brought the bond, and received the money. The court will not inforce *J. S.* to pay the money. *Ch. Pre.* 18.

Two foreigners beyond ſea conſign goods to *B.* then in good circumſtances in *London*, but before the goods arrive, *B.* becomes a bankrupt. If they can by any means prevent the coming of the goods to *B.* or the aſſignees, they may, and *B.* or the aſſignees, ſhall have no relief in equity. 2 *Vern.* 203.

An award is made in an adverſary ſuit between *A.* and *B.* partners in iron mills, in a reference by conſent, and after exceptions taken to it, it was confirmed by the court. *A.* was then a bankrupt, but not known to be ſo. A commiſſion is afterwards taken out; aſſignees brought a bill againſt *B.* for an account of *A.*'s eſtate; but *per cur'*, There appearing no fraud in obtaining the award, but it being an adverſary ſuit, and the award after excepted to, *&c.* tho' *A.* might be then a bankrupt, yet not being known to be ſo at the time of the award, ſuch award ought to ſtand. 2 *Vern.* 229.

A man had deviſed lands, which were in mortgage, to be ſold, and the ſurplus of the money to be paid to his daughter; the daughter married a man who ſoon after became a bankrupt, and the commiſſioners aſſigned this intereſt of the wife's; the huſband died, and the aſſignees brought this bill againſt the wife and truſtees, to have the land ſold, and the ſurplus of the money paid to them; but the court would not aſſiſt in ſtripping the wife (who was wholly unprovided for) of this intereſt, but diſmiſſed the bill at the Rolls. *Eq. Ca. Abr.* 54.

7. Of the creditors; who are ſuch; how to prove their debts, and when to come in.

A. and *B.* were ſureties for one *C.* for the payment of money, and had counter-bonds to ſave them harmleſs. The money was not paid at the day, and the ſureties paid it, and afterwards *C.* became a bankrupt; and whether they were creditors within the ſtatute was the queſtion; and it was reſolved that they were. *Cro. Jac.* 127.

If *A* is bail for *B.* either to bring in his body, or to pay the condemnation money, and *B.* becomes a bankrupt, whereupon *A.* pays the money, he may come in as a creditor. *Stone* 132.

A. ſells land to *B.* who afterwards becomes a bankrupt. Part of the purchaſe money not being paid, *A.* ſhall not be bound to come in as creditor under the ſtatute, but the land ſhall ſtand charged with the money unpaid, tho' no agreement for that purpoſe. *Vern*, 268.

A merchant mortgages his land, the mortgagee may chuſe to come in as a creditor. *Stone* 130.

A. makes a mortgage, and afterwards a commiſſion of bankruptcy is taken out againſt him, and commiſſioners make an aſſignment of his eſtate, and then *B.* lends 2000*l.* to the bankrupt on a ſecond mortgage, having no notice of the bankruptcy, and afterwards he gets in the firſt mortgage. This prior mortgage ſhall not protect the mortgage ſubſequent to the bankruptcy. 2 *Vern.* 157.

A merchant pledges goods, and becomes a bankrupt, the party need not come in. *Stone* 130.

An executor becomes bankrupt, a legatee ſhall be relieved. *Stone* 131.

The plaintiff that hath the defendant's body in execution, ſhall not come in to be relieved. *Stone* 130.

One that hath the bankrupt's body in execution upon a ſtatute merchant, may come in. *Stone* 131.

And he that hath judgment for a debt may come in before execution. *Stone* 130.

A. ſeiſed in fee, borrowed money of *J. S.* on a judgment, and then articled for ſale of the lands to *B.* and afterwards became bankrupt. The queſtion was upon ſtatute 21 *Jac. cap.* 19. *ſect.* 9. the judgment not being executed before the bankruptcy, 650*l.* part of the purchaſe money remained unpaid. It was decreed at the *Rolls*, that the aſſignees convey the premiſſes to *B.* as *A.* had articled to do, and thereupon *B.* to pay the aſſignees the 650*l.* for the benefit of the creditors, and *J. S.* to come in for a proportion only with the reſt of them. *Will. Rep.* 737.

But though *J. S.* could not come in upon the bankrupt's eſtate for more than his proportion with the other creditors, yet it was inſiſted, that he ſhould be at liberty to extend his judgment againſt the purchaſer who bought the land prior to the bankruptcy, which ſeems to be admitted; but that *B.* could not be deemed a purchaſer until he had paid the remainder of the money, which, when paid, muſt go to the creditors, and that he was not compellable to pay it, unleſs upon his having a good title made him by the aſſignees, who had the legal eſtate of the premiſſes aſſigned to them by the commiſſioners, and ſo decreed as above. *Will. Rep.* 739.

If there be an act of bankruptcy committed, and a creditor obtains a judgment ſubſequent to it, then a commiſſion is taken out; now the judgment is thereby avoided. 12 *Mod.* 446.

Rent due to a landlord is a debt of the higheſt nature, and affects the goods, chattels, and ſtock of the tenant upon the premiſſes; and (if there is no ſeizure made by the landlord) in the caſe of an execution or extent, a year's rent is to be reſerved for him, as appears by the ſtatute 8 *Ann. c.* 14. *ſect.* 1.

But in commiſſions of bankruptcy it is otherwiſe, and no commiſſion can remove or carry away any goods belonging to the bankrupt, if the landlord ſeizes for the rent before the goods are removed, and he is to be the firſt diſcharged, even if there are ſeveral years rent in arrear; but if the landlord does not ſeize before the commiſſion of bankruptcy carries away the goods from off the premiſſes, he muſt then come in as a creditor for his rent, with the reſt of the bankrupt's creditors. *Dav.* 314.

Alſo if there are not ſufficient goods upon the premiſſes to pay the landlord's rent, he can then only take what goods there are upon the premiſſes, and after they are appraiſed and ſold, as the law, in caſes of diſtreſs for rent, directs; then the landlord may come in as a creditor for the rent remaining due to him, with the reſt of the creditors under the commiſſion. *Dav.* 314.

On a diſtreſs for rent, goods were ſold, and 77*l.* 3*s.* remained in the conſtable's hands, who became a bankrupt. The tenant dies, and his executors pray to be paid this money by the aſſignees, in preference to other creditors.

Objection; This comes to the hands of the conſtable by due courſe of law, and cited *Mar.* 9, 1721. Lord *Macclesfield ex parte Peviſon*, where was cited *Wright* v. *Dixon*, *Mich.* 6 *Geo.* 1. *C. B.* Goods taken in execution by *Wilcox*, bailiff of *Weſtminſter*, and he died, judgment and execution ſet aſide, and ruled by *B. R.* that the widow and executrix of *W.* ſhould refund the money, tho' ſhe alledged ſhe had not aſſets to pay ſpecialties.

But *per* Lord Chancellor *Hardwicke*, both the caſes cited are againſt executors, and though the law makes a difference between one creditor and another, yet in caſe of bankruptcy all creditors are upon an equal foot; if any thing remain *in ſpecie*, it might be otherwiſe; but here the money is imbeziled by the conſtable; ſo ordered the petitioner to come in as a creditor with the reſt. 7 *Vin. Abr.* 74. *pl.* 7.

An attorney had been employed by one who became bankrupt; aſſignees petition to have up papers, and that the attorney might come in for his demands *pari paſſu* with other creditors.

Lord Chancellor *Hardwicke:* The attorney hath a lien upon the papers, in the ſame manner againſt aſſignees as againſt the bankrupt; and though it doth not ariſe by any expreſs contract or agreement, yet it is as effectual, being an implied contract by law; but as to the papers received after the bankruptcy, they cannot be retained; and therefore, if the aſſignees deſire it, let the bill be taxed, and upon payment papers delivered up; and although the attorney had come in and proved his debt, yet a creditor who hath a ſecurity may properly come in and prove his debt, becauſe poſſibly his ſecurity may prove deficient. 7 *Vin. Abr.* 74. *pl.* 8.

A. lends money to *B.* and *C.* on their bonds, *B.* becomes bankrupt, the commiſſioners aſſign the eſtate in truſt for the creditors.

A. ſues the bond againſt *C.* and gets judgment, and takes him in execution by a *ca. ſa.* and thereupon *C.* paid *A.* 24*l.* but being old and poor, *A.* conſented to diſcharge him out of cuſtody. Ld. C. *Harcourt* decreed *A.* to come in as a creditor for a moiety of what remained due on the bond, for the execution being ſubſequent to the aſſignment of the bankrupt's eſtate, ſhall not (at leaſt in equity) diſcharge *A.*'s demand out of the bankrupt's eſtate; but becauſe each in equity was liable but to half the debt, and *C.* was not the original debtor for the whole, *A.* ſhall have relief only for a moiety of his remaining debt againſt the aſſignees; but had the bankrupt been the original debtor, and had borrowed all the money, then *A.* ſhould come in before the aſſignees, as a creditor for all his debt.

P. had a current account with *B.* a banker, and had 3000*l.* in B.'s hands; *B.* paid *P.* 1000*l.* and *P.* inſtead of a receipt, gave *B.* a promiſſory note; *B.* aſſigned the note to *H.* and afterwards *B.* became a bankrupt; *H.* ſued the note, and *P.* not being able to prove on the trial, that *B.* was bankrupt at the time of the aſſignment, *H.* recovered; *P.* brought a bill for an injunction, and for a diſcovery whether the aſſignment was not made after it bore date; it was inſiſted, that though this was a promiſſory note, it ſhould be conſidered only as a receipt, he having at that time money in his hands, and it could not be imagined he intended to be liable on the note at the ſame time that ſo much money was due to him; and if ſo, the 1000*l.* ſhould be taken as ſo much money paid, and deducted out of the 3000*l.* ſo ſhould come in for his diſtri-

distributive share of 2000*l.* of the bankrupt's estate, and not be a creditor for 3000*l.* and pay the 1000*l.* note; no proof was made of the bankruptcy at the time of the assignment, only that he could not pay it, but never kept out of the way. Lord Chancellor *King*; That does not amount to any act of bankruptcy; and if people are so careless to give notes instead of receipts, it is more fit they should suffer than innocent people, who know nothing of their transactions; bill dismissed. *Select. Ca. in Ch.* 42, 43.

A clothier became a bankrupt; the question was, whether his factor having cloths in his hands of the bankrupt's, might thereout retain his debt, or must come in as a creditor under the statute, and accept of a satisfaction in proportion with other creditors, and account for the cloths he had in his hands. 2 *Vern.* 254. *See the next division of this title.*

A. by articles was to build certain houses; *B.* furnishes him with materials, and takes an assignment of the articles for his security, but before the assignment *A.* was a bankrupt.

Lord Chancellor *Cowper*: *B.* has a special equity, in as much as by what he had advanced *A.* was enabled to perform his agreement to the common benefit of the creditors, and therefore *B.* shall have all his money he advanced after he had a specifick interest in the articles; but as to what he gave credit for before, he trusted as another creditor.

And *Lord Chancellor* put the case of *A.* in building a ship, he becomes a bankrupt, and after *B.* furnishes materials to finish it; *B.* shall have all his money, and not come in average with the other creditors. 7 *Vin. Abr.* 73. *pl.* 4.

A. lent money to a bankrupt after a commission of bankruptcy sued out against him. *Trevor* and *Hutchins* Lords Commissioners held, that he could not come in as a creditor, but was excluded; but Lord *Rawlinson* doubted, and took it to be a new point not yet settled, and that there were no words in the act to exclude him; but Lord *Trevor* and *Hutchins* held, that when the commission was sued out he was bound to take notice. 2 *Vern.* 157, 161.

A bankrupt is committed by commissioners, because he will not answer interrogatories; the gaoler gives him credit for victuals, he shall not be relieved, although he come in before distribution, or any man that trusts him after. *Stone* 131.

If a man trade with a bankrupt between the act of bankruptcy and the commission sued out; whether by delivery of goods, or payment of money, without notice of the act of bankruptcy, the bankrupt keeping open trade, such person shall come in as a creditor for such goods or money. 7 *Vin. Abr.* 69. *pl.* 6.

Creditors shall be admitted to prove debts, due at a future day. See *stat.* 7 *Geo.* 1. *c.* 31. *sect.* 1, 2. under the first division of this title.

A trader contracted with the *East India* company at one of their sales for the purchase of a parcel of *East India* goods, to be paid for at a future day, and before the day of payment he became a bankrupt. Lord Chancellor *King* held the case not within the statute, because the goods were not delivered, nor the contract signed by the party. *Ex parte* of the *East India* company. 2 *Will. Rep.* 396.

And at this day, if a bond or note be given by a trader upon a contingency, and before it happens the trader becomes a bankrupt, and then the contingency happens, this is not within the act, neither shall the debt arising after the bankruptcy be satisfied under the commission. *Per* Lord Ch. *King*, in case of the *East India* company. 2 *Will. Rep.* 397. *Mos.* 28, 79. 2 *Stra.* 269. 2 Ld. *Raym.* 1549. *Barnard. K. B.* 59.

Upon a treaty of marriage between the plaintiff's nephew and the defendant's daughter, a settlement was agreed upon, and articles entered into between plaintiff and defendant, and also before the marriage, the plaintiff, by a separate writing, reciting, that a marriage was intended, and in consideration thereof the plaintiff promised and agreed to pay the defendant 40*l.* a year by quarterly payments, during the plaintiff's life; but if the intended husband and wife, or either of them, should die during the defendant's life, then the annuity to cease. This agreement was signed and sealed by the plaintiff; the marriage was had, and settlement made according to the articles. The plaintiff soon after became a bankrupt, and in all things conformed to the acts relating to bankrupts, and had his certificate confirmed. The defendant did not come in under the commission, but afterwards for two years and a half's annuity accrued since his bankruptcy, brought action of covenant; it was tried *per* Ch. J. *King*. The now plaintiff pleaded the bankruptcy and certificate, and it was strongly insisted, that it was within the statute of the seventh of the present King, whereby persons intitled to notes payable at a future day, should come in under the statute, and a value set on the debt, with rebate of interest; but the *Ch. J.* was of opinion, this agreement was not within the statute; the rather, because of the impossibility of setting a value on this annuity, being on three contingencies, and verdict for the now defendant; but upon the now plaintiff's importunity, the point was referred to be argued in the court of *C. B.* which was done accordingly, and all the judges were of the same opinion. Plaintiff brought a bill for an injunction.

First, On suggestion that this agreement was a fraud, being private, and not in the articles.

Secondly, For the verdict was against conscience, for that the now defendant ought to have come in under the statute, being within the late act; but on motion for continuing the injunction the Master of the Rolls said, had it been *res integra* he knew not what he might have done, but now the point was determined at law, so disallowed the cause, for that there was no fraud. 7 *Vin. Abr.* 71. *pl.* 4.

If *J. S.* gives a bond to certain persons conditioned for payment of so much, in case he shall marry such a woman, and that she shall survive him, but in trust for said woman, her executors, *&c.* and afterwards *J. S.* marries her and becomes bankrupt, and has his certificate of discharge, and dies, living his said wife; the court held that this was not barred, for that it was not within the above statute, it being uncertain whether this bond should ever become payable or not, by reason of its depending on two contingencies, which had not both happened at the time of the act of bankruptcy committed, and so it was impossible to make abatement of 5*l. per cent.* as the act directs. 2 Ld. *Raym.* 1546. 2 *Stra.* 868.

The above statute of 7 *Geo.* extends only to creditors at a future day certain, and not mere contingent creditors, as the above case is; and it seems clear, that a cerditor could not be prejudiced for not coming; for if he had come in, it would have done him no service; and judgment for the plaintiff *nisi*, and says this matter came on again next term, and the court was of the same opinien. *Barnard. K. B.* 59.

Edward Cock on marriage, by articles, 1716, covenanted to pay trustees 4000*l.* in case he should die, leaving a son and other children, who should arrive to twenty-one, equally, *&c. C.* becomes a bankrupt, and has a son and four other children, all infants, who prefer a petition, praying, that sufficient part of the estate might be set apart in order to be divided when, *&c.* Ld. Chan. *Hardwicke*; It is uncertain, whether ever any thing will become due; and before 7 *Geo.* 1. *cap.* 31. it was a question, whether bonds or promissory notes, payable at a future day, though certain, in all events could be let in, and the difference now in such cases is to be adjusted by rebate of interest. But here how is it possible to adjust the difference upon a contingency, which may never happen: he allows the case upon bottomree bonds, where contingency had happened before a distribution actually made. *Objection*; That this demand will be discharged by certificate by stat. 5 *Geo.* 2. *cap.* 30. But *Lord Chancellor*; That clause only relates to inrolling proceedings, and this is not a debt due or arising at the time of the bankruptcy. Petition dismissed. *Ex parte Jefferies.* 7 *Vin. Abr.* 72 *pl.* 7.

In a question about a bankruptcy, the Chief Justice held, that though the preamble of 7 *Geo. cap.* 31. speaks only of bonds given for goods in trade, payable at a future day,

day, yet the enacting words extend to all ſorts of bonds for the payment of money; and that the words ſuch ſecurity, do not mean ſecurity for ſuch a ſort of debt, but ſecurity by bonds, bills, notes, &c. 2 *Stra.* 1211.

A creditor on a bond, with condition to pay money at a future day, ſubſequent to an act of bankruptcy, could not, before 7 *Geo. c.* 31. be admitted to prove ſuch debt, or to have any dividend before ſuch ſecurity became payable; and that act recites it to have been a queſtion; for remedy whereof that act was made, and ſo was the opinion of all the judges. 2 Ld. *Raym.* 1549.

Creditors taking bills, bonds, notes, payable at a future day, may petition for a commiſſion. *Stat.* 5 *Geo.* 2. *c.* 30. *ſect.* 22.

Obligee in any bottomree or *reſpondentia* bond, and the aſſured in any policy of inſurance, are admitted to claim. *Stat.* 19 *Geo.* 2. *c.* 32. *ſect.* 2.

Creditors, how to prove their debts, &c. See *ſtat.* 5 *Geo.* 2. *c.* 30. *ſect.* 24, 26, 27, 29, 30, 32. under the firſt diviſion of this title.

A creditor offered proof of his debt, which the commiſſioners diſallowed, whereupon application was made to the court, who at firſt declined to meddle with it, but at length conſented to hear the proof. *Ch. Ca.* 275.

A commiſſion of bankruptcy was taken out againſt *T. F.* the ſeventeenth of *November* 1676, but proſecuted only by *R.* the other creditors conſenting, that execution of the commiſſion be forborn a month; but *R.* did not conſent thereto, nor know thereof; but *R.* proſecuted and ſued *M.* who had poſſeſſed the eſtate by aſſignment of the bankrupt. It was inſiſted at the trial, that *F.* (the ſuppoſed bankrupt) was not ſo. *R.* had a verdict, and the four months were out; three weeks after ſhe petitions to be admitted into the diſtribution, and now would contribute to the charges, the ſuſpenſion of executing the commiſſion having been ſo ordered by the Chancellor; and now his Lordſhip directed her to be admitted into contribution. *Ch. Ca.* 307.

After diſtribution and four months it was admitted *arguendo*, that other creditors could not come in to diſturb the firſt diſtribution, but might come in for the reſidue, of which no diſtribution was made. 2 *Ch. Ca.* 153, 154.

If a trader, being indebted on ſimple contract, pledges goods for the payment, and promiſes intereſt, ſuch creditor ſhall have intereſt, even between the act of bankruptcy and the commiſſion; and for debts on ſpecialty, the creditor ſhall have intereſt as well between the act of bankruptcy as before. 7 *Vin. Abr.* 110. *pl.* 1.

A mortgagee ſhall have his intereſt run on upon a bankrupt's eſtate, becauſe he hath right *in rem*; but as to other intereſt, it ceaſeth on the bankruptcy. 7 *Vin. Abr.* 110. *pl.* 3.

8. *Of ſetting off, ſubmitting to arbitration, and compounding debts due to the bankrupt.*

Where there is mutual credit between a bankrupt and a creditor, the balance ſhall only be paid, and the clauſe in the ſtatute is not to be conſtrued of dealings in trade only, or in caſe of mutual running accounts, but alſo where one credit is upon mortgage, and the other upon note, *per* Lord *Cowper*; and he ſaid, that in all caſes of mutual credit, it is natural juſtice and equity, that only the balance ſhould be paid. *Will. Rep.* 325, 326.

Sir *Stephen Evans*, in the year 1711, had 5000 *l.* ſtock in the *Hudſon's Bay* company, and was their banker or caſhier, and upon that account was indebted to the company in 800 *l.* and ſoon after became a bankrupt: The aſſignees bring a bill againſt the company to transfer the 5000 *l.* ſtock to them, with all dividend due thereon: the company, by their anſwer, inſiſt, that, by virtue of a by-law in theſe words, *viz. That the ſtock and dividend of each adventurer ſhall be obliged for ſuch debts and engagements as ſuch adventurer ſhall become engaged in to the company, and that the committee of the company for the time being ſhall and may diſtrain the ſame, until ſuch debts and engagements are fully ſatisfied*; the company is not obliged to transfer the ſtock to the complainants, until they pay the 800 *l.* due to the company, and they likewiſe inſiſt upon the clauſe in the ſtatute of bankrupts, 5 *Geo.* 2. *c.* 30. *ſect.* 28. and that Sir *Stephen Evans* having credit in their books for 5000 *l.* ſtock, and the company on the other ſide having credit in Sir *Stephen Evans's* book for 800 *l.* they ought to deduct and have an allowance of the 800 *l.* out of the 5000 *l.* ſtock.

It was argued for the plaintiffs, that the by-law to diſtrain the adventurers ſtock for a debt due to the company was contrary to law, and void by law; that it gave the preference to a ſimple contract before a debt by ſpecialty or judgment; and it ſubverted the legal courſe of adminiſtration; that if an adventurer died indebted by ſimple contract to the company, that debt by ſimple contract would be ſatisfied before debts by ſpecialty or record to other perſons; that this by-law was contrary to the ſtatutes of bankrupts, which make all debts equal, and to be paid *pari paſſu*, which is moſt agreeable to natural juſtice and equity; and ſuppoſing it might bind the adventurer himſelf as an agreement, yet it would not bind the aſſignees, who are truſtees for the creditors, and the ſtock and effects of the bankrupt veſted in them by act in law, and by the party: that this caſe was out of the clauſe of the ſtatute 5 *Geo. cap.* 30. of ſtating accounts where mutual credit had been given; that clauſe extends only to mutual debts; here the company is not mutual debtors to the proprietors of the ſtock, nor can they demand the value of the ſtock from the company; the company is only a a truſtee for the proprietor, and not their debtor, &c.

It was argued for the defendant, that this was a good by-law to bind the members of the company; that ſuch an agreement among partners in trade would be good; that if any of the partners borrowed or took any money out of the joint ſtock, that his ſhare and intereſt in the joint ſtock ſhould be liable to make ſatisfaction for ſuch debt; that the company, having the controul and power over the proprietor's ſtock, might reaſonably detain the ſtock, until they were ſatisfied for a debt due to them from ſuch proprietor; that the aſſignees were in the ſame condition with the bankrupt himſelf, they ſtand in his place, and muſt take eſtate and effects, ſubject to the engagements and charges they were liable to in the hands of the bankrupt. *Secondly*, That this caſe was within the clauſe of the *ſtat.* 5 *Geo.* 2. *c.* 30. of mutual credit, &c. and that Sir *Stephen Evans* was a creditor of the company for his 5000 *l.* ſtock, and the company a creditor of Sir *Stephen Evans* for the 800 *l.* due to them; that the ſtock is called credit in the books of the company, and he has a demand againſt the company for the intereſt and produce of the ſtock; and though there was nothing due to Sir *Stephen Evans* for dividends at the time of his bankruptcy, yet the ſtock itſelf was a debt from the company, and ſo within the clauſe of the act for ſetting one debt againſt another, and only the balance due to Sir *Stephen's* aſſignees; that it would be unreaſonable, where there are mutual dealings and credit, that the debtor to the bankrupt ſhall be bound to pay the whole due from him to the bankrupt's eſtate, and he *contra* ſhould only come in as a creditor under the commiſſion for all due to him, and receive perhaps only two or three ſhillings in the pound for his whole debt, &c.

King C. was of opinion, that the by-law was not good; it was aſſuming a legiſlative power, and altering the law; it was different from an agreement between private partners in trade; theſe ſort of companies were of a publick nature, all people were admitted into them, and great part of the perſonal eſtates of the kingdom were inveſted in them; that it not only made debts by ſimple contract equal to ſpecialty and judgment, but gave them the preference; it gave them a power to attach their creditors effects, and to be their own carvers; it ſubverted the legal courſe of adminiſtration, and was inconſiſtent with the ſtatutes of bankrupts, which make all debts equal, &c.

But *Raymond* Ch. J. and Mr. Baron *Price*, who aſſiſted his lordſhip, thought it a good by-law; it extends only to their own members, and tends to the benefit and advantage of the corporation. All by-laws for the benefit and advantage of trade are good, unleſs ſuch by-laws be unreaſonable or unjuſt; that this, in their opinion, was

neither;

neither; not unreaſonable, becauſe it extends only to their own members, whoſe conſent is implied in all by-laws, and every man that buys ſtock muſt take it ſubject to the engagement laid upon ſuch ſtock by the company; it is not unjuſt, becauſe the ſtock is only to be retained as a pledge till the debt be ſatisfied, which every debtor in juſtice is bound to do; that the aſſignees ſtand in the place of the bankrupt, and can be in no better condition than the bankrupt himſelf.

King, C. ſaid, I think this caſe is within the clauſe of the ſtatute 5 *Geo. cap.* 30. of ſetting off debt againſt debt, ſo need not give any direct opinion as to the by-law: here is mutual credit given, and therefore I think the company may retain the 800*l.* due to them out of the dividends due to the bankrupt's eſtate, ſubſequent to the bankruptcy, and ſhall not be obliged to come in as a creditor under the commiſſion; and decreed accordingly. *Gibſon et al'*, aſſignees of Sir *Stephen Evans*, a bankrupt, v. *Hudſon's Bay Company*. 7 *Vin. Abr. pl.* 2. *Stra.* 645.

The petitioner was indebted to *Woodward*, a banker, upon account of caſh notes that he had accommodated him with, and whilſt he was ſo indebted *Woodward* became a bankrupt, and the aſſignees under the commiſſion againſt *Woodward* had brought an action againſt *Riley* for the money; it happened that *Riley*, againſt whom the action was brought, and one *Chapman*, who were joint-partners, were creditors of the bankrupt *Woodward* on other accounts, more than *Riley* on his own ſeparate account really owed to *Woodward*; therefore *Riley* inſiſted, as there was a mutual credit between him and the bankrupt, one debt ſhould be ſet againſt another; and that it would be hard, that aſſignees under the commiſſion ſhould recover the whole againſt him, and he and his partner come in only under the commiſſion proportionably for what *Woodward* owed them with other creditors. It was inſiſted for the petitioner, that altho' the 5 *Geo.* as to mutual credit was expired, yet this caſe was within the equity of the ſtatute 2 *Geo.* 2. *c.* 22. *ſect.* 13. [made perpetual by 8 *Geo.* 2. *c.* 24. *ſect.* 4.] for relief of inſolvent debtors, whereby mutual debts are to be ſet one againſt the other, upon notice given, *&c.* and that it had lately been determined in a caſe where *Woodward's* aſſignees were parties, and a debtor of *Woodward's*, though a creditor in other reſpects, ſhould have one debt ſet againſt the other upon the footing of mutual credit by the commiſſioners.

It was ſaid, on the other ſide, that joint debts cannot be ſet againſt a ſeparate demand due to the bankrupt.

King, Chancellor, was of opinion, that the caſe was not within the meaning of the ſtatute 2 *Geo.* 2. of one debt being joint and the other ſeparate; but if *Woodward* had been indebted to *Riley* ſingly, he thought that was a mutual credit within the ſtatute; and though in ſuch caſe the ſtatute ſpeaks only of ſetting one debt againſt another upon trials, yet commiſſioners of bankruptcy are within the equity of the ſtatute, and may allow of mutual debts being given in diſcharge, upon the demand of aſſignees. *Ca. Temp. King*, *&c.* 24.

In *aſſumpſit* the defendant was proved to be indebted to the bankrupt in 208*l.* by a ſet-off, and bringing money into court, this whole demand would be diſcharged, if the defendant was intitled to be allowed 127*l.* upon a note of this bankrupt's, which he claimed as indorſee; the caſe as to which was thus:

One *Scott*, who was poſſeſſed of this note at the time of the bankruptcy, applied to the defendant, who he knew owed more money to the bankrupt's eſtate, deſiring him to take the note and claim a credit for it, on ſettling with the aſſignees, according to the above clauſe of the ſtatute; the defendant ſcrupled it, and the bankrupt would not conſent; but at laſt the defendant ventured, upon *Scott's* indorſement (who he ſaid was a good man) to pay the 127*l.* and upon notice to ſet off, produced the note; *Strange* oppoſed its being allowed, it appearing to be an indorſement after the bankruptcy; whereas the words of the act are mutual debts before; and it was an unjuſt attempt in *Scott* to give twenty ſhillings in the pound; but the Chief Juſtice conſidering it might be dangerous to inquire into the preciſe time of indorſing negotiable notes, directed the jury to allow it, which, with much difficulty, and merely in deference to his opinion, they did. But upon motion for a new trial, the verdict was ſet aſide, with the concurrence of the Chief Juſtice; the words of the act being as before ſtated, and the defendant having no right to ſtand in a better condition than *Scott*, who could only come in for a dividend; beſides, it would be of ill conſequence in trade, if debtors to the bankrupt's eſtate ſhould be allowed to buy up debts, in order to ſet them off in this manner: they gave no opinion how it would be, if the nature of the tranſaction, and the time of the actual indorſement, did not appear. 2 *Stra.* 1234.

Diſputes may be ſubmitted to arbitration, and compounded. See 5 *Geo.* 2. *c.* 30. *ſect.* 34, 35. *under the firſt diviſion of this title.*

F. being a goldſmith in *London*, and being diſabled, agreed with moſt of his creditors to aſſign over all his eſtate upon oath, to ſeveral perſons in truſt, for the payment of his debts, as far as his eſtate would pay, he having ſuch allowance for himſelf and family as was agreed upon; and moſt of the creditors ſigned the ſaid agreement; but ſome of the perſons that ſigned, finding that *F.* had done ſome act in violation of the agreement, took out a commiſſion of bankruptcy againſt the ſaid *F.* and ſeized all the eſtate they could come by, and pretended, that ſome of the creditors aforeſaid, that ſigned the agreement, and that were not privy to the ſuing out the commiſſion, had notice in due time, though they had neglected the ſame, and that it was ſeven months from the date of the commiſſion before the commiſſioners aſſigned; and *F.* and other perſons concerned in the firſt agreement, and excluded by the commiſſion of bankruptcy, being not compriſed, as aforeſaid, preferred their bill againſt the aſſignees of the commiſſion of bankruptcy to have the agreement performed, or at leaſt to be admitted to an equal dividend with them; but this court would give no relief therein; and the rather, for that it was made appear that *F.* had made a ſale of ſome of the goods he aſſigned to the creditors, but diſmiſſed the bill. *Chan. Ca.* 18, 19.

Scire facias on a judgment, the defendant pleaded a compoſition for 2*s.* in the pound; *ſo that it* be paid within five years after the major part of his creditors in number and value ſhall ſubſcribe the ſame compoſition, and after the defendant ſhould be diſcharged from impriſonment; and upon a demurrer to this plea, *Holt* Ch. J. was of opinion, that a compoſition, by virtue of the ſtatute, muſt be final, and ſuch as will bind the defendant, and from which he cannot vary; that thoſe words *ſo that*, in things executory (as in this caſe) make a condition precedent; but in eſtates executed, they make a condition ſubſequent; and ſo is *Littleton* to be underſtood; that the payment of 2*s. per* pound, being a condition precedent to this agreement, and wholly in the power and will of the defendant 'till it is paid, it is therefore no compleat agreement; and conſequently not within the ſtatute: and this caſe is the ſtronger againſt the defendant, becauſe it does not appear by his plea, that he was in priſon; ſo that this condition precedent may be impoſſible to be performed, and conſequently the agreement can never ariſe. It is true, it might have been otherwiſe, if 2*s.* in the pound had been agreed to be paid within the five years, in the nature of a defeaſance to the agreement; for this ſtatute operates as a defeaſance. 3 *Salk.* 59.

An objection was made to a compoſition, for that the agreement appeared to be only to, for, and with, thoſe creditors who were parties, and had ſigned the compoſition; but this objection was diſallowed, becauſe the ſtatute makes this an agreement for the reſt. 3 *Salk.* 60.

The ſtatute of two-thirds in number and value was pleaded in bar; and the defendant, to bring himſelf within the benefit of the ſtatute, ſhews, that he abſconded at the time mentioned by the ſtatute, but did not ſhew for what he abſconded; and for this the plaintiff had judgment on demurrer. 2 *Ld. Raym.* 810.

When one pleads the ſtatute of two-thirds, if he would take advantage of the clauſe of being in cuſtody, he muſt ſhew it to have been on the 17th of *November*; if of the clauſe of abſconding, he muſt ſhew he abſconded for debt at the time of the ſtatute made; and *Holt* ſaid, he took the

he ſtatute to be a private law; for though it concerned a great many, yet it concerned a particular ſort of people, and here the plaintiff had judgment, becauſe the defendant did not ſhew in his plea, that he abſconded at the time of the act made, but only ſaid it was on the 17th of *November*. 2 *Ld. Raym.* 811.

9. *Of diſtributing the bankrupt's eſtate.*

See *ſtat.* 1 *Jac.* 1. *c.* 15. *ſect.* 4. 5 *Geo.* 2. *c.* 30. *ſect.* 1, 2, 3, 4, 25. *under the firſt diviſion of this title.*

A commiſſion of bankruptcy was taken out againſt *T. F.* the 17th of *November* 1676; but proſecuted only by *R.* the other creditors conſenting that execution of the commiſſion be forborn a month; but *R.* proſecuted and ſued *M.* who had poſſeſſed the eſtate by aſſignment of the bankrupt. It was inſiſted upon at the trial, that *F.* (the ſuppoſed bankrupt) was not ſo. *R.* had a verdict, and the four months were out; three weeks after, ſhe petitions to be admitted into the diſtribution, and now would *contribute to the charges*, the ſuſpenſion of executing the commiſſion having been ſo ordered by the *Chancellor*; and now his Lordſhip directed her *to be admitted into contribution*. *Ch. Ca.* 307.

After diſtribution and four months, it was admitted, *Arg.* That other creditors could not come in to diſturb the firſt diſtribution, but might come in for the reſidue, of which no diſtribution was made. 2 *Ch. Ca.* 153, 154.

Upon view of the ſtatute of 13 *Eliz. c.* 7. and 1 *Jac.* it was reſolved by the court, that if certain creditors ſue a commiſſion, and others within four months after or more, being creditors, come before contribution and will join *in the charges of the commiſſion*, and all that belongs to it, and tender their parts, that they ſhall not be refuſed, but have their equal parts as creditors. But if any diſtribution be made of any part of the eſtate, no creditors are to be admitted after, that came not in before. *Hob.* 287. *Hut.* 37, 38.

The commiſſioners may ſell and prepare for diſtribution preſently upon the execution of the commiſſion; but until the four months are paſt they may not proceed to diſtribution, for the creditors which inhabit in the remote parts of the realm, perhaps, cannot have notice; and it may be carried ſo ſecretly, that if they might diſtribute preſently, that they which ſued out the commiſſion ſhould be only ſatisfied, when, indeed, there was no default in the others. Alſo it was reſolved, that the offer of creditors to be joined, and before they be partakers, is not an effectual offer, without offering *to be contributory to the charges; but to offer any particular ſum is not neceſſary, becauſe they know not what ſum is diſburſed, and that is to be aſſeſſed by the commiſſioners. And the words (for the charge of the commiſſion) is to be extended to all charges ariſing in ſuing forth the commiſſion, and in execution and defence thereof.* *Hut.* 37, 38.

Where there are lands unſold, and the commiſſioners make a diſtribution on a ſuppoſed value thereof, without having any money to diſtribute, this was held by the court to be a good and regular diſtribution; and the words of the act are, "that the commiſſioners ſhall have the ordering of the bankrupt's eſtate," ſo that there is no neceſſity to ſell and diſtribute the money; but if they allot a proportion of the land to each creditor, it is well enough. Lord *Hutchins* ſaid, that a fraudulent diſtribution may be ſet aſide by the *Lord Chancellor*, even upon a petition; that it had been ſo done in the Lord *Clarendon*'s time; and in the principal caſe a new diſtribution was ordered to be made, and other creditors not taken in before to have their proportions. 2 *Vern.* 158.

Bankrupt's goods ſhall be rateably divided, notwithſtanding any judgment, recognizance, *&c.* See *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 9. *under the firſt diviſion of this title.*

Creditors, upon what ſecurity ſoever they be, come in all equal, unleſs ſuch as have obtained actual execution before the bankruptcy, or had taken pledges for their juſt debts; and the reaſon is, becauſe, from the act of bankruptcy, all the bankrupt's eſtate is veſted in the commiſſioners, who are eſtabliſhed as courts of juſtice touching the bankrupt's eſtate, and before whom the creditors muſt authenticate their debts, in order to receive their dividends; and therefore they muſt equally admit all perſons to make proof of their debts; but ſuch as have pawns or mortgages have a property in the thing ſo pledged, precedent to the tranſlation of the property to the commiſſioners, in which caſe they have only an equity of redemption, and are in no better condition than the bankrupt himſelf; that the bankrupt, before the aſſignment of the commiſſioners, has ſuch property as will maintain an action for the recovery of the goods. *Bac. Abr.* 258. *in Notes.* See *Salk.* 108.

One ſeiſed of lands in fee owes a debt by ſtatute, and afterwards becomes a bankrupt, and the creditor by ſtatute extends the lands, then a commiſſion of bankruptcy is iſſued out. Upon a reference by the Lord Chancellor *Cowper* to the judges of *C. B.* they held, that the clauſe of the ſtatute was full and plain, that all the creditors of the bankrupt, unleſs where there was a mortgage, ſhould be equally paid. *Will. Rep.* 92, 93.

And *Trevor* Ch. J. ſaid, a judgment or recognizance did no more bind the lands, than the *teſte* of a *fi. fa.* bound the goods, at the time of the making of this ſtatute; and it was plain, if the *fi. fa.* was not ſerved and executed, ſuch creditor, notwithſtanding his ſuing out his *fi. fa.* ſhould come in only in proportion with the creditors, even by a ſimple contract. *Will. Rep.* 93. *Same caſe.*

A. being indebted to a feme covert, becomes a bankrupt, the huſband *pays the contribution-money*, and dies before diſtribution, and then the wife died; the executors of the wife are intitled to the dividend; for the huſband paying the contribution-money, does not alter the property of the debt. 2 *Vern.* 707.

A. drew a bill of exchange for 100 *l.* on *B.* in *Holland*, payable to *C.* which *B.* accepted, and afterwards *A.* and *B.* became bankrupts, and *C.* received 40 *l.* of the 100 *l.* out of *B.*'s effects. Ld. C. *Macclesfield* directed, that the creditors of *A.* ſhould come in for the 60 *l.* reſidue of the 100 *l.* and that if the 40 *l.* paid to *C.* ſhall appear to have been paid out of *B.*'s own effects, then the creditors of *A.* ſhall come in for the whole 100 *l.* out of which they muſt anſwer the other 40 *l.* to the creditors of *B.* that being to be taken by *A.*'s creditors in ſuch caſe only as truſtees for *B.*'s creditors. 2 *Will. Rep.* 89.

A. mortgaged lands, and afterwards became a bankrupt. The title of the mortgagee is not to be impeached by the ſtatute; and the mortgagee being a creditor likewiſe by bond, was decreed to come in, *he paying his contribution-money*. *Finch Rep.* 466.

If one quits his trade, and a commiſſion of bankruptcy is afterwards ſued out againſt him by his old creditors, yet an after creditor ſhall be admitted to have his ſhare in the bankrupt's eſtate. *Ld. Raym. Rep.* 287.

Bill againſt the commiſſioners and aſſignees of a ſtatute of bankruptcy to be let into the ſtatute, *paying contribution-money*, and decreed accordingly; the plaintiff likewiſe accounted for what eſtate of the bankrupt came to the hands of the plaintiff's father, and repaying money which himſelf had recovered at law. *Fin. Rep.* 60.

Creditors excluded, were let in for their ſhares according to a prior agreement, tho' an aſſignment and dividend had been made of the eſtate. *Finch Rep.* 326.

Upcot, a merchant, mortgaged lands to *W.* for 1157 *l.* and afterwards mortgaged the ſame, together with other lands, to *Howell*, as a collateral ſecurity for 500 *l.* due by the ſaid *U.* to *H.* by bond, and about ten days afterwards *U.* was declared a bankrupt; part of the premiſſes were ſold for 1050 *l.* and the money paid to *U.* but the commiſſioners refuſing to ſell the reſidue, and the aſſignees refuſing to ſatisfy the demand of *H.* or to admit him to have any ſhare of the bankrupt's eſtate, he petitioned for a ſale to be made of the reſt of the mortgaged premiſſes, and the money to be applied towards the demands of *U.* and himſelf; and in caſe of any deficiency, then to be admitted a creditor on the ſaid bankrupt's eſtate, for what ſhould remain due after ſuch ſale and application as aforeſaid, and to ſtay any dividend in the mean time. Where-

upon the Lord Chancellor *Hardwicke*, upon hearing counſel, referred it to the commiſſioners to take an account of what was due to *W.* and *H.* reſpectively, for principal and intereſt on their reſpective mortgages, and ordered, that ſo much of the ſaid mortgaged premiſſes as remained unſold, to be ſold to the beſt bidder, and the monies ariſing to be applied to the diſcharge of all principal and intereſt due to the ſaid *W.* in the firſt place, and then of the ſaid *H.* together with his coſts of application, by petition to this court to be ſettled by the ſaid commiſſioners; and in caſe the petitioner and aſſignees ſhould differ about the ſame, and if the ſame ſhould not prove ſufficient to pay the petitioner his principal, intereſt and coſts as aforeſaid; then the petitioner to be admitted a creditor for ſuch deficiency, and be admitted to a dividend, *&c.* for the ſame; and that the ſaid *W.* and *H.* be examined touching the account, and to produce upon oath all deeds, books of account, and vouchers, *&c.* upon the petition of *William Hollwell*, of *Exeter*, Eſq; 7 *Vin. Abr.* 102. *pl.* 13.

A. gives a promiſſory-note for 200*l.* payable to *B.* or order, who indorſes it to *C.* who indorſes it to *D.* *A. B.* and *C.* become bankrupts, and *D.* receives 5*s.* in the pound on a dividend made by the aſſignees againſt *A. D.* ſhall come in as creditor for 150*l.* only out of *B.*'s effects; and if *D.* paid *contribution-money* for more than 150*l.* it ſhall be returned. 2 *Will. Rep.* 407.

Upon petition to Lord Chancellor *Hardwicke*, the caſe was, *Hugh Payne* and *Deborah Bullock*, *May* 1716, gave bond to *Mary Tirrel* for payment of 120*l.* In 1727, *Mary Tirrel* aſſigned the bond to *Rachel* her daughter, the petitioner; *Hugh Payne* and *Deborah Bullock* both died; *Hugh Payne* died inſolvent, *Deborah Bullock* left a conſiderable real eſtate, which devolved to *Hugh Payne* her grandſon; *Hugh Payne* the grandſon entered, and ſold part of the lands, and after became a bankrupt; his aſſignees were in poſſeſſion of the lands that were *Deborah Bullock*'s, unſold by *Hugh Payne* the grandſon; the petitioners therefore prayed, that thoſe lands in the hands of the aſſignees might be liable to the bond of *Deborah*, preferable to the general creditors of *Hugh Payne* the grandſon. It was inſiſted for the petitioner, that ſince the ſtatute 3 & 4 *Will. & Mar. cap.* 14. of fraudulent deviſes, lands in the hands of deviſees are made liable to bond debts, as in the hands of the heir, and here the aſſignees ſtand in the place of the bankrupt, and ſubject to the ſame equity, and the bankruptcy and aſſignment is no alienation *bona fide* within the exception and intention of the ſtatute; and the caſe of executors becoming bankrupts, having aſſets remaining *in ſpecie*, is common, and always held the creditors of teſtator to have a preference; but it was inſiſted *e contra*, that there is no ſpecifick lien; the aſſignment is an alienation, and the caſe of executors differs; an executor is looked upon as a truſtee. *Lord Chancellor* ſaid, This is a point of too much difficulty to determine in this ſummary way; let the petitioner bring his bill by *Eaſter* term, and ſtay ſufficient of the eſtate in the mean time in the aſſignees hands. 7 *Vin. Abr.* 101. *pl.* 12.

Trover for three bank-notes, which were payable to *A.* and Co. and upon the trial it was objected, that the ſole intereſt of theſe notes was not in *A.* alone, *&c.* and that *A.* had once a partner, one *J.* who died before the drawing of theſe notes, and ſo the executors having renounced the partnerſhip, were ſtill intereſted in all things relating to their trade; and J. *Powell* held, that this was true enough; for *prima facie* the executors of *J.* ſhall be taken to continue in the partnerſhip until they renounce it; and no renunciation being made out in this caſe, but ſome of the executors having proved the will, they were intereſted in theſe notes too, though they never acted in the trade. 7 *Vin.* 103. *pl.* 5.

If a joint commiſſion of bankruptcy iſſues out againſt two joint traders, it was queſtioned, if ſeparate creditors might come in under it; and that they may, it was argued, that if there are two joint traders, and one becomes bankrupt one day, and the other the next day, and a joint commiſſion is taken out, different relations muſt be had under a joint commiſſion with regard to the different times of the bankruptcy; and the diſtribution under it muſt be the ſame, as if ſeparate commiſſions had been taken out; for in both caſes the joint fund is primarily applied to the joint debts, and the ſeparate fund to the ſeparate debts, and then in average to the joint debts, and *vice verſa*; ſo are the orders in the court of *Chancery* in the following inſtances, *viz.* *A.* and *B.* were partners, but the partnerſhip being diſſolved, and *A.* ſetting up for himſelf, became bankrupt, and a commiſſion iſſued out againſt him; the joint creditors were admitted to prove their joint debts under the ſeparate commiſſion, and cites the 22d of *January* 1738, the caſe of *Stephens* v. *Brown*, and *Adland*——That 22d of *April* 1729, it was ordered that the joint eſtate ſhould go to the joint creditors, and the remaining part of the joint eſtate, which reſpectively belonged to each, ſhould go to their ſeparate creditors upon a joint commiſſion ſued out againſt the then defendants, and cited *Horſey* v. *Heyham* and *Heyham*. And that 2 *Geo.* 2. in *C. B.* two being joint obligors, and afterwards bankrupts, ſeparate commiſſions were taken out againſt them, and the ſeparate commiſſioners refuſing to let in the obligee, he brought an action againſt one of the obligors; but the defendant having got a certificate under the ſeparate commiſſion was diſcharged. *Matthews* v. *Aland*; which proves that joint creditors may come in under ſeparate commiſſions; and by the ſame reaſon, ſeparate creditors may come in under a joint commiſſion, and the law being ſo, every aſſignee may recover by ſetting forth the ſpecial matter; and beſides, if the aſſignee of the other part will not join, he may be ſummoned and ſevered; and the court thought the laſt caſe cited came fully to the point of the principal caſe, and therefore inclined to give judgment accordingly. *Sed adjournatur.* *Fitzgib.* 281.

Joint debts are to be paid out of the joint ſtock firſt; and if there be any overplus, then that ought to be applied to pay particular debts of each partner; but if there be not enough to pay all the joint debts, and if either of the partners ſhall pay more than a moiety of the joint debts, then ſuch partner is to come in before the commiſſioners of bankrupts, and be admitted as a creditor for what he ſhall pay over and above his moiety. 2 *Chan. Rep.* 226.

If there be ſeveral joint traders, payment to one of them is payment to all; ſo if they all, except him to whom the payment was made, were bankrupts, the payment is only unavoidable as to his proportion. 12 *Mod.* 447.

And if there be four partners, whereof three are bankrupts, and their ſhares aſſigned, and a payment was made to him that was no bankrupt, it is payment to all the aſſignees, for now they are all partners. 12 *Mod.* 447.

On a joint commiſſion of bankruptcy againſt two traders, ſeparate creditors are allowed to come in; for the joint effects are to be applied, firſt to pay the partnerſhip debts, and then the ſeparate debts; and the ſeparate effects to pay firſt the ſeparate creditors, and afterwards the partnerſhip creditors. *Per Cowper*, Chan. 2 *Vern.* 706.

Two partners in trade put in each an equal ſtock, and agreed by covenant, that the ſtock ſhould pay the debts of the ſtock, and neither of their ſeparate debts ſhould charge the ſtock, but only his own eſtate, or to that effect; they both became bankrupts, and a commiſſion iſſued againſt them both; one of them owed ſeparately more than the other; the queſtion was between the ſeparate creditors of each bankrupt, and the creditors on account of the joint ſtock, for theſe would exclude the ſeparate creditors from charging the joint ſtock, but that it ſhould ſatisfy the ſtock debts; but the Lord *North* was of a contrary opinion, for the covenant of the partners cannot bind any of the creditors, but only themſelves. 2 *Chan. Ca.* 139.

R. S. and *G.* were partners together in the trade of a dry ſalter: *G.* embezzles and waſtes the joint ſtock, contracts private debts, and becomes a bankrupt; the commiſſioners aſſign the goods in partnerſhip. Bill by *R.* the plaintiff for an account, and to have the goods ſold to the beſt advantage, and inſiſted, that out of the produce of

of the goods the debts owing by the joint trade ought to paid in the first place, and that out of *G.*'s share satisfaction must be made for what *G.* had wasted or embezzled; that the assignees could be in no better a case than the bankrupt himself, and were intitled only to what his third part would amount unto, clear after debts paid and deductions for his embezzlement; and the court seemed to be of that opinion, but sent it to a master to take the account and state the case. 2 *Vern.* 293.

If one or more of the joint traders become bankrupt, his or their proportions only are assignable by the commissioners to be held in common with the rest, who were not bankrupts. 12 *Mod.* 446.

10. *Of the bankrupt's not appearing, nor discovering his estate; his privilege during his attendance; the allowances to be made him; his discharge and certificate.*

See the statute 5 *Geo.* 2. *c.* 30. *sect.* 1, 2, 3, 4, 5, 8, 12, 13, 14, 15, 16, 17, 18, 36. and *stat.* 1 *Jac.* 1. *c.* 15. *sect.* 8. under the first division of this title.

A. was declared a bankrupt, and the commissioners being informed that he was embezzling and concealing his effects, and fraudulently conveying away and alienating his estate, thought it necessary to have him before them, before the first day appointed in the *Gazette* for his examination; and accordingly, at the request of the petitioning creditor, they summoned him personally to attend them to be examined touching the said complaint; and upon his refusing to comply with the summons, they got a judge's warrant, and the bankrupt, by virtue thereof, was committed to *Newgate*, and upon his being brought before the commissioners, pursuant to their warrant directed to the keeper of *Newgate*, and refusing to be examined, they re-committed him to *Newgate*, there to remain without bail or mainprize, according to the form of the statutes in that case made and provided; and upon the bankrupt's petition, the commissioners right of committing the bankrupt was (among other things) contested; but upon great debate of this matter, Lord Chancellor *Hardwicke* was clearly of opinion, that the commitment by the commissioners was legal, and therefore his lordship ordered, that such part of *A.*'s petition as prayed to be discharged out of prison, should be dismissed. 2 *Eq. Abr.* 99.

In the month of *July* 1732, a commission of bankrupt issued against *Philip de Fries*, of *Lemon Street*, *Goodman's Fields*, in the county of *Middlesex*, merchant, and he was declared a bankrupt, and was required to surrender himself to the commissioners on the ninth and sixteenth of *August*, and the ninth of *September* following.

Upon the messenger's executing the warrant of seizure, which was three days before the service of the summons upon him, he had without resistance delivered up his keys and effects to the messenger, and promised to submit to the commissioners, and comply with the directions of the act.

The summons was not served upon him until the first day mentioned for his surrender in the *Gazette*; and about an hour after the service of the summons, and before he surrendered himself, the bankrupt was arrested in his own yard, the bailiff having got over the wall; and he thereupon petitioned the Lord Chancellor, amongst other things, to be discharged, and such petition came on to be heard before he had surrendered himself to the commissioners: and upon hearing the petition, the Lord Chancellor *King* so far considered what he had done (and which was all that he could then do) as a compliance with the act, that he held he ought to be discharged; but he dissuaded the bankrupt from suing the officer for the penalty; whereupon an order was made accordingly by consent. *Dav.* 163.

A man rents an house for years, by lease, at *C.* and becomes a bankrupt, and surrenders all his goods and effects to commissioners, according to the 4 & 5 *Ann.* and with the rest this lease, and his certificate was allowed; but being taken into custody for non-payment of the rent since, he moved by counsel to be discharged; but the court would not grant it, and forced him to put in bail, for they said the act of parliament did not make void the contract between him and his landlord. 7 *Vin.* 129. *pl.* 2.

Two persons, having authority to seize the effects of a bankrupt, broke open a closet, where the bankrupt was, to search for them, and took him on an action, and threw him into the Compter, where he was served with several other actions in custody; it was ordered, that they, at their own costs, should procure him to be discharged out of custody, or to stand committed, being an abuse of the process of the court. *Select. Ch. Ca.* 64.

In debt on obligation the defendant pleaded, that before the action brought the plaintiff became a bankrupt, to which the plaintiff demurred; and *per curiam*, It is an ill plea until an assignment be made, the debtor is defenceless, and cited therefore (the case of) *Hanson* and *Hale* (that) payment before a commission sued out is well enough, and so it is before his debt be assigned; and judgment for the plaintiff. 3 *Keb.* 616.

The plaintiff declared upon a promissory-note; defendant pleaded 5 *Ann. c.* 22. *sect.* 3. that he became bankrupt such a day, and that before that time he was and still is indebted to *J. S.* in 100 *l.* and upwards; that a commission issued, and the commissioners proceeded and made a certificate, that he had conformed in all things to the statute, *&c.* (according to the common form) and that *J. S.* refused to subscribe the certificate 'till the defendant gave the aforesaid note in the declaration mentioned, in trust for *J. S.* whereupon he gave the note in the declaration to the plaintiff, in trust for *J. S.* intending thereby to induce him to subscribe the said certificate; and this, *&c.*

The court was of opinion (but Mr. J. *Powys* seemed of a contrary one) that the defendant ought to set forth his conformity, in all things, to the statute, that it may appear to the court he was such a bankrupt as is intitled to be discharged, which not being done by words in the plea, but only under the certificate of the commissioners, which was set forth, they held the plea ill. *Eyre* J. likened it to the case of the plea upon the act for discharging of poor prisoners, where the defendant must shew himself out of all the exceptions.

Parker, Ch. Just. said, the intention of the act was, that it might not be in the power of a creditor, who had four-fifths, to discharge the debts of the other fifth part, unless he fairly discharged his own; but there would be no danger of that, unless the bankrupt had so conformed himself, as to be intitled to be discharged by certificate; for otherwise, no injury would be done to other creditors by such note, therefore he thought it would best inforce the intention to make the note good, where the creditors would not be hurt by it; because it would be the greatest punishment upon the bankrupt who intended a cheat. *Jackson* and *Amery*. *Quære* this, and see the act, the express words of which are, *that such note shall be void.* *Gilb. Ca.* 140.

The *stat.* 5 *Geo.* 2. *c.* 30. *sect.* 7. extends not to debts due to a bankrupt as executor, but it is for this particular reason, because they are appropriated to pay testator's debts; and if they were assigned it would be a wrong, *viz.* a *devastavit*; and it being objected, that it extends not to debts due to the bankrupt jointly with another, it was answered by Ld. Ch. J. *Parker*, in delivering the opinion of the court, that the case cited for that purpose from *Lev.* 17. is not determined. *Will. Rep.* 254. *Gilb. Ca.* 323.

If a bankrupt has a certificate, and an action be brought against him afterwards for a debt precedent to the statute, he may plead his certificate upon the roll, and so prevent a judgment from being entered up afterwards; but having neglected so to do, it was his own default; that a court of equity is not to relieve either his pleading, or his want of a plea, or no proper plea put in in time, nor could he be relieved on an *audita querela*, because he had an opportunity, and might have pleaded his certificate before the judgment was entered; and upon producing such precedents where bankrupts had been relieved against judgments obtained against them, they did not come

come up to the caſe in queſtion; and the petition was diſmiſſed. 2 *Vern.* 696, 697.

Gore brought an action for rent againſt *Bagſhall*, a bankrupt, and obtained judgment before his certificate was allowed by *Lord Chancellor*; and the certificate not being allowed till after the rules of pleading were out, the bankrupt had no opportunity to plead his certificate, and take the benefit of the act 4 *Ann.* but in the *ſcire facias* againſt the bail, the certificate was pleaded, and the plea over-ruled, ſo that the bankrupt has no relief but in equity, or by *audita qnerela*, which is an equitable remedy at law. A motion was made by Sir *Joſeph Jekyl* for an injunction; but *Cowper*, C. denied the motion (though Sir *Joſeph Jekyl* ſaid, there were ſeveral precedents of injunctions of this ſort, but had none ready to produce) becauſe this was a merciful law made in favour of the bankrupt, and in prejudice of the creditors, and therefore not to be extended in equity farther than at law. 7 *Vin. Abr.* 131. *pl.* 5.

A. a creditor of *B.* brought an action at law, and having got judgment took him in execution, on a *ca. ſa.* afterwards the act of 5 *Geo.* was made, where by *cap.* 24. a bankrupt, if he ſurrenders, is examined, and four-fifths in value and number of his creditors ſign his certificate, and teſtify their conſent, *&c.* is to be diſcharged. After which ſtatute a commiſſion is taken out againſt *B.* by *C. B.*'s father-in-law, and *A.* is perſuaded to come in and be an aſſignee, to prevent the ſinking the eſtate, and getting him diſcharged. The eſtate of *B.* (beſides what he had before the ſtatute made over to *C.*) was only ſome few ſhillings and ſome deſperate debts, it was inſiſted that, fraud appearing, equity would not interpoſe in prejudice of an honeſt creditor, and in favour of the bankrupt, which Lord Chan. *Parker* admitted; and as to *A.*'s coming in and proving the debt, it was argued, that it might be thought neceſſary, in order to prevent *B.*'s diſcharge, and this his lordſhip held reaſonable: and that as to not detaining the body, where all the bankrupt's eſtate was to be ſeized, here was no eſtate left to ſeize, all that being made away to *C.* and that in this caſe *A.*'s coming in cannot be conſtrued an election to be paid out of *B.*'s eſtate, and ſo a waiver of his former execution of the body; for here being no eſtate, there could be no election, and *A.* propoſing to waive any benefit under the commiſſion, his lordſhip ſaid, it ought to be accepted, and refuſed to diſcharge *B.* *Will. Rep.* 560.

Such creditors of a bankrupt as come in under the commiſſion, by which all the bankrupt's eſtate both real and perſonal (by means whereof he ſhould pay his debts) was ſeized, ſhall not be allowed to impriſon the bankrupt for not paying thoſe debts. *Per* Ld. Ch. *Parker*, who ſaid, he would order his diſcharge out of cuſtody, as to any action brought by thoſe who had come into the commiſſion of bankruptcy, and had ſought relief thereby. And though it was objected, that he ought not to be diſcharged till he had perfected his examination, yet the court held the contrary; for it did not appear, that he had been in in contempt, or refuſed; but if he had, yet when the commiſſion was irregularly ſued out, there ought not to be any proceedings upon it by way of examining the bankrupt, or otherwiſe. *Will. Rep.* 612.

A creditor came in under the commiſſion, and proved his debt, and after arreſted the bankrupt, who now prayed to be diſcharged. Ld. Ch. *King* ſaid it has been the conſtruction of equity upon ſtatute of 5 *Ann. cap.* 17. which diſcharges the bankrupt of his debts, on a certificate, by four-fifths of his creditors, and allowed by the Chancellor, that where a trader becomes bankrupt, and any one of his creditors comes in before (under) the commiſſion to prove his debt, though with deſign only to oppoſe the bankrupt's certificate; yet this is an election to take his remedy for his debt under the commiſſion, and if, pending that, the creditor ſues and arreſts the bankrupt, it is taken to be an oppreſſion, and ordered the creditor, at his own expence, to diſcharge the bankrupt out of cuſtody. 2 *Will. Rep.* 394.

But if ſuch creditor will waive any benefit under the ſtatute, and ſtay a reaſonable time, and there is an improbability of the bankrupt's being able to gain his certificate ſigned by four fifths in number and value of the creditors, or allowed by the court; in ſuch caſe, if the creditor applies to the court, declaring his conſent to waive any right or ſhare of the bankrupt's eſtate under the commiſſion, and praying, that he may ſue the bankrupt; Ld. Ch. *King* thought it reaſonable for the court to give leave to ſuch creditor to proceed at law againſt the bankrupt for his debt. 2 *Will. Rep.* 395.

Bankrupt in priſon on a meſne proceſs at ſuit of *A.* prayed that *A.* might make election, whether he would come in under the commiſſion, or take his remedy at law? *per* Ld. C. *Talbot*, *A.* may make a ſpecial election, to take his remedy at law, and to come in under the commiſſion, ſo far as to prove his debt, and aſſent or diſſent to the certificate, becauſe that will affect his remedy at law; but he is to waive any dividend or further benefit under the commiſſion, and accordingly *A.* made his election in this caſe. 7 *Vin. Abr.* 134. *pl.* 19.

F. having proved a debt of 2000*l.* under a commiſſion of bankruptcy againſt one *L.* and paid contribution, and yet had *L.* in execution for his debt. An order was made by the late Ld. C. *King*, that *F.* ſhould either diſcharge *L.* or loſe his dividend; and the commiſſioners having certified, that four-fifths in number and value of the creditors had conſented to *L.*'s diſcharge, excluſive of *F.* he now petitioned againſt the allowing of the certificate, and that he might be admitted to come in, ſo far under the commiſſion as to have liberty to aſſent or diſſent. Lord C. *Talbot* ſaid, that it was ſettled on great debate, that a creditor might be at liberty to elect to proceed at law, and, notwithſtanding, have liberty to aſſent or diſſent to the certificate. The caſe of putting creditors to election, is but modern in favour of bankrupts; but if that election is made in general terms, and in conſequence the creditor is to be excluded from a liberty of diſſenting to the certificate, the reſt of the creditors are not only to take all the reſt of the effects, but have it in their power, by allowing the certificate, to bar the other's debts, *&c.* So that permitting ſuch creditor to aſſent or diſſent to the certificate, is not to give him a benefit, but to prevent his being hurt; and the laſt ſtatute about bankrupts mentions four-fifths of creditors, who ſhall have proved their debts, and not who proved, *&c.* and ſought relief; and it would be hard to put it in the power of a few ſmall creditors, by conſenting to the certificate, to preclude the other of his debt; and therefore as the court, by equitable conſtruction, puts a creditor to his election for abiding by his remedy at law, or coming in to have his dividend under the commiſſion; ſo by the ſame rule of equity, ſuch creditor renouncing any benefit under the commiſſion, ſhould not be hurt; therefore let *F.* be at liberty to make a ſpecial election. 7 *Vin. Abr.* 134. *pl.* 20.

A creditor petitioned the Lord C. *Parker*, againſt the allowance of the bahkrupt's certificate, who, in conſideration of the plaintiff's withdrawing his petition, gave him a bond for the whole debt. The certificate was afterwards allowed, and the creditor ſued the bond againſt the bankrupt, who pleaded the act of 5 *Geo.* 2. and that the bond was obtained in order to procure his diſcharge; but Lord C. *Parker* refuſed to relieve the bankrupt, and diſmiſſed his bill with coſts. *Will. Rep.* 620.

Where a bankrupt is in execution before the commiſſion, and the creditors come in and receive a dividend out of the eſtate, the court will put him to his election, either to diſcharge the bankrupt, or renounce the dividend, and this in conformity to the law, where if the creditor will take the debtor in execution, he cannot afterwards take execution by *fi. fa.* becauſe the body is deemed a ſatisfaction; but otherwiſe, if the creditor takes a *fi. fa.* firſt, and levies ſhort, *&c.* there he may take a *ca. ſa.* afterwards and ſue both, and here *A.* ſued out a commiſſion of bankruptcy againſt *B.* in 1726, and after 1727, received a dividend of 2*s.* 6*d.* in the pound, and now lately took *B.* in execution for the reſt of his debt, and now *B.* petitioned to be diſcharged, but was denied. 7 *Vin. Abr.* 134. *pl.* 17.

Per Lord C. *Talbot*; Though a creditor of bankrupt under 20*l.* is by the laſt act excluded from aſſent or diſſent to the certificate, yet as he is affected by the conſe-

quence

quence of allowing the certificate, he hath right to petition, and ſhew any fraud againſt allowing the certificate. 7 *Vin. Abr.* 134. *pl.* 18.

A queſtion was concerning the form of certificates on the late act; but *per* Lord C. *Parker*, the commiſſioners are to certify one day, that the bankrupt has in all things conformed, *&c.* and then the next day, the creditors certify on the ſame parchment their conſent, at the foot of which the commiſſioners are to certify that the creditors had conſented, according to the terms of the act. 7 *Vin. Abr.* 132. *pl.* 9.

A bankrupt ſo found, was ſued for a debt on bond, before his certificate allowed, but he had ſurrendered his effects and ſubmitted to be examined, and his certificate not being allowed, he pleaded *non eſt factum*, and judgment was given againſt him. He had afterwards a certificate allowed and confirmed. The obligee three or four years afterwards brought a *ſcire facias* upon the judgment, and the defendant pleaded the *ſtat.* 5 *Ann. c.* 22. and that the cauſe of action accrued before his bankruptcy; and upon iſſue joined, it was found againſt the bankrupt, he (as was alledged) not being able to get the commiſſion, or a copy thereof, to produce at the trial, and the plaintiff after had judgment. The plaintiff got an injunction; but the Maſter of the *Rolls* upon hearing diſmiſſed it, as a matter wholly at law; but upon appeal, Lord C. *Macclesfield* reverſed the decree, but ſeemed to admit, were the caſe only matter of miſpleading, equity ſhould not relieve; but upon the ſeveral circumſtances of the caſe, a perpetual injunction was granted. 2 *Will. Rep.* 70.

The defendant and his partner in trade had a joint commiſſion of bankruptcy taken out againſt them, under which they obtained a certificate. The plaintiff was a ſeparate creditor, and had obtained a judgment before the commiſſion or act of bankruptcy; and having now the body of the defendant in execution, the court was moved to diſcharge him, upon the authority of *Howard* v. *Poole*, where it was held, that a ſeparate creditor might come in under a joint commiſſion; and alſo on *Eq. Caſ. Abr.* 55. 2 *Vern.* 707. 2 *Will. Rep.* 500. and the court diſcharged him accordingly. 2 *Stra.* 1157.

If there be two partners, and one of them becomes bankrupt, and on a ſeparate commiſſion being ſued out againſt him, his certificate is allowed; this does not only diſcharge the bankrupt of what he owed ſeparately, but alſo of what he owed jointly, and on the partnerſhip account; becauſe, by the act of parliament, the bankrupt, upon making a full diſcovery, and obtaining his certificate, is to be diſcharged of all debts. Now, as the debts he owes jointly with onother are equally his debts as what he owes on his ſeparate account, conſequently he is to be diſcharged of both his joint and ſeparate debts. And ſo it has been determined by the judges of *B. R.* By the Lord Chancellor *Parker*. 3 *Will. Rep.* 24. in a note.

On a joint commiſſion againſt two partners, the ſeparate creditors, though they have taken out ſeparate commiſſions, ſhall yet be at liberty to come in to oppoſe the allowing of the certificate. 3 *Will. Rep.* 23.

Where two partners are bankrupts, and a joint commiſſion is taken out againſt them, if they obtain an allowance of their certificate, this will bar as well their ſeparate as their joint creditors. 3 *Will. Rep.* 24.

Three commiſſions of bankruptcy iſſued at the ſame time; one againſt *A.* ſeparately, one againſt *B.* ſeparately, and a joint commiſſion againſt *A.* and *B.* as partners, in company; and the bankrupts certificates on the two ſeparate commiſſions were confirmed by the Lord Chancellor, and delivered to them, and four-fifths in number and value of the joint creditors ſigned a certificate for the bankrupts diſcharge on the joint commiſſion.

At the time the joint certificate was to have been confirmed, one of the joint creditors applied by petition to the Lord Chancellor, ſuggeſting, that *A.* had loſt more than 5*l.* by gaming in one day, within the year before the commiſſion iſſued, and therefore was not intitled to be diſcharged; and the Lord *Macclesfield* not only refuſed to confirm the joint certificate, but ordered the former ſeparate certificate to be recalled and diſallowed, and allowed the joint certificate as to *B.* only.

And this being a matter of very great conſequence to *A.* who had traded very conſiderably; as ſoon as his certificate was allowed, he ordered his caſe to be ſtated, and the opinion of the moſt eminent counſel thereon.

And the queſtions which aroſe upon this caſe were ſeveral:

Firſt, Whether it was in the power of the *Lord Chancellor*, after a certificate was duly allowed, and delivered to the bankrupt, and enjoyed by him for ſeveral months, to recall the ſame, *ex officio*, and deprive the party of the benefit of the diſcharge?

If the bankrupt has loſt 5*l.* at one time, and the fact ſhall be proved before the allowance of the certificate, I think the certificate ought not to be allowed by the commiſſioners of bankruptcy, or by the Great ſeal; but if the bankrupt hath conformed in all things, and his certificate hath been allowed, without any objections made upon the account of gaming, by the creditors, I conceive there is not a power given to the Great ſeal to recal the certificate. *S. Cowper*, 14 *June* 1725.

The ſecond queſtion was, whether a ſeparate certificate diſcharged the partner from joint debts?

As I was clearly of opinion at firſt, that the bankrupt's ſeparate certificate, ſo long as it continued in force, diſcharged the bankrupt not only from ſuch debts as were owing from the bankrupt on the ſeparate account, but likewiſe ſuch as were owing on the partnerſhip account; ſo I continue in the ſame opinion. I alſo concur in opinion with Mr. *Cowper*, that the *Lord Chancellor* cannot legally recal the certificate, after it is once confirmed, upon the account of a fact which was never proved, or never objected to, before the allowance of the certificate.

Another opinion on the ſame queſtions.

Firſt, As to the *Chancellor*'s power of recalling the certificate: This is a queſtion of conſiderable difficulty; but I am rather of opinion, that ſuch a confirmation cannot be revoked, ſo as to prevent the bankrupt's diſcharge; becauſe, by the ſtatutes, conforming to the acts, and a certificate confirmed, is made an actual diſcharge of the bankrupt's debts due at the time of his bankruptcy; and a revocation after the debts are once extinguiſhed, ſeems to come too late.

And as to the ſecond queſtion, whether a ſeparate commiſſion diſcharged joint debts; his anſwer was this;

As this ſtatute extends expreſsly to all debts of *A.* the certificate is equally a diſcharge as to thoſe debts as well as to others.

There was another queſtion which aroſe in this caſe, which was this:

The ſaid *A.* before his bankruptcy, being a merchant in *London*, and in the way of his trade, at the time he became a bankrupt, was indebted to ſeveral perſons in *Virginia*, and other plantations: and the queſtion was, whether his certificate, when confirmed here, would diſcharge him againſt ſuch debts, in caſe he went into thoſe parts.

And the opinion of the late Lord *Talbot*, when he was a counſel, was taken thereon, and was as follows.

The effects of *A.* in the plantations are liable to the commiſſion here, and the right of them is veſted in the aſſignees; and it ſeems reaſonable, that this certificate ſhould be equally extenſive as to his diſcharge: however, as the laws of *England*, made ſince *Virginia* and the other plantations were ſettled, do not extend to them, unleſs they are expreſsly named, and as the laws relating to certificates do not expreſsly extend to the plantations, I am of opinion, that a certificate confirmed here will be no diſcharge to *A.* if a ſuit is commenced againſt him in *Virginia*, or the other plantations.

C. Talbot, *Dec.* 24, 1723.

Another opinion on the ſame queſtion.

I am of opinion, that the act of parliament will not extend to any of the plantations, unleſs they had been particularly mentioned, they being governed by particular laws and conſtitutions of their own making. *Dav.* 343.

In the year 1732, a commiſſion of bankruptcy iſſued againſt *Richaad Jackſon*, by the deſcription of *Richard Jackſon*, of *Green-Lattice-Lane*, *London*, tea-merchant,

and an assignment was made of his estate to *Thomas Wright*, of *Lawrence-Lane*, and *James Huey*, of *Aldermanbury*, *London*, merchants, in trust for his creditors.

Upon his first commission he made a discovery of his estate and effects, and four parts in five of his creditors signed his certificate; but the commissioners did not think proper to sign it.

Afterwards he set up the trade of a distiller, in the parish of *St. George's*, *Southwark*, and in consequence of such trading he became indebted to several persons, and particularly to one *Thomas Sorrel*, grocer, in 100*l.* and upwards.

On the 31st of *June* 1739, *Sorrel* sued out another commission of bankruptcy against him, by the description of *Richard Jackson*, of the parish of *St. George's Southwark*; and he submitted to such second commission, and obtained his certificate, which was allowed by the *Lord Chancellor* on the 5th of *June* 1740.

He then set up the trade of a tea-merchant, and contracted several debts, to the amount of several hundred pounds.

In *May* 1740, *Wright* and *Huey*, the assignees in the first commission, preferred a petition in the names of themselves and all the rest of the creditors under the first commission, in order to set aside the second commission, and his certificate, which was advertised in the *Gazette* to be allowed, unless cause was shewn to the contrary.

And pending this petition, *viz. 24th of May* 1740, a notice was published in the *London Gazette*, to the effect following: "The creditors of *Richard Jackson*, formerly of *Green Lattice Lane*, *London*, a bankrupt, who have proved their debts under the said commission, are desired to meet the assignees on *Wednesday* next, at the *Paul's Head* tavern in *Cateaton Street*, at five o'clock in the afternoon, to assent to or dissent from the allowance of the said bankrupt's certificate, now lying before the Right Honourable *Philip* Lord *Hardwicke*, baron of *Hardwicke*, Lord High Chancellor of *Great Britain*, for confirmation, and other special affairs."

Pursuant to this advertisement, and to circular letters also sent to the creditors under the first commission, the assignees, *Huey* and *Wilcox*, and some of the creditors under the first commission, met the creditors under the second commission; and upon payment of a sum of money to them, they agreed to withdraw the petition, which they had preferred to the *Lord Chancellor*, to set aside the commission, and the certificate advertised to be obtained in pursuance thereof; and *Jackson* carried on his trade from that time.

Edmund Proudfoot and *Thomas Huet*, two of *Jackson's* creditors under the first commission, preferred their petition to the *Lord Chancellor*; and amongst other things set forth the matters above mentioned; and that *Jackson* had not made a fair discovery of his estate, and had prevailed on the assignees under the first commission not to attend the petition; and that by means thereof he had obtained his certificate, to their great surprize, who had never consented thereto.

That they were advised that the second commission was obtained fraudulently, and that the issuing the same under these circumstances was irregular, and that the said certificate was obtained, in order to prevent the creditors under the first commission from recovering their debts from the said *Richard Jackson*, who was then, as they were assured, able to pay all his creditors their just demands.

They therefore prayed, that the commission might be superseded, and that all proceedings under the same, with the bankrupt's certificate, might be set aside, and that the clerks to both the commissions might attend with the proceedings therein.

His Lordship ordered the parties to attend, and that the proceedings under both commissions should be produced.

And soon afterwards such petition came to be heard before his Lordship, and was learnedly argued by the gentlemen at the bar on both sides; and it was admitted, that if a bankrupt had a first commission out against him, and had not obtained his certificate in such first commission, that such second commission could not regularly issue, and that all the proceedings thereon, and the certificate obtained by virtue thereof, was void, and of no effect; and had it been attended with those circumstances only, the petition might not have been improper.

But in this case his Lordship was pleased to make these essential distinctions, and to the effect following:

First, That the parties had acquiesced under the allowance of the certificate under the second commission from the fifth of *June* 1740, being the time of *Jackson's* obtaining such certificate, to the 17th of *December* 1743, being three years and an half, and had never made any complaint of the same.

Secondly, There had been a meeting between the assignees and several of the creditors under the first and second commission, and that the petition, which was intended to be presented to the court for staying *Jackson's* ceitificate under the second commission, was by the consent of the assignees and the creditors under the first commission, who were present, and had publick notice in the *Gazette* to meet the assignees and the creditors under the second, and circular letters sent them for that purpose, and that they had agreed that such petition should be withdrawn, in consideration of a sum of money paid by the creditors under the second commission, to the creditors under the first commission; and that this was in the nature of an acquiescence and consent from the creditors of the first commission, that *Jackson* should have his certificate under the second commission.

Thirdly, That it did not appear to him, but that the petitioners *Proudfoot* and *Huet* were well acquainted with the steps that were taken by the assignees and creditors in the first commission, and that they had notice of the same, in regard they had not denied the same in their affidavit, but had only swore, that they did not know, remember, or believe, that they ever consented to the withdrawing the petition preferred by *Wright* and *Huey*, to set aside the certificate under the second commission; and that if the assignees had done amiss, the creditors had a remedy against them.

Fourthly, That *Jackson* had, under the sanction of the court, carried on a considerable trade, and that it would be contrary to the justice of a court of equity, to prejudice innocent persons, who might have been induced to have given future credit, believing him to be a free person, on having such certificate; and the consequence would be, that all his dealings from that time must be opened and unravelled.

And for these reasons, amongst others, his Lordship was pleased to dismiss the petition. 2 *Gen. Syst.* 246.

A joint commission was taken out against the defendant and partner, and an allowance of the certificate of the commissioners of bankrupts was obtained by the *Lord Chancellor*, pursuant to the statute 5 *Geo.* 2. and the defendant was now sued by the plaintiff for a debt due on his separate account, and arrested; on which it was moved that he should be discharged out of custody upon filing common bail; for the defendant had pleaded in this case, that the cause of action arose before the cause of bankruptcy, and the statute 5 *Geo.* 2. says, "That in case any such bankrupt shall afterwards be arrested, prosecuted or impleaded for any debt, due before such time as he, she or they became bankrupt, such bankrupts shall be discharged upon common bail." So the only question in this case was, whether the certificate under the joint commission should operate as a discharge of all debts due upon the separate account before the bankruptcy, as it certainly does upon their joint account.

F. for the plaintiff argued, that in a joint commission the separate creditors who come in under that commission, can have no satisfaction for their debts until all the joint debts are paid off; and therefore they ought not to be bound by such a joint commission; and in this case the plaintiff was denied to be admitted a creditor under the joint commission; for this he cited *Trin.* 11 *Ann. Golling* and *Bunter*, to shew that if any doubt arises with the court, they will not admit the party to common bail.

D. The statute is in general words, that the bankrupt shall be discharged, on filing common bail, from all debts owing

owing by him before the bankruptcy, and makes no diſtinction between a joint and ſeparate commiſſion.

Ch. J. If there was any doubt in this caſe, the court would not diſcharge the defendant on common bail, according to the caſe cited by Mr. *F.* but in this caſe I think the defendant ought to be diſcharged on filing common bail, for the ſtatute makes no difference between a joint and ſeparate commiſſion. I have heard it ſaid, that ſeparate commiſſions are often taken out to ſave expence, though I think it is rather to create expence; and I never could ſee any reaſon for taking out both joint and ſeparate commiſſions; for if two partners commit an act of bankruptcy, they are bankrupts in all reſpects, and cannot be ſaid to be bankrupts as to their joint eſtates, and not ſo as to their ſeparate eſtates.

The ſtatute 5 *Geo.* 2. is general, and takes no notice of ſeparate commiſſions; and a diſcharge under a ſeparate commiſſion has been determined to be a diſcharge of debts owing under the joint trade; before the ſtatute 10 *Ann. cap.* 15. if there were two partners, and only one party became bankrupt, and a ſeparate commiſſion was taken out againſt him; there was no doubt but the diſcharge of that bankrupt diſcharged him from all debts which he owed in his joint as well as private capacity; but the great queſtion in that caſe was, whether by ſuch diſcharge of the bankrupt, the partner of ſuch bankrupt ſhould likewiſe be diſcharged from ſuch debts as he was diſcharged of; and therefore that ſtatute has enacted, that ſuch partner ſhall not be diſcharged; though if a joint debt is diſcharged by a ſeparate commiſſion, there can be no queſtion but a joint commiſſion will diſcharge a ſeparate debt.

Wherefore, I think clearly, that the defendant muſt be diſcharged on filing common bail.

P. The ſuing out of a ſeparate commiſſion, is only for the benefit of the clerks; and he ſpoke to the ſame effect with the chief juſtice.

L. The caſe of *Grace* and *Higham*, *Paſch.* 4 *Geo.* 2. [*Fitzgib.* 281.] was the ſame in effect with this; it was an action againſt the defendant, as indorſor of a note upon his ſeparate credit; and on the evidence at the trial he produced his certificate under a joint commiſſion of bankruptcy; and though, on its being made a caſe and argued here, the court did not determine it, yet they ſeemed ſtrongly inclined to think, that the certificate was a diſcharge of the ſeparate debt. But we are now to take this caſe on the ſtatute and certificate; and the ſtatute ſays, That he who has ſuch certificate ſhall be diſcharged from all debts owing by him before the time of that bankruptcy; therefore we are not to conſider what directions are given in equity, as to the diviſion and diſtribution of the bankrupt's eſtate, and ſo I think the defendant ought to be diſcharged.

P. being of the ſame opinion, he was diſcharged on filing common bail. 2 *Gen. Syſ.* 246.

A note was given upon a day, promiſing payment a year after; the perſon who gave the note became a bankrupt after the note given, and before the day of payment; and the queſtion was, whether the bankrupt being diſcharged, *per* ſtat. 5 *Ann.* and 5 *Geo.* 2. this note was diſcharged; and *per* three barons againſt *Price*, it is not. *Bunb.* 120.

The defendant, the ninth of *May* 1734, was bail on a writ of error. On the 25th of *October* 1734 he committed an act of bankruptcy, and after a commiſſion obtained his certificate. On the 12th of *November* 1735 the judgment was affirmed; and in debt upon the regognizance he pleaded his diſcharge, and that the cauſe of action aroſe before his bankruptcy: And the chief juſtice on the trial held, that the defendant was not diſcharged according to the caſe of *Tully* v. *Sparkes*, (2 *Stra.* 867.); for this was but a contingent debt, for which the plaintiff could not come in under the commiſſion, the ſtat. 7 *Geo. cap.* 31. only letting in thoſe where the payment was certain, though future. There was a verdict for the plaintiff. 2 *Stra.* 1043.

A man was taken upon an attachment for not performing an award; after which he became a bankrupt, and obtained his certificate, and now moved to be diſcharged; but was oppoſed, becauſe (it was ſaid) bankruptcy does not purge a contempt. *Sed per curiam*, This was a demand for which debt would lie; and the act ſays, he ſhall not be arreſted, proſecuted or impleaded, for any debt due before the bankruptcy. It would therefore be hard to keep him in cuſtody when the duty is diſcharged, and therefore in this caſe he muſt be diſcharged. 2 *Stra.* 1152.

The defendant gave a bond of indemnity, and before any breach became a bankrupt, and being now ſued, moved to be diſcharged on common bail; but the court compared it to the caſe of *Tully* v. *Sparkes*, and ordered he ſhould give ſpecial bail. 2 *Stra.* 1160.

On a motion to diſcharge the defendant out of execution, as being a bankrupt, on the ſtat. 5 *Geo.* 2. *cap.* 30. it appeared, that the debt was contracted before the bankruptcy, and ſued for and recovered pending the commiſſion, and before any certificate obtained, and the judgment was afterwards affirmed on error, and coſts given on ſuch affirmance.

And the court diſcharged him as to all; for not having his certificate he could not plead to the action, and theſe coſts were attendant upon the original judgment, and cannot be conſidered as given for delay of execution, when it appears there ought to have been no execution, though no writ of error had been brought. 2 *Stra.* 1196.

Action of debt on a leaſe dated in 1727, for two years rent due ſince 1733, at which time the defendant became a bankrupt. He produced his certificate allowed, confirmed and inrolled, and moved that he might be diſcharged on entering a common appearance, which was ordered accordingly, the bankrupt having neither the poſſeſſion nor the legal intereſt of the eſtate. *Barn. Not. C. P.* 61.

Defendant having produced his certificate as a bankrupt allowed and confirmed, moved for a common appearance in this action, which was debt on bond for payment of money by inſtallments, ſome of which were not payable 'till after the bankruptcy; and the queſtion was, whether this be a debt diſcharged by the certificate or not. After the firſt default of payment, the bond is forfeited, and the penalty is the debt in law. *Cur':* We will not enter nicely into the matter on bail or no bail; and a rule was granted for common appearance. 2 *Barn. Not. C. P.* 82.

Defendant, a bankrupt, was rendered in diſcharge of his bail after judgment, and now moved to be diſcharged purſuant to the bankrupt act. Plaintiff objected, that the words of the act extended only to perſons charged in execution, or by virtue of judgments; the judgment appeared to be for a debt due before the bankruptcy, and was entered in *Hilary* term laſt; the render was in the beginning of *April*, and the bankrupt's certificate was confirmed the 18th of *April*. *Chapple* for defendant urged, that the words of the act extended to bankrupts detained in cuſtody for debts due before they become bankrupts, which debts are diſcharged by the act, let them be detained how they will, in execution or otherwiſe, they are to be diſcharged. *Cur'*, after taking time to conſider, ordered defendant to be diſcharged. *Barn.* 261.

Rule made abſolute (on affidavits of ſervice, no cauſe being ſhewn to the contrary) for leave to enter an *exoneretur* on the recognizance of bail. Defendant pending the action having become a bankrupt, and obtained his certificate allowed and confirmed. 2 *Barn.* 87.

Rule made abſolute to diſcharge defendant, a bankrupt, taken in execution for a debt accrued before the bankruptcy; defendant could not plead his diſcharge in the firſt inſtance, becauſe he did not obtain his certificate until after he was obliged to plead. But it was inſiſted by plaintiff's counſel, that he might have pleaded *poſt darrein continuance*. Theſe caſes muſt be conſidered equitably. 2 *Barn.* 302.

Debt upon a bond againſt the defendants *Sparkes* and *May*, as executors of *William Donelſon*, ſetting forth that *Donelſon* entered into a bond in 800 *l.* conditioned, that if he, his heirs, executors or adminiſtrators, ſhould pay to the plaintiff 400 *l.* within two months after the death

death of the obligor, in case he shall marry *Martha Latimer*, and she shall survive him, then the bond to be void. The plaintiff then avers, that the marriage was had, and the wife survived, and the defendants were made executors; but neither they nor the heir have paid the money according to the condition. The defendant *May* pleads, that he never administred or proved the will, and the plaintiff as to him enters a *nolle prosequi*. The other defendant *Sparkes*, prays *oyer* of the bond, which is set out without the condition; and then pleads, that the obligor was a trader, and after entering into the bond committed an act of bankruptcy, whereupon the creditors petitioned, had a commission, and he was declared a bankrupt, and had his certificate, which was confirmed; to this the plaintiff, having inrolled the condition of the bond *in hæc verba*, demurred; and defendant joined in demurrer.

It was argued for the plaintiff, that the plea was ill; and it was laid down as a general rule, that a creditor shall not be barred *quoad* a demand which he cannot come into a distribution for; although to some purpose a bond is *debitum in præsenti*, yet this is to be considered upon the reason of the several acts relating to bankrupts, which plainly design to bar nobody, but those who can seek relief under the commission; and this is proved by the statute 7 *Geo. cap.* 31. which recites the inconveniency, that creditors by bond or note, payable at a future day, could not prove their debts before the commissioners, and therefore gives a liberty to prove the debt and have a distribution, making a rebate of interest, where the money is payable at a certain future day, and where the debt arose by the sale of goods. That it could not be done before this act, is proved by the case of *Callowel* v. *Clutterbuck*, *Pasch.* 10 *Ann. B. R.* which was a note dated the first of *January*, payable one month after date; the party became a bankrupt the tenth of *January*; and it was held, that the creditor could not come in for the distribution, for though it was *debitum in præsenti*, yet the cause of action did not accrue until after the act of bankruptcy.

This demand depends on two contingencies, whether it shall ever arise; *first*, the marriage taking effect; and *secondly*, the wife's surviving; and it is impossible to make a rebate of interest, there being no certain time to compute it from. If the bankrupt himself would discharge himself, his plea must be, that the cause of action arose before he became a bankrupt; but could that be said in this case?

For the defendant it was insisted, that the words of 5 *Geo. cap.* 24. discharged the bankrupt from all debts contracted, due or owing, in the disjunctive, and that this is certainly a debt contracted; were it a bond to the bankrupt on such a contingency, it would certainly be assignable, and it was endeavoured to be proved, that the condition was no part of the bond, but only stayed the effect of it. *Sed per curiam*, As no cause of action could accrue upon this bond during the life of the bankrupt, the obligee could never come in for a distribution, and therefore shall not be barred. The statute 7 *Geo.* has not taken in this case, but explains very well what the law is concerning it, and the word debt in 5 *Geo.* must be expounded a demandable debt; whereas it could never appear during the life of the bankrupt, whether this would ever come to be charged upon his estate. 2 *Stra.* 867. 2 Ld. *Raym.* 1546, 1570.

On rule to shew cause, why the defendant should not be discharged out of execution upon the late act of bankruptcy made 5 *Geo.* 2. Mr. *Strange* said, the state of the fact was in the manner following: In the months of *December* and *January* 1728, the defendant drew his bills of exchange upon one *Parminteer* and others, beyond sea, which were not accepted. On the thirteenth of the same month of *January*, a commission of bankruptcy was sued out against the defendant, *tested* the same day, and in the months of *February*, *March* and *April* following, these bills were returned and protested, and notice of this was given to the defendant. The plaintiff has since brought an action upon these notes against the defendant, as drawer of them, and has obtained judgment, and taken the defendant in execution. On the twenty-fourth of *March* last, the defendant obtained his certificate, and since has applied for a rule to shew cause why he should not be discharged out of custody upon the late act of parliament that has been mentioned. Mr. *Strange* said, he did agree, that as no day is mentioned, on which the defendant became a bankrupt, it must be taken that he was a bankrupt only on the day in which the commission of bankruptcy bears *teste*; and therefore that he was not a bankrupt at the time the bills were drawn; but he observed the cause of this action was the protesting the bills as well as the drawing them. The protesting them was after the commission, and therefore the substance of this case was not within the relief of the statute 5 *Geo.* 2. but if the substance was, yet he apprehended clearly, that the method of pursuing it was not; for the clause in this statute, which the present motion is founded upon, is the last but two in that act of parliament; and that clause gives suchpersons as obtain certificates before the twenty-fifth of *March* last, only such relief as was given upon the statute of 5 *Geo.* 1. which is by plea only of the general issue before trial, and not by motion after judgment and execution. He did agree the statute of 6 *Geo.* 1. allowed discharges by certificate even upon motion at any time; but this clause in the statute of *Geo.* 2. having relation to the statute of *Geo.* 1. and not to the statute of the 6th, he apprehended the party was not relievable in this way upon motion, but must take his remedy by *andita querela*. Judge *Probyn* and Judge *Lee* were only in court; and they said, that this matter came before J. *Page* at his chambers, and therefore directed it to be moved again, when that judge should be in court.

This matter coming on again, Mr. *Folkes* argued for the defendant. He said, he did agree, that the statute of 5 *Geo.* 1. which was mentioned on the former motion, was a temporary act. He did agree, that the statute of 6 *Geo.* 1. had relation to the former statute; but yet as no time is mentioned for the expiration of that statute, he submitted it; it was a perpetual law, and subsisting at this day. The words of that statute, he said, were, that every bankrupt obtaining a certificate, shall be discharged from all debts due and owing at the time he became a bankrupt. The bills of exchange which the defendant drew, by the very drawing them, became debts of the defendant; for which reason he submitted it, that this certificate was a full discharge of those debts by the words of the act of parliament; but if there was any doubt upon that statute, the act of 7 *Geo.* 1. has made the present case more clear; for that act provided, that the bankrupt should be discharged from all debts contracted at that time, though payable at a future day. If this was so, he said there would be no doubt as to the second objection that was made upon the former motion, that the present application of discharging the defendant upon motion was very regular. Mr. *Strange* argued on the other side, and submitted, that it appears from what was allowed by Mr. *Folkes*, that the statute of 6 *Geo.* 1. expired with the 5th; and as to the statute of the 7th, the said he apprehended that was confined to such credit only as is given for goods sold in trade, which appears by the preamble of that statute; and he had an affidavit to produce, that the present bills were drawn for money lent the defendant by the plaintiff. But what he principally relied upon in the present case was, that it was incumbent upon the other side to ascertain the time by affidavits, when the defendant became a bankrupt; the act of bankruptcy makes him one, and not the commission. The act of bankruptcy must be presumed to be before the commission, and it might have been so long before, as to have been precedent to the drawing of the bills. This fact, he said, was in their knowledge, and not in the plaintiff's; the proof therefore of that fact was incumbent upon them, and not upon the plaintiff; and if the fact was so, that the bills were drawn after the act of bankruptcy, there was no pretence to say, that the certificate was a discharge of them. The court said, as the fact stands at present, they would take the act of bankruptcy to be just before the suing out the commission; and if the plaintiff insists upon the contrary, if he insists upon it that the present bills were drawn between the act of bankruptcy and the commission, that fact is incumbent

upon

upon him to make out; and as he has not done it, they would take it to be otherwiſe. Then as to the ſtatute of 6 *Geo.* 1. they were of opinion, it was a perpetual act, and they thought the preſent defendant well relievable under it; and if he was not under the ſtatute, they ſhould have thought he clearly would have been under that of the 7th. Accordingly they made the rule abſolute. 2 *Barnard. K. B.* 251, 255. 2 *Stra.* 949.

Affidavit of a debt to make the party a bankrupt.

R. J. *(one of the petitioning creditors) of* Cheapſide, London, *linen-draper, and* D. R. *(the other petitioning creditor) of* Charing-Croſs, *in the county of* Middleſex, *hoſier, ſeverally maketh oath; and firſt this deponent* R. J. *for himſelf ſaith, That* J. R. *of,* &c. *(the bankrupt) is juſtly indebted unto him this deponent in the ſum of* 100 l. *and upwards, for which ſaid ſum, or any part thereof, this deponent hath received no manner of ſatisfaction or ſecurity whatſoever; and this deponent* D. R. *for himſelf ſaith, that the ſaid* J. R. *is juſtly indebted unto him this deponent in the ſum of* 50 l. *and upwards, for which ſaid ſum, or any part thereof, this deponent hath received no manner of ſatisfaction or ſecurity whatſoever; and both theſe deponents ſay, that they do believe the ſaid* J. R. *is become a bankrupt within the intent and meaning of ſome or one of the ſtatutes now in force concerning bankrupts.*

A bond to the Lord Chancellor on granting the commiſſion.

KNOW all men by theſe preſents, that we R. J. *of,* &c. *and* D. R. *of,* &c. *are held and firmly bound to the right honourable* Robert *Earl of* Northington, *&c. Lord High Chancellor of* Great Britain, *in* 200 l. *of good and lawful money of this kingdom, to be paid to the ſaid Lord Chancellor, or his certain attorney, his executors, adminiſtrators or aſſigns; for which payment well and truly to be made, we bind ourſelves, and each of us, our and each of our heirs, executors and adminiſtrators, firmly by theſe preſents, ſealed with our ſeals. Dated the day of in the fourth year of the reign of our ſovereign Lord* George III. *by the grace of God, of* Great Britain, France *and* Ireland, *King, Defender of the Faith,* &c. *and in the year of our Lord* 1764.

The condition of this obligation is ſuch, that if the above-bound R. J. *and* D. R. *ſhall prove, as well before the major part of the commiſſioners to be appointed in a commiſſion of bankrupts, againſt* J. R. *of,* &c. as upon a trial at law, in caſe the due iſſuing forth of the ſaid commiſſion ſhall be conteſted and tried, *that the ſaid* J. R. *ſtands juſtly indebted to the ſaid* R. J. *in the ſum of* 100 l. *and upwards, and to the ſaid* D. R. *in the ſum of* 50 l. *and upwards, and is become bankrupt within the meaning of ſome or one of the ſtatutes concerning bankrupts, and if the ſaid* R. J. *and* D. R. *ſhall cauſe the commiſſion to be executed according to the directions of an act of parliament paſſed in the fifth year of his late Majeſty's reign, intitled,* An Act to prevent the committing of frauds by bankrupts; *then this obligation to be void, or elſe to be and remain in full force and virtue.*

A petition to the Lord Chancellor for a commiſſion.

TO *the right honourable* Robert *Earl of* Northington, *Lord High Chancellor of* Great Britain.

In all humble Manner complaining, ſhew unto your Lordſhip your orators R. J. *of,* &c. *and* D. R. *of,* &c. *as well for themſelves as for all other the creditors of* J. R. *of,* &c. *that whereas the ſaid* J. R. *uſing and exerciſing the trade of merchandize, by way of bargaining, exchange, bartering and chevizance, ſeeking his trade of living by buying and ſelling, upon juſt and good cauſes, for wares and merchandizes to him ſold and delivered, and alſo for ready money to him lent, being indebted to your orators and others his creditors, in the ſum of* 150 l. *and upwards, of late (that is to ſay) about the month of laſt paſt, did become bankrupt, within the ſeveral ſtatutes made againſt bankrupts, to the intent to defraud and hinder your ſaid orators and others his creditors of their juſt debts and duties to them due and owing (that is to ſay) within the ſtatute made in the parliament begun and holden at* Weſtminſter *the ſecond day of* April *in the thirteenth year of the reign of* Elizabeth *late Queen of* England, *concerning bankrupts; and within the ſtatute made in the parliament begun and holden at* Weſtminſter *aforeſaid, the nineteenth day of* March, *in the* firſt *year of the reign of the late King* James *the* firſt *of* England, France *and* Ireland, *and of* Scotland *the ſeven and thirtieth, intituled,* An act for the better relief of creditors againſt ſuch as ſhall become bankrupts; *and alſo within the ſtatute made in the parliament begun and holden at* Weſtminſter *aforeſaid, the nineteenth day of* February, *in the one and twentieth year of the reign of the ſaid late King* James *the* firſt *of* England, France, *and* Ireland, *and of* Scotland *the ſeven and fiftieth, intituled,* An act for the further deſcription of a bankrupt and relief of creditors, againſt ſuch as ſhall become bankrupts, and for inflicting corporal puniſhments upon the bankrupts in ſome ſpecial caſes: *And alſo within the ſtatute made in the fifth year of the reign of his late Majeſty* George *the ſecond, intituled,* An act to prevent the committing of frauds by bankrupts, *or within ſome or one of them: In tender conſideration whereof may it pleaſe your Lordſhip to grant unto your orators his Majeſty's moſt gracious commiſſion, to be directed to ſuch and ſo many wiſe, honeſt and diſcreet perſons, as to your Lordſhip ſhall ſeem meet; authoriſing them thereby not only concerning the ſaid bankrupt, his body, land, tenements, freehold and cuſtomary goods, debts, and other things whatſoever, but alſo concerning all other perſons, who by concealment, claim, or otherwiſe, do or ſhall offend touching the premiſſes, or any part thereof, contrary to the true intent and meaning of the ſaid ſtatutes, to do and execute all and every thing and things whatſoever, as well for and towards ſatisfaction and payment of the ſaid creditors, as towards and for all other intents and purpoſes, according to the ordinance and proviſion of the ſame ſtatutes, and of any other ſtatutes in force concerning bankrupts. And your orators ſhall ever pray, and ſo forth.*

Form of a commiſſion of bankrupt.

GEORGE *the Third by the grace of God of* Great Britain, France *and* Ireland *King, Defender of the Faith, and ſo forth; To our truſty and well-beloved* R. S. T. N. R. D. M. W. *Eſquires, and* R. W. *Gentleman, greeting. Whereas we are informed, that* J. R. *of,* &c. *uſing and exerciſing the trade of merchandize, by way of bargaining, exchange, bartering and cheviſance, ſeeking his trade and living by buying and ſelling, about ſince did become bankrupt within the ſeveral ſtatutes made againſt bankrupts, to the intent to defraud and hinder* R. J. *of,* &c. *and* D. R. *of,* &c. *and others his creditors, of their juſt debts and duties to them due and owing; We minding the due execution as well of the ſtatute touching orders for bankrupts, made in the parliament begun and holden at* Weſtminſter *the* ſecond *day of* April, *in the thirteenth year of the reign of* Elizabeth, *late Queen of* England, *made and provided, as of the ſtatute made in the parliament begun and holden at* Weſtminſter *aforeſaid the* nineteenth *day of* March *in the firſt year of the reign of the late King* James *the* firſt *of* England, France *and* Ireland, *and of* Scotland the *ſeven and* thirtieth, *intituled,* An act for better relief of creditors againſt ſuch as ſhall become bankrupts; *and alſo the ſtatute made in the parliament begun and holden at* Weſtminſter *aforeſaid, the nineteenth day of* February, *in the* one *and* twentieth *year of the reign of the ſaid late King* James *the* firſt *of* England, France *and* Ireland, *and of* Scotland *the ſeven and fiftieth, intituled,* An act for the further deſcription of a bankrupt, and relief of creditors againſt ſuch as ſhall become bankrupts; and for inflicting corporal puniſhments upon the bankrupts in ſome ſpecial caſes: *And alſo the ſtatute made in the parliament begun and holden at* Weſtminſter *the ninth day of* October, *in the firſt year of the reign of* George *the* ſecond, *late King of* England, *intituled,* An act to prevent the committing of frauds by bankrupts: *Upon truſt of the wiſdom, fidelity, diligence and provident circumſpection which we have conceived in you, do by theſe preſents name, aſſign, appoint, conſtitute*

conſtitute and ordain you our ſpecial commiſſioners, hereby giving full power and authority unto you, four or three of you, to proceed according to the ſtatutes, and all other ſtatutes in force concerning bankrupts, not only concerning the ſaid bankrupt, his body, lands, tenements, freehold and cuſtomary, goods, debts, and other things whatſoever; but alſo concerning all other perſons, who by concealment, claim, or otherwiſe, do, or ſhall offend, contrary to the true intent and meaning of the ſaid ſtatutes; and to do and execute all and every thing and things whatſoever, as well for and towards ſatisfaction and payment of the ſaid creditors, as towards and for all other intents and purpoſes, according to the ordinance and proviſion of the ſame ſtatutes; willing and commanding you, four, or three of you, to proceed to the execution and accompliſhment of this our commiſſion, according to the true intent and meaning of the ſame ſtatutes, with all diligence and effect. Witneſs ourſelf at Weſtminſter, *the day of in the fourth year of our reign.*

Form of a bankrupt's certificate.

To the Right Honourable, *&c.*

WE R. S. T. N. *and* R. D. *eſquires*, M. W. *and* R. W. *gentlemen, or the major part of us, whoſe names are hereunto ſubſcribed, and ſeals ſet, the commiſſioners named and authoriſed in and by a commiſſion of bankrupt awarded againſt* J. R. *of*, &c. *bearing date at* Weſtminſter *the day of in the year of the reign of our Sovereign Lord* George III. *having begun to put the ſaid commiſſion in execution, and found that the ſaid* J. R. *did, before the date and ſuing forth of the ſaid commiſſion, and ſince the day of* 17 , *become a bankrupt within the true intent and meaning of ſome or one of the ſtatutes made and now in force concerning bankrupts, do humbly certify to your Lordſhip, that the ſaid* J. R. *did, on the day of laſt paſt, ſurrender himſelf to us, or the major part of us, purſuant to notice in the* London Gazette *for that purpoſe given, and did ſign or ſubſcribe ſuch ſurrender, aad did ſubmit himſelf to be examined from time to time upon oath, by and before us or the major pare of us, and in all things did conform himſelf to the ſeveral ſtatutes made and now in force concerning bankrupts, and particularly to the act made in the fifth year of his late Majeſty's reign, intituled,* An act to prevent the committing of frauds by bankrupts; *whereupon, and for the better diſcovery of the eſtate and effects of the ſaid* J. R. *and putting the ſaid acts and the ſaid commiſſion in execution, we, or the major part of us, have had three or more ſeveral meetings upon the ſaid commiſſion, for the examination of the ſaid* J. R. *and cauſed due notice to be publiſhed in the* London Gazette, *of the time and place when and where we intended to meet for the taking ſuch examination and ſurrender, and for the ſaid bankrupt's delivering up his eſtate and effects, and all books, papers and writings relating thereto, and for the creditors of the ſaid* J. R. *to prove their debts before us at ſuch meetings; at which meetings the ſaid* J. R. *hath been examined from time to time upon oath by and before us, or the major part of us, according to the direction of the ſaid laſt mentioned act; and we likewiſe gave notice in the* London Gazette *of the time and place when and where we intended to meet, for the ſaid* J. R. *to finiſh his examination before us; and that ſuch of his creditors as had not proved their debts before us, might at ſuch meeting prove the ſame, and be preſent at his finiſhing his ſaid examination, and ſhew cauſe why we ſhould not make this certificate, in order for the ſaid* J. R. *being diſcharged from all his debts, according to the ſaid laſt mentioned act; and we further humbly certify unto your Lordſhip, that the ſaid* J. R. *did, at the time and place appointed for his laſt examination, attend us, or the major part of us, and finiſh his examination before us, according to the direction of the ſaid laſt mentioned act; and that none of the creditors of the ſaid* J. R. *who have proved their debts before us or the major part of us, have ſhewn any cauſe againſt our making this certificate; and we do further humbly certify unto your Lordſhip, that the ſaid* J. R. *hath, upon ſuch his examination, made a full diſcovery of his eſtate and effects to us, or the major part of us, and in all things conformed himſelf to the ſeveral ſtatutes made and now in force concerning bankrupts, and particularly according to the direction of the ſaid laſt mentioned act; and that there doth not appear to us any reaſon to doubt of the truth of ſuch diſcovery, or that the ſame is not a full diſcovery of all the eſtate and effects of the ſaid* J. R. *And we further humbly certify, that the creditors whoſe names or marks are hereunto ſubſcribed or ſet, are full four parts in five in number and value of the creditors of the above named* J. R. *and that they are creditors for not leſs than twenty pounds reſpectively, and have duly proved their debts under the ſaid commiſſion. And laſtly, we humbly certify, that it doth appear to us, upon due proof, that all the ſaid creditors have already ſigned or ſet their marks to this certificate, teſtifying their conſent to ſuch allowance as by the ſaid laſt mentioned act is made to bankrupts, and to this certificate, and to the ſaid bankrupt's diſcharge from his ſaid debts, in purſuance of the laſt act. In witneſs whereof, we, or the major part of us, have hereunto ſet our hands and ſeals, this day of* 1764.

For more precedents, ſee *A General Syſtem of the Laws concerning Bankrupts.*

Note: By ſtat. 4 *Geo.* 3. *cap.* 36. the ſtat. 5 *Geo.* 2. *c.* 30. concerning bankrupts, is further continued to *Sept.* 29, 1771, and from thence to the end of the then next ſeſſion of parliament. *And with reſpect to perſons intitled to privilege of parliament not paying their debts, the following act (intituled,* An act for preventing inconveniencies ariſing in caſes of merchants, and ſuch other perſons as are within the deſcription of the ſtatutes relating to bankrupts, being intitled to privilege of parliament, and becoming inſolvent) *was made in the laſt ſeſſion.*

Stat. 4 *Geo.* 3. *c.* 33. *ſect.* 1. Whereas merchants, bankers, brokers, factors, ſcriveners and traders, within the deſcription of the ſtatutes relating to bankrupts, having privilege of parliament, are not compellable to pay their juſt debts, or to become bankrupts, by reaſon of freedom of their perſons from arreſt upon civil proceſs; and ſome doubts have alſo ariſen, whether, in caſes of bankruptcy, a commiſſion can be ſued out during the continuance of ſuch privilege: To remedy which inconveniencies, and to ſupport the honour and dignity of parliament, and good faith and credit in commercial dealings, which require, that in ſuch caſes the laws ſhould have their due courſe, and that no ſuch merchants, bankers, brokers, factors, ſcriveners or traders, in caſe of actual inſolvency, ſhould, by any privilege whatever, be exempted from doing equal juſtice to all their creditors; Be it enacted, *&c.* That from and after the 11th day of *May* 1764, it ſhall be lawful for any ſingle creditor, or two or more creditors, being partners, whoſe debt or debts ſhall amount to 100*l.* or upwards, and for any two creditors whoſe debts ſhall amount to 150*l.* or upwards, or any three or more creditors whoſe debts ſhall amount to 200*l.* or upwards, of any perſon or perſons deemed a merchant, banker, broker, factor, ſcrivener, or trader or traders, within the deſcription of the acts of parliament relating to bankrupts, having privilege of parliament, at any time, upon affidavit being made and filed on record in any of his Majeſty's courts at *Weſtminſter* by ſuch creditor or creditors, that ſuch debt or debts is or are juſtly due to him or them reſpectively, and that every ſuch debtor, as he or they verily believe is a merchant, banker, broker, factor, ſcrivener or trader, within the deſcription of the ſtatutes relating to bankrupts, to ſue out of the ſame court ſummons, or any original bill and ſummons, againſt ſuch merchant, banker, broker, factor, ſcrivener, or trader, and ſerve him with a copy thereof; and if ſuch merchant, banker, broker, factor, ſcrivener, or trader, ſhall not within two months after perſonal ſervice of ſuch ſummons (affidavit of the debt or debts having been duly made and filed as aforeſaid) pay, ſecure, or compound for, ſuch debt or debts, to the ſatisfaction of ſuch creditor or creditors, or enter into a bond in ſuch ſum, and with two ſuch ſufficient ſureties, as any of the judges of that court out of which ſuch ſummons ſhall iſſue ſhall approve of, to pay ſuch ſum as ſhall be recovered in ſuch action or actions, together with ſuch coſts as ſhall be given in the ſame, he ſhall be accounted and adjudged a bankrupt from the time of the ſervice of ſuch ſummons; and any creditor or creditors may ſue out a commiſſion againſt any ſuch perſon, and proceed thereon in like manner as againſt other bankrupts.

Sect.

Sect. 2. Provided always, and it is hereby declared, that this act ſhall not extend, or be deemed or conſtrued to extend, to any ſuch debt or debts as aforeſaid contracted before the 8th day of *March* 1764; any thing herein before contained to the contrary thereof in any wiſe notwithſtanding.

Sect. 3. And be it further enacted by the authority aforeſaid, That if any merchant, banker, broker, factor, ſcrivener or trader, ſhall, after the laſt day of this ſeſſion of parliament, commit any act of bankruptcy, that then, and in ſuch caſe, any creditor or creditors as aforeſaid, may ſue out a commiſſion of bankruptcy againſt any ſuch merchant, banker, broker, factor, ſcrivener or trader; and the commiſſioners in ſuch commiſſion, and other perſons, may proceed thereon in like manner as againſt other bankrupts; any privilege of parliament to the contrary notwithſtanding.

Sect. 4. Provided nevertheleſs, and be it enacted, That nothing in this act ſhall ſubject any perſon intitled to privilege to be arreſted or impriſoned during the time of ſuch privilege, except in caſes made felony by the acts relating to bankrupts, or any of them.

Banks. No town or freeman ſhall be diſtrained to make *banks* or bridges, but ſuch as of old time have been uſed to make them. *Stat.* 9 *Hen.* 3. *c.* 15.

Every perverſe and malicious perſon cutting down and breaking up of any part of the dike called *New Powdike* in *Marſhland* in the county of *Norfolk*, and the broken dike called *Oldfield Dike* by *Marſhland* in the iſle of *Ely*, or of any other bank being parcel of the rind and uppermoſt part of the ſaid county of *Marſhland*, made for the defence and ſalvation of the ſaid county of *Marſhland*, ſhall be adjudged felony. And the ſeſſions may determine the ſame. *Stat.* 22 *Hen.* 8. *c.* 11.

In *Norfolk*, perſons ſhall be charged towards the repair of *ſea-banks*, as they are chargeable to the highways. *Stat.* 27 *Eliz. c.* 24.

Commiſſions for ſupporting banks. *Stat.* 7 *Jac.* 1. *c.* 20.

By *ſtat.* 6 *Geo.* 2. *c.* 37. *ſect.* 5. it is enacted, That if any perſon ſhall unlawfully and maliciouſly break down or cut down the bank of any river, or any ſea-bank, whereby any lands ſhall be overflowed or damaged, he ſhall be guilty of felony without benefit of clergy. And the hundred ſhall make ſatisfaction for the damage not exceeding 200 *l.* See title **Black act.**

By *ſtat.* 10 *Geo.* 2. *c.* 32. *ſect.* 5. it is enacted, That if any perſon ſhall unlawfully cut off, draw up, or remove and carry away any piles, chalk, or other materials, driven into the ground, and uſed for the ſecuring any marſh or ſea walls, or banks, in order to prevent the lands lying within the ſame from being overflowed and damaged; on complaint or information thereof made upon oath to any juſtice reſiding near the place, ſuch juſtice ſhall ſummon the party complained of, or ſhall iſſue his warrant to apprehend and bring ſuch perſon before him; and upon his appearance, or neglect to appear, he ſhall proceed to examine the fact; and upon due proof thereof made, either by confeſſion, or oath of one witneſs, ſhall convict the offender, who ſhall thereupon forfeit 20*l.* half to the informer, and half to the overſeers for the uſe of the poor, to be levied by diſtreſs and ſale; and for want of ſufficient diſtreſs, to be committed to the houſe of correction, to be kept to hard labour for ſix months.

Banleuga. See **Bannum.**

Banniatus fozis, Is uſed in the ſame ſenſe as *bannitus*, outlawed, or judicially baniſhed. —— *Ego* David *filius* Leolini *conceſſi domino* Henrico *regi* Angliæ——*quod de cætero non receptabo utlagos, vel* foriſbanniatos *ipſius domini regis vel baronum ſuorum.* Pat. 25 Hen. 3. apud Brady, Hiſt. Angl. Append. p. 196.

Banni nuptiales, The *banns* of matrimony. —— Benedictus de Hertelpool, *præſentatur ad eccleſiam de* Rungeton *per priorem et conv.* Dunelm. 3 Id. *Novemb.* 1724. *per amotionem* Johannis de Baulton, *qui matrimonium contraxit cum* Iſabella de Aſlakeby, bannis *editis in facie eccleſiæ, ut moris eſt, de* Goldburg. *Ex Regiſt. Walt. Giffard. Archiep. Ebor'.*

Bannimus, The form of expulſion of any member from the univerſity of *Oxford*, by fixing the ſentence in ſome publick places, as a denunciation or promulgation of it. *Cowell, edit.* 1727.

Bannitus, An outlaw or baniſhed man. —— *Vobis præcipimus quod eidem cancellario ad inſequendum, arreſtandum & capiendum dictos malefactores &* bannitos, *&c.* Pat. 15 Ed. 3. part. 3. dorſ. 8.

Bannum, vel **Banleuga,** The utmoſt bounds of a manor or town; ſo uſed 47 *H.* 3. *Rot.* 44. *Carta* Canuti *regis cœnobio Thorniæ. Notum facio, me eleemoſynam noſtram* Chriſto *conceſſiſſe & omnibus ſanctis ſuis, &c.* viz. *primo terram illam a* Twiwella *uſque* Thorney *ubi* bannum *noſtrum ceſſat. Banleuca de Arundel* is uſed for all comprehended within the limits or lands adjoining, and ſo belonging, to the caſtle or town. *Seld. Hiſt. of Tithes, p.* 75.

Banquerium. See **Bancale.** *Fleta, lib.* 2. *ca.* 6. *Debet diſponere, & cameræ tapetis &* banqueriis *ornentur, &c.*

Bar. See **Barr.**

Baratoz. See **Barratoz.**

Barberries, *(Oxycantha)* A thorny ſhrub, known to moſt men to bear a berry or fruit red, and of a ſharp taſte. Theſe berries are mentioned among drugs to be garbled in *ſtat.* 1 *Jac. c.* 9.

Barbers, Are incorporated with the ſurgeons of *London*; but not to practiſe ſurgery, except drawing of teeth. *Stat.* 32 *Hen.* 8. *c.* 42. See **Surgeon.**

Barbican, *(Barbicanum)* A watch-tower, bulwark, or breaſt-work.——*Mandatum eſt* Johanni de Kilmyngton *cuſtodi caſtri regis & honoris de* Pickering, *quoddam* barbicanum *ante portam caſtri regis prædicti muro lapideo, & in eodem* barbicano *quandam portam cum ponte verſatili, &c. de novo facere, &c. T. rege,* 10 *Aug.* Clauſ. 17 Ed. 2. m. 39. *Fontem etiam duplici muro circumdatum habentem* barbicanum *novem turribus circumſeptum.* Rand. de Diceto, anno 1181.

Barbicanage, (*Barbicanagium*) Money given to the maintenance of a *barbican*, or watch-tower. *Carta* 17 *Ed.* 3. *m.* 6. *n.* 14. 'Tis a tribute towards the repairing or building a bulwark. 'Tis mentioned in the *Monaſticon.* 1 *tom. p.* 976. *de kaiagio, muragio, pavagio,* barbicanagio, *& de operibus caſtrorum, &c.*

Barca, A bark. *Navis mercatoria, & quæ merces exportat. Gloſſ. Sax. Elfrici.* A flotſkip.

Barcary, *(Barcaria)* A *barkary*, or tan-houſe, or place to keep bark for the uſe of tanners. *Cowell, ed.* 1727.

Barcarium, *(Barcaria)* A *berghery*, a ſheep-cote, and ſometimes a ſheep-walk. See **Bercarii.**

Bercarii, or rather **Berquarii,** May be taken for ſhepherds; for we uſually ſay *berecarium* a ſhepherd, and both of them ſeem to come from the French word *bergerie. Cowell, edit.* 1727.

Bard, alias **Beard.** See **Clack.**

Bar-fee, Is a fee of 20*d.* which every priſoner, acquitted of felony, pays to the gaoler. *Crompt. Juſt. of Peace, fo.* 158.

Bargain and ſale, Is a contract in conſideration of money, paſſing an eſtate in lands by deed indented and inrolled. This manner of conveying lands is created and eſtabliſhed by the 27 *Hen.* 8. *cap.* 10. which executes all uſes raiſed; and as this has introduced a more ſecret way of conveyancing than was known to the policy of the Common law, therefore the inrollment of the deed of bargain and ſale was made neceſſary by the 27 *Hen.* 8. *c.* 16. *Co. Lit.* 273. 2 *Inſt.* 672. *Kelw.* 85. 1 *Co.* 87. 1 *New Abr.* 273. But the learning on this head depending on ſtatutes, it is firſt proper to recite that,

By the 27 *Hen.* 8. *cap.* 10. " Where any perſon or perſons ſtand or is ſeiſed, of or in any honours, *&c.* lands, tenements, rents, ſervices, *&c.* to the uſe, confidence or truſt of any other perſon or perſons, or body politick, by reaſon of any bargain, ſale, feoffment, *&c.* ſuch perſon or perſons, *&c.* that have any ſuch uſe, ſhall be deemed and adjudged in lawful ſeiſin, eſtate and poſſeſſion thereof,

to

to all intents and purpoſes, of or in ſuch like eſtates as they have in the uſe, &c. and the eſtate, right and poſſeſſion of him and them ſo ſeiſed to any uſe, &c. ſhall be deemed and adjudged in him or them which have the uſe, &c. after ſuch quality, manner, &c. as they had before in or to the uſe, &c.

By the 27 *H.* 8. *cap.* 16. "No manor, lands, tenements or other hereditaments ſhall paſs from one to another, whereby any eſtate of inheritance of freehold ſhall be made or take effect, or any uſe thereof to be made, by reaſon only of any bargain and ſale, except by writing indented, ſealed and inrolled in one of the courts at *Weſtminſter*, or elſe within the county or counties where the lands, &c. ſo bargained and ſold lie, before the *cuſtos rotulorum*, and two juſtices of peace, and the clerks of the peace, &c. or two of them, whereof the clerk of the peace to be one; the ſame inrollment to be made within ſix months after the date of the ſame writing indented.

"Provided this act extends not to any lands, &c. lying within any city, borough, &c. wherein the mayors, &c. or other officers have uſed to inrol any evidences, deeds or other writings within their precincts or limits.

By the 5 *Eliz. cap.* 26. "Bargains and ſales of lands, &c. in the county of *Lancaſter*, being within ſix months inrolled in the Chancery at *Lancaſter*, or before the judges of aſſiſe there, of lands, &c. in *Cheſter*, in the Exchequer at *Cheſter*, or before the judges of aſſiſe there, of lands, &c. in the biſhoprick of *Durham*, in the Chancery at *Durham*, or before the juſtices of aſſiſe there, ſhall be as effectual as if inrolled in any courts at *Weſtminſter*. Provided that this act extends not to any lands lying within any city, &c. wherein the mayors, &c.

1. *Who may bargain and ſell, and to whom.*

2. *What may be bargained and ſold.*

3. *In what manner, and by what words, a bargain and ſale is made; where it is good, and where not.*

4. *Of the conſideration and inrolment of a bargain and ſale.*

5. *Manner of pleading bargain and ſale, good and not good.*

1. *Who may bargain and ſell, and to whom.*

The King, and all other perſons that cannot be ſeiſed to a uſe, cannot bargain and ſell; for at Common law, when a man had ſold his land for money without giving livery, the uſe only paſſed in equity, and this is now executed, and becomes a bargain and ſale by the ſtatute; but antecedent to any ſuch execution there muſt be a uſe well raiſed, which cannot be without a perſon capable of being ſeiſed to a uſe, which the King is not, there being no means to compel him to perform the uſe or truſt; for the Chancery has only a delegated power from the King over the conſciences of his ſubjects; and the King is the univerſal judge of property, and ought to be perfectly indifferent, and not to take upon him the particular defence of any man's eſtate as a truſtee. *Bro. Feoffment to Uſes* 33. *Hard.* 468. *Poph.* 72.

If tenant in tail bargains and ſells his land in fee, this paſſes an eſtate determinable upon the life of the tenant in tail; for at Common law the uſe could not be granted of any greater eſtate than the party had in him; now tenant in tail had an inheritance in him, but he could diſpoſe of it only during his own life; and therefore when he ſells the uſe in fee, *ceſtui que uſe* has a kind of an inheritance, yet determining within the compaſs of a life; and the ſtatute executes it in the ſame manner as he has the uſe, and conſequently he will have ſome properties of a tenant in fee, and ſome of a tenant for life only; but if tenant for life bargains and ſells in fee, this paſſes only an eſtate for life, for he could not paſs the uſe of an eſtate for life to the bargainee, and the ſtatute executes the poſſeſſion as the party has the uſe. 10 *Co.* 96, 98. 1 *Sand.* 260, 261. 1 *Co.* 14, 15. *Co. Lit.* 151.

If a huſband ſeiſed of lands in right of his wife, or tenant in tail bargains and ſells the trees growing on the lands, and dies before ſeverance, the bargainee cannot afterwards cut them down and take them away. *Mo.* 41.

If a ſon and heir bargains and ſells the inheritance of his father, this is void, becauſe he hath no right to transfer; the ſame law of a releaſe. *Kelw.* 84. *Co. Lit.* 265.

If there be two jointenants, and one of them makes a bargain and ſale of his own eſtate in fee, and then the other dies, the other moiety ſhall ſurvive to the bargainor; for ſince the freehold is in the bargainor the inheritance continues; but if ſuch jointenant had bargained and ſold *totum ſtatum ſuum* in fee, though he died before inrollment; yet if the deed were afterwards inrolled, the moiety would not ſurvive, but would paſs to the bargainee. *Cro. Jac.* 53. *Co. Lit.* 186. 1 *Bulſt.* 3.

If an infant bargains and ſells his land by deed indented and inrolled, yet he may plead non-age; for notwithſtanding the ſtatute the bargainee claims by the deed as at Common law, which was, and therefore is ſtill, defeazible by non-age. 2 *Inſt.* 673.

If a wife joins with her huſband in a bargain and ſale by deed indented and inrolled, of her lands, yet it ſhall not bind her, for the wife cannot be examined by any court without writ, and there is no writ allowed in this caſe, which is for the better ſecurity of wives, who are by our law intirely ſubjected to the will of the huſband. 2 *Inſt.* 673.

A man may bargain and ſell to a corporation, for they may take a uſe, though the money be given by the governors in their natural capacity. 10 *Co.* 24, 34. 2 *Rol. Abr.* 788.

A man may bargain and ſell to his ſon, but then the conſideration of money ought to be expreſſed, and it ought to have all the other circumſtances of a bargain and ſale; but this ſhall operate as a covenant to ſtand ſeiſed, if there be none but the conſideration of natural love and affection expreſſed. 7 *Co.* 40. 2 *Co.* 24. *Cro. Eliz.* 394. 1 *Vent.* 137. 1 *Lev.* 56.

2. *What may be bargained and ſold.*

Any freehold or inheritance in poſſeſſion, reverſion or remainder, upon an eſtate for years, or life, or in tail, may be bargained and ſold, but the deed ſhall be inrolled. 2 *Co.* 54. *Dyer* 309. 2 *Inſt.* 671.

But a man ſeiſed of a freehold may bargain and ſell for years, and this ſhall be executed by the ſtatute of uſes, but it need not be inrolled by the ſtatute of inrollments. 8 *Co.* 93. 2 *Rol. Abr.* 204. 2 *Inſt.* 671.

A man poſſeſſed of a term cannot bargain and ſell it ſo as to be executed by the ſtatute. 2 *Co.* 35, 36. *Poph.* 76.

A rent in *eſſe* may be bargained and ſold, becauſe this is a freehold within the ſtatute: and before the ſtatute a rent newly created might be bargained and ſold, becauſe when money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery ſupplied them; but it ſeems, that ſince the ſtatute, a rent newly created cannot be bargained and ſold, becauſe there ought to be a freehold in ſome other perſon, to be executed *in ceſtui que uſe*, but here can be no ſeiſin of his rent in the bargainor, becauſe no man can be ſeiſed of a rent in his own land, and conſequently there can be no eſtate to be executed in the bargainee. *Kelw.* 85. 1 *Co.* 126. 1 *And.* 327. 1 *Jones* 179.

If *A.* by indenture inrolled bargains and ſells lands to *B.* and his heirs, with a way over other of the lands of *A.* this is void as to the way; for nothing but an uſe paſſes by the deed, and there can be no uſe of a thing not in *eſſe*, as a way, common, &c. before they are created. *Cro. Jac.* 189.

3. *In what manner, and by what words, a bargain and ſale is made; where it is good, and where not.*

At Common law land might be bargained and ſold by words only, for it was the conſideration that in equity raiſed the uſe, but ſince the ſtatute of 27 *Hen.* 8. lands cannot

cannot paſs without indenture. 2 *Inſt.* 675. *Dyer* 229. *Poph.* 48. *Dalt.* 63.

'Tis not neceſſary to uſe the words bargain and ſale, but any words equivalent are ſufficient, and whatever words upon valuable conſideration would have raiſed an uſe of any lands, &c. at Common law, the ſame would amount to a bargain and ſale within this act; as if a man by deed, &c. for a valuable conſideration covenants to ſtand ſeiſed to the uſe of another, &c. 2 *Inſt.* 672. *Cro. Jac.* 210. *Mo.* 34. *Cro. Eliz.* 166.

Though the deed may be either in parchment or paper, yet the inrollment muſt be in parchment only, for that is implied when an inrollment is to be in any of the courts of record at *Weſtminſter*; and in the clauſe of inrollment by the clerk of the peace, it is particularly provided, that he ſhall ſufficiently inrol and ingroſs it in parchment. 2 *Inſt.* 673.

A man demiſes, bargains and ſells a manor, part in demeſne and part in tenants hands for ſeventeen years: the party may chooſe either to take it by way of leaſe at Common law, and then the tenants muſt attorn; or by way of bargain and ſale with attornment; and this agrees with the policy of the Common law, to take every man's grant, ſo as to paſs an intereſt that ſhall be moſt advantageous for the grantee; and ſince, in this caſe, the words allow a double way of taking it, the grantee ſhall be judge which is moſt beneficial. 2 *Co.* 35.

Debtor to the Queen in 800*l.* to be paid 20*l.* every year, till the principal ſum was paid, covenanted with her to convey to the Lord Treaſurer and his heirs, certain land to the uſe of the covenantor and his heirs, until default of payment of either of the ſaid ſums, and after ſuch default, then to the uſe of the Queen, her heirs and ſucceſſors, until they ſhould have received out of the profits the aforeſaid debt, *and after the ſame was paid, then to the covenantor and his heirs*; and he levied a fine to the Lord Treaſurer to the uſes aforeſaid, and afterwards he *bargained and ſold* the lands to a ſtranger; the money was not paid; the Queen entered, and granted the lands to *G. D.* and his heirs, until the ſaid debt ſhonld be paid, which was afterwards paid and received out of the profits; adjudged, that the bargainor, at the time of the *bargain and ſale*, had an eſtate in fee, determinable upon default of payment, &c. which eſtate paſſed by bargain and ſale, and not the new eſtate which accrued to him *by the limitation to him and his heirs*, after the debt paid; becauſe that eſtate was not in being at the time of the bargain and ſale made; but if the conveyance had been either by fine or feoffment, inſtead of bargain and ſale, in ſuch caſe, all uſes and poſſibilities had been carried away by operation of it. *Mich.* 28 *Eliz.* 1 *Leon.* 33.

Tenant in fee demiſed his lands to *huſband and wife*, *habendum* to them for their lives, remainder to another for life, rendering 40*l.* rent half yearly, during their lives; the *huſband died*, afterwards the leſſor, in conſideration of 10*l.* to him paid, *demiſed and granted* the ſaid lands to *G. D. habendum* to him for 99 *years*, from the date of the indenture, rendering rent, &c. The wife did not attorn; adjudged, that the words *demiſe and grant*, when 'tis made in *conſideration of money paid*, do amount to a bargain and ſale for the ſaid years, and that 'tis immediately executed by the ſtatute 26 *Hen.* 8. of *uſes*, and there need no *inrollment*, becauſe only a term for years, and no freehold paſſes; adjudged likewiſe that if a father, *in conſideration of money*, *covenanted to ſtand ſeiſed* to the uſe of his ſon in fee, if the deed is inrolled, 'tis a good bargain and ſale, tho' thoſe words are omitted, becauſe it amounts to as much; ſo if a man, *in conſideration of money*, *alien and grant* his lands in fee by deed indented and inrolled, the ſame amounts to a *bargain and ſale*, and the land ſhall paſs without livery. 8 *Rep.* 43.

Bargain and ſale was made by tenant in tail of a houſe in *London*, and this was in order to make a *tenant to the præcipe* to ſuffer a *common recovery*; two days afterwards the ſame tenant in tail made a *feoffment* to the ſame perſon, and of the ſame meſſuage, which was executed by *livery and ſeiſin*; adjudged, that the houſe did paſs by the *bargain and ſale* tho' not *inrolled* (for houſes in *London* are out of the ſtatute of inrollment) and not by the *feoffment*; becauſe it was made to the ſame perſon who had the inheritance of the houſe at that time, by virtue of the bargain and ſale, and a *poſſeſſion executed* ſhall always hinder a *poſſeſſion executory*. *Yelv.* 123.

The bargainor reciting in the deed, that whereas *G. D.* became bound for him in ſeveral recogniſances and bonds; now *for divers conſiderations*, he bargained and ſold the lands to him and his heirs; the deed was inrolled within ſix months, but it was not found that *any money was paid*; adjudged, that this was not a good *bargain and ſale*, becauſe in every ſuch conveyance there ought to be *quid pro quo*; but if there had been apt words in it, the ſame might be good by way of covenant; for if the father *bargains and ſells* his lands to his ſon, no uſe ariſeth by ſuch a conveyance; but 'tis a good conſideration to raiſe an uſe by way of *covenant*. *Cro. Eliz.* 394.

The Lord *Lumley*, 15 *Junii anno* 22 *Eliz.* by bargain and ſale conveyed the manor of *Hazelburg Brian in Com. Dorſet*, to the Earl of *Northumberland*, and his heirs, *with a covenant for farther aſſurance*; and becauſe the manor was held *in capite*, the ſaid Earl 30 *Sept.* in the ſame year, procured a licence for the alienation in *Octab. Michaelis* following; the Lord *Lumley levied a fine*, and 2 *die Novemb.* the deed was inrolled, and not before; whereupon a *ſci. fa.* iſſued out of the Exchequer againſt the tertenants for a fine, upon alienation of the lands, made by this *bargain and ſale* without licence; the Earl of *Northumberland* appeared, and pleaded all this matter, and averred, that the *fine* was levied by virtue of the *covenant for farther aſſurance*; and upon demurrer to this plea the defendant had judgment; becauſe the alienation by the *bargain and ſale was not* compleat till the inrollment, and the fine being levied after the licence was procured, and before the deed was inrolled, the Earl was in poſſeſſion by virtue of the fine, which had prevented the operation of the deed before it was inrolled. *Moor* 337.

4. *Of the conſideration and inrollment of a bargain and ſale.*

If a man bargains and ſells lands for divers good cauſes and conſiderations, it is void, unleſs money be averred: for ſelling *ex vi termini* ſuppoſes a transferring a right of ſomething for money, the common medium of commerce; but if there be no ſuch conſideration, it may be an exchange, a covenant to ſtand ſeiſed, grant, &c. but it can be no ſale within the ſtatute. 1 *Co.* 176. *Mo.* 578.

If there be a conſideration of money expreſſed in the deed, no averment nor evidence can be admitted againſt it, for the affirmative is proved by the deed; and it is impoſſible to prove the negative. *Mo.* 378.

If the deed ſays for a competent ſum of money, it is ſufficient, without averring the ſum; for it is a ſale if there be any money. *Moor* 378.

A man in conſideration of 70*l.* bargains and ſells to his daughter and *J. S.* in tail, who intermarry; it may be averred *tam in conſideratione maritagii quam in conſid' del* 70*l.* for a man may aver any conſideration conſiſtent with that in the deed. 1 *Co.* 176. 2 *Co.* 76. *a.*

If a man, in conſideration that *J. S.* was bounden in a recognizance, and other bonds for him, and for divers other good cauſes and conſiderations, bargains and ſells his lands to him and his heirs, it is not good. *Cro. Eliz.* 394.

If a man, in conſideration of ſo much money to be paid at a day to come, bargains and ſells, the uſe paſſes preſently, and after the day the party has an action for the money, for it is a ſale by the money paid preſently or hereafter. *Dyer* 337. *a.*

At Common law the uſe paſſed from the delivery or date of the deed, and by the ſtatute 27 *Hen.* 8. *cap.* 10. the poſſeſſion paſſed as the party had the uſe at the time of the delivery of the deed; but it was thought proper to add ſome further circumſtances, which is done by *cap.* 16. and therefore, if theſe circumſtances are not obſerved, it hath the ſame effect it had before at Common law, to wit, to raiſe the uſes from the delivery; for the words of the

ſtatute are only to ſome things, and not to aboliſh or ſet aſide the force it had formerly. *Dyer* 218. *Hob.* 136. 2 *Inſt.* 674. *Cro. Jac.* 1. 408. 1 *Rol. Abr.* 627. *Owen* 149, 150.

If *A.* bargains and ſells lands to *B.* and his heirs, and before inrollment *B.* reciting this bargain and ſale to be by indenture inrolled, bargains and ſells to *C.* and his heirs, all the eſtate which he had by the ſaid indenture inrolled, and after the firſt, and then the ſecond deed is inrolled. By *Daniel* and *Kingſmill*, the lands are well conveyed to *C.* for when the firſt indenture was inrolled, the eſtate was in *B. ab initio* to bargain, ſell, *&c.* and the words in the ſecond deed are apt enough to paſs the land, and the recital of the inrollment immaterial; but *Anderſon* and *Warburton cont'*; for a man cannot paſs what he hath not, and till the deed was inrolled *B.* had nothing, and he paſſed only what he had by indenture inrolled; but *Walmſly* held, the land paſſed not by reaſon of the miſrecital, but that otherways it would have paſſed; and it was adjudged for the defendant, according to the opinion of the three laſt judges. *Cro. Jac.* 52. 2 *Inſt.* 675. 1 *Vent.* 360.

If a man bargain and ſell his manor, to which there is an advowſon appendant, the bargainee can make no title to preſent before inrollment. 2 *Co.* 56.

If a man bargains and ſells his lands, and then ſuffers a recovery, levies a fine, or makes a feoffment to the bargainee, and then the deed is inrolled, the land paſſes by the recovery, fine or feoffment; for ſince the freehold and the uſe is in the bargainor till inrollment, it muſt paſs by the recovery, *&c.* and when it paſſed by the recovery, the uſe cannot riſe, nor poſſeſſion be executed from the date of the deed. 4 *Co. Hind*'s caſe. *Mo.* 681. 2 *And.* 3, 162, 303. 4 *Leon.* 4. *Poph.* 49.

If the bargainor or bargainee died before inrollment, it may notwithſtanding be inrolled, for here are parties to give and take the intereſt when it begins to veſt, for it veſts from the date of the deed; otherwiſe in the caſe of an attornment. 2 *Inſt.* 674. *Hob.* 136. 1 *And.* 229, 337.

If a man bargains and ſells his land, the bargainee may be tenant to the *præcipe* before inrollment, and may receive a releaſe before inrollment. 1 *Vent.* 361.

But where the commiſſioners of a bankrupt had aſſigned the bankrupt's lands to the leſſor of the plaintiff, which indenture was afterwards inrolled, but the declaration was upon a demiſe made after the indenture, and before the inrollment; and it was adjudged, that this declaration was not ſufficient. 1 *Vent.* 206. 2 *Show. Rep.* 156. *S. C.* 2 *Jones* 196. *S. C. Carth.* 178. *S. P.* adjudged on the authority of this caſe, 1 *Show.* 207. *S. C.* where it is ſaid, that *Holt*, Ch. J. held, that it was not amendable.

If a man bargains and ſells a reverſion, and the rent is incurred, and afterwards the deed is inrolled, the bargainee ſhall have the rent unpaid; but if the rent be paid to the bargainor, the tenant is not only excuſed, but the bargainor is not accountable, becauſe the contract had not any effect to paſs the eſtate from the bargainor before inrollment; and the relation of the law cannot make void an act that was lawful, for it cannot be ſet aſide but by an expreſs and poſitive law. *Owen* 150. *Godb.* 209. 1 *Sid.* 310.

If a man make a leaſe for life, reſerving rent, with clauſe of re-entry, and then bargains and ſells the reverſion, the bargainee demands the rent, and the leſſee refuſes, and then the deed is inrolled, the bargainee cannot enter for the forfeiture; for till inrollment he is not grantee of the reverſion within the ſtatute capable of the duty, and conſequently at the day could make no legal demand, which was precedently neceſſary to this entry. *Owen* 69, 150. *Godb.* 156. *Latch* 157. 1 *Sid.* 310. *Cro. Car.* 217.

If a man ſeiſed in fee is bound in a recognizance, and then bargains and ſells all his lands, and then the recognizance is forfeited, and then a *ſcire facias* is ſued out againſt the land in the hands of the bargainor, and then the deed is inrolled, this *ſcire facias* is not maintainable. 2 *And.* 160. *Owen* 69, 70. 2 *Inſt.* 674. *Cro. Car.* 217.

If before inrollment the bargainor and bargainee grant a rent, *&c.* after inrollment, by operation of the ſtatute, it ſhall be the grant of the bargainee, and confirmation of the bargainor. *Co. Lit.* 147. *b.*

If lands are bargained and ſold, and the bargainee die before inrollment, his wife ſhall not be endowed; ſo if a man bargains and ſells lands by indenture, and then takes a wife and dies, and after the deed is inrolled, the wife ſhall not be endowed. 1 *And.* 161. *Cro. Car.* 569.

All eſtates of freehold and inheritance muſt be inrolled; but if a man bargains and ſells his lands for any number of years, the deed need not be inrolled. 2 *Inſt.* 671.

If a man bargain and ſell land to his ſon in conſideration of money, the deed muſt be inrolled; but if the father, in conſideration of natural love and affection, and alſo for money, grants land to his ſon, this need not be inrolled; for covenants to ſtand ſeiſed are not within the words of the ſtatute, and where the conſideration of blood is expreſſed, it may enure as a covenant to ſtand ſeiſed; but it is only a ſale where the conſideration of money is alone expreſſed, for that excludes all other tacit conſiderations. 7 *Co. Badell*'s caſe.

Lands in cities, boroughs, *&c.* that have the privilege of inrollments, are not within the act; for though the intent of the ſtatute be, to have excepted them from inrollments in the courts of *Weſtminſter* only, yet the ſtatute is ſo worded, that they are diſcharged from any inrollment at all, and therefore the poſſeſſion of ſuch lands is executed from the date of the deed. 2 *Inſt.* 676. *Dyer* 229. *Yelv.* 124.

It muſt be inrolled within ſix months from the date, which ſhall be accounted according to the computation of 28 days *per* month; for *month*, in its proper and original ſignification, is the ſpace of time meaſured by the compleat courſe of the moon, as the year is the time meaſured by the complement of the ſun's courſe. 2 *Inſt.* 674. 6 *Co.* 62.

From the date, and from the day of the date, in this caſe, is taken as all one, as it is in all other caſes of computation, and therefore the inrollment may be on the day of the date, or on the laſt day of the ſixth month after the day of the date; for though when an intereſt paſſes from the day of the date, the day itſelf is excluded; yet when a time is ſtinted, in which an act ought to be done, it is in order to haſten the doing of that act; and therefore the doing of it on the day from whence the period is firſt reckoned within the time appointed, and the laſt day of the ſix month is within the words of the time given. *Hob.* 240. *Mo.* 40, 42. 2 *Inſt.* 674. 1 *Co.* 6. *Dyer* 282. 3 *Lev.* 438. *Salk.* 413. 6 *Mod.* 260.

If the deed has no date, the ſix months are to be reckoned from the delivery, but not otherwiſe. *Hob.* 140. 2 *Inſt.* 674. *Mo.* 42.

5. *Manner of pleading bargain and ſale, good, and not good.*

A bargain and ſale is a deed inrolled, and as ſuch muſt be pleaded, and the deed itſelf, whereby the uſe originally paſſes, being a matter *in pais*, muſt be produced, and not the tenor of the deed, which is on the roll of *record*; for though the inrollment being on record is of undoubted veracity, being the tranſaction of the court, yet the private deed has the ſanction of a record, though publickly acknowledged and inrolled; for it might have been falſly and fraudulently dated, or ill executed. *Co. Lit.* 225. *b.* 251. *b.* 2 *Inſt.* 673. 4 *Co.* 71. 5 *Co.* 53. 2 *Rol. Rep.* 119.

The party that claims by any bargain and ſale, muſt ſhew in what court the deed is inrolled, becauſe he muſt ſhew all things in certain that make out his title; otherwiſe his adverſary would be put to an infinite ſearch before he could traverſe with ſecurity. *Yelv.* 213. *Cro. Jac.* 291. *S. C.*

In

In debt for rent, the plaintiff declared upon a leaſe made by a ſtranger, who after bargained and ſold the reverſion to the plaintiff *per indenturam debito modo irrotulat' in curia cancellariæ*; and after verdict for the plaintiff judgment was arreſted, becauſe it was not alledged that the inrollment was within ſix months, nor *ſecundum formam ſtatuti*; and *debito modo* will not help it, for it might be ſo at Common law. *Allen* 19. *Carter* 221. *Style* 34. *S. C.*

If a man makes a leaſe for years the 10th of *May*, and afterwards bargains and ſells his lands, and antedates the deed by making it the 10th of *April*, and the inrollment is alſo as of that time, the leſſee is without remedy, for he cannot aver againſt the record. See *Owen* 138. 1 *Leon.* 183. 2 *Leon.* 183. 2 *Leon.* 121. 3 *Leon.* 175.

In pleading a bargain and ſale, the party ought regularly to aver payment of the money. 1 *Leon.* 170. See *Moor* 504.

Debt upon a leaſe for years, in which the plaintiff declared, that by indenture, bearing date the 27th of *Nov. G. D.* in conſideration of ſo much money, bargained and ſold the reverſion to him in fee, which indenture *was inrolled* ſuch a day, according to the ſtatute: and becauſe *he did not ſhew in what court it was inrolled*, the plea was held ill; for 'tis unreaſonable to put the leſſee to ſearch the courts at *Weſtminſter*, and the rolls of the clerks of the peace. *Yelv.* 313.

The leſſor made a leaſe for years, rendring rent, and afterwards he bargained and ſold the reverſion to the plaintiff, who brought an action of debt for the rent, and averred, that the deed of bargain and ſale was inrolled within ſix months, *according to the ſtatute*; it appeared, that this deed bore date before the rent became due, but that it was actually due before the expiration of the ſix months: it was objected againſt the declaration, that the plaintiff had not ſhewed, whether the *deed was inrolled before or after the day the rent became due*; but adjudged, that it being ſet forth to be inrolled according to the ſtatute, is well enough, but the bargainee is intitled to the rent before the inrollment of the deed. *Latch* 157.

In ejectment, the defendant pleaded a ſpecial bar, but it was inſufficient; the plaintiff replied, and conveyed a title to his leſſor by bargain and ſale, acknowledged before *W. R.* a juſtice of the peace of the *Weſt Riding* in *Yorkſhire*, and before *R. B.* clerk of the peace there, which was inrolled within ſix months: Upon demurrer to this replication, it was objected, that it was ill; becauſe the plaintiff had not ſet forth, that the lands which were conveyed, did lie within the *Weſt Riding*, *&c.* but adjudged, tho' the ſtatute requires it to be acknowledged before a juſtice of the peace of the *county*, yet it will ſerve before a juſtice of the peace of the *Weſt Riding*, if the lands lie there. *Hob.* 128.

In debt for rent, the plaintiff declared on a leaſe for years, made by *W. R.* who by a certain indenture *debito modo irrotulat'*, in Chancery, did ſell the reverſion to the plaintiff: Upon *nil debet* pleaded, the plaintiff had a verdict; but the judgment was arreſted, becauſe he did not ſet forth, that the inrollment was within *ſix months*, or *ſecundum formam ſtatuti*; 'tis true, he ſet forth, that it was *debito modo irrotulat'*, but it might be at Common law; and the *verdict* will not make a declaration good, which is uncertain in the very foundation of the action. *Allen* 19.

In replevin, the caſe upon the pleadings was, that the defendant made a title under bargain and ſale, inrolled within ſix months, and the ſtatute of uſes, and did not ſhew that it was *in conſideration of money*; but adjudged, that *after a verdict*, as this caſe was, it ſhall be intended, that evidence was given at the trial of money paid. 1 *Vent.* 108.

Form of a *bargain and ſale* of lands.

THIS Indenture, *made the day and year, &c. between* A. B. *of, &c. of the one part, and* C. D. *of, &c. of the other part, witneſſeth, That the ſaid* A. B. *for and in conſideration of the ſum of, &c. to him in hand paid by the ſaid* C. D. *the receipt whereof the ſaid* A. B. *doth hereby acknowledge, he the ſaid* A. B. *hath granted, bargained and ſold, aliened and confirmed, and by theſe preſents doth grant, bargain and ſell, alien and confirm unto the ſaid* C. D. *his heirs and aſſigns for ever, All that meſſuage or tenement, ſituate, &c. and alſo all lands, trees, woods, underwoods, tithes, commons, common of paſture, profits, commodities, advantages, hereditaments, ways, waters, and appurtenances whatſoever to the ſaid meſſuage or tenement, lands and tenements above mentioned, belonging or any wiſe appertaining; and alſo the reverſion and reverſions, remainder and remainders, rents and ſervices of the ſaid premiſſes, and of every part thereof; and all the eſtate, right, title, intereſt, claim and demand whatſoever of him the ſaid* A. B. *of, in and to the ſaid meſſuage, tenement and premiſſes, and every part thereof; To have and to hold the ſaid meſſuage or tenement, and all and ſingular the ſaid premiſſes above mentioned, and every part and parcel thereof, with the appurtenances, unto the ſaid* C. D. *his heirs and aſſigns, to the only proper uſe and behoof of the ſaid* C. D. *his heirs and aſſigns for ever: And the ſaid* A. B. *for him and his heirs, the ſaid meſſuage or tenement, and premiſſes, and every part thereof, againſt him and his heirs, and againſt all and every other perſon and perſons whatſoever, to the ſaid* C. D. *his heirs and aſſigns, ſhall and will warrant, and for ever defend by theſe preſents. In witneſs, &c.*

The manner of inrolling a *bargain and ſale*.

IT *is to be remembred, That the day, &c. thither in the ſame term, before the lord the King at* Weſtminſter, *came* A. B. *of, &c. in the county of* M. *gentleman, in his proper perſon, and brought here into the court of the ſaid lord the now King, before the King himſelf at* Weſtminſter, *a certain indenture, which he hath acknowledged to be his deed; and he deſired that that indenture in the court of the lord the now King, before the ſaid lord the King at* Weſtminſter, *might be of record inrolled; and it is inrolled in form following, that is to ſay, This Indenture made, &c.* [And ſo inroll it verbatim.]

Afterwards is indorſed on the back of the deed, *Inrolled in the court of the lord the King, before the King himſelf at* Weſtminſter, *of the term of the Holy Trinity, &c. and in the firſt year of the reign of the Lord* George *the Third, the now King of* Great Britain, *&c.*

Roll ——

There is a bargain and ſale of goods, for which ſee **Contract**, &c.

Bargarer, Is an obſolete word, ſignifying a ſhepherd, from the French *berger*. *Cowell, edit.* 1727.

Barghmaſter. See **Berghmaſter.**

Barillus, *(Barillum)* A barrel. See **Barrel.**

Barkary. See **Barcary.**

Baron, *(Baro)* Is a *French* word, and hath divers ſignifications here in *England*. Firſt it is taken for a degree of nobility next to a viſcount. *Bracton, lib.* 1. *cap.* 8. ſays, they are called *barones, quaſi robur belli*. In which ſignification it agrees with other nations, where *baroniæ* are as much as *provinciæ*: ſo that *barons* are ſuch as have the government of provinces, as their fee holden of the King; ſome having greater, and others leſs authority, within their territories. It is probable that formerly in this kingdom, all thoſe were called *barons* that had ſuch ſeignories as we now call *courts-baron*; as they are at this day called *ſeigneurs* in *France*, who have any manor or lordſhip: and ſoon after the Conqueſt, all ſuch came to parliament, and ſat as peers in the lords houſe. But when by experience it appeared that the parliament was too much thronged by theſe *barons*, who were very numerous, it was in the reign of King *John* ordained that none but the *barones majores* ſhould come to parliament, who for their extraordinary wiſdom, intereſt, or quality, ſhould be ſummoned by writ. After this, men obſerving the eſtate of nobility to be but caſual, and depending merely upon the King's will, they obtained of the King letters patent of this dignity to them and their heirs male, who were called *barons by letters patent*, or by creation, whoſe poſterity are now by inheritance thoſe *barons* that are called

called Lords of the parliament; of which kind the King may create at his pleaſure. Nevertheleſs there are ſtill *barons* by writ, as well as *barons* by letters patent. And thoſe *barons* who were firſt by writ, may now alſo juſtly be called *barons by preſcription*, for that they and their anceſtors have continued *barons* beyond the memory of man. The calling up by writ is at this day ſeldom practiſed, unleſs it be to ſummon the ſon of ſome lord to parliament, in the life-time of his anceſtor; for creation by letters patent is almoſt altogether in uſe. 2 *Inſt.* 48. The original of *barons* by writ *Camden* refers to King *Hen.* 3. and *barons* by letters patent, or creation, commenced 11 *R.* 2. *Camd. Brit. pag.* 109. To theſe is added a third kind of *barons*, called *barons by tenure*, which are ſome of our ancient *barons*; and likewiſe the biſhops, who, by virtue of *baronies* annexed to their biſhopricks, always had place in the Lords houſe of parliament, as barons by ſucceſſion. *Seager of Honour*, *lib.* 4. *cap.* 13. There are alſo *barons* by office; as the *barons of the Exchequer*, *barons of the Cinque Ports*, &c. of which you may read under their proper heads. In ancient records, the word *baron* included all the nobility of *England*, becauſe regularly all noblemen were *barons*, though they had a higher dignity; and therefore the charter of King *Ed.* 1. which is an expoſition of what relates to *barons in Magna Charta*, concludes *teſtibus archiepiſcopis*, *epiſcopis*, *baronibus*, *&c.* And the great council of the nobility, when they conſiſted, beſides earls and *barons*, of dukes, marqueſſes, *&c.* were all comprehended under the name *de la councell de baronage*, *Glanv. cap.* 4. Theſe *barons* have given them two enſigns to remind them of their duties; firſt a long robe of ſcarlet, in reſpect whereof they are accounted *de magno concilio regis*. And ſecondly, they are girt with a ſword, that they ſhould ever be ready to defend their King and country. 2 *Inſt.* 5. A *baron* is *vir notabilis & principalis:* And the chief burgeſſes of *London* were in former times barons, before there was a Lord mayor, as appears by the city ſeal, and their ancient charters——*Henricus* 3. *Rex. Sciatis nos conceſſiſſe & hac præſenti charta noſtra confirmaſſe* baronibus *noſtris de civitate noſtra* London *quod eligant ſibi Mayor de ſeipſis ſingulis annis*, *&c. Spelm. Gloſſ.* The earl palatines and marches of *England*, had anciently their *barons* under them; but no *barons* but thoſe who held immediately of the King were peers of the realm. 'Tis certain the King's tenants were called barons; as we may find in *Mat. Pariſ.* and other writers: And in days of old, all men were ſtiled *barons*; but this, I take it, was only a term in law, not a title of nobility. *Cowell.* See *Spelman's Gloſſary.*

Barons of the Exchequer. See title **Exchequer.**

Barony, (*Baronia*) Is that honour and territory which gives title to a *baron*; comprehending not only the fees and land of temporal *barons*, but of biſhops alſo who have two eſtates; one as they are ſpiritual perſons, by reaſon of their ſpiritual revenues and promotions; the other grew from the bounty of our *Engliſh* Kings, whereby they have *baronies* and lands added to their ſpiritual livings and preferments. The *baronies* belonging to biſhops are by ſome called *regalia*, becauſe *ex ſola liberalitate regum eis olim conceſſa*, *& a regibus in feudum tenentur. Blount. Barony*, *Bracton* ſays (*lib.* 2. *c.* 34.) is a right indiviſible; and therefore, if an inheritance be to be divided among coparceners, though ſome capital meſſuages may be divided, yet *ſi capitale meſſuagium ſit caput comitatus vel caput* baroniæ, they may not be parcelled. In ſome caſes a *barony* may be aliened, or entailed, and the honour paſs accordingly. In antient times thirteen knights fees and a quarter made a tenure *per baroniam*, which amounted to 400 marks *per annum.*

Baronet, (*Baronettus*) Is a dignity or degree of honour, which hath precedency before all knights, as knights of the bath, knights batchellors, *&c.* except *banerets*, made *ſub vexillis regiis in exercitu regali in aperto bello*, *& ipſo rege perſonaliter præſente.* This order of *baronets* was inſtituted by King *James* the firſt in the year 1611, with ſuch precedency as aforeſaid, and other privileges, *&c.* Their number at firſt was but two hundred; but now they are without limitation: they are created by patent with an *habendum ſibi & hæredibus maſculis*, *&c.* and their dignity, on its firſt inſtitution, was a kind of purchaſed honour, by men of great eſtates qualified for titles. *Cowell, edit.* 1727. *Jacob.*

Baron and feme, Are huſband and wife by our law; and they are adjudged but one perſon. *Bracton* ſaith, *Vir et uxor ſunt quaſi unica perſona; quia caro una et ſanguis unus. Bract. lib.* 5. *fo.* 416.

1. *Of the acts and agreements of the wife before marriage; where the huſband is bound by them; and in what caſes ſuch acts are revoked, extinguiſhed, and made void, by the marriage.*

2. *Of the legality of the marriage; who are eſteemed huſband and wife; and of marriage contracts.*

3. *What eſtate real and perſonal, of the wife, ſhall veſt in the huſband by the marriage; and of the huſband's right to things accruing to the wife during the coverture.*

4. *Where the huſband ſhall be charged with debts of the wife, contracted before and after marriage; and of a wife who is executrix or adminiſtratrix.*

5. *What acts done by the huſband or wife alone, or jointly with the wife, will bind the wife; and of her agreement or diſagreement to ſuch acts after the death of the huſband.*

6. *Where the huſband and wife muſt join in bringing actions; where they muſt be jointly ſued; and where a wife ſhall be conſidered as a feme ſole.*

7. *Of the power of the huſband over the perſon of his wife; her remedy for any injury done her by him; and of actions by the huſband for criminal converſation with his wife.*

8. *Of crimes and offences committed by the wife; and how puniſhable.*

9. *Of divorce, and the effects of it; and of ſeparate maintenance and pin-money.*

10. *Of ſurvivorſhip, and the effects of it; what things the huſband ſhall have after the death of the wife, and what charge of the huſband ſhall bind the wife.*

1. *Of the acts and agreements of the wife before marriage; where the huſband is bound by them, and in what caſes ſuch acts are revoked, extinguiſhed, and made void by the marriage.*

By the marriage the huſband and wife become one perſon in law, and therefore ſuch an union works an extinguiſhment or revocation of ſeveral acts done by her before the marriage; and this not only for the benefit of the huſband, but likewiſe of the wife, who, if ſhe were allowed at her pleaſure to reſcind and break through, or confirm ſeveral acts, might be ſo far influenced by her huſband, as to do things greatly to her diſadvantage. 4 *Co.* 60. 5 *Co.* 10. *Kelw.* 162. *Co. Lit.* 55. *Hal.* 72. *Cro. Car.* 304.

But in things which would be manifeſtly to the prejudice of both huſband and wife, the law does not make her acts void; and therefore if a feme ſole makes a leaſe at will, or is leſſee at will, and afterwards marries, the marriage is no determination of her will, ſo as to make the leaſe void; but ſhe herſelf cannot without the conſent of her huſband determine the leaſe in either caſe. 5 *Co.* 10.

So where a warrant of attorney was given to confeſs a judgment to a feme ſole; and the court gave leave, notwithſtanding the marriage, to enter up judgment, for that the authority ſhall not be deemed to be revoked or countermanded, becauſe it is for the huſband's advantage; like a grant of a reverſion to a feme ſole, who marries before attornment, yet the tenant may attorn afterwards; otherwiſe if a feme ſole gives a warrant of attorney, and marries, for that is to charge the huſband. 1 *Salk.* 117.

But if a feme ſole makes her will, and deviſes her land to *J. S.* and afterwards marries him, and then dies, yet *J. S.* takes nothing by the will, becauſe the marriage was a revocation of it; for as the law will not allow a woman under coverture to make a will, leſt ſhe ſhould be influenced by her huſband in the diſpoſition of her eſtate; ſo for the ſame reaſon a will made by a feme ſole is countermanded by the marriage, leſt ſhe ſhould be influenced

influenced by her husband (if it continued after the coverture) to revoke it, or let it stand, as it best answered his interest. 4 *Co.* 60.

If *A.* on the one part, and *B.* and *C.* a feme sole on the other part, submit themselves to the award of *J. N.* and after *C.* takes *J. S.* to husband, and after the arbitrator, before any notice of the marriage, makes an award that *B.* and *C.* shall pay 30 *l.* to *A.* yet this shall not bind *J. S.* and *C.* his wife, nor *B.* for the submission by the marriage of *C.* is revoked as to *B.* also, and this without any notice. 1 *Rol. Abr.* 332.

A. entered into a bond with his intended wife, conditioned to leave her at his death 1000 *l.* if she survived him, *&c. A.* died intestate, and the wife took out administration to him; in an action of debt brought against her as administratrix for rent incurred due in the life-time of her husband, she pleaded this bond, and that 250 *l.* only came to her hands, which she retains in part of satisfaction, and that she had not assets *ultra*; on demurrer the whole court held, that contracts and debts *in præsenti*, also such as were contingent, and might happen during the coverture, were extinguished by the marriage; but two judges in this case against *Holt* Ch. Just. held, that this bond with a condition was like a promise or covenant before marriage, to leave the wife so much (which were agreed to be good) and being to be paid *in futuro*, was not extinguished by the marriage, but was *in custodia legis*, to preserve a right, and answer the intention of the parties; but *Holt* held, that the bond and condition were distinct, and that upon the execution of the bond there was a debt *in præsenti*, which was extinguished by the marriage; but the defendant had judgment. 1 *Salk.* 325.

A man enters into a bond to his intended wife, conditioned to leave her 1000 *l.* the husband mortgages his estate, and died, not leaving personal assets to discharge the bond; and it was decreed in equity, that though the bond was void by law, being extinguished by the marriage, yet it should be made good in equity; and that the wife might redeem and hold the land till she was satisfied her debt. 2 *Vern.* 480.

Also equity will set aside the intended wife's contracts, though legally executed, when they appear to have been entred into with an intent to deceive the husband, and are in derogation of the rights of marriage; as where a widow made a deed of settlement of her estate, and married a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate that the husband married her, the court set aside the deed as fraudulent; so where the intended wife, the day before her marriage, entred privately into a recognizance to her brother, and it was decreed to be delivered up. See 2 *Chan. Rep.* 79, 81. 2 *Vern.* 17.

But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees for children by her former husband; and though it was insisted that this was without the privity of the husband, and done with a design to cheat him, yet the court thought, that a widow might thus provide for her children before she put herself under the power of a husband; and it being proved that 8000 *l.* was thus settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account. 1 *Vern.* 408.

The plaintiff's *wife before marriage conveyed away her estate to* the defendant, being *her son*, and after the defendant conveyed the same to his children, being infants; because (as the court conceived) it was passed without any consideration, it was decreed for the plaintiff against the defendant and the infants, in 32 *&* 33 *Eliz. Toth.* 162.

A widow having an estate devised to her for 400 years by her former husband, and being about to marry Sir *P. N.* she *made a settlement* thereof, *in order to prevent such after-husband from having the same*, and Sir *P. N.* having intimation that she intended to make such settlement, but now knowing of its being made, *broke off the treaty of marriage, which was afterwards brought on again* by some friends of the widow, and Sir *P.* accordingly married her upon hopes and in confidence of having the interest she had in the said estate, and without which he would not have married her; the court decreed the said deed to be absolutely set aside, and no use to be made thereof against Sir *P. N.* or any claiming under him. 2 *Chan. Rep.* 81.

A *recognizance entred into by the wife the day before* was set aside, and a perpetual injunction granted, tho' one witness deposed the husband's consent to the drawing it, but that witness had an assignment of it to himself. 2 *Cha. Rep.* 79.

It was clearly held *per cur.* and admitted by both parties, that if a feme, *with the privity of the husband, before marriage, conveys a term* for years in trust *for herself*, that is clearly out of the husband's power, and he can neither dispose of nor release the interest of the wife; and if the feme should join in the grant it would not amend the case: But the court seemed to incline, that if a feme does secretly, *without the knowledge of her husband*, before marriage, convey a term for years in trust for herself, that this shall be in the power of the husband, so as he may either grant or release the interest of the wife. 2 *Freem. Rep.* 29.

M. a *feme possessed of a long term*, being *about to marry* A. *who was indebted to* J. S. 400 l. *by agreement of* A. *and* J. S. *makes a lease to* J. S. *for ten years to secure the* 400 l. the land being reckoned 80 *l.* a year, and then *by indenture sealed in the presence of* A. (the intended husband) *assigns the residue of the term in trust to be at her disposal, whether sole or covert*, (but there were *no other words whereby to exclude the husband)* and brought in money, *&c.* to the value of 600 *l.* after marriage other creditors of *A.* got judgment against him, and on a *fi. fa.* the sheriff sold the residue of the term; and on a bill in Chancery it was decreed for the vendees against the trustees of *M.* because the like point had been decreed so in Sir *Edward Turner's* case; the Lord Chancellor holding it not fit a decree should be one way in parliament and another way in Chancery, but declared it against his own opinion, because widows in most cases cannot otherwise provide for themselves; and the husband in this case forsook his wife, and refused reconciliation, and allowed her nothing, *&c.* yet decreed *ut supra.* 2 *Chan. Ca.* 73.

A woman being married *agreed* with her husband, *that she should have power to act as a feme sole notwithstanding that marriage*; the *husband died*, and *she married another* husband, who was *not privy to the settlement on the former marriage.* It was decreed, that the second husband should not be bound by that settlement on the former marriage. 2 *Vern.* 17, 18.

In detinue by feme it is a good *plea, that after the bailment she married the bailee*; for by this the bailment is discharged; *per Fineux* Ch. J. and he ought to declare upon a trover. *Br. Barre, pl.* 53.

A. makes an obligation *to B. to the use of C.*——*A.* seals it; *A. B.* and *C.* being, at the time of sealing it, at one place, *A. puts the obligation into the hands of C.* and says, *this will serve*; this is a good delivery; and tho' *C. afterwards marries A.* yet the obligation remains, and is neither extinguished or suspended. Adjudged and affirmed in error. *Jenk.* 221.

In debt on a bond for performance of *covenants in an indenture* made by the baron before marriage, *to pay legacies by the feme in a will made by her before marriage*; tho' it was objected, that the marriage continued till her death, the will and devise was void; but adjudged for the plaintiff; for tho' it was not a will to all intents, yet it referred to that which did bear the name of a will, and tho' it was not a will *in facto*, it is not material. *Cro. E.* 27. *pl.* 9.

A. promised M. a feme sole, *that if she would marry him, he would leave her worth* 100 l. *Hobart* Ch. J. said, that the promise is extinguished by the marriage; but *Winch* and *Hutton* J. *e contra*; for that the law will not work a release contrary to the intent of the parties, and that the marriage, which was the cause, does not destroy that which itself creates. *Hutt.* 17, 18.

A feme sole *possessed of a term, conveyed the same over in trust for her, and covenanted with J. S. whom she did intend*

intend to marry, that he ſhould not meddle with it, and for that purpoſe took a *bond* of him; they intermarried; he may intermeddle with it, but he ſhall not have it; and by equity he cannot aſſign it, by reaſon of the covenant before marriage. *Mar.* 88. *pl.* 141.

A. intending to marry ſuch a woman covenanted, *that if ſhe would marry him, and ſhould ſurvive, he would give* 300 *l. to her next of kin*, and gave a bond to a third perſon for the performance of this covenant. In debt for this 300 *l.* it was argued, that tho' this was a future covenant, which could not be broken in the life-time of the parties, yet it might be releaſed; and if ſo, then the marriage was a releaſe in law, and ſo the debt extinct; but the court inclined the judgment ought to be for the plaintiff, and ruled it to be moved at another time. 2 *Sid.* 58.

A before marriage with *M.* agrees with *M.* by deed in writing, that ſhe, or ſuch as ſhe ſhould appoint, ſhould, during the coverture, receive and diſpoſe of the rents of her jointure, by a former huſband, as ſhe pleaſed. *Per cur.* The aforeſaid *agreement with the feme herſelf* before marriage, was by the marriage *extinguiſhed*. *Chan. Ca.* 21.

The baron before marriage *articled with the feme to make a ſettlement of certain lands, before the marriage ſhould be ſolemnized*; but they *intermarried before the ſettlement*. Then the baron died; and on a bill by the widow for a execution of the articles, it was decreed againſt the heir at law of the baron; who objected, that marrying before the execution of the ſettlement was a waiver of the articles, and the benefit of them; and ſhe being the only party with whom they were made, her marriage with the other party before performance was a releaſe in law. 2 *Vent.* 343.

Huſband covenants with his intended wife, that ſhe ſhould have *power to diſpoſe of* 300 *l.* of her eſtate, notwithſtanding the intermarriage; whether this covenant is diſcharged by the marriage? The court inclined to diſmiſs the bill brought by the huſband for the money; but it was argued, that the wife conſented, and ſo put off for her to come and ſignify her conſent in court. *Vern.* 408.

Lands limited to *A.* in *truſt for a feme covert*, and that *A.* ſhould receive the rent, and apply them as the feme, whether ſole or covert, ſhould appoint. *Per cur.* This is only a *truſt*, and not an uſe executed by the ſtatute. *Vern.* 415.

Settlement by the feme before marriage, for her ſeparate uſe, *without the privity of the baron*. Lord Chancellor decreed, that the huſband ſhould have the poſſeſſion of the eſtate, and that the truſtees ſhould make a conveyance of the lands to the Six clerks, that it might be ſubject to the order of the court. 2 *Vern.* 17.

A feme ſole, being *executrix* and reſiduary legatee of *J. S. lends* 100 *l. to A. and B.* for which ſhe *takes a note in her own name, and a bond in a truſtee's name*, and afterwards *marries B.* one of the obligors; *B.* dies: On a bill againſt *A.* he inſiſted, that the marriage with *B.* was an extinguiſhment of the bond, as well as if it had been made in her own name; *ſed non allocatur*. 2 *Vern.* 290.

Debt on bond for performance of covenants, in certain *articles* made between the defendant and his wife before marriage, (viz. *that the man ſhould bring* 50 *l. and the woman* 25 *l. into a ſtock, into the hands of a third perſon, to be ſo and ſo diſpoſed of*). It was argued, that the promiſe was ſuſpended, and conſequently extinguiſhed by the marriage. But *per Holt* Ch. J. Tho' the articles are ſuſpended by the marriage, yet it was the intent of the parties, that the things ſhould be performed tho' the articles are gone; and the bond is not void, being made to a third perſon; and *Eyres* J. cited 1 *Inſt.* 206. and they ſaid the money was to be brought in preſently; ſo that tho' the marriage had been a releaſe, yet they ſhould plead performance to that time. Judgment for the plaintiff, unleſs cauſe. *Comb.* 242.

Upon a treaty of marriage, the man gave a *bond to the woman, conditioned that if he did permit her to diſpoſe of* 100 *l. then the bond ſhould be void.* Afterwards the marriage took effect, ſo that the *bond became void, yet this was held to be a good agreement*; and the court decreed, that the huſband ſhould give bond to truſtees with the ſame condition; it was held, that a bill may be exhibited by her *prochein amy*; or if truſtees exhibit a bill for or on her behalf, it is good either way. 2 *Freem. Rep.* 205.

Bond by a man to a woman before intermarriage, that in caſe they intermarried, and the wife ſurvived, and the huſband left her 1000 *l.* then to be void. *Per Holt* Ch. J. the bond is extinguiſhed by the marriage. *Per Gould* and *Turton* J. 'Tis only ſuſpended, becauſe it would ſubvert the marriage agreement; and the rather, becauſe it was not payable during the coverture, but it was a debt on contingency; ſo that if the wife *dum ſola* had releaſed all demands, the debt had not been extinguiſhed. 1 *Salk.* 325.

2. *Of the legality of the marriage; who are eſteemed huſband and wife; and of marriage contracts.*

Marriage is a compact between a man and a woman, for the procreation and education of children, which is to continue during both their lives; and it may be celebrated in a private houſe as well as in a church; for it being an exchange of mutual vows in the preſence of God, if all other circumſtances are complied with, it cannot be ſuppoſed that God is leſs preſent at theſe marriages than thoſe made in the church. 1 *New Abr.* 283. 1 *Rol. Abr.* 341, 359. 1 *Sid.* 64. *Perk.* 306. *F. N. B.* 150.

Before the time of pope *Innocent* the Third, there was no ſolemnization of marriage in the church; but the man came to the houſe where the woman inhabited, and led her home to his own houſe, which was all the ceremony then uſed. *Moor* 170. *Per Goldingham*, Doctor of the Civil Law, *arguendo*.

The age of conſent to a marriage in an infant male is fourteen, and in a female twelve; but they may marry before; and if they agree to them when they attain theſe ages, the marriage is good; but they cannot diſagree before then; alſo if one of them be above the age of conſent, and the other under ſuch age, the party ſo above the age may as well diſagree as the other; for both muſt be bound or neither. *Co. Lit.* 33, 78, 79. 2 *Inſt.* 434. 3 *Inſt.* 88, 89. 6 *Co.* 22. 7 *Co.* 43. 1 *Rol. Abr.* 340.

By the ſtatute 32 *Hen.* 8. *cap.* 38. it is enacted, "That no reſervation or prohibition (God's law excepted) ſhall trouble or impeach any marriage without the Levitical degrees, and that no perſon, of what eſtate, degree or condition ſoever he be, ſhall be admitted in any of the ſpiritual courts within the King's realm, or any his Grace's other lands and dominions, to any proceſs, plea or allegation contrary to the ſtatute." For the expoſition of this ſtatute, ſee *Co. Lit.* 24. *a.* 2 *Inſt.* 684. See 25 *Hen.* 8. *c.* 22. 28 *Hen.* 8. *c.* 7. 28 *Hen.* 8. *c.* 16. Before which the eccleſiaſtical courts had the ſole juriſdiction of matrimonial cauſes. See 13 *Ed.* 1. the ſtat. *Circumſpecte agatis. Hob.* 181. *Co. Lit.* 235. 2 *Inſt.* 683, 684. See *Vaugh.* 214. But if a man marries his couſin within the degrees, or his mother or ſiſter, they continue huſband and wife till a ſentence of divorce be pronounced. 1 *Rol. Abr.* 340, 357.

In a prohibition to the conſiſtory court of *York*, for proceeding againſt a perſon for inceſt who married the relict and widow of his great uncle, it was agreed by all the judges at *Serjeants-Inn*, that the prohibition ſhould ſtand, and the following points were reſolved; firſt, that by the ſtat. 32 *Hen.* 8. *cap.* 38. No marriage without the Levitical degrees is unlawful upon the account of conſanguinity nor affinity, nor for that reaſon can be proceeded againſt by the eccleſiaſtical court; and though the words of the ſtatute are, *that no prohibition* (God's *law excepted*) *ſhall impeach ſuch marriages*, yet the reſervation for God's law was not intended to leave marriages at large to the determination of the eccleſiaſtical courts, as they were before; for then the Levitical degrees need never have been ſpoken of, and then indeed the ſtatute would have been of no ſignification; the proper meaning therefore of theſe words (God's *law excepted*) muſt be this; that the ſtatute did not intend to reſtrain the eccleſiaſtical courts from divorces upon other accounts; as upon the account of inſufficiency, adultery, precontract, *&c.* ſo that the lawfulneſs

lawfulneſs of marriage is hereby determined, but not as to other cauſes. *Secondly*, That this marriage with the uncle's wife, was a marriage without the Levitical degrees, and therefore lawful. 2 *Vent.* 9. *Harriſon and wife* againſt *Dr. Burwell.*

Marriage is to be ſolemnized *in facie eccleſiæ*; and therefore a private contract without the prieſt's bleſſing will make no marriage. 1 *Rol. Abr.* 357. *Moor* 169.

A. and *B.* being ſabbatarians, were married by one in their own way, who uſed the form of the Common Prayer, except the ring, but was a mere layman; the wife dying, the huſband took out adminiſtration to her; but upon the application of her ſiſter, the letters of adminiſtration were repealed, and the ſentence of repeal affirmed by the delegates; for the huſband demanding a right due to him as huſband, muſt bring himſelf within the rules preſcribed by that juriſdiction to whom he applies; alſo the conſtant form of pleading marriage is, that it was *per preſbyterum ſacris ordinibus conſtitutum*; and an act of parliament was made, confirming the marriages contracted during the uſurpation. 1 *Salk.* 119. *Heydon* and *Gould.* See 2 *Salk.* 438. ſeems *cont.*

If *A.* contracts himſelf to *B.* and after marries *C.* and *B.* ſues *A.* upon this contract in the ſpiritual court, and there ſentence is given that *A.* ſhall marry and cohabit with *B.* which he does accordingly, they are baron and feme, without any divorce between *A.* and *C.* for the marriage of *A.* and *C.* was a mere nullity. *Moor* 169. 4 *Co.* 29. *S. C.* 1 *Sid.* 13. *S. C.* cited and denied by *Twiſden.* If a woman maketh a contract of matrimony with *J. S.* and then marrieth with *J. D.* who is ſeiſed of lands and dieth, ſhe ſhall have dower of his lands, becauſe ſuch marriage was not void, but voidable only by reaſon of the pre-contract. *Moor* 226. *Perk.* 34.

A. contracts *per verba de præſenti* with *B.* and hath iſſue by her, and after marries *C. in facie eccleſiæ. B.* recovers *A.* for her huſband by ſentence of the ordinary, and for not performing the ſentence *A.* is excommunicated, and after enfeoffs *D.* and then marries *B. in facie eccleſiæ*, and dies, and ſhe brought dower againſt *D.* and recovered, becauſe the feoffment was *per fraudem*, between the ſentence and ſolemn marriage; but this was reverſed *coram rege & concilio, quia prædict' A. non fuit ſeiſitus* during the eſpouſals between him and *B.* 1 *New Abr.* 284. But as to the legality of marriage to intitle a woman to dower, and how the biſhop muſt certify upon an iſſue *ne unques accouple in loyal matrimonie*, ſee *Bro.* 54. *Co. Lit.* 33. *a. Dyer* 313. 9 *Co.* 19. *Cro. Car.* 351.

A contract *per verba de præſenti*; as *I marry you, you and I are man and wife, &c.* is by the Civil law eſteemed *ipſum matrimonium*; for ſuch contracts the ſpiritual courts will compel them to celebrate *in facie eccleſiæ. Swinb. of Eſpouſals* 74. 2 *Salk.* 438.

A contract *in futuro*, as *I will marry you, &c.* may be inforced in the ſpiritual court; but ſuch contract either party may releaſe; alſo if either party marry another perſon, the ſpiritual court can give no remedy; for ſuch ſecond marriage diſſolves the contract. 1 *New Abr.* 284. For the words which make a contract *in præſenti*, or *in futuro*, ſee *Swinb. ſect.* 10 & 11. But in theſe cauſes the temporal courts have given a remedy by action, for the breach of promiſe. *Cro. Eliz.* 79. *Carter* 273. In an action againſt huſband and wife, the plaintiff declared that he promiſed to marry the defendant's wife whilſt ſole, and that ſhe the ſame time promiſed to take him for her huſband, and averred that he tendered himſelf, and that ſhe refuſed, *&c.* It was objected, that marriage was no advancement to a man, though it was to a woman; alſo that no time was laid when this agreement was to be executed; but the court over-ruled both the objections. *Carth.* 467. *Harriſon* v. *Cage et ux.* 1 *Salk.* 24. *S. C.* See 2 *Salk.* 437, 438. If a man and an infant at the age of fifteen promiſe to intermarry, and the man refuſes, and after marries another, ſhe may, notwithſtanding her infancy, maintain an action; for this is a contract which ſhe may at theſe years enter into, being for her advantage; and though it may be voidable as to her, yet it is good againſt the man, who muſt be preſumed to have acted with as much caution as if he had contracted with a perſon of full age. *Trin.* 5 *Geo.* 2. adjudged between *Holt* and *Ward. Note*; By the ſtatute of *frauds* and *perjuries*, theſe contracts muſt be reduced into writing.

If a man takes *A. S.* to wife, *per dureſs*, though the marriage be ſolemnized *in facie eccleſiæ*, yet it is merely void; and they are not baron and feme, becauſe there is not any conſent; and it cannot be a marriage without conſent. 1 *Rol. Abr.* 340.

Stat. 32 *Hen.* 8. *cap.* 38. *ſect.* 2. All ſuch marriages as within the church of *England* ſhall be contracted between lawful perſons (as all perſons be lawful that be not prohibited by God's law to marry) being contracted and ſolemnized in the face of the church, and conſummate with bodily knowledge and fruit of children, ſhall be lawful and indiſſoluble, notwithſtanding any diſpenſation, preſcription or other thing. And no reſervation or prohibition (God's law excepted) ſhall impeach any marriage without the Levitical degrees. And no perſon ſhall be admitted in the ſpiritual courts to any proceſs contrary to this act.

So much of this act as is not repealed by 2 & 3 Ed. 6. cap. 23. *is revived by* 1 Eliz. cap. 1.

Stat. 2 & 3 *Edw.* 6. *cap.* 23. *ſect.* 2. As concerning precontracts, the ſtatute 32 *Hen.* 8. *cap.* 38. ſhall be repealed, and reduced to the ſtate of the King's eccleſiaſtical laws.

Stat. 1 *Jac.* 1. *cap.* 11. *ſect.* 1. If any perſon married do marry any perſon, the former huſband or wife being living, ſuch offence ſhall be felony, and the perſon offending ſhall ſuffer death; and the parties offending ſhall receive like trial and execution in ſuch county where ſuch perſons ſhall be apprehended, as if the offence had been committed in ſuch county.

Sect. 2. This act ſhall not extend to any perſon, whoſe huſband or wife ſhall be continually remaining beyond the ſeas ſeven years together; or whoſe huſband or wife ſhall abſent him or herſelf ſeven years together within his Majeſty's dominions, the one of them not knowing the other to be living all that time.

Sect. 3. This act ſhall not extend to perſons that ſhall be divorced by any ſentence in the eccleſiaſtical court, or where the former marriage ſhall be by ſentence in the eccleſiaſtical court declared void; nor to any perſons for any former marriage to be had within age of conſent.

Sect. 4. No attainder for this offence ſhall work corruption of blood, loſs of dower, or diſinheriſon of heirs.

Stat. 6 & 7 *Will.* 3. *cap.* 6. *ſect.* 52. No perſon ſhall be married at any place pretending to be exempt from the viſitation of the biſhop, without a licence, except the banns be publiſhed and certified; and every parſon, vicar and curate, who ſhall marry any perſons contrary to the meaning hereof, ſhall forfeit 100*l.* to be recovered in any of his Majeſty's courts of record; one moiety to the King and the other moiety to the informer; and ſhall for the ſecond offence be ſuſpended *ab officio et beneficio* for three years.

Stat. 7 & 8 *Will.* 3. *cap.* 35. *ſect.* 2. Every parſon, vicar or curate, who ſhall marry any perſons without publication of banns, or without licences, ſhall forfeit 100*l.*

Sect. 3. Every parſon, vicar or curate, who ſhall ſubſtitute, or knowingly permit, any other miniſter to marry any perſons in any church or chapel to ſuch parſon, *&c.* belonging, without publication of banns or licences, ſhall forfeit 100*l.* to be recovered in any of his Majeſty's courts of record; one moiety to his Majeſty, and the other moiety to him who ſhall ſue for the ſame.

Sect. 4. Every man married without licence or publication of banns ſhall forfeit 10*l.* to be recovered with coſts as aforeſaid by any perſon who ſhall ſue for the ſame; and every ſexton or pariſh clerk who ſhall knowingly aſſiſt at ſuch marriages, ſhall forfeit 5*l.* to be recovered with coſts as aforeſaid by any perſon who ſhall ſue.

Stat. 10 *Ann. cap.* 19. *ſect.* 176. Every parſon, vicar or curate, or other perſon in holy orders, who ſhall marry any perſon without publication of banns, or without licence from the proper ordinary, ſhall forfeit 100*l.* to be recovered with coſts in any of her Majeſty's courts of record at *Weſtminſter*; one moiety to the Queen, and the other

other moiety to him who ſhall ſue for the ſame; and if ſuch offender be a priſoner in any priſon (other than a county gaol) and ſhall be convicted of ſuch offence by action or information, upon oath made of ſuch impriſonment before any judge of her Majeſty's courts of record at *Weſtminſter*, and upon producing a copy of the record of ſuch conviction proved upon oath, the judge is required to grant his warrant to the keeper of the gaol where ſuch offender is a priſoner, to remove ſuch offender to the gaol of the county; and if any gaoler ſhall knowingly permit any marriage to be ſolemnized in his priſon before publication of banns, or licence obtained, he ſhall forfeit 100*l.* as aforeſaid.

Sect. 177. Saving to all archbiſhops, biſhops and other ordinaries, *&c.* all eccleſiaſtical juriſdictions.

Sect. 178. The ſaid proviſion for marriages ſhall not extend to *Scotland*.

Stat. 26 *Geo.* 2. *cap.* 23. *ſect.* 1. All banns of matrimony ſhall be publiſhed in an audible manner in the pariſh church, or in ſome publick chapel, in which banns of matrimony have been uſually publiſhed, belonging to ſuch pariſh or chapelry wherein the perſons to be married dwell; according to the form preſcribed by the rubrick prefixed to the office of matrimony in the book of common prayer; upon three *Sundays* preceding the ſolemnization of marriage, during the time of morning ſervice (or of evening ſervice, if there be no morning ſervice in ſuch church or chapel upon any of thoſe *Sundays)* immediately after the ſecond leſſon: And when the perſons to be married dwell in divers pariſhes or chapelries, the banns ſhall be publiſhed in the church or chapel where each of them dwell; and where both or either of the perſons to be married dwell in any extraparochial place having no church or chapel wherein banns have been uſually publiſhed, then the banns ſhall be publiſhed in the pariſh church or chapel belonging to ſome pariſh or chapelry adjoining to ſuch extraparochial place; and where banns ſhall be publiſhed in any church or chapel belonging to any pariſh adjoining to ſuch extraparochial place, the parſon, vicar, miniſter or curate publiſhing ſuch banns, ſhall under his hand certify the publication thereof, in ſuch manner as if either of the perſons to be married dwelt in ſuch adjoining pariſh; and all other rules preſcribed by the ſaid rubrick, concerning the publication of banns and the ſolemnization of matrimony, not hereby altered, ſhall be obſerved. And in all caſes where banns ſhall have been publiſhed, the marriage ſhall be ſolemnized in one of the pariſh churches or chapels where ſuch banns have been publiſhed.

Sect. 2. No parſon, vicar, miniſter, or curate, ſhall be obliged to publiſh banns of matrimony between any perſons, unleſs the perſons to be married ſhall, ſeven days before the time required for the firſt publication of ſuch banns, cauſe to be delivered to ſuch parſon, *&c.* a notice in writing of their chriſtian and ſurnames, and of their reſpective abodes within ſuch pariſh, chapelry, or extraparochial place, and of the time during which they have dwelt in ſuch houſes reſpectively.

Sect. 3. No parſon, *&c.* ſolemnizing marriages between perſons, both or one of whom ſhall be under the age of 21 years, after banns publiſhed, ſhall be puniſhable by eccleſiaſtical cenſures, for ſolemnizing ſuch marriages without conſent of parents or guardians, whoſe conſent is required by law, unleſs ſuch parſon, *&c.* have notice of the diſſent of ſuch parents or guardians. And in caſe ſuch parents or guardians, or one of them, publickly cauſe to be declared, in the church or chapel where the banns ſhall be ſo publiſhed, at the time of ſuch publication, their diſſent to ſuch marriage, ſuch publication of banns ſhall be void.

Sect. 4. No licence of marriage ſhall be granted by any perſon having authority to grant ſuch licences, to ſolemnize any marriage in any other church or chapel, than in the pariſh church or publick chapel belonging to the pariſh or chapelry, within which the uſual place of abode of one of the perſons to be married ſhall have been for four weeks, immediately before the granting of ſuch licence; or where both or either of the parties to be married dwell in an extraparochial place having no church or chapel wherein banns have been uſually publiſhed, then in the pariſh church or chapel belonging to ſome pariſh or chapelry belonging to ſuch extraparochial place.

Sect. 5. All pariſhes where there ſhall be no pariſh church or chapel, or none wherein divine ſervice ſhall be uſually celebrated every *Sunday*, may be deemed extraparochial places for the purpoſes of this act.

Sect. 6. Nothing herein contained ſhall deprive the archbiſhop of *Canterbury* and his officers, of the right which hath hitherto been uſed in virtue of 25 *Hen.* 8. *cap.* 21. of granting ſpecial licences to marry at any convenient time or place.

Sect. 7. No ſurrogate deputed by any eccleſiaſtical judge, who hath power to grant licences of marriage, ſhall grant any ſuch licence, before he hath taken an oath before the ſaid judge faithfully to execute his office according to law to the beſt of his knowledge, and hath given ſecurity by his bond in the ſum of 100*l.* to the biſhop of the dioceſe, for the faithful execution of his office.

Sect. 8. If any parſon ſhall ſolemnize matrimony in any other place than a church, or publick chapel, where banns have been uſually publiſhed, unleſs by ſpecial licence from the Archbiſhop of *Canterbury*, or ſhall ſolemnize matrimony without publication of banns, unleſs licence of marriage be firſt obtained from ſome perſon having authority to grant the ſame; every perſon wilfully ſo offending and convicted ſhall be adjudged guilty of felony, and be tranſported to ſome of his Majeſty's plantations in *America*, for 14 years, according to the laws for tranſportation of felons. And all marriages ſolemnized in any other places than a church or publick chapel, unleſs by ſpecial licence as aforeſaid, or without publication of banns, or licence of marriage from a perſon having authority to grant the ſame, ſhall be void.

Sect. 9. All proſecutions for ſuch felony ſhall be commenced within three years after the offence committed.

Sect. 10. After the ſolemnization of any marriage under a publication of banns, it ſhall not be neceſſary in ſupport of ſuch marriage to give any proof of the dwelling of the parties in the reſpective pariſhes or chapelries wherein the banns are publiſhed; or where the marriage is by licence, it ſhall not be neceſſary to give any proof that the uſual place of abode of one of the parties, for four weeks as aforeſaid, was in the pariſh church or chapelry where the marriage was ſolemnized; nor ſhall any evidence in either of the ſaid caſes be received to prove the contrary in any ſuit touching the validity of ſuch marriage.

Sect. 11. All marriages ſolemnized by licence, where either of the parties, not being a widower or widow, ſhall be under the age of 21 years, which ſhall be had without the conſent of the father of ſuch of the parties ſo under age, if living, or, if dead, of the guardians of the perſon of the party ſo under age, or one of them; and in caſe there be no ſuch guardian, then of the mother, if living and unmarried; or if there be no mother living and unmarried, then of a guardian of the perſon appointed by the court of *Chancery*, ſhall be void.

Sect. 12. In caſe any ſuch guardian or mother, or any of them, whoſe conſent is made neceſſary, ſhall be *non compos mentis*, or beyond the ſeas, or ſhall refuſe their conſent to the marriage, it ſhall be lawful for any perſon deſirous of marrying, in any of the before mentioned caſes, to apply by petition to the Lord Chancellor, who is hereby impowered to proceed upon ſuch petition in a ſummary way; and in caſe the marriage propoſed appear proper, the Lord Chancellor ſhall judicially declare the ſame to be ſo by an order of court, and ſuch order ſhall be deemed as good as if the guardian or mother of the perſon ſo petitioning had conſented to ſuch marriage.

Sect. 13. In no caſe ſhall any ſuit or proceeding be had in any eccleſiaſtical court, to compel a celebration of any marriage *in facie eccleſiæ*, by reaſon of any contract of matrimony, whether *per verba de præſenti*, or *per verba de futuro*, entered into after the 25th of *March* 1754.

Sect. 14. The churchwardens and chapelwardens of every pariſh or chapelry ſhall provide books of vellum, or durable paper, in which all marriages reſpectively, there

there publiſhed or ſolemnized, ſhall be regiſtered: and every page thereof ſhall be marked at the top with the number of ſuch page, beginning at the ſecond leaf with number one; and every leaf or page ſo numbered, ſhall be ruled with lines at proper and equal diſtances: and all banns and marriages publiſhed or celebrated in any church or chapel, or within any ſuch pariſh or chapelry, ſhall be regiſtred, printed or written upon, or as near as may be to, ſuch ruled lines; and ſhall be ſigned by the parſon, vicar, miniſter, or curate, or by ſome other perſon in his preſence, and by his direction: and ſuch entries ſhall be made on or near ſuch lines in ſucceſſive order, where the paper is not damaged or decayed, until a new book ſhall be neceſſary; and then the directions aforeſaid ſhall be obſerved in every ſuch new book. And all books provided as aforeſaid, ſhall belong to every ſuch pariſh or chapelry reſpectively, and ſhall be carefully preſerved for publick uſe.

Sect. 15. All marriages ſhall be ſolemnized in the preſence of two witneſſes, beſides the miniſter who ſhall celebrate the ſame. And immediately after the celebration of every marriage, an entry thereof ſhall be made in ſuch regiſter; in which it ſhall be expreſſed, that the ſaid marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with conſent of the parents or guardians, as the caſe ſhall be; and ſhall be ſigned by the miniſter with his proper addition, and alſo by the parties married, and atteſted by ſuch two witneſſes; which entry ſhall be in the form or to the effect following, *viz.*

A. B. *of* [*the* / *this*] *pariſh* - *and* C. D. *of* [*the* / *this*] *pariſh* *were married in this* [*church* / *chapel*] *by* [*banns* / *licence*] *with conſent of* [*parents* / *guardians*] *this day of* *in the year*

By me J. P. {*rector* / *vicar* / *curate*}

This marriage was ſolemnized between us A. B. / C. D. *in the preſence of* E. F. / G. H.

Sect. 10. If any perſon ſhall, with intent to elude this act, wilfully inſert, or cauſe to be inſerted, in the regiſter book of ſuch pariſh or chapelry, any falſe entry of any thing relating to any marriage; or falſly make, alter, forge, or counterfeit, or cauſe to be falſly made, *&c.* or aſſiſt in falſly making, *&c.* any ſuch entry in ſuch regiſter; or falſly make, *&c.* or cauſe to be falſly made, *&c.* or aſſiſt in falſly making, *&c.* any ſuch licence of marriage as aforeſaid; or publiſh as true any ſuch falſe, altered, forged, or counterfeited regiſter, or a copy thereof, or any ſuch falſe, *&c.* licence of marriage, knowing ſuch regiſter or licence of marriage reſpectively to be falſe, *&c.* or if any perſon ſhall wilfully deſtroy, or cauſe to be deſtroyed, any regiſter-book of marriages, or any part of ſuch regiſter-book, with intent to avoid any marriage, or to ſubject any perſon to any of the penalties of this act; every perſon ſo offending, and being convicted, ſhall be adjudged guilty of felony, and ſhall ſuffer death.

Sect. 17. This act ſhall not extend to the marriages of any of the royal family.

Sect. 18. Nothing in this act ſhall extend to *Scotland*; nor to any marriages amongſt *Quakers*, or amongſt perſons profeſſing the *Jewiſh* religion, where both the parties to ſuch marriage ſhall be *Quakers*, or perſons profeſſing the *Jewiſh* religion; nor to any marriage ſolemnized beyond the ſeas.

3. *What eſtate real and perſonal, of the wife, ſhall veſt in the huſband by the marriage, and what not; and of the huſband's right to things accruing to the wife during coverture.*

From the time of the intermarriage, the law looks upon the huſband and wife but as one perſon, and therefore allows of but one will between them, which is placed in the huſband, as the fitteſt and ableſt to provide for, and govern the family; and for this reaſon the law gives the huſband an abſolute power of diſpoſing of her perſonal property, no act of her's being of any force to affect or transfer that, which by the intermarriage ſhe has reſigned to the huſband; but the freehold and inheritance of the wife is ſubject to other rules and regulations; for the huſband by the marriage does not become abſolute proprietor of the inheritance, but as the governor of the family is ſo far maſter of it as to receive the profits of it during her life, but has no power to make an abſolute ſale of it without her conſent. 10 *Co.* 42. 2 *Inſt.* 510. 1 *Sid.* 11. 1 *Rol. Abr.* 347.

If a man marries a woman ſeiſed in fee, he gains a freehold in right of his wife. *Co. Lit.* 351. *a.*

The marriage is a gift in law to the huſband of all the wife's chattels real, as a term for years in right of the wife; ſo of eſtates by ſtatute-merchant, ſtatute-ſtaple, elegit, *&c.* and of theſe he may alone diſpoſe, forfeit, or they may be extended for his debts, but if he make no diſpoſition of them in his life-time, they ſurvive to the wife, and therefore he cannot deviſe them. 7 *H.* 6. 1. *b.* *Bro.* 24. *Co. Lit.* 46, 351.

If a woman leſſee for years takes huſband, and he after purchaſes a new leaſe to them both for their lives, of the ſame lands, this is a ſurrender in law of the firſt term, and ſhall bind the wife, becauſe it amounts to an actual diſpoſition thereof, which the huſband had power to make. 2 *Rol. Abr.* 495.

If the huſband poſſeſſed of a term for 70 years in right of his wife, makes a leaſe of thoſe lands for 20 years, to begin after his death, this is good, and ſhall bind the wife; becauſe the term being but a chattle, he had power to diſpoſe of it wholly, and by conſequence may diſpoſe of any leſſer intereſt thereto as he thinks fit; and this being a preſent diſpoſition, which he cannot revoke, binds the intereſt of the lands immediately, though it takes not effect in poſſeſſion till after his death; and therefore this differs from a deviſe of ſuch term, or any part thereof, by the huſband, by his will; for that not taking effect, nor binding the intereſt at all till after his death, comes too late to prevent the operation of law, which at the inſtant of death immediately caſts it upon the wife ſurviving, and ſo defeats and deſtroys the operation of the deviſe; but as to the reſidue of the term, whereof the huſband makes no diſpoſition in his life-time, the wife, if ſhe ſurvives, will be intitled to it; becauſe as to that the law is left to take place, as it would have done for the whole, if he had not prevented it by ſuch his diſpoſition of part; but if the huſband had granted away the whole term upon condition, and died, though the condition were afterwards broken, and his executors entred for breach thereof, yet would the wife be for ever barred to claim any intereſt in the ſaid term, becauſe there was a total diſpoſition thereof by the huſband in his life-time, and the breach or non-performance of the condition was perfectly contingent and uncertain; beſides that, the breach of the condition happened not till after his death, and ſo the diſpoſition continued perfect and uninterrupted during his life; for if the condition had been broken during his life, and he himſelf had entred for breach thereof, it might be a great queſtion, if the wife ſurviving ſhould not have the term after his death, becauſe by his re-entry for the condition broken, he is reſtored to the whole term *in ſtatu quo*, and then being poſſeſſed of it in right of his wife, as he was before, it ſeems but reaſonable the wife ſhould have it, if ſhe ſurvives the huſband, as ſhe would have had if no ſuch diſpoſition had been made, ſince that diſpoſition is now defeated and

gone: Alſo ſuch term, whereof the huſband is poſſeſſed in right of his wife, may be extended for the debts, or forfeited for the crimes of the huſband, for theſe are legal diſpoſitions thereof, which ſhall bind the wife; but if the huſband ſhould grant a rent, common, *&c.* out of ſuch term, and die, this would not bind the wife ſurviving, becauſe the term or poſſeſſion itſelf being left to come intire to the wife, all intermediate charges or grants thereout by the huſband determine with his death; for the title of the wife to ſuch term has relation to the time of their intermarriage, and ſo is paramount all collateral charges or grants made thereout by the huſband after; but a grant by the huſband of the herbage or veſture of ſuch lands which he held in right of his wife for years, will be void after his death, becauſe they are part of the land itſelf, and not collateral to it. *Poph.* 5, 97, 145. *Co. Lit.* 46. *b.* 351. *a.* *Cro. Car.* 344. *Plowd.* 418. *Cro. Eliz.* 33, 279. *Co. Lit.* 300. *a.* *Bro.* tit. *Charge*, 111. 8 *Co.* 97. 1 *Rol. Abr.* 851, 343, 344. *Godb.* 279. 3 *Keb.* 299. 1 *Vent.* 259. Note; It appears by all the above-cited books, that if the huſband makes a leaſe of part of the wife's term, rendring rent, and dies, that his executors ſhall have the rent, and not the wife, though ſhe hath the reverſion, becauſe not party or privy to the leaſe, and the rent is not incident to the reverſion.

If the huſband and wife be evicted of a term, which he hath in right of his wife, and the huſband brings an ejectment in his own name, and hath judgment to recover, this makes an alteration in the term, and veſts it in the huſband; becauſe, not making his wife a party to the recovery, he takes the whole wrong to be done to himſelf, and conſequently if he recovers, it muſt be by virtue of that right whereof he was diſpoſſeſſed. *Co. Lit.* 46. *b.* 1 *Rol. Abr.* 345.

If a term for years be granted to a feme covert and another, or if a feme ſole and another are joint-tenants of a term for years, and the feme takes huſband, yet in both caſes the jointenancy ſtill continues; for the marriage makes no ſeverance or alteration of it, but gives the huſband the ſame power his wife had before, by an actual diſpoſition of her moiety to break the jointenancy, and bind his wife's intereſt therein; but without ſuch diſpoſition the jointenancy continues; and if the huſband dies, the whole ſhall go accordingly; ſo if ſuch jointenants are ouſted of the term, the wife ſhall join with the huſband and the other jointenant in ejectment, and the wife ſhall have judgment to recover as well as the huſband; if his wife die, the whole term ſhall go to the ſurviving jointtenant, and no part thereof to the huſband; becauſe, tho' the huſband, if he ſurvives, is by law to have all chattles real and perſonal of his wife's, and this term was a chattle real, yet the title of the other jointenant, to have the whole by ſurvivorſhip, coming at the ſame inſtant, and being the elder title, ſhall prevail againſt the huſband. *Plowd.* 418. *Co. Lit.* 185.

A leaſe was made to the huſband and wife for years; they enter, and the leſſor afterwards enfeoffs the huſband, who dies ſeiſed, the wife ſurvives and claims the term; and betwixt her and the heir of the huſband the diſpute was, whether the term were extinguiſhed; and *per totam curiam*, By acceptance of the feoffment the huſband hath ſurrendred the term, and then it is extinguiſhed, and the wife barred of any title thereto; but they held that it would have been otherwiſe if the conveyance had been to the huſband by bargain and ſale inrolled, or by fine; for theſe meddle not with the poſſeſſion, but only carry ſuch intereſt as the reverſioner had in him, and then the huſband might have the term in right of his wife, and the inheritance in his own right; but by the feoffment he admits the leſſor to have a power to come upon the poſſeſſion to make livery; which, if the term ſhould ſtand in his way, he could not do; and therefore ſuch admittance amounts to a ſurrender thereof. *Cro. Eliz.* 912.

A huſband poſſeſſed of a term for years in right of his wife, with remainder to himſelf in fee, by deed inrolled bargains and ſells the land for money, and dies, and his wife enters, claiming the reſidue of the term; and the opinion of the book ſeems to be, that her claim was good; for though a feoffment, in ſuch caſe, by the huſband, would have paſſed the term which he had in right of his wife by way of union and extinguiſhment, yet by bargain and ſale nothing paſſes but a uſe, and by creation and grant of the uſe, the term which he had *in jure uxoris* ſhall not paſs; ſo that this being no diſpoſition of the legal intereſt of the term, but only of an uſe (which, in reſpect of his inheritance in remainder, he might well create) this was good as to the term during the life of the huſband only, and then the wife after his death ſhall have the leaſe diſcharged of it; as if the huſband had granted a rent, *&c.* out of the wife's term; but if there had been the words *grant*, *aſſign*, or any other word which would have paſſed the legal intereſt of the term, this would have barred the wife; but the words *bargain and ſell*, by 27 *Hen.* 8. could have no operation to raiſe an uſe, which ſhall be executed in poſſeſſion, but only out of the reverſion, whereof the huſband was ſeiſed, as the ſtatute ſpeaks; and therefore this being a term in groſs, whereof the huſband was not ſeiſed, but only poſſeſſed, the bargain and ſale paſſed only an uſe thereof at Common law, and not by virtue of that ſtatute, and then not being executed in poſſeſſion, the uſe at Common law, which was collateral to the land, fell off with the death of the huſband, who created it, as other collateral charges of his would do, and by conſequence the wife's title to the reſidue of the term continues good; but if the huſband had been poſſeſſed of ſuch term in groſs in his own right, without any inheritance in him, and had made a bargain and ſale thereof, though this would not have been executed by the ſtatute in poſſeſſion, for the reaſon before mentioned; yet it would have paſſed a uſe at Common law, which would have made him truſtee in equity for the bargainee. *Mo. pl.* 304. *Plowd.* 423.

If a man marries a woman who has a term for years ſettled on her in truſt, the huſband may as well diſpoſe of his truſt, as if the legal intereſt was in her. See 1 *Rol. Abr.* 343. *Lane* 54, 55. 1 *Chan. Ca.* 225. 1 *Vern.* 7, 18. 2 *Vern.* 270.

Leſſee for years covenanted with the leſſor, that if he, or his *executors*, *aliened the term*, it ſhould be lawful for him, *&c.* to enter; the leſſee made his wife *executrix* and died: the widow married a ſecond huſband, who aliened, *&c.* adjudged, that by *the marriage the term veſted in the ſecond huſband*, as a gift of the wife; and if he had not aliened, it ſhould return to her, if ſhe had ſurvived, this being a *chattle real*; but perſonal chattles are abſolutely in the huſband. *Dyer* 3.

A feme ſole, being poſſeſſed of a *term for years in lands*, *married*, and then ſhe and her huſband mortgaged the term for 20*l.* but before the day of payment, the wife died; and afterwards the huſband paid the money at the day, and entered, and having married a ſecond wife, he made her executrix, and died; and *G. D.* took out adminiſtration of the goods of the firſt wife; but adjudged againſt him, for tho' the leaſe did originally belong to the firſt wife, and the huſband was poſſeſſed of it in her right, ſo that if he had purchaſed the inheritance the leaſe had not been merged in it, yet by the intermarriage he had a power to alien the term; and therefore he having ſurvived his wife, he ſhall enjoy it againſt her adminiſtrator. *Hob.* 3.

The huſband being *poſſeſſed of a term of twenty-one years in right of his wife*, made a leaſe for *ten years*, rendring rent to him, or to his executors or aſſigns, and died; adjudged, that the executors of the huſband ſhall not have the rent; and that if after ſuch leaſe the huſband had aſſigned the reverſion of the term, the aſſignee ſhould not have the rent; but in *Lampit*'s caſe, there is a contrary reſolution, *(viz.)* if the huſband make a leaſe of part of the term, which he had in right of his wife, rendring rent, and dieth, his executors ſhall have the rent, tho' the wife ſhall have the reverſion of the term; for the rent was not incident to the reverſion, becauſe ſhe was no party to the leaſe; ſo likewiſe, if the huſband had made a *grant of the whole term*, *upon condition* that the grantee ſhould pay a ſum of money to his executors, *&c.* and if after his death they had entered upon a breach of this

this *condition*, this had been a good diſpoſition of the whole term, and the wife had been barred, becauſe the whole intereſt was paſſed by her huſband. 1 *Inſt.* 46. 10 *Rep.* in *Lampit*'s caſe, S. P.

The *huſband poſſeſſed for a term of years in right of his wife*, made a leaſe for years of the ſame lands, *to commence after his death*, and in a ſhort time afterwards he died, and his wife ſurvived; adjudged, that the leſſee of the huſband ſhall have the lands during his leaſe; becauſe the husband, during his life, might have diſpoſed or aliened the whole term which his wife had in thoſe lands; and if he might diſpoſe of the whole, by conſequence he may diſpoſe any part of it; but the remainder of the term, whereof no diſpoſition was made by him, ſhall return to the wife. *Poph.* 5.

Feme ſole being leſſee for years, the leſſor covenanted with her to *repair* the houſes during the term; afterwards ſhe married, and not long after ſhe died; adjudged, that the husband ſhall have an action of covenant againſt the leſſor for not repairing, and this he may have as well upon the covenant in law, upon the words *demiſe and grant*, as upon an expreſs covenant. 5 *Rep.* 17. in *Spencer*'s caſe.

Feme ſole leſſee for years married, and afterwards her husband purchaſed the fee ſimple of the lands, the term is extinct, becauſe the husband had done an act to deſtroy it; but if ſhe had married with him who had the reverſion, in ſuch caſe the term ſhould not be extinguiſhed, becauſe the husband had done no act to deſtroy it. *Godb. Paſch.* 17 *Eliz.*

The *huſband was poſſeſſed of a term for eighteen years in lands*, and of a reverſionary term for forty years in the ſame lands, and he dying inteſtate, his wife adminiſtred and married a ſecond husband, who made a leaſe of thoſe lands for twenty-one years, rendring rent, and died, having firſt made a will and an *executor*; the queſtion was, whether the wife, or this executor of her ſecond huſband, ſhould have the rent? It was inſiſted for the executor, that he ſhould have it; becauſe the firſt term for eighteen years was veſted in him by the intermarriage, and he having made a leaſe of the lands for ſo long a time, and longer, nothing of that term remains in the wife; but for the laſt *three years*, to make up the 21 years, that being derived out of the reverſion, the wife ſhall have the rent thereof, as annexed to the reverſion. *Cro. Eliz.* 278.

The *Lady* Cromwell *was poſſeſſed of ſeveral leaſes*, and conveyed them over in *truſt*, and afterwards ſhe married *Sir John St. John*; then ſhe received the money which came of the truſt, and with part of it ſhe bought *jewels*, and left the other part in ready money, and died; her husband adminiſtred; adjudged, that the money received upon the *truſt* was the money of the husband; but that a leaſe conveyed by a feme ſole *in truſt*, for the uſe of herſelf, who afterwards marrieth, cannot be diſpoſed by the husband; and if ſhe die, he ſhall not have it, but the executors of the wife. *March* 44.

A man and a feme ſole were *joint-tenants for life*, the woman married *W. R.* and then the husband and wife made a leaſe for years of their moiety; adjudged, that this leaſe was voidable by the wife, if ſhe ſurvive her huſband, but ſhall ſtand againſt the other joint-tenant after the death of the wife. *Bridgm.* 44.

An *annuity* was granted to a feme ſole, who afterwards married; the rent was in arrear, and the annuity determined by the death of the wife; but adjudged, that the husband ſhall have an action of debt at the Common law for the arrears; becauſe an annuity is more than a *thing in* action, for it may be granted over. *Owen* 3.

A *feme ſole made a leaſe for years*, rendring rent, and afterwards *married*, and after the marriage the wife received the rent; the queſtion was, whether that receipt ſhall bind the husband, or whether he may diſagree to it; adjudged, that the payment to her is void in law, without giving notice of the marriage to the leſſee. *Bendl.* 93.

A *feme executrix was poſſeſſed of a leaſe for years*, of lands; her husband purchaſed the reverſion in fee, after the determination of the leaſe for years; adjudged, that if ſhe ſurvive, the term is *extinct* as to her; but as to the creditors, it ſhall have a continuance, and be *aſſets* in her hands. *Moor* 54.

The husband poſſeſſed of a term, in right of his wife, made a leaſe of part of it, rendring rent, and afterwards made a will, and *T. S.* executor, and died; adjudged, that the executor of the husband ſhall have the rent, tho' the wife hath the reverſion, becauſe ſhe was no party to the leaſe. 2 *Lev.* 100.

Bill for diſcovery of aſſets, and to have a ſatisfaction for a debt due by bond, brought againſt the *widow and executrix of the obligor*. Defendant inſiſts by anſwer, that ſhe has not aſſets to ſatisfy the debt. The caſe upon the proof was, that the defendant *had lands to the value of* 700*l.* *and alſo* 500*l.* *due to her upon bond, which remained in her brother's hands.* Her *huſband before marriage makes a marriage ſettlement, and in conſideration of a conſiderable fortune and portion* with his intended wife, he *does grant*, &c. But *the particulars* wherein her portion did conſiſt, *did not appear by the deed*; and the queſtion was, *if this bond* to the defendant for 500*l.* part of her portion, (*being a choſe en action, and not called in by the huſband*) *ſhould be aſſets in equity to ſatisfy a debt of the huſband*, the wife having enjoyed the benefit of the ſettlement made to her out of the husband's eſtate, which would have been liable to the debt? It was argued for the plaintiff, that if this bond of 500*l.* had been mentioned in particular as part of the conſideration of the ſettlement, there would be no doubt but it would be aſſets of the husband; for in equity the husband is a purchaſer of it by making the ſettlement, and that there was no difference where the conſideration is general of the wife's portion, eſpecially in this caſe, where the wife had nothing but lands beſides this bond of 500*l.* ſo that this bond muſt be taken as the conſideration of the ſettlement, there being no other, and the rather in favour of a fair creditor, who otherwiſe muſt loſe his debt, and if there had not been ſuch a ſettlement made, might have had ſatisfaction out of thoſe very lands. *Parker* C. ſaid, the caſe was ſo very clear, that the defendant's counſel need not to argue it. Creditors in this caſe cannot be in a better condition than the executor of the debtor; and can it be imagined, that if another perſon had been made executor to the huſband, and ſuch executor had brought a bill againſt the wife to compel her to aſſign this bond, that the court would have decreed for the executor? What the law gives the huſband by the intermarriage, is a good conſideration for making a ſettlement, but the huſband's making a ſettlement does not veſt in the huſband the *choſes en action* of the wife, unleſs it be *expreſsly ſo agreed* between the parties, *and* that *appears to be part of the conſideration of the ſettlement*; for then the husband is a purchaſer, and well intitled to them in a court of equity. An account was decreed to be taken of the aſſets of the husband, but not of this bond of 500*l.* to the wife. 4 *Vin.* 40. cites M. S. *Rep. Mich.* 6 *Geo. in Canc. Heaton* v. *Haſſell.*

All the perſonal eſtate, as money, goods, chattels, houſhold furniture, *&c.* that were the property, and in the poſſeſſion of the wife at the time of the marriage, are actually veſted in the husband; ſo that theſe he may take and diſpoſe in his life-time, without her conſent, or may by will deviſe them, and ſhall without any ſuch diſpoſition go to the executors or adminiſtrators of the husband, and not to the wife, though ſhe ſurvive him. *Dr. & Stud. Dial.* 1. *c.* 7. *Co. Lit.* 351.

But *choſes en action*, as debts due to the wife by obligation, *&c.* which are to be demanded by action, though they are likewiſe ſo far veſted in the husband, and he may reduce them into poſſeſſion; yet if he dies before any alteration made by him, they ſhall go to his wife, nor ſhall they, without ſuch alteration, ſurvive to the husband upon the death of the wife, or he have any right in them, but as he is intitled as adminiſtrator to his wife. *Co. Lit.* 351. 3 *Mod.* 186.

If a feme ſole obligee marries, and the husband makes a letter of attorney to *J. S.* to receive the money, who receives it accordingly, and the feme dies, the husband ſhall have an action of account for the money; for by the receipt this was become a thing in poſſeſſion. 1 *Rol. Abr.* 342. *Moor* 45. *Goldſ.* 160.

If

If a legacy be deviſed to a feme, who takes husband, and the baron makes a letter of attorney to *J. S.* to receive the legacy, and he receives it accordingly, this, by his receipt, is become the chattle of the husband. *Goldſ.* 160. 1 *Rol. Abr.* 342.

So if the baron and feme had made a letter of attorney to *J. S.* to receive the legacy, and he had received it accordingly, by this receipt this ceaſes to be a thing in action, and is become a thing in poſſeſſion; and the huſband, or his executor, after the death of the feme, may have an account upon this receipt againſt *J. S.* *Moor* 452. 1 *Rol. Abr.* 342, 350. *Goldſ.* 159, 160.

The cogniſee of a ſtatute died inteſtate, and adminiſtration was granted to the widow, who married a ſecond husband, who was indebted to the King; and then the ſaid ſecond husband and wife aſſigned this ſtatute to the King in ſatisfaction of the debt; adjudged, that this aſſignment was good, notwithſtanding the act 7 *Jac.* which makes aſſignments of debts void, other than as did originally and *bona fide* grow due to the King's debtor; now, tho' this did not originally grow due to the King's debtor, for he had the ſtatute in right of his wife, who was adminiſtratrix to her firſt husband, yet by the intermarriage, the intereſt and power of the eſtate was veſted in him, and his releaſe of it had bound the wife; and if ſo, then by the ſame reaſon he might aſſign it. *Hob.* 253.

The husband married a widow, who had a conſiderable perſonal eſtate, which widow had a grandchild; the wife died, and the queſtion was, whether the husband ſhould maintain the grandchild within the ſtatute; and adjudged, that he ſhould; becauſe the eſtate, which he had with the wife, *tranſit cum onere.* 2 *Bulſt.* 346.

Feme covert was tenant for life, remainder to another for life, and ſeveral *hops* were growing out of the old roots on the lands in queſtion, when the wife died; adjudged, that the *hops* ſhall go to the husband, and not to the tenant for life in remainder; becauſe they are things which grow by the manurance and induſtry of the owner, and therefore like *emblements* ſhall go to the husband; or if no huſband, then to the executor or adminiſtrator of the tenant for life. *Cro. Car.* 390.

The wife had a portion given her, the payment whereof was *charged on certain lands*, and the husband ſettled a jointure on her in marriage, and died before he received the portion; it was decreed for his executor, that this is not in the nature of a *choſe en action*, but of a *rent*; becauſe 'tis charged *on lands*, and that 'tis given to the huſband by the intermarriage, and by conſequence goeth to his executor, and not to his wife ſurviving. 1 *Chan. Rep.* 189.

In an action of debt, brought by the *huſband alone*, upon a bond made to his wife *dum ſola*; the defendant demanded oyer of the condition, which was to *pay her* ſo much, and then demurred to the declaration; but the plaintiff had judgment. 3 *Lev.* 503.

The husband deviſed, that after his debts and legacies were paid, the reſidue of his goods ſhould be to his wife, to diſtribute for the good of his ſoul, and he made her *executrix*, and died; afterwards ſhe married a ſecond huſband, who made *G. D.* executor and died, againſt whom the widow brought an action of *detinue* for the goods of her firſt husband; and adjudged good, for they were not veſted in the ſecond husband by intermarriage; becauſe the wife had them as *executrix*, and not as a legatee to her firſt husband; and ſo ſhe being poſſeſſed of them in the right of another, they were not given to the ſecond huſband by the intermarriage. *Dyer* 331.

In a ſpecial verdict the caſe was, A feme ſole being ſeiſed of lands, deviſed the ſame to *T. S. and his heirs*, whom ſhe afterwards *married*, and ſoon after made a parol revocation of this will, declaring that her husband ſhould not have the lands, and died; after whoſe death the queſtion was, who ſhould have the lands, the *huſband, or the heir of the wife?* It was inſiſted for him, that the will was good, and ſhall be guided as circumſtances were when it was made; for ſhe was at that time of ſound memory, and capable of making a will, and ſhe had determined her power to revoke it by marriage; becauſe after marriage, ſhe is to be guided and directed by her husband, and hath no power, without his aſſent, to make or revoke a will; to which it was anſwered, and ſo adjudged, that true it is, ſhe cannot after coverture make a will; but if the will ſhe made before coverture, ſhould by operation of law continue to be her laſt will, then ſhe who made that will cannot alter it in her life-time, for ſo it muſt neceſſarily be, unleſs the law ſhall adjudge this will to be void; and accordingly it was adjudged to be a void will. 1 *And.* 181.

A widow, who was an *executrix*, married, and then ſhe and her husband join in an action, in which ſhe, as executrix, and her husband declared, but he was outlawed, and this outlawry was pleaded in bar to the action; adjudged, that he did not forfeit the goods by the outlawry, becauſe he had them in right of his wife, as executrix. 3 *Bulſt.* 211.

Debt brought by a man and his wife as adminiſtratrix to her firſt husband, upon a bond due to him, in which they had a verdict, and afterwards ſhe died before execution; then the husband brought a *ſci. fa.* to have execution, *&c.* but adjudged, that it did not lie by him, becauſe it was a duty which was demanded by the wife in the right of another; and tho' they both recovered, yet ſhe dying before execution, the duty remains to him who has the right of adminiſtration to her firſt husband the inteſtate; and tho' the ſecond husband was a party to the judgment, yet he had no property in the debt, but he who brings a *ſci. fa.* muſt have both a privity and property to the debt; 'tis true, if the judgment had been entered, and afterwards the wife had died, in ſuch caſe the husband might bring a *ſci. fa.* becauſe the debt being recovered, the husband ſhall have it after her death. *Cro. Car.* 150.

The leſſor made a leaſe *for years* of lands to the leſſee, *to the uſe of the ſiſter* of the leſſor, whom the leſſee afterwards married, and died; after his death the widow married a ſecond husband, and then ſhe died, and this ſecond husband ſued the *adminiſtrator of the wife* in Chancery to have this term; but decreed, by the advice of all the judges, that he had no right to it, nor to the uſe of it. *Cro. Eliz.* 466.

A *bond* was given to a *ſingle woman*, ſhe afterwards married, and ſoon after her marriage died; *W. R.* took out letters of adminiſtration to the goods and chattles of the woman, and brought an action of debt upon this bond againſt the obligor, who pleaded that by the marriage the debt became due to the husband; adjudged, that it did not, for it was a thing in action, and not recovered in her life-time. *Style* 105.

In *Beaumont* and *Long*'s caſe, the husband and wife, who was adminiſtratrix to her husband, joined in an action of debt on a bond due to her firſt husband, and recovered, and then the wife died before execution, and the husband brought a *ſci. fa.* to have execution; but adjudged, that it did not lie, becauſe the judgment was obtained by them in right of the firſt husband; but if the woman had recovered a judgment *dum ſola*, or if a debt had been due to her *dum ſola*, and afterwards ſhe marries, and then husband and wife bring an action for that debt, and recover, and the wife dies before execution; in ſuch caſe the husband ſhall have execution by *ſci. fa.* becauſe the debt being *originally due to the wife*, the recovery in the action brought by her husband and her is in her right, and by conſequence 'tis become a proper debt to him, and therefore he ſhall have a *ſci. fa.* after her deceaſe; but if ſhe happen to die before the debt paſſes *in rem judicatam, (i. e.)* before 'tis recovered, then the husband cannot ſue for it; but if 'tis once recovered, then by the awarding execution he ſhall have it by ſurvivorſhip. 1 *Mod.* 179.

Husband and wife are conſidered as one perſon in law, and to have but one will between them, which is ſeated in the husband, as the head and governor of the family; and therefore the law gives him the ſame right over any real eſtate accruing to the wife during coverture as if ſhe were ſeiſed of it before marriage; ſo of chattles real accruing to the wife, and an abſolute power over any perſonal eſtate or intereſt accruing to the wife by gift, deviſe, or her labour. *Co. Lit.* 351. 1 *Salk.* 115. *Carth.* 251.

Indebitatus

Indebitatus aſſumpſit was brought by huſband and wife againſt the defendant, in which they declared, that he was indebted to them in ſuch a ſum of money for periwig-maker's work done by the wife, *ad damnum ipſorum*; and on demurrer, judgment was given againſt the plaintiffs, for this being a general *indebitatus aſſumpſit* implied by law, the law will not imply any promiſe made the wife, for ſhe is a ſervant to the huſband, who is at all the charges in furniſhing hair, *&c.* and therefore the law implies, that the promiſe was made to him only, for breach of which he alone ought to have ſued. *Carth.* 251. 1 *Salk.* 114. *S. C.* 4 *Mod.* 156. *S. C.*

If a feme covert ſues a woman in the ſpiritual court for adultery with her huſband, and obtains a ſentence againſt her, and coſts, the huſband may releaſe theſe coſts, for the marriage continues, and whatever accrues to the wife during coverture, belongs to the huſband; *per Holt* Ch. Juſt. on a motion for a prohibition. 1 *Salk.* 115.

But if the huſband and wife be divorced *a menſa & thoro*, and the wife has her alimony, and ſues for defamation or other injury, and there has coſts, and the huſband releaſes them, this ſhall not bar the wife, for theſe coſts come in lieu of what ſhe hath ſpent out of her alimony, which is a ſeparate maintenance, and not in the power of her huſband. 1 *Rol. Rep.* 426. 3 *Bulſt.* 264. 1 *Rol. Abr.* 343. 2 *Rol. Abr.* 293. 1 *Salk.* 115.

A legacy was given to a feme covert, who lived ſeparate from her huſband, and the executor paid it to the feme, and took her receipt for it; yet on a bill brought by the huſband againſt the executor, he was decreed to pay it over again, with intereſt. 1 *Vern.* 261.

4. *Where the huſband ſhall be charged with debts of the wife, contracted before and after marriage; and of a wife who is executrix or adminiſtratrix.*

The huſband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not; and this the law preſumes reaſonable, becauſe by the marriage the huſband acquires an abſolute intereſt in the perſonal eſtate of the wife, and has the receipt of the rents and profits of her real eſtate during coverture; alſo whatever accrues to her by her labour, or otherwiſe, during the coverture, belongs to the huſband; ſo that in favour of creditors, and that no perſon's act ſhould prejudice another, the law makes the huſband liable to thoſe debts with which he took her attached. *F. N. B.* 265. 20 *Hen.* 6. 22. *b.* *Moor* 468. 1 *Rol. Abr.* 352. 3 *Mod.* 186.

But if a feme ſole indebted marries and dies, the huſband ſhall not be charged, for they muſt be recovered in the life-time of the wife. 10 *Hen.* 6. 10, 12. 20 *Hen.* 6. 22. 1 *Rol. Abr.* 351.

So though there be a judgment in debt againſt a feme ſole, and ſhe marries and dies, the baron ſhall not be charged therewith, for he is not liable to her debts before coverture, unleſs recovered in her life-time. 1 *Rol. Abr.* 351.

If baron and feme are ſued on the wife's bond, entered into by the feme before marriage, and judgment is had thereupon, and the wife dies before execution, yet the huſband is liable; for the judgment has altered the debt. 1 *Sid.* 337.

If there be judgment in debt upon a bond againſt a feme ſole, and ſhe marries, and after upon two *ſci. fa.* againſt the baron and feme, and *nihils* returned, judgment is thereupon had againſt the baron and feme, and ſo it reſts for a year and a day, and then the wife dies, *ſcire facias* will lie againſt the baron, to ſhew cauſe why execution ſhould not go againſt him upon the firſt judgment, for the award of execution was abſolute againſt the baron and feme, and ſo it became his debt, whereas before, it was only the debt for the wife. *Carth.* 30.

It is clear that a huſband is obliged to maintain his wife, and may by law be compelled to find her neceſſaries, as meat, drink, clothes, phyſick, *&c.* ſuitable to the huſband's degree, eſtate or circumſtances; it ſeems alſo ſettled that the wife is not to be her own carver, and that ſhe hath not an innate or abſolute power of binding the huſband by any contract of hers, though for neceſſaries, without his aſſent, precedent or ſubſequent; the law therefore in theſe caſes, which ſeems eſtabliſhed by uſage and practice, is to leave it to the jury to find whether the huſband conſented or not; and though no expreſs conſent or agreement of his be proved, yet if it appear that ſhe cohabited with her huſband, and bought neceſſaries for herſelf, children, or family, the husband ſhall be chargeable, and the jury may find, on their oaths, that they came to the husband's uſe, he being by law obliged to provide for thoſe; alſo if ſhe cohabits with her husband, and is ever ſo lewd, he ſhall be liable to her neceſſaries; for he took her for better for worſe; ſo if he runs away from her, or turns her away, or forces her by cruelty or ill uſage to go away from him; but if he allows her a ſeparate maintenance, or prohibits particular perſons from truſting her, he ſhall not be liable during the time that he pays ſuch ſeparate maintenance, nor for neceſſaries taken up of thoſe perſons particularly prohibited; for in theſe caſes no conſent, but rather the contrary appears; but a general warning or notice in the *Gazette*, or other news-paper, not to truſt her, is not a ſufficient prohibition. Alſo the jury are to determine as to the wife's neceſſity, the husband's degree and circumſtances, and the value of the things ſold and delivered, and give a verdict, and aſſeſs damages accordingly. 11 *Hen.* 6. 50. *Fitz. Debt* 41. *Brownl.* 47. *All.* 61. *Litt. Rep.* 307. *Hutt.* 105. *Jenk. Rep.* 4. 1 *Rol. Abr.* 350, 351. 1 *Sid.* 109, 110, *&c.* 1 *Mod.* 128. 2 *Vent.* 155. 1 *Keb.* 69, 80, 87. 2 *Vent.* 42. 1 *Lev.* 4, 5. 1 *Salk.* 116, 118. 6 *Mod.* 171. 2 *Show.* 283. *Skin.* 348.

But the learning on this head will be beſt explained by inſerting the celebrated caſe of *Scot* and *Manby*, with my Lord Chief Baron *Hale*'s argument at length.

A woman departs from her husband without his conſent; and during her abſence, the husband prohibits ſeveral perſons, and among the reſt *J. S.* to truſt her, and after ſhe makes a requeſt to cohabit again with her huſband, and he refuſes to receive her, and yet *J. S.* ſells to her ſilk and velvet to the value of 40*l.* which is found ſuitable to the degree of her husband; the husband ſhall not be charged.

I will ſay ſomething of the nature of contracts.

I will apply it to our caſe, in conſideration of the verdict, as it is found.

I will ſhew in what particulars we all agree, and where we differ, and ſo ſtate the queſtion.

I will ſpeak to the queſtion as it ſhall be ſo ſtated.

1. A contract is the conſent of two or more, whereby to bring in an obligation of one to the other; and the parts requiſite to ſuch a contract, are 1ſt, parties; 2dly, conſent; 3dly, an obligation.

1ſt, It is requiſite that the parties be not diſabled to contract; and as to that, in law ſome are diſabled to contract *quoad hoc* and *ex parte*, as an infant, *non compos*, *&c.* and ſome have an abſolute diſability; as a feme covert, who can no way in our law contract.

2dly, As to the conſent, that muſt be either expreſs or implied; expreſs muſt be either precedent, concomitant or ſubſequent; implied is raiſed by law; as where a man is made bailiff, ſteward or houſe-keeper, a general authority is given him; when goods come to a man's uſe, he having had notice of the contract, it is an aſſent the law will imply, and make the contract oblige him; and if either of theſe had been found in this ſpecial verdict, it had been well; for then there had been fact enough for the law to have made conſtruction upon. There is, beſides all this, evidence of a conſent in fact, which muſt induce a jury, if there be no circumſtances againſt it. As if I ſend a ſervant always with ready money, and he buys upon truſt, here is no evidence; but if I uſually ſend him upon truſt, and where he takes up goods I ſtand to his bargain, and pay for them, this is evidence that I would have all the world truſt him; and this a jury may apply to make a conſent to any particular contract; but then they muſt find the aſſent in fact, for that which is the evidence to them we cannot judge upon.

3dly, As to the obligation, it is neceſſary that this be upon the party conſenting. I know that in ſome caſes the

the obligation of a contract may be transferred by way of concomitancy; as to the husband, it is carried with the chattles and person of the wife; and it lies upon the heir and executor when they have assets; but for a man to be originally bound by a contract, it is necessary that there be his consent; and the consent of no other person will serve.

2. To consider what is in this verdict, and apply what had been said to it: I find in it no assent of the husband's found, nor any authority he gave his wife, but only matter of evidence; I confess that when a wife, though not particularly appointed, contracts for necessaries for herself, her family, her husband or her children, this is great evidence to a jury to make them find the assent of the husband; for it cannot be reasonably thought that any man would be so barbarous as to deny his assent to have the necessities of his family supplied; and so it may be believed and found he did assent; but this is only in case of cohabitation; for it may be well imagined, that when a wife leaves her husband, that he may refuse to supply her; and so in the verdict, this matter of evidence is answered by finding that she departed from him; but then there is an answer on the other side, that she afterwards, and before this contract, desired to cohabit with him. To this it is replied again with a flat bar to any evidence that can be given of an assent, *viz.* That the husband did expressly prohibit those tradesmen to trust her; the judges in their directions to a jury direct them to be guided by such evidence of an assent, when nothing appears to the contrary; because it would be very hard in point of proof to shew express evidence of assent to every particular; but when there is an express prohibition or denial of assent, this takes off all circumstances of evidence on the other side.

3. I am to shew in what points we all agree, and where we differ.

1st, We all agree that it is not the contract of the wife's to bind her; for in our law, she has no will, nor power to bind herself; the Civil law, as it allows her a property distinct from the husband's, so it gives her power to bind herself by contract.

2dly, It is agreed of all hands, the wife ought to be maintained; the Civil law, though it allows the wife a separate property, yet the husband ought to maintain her out of her own dowry; it is more necessary for the Common law, that takes away all property from her, to make provision for her subsistence, else that which we pretend to be the most reasonable and provident law in the world would be the most barbarous; but in this we differ. It is said by those who argue that the husband should be charged, that she may be maintained by a power the law gives her to charge her husband by way of contract; which is altogether denied by us.

3dly, We all agree, that when the wife contracts for the necessaries of her husband, children or family, that this shall not charge him by any inherent power in the wife, but by a reasonable and implicit assent, which must be found by a jury; but we differ in the charging him; when she contracts for the supply of her own necessities, we say it is not by a power she has, but there must be his consent, either express or implied. Secondly, We confess, that in case of cohabitation, there is great evidence of his assent, till the contrary appears; but it is not so binding as will amount to a presumption. Thirdly, Therefore we say it must be found by the jury. Fourthly, That it is countermandable by prohibition; where it is said on the other side, and must be maintained, else they can make nothing of the case, that there is in the wife, upon the intermarriage, an original, inherent, primogenial, and uncountermandable power to charge the husband for her necessities, which the husband can no ways repeal, though there be no cohabitation or consent, but an express prohibition; and this is the true state of the question betwixt us; if there be such a power in the wife or no, independent upon any consent of the husband's; I shall consider,

1st, If there be such a power during cohabitation; 2dly, if for necessaries; and here I shall make a second question, if there be such a finding of necessaries as is requisite in a verdict; 3dly, if the departure makes nothing in the case; 4thly, admitting all this, whether it be countermandable *quoad* one man.

1st, I shall hold there is no such power in the wife; my reasons are,

1st, By the law of God, of nature, of reason, and by the Common law, the will of the wife is subject to the will of the husband; and therefore an indictment for being a joint-receiver with her husband was held ill; but if the law were with those who argue on the other side, this would be inverted, and the will of the husband would be subject to the will of the wife.

2dly, Because no man can be originally bound in a contract, but by his own consent.

3dly, To prove the law on their side lies upon them, which they have not, nor no ways can do, there being but one semblance of an authority they can alledge, which is 11 *H.* 6. which is the opinion of Judge *Martin*, and must be intended by way of evidence; but they say, they prove it by reason and inconvenience.

1. I answer, *argumentum ab inconvenienti* will not change or alter the law when it appears to be so; but it is only to prove and interpret the law when we are in doubt whether it be so or no.

2dly, I answer, the inconvenience of the other side outweighs, and is far greater, for it will bring into the law a manifold uncertainty.

1. What things are necessary, what kind of necessity, and when, and how often, this necessity may happen; as if the husband should give the wife clothes, and she gives them away the next day, she is in as much necessity the next day as she was before, and *quicquid necessitas cogit debetur*.

2dly, There would be great uncertainty, which way she should supply her necessities; as this way, 1. of taking up goods, and if she can find no credit with the mercer, but has the usurer for her friend, then the law surely, that provides against her necessities, will give her leave to take up money; and if that fails, it is reasonable that she should sell goods; for the two other ways failing, the law will not let her perish; if there were no goods, then it were as reasonable she might receive rents, which would be against Sir *Paul Tracy* and *Dutton*'s case, *Cro. Jac.* And if there were none such, she might raise money upon the demise of the land; if the law will give way to her necessities in the first case, it must yield in all the rest, for the case may else be so, that the provision of law would be defective; but I hold, that in none of these cases the wife can provide for herself; but I say there must be a trust somewhere; as a father is bound by the law of nature to provide for his son, and the son is bound to provide for the father, but the law will not give the one leave to oblige the other by way of contract, because the law supposes that they will not be so unnatural, and entrusts them with it, *viz.* before the 43 *Eliz.* for the poor; if this trust must be somewhere, the husband knows best how to manage affairs, and so is fitter to be entrusted by the law than any body else: I add, that although the law will not presume so much ill, as that a husband should not provide for his wife's necessities; yet there is a severe obligation on him, not only to supply her in case of exigencies and extreme necessity, but according to conveniency; but the law has not made her her own judge, but provided her a judicature sufficient to reform the closehandedness of her husband; where she is driven to an extreme necessity and want of subsistence, the law has appointed a judge to compel the husband to supply her, I mean the Chancellor; for upon a *supplicavit* he may be bound to the peace, and *bene & honeste tractare*, which I hold not to be understood only, that he must use her gently, and forbear beating of her, but that he must supply her exigencies; then for her conveniencies the law has appointed the bishops courts; and whereas it is said, that this is not the Common law, I answer, that they are jurisdictions appointed by the Common law, and though their coercion and proceedings are after another law, yet their derivation, as to their use here, was from the Common law; and concerning the amplitude of their power, which is said not to be able to administer a medicine

dicine ſufficient for this diſeaſe; I ſay, as it is aided by the *brachium ſeculare*, the power of it falls as ſeverely upon them that diſobey it, as the Common law can uſe when men will not pay their debts; for they may excommunicate, and upon that follows impriſonment, and a diſability to ſue any action.

The ſecond objection made on the other ſide is, by comparing the caſe of a feme covert with the caſe of an infant; but I anſwer, an infant is diſabled only *quoad hoc*, and may oblige himſelf for neceſſaries; but here the wife would bind her husband alſo; in the caſe of an infant there is nobody intruſted by the law to provide for him (for guardian in ſocage is only where there is land) immediately; and therefore he muſt do it himſelf, whereas the husband is intruſted for the wife; ſo the caſes are not parallel.

3dly, It is objected, that it comes to the uſe of the husband; I anſwer, it would then bind the husband in ſuperfluities, which may ſo come to his uſe; which how inconvenient, I leave any man to judge.

4thly, It is objected, that the husband is bound by the wrongs of his wife, and may be charged in trover and converſion upon her act; I ſay, that in caſe of a wrong ſhe binds herſelf, for ſhe muſt be joined in the action, and ſo ſhe will be more careful not to ſubject herſelf, than when the husband is charged alone; but I hold, that in this caſe no trover and converſion lies; for the delivery of the party knowing the fact, and intending a ſale and contract, tranſlates the property at the peril of him that delivers them. If a man knows one to be an infant, and ſells him goods, it is at his peril, for if they be not neceſſaries, he ſhall never charge the infant for the converſion; and ſo of a feme covert, if there be no conſent of the husband: for it has been held, that what the wife eats or wears comes to the uſe of the husband, and will maintain a converſion; and if the law ſhould not be taken thus, we ſhould let in a flood of inconveniencies, which would make all thoſe diſabilities the law has raiſed for the protection of infants and feme coverts, mere words and of no effect.

2dly, I ſhall lay no ſtreſs upon the imperfect finding of the verdict, leſt it might be ſaid that that was the reaſon of the judgment, but only name ſome particulars, wherein it ſeems to be imperfect. 1ſt, They ſhould have found what the ſtuffs were; for it has been adjudged, that the velvets were not neceſſary for an infant; they ought to have found the circumſtances of the neceſſity; as where manſlaughter is committed *ſe defendendo*, or in execution of an office; they ſhould have ſet forth of what kind the neceſſity was, as there is a neceſſity of clothes, of meat, of medicine, and of habitation; they have found, that theſe goods were neceſſary and convenient for his degree, they ſhould have ſaid alſo for his eſtate; for a high degree may have a low eſtate, and the wife cannot expect to be maintained according to the height of her huſband's degree; but I lay no hold on theſe defects in the verdict.

3dly, Upon her departure, all evidence of any obligation of the huſband to maintain her, ceaſes; it would elſe be very unreaſonable, for whilſt they are both in one houſe, the ſame proviſion will ſerve for both; in caſe of a bailiff, if he goes away, no contract of his will bind the maſter, though he had no expreſs diſcharge; and here we muſt preſume ſome unreaſonable cauſe of her departure; for a wife in no caſe ought to do it, and ſhe might have had alimony without any ſeparation.

4thly, Admitting all this, I hold that the prohibition here takes away all preſumption of any conſent of the huſband to the contract, either expreſs or implied, and though the wife ſhould be allowed ſuch a power to charge her huſband, as is affirmed on the other ſide, yet it may be diſcharged as to one particular man, by the prohibition and countermand of the huſband; it would be a very hard caſe elſe, for ſhe may make him liable to the greateſt enemy he had in the world. 12 *Edw.* 4. 18. The King may grant to *J. S.* to be exempt of juries; but if he grants it to a whole county, hundred or townſhip, the grant is void; and by this prohibition of the huſband here is no diſcharge of the whole power, but only it is taken of thoſe particular perſons. If a man enters into an obligation not to uſe his trade, it is againſt law, and void, but if it be not to ſet up his trade in ſuch a ſtreet or town, it is good.

Note; he added, that as to the charging the huſband by way of evidence, which he had reſtrained to cohabitation, he ſaid, the law is the ſame where the huſband departs from the wife; as upon going beyond ſea, *&c.* 1 *Sid.* 109, 110, *&c.* and 1 *Mod.* 128. 1 *Lev.* 4, 5. 1 *Keb.* 69, 80, *&c. S. C.*

Since this reſolution there have been ſeveral caſes in which tradeſmen have recovered in actions brought againſt the huſband for goods delivered to the wife; and in all theſe caſes the judges have laid down the diſtinction of an implied promiſe, and directed it as a ſufficient foundation to charge the huſband, and in their directions have ſhewn as much favour as poſſible to ſuch tradeſmen as intruſted her on the credit of her huſband, and were in no combination with the wife to charge him. 1 *New Abr.* 300.

An ordinary working man married a woman of the like condition, and after cohabitation for ſome time, the huſband left her, and during his abſence, the wife worked; and this action being brought for her diet, died; it was held, that the money ſhe earned ſhould go to keep her. 1 *Salk.* 118.

If the wife, whilſt ſhe lives ſeparate from her huſband, and has a ſeparate maintenance, buys goods of tradeſmen, who know of the ſeparation and maintenance, they cannot ſue the executors of the huſband in Chancery, for theſe goods; neither will equity give the executors any relief, becauſe they have a very good defence at law. 1 *Vern.* 71.

If a *feme bound in debt takes baron*, he ſhall be charged during the life of the feme, but not after her death, becauſe *ceſſante cauſa ceſſabit effectus*. *Br. Baron and Feme, pl.* 27. cites 49 *E.* 3. 23.

Citation was iſſued in the ſpiritual court *againſt a feme ſole upon ſlander*, and the *libel proved* for the plaintiff, upon which the *court awarded* 10*l. to the party for his coſts, and for the defamation*, and after the feme took baron, and made the baron her executor, and died; after *citation was againſt the baron as executor of his feme, to pay the ſum to the party*; upon which a prohibition was ſued, and the other prayed conſultation; and *per* the opinion of the court, becauſe the ſlander is ſpiritual, and they cannot award better recompence than money, and that the baron has proved the teſtament of the feme, and ſo agreed that ſhe made him executor, and therefore conſultation ſhall be granted; but ſeveral ſerjeants *contra*, and that the ſpiritual court cannot award a ſum of money, and that the ſlander dies with the perſon, and all that which depends upon it likewiſe; but *Brooke* ſays, it ſeems to him *that it is a debt, and by the death of the feme, the debt ſhall not run upon the baron*; but it ſeems, *by the probate of the teſtament he has taken upon him to pay it in law. Br. Conſultation, pl.* 5.

A. married a feme, *executrix, ſubject to a devaſtavit*; if *A.* have not ſufficient to ſatisfy, himſelf ſhall be impriſoned for the debt. *Cary's Rep.* 34. *Trin.* 1 *Jac.* 1.

In debt againſt baron and feme, as adminiſtratrix to her firſt huſband, judgment being againſt them, the ſheriff returned *nulla bona, &c.* of the inteſtate, whereupon another *fi. fa.* was brought againſt them, that if it be found that they *devaſtaverunt bona, & ſi conſtare poterit, tunc fi. fa.* and the ſheriff *returned, that they had no goods of the inteſtate in their hands, but that the wife had goods to the value of* 100*l. which ſhe had waſted during her widowhood, and that the huſband had not waſted any of them, & ſi devaſtaverunt* according to the writ, the jury pray the direction of the court. It was argued, that this was a *devaſtavit* in both; and the court held, that the return of what was found by the jury was good enough, and judgment for the plaintiff. *Cro. Car.* 603. *pl.* 7.

It was admitted on all ſides, that if a *feme ſole is indebted* and *marries*, an action will lie againſt huſband and wife, and he is liable to the payment of her debts. 3 *Mod.* 186.

A. marries *B.* an *adminiſtratrix*; *B. had waſted* great part of the eſtate before the marriage. After the marriage, a ſuit is brought againſt them for a diſtribution, according to

to the act of parliament, and a decree is had for that purpose, and then *the wife dies*; *per* Lords Commissioners, the husband is not to be charged further than what came to his or his wife's hands after marriage. 2 *Vern.* 118.

Feme *dum sola gives bond*; if the husband dies, his executor is not chargeable with this debt. *Arg.* 10 *Mod.* 161.

A *freeman of London having issue two daughters, devises* 6000 *l. apiece to them*, and makes his *wife executrix: by an estimate* it appeared, that *his personal estate* at his death *was* 18000 *l.* to 6000 *l.* of which the widow being intitled, *A.* her second husband, in consideration thereof, settled a jointure of 600 *l. per ann.* Afterwards a loss of 12000 *l. befel the freeman's estate*; and tho' the wife was dead, and it was urged that the second husband was a purchaser of her fortune, yet it was decreed, that the daughters should have a proportionable recompence out of the 6000 *l.* for where he takes notice in the articles, that the 6000 *l.* he was with his wife, who was executrix of her former husband, was part of her first husband's personal estate, *upon an account open and unliquidated*, he comes in as a purchaser thereof, subject and liable to an account; that is, as so much as upon the account might be coming to her; and besides having taken collateral security, that her share should amount to the 6000 *l.* he shall be *liable to a loss befalling the personal estate afterwards, as far as the wife's proportion* amounts to, (tho' she is dead) together with her two daughters-in-law, who were each intitled to a third part by the custom of *London*. *Per Cowper* C. *Ch. Prec.* 431.

Where a man marries a *widow executrix*, &c. her evidence shall not be allow'd to charge her second husband with more than she can prove to have actually come to her hands. Agreed *per cur. Abr. Eq. Ca.* 227. *Hil.* 1719.

Where the *feme dies*, the *baron shall be discharged of the debt of the feme dum sola fuit*; for *cessante causa cessabit effectus*. *Br. Dette, pl.* 48. cites 49 *E.* 3. 25.

A. bequeathed 7 *l. to the plaintiff, and made his wife executrix*, and died; *she married the defendant, who had divers goods of the testator*'s in his hands, and in consideration the plaintiff would forbear to sue him, he promised to pay it. The defendant pleaded, that his wife was dead before the promise supposed to be made; and adjudged for the defendant; for the feme being dead, he is not chargeable; and as to goods in his hands, he is liable to the executor or administrator for them. *Cro. Jac.* 257. *Mich.* 8 *Jac.* 1. *B. R. Smith* v. *Johns.*

It has been held, that where a man married a *woman trader*, who died, and at her death was *indebted* to several persons *for wares* which she had bought of them, and which were by her *in specie* at the time of *her death, and came to her husband*, that tho' a bill be brought against him, he may either pay for those goods, or let the person have them again; yet he may insist that he is neither executor nor administrator to his wife, and therefore not liable to her debts, and that all her goods belong to him by law. Ruled upon demurrer. *Abr. Eq. Ca.* 60. *Trin.* 1700. *Blackmore* v. *Ley.* But *quære.*

Judgment was obtained *against a feme sole*; she *marries*; then the plaintiff sues a *scire facias against husband and wife*, and has *judgment quod habeat executionem* against them. Then the *wife dies*, and the plaintiff sues a *scire facias against the husband*, and has judgment *quod habeat executionem* against him; and resolved to be well, upon a writ of error out of *Ireland*. Cited by *Holt* Ch. J. as the case of *O Brian* v. *Ram.* 2 *Ld. Raym. Rep.* 1050.

A. married a feme sole trader, and *she dies indebted*. It was insisted, that tho' the husband in such cases be not liable at law to the debts, yet he ought to be so in equity; but Lord C. *Parker* said, that this was a question with him; for the husband runs a hazard in being liable to the debts, much beyond the wife's personal estate; and that, in recompence for such hazard, he is intitled to the whole of the personal estate, tho' exceeding the debts, and discharged therefrom, and indeed is intitled to the same upon the very marriage. *Wms's Rep.* 466, 469. *pl.* 132. *Trin.* 1718. in case of the Earl of *Thomond* v. the Earl of *Suffolk.*

M. was indebted to A. her mother *in* 2000 *l. by bond*, and then *A. by will devised this* 2000 *l. to J. S.* afterwards *M. married, and survived her husband, and* afterwards *married W. R. who had with her several jewels, and a rent-charge of* 1500 *l. a year.* About *ten years after this last marriage M. died*, add then *A. died, without having ever put the bond in suit.* Lord C. *Parker* held, that if *W. R.* had been executor or administrator of his wife, or executor of his own wrong, he had been liable at law as far as he had assets; but he appears not to the court in any of these capacities; and that, for aught appears, *A.* purposely omitted recovering judgment against him; that the husband, during the coverture, is answerable for the wife's debts, tho' he has nothing with her; and on the other hand, *if he has received a personal estate with his wife, and happens not to be sued during the coverture, he is not liable*; and in the principal case, the jointure enjoyed by *W. R.* might have determined the next moment after marriage; and as to the demand from *W. R.* of his said wife's debt, his Lordship dismissed the bill with costs. *Wms's Rep.* 461. *pl.* 132. *Trin.* 1718.

A *woman entered into a bond, and after married*, having brought her husband a very considerable fortune. The *husband constantly paid the interest of the bond during the life of the wife.* Now a bill is brought against the husband for the payment of the bond, and 1 *Chan. Cases* 295. was cited; and that having paid the interest, was a taking the debt upon himself. But the bill was dismissed, tho' without costs. *Select Ca. in Chan.* in Lord *King*'s time, 19. *Trin.* 11 *Geo.* 1. *Jordon* v. *Foley.*

Wife of *A. receives* 10 *l. to the use of A.* and this comes to the profit of *A.* in a necessary and convenient way, tho' it was without *A.*'s order or consent after, yet *A.* is liable to this debt, and the count shall be of a receipt by the hands of the baron. *Jenk.* 4. *pl.* 5.

A *feme covert bought tobacco*, and the husband was sued for it, tho' he had made *proclamation that no man should trust her*, and *no proof* was *that it came to the husband's use, or that the wife did use to buy and sell for the husband*; and it was ruled, that it shall be intended she did so as his servant; and the judge took this difference, where *particular notice* is given not to trust the wife, there, if the party, to whom such notice is given, do trust her, it is at his peril; but not so upon this *general notice by the proclamation* aboveaid; and in this case it was proved she had formerly bought and sold, but not lately. *Clayt.* 125, 126. *pl.* 223.

If the *baron is beyond sea* in any voyage, *and during his absence the wife buys necessaries*, this is a good evidence for a jury to find that the baron *assumpsit. Sid.* 127.

But such evidence is only presumptive, and not *conclusive evidence*, and therefore the jury in such case finding it specially, the court cannot give judgment against the baron; for their being necessaries and the employment, with the residue of the *special circumstances*, is not but matter of evidence, upon which the jury should proceed to ascertain the fact, whether the baron promised or not. *Sid.* 127. in case of *Manby* v. *Scott.*

And the baron might contradict such presumptive evidence by other proofs; as that he *gave her ready money* to buy, &c. *Sid.* 127. in case of *Manby* v. *Scott.*

The *father devised legacies to his children*, and made the *mother executrix.* She married again, and *died.* The infants brought a bill against their father-in-law, to have an *account of the personal estate* of the father; but decreed, that not being called to account in the life-time of their mother, he was not responsible now. *Fin. Rep.* 95. *Hil.* 25 *Car.* 2. *Gratwick* v. *Freeman.*

If the wife *pawns her cloaths* for money, and afterwards *borrows money to redeem them*, the husband is not chargeable unless he were consenting, or that the first sum came to his use. 2 *Show.* 283.

In case brought for *wares sold and delivered* by the plaintiff, *to the wife* of *the defendant*, *non assumpsit* was pleaded, and upon evidence it appeared that the goods were *silver fringes and laces* for a petticoat and side-saddle, and that they were all delivered within the compass of four months, and that they *amounted to* 94 l. and that part of them were delivered *to a carrier* for the wife of the defendant, by the order of Mrs. *Rider*, *upon a letter*

of

of the wife to Mr. *Rider*, and that the other part were delivered upon a letter of the wife to the plaintiff; and that the laces *were worn and uſed by the wife in the view of the defendant, and* that the wife at that time *lived with the defendant* in the ſame houſe. For the defendant it was inſiſted, that long time before the delivery of theſe goods, there was a difference between him and his wife, and that they for the ſpace of *two or three years had not lived together, and* that the *wife declared* to the defendant that ſhe would charge him with 500 *l.* in one term, and would have him in gaol in the next, and all this before the goods were delivered; and that for many years the *wife had an allowance for cloaths, viz.* 50 *l. per ann.* and no evidence was given that ſhe had any occaſion to have theſe cloaths, ſo as they could appear to be neceſſary. And *the ſame day another action was tried for velvet and tiſſues of* 3 l. per *yard, to the value of* 80 *l.* And *Treby* Ch. J. directed that if the jury found the *plaintiff innocent of the deſign of the wife to ruin the huſband, and delivered the laces*, &c. *as goods fit for the wife*, and upon the credit of the huſband, *without notice of the difference between* them, that the huſband ſhall be obliged to pay the plaintiff, for it is part of his promiſe of marriage to feed and cloath her; and tho' ſhe had an *allowance*, this *was ſecret*, and of which the plaintiff had not notice; but if the plaintiff had notice of the differences between the huſband and wife, and ſold them only to enable the wife to ruin the huſband, then the defendant would not be chargeable, and though the huſband be chargeable heretofore, yet *after ſuch a ſolemn trial*, and their differences made ſo publick, he held that the huſband ſhall not be chargeable; and likewiſe if the plaintiff was privy to their differences, but delivered the goods innocently, yet, if the goods were not *ſuitable to the quality* of the wife, the defendant ſhould not be chargeable; and if *part be only ſuitable*, he ſhould be charged for that part only. Upon this direction the jury, being of gentlemen, found generally for the plaintiff for his whole damages. *Skin.* 348.

Debt againſt huſband for the *lodging* of his wife, and *proof* only made that he *formerly* cohabited with her, *and owned her as his wife*, and held ſufficient to charge him, but that he might diſcharge himſelf by giving *elopement in evidence*, for they that will truſt a wife after ſhe has eloped, do it at their peril. 12 *Mod.* 372.

While they *cohabit*, the huſband ſhall anſwer all contracts of the wife for *neceſſaries*; for his aſſent ſhall be preſumed to all neceſſary contracts upon the account of cohabiting, unleſs the contrary appear; *per Holt* Ch. J. at *Guildhall*. 1 *Salk.* 118.

If a wife takes up clothes, as ſilk, *&c.* and *pawns them before made into clothes*, the huſband ſhall not pay for them, becauſe they never came to his uſe; otherwiſe if made up and worn, and then pawned; *per Holt* Ch. J. at *Guildhall*. 1 *Salk.* 118.

If baron turns away his wife, he gives her credit wherever ſhe goes, and muſt pay for neceſſaries for her; but if *ſhe runs away* from her huſband, he ſhall not be bound by any contract ſhe makes; *per Holt* Ch. J. 1 *Salk.* 118.

If a woman be found *guilty of a battery and fined*, the huſband ſhall not be liable; *per cur'*. 11 *Mod.* 253.

A *feme*, who *had the foul diſtemper given her by her huſband* twice, left him, and *borrowed* 30l. *of* W. R. *to pay doctors and apothecaries, and for neceſſaries*; it was ſaid by the Maſter of the Rolls, that admitting the wife cannot at law borrow money, though for neceſſaries, ſo as to bind the huſband, yet this money being *applied to the uſe of the wife for her cure and neceſſaries*, the plaintiff who lent this money muſt in equity ſtand in the place of the perſons who found and provided ſuch neceſſaries for her, and therefore, as ſuch perſons would be creditors of the huſband, ſo *W. R.* ſhall ſtand in their place, and be a creditor alſo; and his honour directed the truſtees (to whom the huſband then deceaſed had deviſed lands for payment of all his debts) to pay *W. R.* his money and likewiſe his *coſts*. *Wms's Rep.* 482. *Mich.* 1718. *Harris* v. *Lee*.

If a married *woman comes into a ſhop to buy goods*, and the owner not being willing to truſt her, becauſe ſhe is under coverture, a *third perſon coming by undertakes for the payment*. The court thought it clear, that the owner cannot come upon the huſband for the payment. *Barnard. Rep. in Br. R. Mich.* 2. *Geo.* 2. in caſe of *Garnum* v. *Bennet*.

In detinue it was admitted, that if a *man gives a legacy, and makes his feme his executrix*, and dies, and *ſhe takes* baron, and after ſhe delivers the legacy, this is well, notwithſtanding ſhe be covert baron. *Br. Executors, pl.* 47.

In treſpaſs a feme executrix took baron, and after *ſhe bailed the goods of the teſtator to* J. S. *without her baron*; and well, *per Vaviſor* and *Brian*; for ſhe may *deliver legacies*, and *receive debts*, and *make a releaſe* or acquittance, and may *give the goods without her baron*; for ſhe alone may do all matters in fact. *Contra of matters of record*; for ſhe cannot ſue nor be ſued without her baron. *Br. Executors, pl.* 178.

Feme executrix took baron; there in debt againſt them as executors, *he may ſay that the feme has fully adminiſtred*, and the *other may ſay that the feme has aſſets*, &c. *without ſpeaking of the baron*; for it is ſaid there that the feme may adminiſter without the baron. *Quære. Br. Executors, pl.* 150.

In treſpaſs, *per Newton*, a feme covert may be executrix, and ſhe and her baron may ſue for a debt, and yet ſhe cannot make a deed without the baron. *Br. Executors, pl.* 68.

If feme executrix takes baron, and afterwards ſhe *releaſes debt of the teſtator by deed in her own name*, this is good, for ſhe repreſents the teſtator; *per Littleton*, but *Cook contra* without her baron. *Br. Coverture, pl.* 52.

In account, if *a feme* be *executrix* and *takes baron*, and after *ſhe delivers money to* J. S. and her *baron dies*, and *ſhe brings writ of account, and does not name herſelf executrix*, and well, becauſe it was a thing which was once in his poſſeſſion. *Br. Executors, pl.* 101.

And *Rede* agreed that a feme executrix may *pay debts* of the teſtator *and the legacies*, but *not deliver money to render account*. But *Keble* ſaid that ſhe may do the one and the other. *Ibid.*

Feme executrix *cannot make acquittance* as executrix *without her baron*; but *contra by the Spiritual law. Br. Executors, pl.* 101.

D. confeſſed a judgment to *F.* who made his wife, the plaintiff, *executrix* and died; ſhe *adminiſtred and married a ſecond huſband*; *and* then, *ſhe alone*, without her huſband, *acknowledged ſatisfaction, though no real ſatisfaction was made*. The court held that this was not good. *Sid.* 31.

A wife *adminiſtratrix under* 17 ſhall join with her huſband in an action; *per Twiſden* J. *Mod.* 297.

It was ſaid, that if *a feme* be made *executrix* who *does not adminiſter*, and *ſhe takes baron*, the *baron may adminiſter* for him and his feme, and prove the teſtament, *&c.* and there releaſe of the baron is good. *Br. Executors, pl.* 147.

If a feme *executrix takes baron*, and *he releaſes all actions*, this ſhall be a bar during the coverture without queſtion; by the juſtices. But *Choke* doubted if it ſhall be a bar after the death of the baron; but *per Pigot*, once extinct is for ever. *Br. Releaſes, pl.* 29.

If a *feme executrix takes baron*, and the *baron puts himſelf in arbitrement for debt of the teſtator*, and *award is made*, and the *baron dies*, the *feme ſhall be barred, per tot' cur'*. *Brook* ſays, that from hence it ſeems to him, that the releaſe of the baron without the feme is a good bar againſt the feme; *quod conceditur, anno* 39 *H.* 6. 15. and therefore there he excepted thoſe debts in his releaſe, and otherwiſe they had been extinct. *Br. Releaſes, pl.* 79.

A feme executrix takes baron, and they bring debt as executors, and have judgment, the defendant pleaded *outlawry of the huſband* in bar; but *per cur.* Clearly the huſband forfeits nothing of the goods which the wife had as executrix; and judgment for the plaintiff. 3 *Bulſt.* 210.

The *poſſeſſion* of the wife as executrix is alſo the poſſeſſion of her baron, and damages recovered in trover of them ſhall be to the eſtate of teſtator, and ſo may concern them both. *Sty.* 48.

A. made his will, by which he gave divers legacies, and then adds; "*The reſidue of all my goods I bequeath to* Frances *my wife, whom I make executrix to pay my debts.*" *Frances* paid the debts and legacies, and had goods left, and marries *B.* who made *J. S.* executor and died. *J. S.* took the goods, the widow brought detinue againſt *J. S.* and judgment for her, for notwithſtanding the deviſe of the reſidue, *&c.* ſhe had it not as deviſee, but as executrix, by reaſon of the words of the deviſe *(to pay my debts)*, which have no other meaning, but that ſhe ſhall enjoy them as executrix. *And.* 22. *pl.* 45.

A *ſtranger lays claim to a term* which the wife has as executrix to her baron, and her ſecond husband by writing *ſubmits to an award* the title and intereſt of his wife. The arbitrator awards one moiety to the claimant, and *awards* the other *moiety* to the baron and feme. The ſecond baron dies. The wife is bound. For if the baron had granted over the term, ſuch grant would bind the feme. And conſequently the ſubmiſſion in this caſe being for the title and intereſt of the term, is the ſame in effect as if the baron had granted the term over; but if the arbitrators award that the poſſeſſor ſhall hold the term, this it ſeems does not bind the right of the other, for ſuch arbitrament does not extinguiſh the right as it does in the other caſe where it makes the poſſeſſion to paſs. *Dyer* 183. *a. pl.* 57.

A feme *adminiſtratrix* to her former huſband, *brought debt with her then husband upon an obligation to the inteſtate*, and had *judgment for debt, damages and coſts*. The *feme died.* The *baron* after a year and a day *brought ſci. fa.* to have execution; and all the court (except *Hide* Ch. J. who doubted thereof) conceived that the *ſci. fa.* lay not for the huſband, becauſe, being a debt demanded by the wife as adminiſtratrix, it was *en auter droit*; and though they recover, yet ſhe dying before execution, the duty remains to ſuch perſon as takes a new adminiſtration as in right of the inteſtate; and though the baron is party to the judgment, yet he has no property in the debt, whereas *he that ought to have a* ſci. fa. *muſt have privity and property to have the debt*, otherwiſe it is a vain ſuit. *Cro. Car.* 208. *pl.* 2.

Obligee made his wife executrix. She married a *ſecond husband*, who *became bankrupt*, and the commiſſioners aſſigned this debt. But by *Holt* Ch. J. they have no power to aſſign any thing but what is the bankrupt's eſtate, and if the wife dies before aſſignment by him, there muſt be an adminiſtration *de bonis non.* His power to diſpoſe of her eſtate does not make a title in him; and though he may diſpoſe of a *term which he has in jure uxoris*, yet if he becomes a bankrupt, the commiſſioners cannot aſſign over this eſtate; and by *Powel* J. they have nothing to do with the debts of the teſtator, but only with the debts of the bankrupt. *Holt's Rep.* 104, 105.

Where the wife has *debts or duties due to her*, ſhe cannot, by making another perſon executor, preclude her husband from that benefit which to him ſhould appertain as adminiſtrator of her goods. *Went. Off. Ex.* 200.

But where they *belong to her as executrix*, no benefit can redound to the huſband by having ſuch adminiſtration of his wife's goods; for thoſe ſhould go to the next a-kin of the wife's teſtator, who muſt take adminiſtration *de bonis non* of ſuch teſtator, if ſhe has no executor, and therefore her making executor as touching theſe brings *no prejudice to her baron*, and ſo is out of the reaſon of the caſe of *Ognell* v. *Underhill* and *Appleby*. *Went. Off. Ex.* 200.

Where the wife is *executrix and legatee*, if ſhe *claims as executrix*, and dies, if the ſecond baron would have advantage of it, he muſt take letters of *adminiſtration de bonis non* of the firſt huſband, and not of the wife; but if ſhe had claimed the land and the term in it *as legatee*, and had *not been in poſſeſſion*, adminiſtration taken of the rights and debts of the wife had been good as to that intent, tho' his wife was not actually poſſeſſed of it, but only had a right unto it, and of ſuch *things in action* the huſband might be executor or adminiſtrator to his wife; and if the baron takes adminiſtration differently, and brings action, he will be nonſuit, and if the *wife before election marries*, the baron may make the election. *Lev.* 216. *pl.* 298. *Mich.* 32 & 33 *Eliz. C. B.* in caſe of *Cheyney* v. *Smith.*

The *wife intitled by the ſtatute of diſtributions dies, before diſtribution*, inteſtate, and ſo does the huſband too ſoon after. Whether the intereſt veſted in the wife did veſt in the baron without taking adminiſtration to his wife, or not? It was argued that it did, and ſo that it ſhould go to the adminiſtrator of the husband, and not to the adminiſtrator of the wife. See 2 *Vern.* 302. *pl.* 293.

Feme covert *executrix* dies inteſtate; adminiſtration may be granted to the next a-kin of the firſt teſtator *de bonis non. Jo.* 176. *pl.* 9. *Hil.* 3 *Car.* 1. *B. R.* in caſe of *Jones* v. *Rowe.*

5. *What acts done by the huſband or wife alone, or jointly with the wife, will bind the wife; and of her agreement or diſagreement to ſuch acts after the death of the huſband.*

The husband, as head and governor of the family, has an abſolute power over the chattles real and perſonal which he is poſſeſſed of in right of his wife, to diſpoſe of them as he thinks proper, and no act or concurrence of hers is of any avail, either in confirming or controuling ſuch diſpoſition; but the real eſtate is under a different regulation, and not under the power of the husband, longer than during the coverture; and therefore any diſpoſition of it made by him alone may be defeated, alſo all charges laid on it by him fall off with his death. 1 *Rol. Abr.* 346, 347. 2 *Inſt.* 510. 10 *Co.* 42. 1 *Sid.* 11.

At Common law, any alienation made by the husband of the wife's land, whether by feoffment, fine or recovery, was a diſcontinuance, and after his death ſhe was put to her *cui in vita*, to reinſtate herſelf; but now by the ſtatute 32 *H.* 8. *cap.* 28. it is provided, *That no fine levied by the huſband alone, of lands, being the freehold and inheritance of the wife, ſhall in any wiſe be or make a diſcontinuance, or be otherwiſe prejudicial to her or her heirs, but that the wife and her heirs ſhall and may lawfully enter into the ſaid lands, according to their rights and titles therein.* 2 *Inſt.* 681.

If a feme covert levies a fine of her own inheritance without her husband, this ſhall bind her and her heirs, becauſe they are eſtopped to claim any thing in the land, and cannot be admitted to ſay ſhe was covert againſt the record; but the husband may enter and defeat it, either during the coverture, to reſtore him to the freehold he held *jure uxoris*, or after her death, to reſtore himſelf to his tenancy by the courteſy, becauſe no act of a feme covert can transfer that intereſt which the intermarriage has veſted in the husband; and if the husband avoids it during the coverture, the wife or her heirs ſhall never after be bound by it. *Bro. Tit. Fines*, 33. 10 *Co.* 43. *Hob.* 225. 7 *Co.* 8. *Co. Lit.* 46.

If a husband and wife join in a fine to convey her own inheritance, it ought to be received, if upon her examination it appears to be voluntary and free from conſtraint, and if ſhe be of full age, the fine ſhall bind her as if ſhe had been ſole. 1 *Rol. Abr.* 347. 2 *Rol. Abr.* 20. 2 *Inſt.* 515.

Where the feme is examined by writ, ſhe ſhall be bound, elſe not. 10 *Co.* 43.

Baron and feme levy a fine; this will bar the feme. 1 *Rol. Abr.* 347.

If baron and feme ſuffer a common recovery, this binds the feme; for ſhe is examined in this. 10 *Co.* 43.

Baron and feme acknowledge a deed to be inrolled; this does not bind the feme, becauſe ſhe is not examined by writ. 10 *Co.* 43.

If the *baron and feme* are *bound in an obligation* of 100 *l. for a releaſe made to them of the land de jure uxoris*, and the baron dies, this obligation ſhall bind the feme, becauſe it was made for her releaſe, *which is a benefit to her*; *per Belknap. Quære*; for it was not adjudged. *Br. Baron & Feme, pl.* 77.

If a man *leaſes to baron and feme* for years rendring rent, and dies, the feme ſhall be bound by it; contrary of other collateral covenants. *Br. Baron and Feme, pl.* 78.

Leaſe

Leaſe made *by baron and feme* ſhall be ſaid the leaſe of them both, till the feme diſagrees, which ſhe cannot do in the life of the baron, and waſte lies by both. *Br. Agreement, pl.* 6.

A man was *infeoffed to the uſe of a feme ſole*, who takes an huſband. They both for money ſell the land *to B.* who pays it to the wife, and *ſhe and her huſband do pray the feoffee to make the eſtate to B.* Afterwards her huſband dies. Now, by the Chancellor and all the juſtices, ſhe ſhall have aid againſt the firſt feoffee by ſubpœna, to ſatisfy her for the land; and if the ſecond feoffee were conuſant, a ſubpœna ſhall be againſt him for the land; for all that the wife did during her coverture (as they ſaid) ſhall be taken to be done for fear of the huſband. *Cary's Rep.* 18, 19.

Huſband and wife, *ſeiſed of lands to them and the heirs of the huſband. He covenanted*, in conſideration of 20*l.* that *he and his wife would ſuffer a recovery thereof* by writ of right, according to the cuſtom of *London*, which is as binding as a fine at Common law, and that it ſhould be to the *uſe of the recoverors, until they* (the baron and feme) *had made a good and ſufficient leaſe for* 40 *years, &c. and after to the uſe of the huſband and wife, and to the heirs of the feme.* The *leaſe was made* accordingly, and afterwards the *huſband died.* All the judges were of opinion, that the wife ſhall not avoid this leaſe, becauſe her former eſtate was gone and extinguiſhed by the recovery; and judgment accordingly; and the reporter ſays, that all the juſtices of *B. R.* were of the ſame opinion. *Dyer* 290. *a. pl.* 61.

Fine by *E.* to the uſe of himſelf for life, *remainder to his wife that ſhould be at the time of his death, for life*; remainder to the ſon of *E.* in tail, *E.* took to wife *A. A fine* levied by *E.* and *A.* his wife, who afterwards ſurvived him, and other uſes declared, is *no bar* to her, becauſe it was uncertain who would be the perſon; but had the *perſon been certain*, there perhaps, notwithſtanding it was but a poſſibility, it might have been a bar; *per Walmſley* J. *Cro. E.* 826. *pl.* 31.

The examination of a feme covert is not always neceſſary in levying of fines, becauſe that being provided that ſhe may not at the inſtance of her huſband make any unwary diſpoſition of her property, it follows, that when the huſband and wife do take an eſtate by the fine, and part with nothing, the feme need not be examined; but where ſhe is to convey or paſs any eſtate or intereſt, either by herſelf or jointly with her huſband, there ſhe ought to be examined; therefore if *A.* levies a fine *come ceo* to baron and feme, and they render to the conuzor, the feme ſhall be examined; ſo it is where ſhe takes an eſtate by the fine, rendring rent. 2 *Inſt.* 515. 2 *Rol. Abr.* 17.

If huſband and wife levy a fine, and the wife is within age, they may join in a writ of error to reverſe it during the minority of the wife, not by any privilege of coverture, but becauſe, during her ſtate of infancy, no act of hers can be ſo obligatory as not to be cancelled, if ſhe thinks it prejudicial to her. *F. N. B.* 21. 1 *Leon.* 15. 3 *Lev.* 36.

If a man makes a jointure on his wife, either before or after marriage, and they both join in a fine, ſhe is bound thereby; and if the jointure was made before marriage, ſhe is barred to claim dower in any other lands of the huſband's; but if the jointure was made during coverture, ſhe may claim dower in the other lands. *Co. Lit.* 36. *Dyer* 358.

If baron and feme by fine *ſur conceſſit* grant land to *J. S.* for 99 years, and warrant the ſaid land to *J. S.* during the ſaid term, and the baron dies, and *J. S.* is evicted by one that hath a prior title, he may thereupon bring covenant againſt the feme, notwithſtanding ſhe was covert at the time when the fine was levied. 2 *Saund.* 177. 1 *Sid.* 466. *S. C.* 1 *Mod.* 290. 2 *Keb.* 684, 703.

A recovery, as well as a fine by a feme covert, is good to bar her, becauſe the *præcipe* in the recovery anſwers the writ of covenant in the fine, to bring her into court, where the examination of the judges deſtroys the preſumption of the law, that this is done by the coercion of the huſband, for then it is to be preſumed they would have refuſed her. 10 *Co.* 43. 2 *Rol. Abr.* 395.

But if a wife alone, or with her huſband, barga'n and ſell her lands by deed indented and inrolled, yet it ſhall not bind her, for a wife cannot be examined by any court without writ, and there is no writ allowed in this caſe. 2 *Inſt.* 673. *Hob.* 225.

If a feme covert joins her huſband in levying a fine to raiſe a ſum of money by way of mortgage, this ſhall bind her. See 2 *Vern.* 436, 689. 1 *Vern.* 41, 213.

If a huſband diſſeiſe another to the uſe of his wife, this does not make her a diſſeiſoreſs, ſhe having no will of her own; nor will any agreement of hers to the diſſeiſin during the coverture, make her guilty of the *diſſeiſin*, for the ſame reaſon; but the agreement after her huſband's death will make her a diſſeiſoreſs, becauſe then ſhe is capable of giving her conſent, and that makes her tenant of the freehold, and ſo ſubject to the remedy of the diſſeiſee. 1 *Rol. Abr.* 660. *Bro. Diſſeiſin* 67.

So if a man diſſeiſes another to the uſe of a feme covert, her agreement to it ſignifies nothing, though the huſband's agreement to it ſettles the eſtate in the wife, yet it makes her no ſharer in the guilt of the diſſeiſin. 1 *Rol. Abr.* 660. *Br. Diſſeiſin* 67.

A. having three daughters, *B. C.* and *D.* intails his land upon them; afterwards *C.* married, and being a feme covert, *agreed with conſent of her husband to take* 1000*l. in conſideration of extinguiſhment of her right as coheir.* The judges by their certificate held it to be no bar to her. *Toth.* 162.

A *ſingle woman did agree* to have a moiety of land, *and after marriage, ſubſcribed* her name with her husband to a latter agreement, though feme covert. *Toth.* 160.

M. a feme, before her marriage with *A. conveyed land to truſtees with A.'s privity, in truſt, to pay the rents and profits to her ſole and ſeparate uſe for her life; and after to ſuch uſes as ſhe, whether ſole or covert, ſhould by her laſt will limit and appoint; and for want of ſuch appointment, then to her own right heirs for ever.* After the marriage, *A.* mortgaged the land to the plaintiff for 500 years, to ſecure 1000*l.* *A.* and *M.* joined in a fine, and both declared the uſes to be to the plaintiff for ſecuring this principal and intereſt, the remainder to the right heirs of *A. M.* inſiſted that ſhe was compelled by dureſs to join in the fine, and that the mortgage was fictitious only, and in truſt for *A.* in order to defraud her; and it was argued that this was a *naked power* without any intereſt, and ſo could not be barred by the fine; but Lord Chancellor *è contra*; and decreed the truſtees to convey to the plaintiff, but without prejudice to any future bill that may be brought for diſcovery of the fraud or force. *Caſes in Eq. in* Ld. *Talbot's time*, 41. *Mich.* 1734. *Penne* v. *Peacock.*

A feme covert *by dureſs* joins in *a leaſe* with her huſband, ſhe ſhall be bound by it; *per Manwood* J.

Baron and feme ſeiſed in the right of the feme, *mortgaged* by deed for 300*l.* and covenanted to levy a *fine for further aſſurance*, and if the baron and feme, or either of them, or their heirs, executors, *&c.* did pay, *&c.* then the ſaid *fine to enure to the baron and feme, and the ſurvivor*, and after to the *right heirs of the baron.* A fine was levied, and the monies not paid at the time, but borrowed more money, and by deed confirmed the mortgage for the further ſum: the baron died; his heir an infant; decreed the feme to pay one third, and the infant heir two thirds. *Chan. Rep.* 218.

A. promiſes to leave his wife 400*l.* if ſhe will join in ſale of her lands, and let him have the money to trade with. She joins, and ſix months after he gives bond to a ſtranger to pay his wife 300*l.* after his death; *per Hale* Ch. J. This bond is not fraudulent againſt creditors. 2 *Lev.* 148.

But if a feme covert actually enters and commits a diſſeiſin, either ſole or together with her husband, then ſhe is a diſſeiſoreſs, becauſe ſhe thereby gains a wrongful poſſeſſion, but ſuch actual entry cannot be to the uſe of her husband or a ſtranger, ſo as to make them diſſeiſors, becauſe though by ſuch entry ſhe gains an eſtate, yet ſhe has

has no power of transferring it to another. *Co. Lit.* 357. 1 *Rol. Abr.* 660. *Bro. Diſſeiſin*, 15, 67. See 8 *Hen.* 6. 14 *cont.*

If the huſband ſeiſed of lands in right of his wife, makes a leaſe thereof for years by indenture or deed parol, reſerving rent; all the books agree this to be a good leaſe for the whole term, unleſs the wife by ſome act after the huſband's death, ſhews her diſſent thereto, for if ſhe accepts rent which becomes due after his death, the leaſe is thereby become abſolute and unavoidable; the reaſon whereof is, that the wife after her intermarriage being by law diſabled to contract for, or make any diſpoſition of her own poſſeſſions, as having ſubjected herſelf and her whole will to the will and power of her huſband; the law therefore transfers the power of dealing and contracting for her poſſeſſions to the huſband, becauſe no other can then intermeddle therewith, and without ſuch power in the huſband, they would be obliged to keep them in their own manurance or occupation, which might be greatly to the prejudice of both; but to prevent the huſband's abuſing ſuch power, and leſt he ſhould make leaſes to the prejudice of his wife's inheritance, the law has left her at liberty after his death, either to affirm and make good ſuch leaſe, or defeat and avoid it, as ſhe finds it ſubſervient to her own intereſt; and this ſhe may do, tho' ſhe joined in ſuch leaſe, unleſs made purſuant to ſtatute 32 *Hen.* 8. *cap.* 28. *Bro. Acceptance* 10. *Bro. Leaſes* 24. *Cro. Jac.* 332. 2 *And.* 42. *Co. Lit.* 45. *Plow.* 137. *Cro. Jac.* 563. *Yelv.* 1. *Cro. Eliz.* 769.

Huſband and wife make a leaſe for years, by indenture, of the wife's lands, reſerving rent; the leſſee enters, the huſband, before any day of payment, dies; the wife takes a ſecond huſband, and he at the day accepts the rents, and dies; and it was held, that the wife could not now avoid the leaſe, for by her ſecond marriage ſhe transferred her power of avoiding it to her huſband, and his acceptance of the rent binds her, as her own act before ſuch marriage would have done, for he by the marriage ſucceeded into the power and place of the wife, and what ſhe might have done either as to affirming or avoiding ſuch leaſe before marriage, the ſame may the huſband do after the marriage. *Dyer* 159. 1 *Rol. Abr.* 475. 1 *Rol. Rep.* 132.

The husband being ſeiſed of copyhold lands in right of his wife in fee, makes thereof a leaſe for years not warranted by the cuſtom, which is a forfeiture of her eſtate, yet this ſhall not bind the wife or her heirs after the huſband's death, but that they may enter and avoid the leaſe, and thereby purge the forfeiture; and the diverſity ſeems between this act, which is at an end when the leaſe is expired or defeated by the entry of the lord, or the wife after the husband's death, and ſuch acts as are a continuing detriment to the inheritance, as wilful waſte by the husband, which tends to the deſtruction of the manor; ſo of non-payment of rent, denial of ſuit or ſervice; for ſuch forfeitures as theſe bind the inheritance of the wife after the husband's death; but in the other caſe the huſband cannot forfeit by this leaſe more than he can grant, which is but for his own life. 2 *Rol. Rep.* 344, 361, 372. *Cro. Car.* 7. *Cro. Eliz.* 149. 4 *Co.* 27.

A woman guardian in ſocage marries, and joins with her husband by indenture in making a leaſe for years of the ward's lands, yet after her husband's death ſhe may avoid the ſame; for though the husband has abſolute power of all chattles, either real or perſonal, whereof he is poſſeſſed in right of his wife, and the wardſhip of the body, and the land in this caſe is but a chattle, yet the wife being poſſeſſed of it in right of the infant, and accountable to him for the profits when he comes of age, the husband's diſpoſition ſhall not bind her after his death, but that ſhe may evade it in right of the infant, whoſe guardian ſhe ſtill continues to be; and her own joining in the leaſe was not material, becauſe ſhe was then under coverture. *Plowd.* 293. *Co. Lit.* 351. 1 *Rol. Abr.* 343.

A feme covert is capable of purchaſing, for ſuch an act does not make the property of the husband liable to any diſadvantage, and the husband is ſuppoſed to aſſent to this, as being to his advantage, but the husband may diſagree; and it ſhall avoid the purchaſe; but if he neither agrees nor diſagrees, the purchaſe is good, for his conduct ſhall be eſteemed a tacit conſent, ſince it is to turn to his advantage; but in this caſe, though the huſband ſhould agree to the purchaſe, yet after his death ſhe may waive it, for, having no will of her own at the time of the purchaſe, ſhe is not indiſpenſably bound by the contract; therefore if ſhe does not, when under her own management and will, by ſome act expreſs her agreement to ſuch purchaſe, her heirs ſhall have the privilege of departing from it. *Co. Lit.* 3. *a.*

Jointreſs paying off a mortgage was decreed *to hold over* till ſhe or her executor be ſatisfied, and intereſt to be allowed her. *Chan. Caſes* 271.

A. and his wife ſeiſed of lands in the right of the wife, by fine and deed, *mortgage* them for 340 *l* which was not paid at the day, but 200*l. part was paid* afterwards, and then *A. borrowed other money* of the ſame mortgagee. The payment of the 200*l.* was indorſed on the mortgage deed. The wife, in the preſence of *A.* made account of what was due on the firſt and ſecond loan; for both, by agreement, were to be on ſecurity of the mortgage. The wife died, but *no fine was levied on the ſecond loan*, and therefore objected, that neither the wife's nor *A.*'s conſent ſhould bind the heir; but *Finch* C. *contra*; for the mortgagee has good title in law, and as much equity to the money as the heir has to the land. 2 *Chan. Ca.* 98.

Where the wife *joined in a fine ſur conceſſit* of her *jointure*, being houſes burnt down in the fire of *London*, in order to a *mortgage* or ſecurity to raiſe 1500*l.* to rebuild them, it is not an abſolute departure with her intereſt; but there is a *reſulting truſt* for her, when the ſecurity or mortgage is paid, to have her eſtate again, as if it had been a mortgage on condition, and the money paid at the day. 2 *Chan. Ca.* 98.

The husband gave a voluntary bond after marriage to make a jointure of ſuch value on his wife; the husband accordingly makes a jointure; the wife gives up the bond; the jointure is *evicted*; the jointure ſhall be made good out of the husband's perſonal eſtate, there being no creditors in the caſe; and the delivery up of the bond by a feme covert could no ways bind her intereſt. *Vern.* 427. *pl.* 402.

A feme covert agrees to ſell *her inheritance*, ſo as ſhe might have 200*l.* of the money ſecured to her; the land is ſold, and the money put out in a truſtee's name accordingly; this money ſhall not be liable to the *huſband's debts*, nor ſhall any *promiſe by the wife* to that purpoſe, ſubſequent to the firſt original agreement, be obliging in that behalf. 2 *Vern.* 64, 65. *pl.* 58. *Trin.* 1688.

Feme joins with baron in a mortgage of her own inheritance, to raiſe money to buy a place for the baron; baron covenants in the mortgage to pay the money (4500*l.*) and on payment thereof by proviſo the term is to ceaſe. The mortgage is afterwards *aſſigned*, and the proviſo is, that on payment of them, or either of them, the *term to be aſſigned, as they or either of them ſhall direct*. Baron, ſoon after the mortgage, promiſed his wife to apply the profits of his place to pay it off. *Baron pays it off, and takes an aſſignment in truſt for himſelf, and deviſed it to a ſecond wife.* The ſon and heir of the baron and firſt wife brings a bill to have the mortgage aſſigned to him. Denied relief in Chancery but on payment of principal, intereſt and coſts. But *in dom. procer.* decreed the mortgage to be aſſigned to the heir. 2 *Vern. Rep.* 437.

Baron and feme *mortgaged* his wife's eſtate, and baron *covenants to pay* the money, but the *equity of redemption* was reſerved *to them and their heirs.* Baron died, and made *J. S.* executor; *per cur.* The baron having had the money is, in equity, the debtor, and the land is to be conſidered but as additional ſecurity, and ſo decreed it according to the judgment *in dom. proc.* in the caſe of Lord and Lady *Huntington.* 2 *Vern.* 604. *pl.* 542.

The wife joined with the husband in a fine to raiſe 400*l. to equip him as an officer* of the army. The huſband dies. *Per cur.* This muſt be taken to be a debt due from

from the husband, and to be paid out of his personal estate if he be able; but all other debts shall be paid first. 2 *Vern.* 689.

6. *Where the husband and wife must join in bringing actions; where they must be jointly sued; and where a wife shall be considered as a feme sole.*

In those cases where the debt or cause of action will survive to the wife, the husband and wife are regularly to join in action; as in recovering debts due to the wife before marriage; in actions relating to her freehold or inheritance, or injuries done to the person of the wife. 1 *Rol. Abr.* 347.

But if a feme sole hath a rent-charge, and rent is arrear and she marries, and the baron distrains for this rent, and thereupon a rescous is made, this is a tort to the baron himself, and he may have an action alone. *Cro. Eliz.* 439. *Owen* 82. *S. P. Moor* 584. *S. C.*

So if a feme sole hath right to have common for life, and she takes husband, and she is hindred in taking the common, he may have an action alone without his wife, it being only to recover damages. 2 *Bulst.* 14.

But if baron and feme are disseised of the lands of the feme, they must join in action for the recovery of this land. 1 *Bulst.* 21.

If the baron be possessed of a rectory for years, in the right of his feme, he and his feme may join in an action upon the 2 *Ed.* 6. for not setting forth of tithes; for the possession of the baron is in the right of the feme, and the action is given by the statute to the proprietor. *Cro. Eliz.* 608. 13 *Co.* 47. *S. C. Moor* 912. *S. C.*

If a feme sole is possessed for years of a close to which time out of mind there hath been a way through the close of *J. S.* next adjoining, and *J. S.* erects a building *ex transverso viæ prædict'*, so that she cannot use the said way, and after she marries, the baron and feme may join in an action for the stoppage during the coverture, declaring that after the said marriage they could not use the said way, *&c.* because the wrong was done to the feme, and the baron had the close in her right. 1 *Bulst.* 110. 2 *Vent.* 197. *Cro. Car.* 419. 2 *Mod.* 217. *S. C.*

If *A.* declares that he was seised, in right of his wife, of a messuage, bakehouse, *&c.* and that the defendant erected two houses of office so near the said bakehouse, which foundered the walls thereof, and by which the air was so unwholesome that he lost his custom, *&c.* the action lies for the husband alone. 2 *Mod.* 269.

If *A.* leases to *B.* for years, rendring rent, and after grants his reversion to baron and feme, and *B.* attorns, and then the rent is arrear, and the term expires, the baron may bring an action alone for this rent, because this action is grounded upon the duty, and upon the nature of their estate; and the money must come to the baron; and there is no difference where baron and feme are joint-lessors, and where joint-purchasers. 2 *Bulst.* 233. 1 *Rol. Rep.* 52. *S. C. adjudged.*

But if *A.* conveys lands to *B.* in fee, and covenants with him, his heirs and assigns to make further assurances, and these lands are assigned to *J. S.* and his wife, and the heirs of *J. S.* they must both join in an action on the covenant for further assurances. 1 *Rol. Abr.* 348. *Cro. Car.* 503, 505. 1 *Jones* 406, 407. *S. C.*

But if a bond is made to a feme covert, during coverture, conditioned to pay money to the feme, the baron alone may bring an action upon this bond. 3 *Lev.* 403.

Rescous was brought by the baron and feme, *of rescous made by the lord in right of his feme*; and it was argued that the baron alone ought to have the action, and afterward that the action is well brought in name of both; *quod nota.* And *per Littleton*; It is well brought also in the name of the baron only. *Br. Baron and Feme, pl.* 50.

Baron brought an action for the battery of his wife, *per quod negotia sua infecta remanserunt*, and had judgment to recover. *Cro. Jac.* 502. *pl.* 11.

Where the *feme is administratrix*, the suit must be in both their names, and they shall be named administrators; for by the intermarriage the husband hath authority to intermeddle with the goods as well as the wife; but in the declaration *all the special matter must be set forth*; *per Wray* Ch. J. and so some said is the book of Entries, that both of them shall be named administrators. *Godb.* 40. *pl.* 44.

In action *for goods which the feme has as executrix*, they must join, to the end that the damages thereby recovered may accrue to her as executrix in lieu of the goods. *Went. Off. Ex.* 207.

In battery the plaintiff declared, that on such a day the defendant assaulted and *beat his wife*. This *action was brought by the husband after the death of his wife*, and it being a personal wrong, is dead with the person; and if she had been living, the husband alone could not have the action, because damages must be given for the tort offered to the body of his wife; *quod fuit concessum. Yelv.* 89.

A feme sole had right of common for her life, and marries *B.* who, being hindered in taking the common, brings action in his own name, without naming his wife. The court held the action well brought, it being only to recover damages. 2 *Bulst.* 14.

The Queen leased a house to *C.* who *covenanted for himself and his executors and assigns to repair*, and leave the house repaired. Afterwards the Queen *granted the reversion to* B. *the plaintiff and his wife, and to the heirs of* B. *in fee*; and for not repairing, *B.* alone brought covenant. Resolved, that the action being personal, and damages only recoverable, *the husband may alone have the action, or join the wife* with him. *Cro. Jac.* 399. *pl.* 6.

Trespass of assault, and *wounding of the plaintiff*, *nemon* of assaulting and *beating the plaintiff's wife, per quod consortium uxoris suæ amisit* for three days. Found against the defendant in both. It was moved that the husband ought not to join the battery of his wife with the battery of himself; but resolved that the action was well brought; for it is not brought in respect of the harm done to the wife, but for the husband's particular loss, that he lost the company of his wife, which is only a damage to himself. *Cro. Jac.* 501. *pl.* 11.

If *A.* in consideration that *B.* a feme covert, will cure a wound, assumes and promises to *B.* to pay unto her 10*l.* if *B.* does cure it accordingly, she may join with her husband in an *assumpsit* for this money; for this promise arising upon a matter of skill and performance of the wife, she is the cause of the action; and such an action will survive to the wife. *Cro. Jac.* 77, 205.

If *A.* in consideration that baron and feme had intermarried at his request, assumes and promises to them to pay unto the feme 8*l. per ann.* during the coverture, *&c.* Notwithstanding the whole benefit redounds to the husband, yet in an action thereupon they may join, *a fortiori*, because it is an executory promise, and hath continuance, and is not to be done *unica vice* only. 1 *New Abr.* 306.

It seems clearly agreed, that for debts due to the wife, and all causes of action before coverture, the husband must join in the action. 1 *Rol. Abr.* 347. *Mo.* 422. *S. P.*

In an action upon a *trover* before marriage, and a *conversion* after, the baron and feme ought to join; for this action, as a trespass, disaffirms the property; but the baron ought alone to bring a *replevin*, *detinue*, *&c.* for these actions admit and affirm a property in the feme at the time of the marriage, which by consequence must have vested in the baron. 1 *Sid.* 172. 1 *Keb.* 641. *S. C.* 1 *Vent.* 261. 2 *Lev.* 107. *S. P.* and that he may join the wife at his election.

But if *A.* declares, that the defendant being indebted to him and his wife, as executrix to one *J. S.* in consideration that *A.* would forbear to sue him for three months, assumed, *&c.* and avers that he forbore, and that his wife is still alive, the action is well maintainable by the husband alone, for this is on a new contract, to which the wife is a stranger. *Carth.* 462. 1 *Salk.* 117. *Yelv.* 84. *Cro. Jac.* 110. *S. P.*

For a battery or other personal *tort* done to the wife they must join, and if the wife dies, the action dies with her. 1 *Rol. Rep.* 360.

But the baron may bring an action alone for the battery, carrying away and detaining of his wife, *per quod ſolamen & conſortium* of his ſaid wife *amiſit*, becauſe the action is founded upon the ſpecial damage done to himſelf, and will be no bar to another action brought by baron and feme, or by the feme after the death of the baron, for the ſame battery. *Cro. Car.* 89, 90.

In treſpaſs by baron and feme, they declared for a battery of the feme, & *quod* the defendant *alia enormia eis intulit*; and tho' objected, the feme cannot join for a wrong done to the baron, yet becauſe the *alia enormia*, &c. was but form, and only in aggravation of damages, and altered not the ſubſtance of the declaration; it was adjudged for the plaintiffs. *Cro. Jac.* 664.

So in treſpaſs and falſe impriſonment by baron and feme, *per quod negotia domeſtica* of the huſband *remanſerunt infecta ad damnum ipſorum*; and it was objected, that this being laid as a ſpecial damage to the huſband, the action ought to have been brought by him alone, but adjudged for the plaintiff after verdict, being only matter in aggravation of damages. 1 *Salk.* 119.

In treſpaſs by baron and feme for beating the feme; they may declare that it was *ad damnum ipſorum*, notwithſtanding a feme covert can have no damages, for this action will ſurvive. 1 *Sid.* 387.

But if in *trover* by baron and feme, they declare *quod cum poſſeſſionat' fuerunt*, &c. and that the defendant converted, *ad damnum ipſorum*, this is naught after verdict; for the poſſeſſion of the wife is the poſſeſſion of her huſband, and ſo is the property; ſo that the converſion cannot be to the damage of the wife, but of the huſband only. 1 *Salk.* 114.

The huſband is by law anſwerable for all actions for which his wife ſtood attached at the time of the coverture, and alſo for all torts and treſpaſſes during coverture, in which caſes the action muſt be joint againſt them both; for if ſhe alone were ſued, it might be a means of making the huſband's property liable; without giving him an opportunity of defending himſelf. *Co. Lit.* 133. *Doctr. Placit.* 3. 2 *Hen.* 6. 4.

If goods come to a feme covert by *trover*, the action may be brought againſt huſband and wife, but the converſion may be laid only in the huſband, becauſe the wife cannot convert goods to her own uſe; and the action is brought againſt both, becauſe both were concerned in the treſpaſs of taking them. See *Co. Lit.* 351. 1 *Rol. Abr.* 6. *pl.* 7. *Yelv.* 166. *Noy* 79. 1 *Leon.* 312. *Cro. Car.* 494, 254. 1 *Rol. Abr.* 348.

An action on the caſe was brought againſt baron and feme, for retaining and keeping the ſervant of the plaintiff, and judgment accordingly. 2 *Lev.* 63.

If a leaſe for life or years be made to baron and feme, reſerving rent, an action of debt for rent arrear may be brought againſt both, for this is for the advantage of the wife. 1 *Rol. Abr.* 348.

If an action be brought againſt the huſband and wife, and the wife be arreſted, ſhe ſhall be diſcharged upon common bail; for nobody can be ſuppoſed to undertake for a wife, who hath no property of her own. 1 *Salk.* 114. *Comb.* 355. 6 *Mod.* 17, 105.

In *debt againſt huſband and wife* he was *outlawed* and his wife was *waived*, afterwards ſhe pleaded the Queen's pardon; adjudged, that ſhe ſhall be diſcharged of her *impriſonment*, but the pardon was not allowed, becauſe ſhe could not ſue out a *ſcire facias* againſt the plaintiff to make him declare upon the original without her huſband, and becauſe there was a condition in the pardon, *(viz.) Ita quod ipſa ſtaret recta in curia*, which ſhe could not do without him. *Dyer* 271.

An action of debt was brought *by the huſband alone*, upon a *judgment* obtained in an action brought by him and his wife; and becauſe the wife was not joined in this action, the defendant demurred to the declaration; but adjudged, that the action was well brought by the huſband alone. *Cro. Eliz.* 844.

Huſband and wife, ſeiſed of lands in right of the wife, made a leaſe thereof for twenty-one years, and the leſſee covenanted for himſelf, his executors, &c. to build a *brick wall* upon part of the lands; the leſſee afterwards aſſigned his term to another, and the huſband and wife joined in an action againſt the aſſignees of the leſſee for not building the wall; and adjudged, that the action was well brought by both. 5 *Rep.* 16.

Where a right of action doth accrue to a woman before marriage, as where a bond is made to her and forfeited, there, if ſhe marry, ſhe muſt be joined with the huſband in an action of debt againſt the obligor; but where the right doth accrue after marriage, there it may be otherwiſe; however, in that caſe, 'tis the ſafeſt way to join both in the action. *Owen* 82.

Where a *feme ſole* is indebted, and afterwards married, ſhe and her huſband ſhall both be ſued *for her debts*, and the action muſt be *joint* againſt both during her life; but if ſhe dieth, the huſband ſhall not be charged with her debts, unleſs judgment was had againſt him and his wife during the coverture. *F. N. B.* 120.

The huſband being ſeiſed of an houſe in right of his wife, who was tenant thereof for life, brought an action alone againſt the defendant, for waſte done to the houſe; it was a queſtion, whether he could maintain this action alone, becauſe the wrong was done to the eſtate which he had in right of his wife, and it might ſo happen, that no loſs or injury might accrue to him, for no action might be brought againſt him by the leſſor in the life-time of his wife, and if ſo, then he is not chargeable after her death, for which reaſon the wife ought to be joined in the action; the court doubted, and no judgment was given. *Cro. Eliz.* 461.

Raviſhment of ward was brought upon the ſtatute *W.* 2. *cap.* 35. againſt huſband and wife; the jury found the wife guilty, but acquitted the husband, and aſſeſſed coſts and damages; adjudged, that the wife was not within this ſtatute, becauſe ſhe, being a feme covert, cannot make ſatisfaction, having nothing of her own to do it; for the goods and lands of her husband, who is innocent, are not liable by this ſtatute for the injury done by his wife, but the plaintiff might have an action of treſpaſs at Common law againſt thoſe which did the injury, or a writ *de valore maritagii* againſt the heir. 9 *Rep.* 71.

Debt againſt *husband and wife as executrix* to her former husband; he appeared upon the *exigent*, and would have put in a *ſuperſedeas* for himſelf alone, but was not admitted by the court ſo to do, but was compelled to put in an appearance, and to appoint an attorney, and a *ſuperſedeas* for his wife as well as for himſelf. *Cro. Eliz.* 118.

Trover againſt husband and wife, and the *converſion* is charged on the wife alone; if *they both plead Not guilty*, and the plaintiff hath judgment, 'tis not good, becauſe the husband being not charged with any wrong, the *iſſue* ought to have been *quod ipſa* is not guilty, and therefore the judgment was reverſed, and that reverſal was affirmed in a writ of error. *Cro. Eliz.* 883.

Aſſumpſit againſt husband and wife; after imparlance the record was *ad quem diem tam prædict'* (the plaintiff) by attorney, *quam præd'* (the husband and wife) by their attorney *veniunt*, &c. & *præd' Brigitta dicit quod ipſa non aſſumpſit*; the plaintiff had a verdict, but could never get judgment; becauſe the plea is only by the wife, and ſhe alone cannot plead without her husband, for by law they muſt both join in pleading. *Yelv.* 210.

Error of a judgment in *aſſumpſit by husband and wife* againſt the defendant, who promiſed that, in conſideration the wife would cure him of ſuch a wound, he would pay her 10*l.* the error aſſigned was, that the husband alone ſhould have brought the action, for the promiſe being made during the coverture, the not performing it was a damage to the husband and not to the wife; but adjudged, that the action was well brought *by both*, becauſe the cauſe of the promiſe did ariſe from the ſkill and labour of the wife. 2 *Cro.* 77, 205.

Debt againſt husband and wife, wherein the plaintiff declared for 39*s.* upon a contract of the *wife dum ſola*, and for 39*s.* more upon an *inſimul computaſſet* with the husband; upon *nil debet* pleaded, it was found for the plaintiff, but he could never get judgment, becauſe he had declared

declared upon ſeveral contracts of the huſband and wife, in which caſe they cannot be *joined in one action*. *Hob.* 19, 184.

Error of a judgment in an *inferior court*, in an action of *trover againſt huſband and wife*; the goods were alledged to be in her poſſeſſion, and a requeſt made to both to deliver them; and that ſhe and her huſband refuſed, and afterwards the wife *converted* them to her own uſe; the error aſſigned was in the entry of the judgment, which was, that the *wife be in miſericordia*, when it ſhould be the *huſband and wife in miſericordia*; becauſe both were required to deliver the goods, and for this reaſon the judgment againſt them was reverſed. 3 *Bulſt.* 150.

Treſpaſs and aſſault againſt huſband and wife, ſuppoſing, that they *both* beat the plaintiff; upon Not guilty pleaded, the jury found, that the *wife only* beat him; adjudged, that in ſuch caſe the verdict is againſt the plaintiff, becauſe it appears that his action is falſe, for the huſband is not joined for conformity only in this action. 1 *Brownl.* 209.

Treſpaſs, *&c.* againſt the defendant, brought by the huſband and wife, for beating the wife, and taking the goods of the huſband only, *ad damnum ipſorum*; it was objected againſt the declaration, that the wife cannot join for a treſpaſs done to her huſband alone, but he may join in a treſpaſs done to her alone; ſo if the huſband and wife bring an action of treſpaſs for beating the wife, he may declare of a treſpaſs done to him *ad damnum ipſius* the plaintiff. *Hetley* 2.

A leaſe was made to huſband and wife of an ancient mill, where the inhabitants of ſuch houſes uſed to grind their corn, and for not grinding they brought an action againſt them, in which they had a verdict, but could never get judgment, becauſe the action was brought *by the huſband and wife*, and being only for damages, and not for the term, the wife ſhould not be *joined*. *Hob.* 189.

A *feme ſole* was proprietor of a parſonage, and married, and then the huſband alone brought an action upon the ſtatute 2 *Edw.* 6. *for treble damages* againſt a pariſhioner for not *ſetting out his tithes*; adjudged, that tho' the huſband may ſue alone for a thing which is perſonal, yet in this caſe, the ſtatute giving the action to the *proprietor*, the huſband cannot be intended to be the proprietor, but the wife; therefore ſhe ought to be joined in the ſuit. 2 *Brownl.* 9.

In *falſe impriſonment* brought by *the huſband* for aſſaulting and impriſoning his *wife*; the defendant juſtified by virtue of a warrant upon a *ca. ſa.* to take *Julian Goddard, widow*, who, in truth, at that time, was a widow, but before ſhe was taken, ſhe was married to one *Daily*, the now plaintiff; adjudged, that this was a good deſignation of the party who was to be taken, and that the *capias* was well awarded againſt her alone; and if the ſheriff had returned, that ſhe was *married, or non eſt inventa*, it had been an ill return, becauſe directly againſt all proceedings againſt her by the name of *Julian Goddard*; for if an action is brought againſt a widow, and ſhe marries before judgment, the *capias* ſhall be awarded againſt her, and not againſt her huſband. 2 *Buſt.* 80.

Aſſault and battery againſt huſband and wife; the huſband juſtified, for that the plaintiff aſſaulted his wife, in aid of whom *molliter manus impoſuit, &c.* the wife pleaded by herſelf *ſon aſſault demeſne*; the plaintiff replied *de injuria ſua propria abſque tali cauſa*; and both iſſues being found for him, and entire damages given, which being moved in arreſt of judgment, adjudged, that it was ill, and that the trial was ill, becauſe the wife could not plead by herſelf. 2 *Cro.* 339.

Action againſt *husband and wife*, upon a promiſe made by her *dum ſola*, they both appeared, and the woman pleaded *quod ipſa non aſſumpſit*, upon which they were at iſſue, and the plaintiff had a verdict; and upon a motion in arreſt of judgment it was inſiſted, that a plea of a feme covert, without her huſband, is not good, and by conſequence an iſſue joined upon ſuch a plea is idle and helped by the ſtatute of jeofails; and ſo it was adjudged. 2 *Cro.* 288.

The huſband diſtrained for arrears of rent due to the *wife dum ſola*; and upon a *reſcous* made, the huſband alone brought the action againſt thoſe who reſcued the diſtreſs; adjudged, that he alone, or both, might bring the action; but for a debt due to the wife *dum ſola*, they muſt both join in the action. *Moor* 422.

Husband and wife brought an action againſt the defendant, for that he preſented them in the ſpiritual court, for making *hay on midſummer-day*, and this upon oath, and that they made this hay in time of divine ſervice, when in truth they did not make hay on that day in time of divine ſervice; the defendant pleaded, that they did make hay on that day, *&c.* upon which they were at iſſue, and the plaintiffs had a verdict, but the judgment was ſet aſide, becauſe the *husband and wife* ought not to join in this action, no more than in an *aſſault and battery*, for the falſe oath againſt the huſband could not be ſo againſt the wife. 1 *Rol. Rep.* 108.

Caſe, &c. againſt *husband and wife* for ſcandalous words ſpoken *by the wife*; defendant pleaded, that *ipſi non ſunt culpabiles*, and the jury found *quod ipſi ſunt culpabiles*; it was objected in arreſt of judgment, that the husband was joined only for conformity, and therefore it cannot be ſaid that *ipſi ſunt culpabiles*, but that *ipſa eſt culpabilis*, and the verdict ſhould have been ſo accordingly: but *per curiam*, The plea of the husband is void, and if ſo, the verdict is good againſt the wife. 1 *Rol. Rep.* 216.

A promiſe was made to the wife, and the husband and wife brought an *aſſumpſit*, and concluded *ad damnum ipſorum*. *Sed per curiam*, They ought not to join in this action, for a wife cannot agree to contract during the coverture, in her own name. 2 *Rol. Rep.* 250.

A husband who has abjured the realm, or who is baniſhed, is thereby *civiliter mortuus*; and being diſabled to ſue or be ſued in right of his wife, ſhe muſt be conſidered as a feme ſole; for it would be unreaſonable, that ſhe ſhould be remedileſs on her part, and equally hard on thoſe who had any demands on her, that, not being able to have any redreſs from her husband, they ſhould not have any againſt her. *Br. Baron and feme* 66. *Co. Lit.* 133. *a.* 1 *Rol. Rep.* 400. *Moor* 851. 3 *Bulſt.* 188. 1 *Bulſt.* 140. 2 *Vern.* 104.

7. Of the power of the huſband over the perſon of his wife; her remedy for any injury done her by him; and of actions by the huſband for criminal converſation with his wife.

The husband hath by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner; for in ſuch caſe, or if he but threaten to beat her outrageouſly, or uſe her barbarouſly, ſhe may bind him to the peace, by ſuing out a writ of *ſupplicavit* out of the Chancery, or may apply to the ſpiritual court for a divorce *propter ſævitiam*. *Crom.* 28, 136. *F. N. B.* 80. *Hetl.* 149. *cont.* 1 *Sid.* 113, 116. *Dalt. c.* 68. *Lamb.* 7. *Crom.* 133.

But a wife cannot, either by herſelf or her *prochein amy*, bring a *homine replegiando* againſt her husband, for he has by law a right to the cuſtody of her, and may, if he thinks fit, confine her, but he muſt not impriſon her; if he does, it will be good cauſe for her to apply to the ſpiritual court for a divorce *propter ſævitiam*; and the nature and proceedings in the writ *de homine replegiando* ſhew that it cannot be maintained by the wife againſt her husband. *Prec. in Ch.* 492.

Licence *by husband* to the wife to lie with another man, cannot be pleaded in bar to an action of treſpaſs by the husband; nor that ſhe was a *notorious lewd woman*; but theſe matters may be given in mitigation of damages. 12 *Mod.* 232.

If adultery be committed with another man's wife *without any force, but by her own conſent*, the husband may have aſſault and battery, and lay it *vi & armis*; and yet they ſhall in that caſe puniſh him below for that very offence; for an indictment will not lie for ſuch an aſſault and

and battery; neither ſhall the husband and wife join in an action at Common law; and therefore they proceed below either civilly, that is, to divorce them, or criminally, becauſe they were not criminally proſecuted above; and the true action for the husband in ſuch caſe is a *ſpecial action, quia the defendant uxorem rapuit*, and not to lay it, *per quod conſortium amiſit*; *per Holt* Ch. J. and *per cur.* accordingly; for that the offence is not merely ſpiritual. 7 *Mod.* 81.

8. *Of crimes and offences committed by the wife; where ſhe alone ſhall be puniſhed, and where the husband ſhall be anſwerable for what ſhe doth in a civil action.*

A feme covert is ſo much favoured in reſpect of that power and authority which her husband has over her, that ſhe ſhall not ſuffer any puniſhment in committing a bare theft, in company with or by coercion of her huſband. *Kelw.* 31. *S. P. C.* 26, 142. *H. P. C.* 65. 27 *Aſſ.* 401. *Hawk. P. C.* 2. She ſhall not be deemed acceſſary to a felony for receiving her husband who has been guilty of it, as her husband ſhall be for receiving her. 3 *Inſt.* 108. *H. P. C.* 65. 2 *Hawk.* 320.

But if ſhe commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treaſon, murder, or robbery, in company with, or by coercion of her husband, ſhe is puniſhable as much as if ſhe were ſole. *H. P. C.* 65. *Dalt.* 104. 27 *Aſſ. pl.* 40. *Fitz. Coron.* 199.

A feme covert generally ſhall anſwer as much as if ſhe were ſole, for any offence not capital againſt the Common law or ſtatute; and if it be of ſuch nature, that it may be committed by her alone, without the concurrence of her huſband, ſhe may be puniſhed for it without the huſband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the huſband ſhall not be included in it for any offence to which he is no way privy. 9 *Co.* 71. *Hawk. P. C.* 3. See *Moor* 813. *Hob.* 93. *Noy* 103. *Savil* 25. *Cro. Jac.* 482. 11 *Co.* 61.

A feme covert lent 20*l.* to be paid at 20*s.* by the week, and one ſhilling and ſixpence intereſt; the borrower paid the intereſt, which amounted to 30*s.* which the wife exacted and received; and this appearing on evidence, in an action brought by the huſband for the money, *Holt* Ch. Juſt. ruled it to be an uſurious contract by the huſband, ſufficient to diſcharge and avoid the obligation *civiliter*, though not ſufficient to charge the huſband *criminaliter*. *Skin.* 348.

If the wife incur the forfeiture of a penal ſtatute, the huſband may be made a party to an action or information for the ſame, as he may be generally to any ſuit for a cauſe of action given by his wife, and ſhall be liable to anſwer what ſhall be recovered thereon. See 1 *Hawk. P. C.* 3. and the authorities there cited.

If a feme covert, pretending herſelf to be ſole, marries a ſecond huſband, he ſhall have no action againſt the firſt, becauſe this action is founded upon the communication and contract of the wife, which will not bind the huſband; beſides, this is felony. 1 *Sid.* 375. 1 *Lev.* 247.

Several goods were deviſed to *A.*'s wife for life, and after her deceaſe to *J. S.* In this caſe, though *A.* and his wife were parted, and there had been great ſuits for alimony, and ſhe, during the ſeparation, had waſted the goods, yet the Lord keeper thought it reaſonable that the huſband ſhould be charged for this converſion of the wife's, *B.*'s title being paramount the feme's. 1 *Vern.* 143.

Feme was arraigned of felony, and was covert baron, *and would have confeſſed by command of the baron*, and the *court would not take it* for pity, *but charged the inqueſt, who ſaid that ſhe did it by coercion of her baron in ſpight of her teeth*, by which ſhe went quit; and it was ſaid that the command of the baron, without other coercion, ſhall not make felony. The reaſon ſeems to be, in as much as the law intends that the feme, who is under the power of her baron, does not contradict her baron. *Br. Corone, pl.* 108.

A feme covert *commits felony*. *Appeal* ſhall be brought againſt her without her huſband, becauſe it concerns life, as if ſhe commits treſpaſs. *Jenk.* 28.

The huſband ſhall not anſwer for *damages given in a criminal matter*, as in an information for ſuppreſſing a will; though for civil offences it is otherwiſe, as battery, ſlander, or *aſſumpſit* by feme covert. *Noy* 103, 104.

Where debt was brought againſt husband and wife for the *recuſancy* of the wife, the husband would have appeared by a *ſuperſedeas* alone; but the court reſolved that either both muſt appear, or both be outlawed. *Hob.* 179.

At the ſeſſions at the *Old Baily* the 7th of *December* 1664, one *Jane Jones*, together *with one* Thomas Warton, *were indicted for burglary*, and ſhe *pleaded herſelf to be married to Warton*, on purpoſe to be excuſed, being with the husband at the burglary; and ſhe refuſed to plead by the name of *Jones*, and thereupon we called for the jury which found the indictment, and in their preſence, and by their conſent, we made the indictment as to her name to be *Jane Warton, alias Jones*, but we did *not call her Jane Warton, the wife of Thomas Warton, but gave her the addition of ſpinſter*, and then ſhe pleaded to it; and the court told her, that if upon her trial ſhe could prove ſhe was married to *Warton* before the burglary committed, ſhe ſhould have the advantage of it; but on the trial ſhe could not prove it, and ſo was found guilty, and judgment given upon her. *Kel.* 37.

A *feme covert was indicted alone for buying and ingroſſing fiſh contrary to the ſtatute*, and found guilty, and it was moved to quaſh the indictment, becauſe a married woman cannot make a contract without her husband, and that he ought to be joined in this indictment; for if any profit ariſes by buying and ingroſſing, it accrues to the husband alone, but whether ſhe might in this caſe, the court gave no judgment. *Sid.* 410.

Where the *husband and wife uſe the ſame trade*, as ſelling of ale, *&c.* ſhe does it as ſervant, and he alone ſhall be indicted.

Husband and wife may be found guilty of *nuſance, battery, &c.* and the reaſon why in *burglary, larceny*, &c. ſhe is excuſed, is, *becauſe* ſhe could not tell what property the husband might claim in the goods. *Arg.* 10 *Mod.* 63.

Husband and wife were indicted for keeping a *bawdy-houſe and procuring lewdneſs*. The court held the indictment good, and ſaid, that keeping the houſe does not neceſſarily import property, but may ſignify that ſhare of government which the wife has in a family as well as the husband. 10 *Mod.* 63.

Husband and wife were indicted for keeping a *common gaming-houſe*, and held good, and compared it to the caſe of *Queen* v. *Williams*; for as there the wife may be concerned in acts of bawdry, ſo here ſhe may be active in promoting gaming, and furniſh the gueſts with all conveniencies for the purpoſe. 10 *Mod.* 335.

9. *Of divorce, and the effects of it; and of ſeparate maintenance and pin-money.*

If a man *gives lands in tail to baron and feme*, and they have iſſue, and after *divorce is ſued*, now they have only frank tenement, and the iſſue ſhall not inherit; for it was once poſſible that their iſſue might inherit. *Br. Tail et dones, &c. pl.* 9.

If *a man is bound to feme ſole*, and after *marries her*, and after they are divorced, *the obligation is revived. Br. Coverture, pl.* 82.

The feme, after divorce, ſhall re-have *the goods which ſhe had before marriage. Br. Coverture, pl.* 82.

If land be given in frank-marriage, and donees are divorced, which of them firſt moves for the divorce ſhall loſe the land, *per Shelly*; but by *Fitzherbert*, the land ſhall be *divided* between them. Cited *Dyer* 13. *pl.* 62. *Trin.* 28 *Hen.* 8.

If the baron and feme *purchaſe jointly and are diſſeiſed, and the baron releaſes*, and after they are divorced, the feme ſhall have the *moiety*, tho' before the divorce they were no moieties; for the divorce converts it into moieties. *Br. Deraignment, pl.* 18. cites 32 *Hen.* 8.

If

If baron *alien* the *wife's land*, and then is a divorce *cauſa præcontractus*, or any other divorce which diſſolves the marriage *a vinculo matrimonii*, the wife during the life of baron may *enter* by ſtatute 32 *Hen.* 8. *Dyer* 13. *pl.* 61.

If obligor or obligee marry with the party, and after are divorced *cauſa præcontractus*, the *debt is extinct. Dyer* 140.

After divorce the wife ſhall have ſuch *goods as were hers* before marriage, and are not ſpent. *D.* 13. *pl.* 63. by *Fitzherbert*, and ſays, that ſo was the opinion of the court about the 26 *Hen.* 8. *Kelw.* 122. *b. pl.* 75.

Divorce *cauſa adulterii* of the huſband; afterwards the wife ſues in the ſpiritual court for a *legacy*; the executor pleads the *releaſe of the baron*; the releaſe binds the wife, for the *vinculum matrimonii* continues. *Cro. E.* 908.

Huſband may *releaſe coſts* adjudged to the wife ſuing in the ſpiritual court, notwithſtanding a divorce *a menſa & thoro*; but if ſuch divorce be, and the wife has *alimony*, and ſhe ſues there for defamation, *&c.* the huſband cannot then releaſe the coſts; for theſe coſts come in lieu of what ſhe has ſpent out of her alimony, which is a ſeparate maintenance, and not in the power of the huſband. 1 *Salk.* 115.

A divorce was *a menſa & thoro*, and then the huſband dies inteſtate. The wife by bill pray'd aſſiſtance as to *dower and adminiſtration* (it being granted to another) and *diſtribution*. The Maſter of the Rolls bid her go to law to try if ſhe was intitled to her dower, there being no impediment, and as to that diſmiſs'd the bill; and as to the adminiſtration, the granting that is in the eccleſiaſtical court; but the diſtribution more properly belongs to this court; but ſince in that court ſhe is ſuch a wife as *is not intitled to adminiſtration*, he diſmiſs'd the bill as to diſtribution too, and ſaid, if they could repeal that ſentence, ſhe then would be intitled to diſtribution. *Ch. Prec.* 111.

Land was given to baron and feme *in frank-marriage*, and after a divorce was had between them *at the ſuit of the feme*, and yet it was ſaid, that the feme remained tenant always. *Br. Eſtate, pl.* 55.

After a divorce *a menſa & thoro*, an *injunction* was moved for to ſtop the huſband from *ſelling a term of the wife's*. The court at firſt thought it ſhould not be granted; for that the marriage continued, and the huſband had the ſame power over it as before the divorce; but upon the importunity of the plaintiff's counſel it was granted; for tho' the marriage continues notwithſtanding the divorce, yet the huſband does nothing as huſband, nor the wife as wife. 9 *Mod.* 43, 44.

It ſeems that *a writ* brought *againſt baron and feme ſhall abate by divorce* made between them pending the writ. *Thel. Dig.* 185. *lib.* 12. *cap.* 13.

Treſpaſs *de muliere abducta*, and raviſh'd, *cum bonis viri aſportatis, againſt baron and feme and others*, and well againſt the feme; for *a feme may aſſent and aid to raviſhment of another feme*, and may carry away the goods; and there 'tis agreed, that *it is no plea that the plaintiff and his feme are divorced*; for he is not to recover the feme, but damages; and if ſhe was feme at the time, *&c.* this is ſufficient. *Br. Treſpaſs, pl.* 43.

N. K. brought *treſpaſs againſt K. and his feme*, and two others, in *B. R. of raviſhing his feme and carrying away his goods*, and all came into *B. R.* by *capias* in ward of the ſheriff, and the *plaintiff counted of a rape of his feme, and carrying away of his goods*, and *protection was ſhewed forth for R. which was allowed for him and his feme*, and the *other demanded judgement of the writ, becauſe N. and the feme are divorced. Per Knivet* J. If the feme was dead, yet action lies of the raviſhment, and the ſame of divorce; for *he ſhall not recover the feme, but damages*; and it was ſaid, that the *divorce was cauſa frigiditatis*; and *per Knivet*, Then he may recover his nature, and act as a man, and rehave his feme, therefore anſwer. *Kirton* ſaid, the action is brought againſt *R.* and his feme, and feme cannot raviſh a feme; judgment of the writ, *& non allocatur*; for *ſhe may aſſent, or be aiding, or carry away the goods*, by which he pleaded Not guilty. *Br. Rape, pl.* 2.

The plaintiff ſets forth in her bill, that ſhe joined with her huſband in ſale of part of her inheritance, and after ſome diſcord growing between them, they ſeparated themſelves, and 100*l.* of the money received upon the ſale of the lands was *allotted* to the plaintiff *for her maintenance*, and put into the hands of *Nicholas Mine, &c. and bonds then given* for the payment thereof *unto H. G. deceaſed, to the uſe of the plaintiff*, which bonds are come to the defendant as adminiſtrator to the ſaid *H. G.* who refuſes to deliver the ſame to the plaintiff, and hereupon ſhe prays relief; the defendant does *demur in law, becauſe the plaintiff ſueth without her huſband*; and it is ordered the defendant ſhall anſwer directly. *Cary's Rep.* 124.

She *cannot ſue for it during cohabitation. Mo.* 874.

The *eccleſiaſtical court* is the proper court for alimony, and if the perſon *will not obey*, they cannot but excommunicate him. *Het.* 69.

Alimony was *decreed* at the ſuit of *her brother, who had maintained her a year and an half ſince her departure*, and alſo the benefit of a bond given before marrriage. *Chan. Rep.* 44.

The *ſpiritual court never allows any ſuit for alimony but after divorce*, tho' ſometimes they have decreed it upon divorce; *per Twiſden* J. who ſaid that the judges of the ſpiritual court had ſo informed him. *Sid.* 116.

A *deed*, by which the baron *agreed* to allow the wife a ſeparate maintenance, was confirmed in Chancery. *Finch Rep.* 73.

The baron *covenanted with L. to pay his wife, or ſuch as ſhe ſhould appoint*, 50*l. a year* as a ſeparate maintenance, *provided ſhe live at ſuch a place as N. and W. appoint.* Baron pleaded, that ſhe did not live at ſuch place as *N.* and *W.* appointed. Plaintiff replies, that ſhe was always ready to live at ſuch place, but that *N. and W. appointed no place.* Defendant demurred, for that it was a condition precedent; but the plaintiff inſiſted it was only ſubſequent, and ſo become impoſſible, *N.* being ſince dead, and no place being appointed. *Per cur.* The condition is ſubſequent, the covenant being, in purſuance of a former abſolute agreement, to pay ſo much, and it is like an aſſent of the huſband, which is intended, till the contrary appears. 3 *Keb.* 363.

No alimony except *pro expenſis litis* can be decreed but by conſent, unleſs *firſt* there is *a decree for ſeparation. Chan. Ca.* 251.

Action at law againſt the executor of the baron for *goods bought* in the baron's life-time by the wife, while ſhe lived ſeparate, and had a ſeparate maintenance, and after verdict for the plaintiff at law, the executors bring bill for relief, and ſuggeſt as above, and that the plaintiff knew it to be ſo, and pray'd an injunction; but denied, it being *a proper defence at law. Vern.* 71.

Where, on a ſeparation, lands are convey'd by the baron in truſt for the feme, Chancery will not bar the feme from *ſuing the baron* in the truſtee's name, and a ſurrender or releaſe by the baron ſhall not be made uſe of againſt the feme. 2 *Chan. Ca.* 102.

A woman living ſeparate from her huſband, and having a ſeparate maintenance, *contracts debts*. The *creditors*, by a bill in this court, may follow the ſeparate maintenance whilſt it continues; but when that is determined, and the huſband dead, they cannot by a bill charge the jointure with the debts; by Lord Keeper *North*; and the rather becauſe the executor of the huſband, who may have paid the debt, is no party. *Vern.* 326.

Defendant *covenanted* with the plaintiff *to permit S. the defendant's wife to live ſeparate from him, until he and ſhe ſhould by writing under their hands, atteſted by two witneſſes, give notice to each other that they would again cohabit*, and *that during the covertures, and until ſuch notice, he would pay unto the plaintiff* 300*l. per ann. for her maintenance by quarterly payments, &c.* and for 75*l.* being one quarterly payment, he brought action of covenant. The defendant *pleaded* in bar, *That after the ſaid indenture, and before this action brought, another indenture was made between him and S. his wife of the one part, and the plaintiff of the other part, reciting the ſaid firſt indenture*; *and* alſo *that he and his wife did intend to cohabit, and did then actually cohabit, and that ſo long as they ſhould cohabit,*

the yearly payment ſhould ceaſe; and that in the ſaid laſt-recited indenture the plaintiff did covenant with the defendant, that he ſhould be ſaved harmleſs from the ſaid yearly payment, ſo long as he and his wife ſhould cohabit; and *avers that ever ſince the laſt indenture they did cohabit*, and demands judgement of the action. The plaintiff *replied, that they did not cohabit modo & forma, &c.* Adjudged *per tot. cur.* for the plaintiff; for unleſs the cohabitation had been according to the firſt indenture it was no bar, the laſt indenture not having taken away the effect of the former, and a latter covenant cannot be pleaded in bar of a former; but the defendant muſt bring his action on the laſt indenture, if he would help himſelf. 2 *Ven.* 217.

Where baron and feme live ſeparate, and *alimony is ſentenced* to the wife, if the wife ſues in the ſpiritual court for defamation, the *baron cannot releaſe the coſts*; otherwiſe if baron and feme cohabit. So of a *legacy*; but if the ſuit be there for a legacy, which is originally due to the baron and feme, and is not a part of the alimony, he may releaſe the ſuit, and alſo the coſts, becauſe he may diſcharge the principal; *per Holt* Ch. J. 5 *Mod.* 71.

Tho' a huſband be bound to pay his wife's debts for a reaſonable proviſion, yet if *ſhe parts from him*, eſpecially by reaſon of *her miſbehaviour* (as in the principal caſe it muſt be preſumed ſhe did, ſhe living in adultery after the ſeparation) and he *allows her a maintenance*, he ſhall never after be *charged with her debts*, till a *new cohabitation*. 6. *Mod.* 147.

Dutton, having more than 3000 *l. per ann. married M.* the plaintiff, who had 10,000 *l. portion*, and ſettled 1000 *l. per ann.* upon her for her jointure, and the greateſt part of *D*'s eſtate was ſettled upon the firſt and every other ſon in tail male ſucceſſively, as uſual in marriage ſettlements. *D. run greatly in debt, and J. his eldeſt ſon being of full age, D.* upon a calculation of his debts, and the value of his eſtate for life, with impeachment of waſte *agreed with J. to convey all his eſtate to him, and J. covenants to pay all D*'s debts, and to allow him 500 *l. per ann.* rent-charge for his life; *and further* (upon which the queſtion ariſes) *that J. ſhall indemnify D. from all debts, charges, and expences for the maintenance of the ſaid M. being then ſeparated by conſent. M. brings a bill againſt D. her huſband, and J. the ſon, to have an allowance for her maintenance, &c. Cowper* C. ſaid, that by this covenant to indemnify the father from maintaining his wife, the ſon has taken upon himſelf the charge of maintaining her; and, as to this purpoſe, ſtands in the place of the huſband, who is bound to give his wife an allowance, if he voluntarily ſeparates from her, and he took *the ſon in this caſe* to be *in nature of a truſtee for the wife, ſo far as a reaſonable allowance for her maintenance*; and tho' the ſon doth offer to maintain her at his own houſe, yet he did not think ſhe is bound to accept that offer; for tho' he ſtands in the place of the huſband as to her maintenance, and a huſband is not bound to allow any thing to his wife for maintenance if he offers to take her home; yet in this caſe here lies no ſuch obligation upon the wife to live with the ſon, and tho' ſhe refuſes, ſhe ought to have a reaſonable allowance; and ordered her to be allowed 200 *l. per ann.* Note; In this caſe, Lord Chancellor allowed her to keep the plate, *&c.* which ſhe bought, or was given to her by friends, during the ſeparation. 4 *Vin.* 178. cites *MS. Rep. Trin.* 1 *Geo.* 1.

An *agreement* between huſband and wife to live ſeparate, and that ſhe ſhould have a ſeparate maintenance, ſhall bind them both till they agree to cohabit again. 8 *Mod.* 22.

In the caſe of a ſeparate maintenance, if the *huſband maintains the wife*, it *bars her claim in reſpect* thereof; *per* Ld. C. *Macclesfield.* 2 *Wms's Rep.* 84.

In caſe of a wife's ſeparate maintenance, if it be *not demanded by her, ſhe will be concluded* even where ſhe has no other perſon to demand it of but her huſband; *per* Lord C. *Macclesfield.* 2 *Wms's Rep.* 84.

Tho' the wife has a ſeparate maintenance, with power to make a will, and by will *makes an executor, and diſpoſes of all ſhe had*, but the executor took nothing, the whole being otherwiſe diſpoſed of; it was decreed, that the huſband's eſtate in the hands of another perſon, the huſband being now dead, is ſubject by law to *pay the wife's funeral expences.* 9. *Mod.* 31.

Where the huſband, during his cohabitation with the wife, makes her an allowance of ſo much a year for her expences, if ſhe out of her own good houſewifry ſaves any thing out of it, this will be the huſband's eſtate, and he ſhall reap the benefit of his wife's frugality, becauſe when he agrees to allow her a certain ſum yearly, the end of the agreement is, that ſhe may be provided with cloaths and other neceſſaries, and whatſoever is ſaved out of this, redounds to the huſband; *per* Lord Keeper *Finch. Freem. Rep.* 304.

A term was created on the marriage of *A.* with *B.* for raiſing 200 *l.* a year for pin-money, and in the ſettlement *A.* covenanted for payment of it. There was an *arrear of one year at A.'s death*, which was decreed, becauſe of the covenant to be charged on a truſt eſtate ſettled for payment of debts, it being in arrear for one year only; *ſecus* had it been in arrear for ſeveral years. *Chan. Prec.* 26.

The plaintiff's relation (to whom he was heir) allow'd the wife pin-money, which *being in arrear*, he *gave her a note* to this purpoſe; *I am indebted to my wife* 100 *l. which became due to her ſuch a day*; after *by his will he makes proviſion out of his lands for payment of all his debts, and all monies which he owed to any perſon in truſt for his wife*; and the queſtion was whether the 100 *l.* was to be paid within this truſt; and my Lord Keeper decreed not; for in point of law it was no debt, becauſe a man cannot be indebted to his wife, and it was not money due to any in truſt for her. *Hill.* 1701. between *Cornwall* and the Earl of *Mountague*. But *quære*; for the teſtator looked on this as a debt, and ſeems to intend to provide for it by his will. *Abr. Eq. Ca.* 66.

Where the wife has a ſeparate allowance *made before marriage*, and *buys jewels with the money* ariſing thereout, they will not be aſſets liable to the huſband's debts. *Chan. Prec.* 295.

Where there is a proviſion for the wife's ſeparate uſe *for cloaths*, if the *huſband finds her cloaths*, this *will bar the wife's claim*; nor is it material whether the allowance be provided out of the eſtate which was originally the huſband's, or out of what was her own eſtate; for in both caſes her *not having demanded it* for ſeveral years together, ſhall be *conſtrued a conſent from her that he ſhould receive it*; *per* Lord C. *Macclesfield.* 2 *Wms's Rep.* 82, 84.

So where 50 *l. a year was reſerved for cloaths and private expences*, ſecured by a term for years, and ten years after the huſband died, and ſoon after the wife died; the executors in equity demanded 500 *l.* for ten years arrear of this pin-money; but it appearing that the *huſband maintain'd her*, and *no proof that ſhe ever demanded it*, the claim was diſallowed. 2 *Wms's Rep.* 341.

10. *Of ſurvivorſhip and the effects of it; what things the huſband ſhall have after the death of the wife, and what charge of the huſband ſhall bind the wife.*

Baron marries a *feme wrongfully ſeiſed of lands*, and after the marriage *ſhe occupies them without the baron's aſſent*, yet action lies againſt both, as well for the occupation before the eſpouſals, as after during the feme's life; but after her death, action lies not for this occupation againſt the baron; but if the perſon who has right enters into the land after marriage, and the baron re-enters in right of his feme, or if after the marriage *he occupies* the lands, and then the feme dies, treſpaſs lies againſt him; *per Rede* J. *Kelw.* 61.

A *feme ſole* makes an *agreement* with other perſons *to diſtribute the reſidue of the eſtate of M.* among them, and after marries the defendant; *per cur.* What came in between ſeven and eight years after marriage by the death of the ſaid *M.* was not within the compaſs of the ſaid agreement, but was to go to the benefit of the huſband. *Chan. Rep.* 26.

If a man marries an *executrix and waſte the goods*, 'tis a *devaſtavit* in the wife; *per cur.* for it was her folly to take ſuch huſband that would make a *devaſtavit*; and by

Jones

Jones J. If a *recovery againſt baron and feme* be in a *devaſtavit*, if the baron ſurvives the wife he ſhall be charged, and if the feme ſurvives ſhe ſhall be charged; but if the recovery be not againſt baron and feme in the life of the feme, and ſhe dies, the baron ſhall not be charged. *Cro. Car.* 519.

The wife when *ſole bought goods* for money, and after married, and died. The goods *came to the huſband's hands after her death*, but the *debt remained unpaid*; the bill was by the creditor to diſcover the goods. Defendant demurred, but over-ruled by the Lord Chancellor, who with ſome earneſtneſs ſaid, he would change the law in that point. *Chan. Ca.* 395.

If *huſband and wife have judgment in ſcire facias for a debt due to the wife*, the benefit thereof ſurvives to the huſband; for the judgment is joint, and therefore ſhall ſurvive; if the huſband outlives the wife, he ſhall have the benefit of it; and if the wife outlives the huſband, ſhe ſhall have the benefit of it; *per Holt* Ch. J. but *Rookeſby* J. doubted. *Comyns's Rep.* 31, 32.

Baron by reputation only, as where the marriage was by a mere layman, (a ſabbatarian) is not intitled to *adminiſtration to the wife*. 1 *Salk.* 119.

A feme *dum ſola gave a bond*, and then married; the *huſband became bankrupt*; the bond-debt is diſcharged by the bankruptcy of the huſband, ſo that if he dies, ſhe ſhall not be further chargeable; *per Parker* Ch. J. who declar'd the judgment of the court as to the firſt part, and his own opinion as to the latter part. 10 *Mod.* 243.

Bill by the heirs and reſiduary legatees of Sir *W. Milman* againſt Lady *Milman*, executrix of Sir *W. M.* to have an account of the teſtator's eſtate; it being proved in the cauſe, that Sir *W. M. being very old and infirm for ſeven years before his death, did not receive money himſelf, tho' he ſigned receipts, and executed leaſes, &c. but the money was uſually paid to Lady Milman, his wife.* *Cowper* C. decreed Lady *Milman* to account for what money ſhe received for ſeven years before her huſband's death, but the maſter ſhould be eaſy in taking the account, and allow for houſe-keeping, *&c.* without vouchers. 4 *Vin.* 129. *pl.* 8.

If *tenant in dower takes a ſecond baron*, and *they two leaſe the land which ſhe had to her dower* of the endowment of her firſt baron *for years rendring rent, and dies*, the ſecond baron ſhall have that which was *arrear in the time of the wife*, and not the heir; for he is a ſtranger to the leaſe, and by the death of the tenant in dower the leaſe is void. *Br. Rents, pl.* 10.

If baron be poſſeſſed of a *term for* 20 *years* in right of his wife, *and he makes a leaſe for* 10 *years, rendring rent to him, his executors and aſſigns*, and dies, tho' the wife ſurvives, ſhe ſhall not have the rent, becauſe ſhe comes in paramont the leaſe. 4 *Lev.* 185.

A truſt of leaſe for years for a wife does not, after the wife's death, go to the huſband in equity, as it was reſolved. *Jenk.* 245.

Two femes jointenants of a leaſe for years, one of them takes huſband, and dies, yet the term ſhall ſurvive; for tho' all chattles real are given to the huſband if he ſurvive, yet the ſurvivor between jointenants is the elder title; and after the marriage the feme continued ſole poſſeſſed; for if the huſband die, the wife ſhall have it, and not the executors of the huſband; but otherwiſe of perſonal goods. *Co. Lit.* 185.

If a *feme ſole be poſſeſſed of a chattle real*, and be thereof *diſpoſſeſſed*, and then takes huſband, and the wife dies, and the huſband ſurvives, this right is not only given to the huſband by the intermarriage, but the executors or adminiſtrators of the wife ſhall have it; ſo it is if the wife have but *a poſſibility*. *Co. Lit.* 351. *a.*

If the wife be poſſeſſed of *chattles real in auter droit*, as executrix or adminiſtratrix, or as guardian in ſocage, *&c.* and ſhe intermarries, the law makes no gift of them to the huſband, altho' he ſurvived her. *Co. Lit.* 351. *a.*

If a *woman grants a term to her own uſe*, and takes huſband and dies, the huſband ſurviving ſhall not have this truſt, but the executors or adminiſtrators of the wife; for it *conſiſts in privity*; and ſo it has been reſolved by the juſtices. *Co. Lit.* 351. *a.*

If huſband dies *before he ſeizes an eſtray*, which happened in a manor of the feme's, ſhe ſhall have it; becauſe there is no property before a ſeizure. *Co. Lit.* 351. *b.*

Goods which a feme has as *executrix* remain in and to her if her huſband die, and if ſhe herſelf die, her huſband ſhall not have them, unleſs he be his wife's executor, and ſo executor to the firſt teſtator; for they were heirs *in auter droit*, viz. as ſhe repreſented the perſon of the teſtator. *Went. Off. Ex.* 86, 87.

A *bond* was given *to a feme ſole, who takes baron*, and dies. *J. S.* took out letters of adminiſtration to the feme, and brought an action of debt upon this bond; the obligor pleaded, that by the marriage the debt became due to the baron; but the court ſaid, that it did not; for it was a thing in action, and therefore the plea is not good. *Sty.* 205.

A ſum of money was provided by ſettlement of lands for raiſing daughters portions. One of them marries, and dies before her portion paid. The huſband takes out adminiſtration; this adminiſtraton is *pro forma* only; for here he had a right to the money, as a portion or proviſion for his wife. *Chan. Ca.* 169.

Legacy deviſed to a daughter *to be paid out of lands mortgaged* to the father, which mortgage was forfeited in teſtator's life; ſhe married the plaintiff and died; the huſband takes out adminiſtration, and the legacy was decreed to him. *Fin. Rep.* 91.

If a perſon dies *inteſtate* poſſeſſed of goods, and a *feme covert and another are next a-kin, and adminiſtration is granted to the other only*, and the feme dies within the year, before any diſtribution; yet the baron, by taking adminiſtration to his feme, ſhall be intitled to her ſhare, it being an intereſt veſted in her upon the death of the inteſtate. *Carth.* 51.

Baron cannot prejudice the wife for her *frank tenement* or *inheritance*; if ſhe is intitled to dower of the lands of her firſt baron, and her ſecond baron *accepts for dower leſs than a third part*; after the death of the ſecond baron ſhe may waive it, and have her full third part. *Jenk.* 79.

Where the *baron is indebted to the King*, and *he and his feme purchaſe* land *for* 60 *years*, and *he dies*, the feme ſhall be charged. *Br. Jointenants, pl.* 30.

And yet if A. be indebted to the King, and *A.* and *B. purchaſe jointly in fee*, and *A. dies*, and *B.* ſurvives, he ſhall not be charged. Note the diverſity; for the other is only a *chattle*, all which the baron may alien without his feme. *Br. Jointenants, pl.* 30.

Baron made a leaſe of the wife's lands, and the leſſee being *ignorant* of the defeaſible title, *built* upon the land, and was at great charge therein; the baron died, and the wife ſet aſide the leaſe at law; but was compell'd in equity to yield *a recompence* for the building and bettering the land; for it was worth ſo much the more to her. *Chan. Rep.* 5.

An *avowry* is made upon the huſband and wife, where the *wife is the tenant*. In this caſe no *diſclaimer* lies; for the wife cannot be examined in this caſe; and the huſband's diſclaimer ſhall not hurt the wife for her freehold or inheritance, any more than his *confeſſion* ſhall. *Jenk.* 143.

Baron alone aliens the land of the wife by *fine with proclamations*, and dies; five years expire after his death without action or entry of the wife, 'tis a bar for ever to the wife and her heirs. *Dyer* 72.

In *debt on bond for performance of covenants* in an indenture between the defendant and *A.* his wife of the one part, and the plaintiff of the other part. The jury found *the huſband ſealed the deed, but not the wife*; the juſtices held, that if the huſband had ſealed and delivered it *in the name of the wife*, it had been the deed of the wife during the life of the huſband; and if they by indenture had bargained and ſold land of the wife rendring rent, it had been a good deed of the wife, becauſe ſhe might have afterwards accepted the rent, and made the deed good. *Cro. E.* 769. *pl.* 12.

Husband deviſed his land to his wife during the minority of his ſon, and dies; he has only a poſthumous ſon; by the will the wife has *power to make leaſes*, to raiſe money to pay debts, *&c.* ſhe enters and takes the profits, and marries a ſecond huſband; he lives ſome years and takes the profits and dies. She *leaſed* ſome part according to the will, and continued taking the profits of the reſt; the *ſon comes to* 21, *and proves a revocation of the will*, and prays his mother may account. Ordered that ſhe *account for all the profits* that herſelf or her huſband took; for ſhe ſhall be ſaid to take them as guardian till 14, and after as bailiff, and was to anſwer what her huſband took as in a *devaſtavit*; and the wife having *no notice* of the revocation, had *paid legacies according to the will*, which were charged on the lands. Thoſe were ordered to be allowed, but as for the leaſes, tho' for fines and full rents, the court would not make them good, becauſe ſhe could not let or leaſe lands. *Chan. Ca.* 126.

If *feme executrix ſurvives*, ſhe ſhall be *charged for damages recovered upon a devaſtavit againſt her and her baron, for waſte committed by the baron* during the coverture, *but* ſhe ſhall *not* be charged *for coſts* recovered againſt the baron *de bonis propriis*; and judgment accordingly. 2 *Lev.* 161.

Deviſe of 800*l.* *to be inveſted in land for the benefit of the wife of J. S.* for her life, and afterwards to her children, and the intereſt of the money to go in the mean time to ſuch perſon as would be intitled to receive the profits; *J. S.* the *huſband becomes a bankrupt. Per cur.* This not being a truſt created by the huſband, nor any thing carved out of his eſtate, but given by a relation of the wife's, and intended for her maintenance; 'tis not liable to the creditors of the huſband, and decreed the *intereſt to be paid to the truſtee*, to be laid out in land, and ſettled according to the will. 2 *Vern. Rep.* 96.

A feme had 1000*l.* and *it was agreed by marriage-articles, that* 700*l.* *of it ſhould go to pay his debts.* The huſband after marriage, *without the wife, aſſigned the* 300*l.* *likewiſe to creditors*, and decreed ſo much to be paid as was really due to them, and the reſidue, if any, to be put out for her benefit. *Chan. Prec.* 325.

If a *bill of exchange* be *made to the feme dum ſola*, the huſband may aſſign it, and the aſſignee ſhall bring the action in his own name. *Wms's Rep.* 255.

If the *wife had recovered a judgment at law, and elegit thereupon*, the *huſband would have had a power to aſſign that intereſt of the wife, for or without conſideration, &c. in truſt for himſelf or as he pleaſed*; ſo by parity of reaſon, the *wife having a decree of a court of equity for her demand, and to hold and injoy 'till ſatisfaction, &c. the huſband has the ſame right and power to diſpoſe of this equitable intereſt of the wife*, as he would in caſe of a demand recovered at law, *&c.* and tho' after marriage the huſband is to uſe the wife's name in the proceedings in equity in this and the like caſes, whereas he need not at law; that makes no difference in the thing, or in the right, but in the form and manner of proceeding, *&c.* *Per* Lord *Hardwicke, MS. Rep. Feb.* 26, 1734. 4 *Vin.* 57.

Barony. See **Baron.**

Barr or **Bar,** (Lat. *barra, repagulum, obex, vectis*; in Fr. *barre)* In a legal ſenſe is a plea or peremptory exception of a defendant, ſufficient to deſtroy the plaintiff's action; and it is divided into *bar* to common intendment, and *bar* ſpecial; *bar* temporary, and perpetual: *bar* to a common intendment is an ordinary or general *bar*, which uſually diſableth the declaration of the plaintiff: *bar* ſpecial is that which is more than ordinary, and falls out upon ſome ſpecial circumſtance of the fact, as to the caſe in hand. *Terms de la ley* 77. *Bar* temporary is ſuch a *bar* that is good for the preſent, but may afterwards fail: and *bar* perpetual is that which overthrows the action of the plaintiff for ever. *Plowd.* 26. But a plea in *bar*, not giving a full anſwer to all the matter contained in the plaintiff's declaration, is not good. 1 *Lill. Abr.* 211. If one be *barred* by plea to the writ, or to the action of the writ, he may have the ſame writ again, or his right action: but if the plea in *bar* be to the action itſelf, and the plaintiff is *barred* by judgment, *&c.* it is a *bar* for ever in perſonal actions. 6 *Rep.* 7. And a recovery in debt is a good *bar* to action on the caſe for the ſame thing: Alſo a recovery on *aſſumpſit* in caſe, is a *bar* in debt, *&c.* *Cro. Jac.* 110. In all actions perſonal, as debt, account, *&c.* a *bar* is perpetual, and in ſuch caſe the party hath no remedy, but by writ of error or attaintment; but if a man is *barred* in a real action or judgment, yet he may have an action of as high a nature, becauſe it concerns his inheritance; as for inſtance, if he is *barred in formedon in deſcender* yet he may have a *formedon* in the remainder, *&c.* 6 *Rep.* 7.

It has been reſolved, that a *bar* in any action real or perſonal by judgment upon demurrer, verdict, or confeſſion, is a *bar* to that action, or any action of like nature for ever: But according to *Pemberton* chief juſtice, it is to be underſtood, when it doth appear that the evidence in one action would maintain the other; for otherwiſe the court ſhall intend that the party hath miſtaken his action. *Skin.* 57, 58. *Bar* to a common intent is good; And if an executor be ſued for his teſtator's debt, and he pleadeth that he had no goods left in his hands at the time the writ was taken out againſt him, this is a good *bar* to a common intendment, till it is ſhewn that there are goods: but if the plaintiff can ſhew by way of replication, that more goods have fallen into his hands ſince that time, then, except the defendant alledge a better *bar*, he ſhall be condemned in the action. *Plowd.* 26. *Kitch.* 215. *Bro.* tit. *Barr.*

A bar may be good to a common intent, though not to every intent; as if *debt* be brought *againſt five executors*, and *three of them make default*, and *two appear and plead in bar a recovery had againſt them two of* 300*l.* and that they have nothing in *their hands over and above that ſum.* If this bar ſhould be taken ſtrongeſt againſt them, it ſhould be intended that they might have abated the firſt ſuit, becauſe the other three were not named, and ſo the recovery not duly had againſt them; but according to the rule, the bar is good. For that by common intendment it will be *ſuppoſed, that the two others did only adminiſter*, and ſo the action well conſidered, rather than to imagine that they would have loſt the benefit and advantage of abating the firſt writ. *Heath's Max.* 54. cites *Touchſtone of Precedents*, tit. *Pleas and Pleadings*, *fol.* 192.

So if a bar *have matter of ſubſtance in it, and* be good to common intent, *it is ſufficient, albeit it be not good to every ſpecial intent*; as when *one ſues as executor*, and the *defendant ſaith, that the teſtator made the plaintiff and one J. S. executors*, and does not ſay after this, that he did not make the plaintiff executor, yet this may be ſufficient. *Heath's Max.* 55.

So in *treſpaſs*, where the defendant *pleads that the place is his freehold*, this is good; yet the plaintiff may have a particular eſtate. *Heath's Max.* 55.

So upon an *obligation to perform covenants*, the defendant alledgeth two covenants, and ſaith he hath performed them, and doth not ſay there are no more covenants in the deed to be by him performed, yet it is good; for it ſhall be intended there are no more for him to perform. *Heath's Max.* 55.

If a *leaſe* be made *to A. and B. for life*, the *remainder to C. and if C. ſhall die during the life of A. or B. then* that *it ſhall remain to E. for life, ſi ipſe vellet eſſe reſidens, &c.* and *E.* (being defendant) *pleads his entry after the death of A. and B. and C.* and doth *not ſay when they died*, yet held to be good in a plea in bar: *for* if it be a condition, it ſhall be intended that the defendant did enter as ſoon as his title accrued; and if the caſe be otherwiſe in truth, than by common intendment it is taken to be, the plaintiff muſt ſet it forth in his pleading; as in a *formedon in deſcender*, if the tenant pleads in bar a releaſe of the demandant without warranty, it is good; and yet the releaſe might be made by the demandant in the life of his father, and then it is no bar to the iſſue. *Heath's Max.* 56, 57.

But no ſubſtantial part of a bar may be omitted; as where one is *bound to do a thing between ſuch and ſuch a time*, and the defendant *ſaith that he did it, or did it before the day*, this is not ſufficient, but he *muſt ſhew that he did it ſuch a day within thoſe times. Heath's Max.* 55.

Debt againſt an executor upon a bond of the teſtator; the defendant *pleaded a ſtatute* acknowledged *by the teſtator*, &c. and *averred that he has not, nor at the day of the bill brought he had not, any goods which were the teſtator's tempore mortis ſuæ*, in his hands to be adminiſtered, *unleſs to ſatisfy the ſaid ſtatute*; and upon demurrer to this plea, it was objected that it was ill, becauſe the defendant might have goods liable to debts, though they were not the teſtator's goods *tempore mortis ſuæ*; but all the court, except *Williams* J. held it well, the bar being good to a common intent, and it ſhall not be intended that he had ſuch aſſets, being ſpecial aſſets, unleſs it was ſpecially ſhewed; and denied the 7 *Hen.* 4. 39. which was cited to be good law in that point, and judgement for the plaintiff. *Cro. Jac.* 131. *pl.* 4.

Though a bar ſhall be taken good by a common intent, yet when the bar *depends upon circumſtance*, therein pleading the matter, he *muſt ſhew it to be within the circumſtance*. *Per Doderidge* J. *Lat.* 171.

Debt upon *bond for quiet enjoyment* from the time, &c. the defendant *pleaded, that* after making the ſaid bond *to the day of the bill the plaintiff had enjoyed the lands*; and upon demurrer to this plea it was objected, that the defendant does not ſay, *a die confectionis ſcripti obligatorii & ſemper poſt confectionem*, &c. *Sed non allocatur*; for the bar is good to a common intent, and it ſhall be intended that he always enjoy'd it, unleſs the contrary is ſhewn. *Cro. Car.* 141.

The *reaſon why* a bar is good to a common intent, is becauſe it *is to excuſe from a charge*. But a replication muſt have a general certainty, becauſe it is to deſtroy the excuſe of the defendant, which is always receiv'd favourably. *Per Holt* Ch. J. 12 *Mod.* 665.

There is a *bar* material, and *bar* at large: *Bar* material may be alſo called ſpecial *bar*; as when one in ſtay of the plaintiff's action, pleadeth ſome particular matter, *viz.* a deſcent from him that was owner of the land, &c. a feoffment made by the anceſtor of the plaintiff, or the like: A *bar* at large is, when the defendant by way of exception, doth not traverſe the plaintiff's title, by pleading, nor confeſs, or avoid it, but only makes to himſelf a title in his *bar*. *Kitch.* 68. 5 *Hen.* 7. 29. This word *bar* is likewiſe uſed for the place where ſerjeants and counſellors at law ſtand to plead the cauſes in court; and priſoners are brought to anſwer their indictments, &c. whence our lawyers that are called to the *bar* are termed barriſters. 24 *Hen.* 8. *c.* 24.

For more of bar in general, ſee **Abatement, Actions, Judgement,** and the pleadings under the ſeveral other titles.

Barraſter, Barriſter, *(Barraſterius)* Is a counſellor learned in the law, admitted to plead at the *bar*, and there to take upon him the protection and defence of clients. They are termed *juriſconſulti*; and in other countries called *licentiati in jure*: and antiently *barriſters* at law were called *apprentices* of the law, in Lat. *apprenticii juris nobiliores*. *Forteſc.* The time before they ought to be called to the bar, by the ancient orders, was eight years, now reduced to five, and the exerciſes done by them (if they were not called *ex gratia*) were twelve grand moots performed in the inns of *Chancery* in the time of the grand readings, and twenty-four petty moots in the term times, before the readers of the reſpective inns: And a *barraſter* newly called is to attend the ſix next long vacations, the exerciſe of the houſe, *viz.* in Lent and Summer, and is thereupon for thoſe three years ſtiled a vacation *barraſter*: Alſo they are called *utter barraſters*, *i. e.* pleaders *ouſter* the bar, to diſtinguiſh them from benchers, or thoſe that have been readers, who are ſometimes admitted to plead within the bar, as the King, Queen, or Prince's counſel are. *Barraſters* who conſtantly attend the *King's Bench*, &c. are to have the privilege of being ſued in tranſitory actions in the county of *Middleſex*. But it hath been queſtioned, whether an action of debt doth lie for their fees; unleſs it be upon ſpecial retainer; for a counſellor's fee is *honorarium quiddam*, not *mercenarium*, as that of an attorney or ſolicitor. 2 *Inſt.* 213, 214, &c. *Wood's Inſt.* 448. *Jacob.*

Barrator, or Barreter. A barrator is deſcribed a perſon who is a common mover, exciter or maintainer of ſuits or quarrels, either in courts or in the country; and this offence conſiſting in all kinds of diſturbances of the peace, and the ſpreading of falſe rumours and calumnies, whereby diſcord and diſquiet may grow among neighbours, it is not material whether the ſuits commenced be in a court of record or not, or whether thoſe quarrels relate to a diſputed title of poſſeſſions or not. *Co. Lit.* 368. *a. b.* 8 *Co.* 36. *b.* 1 *Hawk. P. C.* 243. 1 *Dan.* 725. 3 *Inſt.* 175.

But if a man proſecutes an infinite number of ſuits which are his own proper ſuits againſt others, yet he ſhall not be a barrator by this; for if they are falſe and groundleſs, the defendants ſhall have coſts againſt him. 1 *Rol. Abr.* 335. But by 1 *Hawk, P. C.* 243. if ſuch ſuits are merely groundleſs, and brought only with a deſign to oppreſs the defendants, ſuch a man may as properly be called a barrator, as if he had ſtirred up others to bring them. See 3 *Mod.* 98. 8 *Co.* 36.

An attorney cannot be deemed a barrator in reſpect of his maintaining another in a groundleſs action, to the commencing whereof he was no way privy. 1 *Hawk. P. C.* 343.

Alſo it ſeems clear that no man can be a barrator in reſpect to one act only; for every indictment for ſuch crime muſt charge the defendant with being *communis barratator*. 8 *Co.* 36. 2 *Rol. Abr.* 39.

A feme covert cannot be indicted as a common barreter. 2 *Rol. Abr.* 39. But this opinion Serjeant *Hawkins* ſays is juſtly queſtionable; for ſince a feme covert is as capable of exciting quarrels, in the frequent repetition whereof the notion of barretry ſeems to conſiſt, as if ſhe were ſole, why ſhould ſhe not as properly be indictable for it? 1 *Hawk. P. C.* 243.

No general indictment, charging the defendant with being a common oppreſſor and diſturber of the peace, and ſtirrer-up of ſtrife among neighbours, is good, without adding the words *communis barratator*, which is a term of art appropriated by the law to this purpoſe. 1 *Mod.* 288. 1 *Sed.* 282. *Cro. Jac.* 526.

An indictment of barratry concluding *cont' formam ſtatuti* is good, though no ſtatute be made directly againſt it. But only for the puniſhment of it, ſuppoſing it an offence at Common law. 2 *Rol. Abr.* 79. *Cro. Jac.* 527. *Cro. Car.* 340. 2 *Keb.* 409, 410. *Cro. Eliz.* 148. 1 *Hawk. P. C.* 244.

Alſo it hath been holden that an indictment of this kind may be good, without alledging the offence at any certain place; becauſe from the nature of the thing, conſiſting in the repetition of ſeveral acts, it muſt be intended to have happened in ſeveral places; for which cauſe it is ſaid, that a trial ought to be by a jury from the body of the county. 2 *Keb.* 410. *Cro. Eliz.* 195. *Latch* 194. *Palm.* 450. and 1 *Rol. Rep.* 295.

It hath been reſolved that ſuch an indictment is not good, without concluding *cont' pacem*, &c. for this is an eſſential part of it. *Cro. Jac.* 527.

It ſeemeth to be the ſettled practice at this day, not to ſuffer the proſecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters which he intends to prove againſt him; for otherwiſe it will be impoſſible to prepare a defence againſt ſo general and uncertain a charge, which may be proved by ſuch a multiplicity of different inſtances. 5 *Mod.* 18. 1 *Hawk. P. C.* 244.

If they are common perſons, the uſual puniſhment is by fine and impriſonment, and alſo by binding them to their good behaviour; but if they are of any profeſſion relating to the law, they may be farther puniſhed, by being diſabled to practiſe for the future. *Hut.* 104. 1 *Hawk. P. C.* 244.

An attorney, upon barretry being proved againſt him by divers affidavits read in court, had judgement to be put out of the roll of attornies, and be fined 50 l. and turned over the bar, and ſtand committed. *Sty.* 483.

In caſe of barretry the defendant, upon motion, may have a *rule to have articles delivered him of the inſtances*,

and the profecutor ſhall not give evidence of any particular beſides; and if he gives no articles, he ſhall give no evidence; *per Harcourt*, Maſter of the office. 6 *Mod.* 262.

By *ſtat.* 3 *Ed.* 1. *c.* 33. No ſheriff ſhall ſuffer any barreter or maintainer of pleas in the counties, nor ſtewards, who are not attornies of their lords, to make ſuit; nor to pronounce the judgments, unleſs they be requeſted of all the ſuitors; and if any do it, the King ſhall grievouſly puniſh the ſheriff and him.

An indictment for barretry.

Middleſex, to wit. } THE *jurors for our ſovereign lord the King upon their oath preſent, that* A. B. *of* ——*in the ſaid county* ——, *on the* —— *day of* —— *in the* —— *year of the reign of our ſovereign lord* —— *at* —— *in the ſaid county, was and yet is a common barrator, and continual diſturber of the peace of our ſaid lord the King; and alſo on the day and year, and at the place above-mentioned, was and ſtill is a common and troubleſome ſlanderer, railer, and ſower of diſcord among his neighbours, and that he hath procured and cauſed divers ſuits and quarrels then and there and elſewhere in the county aforeſaid, amongſt divers ſubjects of our lord the King, to the great contempt of our ſovereign lord the King, and the bad example of other offenders, and againſt the peace of our ſaid lord the King.*

Barrel, *(Barillus)* Is a meaſure of wine, ale, oil, *&c.* of wine it contains the eighth part of a tun, the fourth part of a pipe, and the moiety of a hogſhead, that is thirty-one gallons and a half. 1 *R.* 3. *c.* 13. Of beer it contains thirty-ſix gallons; and of ale, thirty-two gallons. *Stat.* 23 *Hen.* 8. *cap.* 4. and 12 *Car.* 2. *c.* 22. It is declared that the aſſize of herring *barrels* is thirty-two gallons wine meaſure, containing in every *barrel* uſually a thouſand full herrings. *Anno* 13 *Eliz. c.* 11. The eel *barrel* contains thirty gallons. 2 *H.* 6. *cap.* 13. *Cowell, ed.* 1727. *Jacob.*

Barriers, (Fr. *Barrieres)* Signifies that which the *French* call *jeu de barres, i. e. palæſtra*, a martial exerciſe of men armed and fighting together with ſhort ſwords, within certain bars or rails which ſeparate them from the ſpectators; it is now diſuſed here in *England.* There are likewiſe *barrier towns*, or places of defence on the frontiers of kingdoms. *Cowell, edit.* 1727. *Jacob.*

Barriſter. See **Barraſter.**

Barrow, (from the Sax. *Boerg*, a heap of earth) A large hillock or mount, raiſed or caſt up in many parts of *England*, which ſeem to have been a mark of the Roman *tumuli*, or ſepulchres of the dead. The Sax. *boera* was commonly taken for a grove of trees on the top of a hill. *Kennet's Gloſſ.*

Barter, (from the Fr. *Baratter*, to circumvent) Signifies in our books to exchange one commodity for another, or truck wares for wares. *Stat.* 1 *R.* 3. *c.* 9. And the reaſon may be, becauſe they that exchange in this manner, do endeavour for the moſt part, one to overreach and circumvent the other. *Cowell, edit.* 1727.

Barton, Is a word uſed in *Devonſhire* for the demeſne lands of a manor; ſometimes the manor-houſe itſelf; and in ſome places for out-houſes and fold-yards. In the *ſtat.* 2 & 3 *Ed.* 6. *c.* 12. *Barton* lands and demeſne lands are uſed as *ſynonyma's.* See **Berton.** *Cowell, edit.* 1727.

Bas Chevaliers, Low or inferior knights by tenure of a bare military fee, as diſtinguiſhed from bannerets, the chief or ſuperior knights: hence we call our ſimple knights, *viz.* knights bachelors, *bas chevaliers. Kennet's Gloſſ.*

Baſardi. —— *Inter injunctiones* Philippi Repingdon *epiſcopi* Lincoln. *datas vicariis ludimagiſtris, &c.* an. 1710. —— *Item quod dicti vicarii et clerici quicunque, et præcipue cum fuerint veſtiti, inhoneſtis togis ſuis cum longis manicis, quæ vulgariter* Pokes *nominantur, non utantur* —— *ne etiam* baſardos *et calapodia deponant, quæ in eccleſia ſtrepitum faciunt et generant malum ſonum.* Reg. Repingdon Epiſc. Linc. Cowell, edit. 1727.

Baſe court, (Fr. *cour baſſe)* Is an inferior court, that is, not of record, as the court baron, *&c. Kitch. fol.* 95, 96

Baſe eſtate, (Fr *bas eſtat)* Is that *eſtate* which *baſe* tenants have in their lands; and *baſe* tenants, according to *Lambert*, are thoſe who perform villainous ſervices to their lords. *Kitchen, fol.* 41 makes *baſe* tenure and frank tenure to be contraries, and puts copyholders in the number of *baſe* tenants; where it may be gathered, that every *baſe* tenant holds at the will of the lord; but there is a difference between a *baſe eſtate* and villenage; for to hold in pure villenage, is to do all that the lord will command him; and if a copyholder have but a *baſe eſtate*, he not holding by the performance of every commandment of his lord, cannot be ſaid to hold in villenage: And copyholders are by the cuſtom of manors, and continuance of time, grown out of that extreme ſervitude wherein they were firſt created. *Cowell, edit.* 1727. *Jacob.*

Baſe fee, Is a tenure in *fee* at the will of the lord, diſtinguiſhed from focage free tenure: But the lord *Coke* ſays, that *baſe fee* is what may be defeated by limitation, or on entry, *&c. Co. Lit.* 1. 18. *Baſſa tenura*, or *baſe* tenure, was a holding by villenage, or other cuſtomary ſervice, oppoſite to *alta tenura*, the higher tenure *in capite* or by military ſervice, *&c.* —— *Manerium de* Cheping Farendon *cum pertinentiis eſt de antiquo dominico coronæ domini regis, unde omnia prædicta tenementa ſunt parcella & de* baſſa tenura *ejuſdem manerii.* Conſuetud. domus de Farendon, MS. 44. *Jacob.*

Bas ville, The ſuburbs or inferior town, as uſed in *France.*

Baſels, *(Baſſelli)* A kind of coin aboliſhed by king *Hen.* 2. *anno* 1158. *Hollingſhed's Chron. p.* 67.

Baſillard, in the *ſtat.* 12 *Rich.* 2. *cap.* 6. Signifies a weapon, which Mr. *Speight* in his expoſition upon *Chaucer* calls *pugionem vel ſicam*, a poinard; *arrepto* baſillardo *tranſfixit* Jack Straw in gutture. *Cum alio* baſillardo *penetravit latera ejus, &c.* Knighton. lib. 5. p. 2731.

Baſelers. *Nova moncta curit in Anglia poſt* baſelers, *circa feſtum ſancti* Martini. Anal. Waverl. ſub. ann. 1180. *Cowell, edit.* 1727.

Baſileus, A word mentioned in ſeveral of our hiſtorians, ſignifying a King, and ſeems peculiar to the King of *England. Monaſticon, tom.* 1. *pag.* 65. *Ego* Edgar *totius Angliæ* baſileus *confirmavi.* —— In many places of the *Monaſticon* this word occurs; and alſo in *Ingulphus, Malmeſbury, Mat. Paris, Hoveden, &c. Cowell, edit.* 1727.

Basket-tenure Of lands. See **Caneſtellus.**

Baſnetum, A *baſnet*, or helmet. By *Inq.* 22 *Ed.* 4. after the death of *Laurence de Haſtings* Earl of *Pembroke*, it was found thus —— *Quod quidem manerium, (i. e. de* Aſton Cantlore) *per ſe tenetur de domino rege in capite, per ſervitium inveniendi unum hominem peditem, cum arcu ſine chorda, cum uno* baſneto, *ſive cappa, per xl. dies ſumptibus ſuis propriis quotiens fuerit guerra in* Wallia. Cowell, edit. 1727.

Baſſa tenura. See **Baſe eſtate.**

Baſſe, A collar for cart-horſes, made of ſtraw, ſedge, ruſhes, *&c. A. D.* 1425. The burſars of the priory of *Burceſter Com. Oxon.* account —*in tribus coleris, uno* baſſe, *cum tribus capiſtris, &c. Paroch. Antiq. p.* 574. Hence the *baſſe* for kneeling in churches. *Cowell, edit.* 1727.

Baſſinet, A ſkin with which the ſoldiers covered themſelves; from the Saxon *baſang*, *chalamys. Cowell, edit.* 1727.

Baſtard, *(Baſtardus)* From the Brit. *baſtaerd*, that is, *nothus* or *ſpurius*, is one that is born of any woman not married, ſo that his father is not known by the order of law; and therefore is called *filius populi*, the child of the people:

Cui pater eſt populus, pater eſt ſibi nullus et omnis;
Cui pater eſt populus, non habet ipſe patrem. See 1 *Inſt.* 244.

The learned *Spelman* derives the opprobrious name of *baſtard* from the Norman *bas*, and Saxon *ſteort*, riſe or original; as a perſon of a baſe and vile birth.

All

All well-regulated governments have laid down and ſettled certain rules of propagation, as neceſſary to the very being of human ſociety. Hence the ſolemnity of marriage was eſtabliſhed, not only as it prevents lewdneſs, but as a regulation, without which there would be no diſtinction of families, and conſequently no encouragement for induſtry, or foundation for acquiring riches; the children therefore that are born in theſe ſocieties, and are to enjoy any privileges by the laws, muſt be ſuch as are born according to the rules of copulation; for it is abſurd that the laws ſhould give ſanction and privilege to things done contrary to the law, ſince that would take away the diſtinction of right and wrong, lawful and unlawful; and therefore baſtards, by our law, lie under ſeveral diſabilities. 1 *New Abr.* 309.

In ancient days, baſtardy was ſo diſgraceful, that to retain a baſtard in a man's houſe was a reflection, and the ſtain and reproach of the parent's crime dwelt always upon the iſſue, ſo that he could not be admitted to a feudal ſervice; and therefore, when the biſhops requeſted that our laws ſhould be changed in the particular of baſtard *eignes*, the ſtatute ſays, that all the barons and earls anſwer'd *una voce Nolumus leges Angliæ mutare. Merton* 9. 2 *Inſt.* 93.

A baſtard is *quaſi nullius filius*, and can be heir to no man. *Doct. & Stud. dial.* 1. *cap.* 7. 2 *Inſt.* 143.

But though he cannot inherit any anceſtor, yet when he hath gotten a name of reputation, he may purchaſe by it; for all ſurnames were originally acquired by reputation. *George Shelly* conveyed lands to the uſe of himſelf, the remainder to *George Shelly* his ſon; whereas in truth *George* was born of one *B.* in matrimony of one *C.* yet was reputed the ſon of *George*, and educated by him; though the boy was but ſix years old, it was ruled that he ſhould take the remainder; for having got by reputation the name of *George Shelly*, theſe words are a certain deſignation of the perſon to take the remainder. But if a remainder be limited to the eldeſt iſſue of *J. S.* whether legitimate or illegitimate, and *J. S.* hath iſſue a baſtard, he ſhall not take this remainder; for it is not veſted in *J. S.* as it was in the other caſe, but is in contingency, and the certain time is not defined when this contingency ſhall happen; for the baſtard at his birth does not acquire the reputation of being the iſſue of *J. S.* and ſince the baſtard, when firſt in being, cannot take by virtue of this limitation, he can never take it; for he cannot be underſtood to be the perſon deſigned and marked out by theſe words, if after his birth it depends on the uncertainty of popular reputation, whether he ſhould take the remainder or not, and ſuch a deſignation of the perſon as contains no certainty in itſelf, or no relation to any other certain matter that may reduce it to certainty, is a void limitation. *Co. Lit.* 3. *b.* 6 *Co.* 65. 1 *New Abr.* 309.

But where a remainder is limited to the eldeſt ſon of *Jane S.* whether legitimate or illegitimate, and ſhe hath iſſue, a baſtard ſhall take this remainder, becauſe he acquires the denomination of her iſſue by being born of her body; and ſo it was never uncertain, who was deſigned by this remainder. *Noy* 35.

If parents are married, and afterwards divorced, this gives the iſſue the reputation of children; and ſo doth a ſubſequent marriage of the parents. 6 *Co.* 65. *Hugh's Abr.* 363.

If the mother diſpoſe of all her lands holden in chivalry, to her baſtard ſon; ſhe is not within the 32 *Hen.* 8. *cap.* 1. which forbids the owners to diſpoſe of above two-thirds of ſuch land for preferment of children; for children in any law muſt be intended ſuch as are lawfully begotten. *Dyer* 345. *Co. Lit.* 123. *b.* 2 *Rol. Abr.* 785.

If a man, in conſideration of natural affection and love, covenants to ſtand ſeiſed to the uſe of a baſtard, this is not good; for he is not *de ſanguine patris*; but it is ſaid that a woman may give lands in frank-marriage with her baſtard, becauſe he is of the blood of the mother; but he hath no father, but from reputation only. *Dyer* 374. *And* 79. 6 *Co.* 77. *Noy* 35.

A court of equity will not ſupply the want of a ſurrender of a copyhold eſtate, in favour of a baſtard, as it will for a legitimate child. *Preced. Chan.* 475.

Under this head is conſidered,

1. *Who ſhall be deemed baſtards; and of ſuppoſititious births; and of baſtard* eigne *and* mulier puiſne.

2. *Statutes concerning the ſettling and providing for baſtards, and the caſes determined upon them.*

3. *Of general and ſpecial baſtardy; how baſtardy is to be tried; and of murdering baſtards.*

1. *Who ſhall be deemed baſtards; and of baſtard* eigne, *and* mulier puiſne.

All perſons born out of lawful matrimony are baſtards by the Common law; but by the Civil law, thoſe that are born before marriage are legitimated by a ſubſequent marriage; for by the Civil law, all perſons adopted into a man's family were inheritable; and the canoniſts have allowed of this notion, becauſe the ſubſequent marriage, they ſay, takes away the preceding guilt, and ſhews a conſent from the beginning. This difference between the Civil law may likewiſe be aſcribed to the power which the father, by the Roman law, had over his children, becauſe he was the author of their being, and had the care of their education; if therefore a child ſhould not be legitimated by a ſubſequent marriage, the parent would not have him under his power; for no man had a power over the *vulgo quæſiti*; and conſequently the father would not have commanded that to which he gave being; nor would the child have had the benefit of the parent's education; which would have cut a member from the commonwealth. 47 *Ed.* 3. 14. *b.* 11 *H.* 4. 81. *Bract. lib.* 5 *fo.* 416. 1 *Rol. Abr.* 624.

If a man dies, and his wife hath iſſue, born 40 weeks and 8 days after his death, as if he dies the 23d of *March*, and the iſſue is born the 9th of *January* following, the iſſue ſhall be legitimate, for by nature it may be legitimate, and the law has not appointed any certain time for the birth of legitimate infants. *Mich.* 17 *Jac. B. R.* between upon evidence at the bar, which concerned the heir of one *Andrews*, reſolved *per curiam*; in which caſe Dr. *Paddy* and Dr. *Monford*, two phyſicians, being ſworn, informed the court, that by nature ſuch iſſue may be legitimate; for they ſaid that the exact time of the birth of an infant is 280 days from the conception, *ſcilicet*, 9 months and 10 days after the conception, accounting it *per menſes ſolar'*, *ſcilicet*, 30 days to each month; but it is natural alſo, if the birth be at any time within 10 months, *ſcilicet*, within 40 weeks; for by ſuch account 10 months and 40 weeks are all one; but by accident an infant may be born after the 40 weeks or before; and in the caſe at the bar it was proved, that the wife longed for things in the life of her huſband, and the huſband died of the plague; ſo that he was ſick but one day before his death; and that the father-in-law of the woman perſecuted her, and uſed her with great inhumanity, and cauſed her to lie in the ſtreets for ſeveral nights; and that the woman was in travel ſix weeks before ſhe was deliver'd, but that it was interrupted by the ſaid uſage of her father-in-law, and that ſhe was deliver'd within 24 hours after ſhe was received into a houſe and well uſed; which was good proof of the legitimation; tho' it was proved of the other part, that the woman was a lewd woman of her body; and upon evidence the jury found him legitimate. *Nota*; At the trial one *Chamberlain*, a man-midwife, informed the court upon his oath, that he had known a woman deliver'd of one child, and within a fortnight after of another; and the doctors ſaid, the birth is ſooner or later, according to the nutriment that the mother hath for it. 1 *Rol. Abr.* 356. *Cro. Jac.* 541.

All perſons born within marriage are legitimate, unleſs there is an apparent impoſſibility that they ſhould be generated by the huſband; for there is the ſtrongeſt preſumption that can be, that they are legitimate, becauſe the huſband

husband hath the power and dominion over his wife; and therefore may by the law keep her by force within the bounds of duty; to which the canoniſts have added a fanciful reaſon, *to wit*, the huſband having the ownerſhip of his wife, hath the property of the fruits of her body, tho' planted by another; *quicunque ſemen appoſuit marito acquiritur quia eſt dominus ventris*. Now the preſumption thus being that it is the huſband's child, it muſt be deſtroyed by contrary proof; and this negative, that it is not the huſband's child, is capable of no other proof than this only, that it muſt be ſhewn impoſſible it ſhould be the huſband's child; if therefore the huſband be proved caſtrate, the iſſue are baſtards. 1 *New Abr.* 310. 1 *Rol. Abr.* 358.

If the huſband be under the age of fourteen, the iſſue are baſtards; for before the age of puberty, generation is naturally impoſſible. 18 *Hen.* 6. 31. 34. 29 *Aſſ.* 54. *Bro. Baſtardy* 36. *Co. Lit.* 244. 1 *Rol. Abr.* 359.

If the huſband be not within the four ſeas, during the time that paſſes between the conception and birth of the child, it is a baſtard. This was ſettled when the King's dominions extended to the four ſeas only; for to paſs and repaſs in the King's dominions was poſſible; without ſome knowledge or proof of the matter, was ſuppoſed by the law not poſſible; for there is no ſuch paſſage in a realm well governed without examination. 1 *Rol. Abr.* 358. *Co. Lit.* 244. *Bract.* 239. If the huſband be in *Ireland*, during the time the wife goes with child, the iſſue is no baſtard, becauſe the huſband was within the King's dominions. 1 *Rol. Abr.* 358. *Quære.*

An order of two juſtices, which was affirmed on appeal, adjudged *J. S.* the reputed father of a baſtard child; the order recited ſpecially, that *Mary*, the wife of *Jonathan Spence*, mariner, was delivered of a male baſtard child, and that it appeared to them upom oath of, *&c.* that *Jonathan Spence* her huſband was in the King's ſervice at *Cadiz* in *Spain*, and not within the King of *England*'s dominions, at the time when the ſaid child was begotten or born; and becauſe it did not appear that the huſband was abſent all the time, as well as at the time of conception and the child's being born, the order was quaſhed. *Carth.* 469. 1 *Salk.* 122. 5 *Mod.* 419. *S. C. Note*; In trials of baſtardy at this day, if the jury find that the huſband had not acceſs, tho' the huſband and wife live in *England*, the child is a baſtard; but this proof muſt be clear, otherwiſe acceſs will be preſumed in favour of legitimation. See 1 *Salk.* 123.

If the marriage is made null by divorce, the iſſue is illegitimate; as if the parties be divorced by pre-contract, conſanguinity, affinity, or frigidity; for where the marriage is nullified, it is a copulation without marriage, and conſequently the iſſue are baſtards; and it is the ſame by our law whether they have notice or not of the conſanguinity, becauſe we look no further than the diſſolution. 1 *Rol. Abr.* 358, 359, 360.

If a man marry his couſin within three degrees, or his ſiſter, the iſſue got between them is not a baſtard till there be a divorce; for though ſuch a marriage be unlawful, yet it remains good till ſentence of divorce be pronounced, and conſequently the iſſue muſt be eſteemed legitimate till ſuch a diſſolution. 1 *Rol. Abr.* 357.

In ejectment, the queſtion on a trial at bar was, whether the leſſor was ſon and heir of *Caleb Lomax* eſquire, deceaſed, which depended on the queſtion of his mother's marriage; and that being fully proved, and evidence given of the huſband's being frequently at *London*, where the mother lived, ſo that acceſs muſt be preſumed; the defendants were admitted to give evidence of his inability from a bad habit of body; but their evidence not going to an *impoſſibility*, but an *improbability* only, that was not thought ſufficient, and there was a verdict for the plantiff. *Stra.* 940.

And it is ſaid, that formerly if the huſband was within the four ſeas, no proof of *non-acceſs* to his wife was admitted, but the child was deemed to be his; but as this notion was built on no rational foundation, it is now intirely departed from; and though the huſband and wife are both in *England*, if there is ſufficient evidence that he had no acceſs to her, the child will be a baſtard. And this was determined in the caſe of *Pendrell* and *Pendrell*, *M.* 5 *G.* 2. which was an iſſue out of Chancery, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for ſome months; that they parted, ſhe ſtaying in *London*, and he going into *Staffordſhire*; that at the end of three years the plaintiff was born: And there being ſome doubt upon the evidence, whether the huſband had not been in *London* within the laſt year, it was ſent to be tried. And the plaintiff reſted at firſt upon the preſumption of law in favour of legitimacy, which was encountred by ſtrong evidence of no acceſs. And it was agreed by court and counſel, on the trial at *Guildhall* before Lord Ch. J. *Raymond*, that the old doctrine of being within the four ſeas was not to take place, but the jury were at liberty to conſider of the point of acceſs, which they did, and found againſt the plaintiff; and the court of Chancery acquieſced in the determination. *Stra.* 925. *Andr.* 9.

An order was made upon one *Moor*, as the putative father of two baſtards, born of the body of *Elizabeth* the wife of *Richard Sharpleſs*; in which it is ſtated, that for ſeven years before, the huſband had had no acceſs to her, ſhe having never ſeen or heard of him all that time, and not knowing whether he was alive or dead; which the juſtices adjudge to be true, and that *Moor* is the father of them, and ordered him to provide accordingly. Upon appeal to the ſeſſions, the caſe is ſtated with ſome variation; that in 1728 ſhe was married to *Sharpleſs*, then a ſoldier in *Mullin*'s troop, in a barn, by a perſon not in the habit of a clergyman; and that there had been no acceſs for ſeven years: but it appearing by a certificate from the commiſſary general's office, and from the evidence of *Simon Clarkſon*, that one *Richard Sharpleſs*, who he was told was formerly in *Mullin*'s troop, was muſtered as a private gentleman in the third troop of horſe guards from *June* 25, 1733, to *Feb.* 23, 1736, though *Clarkſon* ſaid he could not take upon him to ſwear that it was the ſame *Richard Sharpleſs* pretended to be married as aforeſaid: Upon this ſuppoſition of the huſband's being alive, the ſeſſions were of opinion, the children were not baſtards, and reverſed the order of the two juſtices. And now upon debate, the order of ſeſſions was quaſhed, and the order of the juſtices confirmed: for it being ſtated in both orders, that there was no acceſs, according to the caſe of *Pendrell* and *Pendrell*, it was immaterial whether the huſband was alive or not. *Stra.* 1076.

The caſe was, a feme covert, during the abſence of her huſband at *Cadiz*, was brought to-bed of a baſtard; and her huſband was not in *England* from the time of her conception, till ſhe was brought to-bed. The queſtion was, whether this child was a baſtard, eſpecially within the words of the ſtatute of the 18 *Eliz.* (here after following) which ſaith, *children begotten and born out of lawful matrimony*, which cannot be ſaid of this caſe, the mother being married at the time of the birth of the child; and if ſuch a mother ſhould kill ſuch a child, ſhe could not be guilty within the ſtatute of the 21 *Jac. cap.* 27. But by the court; he is a baſtard who is begotten and born of a feme covert, whilſt the huſband is beyond the four ſeas. And in a real action, if general baſtardy was pleaded, the biſhop ought to certify ſuch a one a baſtard; and where a man is a baſtard, he is ſuch to all purpoſes, and why not within the 18 *Eliz.* for though the ſtatute of 21 *Jac.* is a penal law, yet the act of 18 *Eliz.* is a remedial law. *Ld. Raym.* 395, 396.

But this non-acceſs of the huſband ought to be proved otherwiſe than upon the wife's oath; as in the following caſe: The defendant *Reading* was adjudged, by an order of baſtardy, to be the putative father of a baſtard child, begotten of the wife of one *Almont* of *Shelborn*. The ſaid woman, on the appeal, gave evidence, that the ſaid *Reading* had carnal knowledge of her body in or about *Auguſt* 1732, and ſeveral times ſince; and that her huſband had no acceſs to her from *May* 1731, to the time of her examination in that court, being the 3d of *October* 1733; and that the ſaid *Reading* was the father of the ſaid child. And the queſtion on removal of the ſame into the King's Bench was, whether the wife in this caſe could

could be admitted as an evidence for or againſt her huſband, and to baſtardize her own child. And the whole court were of opinion, that the wife could be a witneſs to no other fact but that of incontinence, and that this ſhe muſt be admitted to be a witneſs to from the neceſſity of the thing: but not to the abſence of her huſband; which might properly be proved by other witneſſes; and likened it to the caſe of hue and cry, where the perſon robbed ſhall be admitted a witneſs of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, becauſe that may be proved by others. 2 *Seſſ. Ca.* 175.

Where a woman is ſeparated from her huſband by a divorce *a menſa & thoro*, the children ſhe has during the ſeparation are baſtards: for a due obedience to the ſentence ſhall be intended, unleſs the contrary be ſhewed: but if a huſband and wife, without ſentence, do part and live ſeparate, the children ſhall be taken to be legitimate, and ſo deemed till the contrary be proved, for acceſs ſhall be intended. But if a ſpecial verdict find the man had no acceſs, it is a baſtard; and ſo was the opinion of Ld. *Hale*, in the caſe of *Dickens* and *Collins*. 1 *Salk.* 123.

If a man be divorced from one woman *propter perpetuam generandi impotentiam*, and then marry another, and have iſſue by the ſecond marriage, which continues without divorce, the iſſue are lawful; for a man may be *habilis & inhabilis diverſis temporibus*, and the ſecond marriage is not avoided by any divorce, and therefore ſtands good in law. 5 *Co.* 98. *b. Burie*'s caſe. 2 *Leon.* 169. *S. C. Jenk. Rep.* 268. *Noy* 72. *Moor* 225. *pl.* 366. *S. C.*

A bed-rid perſon marries a woman that is pregnant in his chamber, the woman is delivered twelve weeks after; the child adjudged a baſtard, for the apparent impoſſibility of his being the father of it. 2 *Rol. Abr.* 353.

If a woman marry *groſſment enſient*, it is the child of the huſband; for when they teſtify their conſent by a public marriage before the birth of the child, it is a public acknowledgment that the child is his, for at that time the child is one with the mother, and therefore in taking the mother he takes the child with her. 1 *Rol. Abr.* 358.

If a man be married within the age of conſent, and when he comes to that age he is divorced by reaſon of his diſſent from the marriage, and then he marries again, and hath iſſue, and dies; it cannot be averred that he cohabited with his firſt wife to avoid the divorce, and diſannul the ſecond marriage, and baſtardize the iſſue; for the eccleſiaſtical courts are proper judges in this caſe; and when by ſentence they have declared the marriage void, it cannot belong to the temporal courts to inquire into and ſet aſide their ſentence, for that is to take away their juriſdiction; the ſame law, if the firſt wife had been divorced *cauſa præcontractûs*. 7 *Co.* 41. *Kenn*'s caſe. 1 *Rol. Abr.* 360. *Cro. Jac.* 186. 4 *Co.* 29. *Godolph.* 484.

If there be a ſeparation for adultery *a menſa & thoro*, the iſſue born afterwards are preſumed *prima facie* not to be the huſband's, unleſs it appear upon proof that the huſband after ſuch ſeparation did cohabit with his wife. 11 *Hen.* 7. 27. *a.* 1 *Rol. Abr.* 359. 7 *Co.* 42. 1 *Salk.* 123.

If *A.* takes *B.* to wife, and has iſſue by her, and they are afterwards divorced, becauſe they were within the age of conſent at the time of marriage, and afterwards diſagreed; and then *A.* takes *D.* to wife, by whom he had iſſue, and died; upon the ſuit of the iſſue of *B.* the eccleſiaſtical commiſſioners, upon a commiſſion directed to them, cannot inquire into the marriage between *A.* and *D.* becauſe they are dead; for though a ſentence of divorce may be repealed after the death of parties, by ſuit in the ſpiritual courts, yet no ſentence of divorce can paſs there after the death of the parties; for a divorce in the eccleſiaſtical courts, after the death of the parties, can be only made to baſtardize the iſſue of that marriage, which being a thing that concerns the inheritance, is properly cognizable in the temporal courts; therefore a prohibition ſhall be granted to ſtop their proceedings in it. 1 *Rol. Abr.* 360. 7 *Co.* 43. *b.*

As to the legitimation of children born after the death of the huſband, it is agreed, that the uſual time of birth is nine ſolar months and ten days; but it may be haſtened or prolonged by accident; as by hard uſage, want of ſuſtenance, *&c.* becauſe the nouriſhment of the child in the womb depends on that of the mother; ſo that a child hath been allowed legitimate nine months and twenty days after the death of the father; but if the child is born eleven months after the death of the father, and it is proved the father could not enjoy his wife within a month before his death, it was adjudged a baſtard. *Palm.* 91. *Rol. Abr.* 356. *Godolph.* 281. *Style* 277.

A lewd woman after her huſband's death married her adulterer, and within ſix months and a day after her firſt huſband's death had a child; it was adjudged the firſt huſband's, becauſe he had the dominion of the woman at the time of her conception. *Palm* 9. *Co. Lit.* 8.

A wife marries immediately after her huſband's death, and hath a child nine months and eleven days after the death of the firſt huſband, it was adjudged the ſecond huſband's, becauſe it was born one day after the uſual time, and the uſual time is the only meaſure to diſcern between them; but if it be born at the end of nine months and ten days, the father is doubtful, and ſome have ſaid, that the child might chooſe his father. 21 *Ed.* 3. 39. *Co. Lit.* 8. *a. Bro* 97. 1 *Rol. Abr.* 357. But to prevent this doubtfulneſs in heirs, and to hinder the wife from putting falſe children upon her deceaſed huſband, the law hath provided the writ *de ventre inſpiciendo* for the huſband's heir; and if the wife be found with child, or ſuſpected to be ſo, ſhe muſt be removed to a caſtle, and there ſafely kept till her delivery; and by this writ the heir may take her away from her ſecond huſband; but it lies not for the heir apparent, who hath no intereſt in the eſtate, in the life of the anceſtor. *Co. Lit.* 8. 1 *Rol. Abr.* 357.

This power of removing the relict of the anceſtor to a caſtle, in caſe ſhe really is, or is ſuſpected to be with child, ſeems only to be uſed where the woman continues unmarried; for if ſhe takes another huſband, and the ſheriff returns that he cauſed her to be ſearched by ſuch women, and found her to be *enſient*, the courſe ſeems to be this, *viz.* for the huſband to enter into recognizance, that ſhe ſhall not remove from the houſe where they then inhabit; after which a writ is to be awarded to the ſheriff to cauſe her to be viewed every day till her delivery by two at leaſt of the ſaid women returned by him; and that three or more of them ſhould be preſent with her at her delivery. *Cro. Jac.* 685. *Mo.* 523. *Co. Lit.* 8. *Cro. Eliz.* 566. *Reg.* 227.

The author of *Fleta*, who lived in the reign of *Edward* the Second, hath a whole chapter about ſuppoſititious births; where he tells us, what remedy the right heir had in ſuch caſe, *viz.* that a writ was directed to the ſheriff to cauſe the woman, who pretended herſelf to be with child, forthwith to appear in the county court, there to be ſearched by diſcreet and lawful women. And if it was doubtful to them whether ſhe was with child or not, then the ſheriff might commit her to ſome caſtle, there to continue; and no woman with child was to come near her, until ſhe ſhould be delivered. And this writ was uſed above ſixty years before the author of *Fleta* wrote, *viz.* in the 5 *H.* 3. when the widow of *William Conſtable*, of *Manton* in *Norfolk*, was found guilty of this cheat. And in all probability it was of uſe in the *Saxon* times: for the form of the writ is, to command the ſheriff to ſummon the woman to appear in the full county; as it is generally known, that all buſineſs of the law was then tranſacted in that court, where the biſhop ſate with the civil magiſtrate. *Nelſ. Rights of the Clergy*, tit. *Baſtards.*

But afterwards, when the courts at *Weſtminſter* came to be eſtabliſhed, then was the writ *de ventre inſpiciendo* framed; by which the ſheriff was commanded, that in the preſence of twelve knights and ſo many women, he ſhould cauſe examination to be made, whether the woman was with child or not; and if with child, then about what time it would be born; and that he certify the ſame to the juſtices of aſſize, or at *Weſtminſter*, under his ſeal, and under the ſeals of two of the men preſent. *Id. ib.*

husband hath the power and dominion over his wife; and therefore may by the law keep her by force within the bounds of duty; to which the canoniſts have added a fanciful reaſon, *to wit*, the huſband having the ownerſhip of his wife, hath the property of the fruits of her body, tho' planted by another; *quicunque ſemen appoſuit marito acquiritur quia eſt dominus ventris*. Now the preſumption thus being that it is the huſband's child, it muſt be deſtroyed by contrary proof; and this negative, that it is not the huſband's child, is capable of no other proof than this only, that it muſt be ſhewn impoſſible it ſhould be the huſband's child; if therefore the huſband be proved caſtrate, the iſſue are baſtards. 1 *New Abr.* 310. 1 *Rol. Abr.* 358.

If the huſband be under the age of fourteen, the iſſue are baſtards; for before the age of puberty, generation is naturally impoſſible. 18 *Hen.* 6. 31. 34. 29 *Aſſ.* 54. *Bro. Baſtardy* 36. *Co. Lit.* 244. 1 *Rol. Abr.* 359.

If the huſband be not within the four ſeas, during the time that paſſes between the conception and birth of the child, it is a baſtard. This was ſettled when the King's dominions extended to the four ſeas only; for to paſs and repaſs in the King's dominions was poſſible; without ſome knowledge or proof of the matter, was ſuppoſed by the law not poſſible; for there is no ſuch paſſage in a realm well governed without examination. 1 *Rol. Abr.* 358. *Co. Lit.* 244. *Bract.* 239. If the huſband be in *Ireland*, during the time the wife goes with child, the iſſue is no baſtard, becauſe the huſband was within the King's dominions. 1 *Rol. Abr.* 358. *Quære.*

An order of two juſtices, which was affirmed on appeal, adjudged *J. S.* the reputed father of a baſtard child; the order recited ſpecially, that *Mary*, the wife of *Jonathan Spence*, mariner, was delivered of a male baſtard child, and that it appeared to them upom oath of, *&c.* that *Jonathan Spence* her huſband was in the King's ſervice at *Cadiz* in *Spain*, and not within the King of *England*'s dominions, at the time when the ſaid child was begotten or born; and becauſe it did not appear that the huſband was abſent all the time, as well as at the time of conception and the child's being born, the order was quaſhed. *Carth.* 469. 1 *Salk.* 122. 5 *Mod.* 419. *S. C. Note*; In trials of baſtardy at this day, if the jury find that the huſband had not acceſs, tho' the huſband and wife live in *England*, the child is a baſtard; but this proof muſt be clear, otherwiſe acceſs will be preſumed in favour of legitimation. See 1 *Salk.* 123.

If the marriage is made null by divorce, the iſſue is illegitimate; as if the parties be divorced by pre-contract, conſanguinity, affinity, or frigidity; for where the marriage is nullified, it is a copulation without marriage, and conſequently the iſſue are baſtards; and it is the ſame by our law whether they have notice or not of the conſanguinity, becauſe we look no further than the diſſolution. 1 *Rol. Abr.* 358, 359, 360.

If a man marry his couſin within three degrees, or his ſiſter, the iſſue got between them is not a baſtard till there be a divorce; for though ſuch a marriage be unlawful, yet it remains good till ſentence of divorce be pronounced, and conſequently the iſſue muſt be eſteemed legitimate till ſuch a diſſolution. 1 *Rol. Abr.* 357.

In ejectment, the queſtion on a trial at bar was, whether the leſſor was ſon and heir of *Caleb Lomax* eſquire, deceaſed, which depended on the queſtion of his mother's marriage; and that being fully proved, and evidence given of the huſband's being frequently at *London*, where the mother lived, ſo that acceſs muſt be preſumed; the defendants were admitted to give evidence of his inability from a bad habit of body; but their evidence not going to an *impoſſibility*, but an *improbability* only, that was not thought ſufficient, and there was a verdict for the plantiff. *Stra.* 940.

And it is ſaid, that formerly if the huſband was within the four ſeas, no proof of *non-acceſs* to his wife was admitted, but the child was deemed to be his; but as this notion was built on no rational foundation, it is now intirely departed from; and though the huſband and wife are both in *England*, if there is ſufficient evidence that he had no acceſs to her, the child will be a baſtard. And this was determined in the caſe of *Pendrell* and *Pendrell*, *M.* 5 *G.* 2. which was an iſſue out of Chancery, to try whether the plaintiff was the heir at law of one *Thomas Pendrell*. It was agreed, that the plaintiff's father and mother were married, and cohabited for ſome months; that they parted, ſhe ſtaying in *London*, and he going into *Staffordſhire*; that at the end of three years the plaintiff was born: And there being ſome doubt upon the evidence, whether the huſband had not been in *London* within the laſt year, it was ſent to be tried. And the plaintiff reſted at firſt upon the preſumption of law in favour of legitimacy, which was encountred by ſtrong evidence of no acceſs. And it was agreed by court and counſel, on the trial at *Guildhall* before Lord Ch. J. *Raymond*, that the old doctrine of being within the four ſeas was not to take place, but the jury were at liberty to conſider of the point of acceſs, which they did, and found againſt the plaintiff; and the court of Chancery acquieſced in the determination. *Stra.* 925. *Andr.* 9.

An order was made upon one *Moor*, as the putative father of two baſtards, born of the body of *Elizabeth* the wife of *Richard Sharpleſs*; in which it is ſtated, that for ſeven years before, the huſband had had no acceſs to her, ſhe having never ſeen or heard of him all that time, and not knowing whether he was alive or dead; which the juſtices adjudge to be true, and that *Moor* is the father of them, and ordered him to provide accordingly. Upon appeal to the ſeſſions, the caſe is ſtated with ſome variation; that in 1728 ſhe was married to *Sharpleſs*, then a ſoldier in *Mullin*'s troop, in a barn, by a perſon not in the habit of a clergyman; and that there had been no acceſs for ſeven years: but it appearing by a certificate from the commiſſary general's office, and from the evidence of *Simon Clarkſon*, that one *Richard Sharpleſs*, who he was told was formerly in *Mullin*'s troop, was muſtered as a private gentleman in the third troop of horſe guards from *June* 25, 1733, to *Feb.* 23, 1736, though *Clarkſon* ſaid he could not take upon him to ſwear that it was the ſame *Richard Sharpleſs* pretended to be married as aforeſaid: Upon this ſuppoſition of the huſband's being alive, the ſeſſions were of opinion, the children were not baſtards, and reverſed the order of the two juſtices. And now upon debate, the order of ſeſſions was quaſhed, and the order of the juſtices confirmed: for it being ſtated in both orders, that there was no acceſs, according to the caſe of *Pendrell* and *Pendrell*, it was immaterial whether the huſband was alive or not. *Stra.* 1076.

The caſe was, a feme covert, during the abſence of her huſband at *Cadiz*, was brought to-bed of a baſtard; and her huſband was not in *England* from the time of her conception, till ſhe was brought to-bed. The queſtion was, whether this child was a baſtard, eſpecially within the words of the ſtatute of the 18 *Eliz.* (here after following) which ſaith, *children begotten and born out of lawful matrimony*, which cannot be ſaid of this caſe, the mother being married at the time of the birth of the child; and if ſuch a mother ſhould kill ſuch a child, ſhe could not be guilty within the ſtatute of the 21 *Jac. cap.* 27. But by the court; he is a baſtard who is begotten and born of a feme covert, whilſt the huſband is beyond the four ſeas. And in a real action, if general baſtardy was pleaded, the biſhop ought to certify ſuch a one a baſtard; and where a man is a baſtard, he is ſuch to all purpoſes, and why not within the 18 *Eliz.* for though the ſtatute of 21 *Jac.* is a penal law, yet the act of 18 *Eliz.* is a remedial law. *Ld. Raym.* 395, 396.

But this non-acceſs of the huſband ought to be proved otherwiſe than upon the wife's oath; as in the following caſe: The defendant *Reading* was adjudged, by an order of baſtardy, to be the putative father of a baſtard child, begotten of the wife of one *Almont* of *Shelborn*. The ſaid woman, on the appeal, gave evidence, that the ſaid *Reading* had carnal knowledge of her body in or about *Auguſt* 1732, and ſeveral times ſince; and that her huſband had no acceſs to her from *May* 1731, to the time of her examination in that court, being the 3d of *October* 1733; and that the ſaid *Reading* was the father of the ſaid child. And the queſtion on removal of the ſame into the King's Bench was, whether the wife in this caſe could

could be admitted as an evidence for or againſt her huſband, and to baſtardize her own child. And the whole court were of opinion, that the wife could be a witneſs to no other fact but that of incontinence, and that this ſhe muſt be admitted to be a witneſs to from the neceſſity of the thing: but not to the abſence of her huſband; which might properly be proved by other witneſſes; and likened it to the caſe of hue and cry, where the perſon robbed ſhall be admitted a witneſs of the fact of robbery, but not to prove any other matter relating thereto, as in what hundred the place was, and the like, becauſe that may be proved by others. 2 *Seſſ. Ca.* 175.

Where a woman is ſeparated from her huſband by a divorce *a menſa & thoro*, the children ſhe has during the ſeparation are baſtards: for a due obedience to the ſentence ſhall be intended, unleſs the contrary be ſhewed: but if a huſband and wife, without ſentence, do part and live ſeparate, the children ſhall be taken to be legitimate, and ſo deemed till the contrary be proved, for acceſs ſhall be intended. But if a ſpecial verdict find the man had no acceſs, it is a baſtard; and ſo was the opinion of Ld. *Hale*, in the caſe of *Dickens* and *Collins*. 1 *Salk.* 123.

If a man be divorced from one woman *propter perpetuam generandi impotentiam*, and then marry another, and have iſſue by the ſecond marriage, which continues without divorce, the iſſue are lawful; for a man may be *habilis & inhabilis diverſis temporibus*, and the ſecond marriage is not avoided by any divorce, and therefore ſtands good in law. 5 *Co.* 98. *b. Burie*'s caſe. 2 *Leon.* 169. *S. C. Jenk. Rep.* 268. *Noy* 72. *Moor* 225. *pl.* 366. *S. C.*

A bed-rid perſon marries a woman that is pregnant in his chamber, the woman is delivered twelve weeks after; the child adjudged a baſtard, for the apparent impoſſibility of his being the father of it. 2 *Rol. Abr.* 353.

If a woman marry *groſſment enſient*, it is the child of the huſband; for when they teſtify their conſent by a public marriage before the birth of the child, it is a public acknowledgment that the child is his, for at that time the child is one with the mother, and therefore in taking the mother he takes the child with her. 1 *Rol. Abr.* 358.

If a man be married within the age of conſent, and when he comes to that age he is divorced by reaſon of his diſſent from the marriage, and then he marries again, and hath iſſue, and dies; it cannot be averred that he cohabited with his firſt wife to avoid the divorce, and diſannul the ſecond marriage, and baſtardize the iſſue; for the eccleſiaſtical courts are proper judges in this caſe; and when by ſentence they have declared the marriage void, it cannot belong to the temporal courts to inquire into and ſet aſide their ſentence, for that is to take away their juriſdiction; the ſame law, if the firſt wife had been divorced *cauſa præcontractûs*. 7 *Co.* 41. *Kenn*'s caſe. 1 *Rol. Abr.* 360. *Cro. Jac.* 186. 4 *Co.* 29. *Godolph.* 484.

If there be a ſeparation for adultery *a menſa & thoro*, the iſſue born afterwards are preſumed *prima facie* not to be the huſband's, unleſs it appear upon proof that the huſband after ſuch ſeparation did cohabit with his wife. 11 *Hen.* 7. 27. *a.* 1 *Rol. Abr.* 359. 7 *Co.* 42. 1 *Salk.* 123.

If *A.* takes *B.* to wife, and has iſſue by her, and they are afterwards divorced, becauſe they were within the age of conſent at the time of marriage, and afterwards diſagreed; and then *A.* takes *D.* to wife, by whom he had iſſue, and died; upon the ſuit of the iſſue of *B.* the eccleſiaſtical commiſſioners, upon a commiſſion directed to them, cannot inquire into the marriage between *A.* and *D.* becauſe they are dead; for though a ſentence of divorce may be repealed after the death of parties, by ſuit in the ſpiritual courts, yet no ſentence of divorce can paſs there after the death of the parties; for a divorce in the eccleſiaſtical courts, after the death of the parties, can be only made to baſtardize the iſſue of that marriage, which being a thing that concerns the inheritance, is properly cognizable in the temporal courts; therefore a prohibition ſhall be granted to ſtop their proceedings in it. 1 *Rol. Abr.* 360. 7 *Co.* 43. *b.*

As to the legitimation of children born after the death of the huſband, it is agreed, that the uſual time of birth is nine ſolar months and ten days; but it may be haſtened or prolonged by accident; as by hard uſage, want of ſuſtenance, *&c.* becauſe the nouriſhment of the child in the womb depends on that of the mother; ſo that a child hath been allowed legitimate nine months and twenty days after the death of the father; but if the child is born eleven months after the death of the father, and it is proved the father could not enjoy his wife within a month before his death, it was adjudged a baſtard. *Palm.* 91. *Rol. Abr.* 356. *Godolph.* 281. *Style* 277.

A lewd woman after her huſband's death married her adulterer, and within ſix months and a day after her firſt huſband's death had a child; it was adjudged the firſt huſband's, becauſe he had the dominion of the woman at the time of her conception. *Palm* 9. *Co. Lit.* 8.

A wife marries immediately after her huſband's death, and hath a child nine months and eleven days after the death of the firſt huſband, it was adjudged the ſecond huſband's, becauſe it was born one day after the uſual time, and the uſual time is the only meaſure to diſcern between them; but if it be born at the end of nine months and ten days, the father is doubtful, and ſome have ſaid, that the child might chooſe his father. 21 *Ed.* 3. 39. *Co. Lit.* 8. *a. Bro* 97. 1 *Rol. Abr.* 357. But to prevent this doubtfulneſs in heirs, and to hinder the wife from putting falſe children upon her deceaſed huſband, the law hath provided the writ *de ventre inſpiciendo* for the huſband's heir; and if the wife be found with child, or ſuſpected to be ſo, ſhe muſt be removed to a caſtle, and there ſafely kept till her delivery; and by this writ the heir may take her away from her ſecond huſband; but it lies not for the heir apparent, who hath no intereſt in the eſtate, in the life of the anceſtor. *Co. Lit.* 8. 1 *Rol. Abr.* 357.

This power of removing the relict of the anceſtor to a caſtle, in caſe ſhe really is, or is ſuſpected to be with child, ſeems only to be uſed where the woman continues unmarried; for if ſhe takes another huſband, and the ſheriff returns that he cauſed her to be ſearched by ſuch women, and found her to be *enſient*, the courſe ſeems to be this, *viz.* for the huſband to enter into recognizance, that ſhe ſhall not remove from the houſe where they then inhabit; after which a writ is to be awarded to the ſheriff to cauſe her to be viewed every day till her delivery by two at leaſt of the ſaid women returned by him; and that three or more of them ſhould be preſent with her at her delivery. *Cro. Jac.* 685. *Mo.* 523. *Co. Lit.* 8. *Cro. Eliz.* 566. *Reg.* 227.

The author of *Fleta*, who lived in the reign of *Edward* the Second, hath a whole chapter about ſuppoſititious births; where he tells us, what remedy the right heir had in ſuch caſe, *viz.* that a writ was directed to the ſheriff to cauſe the woman, who pretended herſelf to be with child, forthwith to appear in the county court, there to be ſearched by diſcreet and lawful women. And if it was doubtful to them whether ſhe was with child or not, then the ſheriff might commit her to ſome caſtle, there to continue; and no woman with child was to come near her, until ſhe ſhould be delivered. And this writ was uſed above ſixty years before the author of *Fleta* wrote, *viz.* in the 5 *H.* 3. when the widow of *William Conſtable*, of *Manton* in *Norfolk*, was found guilty of this cheat. And in all probability it was of uſe in the *Saxon* times: for the form of the writ is, to command the ſheriff to ſummon the woman to appear in the full county; as it is generally known, that all buſineſs of the law was then tranſacted in that court, where the biſhop ſate with the civil magiſtrate. *Nelſ. Rights of the Clergy*, tit. *Baſtards*.

But afterwards, when the courts at *Weſtminſter* came to be eſtabliſhed, then was the writ *de ventre inſpiciendo* framed; by which the ſheriff was commanded, that in the preſence of twelve knights and ſo many women, he ſhould cauſe examination to be made, whether the woman was with child or not; and if with child, then about what time it would be born; and that he certify the ſame to the juſtices of aſſize, or at *Weſtminſter*, under his ſeal, and under the ſeals of two of the men preſent. *Id. ib.*

We have two inſtances of this writ in the books; the one in *Eaſter* term in the 39 *El.* which was thus: *Percival Willoughby*, and *Bridget* his wife, one of the coheirs of Sir *Francis Willoughby* (becauſe Sir *Francis* died ſeiſed of a great inheritance, having five daughters, whereof the eldeſt was married to *Percival Willoughby*, and not any ſon; and the ſaid *Francis* leaving his wife *Dorothy*, who at the time of his death pretended herſelf to be with child by Sir *Francis*, which if it were a ſon, all the five ſiſters ſhould thereby loſe the inheritance unto them) prayed a writ *de ventre inſpiciendo* out of the Chancery, directed to the ſheriff of *London*, that he ſhould cauſe the ſaid *Dorothy* to be viewed by twelve knights, and ſearched by twelve women, in the preſence of the twelve knights, *& ad tractandum ubera, & ventrem inſpiciendum*, whether ſhe were with child, and to certify the ſame into the court of Common Pleas; and if ſhe were with child, to certify for how long time in their judgments, and when ſhe would be delivered. Whereupon the ſheriff accordingly cauſed her to be ſearched, and returned, that ſhe was twenty weeks gone with child, and that within twenty weeks ſhe would be delivered. Whereupon another writ iſſued out of the Common Pleas, commanding the ſheriff ſafely to keep her in ſuch an houſe, and that the doors ſhould be well guarded, and that every day he ſhould cauſe her to be viewed by ſome of the women named in the writ (wherein ten were named); and when ſhe ſhould be delivered, that ſome of them ſhould be with her to view the birth, whether it be male or female, to the intent there ſhould not be any falſity. And upon this writ the ſheriff returned, that accordingly he had done, and that ſuch a day ſhe was delivered of a daughter. *Cro. El.* 566.

Note; this writ, and the proceedings thereupon, are grounded upon *Bracton*, *b.* 2. *p.* 69. and upon the writ in the *Regiſter*, p. 227.

The other caſe was in *Eaſter* term 22 *J.* which was thus: *Alphonſus Theaker*, couſin and heir of *William Theaker*, after the death of *William Theaker*, becauſe he had not any iſſue alive at the time of his death (but *Mary* his wife was then ſuppoſed to be *enſient* by him, and within one week after his death was married again to one *John Duncomb*) procured out of the Chancery a writ *de ventre inſpiciendo* of the ſaid *Mary*, directed to the ſheriff of *London*, to cauſe the ſaid *Mary* to be ſearched, whether ſhe were with child by the ſaid *William Theaker*, and when ſhe would be delivered (no mention being made of her ſecond marriage); and this writ was according to the precedent in 39 *El.* of the like writ againſt the lady *Willoughby*. And this writ was returnable in the Common Pleas. The ſheriff returned the inquiſition, that by ſuch perſons he cauſed her to be ſearched, and found her to be *enſient*, and that ſhe would be delivered within twenty weeks. Wherefore he now prayed a ſecond writ out of the Common Pleas to be directed to the ſheriff of *Surry*, becauſe ſhe was removed with her huſband to *Wandſworth* in *Surry*, and there inhabited, that the ſheriff might take her into his cuſtody, and keep her until ſhe were delivered of her child, that there might not appear to be any falſe or ſuppoſititious birth; and that in the mean time he ſhould cauſe her to be viewed every day by certain matrons named by the court in the writ, and that ſome of them might be at the birth of the child, according to the ſaid precedent of the lady *Willoughby*. But becauſe in that caſe the lady was a widow, and ſo ſuch a courſe might well be obſerved, but here ſhe was a feme covert, who ought to cohabit with her huſband, they would not take ſuch a courſe with her, but left her with her huſband, he entering into recognizance that he ſhould not remove from the houſe wherein they then inhabited; and that one or two of the women returned by the ſheriff ſhould ſee her every day, and that two or three of them ſhould be preſent at her travail: for it was ſaid, that this iſſue might be well ſaid to be the child of the firſt huſband, and ſhould inherit his land. So as if there were any falſe or ſuppoſititious birth, the couſin and heir might be diſinherited. Wherefore a writ was accordingly awarded to the ſheriff of *Surry*, to cauſe her to be ſeen every day until her delivery by two at leaſt of the ſaid women returned by him; and that three of them or more ſhould be preſent with her at her delivery, ſo as no falſhood might be in her birth. And after this courſe obſerved, ſhe was delivered of a female child, who was afterwards by inquiſition found to be the daughter and heir of the ſaid *William Theaker*, deceaſed. *Cro. Jac.* 685.

And this whole procedure ſeemeth to be deduced from the rules of the civil law, which is particularly expreſs and punctual in this behalf. For by that law, the woman, who ſuppoſeth herſelf to be with child, muſt intimate it twice in every month to thoſe who are neareſt concerned, that they may ſend five women to inſpect her; and ſhe muſt do the like for the ſpace of a month before ſhe expects to be delivered, that they may ſend ſome perſon to be there at the time. The judge may appoint in what houſe ſhe ſhall dwell; and the room wherein ſhe lies muſt be ſearched; and if there be more than one door, it muſt be nailed up; and three men, and as many women, muſt be ſet to watch her as often as ſhe comes into the chamber, who are alſo to ſearch all perſons who come into the houſe and chamber. When ſhe is in labour, five women, ſent by the party next concerned, muſt be witneſſes to the birth, of which they muſt have notice beforehand; and there muſt be no more in the chamber at that time but ten women, two midwives, and ſix ſervants, of which none muſt be with child, and therefore may be ſearched before they go in; there muſt be three lights in the room; the child when born muſt be ſhewed to thoſe who are concerned; the judge muſt appoint who ſhall keep it, unleſs the father hath otherwiſe appointed; and it muſt be ſhewed twice in a month till it is three months old, and afterwards once in a month till it is ſix months old; and once in two months till it is a year old; and from thence once in ſix months till it can ſpeak. And if any thing is done contrary to the premiſſes, or not permitted to be done; then upon proof thereof, the child is not to be admitted to the poſſeſſion of the eſtate. *Nelſ. Rights of the Clergy*, tit. *Baſtards*.

A man who hath iſſue a ſon by a woman before marriage, and afterwards marries the ſame woman, and hath iſſue a ſecond ſon born after the marriage; the firſt of theſe is termed in law a *baſtard eigne*, and the ſecond a *mulier*; by the common law, as has been ſaid, ſuch *baſtard eigne* is as incapable of inheriting, as if the father and mother had never married; but yet there is one caſe in which his iſſue was let into the ſucceſſion, and that was by the conſent of the lord and perſon legitimate; as if upon the death of the father the *baſtard eigne* enters, and the *mulier* during his whole life never diſturbs him, he cannot upon the death of the *baſtard eigne* enter upon his iſſue. *Lit. Sect.* 399. *Co. Lit.* 245.

No man can baſtardize another after his death, that was a *mulier* by the laws of holy church, and who carried the reputation of legitimate during his life; for a man muſt be baſtardized by the rules of the civil or common law: by the rules of the civil law, this perſon is by ſuppoſition legitimate; and if the common law be made the judge, he cannot be baſtardized; for it is a rule of common law, that a perſonal defect dies with the perſon, and cannot after his death be objected to his ſucceſſor that repreſents him; and this rule of law was taken from the humanity of the ancients, which would not allow the calumny of the dead, as alſo from an important reaſon of convenience, for pedigrees are often derived through ſeveral perſons, concerning whom there remains little knowledge or remembrance of any thing, but only of their being; and therefore it were an eaſy matter to throw on them the aſperſion of baſtardy by any forged evidence, which cannot be confronted by oppoſite proof; and ſo it is fit to limit a time in which all proofs of baſtardy are to be diſallowed. 7 *Co.* 44. *Jenk. Rep.* 268. 1 *Brownl.* 42. *Co. Lit.* 33. *a. Lit. Sect.* 399. *Co. Lit.* 245.

Though this ſeems to be the doctrine of the old books, yet there is this modern caſe. An ejectment was brought by one *Pride* againſt the earls of *Bath* and *Mountague*; *Pride* made title as heir to *George* duke of *Albemarle*, proving himſelf the ſon of one who was brother to the duke, and that the duke died without iſſue; the defendant

dant gave evidence, that duke *George* had iſſue duke *Chriſtopher*, who conveyed to him; plaintiff gave evidence, that duke *Chriſtopher* was a baſtard, begotten of ſuch a woman, who, at the time of her marriage with the ſaid *George* duke of *Albemarle*, was married to another man, who was then, and yet living: upon which it was objected, that ſince duke *George* and this woman lived together as man and wife, and were now dead, the plaintiff could not be admitted to baſtardize the iſſue, who was dead alſo; and who, during his whole life, was reputed and taken to be the legitimate ſon of the duke, and ſo ſtiled by the duke himſelf in his deed of ſettlement, and in his will his ſon and heir; *& quod juſtum non eſt aliquem poſt mortem facere baſtardum.* The court held this true of ſuch a baſtard as is meant by *Littleton*, in his caſe of *baſtard eigne*, and *mulier puiſne*, that is, ſuch a baſtard as is born before the eſpouſals of a father and mother, who may afterwards marry; and ſaid, the rule extended only to that caſe. 1 *Salk.* 120. *Pride* v. Earls of *Bath*, &c. 7 *W. & M.* 3 *Lev.* 410. *S. C.* Who tells us, that though the evidence was admitted by *Holt*, and *Gil. Eyre*, who were only in court, the jury were not ſatisfied with it, and gave a verdict for the Earl of *Bath*.

To exclude the *mulier* from the inheritance, there muſt not only be an uninterrupted poſſeſſion of the *baſtard eigne* during his life, but a deſcent to his iſſue. *Co. Lit.* 244. 1 *Rol. Abr.* 624.

If the *baſtard eigne* die, having iſſue *in ventre ſa mere*, and the *mulier* enter, and then the ſon is born, the ſon of the *baſtard eigne* is for ever excluded, becauſe there was no deſcent; and ſo our law in this diſagrees with the civil law, which, for the benefit of the infant, reputes a child in its mother's womb in the ſame condition as if it were born. *Co. Lit* 244. *Hughes* 365.

If the *baſtard eigne* enter and die without iſſue, yet the lord by eſcheat cannot claim it againſt the *mulier*, for there is no deſcent caſt to extinguiſh his right. *Co. Lit.* 244.

If the *mulier* enter into the land after the deceaſe of the baſtard, before the heir of the *baſtard eigne*, yet he is barred; for the land is caſt upon the iſſue of the baſtard immediately after his death, and the deſcent to him is made without any entry, and conſequently he is within the benefit of the rule. *Co. Lit.* 244

If the *mulier* be an infant during the poſſeſſion of the *baſtard eigne*, yet he is barred by the deſcent; for though no laches can be imputed to an infant, becauſe not being of the age of conſent, his permiſſion cannot be taken for a conſent; yet in ſuch caſes where the time is limited by the law for pleas and actions, infants are included, unleſs ſpecially excepted, for here their permiſſion is taken for a conſent, becauſe they are ſuppoſed to conſent to the eſtabliſhed law, to which they are obliged for protection during minority; and the law hath not thought fit to except, becauſe it is a publick miſchief in a very tender point; for it might be any man's caſe to ſuffer by the baſtard of an anceſtor, and the law hath given the infants guardians to plead by; but it cannot revive the evidence of legitimation, which ſo eaſily periſhes with the life of the party. *Co. Lit.* 244. 8 *Co.* 101. *Plowd.* 372.

If *baſtard eigne* and *mulier puiſne* daughters enter and occupy in coparcenary, the law will not ſuppoſe the whole in the *mulier*, but by a more eaſy conſtruction preſume that the *mulier* admits the other into the inheritance; ſo if there be *baſtard eigne* and *mulier puiſne*, and the *mulier* enters to hunt or hawk, this doth not diſturb the baſtard's poſſeſſion, for a man's intention does always govern and denominate his actions; and in this caſe he did not enter to claim. *Co. Lit.* 244.

If the *baſtard eigne* enters after the deceaſe of his father, and the king ſeizes the land for a contempt (whereby the profits only are taken) without cauſe, and the baſtard dies, and the iſſue petitions and is reſtored, he ſhall hold it againſt the *mulier*; for when the king ſeizes land without cauſe, he ſhall only hold it as a ſubſtitute to the poſſeſſor. *Co. Lit.* 245.

The baſtard being impleaded ſhall have his age, for the dilatory plea muſt be determined before the pleas in chief can come; ſo that the plea of infancy will ſtay the ſuit before it can be inquired whether he is or is not a baſtard; alſo he ſhall be vouched as heir to the father, for *qui ſentit commodum ſentire debet & onus.* *Co. Lit.* 244.

If a man hath iſſue a ſon *baſtard eigne*, and a daughter, being *mulier puiſne*, and the daughter is married, the father dies, and the ſon enters and dies ſeiſed, this ſhall bar the *mulier*, for ſhe might have claimed by her huſband. The ſame law if the *baſtard eigne* enters and enjoys peaceably during his life, while the *mulier* is impriſoned or beyond the ſea, or of non-ſane memory, for the conſtant and quiet poſſeſſion of the *baſtard eigne*, together with the character he had, during life, of being legitimate, ſhall in caſe of ſuch nice conſequence outweigh at a trial, any evidence that can be brought to the contrary. *Co. Lit.* 244. 8 *Co.* 101.

The deſcent of ſervices, rents, or reverſions expectant upon eſtates tail, or for life, whereon rents are reſerved, ſhall bind the *mulier*; for the enjoyment of theſe do equally ſuppoſe the character of legitimate, as the poſſeſſion of any corporal rights; but ſuch a deſcent would not drive the party that hath right to an action, for it is a contradiction in terms, that a man ſhould be diſpoſſeſſed of a mere right. *Co. Lit.* 244. 8 *Co.* 101.

If the *baſtard eigne* die ſeiſed, and the ſon endow the wife, yet the deſcent takes away the right of the *mulier*; the *baſtard eigne*'s entering into religion is ſuch a deſcent as takes away the right of the *mulier*. *Co. Lit.* 244. 8 *Co.* 101.

Tenant in tail, the remainder in tail, the remainder in fee; tenant in tail hath iſſue *baſtard eigne* and *mulier puiſne*, and dies; the baſtard entereth and continueth his poſſeſſion, and hath iſſue and dies; the iſſue enters, the *mulier* dies; he in remainder ſhall have a *formedon* againſt the iſſue of the baſtard, and the continuance of the poſſeſſion of the baſtard ſhall not prejudice him; for the ſtatute *Weſtm.* 2. ſays, that the will of the donor manifeſtly expreſſed in his gift muſt be obſerved; now the baſtard cannot bring himſelf within the intention of the donor, for he is neither the heir, nor a perſon begotten by tenant in tail, ſince, in law, he is the ſon of no man, and conſequently the expreſs words of the ſtatute excludes him from the inheritance, which ſets aſide the rules of common law in this caſe. 1 *Rol. Abr.* 625.

If a man hath iſſue *baſtard eigne* and *mulier puiſne*; and the baſtard in the life of the father dies, leaving iſſue, and then the father dies, and the ſon of the baſtard enters and dies ſeiſed, and it deſcends to his iſſue, the deſcent ſhall bind the *mulier*; for if otherwiſe, it would be baſtardizing the anceſtor after one deſcent, which is contrary to the rule. *Co. Lit.* 244.

2. *The ſtatutes concerning the ſettling and providing for baſtards, and the caſes determined upon them.*

By the ſtat. 18 *Eliz. cap.* 3. it is enacted, "That two juſtices of the peace, whereof one to be of the *quorum*, in or next unto the limits where the pariſh church is, within which pariſh the baſtard ſhall be born, upon examination of the cauſe and circumſtance, ſhall and may by their diſcretion take order, as well for the puniſhment of the mother and reputed father of ſuch baſtard child, as alſo for the better relief of every ſuch pariſh, in part or in all; and ſhall and may likewiſe by like diſcretion take order for the keeping of every ſuch baſtard child, by charging ſuch mother or reputed father with the payment of money weekly, or other ſuſtentation for the relief of ſuch child, in ſuch wiſe as they ſhall think meet and convenient; and if, after the ſame order by them ſubſcribed under their hands, and the ſaid perſons, *viz.* mother or reputed father, upon notice thereof, ſhall not for their part obſerve and perform the ſaid order, then every ſuch party ſo making default, in not performing the ſaid order, to be committed to ward to the common gaol, there to remain without bail or mainprize, except he, ſhe, or they ſhall put in ſufficient ſurety to perform the ſaid order, or elſe perſonally to appear at the next general ſeſſions of the peace to be held in that county where ſuch order ſhall be taken, and alſo to abide ſuch order as the ſaid

B A S

ſaid juſtices of the peace, or the greater part of them, then and there ſhall take in that behalf, if they then and there ſhall take any; and that if at the ſaid ſeſſions the ſaid juſtices ſhall take no other order, then to abide and perform the order before made, as is above ſaid."

Two juſtices] A ſingle juſtice may bind to the good behaviour him that is charged or ſuſpected to have begotten a baſtard child. *Lam.* 122. *Crom.* 196. *Dalton* 44. But the two juſtices cannot make any order purſuant to this ſtatute, unleſs the child has been a charge to the pariſh. *Comb.* 39. 1 *Vent.* 37, 363.

If the two juſtices diſagree, ſo that they make no order, the two juſtices of the next diviſion, being of the ſame county, may make the order. *Dalt.* 45.

If five juſtices make the order, it is good; for the ſtatute is not reſtrictive, but requires two at leaſt. 2 *Salk.* 477.

If *J. S.* is adjudged the father of a baſtard child, and by the order it appears, that the examination of the woman was by one juſtice only, though the ordering part thereof is ſaid to be made by two, the court will quaſh it. *Rex* v. *Beard*, 2 *Salk.* 122. We the ſaid juſtices *doth*, inſtead of *do*, an order was quaſhed for this fault. 1 *Salk.* 478.

Whereof one to be of the quorum] Many orders have been formerly quaſhed, for want of ſetting forth that one of the juſtices was of the *quorum*. See *Dalt.* 47. 2 *Salk.* 477. 1 *Sid.* 222. *S. P.* But now by the ſtatute 26 *Geo* 2. *cap.* 27. no order ſhall be quaſhed for that defect only.

Shall be born] The place of birth muſt be ſet forth in the order, becauſe it may be born in a pariſh where the two juſtices who made the order had no juriſdiction; and that it may appear that it was born in that pariſh to which the relief is ordered. *Style* 368. *Dalton* 47.

Upon examination] And therefore not only the mother, but likewiſe the putative father, ſhould be ſummoned to appear, and both parties examined before any order is made; but this, however agreeable it ſeems to natural juſtice, is not always practiſed, the juſtices being apprehenſive that ſuch warning would tend to no other uſe, but to make the father keep out of the way; however, it has been reſolved, that ſuch ſummons is neceſſary. *Dalt.* 52.

An order made by two juſtices of the peace was quaſhed, becauſe it was made on an affidavit brought to them without the examination of any witneſſes. *Comb.* 103.

Reputed father] They muſt adjudge him the father of the child. 1 *Sid.* 363. *Style* 154. *Dalt.* 52.

Take order for the keeping] An order that the reputed father ſhould pay ſo much till further order, was quaſhed; for that further order might be 40 years hence. 2 *Show.* 129.

An order that the reputed father ſhould give ſuch ſecurity as overſeers or churchwardens ſhall think fit, is naught; for by ſuch order the juſtices delegate their authority to others. *Salk.* 477. *Dalt.* 47.

An order to pay ſo much money a week till the child is fourteen years of age, is naught; for the juſtices have no power but to indemnify the pariſh, and that is done by obliging the father to maintain the child as long as it may be chargeable to the pariſh. 1 *Salk.* 121. *Comb.* 232. *S. P.*

An order that the father ſhould pay ſo much a week to the pariſh till the child was twelve years old, quaſhed; for the father may take it away and maintain it himſelf. 1 *Vent.* 48. 151. 1 *Sid.* 222. *S. P.* 1 *Mod.* 20.

An order that the father ſhould pay ſo much weekly, without ſaying for how long, is naught; for it ſhould be ſo long as it is chargeable to the pariſh. *Style* 134. *S. P.* 2 *Keb.* 575. 2 *Salk.* 480.

The juſtices may order the payment of a ſum in groſs, for the charges the pariſh has been already at to midwife, nurſe, *&c.* *Dalton* 47. 1 *Vent.* 336. 1 *Salk.* 124, 477.

But an order that the father ſhould pay 4*s.* to the midwife, and 7*s.* a week until the child was able to get its living by working, was quaſhed. 1ſt, Becauſe it did not appear that the pariſh procured the midwife, or were at any charge with reſpect to her; and they have no power to order any money but for the indemnity of the pariſh. 2dly, 7*s.* a week is exceſſive, and uncertain as to the time; for the father may, if he pleaſes, maintain it cheaper; and the order ſhould have been for ſo long time as it ſhall be chargeable to the pariſh. 1 *Vent.* 210.

An order that the father ſhould pay 2*d.* a week is too little and unreaſonable. 1 *Sid.* 363.

When they order a ſum in groſs, they muſt ſhew for what, and the charges the pariſh had been at. *Comb.* 103.

They cannot order a ſum in groſs for putting out the child apprentice. *Comb.* 448.

An order to pay ſo much weekly to the overſeers of the poor, for, *&c.* is good; for before the inſtitution of theſe it might have been ordered to be paid to two or three of the inhabitants. *Salk.* 122.

The order directed that ſecurity ſhould be given for the performance of it; and becauſe the ſtatute directs, that the ſecurity ſhould be either to perform the order, or appear at the next ſeſſions; for this the order was quaſhed. 2 *Show.* 258. 2 *Bulſt.* 242. *S. P.*

Such baſtard child] If the child is no baſtard, and yet they adjudge him ſuch, an action lies againſt them. *Comb.* 482.

Where the huſband was ſeven years abſent beyond ſea, and they adjudged the child which the wife had in that time a baſtard. 5 *Mod.* 419. 1 *Salk.* 122, 123.

At the next general ſeſſions] Muſt be intended that the order made by the two juſtices muſt be confirmed or diſcharged at the next quarter ſeſſions of that part of the county where it was made, and not at the ſeſſions in the county, for that would be miſchievous in many counties, where there are ſeveral ſeſſions in diſtinct parts of the county. *Dalton* 48. 1 *Sid.* 149. Muſt be the next ſeſſions after the notice of the order. 1 *Sid.* 325.

Held in that county] Exception was taken to an order, that it was made *ad ſeſſionem pacis in com' præd'*, and did not ſay *pro com'*, but over-ruled. 1 *Vent.* 37.

And alſo to abide ſuch order] It ſeems by the better opinions, that the juſtices in their ſeſſions have no power to make an original order, and are only to reverſe or affirm the order made by the two juſtices; for this *vide* 2 *Bulſt.* 342, 355. *Dalt.* 48, 49. *Cro. Car.* 337, 341. 2 *Show.* 132. 1 *Vent.* 59, 48. But upon the removal of the cauſe by *certiorari*, the court of King's Bench may either reverſe the order in whole, or in part; and though they reverſe the order for irregularity, yet will they oblige the father to give ſecurity to appear at the next ſeſſions, to abide ſuch further order as ſhall then be made. *Comb.* 286, 264. 2 *Salk.* 477.

Baſtard children gain a ſettlement in the pariſh where they are born; but if a woman big with child of a baſtard, is by order of two juſtices removed from the pariſh of *A.* to *B.* as her laſt place of ſettlement; from which order *B.* appeals, but before the next ſeſſions ſhe is delivered of a baſtard child in *B.* and afterwards the order of the two juſtices is vacated, the child muſt follow the mother, and gains a ſettlement in *A.* *Carth.* 397. 1 *Salk.* 121. 5 *Mod.* 204. *Comb.* 360. See 2 *Bulſt.* 349. *Dalt.* 49.

By the ſtat. 7 *Jac.* 1. *cap.* 4. it is enacted, "That every lewd woman which ſhall have any baſtard which may be chargeable to the pariſh, the juſtices of the peace ſhall commit ſuch lewd woman to the houſe of correction, there to be puniſhed and ſet to hard labour during the term of one whole year; and if ſhe ſhall eftſoons offend again, then to be committed to the ſaid houſe of correction as aforeſaid, and there to remain till ſhe can put in good ſureties for her good behaviour not to offend again."

Which ſhall have any baſtard] The woman muſt be delivered of ſuch baſtard child before ſhe can be ſent to the houſe of correction, and the child is not to be ſent with her. *Dalton* 48.

Which may be chargeable] The child muſt be chargeable to the pariſh; therefore if the father, or any other maintains it, it ſeems ſhe is not to be puniſhed by this ſtatute. See *Dalton*, *c.* 46.

Juſtices of the peace] Muſt be by two juſtices at leaſt. *Dalt. c.* 46.

Offend again] But ſhe ſhall not be puniſhed upon this part of the ſtatute, unleſs ſhe were before convicted and puniſhed on the firſt. *Qu.* If ſhe were before proceeded againſt purſuant to the ſtatute 18 *Eliz.* 2 *Bulſt.* 348, 349.

By ſtat. 13 & 14. *Car.* 2. *cap.* 12. *ſect.* 19. "Whereas the putative fathers and lewd mothers of baſtard children run away out of the pariſh, and ſometimes out of the county, and leave the ſaid baſtard children upon the charge of the pariſh where they are born, although ſuch putative father and mother have eſtates ſufficient to diſcharge ſuch pariſh; it is therefore enacted, That it ſhall and may be lawful for the churchwardens and overſeers for the poor of ſuch pariſh where any baſtard child ſhall be born, to take and ſeize ſo much of the goods and chattels, and to receive ſo much of the annual rents or profits of the lands of ſuch putative fathers or lewd mothers, as ſhall be ordered by any two juſtices of the peace, for or towards the diſcharge of the pariſh, to be confirmed at the ſeſſions, for the bringing up and providing for ſuch baſtard child; and thereupon it ſhall be lawful for the ſeſſions to make an order for the churchwardens or overſeers of the poor of ſuch pariſh to diſpoſe of the goods by ſale or otherwiſe, or of ſo much of them for the purpoſes aforeſaid as the court ſhall think fit, and to receive the rents and profits, or ſo much of them as ſhall be ordered by the ſeſſions as aforeſaid, of his or her lands."

To ſeize ſo much of the goods] Order to the churchwardens and overſeers to ſeize, of the putative father's goods, what they ſhould judge proper for ſecuring of the pariſh, quaſhed; for that it ſhould be what the juſtices think proper, and not what the churchwardens and overſeers think proper. *L. Raym.* 858.

By ſtat. 6 *Geo.* 2. *ſect.* 1. it is enacted, "That if any ſingle woman ſhall be delivered of a baſtard child, which ſhall be chargeable, or likely to become chargeable to any pariſh or extraparochial place; or ſhall declare herſelf to be with child, and that ſuch child is likely to be born a baſtard, and to be chargeable to any pariſh or extraparochial place, and ſhall in either of ſuch caſes, in an examination to be taken in writing upon oath before any one or more juſtice or juſtices of the peace of any county, riding, diviſion, city, liberty, or town corporate, wherein ſuch pariſh or place ſhall lie, charge any perſon with having gotten her with child, it ſhall and may be lawful to and for ſuch juſtice or juſtices, upon application made to him or them by the overſeers of the poor of ſuch pariſh, or by any one of them, or by any ſubſtantial houſeholder of ſuch extraparochial place, to iſſue out his or their warrant or warrants for the immediate apprehending ſuch perſon ſo charged as aforeſaid, and for bringing him before ſuch juſtice or juſtices, or before any other of his Majeſty's juſtices of the peace of ſuch county, *&c.* and the juſtice and juſtices before whom ſuch perſon ſhall be brought is and are hereby authorized and required to commit the perſon ſo charged as aforeſaid to the common gaol or houſe of correction of ſuch county, *&c.* unleſs he ſhall give ſecurity to indemnify ſuch pariſh or place; or ſhall enter into a recognizance with ſufficient ſurety, upon condition to appear at the next general quarter ſeſſions, or general ſeſſions of the peace, to be held for ſuch county, *&c.* and to abide and perform ſuch order or orders as ſhall be made in purſuance of an act paſſed in the 18th year of Queen *Elizabeth*, concerning baſtards begotten and born out of lawful matrimony.

Sect. 2. Provided that if the woman ſo charging any perſon as aforeſaid ſhall happen to die or be married before ſhe ſhall be delivered, or if ſhe ſhall miſcarry of ſuch child, or ſhall appear not to have been with child at the time of her examination, then and in any of the ſaid caſes ſuch perſon ſhall be diſcharged from his recognizance at the next general quarter ſeſſions, or general ſeſſions of the peace to be holden for ſuch county, *&c.* or immediately releaſed out of cuſtody, by warrant under the hand and ſeal or hands and ſeals of any one or more juſtice or juſtices of the peace reſiding in or near the limits where ſuch pariſh or place ſhall lie.

Sect. 3. Provided alſo, that upon application made by any perſon who ſhall be committed to any gaol or houſe of correction by virtue of this act, or by any perſon on his behalf, to any juſtice or juſtices reſiding in and near the limits where ſuch pariſh or place ſhall lie, ſuch juſtice or juſtices are hereby authorized and required to ſummon the overſeer or overſeers of the poor of ſuch pariſh, or one or more of the ſubſtantial houſholders of ſuch extraparochial place, to appear before him or them at a time and place to be mentioned in ſuch ſummons, to ſhew cauſe why ſuch perſon ſhould not be diſcharged; and if no order ſhall appear to have been made in purſuance of the ſaid act of the 18th of *Elizabeth*, or within ſix weeks after ſuch woman ſhall have been delivered, ſuch juſtice or juſtices ſhall and may diſcharge him from his impriſonment in ſuch gaol or houſe of correction to which he ſhall have been committed.

Sect. 4. Provided always, that it ſhall not be lawful for any juſtice or juſtices of the peace to ſend for any woman whatſoever before ſhe ſhall be delivered, and one month after, in order to her being examined concerning her pregnancy, or ſuppoſed pregnancy, or to compel any woman before ſhe ſhall be delivered to anſwer to any queſtions relating to her pregnancy.

3. *Of general and ſpecial baſtardy; how baſtardy is to be tried; and of murdering baſtard children.*

Baſtardy, in relation to the ſeveral manners of its trial, is diſtinguiſhed into general and ſpecial baſtardy. General baſtardy is the baſtardy tried by the biſhop, which in its notion contains two things: 1ſt, It ſhould not be a baſtard made legitimate by a ſubſequent marriage. 2dly, That it ſhould be a point collateral to the original cauſe of action. 1 *Rol. Abr.* 361.

Formerly baſtards had a way in ſuch iſſues to trick themſelves into legitimation, for they uſed to bring feigned actions, and get ſuborned witneſſes before the biſhop to prove their legitimation, and then got the certificate returned of record, and after that their legitimation could never be conteſted; for being returned of record as a point adjudged by its proper judges, and remaining among the memorials of the court, all perſons were concluded by it; but this created great inconveniencies, as it is taken notice of in the preamble of the 9 *Hen.* 6. *cap.* 11. in the caſe of ſeveral perſons of quality; for the evidence of the contrary parties concerned were never heard at the trial, and yet their intereſt was concluded: to remedy this inconvenience, without altering the rules of law, it was enacted, that before any writ to the biſhop there ſhould be a proclamation made in the ſame court, and after that the iſſue ſhould be certified into Chancery, where proclamation ſhould be made once in every month for three months, and then the Chancellor ſhould certify to the court where the plea depends, and afterwards it ſhall be again proclaimed in the ſame court, that all that are concerned may go to the ordinary to make their allegations; and without theſe circumſtances, any writ granted to the ordinary, and all proceedings thereupon, ſhall be utterly void. 1 *Rol. Abr.* 361.

If the ordinary certify or try baſtardy without a writ from the King's temporal courts, it is void; for the ſpiritual juriſdiction within theſe kingdoms is derived from the King, and therefore it muſt be exerciſed in the manner the King hath appointed; for it would be injurious if they ſhould declare legitimation where the rights of inheritance

heritance are ſo nearly concerned, without any apparent neceſſity. 1 *Rol. Abr.* 361.

The certificate muſt be under the ſeal of the ordinary, and not under the ſeal of the commiſſary only, for the command is to the biſhop himſelf to certify, and therefore the execution of the command muſt appear to be by the biſhop in proper perſon. 1 *Rol. Abr.* 362.

If a man be certified baſtard, this binds perpetually, though the perſon ſo adjudged a baſtard is not party to the action, for all perſons are eſtopped to ſpeak againſt the memorial of any judicatory; becauſe the act of the publick judicatory under which any perſon lives is his own act; and were he not thus bound, there might be contradiction in certificates. 1 *Rol. Abr.* 362.

If a man be certified baſtard, that doth not bind a ſtranger till returned of record, becauſe it is no judicial act till recorded in the place appointed to record ſuch tranſactions, nor doth it bind the party to the action till judgment thereon, becauſe if he avoid the action he avoids all conſequences of the action; and therefore if the defendant be certified baſtard by the ordinary, yet if the plaintiff be nonſuit they cannot go on to trial, and ſo the biſhop's certificate never appears of record, and therefore is not binding. 1 *Rol. Abr.* 362.

If a man be certified *mulier*, no man is eſtopped to baſtardize him, for though he may be a *mulier* by the ſpiritual law, yet he may be a baſtard by our law; and therefore any man, notwithſtanding the certificate, may plead the iſſue of ſpecial baſtardy. 1 *Rol. Abr.* 362.

When a writ is awarded to the biſhop to certify baſtardy, day is given in court to attend ſuch certification, otherwiſe the parties would be without day in court in waiting for the biſhop's certificate, and this would create a diſcontinuance, and therefore the parties muſt attend the day, and not expect that the proceeding ſhould be revived by reſummons, though ſome have held the contrary, becauſe the biſhop is judge, and ſo not held to a certain day. *Bro.* 76. 4 *Ed.* 3. 39. *Raſt.* 289.

Ne unques accouple in loyal matrimony is no plea but in dower, and in appeal for to baſtardize any perſon, baſtardy general or ſpecial muſt be pleaded; for the matrimony is there to be queſtioned, where there is a claim under the relation of a wife, but there is more than marriage in queſtion in the point of legitimation. *Bro. Baſtardy*, 97. *a.*

The plea of baſtardy may be tried by the biſhop in actions perſonal as well as in real. 1 *Rol. Abr.* 361.

If there be no biſhop, the certificate muſt be made by the guardian of the ſpiritualties, for he is to ſuſtain the office in the mean time. *Bro.* 97, 98.

In an aſſiſe the tenant makes bar as heir, the plaintiff ſays the tenant is a baſtard, the tenant ſays he is a *mulier*, born at *London*, and prays a writ to the biſhop of *London*; the plaintiff ſays, that he was born at *L.* in *Surrey* (the county alſo where the land lies) and prays that it may be tried by aſſize; but this could not be granted, becauſe here baſtardy was particularly pleaded, and not left at large upon the iſſue; but the certificate in this caſe was directed to the biſhop of *Wincheſter*, within whoſe juriſdictions *Surrey* is, becauſe where the place of birth is in diſpute, the trial muſt be in the place where the land lies, for where the place of birth is controverted it is uncertain, and ſo is the ſame as if not alledged. *Bro. Baſtardy*, 97.

In an aſſize the biſhop certified directly, that the defendant was a baſtard, and it was indorſed on the certificate, that *A.* the mother of the defendant left her huſband for ſeven years, in which time the defendant was begot by one *B.* a prieſt, and ſo a baſtard; but becauſe the defendant was made a baſtard in the certificate, they gave no heed to the indorſement, as a thing foreign and immaterial. *Bro. Baſtardy*, 98.

Special baſtardy, which is always tried by a jury in the temporal courts, is twofold: 1ſt, Where the baſtardy is the giſt of the action, and the material part of the iſſue. 2dly, Where thoſe are baſtards by the common law that are *muliers* by the ſpiritual law, and ſuch are thoſe that are born before marriage, whoſe parents afterwards intermarry. 1 *New Abr.* 314.

If a man receives any temporal damage by being called a baſtard, and brings his action in the temporal courts, and the defendant juſtifies that the plaintiff is a baſtard, this muſt be tried at common law, and by writ to the biſhop; for otherwiſe you ſuppoſe an action brought in a court which hath not a capacity to try the cauſe of action. 1 *Brownl.* 1. *Hob.* 179. *Godol.* 479. *Co. Ent.* 29.

If it be found by an aſſiſe taken at large that a man is a baſtard, the temporal courts are judges of it, for the jury cannot be eſtopped to ſpeak truth which may fall within their own knowledge, and what they find becomes the record of the temporal courts, and ſo within their conuzance. *Bro. Baſtardy*, 97.

In an aſſiſe of *mort d'anceſtor*, one of the three points inquirable is, whether the demandant be heir to *J. S.* the anceſtor; in which caſe, if the tenant plead he is ready to hear the recognizance of the aſſiſe (*& hoc paratus eſt per aſſiſam inquirere*) he cannot give in evidence that the demandant is a baſtard, but he ought to have pleaded the ſame; for if this were given in evidence, and not pleaded, the ſpiritual court would be ouſted of their juriſdiction. *Fitz Abr.* 12. 2 *Inſt.* 400.

By the ſtat. 21 *J.* 1. *c.* 27. "If any woman be delivered of any iſſue of her body, male or female, which being born alive, ſhould by the laws of this realm be a baſtard, and ſhe endeavour privately, either by drowning, or ſecret burying thereof, or any other ways, either by herſelf, or the procuring of others, ſo to conceal the death thereof, as that it may not come to light whether it were born alive or not, but be concealed, ſhe ſhall ſuffer death as in caſe of murder, except ſhe can prove, by one witneſs at the leaſt, that the child was born dead."

It hath been adjudged, that in order to convict a woman by force of this ſtatute, there is no need that the indictment be drawn ſpecially, or conclude againſt the form of the ſtatute; for the ſtatute doth not make a new offence, but only makes ſuch concealment an undeniable evidence of murder. 2 *Hawk.* 438.

Alſo it hath been agreed, that where a woman appears to have endeavoured to conceal the death of ſuch child within the ſtatute, there is no need of any proof that the child was born alive, or that there were any ſigns of hurt upon the body, but it ſhall be undeniably taken that the child was born alive, and murdered by the mother. 2 *Hawk.* 438.

But it hath been adjudged, that where a woman lay in a chamber by herſelf, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not diſcover it till the following night, yet ſhe was not within the ſtatute, becauſe ſhe knocked for help. 2 *Hawk.* 438.

Alſo it hath been agreed, that if a woman confeſs herſelf with child beforehand, and afterwards be ſurprized and delivered, nobody being with her, ſhe is not within the ſtatute, becauſe there was no intent of concealment, and therefore in ſuch caſes it muſt appear by ſigns of hurt upon the body, or ſome other way, that the child was born alive. 2 *Hawk.* 438.

If a woman be with child, and any gives her a potion to deſtroy the child within her, and ſhe takes it, and it works ſo ſtrongly that it kills her, this is murder; for it was not given to cure her of a diſeaſe, but unlawfully to deſtroy the child within her; and therefore he that gives her a potion to this end muſt take the hazard, and if it kills the mother, it is murder. 1 *Hal. H.* 429, 430.

If a woman be quick or great with child, if ſhe take, or any other give her any potion to make an abortion, or if a man ſtrike her, whereby the child within her is killed, though it be a great crime, yet it is not murder nor manſlaughter by the law of *England*, becauſe it is not yet *in rerum natura*, nor can it legally be known, whether it were killed or not: ſo it is, if after ſuch child were born alive, and after die of the ſtroke given to the mother, this is not homicide. 1 *Hal. H.* 433.

But if a man procure a woman with child to deſtroy her infant when born, and the child is born, and the woman in purſuance of that procurement kill the infant; this

this is murder in the mother, and the procurer is acceſſary. 1 *Hal. H.* 433.

Baſtard eigne. See title **Baſtard.**

Baſtardy, (*Baſtardia*) Signifies a defect of birth, objected to one born out of wedlock. *Bract. lib.* 5. *c.* 19. See title **Baſtard.**

Baſton, (Fr.) A ſtaff or club; and by our ſtatutes it ſignifies one of the warden of the *Fleet*'s ſervants or officers who attend the king's courts with a red ſtaff for taking ſuch into cuſtody who are committed by the court. 1 *Ric.* 2. *c.* 12. 5 *Eliz. c.* 23. See **Tipſtaff.**

Baſus. *Per* baſum *tolnetum capere,* To take toll by ſtrike, and not by heap; *per baſum* being oppoſed to *in cumulo vel cantello*——*Tolnetus ad molendinum ſit ſecundum conſuetudinem regni*; *menſuræ per quas tolnetus capi debet ſint concordantes menſuris domini regis, & capiatur tolnetus per* baſum, *& nichil in cumulo vel cantello.* Conſuetud. Dom. de Farendon, MS. f. 42.

Batable Ground, Is taken for the land that lay between *England* and *Scotland,* heretofore in queſtion, when they were diſtinct kingdoms, to which it belonged. *Anno* 23 *Hen.* 8. *c.* 6. and 33 *Hen.* 8. *c.* 6. it ſeems to mean, as if we ſhould ſay, litigious or debatable ground, *i. e.* land about which there is a debate; and by that name *Skene* called *ground,* that is in controverſy. *Camb. Britan.* tit. *Cumberland.*

Bath, (Lat. *Bathon,* called by the *Britons, Badiza*) Has been termed the city of *Sick Men*: it is a place of reſort in *Somerſetſhire,* famous for its medicinal waters. The chairmen are there to be licenſed by the mayor and aldermen, for carrying perſons to and from the hot *baths, &c.* under the penalty of 10*s.* by ſtatute 7 *Geo.* 1. *c.* 19.

And a public *hoſpital* or infirmary for poor is eſtabliſhed in the city of *Bath,* the governors whereof have power to hold all charities, *&c.* and appoint phyſicians, ſurgeons, and other officers: any perſons, not able to have the benefit of the *Bath waters,* may be admitted into this hoſpital, their caſe being atteſted by ſome phyſician, and the poverty of the patients certified by the miniſter and churchwardens of the place where they live, *&c.* Every perſon ſo admitted ſhall have the uſe of the old hot *bath,* and be entertained and relieved in the hoſpital; and when cured or diſcharged, ſuch perſons ſhall be ſupplied with 3*l.* each, to defray the expence of removing them back to their pariſhes, *&c. Stat.* 12 *Geo.* 2. *c.* 31. Penalties in the horſe-race act incurred in *Somerſetſhire* are given to the hoſpital at *Bath,* by *ſtat.* 13 *Geo.* 2. *c.* 19. *ſect.* 6. And ſee *ſtat.* 30 *Geo.* 2. *c.* 65. for paving and lighting the ſtreets of *Bath.*

Batitoria, A fulling mill. 'Tis mentioned in the *Monaſticon, tom.* 2. *pag.* 832. *Uſque ad ſtagnum molendini ipſius* Willielmi *cum* Batitoria *& a gardino ſuo ubique, &c.*

Batſwaine, Sax. *Bat,* a *boat,* and *ſwaine,* a ſervant; a mariner, or *boatſwain. Domeſday. Cowell, edit.* 1727.

Battel, (Fr. *Battaile*) Signifies a trial by combat, which was anciently allowed of in our laws, where the defendant in appeal of murder or felony may fight with the appellant, and make proof thereby whether he be culpable or innocent of the crime. *Glan. lib.* 14. *cap.* 1. When an appellee of felony wages *battel,* he pleads that he is *not guilty,* and that he is ready to defend the ſame by his body, and then flings his glove; and if the appellant will join *battel,* he replies, that he is ready to make good his appeal by his body upon the body of the appellee, and takes up the glove; and then the appellee lays his right hand on the book, and with his left hand takes the appellant by the right, and ſwears thus: *Hear this, thou who calleſt thyſelf* John *by the name of baptiſm that I who call myſelf* Thomas *by the name of baptiſm, did not felonioufly murder thy father* W. *by name, in the year of,* &c. *at* B. *as you ſurmiſe, nor am any way guilty of the ſaid felony*; *ſo help me God.* And then he ſhall kiſs the book, and ſay; *And this I will defend againſt thee by my body, as this court ſhall award.* Then the appellant lays his right hand on the book, and with his left hand takes the appellee by the right, and ſwears to this effect: *Hear this, then thou who calleſt thyſelf* Thomas *by the name of baptiſm, that thou didſt felonioufly on the day, and in the year,* &c. *at* B. *murder my father* W. *by name*; *ſo help me God.* And then he ſhall kiſs the book, and ſay; *And this I will prove againſt thee by my body, as this court ſhall award.* This being done, the court ſhall appoint a day and place for the *battel,* and in the mean while the appellee ſhall be kept in cuſtody of the marſhal, and the appellant ſhall find ſureties to be ready to fight at the time and place, unleſs he be an approver, in which caſe he ſhall alſo be kept by the marſhal: and the night before the day of *battel* both parties ſhall be arraigned by the marſhal, and ſhall be brought into the field before the juſtices of the court where the appeal is depending, at the riſing of the ſun, bare-headed and bare-legged from the knee downwards, and bare on the arms to the elbows, armed only with baſtons an ell long, and four-corned targets; and before they engage they ſhall both make oath, *that they have neither eat nor drank, nor done any thing elſe by which the law of God may be depreſſed, and the law of the devil exalted:* and then, after proclamation for ſilence under pain of impriſonment, they ſhall begin the combat, wherein, if the appellee be ſo far vanquiſhed that he cannot or will not fight any longer, he may be adjudged to be hanged immediately; but if he can maintain the fight till the ſtars appear, he ſhall have judgment to be quit of the appeal: and if the appellant becomes a crying coward, the appellee ſhall recover the damages, and may plead his acquittal in bar of a ſubſequent indictment of appeal; and the appellant ſhall for his perjury loſe his *liberam legem.* And if an appellant becomes blind by the act of God after he has waged *battel,* the court will diſcharge him of the *battel*; and in ſuch caſe it is ſaid, that the appellee ſhall go free. This trial by *battel* is at the defendant's choice; but if the plaintiff be under an apparent diſability of fighting, as under age, maimed, *&c.* he may counter-plead the wager of *battel,* and compel the defendant to put himſelf upon his country: alſo any plaintiff may counter-plead a wager of *battel,* by alledging ſuch matters againſt the defendant, as induce a violent preſumption of guilt; as in appeal of death, that he was found lying upon the deceaſed with a bloody knife in his hand, *&c.* for here the law will not oblige the plaintiff to make good his accuſation in ſo extraordinary a manner, when in all appearance he may prove it in the ordinary way. It is a good counter-plea of *battel,* that the defendant hath been indicted for the ſame fact; when, if appeal be brought, the defendant ſhall not wage *battel.* And if a peer of the realm bring an appeal, the defendant ſhall not be admitted to wage *battel,* by reaſon of the dignity of the appellant. 2 *Hawk. P. C.* 426, 427. This trial by *battel* is before the conſtable and marſhal; but with all its ceremonies is now diſuſed. See *Glanv. lib.* 14. *Cowell. Jacob.*

Battery, (from the French, *battre,* to ſtrike; or from the Saxon, *batte,* a club) Seems to be, when any injury whatſoever, be it never ſo ſmall, is actually done to the perſon of a man in an angry, or revengeful, or rude, or inſolent manner, as by ſpitting in his face, or any way touching him in anger, or violently joſtling him out of the way, and the like. 1 *Hawk.* 134. The wrong-doer is ſubject to an action at the ſuit of the party, wherein he ſhall render damages; and alſo to an indictment at the ſuit of the king, wherein he ſhall be fined according to the heinouſneſs of the offence. 1 *Hawk.* 134. See **Aſſault and Battery.**

Battle, *Batellus,* a little boat. In the reign of *Ed.* 3. every great ſhip landing at *Billingſgate* in *London* paid for ſtandage two-pence; every little ſhip with orelocks, a penny; and the leſſer boat called a *battle,* a half-penny. See *Stow's Survey of London.*

Bawdy-houſe, (*Lupanar, fornix*) A houſe of ill fame, kept for the reſort and commerce of lewd people of both ſexes. The keeping of a *bawdy-houſe* comes under the cognizance of the temporal law, as a common nuiſance, not only in reſpect of its endangering the public peace, by drawing together diſſolute and debauched perſons, and promoting quarrels, but alſo in reſpect of its tendency to corrupt the manners of the people, by an open profeſſion of lewdneſs. 3 *Inſt.* 205. 1 *Hawk. P. C.* 196.

And in general, all open lewdneſs groſly ſcandalous is puniſhable upon indictment at the common law. 1 *Hawk.* 7. And offenders of this kind are puniſhable not only with fine and impriſonment, but alſo with ſufficient infamous puniſhment, as to the court in diſcretion ſhall ſeem proper. 1 *Hawk.* 196.

And upon information given to a conſtable, that a man and a woman of evil report are gone to a ſuſpected houſe together in the night, the officer may take company with him, and if he find them ſo, he may carry them before a juſtice, to find ſureties of the good behaviour. *Dalt. c.* 124. 2 *Hawk.* 61. For it ſeems always to have been the better opinion, that a man may be bound to his good behaviour for haunting *bawdy-houſes* with women of bad fame, as alſo for keeping bad women in his own houſe. 1 *Hawk.* 132.

And a wife may be indicted together with her huſband, and condemned to the pillory with him for keeping a *bawdy-houſe*; for this is an offence as to the government of the houſe, in which the wife has a principal ſhare; and alſo ſuch an offence as may generally be preſumed to be managed by the intrigues of her ſex. 1 *Hawk.* 2.

But if a perſon is indicted for frequenting a *bawdy-houſe*, it muſt appear that he knew it to be ſuch a houſe; and it muſt be expreſly alledged, that it is a *bawdy-houſe*, and not that it is ſuſpected to be ſuch a houſe. *Wood, b.* 3. *c.* 3.

On an indictment for keeping a diſorderly houſe, a female witneſs ſwore, that ſhe was a ſailor's wife, and during her huſband's abſence out of the realm ſhe had often proſtituted herſelf there: Lord *Raymond* ſaid it was an odious piece of evidence, and ought not to be heard. *Barlow's Juſtice*, tit. *Bawdy-houſe.*

But it is ſaid, a woman cannot be indicted for being a bawd generally: for that the bare ſolicitation of chaſtity is not indictable. 1 *Hawk.* 196. 1 *Salk.* 382.

Stat. 25 *Geo.* 2. *cap.* 36. *ſect.* 5. If any two inhabitants of any pariſh or place, paying ſcot, and bearing lot therein, give notice in writing to any conſtable (or other peace-officer, where there is no conſtable) of ſuch pariſh, *&c.* of any perſon keeping a *bawdy-houſe*, gaming-houſe, or any other diſorderly houſe, in ſuch pariſh, *&c.* the conſtable or officer, on ſuch notice, ſhall forthwith go with ſuch inhabitants to a juſtice of peace of the county or liberty, and ſhall, upon ſuch inhabitants oath before ſuch juſtice, that they believe the contents of ſuch notice to be true, and entering into a recognizance in the penal ſum of 20 *l.* each, to give or produce material evidence againſt ſuch perſon for ſuch offence, enter into recognizance in the penal ſum of 30 *l.* to proſecute with effect ſuch perſon for ſuch offence at the next general or quarter ſeſſions of the peace, or at the next aſſizes for the county in which ſuch place lies, as to the ſaid juſtice ſhall ſeem meet; and ſuch conſtable, *&c.* ſhall be allowed the expences of ſuch proſecution, to be aſcertained by two juſtices of peace of the county, *&c.* where the offence ſhall have been committed, and ſhall be paid the ſame by the overſeers of the poor of ſuch pariſh, *&c.* and in caſe ſuch perſon be convicted, the overſeers of the poor of ſuch pariſh, *&c.* ſhall pay 10 *l.* to each of ſuch inhabitants; and in caſe ſuch overſeers neglect to pay to ſuch conſtable, *&c.* ſuch expences of proſecution, or neglect to pay upon demand the ſaid ſums of 10 *l.* and 10 *l.* ſuch overſeers, and each of them, ſhall forfeit to the perſon intitled to the ſame double the ſum ſo neglected to be paid.

Sect. 6. Upon ſuch conſtable, *&c.* entering into ſuch recognizance to proſecute, the juſtice ſhall make out his warrant to bring the perſon accuſed before him, and ſhall bind him over to appear at ſuch general or quarter ſeſſion or aſſizes, to anſwer to ſuch indictment as ſhall be found againſt him; and ſuch juſtice may, if he thinks fit, take ſecurity for ſuch perſon's good behaviour in the mean time.

Sect. 7. In caſe ſuch conſtable ſhall neglect, upon ſuch notice, to go before any juſtice of peace, or to enter into recognizance, or ſhall be wilfully negligent in carrying on the proſecution, he ſhall for every ſuch offence forfeit 20 *l.* to each of ſuch inhabitants ſo giving notice.

Sect. 8. Any perſon who ſhall appear, act, or behave him or herſelf as maſter or miſtreſs, or as having the management of any *bawdy-houſe*, gaming-houſe, or other diſorderly houſe, ſhall be deemed the keeper thereof, and ſhall be liable to be puniſhed as ſuch, notwithſtanding he or ſhe ſhall not be the real owner or keeper.

Sect. 9. Upon any ſuch proſecution againſt any perſon for keeping a *bawdy-houſe*, gaming-houſe, or other diſorderly houſe, any perſon may give evidence againſt the defendant, or on behalf of the defendant, notwithſtanding his being an inhabitant of the pariſh, or having entered into ſuch recognizance.

Sect. 10. No indictment preferred againſt any perſon for keeping a *bawdy-houſe*, gaming-houſe, or other diſorderly houſe, ſhall be removed by any writ of *Certiorari* into any other court; but ſhall be tried, and finally determined, at the ſame general or quarter ſeſſions or aſſizes where ſuch indictment ſhall have been preferred, unleſs the court think proper upon cauſe ſhewn to adjourn the ſame.

Sect. 13. Any perſon intitled to any of the forfeitures by this act impoſed may ſue for the ſame by action of debt in any court at *Weſtminſter*, in which it ſhall be ſufficient to declare, that the defendant is indebted to the plaintiff in the ſum of being forfeited by an act, intitled, *An act for the better preventing theſts and robberies, and for regulating places of publick entertainment, and puniſhing perſons keeping diſorderly houſes*: and the plaintiff, if he recover, ſhall have his full coſts.

Sect. 14. No action ſhall be brought by virtue of this act, unleſs the ſame be commenced within ſix calendar months after the offence committed.

Sect. 15. This act ſhall continue for three years from the firſt day of this ſeſſion of parliament, and to the end of the then next ſeſſion.

Made perpetual by 28 Geo. 2. cap. 19. ſect. 1.

Indictment for keeping a bawdy or diſorderly houſe.

THE jurors of our lord the King upon their oath preſent, that A. O. *late of* ——— *in the ſaid county, labourer, on the* —— *day of* ——— *in the* —— *year of the reign of* ——— *and at divers other times as well before as after, with force and arms, at* ——— *aforeſaid, in the county aforeſaid, did keep and maintain a certain common, ill-governed, and diſorderly houſe, and in his ſaid houſe, for his own lucre and gain, certain evil and ill-diſpoſed perſons, as well men as women, of evil name and fame, and of diſhoneſt converſation, to frequent and come together then, and the ſaid divers other times, there unlawfully and wilfully did cauſe and procure; and the ſaid men and women, in his ſaid houſe, at unlawful times, as well in the night as in the day, then and the ſaid other times, there to be and remain, drinking, tipling, whoring, and miſbehaving themſelves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuiſance of all the ſubjects of our ſaid lord the King, and againſt the peace of our ſaid lord the King, his crown and dignity.*

Bay, or *Pen*, Is a pond-head, made up of a great height, to keep water for the ſupply of a mill, *&c.* ſo that the wheel of a mill may be driven by the water coming thence through a paſſage or floodgate. A harbour where ſhips ride at ſea near ſome port is called a *bay*: and this word is mentioned in ſtat. 27 *Eliz. c.* 19. *Buchan.* in his *Hiſt. Scot. fo.* 7. writes it *bei*, and expounds it *ſinus maris*. *Cowell, edit.* 1727.

Bays. See **Drapery.**

Beacon, (from the Sax. *beacen*, i. e. *ſignum*) A ſignal well known; being a fire maintained on ſome eminence near the coaſt of the ſea, to prevent invaſions, *&c.* 4 *Inſt.* 148. 8 *Eliz. c.* 13. Hence *beaconage*, (*beaconagium*) money paid towards the maintenance of *beacons*: and we ſtill uſe the word *beckon* to give notice unto. See *ſtat.* 5 *Hen.* 4. & *Dorſ. Pat.* 28. *Hen.* 6. *part* 2. *m.* 21. And *Pryn's Animad.* on 4 *Inſt. fol.* 134, 135. See **Firebare.**

Bead, or **Bede** (Sax. *bead, oratio*) A prayer; ſo that to ſay over *beads*, is to ſay over one's *prayers*. They were moſt in uſe before printing, when poor perſons could not go to the charge of a manuſcript prayer-book: though they are ſtill uſed in many parts of the world, where the Roman Catholick religion prevails. They are not allowed to be brought into *England*, or any ſuperſtitious things, to be uſed here, under the penalty of a *præmunire*, by *ſtat.* 13 *Eliz. cap.* 2. See **Bugle**.

Beam, Is that part of the head of a ſtag where the horns grow, from the Sax. *beam*, i. e. *arbor*; becauſe they grow out of the head as branches out of a tree. *Beam* is likewiſe uſed for a common balance of weights in cities and towns. *Stat.* 13 *Ed.* 1.

Beams and ballance, For weighing goods and merchandize in the city of *London*. See **Tronage**.

Beans. See **Corn**.

Bearding, otherwiſe **Barding** of wooll. See **Clack**.

Bearers, Signifies ſuch as bear down or oppreſs others, and ſo ſaid to be all one with *maintainers*.——Juſtices of aſſize ſhall inquire of, hear, and determine maintainors, *bearors*, and conſpirators, and of thoſe that commit champerty, *&c.* *Stat.* 4 *Ed.* 3. *cap.* 11.

Beaſts of chaſe (*Feræ campeſtres*) Are five, *viz.* the buck, doe, fox, marten, and roe. *Manw. part* 1. *pag.* 342.

Beaſts of the foreſt (*Feræ ſylveſtres*) otherwiſe called *beaſts* of venary, are the hart, hind, boar, and wolf. *Ibid par.* 2. *cap.* 4.

Beaſts and **fowl** of warren, Are the hare, coney, pheaſant, and partridge.

Beaver-skins, To what duties liable, and other regulations concerning them, ſee *ſtat.* 4 *Geo.* 2. *c.* 9.

Beaumaris in the county of *Angleſea*; Its quarter-ſeſſions how to be adjourned, ſee *ſtat.* 1 *Geo.* 1. *ſt.* 6. *c.* 26. *ſect.* 8.

Beaupleader, (*Pulchre placitando*, Fr. *beauplaider, i. e.* to plead fairly) Is a writ upon the ſtatute of *Marlbridge*, 52 *Hen.* 3. *c.* 11. whereby it is enacted, that neither in the circuit of juſtices, nor in counties, hundreds, or courts baron, any fines ſhall be taken for *fair pleading*, *viz.* for not pleading fairly or aptly to the purpoſe; upon which ſtatute this writ was ordained, directed to the ſheriff, bailiff, or him who ſhall demand ſuch fine, and it is a prohibition not to do it; whereupon an *alias* and *pluries* and *attachment* may be had, *&c.* *New Nat. Br.* 596, 597. And *beaupleader* is as well in reſpect of vicious *pleadings*, as of the *fair pleading*, by way of amendment. 2 *Inſt.* 122.

Bed-ale, or **Bid-ale**, Was a friendly aſſignation made for neighbours to meet and drink at the houſe of new-married perſons, or other poor people, and then for the gueſts to contribute to the houſe-keepers. See **Bidale**. *Cowell, edit.* 1727.

Bedel, (*Bedellus*, Fr. *bedeau*) A crier or meſſenger of a court, that cites men to appear and anſwer; and is an inferior officer of a pariſh or liberty, very well known in *London* and the *ſuburbs*. There are likewiſe univerſity *beadles*, and church *beadles*; now called ſummoners and apparitors: and *Manwood* in his *Foreſt Laws* ſaith there are foreſt *beadles*, that make all manner of garniſhments for the courts of the foreſt, and all proclamations, and alſo execute the proceſs of the foreſt, like unto bailiffs errant or a ſheriff in his county——Edgarus *interdicit omnibus miniſtris, id eſt vicecomitibus*, bedellis *& balivis, &c. Ne introeant fines & limites dicti mariſci.* Ingulph. Hiſt. Croyl. The word *bedel*, properly a crier, was in Sax. *bydel*, from *bydde*, to publiſh or declare: as to *bid* and *forbid* the banns of matrimony, *bidding* of prayers, *&c.* Hence the univerſity *bedels*, the *bedel* of beggars; the church *bedels*, whom we now call ſummoners and apparitors. *Cowell, edit.* 1727.

Bedehouſe, An hoſpital, or *almſhouſe* for *bedeſmen*, or poor people, who prayed for their founders and benefactors, from the Sax. *biddan*, to pray.

Bedelary, (*Bedelaria*) Is the ſame to a *bedel*, as bailiwick to a bailiff. *Lit. lib.* 3. *cap.* 5.—— Will. *filius Adæ tenet* bedelarium *hundredi de* Macclesfield, *&c.* *Ex. Rot. Antiq.*

Bederepe, alias **Biderepe**, (from the Sax. *biddan*, to intreat or pray, and *repe*, to reap corn) Is a ſervice which certain tenants were anciently bound to perform, *viz.* to reap their landlord's corn at harveſt; as ſome yet are tied to give them one, two, or three days work, when commanded. This cuſtomary ſervice of inferior tenants was called in the Latin *Precaria*, bedrepium, *&c.*—*Debent venire in autumno ad precariam quæ vocatur à le* bederepe. *Plac. in craſt. Pur.* 10 *Hen.* 3. *Rot.* 8. *Surrey.* See *Magna Precaria*.

Bedewert, Thoſe which we now call *banditti*, profligate and excommunicated perſons. The word is mentioned in *Mat. Pariſ. anno* 1258.

Bedford-Level. Adventurers how made a corporation, and how to act, ſee ſtat. 15 *Car.* 2. *c.* 17. Their lands how to be taxed, 20 *Car.* 2. *cap.* 8. The other ſtatutes concerning it are, 1 *Jac.* 2. *cap.* 21. 27 *Geo.* 2. *c.* 19. 29 *Geo.* 2. *c.* 9 & 22. 30 *Geo.* 2. *c.* 35. See **Marſhes**.

Beds. See **Upholſters**.

Beechwood. See **Fewel**.

Beef. The ſtatutes concerning it are, 12 *Car.* 2. *c.* 4. 18 *Car.* 2. *c.* 2. 20 *Car.* 2. *c.* 7. 22 *Car.* 2. *c.* 13. 3 & 4 *Will. & Mar. c.* 8. 3 *Geo.* 2. *c.* 20. 5 *Geo.* 2. *c.* 6. 4 *Geo.* 3. *c.* 28.

Beer and Ale. Ordinance for bakers, *&c.* *Incerti Temporis, cap.* 6. the aſſiſe of ale ſhall be aſſeſſed, proclaimed, and kept according to the price of the corn whereof the malt is made; and the brewer ſhall not increaſe more in a gallon, but according to the rate of ſixpence riſing in a quarter of malt; and if he break the aſſiſe, the firſt, ſecond, and third time he ſhall be amerced; but the fourth time he ſhall ſuffer the pillory.

Stat. 1 *Will. & Mar. ſtat.* 1. *cap.* 22. *ſect.* 1. Any perſon may ſhip off, within any of the uſual and allowed ports by law, and at the common keys, and within the uſual hours of exciſe, to be exported into foreign parts, in the preſence of a ſworn officer to be appointed by the farmers, *&c.* of exciſe within the limits where the ſame ſhall be ſhipped, any ſtrong ale, ſtrong beer, cyder, or mum, to be ſpent beyond the ſeas, paying cuſtom for the ſame after the rate of 1 *s. per* ton, and no other duty: ſuch officer to certify the quantity ſo ſhipped off to the commiſſioners and officers of exciſe, where the entry thereof ſhall be made, who are required to make allowance, or repay the exciſe of the beer, ale, cyder, or mum ſo exported, to the brewer or maker thereof, within one month after ſuch exportation, deducting 3*d. per* ton for the charges of their officers.

Sect. 2. If any perſon ſhall cauſe or ſuffer any liquors ſo ſhipped to be laid on land, or put into any other veſſel, within *England*, *Wales*, or *Berwick*, he ſhall forfeit the ſame, and 50 *l.* more for every caſk ſo unduly landed, or put on board any veſſel; the one moiety to the King, *&c.* the other to the informer; and their Majeſties commiſſioners and officers of the cuſtoms ſhall charge every maſter of any veſſel, in his victualling bill, with ſo much beer, ale, cyder, or mum, and no more, as ſuch number of men uſed to ſpend in ſuch voyages; the exciſe whereof to be recovered according to the laws eſtabliſhed.

Sect. 3. The ſaid rate of 1 *s.* the ton for beer, *&c.* exported ſhall be levied and paid under ſuch rules and penalties, and in ſuch manner, as by the laws of tonnage and poundage are ordained.

Sect. 4. No mum imported from foreign parts ſhall have any part of the cuſtom or exciſe repaid upon exportation.

Stat. 11 *&* 12 *Will.* 3. *cap.* 15. *ſect.* 1. *for aſcertaining the meaſure for retailing ale and beer*, all perſons retailing ale or beer ſhall ſell their ale and beer by the full ale quart, or ale pint, according to the ſtandard remaining with the chamberlains of the exchequer, in a veſſel made of wood, earth, glaſs, horn, leather, pewter, or other wholeſome metal, marked from the ſaid ſtandard in the Exchequer, or city of *London*, or ſome other place where a ſtandard ſhall be kept; and not any other veſſel not marked, on forfeiture of a ſum not exceeding 40 *s.* nor leſs than 10 *s.*

Sect. 2. If any innkeeper, alehouſekeeper, *&c.* ſhall ſell any ale or beer in a veſſel not marked, or deny to give

give the particular number of quarts, *&c.* in any reckoning, ſuch innkeeper, *&c.* ſhall not, for non-payment of the reckoning, detain any of the perſon's things not paying the ſame, but be left to his action in law.

Sect. 3. The ſub-commiſſioners, or collectors of exciſe, ſhall procure a ſubſtantial ale quart and ale pint of braſs, according to the Exchequer ſtandard, to be made, ſealed, and certified from the chamberlains there, without fee, and deliver to the mayor or chief officer in each city, corporation, borough, and market town within their diviſions, where there is not one already; and the chief officer giving a receipt for it, the ſame is to be delivered to the ſucceeding officer. The ſub-commiſſioner or collector to forfeit for every default therein 5 *l.*

Sect. 5. Every mayor or chief officer of every city, borough, or market town, ſhall, on requeſt, cauſe all ſuch ale quarts and pints, made of wood, *&c.* as ſhall be brought to him to be meaſured and ſized with ſuch ſtandard, and marked with W. R. and a crown; which marks the ſaid mayor or chief officer are to provide, and to take not above a farthing for marking each meaſure. The mayor or chief officer not doing his duty herein to forfeit 5 *l.* and treble damages to the party grieved.

Sect. 6. One moiety of the penalties in this act to the poor of the place, the other to the proſecutor, to be recovered by the oath of a credible witneſs before a juſtice of peace, and proſecution within thirty days after the offence committed; and the juſtice of peace to cauſe to levy the penalty.

Sect. 7. Nothing in this act ſhall extend to beer or ale ſold to be ſpent out of the houſe, if it be meaſured out by the ſtandard.

Sect. 8. Actions brought againſt juſtices of peace, or perſons employed by them, upon the execution of this act, ſhall be laid in the proper county only, to which the general iſſue may be pleaded, *&c.* and upon a verdict, *&c.* the defendant to recover treble coſts.

Sect. 9. The juſtice of peace at their quarter ſeſſions are to give this act in charge to the juries.

Sect. 10. This act ſhall not extend to colleges or halls in the univerſities.

The 12 & 13 *Will.* 3. *cap.* 11. *ſect.* 19. Nothing in this act 11 *Will.* 3. *cap.* 15. ſhall extend to deprive the univerſities of their right of ſizing and marking of meaſures for ale and beer within their juriſdictions.

Stat. 13 *Will.* 3. *cap.* 5. *ſect.* 34. No common brewer, innkeeper, victualler, or retailer of beer and ale, ſhall uſe any ſugar, honey, foreign grains, *Guiney* pepper, the liquor called *eſſentia bine* made from malt and water boiled up, *coculus Indiæ*, or any unwholeſome ingredients in the brewing or making of beer or ale; or mix any ſugar, *&c.* with any beer or ale in caſks, after the ſame is cleanſed; on pain of forfeiture of 20 *l.* See **Alehouſes** and **Brewers.**

Bees-wax. See **Wax.**

Beggars. See **Vagrants.**

Behaviour of perſons. See **Good behaviour**, and **Peace.**

Belerium, The cape of *Cornwall. Cowell, edit.* 1727.

Belgae, The inhabitants of *Somerſetſhire*, *Wiltſhire*, and *Hampſhire*. *Id. ib.*

Beliſama fluvius, *Rhebel*, in *Lancaſhire*. *Id. ib.*

Bell-metal. See **Metal.**

Bells. By a conſtitution of archbiſhop *Winchelſea* the pariſhioners ſhall find, at their own expence, bells with ropes.

By *Can.* 88. The churchwardens or queſtmen, and their aſſiſtants, ſhall not ſuffer the bells to be rung ſuperſtitiouſly upon holidays or eves abrogated by the book of common prayer, nor at any other times, without good cauſe to be allowed by the miniſter of the place, and by themſelves.

By *Can.* 111. The churchwardens ſhall preſent all perſons, who by untimely ringing of bells do hinder the miniſter or preacher.

By *Can.* 15. Upon Wedneſdays and Fridays weekly the miniſter, at the accuſtomed hours of ſervice, ſhall reſort to the church or chapel, and, warning being given to the people by tolling of a bell, ſhall ſay the litany.

By *Can.* 67. When any is paſſing out of this life, a bell ſhall be tolled, and the miniſter ſhall not then ſlack to do his laſt duty: and after the party's death (if it ſo fall out) there ſhall be rung no more than one ſhort peal, and one other before the burial, and one other after the burial.

Bellum. See **Camp-fight.**

Belundita, for **Bidowita**, An amerciament for ſhedding blood. *Leg. H.* 1. *cap. ult. Qui vulnus alicui faciet in cooperto, in nudo, pro ſingulis unciis* 10 *denar. et remaneat de cæteris ictibus et* belunditis, *et wita domino decidat, ſi ſanguis decidat. Cowell, edit.* 1727.

Benedictines. See **Monaſteries.**

Benefice, *(Beneficium)* Is generally taken for all eccleſiaſtical livings, be they dignities, or other. And by ſtat. 13 *Rich.* 2. *ſtat.* 2. *cap.* 8. *benefices* are divided into elective and donative. In the ſame ſenſe it is uſed alſo in the Canon law. *Duarenus de* beneficiis, *lib.* 2. *c.* 3. The portions of land, and other immoveable things, granted by the lords to their followers, for their ſtipend or maintenance, were at firſt called *munera*, while revocable at the pleaſure of the lord: they were after called *beneficia*, while temporary, or held for ſome limited time, which was commonly one year. But when by degrees theſe tenures, from an arbitrary condition, became perpetual and hereditary, then they left their former name of *beneficia* to the livings of the clergy, and retained to themſelves the proper names of *feuds*, and became perpetual and hereditary. See *Spelman of Feuds*, *cap.* 2. See **Beneficium.**

In order to be legally intitled to a *benefice*, the ſeveral following particulars are conſiderable, *viz.*

1. *Preſentation.*
2. *Examination.*
3. *Refuſal.*
4. *Admiſſion.*
5. *Inſtitution, or Collation.*
6. *Induction, and requiſites after induction.*

1. *Preſentation.*

Preſentation, nomination, and collation are ſometimes uſed in law for the ſame thing; and yet they are commonly diſtinguiſhed; for preſentation is an offering of the clerk to the ordinary; and nomination may be of the clerk to him that may and ought to preſent him to the ordinary, by reaſon of a grant made by him that hath the power of preſenting, obliging him thereto; and collation is the giving of the church to the clerk, and is that act by which the ordinary doth admit and inſtitute a clerk to a church or benefice of his own gift, in which caſe there is no preſentation. *Watſ. c.* 15.

For it is to be obſerved, that the right of nomination may be in one perſon, and the right of preſentation in another. And this is, where he who was ſeiſed of the adowſon doth grant unto another and his heirs, that as often as the church becomes void, and the grantee and his heirs ſhall nominate to the grantor and his heirs; who ſhall be bound to preſent accordingly. In which caſe, it was agreed by the whole court in the caſe of *Shirly* and *Underhill*, *M.* 16 *Ja.* that the nomination is the ſubſtance of the adowſon, and the preſentation no more than a miniſterial intereſt; and that if the preſentor ſhall preſent without nomination, or the nominator preſent in his own perſon, each ſhall have his *quare impedit*, for the ſecurity of their reſpective rights. And if the nominator neglect to appoint his clerk, till lapſe incurs, and then the patron preſents before the biſhop collates, the biſhop is bound to admit his clerk. *Gibſ.* 794. *Mo.* 894.

Preſentation muſt be to avoid *benefice*. Thus in the caſe of *Owen* and *Stainoe*, *E.* 34 *Car.* 2. *Owen* moved for a *mandamus* to admit him a prebendaty of *St. David's*, and ſet forth a cuſtom, that they uſed to chooſe a ſupernumerary (all the places being full) who is admitted upon the death of the next prebendary; and ſays, that he was choſen a ſupernumerary in ſuch a year, and that one of the

the prebendaries died, and that *Stainoe* was admitted: but the court refuſed to grant a *mandamus*, and held the cuſtom to be void and fooliſh; for that there cannot be an election but to a void place. *Skin.* 45.

The King ſhall not preſent in prejudice of another's right. Thus by ſtat. 25 *Ed.* 3. *ſt.* 3. *cap.* 1. "Touching preſentments to be made by the King to a *benefice* of holy church, in another's right by old title; our lord the King, to the honour of God and holy church, willeth and granteth, of the aſſent of the parliament, that from henceforth he nor any of his heirs ſhall not take title to preſent to any *benefice*, in any other's right, of any time of his progenitors; nor that any prelate of this realm be bound to receive any ſuch preſentment to be made, nor to do thereof any execution; nor that any juſtice of the one place or the other may not nor ought not to hold plea or give judgment upon any ſuch preſentment to be made; but that the ſaid King and his heirs be for ever clearly barred of all ſuch preſentments: ſaving always to him and his heirs, all ſuch preſentments in another's right, fallen or to fall, of all his time, and of the time to come.

And by the 25 *Ed.* 3. *ſt. c.* 3. "Whereas before this time, our lord the King had taken title to preſent to *benefices* at the ſuggeſtion of many clerks, where the title hath not been true, and by ſuch preſentments and judgments thereupon given, the clerks have been received by the ordinaries of the places, againſt God and good faith, and in depreſſion of them which had good and true title to the ſaid *benefices*; now the King willeth and granteth, that at what time he ſhall make collation or preſentment from henceforth to any *benefice* in another's right, that the title whereupon he groundeth himſelf ſhall be well examined that it be true: and at what time before judgment the title be found by good information untrue or unjuſt, the collation or preſentment thereof made ſhall be repealed; and the patron, or the poſſeſſor, which ſhall ſhew and prove the falſe title, ſhall have thereupon writs out of the Chancery, as many as to him ſhall be needful."

And by the 13 *Rich.* 2. *cap.* 1. "Whereas notwithſtanding the laſt-recited ſtatute, ſome of the King's preſentees, by favour of the ordinaries, be inſtituted and inducted in *benefices* of holy church without due proceſs, the parties not warned nor called, and ſometimes taken by falſe inqueſts favourably, and the incumbents in ſuch manner put out; it is ordained, that the ſaid ſtatute be firmly holden and kept: and moreover the King, for the reverence of God and holy church, doth will and grant, that if he preſent to any *benefice* that is full of any incumbent, the preſentee of the King ſhall not be received by the ordinary to the *benefice*, till the King hath recovered his preſentment by proceſs of the law in his own court: and if any preſentee of the King be otherwiſe received, and the incumbent put out without due proceſs, as afore is ſaid, the ſaid incumbent ſhall begin his ſuit within a year after the induction of the King's preſentee at the leaſt." Or at any time after, at his will, by ſtat. 4 *Hen.* 4. *c.* 22.

2. *Examination.*

It is very well known, that in the firſt ſettlement of this church of *England*, the biſhops of the ſeveral dioceſes had them under their own immediate care; and that they had the clergy living in a community with them, whom they ſent abroad to ſeveral parts of the dioceſes, as they ſaw occaſion to employ them; but that by degrees they found a neceſſity of fixing preſbyters within ſuch a compaſs, to attend upon the ſervice of God amongſt the inhabitants, and thoſe precincts, which are ſince called pariſhes, were at firſt much larger; that when lords of manors were inclined to build churches for their own conveniencies, they found it neceſſary to make ſome endowments, to oblige thoſe who officiated in their churches to a diligent attendance: that upon this, the ſeveral biſhops were very well content to let thoſe patrons have the nomination of perſons to thoſe churches, provided they were ſatisfied of the fitneſs of thoſe perſons, and that it were not deferred beyond ſuch a limited time. So that the right of patronage is really but a limited truſt; and the biſhops are ſtill, in law, the judges of the fitneſs of the perſons to be employed in the ſeveral parts of their dioceſes. But the patrons never had the abſolute diſpoſal of their *benefices* upon their own terms; but if they did not preſent fit perſons within the limited time, the care of the places did return to the biſhop, who was then to provide for them. 1 *Still.* 309.

And by the ſtatute of *Articuli Cleri*, 9 *Ed.* 2. *ſt.* 1. *cap.* 13. it is enacted as followeth: "It is deſired, that ſpiritual perſons, whom our lord the King doth preſent unto *benefices* of the church (if the biſhop will not admit them, either for lack of learning, or for other cauſe reaſonable) may not be under the examination of lay perſons in the caſes aforeſaid, as it is now attempted, contrary to the decrees canonical; but that they may ſue unto a ſpiritual judge for remedy, as right ſhall require. The anſwer: Of the ability of a parſon preſented unto a *benefice* of the church, the examination belongeth to a ſpiritual judge; ſo it hath been uſed heretofore, and ſhall be hereafter."

3. *Refuſal.*

The moſt common and ordinary cauſe of refuſal is want of learning: but there are alſo many other cauſes for which a clerk preſented may lawfully be refuſed; as, if he be perjured before a lawful judge; or if he be an heretick or ſchiſmatick; or irreligious; or (as is ſaid in the old books) if he is a baſtard, and not diſpenſed withal; or if he is within age; or if he or his patron be excommunicated for the ſpace of forty days; or if he be outlawed; or guilty of forgery; or hath committed ſimony in the procuring of the preſentment he brings, or of any other preſentment to a former *benefice*; or hath committed manſlaughter, that is, if he be attainted thereof, and not pardoned; and that it is ſaid, that the ordinary may refuſe a clerk upon his own knowledge for an offence committed by him, which is a good cauſe of refuſal, altho' he be not convicted thereof by the law; and this ſhall be tried by iſſue, whether it be true or not: and generally, all ſuch as are ſufficient cauſes of deprivation, are alſo ſufficient cauſes of refuſal. *Watſ. c.* 20.

If the clerk refuſed be the preſentee of a biſhop, or other eccleſiaſtical patron, the ordinary is not bound to give notice of the refuſal; or if he ſhould do it, ſuch patron can never revoke nor vary his preſentation, by preſenting one afterwards that is better qualified, without the ordinary's conſent; the law ſuppoſing him that is a ſpiritual perſon to be capable of chooſing an able clerk: and ſo lapſe may come upon him unavoidably, if the clerk firſt preſented be juſtly refuſed. But if the clerk preſented be the preſentee of a lay patron, and be refuſed by the ordinary, the ordinary in moſt caſes is bound to give notice to the patron of ſuch refuſal: for if in ſuch caſe no notice is given, no lapſe can run, though no other clerk be preſented; nor if notice be given, unleſs upon trial the clerk was juſtly refuſed. But if a clerk be for good cauſe refuſed, and notice thereof be in due time and manner given to the patron, and no other clerk be preſented in time, lapſe doth run to the ordinary. *Watſ. c.* 12.

In the caſe of *Hele* and the biſhop of *Exeter*, *M.* 3 *Will.* it was ſaid by the court, That if the ordinary refuſe becauſe he is criminous, he need not give notice of the refuſal; for the crime is as much in the cognizance of the patron as of the biſhop; but if he refuſe becauſe illiterate, he muſt give notice. 2 *Salk.* 539.

4. *Admiſſion.*

In a larger ſenſe, admiſſion is ſometimes uſed to include alſo inſtitution; but more frequently and properly, admiſſion is taken to be, when the biſhop upon examination doth approve of the preſentee, as a fit perſon to ſerve the cure of the church to which he is preſented: and inſtitution is that act by which he doth commit to him the cure thereof. *Watſ. c.* 15.

5. *Inſtitution,*

5. *Inſtitution, or collation.*

There is no difference between inſtitution and collation as to the action itſelf, but this; that the biſhop doth not preſent to ſuch livings as are in his own gift, but immediately inſtituteth his own clerk, in much the ſame form as he or his chancellor inſtitute a clerk preſented by another patron. And as the biſhop collates to *benefices* of his own gift *jure pleno*, ſo he doth to thoſe which fall to him by lapſe. *Johnſ.* 81.

By the ſtat. 1 *Eliz. c.* 1. and 1 *W. c.* 8. *ſ.* 5. "Every perſon who ſhall be promoted or collated to any ſpiritual or eccleſiaſtical *benefice*, or miniſtry; before he ſhall take upon him to receive, uſe, exerciſe, ſupply, or occupy the ſame, ſhall take the oaths of allegiance and ſupremacy before ſuch perſon as ſhall have authority to admit him." See title **Oaths.**

By the *ſtat.* 13 & 14. *Car.* 2. *c.* 4. "Every dean, canon, and prebendary of every cathedral or collegiate church, and every parſon, vicar, curate, lecturer, and every other perſon in holy orders, who ſhall be incumbent, or have poſſeſſion of any deanry, canonry, prebend, parſonage, vicarage, or any other eccleſiaſtical dignity or promotion, or of any curate's place or lecture, ſhall, at or before his admiſſion to be incumbent, or have poſſeſſion aforeſaid, ſubſcribe the declaration or acknowledgment following, *viz. I* A. B. *do declare, that I will conform to the liturgy of the church of* England, *as it is now by law eſtabliſhed.*" Stat. 13 & 14 Car. 2. c. 4. ſect. 8, 12. 1 Will. Seſſ. 1. c. 8. ſect. 11.

"Which ſaid declaration and acknowledgment ſhall be ſubſcribed before the archbiſhop, biſhop, or ordinary of the dioceſe [or before their vicar general, chancellor, or commiſſary reſpectively, 15 *C.* 2. *c.* 6. *ſ.* 5.] on pain that every perſon failing in ſuch ſubſcription ſhall loſe and forfeit ſuch reſpective promotion, and ſhall be utterly diſabled, and *ipſo facto* deprived thereof; and the ſame ſhall be void, as if ſuch perſon ſo failing were naturally dead." *Stat.* 13 & 14. *Car.* 2. *c.* 4. *ſect.* 10.

"And after ſuch ſubſcription made, every ſuch perſon, vicar, curate, and lecturer ſhall procure a certificate under the hand and ſeal of the reſpective archbiſhop, biſhop, or ordinary of the dioceſe (or ſuch their vicar general, chancellor, or commiſſary as aforeſaid) who ſhall on demand make and deliver the ſame, to be read by him publickly in the church afterwards. *Stat.* 13 & 14 *Car.* 2. *c.* 4.

By *ſtat.* 31 *Eliz. c.* 6. *ſect.* 6. "If any perſon ſhall, for any reward or other profit, or any promiſe, or other aſſurance thereof, directly or indirectly (other than for uſual and lawful fees) admit, inſtitute, inſtal, induct, inveſt, or place any perſon in or to any *benefice* with cure of ſouls, dignity, prebend, or other living eccleſiaſtical, he ſhall forfeit the double value of one year's profit thereof, and the ſame ſhall be void as if ſuch were naturally dead.

6. *Induction, and requiſites after induction.*

After inſtitution given, the ordinary iſſues a mandate for induction, directed to the perſon who hath power to induct; and this perſon, of common right, is the archdeacon. But by preſcription or compoſition, others as well as archdeacons may make inductions, and ſo do the dean and chapter of *St. Paul's. Watſ. c.* 15.

So if a church is exempt from archidiaconal juriſdiction (as many churches are) then the mandate is to be directed to the chancellor or commiſſary; and if it be a peculiar, then to the dean or judge within ſuch peculiar. And when an archbiſhop collates by lapſe, or when a ſee is vacant, the mandate goes, not to the officer of the archbiſhop, but of the biſhop. *Gibſ.* 815.

If a biſhop dies, or is removed, after inſtitution given, and whilſt a mandate of induction is either not iſſued, or not executed, the clerk may repair to the archbiſhop for a mandate of induction. This is becauſe the authority of the biſhop is determined, and that authority devolved to the archbiſhop as guardian of the ſpiritualties *ſede vacante.* And the ſame rule takes place if the biſhop is viſited, and his juriſdiction ſuſpended after inſtitution, and before induction. And though ſuch mandate is not executed before a new biſhop is confirmed (who then hath authority to grant it) but is executed after, it ſhall not be void (becauſe it is the act of one who hath authority throughout his province) but only voidable at moſt; as was determined in the Exchequer Chamber, *M.* 29 *C.* 2. in the caſe of *Robinſon* and *Wooley*; a contrary judgment, which had been given in the court of King's Bench (*viz.* that it was void) being at the ſame time reverſed. *Gibſ.* 815.

By the *ſtat.* 13 & 14 *C.* 2. *cap.* 4. "Every perſon who ſhall be preſented or collated, or put into any eccleſiaſtical *benefice* or promotion, ſhall, in the church, chapel, or place of publick worſhip belonging to his ſaid *benefice* or promotion, within two months next after he ſhall be in the actual poſſeſſion of the ſaid eccleſiaſtical *benefice* or promotion, upon ſome Lord's day, openly, publickly, and ſolemnly read the morning and evening prayers appointed to be read by and according to the Book of Common Prayer, at the times thereby appointed or to be appointed; and after ſuch reading thereof ſhall openly and publickly, before the congregation there aſſembled, declare his unfeigned aſſent and conſent to the uſe of all things therein contained and preſcribed, in theſe words, and no other: *I* A. B. *do here declare my unfeigned aſſent and conſent to all and every thing contained and preſcribed in and by the book,* intitled, *The book of common prayer and adminiſtration of the ſacraments, and other rites and ceremonies of the church, according to the uſe of the church of* England; *together with the pſalter or pſalms of* David, *appointed as they are to be ſung or ſaid in churches; and the form or manner of making, ordaining, and conſecrating of biſhops, prieſts, and deacons.*"

Sect. 6. "And every ſuch perſon who ſhall (without ſome lawful impediment to be allowed and approved by the ordinary of the place) neglect or refuſe to do the ſame within the time aforeſaid) or in the caſe of ſuch impediment, within one month after ſuch impediment removed, ſhall *ipſo facto* be deprived of all his ſaid eccleſiaſtical *benefices* and promotions; and from thenceforth it ſhall be lawful for all patrons and donors of all and ſingular the ſaid eccleſiaſtical *benefices* and promotions, according to their reſpective rights and titles, to preſent and collate to the ſame, as though the perſon or perſons ſo offending or neglecting were dead."

By the *ſtat.* 13 *Eliz. cap.* 12. *ſect.* 3, 8. "Every perſon admitted to any *benefice* with cure ſhall publickly read the thirty-nine articles in the pariſh church of that *benefice*, with declaration of his unfeigned aſſent to the ſame: and every perſon admitted to a *benefice* with cure, except that within two months after his induction he do publickly read the ſaid articles, in the ſame church whereof he ſhall have cure, in the time of Common Prayer there, with declaration of his unfeigned aſſent thereunto, ſhall be upon every ſuch default *ipſo facto* immediately deprived.—Provided, that no title to confer or preſent by lapſe ſhall accrue upon deprivation *ipſo facto*, but after ſix months after ſuch notice of deprivation given by the ordinary to the patron."

Admitted to any benefice with cure] This is meant of ſuch *benefices* as have parochial churches belonging to them, and extends to dignities or prebends in cathedral and collegiate churches; and therefore where the caſe was about reading the articles, and it was alledged in the declaration that the *benefice* was a *benefice* with cure, it was held to be ill. 1 *And.* 62.

Except that within two months after his induction] Computing twenty-eight days to the month: for in the caſe of *Brown* and *Spence*, where the induction was *Sept.* 15. and the articles were read *Nov.* 15. this was adjudged inſufficient. 1 *Lev.* 101.

But by the ſtatute of 23 *Geo.* 2. *cap.* 28. "Whereas it hath happened, and may happen, through ſickneſs or other lawful impediment, that divers perſons have been and may be hindered from reading the ſaid articles, and making the ſaid declaration within the two months, and yet ſuch perſon, after ſuch ſickneſs or other lawful impediment removed, hath read or may read the ſaid articles,

ticles, and hath made or ſhall make the ſaid declaration; and it is reaſonable, that ſuch perſons ſhould be deemed to have complied with the true intent and meaning of the ſaid act; it is therefore enacted, That every perſon who hath read or ſhall read the ſaid articles, and hath made or ſhall make the ſaid declaration, at the ſame time that he did read or ſhall read the morning and evening prayer, and declare his unfeigned aſſent and conſent thereto, according to the ſtatute 13 & 14 *Car.* 2. *cap.* 4. ſhall be, and is hereby declared and adjudged to have complied with the true intent and meaning of the ſaid act of 13 *Eliz.* although the ſame were not, or may be read within the ſpace of two months after ſuch perſon's induction into any *benefice* with cure; and every ſuch perſon ſhall be freed and diſcharged from any deprivation, or other forfeiture by virtue of the ſaid act."

In the ſame church whereof he ſhall have cure] In the aforeſaid caſe of *Brown* and *Spence*, where the keys of the church could not be had, and ſo divine ſervice was performed in the church porch, and the articles read there; this was held to be ſufficient, as *Keble* reports it: but by *Levinz*, what the court there held to be good, was the reading of them in the porch of a chapel of eaſe within the pariſh. 1 *Lev.* 101.

In the time of common prayer there] And therefore not to be put off till divine ſervice or common prayer is ended.

With declaration of his unfeigned aſſent thereunto] In the caſe of *Smith* and *Clark* the jury found, that the incumbent (who was ſued in the ſpiritual court in order to deprivation for not giving aſſent to the articles) did read the articles and then ſaid, I give my conſent unto them, ſo far forth as they agree with the word of God: and it was adjudged that this was not an unfeigned aſſent, as the ſtatute intendeth; but that the aſſent ought to be abſolute, and without condition. For (as Lord *Coke* ſaith) the act was made for the avoiding diverſity of opinions; and by this addition the party might, by his own private opinion, take ſome of them to be againſt the word of God: and by this means diverſity of opinions ſhould not be avoided, and the act hereby made of none effect. *Gibſ.* 817. 4 *Inſt.* 324.

Shall be upon every ſuch default] But in a ſuit for tithes, or the like, though the pariſhioner may plead, that the parſon did not read the thirty-nine articles, yet the law preſumes the affirmative, and (in that caſe) the negative muſt be proved. *Gibſ.* 817.

Ipſo facto *immediately deprived*] So as the church is preſently void, without any declaratory ſentence; for avoidance by act of parliament needeth not any ſentence declaratory, and if it did, the ſtatute ſhould be defrauded at the ordinary's pleaſure if he would not deprive. And this is the received interpretation of the ſtatute; altho' the contrary ſeems to be ſuppoſed in the caſe of *Bacon* and the biſhop of *Carliſle* (which was but ſix years after making of the act) as it is reported by *Dyer*; inaſmuch as the notice given by the biſhop is there declared inſufficient, for this, among other reaſons, that he did not notify, that he had deprived the clerk by ſuch ſentence. *Gibſ.* 817. 4 *Inſt.* 324.

But after ſix months notice of ſuch deprivation given by the ordinary to the patron] In the aforeſaid caſe of *Bacon* and the biſhop of *Carliſle*, a queſtion aroſe concerning the manner of giving notice. The biſhop of *Carliſle* had ſigned in an inſtrument under ſeal, that *Bacon* had not ſubſcribed to the articles, according to the ſtatute; which inſtrument the jury found was publickly read in the church by the curate of the place, and after affixed by the apparitor to the parſonage-houſe. But this notice was declared ſufficient, not only becauſe no mention was made therein either of the patron, or of the deprivation by declaratory ſentence; but chiefly becauſe the notice ought to be given to the patron immediately. And accordingly, Lord *Coke* lays down two qualifications of the notice mentioned in this act; 1. It ought to be given by a perſon certain, that is, the ordinary; for if any other, of his own head, giveth notice to the patron, it is not material. 2. The notice ought to be certain and particular; and therefore it is not ſufficient for the ordinary in ſuch caſe to give notice, that the preſentee had not read the articles, and ſubſcribed generally; but he ought particularly to inform the patron that he had not ſo done, for which default he is deprived, and that thereupon it belongeth to the patron to preſent. *Gibſ.* 818. 6 *Co.* 29.

By the ſtat. 13 & 14 *Car.* 2. *cap.* 4. *ſect.* 11. He ſhall publickly and openly read the ordinary's certificate of his having ſubſcribed the declaration of conformity to the liturgy of the church of *England*, as it is now by law eſtabliſhed, together with the ſame declaration or acknowledgment, upon ſome Lord's day, within three months next after ſuch ſubſcription, in his pariſh church where he is to officiate, in the preſence of the congregation there aſſembled, in the time of divine ſervice; upon pain that every perſon failing therein (without ſome lawful impediment to be allowed and approved by the ordinary of the place, 23 *Geo.* 2. *cap.* 28.) ſhall loſe ſuch parſonage, vicarage, or *benefice*, curate's place, or lecturer's place reſpectively; and ſhall be utterly diſabled, and *ipſo facto* deprived of the ſame; and the ſaid parſonage, vicarage, or *benefice*, curate's place, or lecturer's place, ſhall be void, as if he was naturally dead. *For more matter relative to the ſeveral diviſions of this title, ſee Dr. Burne's Eccleſiaſtical law, title* Benefice.

Beneficio primo eccleſiaſtico habendo, Is a writ directed from the King to the chancellor or lord keeper, to beſtow the *benefice* that firſt ſhall fall in the King's gift, above or under ſuch value, upon this or that man. *Reg. Orig. fol.* 307. *b.*

Beneficium, Was an eſtate in land at firſt granted for life; and it was called *beneficium*, becauſe it was held *ex mero beneficio* of the donor. Theſe tenants were bound to ſwear fealty to the donor, and to ſerve him in the wars: they were only uſufructuaries at firſt, and no more; and moſt commonly ſuch eſtates were given to military men, that they might be more firmly bound to perform military ſervices. At length, by the conſent of the donor or his heirs, theſe eſtates were continued to the poſterity of the donee, ſubject to the ſame ſervices as before. And thoſe which were given by kings, were called *regalia beneficia*. But ſometimes ſuch *benefices* were given to biſhops and abbots, ſubject alſo to the like ſervices, *viz.* to provide men to ſerve in the wars; and when they, as well as the laity, had obtained a property in theſe lands, they were called *regalia*, which upon the death of a biſhop returned to the King till another was choſen. Thus we read in *Randulphus de Diceto, anno* 1093. *viz.* That *W.* 2. commanded, that the city of *Canterbury*, which archbiſhop *Lanfranck* held of him *in beneficio*, and that the abbey of *St. Alban's*, which was enjoyed by him and his predeceſſors, ſhould for the future be held by archbiſhop *Anſelme in Alodium eccleſiæ Cantuariæ perpetuo jure*. And thus began feodatary or feudatary eſtates, which we now call fee ſimple. *Cowell, edit.* 1727.

Benefit of Clergy. The privilege of clergy took its root from a conſtitution of the pope, that no man ſhould accuſe the prieſts of holy church before a ſecular judge; which, being contrary to the crown and dignity of the King and the Common law, bound not here till it was confirmed by parliament. 2 *Inſt.* 636.

Concerning which, by ſtat. 3 *Ed.* 1. *c.* 2. It is enacted as follows: "When a clerk is taken for guilty of felony, and is demanded by the ordinary, he ſhall be delivered to him according to the privilege of holy church. And they which be indicted of ſuch offences by ſolemn inqueſt of lawful men in the King's court, in no manner ſhall be delivered without due purgation."

When a clerk] For the ſcarcity of clergy in the realm of *England*, to be diſpoſed of in religious houſes, or for prieſts, deacons, and clerks of pariſhes, there was a prerogative allowed to the clergy, that if any man that could read as a clerk were to be condemned to death, the biſhop of the dioceſe might, if he would, claim him as a clerk; and he was to ſee him tried in the face of the court,

court, whether he could read or not: the book was prepared and brought by the biſhop, and the judge was to turn to ſome place as he ſhould chooſe, and if the priſoner could read, then the biſhop was to have him delivered over unto him, to diſpoſe of in ſome places of the clergy, as he ſhould think meet: but if either the biſhop would not demand him, or the priſoner could not read, then was he to be put to death. *Lord Bacon's Uſe of the Law* 122.

A clerk] And by a favourable interpretation of the ſtatutes relating to the clergy, not only thoſe actually admitted into ſome inferior order of the clergy, but alſo thoſe who were never qualified to be admitted into orders, have been taken to have a right to this privilege as much as perſons in holy orders, whether they were perſons lawfully born or baſtards, aliens or denizens, in the communion of the church or excommunicate, within the common benefit of the law or outlaws; ſo that they were not hereticks convict, nor *Jews*, *Mahometans*, nor *Pagans*, nor under perpetual diſability of going into orders, admitting of no diſpenſation, as blind and maimed perſons formerly were, and women ſtill are; nor liable to the objection of bigamy, which (by a conſtitution of the council of *Lyons* received in this kingdom) was a bar to the demand of the privilege of the clergy. 2 *Hawk. P. C.* 338.

And by the ſtat. 3 *W.* 3. *c.* 9. *ſect.* 6. Where a *man* being convicted of any felony for which he may demand the benefit of his clergy, if a *woman* be convicted for a like offence, upon her prayer to have the benefit of this ſtatute, judgment of death ſhall not be given againſt her, but ſhe ſhall ſuffer the ſame puniſhment as a man ſhould ſuffer that has the *benefit of clergy* allowed.

Is taken for guilty of felony] This ſtatute, and the cuſtom of the realm, reſtrained the *benefit of clergy* only to felony; ſo as they were to anſwer to high treaſon, and all offences under felony. 2 *Inſt.* 636.

And is demanded by the ordinary] Yet a man might wave the privilege of his clergy if he would, and put himſelf upon his country. 2 *Inſt.* 638.

By ſolemn inqueſt of lawful men] Before this ſtatute, if any clerk had been arreſted for the death of a man, or any other felony, and the ordinary did demand him before the ſecular judge, he was delivered without any inquiſition to be made of the crime; but after this ſtatute, to the end that the ordinary might have more care of purgation to be duly done according to the proviſion of this act, when any clerk was indicted of any felony, and refuſed to anſwer to the felony, but claimed the privilege of the clergy, and was demanded by his ordinary, yet he was not delivered to the ordinary before he had been firſt indicted and arraigned, and his offence had been inquired of, and found by an inqueſt of office: which was done, both to the end that if the priſoner were found guilty, he might abſolutely forfeit his goods (which anciently were ſaved by a purgation) and alſo that the court might be appriſed, whether it were proper from the circumſtances of the caſe, diſcloſed upon ſuch an injury, to deliver the clerk to the ordinary *generally*, in which caſe he was allowed to make his purgation; or *eſpecially*, *without purgation to be made*. But this practice being found inconvenient to priſoners, becauſe they loſt their goods, if found guilty by ſuch inquiry, and yet could take no challenge to any of the jury, it being but an inqueſt of office, it hath been the general practice ever ſince the reign of *Hen.* 6. to oblige thoſe who demand the *benefit of clergy* to plead and put themſelves upon their trial, under pain of being dealt with as thoſe that ſtand mute, whereby they forfeit their goods without any inquiry concerning their crime. 2 *Inſt.* 164. 2 *Hawk.* 358.

In no manner ſhall be delivered without due purgation] When a perſon was delivered to the ordinary, he was to remain in the ordinary's priſon; if committed generally, then he might make his purgation, which was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was diſcharged; if found guilty, he was degraded, and delivered over to the ſecular power. And when he had made his purgation, he had always reſtitution of his lands ſeized, unleſs he were attaint. And as touching his goods, the difference was thus; if before conviction, upon his arraignment, the priſoner had his clergy (as was uſed commonly before the time of *Hen.* 6.) then if he made his purgatiou, he had reſtitution of his goods, unleſs he had fled: but if he had pleaded to inqueſt, and were convict, then the goods were forfeited by the conviction; and he ſhould not have reſtitution upon his purgation. 2 *Hal. H. P. C.* 384. 1 *Inſt.* 638. 23 *Hen.* 8. *c.* 1. *ſect.* 5, 6. See title **Clergy**, and *Dr. Burne's Eccleſiaſtical Law*, title **Benefit of Clergy.**

Benereth, Was a ſervice which the tenant rendered to his lord with his plough and cart. *Lamb. Itin. p.* 412. And *Coke* on *Littleton*, *p.* 86. *a.* ſometimes called *benryden*. and *benyrden*. *Cowell, edit.* 1727.

Benevolence, *(Benevolentia)* Is uſed both in the chronicles and ſtatutes of this realm, for a voluntary gratuity given by the ſubjects to the King. *Stowe's Annals, pag.* 701. By the ſtatute *anno* 1 *Rich.* 3. *cap.* 2. it is called a new impoſition, and in that reſpect found fault with. But *Stowe*, *p.* 791. ſaith, the invention grew firſt from *Edward* the Fourth's days. You may find it alſo ſtat. 11 *Hen.* 7. *cap.* 10. to have been given to that worthy prince, in regard of his great expences in wars and otherwiſe. See *Coke's* 12 *Rep. fol.* 119, 120. It is alſo mentioned, and excepted out of the pardon, 1 *Ed.* 6. *cap.* 15. Other nations call it *ſubſidium charitativum*, given ſometimes to lords of the fee by their tenants, ſometimes to biſhops by their clergy. *Matthæus de Afflictis Deſcis* 136. *Caſſan. de Conſuet. Burg. p.* 134. 136, *Baldus*, *Conſitio*, 120, *vel* 6, *p.* 230. of this *Menochius* makes mention, *lib.* 2. *cent.* 2. *cap.* 178 *and* 179. Alſo by act of parliament, 13 *Car.* 2. *cap.* 4. it was given to King *Charles* the Second. *Cowell, edit.* 1727.

Benevolentia regis habenda, The form in ancient fines and ſubmiſſions to purchaſe the King's pardon and favour, in order to be reſtored to eſtate, title, or place.—Thomas de S. Walerico *dat regi mille marcas*, *pro habenda* benevolentia *regis*, *& pro habendis terris ſuis unde diſſeiſitus fuit*. Paroch. Antiquities, p. 172.

Benhurſt in *Berkſhire*, Remedy for the inhabitants thereof to levy money recovered againſt them on the ſtatute of hue and cry, 39 *Eliz. c.* 25.

Bengals. See **Silks.**

Benanes, High-croſs. *Cowell, edit.* 1727.

Benrip, *Tenentes de Witborn in com. Heref. debent pro quadam conſuetudiue quæ vocatur* beerip, *viz. pro quinque operationibus in termino beati Michaelis*, 5 *d. Lib. Niger Heref.* See **Bederept.** *Cowell, edit.* 1727.

Bent. 15 *Geo.* 2. *c.* 33. *ſect.* 6. Whereas upon the north weſt coaſt of this kingdom, and eſpecially in the county palatine of *Lancaſter*, the ſea is bounded, and the adjacent lands are prevented from being overflowed by large ſand-hills, which are compoſed of ſuch looſe ſand, that in dry weather, when any violent ſtrong weſt winds happen to blow, the ſame is carried away, and thrown upon the adjacent lands, not only to the damage thereof, but alſo to the great terror and danger of the inhabitants, who are thereby expoſed to the inundation of the ſea: and whereas it has been found by experience, that the beſt way to preſerve the ſaid hills from being blown away as aforeſaid, is to plant them with a certain ruſh or ſhrub called *ſtar* or *bent*, which proves an effectual method for keeping the ſame firm and ſolid, and which the owners of the ſaid lands are at great coſts and charges in yearly ſetting and planting for that purpoſe: and whereas it frequently happens, that many idle and diſorderly perſons, reſiding near the ſaid coaſts, do unlawfully and maliciouſly in the night-time, as well as by day, cut, pull up, and carry away the ſtar or *bent* ſo planted as aforeſaid, and inſtead of working in an honeſt manner for the maintenance and ſupport of their families, do privately ſell and diſpoſe of the ſaid ſtar or *bent*, for making of mats, bruſhes, and brooms and beeſoms, and thereby the ſaid hills are rendered ſo looſe and open, that the ſame are often blown upon the adjacent lands, which are covered over therewith in ſuch manner as to deſtroy the corn, graſs, and

and herbage thereof, and expoſe the ſame to inundations, to the great loſs and damage of the owners and occupiers of the ſaid lands :——therefore if any perſon or perſons ſhall by day or night, without the conſent of the lord or owner of ſuch ſtar or *bent* hills, cut, pull up, or carry away any ſtar or *bent* planted or ſet on the ſaid hills or banks, on the north-weſt coaſts of *England*, in order to preſerve and to prevent the ſame from being blown upon the ſaid adjacent lands, it ſhall be lawful for one or more juſtices of the peace of the county, riding, city, town corporate, liberty, or diviſion where ſuch ſtar or *bent* ſhall be cut, pulled up, or carried away ; and ſuch juſtice or juſtices is and are hereby impowered, upon complaint or information upon oath made of ſuch offence, to ſummon the party or parties ſo complained of ; and in default of appearance thereon to iſſue out his or their warrants to apprehend and bring before him or them the perſon or perſons ſo accuſed or complained of ; and upon proof thereof made, either by confeſſion of the party or parties ſo accuſed, or upon the oath of one or more credible witneſs or witneſſes, to convict the offender or offenders ; and every perſon ſo offending, and being thereof convicted as aforeſaid, ſhall forfeit and pay the ſum of twenty ſhillings : one moiety thereof to the informer, and the other moiety to the lord or owner of ſuch ſtar, *bent*, or ſand-hills ; the ſame to be levied by diſtreſs and ſale of the offender's goods and chattels, by warrant under the hands and ſeals of ſuch juſtice or juſtices, together with the charges of ſuch diſtreſs and ſale, rendering the overplus, if any be, to the owner or owners thereof ; and for want of ſufficient diſtreſs, the ſaid juſtice or juſtices are hereby required to commit the perſon or perſons ſo convicted as aforeſaid to the houſe of correction, there to remain and be kept to hard labour for the ſpace of three months ; and if any perſon or perſons ſo convicted ſhall afterwards be guilty of a ſecond offence, and thereof lawfully convicted by ſuch juſtice or juſtices, either by the confeſſion of the party or parties, or upon the oath of one or more credible witneſs or witneſſes, ſuch perſon or perſons ſhall be committed to the houſe of correction for the ſpace of one year, there to be whipt and kept to hard labour.

Sect. 7. And if any ſtar or *bent* ſhall be found in the cuſtody or poſſeſſion of any perſon or perſons within five miles of any ſuch ſtar, *bent* or ſand-hills as aforeſaid, ſuch perſon or perſons being convicted thereof before one or more ſuch juſtice or juſtices in manner aforeſaid, ſhall be deemed, adjudged, and taken to be the cutter and puller of ſuch ſtar or *bent* from ſuch ſand-hills, and ſhall forfeit and pay the ſum of twenty ſhillings; one moiety thereof to the lord or owner of ſuch ſtar, *bent*, or ſand-hills, the ſame to be levied in manner aforeſaid, by diſtreſs and ſale of the offender's goods and chattels ; and for want of ſufficient diſtreſs, ſuch perſon or perſons ſhall be committed in manner aforeſaid to the houſe of correction, there to remain and be kept to hard labour for the ſpace of three months.

Sect. 8. Provided that nothing in this act contained ſhall extend, or be conſtrued to extend, to prohibit or reſtrain any perſon or perſons from the exerciſe or enjoyment of any ancient preſcriptive right to cut ſtar or *bent* upon the ſea-coaſts in the county of *Cumberland*.

Berbiage, (*Barbiagium*) *Nativi tenentes manerii de Caliſtoke reddunt per an. de certo redditu vocat.* berbiag. *ad le hokday* 19s. MS. Survey of the duchy of *Cornwall*.

Berbicaria, A ſheep-down, or ground to feed ſheep. *Leges Aluredi, cap.* 9. *Et quod de* berbicaria, *&c.* Sometimes it is written *bercheria*, as in *Mon. Angl. tom.* 1. *pag.* 308.

Bercaria, (*Berqueria, berceria*) A ſheep-fold, ſheep-cote, or ſheep-pen, or other incloſure for the ſafe keeping of ſheep, abbreviated from *barbicaria*, from *berbex* detorted from *vervex*. Hence the middle-aged Latin *berbicus*, a ram, *berbica*, an ewe ; *caro berbicina*, mutton. *Berbicarius*, *bercarius*, Fr. *berger*, a ſhepherd. *A. D.* 1218. *James le Bret* of *Brigenhall* gave four ſhort ridges or butts of land to the priory of *Burceſtor*,——*ad faciendam* bercariam, *ſive quicquid eis melius placuerit*. Paroch. Antiq. p. 187. *John de Charlton* and *Chriſtian* his wife gave to the abby of *Oſeney* a piece of land in *Hokenorton*, upon which ſtood the *berchery* of *Sutton*. *Ibid. p* 348. In *Domeſday* book it is written *berqueria*. 2 *Inſt. fol.* 476. *Mandatum eſt Roberto de Lexington, quod abbati de Miraval faciat unam* bercariam *in paſtura de Fairfield ad oves cuſtodiendas. Clauſ.* 9 *H.* 3. *m.* 12. *Dedit ſexaginta acras terræ ad unam* bercariam *faciendam. Mon. Angl. tom.* 2. *fol.* 599. where it ſeems to ſignify a ſheep-walk for paſture. *Cowell, edit.* 1727.

Berefellarii. There were ſeven churchmen, ſo called anciently, belonging to the church of St. *John* of *Beverley*. ——*Sed quia eorum turpe nomen* berefelliorum *patens ritui remanebat, dictos ſeptem de cætero non* berefellarios, *ſed perſonas volumus nuncupari*. Pat. 21 R. 2. par. 3. m. 10. per Inſpex. *Cowell, edit.* 1727.

Berefreit, or **Berefreed**, A great wooden tower. *Videns autem rex ſe non ut diſpoſuerat proficere, ligneam turrim, quam* berefreit *vocant, erexit*. Simeon Dunelm. anno 1123.

Beregaful, *i. e.* A tribute of barley ; from the Sax. *bere, hordeum*, and *gafol, tributum*. *Cowell, edit.* 1727.

Berewicha, Villages or hamlets belonging to ſome town or manor.——*Iſtæ ſunt* berewichæ *ejuſdem manerii. Domeſday*.

Berewis. See **Berewicka**.

Berghmayſter, vulgarly **Barmaſter** and **Barmer**, from the Sax. *berg, mons, quaſi* maſter of the mountain) *Præfectus ſeu curator fodinæ*, A bailiff or chief officer among our *Derbyſhire miners*, who, among other parts of his office, doth alſo execute that of *coroner* among them —*Juratores dicunt, quod in principio, quando mineratores veniunt in campum mineras quærentes, inventa minera, venient ad balivum qui dicitur* berghmayſter, *& petent ab eo duas metas, ſi ſit in novo campo, & habebunt unam, ſcil. pro inventione, & aliam de jure mineratorum, & unaquæque meta continet quatuor perticatas, & ad foream ſuam ſeptem pedes, & unaquæque perticata erit de* 24 *pedibus, &c.* Eſc. de an. 16 E. 1. num. 34. See **Bergmoth**, and Sir *J. Pettus* his *Fodinæ Regales*. The *Germans* call a mountaineer, or miner, a *bergman*. *Cowell, edit.* 1727.

Bergmoth or **Berghmote**, vulgarly **Barmote**.—— *Juratores dicunt etiam quod placita del* bergmoth *debent teneri de tribus ſeptimanis in tres ſeptimanas ſuper mineram in Pecco*. Eſc. 16 Ed. 1. *ut ſupra*. This *bergmoth* or *berghmote* comes from the Saxon *berg*, i. e. *mons* and *mote* or *gemote, conventus* ; *quaſi* the court held upon an hill for deciding pleas and controverſies among the *Derbyſhire* miners ; of which thus Mr. *Manlove*, in his ingenious treatiſe of their cuſtoms :

——*And ſute for* oar *muſt be in* berghmote *court,*
3 Ed. 1. art. 9. *Thither for juſtice* miners *muſt reſort ;*
If they ſuch ſutes in other courts commence,
3 & 4 Ph. & M. art. 16. *They loſe their due* oar-debt *for ſuch offence ; And muſt pay coſts ; becauſe they did proceed Againſt their cuſtom :* Miners *all take heed.*
3 E. 6 art. 20. *No man may ſell his* grove, *that's in conteſt, Till ſute be ended ; after the* arreſt
3 & 4 Ph. & M. art. 26. *The ſeller's* grove *is loſt by ſuch offence, The buyer fin'd for ſuch maintenance.*
16 Ed. 1. c. 2. *And two great courts of* berghmote *ought to be*
3 E. 6. art. 10. *In every year upon the* minery, *To puniſh* miners *that tranſgreſs the law,*
3 & 4 Ph. & Mar. art. 19, 30 & 33: *To curb offenders, and to keep in aw Such as be* cavers, *or do rob mens* coes ; *Such as be* pilferers, *or do ſteal mens* ſtows ; *To order* grovers, *make them pay their part, Join with their fellows, or their* groves *deſert To fine ſuch* miners, *as mens* groves *abuſe, And ſuch as orders to obſerve refuſe ;*
3 & 4 Ph. & Mar. art. 31. *Or work their* meers *beyond their length and* ſtakes *Or otherwiſe the* mine *and* rake ; *Or ſet their* ſtows *upon their neighbour's ground, Againſt the cuſtom, or exceed their bound :*
Ibid. art. 4, 3. *Or purchaſers, that* miners *from their way To their* waſh-troughs *do either ſtop or ſtay ; Or dig or delve in any man's* bing-place ;
26 Ed. 1. c. 2. *Or do his* ſtows *throw off, break, or deface ;*

To

To fine offenders that do break the peace,
3 & 4 Ph. & Ma. art. 28. *Or ſhed man's blood, or any tumults raiſe;*
Or weapons bear upon the mine *or* rake;
Or that poſſeſſion forcibly do take;
Or that diſturb the court, the court may fine
For their contempts (by cuſtom of the mine)
And likewiſe ſuch as diſpoſſeſſed be,
And yet ſet ſtows *againſt authority;*
Or open leave their ſhafts, *or* groves, *or* holes,
By which men loſe their cattle, ſheep, or ſoules.
And to lay pains, *that grievance be redreſt,*
To eaſe the burdens of poor men oppreſt.
To ſwear berghmayſters, *that they faithfully*
Perform their duties on the minery;
And make arreſts, and eke impartially
Impanel jurors, *cauſes for to try;*
And ſee that right be done from time to time,
Both to the lord, and farmers on the mine.

Beria, *Berra, Berrie, Berry.* Moſt of our gloſſographers in the names of places, have confounded the termination of *Berrie*, with that of *Berry* and *borough*, as if the appellative of ancient towns; whereas the true ſenſe of the word *Beria*, Eng. *berie*, is a flat wide campaign, as from ſufficient authorities is proved by the learned *Du Freſne* in his gloſſary, under the word *Beria*, and in his notes on the life of St. *Lewis*, p. 89. where he obſerves, that *Beria Sancti Edmundi*, mentioned by *Mat. Paris, ſub. ann.* 1174, is not to be taken for the town, but for the adjoining plain. To theſe and other his remarks on that word, may be added, that many flat and wide meads, and other open grounds, are ſtill called by the name of *Beries* and *Berie-fields*. So the ſpacious mead between *Oxford* and *Iſley*, was in the reign of king *Athelſton* called *Bery*. *B. Twine.* MS. *c.* 2. *pag.* 253. As now the largeſt paſture-grounds in *Quarendon*, in the county of *Bucks*, is known by the name of *Bery-field.* And ſuch indeed were the *Berie meadows*, which, though Sir *Henry Spelman* interprets to be the demeſne meadows, or manor meadows, yet were they truly any flat open meadows that lay adjoining to any vill or firm: the ſame with *Berras*, in that plea between the biſhop and prior of *Carliſle*, 18 *E.* 1. *Et quod rex in foreſta ſua prædicta (ſcil. de Inglewood) poteſt villas ædificare, eccleſias conſtruere, Berras aſſartare, & eccleſias illas cum decimis terrarum illarum pro voluntate ſua cuicunque voluerit conferre*; where *Berras aſſartare* muſt be to aſſart or plough up the plain open heaths, or downs. Hence the termination of many places, ſituate in a more open campaign; as *Mixberie, Cornberie*, &c. *Cowell, edit.* 1727,

Berkſhire. See **Attebatii.**

Bernagium. See **Brenagium.**

Bernet, *(Incendium*, from the Sax. *byrnan*, to burn) Is one of thoſe crimes, which by *Henry* the firſt's laws, *cap.* 13. *emendari non poſſunt*; it ſignifies *domus combuſtio*, according to MS. *Bibl. Cotton. tit. Vitellius. c.* 9. ſometimes it ſignifies any capital offence. *Leges Canuti apud Brompt. c.* 90. *Leg. H.* 1. *c.* 12. 47.

Barocure, in *Domeſday*, is uſed for *Berkſhire.*

Berquaria. See **Berbicaria** and **Bercaria.**

Berquarii and **Bercarii**, Shepherds, *Domeſday.* See **Bercaria.**

Berra, A plain open heath, *Berras aſſartare*, to grub up ſuch barren heath. *Pet.* in *parl.* 18 *Ed.* 2. See **Beria.**

Berrithatch, In the court-rolls of the manor of *Chaton, in com. Somerſ.* is uſed for litter for horſes.

Berruuich, *Habet rex Edwardus unum manerium Derbie nominatum cum ſex* Berruuich. See **Berwica.**

Berſa, Fr. *bers*, a limit, compaſs, or bound.——— *Paſturam duorum taurorum per totam* Berſam *in foreſta noſtra de* Chipenham. Mon. Angl. tom. 2. fol. 210. a. *A park-pale.*

Berſare, To ſhoot; Germ. *Berſen.*—Berſare *in foreſta mea ad tres arcus.* Carta. Ran. Com. Ceſtr. An. 1218, *i. e.* to hunt or ſhoot with three arrows in my foreſt. *Berſarii* were properly thoſe that hunted the wolf, from the Sax. *berf*, a wolf.

erſatrix, (from the Fr. *bercer*, to rock) a rocker. Rex.—*Sciatis quod pro bono ſervitio, quod dilecta nobis Matilda de Plumton*, Berſatrix *Edwardi comitis Ceſtriæ, filii noſtri cariſſimi, eidem filio noſtro impendit, conceſſimus eidem Matildæ decem Marcas percipiend. ſingulis annis ad ſcaccarium noſtrum, &c.* Pat. 10. Edw. 3. *pag.* 1. *m.* 30.

Berſelet, *Berſeleta*, a hound.—*Ad* berſandum *in foreſta cum novem arcubus, & ſex* Berſeletis. Cart. Rog. de Quincy.

Berton, *(Bertona*, from the Sax. *bere, horreum, & ton, villa)* Is that part of a country farm where the barns and other inferior offices ſtand, and wherein the cattle are foddered, and other buſineſs is managed. *Eſt area in averſa parte ædium ruralium primariarum, in qua horrea, ſtabula & vilioris officii ædificia ſita ſunt, in qua foventur domeſtica animalia & negotiationes ruſticæ peraguntur.—Rex Theſaurario & Baronibus ſuis de ſcaccario, ſalutem. Quia volumus quood caſtrum noſtrum Glouceſtriæ, nec non & Tina &* Bertona *Glouc. corpori dicti comitatus noſtri Glouc. annectantur, &c.* Clauſ. 32 *Ed.* 1. *m.* 17. It comes from the Saxon *bere*, which ſignifies barley, and from thence comes *bern*, a barn, *i. e.* a barn-floor; *ern*, a place for barley; and *bere-flor*, a barn-floor; and ſo *barton*, which ſignifies a farm; and is always diſtinct from a manor. *Cowell, edit.* 1727.

Bertonarii. *Cum* Bertona *terris & tenementis, quæ* Bertonarii *modo tenent ad voluntatem.* Charta Johannis epiſc. Exon. dat. 24 Dec. anno 1337. Doubtleſs theſe were ſuch as we now call farmers, or tenants of *Bertons*, huſbandmen, that held at the will of the lord. In *Devonſhire* they call a great farm or manſion a *Berton*; a ſmall farm, a *living*. *Cowell, edit.* 1727.

Berwica, A hamlet, or village appurtenant to ſome town or manor; often found in *Domeſday*; from the Sax. *Berewica*, a corn-farm; *Manerium minus ad majus pertinens; non in gremio manerii, ſed vel in confinio, vel disjunctius interdum ſitum eſt.* Spelman. So in the donation of *Edward the confeſſor*, *Tothill* is called, *the* Berwick of *Weſtminſter. Cam. Brit. fol.* 816.

Berwick *upon Tweed.* Stat. 22 *Edw.* 4. *cap.* 8. *ſect.* 1. No merchandize ſhall be ſhipped in any creek or other place betwixt *Tinmouth* and *Berwick*, but only in the port or haven of *Berwick:* and no perſons, ſaving the burgeſſes and freemen of *Berwick*, ſhall cauſe any ſalmon to be ſold, which ſhall be taken in the water of the *Tweed:* and if any perſon offend contrary to the ſaid ordinances, the ſaid perſon ſhall forfeit all the ſaid merchandizes. And it ſhall be lawful to any of the king's ſubjects, to ſeize all ſuch merchandize ſo forfeited, containing the ſum of the value of the ſaid goods; the King to have one half of ſuch merchandize forfeited, and money recovered, and the perſon which ſhall ſeize and purſue in form aforeſaid, to have the other half.

Sect. 2. The merchants and freemen of the ſaid town may, of the grace of the King, have to farm all waters royal, and fiſhing places, within the ſaid town of *Berwick*, and ſeigniory of the ſame, paying for the ſame as much as any other perſon will do: and the ſame merchants and freemen may from henceforth enjoy to them, their heirs and ſucceſſors for ever, all liberties and cuſtoms which at any time before pertaineth to the ſaid town; and they may ſhip all goods and merchandizes there, and carry them to what place they will, and there diſcharge, and recharge with corn or any other victual or merchandizes, and bring the ſame to *Berwick* for victualling thereof.

Sect. 3. This act ſhall not be prejudicial to the biſhop of *Durham* in any thing belonging to him.

Stat. 1 *Jac. cap.* 28. An act for confirmation of the king's letters patent, dated at *Weſtminſter* the 30th of *April, anno* 2 *Jac.* granted to the mayor, bailiffs, and burgeſſes of the borough of *Berwick upon Tweed*, and their ſucceſſors, and of the franchiſes, privileges, and cuſtoms of the ſaid borough.

By ſtat. 20 *Geo.* 2. *c.* 42. *ſect.* 3. *Wales* and *Berwick upon Tweed* ſhall be included in all acts of parliament wherein the kingdom of *England* ſhall be mentioned.

Bery or *Bury*, The vill or ſeat of a nobleman, a dwelling-houſe, a manſion, or court, a chief farm; from the

the Sax. *beorg*, which ſignifies an hill or caſtle; for heretofore their ſeats were caſtles ſituate on hills, of which we have ſtill ſome remains. The chief houſe of a manor, or the lord's ſeat, is ſtill ſo called in ſome parts of *England*; as in *Herefordſhire* there are the *beries* of *Stockton*, *Luſton*, *Hope*, &c. anciently uſed alſo for a ſanctuary. *Cowell, edit.* 1727.

Beſaile, *Proavus*, (from the Fr. *bis-ayeul*, great grandfather) In the common law ſignifies a writ, that lieth where the great grandfather was ſeiſed in his demeſne as of fee, of any lands or tenements in fee ſimple, the day that he died; and after his death, a ſtranger abateth or entereth the ſame day upon him, and keepeth out his heir, *&c.* the form and uſe of this writ is more at large to be read in *F. N. B. fol.* 221. *Cowell.*

Beſaile, A ſpade or ſhovel; derived from the French *becher*, *fodere*, to dig. Hence perhaps *una* beſcata *terræ incluſa*, *Mon. Angl. p.* 2. *fol.* 642. may ſignify a piece of land uſually turned up with a ſhovel or ſpade, as gardeners uſe to fit their grounds, to ſow and plant in. *Cowell, edit.* 1727.

Beſtials, Cometh of the French *betail*, which is *pecus*, beaſts of any ſort. In ſtat. 4 *Ed.* 3. *cap.* 3. it is written *beſtayle*, and taken to denote all kinds of cattle purveyed for the King's proviſion. It is alſo mentioned to ſignify all kinds of cattle, in 12 *C.* 2. *c.* 4. *Cowell, edit.* 1727.

Betaches, Laymen uſing glebe lands.——*Et Hibernicos ſic admiſſos ad legem prædictam more* Anglicorum *pertractari mandamus jure noſtro & aliorum dominorum in bonis & catallis nativorum, qui vulgariter in illis partibus* betaches *nominantur.* Parl. 14 Ed. 2. p. 2. m. 21.

Beverches, Bed-works, or cuſtomary ſervices done at the bidding of the lord by his inferior tenants——*Inter ſervitia* cuſtumaria *tenentium in* Blebury, *de dominio abbatis & conventus* Rading——*prædictus abbas habebit de eis duas precarias carrucarum per annum, quæ vocantur* beverche, *& cum qualibet carruca duos homines qualibet die ad prandium abbatis* Cartular. Rading. MS. fol. 223.

Bever wool, To what duties liable, ſee ſtat. 2 *Will. & M. ſeſſ.* 2. *c.* 4. *ſect.* 38.

Bewdley, Made part of *Worceſterſhire* by ſtat. 34 & 35 *Hen.* 8. *c.* 26. *ſect.* 116.

Bidale, or **Bidall**, Is the invitation of friends to drink at ſome poor man's houſe, who thereby hopes to receive ſome aſſiſtant benevolence from the gueſts for his relief; ſtill in uſe in the Weſt of *England*, and falſly written by ſome *bildale*, and mentioned 26 *Hen.* 8. *c.* 6. The ſame is uſed alſo in the county palatine of *Cheſter* by ſome perſons of quality towards the relief of their own or neighbours poor tenants. *Cowell, edit.* 1727.

Bidding of the beads, Was a charge or warning that the pariſh prieſt gave to his pariſhioners at certain ſpecial times to ſay ſome particular prayers, or do other acts of devotion in behalf of ſome deceaſed friend's ſoul; in imitation of which the miniſters of the church of *England* are commanded by the canons on the *Sunday* precedent to give notice of or bid the feſtivals in the following week, that the pariſhioners may the better obſerve them; this is mentioned 27 *Hen.* 8. *c.* 26. we may eaſily find bidding in the Sax. words *bidden*, to pray or deſire, and *bead*, a prayer. *Cowell, edit.* 1727.

Bidentes, Two yearlings; Tags or ſheep of the ſecond year.——*Will. Longeſpe, A. D.* 1234. granted to the prior and canons of *Burceſter*,—*Paſturam ad quinquaginta* bidentes, *cum dominicis* bidentibus *meis ibidem paſcendis.* Paroch. Antiq. p. 216. The wool of theſe ſheep being the firſt ſheering was ſometime claimed as a *heriot* to the King on the death of an abbot. *Cowell, edit.* 1727.

Bidripe, (*Bidripa.*) See **Bederepe.**

Biduana, A faſting for the ſpace of two days. 'Tis mentioned in *Matt. Weſt. p.* 135. and in *Flor. of Worceſter, p.* 631. Biduanas *faciant omnes epiſcopi & monachi, &c.*

Biga, (*Bigata*) Properly a cart with two wheels, and not, as ſome have offered, a chariot drawn with coupled horſes; theſe words have it ſufficiently, *Et quod eant cum* bigis *& carris cum cæteris phaleris, &c. ſuper tenementum ſuum, &c.* Mon. Angl. f. 256. b. This *biga*, or cart with two wheels, was drawn ſometimes with one horſe, a more expreſs refutation of the above-mentioned conjecture. King *Hen.* 3. confirmed to the priory of *Repingdon com. Derb. unam* bigam *cum unico equo ſemel in die in boſco ſuo de* Tickenhall *errantem, ad focale ad uſus ſuos proprios portandum.* Mon. Angl. tom. 2. pag. 280.

Bigamus, Is any perſon that hath at ſeveral times married two or more wives ſucceſſively after each other's death, or a widow; as appears by the ſtatutes 18 *Ed.* 3. *c.* 2. 1 *Ed.* 6. *c.* 12. 2 *part. Co.* 2 *Inſt. fol.* 273.

Bigamy, (*Bigamia*) Signifies a double marriage, and is uſed in common law for an impediment to be a clerk, by reaſon he hath been twice married, 4 *Ed.* 1. *c.* 5. which ſeems to be grounded upon the words of St. *Paul* to *Timothy*, epiſt. i. c. 5. verſ. 2. *Oportet ergo epiſcopum irreprehenſibilem eſſe, & unius uxoris virum.* The canoniſts have founded their doctrine upon this, that he that hath been twice married may not be a clerk; and him who hath married a widow they reckon to have been twice married; ſo that they do not only exclude ſuch from holy orders, but alſo deny them all privileges that belong to clerks: but this law is aboliſhed by ſtat. 1 *Ed.* 6. *c.* 12. and ſee ſtat. 18 *Eliz. cap.* 7. The ſtat. called the *ſtatute de bigamis*, is the 4 *Ed.* 1. *c.* 5. and the ſtat. 1 *Jac.* 1. *c.* 11. calls it *bigamy*, where a perſon marries a ſecond wife, the firſt being living, which is felony; but this is properly *polygamy*, and not *bigamy*, which laſt is not where a perſon hath two wives together, but where he hath two wives one after another. 2 *Inſt.* 273.

Matrimonial cauſes are properly cognizable in the ſpiritual courts, and offences againſt the rights of marriages puniſhable by the eccleſiaſtical law; but this offence of *bigamy*, or marrying a ſecond wife, the firſt being alive, is made felony by ſtatute, but the offender is not ouſted the benefit of his clergy.

By the ſtat. 1 *Jac.* 1. *c.* 11. it is enacted, "That if any perſon or perſons within his Majeſty's dominions of *England* and *Wales*, being married, do marry any perſon or perſons, the former huſband or wife being alive, that then every perſon or perſons ſo offending ſhall ſuffer death as in caſes of felony; and the party and parties ſo offending ſhall receive ſuch and like proceeding, trial, and execution in ſuch county where ſuch perſon or perſons ſhall be apprehended, as if the offence had been committed in ſuch county where ſuch perſon or perſons ſhall be taken or apprehended: *but it is provided*, that nothing in this ſtatute contained ſhall extend to any perſon or perſons whoſe huſband or wife ſhall be continually remaining beyond the ſeas by the ſpace of ſeven years together, or whoſe huſband or wife ſhall abſent him or herſelf the one from the other by the ſpace of ſeven years together, in any parts within his Majeſty's dominions, the one of them not knowing the other to be living within that time. *Alſo it is provided*, that the ſaid ſtatute ſhall not extend to any perſon or perſons who ſhall be at the time of ſuch marriage divorced by a ſentence in the eccleſiaſtical court declared to be void and of no effect; nor to any perſon or perſons, for or by reaſon of any former marriage had or made within age of conſent. *Alſo it is provided*, that no attainder for this offence ſhall make or work any corruption of blood, loſs of dower, or diſinheriſon of heir or heirs."

As if the offence had been committed in ſuch county] It is agreed, that if the firſt marriage were beyond ſea, and the latter in *England*, the party may be indicted here; but if the firſt were in *England*, and the latter beyond ſea, it is ſaid that the party cannot be indicted, becauſe the ſecond marriage, which made the offence, was not within any county here. 1 *Sid.* 171. *Kely.* 8. But 1 *Hawk. P. C.* 111. holds, that the party may in the laſt caſe be indicted, and relies on the expreſs words of the ſtatute.

At the time of ſuch marriage divorced] Divorces *a menſa et thoro cauſa adulterii* and *ſævitiæ* are within the exception in the ſtatute, though the word *ſeparamus*, and not *divortiamus*, be made uſe of in the ſentence; for the ſtatute being penal ſhall be conſtrued favourably; and ſuch ſeparations are taken for divorces in common underſtanding.

ſtanding. 1 *Hawk. P. C.* 111. 3 *Inſt.* 89. *H. P. C.* 122. *Kel.* 27. *Cro. Car.* 461. Q.

Made within age of conſent] If one of the parties only were under the age of conſent at the time of ſuch marriage, the exception extends as well to the party above the age of conſent as to the other; becauſe the power of diſagreeing was equal on both ſides.

Bigot, Is a compound of ſeveral old *Engliſh* words, and ſignifies an obſtinate perſon, or one who is wedded to his own opinion. *Rollo*, the firſt duke of *Normandy*, refuſed to kiſs the King's foot, unleſs he held it out to him for that purpoſe; it being a ceremony uſed in token of ſubjection for that dukedom, with which the King at that time inveſted him: thoſe who were preſent taking notice of the duke's refuſal adviſed him to comply with the King's deſire, to which he anſwered them, *Ne ſe bigot*, upon which he was in deriſion called *bigot*; and the *Normans* are ſtill ſo called. *Cowell, edit.* 1727.

Bilagines. See **By-Laws.**

Bilanciis deferendis, Is a writ directed to a corporation for the carrying of weights to ſuch a haven, there to weigh the wools that ſuch a man is licenſed to tranſport. *Reg. Orig. fol.* 270. *a.*

Bilinguis, In general is a man of a double tongue; but in a legal ſenſe is uſed for a jury that paſſeth in any caſe between an *Engliſhman* and an *alien*, whereof part ought to be *Engliſhmen*, and part ſtrangers. 28 *Ed.* 3. *c.* 13. This we call vulgarly *a party-jury*; but in proper language, it is a jury *de medietate linguæ*. See **Medietas linguae.**

Bill, (*Billa*) Is diverſly uſed: in law proceedings it is a declaration in writing, expreſſing either the wrong the complainant hath ſuffered by the party complained of, or elſe ſome offences committed againſt the law or ſtatutes of the realm: and this *bill* is ſometimes addreſſed to the Lord Chancellor of *England*, eſpecially for unconſcionable wrongs done to the complainant; and ſometimes to others having juriſdiction, according as the law directs. It contains the fact complained of, the damage thereby ſuſtained, and petition of proceſs againſt the defendant for redreſs; and it is made uſe of as well in criminal as civil matters. In criminal caſes, when a grand jury upon a preſentment or indictment find the ſame to be true, they indorſe on it *billa vera*; and thereupon the offender is ſaid to ſtand indicted of the crime, and is bound to make anſwer unto it: and if the crime touch the life of the perſon indicted, it is then referred to the jury of life and death, *viz.* the petty jury, by whom if he be found guilty, then he ſhall ſtand convicted of the crime, and is by the judge condemned to death. *Termes de la Ley* 86. 3 *Inſt.* 30. See title **Ignoramus** and **Indictment.**

Bill is alſo a common engagement for money given by one man to another; and is ſometimes with a penalty, called *penal bill*, and ſometimes without a penalty, though the latter is moſt frequently uſed. By a *bill* we ordinarily underſtand a ſingle bond without a condition; and it was formerly all one with an obligation, ſave only its being called a *bill* when in *Engliſh*, and an obligation when in *Latin*. *Weſt Symbol. lib.* 2. *ſect.* 146. A *bill* has been defined to be a writing, wherein one man is bound to another to pay a ſum of money on a day that is future, or preſently on demand, according to the agreement of the parties at the times it is entered into, and the dealings between them: and it is divided into ſeveral ſorts, as *bill* that is *ſingle*, a *bill* that is *penal*, *&c.* Where there is a *bill* of 100*l.* to be paid on demand, it is a duty preſently, and there needs no actual demand. *Cro. Eliz.* 548. And a ſingle obligation or *bill*, upon the ſealing and delivery, is *debitum in præſenti*, though *ſolvendum in futuro*. On a collateral promiſe to pay money on demand there muſt be a ſpecial demand; but between the parties it is a debt, and ſaid to be ſufficiently demanded by the action: it is otherwiſe where the money is to be paid to a third perſon; or where there is a penalty. 3 *Keb.* 176. If a perſon acknowledge himſelf by *bill* obligatory to be indebted to another in the ſum of 50*l.* and by the ſame *bill* bind him and his heirs in 100*l.* and ſays not to whom he is bound, it ſhall be intended he is bound to the perſon to whom the *bill* is made. *Rol. Abr.* 148. A bill obligatory written in a book, with the party's hand and ſeal to it, is good. *Cro. Eliz.* 613. And if a man makes a *bill* thus: *I do owe and promiſe to pay to* A. B. 50*l. &c. for payment whereof I bind myſelf to* C. D. *&c.* another perſon; it is good by the words of the firſt part, and the words obligatory to another perſon are void. A man ſays by his deed: *Memorandum, That I* A. B. *have received of* C. D. *the ſum of* 20 l. *which I promiſe to pay to* E. F. *In witneſs whereof I have hereunto ſet my ſeal*, &c. Or if the *bill be*, *I ſhall pay to* C. D. *In witneſs*, &c. and be ſealed: Or if it runs as follows, *I owe to* C. D. 20 l. *to be paid at*, *&c.* Or, *I had of* C. D. 20 l. *to be paid him again:* Or, *I* A. B. *do bind myſelf to* C. D. *that he ſhall receive* 20 l. *&c.* All theſe are ſaid to be obligatory. 2 *Rol.* 146. 22 *E.* 4. *c.* 22. See title **Obligations.**

Form of a ſingle bill for money.

KNOW all men *by theſe preſents, That I* A. B. *of, &c. do owe and am indebted to* C. D. *of, &c. the ſum of fifty pounds of lawful money of* Great Britain, *which I promiſe to pay unto the ſaid* C. D. *his executors, adminiſtrators, or aſſigns, at and upon the firſt day of* October *next enſuing the date of theſe preſents. In witneſs whereof I have hereunto ſet my hand and ſeal the* —— *day of* —— *in the year of our Lord* 1764.

A penal bill for money.

KNOW all men *by theſe preſents, that I* A. B. *of, &c. do owe unto* C. D. *of, &c. the ſum of one hundred pounds of lawful money of* Great Britain, *to be paid unto the ſaid* C. D. *his executors, adminiſtrators, or aſſigns, on, &c. next enſuing the date hereof; for which payment well and truly to be made, I bind myſelf, my heirs, executors, and adminiſtrators, to the ſaid* C. D. *his executors, adminiſtrators, and aſſigns, in two hundred pounds of like lawful money firmly, by theſe preſents.* In witneſs, *&c.*

Bill of Exception. See **Exception.**

Bill of Exchange, Is a piece of paper commonly long and narrow, on which is wrote a ſhort order, given by a banker, merchant, trader, or other perſon, for paying to ſuch a perſon, or to his order, or alſo in ſome countries to the bearer in a diſtant place, a ſum of money equivalent to that which ſuch a banker, merchant, or other trader has received in his dwelling-place. *Dict. Tr. and Com.* 253. *Savary's Dict.* tit. *Lettre de Change.*

The commerce of changing money for money is carried on two ways. The firſt is, by changing the ſpecies of money for others of the ſame value; ſuch as pieces of ſilver for gold, and the coin of one country for that of another. The ſecond is, where one gives money to a banker, or other perſon, in one place, that he may remit it to another place; whether it be within or without the kingdom. And it is only this ſecond kind of commerce that we ſhall treat of here. This commerce of remitting money from one place to another is carried on by the means of bills of exchange: and in order to the right underſtanding of the nature and rules of this matter, we muſt conſider in this commerce the ſeveral perſons concerned in it, and what paſſes with regard to every one of them.

There are commonly in the commerce of bills of exchange three perſons concerned, whom we ought to diſtinguiſh. There is he who wants to have his money remitted from one place to another; then he who receives it, as the banker or drawer does, who undertakes to remit the money; and thirdly, there is the perſon who delivers the money in the place to which it is to be remitted, ſuch as the banker or drawer's correſpondent. And there is often a fourth perſon concerned, *viz.* he to whom the perſon who paid in the money ſends his order to receive it: and this fourth perſon may likewiſe transfer his right to others, to whom he gives his order. It may alſo happen that there are only two perſons concerned, he who gives the money, and he who receives it in one place,

place, and delivers it back in another place to the ſame perſon who gave it to him on that condition. We muſt, in the next place, conſider the different covenants that paſs between thoſe perſons.

The covenant which paſſes between the perſon who gives the money, and him who undertakes to remit it to another place, hath in it ſome particular characters which diſtinguiſh it from all other kinds of covenants that may ſeem to have ſome reſemblance with it. It is not a ſale; for no body ſells or buys in it: and in the contract of ſale there is a ſeller, who gives ſomething elſe than money, as there is a buyer, who gives nothing but money. It is not an exchange; for thoſe who barter for exchange in any thing give ſomething different from what they receive; and each party takes for his own uſe a thing which he ſtands in need of, and gives away another thing which he can ſpare; but in the commerce of bills of exchange, he who gives his money takes nothing in counterchange, and does not give one thing that he may receive another of a different kind; ſince he who received the money may reſtore the ſame individual ſpecies which he received. It is not a *depoſitum*; for he who has received the money remains anſwerable for it, although it ſhould be loſt by any unforeſeen accident. It is not a loan; becauſe he who receives the money does not borrow it. It would be a letting and hiring, if he who receives the money did nothing elſe but barely carry it to the place whither it ought to be remitted, having a certain allowance for carrying it, as is uſual for meſſengers, carriers, and maſters of ſtage-coaches to do, who take the charge of a bag of money, to carry it from one place to another, without anſwering for accidents;—but when he who receives the money engages himſelf by a bill of exchange to remit it to another place, the money remains in his hands, at his peril, and is no longer the money of the perſon who gave it. Thus, it is not a letting and hiring; and conſequently, it is a covenant, different from all the others; which conſiſts in the commerce of tranſmitting money belonging to a perſon from one place to another: and which is diſtinguiſhed from all theſe other kinds of covenants by the characters which we have juſt now remarked.

The covenant that paſſes between the perſon who has received the money, whether banker or other perſon, and him to whom he gives order to pay it in another place, is a partnerſhip, if they are partners and correſpondents with one another: or it is a procuration or commiſſion, if the correſpondent be only the factor or agent of the perſon who has received the money.——

The covenant between the perſon who has paid the money, and him to whom he gives his order to receive it, is either an aſſignment, if he ſubſtitutes him in his place, and transfers his right to him; or it is a procuration, if he gives him barely the power to receive the money for his uſe.——

There is, laſtly, another covenant which paſſes between him who paid down the money, and the perſon who is ordered to anſwer the bill of exchange, when he accepts the bill. And this covenant is the ſame with that which paſſed between him who paid in the money, and him who received it; for it only adds an obligation of him who accepts the bill, to that of the perſon who drew it: and it obliges the perſon who accepts the bill to pay it on the day and in the place ſpecified in the bill. *Domat, vol.* 1. *p.* 231.

1. *What ſhall be deemed a good bill of exchange; the form of it, and the words neceſſary to be uſed therein.*

2. *Of foreign and inland bills.*

3. *Of the acceptance; and what ſhall be deemed a good acceptance.*

4. *Of the proteſt, and indorſement.*

5. *Of ſuing the drawer, indorſor, and acceptor.*

6. *Of the action and remedy on a bill of exchange; and the manner of declaring and pleading thereon.*

7. *Of bills loſt, forged, and ſtolen.*

8. *Of the evidence neceſſary to ſupport the action on a bill of exchange, and the damages recovered for non-payment thereof.*

1. *What ſhall be deemed a good bill of exchange; the form of it, and the words neceſſary to be uſed therein.*

As the cuſtom of merchants hath eſtabliſhed theſe bills and notes, ſo hath it preſcribed their form, and required that the ſame ſhould be in writing, and drawn by the party, or thoſe having legal authority from him; and ſuch drawing raiſes a contract to pay the ſame without any expreſs promiſe. 3 *New Abr.* 606. *Carth.* 510. *Salk.* 128. *Starky* v. *Cheeſman.*

As to the form of the bill, it is ſaid, that the ſame ſtrictneſs and nicety are not required in penning of bills current between merchant and merchant, as in deeds, wills, *&c.* On the other hand it may happen, that a writing may have the form of a bill of exchange, and yet be otherwiſe. 3 *New Abr.* 606. *Lucas* 287.

As if *A.* draw a bill in this form; *Sir, pray pay to* H. 1945 *l. upon demand out of the money belonging to the proprietors of the* Devonſhire *mines, being part of the conſideration-money for the purchaſe of the manor of* Weſt-Buckland. This is no ſuch bill of exchange as will intitle *H.* to an action againſt the drawer on the cuſtom of merchants; for it is only a direction or appointment to the caſhier to pay the money, and that out of a particular fund, and doth not anſwer the neceſſity of trade, not being a negotiable note, nor indorſable over; and charging the drawer on ſuch a note would be liable to this further inconveniency, that hereby every one, who gives his ſteward an order or authority to pay money, might be charged for non-payment. *Stran.* 591. 3 *Geo.* 1. *Jenny* v. *Herle. L. Raym.* 1361.

So where a bill drawn by an officer upon his agent, requiring him to pay ſo much out of his *growing ſubſiſtence*, was held no bill of exchange, nor the drawer liable, though he accepted ſuch bill; for it concerns neither trade nor credit; but is to be paid out of the growing ſubſiſtence of the drawer; ſo that if the party die, or the fund be taken away, the payment is to ceaſe and determine. And it would be of dangerous conſequence to make thoſe orders which a man gives to his ſteward or bailiff, no way concerning trade, to be bills of exchange. *L. Raym.* 1361. 1 *Geo.* 1. *Jocelyn* v. *Laſerre*

In action upon the caſe upon ſeveral promiſes, the plaintiff in his firſt count declared, that one *Thomas Rogers*, 8th of *Auguſt* 1728, *&c.* according to the cuſtom of merchants, his certain bill of exchange with his own hand, and in the name of the ſaid *Thomas* ſubſcribed, did make, dated the ſame day and year, and directed the ſaid bill of exchange to the ſaid *Rogers*, and thereby requeſted the ſaid *Rogers* to pay the ſaid *Henry*, or his order, 14 *l.* 3 *s.* out of the *fifth payment* when it ſhould become due, and it ſhould be allowed by the ſaid *Thomas*, which was afterwards accepted by the defendant; *ratione quorum præmiſſorum*, the defendant became liable to pay the ſaid 14 *l.* 3 *s.* to the plaintiff *Henry*, and ſo being liable, promiſed to pay, *&c.* Then there were other counts in the declaration, to which counts the defendant pleaded *non aſſumpſit, &c.* and as to this count the defendant demurred. And it was inſiſted upon by Mr. *Parker* for the defendant, that this action was not maintainable upon this bill as a bill of exchange, according to reſolutions in the caſe of *Jocelyn* v. *Laſerre*, and *Jenny* v. *Herle* (the two foregoing caſes). And of that opinion was the court, and gave judgment for the defendant. *Ld. Raym.* 1563. 3 *Geo.* 2. *Heydock* v. *Lynch.*

Error of a judgment in *C. B.* wherein the plaintiff declares, that *A. B.* drew a bill of exchange, dated the 25th of *May*, whereby he requeſted the defendant, one month after date, to pay the plaintiff or order 9 *l.* 10 *s.* as my quarterly half-pay, to be due from the 24th of *June* to the 27th of *September* next by advance. And the action is againſt the defendant upon his acceptance. It was objected, that this was no bill of exchange; it is not to pay in all events, but is left to the pleaſure of the perſon on whom it is drawn, either to advance the money or not: and it was compared to the caſe of *Jocelyn* v. *Laſerre* (the laſt but one) which was to pay out of his *growing ſubſiſtence*, and to the caſe of *Jenny* v. *Herle* (the laſt

laſt but two) which was payable out of a particular fund, and in both caſes held to be as no bill of exchange. *Sed per curiam*, The quarterly half-pay is a certain fund, which the growing ſubſiſtence was not: the mention of the half-pay is only by way of direction how he ſhall reimburſe himſelf, but the money is ſtill to be advanced on the credit of the perſon. The reaſon it was held no bill of exchange in *Jenny* v. *Herle* was, becauſe it was no more than a private order to a man's ſervant. Judgment affirmed. *Strang.* 762. 13 *Geo.* 1. *Macleod* v. *Snee & al'. Ld. Raym.* 1481.

The plaintiff declared upon the cuſtom of merchants againſt the defendants as acceptors of a bill of exchange, and the inſtrument run in theſe words.

Meſſrs. Gilly *and Co.*

Pray pay Mr. Richard Banbury *one month after date two hundred pounds on account of freight of the* Veale Galley, Edward Champion, *and this order ſhall be your ſufficient diſcharge for the ſame.*

J. Gibſon.

Accepted for Leſſet *and* Gilly *at* Leghorn, *to pay as remitted from thence at uſance.*

March 18, 1748. H. Gilly.

And two objections were made by the defendants: 1ſt, That this was not a bill of exchange; for it is not payable to order, ſo as to be negotiable: it is not to be *for valued received*: and it is only an order upon a particular fund, like the caſe of *Jenny* v. *Herle*; and ſeveral merchants proved, that they did not look upon it to be a bill of exchange; and others were of a contrary opinion.

The chief juſtice ruled it to be a bill of exchange. He ſaid it was not in the power of the parties to make what form they pleaſe paſs for ſuch a bill; it ought to be agreeable to the *Lex Mercatoria*: the privilege ariſes from the convenience to trade, which is not conſulted in this caſe. And he thought it bad upon the objection of the fund out of which it was to be paid: however, being a mercantile tranſaction, he left it to the ſpecial jury of merchants, who found it to be no bill of exchange on the objection for want of *value received.*

The ſecond objection was, that the plaintiff (ſuppoſing it a bill of exchange) had not ſhewn there was any remittance to the defendants; and that this was not an abſolute acceptance, but only conditional: and ſo the chief juſtice declared he underſtood it, and left it to the jury. But they, finding for the defendants upon the firſt point, gave no opinion as to this. *Stran.* 1211. 17 *Geo.* 2. *Banbury* v. *Liſſet* and *Gilly*.

In caſe for money had and received to the plaintiff's uſe, the defendant pleaded *non aſſumpſit*, and gave notice to ſet-off the following bill of exchange, directed to *J. S. Sir, at ſix weeks after date pay to* Benjamin Wheatly, *Eſq; or order, eight guineas for your humble ſervant*, John Pierce, London, Auguſt 23, 1736. At the trial it was objected, and agreed to by the court, *firſt*, That this was not a bill of exchange within the cuſtom of merchants, nor could be taken advantage of as ſuch, either by way of ſet-off, or by any action brought upon it; nor would it be any ſort of evidence of money lent; there being *no conſideration, either appearing on the note, or offered to be proved*, and it is nothing more than a bare power or authority to receive ſo much to the plaintiff's uſe. *Secondly*, That if it had amounted to a bill of exchange, yet the *laches of the defendant, in not demanding the money, and giving notice in caſe of non-payment* for ſo long a time, would effectually diſcharge the plaintiff; and accordingly the plaintiff had a verdict, at the ſittings in C. B. at *Weſtminſter*, before Lord Chief Juſtice *Willes*, after *Trinity* term 1742. *Pierce* v. *Wheatly*. *Vin. Abr.* tit. *Bills of Exchange* (A) 20.

Pay to me or my order ſo much is a bill of exchange, if accepted; and this is the way to make a bill of exchange without the intervention of a third perſon. 1 *Salk.* 130. *Trin.* 2 *Ann. B. R. Butler* v. *Crips.*

2. *Of foreign and inland bills.*

The cuſtom of merchants, in relation to foreign bills of exchange, ſeems to have prevailed time out of mind; and was at firſt introduced for the expedition of trade and its ſafety, and to prevent the exportation of money out of the realm; and, therefore, hath been always countenanced and encouraged as a matter of great eaſe and advantage to trade, and is now become part of the law of the land; and as bills of exchange are eſtabliſhed merely by the cuſtom of merchants, and for their benefit, ſo their rules and cuſtoms are allowed to preſcribe their form and ſeveral properties, as to their creating engagements on the parties that are concerned in them. 3 *New Abr. Law* 602.

By this cuſtom, if a merchant abroad draw a bill on a merchant here, or *vice verſa*, requeſting him to pay a certain ſum of money, and the drawer ſets his name to it; this amounts to a promiſe to pay, and ſubjects him, though but a collateral engagement, to an action on the non-payment. 1 *Rol. Abr.* 6. *Cro. Jac.* 306. *Cro. Car.* 301.

A writ of error was brought in the *Exchequer* Chamber upon a judgment in *B. R.* where the plaintiff declared, in caſe, on the cuſtom of merchants, that if any merchant, or other trading perſon, make and direct any bill of exchange to another, payable to a merchant, or any other trading perſon, and the bill be tendered, and, for want of acceptance, proteſted; in ſuch caſe the drawer, by the cuſtom, is chargeable to pay, *&c.*—That the defendant at *Paris*, in *France*, did draw a bill on his father here in *London*, payable to the plaintiff, and the ſame was preſented, but refuſed; and he, according to cuſtom, proteſted the bill, whereby the defendant became chargeable, and, in conſideration of the premiſſes, did aſſume, *&c.* To this the defendant pleaded, that he was a gentleman, the ſon and heir of Dr. *Thomas Witherley*, and at the time of drawing the bill was a traveller, and at *Paris*; and that he was no merchant, nor trader, nor did ever deal as ſuch; and he was then at *Paris* as a gentleman and traveller, as aforeſaid, *abſque hoc*, and denies that he is, or ever was a merchant, *&c.* The plaintiff demurs to the defendant's plea; and ſhews for cauſe, that it amounts to the general iſſue, is double and uncertain, *&c.*

Holt C. J. It is not every plea that amounts to the general iſſue that is ill; and the cuſtom is the foundation, and the plea is an anſwer to that, and therefore enough: but this drawing a bill muſt ſurely make him a trader for that purpoſe: for we all have bills directed to us, and payable to us, which muſt be all voidable, if the negotiating a bill will not oblige the drawer of it. The judgment for the defendant was reverſed. *Holt's Rep.* 113. 2 *Ven.* 292, 295. *Sarsfield* v. *Witherley*, 1 *W. & M.* 1 *Show.* 125. *Comb.* 45.

Carth. 82. *S. C.* ſays it was agreed by all that the judgment ſhould be reverſed accordingly; and that this was, upon conſideration had of the inconveniencies which might enſue, and the ſuſpicion which might increaſe among foreign merchants upon bills of exchange, if perſons, who took upon themſelves to draw ſuch bills, ſhould not be liable to the payment thereof. See *Salk.* 125. *Hodges* and *Steward*; where it is determined, that the drawing of a bill makes a merchant for that purpoſe.

And if the drawer, or he on whom the bill is drawn, refuſe to accept it, or having accepted it, refuſe to pay it, the payee, or he in whoſe favour it is drawn, may proteſt it, and ſhall recover againſt the drawer, not only the principal ſum, but likewiſe all intereſt, coſts, and damages, by reaſon of the proteſt or refuſal of acceptance, or payment of the money. *Cro. Car.* 301.

The uſe of the proteſt is this, that it ſignifies to the drawer, that the party on whom he drew his bill was unwilling, not to be found, or inſolvent, and to let him have timely notice of the ſame, and to enable the party to recover againſt the drawer; for, if one draws a bill from *France* upon a perſon in *England*, who accepts and fails,

fails, or becomes inſolvent at the time of payment, if there be not a proteſt and timely notice ſent to the drawer there, it will be difficult to recover the money. *Molloy, book* 2. *cap.* 10. *ſ.* 31.

A proteſt is no more but to ſubject the drawer to anſwer in caſe of non-acceptance or non-payment; nor does the ſame diſcharge the party acceptor if once accepted; for the payee, or perſon to whom payable, hath now two remedies, one againſt the drawer, and the other againſt the acceptor. *Molloy, book* 2. *cap.* 10. *ſ.* 17.—A proteſt on a foreign bill is part of the cuſtom; *per Holt. Ld. Raym.* 993. *Borough* and *Perkins. S. C.* in *Salk.* 131. where it is ſaid to be part of its conſtitution.

In caſe of foreign bills of exchange, the cuſtom is, that three days are allowed for payment of them; and if they are not paid upon the laſt of the ſaid three days, the party ought immediately to proteſt the bill, and return it, and by this means the drawer will be charged; but if he does not proteſt it the laſt of the three days, which are called the days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it ſhall be reckoned his folly that he did not proteſt: but if it happens that the laſt of the three days is a *Sunday*, or great holiday, as *Chriſtmas-day*, *&c.* upon which no money uſed to be paid, there the party ought to demand the money upon the ſecond day; and if it is not paid, he ought to proteſt the bill the ſaid ſecond day; otherwiſe it will be at his own peril, for the drawer will not be chargeable. Merchants in evidence at a trial at *Guildhall, Trin.* 7. *W.* 3. before *Holt* Chief Juſtice, ſwore the cuſtom of merchants to be ſuch, which was approved by *Holt* Chief Juſtice. *Ld. Raym.* 743. *Taſſel* v. *Lewis.*

But though the cuſtom of merchants, in relation to bills of exchange, be eſtabliſhed by the Common law, and ſuch bills being ſecurities for money, are of great credit among them; yet they are not allowed to be ſecurities of as high a nature as bonds or ſpecialties; and therefore it hath been adjudged, that a bill of exchange is within the ſtatute of limitations, and muſt be ſued for within ſix years after it becomes payable. 3 *New Abr.* 602. *Carth.* 3. *Renew* v. *Axton.*

So, if a merchant in *London* draw a bill of exchange on his correſpondent in *Newcaſtle*, in favour of *J. S.* and the bill is refuſed, and *J. S.* dies inteſtate, his adminiſtrator, on letters of adminiſtration taken out in *Durham*, cannot bring an action on the cuſtom of merchants againſt the drawer, and lay the ſame in *London*; for that a bill of exchange is not equal to a bond or ſpecialty, (which are the deceaſed's goods where they happen to be at his death) but is a ſimple contract, which follows the perſon of the debtor, and makes *bona notabilia* where the debtor reſides; and therefore adminiſtration ought to have been taken out in *London*. 3 *New Abr.* 603. *Carth.* 373. *Yeoman* v. *Bradſhaw*. *Comb.* 392. *S. C.*

Alſo this cuſtom ſhall not prevail againſt the privilege of infants, ſo as to bind them; and accordingly it hath been adjudged, that if an infant draw a bill of exchange, infancy is a good plea in bar to an action brought againſt him. 3 *New Abr.* 603. *Carth.* 160. *Williams* v. *Harriſon.*

Bills of exchange are uſually drawn payable on ſight, ſo many days after date, or at ſingle, double, or treble uſance; and it is frequent to draw two or three for the ſame ſum, and of the ſame date, for fear of loſs or miſcarriage, which carry a condition with them that only one ſhall be paid. 3 *New Abr.* 603. *Molloy, b.* 2. *cap.* 10. *ſ.* 10.

Inland bills of exchange are thoſe drawn by one merchant reſiding in one part of the kingdom on another reſiding in ſome city or town within the ſame kingdom; and theſe alſo being found uſeful to trade and commerce have been eſtabliſhed on the ſame foot with foreign bills; but at Common law they differ from them in this, that there was no cuſtom of proteſting them, ſo as to ſubject the drawer to intereſt and damages in caſe of non-payment, as there was on foreign bills. 3 *New Abr.* 603. 1 *Salk.* 131. *Borough* v. *Perkins.*

To remedy this inconveniency, by the 9 & 10 *W.* 3. *c.* 17. reciting, That great damages and other inconveniencies do frequently happen in the courſe of trade and commerce by reaſon of delays of payment, and other neglects on inland bills of exchange, it is enacted, "That all and every bill or bills of exchange drawn in, or dated at and from any trading city or town, or any other place in the kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, of the ſum of 5*l.* or upwards, upon any perſon or perſons of or in *London*, or any other trading city or town, or any other place (in which ſaid bill or bills of exchange ſhall be acknowledged and expreſſed the ſaid value to be received) and is and ſhall be drawn payable at a certain number of days, weeks, or months after date thereof; that from and after preſentation and acceptance of the ſaid bill or bills of exchange (which acceptance ſhall be by the under writing the ſame under the party's hand ſo accepting) and after the expiration of three days after the ſaid bill or bills ſhall become due, the party to whom the ſaid bill or bills are made payable, his ſervant, agent, or aſſigns may and ſhall cauſe the ſaid bill or bills to be proteſted by a notary public, and in default of ſuch notary public by any other ſubſtantial perſon of the city, town, or place, in the preſence of two or more credible witneſſes; refuſal or neglect being firſt made of due payment of the ſame; which proteſt ſhall be made and written under a fair written copy of the ſaid bill of exchange, in the words following. *Know all men that I* A. B. *on the day of at the uſual place of abode of the ſaid have demanded payment of the bill, of which the above is the copy, which the ſaid did not pay; whereof I the ſaid do hereby proteſt the ſaid bill. Dated at this day of*; which proteſt ſo made as aforeſaid ſhall, within fourteen days after making thereof, be ſent, or otherwiſe due notice ſhall be given thereof to the party from whom the ſaid bill or bills were received, who is, upon producing ſuch proteſt, to repay the ſaid bill or bills, together with all intereſt and charges from the day ſuch bill or bills were proteſted, for which proteſt ſhall be paid a ſum not exceeding the ſum of ſixpence; and in default or neglect of ſuch proteſt made and ſent, or due notice given within the days before limited, the perſon ſo failing or neglecting thereof is and ſhall be liable to all coſt, damages, and intereſt, which do and ſhall accrue thereby.

"Provided, nevertheleſs, that in caſe ſuch inland bill or bills of exchange ſhall happen to be loſt or miſcarried within the time before limited for payment of the ſame, then the drawer of the ſaid bill or bills is and ſhall be obliged to give another bill or bills of the ſame tenor with thoſe firſt given; the perſon or perſons to whom they are and ſhall be ſo delivered giving ſecurity, if demanded, to the ſaid drawer to indemnify him againſt all perſons whatſoever, in caſe the ſaid bill or bills of exchange, ſo alledged to be loſt or miſcarried, ſhall be found again."

But this ſtatute was defective, becauſe it could not operate, unleſs the party, on whom the bill was drawn, accepted it by under writing the ſame, which few or none cared to do. 3 *New Abr.* 604.

To remedy which inconveniency, by 3 & 4 *Anne, cap.* 9. it is enacted, "That in caſe, upon preſenting any ſuch bill or bills of exchange, the party or parties on whom the ſame ſhall be drawn, ſhall refuſe to accept the ſame by under writing the ſame as aforeſaid, the party to whom the ſaid bill or bills are made payable, his ſervant, agent, or aſſigns may and ſhall cauſe the ſaid bill or bills to be proteſted for non-acceptance, as in caſe of foreign bills of exchange; any thing in the ſaid act, or any other law to the contrary notwithſtanding; for which proteſt there ſhall be paid two ſhillings and no more.

"Provided, that no acceptance of any ſuch inland bill of exchange ſhall be ſufficient to charge any perſon whatſoever, unleſs the ſame be under written, or indorſed in writing thereupon; and if ſuch bill be not accepted by ſuch under writing or indorſement in writing, no

laſt but two) which was payable out of a particular fund, and in both caſes held to be as no bill of exchange. *Sed per curiam*, The quarterly half-pay is a certain fund, which the growing ſubſiſtence was not: the mention of the half-pay is only by way of direction how he ſhall reimburſe himſelf, but the money is ſtill to be advanced on the credit of the perſon. The reaſon it was held no bill of exchange in *Jenny* v. *Herle* was, becauſe it was no more than a private order to a man's ſervant. Judgment affirmed. *Strang.* 762. 13 *Geo.* 1. *Macleod* v. *Snee & al'. Ld. Raym.* 1481.

The plaintiff declared upon the cuſtom of merchants againſt the defendants as acceptors of a bill of exchange, and the inſtrument run in theſe words.

Meſſrs. Gilly *and Co.*

Pray pay Mr. Richard Banbury *one month after date two hundred pounds on account of freight of the* Veale Galley, Edward Champion, *and this order ſhall be your ſufficient diſcharge for the ſame.*

J. Gibſon.

Accepted for Leſſet *and* Gilly *at* Leghorn, *to pay as remitted from thence at uſance.*

March 18, 1748. H. Gilly.

And two objections were made by the defendants: 1ſt, That this was not a bill of exchange; for it is not payable to order, ſo as to be negotiable: it is not to be *for valued received:* and it is only an order upon a particular fund, like the caſe of *Jenny* v. *Herle*; and ſeveral merchants proved, that they did not look upon it to be a bill of exchange; and others were of a contrary opinion.

The chief juſtice ruled it to be a bill of exchange. He ſaid it was not in the power of the parties to make what form they pleaſe paſs for ſuch a bill; it ought to be agreeable to the *Lex Mercatoria:* the privilege ariſes from the convenience to trade, which is not conſulted in this caſe. And he thought it bad upon the objection of the fund out of which it was to be paid: however, being a mercantile tranſaction, he left it to the ſpecial jury of merchants, who found it to be no bill of exchange on the objection for want of *value received.*

The ſecond objection was, that the plaintiff (ſuppoſing it a bill of exchange) had not ſhewn there was any remittance to the defendants; and that this was not an abſolute acceptance, but only conditional: and ſo the chief juſtice declared he underſtood it, and left it to the jury. But they, finding for the defendants upon the firſt point, gave no opinion as to this. *Stran.* 1211. 17 *Geo.* 2. *Banbury* v. *Liſſet* and *Gilly.*

In caſe for money had and received to the plaintiff's uſe, the defendant pleaded *non aſſumpſit*, and gave notice to ſet-off the following bill of exchange, directed to *J. S. Sir, at ſix weeks after date pay to* Benjamin Wheatly, *Eſq*; *or order, eight guineas for your humble ſervant*, John Pierce, London, Auguſt 23, 1736. At the trial it was objected, and agreed to by the court, *firſt*, That this was not a bill of exchange within the cuſtom of merchants, nor could be taken advantage of as ſuch, either by way of ſet-off, or by any action brought upon it; nor would it be any ſort of evidence of money lent; there being *no conſideration, either appearing on the note, or offered to be proved*, and it is nothing more than a bare power or authority to receive ſo much to the plaintiff's uſe. *Secondly*, That if it had amounted to a bill of exchange, yet the *laches of the defendant, in not demanding the money, and giving notice in caſe of non-payment* for ſo long a time, would effectually diſcharge the plaintiff; and accordingly the plaintiff had a verdict, at the ſittings in C. B. at *Weſtminſter*, before Lord Chief Juſtice *Willes*, after *Trinity* term 1742. *Pierce* v. *Wheatly. Vin. Abr.* tit. *Bills of Exchange* (A) 20.

Pay to me or my order ſo much is a bill of exchange, if accepted; and this is the way to make a bill of exchange without the intervention of a third perſon. 1 *Salk.* 130. *Trin.* 2 *Ann. B. R. Butler* v. *Crips.*

2. *Of foreign and inland bills.*

The cuſtom of merchants, in relation to foreign bills of exchange, ſeems to have prevailed time out of mind; and was at firſt introduced for the expedition of trade and its ſafety, and to prevent the exportation of money out of the realm; and, therefore, hath been always countenanced and encouraged as a matter of great eaſe and advantage to trade, and is now become part of the law of the land; and as bills of exchange are eſtabliſhed merely by the cuſtom of merchants, and for their benefit, ſo their rules and cuſtoms are allowed to preſcribe their form and ſeveral properties, as to their creating engagements on the parties that are concerned in them. 3 *New Abr. Law* 602.

By this cuſtom, if a merchant abroad draw a bill on a merchant here, or *vice verſa*, requeſting him to pay a certain ſum of money, and the drawer ſets his name to it; this amounts to a promiſe to pay, and ſubjects him, though but a collateral engagement, to an action on the non-payment. 1 *Rol. Abr.* 6. *Cro. Jac.* 306. *Cro. Car.* 301.

A writ of error was brought in the *Exchequer* Chamber upon a judgment in *B. R.* where the plaintiff declared, in caſe, on the cuſtom of merchants, that if any merchant, or other trading perſon, make and direct any bill of exchange to another, payable to a merchant, or any other trading perſon, and the bill be tendered, and, for want of acceptance, proteſted; in ſuch caſe the drawer, by the cuſtom, is chargeable to pay, *&c.*—That the defendant at *Paris*, in *France*, did draw a bill on his father here in *London*, payable to the plaintiff, and the ſame was preſented, but refuſed; and he, according to cuſtom, proteſted the bill, whereby the defendant became chargeable, and, in conſideration of the premiſſes, did aſſume, *&c.* To this the defendant pleaded, that he was a gentleman, the ſon and heir of Dr. *Thomas Witherley*, and at the time of drawing the bill was a traveller, and at *Paris*; and that he was no merchant, nor trader, nor did ever deal as ſuch; and he was then at *Paris* as a gentleman and traveller, as aforeſaid, *abſque hoc*, and denies that he is, or ever was a merchant, *&c.* The plaintiff demurs to the defendant's plea; and ſhews for cauſe, that it amounts to the general iſſue, is double and uncertain, *&c.*

Holt C. J. It is not every plea that amounts to the general iſſue that is ill; and the cuſtom is the foundation, and the plea is an anſwer to that, and therefore enough: but this drawing a bill muſt ſurely make him a trader for that purpoſe: for we all have bills directed to us, and payable to us, which muſt be all voidable, if the negotiating a bill will not oblige the drawer of it. The judgment for the defendant was reverſed. *Holt's Rep.* 113. 2 *Ven.* 292, 295. *Sarsfield* v. *Witherley*, 1 *W. & M.* 1 *Show.* 125. *Comb.* 45.

Carth. 82. *S. C.* ſays it was agreed by all that the judgment ſhould be reverſed accordingly; and that this was, upon conſideration had of the inconveniencies which might enſue, and the ſuſpicion which might increaſe among foreign merchants upon bills of exchange, if perſons, who took upon themſelves to draw ſuch bills, ſhould not be liable to the payment thereof. See *Salk.* 125. *Hodges* and *Steward*; where it is determined, that the drawing of a bill makes a merchant for that purpoſe.

And if the drawer, or he on whom the bill is drawn, refuſe to accept it, or having accepted it, refuſe to pay it, the payee, or he in whoſe favour it is drawn, may proteſt it, and ſhall recover againſt the drawer, not only the principal ſum, but likewiſe all intereſt, coſts, and damages, by reaſon of the proteſt or refuſal of acceptance, or payment of the money. *Cro. Car.* 301.

The uſe of the proteſt is this, that it ſignifies to the drawer, that the party on whom he drew his bill was unwilling, not to be found, or inſolvent, and to let him have timely notice of the ſame, and to enable the party to recover againſt the drawer; for, if one draws a bill from *France* upon a perſon in *England*, who accepts and fails,

fails, or becomes inſolvent at the time of payment, if there be not a proteſt and timely notice ſent to the drawer there, it will be difficult to recover the money. *Molloy, book* 2. *cap.* 10. *ſ.* 31.

A proteſt is no more but to ſubject the drawer to anſwer in caſe of non-acceptance or non-payment; nor does the ſame diſcharge the party acceptor if once accepted; for the payee, or perſon to whom payable, hath now two remedies, one againſt the drawer, and the other againſt the acceptor. *Molloy, book* 2. *cap.* 10. *ſ.* 17.—A proteſt on a foreign bill is part of the cuſtom; *per Holt. Ld. Raym.* 993. *Borough* and *Perkins. S. C.* in *Salk.* 131. where it is ſaid to be part of its conſtitution.

In caſe of foreign bills of exchange, the cuſtom is, that three days are allowed for payment of them; and if they are not paid upon the laſt of the ſaid three days, the party ought immediately to proteſt the bill, and return it, and by this means the drawer will be charged; but if he does not proteſt it the laſt of the three days, which are called the days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it ſhall be reckoned his folly that he did not proteſt: but if it happens that the laſt of the three days is a *Sunday*, or great holiday, as *Chriſtmas-day*, *&c.* upon which no money uſed to be paid, there the party ought to demand the money upon the ſecond day; and if it is not paid, he ought to proteſt the bill the ſaid ſecond day; otherwiſe it will be at his own peril, for the drawer will not be chargeable. Merchants in evidence at a trial at *Guildhall, Trin.* 7. *W.* 3. before *Holt* Chief Juſtice, ſwore the cuſtom of merchants to be ſuch, which was approved by *Holt* Chief Juſtice. *Ld. Raym.* 743. *Taſſel* v. *Lewis.*

But though the cuſtom of merchants, in relation to bills of exchange, be eſtabliſhed by the Common law, and ſuch bills being ſecurities for money, are of great credit among them; yet they are not allowed to be ſecurities of as high a nature as bonds or ſpecialties; and therefore it hath been adjudged, that a bill of exchange is within the ſtatute of limitations, and muſt be ſued for within ſix years after it becomes payable. 3 *New Abr.* 602. *Carth.* 3. *Renew* v. *Axton.*

So, if a merchant in *London* draw a bill of exchange on his correſpondent in *Newcaſtle*, in favour of *J. S.* and the bill is refuſed, and *J. S.* dies inteſtate, his adminiſtrator, on letters of adminiſtration taken out in *Durham*, cannot bring an action on the cuſtom of merchants againſt the drawer, and lay the ſame in *London*; for that a bill of exchange is not equal to a bond or ſpecialty, (which are the deceaſed's goods where they happen to be at his death) but is a ſimple contract, which follows the perſon of the debtor, and makes *bona notabilia* where the debtor reſides; and therefore adminiſtration ought to have been taken out in *London*. 3 *New Abr.* 603. *Carth.* 373. *Yeoman* v. *Bradſhaw*. *Comb.* 392. *S. C.*

Alſo this cuſtom ſhall not prevail againſt the privilege of infants, ſo as to bind them; and accordingly it hath been adjudged, that if an infant draw a bill of exchange, infancy is a good plea in bar to an action brought againſt him. 3 *New Abr.* 603. *Carth.* 160. *Williams* v. *Harriſon.*

Bills of exchange are uſually drawn payable on ſight, ſo many days after date, or at ſingle, double, or treble uſance; and it is frequent to draw two or three for the ſame ſum, and of the ſame date, for fear of loſs or miſcarriage, which carry a condition with them that only one ſhall be paid. 3 *New Abr.* 603. *Molloy, b.* 2. *cap.* 10. *ſ.* 10.

Inland bills of exchange are thoſe drawn by one merchant reſiding in one part of the kingdom on another reſiding in ſome city or town within the ſame kingdom; and theſe alſo being found uſeful to trade and commerce have been eſtabliſhed on the ſame foot with foreign bills; but at Common law they differ from them in this, that there was no cuſtom of proteſting them, ſo as to ſubject the drawer to intereſt and damages in caſe of non-payment, as there was on foreign bills. 3 *New Abr.* 603. 1 *Salk.* 131. *Borough* v. *Perkins.*

To remedy this inconveniency, by the 9 & 10 *W.* 3. *c.* 17. reciting, That great damages and other inconveniencies do frequently happen in the courſe of trade and commerce by reaſon of delays of payment, and other neglects on inland bills of exchange, it is enacted, "That all and every bill or bills of exchange drawn in, or dated at and from any trading city or town, or any other place in the kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, of the ſum of 5 *l.* or upwards, upon any perſon or perſons of or in *London*, or any other trading city or town, or any other place (in which ſaid bill or bills of exchange ſhall be acknowledged and expreſſed the ſaid value to be received) and is and ſhall be drawn payable at a certain number of days, weeks, or months after date thereof; that from and after preſentation and acceptance of the ſaid bill or bills of exchange (which acceptance ſhall be by the under writing the ſame under the party's hand ſo accepting) and after the expiration of three days after the ſaid bill or bills ſhall become due, the party to whom the ſaid bill or bills are made payable, his ſervant, agent, or aſſigns may and ſhall cauſe the ſaid bill or bills to be proteſted by a notary public, and in default of ſuch notary public by any other ſubſtantial perſon of the city, town, or place, in the preſence of two or more credible witneſſes; refuſal or neglect being firſt made of due payment of the ſame; which proteſt ſhall be made and written under a fair written copy of the ſaid bill of exchange, in the words following. *Know all men that I* A. B. *on the day of at the uſual place of abode of the ſaid have demanded payment of the bill, of which the above is the copy, which the ſaid did not pay; whereof I the ſaid do hereby proteſt the ſaid bill. Dated at this day of*; which proteſt ſo made as aforeſaid ſhall, within fourteen days after making thereof, be ſent, or otherwiſe due notice ſhall be given thereof to the party from whom the ſaid bill or bills were received, who is, upon producing ſuch proteſt, to repay the ſaid bill or bills, together with all intereſt and charges from the day ſuch bill or bills were proteſted, for which proteſt ſhall be paid a ſum not exceeding the ſum of ſixpence; and in default or neglect of ſuch proteſt made and ſent, or due notice given within the days before limited, the perſon ſo failing or neglecting thereof is and ſhall be liable to all coſt, damages, and intereſt, which do and ſhall accrue thereby.

"Provided, nevertheleſs, that in caſe ſuch inland bill or bills of exchange ſhall happen to be loſt or miſcarried within the time before limited for payment of the ſame, then the drawer of the ſaid bill or bills is and ſhall be obliged to give another bill or bills of the ſame tenor with thoſe firſt given; the perſon or perſons to whom they are and ſhall be ſo delivered giving ſecurity, if demanded, to the ſaid drawer to indemnify him againſt all perſons whatſoever, in caſe the ſaid bill or bills of exchange, ſo alledged to be loſt or miſcarried, ſhall be found again."

But this ſtatute was defective, becauſe it could not operate, unleſs the party, on whom the bill was drawn, accepted it by under writing the ſame, which few or none cared to do. 3 *New Abr.* 604.

To remedy which inconveniency, by 3 & 4 *Anne, cap.* 9. it is enacted, "That in caſe, upon preſenting any ſuch bill or bills of exchange, the party or parties on whom the ſame ſhall be drawn, ſhall refuſe to accept the ſame by under writing the ſame as aforeſaid, the party to whom the ſaid bill or bills are made payable, his ſervant, agent, or aſſigns may and ſhall cauſe the ſaid bill or bills to be proteſted for non-acceptance, as in caſe of foreign bills of exchange; any thing in the ſaid act, or any other law to the contrary notwithſtanding; for which proteſt there ſhall be paid two ſhillings and no more.

"Provided, that no acceptance of any ſuch inland bill of exchange ſhall be ſufficient to charge any perſon whatſoever, unleſs the ſame be under written, or indorſed in writing thereupon; and if ſuch bill be not accepted by ſuch under writing or indorſement in writing, no

drawer of any ſuch inland bill ſhall be liable to pay any coſts, damages, or intereſt thereupon, unleſs ſuch proteſt be made for non-acceptance thereof; and within fourteen days after ſuch proteſt the ſame be ſent, or otherwiſe notice thereof be given to the party from whom the bill was received, or left in writing at the place of his or her uſual abode; and if ſuch bill be accepted, and not paid before the expiration of three days after the ſaid bill ſhall become due and payable, then no drawer of ſuch bill ſhall be compellable to pay any coſts, damages, or intereſt thereupon, unleſs a proteſt be made and ſent, or notice thereof be given in manner and form above-mentioned: nevertheleſs, every drawer of ſuch bill ſhall be liable to make payment of coſts, damages, and intereſt upon ſuch inland bill, if any one proteſt be made for non-acceptance, or non-payment thereof, and notice thereof be ſent, given, or left as aforeſaid.

" Provided, that no ſuch proteſt be neceſſary, either for non-acceptance or non-payment of any inland bill of exchange, unleſs the value be acknowledged and expreſſed on ſuch bill to be received; and unleſs ſuch bill be drawn for the payment of 20 *l.* or upwards, and that the proteſt hereby required for non-acceptance ſhall be made by ſuch perſons as are appointed by the above ſtatute 9 & 10 *W.* 3.

And it is further enacted by the ſaid ſtat. 3 & 4 *Ann.* " That if any perſon doth accept any ſuch bill of exchange for and in ſatisfaction of any former debt, or ſum of money formerly due to him, the ſame ſhall be accounted and eſteemed a full and complete payment of ſuch debt; if ſuch perſon accepting of any ſuch bill for his debt doth not take his due courſe to obtain payment thereof, by endeavouring to get the ſame accepted and paid, and make his proteſt as aforeſaid, either for non-acceptance or for non-payment thereof.

" Provided that nothing herein contained ſhall extend to diſcharge any remedy that any perſon may have againſt the drawer, acceptor, or indorſer of ſuch bill."

A writ of error was brought on a judgment by *nil dicit*, in an action againſt the drawer of an inland bill of exchange, and it was objected, that ſince the act of 9 *W.* 3. no damage ſhall be recovered againſt the drawer upon a bill of exchange without a proteſt, and therefore the action lies not, there being no proteſt.

But by *Holt* C. J. the ſtatute never intended to deſtroy the action for want of a proteſt, but only to deprive the party of recovering intereſt and coſt upon an inland bill againſt the drawer, without notice of non-payment by proteſt: for before the ſtatute there was this difference between foreign and inland bills of exchange; if a bill was foreign, one could not reſort to the drawer for non-acceptance or non-payment without a proteſt, and reaſonable notice thereof. But in caſe of an inland bill, there was no occaſion for a proteſt; but if any prejudice happened to the *drawer* by the non-payment of the drawee, and that for want of notice or non-payment, which he to whom the bill is made ought to give, the drawer was not liable; and the word *damages* in the ſtatute was meant only of damages that the party is at of being longer out of money by the non-payment of the drawer than the tenor of the bill purported, and not of damages for the original debt: and the proteſt was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a proteſt, they ſhall be borne by him to whom the bill is made; and if no damages accrue to him, then there is no harm done him; and a proteſt is only to give a formal notice, that the bill is not accepted, or is accepted and not paid; and if in ſuch caſe the damage amount to the value of the bill, there ſhall be no recovery, but otherwiſe he ought not to loſe his debt; but that ought either to appear by evidence upon *non aſſumpſit* or by ſpecial pleading; and the act is very obſcurely and doubtfully penned, and we ought not by conſtruction upon ſuch an act to take away a man's right. And the judgment was affirmed *per totam curiam*. 1 *Salk.* 131. *Ld. Raym.* 993.

A. having a bill of exchange payable to him, and he being indebted to *B.* in a ſum of money, ſends and indorſes this bill to *B.* Afterward *B.* brought *aſſumpſit* againſt *A.* for the money; and on *non aſſumpſit*, *A.* gave in evidence this bill of exchange indorſed, and that it had lain ſo long in *B.*'s hands after it was payable, and reckoned it as money paid in his hands; but it was diſallowed; for a bill ſhall never go in diſcharge of a precedent debt, except it be part of the contract that it ſhould be ſo. If *A.* ſells goods to *B.* and *B.* is to give a bill in ſatisfaction, *B.* is diſcharged though the bill is never paid; for the bill is payment: but otherwiſe a bill ſhould never diſcharge a precedent debt or contract; but if part be received, it ſhall be only a diſcharge of the old debt for ſo much. 1 *Salk.* 124. *Clark* v. *Mundal.*

The defendant took up ſeveral goods of the plaintiff, who ſent his ſervant with a bill to him for the money. The defendant orders the ſervant to write him a receipt in full of the bill, which he did, and thereupon he gave him a note upon a third perſon, payable in two months: The maſter ſent ſeveral times to the third perſon to preſent him the note, but could not get ſight of him within the time; the party breaks; and all this appearing in evidence, and that the defendant went to ſea the next day after he gave the note. Now this action was brought againſt the defendant for the money.

Holt, Chief Juſtice: If a man gives a note upon a third perſon in payment, and the other takes it abſolutely as payment; yet if the party giving it knew the third perſon to be breaking, or to be in a failing condition, and the receiver of the note uſes all reaſonable diligence to get payment, but cannot, this is a fraud, and therefore no payment; for the party failed before the money was payable. The chief juſtice directed for the plaintiff. *Holt's Rep.* 122. *Popley* v. *Aſhley.*

3. *Of the acceptance, and what ſhall be deemed a good acceptance.*

The acceptance of a bill of exchange is the ſubſcribing, ſigning, and making a perſon debtor for the ſum of its contents, by obliging him in his own name to diſcharge it at the time mentioned therein. The acceptance is uſually made by the perſon upon whom the bill is drawn, when it is preſented to him by the bearer. *Dict. Tr. and Com.* 5. *Savary's Dict.* tit. *Acceptance.*

A very ſmall matter will amount to an acceptance; and any words will be ſufficient for that purpoſe which ſhew the party's aſſent or agreement to pay the bill; as if, upon the tender thereof to him, he ſubſcribes, *Accepted*, or *Accepted by me* A. B. or, *I accept the bill, and will pay it according to the contents*; theſe clearly amount to an acceptance. *Molloy, book* 2. *cap.* 10. *ſ.* 15.

If the party underwrites the bill, *Preſented* ſuch a day, or only the day of the month, this is ſuch an acknowledgment of the bill as amounts to an acceptance. 3 *New Abr.* 610. *Comb.* 401.

If the party ſays, *Leave your bill with me and I will accept it*, or, *Call for it to-morrow and it ſhall be accepted*; theſe words, according to the cuſtom of merchants, as effectually bind, as if he had actually ſigned or ſubſcribed his name according to uſual manner.

But if a man ſays, *Leave your bill with me*; *I will look over my accounts and books between the drawer and I, and call to-morrow, and accordingly the bill ſhall be accepted*; this does not amount to a complete acceptance; for the mention of his books and accounts ſhews plainly that he intended only to accept the bill, in caſe he had effects of the drawer's in his hands. And ſo it was ruled by the Lord Chief Juſtice *Hale* at *Guildhall*. *Molloy, book* 2. *cap.* 10. *ſ.* 20.

A foreign bill was drawn on the defendant, being returned for want of acceptance, the defendant ſaid, that *if the bill came back again he would pay it*; this was ruled a good acceptance. 3 *New Abr.* 610. cites *Mich.* 6 *Geo.* 1. *B. R. Carr* v. *Coleman.*

The defendant was ſued as acceptor of a bill of exchange. And upon the evidence it appeared to be a parol acceptance only, which the Chief Juſtice ruled to be ſufficient, that being good at Common law, and the ſtat. 3 & 4 *Anne, cap.* 9. which requires it to be in writing in order to charge the drawer with damages and coſts, having a proviſo

viſo that it ſhall not extend to diſcharge any remedy that any perſon may have againſt the acceptor. Upon this direction the jury found for the plaintiff. But the Chief Juſtice of the Common Pleas having lately ruled it otherwiſe, the court was moved for a new trial; and, in order finally to ſettle this point, it was ordered to be argued: and after argument the court was of opinion, that the direction in the preſent cauſe was right and agreeable to conſtant practice. *Stran.* 1000. 8 *Geo.* 2. *Lumley* v. *Palmer.*

The bill was for ſatisfaction of a bill of exchange drawn upon the defendant and accepted by him. Pending the ſuit, the original defendant died, and it was revived againſt his executors, praying alſo a diſcovery of aſſets, and to be ſatisfied thereout. On the proofs ſome queſtion was made, whether the acceptance was ſufficient to charge the defendant, and whether the plaintiff, by keeping the note about ten years after it became due, without coming to the drawee for the money, had not diſcharged the acceptor? But it was inſiſted for the defendant as a previous matter, that the plaintiff had a plain remedy at law; that his caſe depended upon facts, and ought to be tried by a jury, and not to be determined in this court.

Hardwicke Lord Chancellor: Regularly the plaintiff ought to purſue his remedy at law, and not in this court: and, if the caſe ſtood as it did at firſt, I ſhould certainly diſmiſs the bill; but the bill of revivor praying a ſatisfaction out of aſſets, and diſcovery of aſſets, it is made a caſe of which the court takes cognizance; and then the prayer of ſatisfaction is an incident that follows it. I have therefore no doubt but that the plaintiff is proper in praying remedy in this court. But with regard to the acceptance, if there were a doubt of it, as to the fact, or whether in law what has been done amounts to an acceptance, it might be ſtill neceſſary to ſend the parties to a trial at law; but I think there is no doubt of either. The teſtator, when the bill was brought to him, received it, entered it in his book according to his courſe of trade, and the entry is proved to have been made under a particular number, and wrote that number under the bill, and returned it. Now it is ſaid to be the cuſtom of merchants, that if a man underwrites any thing to a bill, it amounts to an acceptance. But if there were no more than this in the caſe, I ſhould think it of little avail to charge the defendant; but what determines me is the teſtator's letters; and I think there can be no doubt, but that an acceptance may be by letter, and it has been ſo determined. There was a doubt whether a parol acceptance be good. Lord Chief Juſtice *Eyre* held it was; Lord *Raymond* held the contrary; and there was a like caſe came once before me at a *Niſi prius*, *Lumley* and *Palmer* (the preceding caſe) and I had a caſe made of it for the opinion of the court; and it was ſeveral times argued, and at laſt ſolemnly determined, that ſuch acceptance is good; much more therefore an acceptance by letter.

As to the plaintiff's being intitled to intereſt, I think it a clear caſe that he is, tho' no proteſt has been made; for that is neceſſary only to intitle the payee to damages againſt the drawer, and all the damage that can be had in ſuch a caſe is the intereſt.——Decree for the defendant to pay the note with intereſt, at the rate of four *per cent.* the plaintiff to pay the coſts to the time of the bill of revivor, and after each party to bear their own coſts. *Dict. Tr. and Com.* 10 *Geo.* 2. in *Chan. Powell* and *Moliere. Law of Bills, &c.* 27.

Caſe upon a bill of exchange againſt acceptor. And it was objected, that the plaintiff ſhould not be admitted to prove the acceptance until he had proved the hand of the drawer. And a difference was taken between this caſe and the caſe of an action againſt the indorſer, who is liable though the bill be not ſigned by the perſon who is ſuppoſed to draw it; becauſe an indorſer is in the nature of a new drawer; whereas an acceptor is not liable, unleſs the bill was fairly ſigned by the drawer. But as to this the Chief Juſtice was of opinion, that the proof of an acceptance was a ſufficient acknowledgment on the part of the acceptor, who muſt be ſuppoſed to know the hand of his own correſpondent: but he ſaid it would not be concluſive evidence; and therefore if the defendant could ſhew the contrary, the reading the bill on behalf of the plaintiff ſhould not preclude him; whereupon the bill was read, and the queſtion came upon the validity of the acceptance. As to which the caſe was this: The bill was drawn from *New-England* for a ſum of money advanced there to fit out a ſhip that had put in there after having been taken by pirates. The bill was drawn upon the defendant, who was the freighter; and, he living at *Whitehaven*, the plaintiff applied to a merchant in *London*, who was his correſpondent, to get him to ſend this bill, and another of 150 *l.* drawn by the ſame perſon, and on the ſame account; he ſent both bills incloſed to the defendant, who by letter acknowledged the receipt of them, and writes thus: *The two bills of exchange which you ſent me, I will pay them in caſe the owners of the* Queen Anne *do not*; *and, they living in* Dublin, *muſt firſt apply to them: I hope to have their anſwer in a week or ten days. I do not expect they will pay them, but I judge it proper to take their anſwer before I do*; *which I requeſt you will acquaint Mr.* Wilkinſon *with, and that he may reſt ſatisfied of the payment.* In another letter he writes, *I have not had an opportunity of ſending the bills you ſent me to the owners of the* Queen Anne *to* Ireland, *but will take the firſt opportunity, and ſhall remit to the gentleman concerned, according to my promiſe.*

The defendant upon this paid the 150 *l.* bill; but in this action inſiſted, that it did not amount to any acceptance, being conditional, to pay it in caſe the owners of the *Queen Anne* did not; and his promiſe to procure it from them was in favour of the plaintiff. But the Chief Juſtice was of opinion, that it was rather in favour of himſelf; and he having undertaken to write to them, it was incumbent on the plaintiff to ſhew an application to them; and as to the acceptance, it was in his opinion a very ſtrong one. The bill was preſented to the defendant; ſays he, *This is a good bill, and I will pay it*; *you need not proteſt it, for it ſhall be paid*; *I only deſire, that for my convenience you would ſtay till I can write to the owners in* Ireland, *who I do not expect will do any thing in it: this will be of ſervice to me*; *and as to you, you ſhall be ſecured, for I promiſe you ſhall have the money at all events.*——The bill being payable thirty days after ſight, the jury gave intereſt for thirty days after the date of the firſt letters, which acknowledged the receipt of the bill. *Strange* 648. *Wilkinſon* v. *Lutwidge.*

The defendant accepted a bill of exchange to pay it when the goods conſigned to him, and for which the bill was drawn, were ſold. And the plaintiff declared upon the cuſtom of merchants; after a verdict for the plaintiff, it was moved in arreſt of judgment, that this acceptance depending on the contingency of the ſale of the goods was not within the cuſtom of merchants, or negotiable. But the court, upon conſideration, held it good; for tho' the plaintiff might have refuſed to take ſuch an acceptance, and have proteſted the bill, yet no body can ſay he might not ſubmit to it. And it will affect trade, if factors are not allowed to uſe this caution, when bills are drawn before they have an opportunity to diſpoſe of the goods. A man who is drawn upon to pay at ten days ſight, may accept for thirty; though the other might proteſt the bill. *Stran.* 1152. *Smith* v. *Abbot.*

It is held, that an acceptance may be qualified, as thus: I accept this bill, half to be paid in money, and half bills. And this is good by the cuſtom of merchants; for he who may refuſe the bill totally may accept it in part; but he to whom the bill is due may refuſe acceptance, and proteſt it ſo as to charge the drawer. Alſo it is ſaid, that after ſuch an acceptance, and refuſal of payment, he hath the liberty of charging the drawer, that he had in caſe the bill had been accepted abſolutely, and payment refuſed. 3 *New Abr.* 611. *Cumb.* 452. *Petit* v. *Benſon.*

The plaintiff declared on a bill of exchange drawn by *J. S.* on the defendant, dated the 25th of *March* 1696, payable a month after ſight, and that afterwards, to wit, the 27th of *April* 1697, he ſhewed it to the defendant, and he promiſed to pay it *ſecundum tenorem billæ prædictæ.* After verdict for the plaintiff, on *non aſſumpſit*, it was moved in arreſt of judgment, that this manner of declaring

claring was abſurd, it being impoſſible to pay *ſecundam tenorem billæ* at the time of the promiſe. *Et per Cur.* Where the time of payment is paſt at the acceptance of the bill, the acceptance can be only to pay the money, and if he was ſo abſurd as to promiſe to pay the money *ſecundum tenorem billæ*, yet that is no more now, than a promiſe to pay the money generally. But it is better to declare, in ſuch a caſe, on a general promiſe to pay the money. 1 *Salk.* 127. *Jackſon* v. *Pigot.*

In aſſumpſit the plaintiff declared upon a bill of exchange, drawn the 28th of *October* at double uſance for 700 ducats payable at *Amſterdam*, which the defendant accepted the 31ſt of *December* following, *per quod devenit onerabilis* to pay the bill, *& in conſideratione inde*, the ſame day and year he aſſumed to pay it *ſecundum tenorem & formam billæ prædictæ*. Upon *non aſſumpſit* pleaded verdict for the plaintiff. Sir *Bartholomew Shower* moved in arreſt of judgment, that the time of payment of the bill being expired at the time of the acceptance, it was impoſſible that the defendant ſhould aſſume to pay it *ſecundum tenorem billæ*, for that was out of his power. And though this acceptance was within the three days of grace, *viz.* the laſt day, within which time payment is good, and no proteſt for want of payment can be made until the ſaid days are elapſed, yet it is a breach not to have paid the money within the uſance; and the plaintiff has no need to ſay in his declaration upon a bill of exchange, that he did not pay it within the days of grace; but if the fact was that it was then paid, it ought to be ſhewn of the other ſide. So that here the time of payment was elapſed at the time of acceptance; and therefore it was impoſſible to accept it then to be paid *ſecundum tenorem billæ*. And this objection is the ſtronger in reſpect to the diſtance of the place; for admitting that payment within any of the three days of grace would be according to the tenor of the bill, yet when the acceptance here was upon the laſt of the ſaid days, it was impoſſible to pay the money to the plaintiff the ſame day at *Amſterdam*. 2. The acceptance here is not good, becauſe no houſe is mentioned where the bill ſhould be paid. Mr. *Hall* for the plaintiff cited the caſe of *Jackſon* and *Pigot*, as a caſe adjudged in point. And Mr. *Northey* for the plaintiff ſaid, that there might be ſome difficulty if the action had been brought againſt the firſt drawer; but none where the defendant is chargeable by his own acceptance; for a man may tender a bill to be accepted after the time of payment is expired, to oblige the acceptor if he will accept it, but not to affect the drawer.

Holt Chief Juſtice: There muſt be ſuch acceptance as will bind the acceptor, and that is ſufficient. As if a bill of exchange be payable at *London*, and the perſon upon whom it is drawn accepts it, but names no houſe where he will pay it; the party that has the bill is not bound to be ſatisfied with this acceptance, but nevertheleſs, if he will be content with it, it will bind the acceptor: ſo if *A.* draws a bill upon *B.* who refuſes to accept it; and *C.* rather than it ſhall be proteſted, accepts it for the honour of *A.* this acceptance will bind *C.* So if a man offer to *B.* a bill of exchange payable in *Amſterdam*, and *B.* refuſes to accept it unleſs ſome merchant in *London* will ſign it; if the merchant ſigns, he becomes acceptor for the honour of the drawer. Acceptance after the day of payment is common, and there is no inconvenience in it. And *Holt* Chief Juſtice ſaid, that he remembered a caſe where an action was brought upon a bill of exchange, and the plaintiff declared upon the bill, where it was negotiated after the day of payment; and a queſtion was made, whether the plaintiff could declare upon the bill, or whether he ought to bring *indebitatus aſſumpſit?* And he ſaid, that he had all the eminent merchants in *London* with him at his chambers at *Serjeants Inn*, in the long vacation about two years ago, and they all held it to be very common, and a very good practice. And as to the matter of the *ſecundum formam, &c.* it is the payment of the money that is the ſubſtance of the promiſe; and ſo it was held in the caſe of *Jackſon* and *Pigot*; judgment for the plaintiff. *Ld. Raymond.* 1 *W.* 3. *Mutford* v. *Walcot.*

In caſe on a bill of exchange the plaintiff ſets forth, that there is a cuſtom, that if any merchant in *London* draws his bill or bills upon any merchant in *Rotterdam*, payable to any merchant or order, and if the merchant there accept any ſuch bill, and before the acceptance or after, the merchant to whoſe order the money is directed to be paid, doth indorſe it to any other merchant, and that other merchant doth indorſe it to ſome other, and the merchant to whom the bill is directed accepts it after ſuch indorſement, and fails in payment to the merchant to whom indorſed at the time limited, whereby the bill becomes proteſted, and notice thereof is given to the drawer; that, in ſuch caſes, the drawer becomes liable to pay the ſame with damage to the indorſer. That the defendant drew a bill of exchange, *November* 19, 1688, on *Edward Williams*, payable in two months and a half, to the order of one *Hartopp*, for 300 *l.* value of him; and *Hartopp* the ſame day indorſed it to *Marques*, and *Marques* indorſed it to the plaintiff: that the plaintiff afterwards, *viz. February* 8, 1689, gave notice to *Williams*, and he then accepted the bill: that *Williams* failed to pay it, and, by reaſon thereof, the ſaid 8th of *February* the bill was proteſted; of which proteſt the defendant had notice the 28th of *April*, and did not pay it.

The defendant demurred generally to the declaration, the bill not being accepted till after the day of payment was expired; and it was inſiſted, that the proteſt ſhould have been for non-acceptance within the time, and failure of payment at the time.

By *Holt* Ch. J. the law of merchants made him liable who was the drawer of the bill, though the acceptance were after the day; for it need not be tendered within the time. Now by that law the drawer is chargeable by the *value received*; and though the money were not paid, or the bill preſented within the time mentioned, yet it ought ſtill to be paid; and if the party do not tender and proteſt at the day, and the perſon upon whom the bill is drawn fails in the mean time, he loſes his money; otherwiſe, if there be no particular damage. Judgment was given for the plaintiff. *Holt's Rep.* 114. 3 *W. & M. Megadara* v. *Holt.*

A bill once accepted cannot be revoked by the party that accepted it, though immediately after, and before the bill becomes due, he hath advice that the drawer is broke.

If a bill is not accepted to be paid at the exact time, it muſt be proteſted; but if accepted for a longer time, the party to whom the bill is made payable muſt proteſt the ſame for want of acceptance according to the tenor; yet he may take the acceptance offered notwithſtanding. Nor can the party, if he once ſubſcribes the bill for a longer time, revoke the ſame, or blot out his name, although it is not according to the tenor of the bill; for by his acceptance he hath made himſelf debtor, and owns the draught made by his friend upon him, whoſe right another man cannot give away, and therefore cannot refuſe or diſcharge the acceptance.

Note; This caſe will admit of two proteſts, perhaps three.

1. One proteſt muſt be made for not accepting according to the time.

2. For that the money, being demanded according to the time mentioned in the bill, was not paid.

3. If the money is not paid according to the time that the acceptor ſubſcribed or accepted.

A bill was drawn the firſt of *January*; the perſon upon whom the bill was drawn accepts it to be paid the firſt of *March*; the ſervant brings back the bill. The maſter perceiving this enlarged acceptance, ſtrikes out the firſt of *March*, and puts in the firſt of *January*, and then ſends the bill to be paid. The acceptor then refuſes; whereupon the perſon to whom the monies were to be paid ſtrikes out the firſt of *January*, and put in the firſt of *March* again. On an action brought on this bill, the queſtion was, whether theſe alterations did not deſtroy the bill? and ruled they did not. *Per* L. Ch. Ju. *Pemberton*, *Price* and *Shute*. *Molloy*, *b.* 2. *c.* 10. *ſect.* 28.

A bill may be accepted for part; for that the party upon whom the ſame was drawn, had no more effects in his hands; which being uſually done, there muſt be a proteſt, if not for the whole ſum, yet at leaſt for the reſidue: however, after payment of ſuch part, there muſt be a proteſt for the remainder.

Before the time of payment of the bill, the party may notwithſtanding accept it, and pay it at the time of payment; or any other may accept the bill for the honour of the drawer, and if he pay it in default of the party, yet before payment he is bound to make a proteſt, with a declaration that he hath paid the ſame for the honour of the drawer, whereby to receive his money again. *Molloy*, *b.* 2. *c.* 10. *ſect.* 21.

Action upon the caſe upon the cuſtom of merchants brought by the perſon to whom a foreign bill of exchange is made payable, againſt the acceptor; and the declaration ſets forth, that one *James Collet*, being a merchant, reſiding at *Chriſtiana* in *Norway*, according to the cuſtom of merchants drew his firſt bill of exchange upon the defendant, requeſting him to pay the plaintiff ſuch firſt bill (his ſecond not being paid) of 127*l.* 18*s.* 4*d.* which bill was afterwards, *viz. December* 9 1717, ſhewed to the defendant, who accepted to pay 100*l.* part thereof, upon the 8th day of *February* following; by virtue whereof he became chargeable, *& in conſideratione inde eiſdem die & anno ultimo ſupradictis ſuper ſe aſſumpſit*, to pay the ſame on the ſaid 8th day of *February tunc prox' ſequentem*, which he hath not done according to his undertaking. There is likewiſe a count for monies had and received, and an *inſimul computaſſent*. The defendant as to thoſe two counts pleads *non aſſumpſit*, and as to the count upon the bills, he pleads, that the ſaid *James Collet* drew another bill for 100*l.* only, wherein he countermands the payment of the odd 27*l.* 18*s.* 4*d.* by virtue whereof the defendant paid the 100*l.* in ſatisfaction of the firſt bill, and the plaintiff accordingly received it in ſatisfaction. The plaintiff *proteſtando* that the defendant did not pay it in ſatisfaction, for plea ſaith, that he did not receive it in ſatisfaction. And to this replication defendant demurs; but adjudged, that an acceptance to pay leſs than is mentioned in a bill of exchange, is good for ſo much againſt the acceptor; and therefore judgment for the plaintiff. *Stran.* 214.

Caſe by the indorſee of a bill of exchange againſt the defendant as acceptor, who on tender of the bill wrote, "Meſſrs. *Caſwal* and *Mount*, pay this bill when due for "*Thomas Chitty*." The bill fell due the 2d day of *January* 1741; the bankers paid till the 19th at two, and the 21ſt of *January*, the money was demanded of the defendant. For the defendant it was inſiſted, that the plaintiff had given ſuch a credit to the bankers, as to make it his loſs; and it was compared to the common caſe of a note or draught kept.

For the plaintiff it was ſaid, that there was no limited time, but that of the ſtatute of limitation, to ſue the acceptor; and that the plaintiff cannot come in as a creditor of the goldſmiths; becauſe they had done nothing to make themſelves liable.

The chief juſtice held, that it was the loſs of the plaintiff, who, though he might have refuſed to take ſuch an acceptance, yet had now agreed to it: and it was to all purpoſes in the nature of a draught, which is always conſidered as actual payment, when a reaſonable time to receive it in is elapſed. *Stran.* 1195. *Biſhop* and *Chitty*.

A bill drawn on two muſt regularly have a joint acceptance; but by the cuſtom of *England*, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both, if it concerns the joint trade; otherwiſe, if it concerns the acceptor only in a diſtinct intereſt and reſpect. *Salk.* 126. *Pinkney* v. *Hall. Ld. Raym.* 175.

If a book-keeper, or ſervant, or other perſon have authority, or uſually tranſacting buſineſs of this nature for the maſter, ſhall accept a bill of exchange, this ſhall bind ſuch maſter. 3 *New Abr. Law* 611.

The plaintiff was indorſee of a bill of exchange drawn from *Scotland* upon the defendant, in theſe words, *At thirty days ſight pay to* J. S. *or order*, 200l. *value received of him, and place the ſame to account of the* York-Buildings *company* per *advice from* Charles Mildmay. *To Mr.* Humphrey Biſhop, *caſhier of the* York-Buildings *company, at their houſe in* Wincheſter-ſtreet, London. *Accepted the* 13*th of* June 1732, *per* H. Biſhop. This bill not being paid, an action was brought againſt the defendant upon his acceptance. And the defendant proved that the letter of advice was addreſſed to the company; and that the bill being brought to their houſe, he was ordered to accept it, which he did in the ſame manner as he had accepted other bills. But Mr. Juſtice *Page*, who tried the cauſe, directed the jury to find for the plaintiff, which they did accordingly.

And now upon motion for a new trial, the court held that the direction was right; for the bill, upon the face of it, imports to be drawn upon the defendant, and it is accepted by him generally, and not as a ſervant to the company, to whoſe account he had no right to charge it, till actual payment by himſelf. And this being an action by an indorſee, it would be of dangerous conſequence to trade, to admit of evidence ariſing from ſuch extrinſic circumſtances as the letter of advice. And they ſaid, this differed widely from the caſe of a bill addreſſed to the maſter, and underwrote by the ſervant; where undoubtedly the ſervant would not be liable, but his acceptance would be conſidered as the act of the maſter. A bill of exchange is a contract by the cuſtom of merchants, and the whole of that contract muſt appear in writing. Now here is nothing in writing to bind the company, nor can any action be maintained againſt them upon the bill; for the addition of caſhier to the defendant's name is only to denote the perſon with more certainty, and the *York-Buildings* houſe is only to inform the order, where the drawee is to be found; and the direction, whoſe account to place it to, is for the uſe of the drawee only. And they compared it to the caſe of *Carth.* 5. 2 *Ven.* 307, where a bill was drawn payable to *Price*, for the uſe of *Calvert*, and held that the legal property was in *Price*, which is ſtronger than the preſent caſe. They ſaid it might be otherwiſe, if the action had been by *J. S.* who was privy to the tranſaction, and it had appeared he tendered the bill as a bill on the company. But this plaintiff being a ſtranger, they could not conſider thoſe circumſtances. The plaintiff had judgment. *Strange* 955. *Thomas* v. *Biſhop*.

4. *Of the proteſt and indorſement.*

A proteſt does not raiſe any debt, but only ſerves to give formal notice that the bill is not accepted, or accepted and not paid; and this by the Common law was, and is ſtill neceſſary on every foreign bill before the drawer can be charged, but it was not required in any inland bill before the ſtat. 9 & 10 *W.* 3. Nor does the want of it ſince that ſtatute deſtroy the remedy, which the party had before againſt the drawer, for the principal. 3 *New Abr. Law* 612.

He, to whom a bill is payable, muſt generally reſort to the drawee, and deſire him to accept the bill before there can be a proteſt; but if he be dead, or cannot be found, theſe are good cauſes fot proteſting the bill; alſo, if after acceptance the drawee dies, there is to be a demand of his executors or adminiſtrators, and in default of payment a proteſt; and in caſe the money becomes due before an executor or adminiſtrator can be appointed, yet this delay is ſufficient cauſe to proteſt the bill. 3 *New Abr. Law* 612.

But if he to whom the bill is to be paid dies, there can be no proteſt before a probate of his will, or adminiſtration granted; for none but his executors or adminiſtrators can give a legal diſcharge or acquittance for the money, and conſequently no other perſon can ſue for or demand the ſame; and though ſecurity be offered to indemnify the drawee againſt the executors, yet he is not obliged to accept thereof; being a matter left entirely to his conſideration, to judge and determine on the ſufficiency of ſuch ſecurity; and in this caſe it is ſaid, that if a public notary proteſt the bill, an action on the caſe lies againſt him. 3 *New Abr. Law* 612.

If a bill be left with a merchant to accept, which is loſt or miſlaid, he to whom it is payable is to requeſt the merchant to give him a note for the payment, according to the time limited in the bill; otherwiſe there muſt be two proteſts, the one for non-acceptance, and the other for non-payment: and though ſuch note be given, yet if the merchant happens to fail, there muſt be a proteſt for non-payment in order to charge the drawer. 3 *New Abr. Law* 613.

The proteſt is uſually made by ſome notary publick, and ſuch proteſt is, *prima facie*, good evidence that the bill was not accepted, or if accepted, that it was not paid, and ſufficient to put the proof on the other ſide. 3 *New Abr. Law* 613.

A proteſt on a foreign bill of exchange is abſolutely neceſſary to intitle the party to recover againſt the drawer, not only intereſt and coſt, but likewiſe the principal ſum; and for this purpoſe the bill muſt be preſented in a reaſonable time; and in caſe of refuſal of acceptance, or in caſe the drawee cannot be found, it muſt be proteſted in a reaſonable time; and notice of ſuch proteſt, as alſo notice of a proteſt after acceptance and non-payment given to the drawer in a reaſonable time; for though the drawer is bound to the party, to whom the bill is payable, till payment be actually made, yet it is with this condition and proviſo, that proteſt be made in due time, and a lawful and ingenuous diligence uſed for the obtaining payment of the money; and the reaſon hereof is, that the drawer might have had effects, or other means of his, upon whom he drew, to reimburſe himſelf the bill, which ſince, for want of timely notice, he hath remitted or loſt, it were unreaſonable the drawer ſhould ſuffer through his neglect. 3 *New Abr. Law* 613.

As to inland bills, though a proteſt was not neceſſary at Common law in order to ſue the drawer, and is only now neceſſary by the ſtat. 9 & 10 *W.* 3. and the 3 & 4 *Anne*, to intitle the party to intereſt and coſts; yet convenient notice muſt be given by the party to whom the bill is payable, to the drawer, of the drawee's refuſal of payment; and if any damages accrue to the drawer for want of ſuch notice, it muſt be borne by the perſon to whom the bill is payable; but this muſt be left to a jury, who are to determine herein according to the cuſtom of merchants. 3 *New Abr. Law* 613.

A bill was drawn on *Sutor* payable in three days; *Sutor* broke; the perſon to whom it was payable kept the bill by him four years, and then brought *aſſumpſit* againſt the drawer: and by *Treby* C. J. when one draws a bill of exchange, he ſubjects himſelf to the payment, if the perſon on whom it is drawn refuſes either to accept or pay: yet that is with this limitation, that if the bill be not paid in convenient time, the perſon to whom it is payable ſhall give the drawer notice thereof; for otherwiſe the law will imply the bill paid, becauſe there is a truſt between the parties; and it may be prejudicial to commerce, if a bill may riſe up to charge the drawer at any diſtance of time; when in the mean time all reckoning and accounts are adjuſted between the drawer and drawee. 1 *Salk.* 127. *Allen* v. *Dockwra.*

The cuſtom of merchants is, that if *B.* upon whom a bill of exchange is drawn, abſconds before the day of payment, the man to whom it is payable may proteſt it, to have better ſecurity for the payment, and to give notice to the drawer of the abſconding of *B.* and after time of payment is incurred, then it ought to be proteſted for non-payment, or after it. But no proteſt for non-payment can be before the day whereon it is payable. Proved by merchants at *Guildhall, Trin. 6 W. & M.* before *Treby* Chief Juſtice. And the plaintiff was non-ſuited, becauſe he had declared upon a cuſtom, to proteſt for non-payment before the day of payment. *Ld. Raym.* 742. *Anon'.*

The uſual cuſtom in this caſe is, that the drawer or indorſor, having received the value, muſt procure an able man, ſome friend of his to underwrite the proteſt, which is common for non acceptance, or for want of better ſecurity, uſing theſe or the like words: *I here underwritten do bind myſelf as principal, according to the cuſtom of merchants, for the ſum mentioned in the bill of exchange whereupon this proteſt is made, Dated, &c. Marius* 117.

Indorſement is a term known in law, which by the cuſtom of merchants transfers the property of the bill or note to the indorſee; and is uſually made on the back of the bill, and muſt be in writing: but the law hath not appropriated any ſet form of words as neceſſary to this ceremony, and therefore it hath been held, that if a man write on the back of a bill of exchange, *This is to be paid to J. S.* or *The contents of this is to be paid to J. S.* and ſets his hand to it, this is a good indorſement. 3 *New Abr. Law* 609.

Clark having a bill of exchange payable to him or order, puts his name upon it, leaving a vacant ſpace above, and ſends it to *J. S.* his friend, who got it accepted; but the money not being paid, *Clark* brought an *indebitatus aſſumpſit* againſt the acceptor: and it was objected on evidence, that the property was transferred to *J. S.*

Et per Holt C. J. *J. S.* had it in his power to act either as ſervant or aſſignee: if he had filled up the blank ſpace, making the bill payable to him, that would have witneſſed his election to have received it as indorſee; but that being omitted, his intention is preſumed to act only as ſervant to *Clark*, whoſe name he would uſe only in order to write the acquittance over it. 1 *Salk.* 126. *Clark* v. *Pigot.*

A bill of exchange was indorſed in this manner: *Pay the contents of this bill unto the order of* J. S. who brought his action as indorſee, averring he had made no order to any body to receive the money; and on demurrer it was objected, that *J. S.* could not maintain an action, becauſe the indorſement was not to him, but to his order: but the court held the action well brought againſt the indorſor; and that among tradeſmen, this form of indorſement is commonly uſed, although it is intended to be made payable to the perſon whoſe order is mentioned, 3 *New Abr. Law* 609.

It has been adjudged, that a bill of exchange cannot be indorſed for part, ſo as to ſubject the party to ſeveral actions; as if *A.* having a bill of exchange upon *B.* indorſes part of it to *J. S.* *J. S.* cannot bring an action for his part, although he alledged a cuſtom amongſt merchants for ſuch kind of indorſement; for the contract being intire, and ſubjecting him only to one man's action, no cuſtom can make him liable to two or more actions for the ſame debt. 3 *New Abr. Law* 610. *Carth.* 466. *Hawkins* v. *Cardy.* 1 *Salk.* 65. *S. C.* where it is ſaid, that the plaintiff ſhould have acknowledged ſatisfaction for the reſt. 3 *New Abr. Law* 610.

If a bill of exchange is made payable to *A.* who indorſes it to *B.* who indorſes it to *C.* which is proteſted for non-payment; *B.* may bring an action on this bill, notwithſtanding his indorſement. 3 *New Abr. Law* 608. 1 *Show.* 163. *Deckers* v. *Harriat.*

The money is to be paid to him in whoſe favour the bill is drawn, or to the indorſee, in caſe it be indorſed over, of which indorſement the drawer and acceptor muſt take notice at their peril; alſo if there are ſeveral indorſors and indorſees, the laſt indorſee is intitled to the money. 3 *New Abr. Law* 608. *Carth.* 130.

5. *Of ſuing the drawer, indorſor, and acceptor.*

Every drawer of a bill is liable to the payment thereof, as is every acceptor and indorſor. Alſo if there are ſeveral indorſors of the ſame bill, the laſt indorſee may bring his action againſt the firſt indorſor, or any of them; for the indorſement is, as it were, a new bill, or at leaſt a warranty, as ſome books expreſs it, by the indorſor that the bill ſhall be paid. 3 *New Abr. Law* 607.

If a bill be drawn upon *A.* and he accepts it, and afterwards refuſes payment, upon which the bill is proteſted, the perſon to whom it is payable may bring ſeveral actions againſt the acceptor and drawer; for the proteſt is no diſcharge of the acceptor. 3 *New Abr. Law* 607.

But

But though the drawer, acceptor, and indorſor are all liable, yet the party can have but one ſatisfaction; and until ſuch ſatisfaction is actually had, he may ſue all, or any of them: and accordingly it was adjudged in the *Exchequer Chamber*, where the caſe was, an indorſee ſued the drawer, and had judgment againſt him, and he alſo brought an action againſt the indorſor, to which the indorſor pleaded the judgment againſt the drawer: but the plea was held ill: for that the judgment was not ſatisfaction, without which the party could not be barred of the remedy which he had againſt the other. 3 *New Abr. Law* 607. 3 *Mod.* 86. *Skin.* 255. *Claxton* v. *Swift*. *Lut.* 878, 882. *S. C.* ſays the judgment was reverſed, becauſe there was not ſatisfaction; for the court were of opinion, that this caſe differs from the caſe of treſpaſſes, and is rather to be reſembled to two debtors by a joint and ſeveral obligation, becauſe by the cuſtom the firſt drawer of the bill, and every indorſor thereof, is liable to the payment of a ſum certain to the laſt indorſee, though the action be to recover by way of damages.

And not only the drawer, acceptor, and indorſor are liable, but alſo, by the cuſtom of merchants, if one merchant draw a bill which is proteſted, and another hearing thereof declare, that he, for the honour of the drawers will pay the contents, and thereupon ſubſcribes in theſe or like words: *I the underwritten do bind myſelf as principal, according to the cuſtom of merchants for the ſum mentioned in the bill of exchange whereupon this proteſt is made, &c.* This ſhall as effectually bind him as if he had been the original drawer; and by this the perſon to whom the bill is payable hath his remedy both againſt ſuch perſon as ſurety, and alſo againſt the principal; but the principal or original drawer is liable to him who ſubſcribes for his honour. 3 *New Abr. Law* 608.

A. draws a bill upon *B.* who had effects enough in his hands to anſwer the bill, which ſome time after is proteſted, whereupon the bill is indorſed to *A.* the drawer, who brings an action as indorſee. *Per Parker*, C. J. at *niſi prius*, there being effects, the acceptance was not *upon the honour of the drawer*, and ſo the action is well brought; for when a merchant draws a bill on his correſpondent, who accepts it, this is payment; for it makes him debtor to another perſon, who may bring his action; ſo that this is ſuch a payment as may be ſet off upon a former action, and pleaded in bar of ſuch action: but if there were no effects, the action would not lie; for it would have been an acceptance upon honour only, and the money would be recovered only to be recovered again. *Vin. Abr.* tit. *Bills of Exchange* (H. 12) 12 *Mod. Trin.* 10 *Anne*, *B. R. Loviere* v. *Lanbray*.

A bill was drawn at ſix days ſight, and preſented and accepted the 8th of *February*, which made it payable the 14th, and the three days of grace brought it to the 17th, which was a *Saturday*, and the acceptor ſtopt payment on the *Tueſday* following, before which the bill was tendered. And upon this evidence it was left to the jury, who were of opinion, that the drawer was diſcharged at the end of the three days of grace. *Stran.* 829. *Coleman* v. *Sayer*.

In an action upon an inland bill of exchange brought by the indorſee againſt the drawer, it appeared the bill was payable the 14th of *May*; that upon promiſe of payment, the indorſee gave the acceptor to the 18th, from thence to the 20th, thence to the 24th, and from thence to the 7th of *June*, when the acceptor failed. And there being no notice to the drawer, the chief juſtice held it to be the loſs of the indorſee. *Stran.* 702. *Gee* v. *Brown*, 1 *Geo.* 2.

In caſe upon a bill of exchange, upon the evidence at the trial before *Holt* Ch. J. at *Guildhall*, *Novem.* 23 *Mich.* 12 *W.* 3. the caſe was thus: *A.* drew a bill of exchange upon *B.* payable to *C.* at *Paris*; *B.* accepted the bill; *C.* indorſed it payable to *D.* *D.* to *E.* *E.* to *F.* *F.* to *G.* *G.* demanded the bill to be paid by *B.* and upon non-payment *G.* proteſted it within the time, *&c.* and then *G.* brought an action againſt *D.* and it was well brought, and he recovered. Afterwards *D.* brought an action againſt *B.* and though *D.* produced the bill and the proteſt, yet becauſe he could not produce a receipt for the money paid by him to *G.* upon the proteſt, as the cuſtom is among merchants, as ſeveral merchants upon their oaths affirmed, he was nonſuited. But *Holt* Ch. J. ſeemed to be of opinion, that if he had proved payment by him to *G.* it had been well enough. *Lord Raym.* 743. *Mendez* v. *Carreroon*.

An action was brought by the plaintiff againſt the defendant as indorſor of an inland bill of exchange for 100*l.* drawn at forty days ſight by one *Carrick* upon one *Dodd*, in favour of the defendant, who indorſed it to the plaintiff. *Dodd* accepted the bill, but did not pay it; upon which it was proteſted by the plaintiff. All which was proved to the jury; but it did not appear that the drawer had notice of the non-payment before this action was brought, or that any application was firſt made to him for payment: and this matter being objected by the defendant's counſel, and they inſiſting that for want of ſuch notice or demand, or due diligence uſed for that purpoſe, the plaintiff muſt be nonſuited, the jury gave a verdict for the plaintiff ſubject to the opinion of the court. And as this was a point unſettled, and many contradictory opinions thereon, as appears from the ſeveral preceding caſes, the court took time to conſider of it, and this term unanimouſly were of opinion, that in the preſent caſe it was not neceſſary to demand the money from the drawer, or to uſe any diligence for that purpoſe, or to give him notice of non-payment by the drawee. That a bill of exchange was an order or command given by the drawer on or to the drawee (who has, or is ſuppoſed to have, effects of the drawer in his hands) to pay a ſum of money to a third perſon; that when the bill is accepted, the drawee is become the principal debtor, and the drawer is liable only in default of the drawee; and if due diligence be not uſed to get the money from the acceptor or drawee, and notice of his non-payment given in convenient time to the drawer, the drawer ſhall not be liable; for if it ſhould be otherwiſe, and the perſon upon whom the bill was drawn ſhould become inſolvent, without ſuch due diligence uſed by the payee, or perſon to whom the bill is payable, to demand payment from the drawee, or without his giving the drawer timely notice of the non-payment, then would the drawer unreaſonably ſuffer through the laches of the payee; having no intimation to call in his effects before the drawee become inſolvent.

That when a bill of exchange is indorſed by the perſon to whom it is made payable, it is become a new bill, and the indorſor is in the place of the drawer; and therefore if the indorſee uſes due diligence to get the money from the acceptor, and is refuſed payment, then the indorſor, who has put himſelf in the place of the original drawer, upon notice of ſuch non-payment, is become liable immediately, but not otherwiſe; in like manner, and for the reaſon that the original drawer would have been, in the like caſe, had there been no indorſement: and the indorſee is not obliged to make any demand upon the drawer, or to give him any notice; for he does not truſt the drawer (who may not perhaps be known to him); the indorſor is his debtor, and not barely a warrantor or ſecurity for the payment of the money.

That there was no difference between foreign and inland bills of exchange, except in the *degree* of the conveniency; and as to foreign bills, this matter has been determined before in *Strange* 441. The reaſon of the judgment there given was for the inconveniencies that would enſue to commerce in general, from the diſcredit it would bring upon bills of exchange to be thus clogged with a neceſſity of giving ſuch notice, and making a demand on the original drawer. Now every inconvenience attending a foreign bill holds to a *great degree*, though not *equally* in reſpect to an inland bill, if a perſon ſhould be obliged perhaps in ſeveral remote parts of the kingdom to enquire after, and find out the drawer; and therefore in this caſe it was not neceſſary to prove any enquiry after, or demand upon, the original drawer, or any notice of the non-payment to him.

That what gave riſe to the ſeeming contrariety of opinions upon this point is the confuſed manner in which

caſes

caſes upon inland bills of exchange and promiſſory notes are reported and bleaded together. There is a ſtrong reſemblance between a promiſſory note indorſed, and an inland bill of exchange, and the law ſhould be ſettled on the analogy between them.—Whilſt a promiſſory note remains in its original ſtate without indorſement, it bears no reſemblance to an inland bill of exchange; but when it is indorſed to a third perſon the ſimilitude begins; for then the maker of the note is in the ſame ſituation with the drawer or acceptor of the bill of exchange; and the indorſee of either bill or note muſt demand the money from the acceptor of the bill, or maker of the note, before an action can be brought againſt the indorſor; that this was determined with reſpect to the maker of a note in the court of Common Pleas, as cited in *Strange* 1087; that where *Holt* ſaid in *Oakes*'s caſe, reported in *Ld. Raym.* 443, *that the indorſee muſt demand or endeavour to demand the money from the maker of the note before he can ſue the indorſor*; and added further, *The ſame law if the bill was drawn upon any other perſon payable to* C. *or order*; he does not mean that the demand muſt be firſt made on the drawer of the bill of exchange, before the indorſee can ſue the indorſor, but upon the perſon who is in the ſame ſituation with the drawer (or maker) of the promiſſory note, who is the real debtor, and this is the acceptor of the bill of exchange.

That this opinion of *Holt*, which, thus conſtrued, agreed with the preſent opinion of the court, was miſunderſtood in *Salk.* 127. (which is manifeſtly a wrong collection from *Holt*'s opinion in *Coke*'s caſe) where it is ſaid, that the indorſee of a bill of exchange muſt, in an action againſt the indorſor, prove *that he demanded the money from the drawer, or him upon whom it is drawn, and that he refuſed to pay it, or elſe that he ſought him and could not find him*; that there was the ſame miſtake in *Mod.* 244; and that the confuſed and ſhort notes taken of theſe and other caſes were the true occaſion of all the contrariety of opinions on this point.

And that upon the whole, in an action by the indorſee of an inland bill of exchange againſt the indorſor, he muſt prove a demand, or due diligence uſed to make it, upon the acceptor, or perſon upon whom the bill was drawn: and in an action by the indorſee of a promiſſory note againſt the indorſor, he muſt prove a demand made, or due diligence uſed to make it, from the maker of the note. In the King's Bench, *Michaelmas* term, 1758. *Heylins* and *Adamſon*.

If the indorſee of a bill accepts but two pence from the acceptor, he can never reſort to the drawer. *Ld. Raym.* 743. *Taſſel* and *Lee* v. *Lewis*.

A bill of exchange was drawn upon plaintiff at *Leghorn*, which he accepted: but by the law there, if a bill be accepted and the drawer fails, and the acceptor hath not ſufficient effects of the drawer in his hands at the time of the acceptance, the acceptance becomes void. And this happening to be the plaintiff's caſe, in order to diſcharge himſelf of this acceptance he inſtituted a ſuit at *Leghorn*, and his acceptance was thereupon vacated by a ſentence in that court. Afterwards the plaintiff returned to *England* and was ſued here at law upon this bill, and thereupon he exhibited his bill in the court of Chancery for an injunction and relief.

King, Lord Chancellor, was clearly of opinion, that this cauſe was to be determined according to the local laws of the place where the bill was negotiated: and the plaintiff's acceptance of the bill having been vacated, and declared void by a competent juriſdiction, he thought that ſentence was concluſive, and bound the court of Chancery here. And in this caſe a perpetual injunction was granted to enjoin the defendant from ſuing upon this bill. 22d of *November* 1720. 2 *Eq. Abr.* 524. *Stran.* 733. *Burrow* v. *Jemino*.

In an action by the indorſee of a bill of exchange againſt the acceptor, it was held not to be neceſſary to prove the hand of the drawer: and the plaintiff reſted on the proof of the acceptance. The defendant offered to prove it a forged bill by calling perſons who were acquainted with the hand of the drawer, and would ſwear they did not believe it to be his hand. But the Chief Juſtice would not admit this, from the danger to negotiable notes, and becauſe a man might with deſign write contrary to his uſual method. And he ſtrongly inclined, that even actual proof of forgery would not excuſe the defendant againſt his own acceptance, which had given the bill a credit with the indorſee. *Stran.* 946. *Jenys* v. *Fawler*.

Upon a caſe made at *niſi prius* before *Pratt*, Chief Juſtice, it appeared that the plaintiff had declared on an indorſement made by *William Abercrombie*, whereby he appointed the payment to be to *Louiſa Acheſon* or order; and upon producing the bill in evidence, it appeared to be payable to *Abercrombie* or order; but the indorſement was only in theſe words, "*Pray pay the contents to* Louiſa Acheſon:" and therefore it was objected, that the indorſement not being *to order*, did not agree with the plaintiff's declaration; but upon conſideration the whole court were of opinion it was well enough, that being the legal import of the indorſement, and that the plaintiff might upon this have indorſed it over to another, who would be the proper order of the firſt indorſor. Judgment for the plaintiff. *Stran.* 557. *Acheſon* v. *Fountain*.

Huſſey brought *aſſumpſit* againſt the defendant *Jacob*, upon his acceptance of a bill of exchange drawn upon him by the Lord *Chandos* according to the cuſtom of merchants. The defendant *Jacob* pleaded, that the Lord *Chandos* played at hazard with the plaintiff *Huſſey*, and loſt to him at one and the ſame time 150*l.* and that for payment and ſecurity of the ſaid ſum of 150*l.* loſt to the plaintiff, he drew this bill of exchange upon the defendant payable to the plaintiff, which the defendant accepted; and then he pleaded the ſtatute of gaming of 16 *Car.* 2. *cap.* 7. by which this bill of exchange, being given for ſecurity of the ſaid ſum gained at play, became void, *&c.* The plaintiff demurs: and Sir *Bartholomew Shower* for the plaintiff argued, 1ſt, That this was not within the ſtatute; for though he well agreed, that an action could not be maintained againſt the Lord *Chandos* himſelf for this money, by reaſon of this ſtatute; yet here a third perſon had made himſelf chargeable by his own collateral engagement, *viz.* by the acceptance of the bill, which ſeems to be out of the intent of the act; the *aſſumpſit* of the acceptor being altogether different from that of the drawer; for although the conſideration of the drawer was for money won at play, yet the conſideration of the acceptor was the honour of the drawer, or his effects in the hands of the acceptor: and the defendant has not pleaded, that the acceptance was *pro ſolutione et ſecuritate* of it. Beſides, that it would be of very ill conſequence to ſuffer the defendant to avoid his own bill and acceptance by this means; for a bill of exchange once accepted by a reſponſible man, is of ſuch credit among traders, that it paſſes as current as ready money, and is negotiated from one to another through all *Europe*, and exchanged upon valuable conſideration, till it comes back to *London*. But if the firſt acceptor ſhall be admitted to avoid it by the ſtatute of gaming, this will diminiſh the credit of bills of exchange, and will be a great check to merchandizing. But to this it was anſwered and reſolved by the court, That if a collateral engagement of a third perſon ſhall not be within the intent of the act, the act will be very eaſily evaded, and in effect rendered uſeleſs. And therefore all the court was of opinion, that if a man loſt money at gaming, *viz.* more than 100*l.* at one time. and he procures *J. S.* to be bound for the payment of it, or as the principal caſe is, gives a bill of exchange for the payment of it, which is accepted, both theſe ſecurities are void by the ſaid act. But if he who wins, being indebted to the ſtranger, procures him who loſes to bind himſelf to the ſtranger for the payment of the money due by him who wins to the ſtranger, in conſideration of a diſcharge of the money which he hath loſt at gaming, this bond which he makes to the ſtranger is not within the act, becauſe it is made for a juſt debt. So in this principal caſe, if the bill of exchange had been afterwards aſſigned for a valuable conſideration, the honeſty of this aſſignment had purged the original canker, and rendered it good enough. As where a fraudulent conveyance is aſſigned upon valuable conſideration, the fraud is purged. (But Sir *Bartholomew Shower*

Shower ſaid, that it was ſtrange, that the party by his aſſignment could make that good which was void *ab initio*.) But in this caſe at bar, the money loſt at play is the foundation of the whole, which is ill, and therefore the bill and the acceptance, which are the ſuperſtructure, are ill alſo. Note; This is called an acceptance for the honour of the drawer, when a ſtranger upon whom the bill was not drawn, in reſpect of the drawer, and having no effects of his in his hands, accepts it.

2. It was objected for the plaintiff, that the defendant has not brought himſelf within the ſtatute; for he has not alledged, that the Lord *Chandos* and the plaintiff played upon tick or credit, according to the words of the act, which is a penal law, and ought to be purſued ſtrictly; for ſuch gaming was not prohibited by the common law. *Sed non allocatur*; for *per curiam*, The giving of the bill of exchange makes it evident, that they did not play for ready money, but for credit.

3. It was objected, that the cuſtom, which was the ground of the action, is not anſwered by the plea. *Sed non allocatur*; for *per curiam*, It is confeſſed and avoided. It is admitted to be good generally, but not with this ingredient. And by *Holt* Chief Juſtice, though theſe declarations ſeem to be grounded upon cuſtom, yet this cuſtom is properly the common law. For the acceptance of the bill amounts to a promiſe in law to pay it, and this promiſe is grounded upon the conſideration of trade.

4. It was objected, that the defendant ſhould have pleaded the general iſſue, and given this matter in evidence; for the ſtatute ſays that ſuch contract ſhall be void; then nothing is due to the plaintiff, and conſequently the defendant ſhould have pleaded the general iſſue; for in effect this plea does but amount to it. *Sed non allocatur*; for *per curiam*, Where the defendant has ſpecial matter conſiſting not only of bare matter of fact, but intermixed with matter of law, which will avoid the charge or action of the plaintiff, he is not obliged to plead the general iſſue, but may plead it ſpecially; for otherwiſe he ſhould be obliged to commit a point of law to a jury who is ignorant of it, which would be abſurd; therefore in debt upon a bond made by a *feme coverte* while ſhe was *coverte de baron*, the defendant may plead the ſpecial matter, or *non eſt factum*, and give it in evidence. See 3 *Cro.* 871, 900. 4 *Co.* 13, 14. Lord *Cromwell*'s caſe, *Hob.* 127. *Poph.* 65. *Dyer* 121. So in this caſe the defendant might have pleaded the general iſſue, and have given this matter in evidence, or he might do as he has done, *viz.* plead it ſpecially. And therefore judgment was given by the whole court for the defendant.

Note; In this caſe, the caſe of one *Roſindale* lately adjudged was cited, where the caſe in effect was thus: *A.* covenanted with *B.* that the horſe of *A.* ſhould run with the horſe of *B.* four heats, for 30 *l.* each heat; and in covenant brought for the 120 *l.* having won every heat, the defendant pleaded the ſtatute of gaming: and upon demurrer it was objected, that this was not within the ſtatute; becauſe the running of each heat for 30 *l.* was a diſtinct and ſingle wager; and then being but for 30 *l.* the ſtatute did not extend to it, the ſum prohibited by the ſtatute being 100 *l.* or more. But it was adjudged that it was void for the whole; for it was but one intire and ſingle contract, though the horſes were to run four times, and then the ſum won amounting to 120 *l.* it was expreſly prohibited by the act. *S. C.* 3 *Keb.* 254, 259. *Ld. Raym.* 87. *Trin.* 8 *W.* 3. *Huſſey* and *Jacob.* 1 *Salk.* 344. *S. C.*

If *A.* draws a bill of exchange payable to *B.* for the uſe of *C.* and *B.* for a valuable conſideration, indorſes it over to *D.* *D.* may bring an action againſt *A.* the drawer; and he cannot plead that the money was extended in his hands at the ſuit of the King, for a debt due from *C.* for *C.* being only *ceſtui que truſt*, had only an equitable intereſt, and no legal remedy for the money; and *B.* is only reſponſible in equity to *C.* for the breach of truſt. 3 *New Abr. Law* 608. *Carth.* 5. *Skin.* 264. 1 *Show.* 5. *S. C.* *Evans* v. *Cramlington*. Adjudged and affirmed in the *Exchequer-Chamber*. 2 *Vin.* 309. *S. C.* Adjudged, it appearing that the bill was indorſed before any ſeizure or writ of extent iſſued out; and an indorſement on ſuch a bill was good by the cuſtom of merchants.

A. gave *B.* a bill of exchange for value received; *B.* aſſigns it to *C.* for an honeſt debt; *C.* brings an *indebitatus aſſumpſit* on this bill againſt *A.* and had judgment; on which *A.* brings his bill to be relieved in equity againſt this judgment; becauſe there was really no value received at the giving this bill, and *C.* would have no prejudice, who might ſtill reſort to *B.* upon his original debt: it was anſwered, that *A.* might be relieved againſt *B.* or any claiming as factor or ſervant of or to the uſe of *B.* But the Chancellor held, that *C.* being an honeſt creditor, and coming by this bill fairly for the ſatisfaction of a juſt debt, he would not relieve againſt him; becauſe it would tend to deſtroy trade, which is carried on every where by bills of exchange, and he would not leſſen an honeſt creditor's ſecurity. *Comyns* 28. *Anon'*.

In action brought upon a bill of exchange made payable to the order of the plaintiff, the declaration ſet forth, that the defendant by his acceptance became liable to pay the plaintiff *ſecundum conſuetudinem mercatorum*. Upon this declaration there is a demurrer.

It was argued for the defendant, that the plaintiff had only an authority to indorſe the bill, and then the indorſee might maintain an action; but that the plaintiff was not intitled to receive the money. It was compared to the caſe of a deviſe, that executors ſhall ſell land, where the executors have only an authority to ſell, but no intereſt; and therefore immediately upon ſale, the vendee is in, not from the executors, but under the will.

On the other ſide it was ſaid, that if this was law, multitude of bills of exchange would be overthrown; that by the cuſtom of merchants there is no difference between payable to the order of ſuch a one, and payable to ſuch a one or order; and that the cuſtom is confeſſed by the demurrer; that the ſame ſtrictneſs and nicety are not required in the penning of bills current between merchant and merchant, as in deeds, wills, *&c.* *Court*: Even in caſe of land, a grant or deviſe of the profits of land carries the land: order implies property; no difference between having a power to diſpoſe of money, and having the money itſelf. What is an order, but an authority to appoint the payment of it; which the plaintiff here does to himſelf. Judgment for the plaintiff. *Lucas* 286. ——— v. *Ormſton*, *B. R.* 1 *Geo.* 1.

A. drew a bill of exchange upon *B.* payable to *C.* then *B.* accepts the bill; *C.* indorſes it to *D.* now by this indorſement by *C.* to *D.* *B.* is diſcharged of any payment as to *C.* and if *D.* indorſes it over to *E.* then *B.* is diſcharged of any payment to *D.* but if *D.* pays the money to *E.* then *D.* by this payment becomes again intitled to receive the money of *B.* and at ſuch time no other, whether *E.* or *C.* is intitled to bring any action againſt *B.* but *D.* only. So if *C.* pays the money to *D.* then *B.* is diſcharged, but *C.* becomes really intitled, and *B.* is again intitled as to him, but diſcharged againſt *D.* and *E.* See *Lutw.* 885. *b.* 888. *b.* 1 *Jac.* 2. *in Cam. Scacc.* *Death* v. *Serwonters*. *Vin. Abr.* tit. *Bills of Exchange* (H. 1.)

6. *Of the action and remedy on a bill of exchange; and the manner of declaring and pleading thereon.*

It ſeems agreed, that againſt the drawer an action of *debt*, or a general *indebitatus aſſumpſit* will lie; for he having received the money, the law raiſes a contract, and lays him under an obligation to pay it; but it hath been adjudged, that neither an action of debt, nor an *indebitatus aſſumpſit* will lie againſt the acceptor of a bill of exchange, and therefore the remedy againſt him muſt be by a ſpecial action on the caſe founded on the cuſtom of merchants; for the acceptance is only a collateral engagement to pay the debt for another, in the ſame manner as a promiſe by a ſtranger to pay, *&c.* if the creditor will forbear his debt. 3 *New Abr. Law* 614. *Hard.* 485. *Hill* 20 *&* 21 *Car.* in the *Exchequer*, *Anon'*. But ſeems, ſays Mr. *Viner*, to be *Milton*'s caſe. *S. C.* cited by *Rainsford* J. as *Milton*'s caſe lately adjudged in the *Exchequer*, and ſays, that tho' *Hale* Ch. B. ſaid it were well if the law were otherwiſe, yet we all agreed, that a bill of exchange accepted, *&c.* was indeed a ground for a ſpecial action upon the caſe,

but that it did not make a debt; firſt, becauſe the acceptance is only conditional on both ſides. If the money be not received, it returns back upon the drawer, and he remains liable ſtill, and this is only collateral. 2dly, Becauſe *onerabilis* does not imply debt. 3dly, Becauſe the caſe is *primæ impreſſionis*, and there is no precedent for it. 1 *Mod.* 286. *Trin.* 22 *Car.* 2. *B. R.* in the caſe of *Brown* v. *London*.

In caſe the plaintiff declared upon the cuſtom of merchants, and that *T. S.* drew a bill of exchange upon the defendant to pay to the plaintiff, which he accepted, and has not paid, and likewiſe upon an *indebitatus*, for that the defendant had accepted it; it was inſiſted in arreſt of judgment, that an *indebitatus aſſumpſit* would not lie, but an action on the caſe only; and of that opinion were *Hale* and *Rainsford*, who ſaid it was ſo adjudged in the *Exchequer* ſince the king's reſtoration; and ſo judgment was ſtayed, *hæſitante Twiſden*; for he conceived that the cuſtom made it a debt by him that accepted the bill. *Vent.* 152. *Mich.* 25 *Car.* 2. *Brown* v. *London*.——*Freem. Rep.* 14. *pl.* 13. *S. C.* accordingly.—2 *Lutw.* 1594. In the caſe of *Bellaſyſe* v. *Heſter*, it was ſaid by *Powell* J. that an *indebitatus aſſumpſit* does not lie upon a bill of exchange; and the reporter obſerves, that at this time it was not denied by the other juſtices; and cites the caſe of *Brown* v. *London*, wherein judgment in like caſe was arreſted after verdict, as reported by *Lev.* 298. and ſays it has been adjudged after verdict, that action of debt does not lie upon a bill of exchange, and cites *Hard.* 485.

But tho' a general *indebitatus aſſumpſit* will not lie againſt the acceptor of a bill of exchange, yet if *A.* delivers money to *B.* to pay over to *C.* and give *C.* a bill of exchange drawn upon *B.* and *B.* accepts it, *C.* may have an *indebitatus aſſumpſit* againſt *B.* as having received money to his uſe, but muſt not declare only upon the bill of exchange accepted. 3 *New Abr. Law* 614. 1 *Vin.* 153. 1 *Rol. Abr.* 32.

As to the manner of declaring on a bill of exchange, this is ſaid to have varied; the declaration in ſome caſes being general, ſometimes ſpecial, and laid with an expreſs promiſe, and at other times without it: but it ſeems to be now ſettled, that the cuſtom of merchants concerning bills of exchange being part of the common law, of which the judges will take notice *ex officio*, it is unneceſſary to ſet forth the cuſtom ſpecially in the declaration, and that it is ſufficient to ſay, that ſuch a perſon, according to the uſage and cuſtom of merchants, draw the bill. 3 *New Abr. Law* 4. *Co. Lit.* 182. 2 *Inſt.* 404. *Yelv.* 136. 4 *Co.* 76. *Cro. Car.* 301. *Hard.* 486. 1 *Salk.* 125, 127. *Lutw.* 233. *Carth.* 83, 269. 5 *Mod.* 367. 1 *Show.* 127. 3 *Mod.* 226. *Ld. Raym.* 1542.

In caſe upon a bill of exchange againſt the acceptor, it was alledged generally *quod acceptavit*: and on demurrer to the declaration, exception was taken, that by 3 *Annæ*, *c.* 9. the acceptance muſt be in writing, and therefore this ought to be alledged to be ſo. *Sed per curiam*, *Acceptavit* is enough, and, if writing is neceſſary, it will be implied. Beſides, the writing required by the ſtatute is only in order to make the drawer liable to damages and coſts. The plaintiff muſt have judgment. *Stran.* 817. *Erſkine* v. *Muray*.

As by the cuſtom of merchants public notaries uſually proteſt bills, it hath been held, that pleading *proteſtavit ſeu proteſtari cauſavit*, is ſufficient; and that the party may plead *proteſtavit*, and give in evidence that the notary public did it. 3 *New Abr.* 613. *Cumb.* 153.

If the drawee be dead, or cannot be found to accept a bill, theſe are good cauſes of proteſting it; and alledging in pleading, that the party on whom the bill was drawn *non fuit inventus*, is ſufficient, without ſhewing inquiry was made after him. *Carth.* 510.

If a bill of exchange be drawn at uſance, it muſt be averred what this uſance is; otherwiſe the court will not take notice of it. 1 *Salk.* 131. *Buckley* v. *Cambell*.

Debt againſt a merchant upon a bill by him payable at the feaſt of the purification called *Candlemas-day*; and after judgment for the plaintiff, it was moved in arreſt thereof, becauſe payment at *Candlemas* is not known in our law: but judgment was affirmed; for that amongſt merchants ſuch payment is known to be on the 2d of *February*; and the judges ought to take notice thereof for the maintenance of traffic. *Vin. Abr.* tit. *Bill of Exchange*, &c. (A.) 1 *Yelv.* 135. *Mich.* 6 *Jac. B. R. Pierſon* v. *Pounteys*. *Note*; It ſeems by this caſe it is not neceſſary to aver in the declaration that *Candlemas-day* was the 2d of *February*.

In an action upon the caſe upon a bill of exchange, the plaintiff in his declaration declared upon a bill of exchange, and that he offered it to the perſon on whom it was drawn, and he refuſed it, *per quod* the firſt drawer *devenit onerabilis per conſuetudinem*, &c. And there was an *indebitatus aſſumpſit*, and a *quantum meruit*, in the declaration. Judgment by default, and a writ of inquiry of damages given. And now it was moved in arreſt of judgment, that as the matter ſtood upon the firſt count, this action was founded upon a deceit, the bill not being paid according to the warranty, every one who draws a bill warranting the payment thereof; and therefore being in the nature of an action for a deceit, which is a *tort*, it cannot be joined with an *aſſumpſit*, which is founded upon a contract; and therefore, for want of laying an expreſs promiſe, it was ill, intire damages being given. *Northey* ſaid, That the action was founded upon the cuſtom, and that the obligation aroſe by that, and therefore the action is maintainable without ſhewing a promiſe. *Cro. Car.* 302. A declaration upon a bill of exchange without ſhewing any promiſe; and the bill is ſo. 2. This founds all in contract; for the cuſtom raiſes a promiſe in law, that the drawer will pay the money if the perſon upon whom it was drawn refuſes to pay it. And 2 *Cro.* 307. ſays, that if a merchant accepts a bill, it has by the cuſtom the force of a promiſe to compel him to pay the money. *Holt* Chief Juſtice, at the beginning ſeemed to agree with the objection, and ſaid, that he who draws the bill warrants the payment of it, and, if he does not, it is a deceit, and one may have an action upon it; but then they ought not to join it with an action upon a promiſe. That is the caſe of Sir *John Dalſton* and *Johnſon*, *Mich.* 7 *W. B. R. Raym.* 58. In the time of 2 *Cro.* they were not arrived at this way of declaring upon bills of exchange. *Gould* Juſtice cited 1 *Sid.* 306. that if a man brings *aſſumpſit* for the arrears of an account, where the action formed is debt, he ought to lay an expreſs promiſe to maintain the action. *Holt* ſaid, that the notion of promiſes in law was a metaphyſical notion; for the law makes no promiſe but where there is a promiſe in the party. Afterwards in this term judgment was given for the plaintiff, becauſe the drawing of the bill was an actual promiſe. *Ld. Raym.* 538. *Strake* v. *Cheeſman*. *S. C.* 1 *Salk.* 128. *Carth.* 509.

Aſſumpſit for 40 *l.* the plaintiff declares upon a bill of exchange for 20 *l.* payable ten days after ſight, and that the bill was ſeen by the defendant, and accepted the 5th of *May*; and then he ſhews another *aſſumpſit* for the other 20 *l.* &c. The defendant craves *oyer* of the original, and upon that prays, that the writ may abate *quoad primam promiſſionem*, becauſe the original bears *teſte* the 15th of *May*, and the bill was not payable until ten days after ſight; & *quoad alteram promiſſionem*, he pleads in bar without defence. The plaintiff demurs. It was argued by the defendant's counſel, that if the bill be payable ten days after ſight, the day of ſight ſhall be taken excluſive, as well by reaſon of the word *poſt*, as becauſe it is always ſo underſtood among merchants. But the court was of opinion, 1ſt, That in real actions the writ may abate in part, but in perſonal actions a writ cannot abate in part: therefore, admitting that the day is excluded here, the writ muſt abate for the whole, or not at all. 2dly, That there is no fraction of a day in this caſe; for the law will never account by minutes or hours to make priorities in a ſingle day, unleſs it be to prevent a great misfortune or inconvenience; as if a bond be made the firſt day of *January*, and this bond is releaſed the ſame day, the bond may be averred to be made before the releaſe. So if a *feme ſole* bind herſelf in a bond, and the

ſame

ſame day marries, one may aver that ſhe married after the bond delivered. In *aſſize* it appears, that the diſſeiſin was done the ſame day on which the writ was *teſted*; yet this ſhall not abate the writ, becauſe the aſſize might be purchaſed after the diſſeiſin. 3dly, That if there is a cuſtom among merchants, that the day of the ſight ſhall be excluded, it ought to have been pleaded ſpecially; for it is a ſpecial cuſtom of which the court cannot take notice without pleading. And *Powell* Juſtice ſaid, that the court would take notice of the *lex mercatoria*, as that there is no ſurvivorſhip, or of a general cuſtom, as gavel-kind; but that ſuch ſpecial cuſtom as this here ought to be pleaded. As in action upon a bill of exchange, unleſs the plaintiff declares upon a cuſtom to ſupport the action according to the common form, the action will not be maintainable. 4thly, *Powell* and *Nevill*, Juſtices, were of opinion, that the day on which the bill was ſhewn be reckoned one of the ten: for according to *Clayton*'s caſe (5 *Co.* 1. 2 *Vin.* 308, 310.) and all the books, when the computation is to be made from an act done, the day on which the act was done muſt be included; becauſe ſince there is no fraction in a day, that act relates to the firſt moment of the day in which it was done, and was as it were then done. But when the computation is to be from the day itſelf, and not from an act done, there the day on which the act was done muſt be excluded by the expreſs words of the parties. As if a leaſe be made to commence *a die datus*, the day is excluded; but if it be *a confectione*, which is an act done, the day of the making ſhall be included. But *Treby* Chief Juſtice *contra* held, that if a bill be payable ten days after ſight, the day of ſight cannot be accounted one of the ten days, but ſhall be excluded. 1. Becauſe it may be ſeen the laſt minute of the day, and that may be intended as reaſonably, as that it was ſeen the firſt minute. 2. The party may have the whole day to view the bill, and that is allowed him by the law. 3. Becauſe the contrary conſtruction ſeems abſurd; for then if a bill be payable one day after ſight, it muſt be paid the ſame day that it is ſeen, which is not the day after the ſight, as the bill requires. As to *Clayton*'s caſe, he admitted that it was good law, but not contrary to his opinion; for if a man makes a leaſe the firſt of *January*, to have and to hold *a confectione* for a year; there the day of the making muſt be accounted one, becauſe being a leaſe from the delivery, and to continue but for one year; unleſs the day be included, the leaſe will not determine until the end of the firſt of *January* the next year, and ſo there will be two firſt days of *January* in one year. But notwithſtanding his opinion, becauſe his brothers were of a contrary opinion, he ordered that the defendant ſhould anſwer over.

Note; Before this opinion of the court was pronounced, the defendant's counſel offered to take exceptions to the declaration, but the court refuſed to admit them; for *per curiam*, upon a plea to the writ, the defendant cannot take exceptions to the count before the writ be adjudged good; for then the defendant has time enough to take advantage of the declaration, and before it is needleſs, becauſe if the writ be abated, that will determine the whole. After that it was objected, that the defendant had not made defence; and the queſtion was, if this was matter of form, and ſo aided by the general demurrer. And *prima facie* the court was of opinion this was matter of ſubſtance; becauſe the defendant is no party to the action without defence. But after having conſulted the judges of the King's Bench, where it has been a long time held matter of form, they agreed that it was aided by the general demurrer; tho' at the ſame time they ſeemed to comply with that opinion, rather than to approve it with their own judgments, to the end that there might be a conformity between the two courts. *Ld. Raym.* 280. in *C. B.* 9 *W.* 3. *Bellaſis* and *Heſter*. *S. C. Lutw.* 1589.

The plaintiff brought an action upon the caſe upon a bill of exchange againſt the defendant, and declared upon the cuſtom of merchants, which he ſhewed to be thus: That if any merchant ſubſcribes a bill, by which he promiſes to pay a ſum of money to another man or his order, and afterwards the perſon to whom the bill was made payable indorſes the ſaid bill for the payment of the whole ſum therein contained, or any part thereof, to another man, the firſt drawer is obliged to pay the ſum ſo indorſed to the perſon to whom it is indorſed payable; and then the plaintiff ſhews, that the defendant *Cardy*, being a merchant, ſubſcribed a bill of 46*l.* 19*s.* payable to *Blackman* or his order; that *Blackman* indorſed 43*l.* 4*s.* of it payable to the plaintiff, *&c.* the defendant pleaded an inſufficient plea. The plaintiff demurred, and the defendant joined in demurrer; and adjudged *per totam curiam*, that the declaration is ill: for a man cannot apportion ſuch perſonal contract; becauſe he cannot make a man liable to two actions, where by the contract he is liable but to one. As if *A.* granted a rent-charge of 20*l.* *per annum* to *B. B.* grants 10*l.* to *C. C.* cannot compel the ter-tenant to attorn. So if lands are conveyed with warranty to *A.* and *B.* their heirs and aſſigns, if partition be made, the warranty is extinct. See *Hob.* 25. but if in the principal caſe plaintiff had acknowledged the receipt of 3*l.* 15*s.* the declaration had been good. And though it was objected by Mr. *Northey* for the plaintiff, that the plaintiff has made payment of a part to be a part of the cuſtom, and therefore it was well enough by the cuſtom. *Holt* Chief Juſtice anſwered, that this is not a particular local cuſtom, but the common cuſtom of merchants, of which the law takes notice; and therefore the court cannot take the cuſtom to be ſo. And the whole court were of opinion, that judgment ought to be entered for the defendant. But, upon the importunity of Mr. *Northey*, leave was given to the plaintiff to diſcontinue upon payment of coſts. *Ld. Raym.* 360. *Hawkins* v. *Cardy*.

7. *Of bills loſt, forged, and ſtolen.*

A bill of exchange was accepted by the drawee, by underwriting his name; but the perſon to whom it become payable by indorſement loſt or miſlaid it, and the drawee refuſing payment, the indorſee exhibited his bill in Chancery, ſetting forth the refuſal, and that he offered to give ſecurity to the defendant to indemnify him, and annexed an affidavit to the bill of the loſing or miſlaying it. This being confeſſed by the anſwer, it was objected, that it did not appear by the plaintiff's affidavit, that he had not aſſigned the bill to another; but decreed the defendant to pay the money, the plaintiff giving ſecurity to indemnify the defendant, as the maſter ſhall think reaſonable, againſt any perſon that may hereafter demand the ſame. *Fin.* 301. *Ferceaſe* v. *Gray*.

By ſtat. 9 & 10 *Will.* 3. *c.* 17. *ſect.* 3. it is enacted, "That if any inland bill of exchange for 5*l.* or upwards, for value received, drawn payable at a certain number of days, *&c.* after the date thereof, be loſt, or miſcarry within the time limited for the payment of the ſame, the drawer of the ſaid bills ſhall give other bills of the ſame tenor, ſecurity being given (if demanded) to indemnify him, in caſe the ſaid bills ſo loſt or miſcarried be found again."

By ſtat. 2 *Geo.* 2. *c.* 25. *ſect.* 1. (made perpetual by 9 *Geo.* 2. *c.* 9.) it is enacted, "That if any perſon ſhall falſly make, forge, or counterfeit, or cauſe or procure to be falſly made, *&c.* or willingly act or aſſiſt in the falſe making, *&c.* any bill of exchange, with intention to defraud any perſon whatſoever, or ſhall utter or publiſh as true any falſe, *&c.* bill of exchange, with intention to defraud any perſon, knowing the ſame to be falſe, *&c.* ſuch perſon ſhall be guilty of felony, without benefit of clergy."

Sect. 3. "If any perſon ſhall ſteal or take by robbery any bills of exchange, being the property of any other perſon or perſons, or of any corporation, notwithſtanding they are deemed in law *choſes* in action, it ſhall be deemed and conſtrued to be felony of the ſame degree, and with or without the benefit of clergy, in the ſame manner as it would have been, if the offender had ſtolen or taken by robbery any other goods of like value with the money due on ſuch bills, or ſecured thereby, and remaining unſatisfied; and ſuch offender ſhall ſuffer ſuch puniſhment

puniſhment as he or ſhe ſhould or might have done, if he or ſhe had ſtolen other goods of the like value with the monies due on ſuch bills, or ſecured thereby, and remaining unſatisfied.

8. *Of the evidence neceſſary to ſupport the action on a bill of exchange, and the damages recovered for non-payment thereof.*

A. gives *B.* a bill of exchange on *C. in payment of a former debt*; this will not be allowed as evidence on *non aſſumpſit* unleſs paid, though *B.* kept it in his hands long after it was payable; for a bill ſhall never go in payment of a precedent debt, unleſs it be part of the contract that it ſhould be ſo. *Salk.* 124. *pl.* 1. *coram Holt.* Ch. J. at *Guildhall*, 3 *W.* and *M. Clark* v. *Mundel.*

An indorſor of a bill of exchange, who has paid it, muſt prove the payment in an action againſt the acceptor. *Ld. Raym.* 742, 743. *Mendez* v. *Careroon.*

Indorſee need not prove the drawer's hand, becauſe, though it be a *forged bill*, the indorſor is bound to pay it. 1 *Salk*, 127. *pl.* 9. *Paſch.* 11 *W.* 3. *coram Holt* at *Guildhall*, *Lambert* v. *Park.*

Plaintiff, to ſhew a proteſt, produced an inſtrument atteſted by a notary publick; and though it was inſiſted upon that he ſhould prove this inſtrument, or at leaſt give ſome account how he came by it, *Holt* ruled it not to be neceſſary; for that, he ſaid, would deſtroy commerce and publick tranſactions of this nature. 12 *Mod.* 345. *Mich.* 11 *W.* 3. at *niſi prius*, *coram Holt. Anon'.*

If a man has a bill of exchange, he may authorize another to indorſe his name upon it by parol; and when that is done, it is the ſame as if he had done it himſelf. *Per Holt* Ch. J. 12 *Mod.* 564. *Mich.* 13 *W.* 3. at *niſi prius. Anon.*'

Action on a bill of exchange, being by an executor, and upon a debt laid to be due to teſtator, he held it neceſſary to prove the acceptance was in the teſtator's time. *Per Holt* Ch. J. 12 *Mod.* 447. at *niſi prius*, *coram Holt*, *Paſch.* 13 *W.* 3. *Anon.*'

Plaintiff had a bill of exchange drawn on the defendant, which he indorſed and delivered to *J. S.* who went to the defendant to get it accepted. *J. S.* left it with him, and it was afterwards loſt; thereupon the plaintiff brought trover. The court were all of opinion, that the bare indorſement, without any other words purporting an aſſignment, does not make an alteration of the property; for it may ſtill be filled up either with a receipt or aſſignment, and conſequently *J. S.* is a good witneſs. *Salk.* 130. *pl.* 15. 2 *Ann. B. R. Lucas* v. *Haines.*

As to notice given by the indorſee to the acceptor before he commences his action, that he muſt provide the money, it was offered in evidence, that he gave him notice by ſending him a letter to do ſo. But the Chief Juſtice ſaid, that he did not think the bare ſending a letter to the poſt-houſe would be ſufficient evidence of notice, without ſome further proofs of the acceptor's receiving it; and beſides he ſaid, that generally a perſonal demand is expected. *Barnard. Rep. in B. R.* 199, 200. *Trin.* 2 *Geo.* 2. *Dale* v. *Lubeck.*

To prove an indorſement over a bill of exchange, it was offered that the defendant had himſelf confeſſed, that he was come to town to haſten on the trial of an action that was brought againſt him, upon an indorſement that he had made on a bill of exchange. And the counſel ſaid, that the very cauſe was brought down by proviſo; ſo that it is ſtrong evidence that it is for the ſame matter: and the Chief Juſtice at the ſittings at *Guildhall* allowed this to be good evidence of the indorſement. *Barnard. Rep. in B. R.* 199. *Trin.* 2 *Geo.* 2. *Dale* v. *Lubeck*

Intereſt on a bill of exchange commences from the time of the demand made; and therefore, if there was no demand made till action, the defendant may plead tender and refuſal, and *uncore priſt*, and ſo diſcharge himſelf of intereſt; but if it be the defendant's fault that the demand could not be made, as if he were out of the kingdom, there want of demand ought not to prejudice the plaintiff. *Per cur.* 6 *Mod.* 138. *Paſch.* 3 *Ann. B. R. Anon'.*

Drawee accepts the bill, and ſome time after it is proteſted for non-payment, and thereupon the bill is indorſed to the drawer, who brought an action as indorſee, and held well, and intereſt was ruled to be paid *from the time of the proteſt.* 10 *Mod.* 36. *Trin.* 10 *Annæ*, *B. R. Louviere* and *Lanbray.*

Since the ſtatute 3 & 4 *Annæ*, *cap.* 9. it hath been adjudged, That an indorſee of an inland bill of exchange may maintain an action againſt the acceptor, on a parol acceptance, as to the principal ſum, though not as to intereſt and coſts; for the act being made to give a further remedy for intereſt, damages, and coſts againſt the drawer, cannot be ſuppoſed to take any advantage from the payee which he had before; and therefore the true conſtruction of the act is, that to charge the drawer with intereſt and coſts, the drawee muſt refuſe to accept it in writing; nevertheleſs, if he accepts the bill by parol, he is liable to the principal ſum in the bill, as he would have been before the act. 3 *New Abr. Law*, 611. cites *Mich.* 8. *Geo.* 2. *B. R. Lumley* v. *Palmer.*

For more matter under the ſeveral diviſions of this title, ſee **Law of bills of exchange**, &c. See title **Notes.**

Bill of lading, Is a memorandum ſigned by maſters of ſhips, acknowledging the receipt of the merchants goods, *&c. Jacob.*

Bill of ſale, Is a ſolemn contract under ſeal, whereby a man paſſes the right or intereſt that he has in goods and chattels; for if a man promiſes or gives any chattels without valuable conſideration, or without delivering poſſeſſion, this alters no property, becauſe it is *nudum pactum unde non oritur actio*; but if a man ſells goods by deed under ſeal duly executed, this alters the property between the parties, tho' there be no conſideration, or no delivery of poſſeſſion, becauſe a man is eſtopped to deny his own deed, or affirm any thing contrary to the manifeſt ſolemnity of contracting. *Yelv.* 196. *Cro. Jac.* 270. 1 *Brown* 111. 6 *Co.* 18.

But what is chiefly to be conſidered under this head, is the ſtatute of 13 *Eliz. cap.* 5. by which it is enacted, "That all fraudulent conveyances of lands, *&c.* goods and chattels, to avoid the debt or duty of another, ſhall (as againſt the party only, whoſe debt or duty is ſo endeavoured to be avoided) be utterly void, except grants made *bona fide*, and on a *good* (which is conſtrued a *valuable*) *conſideration.*" And by the latter clauſe of that ſtatute it is provided, That all parties to ſuch fraudulent conveyance, who being privy thereunto, ſhall wittingly juſtify the ſame to be done *bona fide* and on good conſideration, or ſhall alien or aſſign any lands, leaſe, or goods ſo to them conveyed as aforeſaid, ſhall forfeit one year's value of the lands, leaſe, rent, common, or other profit out of the ſame, and the whole value of the goods; and being thereof convicted ſhall ſuffer half a year's impriſonment without bail; the forfeiture to be divided between the Queen and the party grieved.

For the explanation of this ſtatute, it is thought proper to inſert the following caſes.

A. being indebted to *B.* in 400 *l.* and to *C.* in 20 *l. C.* brings debt againſt him, and hanging the writ, *A* being poſſeſſed of goods and chattels to the value of 300 *l.* makes a ſecret conveyance of them all, without exception, to *B.* in ſatisfaction of his debt; but notwithſtanding continues in poſſeſſion of them, and ſells ſome of them, and others of them, being ſheep, he ſets his mark on; and reſolved that it was a fraudulent gift and ſale within the aforeſaid ſtatute, and ſhall not prevent *C.* of his execution for his juſt debt; for though ſuch ſale hath one of the qualifications required by the ſtatute, being made to a creditor for his juſt debt, and conſequently on a valuable conſideration, yet it wants the other; for the owner's continuing in poſſeſſion is a fixed and undoubted character of a fraudulent conveyance, becauſe the poſſeſſion is the only *indicium* of the property of a chattel, and therefore this ſale is not made *bona fide.* 3 *Co.* 80. *Mo.* 638. 2 *Bulſt.* 226.

Upon

Upon the ſame reaſons the following caſe turns: *A.* is indebted to five ſeveral perſons in the ſums of 20*l.* each and having goods to the value of 20*l.* makes a gift of them to one of the five, in ſatisfaction of his debt, but upon this ſecret truſt between them, that the grantee, in compaſſion to his circumſtances, ſhould deal favourably with him, in permitting him, or ſome other for him, to uſe and poſſeſs the ſaid goods, paying this creditor as he was able, and could afford it, the ſaid debt of 20*l.* and reſolved to be a fraudulent conveyance and deed of ſale. 3 *Co.* 81. *Mo.* 639.

So in that caſe, if *A.* makes a bill of ſale of all his goods, in conſideration of blood and natural affection, to his ſon, or one of his relations, it is a void conveyance in reſpect of creditors; for the conſiderations of blood, *&c.* which are made the motives of this gift, are eſteemed in their nature inferior to valuable conſiderations, which are neceſſarily required in ſuch ſales, by 13 *Eliz. cap.* 5. and this is a conſtruction ſuitable to the ſtricteſt rules of equity; for if conſideration of blood and natural affection were allowed to be of equal dignity with, or to come under the notion of, valuable conſiderations required by this ſtatute, then it would be in the power of any debtor, by ſuch conveyances of his perſonal eſtate to his kindred, to defeat creditors of their juſt debts; moreover, there is a ſtrong preſumption that ſuch ſales to relations are conſtantly attended with a ſecret truſt and perſonal confidence of reconveying part of the goods to the vendor for his ſubſiſtence; ſo that they are intirely inconſiſtent with the ſcheme laid down by the ſtatute; and therefore void and illegal. 2 *Rol. Abr.* 779. 3 *Co.* 81, *Palm.* 214.

A. poſſeſſed of divers goods to the value of 250*l.* by covin to defraud his creditors, made a gift thereof to his daughter, on condition to be void on payment of 20*s.* Adjudged that it was apparently a fraudulent conveyance, and void. *Cro. Eliz.* 810.

As the owner's continuing in poſſeſſion of his goods after his bill of ſale of them is an undoubted badge of a fraudulent conveyance, becauſe the poſſeſſion is the only *indicium* of the property of a chattel, which is a thing unfixed and tranſitory; ſo there are other marks and characters of fraud; as a general conveyance of them all without any exception; for it is hardly to be preſumed, that a man will ſtrip himſelf intirely of all his perſonal property, not excepting his bedding and wearing apparel, unleſs there was ſome ſecret correſpondence and good underſtanding ſettled between him and the vendee, for a private occupancy of all or ſome part of the goods for his ſupport; alſo a ſecret manner of tranſacting ſuch bill of ſale, and unuſual clauſes in it; as that it is made honeſtly, truly, and *bona fide*, are marks of fraud and colluſion; for ſuch an artful and forced dreſs and appearance give a ſuſpicion and jealouſy of ſome defect varniſhed over with it. 3 *Co.* 81. *Mo.* 633.

If goods continue in the poſſeſſion of the vendor after a bill of ſale of them, though there is a clauſe in the bill that they ſhall account annually with the vendee for them, yet it is a fraud; ſince if ſuch colouring were admitted, it would be the eaſieſt thing in the world to avoid the proviſions and caution of the aforeſaid act. *Mo.* 638.

A. by bill of ſale made over his goods to a truſtee, for *B.* who lived with him as his wife and was ſo reputed, and he alſo purchaſed a leaſe of the houſe wherein he dwelt, in the name of a truſtee, and declared the truſt thereof to himſelf for life, then in truſt for *B.* during the reſidue of the term; and this bill of ſale was held fraudulent as to creditors; but as to the declaration of the truſt of the term, the court held it good, and not liable to *A.*'s debts, the term being never in him, and being ſo ſettled at the time it was purchaſed, and *A.* might have given the money to *B.* who might have purchaſed it for herſelf, and in her own name. 2 *Vern.* 490.

If *A.* makes a bill of ſale to *B.* a creditor, and afterwards to *C.* another creditor, and delivers poſſeſſion at the time of the ſale to neither; afterwards *C.* gets poſſeſſion of them, and *B.* takes them out of his poſſeſſion, *C.* cannot maintain treſpaſs, becauſe the firſt bill of ſale is fraudulent againſt creditors, and ſo is the ſecond, yet they both bind *A.* and *B.*'s is the elder title, and the naked poſſeſſion of *C.* ought not to prevail againſt the title of *B.* that is prior, where both are equally creditors, and poſſeſſion at the time of the bill of ſale is delivered over to neither. *Abr. Eq.* 148.

Fraud may be given in evidence to defeat a fraudulent and covinous conveyance, and the party that offers it need not plead it; for the acts to prevent fraud are to be conſtrued literally in ſuppreſſion of the miſchief; beſides, it were a hardſhip to force the party to plead a thing that is managed with ſo much ſubtilty, that he cannot attain a competent knowledge of it to plead it in due time. 5 *Co.* 60.

A man takes a wife, and afterwards marries another, his firſt wife living, and by deed gave part of his goods to his pretended ſecond wife; it ſeems this is a fraudulent gift within 13 *Eliz.* and by the Common law too, in reſpect of creditors, becauſe made without any valuable conſideration; for the ſecond pretended marriage is ſo far from coming under the notion of a conſideration, that it is a crime puniſhable by law. 2 *Leon.* 223.

Where there is an abſolute conveyance or gift of a leaſe for years, and the perſon who makes it continues in poſſeſſion after ſuch ſale, the gift is fraudulent, becauſe attended with that diſtinguiſhing character of a fraud; but if the conveyance or ſale be conditional, as that upon payment of ſo much money the leaſe ſhall go to the vendee, there continuance in poſſeſſion after the gift does not make it fraudulent, becauſe the vendee is not to have the leaſe in poſſeſſion till he performs the condition. 2 *Bulſt.* 226.

A. has a leaſe of certain lands for ſixty years abſolutely, and by indenture reciting this forged leaſe, bargains and ſells it for a valuable conſideration, together with all his intereſt in the land to *B.* in this caſe *B.* is not a purchaſer within 27 *Eliz. cap.* 4. for though there were general words in the ſale to paſs the true intereſt, yet it is plain, that it was never contracted for, or originally included in the bargain; ſo that the bargain being made of an imaginary intereſt, the bargainee can never come under the character of a real purchaſer, to defeat the purchaſer of the true leaſe of ſixty years which *A.* was really poſſeſſed of. *Co. Lit.* 3.

Bill of Stone, Is a kind of licence granted at the cuſtom-houſe to merchants, to carry ſuch ſtores and proviſions as are neceſſary for their voyage, cuſtom free.

Bill of Sufferance, Is a licence granted at the cuſtom-houſe to a merchant, to ſuffer him to trade from one *Engliſh* port to another, without paying cuſtom. *Stat.* 14 *Car.* 2. *c.* 11.

Billets of Gold, Are wedges or ingots of gold: the word is derived from the French *billot*, *maſſa auri.* Stat. 27 Ed. 3. ſtat. 2. cap. 14.

Billet-wood, Is ſmall wood for fuel, which muſt be three feet and four inches long, and ſeven inches and a half in compaſs, *&c.* Juſtices of peace ſhall inquire by the oaths of ſix men of the aſſiſe of *billet*, and being under ſize, it is to be forfeited to the poor. *Stat.* 43 *Eliz.* 9 *Ann. c.* 15. See **Fuel.**

Billingſgate market to be kept every day, and toll is appointed by ſtatute: all perſons buying fiſh in this market may ſell the ſame in any other market by retail; but none but fiſhmongers ſhall ſell in ſhops. If any perſon ſhall buy any quantity of fiſh at *Billingſgate* for others, or any fiſhmonger ſhall ingroſs the market, they incur a penalty of 20*l.* And fiſh imported by foreigners ſhall be forfeited, and the veſſels, *&c.* 10 & 11 *Will.* 3. *c.* 24. See **Fiſh** and **Fiſhermen.**

Billot, *Billo*, *Billonis*, Bullion of gold or ſilver in the maſs before it is coined.—*Volumus quod utrumque argentum* billonis, *& tranſmarinum ematur ad libram Scaccarii, retentis ad opus noſtrum pro cuſtubus & expenſis, & firma noſtra, ſexdecim denariis de argento de gandavo.* Mem. in Scaccar. term. Mich. 9 Ed. 1. by Sir *John Maynard.* Cowell, edit. 1727.

Billus, A ſtick or ſtaff, which in former times was the only weapon for ſervants. *Leg. H.* 1. *cap.* 70. *Si liber ſervum occidat, reddat parentibus* 42 *muſlas, et unum* billum *mutilatum domino ſervi pro manbota*; and *cap.* 78. *Si quis in ſervum tranſeat, in ſignum hujus tranſitionis* billum *vel ſtrublum, vel deinceps ad hunc modum ſervitutis arma ſuſcipiat, & in manum domini mittat.* Cowell, edit. 1727.

Bind of eels. See **Stick of eels.**

Binithenenden. This is enumerated among the privileges granted to the monaſtery of *Glaſtonbury*——*Soc & ſac, hordes*; boveneſden, & binithenenden, on *ſtrond* and on *ſtreme*. Cartular. Abbat. Glaſton. MS. f. 87. a. *Cowell, edit.* 1727.

Binnarium, *Binna, Benna,* A ſtew, or water penned up for feeding and preſerving fiſh.——*Expenſæ in piſce ad inſtaurandum* binnarium *empto* xii *s. vid.* Conſuetud. dom. de Farendon, MS. f. 29.——*Proviſum eſt quod nullus magnus vel parvus currat in parco alieno, aut piſcetur in alterius* binnario.——See ſtat. 3 Ed. 1. *Cowell, edit.* 1727.

Binny-pepper. *Stat.* 1 *Jac. cap.* 19.

Binovium, *Bincheſter. Cowell, edit.* 1727.

Biothanetus, One who deſerves to come to an untimely end: *ordericus vitalis,* writing of the death of *Will. Rufus,* who was ſhot by *Walter Tyrrel,* tells us, that the biſhops conſidering his wicked life and bad end, thought him *eccleſiaſtica veluti* biothanetum *abſolutione indignum.* Lib. 10 p. 782. *Cowell, edit.* 1727.

Bipertijorum. See **Jocum partire.**

Birlaw. See **Byrlaw.**

Birretus, The cap or coif of a judge or ſerjeant at law. The honourable uſe of it is thus deſcribed by *Forteſcue,* De Laud. Leg. Angl. cap. 50. *In ſignum quod omnes juſticiarii ibi taliter extant graduati, quilibet eorum ſemper utitur, dum in curia regis ſedet,* birreto *albo de ſerico, quod primum & præcipuum erat de inſignibus habitus quo ſervientes ad legem in eorum creatione decorantur. Nec* birretum *iſtud juſticiarius, ſicut nec ſerviens ad legem, unquam deponet, quo caput ſuum in toto diſcooperiet etiam in præſentia regis, &c.* Spelman. *Cowell, edit.* 1727.

Births, burials, and **marriages,** &c. By ſtatute, a duty was granted on *births* and *burials* of perſons, from 50*l.* a duke, *&c.* down to 10*s.* and 2*s.* And the like on *marriages*; alſo *bachelors* above 25 years of age were to pay 1*s.* yearly. Stat. 6 *&* 7 *Will.* 3. *c.* 6. By ſtat. 10 *Ann. c.* 26. *ſect.* 109. there is a penalty on erecting offices of inſurance of births and chriſtenings. For other matters, ſee title **Regiſter.**

Biſacuta, An iron weapon cutting on both ſides: *fecit eidem unam plegam mortalem de quadam* biſacuta. *Fleta, lib.* 1. *cap.* 33.

Biſaunt, (*Biſantin, beſant, bizantine, biſantius*) A piece of money coined by the *Weſtern* Emperors at *Biſantium* or *Conſtantinople,* of two ſorts, gold and ſilver, *bizantius aureus & albus*; both which were current in *England. Chaucer* repreſents the gold *beſantine* or *beſaunt,* to have been equivalent to a ducat. The ſilver *beſantine* was computed generally at two ſhillings. *Cowell, edit.* 1727.

Biſcot. 9 *Edw.* 3. At a ſeſſion of ſewers held at *Wigenhale* in *Norfolk,* it was decreed, That if any one in thoſe parts of *Marchland* ſhould not repair his proportion of the banks, ditches, and cauſeys, by a day aſſigned, 12*d.* for every perch unrepaired (which is called a *bilaw*) ſhould be levied upon him. And if he ſhould not by a ſecond day given him accompliſh the ſame, then he ſhould pay for every perch 2*s.* which is called *bi-ſcot. Hiſt. of imbanking and draining, fol.* 254. *a.*

Biſhop. Is derived from the Saxon *biſcop,* and that from the Greek επισκοπος, an overſeer or ſuperintendant; ſo called from that watchfulneſs, care, charge, and faithfulneſs, which by his place and dignity he hath and oweth to the church. *Godol.* 22.

Biſhops, *&c.* need not attend the ſheriff's turn, unleſs eſpecially required, 52 *H.* 3. *cap.* 10.

None ſhall eat or lodge at their houſes without their eave. *St. Weſtm* 1. 3 *Ed.* 1. *cap.* 1.

The order of preſenting and electing biſhops, *St. Weſtm.* 1. 3 *Ed.* 1. *cap.* 5. 9 *Ed.* 2. *c.* 14. 25 *Ed.* 3. *ſt.* 6. *ſect.* 3. 13 *Rich.* 2. *ſt.* 2. *cap.* 2. 25 *H.* 8. *cap.* 2. *ſect.* 4, *&c.*

The King ſhall have the eſcheats of their tenants lands for felony during a vacation, 17 *Ed.* 2. *c.* 14.

Their temporalties not to be ſeized without juſt cauſe, 1 *Ed.* 3. *ſt.* 2. *cap.* 2. 14 *Ed.* 3. *ſt.* 4. *c.* 3. 25 *Ed.* 3. *ſt.* 3. *cap.* 6.

Biſhops ſhall not ſequeſter the fruits of benefices given to aliens, 3 *Rich.* 2. *c.* 3. *ſect.* 2.

For the nomination and conſecration of ſuffragans, 26 *H.* 8. *c.* 14.

The King impowered to make biſhops by letters patent, 31 *Hen.* 8. *c.* 9.

Biſhops diſcharged from levying of tenths, 32 *Hen.* 8. *cap.* 22.

The chapter of *Litchfield* ſhall be the chapter of the biſhop of *Litchfield* and *Coventry,* 33 *H.* 8. *cap.* 30.

The dioceſes of *Cheſter* and *Man* added to the province of *York,* 33 *H.* 8. *cap.* 31.

The dean and chapter of *Wells* ſhall be the chapter of the biſhop of *Bath* and *Wells,* 34 *&* 35 *H. cap.* 15.

The five new-erected biſhops to pay their tenths, *&c.* 34 *&* 35 *H.* 8. *c.* 17.

All biſhops to be appointed by the King, 1 *Ed.* 6. *cap.* 2.

A method of making biſhops to be deviſed by twelve perſons, 3 *&* 4 *Ed.* 6. *c.* 12.

The biſhoprick of *Durham* re-eſtabliſhed, 1 *Mar. ſt.* 3. *cap.* 3.

The Queen empowered to take lands of vacant biſhopricks in exchange for impropriations, *&c.* 1 *El. c.* 19.

Alienations by biſhops made void, 1 *El. cap.* 19. *ſect.* 5.

The manner of electing and conſecrating biſhops confirmed, 8 *El. cap.* 1.

Secret appeals, *&c.* of deprived biſhops, 39 *El. cap.* 8.

Eſtabliſhment of the biſhoprick of *Norwich* againſt a concealed title, 39 *El. c.* 22.

Biſhops diſabled from conveying their lands to the crown, 1 *Ja.* 1. *cap.* 3.

For other matters, ſee Dr. *Burn's Eccleſiaſtical Law,* title **Biſhops.**

Biſſa, (Fr. *biche*) *Cerva major,* a hind.——*Decimam vinationis noſtræ, ſcil. de cervis,* biſſis, *damis, porcis & laïis.* Mon. Angl. vol. 1. fol. 648. a. *Cowell, edit.* 1727.

Biſſextile, (*Biſſextilis*) Called leap-year, becauſe the ſixth day before the kalends of *March* is twice reckoned, *viz* on the 24th and 25th of *February*; ſo that the *biſſextile-year* hath one day more than other years, and happens every fourth year. This intercalation of a day was firſt invented by *Julius Cæſar,* to make the year agree with the courſe of the ſun. And to prevent all ambiguity that might grow thereupon, it is ordained by the ſtatute *de anno biſſextili,* 21 *H.* 3. That the day increaſing in the leap-year, and the day next before, ſhall be accounted but one day. *Britton. fol.* 209. and *Dyer* 17 *Eliz.* 345. *Cowell, edit.* 1727.

Biſus, (*Biſius, mica biſa, panis,* Gall. *pain-bis,* Angl. Brown bread,) A brown loaf.—*Abbas & conventus* Oſen. *concedunt* Petro de Sibbeford *qualibet ſeptimana ſeptem parvas albas micas* (*i. e.* ſeven ſmall white loaves) and *ſeptem* biſas *micas* (*i. e.* ſeven brown loaves) *& quinque galones & dimid. melioris cerviſiæ—anno* 1341.—Cron. Oſen. Bib. Cotton, Vitell. *E.* 15. *f.* 247. *Cowell, edit.* 1727.

Black act. Stat. 9 *Geo.* 1. *c.* 22. Whereas ſeveral ill-deſigning and diſorderly perſons have of late aſſociated themſelves under the name of *Blacks,* and entered into confederacies to ſupport and aſſiſt one another in ſtealing and deſtroying of deer, robbing of warrens and fiſh-ponds, cutting down plantations of trees, and other illegal practices, and have, in great numbers, armed with ſwords, fire-arms, and other offenſive weapons, ſeveral of them with their faces blacked, or in diſguiſed habits, unlawfully hunted in foreſts that belonged to his Majeſty, and in the parks of divers of his Majeſty's ſubjects, and deſtroyed, killed, and carried away the deer, robbed warrens, rivers, and

and fiſh-ponds, and cut down plantations of trees, and have likewiſe ſolicited ſeveral of his Majeſty's ſubjects, with promiſes of money, or other rewards, to join with them, and have ſent letters, in fictitious names, to ſeveral perſons, demanding veniſon and money, and threatening ſome great violence, if ſuch their unlawful demands ſhould be refuſed, or if they ſhould be interrupted in, or proſecuted for ſuch their wicked practices, and have actually done great damage to ſeveral perſons, who have either refuſed to comply with ſuch demands, or have endeavoured to bring them to juſtice, to the great terror of his Majeſty's peaceable ſubjects: therefore, if any perſon or perſons, being armed with ſwords, fire-arms, or other offenſive weapons, and having his or their faces blacked, or being otherwiſe diſguiſed, ſhall appear in any foreſt, chaſe or park, paddock or grounds incloſed within any wall, pale, or other fence, wherein any deer have been or ſhall be uſually kept, or in any warren or place where hares or conies have been or ſhall be uſually kept, or in any high road, open heath, common, or down; or ſhall unlawfully and wilfully hunt, wound, kill, deſtroy, or ſteal any red or fallow deer, or unlawfully rob any warren or place where conies or hares are uſually kept; or ſhall unlawfully ſteal or take away any fiſh out of any river or pond; or if any perſon or perſons ſhall unlawfully and willfully, hunt, wound, kill, deſtroy, or ſteal any red or fallow deer, fed or kept in any places, in any of his Majeſty's foreſts or chaſes, which are or ſhall be incloſed with pales, rails, or other fences, or in any park, paddock, or ground incloſed, where deer have been or ſhall be uſually kept; or ſhall unlawfully and maliciouſly break down the head or mound of any fiſh-pond, whereby the fiſh ſhall be loſt or deſtroyed; or ſhall unlawfully and maliciouſly kill, maim, or wound any cattle, or cut down or otherwiſe deſtroy any trees planted in any avenues, or growing in any garden, orchard, or plantation, for ornament, ſhelter, or profit; or ſhall ſet fire to any houſe, barn, or out-houſe, or to any hovel, cock-mow, or ſtack of corn, ſtraw, hay, or wood; or ſhall wilfully and maliciouſly ſhoot at any perſon in any dwelling-houſe, or other place; or ſhall knowingly ſend any letter without any name ſubſcribed thereto, or ſigned with a fictitious name, demanding money, veniſon, or other valuable thing; or ſhall forcibly reſcue any perſon, being lawfully in cuſtody of any officer or other perſon, for any of the offences before-mentioned; or if any perſon or perſons ſhall, by gift, or promiſe of money, or other reward, procure any of his Majeſty's ſubjects to join him or them in any ſuch unlawful act; every perſon ſo offending, being thereof lawfully convicted, ſhall be adjudged guilty of felony, without benefit of clergy.

Sect. 4. And for the more eaſy and ſpeedy bringing the offenders againſt this act to juſtice, if any perſon or perſons ſhall be charged with being guilty of any of the offences aforeſaid, before any two or more of his Majeſty's juſtices of the peace of the county where ſuch offence or offences ſhall be committed, by information of one or more credible perſon or perſons upon oath by him or them to be ſubſcribed, ſuch juſtices before whom ſuch informations ſhall be made as aforeſaid, ſhall forthwith certify under their hands and ſeals, and return ſuch information to one of the principal ſecretaries of ſtate of his Majeſty, his heirs or ſucceſſors, who is hereby required to lay the ſame, as ſoon as conveniently may be, before his Majeſty, his heirs or ſucceſſors, in his or their privy council; whereupon it ſhall and may be lawful for his Majeſty, his heirs or ſucceſſors, to make his or their order in his or their ſaid privy council, thereby requiring and commanding ſuch offender or offenders to ſurrender him or themſelves, within the ſpace of forty days, to any of his Majeſty's juſtices of the court of King's-Bench, or to any one of his Majeſty's juſtices of the peace, to the end that he or they may be forth coming to anſwer the offence or offences wherewith he or they ſhall ſo ſtand charged, according to due courſe of law; which order ſhall be printed and publiſhed in the next *London Gazette*, and ſhall be forthwith tranſmitted to the ſheriff of the county where the offence ſhall be committed, and ſhall, within ſix days after the receipt thereof, be proclaimed by him or his officers, between the hours of ten in the morning and two in the afternoon, in the market places, upon the reſpective market days, of two market towns in the ſame county, near the place where ſuch offence ſhall have been committed; and a true copy of ſuch order ſhall be affixed upon the ſame public place in ſuch market towns: and in caſe ſuch offender or offenders ſhall not ſurrender him or themſelves purſuant to ſuch order of his Majeſty, his heirs or ſucceſſors, to be made in council as aforeſaid, he or they ſo neglecting or refuſing to ſurrender him or themſelves as aforeſaid, ſhall, from the day appointed for his or their ſurrender as aforeſaid, be adjudged, deemed, and taken to be convicted and attainted of felony, and ſhall ſuffer pains of death, as in caſe of a perſon convicted and attainted by verdict and judgment of felony, without benefit of clergy; and that it ſhall be lawful to and for the court of King's Bench, or the juſtices of *oyer* and *terminer*, or general goal-delivery for the county where the offence is ſworn in ſuch information to have been committed, upon producing to them ſuch order in council, under the ſeal of the ſaid council, to award execution againſt ſuch offender and offenders, in ſuch manner as if he or they had been convicted and attainted in the ſaid court of King's Bench, or before ſuch juſtices of *oyer* and *terminer*, or general goal-delivery reſpectively.

Sect. 5. And all and every perſon and perſons who ſhall, after the time appointed as aforeſaid for the ſurrender of any perſons or perſon ſo charged upon oath with any the offences aforeſaid be expired, conceal, aid, abet, or ſuccour ſuch perſon or perſons, knowing him or them to have been ſo charged as aforeſaid, and to have been required to ſurrender him or themſelves by ſuch order or orders as aforeſaid, being lawfully convicted thereof, ſhall be guilty of felony, and ſhall ſuffer death as in caſes of felony, without benefit of clergy.

Sect. 6. Provided that nothing herein contained ſhall be conſtrued to prevent or hinder any judge, juſtice of the peace, magiſtrate, officer, or miniſter of juſtice whatſoever from taking, apprehending and ſecuring ſuch offender or offenders againſt whom ſuch information ſhall be given, and for requiring ſuch ſurrender, ſuch order in council ſhall be made as aforeſaid by the ordinary courſe of law; and in caſe ſuch offender or offenders, againſt whom ſuch information, and for requiring whoſe ſurrender ſuch order in council ſhall be made as aforeſaid, ſhall be taken and ſecured, in order to be brought to juſtice before the time ſhall be expired, within which time he or they ſhall be required to ſurrender him or themſelves, by ſuch order in council as aforeſaid, that then in ſuch caſe no further proceedings ſhall be had upon ſuch order made in council againſt him or them ſo taken and ſecured as aforeſaid, but he or they ſhall be brought to trial by the courſe of law.

Sect. 7. And the inhabitants of every hundred within that part of *Great Britain* called *England*, ſhall make full ſatisfaction and amends to all and every the perſon and perſons, their executors and adminiſtrators, for the damages they ſhall have ſuſtained or ſuffered by the killing or maiming of any cattle, cutting down or deſtroying any trees, or ſetting fire to any houſe, barn, or out-houſe, hovel, cock-mow, or ſtack of corn, ſtraw, hay, or wood, which ſhall be committed or done by any offender or offenders againſt this act; and that every perſon and perſons, who ſhall ſuſtain damages by any of the offences laſt mentioned, ſhall be, and are hereby enabled to ſue for and recover ſuch his or their damages, the ſum to be recovered not exceeding the ſum of two hundred pounds, againſt the inhabitants of the ſaid hundred, who by this act ſhall be made liable to anſwer all or any part thereof; and that if ſuch perſon or perſons ſhall recover ſuch action, and ſue execution againſt any of ſuch inhabitants, all other the inhabitants of the hundred, who by this act ſhall be made liable to all or any part of the ſaid damage, ſhall be rateably and proportionably taxed, for and towards an equal contribution for the relief of ſuch inhabitant againſt whom ſuch execution ſhall be had and levied; which tax ſhall be made, levied, and raiſed by ſuch ways and means, and in ſuch manner and

and form, as is preſcribed and mentioned for the levying and raiſing damages recovered againſt inhabitants of hundreds in caſes of robberies, in and by an act, intituled, *An act for the following hue and cry*, and in the twenty-ſeventh year of the reign of Queen *Elizabeth*.

Sect. 8. Provided, that no perſon or perſons ſhall be enabled to recover any damages by virtue of this act, unleſs he or they, by themſelves, or by their ſervants, within two days after ſuch damage or injury done him or them by any ſuch offender or offenders as aforeſaid, ſhall give notice of ſuch offence done and committed unto ſome of the inhabitants of ſome town, village, or hamlet, near unto the place where any ſuch fact ſhall be committed, and ſhall, within four days after ſuch notice, give in his, her, or their examination upon oath of his, her, or their ſervant or ſervants, that had the care of his or their houſes, out-houſes, corn, hay, ſtraw, or wood, before any juſtice of peace of the county, liberty, or diviſion, where ſuch fact ſhall be committed, inhabiting within the ſaid hundred, where the ſaid fact ſhall happen to be committed, or near unto the ſame, whether he or they do know the perſon or perſons that committed ſuch fact, or any of them; and if upon ſuch examination it be confeſſed, that he or they do know the perſon or perſons that committed the ſaid fact, or any of them, that he or they ſo confeſſing ſhall be bound by recognizance to proſecute ſuch offender or offenders by indictment, or otherwiſe, according to the laws of this realm.

Sect. 9. Provided, that where any offence ſhall be committed againſt this act, and any one of the ſaid offenders ſhall be apprehended and lawfully convicted of ſuch offence, within the ſpace of ſix months after ſuch offence committed, no hundred, or any inhabitants thereof, ſhall in any wiſe be ſubject or liable to make any ſatisfaction to the party injured for the damages he ſhall have ſuſtained.

Sect. 10. Provided alſo, that no perſon who ſhall ſuſtain any damage by reaſon of any offence to be committed by any offender contrary to this act, ſhall be hereby enabled to ſue, or bring any action againſt any inhabitants of any hundred, where ſuch offence ſhall be committed, except the party or parties ſuſtaining ſuch damage ſhall commence his or their action or ſuit within one year next after ſuch offence ſhall be committed.

Sect. 11. And for the better and more effectual diſcovery of the offenders above-mentioned, and bringing them to juſtice, it ſhall be lawful to and for any juſtice of the peace to iſſue his warrant to any conſtable, headborough, or other peace officer, to enter into any houſe, in order to ſearch for veniſon, ſtolen or unlawfully taken, contrary to the ſeveral ſtatutes againſt deer-ſtealers, in ſuch manner as by the laws of this realm ſuch juſtice of the peace may iſſue his warrant to ſearch for ſtolen goods.

Sect. 12. And if any perſon or perſons ſhall apprehend, or cauſe to be convicted, any of the offenders above-mentioned, and ſhall be killed or wounded, ſo as to loſe an eye, or the uſe of any limb, in apprehending or ſecuring, or endeavouring to apprehend or ſecure any of the offenders above-mentioned, upon proof thereof made at the general quarter ſeſſions of the peace for the county, liberty, or diviſion, or place where the offence ſhall be committed, or the party killed, or receive ſuch wound, by the perſon or perſons ſo apprehending, and cauſing the ſaid offender to be convicted, or the perſon or perſons ſo wounded, or the executors or adminiſtrators of the party killed, the juſtices of the ſaid ſeſſions ſhall give a certificate thereof to ſuch perſon or perſons ſo wounded, or to the executors or adminiſtrators of the perſon or perſons ſo killed, by which he or they ſhall be intitled to receive of the ſheriff of the ſaid county the ſum of fifty pounds, to be allowed the ſaid ſheriff in paſſing his accounts in the Exchequer; which ſum of fifty pounds the ſaid ſheriff is hereby required to pay within thirty days from the day on which the ſaid certificate ſhall be produced and ſhewn to him, under the penalty of forfeiting the ſum of ten pounds to the ſaid perſon or perſons to whom ſuch certificate is given: for which ſaid ſum of ten pounds, as well as the ſaid ſum of fifty pounds, ſuch perſon may and is hereby authorized to bring an action upon the caſe againſt ſuch ſheriff, as for money had and received to his or their uſe.

Sect. 13. And whereas the ſhortneſs of time within which proſecutions for offences againſt the ſtatute made in the third and fourth years of the reign of their late majeſties King *William* and Queen *Mary* (intituled, *An act for the more effectual diſcovery and puniſhment of deer-ſtealers*) are limited to be commenced, has been a great encouragement to offenders: be it thereforefore enacted by the authority aforeſaid, that any proſecution for any offence againſt the ſtatute ſhall or may be commenced within three years from the time of the offence committed, but not after.

Sect. 14. And for the better and more impartial trial of any indictment or information which ſhall be found, commenced, or proſecuted for any the offences committed againſt this act, every offence, that ſhall be done or committed contrary to this act, ſhall and may be enquired of, examined, tried, and determined in any county within that part of *Great Britain* called *England*, in ſuch manner and form as if the fact had been there committed: provided, that no attainder for any of the offences made felony by virtue of this act ſhall make or work any corruption of blood, loſs of dower, or forfeiture of lands or tenements, goods or chattels.

Sect. 15. And this act ſhall be openly read at every quarter ſeſſions, and at every leet or law day.

Sect. 16. And this act ſhall continue in force from *June* 1, 1723, for three years, and from thence to the end of the then next ſeſſion of parliament, and no longer.

Continued for five years by 12 Geo. 1. c. 30.

Continued to Sept. 1, 1736, *by* 6 Geo. 2. cap. 37. ſect. 4. *with the following additions.*

Sect. 5. If any perſon ſhall, during the continuance of the laſt before-mentioned act (9 *Geo.* 1. *cap.* 22.) unlawfully and maliciouſly break down, or cut the bank or banks of any river, or any ſea bank, whereby any lands ſhall be overflowed or damaged, every perſon ſo offending ſhall be adjudged guilty of felony, and ſuffer death, without benefit of clergy.

Sect. 6. If any perſon or perſons ſhall, during the continuance of the before-mentioned act (9 *Geo.* 1. *c.* 22.) unlawfully and maliciouſly cut any hop-binds growing on poles in any plantation of hops, every perſon or perſons ſo offending ſhall be guilty of felony, without benefit of clergy.

Made perpetual together with the two before-mentioned clauſes of 6 Geo. 2. c. 37. *by* 31 Geo. 2. c. 42.

By ſtat. 27 *Geo.* 2. *c.* 15. If any perſon or perſons ſhall knowingly ſend any letter without any name ſubſcribed thereto, or ſigned with a fictitious name or names, letter or letters, threatening to kill or murder any of his majeſty's ſubjects, or to burn their houſes, out-houſes, barns, and ſtacks of corn or grain, hay or ſtraw, *though no money, veniſon, or other valuable thing ſhall be demanded in or by ſuch letter or letters*; or ſhall forcibly reſcue any perſon being lawfully in cuſtody of any officer or other perſon for the ſaid offence; every perſon ſo offending, being thereof lawfully convicted, ſhall be adjudged guilty of felony, and ſhall ſuffer death, as in caſes of felony, without benefit of clergy.

Black-book, Is a book lying in the *Exchequer*.

Black lead Stat. 25 *Geo.* 2. *c.* 10. *ſect.* 1. Whereas by experience it hath been found, that wad or black cawke, commonly called *black-lead*, is and hath been neceſſary for divers uſeful purpoſes, and more particularly in the caſting bomb-ſhells, round-ſhot, and cannon balls; and that ſuch wad, black cawke, or *black-lead* hath hitherto been diſcovered in one mountain or ridge of hills only in this realm; and that great waſte and deſtruction therein hath of late years been made by wicked and evil-diſpoſed perſons, who, by reaſon of the ſituation of the mine or mines, wad-hole or wad-holes of the ſaid wad, black-cawke or black lead, and of the great difficulty to ſecure and preſerve the ſame from being unlawfully broke, or by force entered into; and alſo by reaſon of the ſmall puniſhment by the laws now in being annexed to offences of the like kind, have been encouraged unlawfully to enter, and

and by force to keep poſſeſſion of the ſame; and from thence unlawfully to take and carry away great quantities of the ſaid wad, black cawke or black lead;—Therefore it is enacted, That every perſon who ſhall unlawfully break, or by force enter into, any mine or wad-hole of wad or black cawke, commonly called *black-lead*, or into any pit, ſhaft, or vein thereof; or ſhall unlawfully take and carry away from thence any wad, black cawke, or black-lead; or ſhall aid, hire, or command any perſon to commit any the ſaid offences, ſhall be guilty of felony, and the court or judge may order him to be committed to priſon, or to the houſe of correction, not exceeding one year, to be kept to hard labour, and to be publickly whipt by the common hangman, or by the maſter of ſuch houſe of correction, at the times and places, and in ſuch manner as the court ſhall think proper; or he may be tranſported for a term not exceeding ſeven years; and if he ſhall voluntarily eſcape, or break priſon, or return from tranſportation before the time, he ſhall be guilty of felony without benefit of clergy.

Sect. 2. A certificate of the former conviction from the clerk of the aſſize, or clerk of the peace of the county or city, where ſuch conviction or attainder for the ſaid offence was had, ſhall be deemed ſufficient proof thereof.

Sect. 3. And if any perſon ſhall buy or receive any ſuch wad, knowing the ſame to be unlawfully taken and carried away as aforeſaid, he ſhall be guilty of felony, and be liable to all the penalties inflicted by the laws on perſons knowingly buying or receiving ſtolen goods.

Black-mail, (Fr. *maille*, a ſmall piece of metal or money) Signifies, in the counties of *Cumberland*, *Northumberland*, *Weſtmorland*, and the biſhoprick of *Durham*, a certain rate of money, corn, cattle, or other conſideration paid to ſome inhabiting near the borders, being men of name and power, allied with certain moſs-troopers, or robbers within the ſaid counties; to be protected from the devaſtations of thoſe robbers. Stat. 43 *Eliz. cap.* 23. See **Mayle.** Theſe robbers are of late years called moſs-troopers, and ſeveral ſtatutes have been made againſt them. *Cowell, edit.* 1727.

Black-mail, Alſo ſignifies the rents formerly paid in proviſions of corn and fleſh. The ſtat. 9 *Ed.* 3. *c.* 4. mentions *black-money*.

Blacks of Waltham. See **Black Act.**

Black-rents, The ſame with *black-mail*.

Black-rod, or *Gentleman uſher of the black-rod*, is chief gentleman uſher to the king. He is called in the *Black Book*, *fol.* 255. *Lator Virgæ nigræ*, and *Hoſtiarius*; and elſewhere *Virgæ-bajulus:* his duty is *ad portandum virgam coram domino rege ad feſtum ſancti Georgii infra Caſtrum de Windeſore.* He hath alſo the keeping of the Chapter-houſe door, when a *chapter* of the order of the garter is ſitting; and in the time of parliament attends on the *houſe of Peers*.

He hath a like habit with the regiſter of the order, and *garter* king at arms, which he wears at the feaſt of St. *George*, and at all chapters. He bears a *black-rod*, on the top whereof ſits a lion, gold; which *rod* is inſtead of a mace, and hath the ſame power and authority. His fee is now 30 *l. per annum.* This officer hath been antiently conſtituted by letters patent under the great ſeal. *Cowell, edit.* 1727.

Blackwell-hall. Stat. 8 & 9 *W.* 3. *cap.* 9. *ſect.* 1. The governors of *Blackwell-hall*, and their deputies, ſhall ſtrictly keep the following times and rules, *viz.* the publick market of *Blackwell-hall* ſhall be held every *Thurſday*, *Friday*, and *Saturday*, from eight o'clock in the forenoon till twelve, and from two in the afternoon till five. The ſaid hours of beginning and ending the ſaid market ſhall be known by ringing the market-bell in the hall: the ſame to be continued weekly through the year, except days of humiliation or thankſgiving; and the keepers of the hall ſhall not permit any buying or ſelling of any woollen cloth at the hall upon any other days or hours, upon the penalty of 100 *l.*

Sect. 2. The ſaid governors, &c. ſhall appoint to the county clothiers the moſt convenient room in the hall for the ſale of the cloth, and warehouſe for keeping the ſame, paying the antient duties of the hall.

Sect. 3. No factor, or other perſon, other than the owner of the cloth, ſhall ſell or expoſe to ſale, out of the ſaid market of *Blackwell-hall*, any cloth directed to be brought to the ſaid market, or any factor there, upon penalty of 5 *l.* for every cloth ſo ſold.

Sect. 4. The hall-keepers, clerks, and maſter-porters ſhall take care that the rules and orders appointed by this act be put in execution, and ſhall diligently keep their books and weekly regiſters of all the cloths bought and ſold there; in which books they ſhall enter the names and habitations of the owners, and buyers, and ſellers, and times of ſale, and other factor or other perſon buying or ſelling of every cloth; to which books it ſhall be lawful for the clothiers, their agents or ſervants, at all convenient times to have recourſe without fee. And any hall-keeper, clerk, or maſter-porter neglecting his duty herein, ſhall for every offence forfeit 10 *l.* and if any perſon buy any cloth of any perſon (except the owner) otherwiſe than for ready money, the perſon ſelling ſhall, within twelve days after ſale and delivery of the ſame, take or demand of the buyer a note, teſtifying under the buyer's hand the cloth ſold, and the ſum of money ſold for, payable to the owner, and ſhall deliver ſuch note on demand, with notice of the buyer's place of abode thereon ſubſcribed, to the owner, or any perſon authorized by him to receive the ſame; on pain to forfeit to the owner of the cloth ſold double the value thereof for every neglect of ſo doing. And if any woollen-draper or perſon trading in the woollen manufacture, buying woollen cloth upon truſt, ſhall refuſe or neglect to give ſuch note upon requeſt at any time next after eight days after ſale and delivery, he ſhall forfeit 20 *s.* for every cloth ſo ſold to the owner; and every piece of cloth not returned within eight days after delivery of the ſame, ſhall be deemed to be paſſed and approved of by the buyer as a merchantable cloth; and all contracts for allowing a longer time for the paſſing of any cloth ſhall be void.

Sect. 5. All penalties impoſed by this act, may be ſued for by action of debt, &c. in any of his majeſty's courts of record; and if not otherwiſe herein before diſpoſed of, one moiety to the king, and the other to the informer.

Sect. 6. If the owner of the cloth neglect to ſue for any of the penalties by the ſpace of ſix months, then any other perſon to ſue for the ſame, and one moiety ſhall be to the king, and the other to the informer. See title **Drapery.**

Bladarius, Uſed in our records for a corn monger, meal-man, or corn-chandler. *Pat.* 1. *Ed.* 3. *par.* 3 *M.* 13.

Blade (*Bladum*, Fr. *Bled*) *Noſtro foro, de ſegete tantum intelligitur, præſertim etiam in herba.* Spel. But the Saxon *bled* ſignifies more generally fruit, corn, hemp, flax, herbs, &c. or the branches or leaves of trees or herbs, whilſt they grow. *Univerſis*——Will. de Mohun *ſalutem. Sciatis me relaxaſſe & quietum clamaſſe domino* Reginaldo de Mohun *fratri meo totum manerium meum de Tor*, ——*Salvo mihi inſtauro meo &* blado, &c. (ſine dat.) *i. e.* excepting my ſtock and corn on the ground. Hence *bladier* is taken for an ingroſſer of corn or grain. *Sciant*—*quod ego* Willielmus Alreton, *conſenſu & voluntate* Beatricis *uxoris meæ, dedi*——*Agathæ Gille pro duabus marcis Argenti & una* menſura bladi, *duas ſolidatas redditus in villa Leominſtr. illas ſcil. quas* Walterus de Luda *ſolebat mihi reddere pro quadam terra quæ eſt inter ſoldas Aldæ Talcurteis & Feodum Johannis Reading. habend. &c.* (ſine dat.) Ex libro chartar. priorat. Leominſtriæ. *Cowell, edit.* 1727.

Bladus, A ſky colour. *Mon.* 3 *tom. pag.* 170.

Blanch firmes, In old times the crown rents were many times reſerved *in libris albis*, or *blanch firmes*: in which caſe the buyer was holden *dealbare firmam*; that is, his baſe money, or coin worſe than ſtandard, was molten down in the Exchequer, and reduced to the fine-

neſs of ſtandard ſilver; or (inſtead thereof) he paid to the king twelve pence in the pound, by way of addition. *Vid.* Lowndes's *Eſſay on Coin*, *p.* 5.

Blandford, An act for rebuilding the town of *Blandford*, in the county of *Dorſet*, burnt down by fire in the year 1731, and to determine all differences between proprietors, landlords, and tenants of houſes, and concerning ground, *&c.* *Stat.* 5 *Geo.* 2. *c.* 16.

Blanhornum, A little bell, or rather *ticimium*, viz. *pecoris ticimium, & canis oppa &* blanhornum; *korum trium ſingulum eſt unum ſolidum valens*; from the Saxon *blan*, *ceſſans*, and *horn*, *cornu*. Leg. Adelſtan, cap. 8. *Cowell, edit.* 1727.

Blank bar, Is the ſame with what we call a *common bar*, and is the name of a plea in *bar*, which in an action of treſpaſs is put in to compel the plaintiff to aſſign the certain place where the treſpaſs was committed. It is moſt uſed by the practiſers in the Common Bench; for in the King's Bench the place is commonly aſcertained in the declaration. 2 *Croke, fol.* 594.

Blank farm, A white *farm*; that is, where the rent was paid in ſilver, and not in cattle.

Blankets and coverlets, May be made in any place where they were uſed to be made, by ſtat. 4 *Jac.* 1. *c.* 2. *ſ.* 16.

Blanks (Fr. *Blanc*) That is, *candidus*, white; it ſignifies a kind of money coined in the parts of *France* by *Henry* V. that were ſubject to *England*, the value whereof was eight pence. *Stow's Annals, pa.* 586. Theſe were forbidden to be current within the realm. 2 *H.* 6. *c.* 9. The reaſon why they were called *blanks* may be, becauſe at the time theſe were coined in *France*, there was alſo a piece of gold coined called a *ſalus*, of the value of 2 *s.* from which this ſilver was diſtinguiſhed by the colour. *Cowell, edit.* 1727.

Blaſarius An incendiary. *Cowell, edit.* 1727.

Blaſphemy, (from the Greek Βλαπτω, *laedo*, and φημη, *fama*) Is an injury offered to God, by denying that which is due and belonging to him, or attributing to him what is not agreeable to his nature. *Lind. Prov. Conſt. cap.* 1.

Stat. 3 *Jac.* 1. *c.* 21. For preventing and avoiding of the great abuſe of the holy name of God in ſtage-plays, interludes, may-games, ſhews, and ſuch like, Be it enacted, That if any perſon or perſons do or ſhall in any ſtage-play, interlude, ſhew, may-game, or pageant, jeſtingly or prophanely ſpeak or uſe the holy name of God, or of *Chriſt Jeſus*, or of the Holy Ghoſt, or of the Trinity, which are not to be ſpoken but with fear and reverence, ſhall forfeit for every ſuch offence by him or them committed, ten pounds; one moiety thereof to the king, and the other moiety to him or them that will ſue for the ſame in any court of record at *Weſtminſter*.

Sect. 1. *Will. & Ma. ſeſſ.* 1. *c.* 18. *ſect.* 17. No perſon ſhall have any benefit of the toleration act, who ſhall deny in his preaching or writing the doctrine of the Bleſſed Trinity, as it is ſet forth in the 39 articles.

Sect. 2 & 10 *Will.* 3. *c.* 32. [intituled, *An act for the more effectually ſuppreſſing of blaſphemy and prophaneneſs*] Whereas many perſons have of late years openly avowed and publiſhed many blaſphemous and impious opinions, contrary to the doctrines and principles of the Chriſtian religion, greatly tending to the diſhonour of Almighty God, and may prove deſtructive to the peace and welfare of this Kingdom; wherefore, for the more effectual ſuppreſſing of the ſaid deteſtable crimes, Be it enacted, *&c.* That if any perſon or perſons having been educated in, or at any time having made a profeſſion of the Chriſtian religion within this realm, ſhall, by writing, printing, teaching, or adviſed ſpeaking, deny any one of the perſons in the Holy Trinity to be God, or ſhall aſſert or maintain there are more Gods than one, or ſhall deny the Chriſtian religion to be true, or the Holy Scriptures of the Old and New Teſtament to be of divine authority, and ſhall, upon indictment or information in any of his majeſty's courts at *Weſtminſter*, or at the aſſizes, be thereof lawfully convicted by the oath of two or more credible witneſſes, ſuch perſon or perſons for the firſt offence ſhall be adjudged incapable and diſabled in law, to all intents and purpoſes whatſoever, to have or enjoy any office or offices, employment or employments eccleſiaſtical, civil, or military, or any part in them, or any profit or advantage appertaining to them or any of them: and if any perſon or perſons ſo convicted as aforeſaid ſhall at the time of his or their conviction enjoy or poſſeſs any office, place, or employment, ſuch office, place, or employment ſhall be void, and is hereby declared void: and if ſuch perſon or perſons ſhall be a ſecond time lawfully convicted as aforeſaid of all or any the aforeſaid crime or crimes, that then he or they ſhall from thenceforth be diſabled to ſue, proſecute, plead, or uſe any action or information in any court of law or equity, or to be guardian of any child, or executor or adminiſtrator of any perſon, or capable of any legacy or deed of gift, or to bear any office civil or military, or benefice eccleſiaſtical, for ever within this realm; and ſhall alſo ſuffer impriſonment for the ſpace of three years, without bail or mainprize, from the time of ſuch conviction.

Sect. 2. Provided, that no perſon ſhall be proſecuted by virtue of this act for any words ſpoken, unleſs the information of ſuch words ſhall be given upon oath before one or more juſtice or juſtices of the peace within four days after ſuch words ſpoken, and the proſecution of ſuch offence be within three months after ſuch information.

Sect. 3. Provided that ſuch offender, upon his acknowledgment and renunciation of ſuch offence or erroneous opinions in the ſame court where ſuch perſon was convicted within the ſpace of four months after his conviction, be diſcharged from all penalties and diſabilities incurred by ſuch conviction.

Blatum, *Bullneſs*, in *Cumberland*. *Cowell, ed.* 1727.

Ble, Signifies ſight, colour, *&c.* and *blee*, with a double *e*, is taken for corn. *Cowell, edit.* 1727.

Blench, Is the title of a kind of tenure of land, as to hold land in *blench*, is by payment of a ſugar-loaf, a bever hat, a couple of capons, and ſuch like; if it be demanded in the name of *blench*, id eſt, *nomine albæ firmæ*. See **Alba firma.**

Blenheim, A noble and princely houſe, erected in honour of the Duke of *Marlborough* at *Woodſtock* near *Oxford*, which, with the manor of *Woodſtock*, is ſettled on the Duke and his heirs, in conſideration of the eminent ſervices by him performed to the public; and for building of which houſe the ſum of 500,000 *l.* was granted by parliament, *&c.* See *Stat.* 3 & 4 *Ann. c.* 6. 5 *Ann. c.* 3. & *c.* 4. 1 *Geo.* 1. *ſt.* 2. *c.* 12 *ſect.* 34.

Bleſtum, *Old Town*, in *Herefordſhire*. *Cowell, edit.* 1727.

Bleta, (Fr. *bleche*) *Pete* or combuſtible earth, dug up and dried for burning.——*Miniſter et fratres de* Knaresborough, *petunt quod ipſi & eorum tenentes fodiant turbas & bletas, in foreſta de* Knaresborough *Rot. Parl.* 35 *Ed.* 1.

Blinks, Boughs broken from trees, and caſt in a way where deer are likely to paſs.

Bliſſom (corruptly called *bloſſom*) Is when a ram goes to the ewe; from the Teuton. *bletz*, the bowels, or from *bleten*, to accommodate.

Bloated fiſh or herring, Are thoſe that are half-dry'd, perhaps from the Sax. *blotan*, to kill and offer in ſacrifice. *Stat.* 18 *Car.* 2. *c.* 2. *Cowell, edit.* 1727.

Blockwood. See **Logwood**,

Bloeus (Sax. *Blod*) A deep red colour. Hence *bleat* and *bloated*, *i. e.* ſanguine and high-coloured; which in *Kent* is called *blouſing* colour, and a *blouſe* is there a red-faced wench. The prior of *Burceſter*, *A. D.* 1425. gave his liveries of this colour.——*Et in* blodeo *panno empto pro armigeris & valettis prioris de* Johanne Bandye, *de magna* Tue. *Paroch. Antiq. p.* 576.

Blodius, A ſky-colour. *Mon. Angl. tom.* 3. *pag.* 170.

Blomary, Is one of the forges belonging to an iron mill, through which the iron paſſeth before it cometh to the finery; of this you may read at large, 27 *Eliz. cap.* 19.

Blondus. See **Blundus.**

Blood (*Sanguis*) Is regarded in deſcent of lands; for a perſon is to be next and moſt worthy of blood to inherit his anceſtor's eſtate. 1 *Inſt.* 13. See *Jenk. Cent.* 203.

Bloodſhed, *Blood-wit*, or the fine impoſed for ſhedding of *blood*——*Mich.* 7 *H.* 7. Willielmus Lucy *miles, remittit domui & eccleſiæ de* Thelesford *toll, quick, ſtallange*, and *bloodſhed*. *Ex Cartular. Dom. de Thelesford. MS. Cowell, edit.* 1727.

Bloodwit, or **Bloodwite**, Is a compound from the Saxon *blod, ſanguis*, and *white*, an old *Engliſh* word ſignifying *miſericordia*. It is often uſed in ancient charters, and means an amerciament for *bloodſhed*. *Skene de Verbor. Signif.* writes *bluidveit*; which, ſays he, is in *Engliſh* as much as *injuria* or *miſericordia*; it being, as the *Scotchmen* call it, an unlaw for wrong or injury, as is the effuſion of *blood*; for he that hath *bloodwit* granted him, hath free liberty to take all amerciaments of courts for ſhedding of *blood*. *Fleta* ſaith, *quod ſignificat quietantiam miſericordiæ prò effuſione ſanguinis*, lib. 1. c. 47. *Si aliqui pugnantes ad invicem in Rudham, & extraxerint ſanguinem*, prior *habebit* bloodwit, i e *amerciamentum inde in curia ſua*. Ex. reg. priorat. de Cockesford. Sax *blod*, blood, and *wit*, a fine or penalty; for *blodewite* was a cuſtomary fine paid as a compoſition and atonement for the ſhedding or drawing blood, for which the place was anſwerable, if the party were not diſcovered. And therefore a privilege or exemption from this penalty was granted by the king, or ſupreme lord, as a ſpecial favour. So K. *Henry* II. granted to all his tenants within the honour of *Wallingford, ut quieti ſint de hidagio*, & blodewite & bredewite. ——*Paroch. Antiq. p.* 114.

Bloody-hand, Signifies the apprehenſion of a treſpaſſer in the foreſt againſt veniſon, with his hands or other parts *bloody*, though he be not found chaſing or hunting; of which ſee *Manwood, c.* 18. *num.* 9. In *Scotland*, in ſuch like crimes, they ſay, *taken in the fact*, or *with the red hand*. See **Backberinde**. *Cowell, edit.* 1727.

Bloomsbury-market, The miniſter of the new church there, how provided for, *Geo.* 2, *c.* 19.

Bloſſom, The ſame as *Bliſſom*, which ſee.

Blubber, A kind of whale-oil, ſo called before it is thoroughly boiled; ſpoken of 12 *Car.* 2. *cap.* 18.

Blue, and **Bludie**, The mark of a wound or bruiſe; what we now call black and *blue*, or, as red as blood. Lat. *blodeus: ſi quis verberando aliquem fecerit* blue & bludie, *iſte qui fuerit* blue & bludie, *prius debet exaudiri.* Leg. Burg. Scot. cap. 87.

Bluet, *Blue*——*Veſtimenta autem dabunt mihi de* Griſeng, *vel halberget & pellibus agninis, uxori autem meæ ad carius* bluet, *& pellicus ſimiliter agninis.* Mon. Angl. tom. 1. f. 831.

Blundus, One whoſe hair is yellow; *ſicut pater ſuus tenuit tempore regis* Willielmi Blundi, meaning *William Rufus. Du Freſne.*

Boats, See **Watermen.**

Bockhoyd, Is, as it were, *book-hoard*, or a *hoard* for books, that is, a place where books, writings, or evidences are kept; we may term it in Latin *librorum horreum*. It is derived from the Sax. *bock, liber*, and *hord, theſaurus. Cowell, edit.* 1727.

Bocking. See **Braintree.**

Bockland (Sax. *quaſi* bookland) *Terra hæreditaria vel teſtamentaria*; a poſſeſſion or inheritance held by inſtruments in writing. Bockland *vero ea poſſidendi transferendique lege coercebatur, ut nec dari licuit nec vendi, ſed hæredibus relinquenda erat, in ſcriptis aliter permitteretur*; Terra *inde* Hæreditaria nuncupata *inter leges* Aluredi, cap. 36. See **Charter-land**, **Copyhold**, **Freehold**, and **Land-boc.** See alſo **Gloſſarium in decem ſcriptores.** This was one of the titles by which the *Engliſh Saxons* held their lands, and was always in writing, and from hence called *bockland*, which ſignifies *terram codicillariam*, or *librariam*, deed-land, or charter-land. It commonly carried with it the abſolute inheritance and property of the land, and was therefore preſerved in writing; and poſſeſſed by the *Thanes*, or nobler ſort, as *prædium nobile liberum & immune a ſervitiis vulgaribus & ſervilibus.* It

was the very ſame as *allodium*, deſcendible (according to the common courſe of nations, and of nature) unleſs all the ſons, and therefore called *gavel-kind*; deviſable alſo by will, and thereupon called *terræ teſtamentales*, as the *Thane* that poſſeſſed them was ſaid to be *teſtamento dignus.* See *Spelman of Feuds, c.* 5.

Bodies politick. See **Corporation.**

Bodvary. See **Waris.**

Boia, Chains or fetters, properly what we call *bernicles*. *Quidam a dolore capitis liberatus eſt, adjungens genæ ſuæ* boias, *quibus S.* Britſtanus *ligatus fuit.* Hiſt. Elien. apud Whartoni Angl. Sac. p. 1. p. 618.

Boilary, or **bullary of ſalt**, A *ſalt-houſe*, or *ſalt-pit*, where ſalt is boiled. *Co. on Lit. fol* 4. *b.*

Bois, (Fr.) Wood, and *ſub-bois*, underwood. See **Boſcus.**

Bolarium. See **Belerium.**

Boldagium. See **Bolhagium.**

Bolhagium, A little houſe or cottage, from the Sax. *bold, domicilium. Cowell, edit.* 1727.

Bollis, A bowl.—*Unum baculum proceſſionale cum uno* bolle *argenteo pro magna cruce imponenda.* Mon. Angl. tom. 2. pag. 666.

Bolmeng, Meſlin corn or bread; from the Sax. *bold, villa*, and *mong, miſcella*; becauſe countrymen eat this ſort of bread. *Cowell, edit.* 1727.

Bolſters and pillows. See **Upholſters.**

Bolt. A bolt of ſilk or ſtuff ſeems to have been a long narrow piece.——In the accounts of the priory of *Berceſter, A. D.* 1425.—*Et in* bolt *rubei* Say, *apud* Steterbrugge, *propter anabatam faciendam iv ſol. viii denar.* Paroch. Antiq. p. 574.

Bolter. See **Buſtel.**

Bolting, Is a term of art uſed in *Gray's-Inn*, whereby they intend private arguing of caſes; the manner of it is this: An *ancient* and two *barriſters* ſit as judges; three ſtudents bring each a caſe, out of which the judges chooſe one to be argued; which done, the ſtudents firſt begin and argue, and after them the barriſters. *Bolting* hath alſo a more common acception, which country houſewives ſay is the ſifting of the meal or flour through a bag, to make it finer, which bag they call a *bolter*: and why may not the law term be drawn hence? becauſe the *bolting* of caſes is the thorough ſifting and debating of them. It is inferior to mooting, and may be derived from the Sax. *bolt*, an houſe; becauſe done privately in the houſe for inſtruction. In *Lincoln's-Inn*, in vacation time, *Monday* and *Wednesday* are the *bolting* days; *Tueſday* and *Thurſday* the moot days; but in term-time, *e contra. Cowell, edit.* 1727.

Bona fide. We ſay, that is done *bona fide*, that is done really, with a good faith, without fraud or deceit. It is mentioned 12 *Car.* 2. *c.* 18. and 15 *Car.* 2. *c.* 5.

Bona geſtura, Good abearing, or good behaviour.—*Et ſi per furorem vel aliquos manutentores renuerit invenire ſufficientem ſecuritatem de ſua* bona geſtura *erga ballivos et comburgenſes——a predicto burgo ejiciatur.* Codex MS. LL. Statutis & Conſuetud. Burgi Villæ Montgomer. fol. 15. *Cowell, edit.* 1527.

Bonaght, or **Bonaghty**, An exaction in *Ireland*, impoſed at the will of the lord for relief of the knights called *bonaghti* who ſerved in the wars. *Antiq. Hib. p.* 60. *Camden* in his *Brit.* tit. *Deſmond* ſays, That *James* E. of *Deſmond* impoſed upon the people theſe moſt grievous tributes of coin, livery, cocherings, *bonaghty, &c.*

Bona notabilia, Are ſuch goods as a party dying hath in another dioceſe than that wherein he dies, amounting to 5 *l.* at leaſt, which, whoever hath, his will muſt be proved before the archbiſhop of the province, unleſs by compoſition or cuſtom, other dioceſes are authorized to do it, where *bona notabilia* are rated at a greater ſum. *Book of Canons*, 1 *Jac. can.* 92, 93. *Perk. ſect.* 89. And in the city of *London*, *bona notabilia* are 10 *l.* by compoſition. 4 *Inſt.* 335. One that hath a debt upon bond or ſpecialty, *&c.* in another dioceſe, hath *bona notabilia.* 1 *Rol. Abr.* 908. Though if a perſon happens to die in another dioceſe than that wherein he lives, on a journey, what he hath about him of the value of 5 *l. &c.* ſhall not be *bona notabilia. Can.* 93. There muſt be ſeveral adminiſtrations where a perſon dies, leaving *bona notabilia*

notabilia in each province of *Canterbury* and *York*; for adminiſtration granted in one province doth not extend to goods in the other, becauſe the archbiſhops have diſtinct ſupreme juriſdictions; but then there is to be *bona notabilia* in ſeveral dioceſes in each province. *Dyer* 305. 2 *Lev.* 86. If a man dies in one dioceſe without any goods, and leaves to the value of 5 *l.* in another dioceſe, the archbiſhop of that province may grant adminiſtration, as he hath a general juriſdiction there; though ſuch adminiſtration is voidable by ſentence. *Cro. Eliz.* 457. But where a biſhop grants adminiſtration, and there are *bona notibilia*, ſuch adminiſtration is merely void; for he had no juriſdiction out of his dioceſe. 5 *Rep.* 30. 1 *Nelſ. Ar.* 381.

Bona patria, An aſſiſe of countrymen or good neighbours: ſometimes called *aſſiſa bonæ patriæ*, when twelve, or more, are choſen out of the country to paſs upon an aſſiſe; and they are called *juratores*, becauſe they ſwear judicially in the preſence of the party. *Skene verb. Bona patria.* Vid. *Aſſiſors.*

Bona peritura, Periſhable goods.

Boncha, A *bonch*, or bunch. The prior and *burſar* of *Biſiter*, *com. Oxon. an.* 1425. account to the houſe, ——*Et in duabus bonchis allii vi den.*——For two bunches or ropes of onions 6 *d.* *Fr. Junius* derives it from the Daniſh *buncker*, the tops of hills. It ſeems rather from the old Latin, *bonna*, *bunna*, a riſing bank, for the term or bound of fields. Hence the word *bown* is uſed in *Norfolk*, for ſwelling or riſing up in a bunch or tumour, *&c. Cowell, edit.* 1727.

Bond. See **Obligation.**

Bondage and **Bondman.** See *Nativus*. *Bondmen* in *Domeſday* are called *ſervi*, and different from *villani.*—*Et de toto tenemento, quod de ipſo tenet in* bondagio *in ſoca de Nortone cum pertin.* Mon. Angl. 3. par. f. 609. a.

Bonda. A maſter of a family.

Bone-lace. Foreign bone-lace not to be imported, 13 & 14 *Car.* 2. *cap.* 13. may be imported free to *Scotland*, *Ireland*, or the *plantations*, 11 & 12 *W.* 3. *cap.* 3. *ſect.* 15.

Prohibition of importing bone-lace repealed, 5 *Ann. cap.* 17. Manufactures excuſed from the duty upon hawkers and pedlars, 4 *Geo.* 1. *cap.* 6.

For other matters, ſee **Manufactures.**

Bonis Arreſtandis, Is a writ; which ſee in **Arreſtandis Bonis.**

Bonis non Amovendis., Is a writ to the ſheriffs of *London*, *&c.* to charge them, that one condemned by judgment in an action, and proſecuting a writ of error, be not ſuffered to remove his goods until the error be tried. *Reg. Orig. fol.* 131. *b.*

Bonium, *Bangor* in *Flintſhire.*

Book of rates, A ſmall book, declaring the value of goods that pay poundage. Stat. 12 *Car.* 2. *c.* 4. *ſect.* 6. For the *additional book of rates*, ſee ſtat. 11 *Geo.* 1. *c.* 7. *ſect.* 4.

Books. Stat 25 *Hen.* 8. *cap.* 15. *ſect.* 1. No perſon inhabiting within this realm ſhall buy to ſell again any printed books brought from any parts out of the king's obeiſance, ready bound in boards, leather, or parchment, upon pain to forfeit for every book bound out of the king's obeiſance, and brought within the ſame to ſell again, 6 *s.* 8 *d.*

Sect. 3. No perſon inhabiting within this realm, ſhall buy within this realm of any ſtranger, any printed books brought from beyond the ſea, except only by engroſs, and not by retail, upon pain of forfeiture of 6 *s.* 8 *d.* for every book ſo bought; the ſaid forfeitures to be levied of the buyers; the one half to the king, and the moiety to the party that will ſeize or ſue for the ſame.

Sect. 4. If any of the ſaid printers, or ſellers of printed books, inhabiting within the realm, at any time hereafter increaſe the prices of ſuch books in ſale or binding, in ſuch wiſe as complaint be made thereof unto the king, or the lord chancellor, lord treaſurer, or any of the chief juſtices; then the lord chancellor, *&c.* or any two of them, ſhall have power to inquire thereof, as well by the oaths of twelve perſons, as by examination, by their diſcretions. And after the increaſing of the ſaid prices of the ſaid books and binding ſhall be found, the lord chancellor, *&c.* or two of them, ſhall have power to redreſs ſuch inhauncing of the prices, by their diſcretions, and to limit the prices as well of the books as for the binding; and the offenders, being convicted by examination or otherwiſe, ſhall forfeit, for every book by them ſold, whereof the price ſhall be inhaunced, for the book or binding, 3 *s.* 4 *d.* the one half to the king, and the other half to the parties grieved.

Stat. 3 & 4 *Ed.* 6. *cap.* 10. *ſect.* 1. All books called antiphoners, *&c.* or other books or writings, heretofore uſed for ſervice of the church, written or printed in *Engliſh* or *Latin*, other than ſuch as ſhall be ſet forth by the king, ſhall be aboliſhed, and forbidden to be uſed or kept in the king's dominions.

Sect. 6. Provided, that any perſon may uſe and retain any primers in *Engliſh* or *Latin* ſet forth by king *Henry* the Eighth, ſo that the ſentences of invocation, or prayer to ſaints, be blotted or put out of the ſame.

Repealed by 1 Mar. cap. 2. *but ſee* 1 Jac. cap. 25. *which repeals* 1 M. cap. 2.

Stat. 17 *Car.* 2. *cap.* 4. *ſect.* 2. Every printer within the city of *London*, or any other place, except the two univerſities, ſhall reſerve three copies of the beſt paper of every book new printed, or reprinted by him with additions; and ſhall, before any publick vending of the ſaid book, bring them to the maſter of the company of ſtationers, and deliver them to him; one whereof ſhall by the ſaid maſter, within ten days after he hath received the ſame, be delivered to the keeper of his majeſty's library, and the other two, within the ſaid ten days, ſent to the vice-chancellor of the two univerſities, for the uſe of the publick libraries.

Sect. 3. The printers in the univerſities ſhall deliver one ſuch copy of every book printed, or re-printed in the univerſities, to the keeper of his majeſty's library, as alſo to the vice-chancellor of either of the ſaid univerſities two other ſuch copies for the uſe of the public libraries. And if any of the printers, or the maſter of the company of ſtationers, ſhall not obſerve the direction of this act, they ſhall ſeverally forfeit 5 *l.* for every copy not ſo delivered, as alſo the value of the ſaid copies; the ſame to be recovered by his majeſty, and by the chancellor, maſters, and ſcholars of either of the univerſities reſpectively, in any of his majeſty's courts of record at *Weſtminſter.* Qu. *If not expired.*

Stat. 8 *Ann. c.* 19. *ſ.* 1. The author of any book not yet printed, and his aſſigns, ſhall have the ſole liberty of printing it for fourteen years, to commence from the day of publiſhing thereof: and if any perſon, within the ſaid time, ſhall print, reprint, or import any ſuch book, without the conſent of the proprietor in writing ſigned in the preſence of two credible witneſſes, or ſhall knowingly publiſh it without ſuch conſent, the offender ſhall forfeit the books and ſheets to the proprietor, who ſhall forthwith damaſk, and make them waſte paper, and ſhall forfeit 1*d.* for every ſheet found in his cuſtody, either printed, or printing; one moiety to the crown, the other to him who will ſue in any court at *Weſtminſter.*

Sect. 2. No bookſeller, printer, or other perſon ſhall be liable to theſe forfeitures. by printing or re-printing any book without conſent, unleſs the title to the copy of the book ſhall, before ſuch publication, be entered in the regiſter-book of the company of ſtationers, as uſual, at the hall of the ſaid company; and unleſs the conſent of the proprietor be entered, paying 6 *d.* for each entry; which regiſter-book may at all ſeaſonable times be inſpected without fee: and the clerk of the company of ſtationers, when required, ſhall give a certificate of ſuch entry; for which certificate he ſhall have 6 *d.*

Sect. 3. If the clerk ſhall neglect to make ſuch entry, or to give ſuch certificate, being required by the proprietor of the copy in the preſence of two witneſſes, then notice being given of ſuch refuſal by an advertiſement in the *Gazette*, the perſon ſhall have the ſame benefit as if an entry were actually made; and the clerk for refuſing ſhall forfeit to the proprietor 20 *l.* to be recovered in the courts at *Weſtminſter.*

Sect. 4. If any bookſeller ſhall ſet an unreaſonable price on any book, any perſon may complain to the archbiſhop of *Canterbury*, the lord chancellor, the biſhop of

of *London*, the chief juſtices, chief baron, the vice-chancellor of the two univerſities in *England*, the lord preſident of the ſeſſions, the lord juſtice general, the lord chief baron of the Exchequer, the rector of the college of *Edinburgh* in *Scotland*; who, or any of them, may call the bookſeller before them, and inquire into the cauſe of the dearneſs; and, upon examination, may redreſs and ſettle the price; and, in caſe of alteration of the price which the bookſeller ſet, to ordain him to pay the coſts of the perſon complaining. And this ſhall be done in writing under their hands and ſeals, and public notice ſhall be given by the bookſeller by an advertiſement in the Gazette. And if any bookſeller ſhall, after ſuch price ſet, expoſe to ſale, or ſell any book at a higher rate, he ſhall forfeit 5 *l.* for every book, one moiety to the crown, the other to him who ſhall ſue in any court in *Weſtminſter*. *This ſect. is repealed by* 12 Geo. 2. cap. 36. ſect. 3.

Sect. 5. Nine copies of each book on the beſt paper ſhall be delivered to the warehouſe-keeper of the company of ſtationers at their hall, before publication, for the uſe of the royal library, the libraries of the univerſities of *Oxford* and *Cambridge*, the libraries of the four univerſities in *Scotland*, of *Sion College* in *London*, and the library of the advocates at *Edinburgh*; which ſaid warehouſe-keeper is to deliver the ſaid books within ten days after demand; and if any proprietor, bookſeller, or printer, or the ſaid warehouſe-keeper, ſhall not obſerve the direction of this act therein, they ſhall forfeit the value of the books, and 5 *l.* for every copy not delivered; the ſame to be recovered by the crown, by the chancellor, maſter and ſcholars of the univerſities, and by the preſident and fellows of *Sion College*, *&c.*

Sect. 6. The penalties in *Scotland* ſhall be recovered by an action before the court of ſeſſions there.

Sect. 7. The importation or ſelling of *Greek* or *Latin* books, or in any foreign language printed beyond ſea, ſhall not be hindered.

Sect. 8. If any action ſhall be brought for any thing done in purſuance of this act, the defendant may plead the general iſſue.

Sect. 9. The right of the univerſities, or of any other perſon, to the printing or reprinting any book already printed, ſhall not be prejudiced or confirmed

Sect. 10. All actions for any offence againſt this act ſhall be brought within three months after the offence done.

Sect. 11. After the end of fourteen years, the ſole right of printing or diſpoſing of copies ſhall return to the authors, if then living, for other fourteen years.

By ſtat. 7 *Ann. c.* 14. *ſect.* 10. If any book ſhall be taken or otherwiſe loſt out of any parochial library, any juſtice may grant his warrant to ſearch for it; and if it ſhall be found, it ſhall by order of ſuch juſtice be reſtored to the library.

Stat. 12 *Geo.* 2. *cap.* 36. *ſect.* 1. It ſhall not be lawful for any perſon to import into this kingdom for ſale any books firſt compoſed and printed and publiſhed in this kingdom, and reprinted in any other country; and if any import for ſale any ſuch books, or knowing the ſame to be ſo reprinted or imported, ſell, publiſh, or expoſe to ſale any ſuch books, he ſhall forfeit the ſaid books; and the ſame ſhall be forthwith damaſked, and made waſte paper; and every ſuch offender ſhall forfeit 5 *l.* and double the value of every book, one moiety to the King, and the other moiety to any perſon that ſhall ſue; to be recovered with coſts in any court of record at *Weſtminſter* by action of debt, *&c.* in which no wager of law, *&c.* ſhall be allowed; and if the offence be committed in *Scotland*, to be recovered before the court of ſeſſion there by ſummary action. Provided, that this act ſhall not extend to any book that has not been printed or reprinted in this kingdom within twenty years before the ſame be imported.

Sect. 2. Nothing in this act ſhall extend to prevent the importation of any book firſt compoſed and printed in this kingdom, which ſhall be reprinted abroad, and inſerted among other books or tracts, and ſo to be ſold therewith, in any collection where the greateſt part of ſuch collection ſhall have been firſt compoſed and printed abroad. *Sect.* 3. *repeals* 8 *Ann. cap.* 19. *ſect.* 4.

Sect. 4. This act (except ſo much as repeals 8 *Ann. cap.* 19. *ſect.* 4.) ſhall be in force from the 29th of *September* 1739, for ſeven years, and to the end of the then next ſeſſion of parliament.

Continued by 33 Geo. 2. cap. 16. ſect. 5. *to* Sept. 29. 1767. *and to the end of the next ſeſſion.*

Boothş, Robbery in them, where ouſted of clergy. *Stat.* 5 & 6 *Ed.* 6. *c.* 9. *ſect.* 5.

Booting, or **Boting coꝛn**, Certain rent-corn anciently ſo called. The tenants of the manor of *H.* in *Com. B.* heretofore paid the *booting corn* to the prior of *Rocheſter*. Antiquity of Purveyances, *fol.* 418. See **Bote**. Perhaps it was ſo called, as being paid by the tenants by way of *Bote* (Boot we ſtill call it) or compenſation to the lord, for his making them leaſes. *Cowell, edit.* 1727.

Boꝛcovicum, *Berwick* in *Northumberland.*

Boꝛd, A jeſt, from the French *Bourde, fabula.*

Boꝛda, A plank or board.——*Rex vicecom. Ebor. ſalutem. Facias publice proclamari ne quis—maeremium aliquid, ſeu* bordas *aliquas aptas pro navibus faciendis extra regnum noſtrum ad partes exteras ducat, vel cariari facias.* Rot. Clauſ. 10 Ed. 3.

Boꝛdacii, Are tenants that occupy part of the Demeſnes, which are called *Bordlands.*

Boꝛdagium, The tenure of *Bordlands*, which ſee; *Item ordinatum eſt, quod omnes qui terras & tenementa tenent per* Bordagium *habeant ſuper ſingulis* Bordagiis, *quæ per prædictum ſervitium tenentur, capitalem quandam manſionem in loco ad hoc conſueto, &c.* Ordin. Inſt. Itin. in Inſula de Jerſey. This was a ſort of tenure which ſubjected a man to the meaneſt ſervices: he could not ſell his houſe without leave of the lord. *Cowell, edit.* 1727.

Boꝛdare, *Bordiare, Burdare*, To exerciſe the feats of arms in juſts, tournaments, or other military ſports.——*Nulli conveniant ad turniandum, vel* burdandum, *nec ad alias quaſcunque aventuras.* Aſſiſ. de Armis, an. 36 H. 3. *Burdare* was more properly *burdonibus, ſeu fuſtibus dimicare*, to play at cudgels. *Chaucer* uſes the word *burdans*, for larger ſticks or cudgels: the old French *bourdon*, is a pilgrim's ſtaff. *Bordicia* were the ſolemn challenges and encounters at quarter-ſtaff, cudgel-play, back-ſword) *&c. De tornamentis* & bordiciis *non tenendis,——ne quis præſumat torneare, vel* bordiare. Lit. Clauſ. 28 E. 1 m. 17.

Boꝛdaꝛia, A cottage: from the Saxon, *bord, domus. Mon. Angl.* 1 *tom. pag.* 37. *cum* 18 *ſervis*, 16 *villanis*, & bordariis, *cum* 60 *acris prati.*

Boꝛdaꝛii, or *Borduanni*, often occur in *Domeſday*; by ſome eſteemed to be boors, huſbandmen, or cottagers; which are there always put after villains. *Dicuntur* bordarii *vel quod in tuguriis* (*quæ cottagia vocant*) *habitabant, ſeu villarum limitibus, quaſi* borderers. Spelm. *Tenentes per ſervitia plus ſervilia quam villani, & qui tenent niſi paucas acras.* MS. but ſee **Boꝛdlands.** Some derive it from the old Gall. *bords*, the limits or extreme parts of any extent: as the borders of a country, and the borderers, inhabitants in thoſe parts: whence the border of a garment, and to imborder, which we corrupt to imbroider; but our old *bordarii, bordmen*, were rather ſo called from Sax. *bord*, a houſe. The *bordarii*, often mentioned in the *Domeſday* inquiſition, were diſtinct from the *ſervi* and *villani*, and ſeem to be thoſe of a leſs ſervile condition, who had a *bord* or cottage, with a ſmall parcel of land, allowed to them on condition they ſhould ſupply the lord with poultry and eggs, and other ſmall proviſions for his *bord*, or entertainment. *Cowell, edit.* 1727.

Boꝛdel, Lat. *Bordellum.* At firſt it ſignified any ſmall cottage which grew infamous for a licentious alehouſe, and the common habitation of proſtitutes; thence by degrees a *bordel*, or by *Metatheſis* a *brodel*; *brothel* and *brothel-houſe* came to ſignify a lewd place, a ſtew; from which *femme-bordelier*, a common whore. Hence in *Chaucer*, a *borelman*, contraction of *brothelman*, a looſe idle fellow; and borel folks, drunkards and Epicures, which the *Scotch* now call *buriel-folk. Cowell, edit.* 1727.

Bord-halfpenny (Sax. *board, tabula*, and *halfpenny, obolus*) Is money paid in fairs and markets for ſetting up tables, boards, and ſtalls for ſale of wares. *In antiquis chartis multi immunes fiunt ab iſta ſolutione*, ſays *Spelman*. It is corruptly written *borthalpeny*, and *brodhalpeny* in ſome authors.

Bord lands, The *lands* which lords keep in their hands for the maintenance of their *board* or table. *Eſt dominicum quod quis habet ad menſam ſuam & proprie, ſicut ſunt* bordlands *Anglice, i. e. dominicum ad menſam.* Bract. lib. 4. tract. 3. cap. 9. num. 5. which poſſeſſion was anciently termed *bordage*. Sax. Dict. verbo Bord. And the *bordarii* (often mentioned in *Domeſday*) were ſuch as held thoſe lands which we now call *Demeſne lands*. See *Antiq. of purveyance, fol.* 49.

Bordlode, The firm, or quantity of food or proviſion, which the *bordarii* or *bord-men* payed for their *bordlands*. The old *Scots* had the term of *burd*, and *meet-burd*, for victuals and proviſions; *burden-ſack*, for a ſack full of provender. From whence probably came our *Engliſh* burden at firſt; only a load of meat and drink; which we ſeem ſtill to retain in the proverb, *He has got his burden, i. e.* as much drink as he can bear or carry off. *Bordlode* was alſo a ſervice required of the tenant to carry timber out of woods of the lord to his houſe. *Cowell, edit.* 1727.

Bord-ſervice, Is a tenure of *bordlands*; by which ſome lands in the manor of *Fulham, in com. Middleſex*, and elſewhere, are held of the biſhop of *London*, and the tenants do now pay ſixpence *per* acre in lieu of finding proviſions anciently for their lord's board or table. *Cowell, edit.* 1727.

Borg-brigch, or **Burg-brych**, The breach or violation of ſuretiſhip, or pledge, or mutual fidelity among the *Saxons*.

Borough, or **Borow**, In Latin *burgus, burgum*; may be derived either from the French *burg*, i. e. *pagus*; or from the Saxon *borhoe, pignus*. It ſignifies with us a corporate town, that is not a city, 2 *Edw.* 3. *cap.* 3. namely, ſuch as ſend burgeſſes to the parliament, the number of which may be ſeen in *Gromp. Juriſd. f.* 24. it may be probably conjectured, that anciently it was taken for thoſe companies conſiſting of ten families, which were to be pledges for one another. See *Bract. lib.* 3. *tract* 2. *cap.* 10. See **Head-borow**, and **Borow-head**; and *Lamb. Duty of Conſt. pag.* 8. *Lyndewood* upon the Provincial (*ut ſingula de ſenſibus*) ſpeaks to this effect, *Aliqui interpretantur* burgum *eſſe caſtrum, vel locum ubi ſunt crebra caſtra, vel dicitur* burgus, *ubi ſunt per limites habitacula plura conſtituta*; but afterwards defines it thus: Burgus *dici poteſt villa quæcunque, alia a civitate, in qua eſt univerſitas approbata.* Some derive it from the Greek word πυργος, that is, *turris*. See *Skene de verb. ſignif. Vergeſtan*, in his reſolution of decayed intelligence, ſaith, that *burg* or *burgh*, whereof we take our *borough*, metaphorically ſignifies a town having a wall, or ſome kind of cloſure about it. All places that in old time had amongſt our anceſtors the name of *borough*, were one way or other fenced or fortified. *Lit. ſect.* 164. Yet ſometimes this word is uſed for *villa inſignior*, or county-town of more than ordinary note not walled. *Cowell, edit.* 1727.

Borough-Engliſh, (Sax. *borhoe engliſe*) Is a cuſtom which prevails in certain ancient boroughs, by virtue of which the youngeſt ſon ſhall inherit his father, as to the lands of which he is ſeiſed in fee or fee tail. The reaſon of this cuſtom ſeems to be, that in theſe boroughs people chiefly maintain and ſupport themſelves by trade and induſtry; and the elder children being provided for out of their father's goods, and introduced into his trade in his life-time, were able to ſubſiſt of themſelves without any land proviſion, and therefore the lands deſcend to the youngeſt ſon, he being in moſt danger of being left deſtitute. *Lit. ſect.* 165. *Noy* 106. It is called borough engliſh, becauſe, as ſome hold, it firſt prevailed in *England*. *Co. Lit.* 110. *b.* Others have told us, that the reaſon of this inſtitutirn was, becauſe the lord demanded the firſt night with the bride, ſo that they thought the eldeſt not legitimate. *Preface to* 3 *Mod. Rep.*

If land in borough engliſh be given to *A.* and his heirs, for the life of *B.* and *A.* dies in the life of *B.* having two ſons, the youngeſt ſhall be the ſpecial occupant, becauſe the heir that is repreſentative of the father, as to land of that nature, muſt be the occupant, ſince the heir muſt take by deſcent, and not by purchaſe. *Co. Lit.* 110. *b.* 2 *Lev.* 138. 3 *Keb.* 475. *Vaugh.* 201.

By the cuſtom of borough engliſh the widow ſhall have the whole of her huſband's lands in dower, which is called her free-bench; and this is given to her the better to provide for the younger children, with the care of whom ſhe is intruſted. *Co. Lit.* 33, 111. *F. N. B.* 150. *Cro. Eliz. Mo. pl.* 566.

For a condition broken, the heir at Common law ſhall enter; becauſe the condition is a thing of a new creation, and collateral to the land; but when the eldeſt ſon enters, the youngeſt ſhall enjoy the land; for by breach of the condition he is reſtored to the ancient eſtate. *Cro. Eliz.* 204. *Plow.* 28.

If a man be ſeiſed of land of the nature of borough engliſh, and hath iſſue two ſons, and die, and the eldeſt ſon, before any entry made by the youngeſt, enters into the land by abatement, and dies ſeiſed, this ſhall not take away the entry of the youngeſt brother, becauſe the eldeſt ſhall be preſumed to enter to preſerve the eſtate in the family, which he or his heirs may ſome time or other, upon failure of his brother's line, happen to enjoy. *Co. Lit.* 242.

If a man ſeiſed of borough engliſh lands makes a feoffment in fee, to the uſe of himſelf and the heirs male of his body (*ſecundum curſum communis legis*) and dies, having iſſue two ſons, the youngeſt, notwithſtanding the feoffment and theſe words, ſhall inherit thoſe lands. *Dyer* 179. *Jenk.* 220.

The law takes notice of the cuſtoms of gavelkind and borough engliſh; and therefore it is ſufficient to alledge generally, that the lands are of the cuſtom of *gavelkind* or *borough engliſh*. *Dyer* 179. *b. Jenk. Rep.* 220.

If *A.* hath iſſue five ſons, and the youngeſt dies in the life-time of the father, having iſſue a daughter, after which the father purchaſes lands in borough engliſh, and dies, the daughter of the fifth ſon ſhall *jure repræſentationis* inherit thoſe lands, and not the fourth ſon. 1 *Salk.* 243.

Borough goods, *deviſable*. Theſe words are in the ſtatute of *Acton Burnel*, 11 *E.* 1. *c. unico*. And it ſeems, that as before the ſtatute of 32 & 34 *H.* 8. no lands were deviſable at the Common law, but in ancient baronies; ſo perhaps at the making the ſtatute of *Acton Burnel* it was doubtful, whether the goods were deviſable but in ancient *borows*: for it ſeemeth by the writ *de rationalibus parte bonorum*, that anciently the goods of a man were partible between the wife and children. *Cowell, edit.* 1727.

Borough-head, or **Head-borough** (*Capitalis plegius*) Made up of *borhoe*, a pledge, and *head*. *Lamb. Duty of Conſtables*; where, in the explication of this and other *Saxon* words of that nature, he rehearſeth ſome ancient cuſtoms of *England* during the reign of the *Saxons*. This *borow-head* was the chief man of the *decury*, elected by the reſt to ſpeak, and do in their behalfs thoſe things that concerned them. See **Borough-holders**..

Borough-holders, or **Borſholders**, *quaſi Borhoe-ealders*, Are the ſame officers with thoſe called *borough-heads*, or *head-boroughs*. *Lamb. Duty of Conſtables. Bracton* calleth them *borghy-aldere, lib.* 3. *tract.* 2. *c.* 10.

Bozzel-folk, *i. e.* Country people, from the Fr. *boure*, i. e. *floccus*: becauſe they covered their heads with ſuch ſtuff. *Cowell, edit.* 1727.

Borrowing, A man *borrows* money, corn, or ſuch thing of another, he may not expect the ſame again, but the like, or ſo much: but if one lend me a horſe, &c. he muſt have the ſame reſtored. If a thing be uſed to any other end or purpoſe than that for which it was *borrowed*, the party may have his action on the caſe for it, tho' the thing be never the worſe; and if what is *borrowed* be loſt, altho' it be not by negligence of mine; as if I be robbed of it; or where the thing is impaired or deſtroyed by

by my neglect, admitting I put it to no more ſervice than that for which *borrowed*, I muſt make it good: ſo where I borrow a horſe, and put him in an old rotten houſe ready to fall, which falls on and kills him, I muſt anſwer for the horſe. But if ſuch goods *borrowed* periſh by the act of God in the right uſe of them; as where I put the horſe, *&c.* in a ſtrong houſe, and it fall and kill him, or it dies by diſeaſe, or by default of the owner, I ſhall not be charged. *Co. Lit.* 89. 29 *Aſſ.* 28. 2 *H.* 7. 11.

Boꝛſholder, The ſame with *headborough*, from the Sax. *borhoe-ealder*, i. e. *fidejuſſor primarius*.

Boꝛthal-penny. See **Boꝛd-halfpenny.**

Boꝛwhal-penny, The ſame duty with *bord-penny*. In the charter of *H.* 1. to the church of St. *Peter*, *York*, *Canonici & homines eorum ſint quieti de*——Leyrwyte, hengewyte, & warde-penny, & bor-whalpenny, & de omnibus auxiliis vicecomitum, *&c.* MS. *Cowell*, *edit.* 1727.

Boſcage, (*Boſcagium*) Is uſed for that food which wood and trees yield to cattle, maſt; from the Ital. *boſco*, *ſylva*. But *Manwood* ſays, to be quit *de boſcagio*, is to be diſcharged from paying any duty of wind-fall-wood in the foreſt; it may be derived from the Greek word βοσκειν, *paſcere*.

Boſcaria, May be either wood-houſes, from *boſcus*, or ox-houſes, from *bos*. *Ut ipſi poſſunt domus & boſcaria ſatis competentia ædificare*. Mon. Angl. 2. pa. fol. 302.

Boſcus, Is an ancient word in the law of *England* for all manner of wood. The *Italians* uſe *boſco* in the ſame ſenſe, and the *French*, *bois*. *Boſcus* is divided into high wood or timber, (*haut-bois*) and coppice or underwood, (*ſous-bois*.) High wood is properly called *ſaltus*, and in *Fleta*, *maeremium*——*Cum una carecta de mortuo* boſco. *Pat.* 10 *H.* 6. *par.* 1. *m.* 4. per Inſpect.

Boſinnus, A certain ruſtical pipe. By inquiſition after the death of *Laurence Haſtings*, earl of *Pembroke*, 22 *E.* 3. the manor of *Aſton Cantlow in com. War.* is returned to be held *in capite* of the king, by theſe words, *Quod quidem manerium per ſe tenetur de domino rege in capite per ſervitium inveniendi unum hominem peditem, cum quodam arcu ſine corda, cum uno* boſinno *ſine cappa, &c.* Ex record. Tur. Lond.

Boſtar, An ox-ſtall. It is mentioned in *Mat. Pariſ.* anno 1234. and in *Ingulphus*, *Fecit tum horrea*, boſtaria, ovilia, *&c.*

Bota, A boot or ſhoe, that was the particular calceature of the monks. In ſome aſtronomical fragments of *John de Wallingford*, we ſee the picture of the author, with this diſtich,

Tonſio larga comæ, nigra veſtis, bota rotunda,
Non faciunt monachum, ſed mens a crimine munda.
MS. Cotton, *Jul. D.* 6.

Botargo, or *Cavear*, May be imported, Stat. 10 & 11 *Will.* 3. *c.* 24. *ſect.* 14.

Bote, Signifieth compenſation, recompence, ſatisfaction, or amends, *Lamb. Explicat. Sax. Words.* Thence cometh *manbote* alias *monbote*, that is, compenſation or amends for a man ſlain, which was bound to another. In king *Ina*'s laws, publiſhed by Mr. *Lambard*, *c.* 96. is declared what rate was ordained for the expiation of this offence. Hence alſo comes our common phraſe, to give to *boot*, that is, *compenſationis gratia*. See *Skene de Verb. Signif.* tit. *Bote*. See alſo, **Hedge-bote, Houſe-bote, Theft-bote,** *&c.* in their proper places.

Boteleſs. In the charter of *Hen.* 1. to *Thomas* archbiſhop of *York*, it is ſaid, that no judgment or ſum of money ſhall *acquit* him that commits ſacrilege; but he is in Engliſh called *boteleſs*, *i. e.* without emendation. *Lib. Albus penes Cap. de Suthnet. Int. Plac. Trin.* 12 *Ed.* 2. *Ebor.* 48. We retain the word ſtill in common ſpeech. See **Fridſtol.**

Botericia, *Buttereſs.*—*Rex.*—*Sciatis quod conceſſimus*—Johanni de Chiſhull, *decano* S. Pauli Lond. *Theſaurario noſtro qd' ipſe & ſoc. ſui decani ejuſdem eccleſiæ*,——*in perpetuum habeant & teneant libere & quiete duas columpnas* botericias, *quas idem decanus fieri fecit a parte auſtrali capellæ ſuæ.*——9 Jun. Pat. 35 H. 3. m. 14.

Botellaria, A buttery or cellar, in which the buts and bottles of wine and other liquors are repoſited.—*Veniet ad palatium regis, & ibit in* botellariam *& extrahet a quocunque vaſe in dicta* botellaria *invento, vinum quantum viderit neceſſarium pro factura unius picheri claretti.*—An. 31 Ed. 3.

Botha, A booth or tent to ſtand in, in fairs or markets.—*Et duas menſuras liberas ad* bothas *ſuas faciendas*. Mon. Angl. 2 par. f. 132.

Bothagium, Boothage, or cuſtomary dues paid to the lord of the manor or ſoil, for the pitching and ſtanding of booths in a market or fair.——19 *H.* 6. *Rex conceſſit* Rob. Broke—picagium, ſtallagium, bothagium, & tollagium, *una cum aſſiſa panis & cerviſiæ de novo mercato infra villam de* Burceſter, *com.* Oxon. *Paroch. Antiq. pag.* 680. For the original of the word, from the Old Gallic *bouts*, leather jacks, ſee Mr. *Kennet's Gloſſary*.

Bothna, Buthna, Buthena, Seems to be a park where cattle are incloſed and fed. *Hector Boetius*, *lib* 7. *ca.* 123. *n.* 35. And *Aul. Gel. lib.* 11. *cap.* 1. *Bothena* alſo ſignifies a barony, lordſhip, or ſheriffwick: and *domini Bothenæ*, are lords of the barony, manor, *&c.* *Skene de Verb. Signif.*

Botiler of the King, (*Pincerna regis*, *ſtat.* 43 *Ed.* 3. *cap.* 3.) Is an officer that provides the king's wines, who (according to *Fleta*, *lib.* 2. *cap.* 21.) may, by virtue of his office, out of every ſhip laden with ſale wines *unum dolium eligere in prora navis ad opus regis, & aliud in puppe, & pro qualibet pecia reddere tantum* 20 *ſolid. mercatori. Si autem plura inde habere voluerit, bene licebit, dum tamen pretium fide dignorum judicio pro rege apponatur.*

Bottomry or **Bottomary,** Is when the maſter of a ſhip borrows money upon the keel or bottom of his ſhip, and binds the ſhip itſelf, that if the money be not paid by the day aſſigned, the creditor ſhall have the ſhip. *Ceo* bottomage *eſt quand argent eſt borrow ſur keil del neif, & le neif oblige al payment de ceo*, viz. *ſi ne ſoit pay al temps, que l'auter avera le neif*. Latch's Rep. fol. 252. *Scarborough's* caſe. *Cowell.*

Others define *bottomry* to be the act of borrowing money on a ſhip's bottom, by engaging the veſſel for payment; ſo that in caſe ſhe miſcarries, the lender loſes his money: but if ſhe finiſhes her voyage, and arrives in ſafety, the borrower is to repay the loan with a premium or intereſt agreed on (which is always adequate to the riſk); and if this be denied or deferred, the lender ſhall have the ſhip.

Bottomry is likewiſe caled *foenus nauticum*, *pecunia trajectitia*, and ſometimes *uſura marina*, though improperly; for notwithſtanding the intereſt in theſe contracts is always much larger than the law preſcribes for monies lent on landed ſecurities, yet it is never accounted *uſury*, as marine loans are furniſhed at the hazard of the lender, which the others are not; and where the riſk is greateſt on the advanced monies, the profit ought in reaſon to be ſo too.

Money lent on bottomry is commonly on the ſhip only, though ſometimes it is upon the perſon of the borrower, and ſometimes on both. The firſt is where a man takes up money, and obliges himſelf, that if the ſhip agreed on arrives at ſuch a port, then to repay the loan, with the intereſt ſtipulated; but if the ſhip miſcarry, then nothing: but when money is lent at intereſt, it is delivered at the peril of the borrower, and the profit of this is merely the price of the loan; whereas the profit of the other is a reward for the danger and adventure of the ſea, which the lender takes upon himſelf, and makes the intereſt lawful. *Lex Mercat. Red.* 123.

By ſtat. 19 *Geo.* 2. *c.* 37. it is enacted, That after the firſt of *Auguſt* 1746, every ſum lent on *bottomry*, or at *reſpondentia*, upon any ſubjects ſhips to or from the *Eaſt Indies*, ſhall be lent only on the ſhip, or the merchandizes laden on board her, and ſo expreſſed in the condition of the bond; and the benefit of *ſalvage* ſhall be allowed to the lender, his agents, *&c.* who alone ſhall have a right to make aſſurance on the money lent: and no borrower of money upon bottomry, or at *reſpondentia* as aforeſaid, ſhall recover more on any aſſurance than the value of his intereſt on the ſhip or effects, excluſive of the money borrowed.

borrowed. And if the value of his intereſt doth not amount to the money borrowed, he ſhall be reſponſible to the lender for the ſurplus, with lawful intereſt for the ſame, together with the aſſurance and all charges, *&c.* notwithſtanding the ſhip and merchandize be totally loſt.

Stat. 19 *Geo.* 2. *c.* 32. intituled, An act for amending the laws relating to bankrupts.

The preamble obſerves, that many perſons within the deſcription of, and liable to the ſtatutes concerning bankrupts, frequently commit ſecret acts of bankruptcy, unknown to their creditors, and other perſons with whom they had dealings; and after committing thereof, continue to appear publickly, and carry on buſineſs, by buying and ſelling of goods, drawing, accepting, and negotiating bills of exchange, and paying and receiving money on account thereof, in the uſual way of trade, and in the ſame open manner as if they were ſolvent, and not being bankrupt. And as the permitting ſuch ſecret acts of bankruptcy to defeat payment really made in the caſes and circumſtances above-mentioned, where the perſon receiving the ſame had no notice of, nor were privy to their having committed any act of bankruptcy, will be a diſcouragement to trade, and a prejudice to credit in general; it is therefore enacted, That after the 29th of *October* 1746, no real creditor of a bankrupt in reſpect of goods ſold to, or bills of exchange really drawn, negotiated, or accepted by ſuch bankrupt in courſe of dealing, ſhall be liable to refund to the aſſignees of the bankrupt's eſtate any money, which before the ſuing forth of ſuch commiſſion was really in the courſe of trade received by him of ſuch bankrupt, before he had knowledge or notice of his becoming a bankrupt, or being in inſolvent circumſtances.

And as merchants and other traders frequently lend money on *bottomry*, or at *reſpondentia*, and cauſe their veſſels with their cargoes to be inſured; and where commiſſions of bankruptcy have iſſued againſt the obligor, or aſſurer, before the loſs of the ſhip or goods hath happened, it hath been made a queſtion, whether the obligee, or the aſſured, ſhould be let in to prove their debts, or be admitted to have any benefit under ſuch commiſſion, which may be a diſcouragement to trade: for remedy whereof it is enacted, That the obligee in any *bottomry* or *reſpondentia* bond, and the aſſured in any policy of inſurance made *bona fide* upon a valuable conſideration, ſhall be admitted to claim; and after the loſs or contingency, to prove the debt thereon, in like manner as if the ſame had happened before the iſſuing of the commiſſion of bankruptcy, and ſhall receive a proportionable dividend of the bankrupt's eſtate; and every bankrupt ſhall be diſcharged from the debt on ſuch bond and policy of inſurance as aforeſaid, and ſhall have the benefit of all the ſtatutes againſt bankrupts, in like manner as if ſuch loſs or contingency had happened, and the money due thereon had become payable, before the time of the iſſuing of ſuch commiſſion.

The defendant had lent 300 *l.* on a bottomry bond, and afterwards inſured 450 *l.* on that ſhip with the plaintiff for ſix guineas *per cent.* premium, as intereſted for money lent, *&c.* The ſhip outlived the time at which the money was payable, and afterwards was loſt in the *Eaſt Indies*. The defendant recovered the money on the bottomry bond, and afterwards ſued the inſured upon their policy, who brought their bill to be relieved, for that the money inſured by the policy was the money lent upon the bottomry, and that the defendant was no otherwiſe intereſted in the ſhip; and that the money being paid, no uſe ought to be made of the policy. The court decreed the policy to be delivered up. 2 *Eq. Abr.* 371. *Trin.* 1692. *Goddart* and *Garret. S. C.* 2 *Vern.* 269. where it is held, that a perſon having no intereſt but his bottomry bond cannot inſure; and that a perſon who has no intereſt in the ſhip or cargo cannot inſure, though the policy was intereſted or not; but inſurances are for the benefit of traders only, not that others unconcerned ſhould make unreaſonable gain.

Where the defendant lent the plaintiff 250 *l.* on a bottomry bond, and afterwards inſured on the ſame ſhip; but the inſurance was larger as to the voyage, there being liberty to go to other ports and places than what were contained in the condition of the bottomry bond. The ſhip being loſt, the defendant recovered the money on the policy of inſurance, and alſo put the bottomry bond in ſuit, the ſhip, though loſt, having deviated from the voyage mentioned in the bond; the plaintiff brought his bill, pretending the defendant ought not to recover both on the inſurance, and alſo on the bond, he having inſured only in reſpect of the money he had lent on the bottomry. And therefore the plaintiff would have had the benefit of the inſurance paying the premium; but the court held, that the defendant having paid the premium was intitled to the benefit of the policy; and the inſurers might as well pretend to have aid of the bottomry bond, and to diſcount the money recovered on the policy to eaſe the bottomry bond. *Mich.* 1716. *Harman* and *Vanhatton*, 2 *Vern.* 717.

The plaintiff entered into a penal bond of bottomry to pay 40 *s. per* month for 50 *l.* The ſhip was to go from *Holland* to the *Spaniſh* iſlands, and ſo to return for *England*; but if ſhe periſhed, the defendant was to loſe his 50 *l.* She went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africa*, and upon that occaſion went to *Barbadoes*, and then periſhed at ſea; the plaintiff, being ſued on the bond and penalty, pretended, that the deviation was on neceſſity: but his bill was diſmiſſed, ſaving as to the penalty. 2 *Chan. Caſ.* 130. *Vid.* 2 *Salk.* 444.

But where *J. S.* entered into a bottomry bond, whereby he bound himſelf, in conſideration of 400 *l.* as well to perform the voyage within ſix months, as at the ſix months end to pay 400 *l.* and 40 *l.* premium, in caſe the veſſel arrived ſafe, and was not loſt in the voyage. And it fell out that *J. S.* never went the voyage, whereby his bond became forfeited; and he preferred a bill to be relieved: and in regard the ſhip lay all along in the port of *London*, and ſo the defendant run no hazard of loſing his principal, the lord keeper thought fit to decree, that the defendant ſhould loſe the premium of 40 *l.* and be contented with his ordinary intereſt. *Mich.* 1684. *Deguidler* ahd *Depeiſter*, 1 *Vern.* 263.

A part-owner of a ſhip borrowed money of the plaintiff upon bottomry bond, payable on the return of the ſhip from the voyage ſhe was then going in the ſervice of the *Eaſt India* company; and the *Eaſt India* company broke up the ſhip in the *Indies*; and the owners brought their action againſt the company, and recovered damages; but they did not amount to a full ſatisfaction. And the obligee brought his bill to have his proportionable ſatisfaction out of the money recovered: but his bill was diſmiſſed, and he left to recover as well as he could at law; for a court of equity will never aſſiſt a bottomry bond, which carries an unreaſonable intereſt. *Mich.* 1701. *Danby* and *Turner*, 1 *Eq. Abr.* 372.

Bill to be relieved againſt a bottomry bond, with condition, that if the ſhip *S.* bound to the *Eaſt Indies*, ſhall return to *L.* within thirty-ſix months, or if ſhe does not return within thirty-ſix months, not being taken, or loſt by inevitable accidents within that time, then the money to be paid, *&c.* The ſhip was detained in the port of *Surat* in *India* by imbargo by the Great Mogul, ſo that ſhe could not ſail from *Surat* till after the thirty-ſix months were elapſed, and in her return home was taken by the *French*; but, being after the thirty-ſix months, the bond was forfeited: but there being no fault in the maſter, and the voyage delayed by inevitable accident, *viz.* by the ſaid embargo, the bill prayed *to be relieved againſt the penalty of the bond. Harcourt* C. diſmiſſed the bill, but without coſts, ſaying, *He could not relieve againſt the expreſs agreement of the parties; but if the defendant had inſured this money upon the ſhip, the plaintiff ſhould have the benefit of the inſurance, upon allowing the defendant the charges of the inſurance, if the plaintiff pays the money within three months. Vin. Abr.* tit. *Bottomry Bonds.*

Debt upon an obligation with condition to pay ſo much money (which was more by a third part than the legal intereſt of the money) if the ſhip returned within ſix months from *Oſtend* in *Flanders* to *London*, and if ſhe do not return, then the obligation to be void. The defendant pleaded, that there was a corrupt agreement between him and the plaintiff; and that at the time of making of

of the obligation, it was agreed he ſhould have no more for intereſt than the law allowed, in caſe the ſhip ſhould ever return, and avers that the bond was entered into by covin to avoid the ſtatute of uſury. *Per Hale*, Clearly this bond is not within the ſtatute, for this is the common way of inſurance, and if this were void by the ſtatute of uſury, trade would be deſtroyed; for it is a caſualty whether every ſuch ſhip ſhall return or not: but he agreed the averment was well taken, becauſe it diſcloſed the manner of the agreement. *Hardres* 418. *Joy* and *Kent*. *Molloy*, *b.* 2. *c.* 7. *ſect.* 12.

Where *A.* lends *B.* 100*l.* to freight a ſhip abroad and they agree that if the ſhip comes home ſafe, *A.* ſhall have 150*l.* and that if ſhe does not, that he ſhall loſe the 100*l.* this is not uſury, but good by the cuſtom of merchants; becauſe of the great perils of the ſea, and both principal and intereſt run the ſame hazard of being loſt; but if the principal be ſecured, and the intereſt only depend on hazard, if it be more than is lawful, it is uſury. 2 *Rol. Rep.* 48. 5 *Co.* 70, *&c. Cro. Jac.* 208, 508. 1 *Keb.* 339, 711.

So where the condition of a bottomry bond was, that if the obligor, or the ſhip, or the goods return ſafe, then to pay more than the legal intereſt; this was adjudged good by the cuſtom of merchants, though it depends on many contingencies; and though the obligee may be ſaid to run little hazard; and though any of the contingencies become impoſſible, as if the obligor die before his return, *&c.* yet the bond remains payable, contary to the general rule of law in ſuch caſes; for the law ſupplies theſe words, which ſhall firſt happen, and foreclоſes the election of the obligor, and gives it to the obligee to take his election on which of the contingencies ſhall firſt happen. 1 *Lev.* 54. 1 *Sid.* 27.

A ſhip going in the fiſhing trade to *Newfoundland* (which voyage muſt be performed in eight months) *the plaintiff gave the defendant* 50 l. *to repay* 60 l. *upon the return of the ſhip to* Dartmouth; *and if by leakage or tempeſt he ſhould not return in eight months, then to pay the principal money only; and if ſhe never returned, then he ſhould pay nothing*; all the court held, that this is no uſury within the ſtatute; for if the ſhip had ſtaid at *Newfoundland* two or three years, he was to pay but 60*l.* upon the return of the ſhip, and if ſhe never return, then nothing; ſo that the plaintiff run a hazard of having leſs than the intereſt which the law allows, and poſſibly neither principal nor intereſt. *Cro. Jac.* 208. *pl. Trin.* 6 *Jac. B. R. Sharpley* v. *Sturrell. S. C.* cited by *Dodderbridge* J. *Cro. J.* 508, 509. *pl.* 20. By name of *Dartmouth*'s caſe, where one went to *Newfoundland*, and another lent him 100*l.* for a year, to victual his ſhip; and if he returned with the ſhip, he was to have ſo many 1000*l.* fiſhes, and expreſſed at what rate, which exceeded the intereſt allowed by the ſtatute; and if he did not return, then he ſhould loſe his principal, and adjudged no uſury. *Vin. Abr.* tit. *Bottomry bonds* (A.)

Debt upon a bond of 300*l.* conditioned, that *if ſuch a ſhip ſailed to* Surat *in the* Eaſt Indies, *and returned ſafe to* London, *or if the owner and his goods return ſafe, &c.* the defendant ſhould pay to the plaintiff the principal ſum 300*l.* and alſo 40*l.* for every 100*l.* but if the ſhip ſhould periſh by any unvoidable caſualty of the ſea, fire, or enemies, to be proved by ſufficient evidence, *then the plaintiff was to have nothing.* The queſtion was, whether this was an uſurious contract? Adjudged, that it was not, and that it was a good bottomry contract. *Bridgman* Chief Juſtice, diſtinguiſhed between a bargain and a loan; for if the bargain is plain, and the principal is in a hazard, it cannot be ſaid within the ſtatute of uſury; but it is otherwiſe if a loan, where it is intended that the principal is in no hazard; and adjudged *per tot cur.* for the plaintiff, that this contract is not uſurious *Sid.* 27. *pl.* 8. *Hill.* 12 *Car.* 2. *C. B. Soome* v. *Gleem*, *Vin. Ab.*. tit. *Bott. Bonds* (A. 2.)

A maſter of a ſhip hath no power to take up money by bottomry in places where his owner or owners dwell, unleſs it were only for ſo much as his part comes to in the ſaid ſhip: otherwiſe, he and his eſtate muſt ſtand liable to anſwer the ſame. But when a maſter is out of the country, and where he hath no owners, nor any goods of theirs, nor of his own, and cannot procure money by exchange or otherwiſe, and that for want of money the voyage might be retarded or defeated, money may be taken up upon bottomry, and all the owners are liable thereunto: otherwiſe he ſhall bear the loſs, that is, the owners are liable by their veſſel; and the owners have their remedy againſt the maſter. But the perſons of the owners are no ways liable by the act of the maſter for money taken up. *Molloy*, *b.* 2. *c.* 11. *ſect.* 11.

It is certain, that the greater the danger is, if there be a real adventure, the greater may the profit be of the money advanced; though ſome ſeem to be of opinion, that any profit or advantage ought not to be made of money ſo lent, no more than of that which is advanced on a ſimple loan, and on the peril of the borrower. However, all or moſt of the trading nations of *Chriſtendom* do at this day allow it as a matter moſt reaſonable on account of the contingency or hazard that the lender runs: and therefore ſuch money may be advanced ſeveral ways; ſo that the lender runs a hazard. *Molloy*, *b.* 2. *c.* 11. *ſect.* 14.

There is another way of advancing money called *uſura marina*, joined the advanced money, and the danger of the ſea together; and this is binding ſometimes upon the borrower's ſhip, goods, and perſon: the produce of this will advance ſometimes to 20, 30, and ſometimes 40 *per cent.* As for inſtance: a private gentleman has a 1000*l.* ready money lying by him; and having notice of an ingenious merchant who has credit beyond ſeas, and underſtands his buſineſs well, applies himſelf to him, and offers him 1000*l.* to be laid out in ſuch commodities as the merchant ſhall think convenient for that port or country the borrower deſigns them for, and that he will bear the adventure of that money during the whole voyage (which he knows may be accompliſhed within a year). Hereupon the contract is agreed upon; 5 *per cent.* is accounted for the intereſt, and 12 *per cent.* for the adventure outwards, and 12 *per cent.* for the goods homeward; ſo that upon the return the lender receives 29 *per cent.* and this cannot be uſury by the laws of this realm, on account of the riſk and danger which the lender runs. *Molly*, *b.* 2. *c.* 11. *ſect.* 14.

Form of a *Bill of Bottomry.*

TO all people to whom theſe preſents ſhall come, I A. B. *of*, &c. *owner and maſter of the ſhip called*, &c. *of the burden of two hundred tons, now riding at*, &c. *and bound for*, &c. *in the* Weſt Indies, *ſend greeting: Whereas I the ſaid* A. B. *am at this time neceſſitated to take up, upon the adventure of the ſaid ſhip, called*, &c. *the ſum of* 100*l.* *for the ſetting forth the ſaid ſhip to ſea, and furniſhing her with proviſions for the ſaid voyage, which* C. D. *of*, &c. *merchant, hath on requeſt lent unto me, and ſupplied me with at the rate of* 20 l. *for the ſaid hundred pounds during the ſaid voyage: now know ye, that I the ſaid* A. B. *do by theſe preſents, for me, my executors and adminiſtrators, covenant and grant to and with the ſaid* C. D. *that the ſaid ſhip ſhall with the firſt fair wind after the day*, &c. *depart from the river* Thames, *and ſhall, as wind and weather ſhall ſerve, proceed in her voyage to*, &c. *in the* Weſt Indies; *and having there tarried until*, &c. *and the opportunity of a convoy, or being ſooner diſpatched (which ſhall firſt happen) ſhall return from thence, and ſhall, as the wind and weather ſhall ſerve, directly ſail back to the river of* Thames *to finiſh her ſaid voyage: and I the ſaid* A. B. *in conſideration of the ſaid ſum of* 100 l. *to me in hand paid by the ſaid* C. D. *at and before the ſealing and delivery of theſe preſents, do hereby bind myſelf, my heirs, executors, and adminiſtrators, my goods and chattels, and particularly the ſaid ſhip, with the freight, tackle, and apparel of the ſame, to pay unto the ſaid* C. D. *his executors, adminiſtrators, or aſſigns, the ſum of* 120 l. *of lawful* Britiſh *money, within one and twenty days next after the return and ſafe arrival of the ſaid ſhip, in the ſaid river* Thames, *from the ſaid intended voyage. And I the ſaid* A. B. *do for me, my executors and adminiſtrators, covenant and grant, to and with the ſaid* C. D. *his*

his executors and administrators, by these presents, that I the said A. B. *at the time of sealing and delivery of these presents, am true and lawful owner and master of the said ship, and have power and authority to charge and engage the said ship as aforesaid; and that the said ship shall at all times after the said voyage, be liable and chargeable for the payment of the said* 120l. *according to the true intent and meaning of these presents. And lastly, it is hereby declared and agreed, by and between the said parties to these presents, that in case the said ship shall be lost, miscarry, or be cast away before her next arrival in the said river of* Thames *from the said intended voyage, that then the said payment of the said* 120l. *shall not be demanded, or be recoverable by the said* C. D. *his executors, administrators, or assigns, but shall cease and determine, and the loss thereby be wholly borne and sustained by the said* C. D. *his executors and administrators: and that then and from thenceforth every act, matter, and thing herein contained on the part and behalf of the said* A. B. *shall be void; any thing herein contained to the contrary notwithstanding.* In witness &c.

Bovata terrae, Is as much as one ox can plough in a year: *Octo* bovatæ *terræ faciunt carucatam terræ, octo carucatæ faciunt unum feodum militis,* 28 *acræ faciunt* bovatam *terræ.* MS——*Cujus singulæ* bovatæ *sunt quindecim acræ terræ.* Mon. Angl. par 3. fol. 91. b. See **Organg**.

Bouche of court, or, as it is commonly called, *budge of court,* Was a certain allowance of provision from the King to his knights and servants that attended him in any military expedition. The French *avoir bouche a la cour,* is to have an allowance at court of meat and drink; but sometimes it is extended only to bread beer, and wine; and this was anciently in use as well in the houses of noblemen, as in the King's *court,* as appears by this indenture.

Ceste endenture fait parentre les Nobles hommes Monsieur To. Beauchamp, *counte de Warwyke de une parte, & Monsieur* Joh. Russel *de Strengesham chivalier d'auter part, tesmoigne, que le dit Monsieur* Johan *est demeure ove le dit counte pur terme de sa vie, pur la pees & pur guerre, & prendra pur la pees du dit counte annuelements vynt livres, de la vie du dit Monsieur* Johan, *del manoir le dit counte de Chedworth en le countee de Glouceſter, & pur la guerre quareant livres, & serra paie annuelement es turmes de la nativitee Seinte* John *de Baptiste & de Nowel per ovels portiones des issues du dit manoir de Chedworth, per les mains del gardein de mesme le manoir, & avera le dit Monsr* Johan *pur la pees, quant il serra maunde de venir al dit counte,* Bouche au Cour *pur lui mesme, un chamberlein & un garson, feyn, provendre &* Ferrue *pur trois chivaulx pur la temps de sa demoure, & pur la guerre le dit Monsr.* Johan *Mountra lui mesme convenablement, & avera* Bouche au Cour, *ou liverie par lui mesme, un chamberlein & trois garsons, ou gages al afferant & feyn, provendre &* Ferrure *pur cynk chivaulx en manere come autre de son estat, ove le dit counte, prendront. Et si il preigne prisoner, soit entre le dit counte & le dit Monsr.* Johan *si come il soit parentre lui & autres bachilers de sa retenue pur terme de vie. Et voet & grante le dit counte per cestes presentes lettres, que si la dite rent annuele de* xxl. *pur la pees, ou de* xll. *pur la guerre soit a derere & nyent paye pur un moy apres ascun des termes avantditz, que bien lise au dit Monsr.* Johan *ou son attornie en celle partie en le dit manoir de Chedworth destreindre pur les arrearages de la dite rent, &c. Donne a nostre Chastel de Warwyke le* xxix. *jour del moys de Marcz l'an du regne le Roy* Richard Second, *puis le conqueſt sisme.*

See *Kennet's Gloss.* to *Paroch. Antiq.*

Boveria, or **Boverium,** An ox-house or ox-stall, *loca ubi stabulantur* boves; according to *Gloss.* in 10 *Script.* And *Mon. Angl.* 2 *par. f.* 210. hath these words—— *ad farciendum ibi* boverias *suas, & alias domos usibus suis necessariis.* The *Scotch* now call a cow-house a *byer,* as in the ballad of *Christ kirk on the green——The bolt flew over the* byer. *Cowell, edit.* 1727.

Boverton, in *Glamorganshire.* See **Bovium.**

Bovium, The town in *Wales,* so called by the ancients, now known by the name of *Baverton.*

Bovettus, A young steer or bullock, castrated—— *Unus* bovettus *mas, quatuor boviculæ fœminæ.* Paroch. Antiq. p. 287.

Bovicula, An heifer or young cow, which in the East riding of *Yorkshire* they call a *whee* or *whey.*—— *Possunt sustentari sexdecim vaccæ, & unus taurus cum* boviculis. *Paroch. Antiq. pag.* 495.

Boultel reins, To what duties liable, stat. 4 & 5 *Will. & Ma. c.* 5. *sect.* 2.

Bound, or **Boundary.** (*Bunda*)——*Secundum metas, meras,* bundas, *& Marchias forestæ,* 18 *Ed.* 3. *Itin. Pick. fol.* 6. Sir *Edward Coke,* in 4 *Inst. fol.* 318. derives it from the Saxon *bunna*; but there is no such word in the *Saxon* dictionary.

Bow-bearer, Is an under officer of the forest; whose oath will inform you of the nature of his office, in these words:

I will true man be to the master of the forest, and to his lieutenant; and in their absence I shall truly over-see, and true inquisition make, as well of sworn men as unsworn in every bailiwick, both in the north bail and south bail of this forest, and of all manner of trespasses done, either to vert or venison; I shall truly endeavour to attach, or cause them to be attached in the next court of attachment, there to be presented, without any concealment had to my knowledge. So help me God. *Cromp. Jurisd. fol.* 201.

Bows and **Bow-staves.** Four bowstaves shall be imported with every ton of merchandize from *Venice,* stat. 12 *Ed.* 4. *c.* 2. Ten bows for every butt of malmsey, 1 *Ric.* 3. *c.* 11. 6 *Hen.* 8. *c.* 11. 13 *Eliz. c.* 14. Archery to be used by all able men, 17 *Ed.* 4. *c.* 3. The price of bows limited, 22 *Ed.* 4. *c.* 4. 3 *Hen.* 7. *c.* 13. 33 *Hen.* 8. *c.* 9. 8 *Eliz. c.* 10. Bow-staves discharged of custom, 19 *Hen. c.* 7. 2. Shooting in cross-bows by those who have not 200 marks lands, prohibited, 19 *Hen.* 7. *c.* 4. 3 *Hen.* 8. *c.* 13. 6 *Hen.* 8 *c.* 13 14 & 15 *Hen.* 8. *c.* 7. Cross-bows and hand guns prohibited, 25 *Hen.* 8. *c.* 17. 33 *Hen.* 8. *c* 6. Every bowyer in *London, &c.* shall keep fifty bows of elm, *&c.* 8 *El. c.* 10.

Bowyers, One of the ancient corporations of the city of *London.* See **Bows.**

Box-wood. See **Wood.**

Bozones. See **Busones.**

Bracelets, Hounds or rather beagles of the smaller and slower kind.——*Rex constituit* J. L. *magistrum canum suorum vocatorum* braclets, *dans ei licentiam experiendi eosdem canes necnon habendi & faciendi cum eis sectas ad quascunque bestias infra forestas & chaceas suas prout sibi fore videbitur faciendum pro expeditione & informatione dictorum canum* Pat. 1. R. 2. p. 2. m. 21

Bracelets of glass, To what duties liable, 4 *Will. & Ma. c.* 5. *sect.* 2.

Bracenarius, (Fr. *braconier*) The huntsman, master of the hounds.——*Rex mandat baronibus quod allocent* Rob. de Chademoth *vicecom.* Lincoln. *lvi s. vii d. quos per præceptum regis liberavit* Joh. de Bellovento *pro putura septem leporariorum, & trium falconum & lanerar. & pro vadiis unius* bracenarii, *a die* S. Joh. Bapt. *an.* 14 *usque ad vigil.* S. Mich. *prox. sequent. utroque die computato,* viz. *pro putura cujuslibet leporarii & falconis i d. ob. & pro vadiis prædicti* bracenarii *per idem ii d.*—— Comput. de anno 29 Ed. 1. Rot. 10. in dorso.

Bracetus, (*Brachetus*) Fr. *bracet, braco, canis sagax, indagator leporum.* So a *braco* was properly the large fleet hound, *brachetus* was the beagle or smaller hound; *bracheta,* the bitch in that kind.——*Cart. Hen.* 2. *Rex. Ang.*——*Concedi eis duos leporarios, & quatuor* bracetos *ad leporem capiendum.* Mon. Angl. tom. 2. p. 283.

Bracheta, *canis fœmina, quæ leporem vel vulpem ex odore persequitur, vulgo* a brache, Gal. *brachet.*——*Et duos leporarios & quatuor* brachetas *ad capiendum leporem & vulpem.* Charta 11 Ed. 2.

Bracina,

Bracina, A brewhouſe. *MS. penes* Will. Dugdale, *mil.*

Bracinum, A brewing; the whole quantity of ale brewed at one time, for which *tolſeſter* was paid to the lord in ſome manors.

Bracton, Was a famous lawyer of this kingdom, renowned for his knowledge both of the Common and Civil laws, as appeareth by his book. He lived in the days of *Hen.* 3. *Staunf. Pref. fo.* 5. and, as ſome ſay, was Lord Chief Juſtice of *England.*

Brage, *Broughton* in *Hampſhire.*

Brampton. See **Bremenium.**

Brancaſter. See **Branodunium.**

Brandy, A kind of ſpirits or ſtrong water, made chiefly in *France*, and extracted from the lees of wine or cyder, mentioned in the act 20 *Car.* 2. *cap.* 1. upon an argument in the *Exchequer*, *anno* 1668, whether *brandy* were a *ſtrong water* or *ſpirit*, it was reſolved to be a *ſpirit.* But the 25th of *Novem.* 1669, by a grand committee of the whole *houſe of commons*, it was voted to be a *ſtrong water*, perfectly made. See the ſtatute in purſuance thereof, 22 *Car.* 2. *cap.* 4.

The exciſe upon brandy ſettled, 22 *Car.* 2. *c.* 4. 9 & 10 *W.* 3. *cap.* 21. *ſect.* 27. 6 *Geo.* 2. *c.* 17.

Exciſe upon *Guernſey* brandy, 2 *W. & M. ſt.* 2. *c.* 9. *ſect.* 12.

Imported in veſſels of leſs than 60 gallons, forfeited, 4 *W. & M. c.* 5. *ſect.* 8.

Repeal of the prohibition of importing foreign brandy, 5 *W. & M. c.* 2. *ſect.* 2.

Brandy, *&c.* imported in ſhips under 15 tons burden forfeited, 12 & 13 *W.* 3. *c.* 11. *ſect.* 20. 5 *Geo.* 1. *c.* 11.

Diſtillers permitted to retail brandy without licence, 1 *Ann. ſtat* 2. *c.* 14. *ſect.* 2.

Brandy unduly imported forfeited, 1 *Ann. ſt.* 2. *c.* 14 *ſect.* 2.

All perſons permitted to diſtil brandy from *Britiſh* malt or cyder, 12 *Ann. ſt.* 2. *c.* 3. *ſect.* 9.

All dealers in brandy, *&c.* to enter their warehouſes, *&c.* 6 *Geo.* 1. *c.* 21. *ſect.* 11.

Brandy, *&c.* not to be imported in ſhips leſs than 30 tons, *Geo.* 1. *c.* 21. *ſect.* 29. Not in ſhips leſs than 40 tons, 8 *Geo.* 2 *c.* 18.

Foreign brandy to be kept ſeparate from *Britiſh*, 8 *Geo.* 1. *c.* 18. *ſect.* 11.

Foreign exciſeable liquors may be ſeized by any officer of the cuſtoms or exciſe, 8 *Geo.* 1. *c.* 18. *ſect.* 24,

Penalties on hawking brandy, *&c.* 6 *Geo.* 2. *c.* 17. *ſect.* 11.

Duties on retailers of brandy, *&c.* 9 *Geo.* 2. *c.* 23. 19 *Geo.* 2. *c.* 17. *ſect.* 8.

Occupiers of houſes where brandy, *&c.* is retailed, deemed retailers, 11 *Geo.* 2. *c.* 26.

Reſcuing unlawful retailers of brandy, *&c.* or aſſaulting informers, tranſportation, 11 *Geo.* 2. *c.* 26. *ſect.* 2.

Hawkers of brandy, *&c.* may be apprehended by any perſons, 11 *Geo.* 2. *c.* 26. *ſect.* 5.

Duties on retailers of brandy, *&c.* altered, 19 *Geo.* 2. *c.* 8.

Penalties on retailing without licence, 16 *Geo.* 2. *c.* 8 *ſect.* 9. 24 *Geo.* 2. *c.* 40. *ſect.* 9.

Penalties to be regulated by the law of exciſe, 17 *Geo.* 2. *c.* 17. *ſect.* 16.

Offenders to be whipped in the houſe of correction, 17 *Geo.* 2. *c.* 17. *ſect.* 17.

See titles **Diſtillers**, **Exciſe**, and **Spirituous Liquors.**

Branodunium, *Brancaſter* in *Norfolk.*

Branogenium, *Worceſter.*

Braſiare, To brew. *Cujuſcunque uxor* braſiabat *intus & extra civitatem Herf. dabat x denarios.* Domeſday.

Braſiatrix, A ſhe brewer. *Siqua* braſiatrix *braſiaverit cerviſiam, ſolvet tolſeſter.* Regis Priorat. pe Thurgarton.

Braſiers. See **Brass.**

Braſina, or *Bracina*, and *Braſinaria*, A brewhouſe.

Braſium, Malt. In the ancient ſtatutes, *braſiator* is taken for a brewer, from the Fr. *braſſeur*; and at this day alſo for a malſter or malt-maker; it was adjudged 18 *Ed.* 2. *quod venditio* braſii *non eſt venditio victuarium, nec debet puniri ſicut venditio panis, & cerviſiæ & hujuſmodi contra formam ſtatuti.* To make malt (inland malt) was a ſervice paid by ſome tenants to their lord. *In manerio de Pedington quilibet virgarius præparabit domino unum quarterium* braſini *per annum, ſi dominus inveniet boſcum ad ſiccandum.* Paroch. Antiq. p. 496.

Brass, Is to be ſold in open fairs and markets, or in the owners houſes, on pain of 10*l.* and to be worked according to the goodneſs of metal wrought in *London*, or ſhall be forfeited. Alſo ſearchers of *braſs* and pewter are to be appointed in every city and borough by head officers, and in counties by juſtices of peace, *&c.* and in default thereof, any other perſon ſkilful in that myſtery, by overſight of the head officer, may take upon him the ſearch of defective *braſs*, to be forfeited, *&c.* *Stat.* 19 *H.* 7. *c.* 6. Braſs and pewter, bell-metal, *&c.* ſhall not be ſent out of the kingdom, on pain of forfeiting double value, *&c.* 33 *H.* 8. *c.* 7. 2 & 3 *Ed. c.* 27. Duties on wrought braſs imported, ſtat. 4 & 5 *Will. & Ma. c.* 5. *ſect.* 2.

Brathia, (Sax. *broth*) Broth or pottage —*Conceſſi totum feodum meum de princernaria* Glaſtoniæ—*cum pertinentiis, ut in pane, vino, & cereviſia, carne, piſce, ſive alio quocunque genere companagii, ſive leguminis, jus*, brathia, *et aliis quibuſcunque ad feodum pertinentibus.* Cartular. Abbat. Glaſton. MS. f. 74. a.

Breach carnium. By *breach carnium*, *Thomas Crew*, maſter of the hoſpital of St. *John Baptiſt*, without the North-gate at *Cheſter*, claims *quod omnes tenentes ſui infra eorum libertates reſidentes ſint quieti de venditione carnium.* Pla. in Itin. apud Ceſt. 14 *H.* 7.

Breach of Promiſe, (*Violatio fidei*) A breaking or violating a man's word. And *breach* ſignifies where a perſon commits any *breach* of the condition of a bond, or his covenant, *&c.* entered into, on action upon which the breach muſt be aſſigned. In debt on bond, conditioned to give account of goods, *&c.* a breach muſt be alledged, or the plaintiff will have no cauſe of action. 1 *Saund.* 102. And when a breach is aſſigned it muſt not be general, but muſt be particular; as in action of covenant for not repairing of houſes, the breach ought to be aſſigned particularly, what is the want of reparation. If one covenants he was ſeized, and *breach* is aſſigned that he was not ſeized, it muſt be ſet forth who is ſeized, *&c.* *Cro. Jac.* 369.

But on mutual *promiſe* for one to do an act, and in conſideration thereof another to do ſome act, as to ſell goods, *&c.* for ſo ſuch money, a general *breach* that the defendant hath not performed his part, is well aſſigned, 3 *Lev.* 369. If the condition of a bond conſiſts of ſeveral parts in the affirmative, performance generally is a good plea. *Sid.* 215. In caſe of bond for performance of an award, if the defendant pleads any matter by which he admits a non-performance, and excuſes it, the plaintiff in his application muſt ſhew the award, and aſſign the *breach*, that the court may ſee an award was made, and judge whether it was good or not; for if it ſhould be of a void part thereof, it need not be performed. 1 *Salk* 138. *Breaches* aſſigned ought to be according to the very word of the condition or covenant, when they may be well enough, though too general. 1 *Lutw.* 326. Where a thing is to be done by a perſon or his aſſigns, the breach is to be that it was done neither by the one or the other. 5 *Nod.* 133.

If a perſon is to tender a conveyance, *&c.* to another, his heirs or aſſigns, *breach* aſſigned that the defendant did not tender a conveyance to the the plaintiff, without the words *his heirs or aſſigns*, is good: but if the tender be to be made by another man, his heirs, *&c.* and not to him, it is otherwiſe. 1 *Salk.* 139. Where a leſſee for years is to leave all the timber on the land which was growing there at the time of the leaſe, and he cuts down any trees, though he leaves the timber on the land at the end of his leaſe, there is a *breach* of covenant: for in contracts the intention of parties is chiefly to be conſidered. *Raym.* 464. If lands are only excepted out of a leaſe, and a perſon is diſturbed in enjoying by the leſſee, this is no *breach*

of

of covenant; though it is ſaid it might be otherwiſe if a way, common, *&c.* be excepted. *Moor* 553. A perſon brings an action for a covenant broken, he ought to aſſign the *breach* of it in ſuch a manner that the defendant may have an iſſue. 1 *Lill. Abr.* 240. If ſeveral *breaches* are aſſigned, and the defendant demurs upon the whole declaration, the plaintiff ſhall have judgment for all that are well aſſigned, for they are as ſeveral actions. *Cr. Jac.* 557. Where a declaration aſſigns no particular *breach* of covenant, it is cured by a verdict, though ill upon demurrer. 1 *Vent.* 114, 126.

Formerly a plaintiff could aſſign but one *breach* in action of debt upon a bond for performance of covenants, though ſeveral things were broken, for one *breach* being proved, was a forfeiture of the bond. But in action of covenant, as many *breaches* might be aſſigned as the plaintiff would, becauſe he might have a particular damage upon each covenant broken; and a ſeveral iſſue muſt be taken upon every *breach*. 1 *Neſſ. Abr.* 406. And now by ſtatute, in action on bond for performance of covenants, the plaintiff may aſſign as many *breaches* as he pleaſes, and the jury ſhall aſſeſs damages and coſts for ſuch covenants as are proved to be broken. *Stat.* 8 *&* 9 *W.* 3. *c.* 10. And where judgment ſhall be given for the plaintiff in ſuch action on a demurrer, *nil dicit*, *&c.* he may ſuggeſt on the roll as many *breaches* as he thinks fit; upon which a writ of inquiry ſhall go, *&c.* And if before execution executed the defendant brings the coſts and damages into court, execution ſhall be ſtayed; and the plaintiff ſhall acknowledge ſatisfaction if the execution be executed: but the judgment ſhall ſtill ſtand as a ſecurity to anſwer the future *breach* of any covenant in the deed; for which the plaintiff, or his executors, *&c.* may have a *ſcire facias* upon ſuch judgment againſt the defendant. See the ſtat. 8 *&* 9 *Will.* 3. *c.* 10. See titles **Condition, Covenant,** and **Obligation.**

Bread Stat. 31 *Geo.* 2. *c.* 29. [Intituled, *An act for the due making of bread; and to regulate the price and aſſize thereof; and to puniſh perſons who ſhall adulterate meal, flour, or bread.*]

Sect. 1. Whereas by an act of parliament made in the 51ſt year of *Hen.* 3. intituled, *Aſſiſa panis, & cerviſiæ*, proviſion was made, among other things, for ſettling the aſſize of bread: and whereas by an act of parliament made in the 8th year of the reign of her late majeſty Queen *Anne*, intituled, *An act to regulate the price and aſſize of bread*, ſo much of the ſaid act [intituled, *Aſſiſa panis & cerviſiæ*] as related to the aſſize of bread, was repealed, annulled, and made void; and the ſaid act made in the ſaid 8th year of the reign of her ſaid late majeſty Queen *Anne*, was only made to continue in force three years, and from thence to the end of the then next ſeſſion of parliament; but by ſome ſubſequent acts of parliament the ſaid in part recited act made in the 8th year of Queen *Anne*, with ſeveral alterations and amendments thereto, hath been continued until the twenty-fourth of *June* 1757, and from thence to the end of the then next ſeſſion of parliament: and whereas it is expedient to reduce into one act the ſeveral laws now in force relating to the due making, and to the price and aſſize of bread, and to make ſome alterations in and amendments to the ſame; Be it therefore enacted, *&c.* that the ſaid act made in the ſaid 8th year of the reign of her ſaid late majeſty Queen *Anne*, and all alterations and amendments made by any acts of parliament ſubſequent thereto, for continuing, explaining, or amending the ſame, is and are hereby further continued from the expiration thereof, until the 29th of *September* 1758; and that from and after the ſaid 29th day of *September* 1758, ſo much of the ſaid ſtatute [intituled, *Aſſiſa panis & cerviſiæ*] as relates to the aſſize of bread, and which would otherwiſe be revived, when the ſaid recited act made in the ſaid 8th year of the ſaid Queen *Anne*, ſhall expire; and alſo the ſaid act of parliament of the 8th of Queen *Anne*, and all the alterations and amendments made by any acts of parliament ſubſequent thereto, for continuing, explaining, or amending the ſame, ſhall be and are hereby repealed, annulled, and made void.

Sect. 2. And to the intent that a plain and conſtant rule and method may be duly obſerved and kept in the making and aſſizing of the ſeveral ſorts of bread, which ſhall be made for ſale in any place or places where an aſſize of bread ſhall at any time be thought proper to be ſet in purſuance of this act, Be it further enacted, *&c.* it ſhall be lawful for the court, or perſon or perſons herein after authorized by this act to ſet the aſſize of bread, to ſet, aſcertain, and appoint, in any place or places within their reſpective juriſdictions, the aſſize and weight of all ſorts of bread, which ſhall, in any ſuch place or places, be made for ſale, or expoſed to ſale, and the price to be paid for the ſame reſpectively, when, and as often from time to time as any ſuch court, or perſon or perſons as aforeſaid, ſhall think proper; and that in every aſſize of bread which ſhall be ſet in purſuance of this act, reſpect ſhall from time to time be had by the court, perſon or perſons as aforeſaid, who ſhall ſet the ſame, to the price which the grain, meal, or flour, whereof ſuch bread ſhall be made, ſhall bear in the public market or markets in or near the place or places for which any ſuch aſſize ſhall ſo at any time be ſet; and making from time to time reaſonable allowance to the maker of bread for ſale, where any ſuch aſſize ſhall be ſo ſet, for their charges, labour, pains, livelihood, and profit, as ſuch court, or perſon or perſons as aforeſaid reſpectively, who ſhall at any time think fit to ſet any ſuch aſſize, ſhall from time to time deem proper.

Sect. 3. And where any aſſize of bread ſhall at any time be thought proper to be ſet for any place or places by virtue of this act, no perſon or perſons ſhall there make for ſale, or ſell, or expoſe to or for ſale, any ſort of bread, except wheaten and houſhold, otherwiſe brown bread, and ſuch other ſort or ſorts of bread, as in ſuch place or places ſhall be publickly allowed to be made or ſold by the court, or perſon or perſons who by this act are authorized to ſet an aſſize of bread for any ſuch place or places; but where it hath been uſual to make bread with the meal or flour of rye, barley, oats, beans, peaſe, or with the meal or flour of any ſuch different ſorts of grain mixed together, or the court or perſon or perſons impowered to ſet an aſſize of bread by virtue of this act, ſhall at any time think fit to order or allow in any place or places within the limits of their reſpective juriſdictions, bread to be made with rye, barley, oats, beans, or peaſe, or with the flour or meal thereof, or with the meal or flour of any ſuch different ſorts of grain mixed together, ſuch bread ſhall and may be there made and ſold; and if any perſon ſhall offend in the premiſes, and ſhall be convicted of any ſuch offence, either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of his or their juriſdiction, every one ſo offending ſhall, on every ſuch conviction, forfeit and pay any ſum not exceeding forty ſhillings, as any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall think fit and order.

Sect. 4. And in every place and places for which an aſſize of bread ſhall at any time be thought proper to be ſet by virtue of this act, the aſſize and weight of the ſeveral ſorts of bread which ſhall be there made for ſale, or ſold, or expoſed to or for ſale, and the price to be paid for the ſame reſpectively, ſhall be ſet and aſcertained according to the tables hereafter following, marked N° I. and II.

N° I.

N° I.

A TABLE

OF THE

ASSIZE and PRICE of BREAD made of WHEAT,

IN TWO PARTS.

Part the Firſt; or, The Aſſize Table,

Contains, in column N° I. the price of the buſhel of wheat Wincheſter meaſure, from 2 s. 9 d. to 14 s. 6 d. the buſhel, the allowance of the magiſtrates or juſtices to the baker for baking being included; and in column N° II. are the weights of the ſeveral loaves: ſo that (for example) if the price of wheat in the market is 5 s. the buſhel, and the magiſtrates allow 1 s. 6 d. the buſhel to the baker for baking, find 6 s. 6 d. in column N° I. and even therewith, under N° II. will be found the weights of the ſeveral loaves; but if the price in the market is 3 s. and the allowance 1 s. then the weight of the ſaid loaves will be found even with 4 s.

Note, That the wheaten loaves are three-fourths of the weight of the houſhold loaves; and if the magiſtrates or juſtices ſhall think fit to allow of any white loaves of the price of one penny or two pence, they are to weigh at all times three-fourths of the weight of the wheaten loaves of the ſame price.

Part the Second; or, The Price Table,

Contains, in column N° I. the price of the buſhel of wheat Wincheſter meaſure, from 2 s. 9 d. to 14 s. 6 d. the buſhel, the allowance of the magiſtrates or juſtices to the baker for baking being included; and in column N° II. are the prices of the peck, half peck, and quartern, wheaten and houſhold loaves: ſo that (for example) if the price of wheat in the market is 5 s. the buſhel, and the magiſtrates allow 1 s. 6 d. to the baker for baking, find 6 s. 6 d. in N° I. and even therewith, under N° II. will be found the prices of the ſeveral loaves; but if the price in the market is 3 s. the buſhel, and the allowance 1 s. then the prices of the ſaid loaves will be found even with 4 s.

Note, That the prices of the houſhold loaves are always three-fourths of the prices of the wheaten loaves; and where it ſhall be thought proper to allow of half quartern loaves, the prices of ſuch loaves (if ſold ſingly) are to be half a farthing higher than is allowed by this table, when it ſhall ſo happen that the farthing is ſplit.

And magiſtrates and juſtices, within their reſpective juriſdictions, being to ſet the aſſize and fix the price of the ſeveral loaves of bread, having reſpect to the price which the grain, meal, or flour of which the ſame are made ſhall bear in the market; but no proviſion being made how they ſhould know what price the reſpective ſorts of meal and flour ſhould be eſteemed to bear, in proportion to the price of wheat, they are therefore to take notice, That the peck loaf of each ſort of bread is to weigh, when well baken, 17 lb. 6 oz. averdupois, and the reſt in proportion; and that every ſack of meal or flour is to weigh 2 cwt. 2 qrs. net; and that from every ſack of meal or flour there ought to be produced, on the average, 20 ſuch peck loaves of bread; and, by obſerving the ſaid rule, magiſtrates and juſtices may at all times know if the baker hath more or leſs than the allowance they intend to give him.

No I. No II.

Part the First; or, The Assize Table.

The Price of the Bushel of Wheat, and Baking.		Small Assize Bread.								Large Assize Bread.							
		The Penny Loaf.				The Twopenny Loaf.				The Sixpenny Loaf.				Twelvepenny Loaf.				Eighteenpenny Loaf.			
		Wheaten		Houshold		Wheaten		Houshold		Wheaten		Houshold		Wheaten		Houshold		Wheaten		Houshold	
s.	d.	oz.	dr.	oz.	dr.	lb.	oz. d.	lb.	oz. dr.	lb.	oz. dr.	lb.	oz. dr.	lb.	oz. dr.	lb.	oz. dr.	lb.	oz. dr.	lb.	oz. dr.
2	9	22	4	29	4	2	12 8	3	10 8	8	5 8	10	15 9	16	11 0	21	15 2	25	0 8	32	14 11
3	0	20	4	27	1	2	8 8	3	6 2	7	9 8	10	2 6	15	3 0	20	4 12	22	12 8	30	7 2
3	3	18	9	25	4	2	5 1	3	2 9	6	15 4	9	7 11	13	14 7	18	15 5	20	13 11	28	7 0
3	6	17	6	23	3	2	2 12	2	14 5	6	8 4	8	11 0	13	0 9	17	6 1	19	8 13	26	1 1
3	9	16	6	21	6	2	0 11	2	10 12	6	2 2	8	0 5	12	4 4	16	0 11	18	6 7	24	1 0
4	0	15	4	20	4	1	14 8	2	8 8	5	11 8	7	9 8	11	7 0	15	3 0	17	2 8	22	12 8
4	3	14	4	19	1	1	12 8	2	6 2	5	5 9	7	2 6	10	11 2	14	4 12	16	0 11	21	7 2
4	6	13	9	17	15	1	11 2	2	3 14	5	1 6	6	11 10	10	2 12	13	7 4	15	4 2	20	2 14
4	9	12	12	17	1	1	9 9	2	2 2	4	12 11	6	6 7	9	9 7	12	12 14	14	6 2	19	3 5
5	0	12	1	16	6	1	8 3	2	0 11	4	8 9	6	2 2	9	1 1	12	4 4	13	9 10	18	6 7
5	3	11	9	15	7	1	7 3	1	14 14	4	5 8	5	12 11	8	11 1	11	9 6	13	0 9	17	6 1
5	6	11	2	14	10	1	6 4	1	13 4	4	2 12	5	7 13	8	5 8	10	15 10	12	8 3	16	7 7
5	9	10	8	14	4	1	5 0	1	12 8	3	15 0	5	5 9	7	14 0	10	11 2	11	13 0	16	0 11
5	0	10	2	13	9	1	4 4	1	11 2	3	12 12	5	1 6	7	9 8	10	2 12	11	6 4	15	4 2
6	3	9	11	13	1	1	3 6	1	10 1	3	10 2	4	14 3	7	4 4	9	12 6	10	14 6	14	10 9
6	6	9	4	12	10	1	2 9	1	9 4	3	7 10	4	11 13	6	14 4	9	7 11	10	6 13	14	3 8
6	9	9	0	12	1	1	1 15	1	8 3	3	5 13	4	8 9	6	11 10	9	1 1	10	1 7	13	9 10
7	0	8	11	11	9	1	1 6	1	7 3	3	4 2	4	5 8	6	8 4	8	11 1	9	12 7	13	0 9
7	3	8	7	11	2	1	0 14	1	6 4	3	2 9	4	2 12	6	5 2	8	5 8	9	7 11	12	8 3
7	6	8	3	10	11	1	0 6	1	5 6	3	1 1	4	0 3	6	2 2	8	0 5	9	3 3	12	0 8
7	9	7	14	10	6	0	15 12	1	4 12	2	15 4	3	14 5	5	14 8	7	12 10	8	13 12	11	10 15
8	0	7	10	10	2	0	15 4	1	4 4	2	13 12	3	12 12	5	11 8	7	9 8	8	9 4	11	6 4
8	3	7	5	9	15	0	14 10	1	3 14	2	11 14	3	11 9	5	7 13	7	7 3	8	3 11	11	2 12
8	6	7	2	9	9	9	14 4	1	3 3	1	10 12	3	9 8	5	5 9	7	3 1	8	0 5	10	12 9
8	9	6	15	9	4	0	13 14	1	2 9	2	9 11	3	7 10	5	3 7	6	15 4	7	13 2	10	6 13
9	0	6	13	8	15	0	13 9	1	1 14	2	8 11	3	5 11	5	1 6	6	11 6	7	10 1	10	1 1
9	3	6	9	8	12	0	13 2	1	1 8	2	7 7	3	4 9	4	14 14	6	9 2	7	6 5	9	13 10
9	6	6	7	8	8	0	12 14	1	1 0	2	6 9	3	2 15	4	13 2	6	5 14	7	3 11	9	8 13
9	9	6	4	8	5	0	12 8	1	0 10	2	5 8	3	1 14	4	11 0	6	3 12	7	0 8	9	5 10
10	0	6	1	8	2	0	12 1	1	0 5	2	4 4	3	0 15	4	8 9	6	1 14	6	12 13	9	2 13
10	3	5	15	7	15	0	11 13	0	15 14	2	3 8	2	15 11	4	7 0	5	15 5	6	10 8	8	15 0
10	6	5	13	7	12	0	12 9	0	15 7	2	2 12	2	14 5	4	5 8	5	12 11	6	8 4	8	11 0
10	9	5	11	7	9	0	11 6	0	15 1	2	2 1	2	13 3	4	4 2	5	10 6	6	6 2	8	7 9
11	0	5	9	7	5	0	11 2	0	14 10	2	1 6	2	11 14	4	2 12	5	7 13	6	4 2	8	3 11
11	3	5	6	7	3	0	10 13	0	14 5	2	0 7	2	10 15	4	0 14	5	5 14	6	1 5	8	0 13
11	6	5	5	7	1	0	10 10	0	14 2	1	15 14	2	10 6	3	15 12	5	4 12	5	15 10	7	15 2
11	9	5	2	6	15	0	10 5	0	13 14	1	14 14	2	9 11	3	13 13	5	3 7	5	12 11	7	13 2
12	0	5	1	6	13	0	10 2	0	13 9	1	14 5	2	8 11	3	12 11	5	1 6	5	11 0	7	10 1
12	3	4	15	6	10	0	9 15	0	13 4	1	13 13	2	7 12	3	11 9	4	15 7	5	9 6	7	7 3
12	6	4	14	6	8	0	9 12	0	12 15	1	13 4	2	6 13	3	10 9	4	13 10	5	7 13	7	4 7
12	9	4	13	6	5	0	9 9	0	12 10	1	12 12	2	5 15	3	9 8	4	11 13	5	6 5	7	1 12
13	0	4	11	6	4	0	9 5	0	12 8	1	11 15	2	5 8	3	7 14	4	11 0	5	3 13	7	0 8
13	3	4	9	6	3	0	9 2	0	12 6	1	11 5	2	5 1	3	6 10	4	10 2	5	1 15	6	15 4
13	6	4	8	6	1	0	9 0	0	12 1	1	11 0	2	4 4	3	6 0	4	8 9	5	1 0	6	12 13
13	9	4	7	5	15	0	8 13	0	11 13	1	10 7	2	3 8	3	4 14	4	7 0	4	15 5	6	10 8
14	0	4	5	5	13	0	8 11	0	11 9	1	10 1	2	2 12	3	4 2	4	5 8	4	14 3	6	8 4
14	3	4	4	5	11	0	8 8	0	11 6	1	9 9	2	2 1	3	3 2	4	4 2	4	12 11	6	6 2
14	6	4	3	5	9	0	8 6	0	11 2	1	9 2	2	1 6	3	2 4	4	2 12	4	11 6	6	4 2

B R E

No II.

Part the Second.

Prized Bread.

No I. The Price of the Buſhel of Wheat and Baking.		Quartern Loaf.				Halfpeck Loaf.				Peck Loaf.			
		Wheat.		Houſh.		Wheat.		Houſh.		Wheat.		Houſh.	
s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
2	9	0	3 1/4	0	2 1/4	0	6 1/4	0	4 3/4	1	0 1/2	0	9 1/2
2	10	0	3 1/2	0	2 1/2	0	7	0	5 1/4	1	1 3/4	0	10 1/4
3	3	0	3 3/4	0	2 3/4	0	7 1/2	0	5 1/2	1	3	0	11
3	6	0	4	0	3	0	8	0	6	1	4	1	0
3	9	0	4 1/4	0	3 1/4	0	8 1/2	0	6 1/2	1	5	1	1
4	0	0	4 1/2	0	3 1/2	0	9	0	6 3/4	1	6 1/4	1	1 3/4
4	3	0	4 3/4	0	3 3/4	0	9 3/4	0	7 1/4	1	7 1/2	1	2 1/2
4	6	0	5	0	3 3/4	0	10 1/4	0	7 3/4	1	8 1/2	1	3 1/2
4	9	0	5 1/2	0	4	0	10 3/4	0	8	1	9 3/4	1	4 1/4
5	0	0	5 3/4	0	4 1/4	0	11 1/2	0	8 1/2	1	11	1	5
5	3	0	6	0	4 1/2	1	0	0	9	2	0	1	6
5	6	0	6 1/4	0	4 3/4	1	0 1/2	0	9 1/2	2	1	1	7
5	9	0	6 1/2	0	5	1	1 1/4	0	9 3/4	2	2 1/2	1	7 1/2
6	0	0	7	0	5 1/4	1	1 3/4	0	10 1/4	2	3 1/2	1	8 1/2
6	3	0	7 1/4	0	5 1/2	1	2 1/4	0	10 3/4	2	4 3/4	1	9 1/4
6	6	0	7 1/2	0	5 1/2	1	3	0	11	2	6	1	10
6	9	0	7 3/4	0	5 3/4	1	3 1/2	0	11 1/2	2	7	1	11
7	0	0	8	0	6	1	4	1	0	2	8	2	0
7	3	0	8 1/4	0	6 1/4	1	4 1/2	1	0 1/2	2	9	2	1
7	6	0	8 1/2	0	6 1/2	1	5	1	1	2	10	2	2
7	9	0	8 3/4	0	6 3/4	1	5 1/2	1	1 1/2	2	11 1/4	2	2 3/4
8	0	0	9 1/4	0	6 3/4	1	6 1/4	1	1 3/4	3	0 1/2	2	3 1/2
8	3	0	9 1/2	0	7	1	7	1	2	3	2	2	4
8	6	0	9 3/4	0	7 1/4	1	7 1/2	1	2 1/2	3	3	2	5
8	9	0	10	0	7 1/2	1	8	1	3	3	4	2	6
9	0	0	10 1/4	0	7 3/4	1	8 1/2	1	3 1/2	3	5	2	7
9	3	0	10 1/2	0	8	1	9	1	3 3/4	3	6 1/4	2	7 3/4
9	6	0	10 3/4	0	8 1/4	1	9 3/4	1	4 1/4	3	7 1/4	2	8 3/4
9	9	0	11	0	8 1/4	1	10 3/4	1	4 3/4	3	8 1/2	2	9 1/2
10	0	0	11 1/2	0	8 1/2	1	11	1	5	3	10	2	10
10	3	0	11 3/4	0	8 3/4	1	11 1/2	1	5 1/2	3	11	2	11
10	6	1	0	0	9	2	0	1	6	4	0	3	0
10	9	1	0 1/4	0	9 1/4	2	0 1/2	1	6 1/2	4	1	3	1
11	0	1	0 1/2	0	9 1/2	2	1	1	7	4	2	3	2
11	3	1	0 3/4	0	9 3/4	2	1 3/4	1	7 1/4	4	3 1/4	3	2 3/4
11	6	1	1	0	10	2	2 1/4	1	7 3/4	4	4 1/2	3	3 1/2
11	9	1	1 1/4	0	10	2	3	1	8	4	6	3	4
12	0	1	1 3/4	0	10 1/4	2	3 1/2	1	8 1/2	4	7	3	5
12	3	1	2	0	10 1/2	2	4	1	9	4	8	3	6
12	6	1	2 1/4	0	10 3/4	2	4 1/2	1	9 1/2	4	9	3	7
12	9	1	2 1/2	0	11	2	5	1	10	4	10	3	8
13	0	1	3	0	11 1/4	2	5 3/4	1	10 1/4	4	11 1/2	3	8 1/2
13	3	1	3 1/4	0	11 1/4	2	6 1/2	1	10 1/2	5	1	3	9
13	6	1	3 1/2	0	11 1/2	2	7	1	11	5	2	3	10
13	9	1	3 3/4	0	11 3/4	2	7 1/2	1	11 1/2	5	3	3	11
14	0	1	4	1	0	2	8	2	0	5	4	4	0
14	3	1	4 1/2	1	0 1/4	2	8 1/2	2	0 1/2	5	5	4	1
14	6	1	5	1	0 1/2	2	9	2	1	5	6	4	2

No II.

A TABLE of the Aſſize and Price of the Bread made of the ſeveral Grains hereunder mentioned.

THIS table is divided into ſeven columns: Columns the firſt and ſeventh contain the prices of the buſhel of grain, the allowance for baking included; which prices are adapted ſo as to ſerve either for the *Wincheſter* buſhel of rye, the *Wincheſter* buſhel of barley, the *Wincheſter* buſhel of oats, the *Wincheſter* buſhel of beans, the *Wincheſter* buſhel of maſlin *alias* miſcellany, conſiſting of two-thirds wheat and one-third rye; the price of either of which buſhels in the market being known, the magiſtrates are to add the intended allowance thereto; the amount of which being found either in the column N° I. or VII. the weights which the ſeveral penny, two-penny, ſix-penny, and twelve penny loaves ought to be of will be found under the columns N° II. III. IV. and V. and the price of the reſpective peck loaves (which are to weigh 17 lb. 6 oz. each) under N° VI.

Example, When the price of the buſhel of barley in the market, with the allowance to the baker, is 4 *s.* look for that ſum in column the firſt or ſeventh, and under their reſpective titles in the ſame line will be found the weights which the ſeveral aſſize barley loaves ſhould be of and the price of the peck barley loaf, and ſo of each of the other ſorts.

Note, Where bread is allowed at any time to be made for ſale of peaſe only, the aſſize and price thereof are to ſet and fixed from the bean columns; and where bread is ordered to be made for ſale of a coarſe ſort of maſlin or miſcellany grain, conſiſting of one-third rye, one-third barley, and one-third either peaſe or beans, the aſſize and price thereof are to be ſet and fixed from the barley columns.

Note alſo, That this table is framed for bread to be made of the whole produce of the ſaid ſeveral grains, except the bran or hull thereof only.

No I. Price of the Buſh. and Bak.	No. II. Weight of the Penny Loaf.									
	Rye.		Barley.		Oats.		Beans.		Maſlin.	
s.	d.	oz.	d.	oz.	d.	oz.	d.	oz.	d.	oz.	d.
1	0	62	8	67	8	31	4	83	12	70	0
1	3	50	0	54	0	25	0	67	0	56	0
1	6	41	10	45	0	20	14	55	12	46	10
1	9	35	11	38	9	17	14	47	14	40	0
2	0	31	4	33	12	15	10	41	14	35	0
2	3	27	13	30	0	13	14	37	4	31	2
2	6	25	0	27	0	12	8	33	8	28	0
2	9	22	11	24	9	11	6	30	7	25	6
3	0	20	13	22	8	10	7	27	14	23	5
3	3	19	4	20	12	9	10	25	12	21	8
3	6	17	13	19	4	8	15	23	15	20	0
3	9	16	11	18	0	8	5	22	5	18	10
4	0	15	10	16	14	7	13	20	15	17	8
4	3	14	12	15	14	7	6	19	11	16	8
4	6	13	14	15	0	6	15	18	10	15	9
4	9	13	2	14	4	6	9	17	11	14	12
5	0	12	8	13	8	6	4	16	12	14	0
5	3	11	14	12	14	5	15	15	15	13	5
5	6	11	5	12	4	5	11	15	3	12	11
5	9	10	13	11	12	5	7	14	9	12	2
6	0	10	6	11	4	5	3	13	15	11	10
6	3	10	0	10	13	5	0	13	6	11	3
6	6	9	10	10	6	4	13	12	14	10	12
6	9	9	4	10	0	4	10	12	6	10	6
7	0	8	15	9	10	4	7	11	15	10	0

BRE

No III. Weight of the Twopenny Loaf.										No IV. Weight of the Sixpenny Loaf.										No V. Weight of the Twelvepenny Loaf.										No VI. Price of the Peck Loaf.										No VII. Price of the Bushel and Baking.	
Rye.			Barley.			Oats.			Beans.			Maslin.			Rye.			Barley.			Oats.			Beans.			Maslin.			Rye.			Barley.			Oats.			Beans.			Maslin.		
lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	s.	d.		s.	d.		s.	d.		s.	d.		s.	d.	
7	13	0	8	7	0	3	14	8	10	7	8	8	12	0	23	7	0	25	5	0	11	11	8	31	6	8	26	4	0	46	14	0	50	10	0	23	7	0	62	13	0	52	8	0	0	4	1/2	0	4	1/4	0	9		0	3	1/4	0	4		1	0	
6	4	0	6	12	0	3	2	0	8	6	0	7	0	0	18	12	0	20	4	0	9	6	0	25	2	0	21	0	0	37	8	0	40	8	0	18	12	0	50	4	0	42	0	0	0	5	1/2	0	5	1/4	0	11		0	4		0	5		1	3	
5	3	5	5	10	0	2	9	12	6	15	8	5	13	4	15	9	15	16	14	0	7	13	4	20	14	8	17	7	12	31	3	14	33	12	8	15	10	8	41	13	0	34	15	8	0	6	1/2	0	6	1/4	1	1	1/4	0	5		0	6		1	6	
4	7	6	4	13	2	2	3	12	5	15	12	5	0	0	13	6	2	14	7	6	6	11	4	17	15	4	15	0	0	26	12	4	28	14	12	13	6	8	35	14	8	30	0	0	0	7	3/4	0	7	1/4	1	3	1/4	0	5	3/4	0	7		1	9	
3	14	8	4	3	8	1	15	4	5	3	12	4	6	0	11	11	8	12	10	8	5	13	12	15	11	4	13	2	0	23	7	0	25	5	0	11	11	8	31	6	8	26	4	0	0	8	3/4	0	8	1/4	1	5	3/4	0	6	3/4	0	8		2	0	
3	7	10	3	12	0	1	11	12	4	10	8	3	14	4	10	6	14	11	4	0	5	3	4	13	15	8	11	10	12	20	13	12	22	8	0	10	6	8	27	15	0	23	5	8	0	10		0	9	1/4	1	7	1/4	0	7	1/2	0	9		2	3	
3	2	0	3	6	0	1	9	10	4	3	0	3	8	0	9	6	0	10	2	0	4	11	0	12	9	0	10	8	0	18	12	0	20	4	0	9	6	0	25	2	0	21	0	0	0	11		0	10	1/2	1	10		0	8	1/4	0	10		2	6	
2	13	6	3	1	2	1	6	12	3	12	14	3	2	12	8	8	2	9	3	6	4	4	4	11	6	10	9	8	4	17	0	4	18	6	12	8	8	8	21	13	4	19	0	8	1	0		0	11	1/2	2	1		0	9	3/4	0	11		2	9	
2	9	10	2	13	0	1	4	14	3	7	12	2	14	10	7	12	15	8	7	0	3	14	10	10	7	4	8	11	14	15	9	15	16	14	0	7	13	4	20	14	8	17	7	12	1	1		1	0	1/2	2	2	1/2	0	10		1	0		3	0	
2	6	8	2	9	8	1	3	4	3	3	8	2	11	0	7	3	8	7	12	8	3	9	12	9	10	8	8	1	0	14	7	0	15	9	0	7	3	8	19	5	0	16	2	0	1	2	1/2	1	1	1/2	2	4	1/4	0	10	3/4	1	1		3	3	
2	3	11	2	6	8	1	1	14	2	15	14	2	8	0	6	11	1	7	3	8	3	5	10	8	15	10	7	8	0	13	6	2	14	7	0	6	11	4	17	15	4	15	0	0	1	3	1/4	1	2	3/4	2	6	1/2	0	11	3/4	1	2		3	6	
2	1	6	2	4	0	1	0	11	2	12	10	2	5	4	6	4	2	6	12	0	3	2	1	8	5	14	6	15	12	12	7	4	13	8	0	6	4	2	16	11	12	13	15	8	1	4	1/2	1	3	3/4	2	8	3/4	1	0	1/2	1	3		3	9	
1	15	4	2	1	12	0	15	10	2	9	14	2	3	0	5	13	12	6	5	4	2	14	14	7	13	10	6	9	0	11	11	8	12	10	8	5	13	12	15	11	4	13	2	0	1	5	3/4	1	4	3/4	2	11	1/4	1	1	1/2	1	4		4	0	
1	13	8	1	15	13	0	14	12	2	7	6	2	1	0	5	8	8	5	15	7	2	12	4	7	6	2	6	3	0	11	1	0	11	14	14	5	8	8	14	12	4	12	6	0	1	6	3/4	1	5	3/4	3	0	3/4	1	2	1/4	1	5		4	3	
1	11	13	1	14	0	0	13	14	2	5	3	1	15	2	5	3	7	5	10	0	2	9	10	6	15	9	5	13	6	10	6	14	11	4	0	5	3	4	13	15	2	11	10	12	1	8		1	7		3	2	1/2	1	3		1	6		4	6	
1	10	5	1	12	9	0	13	3	2	3	6	1	13	8	4	14	15	5	5	11	2	7	9	6	10	2	5	8	8	9	13	14	10	11	6	4	15	2	13	4	4	11	1	0	1	8	3/4	1	8		3	5	1/4	1	3	3/4	1	7		4	9	
1	9	0	1	11	0	0	12	8	2	1	8	1	12	0	4	11	0	5	1	0	2	5	8	6	4	8	5	4	0	9	6	0	10	2	0	4	11	0	12	9	0	10	8	0	1	10		1	9		3	8		1	4	3/4	1	8		5	0	
1	7	13	1	9	13	0	11	15	1	15	14	1	10	10	4	7	7	4	13	7	2	3	13	5	15	10	4	15	14	8	14	14	9	10	14	4	7	10	11	15	4	9	15	12	1	11	1/4	1	10		3	11		1	5	3/4	1	9		5	3	
1	6	11	1	8	9	0	11	6	1	14	7	1	9	6	4	4	1	4	9	11	2	2	2	5	11	5	4	12	2	8	8	2	9	3	6	4	4	4	10	6	10	9	8	4	2	0	1/4	1	11		4	1		1	7	1/2	1	10		5	6	
1	5	11	1	7	8	0	10	14	1	13	2	1	8	4	4	1	1	4	6	8	2	0	10	5	7	6	4	8	12	8	2	2	8	13	0	4	1	4	10	14	12	9	1	8	2	1	1/4	2	0		4	3		1	7	3/4	1	11		5	9	
1	4	13	1	6	8	0	10	7	1	11	14	1	7	5	3	14	7	4	3	8	1	15	5	5	3	10	4	5	15	7	12	15	8	7	0	3	14	10	10	7	4	8	11	14	2	2	3/4	2	1		4	5	1/2	1	8		2	0		6	0	
1	4	0	1	5	10	0	10	0	1	10	12	1	6	6	3	12	0	4	0	14	1	14	9	5	0	4	4	3	2	7	8	0	8	1	12	3	12	0	10	0	8	8	6	4	2	3	3/4	2	2		4	7	1/4	1	8	3/4	2	1		6	3	
1	3	4	1	4	12	0	9	10	1	9	12	1	5	8	3	9	12	3	14	4	1	12	14	4	13	4	4	10	8	7	3	8	7	12	8	3	9	12	9	10	8	8	1	0	2	5		2	3		4	9		1	9	1/2	2	2		6	6	
1	2	9	1	4	0	0	9	5	1	8	13	1	4	12	3	7	11	3	12	0	1	11	15	4	10	7	3	14	4	6	15	6	7	8	0	3	7	14	9	4	14	7	12	8	2	6		2	4		5	0		1	10	1/2	2	3		6	9	
1	1	13	1	3	4	0	8	15	1	7	15	1	4	0	3	5	8	3	9	12	1	10	13	4	7	13	3	12	0	6	11	1	7	3	8	3	5	10	8	15	10	7	8	0	2	7		2	5		5	1	1/2	1	11	1/4	2	4		7	0	

Sect. 5. And every aſſize, which ſhall from time to time be ſet in any city, town corporate, hundred, diviſion, liberty, rape, or wapentake, in purſuance of this act, ſhall be always ſet in averdupoize weight, of ſixteen ounces to the pound, and not troy weight, and in the ſeveral proportions directed in or by the ſaid tables above ſet forth, or as near the ſame as may be, as to the ſeveral ſorts of bread in this act ſpecified: and that the ſaid tables ſhall extend as well to ſuch bread which ſhall be made with the flour of wheat mixed with the flour of other grain, as alſo to bread which ſhall be made with the flour of other grain or grains than wheat, which ſhall be publickly licenſed and allowed to be made into bread, in any place or places in purſuance of this act; and that the aſſize of all ſuch mixed bread ſhall be ſet and aſcertained, as near as may be, according to the ſaid tables.

Sect. 6. And the reſpective prices which the ſeveral kinds of grain, meal, and flour, fit and proper to make the different ſorts of bread which ſhall be allowed to be made in purſuance of this act, ſhall from time to time, *bona fide*, ſell for in the markets or places in *London*, where ſuch grain, meal, and flour ſhall be openly and publickly ſold during the whole market, and not at particular times thereof, or on particular contracts only, ſhall from time to time be given in and certified on oath, on ſome certain day in every week, as the court of mayor and aldermen of the city of *London* ſhall from time to time appoint, by the meal-weighers of the ſaid city of *London*, or ſuch other perſons as the ſaid court of mayor and aldermen in *London* ſhall from time to time direct; and ſhall alſo on ſome certain day in every week, to be appointed by the ſaid court of mayor and aldermen in *London*, be entered by ſuch weighers, or other perſons to be appointed as aforeſaid, in writing under their hands, in ſome book to be for that purpoſe provided by the ſaid city of *London*, and kept at the town clerk's office in the ſaid city: and the next day after every ſuch price ſhall be ſo given in and certified as aforeſaid, the aſſize and weight of all ſorts of bread to be ſold or expoſed to ſale by any perſon within the limits of their juriſdiction, and the price to be paid for the ſame reſpectively, ſhall from time to time be ſet by the ſaid court of mayor and aldermen in *London*, if the ſaid court ſhall then ſit, and if ſuch court ſhall not then ſit, by the mayor of the ſaid city for the time being; and that the aſſize of bread which ſhall be ſo ſet in *London* ſhall take place from ſuch time as the ſaid court ſhall order, and be in force for the ſaid city of *London* and the liberties thereof, and the weekly bills of mortality (the city of *Weſtminſter* and liberties thereof, the borough of *Southwark*, and weekly bills of mortality in the county of *Surry* excepted) until a new or other aſſize of bread in *London* ſhall be ſet; and that after the fixing or ſetting of every ſuch aſſize of bread by the ſaid court of mayor and aldermen of *London*, or the mayor of the ſaid city for the time being, when the ſaid court of mayor and aldermen of *London* ſhall not ſit, the aſſize ſo from time to time ſet ſhall, with all convenient ſpeed after ſetting thereof, be made publick in ſuch manner as the ſaid court of mayor and aldermen ſhall order or direct: but before any advance or reduction ſhall in any week be made by the ſaid court of mayor and aldermen, or the mayor of the ſaid city of *London* for the time being, in the price of bread, the meal-weighers of the ſaid city of *London* for the time being, or ſuch other perſons as the ſaid court of mayor and aldermen ſhall from time to time appoint to return the price of grain, meal, and flour, ſhall leave in writing at the common hall of the company of bakers in the ſaid city of *London* a copy of every return of the price of grain, meal, and flour which they ſhall make, and enter in ſuch book to be provided and kept at the town-clerk's office as aforeſaid, ſome time of the ſame day on which ſuch meal-weighers or other perſons ſhall make every ſuch return and entry as aforeſaid; to the intent that the ſaid company of bakers may the morning of the next day after every ſuch return and entry ſhall be made, and before any aſſize ſhall be ſet from time to time, have an opportunity to offer to the ſaid court of mayor and aldermen, if ſuch court ſhall then ſit, and if ſuch court ſhall not then ſit, to the mayor of the ſaid city of *London* for the time being, all ſuch objections as the ſaid company of bakers ſhall have and think fit to offer againſt any advance or reduction being that day made in *London* in the price of bread.

Sect. 7. And the court of mayor and aldermen of evey other city, where there ſhall be any ſuch court, and when ſuch court ſhall ſit; and where there ſhall be no ſuch court, or, there being any ſuch, when the ſame ſhall not ſit, the mayor, bailiffs, or other chief magiſtrate or magiſtrates of every ſuch other reſpective city; and in towns corporate or boroughs, the mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates for the time being of every ſuch town corporate or borough; or two or more juſtices of the peace in ſuch towns and places where there ſhall be no ſuch mayor, bailiffs, aldermen, or chief magiſtrates, ſhall and may ſeverally and reſpectively, from time to time, as there ſhall be occaſion, within their ſeveral and reſpective juriſdictions, cauſe the reſpective prices which the ſeveral ſorts of grain, meal, and flour, fit and proper to make the different ſorts of bread which ſhall be allowed to be made in every ſuch other reſpective city, town corporate, borough, town, or place, ſhall from time to time, *bona fide*, ſell for in the reſpective publick markets in or near to every ſuch other town corporate, borough, town, or place, during the whole market, and not at particular times thereof, or on particular contracts only, from time to time to be given in and certified upon oath unto ſuch court, mayor, bailiffs, aldermen, chief magiſtrate or magiſtrates, or juſtices as aforeſaid reſpectively, within their ſeveral juriſdictions, in ſuch manner, and by ſuch perſon or perſons, and on ſuch day in every week, as any ſuch reſpective court, mayor, bailiffs, aldermen, chief magiſtrate or magiſtrates, or juſtices as aforeſaid, within their reſpective juriſdictions, ſhall from time to time appoint; and the price which ſhall be ſo certified, ſhall from time to time be entered by the reſpective perſon or perſons who ſhall certify the ſame, in ſome book or books to be provided by ſuch reſpective perſon or perſons, and kept by him or them for that purpoſe: and within two days after every ſuch price ſhall be ſo returned, the aſſize and weight of bread for every ſuch other reſpective city, town corporate, borough, town, and place, and the price to be paid for the ſame, ſhall, from time to time, be ſet by the court of mayor and aldermen of every ſuch other city where there ſhall be any ſuch court, and when the ſame ſhall ſit; and when ſuch court ſhall not ſit, by the mayor of every ſuch other reſpective city, and where there ſhall be no ſuch court of mayor and aldermen in any ſuch other city, then by the mayor, bailiffs, or other chief magiſtrate or magiſtrates of every ſuch other city; and in towns corporate, and boroughs, by the mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates of every ſuch town corporate or borough; and by two or more juſtices of the peace in towns or places where there ſhall be no ſuch mayor, bailiffs, aldermen, or chief magiſtrate or magiſtrates: and the aſſize and weight of bread, and price to be paid for the ſame, which ſhall be ſo from time to time ſet in every ſuch other city, and in every town corporate or borough, and in every town and place where there ſhall be no ſuch mayor, bailiffs, aldermen, or chief magiſtrate or magiſtrates as aforeſaid, ſhall commence and take place on ſuch day in every week, and be in force for ſuch time, not exceeding ſeven days from the ſetting of every ſuch aſſize, and ſhall be made publick in ſuch manner as ſuch court of mayor and aldermen in every ſuch other city where there ſhall be any ſuch court, and when the ſame ſhall ſit, and where there ſhall be no ſuch court of mayor and aldermen, or there being any ſuch, when the ſame ſhall not ſit, as the mayor, bailiffs, or other chief magiſtrate or magiſtrates as aforeſaid of every ſuch other city, and as the mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates as aforeſaid of every ſuch town corporate or borough; and in towns and places where there ſhall be no ſuch mayor, bailiffs, aldermen, or chief magiſtrate or magiſtrates as aforeſaid, as any two ſuch juſtices as aforeſaid ſhall, within their reſpective juriſdictions, from time to time direct.

Sect. 8. And if any two or more juſtices of the peace of counties at large, ridings, or diviſions, ſhall at any time think fit to ſet an aſſize of bread for any place or places within the limits of their reſpective juriſdictions, then and in any ſuch caſe, it ſhall be lawful for any ſuch two or more juſtices, within the limits of their reſpective juriſdictions, to cauſe the price which grain, meal, and flour fit to make the ſeveral ſorts of bread which ſhall be made for ſale in any ſuch place or places, ſhall from time to time, *bona fide*, ſell for in the reſpective public corn market or corn markets, in or near any ſuch place or places reſpectively, during the whole market, and not at particular times thereof, or on ſpecial contracts only, to be from time to time given, and certified on oath, to them at their reſpective houſes or places of abode in any ſuch county, riding, or diviſion, on ſuch day in every week as any ſuch two or more juſtices ſhall for that purpoſe fix on and appoint, by the reſpective clerks of the market of the ſeveral markets in or near ſuch reſpective place or places, or ſuch other perſon or perſons as any ſuch two or more juſtices as aforeſaid reſpectively, within their reſpective juriſdictions, ſhall for that purpoſe appoint; and that the price of grain, meal, and flour which ſhall be ſo returned, ſhall from time to time be entered by the reſpective perſon or perſons who ſhall ſo return the ſame, in ſome book or books to be provided by him or them, and kept for that purpoſe; and within two days after any ſuch return of the price of grain, meal and flour, ſhall be made to any ſuch two or more juſtices as aforeſaid, the price and aſſize of bread may be by them, or any two of them, ſet for every ſuch place or places, for any time not exceeding fourteen days from every ſetting thereof; and the aſſize which ſhall be ſo from time to time ſet, ſhall commence and be in force at ſuch time after every ſetting thereof, and be made public in ſuch place or places for which the ſame ſhall be ſo ſet, in ſuch manner as the juſtices, who ſhall ſet the ſame, ſhall order or direct.

Sect. 9. And any maker of bread for ſale in any ſuch other city, town corporate, borough, or place, where the price and aſſize of bread, in purſuance of this act, ſhall at any time be thought proper to be ſet, ſhall have liberty, at all ſeaſonable times, in the day time, the next day after every return of the price of grain, meal, and flour ſhall be made for any ſuch other city, town corporate, borough, town, or place, and entered in the proper book hereby directed to be provided and kept for that purpoſe, to ſee the entry which ſhall be made in ſuch book of the price of grain, meal, and flour, without paying any thing for the ſame; to the intent that every ſuch maker of bread for ſale may have an opportunity on the ſaid next day after any ſuch entry as aforeſaid ſhall be made as hereby is directed, to offer to any ſuch court, mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates, or juſtices as aforeſaid, who ſhall think fit to ſet any ſuch aſſize of bread within their reſpective juriſdictions, and before any ſuch aſſize ſhall be ſet, ſuch objections as any ſuch maker of bread for ſale can reaſonably make againſt any advance or reduction being at any time made in the aſſize or price of bread in any ſuch other city, town corporate, borough, town, or place.

Sect. 10. And no baker or maker of bread for ſale ſhall be liable or compellable to pay any fee, gratuity, or reward to any perſon or perſons for or by means of any aſſize of bread being at any time ſet, altered, or publiſhed by virtue of or under this act.

Sect. 11. And the form of the return, or the certificate of the price of grain, meal, or flour ſhall from time to time be to the purport or effect as followeth; that is to ſay,

The prices of grain, meal, or flour, as ſold in the corn market in in the of the day of 17

The beſt wheat — —	at	by the buſhel
The ſecond — — —	at	by ditto
The third — —	at	by ditto
The beſt wheaten flour	at	by the ſack
Houſehold flour — —	at	by the ſack
Rye — — —	at	by the buſhel
Rye-meal, or flour — —	at	by ditto
Barley — — —	at	by ditto
Barley-meal — —	at	by ditto
Oats — —	at	by ditto
Oatmeal — — —	at	by
White peas — —	at	by the buſhel
White pea flour — —	at	by
Beans — — —	at	by the buſhel
Bean-meal, or flour —	at	by

To every of which returns the perſon or perſons who ſhall be appointed to make the ſame ſhall from time to time ſign their reſpective names or marks.

Sect. 12. And when an aſſize of bread ſhall at any time be ſet in purſuance of this act, the ſame ſhall be made public in the form, or to the effect following, that is to ſay;

The aſſize of bread for the day of for to take place on the day of now next enſuing, and to be in force for the ſaid of

And in places where penny, two-penny, ſix-penny, twelve-penny, and eighteen-penny loaves ſhall be made, as followeth;

	lb.	*oz.*	*dr.*
The two-penny loaf wheaten is to weigh — —			
Ditto houſehold is to weigh			
The two-penny loaf wheaten is to weigh — —			
Ditto houſehold is to weigh			
The ſix-penny loaf wheaten is to weigh — —			
Ditto houſehold is to weigh			
The twelve-penny loaf wheaten is to weigh — —			
Ditto houſehold is to weigh			
The eighteen-penny loaf wheaten is to weigh — —			
Ditto houſehold is to weigh			

And in places where quartern, half-peck, and peck loaves ſhall be made, then as follows;

	lb.	*oz.*		*s.*	*d.*
The peck loaf wheaten is to weigh			and to be ſold for		
Ditto houſehold is to weigh			and to be ſold for		

And the half-peck and quarter of a peck loaves of wheaten and houſehold bread are to weigh, from time to time, in proportion to the weight of a peck loaf of wheaten or houſehold bread ought to weigh, and are to be ſold according to the price a peck loaf of wheaten or houſehold bread reſpectively is to be ſold; and whenever any bread ſhall be ordered to be made by any ſuch magiſtrate or magiſtrates, or juſtices, within the limits of their juriſdiction, with the meal or flour of rye, barley, oats, peas or beans, either alone or mixed with the meal or flour of any other grain or grains, the aſſize of ſuch bread ſhall be made public in ſuch manner as the ſaid magiſtrate or magiſtrates, or juſtices, who ſhall ſet ſuch aſſize, ſhall from time to time direct.

Sect. 13. And in places where any ſix-penny, twelve-penny, and eighteen-penny loaves ſhall at any time be ordered or allowed to be made or ſold, no peck, half-peck, or quarter of a peck loaves ſhall be permitted or allowed at the ſame time to be there made or ſold; to the intent that one of thoſe ſorts of loaves of bread may not be ſold deſignedly or otherwiſe for the other ſort thereof, to the injury of unwary people; upon pain that every one who ſhall offend in the premiſſes, and ſhall be thereof convicted

convicted in manner herein after prescribed, shall, for every such offence, forfeit a sum not exceeding forty shillings, nor less than twenty shillings, as the magistrate or magistrates, justice or justices before whom any such offender shall be convicted, shall from time to time think fit.

Sect. 14. And if, for the better carrying into execution this act, the justices of the peace of any county, riding, or division, shall at any general or general quarter sessions of the peace to be held by them for any such county, riding, or division, think fit to ascertain or fix, that any hundred or hundreds, or other place or places, in any such county, riding, or division, ought to be estimated or considered, as of, or in any one particular hundred, riding, or division of any such county, riding, or division, in order that the assize of bread which shall be set for such particular hundred, place or places, may extend to or comprize such other hundred, place or places, then, and in any such case, it shall be lawful for them so to do; but by so doing thereof, no justice of the peace of any such county, riding, or division shall be excluded or debarred from acting as a justice of the peace in any hundred, riding, or division of any such county in which any such particular towns, districts, or places shall lie, or the assize for them shall be set.

Sect. 15. And an entry shall from time to time be made by every clerk of the market, or other person or persons, who, in pursuance of this act, shall be appointed to make such return and certificate as hereby is directed respectively, in some book or books to be provided and kept by them respectively for that purpose, of every return which shall be made, in pursuance of this act, by them respectively; and also of the rate at which the price, assize, and weight of bread shall from time to time be set or fixed within the jurisdiction of every such clerk of the market, or other person who shall, in pursuance of this act, be appointed to make such return or certificate as aforesaid; which book or books any inhabitant of every such city, town corporate, borough, franchise, hundred, riding, division, liberty, lath, rape, or wapentake, shall at all seasonable times, in the day-time, have liberty to see and inspect, without any fee or reward being to be paid for the same.

Sect. 16. And after an assize of bread shall be set, no alteration shall be made therein in any subsequent week, either to raise the same higher, or to sink the same lower, unless and except when the price of wheat or other grain shall be returned as having rose three-pence each bushel more than the last return made, or having fallen three-pence each bushel lower than the said last return; no provision being made by the said assize tables for altering any assize, when the variation in the price of wheat or other grain shall not in any week have amounted to, and have been returned three-pence a bushel.

Sect. 17. And if any meal-weigher, clerk of any market, or other person or persons who shall be appointed to certify or return, as hereby is directed, the price of grain, meal, and flour, shall in any wise neglect, omit, or refuse to do any matters or things by this act required or directed to be done by him or them respectively, or shall designedly or knowingly make any false certificate or return; or if any constable, headborough, or other peace-officer, shall refuse or neglect to observe or obey any warrant in writing which shall be delivered to him under the hand and seal of any magistrate or justice of the peace, or to do any other act requisite to be done by him or them for the carrying this act, or any of the powers or authorities hereby given, into execution; then every person so offending in any of the premisses, on being convicted of any such offence, shall forfeit and pay for every such offence, any sum not exceeding five pounds, nor less than twenty shillings, as the magistrate or magistrates, justice or justices, before whom any such offender or offenders shall be convicted, shall think fit and order, every time he or they shall so offend and be convicted, as hereby is directed.

Sect. 18. And in case any buyers or sellers of or dealers in corn, grain, meal, or flour, on reasonable request to him, her, or them made by the meal-weighers of the city of *London* in *London*, or by the respective clerks of the markets or other persons, who, in pursuance of this act, shall be appointed to give in and certify, as hereby is directed, the prices of grain, meal, and flour from the respective markets or places within their respective jurisdictions, shall refuse to disclose and make known to such meal-weighers, clerks of the markets, or other persons who shall be appointed to make such returns and certificates as hereby are directed respectively, and also shall request the same within their respective jurisdictions, the true real prices the several sorts of grain, meal, and flour shall be *bona fide* bought at or sold by or for him, her, or them respectively, at any corn market or corn markets, or other place where corn, grain, meal, or flour is or shall be usually, openly, or publickly sold, within the jurisdiction of any such person or persons as aforesaid, who shall request any such account to be given to him or them; or shall knowingly give in to any such meal-weigher, clerk of the market, or other person who shall be appointed in pursuance of this act to give in and certify the price of grain, meal, and flour, any false or untrue price or prices of any grain, meal, or flour bought or sold, or agreed so to be, or any price which hath been made by any deceitful means; then, and in every such case, he, she, or they so offending, on being convicted of any such offence by the oath of one or more credible witness or witnesses, or solemn affirmation of any credible witness or witnesses, being a quaker, or on the confession of the party accused, shall forfeit any sum not exceeding ten pounds, nor less than forty shillings, as the magistrate or magistrates, justice or justices, before whom any such offender or offenders shall be convicted, shall think fit and order, every time he, she, or they shall so offend, and be convicted of any such offence.

Sect. 19. And if any such court, magistrate or magistrates, justice or justices as aforesaid, who shall have thought proper to have ordered any return to be made of the price of grain, meal, or flour, within their respective jurisdictions, shall, at any time within the space of three days after any such return shall have been made, suspect that the same was not truly and *bona fide* made, then, and in such case, it shall be lawful for any such court, magistrate or magistrates, justice or justices, within their respective jurisdictions, to summon before them respectively any person or persons who shall have bought or sold, or shall be suspected to have bought or sold, or agreed to buy or sell any grain, meal, or flour, within their respective jurisdictions, or who shall be thought likely to give any information concerning the premisses, and to examine them respectively upon their several oaths, touching the rates and prices the several sorts of grain, meal, and flour, or any of them, were there really and *bona fide* bought at, or sold for, or agreed so to be by him, her, or them respectively, at any time or times within the space of seven days preceding the summoning of him, her, or them respectively: and if any person or persons who shall be so summoned as aforesaid, shall neglect or refuse to appear on such summons (and proof shall be made on oath of such summons having been duly served upon him, her, or them for that purpose) or if any person or persons so summoned shall appear, and neglect or refuse to answer such lawful questions touching the premisses, as shall be proposed to him, her, or them by any such court, magistrate or magistrates, justice or justices as aforesaid, within their respective jurisdictions, without some just or reasonable excuse, to be allowed of by any such court, magistrate or magistrate, justice or justices as aforesaid, he, she, or they so offending on being convicted of any such offence, either by the oath of one or more credible witness or witnesses, or his, her, or their own confession before any such court, magistrate or magistrates, justice or justices, shall, on every such conviction, forfeit and pay any sum not exceeding ten pounds, and not less than forty shillings, as any such court, magistrate or magistrates, justice or justices, shall think fit and order: and if any person who shall be so examined on oath shall wilfully

wilfully forfwear him or herſelf, every ſuch perſon ſhall be ſubject and liable to be proſecuted as for perjury, by indictment or information by due courſe of law; and, if convicted, ſhall be liable to the penalties perſons convicted of wilful and corrupt perjury are ſubject and liable to; provided that the party or parties ſo ſummoned be not obliged to travel above five miles from the place or places of his, her, or their abode.

Sect. 20. And whenever any court as aforeſaid, magiſtrate or magiſtrates, or juſtices of the peace, ſhall order any bread to be made within their reſpective juriſdictions, of or with the flour or meal of any other grain or grains than wheat, or to be mixed with the flour of wheat, or to be made with the flour or meal of any other ſort or ſorts of grain or grains, either ſeparate or mixed together, all perſons who ſhall make any bread for ſale, in any place where any ſuch order or orders ſhall at any time be made, ſhall from time to time make bread with ſuch mixed meal or flour, in every ſuch place and places, in ſuch manner as they ſhall be required and ordered by any ſuch court, magiſtrate or magiſtrates, or juſtices as aforeſaid, within their reſpective juriſdictions, and ſhall from time to time make the ſame of ſuch weight and goodneſs, and ſhall ſell the ſame at ſuch prices, as any ſuch court, magiſtrate or magiſtrates, or juſtices, within their reſpective juriſdictions, ſhall from time to time order or direct; upon pain that every perſon who ſhall at any time offend in the premiſſes, and ſhall be convicted of any ſuch offence in the manner herein after preſcribed by this act, ſhall forfeit any ſum not exceeding five pounds, nor leſs than forty ſhillings, as the magiſtrate or magiſtrates before whom any ſuch offender or offenders ſhall be convicted ſhall think fit and order, every time he, ſhe, or they ſhall ſo offend and be convicted.

Sect. 21. And the ſeveral ſorts of bread which ſhall be made for ſale, or ſold, or expoſed to or for ſale, in any place or places, ſhall always be well made, and in their ſeveral and reſpective degrees, according to the goodneſs of the ſeveral ſorts of meal or flour whereof the ſame ought to be made; and that no alum, or preparation or mixture in which alum ſhall be an ingredient, or any other mixture or ingredient whatſoever (except only the genuine meal or flour which ought to be put therein, and common ſalt, pure water, eggs, milk, yeaſt, and barm, or ſuch leaven as ſhall at any time be allowed to be put therein by the court, or perſon or perſons who ſhall, by virtue of this act, have ſet any aſſize of bread, for the place or places where any ſuch leaven ſhall be uſed; and where no ſuch aſſize ſhall have been ſet, then ſuch leaven as any magiſtrate or magiſtrates, juſtice or juſtices of the peace, within his or their juriſdiction, ſhall allow to be uſed in making of bread) ſhall be put into, or in any wiſe uſed in making dough, or any bread to be ſold, or as or for leaven to ferment any dough, or on any other account in the trade or myſtery of making bread, under any colour or pretence whatſoever; upon pain that every perſon (other than a ſervant or journeyman) who ſhall knowingly offend in the premiſſes, and ſhall be convicted of any ſuch offence, either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any ſuch magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of his or their juriſdiction, ſhall, on every ſuch conviction, forfeit and pay any ſum of money not exceeding ten pounds, and not leſs than forty ſhillings; or ſhall, by warrant under the hand and ſeal or hands and ſeals of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, within his or their reſpective juriſdiction, be apprehended and committed to the houſe of correction, or ſome priſon of the county, city, town corporate, borough, riding, diviſion, or place where the offence ſhall have been committed, or the offender or offenders ſhall be apprehended, there to remain and be kept to hard labour for any time not exceeding one calendar month, nor leſs than ten days from the time of ſuch commitment, as any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall think fit and order; and if any ſervant or journeyman baker ſhall knowingly offend in the premiſſes, and ſhall be convicted of any ſuch offence, either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any ſuch magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of his or their juriſdiction, he, ſhe, or they who ſhall ſo offend, ſhall, on every ſuch conviction, forfeit and pay any ſum of money not exceeding five pounds, and not leſs than twenty ſhillings; or ſhall, by warrant under the hand and ſeal or hands and ſeals of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, within his or their reſpective juriſdiction, be apprehended and committed to the houſe of correction, or ſome priſon of the county, city, town corporate, borough, riding, diviſion, liberty, or place, where the offence ſhall have been committed, or the offender or offenders ſhall be apprehended, there to remain and be kept to hard labour for any time not exceeding one calendar month, nor leſs than ten days from the time of every ſuch commitment, as any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall think fit and order; and it ſhall and may be lawful for the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender ſhall be convicted, out of the money forfeited, when recovered, to cauſe the offender's name, place of abode, and offence to be publiſhed in ſome news-paper, which ſhall be printed or publiſhed in or near the county, city, or place where any ſuch offence ſhall have been committed.

Sect. 22. And no perſon ſhall knowingly put into any corn, meal, or flour which ſhall be ground, dreſſed, bolted, or manufactured for ſale, either at the time of grinding, dreſſing, bolting, or in any wiſe manufacturing the ſame, or at any other time or times, any ingredient, mixture, or thing whatſoever; or ſhall knowingly ſell, offer, or expoſe to or for ſale any meal or flour of one ſort of grain as or for the meal or flour of any other ſort of grain, or any thing as or for, or mixed with, the meal or flour of any grain, which ſhall not be the real and genuine meal or flour of the grain the ſame ſhall import to be and ought to be; upon pain that every perſon who ſhall offend in the premiſſes, and ſhall be thereof convicted in manner herein after preſcribed, ſhall forfeit and pay for every ſuch offence, any ſum not exceeding five pounds, nor leſs than forty ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit or order.

Sect. 23. And no perſon ſhall knowingly put into any bread which ſhall be made for ſale, any mixture of meal or flour of any other ſort of grain than of the grain the ſame ſhall import to be, and ſhall be allowed to be made of, in purſuance of this act; or ſhall put into any bread which ſhall be made for ſale, any larger or other proportion of any other or different ſort or ſorts of grain, or the meal or flour thereof, than what ſhall be appointed or allowed to be put therein by this act; or any mixture or thing as for or in lieu of flour, which ſhall not really be the genuine flour the ſame ſhall import to be, and ought to be; upon pain that every perſon who ſhall offend in the premiſſes, and ſhall be convicted of any ſuch offence in manner herein after preſcribed, ſhall forfeit and pay any ſum not exceeding five pounds, nor leſs than twenty ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit and order, every time he, ſhe, or they ſhall ſo offend and be convicted.

Sect. 24. And if any perſon or perſons who ſhall make any bread for ſale, or who ſend out, or ſell, or expoſe to or for ſale any bread, ſhall make, ſend out, ſell, or expoſe to or for ſale any bread which ſhall be deficient in weight, according to the aſſize which ſhall be ſet for any ſuch bread from time to time to be ſold at, in purſuance of this act, he, ſhe, or they ſo offending in the premiſſes, and being thereof convicted in manner herein after preſcribed of any ſuch offence, ſhall forfeit and pay a ſum not exceeding five ſhillings, nor leſs than one ſhilling, for every ounce of bread which ſhall at any time be wanting or deficient in the weight every ſuch loaf ought to be of; and for every loaf of bread which ſhall be found wanting leſs than an ounce of the weight the ſame ought to be of, a ſum not exceeding two ſhillings and ſix pence, nor leſs than ſix-pence; as any ſuch magiſtrate or magiſtrates,

ſtrates, juſtice or juſtices, before whom any ſuch bread which ſhall not be of the due weight the ſame ought to be, ſhall be brought, ſhall think fit or order, ſo as ſuch bread which ſhall be complained of as wanting at any time in the weight the ſame ought to be of, in any city, town corporate, borough, liberty, or franchiſe, or the juriſdiction thereof, or within the weekly bills of mortality, ſhall from time to time be brought before ſome magiſtrate or magiſtrates, juſtice or juſtices, having juriſdiction in the premiſſes, and ſhall be weighed before ſuch magiſtrate or magiſtrates, juſtice or juſtices, within 24 hours after the ſame ſhall have been baked, ſold, or expoſed to or for ſale; and ſo as ſuch bread which ſhall be complained of as wanting at any time in the weight the ſame ought to be of, in any hundred, riding, diviſion, liberty, rape, wapentake, or place, ſhall from time to time be brought before ſome juſtice or juſtices of the peace of ſuch hundred, riding, diviſion, liberty, rape, or wapentake, or other place, and ſhall be weighed before ſuch juſtice or juſtices within three days after the ſame ſhall have been baked, ſold, or expoſed to or for ſale; unleſs it ſhall be made out to the ſatisfaction of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, by or on the behalf of the party or parties againſt whom any ſuch complaint or information ſhall be made, that ſuch deficiency in weight wholly aroſe from ſome unavoidable accident in baking, or otherwiſe, or was occaſioned by or through ſome contrivances or confederacy.

Sect. 25. And every perſon who ſhall make for ſale, or ſell, expoſe, or ſend out, to or for ſale, any ſort of bread whatſoever, ſhall from time to time cauſe to be fairly imprinted or marked on every loaf of each reſpective ſort of bread which he, ſhe, or they ſhall make or ſell, or carry out, or expoſe to or for ſale, the *Roman* letters herein after-mentioned; that is to ſay, upon every loaf of bread which ſhall be made, ſold, carried out, or expoſed to or for ſale, as wheaten bread, a large *Roman* W; and upon every loaf of bread which ſhall be made, ſold, carried out, or expoſed to or for ſale, as houſhold or brown bread, a large *Roman* H; and that every perſon who ſhall make for ſale, or ſhall ſell, carry out, or expoſe to or for ſale, any loaf of any ſort of bread, which ſhall be allowed to be made in purſuance of this act, which ſhall not be marked purſuant to the directions of this act, ſo as the ſame may, on the view thereof, be aſcertained from time to time under what denomination or ſort of bread every ſuch loaf was made, and ought to be weighed (except as to ſuch loaves which ſhall be raſped after the beſpeaking or purchaſing thereof, by the particular deſire of any perſon who ſhall order the ſame to be ſo raſped, for his, her, or their own uſe or uſes) ſhall, for every time he, ſhe, or they ſhall offend in the premiſſes, and be thereof convicted, in manner herein after preſcribed, forfeit and pay a ſum not exceeding twenty ſhillings, nor leſs than five ſhillings, as any magiſtrate or magiſtrates, juſtice or juſtices, before whom the offender ſhall be convicted, ſhall direct, for every loaf of bread not marked as hereby is directed.

Sect. 26. And no baker, or other perſon or perſons, ſhall aſk, demand, or take, for any bread which he, ſhe, or they ſhall ſell, or expoſe to or for ſale, any greater or higher price than ſuch bread ſhall be aſcertained to be ſold for or at by the court, magiſtrate or magiſtrates, or juſtices, hereby authorized to ſet the price and aſſize of bread, within their reſpective juriſdictions; and that no baker, or other perſon who ſhall make any bread for ſale, ſhall refuſe or decline to ſell any loaf or loaves of any of the ſorts of bread which, in purſuance of this act, ſhall be allowed or ordered to be made, to any perſon or perſons who ſhall tender ready money in payment for the ſame, at or for the price ſuch bread, by the aſſize which ſhall have been ſet in reſpect thereof, ſhall be fixed at, or aſcertained to be ſold for, when any ſuch baker, or other perſon who ſhall make bread for ſale, ſhall have any loaf of any ſuch bread in his or their houſe, bakehouſe, ſhop, or poſſeſſion, to be ſold, more than ſhall be requiſite for the immediate neceſſary uſe of his, her, or their own family, or cuſtomers; and which it ſhall be incumbent on ſuch baker, or other perſon who ſhall be complained of for refuſing or declining to ſell any ſuch bread, to prove before the magiſtrate or magiſtrates, juſtice or juſtices, to whom any ſuch complaint ſhall be made, if thereunto required by the party or parties who ſhall make any ſuch complaint; upon pain that every perſon who ſhall be convicted of any ſuch offence, in manner herein after preſcribed, ſhall forfeit and pay a ſum not exceeding forty ſhillings, nor leſs than ten ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit and order, every time he, ſhe, or they ſhall ſo offend and be convicted.

Sect. 27. Provided further, that no perſon ſhall ſell, or offer to ſale, any bread of an inferior quality to wheaten bread, at a higher price than houſhold bread ſhall be ſet at by the aſſize; and if any perſon ſhall offend in the premiſſes, he ſhall forfeit and pay for every ſuch offence, on being convicted thereof, either by his, her, or their confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any magiſtrate or magiſtrates, juſtice or juſtices, within whoſe juriſdiction any ſuch offence ſhall have been committed, the ſum of twenty ſhillings.

Sect. 28. And that the good deſign of this ſtatute may be the more effectually accompliſhed, it ſhall be lawful for any magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of their reſpective juriſdictions, and alſo for any peace officer or officers, authorized by warrant under the hand and ſeal or hands and ſeals of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, and which warrant any ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby impowered to grant, at ſeaſonable times in the day-time to enter into any houſe, ſhop, ſtall, bakehouſe, warehouſe, or outhouſe, of or belonging to any baker, or ſeller of bread, to ſearch for, view, weigh, and try all or any the bread which ſhall be there found: and if any bread, on any ſuch ſearch, ſhall be found to be wanting either in the goodneſs of the ſtuff whereof the ſame ſhall be made, or to be deficient in the due baking or working thereof, or ſhall be wanting in the due weight, or ſhall not be truly marked according to the directions of this act, or ſhall be any other ſort of bread than ſhall be allowed to be made by virtue of this act; any ſuch magiſtrate or magiſtrates, juſtice or juſtices, peace officer or peace officers, within the limits of their reſpective juriſdictions, may ſeize the ſame; and any ſuch magiſtrate or magiſtrates, juſtice or juſtices, may diſpoſe thereof as he or they, in his or their diſcretion, ſhall think fit.

Sect. 29. And if information ſhall be given, on oath, to any magiſtrate or magiſtrates, juſtice or juſtices of the peace, that there is reaſonable cauſe to ſuſpect that any miller who grinds any grain for toll or reward, or any perſon or perſons who doth or do dreſs, bolt, or in any wiſe manufacture any meal or flour for ſale, or any maker of bread for ſale, within the limits of the juriſdiction of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, doth or do mix up with, or put into, any meal or flour ground or manufactured for ſale, any mixture, ingredient, or thing whatſoever, not the genuine produce of the grain ſuch meal or flour ſhall import and ought to be, or whereby the purity of any meal or flour in the poſſeſſion of any ſuch miller, mealman, or baker, is or ſhall be in any wiſe adulterated; then, and in every ſuch caſe, it ſhall be lawful for any ſuch magiſtrate or magiſtrates, juſtice or juſtices, and alſo for any peace officer or officers, authorized by warrant or warrants, to him or them directed, under the hand and ſeal or hands and ſeals of any magiſtrate or magiſtrates, juſtice or juſtices, within the limits of their reſpective juriſdictions (and which warrant or warrants every ſuch magiſtrate and magiſtrates, juſtice and juſtices, is and are hereby impowered to grant) at all ſeaſonable times in the day-time to enter into any houſe, mill, ſhop, bake-houſe, ſtall, bolting-houſe, paſtry, warehouſe, or outhouſe, of or belonging to any ſuch miller, mealman, or baker, and to ſearch and examine whether any mixture, ingredient, or thing, not the genuine produce of the grain ſuch meal or flour ſhall import and ought to be, ſhall have been mixed up with, or put into

wilfully forſwear him or herſelf, every ſuch perſon ſhall be ſubject and liable to be proſecuted as for perjury, by indictment or information by due courſe of law; and, if convicted, ſhall be liable to the penalties perſons convicted of wilful and corrupt perjury are ſubject and liable to; provided that the party or parties ſo ſummoned be not obliged to travel above five miles from the place or places of his, her, or their abode.

Sect. 20. And whenever any court as aforeſaid, magiſtrate or magiſtrates, or juſtices of the peace, ſhall order any bread to be made within their reſpective juriſdictions, of or with the flour or meal of any other grain or grains than wheat, or to be mixed with the flour of wheat, or to be made with the flour or meal of any other ſort or ſorts of grain or grains, either ſeparate or mixed together, all perſons who ſhall make any bread for ſale, in any place where any ſuch order or orders ſhall at any time be made, ſhall from time to time make bread with ſuch mixed meal or flour, in every ſuch place and places, in ſuch manner as they ſhall be required and ordered by any ſuch court, magiſtrate or magiſtrates, or juſtices as aforeſaid, within their reſpective juriſdictions, and ſhall from time to time make the ſame of ſuch weight and goodneſs, and ſhall ſell the ſame at ſuch prices, as any ſuch court, magiſtrate or magiſtrates, or juſtices, within their reſpective juriſdictions, ſhall from time to time order or direct; upon pain that every perſon who ſhall at any time offend in the premiſſes, and ſhall be convicted of any ſuch offence in the manner herein after preſcribed by this act, ſhall forfeit any ſum not exceeding five pounds, nor leſs than forty ſhillings, as the magiſtrate or magiſtrates before whom any ſuch offender or offenders ſhall be convicted ſhall think fit and order, every time he, ſhe, or they ſhall ſo offend and be convicted.

Sect. 21. And the ſeveral ſorts of bread which ſhall be made for ſale, or ſold, or expoſed to or for ſale, in any place or places, ſhall always be well made, and in their ſeveral and reſpective degrees, according to the goodneſs of the ſeveral ſorts of meal or flour whereof the ſame ought to be made; and that no alum, or preparation or mixture in which alum ſhall be an ingredient, or any other mixture or ingredient whatſoever (except only the genuine meal or flour which ought to be put therein, and common ſalt, pure water, eggs, milk, yeaſt, and barm, or ſuch leaven as ſhall at any time be allowed to be put therein by the court, or perſon or perſons who ſhall, by virtue of this act, have ſet any aſſize of bread, for the place or places where any ſuch leaven ſhall be uſed; and where no ſuch aſſize ſhall have been ſet, then ſuch leaven as any magiſtrate or magiſtrates, juſtice or juſtices of the peace, within his or their juriſdiction, ſhall allow to be uſed in making of bread) ſhall be put into, or in any wiſe uſed in making dough, or any bread to be ſold, or as or for leaven to ferment any dough, or on any other account in the trade or myſtery of making bread, under any colour or pretence whatſoever; upon pain that every perſon (other than a ſervant or journeyman) who ſhall knowingly offend in the premiſſes, and ſhall be convicted of any ſuch offence, either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any ſuch magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of his or their juriſdiction, ſhall, on every ſuch conviction, forfeit and pay any ſum of money not exceeding ten pounds, and not leſs than forty ſhillings; or ſhall, by warrant under the hand and ſeal or hands and ſeals of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, within his or their reſpective juriſdiction, be apprehended and committed to the houſe of correction, or ſome priſon of the county, city, town corporate, borough, riding, diviſion, or place where the offence ſhall have been committed, or the offender or offenders ſhall be apprehended, there to remain and be kept to hard labour for any time not exceeding one calendar month, nor leſs than ten days from the time of ſuch commitment, as any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall think fit and order; and if any ſervant or journeyman baker ſhall knowingly offend in the premiſſes, and ſhall be convicted of any ſuch offence, either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any ſuch magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of his or their juriſdiction, he, ſhe, or they who ſhall ſo offend, ſhall, on every ſuch conviction, forfeit and pay any ſum of money not exceeding five pounds, and not leſs than twenty ſhillings; or ſhall, by warrant under the hand and ſeal or hands and ſeals of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, within his or their reſpective juriſdiction, be apprehended and committed to the houſe of correction, or ſome priſon of the county, city, town corporate, borough, riding, diviſion, liberty, or place, where the offence ſhall have been committed, or the offender or offenders ſhall be apprehended, there to remain and be kept to hard labour for any time not exceeding one calendar month, nor leſs than ten days from the time of every ſuch commitment, as any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall think fit and order; and it ſhall and may be lawful for the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender ſhall be convicted, out of the money forfeited, when recovered, to cauſe the offender's name, place of abode, and offence to be publiſhed in ſome news-paper, which ſhall be printed or publiſhed in or near the county, city, or place where any ſuch offence ſhall have been committed.

Sect. 22. And no perſon ſhall knowingly put into any corn, meal, or flour which ſhall be ground, dreſſed, bolted, or manufactured for ſale, either at the time of grinding, dreſſing, bolting, or in any wiſe manufacturing the ſame, or at any other time or times, any ingredient, mixture, or thing whatſoever; or ſhall knowingly ſell, offer, or expoſe to or for ſale any meal or flour of one ſort of grain as or for the meal or flour of any other ſort of grain, or any thing as or for, or mixed with, the meal or flour of any grain, which ſhall not be the real and genuine meal or flour of the grain the ſame ſhall import to be and ought to be; upon pain that every perſon who ſhall offend in the premiſſes, and ſhall be thereof convicted in manner herein after preſcribed, ſhall forfeit and pay for every ſuch offence, any ſum not exceeding five pounds, nor leſs than forty ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit or order.

Sect. 23. And no perſon ſhall knowingly put into any bread which ſhall be made for ſale, any mixture of meal or flour of any other ſort of grain than of the grain the ſame ſhall import to be, and ſhall be allowed to be made of, in purſuance of this act; or ſhall put into any bread which ſhall be made for ſale, any larger or other proportion of any other or different ſort or ſorts of grain, or the meal or flour thereof, than what ſhall be appointed or allowed to be put therein by this act; or any mixture or thing as for or in lieu of flour, which ſhall not really be the genuine flour the ſame ſhall import to be, and ought to be; upon pain that every perſon who ſhall offend in the premiſſes, and ſhall be convicted of any ſuch offence in manner herein after preſcribed, ſhall forfeit and pay any ſum not exceeding five pounds, nor leſs than twenty ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit and order, every time he, ſhe, or they ſhall ſo offend and be convicted.

Sect. 24. And if any perſon or perſons who ſhall make any bread for ſale, or who ſend out, or ſell, or expoſe to or for ſale any bread, ſhall make, ſend out, ſell, or expoſe to or for ſale any bread which ſhall be deficient in weight, according to the aſſize which ſhall be ſet for any ſuch bread from time to time to be ſold at, in purſuance of this act, he, ſhe, or they ſo offending in the premiſſes, and being thereof convicted in manner herein after preſcribed of any ſuch offence, ſhall forfeit and pay a ſum not exceeding five ſhillings, nor leſs than one ſhilling, for every ounce of bread which ſhall at any time be wanting or deficient in the weight every ſuch loaf ought to be of; and for every loaf of bread which ſhall be found wanting leſs than an ounce of the weight the ſame ought to be of, a ſum not exceeding two ſhillings and ſix pence, nor leſs than ſix-pence; as any ſuch magiſtrate or magiſtrates,

ſtrates, juſtice or juſtices, before whom any ſuch bread which ſhall not be of the due weight the ſame ought to be, ſhall be brought, ſhall think fit or order, ſo as ſuch bread which ſhall be complained of as wanting at any time in the weight the ſame ought to be of, in any city, town corporate, borough, liberty, or franchiſe, or the juriſdiction thereof, or within the weekly bills of mortality, ſhall from time to time be brought before ſome magiſtrate or magiſtrates, juſtice or juſtices, having juriſdiction in the premiſſes, and ſhall be weighed before ſuch magiſtrate or magiſtrates, juſtice or juſtices, within 24 hours after the ſame ſhall have been baked, ſold, or expoſed to or for ſale; and ſo as ſuch bread which ſhall be complained of as wanting at any time in the weight the ſame ought to be of, in any hundred, riding, diviſion, liberty, rape, wapentake, or place, ſhall from time to time be brought before ſome juſtice or juſtices of the peace of ſuch hundred, riding, diviſion, liberty, rape, or wapentake, or other place, and ſhall be weighed before ſuch juſtice or juſtices within three days after the ſame ſhall have been baked, ſold, or expoſed to or for ſale; unleſs it ſhall be made out to the ſatisfaction of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, by or on the behalf of the party or parties againſt whom any ſuch complaint or information ſhall be made, that ſuch deficiency in weight wholly aroſe from ſome unavoidable accident in baking, or otherwiſe, or was occaſioned by or through ſome contrivances or confederacy.

Sect. 25. And every perſon who ſhall make for ſale, or ſell, expoſe, or ſend out, to or for ſale, any ſort of bread whatſoever, ſhall from time to time cauſe to be fairly imprinted or marked on every loaf of each reſpective ſort of bread which he, ſhe, or they ſhall make or ſell, or carry out, or expoſe to or for ſale, the *Roman* letters herein after-mentioned; that is to ſay, upon every loaf of bread which ſhall be made, ſold, carried out, or expoſed to or for ſale, as wheaten bread, a large *Roman* W; and upon every loaf of bread which ſhall be made, ſold, carried out, or expoſed to or for ſale, as houſhold or brown bread, a large *Roman* H; and that every perſon who ſhall make for ſale, or ſhall ſell, carry out, or expoſe to or for ſale, any loaf of any ſort of bread, which ſhall be allowed to be made in purſuance of this act, which ſhall not be marked purſuant to the directions of this act, ſo as the ſame may, on the view thereof, be aſcertained from time to time under what denomination or ſort of bread every ſuch loaf was made, and ought to be weighed (except as to ſuch loaves which ſhall be raſped after the beſpeaking or purchaſing thereof, by the particular deſire of any perſon who ſhall order the ſame to be ſo raſped, for his, her, or their own uſe or uſes) ſhall, for every time he, ſhe, or they ſhall offend in the premiſſes, and be thereof convicted, in manner herein after preſcribed, forfeit and pay a ſum not exceeding twenty ſhillings, nor leſs than five ſhillings, as any magiſtrate or magiſtrates, juſtice or juſtices, before whom the offender ſhall be convicted, ſhall direct, for every loaf of bread not marked as hereby is directed.

Sect. 26. And no baker, or other perſon or perſons, ſhall aſk, demand, or take, for any bread which he, ſhe, or they ſhall ſell, or expoſe to or for ſale, any greater or higher price than ſuch bread ſhall be aſcertained to be ſold for or at by the court, magiſtrate or magiſtrates, or juſtices, hereby authorized to ſet the price and aſſize of bread, within their reſpective juriſdictions; and that no baker, or other perſon who ſhall make any bread for ſale, ſhall refuſe or decline to ſell any loaf or loaves of any of the ſorts of bread which, in purſuance of this act, ſhall be allowed or ordered to be made, to any perſon or perſons who ſhall tender ready money in payment for the ſame, at or for the price ſuch bread, by the aſſize which ſhall have been ſet in reſpect thereof, ſhall be fixed at, or aſcertained to be ſold for, when any ſuch baker, or other perſon who ſhall make bread for ſale, ſhall have any loaf of any ſuch bread in his or their houſe, bakehouſe, ſhop, or poſſeſſion, to be ſold, more than ſhall be requiſite for the immediate neceſſary uſe of his, her, or their own family, or cuſtomers; and which it ſhall be incumbent on ſuch baker, or other perſon who ſhall be complained of for refuſing or declining to ſell any ſuch bread, to prove before the magiſtrate or magiſtrates, juſtice or juſtices, to whom any ſuch complaint ſhall be made, if thereunto required by the party or parties who ſhall make any ſuch complaint; upon pain that every perſon who ſhall be convicted of any ſuch offence, in manner herein after preſcribed, ſhall forfeit and pay a ſum not exceeding forty ſhillings, nor leſs than ten ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit and order, every time he, ſhe, or they ſhall ſo offend and be convicted.

Sect. 27. Provided further, that no perſon ſhall ſell, or offer to ſale, any bread of an inferior quality to wheaten bread, at a higher price than houſhold bread ſhall be ſet at by the aſſize; and if any perſon ſhall offend in the premiſſes, he ſhall forfeit and pay for every ſuch offence, on being convicted thereof, either by his, her, or their confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any magiſtrate or magiſtrates, juſtice or juſtices, within whoſe juriſdiction any ſuch offence ſhall have been committed, the ſum of twenty ſhillings.

Sect. 28. And that the good deſign of this ſtatute may be the more effectually accompliſhed, it ſhall be lawful for any magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of their reſpective juriſdictions, and alſo for any peace officer or officers, authorized by warrant under the hand and ſeal or hands and ſeals of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, and which warrant any ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby impowered to grant, at ſeaſonable times in the day-time to enter into any houſe, ſhop, ſtall, bakehouſe, warehouſe, or outhouſe, of or belonging to any baker, or ſeller of bread, to ſearch for, view, weigh, and try all or any the bread which ſhall be there found: and if any bread, on any ſuch ſearch, ſhall be found to be wanting either in the goodneſs of the ſtuff whereof the ſame ſhall be made, or to be deficient in the due baking or working thereof, or ſhall be wanting in the due weight, or ſhall not be truly marked according to the directions of this act, or ſhall be any other ſort of bread than ſhall be allowed to be made by virtue of this act; any ſuch magiſtrate or magiſtrates, juſtice or juſtices, peace officer or peace officers, within the limits of their reſpective juriſdictions, may ſeize the ſame; and any ſuch magiſtrate or magiſtrates, juſtice or juſtices, may diſpoſe thereof as he or they, in his or their diſcretion, ſhall think fit.

Sect. 29. And if information ſhall be given, on oath, to any magiſtrate or magiſtrates, juſtice or juſtices of the peace, that there is reaſonable cauſe to ſuſpect that any miller who grinds any grain for toll or reward, or any perſon or perſons who doth or do dreſs, bolt, or in any wiſe manufacture any meal or flour for ſale, or any maker of bread for ſale, within the limits of the juriſdiction of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, doth or do mix up with, or put into, any meal or flour ground or manufactured for ſale, any mixture, ingredient, or thing whatſoever, not the genuine produce of the grain ſuch meal or flour ſhall import and ought to be, or whereby the purity of any meal or flour in the poſſeſſion of any ſuch miller, mealman, or baker, is or ſhall be in any wiſe adulterated; then, and in every ſuch caſe, it ſhall be lawful for any ſuch magiſtrate or magiſtrates, juſtice or juſtices, and alſo for any peace officer or officers, authorized by warrant or warrants, to him or them directed, under the hand and ſeal or hands and ſeals of any magiſtrate or magiſtrates, juſtice or juſtices, within the limits of their reſpective juriſdictions (and which warrant or warrants every ſuch magiſtrate and magiſtrates, juſtice and juſtices, is and are hereby impowered to grant) at all ſeaſonable times in the day-time to enter into any houſe, mill, ſhop, bake-houſe, ſtall, bolting-houſe, paſtry, warehouſe, or outhouſe, of or belonging to any ſuch miller, mealman, or baker, and to ſearch and examine whether any mixture, ingredient, or thing, not the genuine produce of the grain ſuch meal or flour ſhall import and ought to be, ſhall have been mixed up with, or put

into any meal or flour in the poſſeſſion of any ſuch miller, mealman, or baker, either in the grinding of any grain at the mill, or in the dreſſing, or bolting, or manufacturing thereof, or whereby the purity of any meal or flour is or ſhall be in any wiſe adulterated: and if on any ſuch ſearch it ſhall appear that any offence hath been committed in any mill, bolting-houſe, or other place allowed to be ſearched, contrary to the true intent of this act; then, and in every ſuch caſe, it ſhall and may be lawful to and for any magiſtrate or magiſtrates, juſtice or juſtices of the peace, officer or officers, authorized as aforeſaid reſpectively, within the limits of their reſpective juriſdiction, to ſeize and take any meal or flour which ſhall be deemed on any ſuch ſearch to have been adulterated, and all mixtures and ingredients which ſhall be found and deemed to have been uſed, or intended to be uſed, in or for any ſuch adulteration; and ſuch thereof as ſhall be ſeized by any peace officer or officers authorized as aforeſaid, ſhall, with all convenient ſpeed after ſeizure thereof, be carried to ſome magiſtrate or magiſtrates, juſtice or juſtices of the peace, within the limits of whoſe juriſdiction the ſame ſhall have been ſo ſeized: and if any magiſtrate or magiſtrates, juſtice or juſtices of the peace, who ſhall make any ſeizure in purſuance of this act, or to whom any thing ſeized under the authority of this act ſhall be brought, ſhall adjudge that any mixture or ingredients, not the genuine produce of the grain any ſuch meal or flour, which ſhall have been ſo ſeized, ſhall import and ought to be, ſhall have been put into any ſuch meal or flour, or that the purity of any ſuch meal or flour ſo ſeized was adulterated by any mixture or ingredient put therein; then, and in any ſuch caſe, every ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby required, within the limits of their reſpective juriſdiction, to diſpoſe of the ſame as he or they, in his or their diſcretion, ſhall from time to time think poper.

Sect. 30. And every miller, mealman, baker, or ſeller of bread as aforeſaid, in whoſe houſe, mill, ſhop, bake-houſe, ſtall, bolting-houſe, paſtry, warehouſe, outhouſe, or poſſeſſion, any mixture or ingredient ſhall be found which ſhall be adjudged by any magiſtrate or magiſtrates, juſtice or juſtices, to have been lodged there with an intent to have adulterated the purity of meal, flour, or bread, ſhall, on being convicted of any ſuch offence, either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, before any ſuch magiſtrate or magiſtrates, juſtice or juſtices of the peace, within whoſe juriſdiction any ſuch offence ſhall have been committed, forfeit and pay for every ſuch offence a ſum not exceeding ten pounds, nor leſs than forty ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit and order; unleſs the party or parties charged with any ſuch offence ſhall make it appear to the ſatisfaction of the magiſtrate or magiſtrates, juſtice or juſtices, who ſhall find or ſeize any ſuch mixture or ingredients, or before whom the ſame ſhall be brought, that ſuch mixture or ingredients was or were not brought or lodged, where the ſame was or were found or ſeized, with any deſign or intent to have been put into any meal or flour, or have adulterated therewith the purity of any meal or flour, but that the ſame was in the place or places in which the ſame ſhall have been ſo found or ſeized as aforeſaid for ſome other lawful purpoſe; and it ſhall and may be lawful for the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender ſhall be convicted, out of the money forfeited, when recovered, to cauſe the offender's name, place of abode, and offence, to be publiſhed in ſome news paper which ſhall be printed or publiſhed in or near the county, city, or place where any ſuch offence ſhall have been committed.

Sect. 31. And if any perſon or perſons ſhall wilfully obſtruct or hinder any ſearch as herein before is authorized to be made, or the ſeizure of any bread, or of any ingredients which ſhall be found on any ſuch ſearch, and deemed to have been lodged with an intent to adulterate the purity or wholeſomeneſs of meal, flour, or bread, or ſhall wilfully oppoſe or reſiſt any ſuch ſearch being made or the carrying away any ſuch ingredient as aforeſaid, or any bread which ſhall be ſeized, as not being made pursuant to this act, he, ſhe, or they ſo doing or offending in any of the caſes aforeſaid, ſhall, on being convicted thereof, in manner herein after preſcribed, forfeit and pay for every offence ſuch ſum, not exceeding five pounds, nor leſs than twenty ſhillings, as the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall be convicted, ſhall think fit and order.

Sect. 32. Provided always, and be it further enacted by the authority aforeſaid, that no perſon who ſhall follow, or be concerned in the buſineſs of a miller, mealman, or baker, ſhall be capable of acting, or ſhall be allowed to act, as a magiſtrate, or juſtice of the peace, under this act, or in putting in execution any of the powers in or by this act granted; and if any miller, mealman, or baker ſhall preſume ſo to do, he or they ſo offending in the premiſſes, ſhall for every ſuch offence forfeit and pay the ſum of fifty pounds to any perſon or perſons who will inform and ſue for the ſame; to be recovered in any of his Majeſty's courts of record at *Weſtminſter*, by action of debt, bill, plaint, or information, wherein no eſſoign, wager of law, or more than one imparlance ſhall be allowed; or by way of ſummary complaint before the court of ſeſſion in that part of *Great Britain* called *Scotland*.

Sect. 33. Provided always, that if any perſon who ſhall carry on or follow the trade of a baker, ſhall make complaint to any magiſtrate or magiſtrates, juſtice or juſtices of the peace, within their juriſdiction, and make appear to them, by the oath of any credible witneſs, that any offence, which any ſuch perſon who ſhall ſo carry on or follow the trade of a baker ſhall have been charged with, and ſhall have incurred and paid any penalty under this act, ſhall have been occaſioned by or through the wilful neglect or default of any journeyman or other ſervant employed by or under any ſuch perſon who ſhall ſo follow or carry on the ſaid trade of a baker; then, and in any ſuch caſe, any ſuch magiſtrate or magiſtrates, juſtice or juſtices, may and are hereby required to iſſue out his or their warrant, under his or their reſpective hands and ſeals, for bringing any ſuch journeyman or ſervant before any ſuch magiſtrate or magiſtrates, juſtice or juſtices, or any magiſtrate or juſtice of the county, city, riding, diviſion, or place, where the offender can be found; and, on any ſuch journeyman or ſervant being thereupon apprehended, and brought before any ſuch magiſtrate or magiſtrates, juſtice or juſtices, he or they, within their reſpective juriſdictions, is and are hereby authorized and required to examine into the matter of ſuch complaint; and, on proof thereof, being upon oath, to the ſatisfaction of ſuch magiſtrate or magiſtrates, juſtice or juſtices of the peace, who ſhall hear ſuch ſaid complaint, then any ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby directed and authorized, by any order under his or their reſpective hand or hands, to adjudge and order what reaſonable ſum of money ſhall be paid by any ſuch journeyman or ſervant to his maſter or miſtreſs, as or by way of recompence to him or her for the money he or ſhe ſhall have paid by reaſon of the wilful neglect or default of any ſuch journeyman or ſervant: and if any ſuch journeyman or ſervant ſhall neglect or refuſe, on his conviction, to make immediate payment of the ſum of money which any ſuch magiſtrate or magiſtrates, juſtice or juſtices ſhall order him to pay by reaſon of ſuch his ſaid wilful neglect or default; then any ſuch magiſtrate or magiſtrates, juſtice or juſtices, within their reſpective juriſdictions, is and are hereby authorized and required, by warrant under his or their hands and ſeals, to cauſe every ſuch journeyman or ſervant to be apprehended and committed to the houſe of correction, or ſome other priſon of the county, riding, diviſion, city, town corporate, borough, or place, in which any ſuch journeyman or ſervant ſhall be apprehended or convicted, to be there kept to hard labour for any time not exceeding one calendar month from the time of ſuch commitment, as to ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall

ſhall ſeem reaſonable, unleſs payment ſhall be made of the money ordered after ſuch commitment, and before the expiration of the ſaid term of one calendar month.

Sect. 34. And, for the better and more eaſy recovery of the ſeveral penalties and forfeitures to be incurred by diſobedience to this act, and the powers herein contained, and diſpoſing of the money which ſhall be forfeited by breach or non-obſervance of any part of this act, it ſhall and may be lawful to and for the mayor of the ſaid city of *London* for the time being, or any alderman of the ſaid city, within the ſaid city or liberties thereof, and to and for any other of his Majeſty's juſtices of the peace, or any one of them, within their reſpective counties, ridings, diviſions, cities, towns corporate, boroughs, liberties or juriſdictions, to hear and determine in a ſummary way all offences committed againſt the true intent and meaning of this act; and, for that purpoſe, to ſummon before them, or any of them, within their reſpective juriſdictions, any party or parties accuſed of being an offender or offenders againſt the true intent and meaning of this act: and in caſe the party accuſed ſhall not appear on ſuch ſummons, or offer ſome reaſonable excuſe for his default; then, upon oath by any credible witneſs of any offence committed contrary to the true intent and meaning of this act, any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall iſſue his or their warrant or warrants for apprehending the offender or offenders within the juriſdiction of any ſuch magiſtrate or magiſtrates, juſtice or juſtices: and upon the appearance of the party or parties accuſed, or, in caſe he or they ſhall not appear, on notice being given to, or left for, him or them, at his or their uſual place of abode, or if he or they cannot be apprehended on a warrant granted againſt him or them as herein before is directed; then, and in any ſuch caſe, any ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby authorized and required to proceed to make inquiry touching the matters complained of, and to examine any witneſs or witneſſes who ſhall be offered on either ſide, on oath, as aforeſaid, and which every ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby authorized, impowered, and required to adminiſter; and, after hearing of the parties who ſhall appear, and the witneſſes who ſhall be offered on either ſide, ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall convict or acquit the party or parties accuſed: and if the penalty or money forfeited on any ſuch conviction, ſhall not be paid within the ſpace of 24 hours after any ſuch conviction, every ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall thereupon iſſue a warrant or warrants, under his hand and ſeal or their hands and ſeals reſpectively, directed to any peace officer or officers within their reſpective juriſdictions, impowering him or them to make diſtreſs of the goods or chattels of the offender or offenders: and if any offender ſhall convey away his goods out of the juriſdiction of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, before whom he was convicted, or ſo much thereof that the penalty cannot be levied, then ſome magiſtrate or juſtice, within whoſe juriſdiction the offender ſhall have removed his goods, ſhall back the warrant granted by any ſuch magiſtrate or juſtice, or magiſtrates or juſtices; and thereupon the penalty forfeited, ſhall be levied on the offender's goods and chattels, by diſtreſs and ſale thereof; and if within five days from the diſtreſs being taken, the money forfeited ſhall not be paid, the goods ſeized ſhall be appraiſed and ſold, rendering the overplus (if any) after deducting the penalty or forfeiture, and the coſts and charges of the proſecution, diſtreſs, and ſale, to the owner; which charges ſhall be aſcertained by the magiſtrate or magiſtrates, juſtice or juſtices, before whom any ſuch offender or offenders ſhall have been ſo convicted, or by the magiſtrate or juſtice who backed the warrant, if either of them ſhall continue alive; and if not, by ſome other magiſtrate or juſtice of the county, riding, diviſion, city, or place, in which the offender ſhall have been convicted; and for want of ſuch diſtreſs, then every ſuch magiſtrate or juſtice, within whoſe reſpective juriſdiction any ſuch offender or offenders ſhall reſide or be, ſhall, on the application of any proſecutor or proſecutors, and proof made of the conviction and non-payment of the penalty and charges, by warrant under his hand and ſeals, commit every ſuch offender or offenders to the common gaol or houſe of correction of the city or county, riding, diviſion, or place, where ſuch offender or offenders ſhall be found; there to remain for the ſpace of one calendar month from the time of ſuch commitment, unleſs, after ſuch commitment, payment ſhall be made of the ſaid penalty or forfeiture, coſt and charges, before the expiration of the ſaid calendar month; and all ſuch penalties and forfeitures, when recovered, ſhall be paid to the informer.

Sect. 35. And if it ſhall be made out, by the oath of any credible perſon or perſons, to the ſatisfaction of any magiſtrate or magiſtrates, juſtice or juſtices, that any one within the juriſdiction of any ſuch magiſtrate or magiſtrates, juſtice or juſtices, is likely to give or offer material evidence on behalf of the proſecutor of any offender or offenders againſt the true intent and meaning of this act, or on behalf of the perſon or perſons accuſed, and will not voluntarily appear before ſuch magiſtrate or magiſtrates, juſtice or juſtices, to be examined, and give his, her, or their evidence concerning the premiſſes, is and are hereby authorized and required to iſſue his or their ſummons to convene every ſuch witneſs and witneſſes before any ſuch magiſtrate or magiſtrates, juſtice or juſtices, at ſuch ſeaſonable time as in ſuch ſummons ſhall be fixed; and if any perſon ſo ſummoned ſhall neglect or refuſe to appear at the time by ſuch ſummons appointed, and no juſt excuſe ſhall be offered for ſuch neglect or refuſal, then (after proof by oath of ſuch ſummons having been duly ſerved upon the party or parties ſo ſummoned) every ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby authorized and required to iſſue his or their warrant under his hand and ſeal, or their hands and ſeals, to bring every ſuch witneſs or witneſſes before any ſuch magiſtrate or magiſtrates, juſtice or juſtices; and on the appearance of any witneſs before any ſuch magiſtrate or magiſtrates, juſtice or juſtices, every ſuch magiſtrate or magiſtrates, juſtice or juſtices, is and are hereby authorized and impowered to examine upon oath every ſuch witneſs; and if any ſuch witneſs on his or her appearance, or on being brought before any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall refuſe to be examined on oath concerning the premiſſes, without offering any juſt excuſe for any ſuch refuſal, any ſuch magiſtrate or magiſtrates, juſtice or juſtices, within the limits of his or their juriſdiction, may, by warrant under his hand and ſeal, or their hands and ſeals, commit any perſon or perſons ſo refuſing to be examined to the public priſon of the county, riding, diviſion, city, liberty, or place, in which the perſon or perſons ſo refuſing to be examined ſhall be, there to remain for any time not exceeding fourteen days, nor leſs than three days, as any ſuch magiſtrate or magiſtrates, juſtice or juſtices, ſhall direct.

Sect. 36. And the magiſtrate or magiſtrates, juſtice or juſtices, before whom any perſon ſhall be convicted in manner preſcribed by this act, ſhall cauſe ſuch reſpective conviction to be drawn up in the form, or to the effect following (that is to ſay)

(To wit) *BE it remembered, that on this day of in the year of the reign of* A. B. *is convicted before Majeſty's juſtice of the peace for the ſaid county of or for the riding or diviſion of the ſaid county of or for the city, liberty, or town of* (as this caſe ſhall happen to be) *for and to adjudge him, her* (or them) *to pay and forfeit for the ſame the ſum of*

Given under the day and year aforeſaid.

Sect. 37. And no *certiorari*, letters of advocation, or of ſuſpenſion ſhall be granted to remove any conviction, or other proceedings had thereon in purſuance of this act.

Sect. 38. Provided always, and it is hereby further enacted by the authority aforeſaid, that if any perſon convicted of any offence puniſhable by this act, ſhall think him, her, or themſelves aggrieved by the judgment of the magiſtrate or magiſtrates, juſtice or juſtices, before whom he, ſhe, or they ſhall have been convicted, ſuch perſon ſhall have liberty from time to time to appeal to the juſtice at the next general or quarter ſeſſion of the peace, which ſhall be held for the county, riding, diviſion, city, liberty, town, or place where ſuch judgment ſhall have been given, and that the execution of the ſaid judgment ſhall, in ſuch caſe, be ſuſpended; the perſon ſo convicted entering into recognizance at the time of ſuch conviction, with two ſufficient ſureties in double the ſum which ſuch perſon ſhall have been adjudged to pay or forfeit, upon condition to proſecute ſuch appeal with effect, and to be forthcoming to abide the judgment and determination of the juſtices at their ſaid next general or general quarter ſeſſions; which recognizance the magiſtrate or magiſtrates, juſtice or juſtices, before whom ſuch conviction ſhall be had, is and are hereby impowered and required to take; and the juſtice in the ſaid general or general quarter ſeſſions are hereby authorized and required to hear and finally determine the matter of every ſuch appeal, and to award ſuch coſts as to them ſhall appear juſt and reaſonable to be paid by either party: and if upon hearing the ſaid appeal, the judgment of the magiſtrate or magiſtrates, juſtice or juſtices, before whom the appellant or appellants ſhall have been convicted, ſhall be affirmed, ſuch appellant or appellants ſhall immediately pay down the ſum he, ſhe, or they ſhall have been adjudged to forfeit, together with ſuch coſts as the juſtices in their ſaid general or general quarter ſeſſions ſhall award to be paid to the proſecutor or informer, for defraying the exſpences ſuſtained by reaſon of any ſuch appeal; and in default of the appellant's paying the ſame any two ſuch juſtices, or any one magiſtrate or juſtice of the peace, having juriſdiction in the place into which any appellant or appellants ſhall eſcape, or where he, ſhe, or they ſhall reſide, ſhall and may, by warrant under their hands and ſeals, or his hand and ſeal, commit every ſuch appellant and appellants to the common gaol of the county, city, riding, diviſion, or place, where he, ſhe, or they ſhall be apprehended, until he, ſhe, or they ſhall make payment of ſuch penalty, and of the coſts and charges which ſhall be adjudged on the conviction, to the informer; but if the appellant or appellants in any ſuch appeal ſhall make good his, her, or their appeal, and be diſcharged of the ſaid conviction, reaſonable coſts ſhall be awarded to the appellant or appellants againſt ſuch informer or informers, who would (in caſe of ſuch conviction) have been intitled to the penalty to have been recovered as aforeſaid; and which coſts ſhall and may be recovered by the appellant or appellants againſt any ſuch informer or informers, in like manner as coſts given at any general or general quarter ſeſſions of the peace are recoverable.

Sect. 39. Provided alſo, that if any ſuch conviction ſhall happen to be made within ſix days before any general or general quarter ſeſſions of the peace which ſhall be held for the county, riding, diviſion, city, town corporate, borough, or place where ſuch conviction ſhall have been made, then the party or parties who ſhall think him, her, or themſelves aggrieved by any ſuch conviction, ſhall and may, on entering into recognizance in manner and for purpoſes before directed, be at liberty to appeal either to the then next or the next following general or general quarter ſeſſions of the peace which ſhall be held for any ſuch county, riding, diviſion, city, town corporate, borough, liberty, or place where any ſuch conviction ſhall have been made.

Sect. 40. And every action or ſuit which ſhall be brought or commenced againſt any magiſtrate or magiſtrates, juſtice or juſtices, or any peace officer or officers, for any matter of thing done or committed by virtue of or under this act, ſhall be commenced within ſix months next after the fact committed, and not afterwards, and ſhall be laid or brought in the county, city, or place where the matter in diſpute ſhall ariſe, and not elſewhere; and that the ſtatute made in the twenty-fourth year of his late majeſty's reign, intituled, *An act for rendering the juſtices of the peace more ſafe in the execution of their office, and for indemnifying conſtables and others, acting in obedience to their warrants*; ſo far as the ſaid act relates to the rendering the juſtices more ſafe in the execution of their office, ſhall extend and be conſtrued to extend to the magiſtrate and magiſtrates, juſtice and juſtices of the peace, acting under the authority or in purſuance of this act; and that no action or ſuit ſhall be had or commenced againſt, nor ſhall any writ be ſued out, or copy of any writ be ſerved upon any peace officer or officers, for any thing done in the execution of this act, until ſeven days after a notice in writing ſhall have been given to or left for him or them at his or their uſual place of abode by the attorney for the party intending to commence ſuch action; which notice in writing ſhall contain the name and place of abode of the perſon intending to bring ſuch action, and alſo of his attorney, and likewiſe the cauſe of action or complaint; and any peace officer or officers ſhall be at liberty, and may by virtue of this act, at any time within ſeven days after any ſuch notice ſhall have been given to, or left for him, tender or cauſe to be tendered any ſum or ſums of money, as amends for the injury complained of, to the party complaining, or to the attorney named in any ſuch notice; and if the ſame is not accepted of, the defendant or defendants in any ſuch action or actions may plead ſuch tender in bar of ſuch action or actions, together with the general iſſue, or any other plea, with leave of the court in which the action ſhall be commenced: and if upon iſſue joined on ſuch tender, the jury ſhall find the amends tendered to have been ſufficient, they ſhall find a verdict for the defendant or defendants; and in every ſuch caſe, or if the plaintiff ſhall become nonſuit, or diſcontinue his action, or if judgment ſhall be given for the defendant or defendants upon demurrer; or if any action or ſuit ſhall be brought after the time limited by this act for bringing the ſame, or ſhall be brought in any other county or place than as aforeſaid; then and in any ſuch caſe, the jury ſhall find for the defendant or defendants; and the defendant or defendants ſhall be intitled to his or their coſts; but if the jury ſhall find that no ſuch tender was made, or that the amends tendered was not ſufficient, or ſhall find againſt the defendant or defendants, on any plea or pleas by him or them pleaded, they ſhall then give a verdict for the plaintiff, and ſuch damages as they ſhall think proper; and the plaintiff ſhall thereupon recover his coſts againſt every ſuch defendant or defendants.

Sect. 41. And if any action or ſuit ſhall be commenced againſt any perſon or perſons for any thing done in purſuance of this act, the defendant or defendants in any ſuch action or ſuit may plead the general iſſue, and give this act, and the ſpecial matter in evidence, at any trial to be had thereupon; and that the ſame was done in purſuance and by the authority of this act; and if it ſhall appear ſo to have been done, or if verdict ſhall be recorded for the defendant or defendants; or if the plaintiff ſhall be nonſuited, or diſcontinue his action after the defendant or defendants ſhall have appeared; or if judgment ſhall be given upon a verdict or demurrer againſt the plaintiff or plaintiffs; the defendant or defendants in every ſuch action ſhall and may recover treble coſts, and have the like remedy for the ſame as any defendant or defendants hath or have in other caſes by law for recovery of his, her, or their coſts.

Sect. 42. Provided always, that no perſon ſhall be convicted in manner aforeſaid for any of the before-mentioned offences, unleſs the proſecution, in order to ſuch conviction, be commenced within three days next after the offence committed.

Sect. 43. Provided alſo, that this act, or any thing herein contained, ſhall not extend to prejudice any right or cuſtom of the city of *London*, or the practice there uſed, or any right or cuſtom of any lord or lords of any leet

leet, to ſet, inquire, and puniſh the breach of aſſize of bread, within their reſpective leets or views of frank-pledge, or the right of any clerk or clerks of the market in any place.

Sect. 44. Provided further, that neither this act, or any thing herein contained, ſhall extend or be conſtrued to extend to prejudice the ancient right or cuſtom of the dean of the collegiate church of *Saint Peter, Weſtminſter*, or the high ſteward of the city of *Weſtminſter* and the liberties thereof, or his deputy, or any of them, to ſet aſcertain, and appoint, the aſſize and weight of all ſorts of bread to be ſold or expoſed to ſale within the ſaid city of *Weſtminſter* and the liberties thereof; but they and every of them ſhall and may ſeverally and reſpectively from time to time, as there ſhall be occaſion, ſet, aſcertain, and appoint, within the ſaid city of *Weſtminſter* and the liberties thereof, according to the true intent and meaning of this act, the aſſize and weight of all ſorts of bread which ſhall be made, ſold, or expoſed to ſale by any perſon or perſons within the limits of the ſaid city of *Weſtminſter* and the liberties thereof; and ſhall and may inquire and puniſh the breach of every ſuch aſſize and weight of bread, as fully and freely in all reſpects, as they or any of them have heretofore been accuſtomed to do, and as if this act had never been made; any thing herein contained to the contrary thereof notwithſtanding.

Sect. 45. Provided likewiſe, that neither this act, nor any thing herein contained, ſhall extend or be conſtrued to extend to prejudice the ancient right or cuſtom of the two univerſities of *Oxford* or *Cambridge*, or either of them, or of their or either of their clerks of the market, or the practice within the ſeveral juriſdictions of the ſaid univerſities, or either of them, uſed to ſet, aſcertain, and appoint the aſſize and weight of all ſorts of bread to be ſold or expoſed to ſale within their ſeveral juriſdictions; but that they and every of them ſhall and may ſeverally and reſpectively from time to time, as there ſhall be occaſion, ſet, aſcertain, and appoint, within their ſeveral and reſpective juriſdictions, the aſſize and weight of all ſorts of bread to be ſold or expoſed to ſale by any baker or other perſon whatſoever, within the limits of their ſeveral juriſdictions; and ſhall and may inquire and puniſh the breach thereof as fully and freely in all reſpects as they uſed to do, and as if this act had never been made.

Stat. 32 *Geo.* 2. *c.* 18. Whereas ſeveral of the penalties or forfeitures made payable by an act paſſed in the thirty-firſt year of his preſent Majeſty's reign, intituled, *An act for the due making of bread, and to regulate the price and aſſize thereof, and to puniſh perſons who ſhall adulterate meal, flour, or bread,* were not by ſuch ſaid laſt-mentioned act appropriated how or to whom the ſame ſhould, when paid or recovered, go or be diſtributed; Be it therefore enacted, *&c.* That ſuch of the penalties or forfeitures which, from and after the 24th day of *June* 1759, ſhall incur or become payable by or under the ſaid laſt mentioned act, or by reaſon of any thing therein contained (as by the ſaid act are not particularly diſpoſed of, or appropriated, how or to whom the ſame ſhould go or be applied) ſhall, when the ſame ſhall be recovered or paid, go and be diſtributed in manner following; that is to ſay, one moiety thereof, where any offender or offenders ſhall be convicted, either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, ſhall go and be paid to the perſon or perſons who ſhall inform againſt, and proſecute to conviction, any ſuch offender or offenders; and the other moiety thereof, and alſo all penalties and forfeitures, which from the ſaid 24th day of *June* 1759, ſhall incur, be due, or payable, under the ſaid laſt-mentioned act, on the weighing, trying, or ſeizure of any bread by any magiſtrate or magiſtrates, juſtice or juſtices, ſhall go and be applied for the better carrying into execution the purpoſes of the laſt-mentioned act, as any ſuch magiſtrate or magiſtrates, juſtice or juſtices, within his or their juriſdiction, ſhall from time to time think fit and order.

Stat. 3 *Geo.* 3. *c.* 6. (intituled, *An act for explaining and amending an act made in the thirty-firſt year of the reign of his late Majeſty King* George *the Second, intituled,* An act for the due making of bread, and to regulate the price and aſſize thereof, and to puniſh perſons who ſhall adulterate, meal, flour, or bread; *ſo far as the ſame relates to that part of* Great Britain *called* Scotland; *and for rendering the ſaid act more effectual in that part of the united kingdom.)*

Sect. 1. *Whereas by an act of parliament made in the thirty-firſt year of the reign of his late Majeſty King* George *the Second, intituled,* An act for the due making of bread, and to regulate the price and aſſize thereof, and to puniſh perſons who ſhall adulterate meal, flour, or bread, *certain powers are granted to the ſeveral courts, magiſtrates, and juſtices of the peace therein mentioned, to ſet, aſcertain, and appoint the aſſize and weight of bread which ſhall be made for ſale, or expoſed to ſale, and the price to be paid for the ſame reſpectively, within the bounds of their ſeveral juriſdictions, from time to time, as they ſhall think proper: and it is thereby enacted, That in every aſſize of bread which ſhall be ſo ſet and appointed, reſpect ſhall from time to time be had to the price which the grain, meal, or flour, whereof ſuch bread ſhall be made, ſhall bear in the public market or markets in or near the public place or places for which any ſuch aſſize ſhall be ſo at any time ſet; and, for aſcertaining ſuch price of grain, meal, or flour from time to time, the ſeveral courts, magiſtrates, and juſtices of the peace, therein mentioned, are thereby empowered from time to time, as there ſhall be occaſion, within their reſpective juriſdictions, to cauſe the reſpective prices which the ſeveral ſorts of grain, meal, and flour, ſhall from time to time,* bona fide, *ſell for in ſuch public markets, to be given in and certified upon oath unto ſuch court, magiſtrates, or juſtices of the peace reſpectively, within their ſeveral juriſdictions, by the clerk of the market, or by ſuch perſon or perſons, and in ſuch manner, and on ſuch day of the week, as they ſhall reſpectively appoint within their ſeveral juriſdictions; and the price which ſhall be ſo certified, ſhall from time to time be entered by the reſpective perſon or perſons who ſhall certify the ſame, in a book or books to be provided and kept by him or them for that purpoſe, in the form and manner as therein directed: and whereas the above method of aſcertaining the price of wheat and rye, and the flour and meal made of thoſe grains, cannot take place within that part of* Great Britain *called* Scotland, *by reaſon that there are few public markets for ſuch grains, flour, or meal, within that part of the united kingdom; and where there are public markets for grain, flour, or meal of any kind, there is no ſuch officer as clerk of the market, who can certify to the magiſtrates or juſtices of the peace the reſpective prices which the ſeveral ſorts of grain, meal, and flour ſell for in ſuch public markets, whereby the ſalutary effect, and execution of the ſaid act made for the whole united kingdom, is prevented and totally diſappointed within that part thereof called* Scotland: for remedy whereof be it enacted, *&c.* That in place of the method preſcribed and laid down in the ſaid act for aſcertaining the price of the ſeveral kinds of grain, meal, and flour it ſhall and may be lawful, in that part of *Great Britain* called *Scotland*, for the magiſtrates and juſtices of the peace who are by the ſaid act authorized to ſet the aſſize of bread from time to time, and ſo often as they ſhall judge proper, within their reſpective juriſdictions, to inquire into and take proof of the prices which the ſeveral ſorts of grain, meal, and flour, fit and proper to make the ſeveral ſorts of bread which ſhall be allowed to be made by them, ſhall *bona fide* ſell for in the public markets in or near the city, borough, or place for which they are reſpectively authorized to ſet the aſſize of bread; or where there are no public markets for any particular ſpecies of grain, meal, or flour, in or near ſuch city, borough, or place, to inquire into and take proof of the preſent or laſt ſelling price of ſuch ſpecies of grain, meal, or flour, whether of the growth of the country or brought from diſtant places; to which ſelling price or prime coſt ſhall be added ſuch an allowance for the expence and riſk of carriage or tranſportation, as from the inquiry and proof ſhall to the ſaid magiſtrates and juſtices of the

peace appear juſt and reaſonable ; ſo as that the price of ſuch grain, meal, or flour be from time to time aſcertained according to what thoſe ſeveral ſpecies do or may truly coſt the bakers before they can manufacture the ſame into bread.

Sect. 2. And that previous to the proof to be taken in the ſeveral caſes aforeſaid, notice in writing ſhall be given to the deacon of the incorporation of bakers, or, where there is no ſuch incorporation, to any two reputable bakers within the city, borough, or place where ſuch proof is to be taken, 48 hours at leaſt before taking the ſame, to the end that the makers of bread within ſuch city, borough, or place may, if they think proper, attend the taking ſuch proof, and ſuggeſt ſuch queſtions as may be proper to be put to the witneſſes ſummoned by the magiſtrates or juſtices of the peace reſpectively, or offer ſuch other witneſſes or evidence, as may appear proper for proving the prices of the grain, meal, or flour in queſtion.

Sect. 3. And that ſuch proof ſhall only proceed upon the oaths of two or more credible witneſſes converſant in the prices of the ſeveral ſorts of grain, meal, or flour which ſhall be the ſubject of ſuch inquiry, or by writings legally proved ; and that it ſhall and may be lawful to the ſaid magiſtrates and juſtices of the peace, within their reſpective juriſdictions, to ſummon ſuch perſon or perſons as to them ſhall appear moſt proper for that purpoſe, and to compel them to appear, and give their evidence ; and that either by ſuch remedies, and under ſuch penalties as are provided by the ſaid act, in the caſe of perſons duly ſummoned to give evidence, touching the rates and prices of the ſeveral ſorts of grain, meal, and flour, where the return of the prices of ſuch grain, meal, or flour ſhall be ſuſpected as not truly and *bona fide* made, or by ſuch remedies as are competent by the common law of *Scotland* for compelling witneſſes to appear and give evidence in any judicial trial before a competent court.

Sect. 4. Provided always, that the perſon or perſons ſo ſummoned be not obliged to travel above five miles from the place of his, her, or their abode.

Sect. 5. And that the whole evidence to be taken as above ſhall be fairly ingroſſed, in a book to be kept for that purpoſe, by the town clerks of the ſeveral cities and boroughs where ſuch proofs ſhall be taken by the magiſtrates, or by the clerk of the peace where the proof ſhall be taken by the juſtices of the peace ; and the evidence as taken down in ſuch book ſhall be duly ſigned by the ſeveral witneſſes, and by the magiſtrates or juſtices of the peace who ſhall take the ſame reſpectively, according to the practice of the law of *Scotland*; and that ſo often as ſuch proof ſhall be taken, the magiſtrates or juſtices of the peace before whom the ſame ſhall be taken reſpectively, ſhall, immediately after cloſing the evidence, or as ſoon as it can conveniently be done, declare the prices of the ſeveral kinds of grain, meal, or flour, concerning which the inquiry has been made, according as theſe ſhall appear to them to be proved, from conſidering the whole evidence; and which declaration ſhall be ingroſſed in the book appointed to be kept as aforeſaid, immediately after the evidence, and ſhall be ſigned by the magiſtrates or juſtices of the peace reſpectively before whom ſuch proof ſhall be taken ; and which book containing the evidence and declaration aforeſaid, ſhall be open and patent to the inſpection of the makers of bread, and all other perſons, without fee or reward ; and ſhall, to all intents and purpoſes, be deemed and taken to be equivalent to the returns or certificates of the market prices of all kinds of grain, meal, or flour appointed to be taken by the ſaid act ; and the magiſtrates and juſtices of the peace in that part of *Great Britain* called *Scotland* ſhall thereupon proceed to ſet, aſcertain, and appoint the aſſize and weight of all ſorts of bread which ſhall be made for ſale, or expoſed to ſale, and the price to be paid for the ſame, within their reſpective juriſdictions, when and as often, from time to time, as they ſhall think fit, according to the directions, and agreeable to the tables enacted and referred to by the ſaid act.

Sect. 6. Provided always, that when and ſo often as any aſſize of bread ſhall be ſet, aſcertained, and appointed for any city, borough, or place within that part of *Great Britain* called *Scotland*, by the magiſtrates or juſtices of the peace impowered for that purpoſe, ſuch aſſize ſhall not be limited to endure for any certain time, but ſhall continue and ſtand in force until a new aſſize be ſet, aſcertained, and appointed by the ſaid magiſtrates or juſtices of the peace for ſuch city, borough, or place reſpectively ; any thing in the aforeſaid act of the thirty-firſt year of the reign of his late majeſty to the contrary notwithſtanding.

Sect. 7. And upon an application in writing by any two or more of the inhabitants or bakers, within any city, borough, or county, where ſuch aſſize of bread ſhall be ſet, to the magiſtrates or juſtices of the peace who ſet the laſt aſſize, or to the magiſtrates or juſtices of the peace of ſuch city, borough, or county for the time being, ſetting forth, and offering to prove by proper evidence, that the price of any of the ſpecies of grain before-mentioned has roſe or fallen ſince the laſt aſſize of bread was ſet, ſo as to authorize an alteration of ſuch laſt aſſize, according to the aforeſaid act of his late majeſty, and tables therein referred to; in every ſuch caſe the magiſtrates or juſtices of the peace to whom ſuch application ſhall be made, ſhall, within their reſpective juriſdictions, be obliged to take evidence of the then current prices, in the manner before directed; and if, upon adviſing ſuch proof, they ſhall find ſuch a variation of the prices ſince the laſt aſſize, as deſcribed in the ſaid act, they ſhall immediately ſet and aſcertain a new aſſize of bread, which ſhall remain till altered agreeable to the directions herein before given.

Sect. 8. And that in caſe any perſon or perſons ſhall be convicted of any of the offences mentioned in the ſaid act, or in this preſent act, before any magiſtrate or magiſtrates, juſtice or juſtices of the peace, in that part of *Great Britain* called *Scotland*, ſuch conviction ſhall proceed and be drawn up in the form commonly uſed and practiſed before ſuch magiſtrates or juſtices of the peace, in convictions for other offences of the like nature; any thing in the ſaid act to the contrary notwithſtanding.

Sect. 9. And whereas it may happen, that the magiſtrates of ſome of the cities or boroughs in that part of *Great Britain* called *Scotland* may neglect to execute the powers committed to them, of ſetting and appointing the aſſize of bread, within their reſpective cities and boroughs; Be it therefore enacted by the authority aforeſaid, That in caſe of ſuch neglect of the magiſtrates of any ſuch city or borough to ſet an aſſize of bread, or to alter any former aſſize ſet by them by a new aſſize, when ſuch alteration in the price of wheat or other grain ſhall occur, as is ſufficient to authorize an alteration of the laſt aſſize of bread according to the ſaid act, it ſhall and may be lawful for any two or more of the juſtices of the peace of the county within which ſuch city or borough lies, to require the chief magiſtrate of ſuch city or borough, by a writing under their hands, to ſet the aſſize of bread, or to alter any former aſſize of bread, according as the caſe ſhall occur ; and in caſe ſuch chief magiſtrate, or the other magiſtrates of the ſaid city or borough, ſhall refuſe or neglect, for the ſpace of ten days after ſuch requiſition, to ſet ſuch aſſize, or to alter any aſſize then in force, when the alteration of the price of wheat or other grain does permit the ſame, then and in every ſuch caſe any two or more juſtices of the peace of ſuch county ſhall have power, and are hereby authorized, after taking proof of the prices of the ſeveral kinds of grain, meal, or flour in manner above directed, to ſet, aſcertain, and appoint an aſſize of bread for ſuch city or borough, which ſhall remain in full force until altered by the magiſtrates thereof, or in caſe of their neglect, by any two or more of the ſaid juſtices of peace.

Sect. 10. And that every clauſe, matter, and thing contained in the aforeſaid act of the thirty-firſt year of his late Majeſty's reign ſhall remain and continue in full force in that part of the kingdom of *Great Britain* called *Scotland*, except in ſo far as the ſame is altered by this act.

Stat. 3 *Geo.* 3. *c.* 11. (intituled, *An act for explaining and amending an act made in the thirty-first year of the reign of his late Majesty King* George *the Second, intituled,* An act for the due making of bread, and to regulate the price and assize thereof, and to punish persons who shall adulterate meal, flour, or bread.)

Sect. 1. *Whereas the statute made in the thirty-first year of the reign of his late Majesty King* George *the Second, intituled,* An act for the due making of bread, and to regulate the price and assize thereof, and to punish persons who shall adulterate meal, flour, or bread, *is deficient in several of the provisions thereby made, when an assize of bread is not set pursuant to the directions of the said act*; for remedy wherein, and in order that makers of bread for sale, and the sellers thereof, may in all places, altho' the assize of bread shall at any time not be set, be under due regulations; Be it enacted, *&c.* That from and after the first day of *May* one thousand seven hundred and sixty-three, although no assize of bread shall be set in pursuance of the said act, no loaf or loaves of bread, called or deemed assize loaf or loaves in the tables of the assize and price of bread in the said act enacted and referred to, and the weight of which varies according to the variation in the price of grain, shall be made for sale, sold, or carried out for sale, or be offered or exposed to or for sale, or be allowed to be sold in any place, where any loaf or loaves of the bread called or deemed prized loaf or loaves in the said tables of the assize and price of bread, in and by the said act enacted and referred to, and the price of which varies according to the variation in the price of grain, shall at the same time be made for sale, or be allowed to be sold, that is to say, no assize loaves of the price of three-pence, and prized loaves called *half quartern loaves*, nor assize loaves of the price of six-pence, and prized loaves called *quartern loaves*, nor assize loaves of the price of twelve-pence, and prized loaves called *half peck loaves*, nor assize loaves of the price of eighteen-pence, and prized loaves called *peck loaves*, shall, at the same time, in any place be made for sale, sold, or carried out for sale, or be offered or exposed to or for sale, or allowed to be sold; that unwary persons may not in any wise be imposed on, and prejudiced by buying assize loaves referred to in the said tables, as or for prized loaves referred to in the said tables, or by buying such prized loaves as or for such assize loaves; and every person who shall offend in the premisses, and be convicted of any such offence in manner hereafter specified, shall for every such offence forfeit and pay a sum not exceeding forty shillings, nor less than ten shillings, as the justice or justices before whom any such offender or offenders shall be convicted, shall from time to time adjudge.

Sect. 2. And that from and after the said first day of *May* one thousand seven hundred and sixty-three, although no assize of bread shall be set pursuant to the directions of the said act, the justices of the peace of every county, riding, division, city, town, liberty, and place, shall and may, at any general or quarter sessions of the peace which shall be held within their respective counties, divisions, cities, towns, liberties, or jurisdictions, or at any petty session which shall be held by any such justices within their respective jurisdictions, from time to time ascertain and appoint (as often as they shall think proper) for all or any part of their respective jurisdictions, which of the sorts of assize or prized loaves shall be allowed from time to time to be made and sold within their respective jurisdictions; and also what other sorts of bread, and of what sort and sorts of grain shall be allowed to be made and sold within their respective jurisdictions, or within any part thereof; and every order which shall be so from time to time made in or touching the premisses by any such justices, shall be entered in a book to be provided and kept for that purpose by such justices, and which book shall and may be inspected by the makers of bread for sale, within the respective jurisdiction of any such justices, at all seasonable times in the day-time, and without paying any fee or reward in respect thereof; and after the making every such order by any such justices, the justices who shall make the same shall, with all convenient speed, cause a copy of every such order to be affixed or put up in some market, or other public town within the division or part of the county, riding, liberty, rape, wapentake, city, town, or place, in which such order is to be observed and take place: or else every such justices, within their respective jurisdictions, shall cause a copy of every such order to be, with all convenient speed after the making thereof respectively, inserted in some public news-paper which shall be published in the county, riding, division, liberty, rape, wapentake, city, town, or place, or some part thereof, in which every such order respectively is to be observed and take place.

Sect. 3. Provided always, that no justices, within their respective jurisdictions, shall at any time allow the making for sale, or selling any sorts of assize bread made of the flour or meal of wheat, other than and besides wheaten and household bread, and loaves of white bread of the price of two-pence or under.

Sect. 4. And that from and after the said first day of *May* one thousand seven hundred and sixty-three, although the assize of bread shall not be set pursuant to the said act, every maker of bread for sale shall observe and keep the same or like proportion between white and wheaten bread, and wheaten and household assize bread, as to weight, as is mentioned or intended, enacted and referred to in the said assize tables; that is to say, every white loaf of the price of two-pence, or under, shall always weigh three parts in four of the weight of the wheaten loaf of the like price, as near as may be; and every wheaten assize loaf of bread, of whatsoever price the same shall be, shall always weigh three parts in four of the weight of every household assize loaf of bread of the like price, as near as may be; and that every household assize loaf of bread, of whatever price, the same shall be, shall always weigh one third part more than every wheaten assize loaf of the like price as near as may be; and every person who shall make for sale, sell, offer, or expose to or for sale, or have in his or her custody for sale, any loaf of white, wheaten, or household bread, in which the said proportions or regulations shall not be observed and kept, as near as may be, shall, on being convicted of any such offence in manner herein after-mentioned, forfeit and pay for every such offence a sum not exceeding forty shillings, as the justice or justices before whom any such offender or offenders shall be convicted, shall from time to time adjudge.

Sect. 5. And that from and after the said first day of *May* one thousand seven hundred and sixty-three, although the assize of bread shall not be set pursuant to the said act, every peck, half peck, quarter of a peck, and half quarter of a peck loaf, made for sale, of the meal or flour of wheat, and called *wheaten bread*, shall always be sold in proportion to each other respectively, as to price; and that every peck, half peck, quarter of a peck, and half quarter of a peck loaf, made for sale, of the meal or flour of wheat, and called *household bread*, shall always be sold in proportion to each other, and for one fourth less in price than the loaf made for sale with the meal or flour of wheat, called *wheaten bread*, of the same denomination; and every person who shall in any wise offend in the premisses, shall for every loaf of either the said wheaten or household bread which shall be sold by him or her, or offered or exposed to or for sale, or found in his or her custody for sale, contrary to the true intent and meaning of this act, forfeit and pay a sum not exceeding forty shillings, nor less than ten shillings, as the justice or justices before whom any such offender or offenders shall be convicted, shall from time to time adjudge.

Sect. 6. And that from and after the said first day of *May* one thousand seven hundred and sixty-three, altho' the assize of bread shall not be set pursuant to the said recited act, the several loaves herein after mentioned of every sort of bread which shall be made for sale, shall always weigh in averdupoize weight as follows; that is to say, every peck loaf, seventeen pounds six ounces; every half peck loaf, eight pounds eleven ounces; every quarter of a peck loaf, four pounds five ounces and one half ounce; and every h quarter of a peck loaf,

two

two pounds two ounces and three quarters of one ounce: and every perſon who ſhall make for ſale, or offer or expoſe to or for ſale, or have in his or her poſſeſſion for ſale, any peck, half peck, quarter of a peck, or half quarter of a peck loaf in any wiſe deficient of the due weight the ſame ought to be as aforeſaid, ſhall, on being convicted of any ſuch offence in manner herein after mentioned, forfeit and pay a ſum not exceeding five ſhillings, nor leſs than one ſhilling, for every ounce of every loaf of ſuch bread which ſhall at any time be found wanting, or deficient of or in the due weight the ſame ought to be as aforeſaid; and for every ſuch loaf of bread which ſhall be found wanting leſs than one ounce of the due weight the ſame ought to be as aforeſaid, a ſum not exceeding two ſhillings and ſix pence, nor leſs than ſix-pence, as any juſtice or juſtices before whom any ſuch loaf of bread, which ſhall not be of the due weight the ſame ought to be as aforeſaid, ſhall adjudge; ſo as all ſuch bread which ſhall be complained of as want ing at any time of the due weight the ſame ought to be in any city, town corporate, borough, liberty, or franchiſe, or the juriſdiction thereof, or within the weekly bills of mortality, ſhall from time to time be brought before ſome juſtice or juſtices, having juriſdiction in the premiſſes, and ſhall be weighed before ſuch juſtice or juſtices within twenty-four hours after the ſame ſhall have been baked, ſold, or expoſed to or for ſale, or found in any perſon's cuſtody for ſale: and ſo as all ſuch bread which ſhall be complained of as wanting at any time in the due weight the ſame ought to be as aforeſaid, in any hundred, riding, diviſion, rape, wapentake, or other place out of any city, town corporate, borough, liberty, or franchiſe, or the juriſdiction thereof, or out of the weekly bills of mortality, ſhall from time to time be brought before ſome juſtice or juſtices of ſuch hundred, riding, diviſion, liberty, rape, or wapentake, or other place, and ſhall be weighed before ſuch juſtice or juſtices within three days after the ſame ſhall have been baked, offered, or expoſed to or for ſale, or found in any perſon's cuſtody for ſale; unleſs it ſhall be made out to the ſatisfaction of any ſuch juſtice or juſtices before whom any ſuch bread ſhall be brought, by or on the behalf of the party or parties againſt whom any ſuch complaint or information ſhall be made, that ſuch deficiency in weight wholly aroſe from ſome unavoidable accident in baking or otherwiſe, or was occaſioned by or through ſome contrivance or confederacy.

Sect. 7. And that after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three, although an aſſize of bread ſhall not be ſet purſuant to the ſaid act, no perſon ſhall ſell, or offer, or expoſe to or for ſale, or have in his or her cuſtody any bread of any inferior quality to wheaten bread, with intent to ſell the ſame at an higher price than houſhold bread ſhall at the ſame time ſell for in the place where any bread of ſuch inferior qua lity ſhall be ſold, or offered to or for ſale, or be found for ſale in any perſon's cuſtody; upon pain that every one who ſhall offend in the premiſſes ſhall for every ſuch offence, on being thereof convicted in manner herein after mentioned, forfeit and pay not exceeding the ſum of twenty ſhillings, as the juſtice or juſtices before whom any ſuch offender or offenders ſhall be convicted, ſhall from time to time adjudge.

Sect. 8. And that from and after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three, altho' the aſſize of bread ſhall not be ſet purſuant to the ſaid act, all perſons who ſhall make for ſale, ſell, offer, or expoſe to or for ſale, or have in his or her cuſtody for ſale, any of the ſaid wheaten or houſhold bread, ſhall from time to time cauſe to be imprinted on every reſpective loaf thereof as followeth; that is to ſay, on every loaf of the ſaid wheaten bread, a large Roman (W) and on every loaf of the ſaid houſhold bread, a large Roman (H): and if any perſon, after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three, ſhall make for ſale, ſell, offer or expoſe to or for ſale, or have in his or her cuſtody for ſale, any loaf of the ſaid wheaten or houſhold bread, which ſhall not be marked as hereby is directed, ſo as the ſame may, on the view thereof, be aſcertained under what denomination or ſort of bread every ſuch loaf was and ought to be weighed (except as to ſuch loaves as ſhall be raſped after the beſpeaking or purchaſing thereof, by the particular deſire of the perſon who ſhall order the ſame to be ſo raſped for his or her own uſe); he or ſhe who ſhall ſo offend in the premiſſes, and ſhall be thereof convicted in manner herein after mentioned, ſhall for every loaf of ſuch bread not marked as hereby is directed, which ſhall be found in his or her cuſtody, forfeit and pay a ſum not exceeding forty ſhillings, nor leſs than ten ſhillings, as the juſtice or juſtices before whom any ſuch offender or offenders ſhall be convicted, ſhall from time to time adjudge; unleſs it ſhall be made out to the ſatisfaction of ſuch juſtice or juſtices, by or on the behalf of the party or parties againſt whom any ſuch complaint or information ſhall be made, that the not marking or not duly marking thereof wholly aroſe from ſome unavoidable accident in baking, or otherwiſe, or was occaſioned by or through ſome contrivance or confederacy.

Sect. 9. And that from and after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three, although the aſſize of bread ſhall not be ſet purſuant to the directions of the ſaid act, every loaf of every ſort of bread made of the meal or flour of any other ſort of grain than wheat, which ſhall be made for ſale, or be ſold, carried out, offered, or expoſed, in any wiſe, to or for ſale, ſhall be marked with ſome ſignificant and diſtinct letter or letters, not more than two thereon reſpectively, as the juſtices of any county, riding, diviſion, liberty, city, town, or place, at any general or quarter ſeſſion of the peace which ſhall be holden within their reſpective counties, ridings, diviſions, liberties, cities, towns, or places within their reſpective juriſdictions, or at any petty ſeſſions which ſhall be held by any ſuch juſtices within their reſpective juriſdictions, ſhall from time to time, for their reſpective counties, ridings, diviſions, liberties, rapes, wapentakes, cities, towns, or places, or any part thereof, order or direct; and every ſuch order ſhall, with all convenient ſpeed after the making thereof, be entered in ſome book to be for that purpoſe provided and kept by ſuch juſtices, and whereunto any maker of bread for ſale reſiding within any ſuch county, diviſion, liberty, rape, wapentake, city, town, or place, ſhall be at liberty to reſort at ſeaſonable times in the day-time, and to peruſe every ſuch order without being ſubject or liable to pay any fee or reward in reſpect thereof; and ſuch juſtices as aforeſaid ſhall, with all convenient ſpeed after the making any ſuch order as aforeſaid, cauſe a copy thereof to b affixed or put up in ſome market or other public town within the diviſion or part of the county, riding, liberty, or place, in which ſuch order as aforeſaid is to be obſerved or take place, or in ſome public place in every city, town, or place, where ſuch order is to be obſerved or take place; or otherwiſe ſuch juſtices, within their reſpective juriſdictions, ſhall cauſe a copy of every ſuch their reſpective order, with all convenient ſpeed after the making thereof, to be inſerted in ſome public news-paper which ſhall be uſually publiſhed in the county, riding, diviſion, liberty, rape, wapentake, city, town, or place, or ſome part thereof, in which ſuch order as aforeſaid is to be obſerved or take place; and if the juſtices as aforeſaid ſhall at any time, in any place, neglect or omit to make any order, from time to time, with what letter or letters ſuch bread which ſhall be made for ſale of the meal or flour of any other ſort of grain than wheat, ſhall be marked, then the maker of all ſuch bread for ſale ſhall, in every place where no ſuch order ſhall be made or be in force, cauſe every loaf of ſuch bread he or ſhe ſhall make, or cauſe to be made, for ſale, or ſhall ſell, or offer or expoſe to or for ſale, to be reſpectively marked with any two diſtinct capital letters as he or ſhe ſhall think fit; and every perſon who, after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three, ſhall make for ſale, ſell, offer, or expoſe to or for ſale, or have in his or her cuſtody for ſale, any loaf of any ſuch ſort of bread which ſhall be made with the meal or flour of any other ſort of grain than wheat, which ſhall not be marked as herein before is directed, ſo as that the ſame may, on view thereof, be aſcertained

aſcertained under what denomination every ſuch loaf was made (except ſuch loaves thereof which ſhall be raſped, after the beſpeaking or purchaſing thereof, by the particular deſire of the perſon who ſhall order the ſame to be raſped for his or her own uſe, ſhall, for every time he, ſhe, or they ſhall ſo offend in the premiſſes, and be thereof convicted in manner herein after directed, forfeit and pay a ſum not exceeding forty ſhillings, nor leſs than five ſhillings, for every loaf of ſuch bread which ſhall not be ſo marked as herein before is firſt directed, as the juſtice or juſtices before whom any ſuch offender ſhall be convicted, ſhall from time to time adjudge.

Sect. 10. And to the end the good deſign of this ſtatute may be more effectually accompliſhed, be it further enacted by the authority aforeſaid, That from and after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three it ſhall and may be lawful for any juſtice or juſtices within the limits of their reſpective juriſdictions, although the aſſize of bread ſhall not be there ſet according to the ſaid herein before in part recited act; and alſo for any peace officer or officers authorized by warrant under the hand and ſeal or hands and ſeals of any ſuch juſtice or juſtices (and which warrant any ſuch juſtice or juſtices is and are hereby impowered to grant within their reſpective juriſdictions) to enter into any houſe, ſhop, ſtall, bake-houſe, warehouſe, or outhouſe or other place, of or belonging to any baker or ſeller of bread, and to ſearch, view, weigh, examine, and try all or any bread which ſhall be there found; and alſo to view, weigh, and try all bread made for ſale, which at any time ſhall be offered or expoſed to or for ſale, or found in any one's cuſtody for ſale, in any wiſe howſoever, within the reſpective juriſdiction of any ſuch juſtice or juſtices: and if any loaf or loaves of bread of any denomination ſhall, on any ſearch, view, weighing, trial, or examination thereof, by any juſtice or juſtices, or on any complaint made to, or information given before, any juſtice or juſtices, and proved by the oath of one or more credible witneſs or witneſſes, be found to be deficient in the due weight the ſame ought to be, or not to be marked according to the directions and intent of this act, or to be deficient in the due baking or working thereof, or to be wanting in the goodneſs of the ſtuff whereof or wherewith any ſuch loaf ſhall have been made; or to have been made with any mixture of meal or flour of any other ſort of grain than of the grain the ſame ſhall import to be made with; or to be made with any larger or other proportion of any other or different ſort or ſorts of grain, or the meal or flour thereof, than what ought to be put therein; or to be made with any mixture or ingredient which by the ſaid in part recited act ought not to be put therein; or to be made with any thing as or for or in lieu of flour which ſhall not really be the genuine flour the ſame ſhall import to be and ought to be; or that any ſuch bread ſhall be made with any leaven not allowed by the ſaid in part recited act to be uſed in making bread; then, and in every or any of the ſaid caſes, every juſtice and juſtices, peace officer and officers as aforeſaid, is and are hereby reſpectively, within the limits of their ſeveral juriſdictions, impowered and required by the authority of this act to ſeize every loaf of ſuch bread, and to diſpoſe thereof to poor perſons, as ſuch juſtice or juſtices in his or their diſcretion ſhall from time to time, within their reſpective juriſdictions, think fit; unleſs it ſhall be made out to the ſatisfaction of any ſuch juſtice or juſtices, by or on the behalf of the party or parties againſt whom any ſuch complaint or information as aforeſaid ſhall be made, that the default found or complained of wholly aroſe from ſome unavoidable accident, or was occaſioned by or through ſome contrivance or confederacy; and every maker and ſeller of bread reſpectively as aforeſaid, whoſe bread ſhall at any time be found before any juſtice or juſtices wanting in the goodneſs of the ſtuff whereof or wherewith the ſame ſhould have been made, or to be made with any mixture of meal or flour of any other ſort of grain than of the grain the ſame ſhall import to be made with, or to be made with any larger or other proportion of any other or different ſort or ſorts of grain, or the meal or flour thereof, than what ought to be put therein, or to be made with any mixture or ingredient not allowed by the ſaid in part recited act to be put therein, or to be made with any thing as for or in lieu of flour, which ſhall not really be the genuine flour the ſame ſhall import to be and ought to be; or to be made with any leaven not allowed by the ſaid in part recited act to be uſed in making ſuch bread, ſhall for every ſuch offence, on being convicted thereof in manner herein after mentioned, alſo forfeit and pay a ſum not exceeding five pounds, nor leſs than twenty ſhillings, as the juſtice or juſtices before whom any ſuch offender or offenders ſhall be convicted, ſhall from time to time adjudge; unleſs the default found or complained of ſhall be made out to the ſatisfaction of any ſuch juſtice or juſtices, by or on the behalf of the party or parties againſt whom ſuch complaint or information as aforeſaid ſhall be made, to have wholly aroſe from ſome unavoidable accident, or to have been occaſioned by or through ſome contrivance or confederacy.

Sect. 11. And that from and after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three, although the aſſize of bread ſhall not be ſet according to the ſaid in part recited act, if any perſon or perſons ſhall wilfully obſtruct, hinder, reſiſt, or in any wiſe oppoſe any ſearch, view, weighing, trying, or ſeizing of any loaf or loaves of bread, authorized by this act to be made or tried, he, ſhe, or they, who ſhall ſo offend in the premiſſes, ſhall for every ſuch offence, on being convicted thereof in manner herein after mentioned, forfeit and pay ſuch ſum of money not exceeding forty ſhillings, nor leſs than twenty ſhillings, as the juſtice or juſtices before whom any ſuch offender or offenders ſhall be convicted, ſhall from time to time adjudge.

Sect. 12. Provided always, That no perſon who ſhall follow, or be concerned in the buſineſs of a miller, mealman, or baker, ſhall be capable of acting, or ſhall be allowed to act as a juſtice of the peace under this act, or in putting in execution any of the powers in or by this act granted; and if any miller, mealman, or baker ſhall preſume ſo to do, he or they ſo offending in the premiſſes ſhall for every ſuch offence forfeit and pay the ſum of fifty pounds to any perſon or perſons who will inform or ſue for the ſame; to be recovered in any of his Majeſty's courts of record at *Weſtminſter* by action of debt, bill, plaint, or information, wherein no eſſoin, wager of law, or more than one imparlance ſhall be allowed, or by way of ſummary complaint before the court of ſeſſion in that part of *Great Britain* called *Scotland*.

Sect. 13. Provided always, That if any perſon who ſhall carry on or follow the trade of a baker ſhall, at any time after the ſaid firſt day of *May* one thouſand ſeven hundred and ſixty-three, make complaint to any juſtice or juſtices of the peace within his or their juriſdiction, and make appear to him or them by the oath of any credible witneſs, that any offence, which any ſuch perſon who ſhall ſo carry on or follow the ſaid trade of a baker, ſhall have been charged with, and ſhall have incurred and paid any penalty under this act, ſhall have been occaſioned by or through the wilful neglect or default of any journeyman or other ſervant employed by or under any ſuch perſon, who ſhall ſo follow or carry on the ſaid trade of a baker; then, and in any ſuch caſe, every ſuch juſtice and juſtices may and is and are hereby required to iſſue out his or their warrant under his or their reſpective hand and ſeal or hands and ſeals, for bringing any ſuch journeyman or ſervant before any ſuch juſtice or juſtices, or any juſtice of the county, city, riding, diviſion, or place, where the offender can be found; and on any ſuch journeyman or ſervant being thereupon apprehended, and brought before any ſuch juſtice or juſtices, he or they, within their reſpective juriſdictions, is and are hereby authorized and required to examine into the matter of ſuch complaint; and on proof thereof being made upon oath to the ſatisfaction of any ſuch juſtice or juſtices who ſhall hear ſuch ſaid complaint, ſuch juſtice and juſtices is and are hereby directed and authorized, by any order under his or their reſpective hand or hands, to adjudge and order what reaſonable ſum of money ſhall be paid by every ſuch journeyman or ſervant to his maſter or miſtreſs, as or by way of recompenſe

to him or her for the money he or ſhe ſhall have paid by reaſon of the wilful neglect or default of any ſuch journeyman or ſervant; and if any ſuch journeyman or ſervant ſhall neglect or refuſe, on his conviction, to make immediate payment of the ſum of money which any ſuch juſtice or juſtices ſhall order to be paid, by reaſon of ſuch ſaid wilful neglect or default, then any ſuch juſtice and juſtices, within their reſpective juriſdictions, is and are hereby authorized and required, by warrant under his hand and ſeal or their hands and ſeals, to cauſe every ſuch journeyman or ſervant to be apprehended and committed to the houſe of correction, or ſome other priſon of the county, riding, diviſion, city, town, liberty, or place, in which any ſuch journeyman or ſervant ſhall be apprehended, and there to be kept to hard labour for any time not exceeding one calendar month from the time of ſuch commitment, as ſuch juſtice or juſtices ſhall order, unleſs payment ſhall be made of the money ordered to be paid after ſuch commitment, and before the expiration of the ſaid calendar month.

Sect. 14. And for the better and more eaſy recovery of the ſeveral penalties and forfeitures to be incurred by diſobedience to this act and the powers herein contained, Be it further enacted by the authority aforeſaid, That it ſhall and may be lawful to and for the juſtices of the peace, or any one of them, within their reſpective counties, ridings, diviſions, cities, towns corporate, boroughs, liberties, or juriſdictions, to hear and determine, in a ſummary way, all offences committed againſt the true intent and meaning of this act; and for that purpoſe to ſummon before them, or any of them, within their reſpective juriſdictions, any party or parties accuſed of being an offender or offenders againſt the true intent and meaning of this act; and in caſe the party accuſed ſhall not appear on ſuch ſummons, or offer ſome reaſonable excuſe for his default, then, upon oath of any credible witneſs of any offence committed contrary to the true intent and meaning of this act, any ſuch juſtice or juſtices ſhall iſſue his or their warrant or warrants for apprehending the offender or offenders within the juriſdiction of any ſuch juſtice or juſtices; and upon the appearance of the party or parties accuſed, or in caſe he, ſhe, or they ſhall not appear, on notice being given to, or left for him, her, or them at his, her, or their uſual place of abode, or if he, ſhe, or they cannot be apprehended, on a warrant granted againſt him, her, or them, as herein before is directed; then, and in any ſuch caſe, any ſuch juſtice or juſtices is and are hereby authorized and required to proceed to make inquiry touching the matters complained of, and to examine any witneſs or witneſſes who ſhall be offered on either ſide, on oath as aforeſaid, and which oath every ſuch juſtice and juſtices is and are hereby authorized, impowered, and required to adminiſter; and after hearing of the parties who ſhall appear, and the witneſſes who ſhall be offered on either ſide, ſuch juſtice or juſtices ſhall convict or acquit the party or parties accuſed: and if the penalty or money forfeited on any ſuch conviction ſhall not be paid within the ſpace of 24 hours after any ſuch conviction, every ſuch juſtice or juſtices ſhall thereupon iſſue a warrant or warrants under his hand and ſeal, or their hands and ſeals reſpectively, directed to any peace officer or officers within their reſpective juriſdictions, and thereby require him or them to make diſtreſs of the goods or chattels of the offender or offenders within ſuch their reſpective juriſdictions, to ſatisfy ſuch penalty or money forfeited, and the coſts of the proſecution and diſtreſs: and if any offender ſhall convey away his or her goods out of the juriſdiction of any ſuch juſtice or juſtices before whom he or ſhe was convicted, or ſo much thereof that the penalty or money forfeited cannot be levied, then ſome juſtice, within whoſe juriſdiction the offender ſhall have removed his or her goods, ſhall back the warrant granted by any juſtice or juſtices as aforeſaid, and thereupon the penalty forfeited ſhall be levied on the offender's goods and chattels by diſtreſs and ſale thereof; and if within five days from the diſtreſs being taken, the penalty or money forfeited and coſts as aforeſaid ſhall not be paid, the goods ſeized or taken ſhall be appraiſed and ſold, rendering the overplus (if any) after deducting the penalty or forfeiture, and the coſts and charges of the proſecution, diſtreſs, and ſale, to the owner or owners thereof; which charges ſhall be aſcertained by the juſtice or juſtices before whom any ſuch offender or offenders ſhall have been ſo convicted, or by the juſtice who backed the warrant (if either of them ſhall continue alive) and if not, by ſome other juſtice of the county, riding, diviſion, city, or place in which the offender ſhall have been convicted, on application for that purpoſe to be made to any ſuch juſtice; and for want of ſuch diſtreſs, then every ſuch juſtice, within whoſe reſpective juriſdiction any ſuch offender or offenders ſhall reſide or be, ſhall, on the application of any proſecutor or proſecutors, and proof on oath made of the conviction, and non-payment of the penalty and charges, by warrant under his hand and ſeal, commit every ſuch offender or offenders to the common gaol or houſe of correction of the county, riding, diviſion, city, liberty, or place where ſuch offender or offenders ſhall be found, there to remain for the ſpace of one calendar month from the time of ſuch commitment, unleſs after ſuch commitment payment ſhall be made of the penalty or money forfeited, and the coſts and charges aſcertained as aforeſaid, before the expiration of the ſaid one calendar month.

Sect. 15. And that the juſtice or juſtices before whom any perſon ſhall be convicted in that part of *Great Britain* called *England*, in manner preſcribed by this act, ſhall cauſe every ſuch reſpective conviction to be drawn up in the form or to the effect following; that is to ſay,

(To wit) BE *it remembered, That on this day of in the year of the reign of* A. B. *is convicted before Majeſty's juſtices of the peace for the ſaid county of or for the or for the city, liberty, or town of* (as the caſe ſhall happen to be) *for and do adjudge (him, her, or them,* as the caſe ſhall be) *to pay and forfeit for the ſame, the ſum of*

Given under the day and year aforeſaid.

Sect. 16. And that in caſe any perſon or perſons ſhall be convicted of any offence againſt this act before any juſtice or juſtices of the peace in that part of *Great Britain* called *Scotland*, every ſuch conviction ſhall proceed and be drawn up in the form commonly uſed and practiſed before ſuch juſtices of the peace, on convictions for other offences of the like nature.

Sect. 17. And that no *certiorari*, letters of advocation, or of ſuſpenſion, ſhall be granted to remove any conviction or other proceedings had thereon in purſuance of this act.

Sect. 18. Provided always, That if any perſon convicted of any offence puniſhable by this act ſhall think him, her, or themſelves aggrieved by the judgment of any juſtice or juſtices before whom he, ſhe, or they ſhall have been convicted, ſuch perſon ſhall have liberty from time to time to appeal to the juſtices at the next general or general quarter ſeſſions of the peace which ſhall be held for the county, riding, diviſion, city, liberty, town, or place where ſuch judgment ſhall have been given; and that the execution of the ſaid judgment ſhall, in ſuch caſe, be ſuſpended; the perſon ſo convicted entering into a recognizance at the time of ſuch conviction, with two ſufficient ſureties, in double the ſum which ſuch perſon ſhall have been adjudged to pay or forfeit, upon condition to proſecute ſuch appeal with effect, and to be forthcoming, to abide the judgment and determination of the juſtices at their ſaid next general or general quarter ſeſſion; which recognizance the juſtice or juſtices, before whom ſuch conviction ſhall be had, is and are hereby impowered and required to take; and the juſtices in the ſaid general or general quarter ſeſſion are hereby authorized and required to hear and finally determine the matter of every ſuch appeal, and to award ſuch coſts as to them ſhall appear juſt and reaſonable to be paid by either party; and if upon hearing the ſaid appeal, the judgment of the juſtice or juſtices, before whom the appellant or appellants ſhall have been convicted, ſhall be affirmed, ſuch appellant or ap-

pellants ſhall immediately pay down the ſum he, ſhe, or they ſhall have been adjudged to forfeit, together with ſuch coſts as the juſtices in their ſaid general or general quarter ſeſſion ſhall award to be paid to the proſecutor or informer, for defraying the expences ſuſtained by reaſon of any ſuch appeal; and in default of the appellant's paying the ſame, any juſtice or juſtices having juriſdiction in the place into which any ſuch appellant or appellants ſhall eſcape, or where he, ſhe, or they ſhall reſide, ſhall and may, by warrant under their hands and ſeals or his hand and ſeal, commit every ſuch appellant and appellants to the common gaol of the county, riding, diviſion, liberty, city, town, or place where he, ſhe, or they ſhall be apprehended, there to remain until he, ſhe, or they ſhall pay the penalty or money forfeited and coſts as aforeſaid, or ſhall compound in reſpect thereof with the informer, and pay the compoſition-money agreed on to the informer; but if the appellant or appellants in any ſuch appeal ſhall make good his, her, or their appeal, and be diſcharged of the ſaid conviction, reaſonable coſts ſhall be awarded to the appellant or appellants againſt ſuch informer or informers, who (in caſe of ſuch conviction having been affirmed) would have been intitled to the penalty to have been recovered as aforeſaid; and which coſts ſhall and may be recovered by the appellant or appellants againſt any ſuch informer or informers, in like manner as coſts given at any general or general quarter ſeſſion of the peace are recoverable.

Sect. 19. Provided always, That if any ſuch conviction ſhall happen to be made within ſix days before any general or general quarter ſeſſion of the peace, which ſhall be held for the county, riding, diviſion, city, town corporate, borough, or place where ſuch conviction ſhall have been made; then the party or parties who ſhall think him, her, or themſelves aggrieved by any ſuch conviction, ſhall and may, on entering into a recognizance in manner and for the purpoſes before directed, be at liberty to appeal, either to the then next, or the next following general or general quarter ſeſſion of the peace which ſhall be held for any ſuch county, riding, diviſion, city, town corporate, borough, liberty, or place where any ſuch conviction ſhall have been made.

Sect. 20. And that every action or ſuit which ſhall be brought or commenced againſt any juſtice or juſtices, or any peace officer or officers, in that part of *Great Britain* called *England*, for any matter or thing done or committed by virtue of or under this act, ſhall be commenced within ſix calendar months next after the fact committed, and not afterwards, and ſhall be laid or brought in the county, city, or place where the matter in diſpute ſhall ariſe, and not elſewhere; and that the ſtatute made in the twenty-fourth year of King *George* the Second, [intituled, *An act for rendering the juſtices of the peace more ſafe in the execution of their office; and for indemnifying conſtables, and others, acting in obedience to their warrants*] ſo far as the ſaid act relates to the rendering the juſtices more ſafe in the execution of their office, ſhall extend and be conſtrued to extend to the juſtice or juſtices of the peace acting under the authority or in purſuance of this act; and that no action or ſuit ſhall be had or commenced againſt, nor ſhall any writ be ſued out, or copy of any writ be ſerved upon any peace officer or officers, for any thing done in the execution of this act, until ſeven days after a notice in writing ſhall have been given to, or left for him or them at his or their uſual place of abode, by the attorney for the party intending to commence ſuch action; which notice ſhall contain the name and place of abode of the perſon intending to bring ſuch action, and alſo of his attorney, and likewiſe the cauſe of action or complaint: and any peace officer or officers ſhall be at liberty, and may, by virtue of this act, at any time within ſeven days after any ſuch notice ſhall have been given to, or left for him, tender, or cauſe to be tendered, any ſum or ſums of money, as amends for the injury complained of, to the party complaining, or to the attorney named in any ſuch notice; and, if the ſame is not accepted of, the defendant or defendants in any ſuch action or actions may plead ſuch tender in bar of ſuch action or actions, together with the general iſſue, or any other plea, with leave of the court in which the action ſhall be commenced: and if, upon iſſue joined on ſuch tender, the jury ſhall find the amends tendered to have been ſufficient, they ſhall find a verdict for the defendant or defendants: and in every ſuch caſe, or if the plaintiff ſhall become nonſuit, or diſcontinue his action; or if judgment ſhall be given for the defendant or defendants upon demurrer; or if any action or ſuit ſhall be brought after the time limited by this act for bringing the ſame, or ſhall be brought in any other county or place than as aforeſaid; then, and in every ſuch caſe, the jury ſhall find a verdict for the defendant or defendants; and the defendant or defendants ſhall be intitled to his or their coſts: but if the jury ſhall find that no ſuch tender was made, or that the amends tendered were not ſufficient, or ſhall find a verdict againſt the defendant or defendants, on any plea or pleas by him or them pleaded; then they ſhall give a verdict for the plaintiff, and ſuch damages as they ſhall think proper; and the plaintiff ſhall thereupon recover his or her coſts againſt every ſuch defendant and defendants.

Sect. 21. And that if any action or ſuit ſhall be commenced againſt any other perſon or perſons than a juſtice or juſtices, or peace officer, for any thing done in purſuance of this act, the defendant or defendants in any ſuch action or ſuit may plead the general iſſue, and give this act and the ſpecial matter in evidence at any trial to be had thereupon, and that the ſame was done in purſuance and by the authority of this act; and if it ſhall appear ſo to have been done, or if a verdict ſhall be found for the defendant or defendants; or if the plaintiff ſhall be nonſuited, or diſcontinue his action, after the defendant or defendants ſhall have appeared; or if judgment ſhall be given upon a verdict or demurrer againſt the plaintiff or plaintiffs, the defendant or defendants in every ſuch action ſhall and may recover double coſts, and have the like remedy for the ſame as any defendant or defendants hath or have in other caſes by law for recovery of his or their coſts.

Sect. 22. And that the above limitations and remedies for rendering juſtices of peace, peace officers, and all other perſons, ſafe in the execution of their ſeveral offices under this act, ſhall extend to and be available to all ſuch juſtices of peace, peace officers, and other perſons, in that part of *Great Britain* called *Scotland*, and ſhall be pleaded by them, and ſuſtained by the court or courts before which they, or any of them, may happen to be ſued, according to the forms of the law of *Scotland*.

Sect. 23. Provided alſo, That no perſon ſhall be convicted of any offence under this act, unleſs the proſecution in order for ſuch conviction ſhall be commenced within three days after the offence committed; and that no perſon, who ſhall be proſecuted to conviction for any offence done or committed againſt this act, ſhall be ſubject or liable to be proſecuted for the ſame offence under any other law.

Sect. 24. And that all penalties and forfeitures by this act inflicted ſhall, when recovered or paid, go and be diſtributed in manner following; that is to ſay, one moiety thereof, where any offender or offenders ſhall be convicted either by his, her, or their own confeſſion, or by the oath of one or more credible witneſs or witneſſes, ſhall go and be paid to the perſon or perſons who ſhall inform againſt and proſecute to conviction any ſuch offender or offenders; and the other moiety thereof, as the juſtice or juſtices before whom any offender or offenders againſt this act ſhall be convicted, ſhall from time to time think fit and order, for the better carrying into execution the purpoſes of this act, and defraying the charges attending the carrying the ſame into execution.

Sect. 25. Provided likewiſe, and it is hereby enacted, That this act, or any thing herein contained, ſhall not extend, or be conſtrued to extend, to prejudice the ancient right or cuſtom of the two univerſities of *Oxford* or *Cambridge*, or either of them, or of their or either of their clerks of the market, or the practice within the ſeveral juriſdictions of the ſaid univerſities, or either of them,

them, uſed to aſcertain and appoint the weight of all ſorts of bread to be ſold or expoſed to ſale within their ſeveral juriſdictions; but that they, and every of them, ſhall and may, ſeverally and reſpectively, from time to time as there ſhall be occaſion, aſcertain and appoint within their ſeveral and reſpective juriſdictions the weight of all ſorts of bread to be ſold or expoſed to ſale by any baker or other perſons whatſoever, within the limits of their ſeveral juriſdictions; and ſhall and may puniſh the breach thereof as fully and freely, in all reſpects, as they uſed to do, and as if this act had never been made; any thing herein contained to the contrary thereof in any wiſe notwithſtanding.

Bread of treet or **trite**, (*panis tritici*) Is one of thoſe ſorts of *bread* mentioned in the ſtatute *of aſſize of bread and ale*, 51 *Hen.* 3. *ſtat.* 1. where we read of *waſtel bread*, *cocket bread*, and *bread of treet*, which may anſwer to three ſorts now in uſe with us, called white, wheaten, and houſhold *bread*. Heretofore in religious houſes they diſtinguiſhed bread by theſe ſeveral names; *panis armigerorum*, *panis conventualis*, *panis puerorum*, and *panis famulorum*. See **Cocket**.

Breakers of leagues and truces. See **Safe conduct** and **Truce-breakers.**

Breaking priſon. See **Priſon.**

Brecca, (from the Fr. *breche*) A breach or decay, or any other want of repair. In ſome ancient deeds there have been covenants for repairing,——*Muros* & breccas *portas* & *foſſatas caſtelli*,—*ſine dat.*—*de* brecca *aquæ inter* Woolwich & Greenwich *ſupervidend.* Pat. 16 Ric. 2. Dorſ.

Brede, Signifieth broad. *Bracton* uſeth this word, *lib.* 3. *tract.* 2. *cap.* 15. *nu.* 7. proverbially thus; *too large and too brede*; that is, too long and *too broad.*

Brede is alſo a *Saxon* word, and ſignifies *deceit*. *Teſtimonium eſt & cognitio quod ibi* brede *ſit*. *Leges Canuti, par.* 2. *cap.* 22.

Bredgurna, What we now call *bridegroom.*

Bredewite, Sax. *bread*, and *wite*, a fine or penalty; ſo that *bredewite* ſeems to have been the impoſition of fines or amerciaments for defaults in the aſſize of bread. To be exempt from that penalty was a ſpecial privilege granted to the tenants of the honour of *Wallingford*, by King *Henry* 2. *Ut quieti ſint de hidagio* & blodewite & bredewite. *Paroch. Antiq. p.* 144.

Brehon. In *Ireland* the judges and lawyers were anciently ſtyled *brehons*; and thereupon the *Iriſh* law was called *brehon law.* 4 *Inſt.* 358.

Breiſna, Wether ſheep. *Concedo Deo & monachis* 30 breiſnas *ſingulis annis.* Monaſt. tom. 1. cap. 406.

Bremenium, *Brampton* in *Northumberland.*

Brementuracum, *Brumpton* in *Cumberland.*

Brenagium, The payment in bran, which the tenant was to make to feed the lord's hounds.

Brentwood, See **Caeſaromagus.**

Bretoyſe, or **Bretois**,——*Sciant—quod ego Henricus de Penebrugge dedi——omnibus liberis burgenſibus meis burgi mei de Penebrugge omnes libertates & liberas conſuetudines* ſecundum legem de Bretoyſe *nundinis & feriis appertin. ſecundum tenorem chartæ domini Henrici regis quam habeo. Habendum, &c.* ſine dat. *Secundum legem de* Bretoyſe muſt certainly ſignify *legem Marchiarum*; or, the law of the *Britains* or *Welchmen*: for *Penebrugge* (now *Pembridge*) is a town in *Herefordſhire*, bordering upon *Wales.*

Brettenham, See **Cambretonium.**

Breve, So called from the *brevity* of it, is any writ directed either to the Chancellor, Judges, Sheriffs, or other officers, whoſe variety and forms you may ſee in the Regiſter *per totum.* The word is uſed in the Civil law according to ſeveral ſenſes. See *Skene de verb. ſignif. verb.* Breve. And *Bracton, l.* 5. *tract.* 5. *cap.* 17. *num.* 2. Breve *quia* Breviter & *paucis verbis intentionem proferentis exponit, &c.* Any writ or precept from the King was called *Breve*, which we ſtill retain in the name of *Brief*, the King's letters patent to poor ſufferers, for collection. See *Writ.*

Breve perquirere, To purchaſe a writ or licence of trial in the King's Court by the plaintiff, qui breve *perquiſivit.* Hence the preſent uſage of paying ſix ſhillings and eight-pence, where the debt is 100 *l.* and ſo upwards, in ſuits of money due upon bond.

Breve de Recto, A writ of right, or licence for a perſon ejected, to ſue for the poſſeſſion of an eſtate detained from him.

Brevibus et Rotulis liberandis, Is a writ or mandate to a ſheriff, to deliver unto the new ſheriff, choſen in his room, the county, with the appurtenances, *una cum rotulis*, *brevibus*, and other things belonging to that office. *Reg. orig. fol.* 295. *a.*

Brewers, Are to put their drink in veſſels marked by a cooper, or forfeit 3 *s.* 4 *d.* a barrel; and not ſelling it at reaſonable rates, appointed by juſtices of peace, incur a forfeiture of 6 *s.* for every barrel, kilderkin, 3 *s.* 4 *d.* &c. by *ſtat.* 23 *H.* 8. *cap.* 4. And *Brewers* are to make an entry at the exciſe office once a week of liquors brewed, under penalties, &c. 12 & 15 *Car.* 2. 7 & 8 *W.* 3. If *Brewers* mix any ſugar, melaſſes, &c. in brewing beer or ale, they ſhall forfeit 20 *l.* *Stat.* 1 *Ann. cap.* 3. *ſec.* 2. & 3 *Ed.* 6. *cap.* 15. 1 *W.* & *M. cap.* 24. 11 *W.* 3. *c.* 21. 9 *Ann. c.* 12. 12 *Ann. ſtat.* 1. *cap.* 2. Brewers, &c. not to act as juſtices of the peace, 24 *Geo.* 2. *c.* 40. *ſect.* 22. 26 *Geo.* 2. *c.* 13. *ſect.* 12. See title **Exciſe.**

Bribery, In a ſtrict ſenſe, is taken for a great miſpriſion of one in a judicial place taking any valuable thing whatſoever, except meat and drink of ſmall value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the King only. 1 *Hawk.* 168. 3 *Inſt.* 145. But Bribery, in a large ſenſe, is ſometimes taken for the receiving or offering of any undue reward by or to any perſon whatſoever, whoſe ordinary profeſſion or buſineſs relates to the adminiſtration of public juſtice, in order to incline him to do a thing againſt the known rules of honeſty and integrity; for the law abhors any the leaſt tendency to corruption in thoſe who are any way concerned in its adminiſtration, and will not endure their taking a reward for the doing a thing which deſerves the ſevereſt of puniſhments. 3 *Inſt.* 149. *Hob.* 9. *Cro. Ja.* 65. 1 *Hawk.* 168.

Alſo Bribery ſometimes ſignifies the taking or giving of a reward for offices of a public nature; and ſurely nothing can be more palpably prejudicial to the good of the public, than to have places of the higheſt concernment, on the due execution whereof the happineſs of both King and people depend, diſpoſed of not to thoſe who are moſt able to execute them, but to thoſe who are moſt able to pay for them; nor can any thing be a greater diſcouragement to induſtry and virtue, than to ſee thoſe places of truſt and honour, which ought to be the rewards of thoſe who by their induſtry and diligence have qualified themſelves for them, conferred on ſuch who have no other recommendation but that of being the higheſt bidders; neither can any thing be a greater temptation to officers to abuſe their power by bribery and extortion, and other acts of injuſtice, than the conſideration of the great expence they were at in gaining their places, and the neceſſity of ſometimes ſtraining a point to make their bargain anſwer their expectations: for which reaſons, among many others, it is expreſly enacted by 12 *Rich.* 2. 2. "That the Chancellor, Treaſurer, Keeper of the Privy Seal, Steward of the King's Houſe, the King's Chamberlain, Clerk of the Rolls, the Juſtices of the one Bench and of the other, Barons of the Exchequer, and all other, that ſhall be called to ordain, name, or make Juſtices of Peace, Sheriffs, Eſcheators, Cuſtomers, Comptrollers, or any other officer or miniſter of the King, ſhall be firmly ſworn, that they ſhall not ordain, name, or make any of the above-mentioned officers, for any gift or brocage, favour or affection, nor that none which ſueth by himſelf, or by others, privily or openly to be in any manner of office, ſhall be put in the ſame office, or in any other, but that they make all ſuch officers and miniſters of the beſt and moſt lawful men, and ſufficient to their eſtimation and knowledge." Alſo it is further enacted by 4 *H.* 4. 5. "That no Sheriff ſhall let his Bailiwick to farm to any man, for the time that he occupieth ſuch office, &c." Alſo it is enacted by 5 & 6 *Ed.* 6. 16. "That if any perſon ſhall bargain or ſell, or take any reward,

reward, or promiſe of any reward for any office, or the deputation of any office, any way concerning the King's revenue, or the keeping of his caſtles, or the adminiſtration or execution of juſtice (unleſs it be ſuch an office as had been uſually granted before the making of the ſaid act by the juſtices of the King's Bench, or Common Pleas, or by the juſtices of aſſize) that then every ſuch perſon ſo bargaining or ſelling, or taking ſuch reward, or promiſe, *&c.* ſhall not only forfeit his right to ſuch office, or to the nomination thereof, but alſo every perſon who ſhall give any ſuch reward or promiſe, *&c.* ſhall be adjudged a diſabled perſon in law to have or enjoy ſuch office, *&c.*"

In the conſtruction of this ſtatute of 5 & 6 *Ed.* 6. the following points have been reſolved;

That the offices of Chancellor, Regiſter, and Commiſſary in eccleſiaſtical courts, are within the meaning of the ſtatute, inaſmuch as thoſe courts do not only determine matters which are brought before them, merely *pro ſalute animæ*, but alſo have the deciſion of diſputes concerning the lawfulneſs of matrimony and legitimation of children, which touch the inheritance of the ſubject, and alſo hold plea of legacies and titles, *&c.* in which reſpects they are courts of juſtice. *Cro. Ja.* 269. 3 *Inſt.* 148.

That one who makes a contract for any office, contrary to the purport of the ſaid ſtatute, is ſo far diſabled to hold the ſame, that he cannot at any time, during his life, be reſtored to a capacity of holding it by any grant or diſpenſation whatſoever. *Hob.* 75. *Co. Lit.* 234. *Cro. Ca.* 361. *Cro. Ja.* 386.

As to the puniſhment of bribery, it is ſaid, that at Common law bribery in a judge, in relation to a cauſe depending before him, was looked upon as an offence of ſo heinous a nature, that it was ſometimes puniſhed as high treaſon, before the 25 *Ed.* 3. 3 *Inſt.* 148. And at this day it is certainly a very high offence, and puniſhable, not only with the forfeiture of the offender's office of juſtice, but alſo with fine and impriſonment, *&c.* 1 *Leon.* 295. *Cro. Ja.* 65.

Alſo all the other above-mentioned kinds of bribery, taken in a large ſenſe, ſeem to be puniſhable with fine and impriſonment, *&c.* And in the time of King *James* the firſt, the Earl of *M.* Lord High Treaſurer of *England*, being impeached by the Commons for refuſing to hear petitions referred to him by the King, till he had received great bribes, and for other ſuch like miſdemeanors, was, by ſentence of the Lords, deprived of all his offices, and diſabled to have any for the future, or to ſit in the parliament, and was fined fifty thouſand pounds, and impriſonment during the King's pleaſure. 3 *Inſt.* 148. 1 *Hawk.* 170. See title **Parliament.**

Bribers, (derived from the French *Bribeur*) Seemeth, in a legal ſignification, to be one that pilfereth other men's goods, as cloaths out of a window, or the like. *Anno* 28 *Ed.* 2. *ſtat.* 1. *cap.* 1.

Brichominus, *Idem quod Chimine*; *Anglice*, a way. *In piſcariis & mariſcis in* Bricheminis *& ſemitis. Du Freſne.*

Bricks, Are to be made between the firſt day of *March* and the 29th of *September*, and ſhall be burnt either in kilns or diſtinct clamps, *&c.* Alſo place-*Bricks*, when burnt, muſt not be leſs than nine inches long, two inches and a half thick, and four and a quarter wide, on pain of forfeiting twenty ſhillings a thouſand, *&c.* Searchers of *Bricks* and tiles ſhall be appointed by juſtices of peace in their quarter ſeſſions, who are to make preſentments, and may be fined 10*l.* for defaults. Combinations to advance the price of *Bricks*, ingroſſing them, *&c.* incurs a penalty of 20*l.* and mixing mould, ſoil, or mud, with *Brick* earth, is liable to penalties. *Stat.* 12 *Geo.* 1. *cap.* 35. 2 *Geo.* 2. *cap.* 15. But *Bricks* may be made of *Brick*-earth and ſea coal aſhes ſifted, not exceeding a certain quantity; and cinders or breeze may be uſed with coal in the burning of *Bricks*, and ſtock-bricks and place-bricks may be burnt in the ſame clamp, being ſet in diſtinct pareels, *&c.* by 3 *Geo.* 2. *cap.* 22. What quantity of bricks may be carried in one load in *London*, 6 *Geo.* 1. *c.* 6. Bricks and tiles may be carried as ballaſt, 6 *Geo.* 1. *c.* 29. *ſect.* 20. See **Tiles.**

Bridges. Publick Bridges, which are of general conveniency, are of common right to be repaired by the whole inhabitants of that county in which they lie. *Hale's P. C.* 143. 13 *Co.* 33, *Cro. Car.* 365.

But a corporation aggregate, either in reſpect of a ſpecial tenure of certain lands, or in reſpect of a ſpecial preſcription; alſo any other perſon, by reaſon of ſuch a ſpecial tenure, may be compelled to repair them. *Hale's P. C.* 143. *Dalt. c.* 14.

Any particular inhabitant or inhabitants of a county, or tenant or tenants of land, chargeable with the repairs of a common bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine aſſeſſed by the court for the default of ſuch repairs, and ſhall be put to their remedy at law for a contribution from thoſe who are bound to bear a proportionable ſhare in the charge; for caſes of this nature require the utmoſt expedition; and bridges being of abſolute neceſſity, are not to lie unrepaired till law ſuits are determined. 1 *Jones* 173. *Pop.* 192. 6 *Mod.* 307. *Salk.* 358.

If a manor held by the ſervice or tenure of repairing a common bridge comes, by the alienation of the lord, into the hands of ſeveral perſons, every alienee being tenant of any parcel, either of the demeſne or ſervices, ſhall be liable to the whole charge, and put to their remedy for a contribution from the reſt; and though the lord, on ſuch alienation, agreed that the purchaſers ſhould be exempt from the charges, yet however binding ſuch agreement might be among themſelves, it ſhall not work a general injury, by making the remedy the public had more difficult than it was before. 1 *Salk.* 358.

So if a manor, ſubject to ſuch charge, comes into the hands of the crown, yet the duty upon it continues; and any perſon claiming afterwards under the crown, the whole manor, or any part thereof, ſhall be liable to an indictment or information for want of due repairs. 1 *Salk.* 358.

If part of a bridge lie within a franchiſe, thoſe of the franchiſe may be charged with the repairs for ſo much; alſo by a ſpecial tenure, a man may be charged with the repairs of one part of a bridge, and the inhabitants of a county are to repair the reſt. *Hawk. P. C.* 221. *Raym.* 384, 385.

It hath been reſolved, that it is not ſufficient for the defendant to an indictment for not repairing a bridge, to excuſe themſelves by ſhewing that they are not bound either to repair the whole, or any part of the bridge, without ſhewing what other perſon is bound to repair the ſame; and it is ſaid, that in ſuch caſe the whole charge ſhall be laid upon ſuch defendants by reaſon of their ill plea. 1 *Hawk. P. C.* 221. *Pop.* 192.

It is ſaid, that where ſuch defendants plead that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverſe to the charge againſt themſelves; the Attorney General, in this ſpecial caſe, may take a traverſe upon a traverſe, and inſiſt that the defendants are bound to the repairs, and traverſe the charge alledged againſt *A. B.* and that an iſſue ought to be taken of ſuch traverſe; and that the Attorney General may afterwards ſurmiſe, that the defendants are bound to repair it, and that the whole matter ſhall be tried by an indifferent jury. 1 *Hawk. P. C.* 221. 1 *Sid.* 140.

It ſeems clear that thoſe who are bound to repair ſuch bridges, muſt make them of ſuch height and ſtrength as ſhall be anſwerable for the courſe of the water, whether it continue in the old channel or make a new one; and that they are not puniſhable as treſpaſſers for entering on any adjoining land for ſuch purpoſe, or for laying on the materials requiſite for ſuch repairs. 1 *Hawk. P. C.* 221.

No inhabitant of a county ought to be a juror for the trial of an iſſue, whether the county be bound to ſuch repairs or not; but by *ſtat.* 1 *Ann. ſtat.* 1. *c.* 18. he may be a good witneſs. 6 *Mod.* 307. 1 *Hawk.* 222.

No man can be compelled to build or contribute to the charges of building of any new bridge without an act of parliament; nor can the inhabitants of the whole county, by their own authority, change a bridge or high-

way from one place to another, 2 *Inſt.* 701. *Carth.* 193. 6 *Mod.* 307.

If a man makes a bridge for the common good of the King's ſubjects, he is not bound to repair it. 2 *Inſt.* 701.

By ſtat. 22 *H.* 8. *c* 5. *ſect.* 14. "The juſtices of peace in every ſhire, franchiſe, or borough, or four of them, whereof one to be of the *quorum*, may inquire and determine in their general ſeſſions of annoyances of bridges broken in the highways, and make ſuch proceſs and pains on every preſentment againſt the perſons charged, *&c.* as the King's Bench is uſed to do, or as it ſhall ſeem by their directions to be neceſſary and convenient."

Sect. 2, 3. "And where it cannot be known who ought to make ſuch bridges decayed, they ſhall be made by the inhabitants of the ſhire, city, or town corporate wherein they ſhall be; and if part ſhall be in one ſhire, *&c.* and part in another, the inhabitants of each ſhall repair and make ſuch part as lies within their reſpective limits."

Sect. 4. "And for ſpeedy reformation of ſuch bridges the juſtices of the peace of ſuch ſhire or town, or four of them, whereof one to be of the *quorum*, may call before them either the conſtables, or elſe two of the moſt honeſt inhabitants of every town and pariſh, and with the aſſent of the ſaid conſtable or inhabitants may tax every inhabitant within their limits, in ſuch ſums as may be thought convenient; and ſhall cauſe the names and ſums of each perſon to be written in a roll indented, and ſhall have power to make two collectors of every hundred for the collection of ſuch tax, which collectors receiving one part of the roll indented, under the ſeals of the juſtices, ſhall have power to collect all the ſums therein contained, and to diſtrain thoſe who ſhall refuſe to pay; and the ſame juſtices, or four of them, may alſo name two ſurveyors, who ſhall ſee every ſuch decayed bridge repaired from time to time, to whom the ſaid collectors ſhall deliver the ſaid ſums by them received; and the collectors and ſurveyors, and their executors, ſhall from time to time make a true account to the juſtices, or four of them, whereof one of the *quorum*, of their receipts, payments, and expences: and if any of them ſhall refuſe that to do, the ſame juſtices, or four of them, may make proceſs againſt them by attachment, under their ſeals, returnable at the general ſeſſions; and if they appear, may compel them to account, or elſe, on their refuſal, may commit them till the account be truly made."

Sect. 5. Where the bridge is in one ſhire, and the perſon bound to amend it in another; or where the bridge is in a town corporate, and the perſon bound to repair it out of it, the juſtices of ſuch ſhire or town corporate may inquire, and determine all ſuch annoyances within their limits; and on a preſentment may make proceſs againſt ſuch perſons; and do further in every behalf, in every ſuch caſe, as they might do by the ſaid act, in caſe that ſuch perſons were in the ſame ſhire, *&c.* And all ſheriffs and bailiffs of liberties ſhall ſerve ſuch proceſs, on pain to make ſuch fine as ſhall be ſet by the ſaid juſtices.

Sect. 6. Provided that nothing in this act ſhall be prejudicial to the liberties of the five ports; but that the warden, mayor, bailiffs, *jurats* of the ſame ports may inquire and determine all annoyances of bridges therein, and make ſuch proceſs, *&c.* as the juſtices of peace may do in other places by virtue of the ſaid act.

Sect. 8. The ſaid juſtices, *&c.* may allow ſuch reaſonable coſts and charges to the ſaid ſurveyors and collectors, as by their diſcretion ſhall be thought convenient.

Sect. 9. Such parts of highways as lie next adjoining to the ends of the bridges, by the ſpace of 300 foot, ſhall be amended as often as need ſhall require; and that the juſtices, or four of them, whereof one of the *quorum*, within their ſeveral limits may inquire and determine in their general ſeſſions all annoyances therein, and do in every thing concerning the ſame, in as ample a manner as they may do for making and repairing bridges.

Stat. 1 *Ann ſt.* 1. *c.* 18. *ſect.* 2. The juſtices of peace ſhall at their quarter ſeſſions have power, upon preſentment that any bridge is out of repair, which by them ought to be repaired, to aſſeſs upon every place within their comm ſſions, as they uſually have been aſſeſſed towards the repair of bridges; which money ſhall be collected by the conſtables, or ſuch perſons as the ſeſſions ſhall appoint. And the money ſhall be paid over to the high conſtable in ſix days: and they ſhall in ten days pay the ſame to ſuch perſons, as the juſtices by order of ſeſſions ſhall appoint to be treaſurers of the ſame. And the money ſhall be employed and accounted for according to order of the juſtices, for amending ſuch decayed bridges and the highways at the end of the ſame. The aſſeſſments to be levied by diſtreſs and ſale of goods of the perſons not paying in ten days after demanded.

Sect. 3. Perſons neglecting to aſſeſs, collect or pay the money ſhall forfeit 40*s.* and every treaſurer that ſhall pay money, except by order of ſeſſions, ſhall forfeit 5*l.*

Sect. 4. No fine for not repairing ſuch bridges and highways ſhall be returned into the Exchequer, but ſhall be paid to the treaſurer, and applied by the ſaid juſtices towards the building or repairing of ſuch bridges and highways.

Sect. 5. All matters concerning repairing ſuch bridges and highways ſhall be determined in the county, and not removed by *certiorari*.

Sect. 6. The quarter ſeſſions ſhall have power to allow perſons concerned in the execution of this act, 3*d. per* pound.

Sect. 7. Perſons authorized by this act may plead the general iſſue, and give this act and the 22 *Hen.* 8. *cap.* 5. in evidence, and if judgment be for them they ſhall have double coſts.

Sect. 8. This act ſhall not diſcharge particular perſons, eſtates, or places from reparations.

Sect. 9. All penalties upon this act ſhall be applied to repairing the ſaid bridges and highways.

Sect. 12 *Geo.* 2. *c.* 29. The charges of repairing and amending bridges, and highways at the ends of bridges, ſhall be paid out of the general county rate.

Sect. 13. No money ſhall be applied to the repair of bridges, until preſentment be made by the grand jury at the aſſizes or ſeſſions of their inſufficiency, inconveniency, or want of repair.

Sect. 14. When any public bridges, ramparts, banks, or cops are to be repaired at the expence of the county, the juſtices at their general or quarter ſeſſions, after preſentment made by the grand jury of their want of reparation, may contract with any perſon for rebuilding, repairing, and amending the ſame, for any term not exceeding ſeven years at a certain annual ſum; in order to which they ſhall give public notice of their intention of contracting with any perſon for rebuilding, repairing, and amending the ſame. And ſuch contracts ſhall be made at the moſt reaſonable price which ſhall be propoſed by the contractors; who ſhall give ſufficient ſecurity for the due performance thereof, to the clerk of the peace. And all contracts when agreed to, and all orders relating thereto, ſhall be entered in a book to be kept by the clerk of the peace for that purpoſe; who ſhall keep the ſame amongſt the records of the county, to be inſpected by any of the juſtices at all ſeaſonable times, and by any perſon employed by any pariſh or place contributing to the ſame without fee.

Stat. 14 *Geo.* 2. *c.* 33. *ſect.* 1. Juſtices at their ſeſſions may purchaſe any parcel of land, adjoining or near any county bridge, for the more commodious enlarging, or convenient rebuilding the ſame, not exceeding one acre, to be paid for by the treaſurer out of the county rates, by order under the hands and ſeals of the ſaid juſtices in their ſaid ſeſſions; which lands ſo purchaſed ſhall be conveyed to ſuch perſon or perſons as the juſtices in the ſaid ſeſſions ſhall appoint, in truſt for enlarging or rebuilding the ſaid bridge.

Bridlington, alias **Burlington**, Its piers, how repaired, 8 *&* 9 *W.* 3. *c* 29. 1 *Geo.* 1. *ſt.* 2. *c.* 49. 5 *Geo.* 1. *c.* 10. 7 *Geo.* 1. *ſt.* 1. *c.* 16. 26 *Geo.* 2. *c.* 10.

Brief, *(Breve)* Signifies a writ, whereby a man is ſummoned or attached to anſwer any action; or (more largely) any writ in writing iſſuing out of any of the King's courts of record at *Weſtminſter*, whereby any thing is commanded to be done in order to juſtice, or the King's

King's command, and is called a *brief*, or *breve : Quia* breviter *& paucis verbis intentionem proferentis exponit & explanat, ſicut regula juris rem quæ eſt* breviter *enerrat*, ſays *Bracton, lib.* 5. *tract.* 5. *cap.* 17. *num.* 2. Alſo letters patent, or a licence from the King or privy council, granted to any ſubject to make a collection for any public or private loſs, is commonly ſtiled a *brief*. See ſtat. 4 *Ann. c.* 14. concerning briefs for collecting charity-money. See **Writ.**

Brief, alſo ſignifies an abridgment of the client's caſe, made out for the inſtruction of counſel, on a trial at law; wherein the caſe of the plaintiff, *&c.* is to be *briefly* but fully ſtated, the proofs muſt be placed in due order, and proper anſwers made to whatever may be objected againſt the client's cauſe by the oppoſite ſide. *Jacob.*

Briga, (Fr. *brigue*) That is, ſtrife or contention.—— *Et poſuit terram in* brigam, *& intricavit terram ; ſcilicet, per diverſa fraudulenta feoffamenta. Ideo committitur mareſchallo, &c.* Ebor. Hill. 18 Ed. 3. rot. 28.

Brigandine, (*Fr.*) A coat of mail, or a faſhion of ancient armour, conſiſting of many jointed and ſcale-like plates, very pliant unto and eaſy for the body, mentioned in ſtat. 4 & 5 *Phil. & Mar. cap.* 2. Some confound it with *haubergeon*; and ſome with *brigantine*, which ſignifies a low, long, and ſwift ſea veſſel, having ſome 12 or 13 oars on a ſide.

Brigantes, *Yorkſhire, Lancaſhire*, Biſhoprick of *Durham, Weſtmoreland* and *Cumberland.*

Brigbote, or **Brugbote**, *Eſt quietum eſſe de auxilio dando ad reficiendum pontes.* Fleta, lib. 1. cap. 47. It is compounded of *brig*, a bridge, and *bote*, a compenſation or yielding of amends. See **Bote** and **Bruckbote.** *Selden's Titles of Honour, fol.* 622.

Brimſtone, May be imported, 16 *Car.* 1. *c.* 21. To what duties liable, 2 *W. & M. ſeſſ.* 2. *c.* 4. *ſ.* 51.

Briſtles, To what duties liable, 4 *W. & M. c.* 5 *ſ.* 2

Briſtol. A great city, famous for trade. The mayor, burgeſſes, and commonalty of the city of *Briſtol* are conſervators of the river *Avon*, from above the bridge there to *Kingroad*, and ſo down the *Severn* to the two iſlands called *Holmes*; and the mayor and juſtices of the ſaid city may make rules and orders for preſerving the river, and regulating the pilots, maſters of ſhips, *&c.* Alſo for the government of the markets: and the ſtreets are to be kept clean and paved; and lamps or lights hung out at night. Stat. 11 *&* 12 *Will.* 3. *c* 23. No perſon ſhall act as a broker in the city of *Briſtol*, till admitted and licenſed by the mayor and aldermen, *&c.* on pain of forfeiting 500*l.* and thoſe who employ any ſuch to forfeit 50*l. &c.* by ſtat. 3 *Geo.* 2. *c.* 31. By the ſtat. 22 *Geo.* 2. *c.* 20. 28 *Geo.* 2. *c.* 32. 29 *Geo.* 2. *c.* 47. the ſtat. 11 *&* 12 *W.* 3. is rendered more effectual ſo far as it relates to the paving and enlightening the ſtreets; and divers regulations are made in relation to the hackney coachmen, halliers, draymen and carters, and the markets, and ſellers of hay and ſtraw, within the ſaid city and liberties thereof.

Brithol, King *Hen.* 3. in a charter to the citizens of *London*, dated 16 *Mart. an. regn.* 11.—*Ad emendationem civitatis* London, *eis conceſſimus, quod omnes ſint quieti de* Brithol, *& de* Childwite, *& de* Jerſine, *& de* Scotal,—*Placit. Temp. Ed.* 1 *& Ed.* 2. *MS. fol.* 143. *b. Penes Dom. Fountains. Cowell, ed.* 1727.

Britton, Was a famous lawyer that lived in the days of King *Edward* the Firſt, at whoſe command and by whoſe authority he wrote a learned book of the law of this realm. The tenor runneth in the King's name as if it had been penned by himſelf, anſwerable to the inſtitutions which *Juſtinian* aſſumed to himſelf, though compoſed by others. *Standf. Prær. fol.* 6 *&* 21. Sir *Edw. Coke* ſaith, that this *Britton* wrote his book in the fiftieth year of *Edward* the Firſt. *Lib.* 4. *fol.* 126. *a. & lib.* 6. *f.* 67. *a.* Mr. *Guin*, in his preface to his Reading, mentioneth, that this *John Britton* was biſhop of *Hereford.*

Broad arrow. Penalty on perſons, other than the ſurveyor marking pine-trees in the colonies of *New-Hampſhire, &c.* 9 *Ann. c.* 17. And on ſuch as have naval ſtores in their cuſtody ſo marked, 9 *Geo.* 1. *c.* 8. *ſect.* 3.

Broad pieces, Counterfeiting them made high treaſon, 6 *Geo.* 2. *c.* 26.

Brocage, Is commonly taken for the wages, hire, or trade of a *broker*. In 12 *Ric.* 2. *cap.* 2. it is taken for the means uſed by a ſpokeſman. *An.* 1 *Jac. cap.* 21. it is written *brokerage*. See alſo 11 *H.* 4. *n.* 28 not printed.

Brocella.——*Dedi unam* brocellam *vocatam* Rehag. Reg. de Thurgaton. MS. Dr. *Thoroton* interprets it a wood. I have not elſewhere met with the word, nor know I whence to derive it. (So *Blount.*) The word did properly ſignify a thicket or covert of buſhes, and bruſh-wood; from the obſolete Lat. *bruſcia, bruſca, terra bruſcoſa, brocia*; French *broce, brocelle.* Hence our *brouce*, or *brouſe* of wood, and *brouſing* of cattle.

Brocha, (from the Fr. *broche*) An awl or large packing needle, carried as a neceſſary implement to mend ſacks, ſaddles, and other horſe-geer; from the French *broche*, a ſpit, which in ſome parts of *England* is called a *broche*; whence to broach or pierce a barrel. Lat. *brocha, brochia*, Gall. *broches*, armour. *Broccen* were ſharp wooden ſtakes, which, as uſed upon the ſea-banks in *Romney-Marſh*, are called needles. It is true, the learned *Spelman* did conjecture the word *brochia*, or *brocha*, to be a ſort of can or pitcher to hold liquid things, as *ſaccus* to carry dry things; as it is rendered in the following word *brochia :* but it ſeems much rather to ſignify, as I have before explained it, an awl, or a needle. It was certainly an iron inſtrument, as in this authority,——— Henricus de Havering *tenet manerium de* Morton, com. Eſſex, *per ſerjantiam inveniendi unum hominem, cum uno equo, pret. x s. & quatuor ferris equorum, & uno ſacco de corio, & una* brochia *ferrea.* Anno 13 Ed. 1. *Cowell, edit.* 1727.

Brochia, (from the French *broc, quod lagenam majorem aut cantharum ſignificat*) A great can or pitcher. *Bracton, lib.* 2. *tract.* 1. *c.* 6. hath theſe words, *Si quis teneat per ſervitium inveniendi domino regi, certis locis & temporibus, unum hominem & unum equum, & ſaccum cum* brochia, *pro aliqua neceſſitate vel utilitate exercitum ſuum contingente.* By which it ſeems that he intends *ſaccus* to carry dry, and *brochia* liquid things. See **Saccus** and **Brocha.**

Broders. This may take its derivation from the French *brodeur*, and that of *bordure, fimbria*, the edge or hem of a garment, which we yet call *border*, and that becauſe it is uſually diſtinguiſhed from the reſt by ſome coſtly work: he that worketh it is known amongſt us by the name of an *embroiderer.*

Brodehalpeny, in ſome copies *broad-half-peny*, and in others *bordhal-peny.* It ſignifies a ſmall toll by cuſtom paid to the lord of the town for ſetting up of tables, booths, or boards in fairs or markets: and thoſe that were freed by the King's charter of this cuſtom, had this word put in their letters patent; by reaſon whereof at this day the freedom itſelf, for brevity of ſpeech, is called *broad-halfpeny.* It ſeems to be derived from three Saxon words, *bret* or *bred*, that is a *board*, and *halve*, that is, in the behalf of, as we ſay in Latin (*cujus rei gratia*) and *penning*, a toll, which in all makes a toll in behalf of or for a *board. Cowell, ed.* 1727.

Broggars (from the Fr. *bragard*) A gay vain perſon who lives in luxury, and that from the old French word *braguerie, i. e.* braving or ſwaggering.

Brok, An old ſort of ſword or dagger,———*Jurati dicunt ſuper ſacramentum, quod* Johannes de Monemne *miles per* Robertum *armigerum ſuum, percuſſit* Adam Gilberd *capellanum de* Wilton, *in gutture, quodam gladio, qui dicitur* Brok, *per quod propinquior erat morti, &c.* Rot. Parl. 35. Ed. 6.

Broke, Commonly called Sir *Robert Broke*, was a great lawyer, and Lord Chief Juſtice in Queen *Mary*'s time. *Cromp.* Juſtice of the Peace, *fol.* 22. *b.* He made an abridgment of the whole law, from him intituled, *Broke's Abridgment.*

Brokers, (*Broccatores, broccarii & auxionarii*) Are thoſe that contrive, make and conclude bargains and contracts between merchants and tradeſmen in matters of money

money and merchandize, for which they have a fee or reward. Theſe are *Exchange brokers*; and by the ſtat. 10 *R.* 2. *c.* 1. they are called *broggers*; alſo *broggers of corn* is uſed in a proclamation of Queen *Elizabeth* for badgers. *Baker's Chron. fol.* 411. The original of the word is from a trader broken, and that from the Sax. *broc*, which ſignifies misfortune, which is often the true reaſon of a man's breaking; ſo that the *broker* came from one who was a broken trader by misfortune, and none but ſuch were formerly admitted to that employment; and they were to be freemen of the city of *London*, and allowed and approved by the lord mayor and aldermen for their ability and honeſty.

Stat. 6 *Ann. cap.* 16. *ſect.* 4. All perſons that ſhall act as brokers within *London* ſhall be admitted by the court of mayor and aldermen, under ſuch reſtrictions for their good behaviour as the court ſhall think fit; and ſhall upon their admiſſion pay to the chamberlain 40*s.* and ſhall alſo yearly pay 40*s.* upon the twenty-ninth of *September* for the uſe of the mayor and commonalty and citizens of the city of *London*.

Sect. 5. If any perſon ſhall take upon him to act as a broker, or employ any under him to act as ſuch within the ſaid city, not being admitted, every ſuch perſon ſhall forfeit to the mayor and commonalty, *&c.* for every offence 25*l.* to be recovered by action of debt, in the name of the chamberlain, in any of her Majeſty's courts of record.

Stat. 10 *Ann. cap.* 19. *ſect.* 121. Every perſon employed as a broker, ſolicitor, or otherwiſe, in behalf of any other perſon, to make any bargain or contract for the buying or ſelling of any tallies, orders, *&c.* or intereſt in any joint ſtock erected by act of parliament or letters patent, or bonds of any company thereby erected, who ſhall take any money or reward exceeding 2*s.* 9*d.* for every 100*l.* and ſo in proportion for his ſervice in ſoliciting or procuring ſuch contract or bargain, ſhall forfeit 20*l.* with coſts to ſuch perſon as will ſue for the ſame in any of her Majeſty's courts of record at *Weſtminſter*.

Stat. 6 *Geo.* 1. *cap.* 18. *ſect.* 18. All undertakings by public ſubſcriptions relating to fiſheries, and other affairs of trade, and acting as corporate bodies without charter, or under charters intended for other purpoſes, or under obſolete charters, and tending to the common grievance of his Majeſty's ſubjects in their trade, and all public ſubſcriptions, receipts, payments, transfers, and other things for proceeding in ſuch undertaking, and particularly the acting as a corporate body, by raiſing transferrable ſtocks, the transferring any ſhare in ſuch ſtocks without legal authority; and all acting under any charter formerly granted for particular purpoſes therein expreſſed, by perſons who ſhall uſe or endeavour to uſe the ſame charters for raiſing a capital ſtock, or for making transfers of ſuch ſtock, not intended by ſuch charter to be raiſed or transferred, and all acting under any obſolete charter, become void or voidable by nonuſer or abuſer, or for want of making lawful election, ſhall be deemed illegal and void.

Sect. 19. All ſuch unlawful undertakings and all proceedings therein ſhall be deemed public nuſances, and all offenders therein being convicted upon information or indictment in any of his Majeſty's courts of record at *Weſtminſter*, *Edinburgh*, or *Dublin*, ſhall be liable to ſuch puniſhments whereto perſons convicted for public nuſances are by any laws of this realm liable; and ſhall moreover incur ſuch farther pains, *&c.* as were provided by the ſtatute of proviſion and *præmunire*. 16 *Rich.* 2. *cap.* 5.

Sect. 20. If any merchant or trader ſhall ſuffer any particular damage by occaſion of any new undertaking, *&c.* by this act declared unlawful, he ſhall have his remedy by action on this ſtatute in any of his Majeſty's courts of record, and ſhall recover treble damages with coſts.

Sect. 21. If any broker, or perſon acting as a broker, for himſelf or in behalf of any others ſhall bargain, ſell, or buy, or contract for any ſhare or intereſt in any of the undertakings hereby declared unlawful, he ſhall not only be diſabled to act as a broker, but ſhall alſo forfeit 500*l.* one moiety to the King, the other to the informer with coſts.

Sect. 22. Nothing herein ſhall extend to any undertakings eſtabliſhed before *June* 24, 1718.

Sect. 23. This act ſhall not prejudice the two corporations for aſſurance of ſhips, *&c.*

Sect. 24. This act ſhall not hinder the *South Sea* Company from enjoying ſuch powers as belong to them, except as to inſurance upon ſhips and merchandize at ſea, or going to ſea.

Sect. 25. This act ſhall not reſtrain the carrying on of any home or foreign trade in partnerſhip, except only as to the inſuring of ſhips, and lending money on bottomry.

Sect. 27. Nothing in this act ſhall extend to any corporation formerly erected for the carrying on a trade, which they have publickly continued to exerciſe; or to ſubſcriptions for enlarging the capital ſtock of the *South Sea* Company.

Sect. 28. Nothing herein ſhall extend to hinder the *Eaſt-India* Company from enjoying all ſuch powers as belong to them.

Stat. 3 *Geo.* 2. *cap.* 31. *ſect.* 1. No perſon ſhall exerciſe the employment of a broker within the city of *Briſtol*, or within five miles thereof, in making bargains between merchant and merchant, or tradeſmen, or other perſons concerning their merchandizes to be bought and ſold, or concerning monies to be taken up by exchange, till he ſhall be firſt admitted by the mayor, aldermen, and common council of *Briſtol*, and ſuch reſtrictions for his good behaviour, and as to fees, and the number of brokers as the ſaid mayor, *&c.* ſhall think fit.

Sect. 2. Upon the admittance of any broker, ſuch perſon ſhall take his oath to the effect following, *viz.*

I A. B. *do ſincerely promiſe and ſwear, that I will truly and faithfully execute and perform the office and imployment of a broker between party and party in all things appertaining to the duty of the ſaid office and imployment, without fraud or colluſion, to the beſt of my ſkill and knowledge, and according to the tenor and purport of the act, intituled,* An act for the admiſſion and regulation of brokers within the city of *Briſtol*.

Sect. 3. Which oath the mayor and court of aldermen of *Briſtol* ſhall adminiſter; and every ſuch perſon at the time of his admittance ſhall with ſureties enter into obligation with the mayor, *&c.* of the penalty of 200*l.* with condition there under-written, to the effect following, *viz.*

THE condition of this obligation is ſuch, that whereas the above bounden A. B. *is ſworn and admitted a broker, purſuant to the ſtatute in that behalf lately made; now therefore if the ſaid* A. B. *do and ſhall well and truly uſe, and execute, and perform the imployment and office of a broker between party and party, without fraud, covin, or any corrupt or crafty devices, according to the purport, true intent and meaning of the ſaid ſtatute in that caſe lately made and provided, then this obligation to be void, or elſe to remain in full force and virtue.*

Sect. 4. Every perſon at the time of his admittance ſhall pay to the town clerk of *Briſtol* 10*s.* as the fee of admittance.

Sect. 5. The mayor and court of aldermen ſhall order the names of all ſuch brokers, and the places of their habitation, to be fixed on the *Tholſel* and in the *Council-houſe*, and other public places within the city.

Sect. 6. If any perſon ſhall act as broker, not being ſworn and admitted, he ſhall forfeit 100*l.* And if any perſon ſhall knowingly imploy any perſon as a broker, not being ſworn, *&c.* he ſhall forfeit 50*l.*

Sect. 7. Every ſworn broker ſhall keep a *broker's book*, in which he ſhall enter all contractsthat he ſhall make, within three days after making, with the parties names; and if ſuch broker ſhall omit to enter ſuch contract, *&c.* he ſhall forfeit 20*l.*

Sect. 8. Every ſuch broker ſhall carry about him a medal of ſilver, upon which ſhall be his Majeſty's arms

and

and on the reverſe the arms of the city of *Briſtol*, with the name of ſuch broker, which medal he ſhall produce, if required, at the concluding of every bargain by him made, to the parties concerned, on pain to forfeit 5 *l.*

Sect. 9. If any ſuch broker ſhall deal for himſelf in remittance of monies, or buy any goods to ſell again for his own benefit, or ſhall make profit in buying or ſelling any goods, *&c.* for the benefit of any other perſon, ſave in the way of a broker only, he ſhall forfeit for the firſt offence 20 *l.* for the ſecond offence 50 *l.* and for the third offence 100 *l.* and being convicted of ſuch third offence, ſhall be incapable to act as a broker within the city of *Briſtol*.

Sect. 10. All forfeitures given by this act ſhall be recovered by action of debt, *&c.* in any of his majeſty's courts of record; one moiety whereof ſhall be to the uſe of the poor of the corporation of *Briſtol*, and the other moiety to him who ſhall ſue for the ſame.

Sect. 11. This act ſhall be a publick act.

Stat. 7 *Geo.* 2. *cap.* 8 *ſect.* 1. All contracts, upon which any premium ſhall be given for liberty to put upon, deliver, accept, or refuſe any publick ſtock or ſecurities, and all wagers, puts, and refuſals relating to the preſent or future price of ſtock or ſecurities, ſhall be void; and all premiums upon ſuch contracts or wagers ſhall be reſtored to the perſon who ſhall pay the ſame, who ſhall be at liberty, within ſix months from the making ſuch contract, or laying ſuch wager, to ſue for the ſame, with double coſts; and it ſhall be ſufficient therein for the plaintiff to alledge, that the defendant is indebted to the plaintiff, or has received to the plaintiff's uſe, the money or premium ſo paid, whereby the plaintiff's action accrued according to the form of this ſtatute, without ſetting forth the ſpecial matter.

Sect. 2. Perſons, who by this act ſhall be liable to be ſued, ſhall alſo be obliged to anſwer upon oath ſuch bill as ſhall be preſented in equity, for diſcovering any ſuch contract or wager, and the premium given.

Sect. 3. Provided that the plaintiffs, relators, or informers in ſuch bill give ſecurity to anſwer coſts.

Sect. 4. Every perſon who ſhall make any ſuch contract, upon which any premium ſhall be given for liberty to put upon, deliver, accept, or refuſe any publick ſtock or ſecurities, or any contract in the nature of puts and refuſals, or ſhall lay any wager (except ſuch who ſhall *bona fide* ſue, and with effect proſecute, for the recovery of the premium paid by them; and except ſuch who ſhall voluntarily, before ſuit commenced, repay or tender ſuch premium as they ſhall have received; and alſo except ſuch as ſhall diſcover ſuch tranſactions in any court of equity) ſhall forfeit 500 *l.* And all perſons negotiating or writing ſuch contract ſhall likewiſe forfeit 500 *l.* which penalties may be recovered by action of debt or information in any of his majeſty's courts of record at *Weſtminſter*; one moiety to his majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 5. No money or other conſideration ſhall be voluntarily given or received for the compounding any difference for the not delivering or receiving any publick ſtock or ſecurities; but all ſuch contracts ſhall be ſpecially executed, and all perſons who ſhall voluntarily compound ſuch difference, ſhall forfeit 100 *l.* one moiety to his majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 6. No perſon who ſhall ſell ſtock to be delivered and paid for on a certain day, and which ſhall be refuſed or neglected to be paid for, ſhall be obliged to transfer the ſame; but it ſhall be lawful for ſuch perſons to ſell ſuch ſtock to any other, and to receive and recover from the perſon who firſt contracted for the ſame the damage which ſhall be ſuſtained.

Sect. 7. It ſhall be lawful for any perſon, who ſhall buy ſtock to be accepted and paid for on a future day, and which ſhall be refuſed or neglected to be transferred, to buy the like quantity of ſuch ſtock of any other perſon, at the current market price, and to recover and receive from the perſon who firſt contracted to deliver the ſame the damage ſuſtained.

Sect. 8. All contracts which ſhall be made for the buying or transferring of ſtock, whereof the perſon, on whoſe behalf the contract ſhall be made to transfer the ſame, ſhall not, at the time of making ſuch contract, be actually poſſeſſed in his own right, or in the name of truſtees, ſhall be void; and every perſon on whoſe behalf, and with whoſe conſent, any contract ſhall be made to ſell ſtock, whereof ſuch perſon ſhall not be actually poſſeſſed in his own name, or in the name of truſtees, ſhall forfeit 500 *l.* one moiety to his Majeſty, and the other moiety to them who ſhall ſue for the ſame; and every broker or agent who ſhall negotiate any ſuch contract, and ſhall know that the perſon, on whoſe behalf ſuch contract ſhall be made, is not poſſeſſed of ſtock, ſhall forfeit 100 *l.* one moiety to his Majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 9. Every perſon receiving brokerage in the buying or diſpoſing of ſtocks ſhall keep a *broker's-book*, in which he ſhall enter all contracts, with the names of the principal parties; and ſuch broker who ſhall not keep ſuch book, or ſhall wilfully omit to enter any ſuch contract, ſhall forfeit 50 *l.* one moiety to his Majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 10. Nothing in this act ſhall extend to any contracts for the purchaſe or ſale of ſtock, to be made with the privity of the Accountant General of the court of Chancery, in purſuance of any decree or order of the ſaid court.

Sect. 11. Nothing in this act ſhall hinder any perſon from lending money on ſtock, ſo as no premium be paid more than legal intereſt.

Sect. 12. This act ſhall continue three years.

Made perpetual, 10 Geo. 2. cap. 8.

See **Pawnbrokers, Cheats.**

Bromley College; Exempt from taxes, 30 *Geo.* 2. *c.* 3. *ſect.* 22

Broughton, In *Lancaſhire*, the making of cogware, *&c.* here, how encouraged. 7 *Jac.* 1. *c.* 16.

Broſſus, Bruiſed, or hurt with blows, wounds, or other caſualties.——*Mandatum eſt a Domino Rege, ne quis mactet* broſſas *beſtias in* Oxonia.———*Clauſ.* 12 *Edw.* 3. *p.* 3. *dorſ.* 2.

Brothel-houſes, King *Henry* 8. by proclamation 30 *March*, the thirty-ſeventh year of his reign, ſuppreſſed all the ſtews, or *Brothel-houſes*, which long had continued on the bank ſide in *Southwark*, for that they were prohibited by the law of God, and the laws of the land. 3 *Inſt. fol.* 205 and *parl.* 14 *R.* 2. *n.* 32.

Bruarium and **Bruyrium**,——*Sciant quod ego Thomas de Eſtleya miles dedi—totam terram meam de Marton, cum* Bruario *quod vocatur le* Chaleng. *Ex MS. penes* Will. Dugdale *Arm.* Heath, or the ground where heath grows. See **Bruyere.**

Bruckbote, Is compounded of two *German* words, *Bruck, pons*, a bridge; and *bote, compenſatio*, a reward: it ſignifies with us a tribute or duty towards the mending or re-edifying of bridges, whereof many are freed by the king's charter; and thereupon the word is uſed for the very liberty or exemption from this tribute. See **Pontage**, and **Brigbote.**

Brudatus, Bordered, embroidered. Ranulphus *Epiſcopus* Elienſis *contulit monachis quoddam veſtimentum croceum, cappam ſcilicet & caſulam cum dorſali imaginibus brudato, & duas tunicas.*——Albam *bonam* Brudatam *cum imaginibus*. Hiſt. Elien. apud Whartoni Angl. Sacr. p. 1 p. 604.

Bruella, Perhaps a little wood, or heathy ground.—*In Dominicis Boſcis Domini Epiſcopi, ſcil.* Bruellis *ex parte auſtrali Regii itineris*. Reg. priorat. de Wormley, fol. 24.

Bruere, So we call that which the *Latins* name *Crica*, and ſignifies heath: bruaria 2 *leucarum longitudine & latitudine*. Domeſday. *Hac autem appellatione forenſes vocant ſteriles campos licet Ericam non edant*. Spelman.

Brueria, Briars, thorns, bruſh, heath; *a* Sax. *Brær*, Briar. *A. D.* 1434. *Humphry* Duke of *Glouceſter* acknowledges the Foreſter of *Shotore* and *Stowode*,——*tantum de arboribus & Brueriis, quantum pro veſtura indiguerit*——*habebit*. Paroch. Antiquit. p. 600. Hence Lat. *brolium, broilum*,

money and merchandize, for which they have a fee or reward. Theſe are *Exchange brokers*; and by the ſtat. 10 *R.* 2. *c.* 1. they are called *broggers*; alſo *broggers of corn* is uſed in a proclamation of Queen *Elizabeth* for badgers. *Baker's Chron. fol.* 411. The original of the word is from a trader broken, and that from the Sax. *broc*, which ſignifies misfortune, which is often the true reaſon of a man's breaking; ſo that the *broker* came from one who was a broken trader by misfortune, and none but ſuch were formerly admitted to that employment; and they were to be freemen of the city of *London*, and allowed and approved by the lord mayor and aldermen for their ability and honeſty.

Stat. 6 *Ann. cap.* 16. *ſect.* 4. All perſons that ſhall act as brokers within *London* ſhall be admitted by the court of mayor and aldermen, under ſuch reſtrictions for their good behaviour as the court ſhall think fit; and ſhall upon their admiſſion pay to the chamberlain 40*s.* and ſhall alſo yearly pay 40*s.* upon the twenty-ninth of *September* for the uſe of the mayor and commonalty and citizens of the city of *London*.

Sect. 5. If any perſon ſhall take upon him to act as a broker, or employ any under him to act as ſuch within the ſaid city, not being admitted, every ſuch perſon ſhall forfeit to the mayor and commonalty, *&c.* for every offence 25*l.* to be recovered by action of debt, in the name of the chamberlain, in any of her Majeſty's courts of record.

Stat. 10 *Ann. cap.* 19. *ſect.* 121. Every perſon employed as a broker, ſolicitor, or otherwiſe, in behalf of any other perſon, to make any bargain or contract for the buying or ſelling of any tallies, orders, *&c.* or intereſt in any joint ſtock erected by act of parliament or letters patent, or bonds of any company thereby erected, who ſhall take any money or reward exceeding 2*s.* 9*d.* for every 100*l.* and ſo in proportion for his ſervice in ſoliciting or procuring ſuch contract or bargain, ſhall forfeit 20*l.* with coſts to ſuch perſon as will ſue for the ſame in any of her Majeſty's courts of record at *Weſtminſter*.

Stat. 6 *Geo.* 1. *cap.* 18. *ſect.* 18. All undertakings by public ſubſcriptions relating to fiſheries, and other affairs of trade, and acting as corporate bodies without charter, or under charters intended for other purpoſes, or under obſolete charters, and tending to the common grievance of his Majeſty's ſubjects in their trade, and all public ſubſcriptions, receipts, payments, transfers, and other things for proceeding in ſuch undertaking, and particularly the acting as a corporate body, by raiſing transferrable ſtocks, the transferring any ſhare in ſuch ſtocks without legal authority; and all acting under any charter formerly granted for particular purpoſes therein expreſſed, by perſons who ſhall uſe or endeavour to uſe the ſame charters for raiſing a capital ſtock, or for making transfers of ſuch ſtock, not intended by ſuch charter to be raiſed or transferred, and all acting under any obſolete charter, become void or voidable by nonuſer or abuſer, or for want of making lawful election, ſhall be deemed illegal and void.

Sect. 19. All ſuch unlawful undertakings and all proceedings therein ſhall be deemed public nuſances, and all offenders therein being convicted upon information or indictment in any of his Majeſty's courts of record at *Weſtminſter*, *Edinburgh*, or *Dublin*, ſhall be liable to ſuch puniſhments whereto perſons convicted for public nuſances are by any laws of this realm liable; and ſhall moreover incur ſuch farther pains, *&c.* as were provided by the ſtatute of proviſion and *præmunire*. 16 *Rich.* 2. *cap.* 5.

Sect. 20. If any merchant or trader ſhall ſuffer any particular damage by occaſion of any new undertaking, *&c.* by this act declared unlawful, he ſhall have his remedy by action on this ſtatute in any of his Majeſty's courts of record, and ſhall recover treble damages with coſts.

Sect. 21. If any broker, or perſon acting as a broker, for himſelf or in behalf of any others ſhall bargain, ſell, or buy, or contract for any ſhare or intereſt in any of the undertakings hereby declared unlawful, he ſhall not only be diſabled to act as a broker, but ſhall alſo forfeit 500*l.* one moiety to the King, the other to the informer with coſts.

Sect. 22. Nothing herein ſhall extend to any undertakings eſtabliſhed before *June* 24, 1718.

Sect. 23. This act ſhall not prejudice the two corporations for aſſurance of ſhips, *&c.*

Sect. 24. This act ſhall not hinder the *South Sea* Company from enjoying ſuch powers as belong to them, except as to inſurance upon ſhips and merchandize at ſea, or going to ſea.

Sect. 25. This act ſhall not reſtrain the carrying on of any home or foreign trade in partnerſhip, except only as to the inſuring of ſhips, and lending money on bottomry.

Sect. 27. Nothing in this act ſhall extend to any corporation formerly erected for the carrying on a trade, which they have publickly continued to exerciſe; or to ſubſcriptions for enlarging the capital ſtock of the *South Sea* Company.

Sect. 28. Nothing herein ſhall extend to hinder the *Eaſt-India* Company from enjoying all ſuch powers as belong to them.

Stat. 3 *Geo.* 2. *cap.* 31. *ſect.* 1. No perſon ſhall exerciſe the employment of a broker within the city of *Briſtol*, or within five miles thereof, in making bargains between merchant and merchant, or tradeſmen, or other perſons concerning their merchandizes to be bought and ſold, or concerning monies to be taken up by exchange, till he ſhall be firſt admitted by the mayor, aldermen, and common council of *Briſtol*, and ſuch reſtrictions for his good behaviour, and as to fees, and the number of brokers as the ſaid mayor, *&c.* ſhall think fit.

Sect. 2. Upon the admittance of any broker, ſuch perſon ſhall take his oath to the effect following, *viz.*

I A. B. *do ſincerely promiſe and ſwear, that I will truly and faithfully execute and perform the office and imployment of a broker between party and party in all things appertaining to the duty of the ſaid office and imployment, without fraud or colluſion, to the beſt of my ſkill and knowledge, and according to the tenor and purport of the act, intituled,* An act for the admiſſion and regulation of brokers within the city of *Briſtol.*

Sect. 3. Which oath the mayor and court of aldermen of *Briſtol* ſhall adminiſter; and every ſuch perſon at the time of his admittance ſhall with ſureties enter into obligation with the mayor, *&c.* of the penalty of 200*l.* with condition there under-written, to the effect following, *viz.*

THE condition of this obligation is ſuch, that whereas the above bounden A. B. *is ſworn and admitted a broker, purſuant to the ſtatute in that behalf lately made; now therefore if the ſaid* A. B. *do and ſhall well and truly uſe, and execute, and perform the imployment and office of a broker between party and party, without fraud, covin, or any corrupt or crafty devices, according to the purport, true intent and meaning of the ſaid ſtatute in that caſe lately made and provided, then this obligation to be void, or elſe to remain in full force and virtue.*

Sect. 4. Every perſon at the time of his admittance ſhall pay to the town clerk of *Briſtol* 10*s.* as the fee of admittance.

Sect. 5. The mayor and court of aldermen ſhall order the names of all ſuch brokers, and the places of their habitation, to be fixed on the *Tholſel* and in the *Council-houſe*, and other public places within the city.

Sect. 6. If any perſon ſhall act as broker, not being ſworn and admitted, he ſhall forfeit 100*l.* And if any perſon ſhall knowingly imploy any perſon as a broker, not being ſworn, *&c.* he ſhall forfeit 50*l.*

Sect. 7. Every ſworn broker ſhall keep a *broker's book*, in which he ſhall enter all contracts that he ſhall make, within three days after making, with the parties names; and if ſuch broker ſhall omit to enter ſuch contract, *&c.* he ſhall forfeit 20*l.*

Sect. 8. Every ſuch broker ſhall carry about him a medal of ſilver, upon which ſhall be his Majeſty's arms

and

and on the reverſe the arms of the city of *Briſtol*, with the name of ſuch broker, which medal he ſhall produce, if required, at the concluding of every bargain by him made, to the parties concerned, on pain to forfeit 5 *l.*

Sect. 9. If any ſuch broker ſhall deal for himſelf in remittance of monies, or buy any goods to ſell again for his own benefit, or ſhall make profit in buying or ſelling any goods, &c. for the benefit of any other perſon, ſave in the way of a broker only, he ſhall forfeit for the firſt offence 20 *l.* for the ſecond offence 50 *l.* and for the third offence 100 *l.* and being convicted of ſuch third offence, ſhall be incapable to act as a broker within the city of *Briſtol*.

Sect. 10. All forfeitures given by this act ſhall be recovered by action of debt, &c. in any of his majeſty's courts of record; one moiety whereof ſhall be to the uſe of the poor of the corporation of *Briſtol*, and the other moiety to him who ſhall ſue for the ſame.

Sect. 11. This act ſhall be a publick act.

Stat. 7 *Geo.* 2. *cap.* 8 *ſect.* 1. All contracts, upon which any premium ſhall be given for liberty to put upon, deliver, accept, or refuſe any publick ſtock or ſecurities, and all wagers, puts, and refuſals relating to the preſent or future price of ſtock or ſecurities, ſhall be void; and all premiums upon ſuch contracts or wagers ſhall be reſtored to the perſon who ſhall pay the ſame, who ſhall be at liberty, within ſix months from the making ſuch contract, or laying ſuch wager, to ſue for the ſame, with double coſts; and it ſhall be ſufficient therein for the plaintiff to alledge, that the defendant is indebted to the plaintiff, or has received to the plaintiff's uſe, the money or premium ſo paid, whereby the plaintiff's action accrued according to the form of this ſtatute, without ſetting forth the ſpecial matter.

Sect. 2. Perſons, who by this act ſhall be liable to be ſued, ſhall alſo be obliged to anſwer upon oath ſuch bill as ſhall be preſented in equity, for diſcovering any ſuch contract or wager, and the premium given.

Sect. 3. Provided that the plaintiffs, relators, or informers in ſuch bill give ſecurity to anſwer coſts.

Sect. 4. Every perſon who ſhall make any ſuch contract, upon which any premium ſhall be given for liberty to put upon, deliver, accept, or refuſe any publick ſtock or ſecurities, or any contract in the nature of puts and refuſals, or ſhall lay any wager (except ſuch who ſhall *bona fide* ſue, and with effect proſecute, for the recovery of the premium paid by them; and except ſuch who ſhall voluntarily, before ſuit commenced, repay or tender ſuch premium as they ſhall have received; and alſo except ſuch as ſhall diſcover ſuch tranſactions in any court of equity) ſhall forfeit 500 *l.* And all perſons negotiating or writing ſuch contract ſhall likewiſe forfeit 500 *l.* which penalties may be recovered by action of debt or information in any of his majeſty's courts of record at *Weſtminſter*; one moiety to his majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 5. No money or other conſideration ſhall be voluntarily given or received for the compounding any difference for the not delivering or receiving any publick ſtock or ſecurities; but all ſuch contracts ſhall be ſpecially executed, and all perſons who ſhall voluntarily compound ſuch difference, ſhall forfeit 100 *l.* one moiety to his majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 6. No perſon who ſhall ſell ſtock to be delivered and paid for on a certain day, and which ſhall be refuſed or neglected to be paid for, ſhall be obliged to transfer the ſame; but it ſhall be lawful for ſuch perſons to ſell ſuch ſtock to any other, and to receive and recover from the perſon who firſt contracted for the ſame the damage which ſhall be ſuſtained.

Sect. 7. It ſhall be lawful for any perſon, who ſhall buy ſtock to be accepted and paid for on a future day, and which ſhall be refuſed or neglected to be transferred, to buy the like quantity of ſuch ſtock of any other perſon, at the current market price, and to recover and receive from the perſon who firſt contracted to deliver the ſame the damage ſuſtained.

Sect. 8. All contracts which ſhall be made for the buying or transferring of ſtock, whereof the perſon, on whoſe behalf the contract ſhall be made to transfer the ſame, ſhall not, at the time of making ſuch contract, be actually poſſeſſed in his own right, or in the name of truſtees, ſhall be void; and every perſon on whoſe behalf, and with whoſe conſent, any contract ſhall be made to ſell ſtock, whereof ſuch perſon ſhall not be actually poſſeſſed in his own name, or in the name of truſtees, ſhall forfeit 500 *l.* one moiety to his Majeſty, and the other moiety to them who ſhall ſue for the ſame; and every broker or agent who ſhall negotiate any ſuch contract, and ſhall know that the perſon, on whoſe behalf ſuch contract ſhall be made, is not poſſeſſed of ſtock, ſhall forfeit 100 *l.* one moiety to his Majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 9. Every perſon receiving brokerage in the buying or diſpoſing of ſtocks ſhall keep a *broker's-book*, in which he ſhall enter all contracts, with the names of the principal parties; and ſuch broker who ſhall not keep ſuch book, or ſhall wilfully omit to enter any ſuch contract, ſhall forfeit 50 *l.* one moiety to his Majeſty, and the other moiety to them who ſhall ſue for the ſame.

Sect. 10. Nothing in this act ſhall extend to any contracts for the purchaſe or ſale of ſtock, to be made with the privity of the Accountant General of the court of Chancery, in purſuance of any decree or order of the ſaid court.

Sect. 11. Nothing in this act ſhall hinder any perſon from lending money on ſtock, ſo as no premium be paid more than legal intereſt.

Sect. 12. This act ſhall continue three years.

Made perpetual, 10 Geo. 2. cap. 8.

See **Pawnbrokers, Cheats.**

Bromley College; Exempt from taxes, 30 *Geo.* 2. *c.* 3. *ſect.* 22

Broughton, In *Lancaſhire*, the making of cogware, &c. here, how encouraged. 7 *Jac.* 1. *c.* 16.

Broſſus, Bruiſed, or hurt with blows, wounds, or other caſualties.——*Mandatum eſt a Domino Rege, ne quis mactet* broſſas *beſtias in* Oxonia.———*Clauſ.* 12 *Edw.* 3. *p.* 3. *dorſ.* 2.

Brothel-houſes, King *Henry* 8. by proclamation 30 *March*, the thirty-ſeventh year of his reign, ſuppreſſed all the ſtews, or *Brothel houſes*, which long had continued on the bank ſide in *Southwark*, for that they were prohibited by the law of God, and the laws of the land. 3 *Inſt. fol.* 205 and *parl.* 14 *R.* 2. *n.* 32.

Bruarium and **Bruyrium**,——*Sciant quod ego Thomas de Eſtleya miles dedi—totam terram meam de Marton, cum* Bruario *quod vocatur le* Chaleng. *Ex MS. penes* Will. Dugdale *Arm.* Heath, or the ground where heath grows. See **Bruyere.**

Bruckbote, Is compounded of two *German* words, *Bruck, pons*, a bridge; and *bote, compenſatio*, a reward: it ſignifies with us a tribute or duty towards the mending or re-edifying of bridges, whereof many are freed by the king's charter; and thereupon the word is uſed for the very liberty or exemption from this tribute. See **Pontage**, and **Brigbote.**

Brudatus, Bordered, embroidered. Ranulphus *Epiſcopus* Elienſis *contulit monachis quoddam veſtimentum croceum, cappam ſcilicet & caſulam cum dorſali imaginibus brudato. & duas tunicas.*——Albam *bonam* Brudatam *cum imaginibus.* Hiſt. Elien. apud Whartoni Angl. Sacr. p. 1 p. 604.

Bruella, Perhaps a little wood, or heathy ground.—*In Dominicis Boſcis Domini Epiſcopi, ſcil.* Bruellis *ex parte auſtrali Regii itineris.* Reg. priorat. de Wormley, fol. 24.

Bruere, So we call that which the *Latins* name *Crica*, and ſignifies heath: bruaria 2 *leucarum longitudine & latitudine.* Domeſday. *Hac autem appellatione forenſes vocant ſteriles campos licet Ericam non edant.* Spelman.

Brueria, Briars, thorns, bruſh, heath; *a* Sax. *Brær*, Briar. *A. D.* 1434. *Humphry* Duke of *Glouceſter* acknowledges the Foreſter of *Shotore* and *Stowode*,——*tantum de arboribus & Brueriis, quantum pro veſtura indiguerit*——*habebit.* Paroch. Antiquit. p. 600. Hence Lat. *brolium, broilum,*

broilum, brulum, brullium, a hunting chaſe or foreſt. *Bruillus, brogillus,* a wood, a grove. Fr. *breil, breuil, breuille,* a thicket or clump of trees in a park or foreſt. Hence the abbey of *Bruer* in the foreſt of *Wichwood, com. Oxon.* and *Bruel, Brehul,* or *Brill,* a hunting ſeat of our ancient kings in the foreſt of *Bernwode com. Buck.*

Brugiata. See **Drugs.**

Brunſwick, Hereditary Prince of, how naturalized, 4 *Geo.* 3. *c.* 4 & 5.

Bruilletus, A ſmall cops or thicket, a little wood. ——*Dedimus* Will. Briwer *licentiam claudendi duos* broilletos, *qui ſunt extra regardum foreſtæ noſtræ quorum unus eſt inter* Swinburn & Eſtorbrig. Cart. Ric. 1.

Bruneta, *i. e.* Died cloth. *Viginti tunicæ de bono* bruneto. It is ſometimes wrote *burneta,* viz. *Differentia inter* brunum *colorem &* burnetam; *brunus enim color poteſt fieri ex lana abſque tinctura,* viz. Ruſſetum: burnetum *vero requirit tincturam & artificium hominis quoad colorem.* Lyndewode.

Brunettum. See **Burneta.**

Brunt-Iſland, A duty of two pennies *Scots* upon ale there, 6 *Geo.* 1. *c.* 8. 20 *Geo.* 2. *c.* 20.

Bruſcia, i. e. *Burnetum. Charta noſtra confirmavimus centum acras tam de terra quam de* bruſcia *de manerio de Riveria.* Monaſt. tom. 1. pag. 773. Sometimes it ſignifies a wood.

Bruſdus, Brudatus *i. e.* Embroidered. *Caſulam unam per totum* brudatam. Monaſt. 1 tom. pag, 210. In ſome books it is *brullatus* and *bruſlatus, ſeptem capas* brullatas, Thorn. *Quinque capas ſericas auro* bruſlatas. *Monaſt.* 301.

Bruſhment (*Charta Foreſtæ, cap.* 14.) Bruſhwood. *Sciatis nos dediſſe licentiam quatenus totam terram ſuam quæ ſita eſt infra metas foreſtæ de Rotelard, & quantum ibi habent brullii poſſint excolere & convertere ad terram arabilem.* Monaſt. pag 952.

Bruſua and **Bruſula,** Browſe or Bruſhwood. *Man. Angl.* 1. *p. f.* 773.

Bruyere (Fr. *bruyere,* Lat. *bruyrium, erica, quaſi ericetum*) Heath and heath-ground. *Paſtura xi quarentenarum & dimid. longitudine & latitudine.* Bruaria 2 *leucarum longitudine & latitudine.* Domeſday, *tit.* Dorſet. Eccleſ. Creneburn. Ingelingham. *Hac autem appellatione forenſes vocant ſteriles camporum ſolitudines, licet ericam non edant.* Spelm.

Bucinus, A military weapon for a footman.——— Petrus de Chetwode *tenet—per ſerjantiam inveniendi unum hominem peditem, cum una lancea et uno* bucino *ferreo, per* 40 *dies.* Tenures, p. 74.

Buckinghamſhire, For repairing the roads there, ſee ſtat. 9 *Geo.* 2. *c.* 11. 23 *Geo.* 2. *c.* 9. Power given to the juſtices to raiſe money for paying the debts contracted for building the gaol, 10 *Geo.* 2. *c.* 10.

Bucklarium, A buckler.———*Et quod malefactores noctanter cum gladiis &* bucklariis, *ac aliis armis, &c.* Clauſ. 26 Ed. 1. m. 3. intus.

Buckrams, Imported, to what duties liable, 4 *W. & M. c.* 5. *ſ.* 2. 12 *Ann. ſt.* 2. *c.* 19.

Buckſtall.——*Et ſint quieti de chevagio, hound-peny,* buckſtall, *& triſtris, & de omnibus miſericordiis, &c.* Privileg. de Semplingham. By the ſtat. 19 *H.* 7. *ca.* 11. it ſeems to be a deer-hay, toil, or great net to catch deer with; which by the ſaid ſtatute is not to be kept by any man that hath not a park of his own, under pain of 40 *l.*

To be quit of *buckſtalls,* i. e. *Ubi homines convenire tenentur, ibidem convenire ad ſtableiam faciendum circa feras & ad eaſdem congregand. quietum eſſe de hoc ſervitio, quando dominus chaceaverit.* See 4 *Inſt. fol.* 306.

Buck-wheat (mentioned in the ſtat. 15 *Car.* 2. *c.* 5.) Is otherwiſe called *French wheat,* and well known. In *Eſſex* it is called *brank*; in *Worceſterſhire, crap.*

Budge, Lambs fur.

Budge of court. See **Bouche.**

Buff-hides, To what duties liable, 4 & 5 *W & M. c.* 5. *ſ.* 2. 9 *Ann. c.* 11. *ſ.* 1. See **Leather** and **Skins.**

Bugetum.——*A. D.* 1313. 3 *Kal. Jan. Epiſc.* Bath. Well. *Concedit annuam penſionem duarum marc. cum tertia parte unius panni de ſecta clericorum noſtrorum, & una furura de* bugeto, *pro ſupertunica, & alia pro capucio.* Regiſt. Joh. Drokensford. Epiſc. Bath. Well.

Buggery (from the Italian *bugarone,* a buggerer, this vice being ſaid to have been brought into *England* out of *Italy* by the *Lombards*) Is a deteſtable and abominable ſin, amongſt Chriſtians not to be named, committed by carnal knowledge, againſt the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beaſt, or by woman kind with brute beaſt. 3 *Inſt.* 58.

All unnatural carnal copulations, whether with man or beaſt, ſeem to come under the notion of buggery or ſodomy, which was felony by the ancient Common law, and puniſhed, according to ſome authors, with burning, according to others, with burying alive. But at this day, by force of the ſtatutes 25 *Hen.* 8. *c.* 6. and 5 *El. c.* 17. it is puniſhed in the ſame manner as other felonies which are excluded from the clergy. 1 *Hawk.* 6. 3 *Inſt.* 58. 12 *Co.* 36, 37.

The ſaid ſtatute of 25 *Hen.* 8. making it felony generally, there may be acceſſaries both before and after; but thoſe that are preſent, aiding, and abetting, are all principals. And although none of the principals are admitted to their clergy, yet acceſſaries before and after are not excluded from clergy. 1 *Hale H.* 670.

If the party buggered be within the age of diſcretion (which is generally reckoned the age of 14,) it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of diſcretion, it is felony in them both. 3 *Inſt.* 59.

In every indictment for this offence there muſt be the words *rem habuit Veneream et carnaliter cognovit*; and conſequently ſome kind of penetration, and alſo of emiſſion muſt be proved; but any the leaſt degree is ſufficient, and emiſſion is *prima facie* an evidence of penetration. 1 *Hawk.* 6. 12 *Co.* 36, 37. 3 *Inſt.* 58.

By the articles of the navy, (22 *Geo.* 2. *c.* 33.) if any perſon in the fleet ſhall commit the unnatural and deteſtable ſin of buggery or ſodomy, with man or beaſt; he ſhall be puniſhed with death by the ſentence of a court martial.

This crime is excepted out of the act of general pardon. 20 *Geo.* 2. *c.* 25. *ſ.* 17.

Buildings. If a houſe new *built* exceeds the ancient foundation, whereby that is the cauſe of hindering the lights or air of another houſe, action lies againſt the *builder. Hob.* 131. In *London* a man may place ladders or poles upon the ground, or againſt houſes adjoining for *building* his own; but he may not break ground. And *builders* of houſes ought to have licence from the mayor and aldermen, *&c.* for a *hourd* in the ſtreets, which are not to be incumbered. *Cit. lib.* 30, 146. In new *building* of *London* it was ordained, that the outſides of *buildings* be of brick or ſtone, and the houſes of principal ſtreets to be four ſtories high, having in the front balconies, *&c.* Stat. 19 *Car.* 2. *c.* 3. If any perſon *build* any new houſe in *London,* he muſt erect a party wall of brick or ſtone between houſe and houſe, of the thickneſs of two bricks in length in the ground ſtory, *&c.* or he ſhall forfeit 50 *l.* leviable by warrant of juſtices of peace; and party-pipes are to be fixed on the ſides of ſuch houſes, for conveying water falling from the tops thereof into the channels, *&c.* Stat. 6 *Ann. c.* 31. 11 *Geo.* 1. *c.* 28. See ſtat. 19 *Car.* 2. *c.* 3. 22 *Car.* 2. *c.* 11. 6 *Ann. c.* 31. 7 *Ann. c.* 17. 5 *Eliz. c.* 4. 35 *Eliz. c.* 6. 11 *Geo.* 1. *c.* 28. 33 *Geo.* 2. *c.* 30. 4 *Geo.* 3. *c.* 14. See **Fire.**

Bulga, Bulgia, A budget, portmanteau, or any other things for holding portable goods.——Bulgas *& manticas eorum efferri, & expilari juſſit.* Will. Malmeſbur. de Geſtis Pontif. lib. 1. See **Bouche of court.**

Bull (*Bulla,* Ital. *Bolla*) Was a gold ornament or jewel for children, hollow within, and made in faſhion of a heart, to hang about their necks; but now it is moſt uſually taken for a brief or mandate from the pope, or biſhop of *Rome,* from the lead or ſometimes golded ſeal affixed thereto, which *Matthew Paris, anno* 1237. thus deſcribes: *In* bulla *domini Papæ ſtat imago Pauli a dextris crucis in medio* bullæ *figurata, & Petri a ſiniſtris.* The word is often uſed in our ſtatutes, as 28 *Hen.* 8. *c.* 16. 1 & 2 *Ph. &*

Ph. & Mar. cap. 8. and 13 *Eliz. cap.* 2. *Non ſolum ſigillum ſignificat imprimens & impreſſum, ſed ipſas etiam literas* bullatas *& interdum ſchedulam ſeu* bullam. *Miſit quoq; archiepiſcopus* (Cantuariæ) *regi & concilio ſuo ſchedulam ſive* bullam, *in hunc modum continentem, &c.* Spelm. *William de Brinkle* recovered by verdict againſt *Otho*, parſon of the church of *Beſton*, 10 *l. pro ſuſtractione unius* bullæ Papalis *de ordinibus, alterius* bullæ *de ligitimatione, & tertiæ* bullæ *de veniam exorantibus pro animabus anteceſſorum ſuorum.* Trin. 4. Ed. 3. Rot. 100. Bulla *olim ſigillum ſignificans.* Gloſſ. in x ſcriptores. *Per hanc chartam* aurea bulla *munitam.* Charta 15 Johannis, n. 31. intus. *Polyd. virg. de invent. rer. lib.* 8. ſays, that this word ſeems to be derived from the Greek βαλη, *conſilium.* See **Rome.**

Bull and Boar, By the cuſtom of ſome places, a parſon may be obliged to keep a bull and a boar for the uſe of the pariſhioners, in conſideration of his having tithes of calves and pigs, *&c.* 1 *Rol. Abr.* 559. 4 *Mod.* 241.

Bullenger, The commons petition, that certain commiſſions iſſued to cities, for preparing boats and *bullengers,* may be repealed, the parliament not having conſented thereto. *Rot. Parl.* 2. *H.* 2. *nu.* 22. See **Balenger.**

Bullio. See **Bullitio.**

Bullion, Is derived from the French *billon,* the ore, or metal whereof gold is made; it ſignifieth with us gold or ſilver in maſs or billet. 9 *Ed.* 3. *ſtat.* 2. *cap.* 2. And ſometimes the king's *Exchange,* or place whither ſuch gold in the lump is brought to be tried, or exchanged. *An.* 27 *Ed.* 3. *ſtat.* 2. *cap.* 14. 4 *H.* 4. 10. See *Skene de verbor. ſignif. verb.* Bullion. *Gervaſe of Tilbury* ſays, (writing of the ſalt ſprings in *Worceſterſhire*) that of old they called a certain quantity of ſalt, *bullion.*

Bullitio ſalis, As much brine or *ſalt* as is made from one boiling. What the learned *Du Freſne* calls *bullio,* and makes to be *menſura ſalinaria,* is no other than *bullitio,* one *wealing* or boiling. So are the *bullones,* in *Mon. Angl. tom.* 2. 256.——*De quatuor ſummis ſalis continentibus quadraginta* bullones, *pro dimidia ſalina ſua*——*Rectius in libre conſuali apud* Nantwich.——*Octo putei ſalinarii reddebant regi & comiti ſingulis Veneris diebus ſexdecim* bullitiones.——The meaſure ſeems uncertain, according to the quantity of their pits, ciſterns, *&c.* The laſt ingenious editor of *Camden* thinks the *bullitio ſalis* might be the ſame with a *barrow,* or meaſure of twelve gallons.

Bulnels, in *Cumberland.* See **Blatum.**

Bultel, Is the refuſe of the meal after it is dreſſed by the baker; alſo the bag wherein it is dreſſed. We find the word mentioned in *aſſiſa panis & cerviſiæ, an.* 51 *Hen.* 3. Hence *bulted bread,* coarſe bread. This word may be derived from the German *beutel,* a ſieve, *beutelon,* to bolt or to ſift: Gall. *beluter* and *bluter,* which *Menagius* fancies to have affinity with the Lat. *volutare:* hence the Lat. *bolendigarius* and *bolengerius:* Fl. *bouden,* Fr. *boulenger,* a baker, or maker of bread. *Cowell, edit.* 1727.

Bunda. See **Bounds.**

Bundles, A ſort of records of the Chancery lying in the office of the *Rolls*; in which are contained the files of bills and anſwers, of *habeas cor. cum cauſa, certiorari's,* attachments, *ſcire facias's,* certificate of ſtatute ſtaple, extents and *liberates, ſuperſedeas's,* bails on ſpecial pardons, bills from the Exchequer of the names of ſheriffs, letters patent ſurrendered and deeds cancelled, inquiſitions, privy ſeals for grants, bills ſigned by the king, warrants of eſcheators, *&c. Jacob.*

Burcheta (from the Fr. *berche*) A kind of gun, mentioned in the *Foreſt records.*

Burcifer regis (*Pat.* 17 *H.* 8. *par.* 1. *m.* 1.) A purſe-bearer or keeper of the king's privy-purſe.

Burdare, *i. e.* to jeſt or triſle: it is mentioned in *Knighton, viz. In tantum erat affabilis regi, quod* burdando *petebat a rege nundinas ſibi concedi pro leporariis & canibus, &c.* So *in Mat. Pariſ. Addit. pag.* 149. *quod nulli veniant ad turniandum, vel* burdandum, *nec ad alias quaſcumque aventuras, &c.*

Burells. King *Henry* the Third granted to the citizens of *London,* that they ſhould not be vexed for the *burels,* or cloth liſted according to the conſtitution made for breadth of cloth, in the ninth year of his reign. See *Stowe's Survey of London, fol.* 297.

Burg, *burgus.* See **Burgh** and **Borough.**

Burgage (*Burgagium,* Fr. *Burgage*) Is a tenure proper to *boroughs,* whereby the inhabitants by ancient cuſtom hold their lands or tenements of the king, or other lord of the *borough,* at a certain yearly rent. It is a kind of *ſoccage* ſays *Swinburn, p.* 3. *ſect.* 3. *numb.* 6. *Ad militiam non pertinet, habetur ideo inter ignobiles tenuras.* Mentioned 37 *H.* 8. *cap.* 20. *Item non utimur facere fidelitatem vel ſervitium forinſecum dominis feodorum pro terris & tenementis noſtris, niſi tantummodo redditus noſtros de eiſdem terris exeuntes; quia tenemus terras & tenementa noſtra per* ſervitium burgagii, *ita quod non habemus* medium *inter nos & dominum regem.* MS. Codex de LL. ſtatutis & conſuetud. Burgi villæ Mountgomer. a temp. H. 2. *Burgage* was alſo anciently uſed for a dwelling-houſe in a *borough-town.—Sciant—quod ego Editha filia Johannis de Aula in ligea virginitate & poteſtate mea dedi——Deo & beatæ Mariæ & omnibus Sanctis & Eleemoſynariæ Leominſtr. pro ſalute animæ meæ——In liberam, puram & perpetuam Eleemoſynam totum illud* burgagium *cum ædificiis & pertin. ſuis quod jacet in villa Leominſtr.* Ex libro chartarum priorat. Leom.

Burgagium liberum, Was when the tenants had paid their yearly rent to the ſuperior lord, they were free from all other ſervices.

Burgbote (Compounded of *burg, caſtellum, & bote compenſatio*) ſignifies a tribute or contribution towards the building or repairing of caſtles, or walls of defence, or towards the building of a borough or city; from this divers had exemption by the ancient charters of the *Saxon* kings, whereupon it is uſually taken for the exemption or liberty itſelf. *Raſt. Expoſition of Words. Fleta* ſays, *Significat quietantiam reparationis murorum civitatis vel* burgi, *lib.* 1. *c.* 47.

Burg-Engliſh. See **Borough-Engliſh.**

Burgemote, Sax. *Curia vel conventus* burgi *vel civitatis*; the *borough-court.*——*Et habeatur in an. ter* burgeſmotus, *& ſchiremotus bis, niſi ſæpius ſit, & interſit epiſcopus & aldermannus, & doceant ibi Dei rectum & ſeculi.* I.L. Canuti MS. cap. 44.

Burgeſſes (*Burgarii & Burgenſes*) Are properly men of trade, or the inhabitants of a borough or walled town; yet we uſually apply this name to the magiſtrates of ſuch a town, as the bailiff and *burgeſſes* of *Leominſter.* But we do now uſually call thoſe *burgeſſes* who ſerve in parliament for any ſuch borough or corporation. *Filius vero* burgenſis *ætatem habere tunc intelligitur, cum diſerte ſciverit denarios numerare & pannos ulnare, & alia paterna negotia ſimiliter exercere.* Glanvile, lib. 7. cap. 9. In *Germany,* and other countries, they confound *burgeſs* and *citizen*; but we diſtinguiſh them as appears by the ſtatute 5 *R.* 2. *ca.* 4. where the claſſes of this commonwealth are thus enumerated: count, baron, banneret, chevaleer de countee, citizen de citee, burgeſs de burgh. See the ſtatute of *Merton, c.* 7. and *Coke on Litt. fol.* 80.

Burgh, Burh, Borough, Are derived from the Saxon *burgh, i. e. oppidum, caſtrum*; or rather from the Goth. *berg, rupes, ſaxum:* for in ancient times towns were built on hills, and afterwards removed into vales for the ſcarcity of water on hills.

Burghbrech or **Borgbrech** (Sax. *burhbrices, i. e. Fidejuſſionis fractio, vel plegii violatio.*) *Angli omnes decemvirali olim fidejuſſione pacem regiam ſtipulati ſunt; quod autem in hanc commiſſum eſt,* burghbrech *dicitur, ejuſque cognitio & vindicta, regiis chartis, plurimis credebantur, pro quorum dignitate, mulcta alias levior fuit, alias gravior.* Vid. LL. Canuti, cap. 55. Burghbrich, *i. e. læſio libertatis aut ſepti.* Gallice, *bleſmure de Courte ou de Cloſe.* Polychr. lib. 1. cap. 50.

Burgheriſh——*Iſtæ conſuetudines pertinent ad* Taunton, burgeriſth, *Latrones, pacis infractio, hamfare, denarii de hun. & denarii S.* Petri. MS. Camdeni, penes Will Dugdale armig. *Quære.* The word occurs in *Domeſday* book, *ſub tit.* Somerſet. *Epiſ.* Winton. Tanton. *Iſtæ conſuetudines, &c.* So a charter of *Edmund* King, *anno* 944. in *Will. Malmeſbury,* lib. 2. de geſtis rerum Angl. ——*Concedo eccleſiæ S.* Mariæ——*Jura, conſuetudines & forisfacturas,*

forisfacturas,—i. e. Burgheriſth & hundred. Sethna, *&c.* Mr. *Somner* thinks it ſhould be *Burghbrich.*

Burghware (*quaſi burgi vir*) A citizen or burgeſs. *Willielmus Rex ſalutat Willielmum epiſcopum & Goffredum portgrefium & omnem* Burghware *infra London.* Charta Willielmi ſen. Londinenſibus confecta.

Burglary (*Burglaria,* from the Sax. *burgh, domus,* or *arx,* and *larcin,* furtum) Is a felony at common law, in breaking and entering the manſion houſe of another in the night, with intent to commit ſome felony within the ſame, whether the felonious intent be executed or not. *Hale's P. C.* 79.

Every entrance into the houſe by a treſpaſſer is not a breaking in this caſe, but there muſt be an actual breaking. As if the door of a manſion houſe ſtand open, and the thief enter, this is no breaking. So it is if the window of the houſe be open, and a thief with a hook or other engine draweth out ſome of the goods of the owner, this is no burglary, becauſe there is no actual breaking of the houſe. But if the thief breaketh the glaſs of the window, and with a hook or other engine draweth out ſome of the goods of the owner, this is burglary, for there was an actual breaking of the houſe. 3 *Inſt.* 64. Theſe acts amount to an actual breaking, *viz.* opening the caſement, or breaking the glaſs window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *Hal. H.* 552.

One of the *ſervants* in the houſe opened his lady's chamber door, which was faſtened with a braſs bolt, with deſign to commit a rape; and it was ruled to be burglary, and the defendant was convicted and tranſported. *Stran.* 481.

It is deemed an entry, when the thief breaketh the houſe, and his body, or any part thereof, as his foot, or his arm, is within any part of the houſe; or when he putteth a gun into a window which he hath broken, or into a hole of the houſe which he hath made, of intent to murder or kill; this is an entry and breaking of the houſe; but if he doth barely break the houſe, without any ſuch entry at all, this is no burglary. 3 *Inſt.* 64.

If divers come in the night to do a burglary, and one of them break and enter, the reſt of them ſtanding to watch at a diſtance, this is burglary in all. 3 *Inſt.* 64.

All out-buildings, as barns, ſtables, dairy-houſes, adjoining to a houſe, are looked upon as part thereof; and conſequently burglary may be committed in them: but if they be removed at any diſtance from the houſe, it ſeems that it hath not been uſual of late to proceed againſt offences therein as burglaries. 1 *Hawk.* 104.

The manſion-houſe doth not only include the dwelling-houſe, but alſo the out-houſes that are parcel thereof, as barn, ſtable, cow-houſe, dairy-houſe, if they are parcel of the meſſuage, though they are not under the ſame roof, or joining contiguous to it; and ſo, he ſays, it was agreed by all the judges: but if they be not parcel of the meſſuage, as if a man take a leaſe of a dwelling-houſe from one, and of a barn from another; or if it be far remote from the dwelling-houſe, and not ſo near to it as to be reaſonably eſteemed parcel thereof, as if it ſtand a bow ſhot off from the houſe, and not within or near the curtilage of the chief houſe, then the breaking of it is not burglary, for it is not a manſion-houſe, nor any part thereof. 1 *H. H.* 558, 559.

To break and enter a *ſhop,* not parcel of the manſion-houſe, in which the ſhop-keeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny; but if he, or his ſervant, uſually or often lodge in the ſhop at night, it is then a manſion-houſe, in which a burglary may be committed. 1 *H. H.* 557, 558.

It is not neceſſary to make it burglary, that any perſon be actually in the houſe at the very time of the offence committed. 1 *Haw.* 103.

As long as the day continues, whereby a man's countenance may be diſcerned, it is called day; and when darkneſs comes, and the day-light is paſt, ſo as by the light of day you cannot diſcover the countenance of a man, then it is called night. 3 *Inſt.* 63. And this doth aggravate the offence; ſince the night is the time wherein man is at reſt, and wherein beaſts run about ſeeking their prey. Hence in ancient records, the twilight was ſignified, when it was ſaid, *inter canem & lupum* (between the dog and the wolfe); for when the night begins, the dog ſleeps, and the wolf ſeeketh his prey. 3 *Inſt.* 63.

There can be no burglary but where the indictment both expreſly alledges, and the verdict alſo finds, an intention to commit ſome felony: for if it appear, that the offender meant only to commit a treſpaſs, as to beat the party or the like, he is not guilty of burglary. 1 *Haw.* 105. However, it ſeems the much better opinion, that the intention to commit a rape, or other ſuch crime, which is made felony by ſtatute, and was a treſpaſs only at Common law, will make a man guilty of burglary as much as if ſuch offence were a felony at common law; becauſe where a ſtatute makes any offence felony, it incidentally gives it all the properties of a felony at common law. 1 *Hawk.* 105.

Stat. 24 *Hen.* 8. *c.* 5. If any perſon be indicted or appealed for the death of any evil-diſpoſed perſons, attempting to murder, rob, or burglarily to break manſion-houſes, the perſon ſo indicted or appealed, and by verdict ſo found, ſhall not forfeit any lands or goods, but ſhall thereof be acquitted, in like manner as if they were acquitted of the death of the ſaid evil-diſpoſed perſons.

Stat. 18 *El. c.* 7. *ſect.* 1. If any perſon ſhall commit any felonious rape, raviſhment, or burglary, and be found guilty by verdict, or ſhall be out-lawed, or ſhall confeſs ſuch rape or burglary, every perſon ſo found guilty, *&c.* ſhall ſuffer death, and forfeit as in caſes of felony, without benefit of clergy.

Stat. 10 & 11 *W.* 3. *c.* 23. *ſect.* 2. Every perſon who ſhall apprehend any one guilty of burglary, and proſecute him to conviction, ſhall have a certificate, without fee, under the hand of the judge, certifying ſuch conviction, and within what pariſh or place the burglary was committed, and alſo that ſuch burglar was diſcovered and taken, or diſcovered or taken, by the perſon ſo diſcovering or apprehending; and if any diſpute ariſe between ſeveral perſons ſo diſcovering or apprehending, the judge ſhall appoint the certificate into ſo many ſhares to be divided among the perſons concerned, as to him ſhall ſeem juſt and reaſonable; which certificate may be once aſſigned over; and the original proprietor, or the aſſignee of the ſame, ſhall by virtue thereof be diſcharged from all manner of pariſh and ward offices within the pariſh or ward where the felony was committed; which ſaid certificate ſhall be inrolled by the clerk of the peace of the county in which the ſame ſhall be granted, for which he ſhall have 1 *s.* and no more.

Sect. 3. And if any perſon ſhall happen to be ſlain by ſuch burglar, in endeavouring to apprehend him, the executors or adminiſtrators of ſuch perſon ſlain ſhall have the like certificate.

Stat. 5 *Ann. c.* 31. *ſect.* 1. Every perſon who ſhall apprehend any perſon guilty of burglary, and proſecute him to conviction, ſhall have and receive, over and above the rewards given by 10 & 11 *W.* 3. *cap.* 23. the ſum of 40 *l.* within one month after ſuch conviction, to be paid by the ſheriff or ſheriffs of the county where ſuch felony or burglary ſhall be made and done, without any fee for the ſame, to the perſon or perſons ſo taking, apprehending, and proſecuting the ſaid offenders, he and they tendering a certificate to the ſaid ſheriff or ſheriffs, under the hand or hands of the judges or juſtices before whom ſuch felon ſhall be convicted, certifying the conviction of ſuch felon, and in what pariſh the burglary was committed, and alſo that the burglar was taken by the perſon claiming the reward; and if any diſpute ſhall happen to ariſe between the perſons claiming, the judge ſhall by the ſaid certificate appoint the ſame to be paid amongſt the parties claiming the ſame, in ſuch ſhare and proportion as to him ſhall ſeem juſt and reaſonable.

Sect. 2. And if any watchman or any other perſon be killed in endeavouring to apprehend any ſuch burglar, his executors or adminiſtrators, upon certificate delivered under the hand and ſeal of the judge, or of the two next juſtices of the peace, of ſuch perſon being ſo killed; which

certificate they ſhall, on ſufficient proof before them made, give without fee; ſhall receive the ſum of 40*l.* from the ſheriff or ſheriffs of the county where the ſaid fact was committed.

Sect. 3. And the ſheriff upon producing the certificates and receipts for the ſaid rewards, may deduct the ſame on his accounts; and if he had not money in his hands he ſhall be repaid out of the treaſury, on certificate from the clerk of the pipe.

Sect. 4. And moreover if any perſon, being out of priſon, ſhall commit any burglary, and afterwards diſcover two or more the like offenders, ſo as two or more be convicted; he ſhall have the like reward and allowance of 40*l.* and alſo all other advantages which are given to perſons who ſhall apprehend and convict any the like offenders: and ſhall alſo have the King's pardon for all burglaries, robberies, and felonies (except murder and treaſon) by him committed before ſuch diſcovery made; which pardon ſhall be likewiſe a good bar to an appeal.

Stat. 12 *Ann. ſt.* 1. *c.* 7. If any perſon ſhall enter into the manſion-houſe of another, by day or by night, without breaking the ſame, with an intent to commit felony, or being in ſuch houſe ſhall commit any felony, and ſhall in the night-time break the ſaid houſe to get out, he ſhall be guilty of burglary and ouſted of the benefit of clergy, in the ſame manner as if he had broken and entered the houſe in the night-time with intent to commit felony.

Joſhua Cornwall was indicted with another perſon for burglary. And upon the evidence it appeared, that he was a ſervant in the houſe where the robbery was committed, and in the night-time opened the ſtreet door, and let in the other priſoner, and ſhewed him the ſide-board, from whence the other priſoner took the plate; then the defendant opened the door and let him out; but the defendant did not go out with him, but went to bed. Upon the trial it was doubted, whether that was burglary in the ſervant, he not *going out* with the other. But afterwards, at a meeting of all the judges at *Serjeants-Inn*, they were all of opinion, that it was burglary in both, and not to be diſtinguiſhed from the caſe where one watches at the ſtreet end, whilſt another goes in and commits the burglary, which hath been often ruled to be burglary in both; and upon report of this opinion, the defendant was executed. *Stra.* 881.

Stat. 3 *Geo.* 1. *cap.* 15. *ſect.* 4. No ſheriff ſhall be obliged to bring or charge in his accounts any ſum or ſums of money paid for the rewards for convicting burglars, but ſhall and may immediately apply for the ſame to the commiſſioners of the treaſury, who ſhall forthwith repay the ſame without fee.

Stat. 6. *Geo.* 1. *c.* 23. *ſect.* 10. The reward of 40*l.* for the apprehending and convicting any perſon or perſons for burglary ſhall be paid without any deduction for every offender who ſhall be apprehended for the ſaid crime.

Stat. 25 *Geo.* 2. *cap.* 36. *ſect.* 11. The charges of proſecuting and convicting a burglar ſhall be paid by the treaſurer of the county where the burglary was committed, on producing to him the order of the court for that purpoſe, which the clerk of aſſize, or of the peace ſhall make out for the fee of 1*s.*

Indictment for burglary.

THE jurors of our lord the King upon their oaths preſent that ——— *late of* ——— *in the county of* ——— *on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *at the hour of* ——— *in the night of the ſame day, with force and arms, at* ——— *in the county of* ——— *the dwelling-houſe of* ——— *felonioufly and burglarioufly did break and enter, with intent him the ſaid* ——— *of his ſaid goods in the ſame dwelling-houſe then being, felonioufly and burglarioufly to ſpoil and rob, and the ſame goods felonioufly and burglarioufly to ſteal, take, and carry away, againſt the peace of our ſaid lord the King, his crown and dignity.*

Buri, Huſbandmen. It is mentioned in the *Monaſt.* 3 *tom. p.* 183. viz. *In Upton ſunt* 18 *villani*, 11 *bordarii*, *& duo* buri *& preſbyteri.*

Burials. Forfeiture for a popiſh burial, 3 *Jac.* 1. *c.* 5. *ſect.* 15.——Sites of churches to be demoliſhed to be incloſed for burial places, 22 *Car.* 2. *c.* 11. *ſect.* 66 —— Miniſter to keep regiſter at pariſh charge, 30 *Car.* 2. *ſt.* 1. *c.* 3. *ſect.* 7.—Proviſions for burying in woollen, 18 *Car.* 2. *c.* 4. 30 *Car.* 2. *ſt.* 1. *c.* 3.—No burials to be in new churches. See **Regiſter.**

Burlimen. See **Sucking.**

Burneta, Cloth made of dyed wool. A *burnet* colour muſt be dyed; but *brunus color* may be made with wool without dying, which we call medleys or ruſſets. *Differentia inter* brnnum *colorem et* burnetam: brunus *enim color poteſt fieri ex luna abſque tinctura*, viz. *ruſſetum*: burnetum *vero requirit tincturam et artificium hominis quoad colorem.* Lyndewood. Jacob.

Burning. Maliciouſly and voluntarily burning the houſe of another by night or by day is felony at the Common law. 1 *Hawk.* 105. 3 *Inſt.* 66. By the commiſſion of the peace, any juſtice may cauſe to come before him all thoſe, who to any of the people, concerning the firing of their houſes, have uſed threats, to find ſufficient ſecurity for the peace, or their good behaviour towards the King and his people; and if they ſhall refuſe to find ſuch ſecurity, may cauſe them to be ſafely kept in the King's priſon, until they ſhall find ſuch ſecurity.

The burning muſt be *maliciouſly* and *voluntarily*; for if it be done by miſchance, or negligence, it is no felony. 3 *Inſt.* 67. Yet if a man maliciouſly intending only to burn one perſon's houſe, happens thereby to burn the houſe of another, it is certain that he may be indicted as having maliciouſly burned the houſe of that other; for where a felonious deſign againſt one man miſſeth its aim, and takes effect upon another, it ſhall have the like conſtruction as if it had been levelled againſt him who ſuffers by it. 1 *Haw.* 106.

Neither a bare intention to burn a houſe, nor even an actual attempt to do it, by putting fire to a part of a houſe will amount to felony, if no part of it be burned; but if any part of the houſe be burnt, the offender is guilty of felony, notwithſtanding the fire afterwards be put out, or go out of itſelf. 1 *Haw.* 106.

Not only a manſion-houſe, and the principal parts thereof, but alſo any other houſe and the out-buildings, as barns and ſtables adjoining thereto; and alſo barns full of corn, whether they be adjoining to any houſe or not, are ſo far ſecured by law that the malicious burning of them is felony at Common law. 1 *Haw.* 105.

A perſon ſeiſed in fee, or but poſſeſſed for years of a houſe ſtanding by itſelf at a diſtance from all others, cannot commit felony in burning the ſame. Alſo it ſeems the much ſtronger opinion, that a man ſo ſeiſed or poſſeſſed of a houſe in a town, that burns his own with an intent to burn his neighbour's, but in the event burns his own only, is not guilty of felony: but however it is certainly an offence highly puniſhable in regard of the malice thereof, and the great danger to the publick which attends it; and the offender may be ſeverely fined, and impriſoned during the King's pleaſure, and ſet on the pillory, and bound to his good behaviour during life. 1 *Haw.* 106.

By ſtat. 3 *Ed.* 1. *c.* 15. Such as be taken for houſe-burning felonioufly done, are not bailable by juſtices of the peace.

Stat. 37 *Hen.* 8. *cap.* 6. *ſect.* 4. If any perſon ſhall maliciouſly, willingly, and unlawfully burn or cauſe to be burnt any wain, or cart laden with coals, or with any goods or merchandize; or any heap of wood prepared, cut, or felled for making coals, billets, or talwood, he ſhall forfeit treble damages to the party grieved, to be recovered by action of treſpaſs; and alſo 10*l.* as a fine to the King.

Stat. 4 *& 5 P. & M. cap.* 4. Every perſon who ſhall maliciouſly command, hire, or counſel any perſon wilfully to burn any dwelling-houſe, or any part thereof, or any barn then having corn or grain in the ſame, ſhall not have the benefit of his clergy.

Stat. 43 *Eliz. c.* 13. Whoſoever ſhall wilfully and of malice burn, or cauſe to be burned, or aid, procure, or conſent to the burning of any barn, or ſtack of corn or grain, within any of the counties of *Cumberland*, *Northumberland*, *Weſtmorland*, and *Dureſme*, ſhall be guilty of felony without benefit of clergy. And juſtices of peace in ſeſſions may hear and determine the ſame.

Stat. 22 & 23 *Car.* 2. *ſect.* 2. Where in any part of this kingdom, any perſon or perſons ſhall in the night-time maliciouſly, unlawfully, and willingly burn, or cauſe to be burnt or deſtroyed, any ricks or ſtacks of corn, hay, or grain, barns or other houſes or buildings, or kilns, every ſuch offence ſhall be adjudged felony, and the offenders and every of them ſhall ſuffer as in caſe of felony

Sect. 3. Provided, that no attainder for any of the offences made felony by virtue of this act ſhall make or work any corruption of blood, loſs of dower, or diſinheritance of heirs.

Sect. 4. And if any perſon being found guilty (in order to avoid judgment of death, or execution thereupon) ſhall make his election to be tranſported, the court ſhall cauſe judgment to be entered, that he be tranſported to ſome of the plantations, in the ſaid judgment to be particularly mentioned and expreſſed, for the ſpace of ſeven years; and if he ſhall return before the expiration of the term, he ſhall ſuffer death as a felon, and as if no ſuch election to be tranſported had been made by him.

Sect. 6. And the judges of aſſize, or three juſtices of the peace, whereof one be of the *quorum*, may determine the ſaid offence: and the ſaid juſtices, on requeſt of the party injured, ſhall iſſue their warrant for apprehending all ſuch perſons as ſhall be ſuſpected thereof, and take their examination; and ſhall cauſe all others who to them ſhall ſeem likely to make diſcovery, to appear before them, and give information upon oath; yet ſo as no perſon to be examined ſhall be proceeded againſt for any offence concerning which he ſhall be examined as a witneſs, and ſhall upon his examination make a true diſcovery: and if ſuch witneſs, being duly ſummoned, ſhall refuſe to appear or be examined, they may commit him to the common gaol, till he ſubmit to be examined upon oath: and they ſhall iſſue warrants for ſummoning jurors.

Sect. 7. The proſecution muſt be in ſix months after the offence committed.

Stat. 4 & 5 *W.* 3. *cap.* 23. *ſect.* 11. No perſon ſhall on any mountains, hills, heaths, moors, foreſts, chaſes, or other waſtes, burn between *February* the ſecond and *June* the twenty-fourth, any grigling, heath, furze, goſs, or fern, on pain of being committed to the houſe of correction for any time not exceeding one month, nor leſs than twenty days, there to be whipt and kept to hard labour.

Stat. 6 *Ann. cap.* 31. If any ſervant through neglect or careleſneſs ſhall fire, or cauſe to be fired any dwelling-houſe or out-houſe or houſes, and be thereof convicted on the oath of one witneſs before two juſtices, he ſhall forfeit 100*l.* to the churchwardens of the pariſh where the fire ſhall happen, to be diſtributed by them to the ſufferers in ſuch proportions as to them ſhall ſeem juſt; and if he do not pay the ſame immediately on demand of the churchwardens, the ſaid juſtices ſhall commit him to ſome workhouſe or houſe of correction for eighteen months, there to be kept to hard labour.

Stat. 1 *Geo.* 1. *ſtat.* 2. *cap.* 48. If any perſon ſhall maliciouſly ſet on fire, or burn any wood, underwood, or coppice, he ſhall be guilty of felony, and be liable to all the penalties and forfeitures as other felons by law now are.

Stat. 6 *Geo.* 1 *cap.* 16. Owners of trees, hedges, *&c.* burnt, cut down, ſpoiled, *&c.* either by day or by night, ſhall have ſatisfaction from the inhabitants of the place, in the ſame manner as for dikes, *&c.* overthrown in the night is provided by 13 *Ed.* 1.

Stat. 9 *Geo.* 1. *c.* 22. See **Black Act.**

Stat. 28 *Geo.* 2. *cap.* 19. *ſect.* 3. If any perſon ſhall ſet fire to, burn, or deſtroy any goſs, furze, or fern in any foreſt or chaſe without conſent of the owner, or perſon chiefly intruſted with the cuſtody of ſuch foreſt or chaſe, or of ſome part thereof, or ſhall be aiding therein, and being brought before a juſtice ſhall be thereof convicted by confeſſion or oath of one witneſs, or on view of the juſtice, he ſhall forfeit not exceeding 5*l.* nor leſs than 40*s.* half to the informer, and half to the poor; and if not forthwith paid, to be levied by diſtreſs; and if no ſufficient diſtreſs can be found, the juſtice ſhall commit him to the common gaol for any time not exceeding three months, nor leſs than one month.

By ſtat. 20 *Geo.* 2. *c.* 52. All offences of ſetting fire to any houſe, barn, or out-houſe, or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood, are excepted out of the general pardon.

See title **Arſon.**

Burning in the hand. See **Clergy.**

Burpayt, Cables how made there, 21 *Hen.* 8. *c.* 12.

Burrochium, A *burrock*, or ſmall wear, where wheels are laid in a river for the taking of fiſh.

Burrowſtounnels, A duty of exciſe granted to the town of, 17 *Geo.* 2. *c.* 21.

Burſa, A purſe——*Reddendo inde ad* burſam *abbatis* xvi. *d. ad feſtum Sancti Michaelis, &c.* Ex lib. cart. priorat Leom.

Burſaria, The *burſery*, or exchequer of collegiate and conventual bodies, or place of receiving and paying and accounting by the *burſarii*, *burſars*. *A. D.* 1277. *Computaverunt patres* Radulphus de Meriton & Stephanus *de* Oxon. *de* burſaria *domus* Bernceſtre *coram auditoribus*. Paroch. Antiq. p. 288.

Burſarii. This word did not only ſignify the *burſars* of a convent or college, but formerly all exhibitioners, or ſtipendiary ſcholars at *Paris* were called *burſarii*, as they lived on the *burſe* or fund, *or* contribution of benefactors.——*In ea univerſitate* (*ſcil.* Oxon) *ſunt clara collegia a regibus, reginis, epiſcopis, & principibus fundata, & ex ſtipendiis eorum ſcholaſtici plurimi utuntur, quos* Pariſiis burſarios *vocamus*. Joh. Major, Geſt. Scot. lib. 1. cap. 5. So among the Ciſtertian monks, the *burſarii* were the novices or young ſcholars ſent to the univerſity, and there maintained by the religious out of their publick *burſe* or ſtock.

Burſe, (*burſa, cambium, baſilica*) An exchange or place of meeting of merchants. *Jacob.* This word is alſo uſed in *Domeſday* for *bury*. *Cowell, edit.* 1727.

Burſholders. See **Borough-holders.**

Bury. See **Berrie.**

Bury St. Edmund, For erecting workhouſes, and paving the ſtreets there, 21 *Geo.* 2. *c.* 1.

Buſca and **Buſcus**, (Fr. *buſche*) Underwood, billet, alſo bruſhwood. *Rex, dilectis & fidelibus ſuis Rad. de Sandewico & Johanni de Bland.—Quod rogorum artifices ipſos rogos, qui in civitate* (London) *& villis prædictis, ex* buſca, *vel carbone* boſci *fieri conſueverunt, jam dè novo, præter ſolitum, ex carbone mar.no concremant & componunt.* Pat. 35 Ed. 1. m. 4. dorſo. See **Buſta.**

Buſhel. See **Meaſures and Weights.**

Buſones Comitatus, For *barones: Juſticiarii vocatis ad ſe quatuor vel ſex, vel pluribus de majoribus comitatus, qui dicuntur* buſones *comitat. & ad quorum nutum dependent vota aliorum.* Bract. lib. 3. tract. 2. c. 2. num. 1. *Sed quære.*

Buſſa, *i. e.* A great ſhip.

Buſſellus, A buſhel; from *buza, butta, buttis*, a ſtanding meaſure of wine; *butticella, butticellus, buſſellus*, a leſs meaſure. From the old Gall. *bouts*, leathern veſſels for holding wine. Whence our leather *boots*, and *buſkins* and *budget*, and *bottles*. Sax. *bytta*, uſed for bottles in the *Saxon* goſpel, St. *Mat.* ix. 17. The bags of leather in which they lately carried water from the *Severn* to the city of *Worceſter*, were hence called *byttes*, and each load of water was termed a *bytte* of water. See Mr. *Kennet's Gloſſary in Buſſellus*.

Buſta, and **Buſtus**,——*Et unam carrectatam* buſtæ *ſingulis ſeptimanis in boſco prædicto.* Mon. Angl. 1 Par. f. 473. b. Firewood, properly the lopping of trees. *Et auxi Johan. Ate Gate priſt* bouche *& carboun a la mountance* xxviii *s.* iii *d. ſaunz paiement.* Pla. Parl. 14 Ed. 2. Elſewhere we find, *cum ſpinis & buſtis*, where it ſeems to ſignify trowſe or tynet for repair of hedges.

Butchers. A butcher that ſelleth ſwines fleſh meazled, or fleſh dead of the murrain, ſhall for the firſt time be

be grievouſly amerced, the ſecond time ſuffer judgment of the pillory, the third time be impriſoned, and make a fine, and the fourth time forſwear the town. *Ordinance for brokers, made during the reign of* Hen. 3. Ed. 1. *or* Ed. 2. *but uncertain when, or in which of their times.*

Stat. 4 *Hen.* 7. *c.* 3. No butcher ſhall ſlay any beaſt within any walled town, except *Carliſle* and *Berwick*, on pain of forfeiting for every ox 12 *d.* every cow and other beaſt 8*d.* half to the King and half to him that will ſue.

Butchers ſhall not kill calves between the firſt of *January* and the firſt of *May*, 21 *Hen.* 8. *c.* 8.——Prohibited to keep tan-houſes, 22 *Hen.* 8. *c.* 6.—Butchers meat to be ſold by the pound, and the prices limited, 24 *Hen.* 8. *c.* 3. 25 *Hen.* 8. *c.* 1. 27 *Hen.* 8. *c.* 9. But by 33 *Hen.* 8. *c.* 11. it may be ſold by weight or otherwiſe.

Stat. 2 & 3 *Ed.* 6. *cap.* 15. If any butchers ſhall conſpire not to ſell their victuals but at certain prices, every ſuch perſon ſhall forfeit for the firſt offence 10 *l.* to the King, and if not paid in ſix days he ſhall ſuffer twenty days impriſonment, and ſhall only have bread and water for ſuſtenance; for the ſecond offence 20*l.* in like manner, or the pillory, and for the third offence 40*l.* or the pillory, and the loſs of an ear, and to be taken as a man infamous, and not to be credited in any matter of judgment. And the ſeſſions of leet may determine the ſame.

Stat. 1 *Jac.* 1. *cap.* 22. *ſect.* 2. No butcher ſhall water any hide, except in *June*, *July*, and *Auguſt*, on pain of 3*s.* 4*d.* for each offence. No butcher ſhall put to ſale any hide putrefied or rotten, on pain of 3*s.* 4*d.* for each offence in like manner. No butcher ſhall gaſh, ſlaughter, or cut any hide of any ox, bull, ſteer, or cow, in ſlaying thereof, or otherwiſe, whereby the ſame ſhall be impaired or hurt, upon pain of forfeiting 20*d.*

Sect. 46. Which penalties ſhall be divided into three equal parts, one third to the King, one third to the informer, and one third to the town or lord of the liberty.

Stat. 3 *Car. cap.* 1. If any butcher ſhall kill or ſell any victual on the Lord's day, he ſhall forfeit 6*s.* 8*d.* one third to the informer, and two thirds to the poor, on conviction before one juſtice, on his own view, or confeſſion, or oath of two witneſſes to be levied by the conſtable or churchwardens.

Stat. 25 *Car.* 2. *cap.* 8. No perſon uſing the trade of a butcher ſhall ſell, offer, or expoſe to ſale, by himſelf or any other, any fat oxen, ſteers, runts, kine, heifers, calves, ſheep, or lambs alive, on pain of forfeiting double value, half to the King and half to him that will ſue.

Stat. 5 *Ann. c.* 34. *ſect.* 2. Butchers within ten miles of *London* not to ſell fat cattle alive or dead to one another. But by 7 *Ann. c.* 6. they may ſell dead calves or ſheep.

Stat. 9 *Ann. cap.* 11. *ſect.* 11. If any raw hide ſhall wilfully or negligently be gaſhed in the flaying thereof, or being gaſhed be offered to ſale by any butcher or other perſon, the offender ſhall forfeit 2*s.* 6*d.* for ſuch hide, and 1*s.* for a calf ſkin; half to the poor, and half to the informer; to be levied by two juſtices.

Sect. 36. Any two juſtices near the place may, in three months after the offence committed, ſummon the party accuſed, and the witneſſes; and upon the party's appearance, or contempt in not appearing, on proof of notice given, may examine the witneſſes upon oath, and give judgment, and iſſue warrants under their hands to levy the penalty by diſtreſs; and if not redeemed in ſix days, the ſame to be ſold. They may alſo mitigate the penalties, ſo as they reduce them not leſs than a fourth part over and above the coſts and charges. And any perſon aggrieved may appeal to the next ſeſſions, who may finally determine the ſame; and in caſe of conviction, iſſue warrants for levying the penalties.

But or **Butt** (*Butticum*) As a *butt* of *malmſey*, containing at leaſt 126 gallons, *An.* 1 *R.* 3. *c.* 13. It ſignifies alſo the place where archers are wont with their bows and arrows to ſhoot at a mark, which we at this day call ſhooting at the *butts*. There is alſo a meaſure called a *ſalmon butt*, which contains 84 gallons. *Lib. Aſſiſ.* and *ſtat.* 2 *Hen.* 6. *cap.* 11.

Buteſcarles See **Buzcarles**. *Chronicon* Sax. *p.* 172.

Butlerage of Wines, Signifies that impoſition upon ſale *wine* brought into the land, which the King's butler by virtue of his office may take of every ſhip; that is, two ſhillings of every tun of *wine* imported by ſtrangers. *Rot. Parl.* 11 *H.* 4. *Ann.* 1 *H.* 8. *c.* 5. The ſtat. 12 *Car.* 2. *c.* 24. for taking away of *purveyance*, does not extend to prejudice the ancient duties of butlerage and priſage of wines, but they are to continue as before the making this act. See *Calthorp's Reports of Special Caſes*, *p.* 23. and 4 *Inſt. fol.* 30.

See **Priſage**.

Butlecarl, Buthſcarle, Buteſecarle, or **Boteſcarle**, The ſame with *boatſwain* or *mariner*. *Seld. Mar. clauſ.* 184.

Butter and Cheeſe. Stat. 9 *Hen.* 6. *cap.* 8. To the intent that poor people ſhall not be deceived in the weight of cheeſe, it is ordained that the weight of a wey of cheeſe may contain thirty-two cloves, that is to ſay, every clove ſeven pounds by the ſaid weight couching, [that is, bending downwards].

Stat. 3 & 4 *Ed.* 6. *cap.* 21. *ſect.* 1. No perſon ſhall buy to ſell again any butter or cheeſe, unleſs he ſell the ſame again by retail in open ſhop, fair, or market, and not in groſs, on pain of double value; half to the king, and half to him that will ſue.

Sect. 2. Provided that the word *retail*, mentioned in this act, ſhall not be expounded only where a weight of cheeſe, or a barrel of butter of leſs quantity, and not above, ſhall be ſold at any time to any perſon or perſons in open ſhop.

Sect. 3. This act not to extend to innholders or victuallers. Stat. 5 & 6 *Ed* 6. *cap.* 14. *ſect.* 3. whoſoever ſhall ingroſs or get into his hands any butter or cheeſe, to ſell the ſame again, ſhall be deemed an ingroſſer.

Sect. 7. But the buying of any butter or cheeſe by any licenſed badger, lader, kidder, or carrier, who ſhall ſell or deliver in open fair or market, ſhall not be deemed regrating.

Stat. 5 *Eliz. cap.* 12. *ſect.* 4. No badger, lader, kidder, carrier, buyer, or tranſporter of butter and cheeſe, ſhall be licenſed to thoſe offices, unleſs he be or have been a married man, and be an houſholder, and of the age of thirty years or upwards, and unleſs it be in open ſeſſions of the county, where he hath dwelt for three years laſt paſt; and the licence ſhall continue only for one year.

Sect. 5. And the licence ſhall bear date of the day and place of the ſeſſions, and to be ſigned and ſealed by three juſtices there, one whereof to be of the *quorum*, upon pain that every perſon taking any licence contrary hereto ſhall forfeit to the king five pounds, and the licence to be void.

Sect. 6. And the court may take recognizance, that he ſhall not foreſtall, nor ingroſs, nor do any thing contrary to the ſtatute 5 & 6 *Ed.* 6. *cap.* 14. againſt regrating, ingroſſing, or foreſtalling: the licence and recognizance to be written by the clerk of the peace or his deputy, and by no other perſon; for which he ſhall have for the licence one ſhilling, for the recognizance eightpence, and for regiſtering them four-pence: for which fee he ſhall alſo enter the names and dwelling-places of the perſons licenſed, and a brief declaration of the licence, with the day, time, and place when granted, in a regiſter-book, which he ſhall have at every ſeſſions.

Sect. 7. The moiety of the ſaid forfeitures ſhall be to the king, and the other moiety to him that will ſue for the ſame in any of the king's courts of record.

Sect. 8. Juſtices of peace in their ſeſſions ſhall inquire of and determine theſe offences by inquiſition, preſentment, bill, or information before them exhibited.

Sect. 9. But this ſhall not extend to prejudice the liberty of a city or town corporate, but that they may licenſe purveyors for the proviſion thereof.

Stat. 21 *Jac.* 1. *cap.* 22. *ſect.* 6. Nothing in the ſtatutes of the 3 & 4 *Ed.* 6. *cap.* 21. and 5 & 6 *Ed.* 6. *cap.* 14. ſhall extend to cheeſemongers or tallow-chandlers in *London* and *Weſtminſter*, for what they ſhall ſell for victualling of ſhips, or what they ſhall ſell in their ſhops or markets, not exceeding four weights of cheeſe, and four barrels of butter.

Sect. 7. Provided, that if the juſtices of the peace in any county in their quarter-ſeſſions ſhall declare, that the

ſaid

aid traders in butter and cheese shall forbear to buy any in such county for any time, and they do buy within that time, and sell the same by retail, they shall not have the benefit of this act.

Continued indefinitely by 3 *Car.* 1 *c.* 4. *and* 16 *Car.* 1. *c.* 4

Stat. 13 & 14 *Car.* 2. *cap.* 16. *sect.* 2. Every kilderkin of butter shall contain one hundred and twelve pounds, and every firkin fifty-six pounds neat, or above; every pound containing sixteen ounces, besides the tare of the cask, of good and merchantable butter; and every pot of butter shall contain fourteen pounds neat, or above, besides the weight of the pot; and no butter which is old or corrupt shall be mixed or packed up with any butter which is new and sound; nor any whey butter shall be packed or mixed with any butter made of cream; and every cask of butter shall be of one sort and goodness; and no butter shall be salted with any great salt, but shall be salted and saved with small salt; nor more salt shall be intermixed with it than shall be needful for its preservation: upon pain that every owner, farmer, or packer of butter, not putting up in each kilderkin, firkin, and pot, to be sold or exposed to sale, such quantities as aforesaid, or offending in false packing as aforesaid, for every offence shall forfeit the value of all the butter so false packed; and for every offence where any kilderkin, firkin, or pot shall be found to contain a lesser quantity of butter than as above, six times the value of every pound of butter that shall be wanting in such cask or pot.

Sect. 3. And every cheesemonger, or other person who shall sell any kilderkin, firkin, or pot, or other cask of butter, shall deliver therein the full quantity and due quality, or shall be liable to make satisfaction, according to the price thereof.

Sect. 4. And no cheesemonger or other person shall repack for sale any butter in any kilderkin, firkin, or other cask, or pot, on pain of forfeiting double value thereof.

Sect. 5. Every farmer and other person, packing up butter for sale, shall pack up his butter into good and sufficient casks made of sound, dry, and well-seasoned timber, and shall set up every firkin and cask whatsoever, when the same is thoroughly and fully seasoned in water, a continuing visible mark of the just weight of the empty cask, and do likewise set upon every kilderkin, firkin, and cask, when the same is filled with butter, the first letter of his or their Christian name, and his or their surname at length with an iron brand; on pain of forfeiting for every offence the sum of 10 *s.* for every hundred weight of butter otherwise packed, and for more or less proportionably.

Sect. 6. And every potter shall set on every pot which he shall make for packing up butter, the just weight of the pot when it is burnt, together with the first letter of his Christian name, and his surname at length, on pain of 1 *s.* and no person shall expose to sale any butter packed up in any pot not so marked, under pain of 2 *s.* for every such pot: the said offences to be inquired of, heard, and determined in the sessions of the peace for the county, city, borough, town, or liberty wherein such offence shall be committed, by action of debt, indictment, information or presentment; one half of such forfeitures shall be to the use of the poor of the place where such offence shall be committed, and the other half with double costs to him that will sue for the same.

Sect. 7. Every suit and information brought upon this act shall be commenced in four months after the sale of such butter.

Stat. 32 *Car.* 2. *cap.* 2. *sect.* 9. Butter or cheese shall be imported from *Ireland*.

Stat. 4 *W. & M. cap.* 7. *sect.* 2. No seller of butter shall be charged with any of the penalties in 13 & 14. *Car.* 2. *c.* 26. after the buyer hath bought the butter and approved of it.

Sect. 3. And for preventing any fraud in the seller, after the factor or buyer hath bought the butter, the said factor or buyer shall set his seal, or mark, or name upon it, or upon the cask; and if it shall be afterwards exchanged or opened, and the cask changed, or any bad butter mixed or packed up with good butter, or any other fraud be committed by the seller, and he be convicted thereof before one justice by oath of one witness, or confession, he shall forfeit twenty shillings for every firkin and offence, to be levied by the constable by distress, and to be distributed by the justice, half to the churchwardens and overseers for the use of the poor, and half to the informer.

Sect. 4. Every warehouse keeper, weigher, searcher, or shipper of butter and cheese, shall receive all butter and cheese that shall be brought to him for the *London* cheesemongers, and ship the same without undue preference; and shall have for his pains two shillings and six-pence for every load; and if he shall make default, he shall on conviction before one justice, on oath of one witness, or confession, forfeit for every firkin of butter ten shillings, and for every wey of cheese five shillings, to be levied by the constable by distress and sale.

Sect. 5. And he shall keep a book of entry of receiving and shipping the goods; on pain of two shillings and six-pence for every firkin of butter and wey of cheese, to be levied and applied in like manner; and for want of distress he shall be committed till paid.

Sect. 6. A master of a ship refusing to take in butter or cheese before he is fully laden, shall forfeit for every firkin of butter refused five shillings, and for every wey of cheese two shillings and six-pence, to be levied in like manner.

Sect. 7. One half of the said penalties to be paid to the churchwardens and overseers of the poor, and the other half to be distributed by the justice or justices before whom such offender shall be convicted.

Sect. 8. Cheesemongers may send their own proper vessels, or such other vessels as they shall hire and send from *London* for their own proper goods, and the warehouse-keeper where such vessels shall be sent, may ship the said goods on board, and the masters of such ships and their servants may receive the same.

Sect. 9. This act shall not extend to any warehouse in *Cheshire* or *Lancashire*.

Sect. 10. Provided that the person aggrieved by the determination of the justice may appeal to the next sessions, giving 20 *l.* with one or more sureties, to the party, to pay costs within a month after, if he is not relieved on his appeal.

Regulations for weighing and packing butter in *New Malton* in *Yorkshire*, 17 *Geo.* 2. *c.* 8.

Buttes, The ends or short pieces of land in arable ridges and furrows. See **Abbuttals**.

Buttons. Stat. 13 & 14 *Car.* 2. *cap.* 13. *sect.* 2. No person shall sell or offer to sale, or import any foreign bone-lace, cut-work, fringe, band-strings, buttons, or needle-work, made of thread or silk, beyond the seas; on pain that he who shall offer them to sale shall forfeit the same and 50 *l.* and the importer shall forfeit the same and 100 *l.* half to the king, and half to him that shall sue for the same.

Sect. 3. And upon complaint and information given to a justice of peace, at times reasonable, he shall issue his warrant to the constable to enter and search for such manufactures in shops being open, or warehouses, and dwelling-houses of such persons as shall be suspected, and to seize the same.

Sect. 4. All suits for any offences against this law shall be brought within twelve months after the discovery of such offence.

Repealed in part as to bone-lace by 5 Ann. cap. 17. sect. 1.

Stat. 4 & 5 *W. & M. cap.* 10. *sect.* 2. No foreign buttons made of hair, or other foreign buttons, shall be imported, sold, or exchanged, upon pain to forfeit the buttons, and under such further penalties as are expressed in stat. 13 & 14 *Car.* 2. *cap.* 13.

Sect. 3. The justices of peace shall have the same power to issue their warrants to seize all foreign buttons, as by the said act is given them to seize foreign buttons made of thread and silk.

Stat. 10 *W.* 3. *cap.* 2. No person in *England*, *Wales*, or *Berwick* shall make, sell, or set on any clothes any buttons

buttons or button-holes made or bound with cloth, ſerge, drugget or any other ſtuffs, of which clothes are uſually made; or any buttons made of wool only, turned in imitation of other buttons, on forfeiture of 40 *s.* for every dozen of buttons ſo made, ſold, or ſet on, and like proportion for a leſſer quantity; one moiety to the king, the other to the proſecutor.

Stat. 8 *Ann. cap.* 6. No taylor or other perſon ſhall make, ſet on, ſell, uſe, or bind on any clothes, any buttons or button-holes made or bound with ſerge, or other ſtuff of which clothes is uſually made, on pain of 5 *l.* for every dozen of buttons or button-holes; one moiety to to the crown, the other to him who will ſue for the ſame: or two juſtices may by warrant levy the penalty, upon conviction of the offender by one witneſs; but the party aggrieved may appeal to the next quarter ſeſſions, and ſhall have coſts.

Stat. 4 *Geo.* 1. *cap.* 7. *ſect.* 1. No taylor or other perſon ſhall make, ſell, ſet on, uſe, or bind any clothes, button, or button-holes made of or bound with cloth, ſerge, drugget, frize, camlet, or any ſtuffs that clothes are uſually made of, on forfeiture of 40 *s.* for every dozen of ſuch buttons and button-holes ſo made, or in proportion for a leſſer quantity: and every perſon being thereof convicted, upon oath of one witneſs, ſhall forfeit as aforeſaid.

Sect. 2. Nothing in this act ſhall extend to clothes made of velvet.

Sect. 3. Perſons inhabiting in any gaol or houſe of correction, or in any privileged place, offending againſt this act, and being convicted, ſhall be ſubject to the penalties.

Sect. 4. Offences againſt this act ſhall be proſecuted within three months.

Sect. 5. Offences againſt this act ſhall be heard and determined by one juſtice of the peace of the county, city, *&c.* where the ſame ſhall be diſcovered, or where the offender dwells (ſuch juſtice being not concerned in the matter) upon the oath of one witneſs. And one moiety of the forfeitures, the charge of conviction deducted, ſhall be paid to the informer, the other to the poor of the pariſh where the offence ſhall be diſcovered. And if any offender refuſe to pay the forfeitures for fourteen days after conviction, ſuch juſtice ſhall iſſue his warrant to the conſtable, to levy the ſame by diſtreſs and ſale of goods; and for want of diſtreſs to commit the offender to the common gaol, there to be kept three calendar months to hard labour.

Sect. 6. If any perſon find himſelf aggrieved by the juſtice's order or warrant, he may appeal to the quarter-ſeſſions; and coſts ſhall be allowed to the party grieved, to be levied as in other caſes of appeals.

Sect. 7. If any action is commenced againſt any perſon ſo proſecuted, he may plead the general iſſue; if the plaintiff be nonſuited, *&c.* the defendant ſhall have treble coſts.

Sect. 8. All wearing garments made with buttons and button-holes of the ſame clothes, *&c.* and expoſed to ſale, ſhall be forfeited and ſeized, and applied to the uſes in this act.

Sect. 9. If any taylor or other perſon ſhall cauſe his ſervant to make any clothes contrary to this act, he ſhall be ſubject to the penalties; and this act ſhall be a publick act.

Stat. 7 *Geo.* 1. *cap.* 12. *ſect.* 1. It ſhall not be lawful for any perſon to uſe or wear any clothes, buttons, or button-holes made of or bound with cloth, ſerge, drugget, frize, camlet, or any ſtuffs whereof clothes or wearing garments are uſually made; and if any perſon ſhall uſe or wear ſuch buttons or button-holes, ſuch perſon being convicted in manner hereafter mentioned ſhall forfeit for every dozen of ſuch buttons or button-holes 40*s.* or in proportion for a leſſer quantity.

Sect. 2. It ſhall be lawful for one juſtice of peace of the county or place where any offence ſhall be committed againſt this act, or where ſuch offender ſhall inhabit, upon oath of one credible perſon, to ſummon the party accuſed, and upon his appearance or contempt to proceed to the examination of the matter, and on due proof made, either by confeſſion of the party, or ſuch oath, to determine the ſame, and to convict the offender; and to cauſe the penalties, on the offender refuſing to pay the ſame on demand, by warrant to be levied by diſtreſs and ſale of goods, rendering the overplus; and one moiety of the forfeiture ſhall be to him on whoſe oath the perſon ſhall be convicted, and the other to the poor of the pariſh where ſuch offence ſhall be committed.

Sect. 3. Perſons aggrieved by the order or warrant of ſuch juſtice may appeal to the next quarter-ſeſſions, giving eight days notice, which ſeſſions are to hear and determine the ſame, and their judgment ſhall be final.

Sect. 4. Offences againſt this act ſhall be proſecuted within one month after ſuch offence committed.

Sect. 5. This act ſhall not extend to clothes made of velvet.

Sect. 6. Perſons ſued may plead the general iſſue, *&c.* and on a verdict, *&c.* recover treble coſts.

Sect. 7. This act ſhall be a publick act.

Buttum terrae, A butt of land.—*Dedi decem acras & unum* buttum terræ, *cum capuciis & ſidlingis prati, ad eandem terram pertinentibus.* Cart. 3. de Sibbeford, penes Will. Dugdale Mil.

Buyers of ſtolen Goods. See **Acceſſary.**

Buying and ſelling of Offices. See **Offices.**

Buying and ſelling of Titles. See **Champerty.**

Buzcarles, or **Buſcarles**, (*Buſcarli & Buthſecarli*) *Sunt qui portus nauticos cuſtodiunt*, mariners or ſeamen. *Quando rex ibat in exſelitionem vel terra vel mari, habebat de hoc manerio aut xx ſol. ad paſcendos ſuos* buzecarl. *aut unum hominem ducebat ſecum pro honore quinque hidarum.* Domeſd. tit. *Wiltſc. Wilton.* and *Selden's Mare Clauſum, fol.* 184. where it is written *Butſecarli.* See **Batſwain.**

Buzoonis.——Gulielmus de Greſeley *tenet maner. de* Drakelow, *com.* Derb. *in capite per ſervitium reddendi unum arcum ſine corda, & unam pharetram de tuteſbit, & duodecim ſagittas flectatas & unum* buzonem. Radulphus de Stopham *tenet maner. de* Brianſtan, *com.* Dorſet, *per ſerjantiam inveniendi domino regi garcionem deferentem unum arcum ſine corda, & unum* buzonem *ſine pennis.* S. Ed. 1.—It ſeems to be the ſhafts of an arrow, before it is fledged or feathered.

Buzones Judiciorum, *Placita de temp. Johannis Regis, Glouc.* 139. See **Buſones** comitatus.

Bydalle, (Stat. 26 *H.* 8. *cap.* 6.) See **Bidale.**

Bye, Bee, Words ending in *bye* and *bee* are derived from the Saxon *bye*, which ſignifies a dwelling-place or habitation.

By-law, (from the Goth, *by*, *pagus*, and *lagen*, lex) Is a private law made by thoſe who are duly authoriſed thereunto by charter, preſcription, or cuſtom, for the conſervation of order and good government within ſome particular place or juriſdiction. *Moor* 583, 584. 5 *Co.* 62.

A power of making by-laws is included in the very act of incorporating, and incident to every corporation aggregate, without expreſs words in the charter; and all by-laws muſt ever be ſubject and ſquared to the rule of the general law of the realm, as ſubordinate to it. *Hob.* 211.

By the ſtat. 19 *Hen.* 7. *c.* 7. it is enacted, That no ordinance ſhall be made in diminution, or to the diſinheritance of the prerogative of the king, nor againſt the common profit of the people, unleſs they are examined and approved by the Chancellor, Treaſurer of *England*, Chief Juſtices of either Bench, or three of them, or both Juſtices of Aſſiſe in their circuit, where the ordinance is, *&c.* nor ſhall reſtrain any to ſue to the king againſt ſuch ordinance. See 1 *Roll. Abr.* 363. 5 *Co.* 63. *Comb.* 222.

The inhabitants of a town, without any cuſtom, may make by-laws for the repair of their church, highways, or ſuch other things which is for the publick good; and in ſuch caſe, the greater part, without any cuſtom, ſhall bind all. 5 *Co.* 63. *Mo.* 579. *Brownl.* 288. *Hob.* 212. 1 *Mod.* 194.

If there be a corporation made, and incorporated by the name of *mayor and commonalty*, and by the charter the mayor is appointed to be choſen by the commonalty, and in the ſaid charter there is a power given to them to make by-laws for the better order and government of the ſaid corporation, they may make a by-law that a ſelect num-

ber of the commonalty ſhall be choſen, by whom the mayor ſhall be choſen, for avoidance of popular confuſion. 4 *Co.* 78. *Jenk. Rep.* 273, *S. C.*

If a by-law is made by the company of *vintners* in *London*, that every freeman of the ſaid company, who ſhall be choſen and admitted to be a liveryman, ſhall pay 31 *l.* 13 *s.* 4 *d.* *&c.* this is a good by-law; for this being a degree of pre-eminence to which men of ſubſtance only are raiſed; and there being a neceſſity for money to ſupport the honour and reputation of the company, were the ſum more or leſs, it could not make the by-law void, while it binds only the members of the corporation; for when a man doth agree to be of a company, he doth thereby ſubmit himſelf to the laws thereof. *Raym.* 446. *Comb.* 221.

A by-law made in *London*, that no freeman choſen ſheriff, *&c.* ſhall be excuſed, unleſs he voluntarily ſwears he is not worth 10,000 *l.* and bring ſix other citizens to vouch in like manner, on their oaths, that they believe it to be true; if he openly refuſe to take the office, then to forfeit the ſum of 500 *l. viz.* 400 *l.* to the city, and 100*l.* to the next man that ſhall hold the office; held a good by-law. 1 *Salk.* 142. *Carth.* 480. *S. C.*

A new corporation, not having any preſcription to appropriate to themſelves, and exclude others, cannot make a by-law to exclude all perſons from uſing an art or trade in their town to which they were not apprentices in the ſame town, though they have ſerved as apprentices to it in another place. 1 *Rol. Abr.* 364. *Hob.* 211, 212.

Therefore if a corporation make a by-law, that none ſhall uſe the art of weaving within the corporation, who has not ſerved ſeven years as an apprentice there, or who has not exerciſed that trade there for five years before the making of the by-law, nor unleſs he be allowed and approved of by the wardens of the company, this is a void by-law; for any perſon may lawfully follow what trade he pleaſes, and where he pleaſes, unleſs prohibited by the general law of the land. *Hob.* 211. *Hut.* 6. *S. C.* *Moor* 869. *S. C.*

So where a corporation of taylors in *Ipſwich* made a by-law, that none ſhould exerciſe the trade of a taylor in *Ipſwich, qui non fuerit allocatus per legale warrantum authoritate datum* by the ſaid corporation, or three of the maſters and wardens; nor ſhould ſet up any ſhop for this art, nor exerciſe it until they preſented themſelves to the maſter, *&c.* or three of them, or proved that they had ſerved in this trade as apprentices for ſeven years. 11 *Co.* 53, 54.

So where the town of *Bedford* made a by-law, that none except freemen ſhould exerciſe any art or myſtery within the corporation; which not being founded on any cuſtom they had of excluding foreigners, was held void. 1 *Lutw.* 562.

If the merchant taylors of *London*, by virtue of their charter, make a by-law that no merchant ſhall put his cloth to be dreſſed, but to a clothworker of their company, this is a void by-law; for it is againſt reaſon and the general liberty of the ſubject to be reſtrained from putting his work to whom he pleaſes. 1 *Rol. Abr.* 364.

So a by-law in *London*, that none ſhall bring any ſand, nor ſell nor uſe any within the city or ſuburbs, but only that which is taken out of the river *Thames*, *&c.* is void; becauſe it is againſt reaſon that a freeman ſhould be reſtrained from merchandizing and ſelling; and this may concern the inheritance of ſome who may have ſands in their land. *Godb.* 106, 107.

If the city of *London* make a by-law, that no perſon ſhall follow the profeſſion of a dancing-maſter within the city, who is not a freeman of the company of muſicians, this is a void by-law; for if he be free of any other company, it is ſufficient; and the obliging a man to be free of a particular company, when he has no remedy to compel the company to admit him, is creating a kind of monopoly in ſuch company, and putting a certain number of men under the final juriſdiction and power of others. 5 *Mod.* 104.

But if an ordinance be made in *London* by the common-council (who have power by cuſtom, which is among other cuſtoms confirmed by act of parliament, by general words) that if a freeman, citizen, or ſtranger within the city ſhall put any broad cloth to ſale within the city of *London*, before it be brought to *Blackwell Hall* to be viewed and ſearched, ſo that it may appear to be ſaleable, and the hallage be paid for it, *ſcilicet* one penny for every cloth, that he ſhall forfeit for every cloth 6 *s.* 8 *d.* this is a good ordinance, as well to bind ſtrangers as freemen, becauſe it is made to prevent fraud and falſity in cloth, and for the better execution of the ſtatutes without deceit; and the one penny for hallage is but a reaſonable recompence of charge for the benefit which the ſubject hath by it. 5 *Co.* 62. 1 *Rol. Abr.* 365. *S. C.*

If in *London* there is an act of common-council made, that the bricklayers ſhall not plaiſter with lime and hair, but with lime and ſand only, and that plaiſtering with lime and hair ſhall belong to the plaiſterers, under the penalty of, *&c.* (admitting this before to have been part of the trade of a bricklayer) the by-law is void; for though they have *regimen perſonarum* in their manufactures, yet this power extends only to their demeanor in their trade, and not to annex that to one trade which before belonged to another. *Palm.* 395.

But if a by-law is made by the corporation of *throwſters* in *London*, that none ſhall have above ſuch a number of ſpindles in one week, this is a good by-law, for it is not in reſtraint of trade, but to make a more equal diſtribution of it. 1 *Lev.* 229.

If the company of *horners* of *London*, being incorporated by letters patent, and impowered to make by-laws for the better government of their corporation, make a by-law, that two men by them appointed ſhall buy rough horns for the ſaid company, and bring them to the hall, there to be diſtributed every month by the maſter, *&c.* for the uſe of the company; and that no member of the company ſhall buy rough horns within 24 miles of *London*, but only of thoſe two men appointed, under the penalty, *&c.* this is no good by-law; for they being a company incorporated in the city of *London*, have no juriſdiction elſewhere, and may as well extend their power over *England*, as for 24 Miles. 3 *Mod.* 159.

A by-law, that all ſtrangers coming into the port of *London* ſhould employ city porters to carry their goods, *&c.* is naught; but they may make a by-law, that none but freemen ſhall be porters; but to confine ſtrangers to none but ſuch as are city porters is unreaſonable; for if the city will appoint no porters, they have no remedy againſt the city; alſo ſtrangers cannot know who are city porters, nor compel them to ſerve them. 1 *Salk.* 143. See 1 *Salk.* 192, 193.

By-laws are uſually made with certain penalties, which regularly are to be recovered by action of debt, or may be levied by diſtreſs. 5 *Co.* 64.

But a by-law with a penalty of impriſonment, or forfeiture of goods and chattels, is void: for by the general law of the kingdom, no man is to be impriſoned or diſpoſſeſſed of his goods and chattels, *niſi per legale judicium parium ſuorum vel per legem terræ*; and were by-laws with ſuch penalties allowed, it would be enabling corporations to ſet up private particular laws in contradiction to the laws of the land; which would be againſt the very nature and eſſence of a by-law, which, though it may be *præter* the general law of the realm, it cannot be *contra.* 5 *Co.* 64. 8 *Co.* 127. 2 *Inſt.* 54. *Moor* 411. *S. P.*

If the company of taylors in the city of *Exeter*, being incorporated by letters patent of *Ed.* 4. and having thereby power given them to make by-laws, make a by-law under a certain penalty, to be levied by diſtreſs and ſale of the offender's goods, this is no good by-law; for the forfeiture cannot be levied by ſale of the offender's goods. 1 *Vent.* 182.

If in *London* a by-law is made, that if any freeman takes the ſon of an alien to be his apprentice, the bond and covenants ſhall be void, this is no good by-law; for though the common-council might have inflicted a fine or other puniſhment upon ſuch maſter, yet they cannot make the bond and covenants void. *Moor* 411.

For more matter on this ſubject, ſee Bacon *and* Viner's Abr. *tit.* By-law.

Bylaw, or **Laws of Burlaw**, (*Leges Ruſticorum*, from the Germ. *baur*, *i. e. ruſticus*, *& lauch*, *lex*) Laws made by husbandmen or townſmen concerning neighbourhood to be kept among themſelves. *Skene*, *pag.* 33.

Byrn and **Byrnan**, *i. e. Lorica.*

C.

CABAL (*Cabala*) A *junto* or private meeting; from a doctrine or ſcience practiſed by the Jews, in fetching out myſteries from the numbers that letters of words make. *Jacob.*

Caballa (from the Lat. *Caballus*) Belonging to a horſe. *Domeſday.*

Cables and Cordage. Stat. 21 *Hen.* 8. *c.* 12. *ſect.* 2. No perſon dwelling within five miles from the town of *Burport*, in the county of *Dorſet*, ſhall ſell, out of the market holden within the ſame town, any hemp which ſhall grow within the ſaid five miles, upon pain of forfeiture of the hemp.

Sect. 3. No perſons, other than ſuch as ſhall dwell within the ſaid town, ſhall make out of the ſaid town any cables, halſers, ropes, traces, halters, or other tackle made of hemp, within five miles from the ſaid towns, upon pain of forfeiture of the ſaid cables, *&c.* the one half of ſuch forfeitures, as well as of the hemp ſo ſold out of the ſaid town, to be to the king, and the other half to him that will ſue by action of debt, *&c.*

Sect. 4. Twenty pounds weight ſhall be accounted to the ſtones.

Sect. 5. Every perſon dwelling within the ſaid diſtance may make cables, *&c.* and other tackle for their own uſe. This act to endure to the next parliament.

Continued indefinitely by 3 Car. 1. cap. 4. 16 Car. 1. c. 4.

Stat. 35 *Eliz. cap.* 8. *ſect.* 3. If any perſon ſhall make cables of old and overworn ſtuff, which ſhall contain above ſeven inches in compaſs, every perſon ſo offending ſhall forfeit four times the value. And if any perſon ſhall tar any halſers or other cordage made within this realm of ſuch old and overworn ſtuff, being of leſſer aſſiſe, and not containing in compaſs ſeven inches, and ſhall by retail put to ſale the ſame, being ſo tarred; every perſon ſo offending ſhall forfeit the treble value, one moiety to the queen, and the other moiety to ſuch as will ſue for the ſame by action of debt, *&c.*

Sect. 4. Every perſon which ſhall offend againſt this act ſhall be impriſoned during her majeſty's pleaſure.

Cable-yarn and cordage imported, to what duties liable, 2 *W. & M. Seſſ.* 2. *c.* 4. *ſect.* 33, 40.

Stat. 6 *Ann. cap.* 19. *ſect.* 13. Foreign cordage or cable-yarn imported, upon exportation ſhall have no allowance or drawback of duties.

Cabliſh (*Cablicium*) Among the writers of the foreſt laws ſignifies *bruſh-wood*, or *browſe-wood*. *Cromp. Juriſd. fol.* 163. But Sir *Henry Spelman* thinks it more properly ſignifies *wind-faln wood*, becauſe it was written of old *cadibulum*, from *cadere:* or, if derived from the French *cabilis*, it alſo ſignifies *wind-faln wood*. *Item dicunt, quod* ceppeg. & cablicia *vento proſtrat. valent per an. dimid marcæ.* Inq. de an. 47 *H.* 3. *nu.* 32. *Et debent habere quicquid vento proſternitur præter* cablicium, *quod pertinet ad dominum regem.* Ryley Pla. Parl. fol. 652.

Cachepollus. A purſevant, a bailiff, a catchpole—*In ſtipendiis ballivi* 13 s. 4 d. *in ſtipendiis unius præpoſiti* 26s. 6d. *in ſtipendiis unius* cachepolli *per an.* 9 s. 8 d. Conſuetud. Domus de Farendon, MS. fol. 23.

Cacherellus, An inferior bailiff. It is mentioned in *Thorn*, *viz. Seneſchallus & cuſtodes noſtri diligenter inquirant de injuriis per* chacherellos *vicecomitis*, *&c.*

Cacia. See **Chacea.**

Cacor and **Chaſor**, An hunting horſe, *viz. Dederunt mihi unum* chaſorem; in another charter 'tis writ *cacorem*, *Leg. Willi.* 1. *cap.* 22, 23. Mr. *Selden* tells us, that he did not underſtand the ſignification of this word in the

hiſtory of the foundation of the abbey of *King's Wood* in *Glouceſterſhire.*

Cade of herrings, is 500, of *ſprats* 1000. *Book of Rates.* Yet we find anciently 600 made the *cade of herrings*, ſix ſcore to the hundred, which is called *magnum centum.*

Cadet, The younger ſon of a gentleman; particularly applied to a volunteer in the army, waiting for ſome poſt.

Cadiz, The payment of conſulage there enforced, 9 *Geo.* 2. *c.* 25.

Caducus Morbus, The falling-ſickneſs, or *epilepſy.*——A. D. 1227. Willielmus Scottus *archidiaconus* Wigorn, *electus epiſcop.* Dunelm. *contra quem objectum eſt quod non fuit nativus de terra regis* Angliæ, *& in ſuper morbum* caducum *patiebatur.* Chron. priorat. Dunſtaple MS. Bibl. Cotton. Tiber. A. 10.

Caep Gildum, The reſtoring goods or cattle, from the Sax. *Ceap*, *merx*, *& gildan*, *ſolvere.*

Caermarthen. See **Maridunum.**

Caeſaromagus. *Brentwood* in *Eſſex.*

Cagia, A cage for birds, a coop for hens.——*Mandatum eſt vicecom.* Wilt. *quod emat in balliva ſua* 100 *bacones*, *&* 300 *gallinas*, *cum* cagiis *in quibus eædem gallinæ poni poſſunt.* Ex Rot. Clauſ. 38 H. 3. m. 9.

Calamitus, The word ſeems uſed for a ſtick or gag put into the mouth of dogs, to prevent their barking.——*Ignaviter & prorſus inutiliter, veluti canes non latrantes, ſed tanquam in ore* calamitum *habentes, eccleſiæ bonis incubare.* Giral. Cambrenſis apud Whartoni Angl. Sac. P. 2. p. 614.

Calamus, Is a cane, reed, or quill. This is comprized among merchandiſe, and drugs to be garbled, by 1 *Jac. cap.* 19.

Calangium and **Calangia**, Challenge, claim, or diſpute. *Sciant——quod ego Godefridus de Doddenſul, cum aſſenſu Amiliæ uxoris meæ, dedi——Deo & Beatæ Mariæ & Dominis meis priori & conventui Wigorn. in pura & perpetua eleemoſyna unam acram terræ—Sine aliqua reclamatione ſeu* calangio, &c. ſine dat. penes Thomam Chyld, arm. *Boſcum, qui fuit in* calangio *inter ipſum & Walterum.* Mon. Angl. 2 Par. fol. 252. b.

Calcaria, *Tadcaſter* in *Yorkſhire.*

Calcea, *Calceia*, A road or highway, maintained and repaired with ſtones and rubbiſh; from the Latin *calx*, chalk, French *chaux*; whence their *chauſſee*, our *cauſway* or path raiſed with earth, and paved with chalk-ſtones, or gravel. *Calcagium* was the tax or contribution paid by the neighbouring inhabitants towards the making and repairing ſuch common roads. *Calcearum operationes* were the work and labour done by the adjoining tenants; from which duty ſome inhabitants were, by royal charter, eſpecially exempted. See Mr. *Kennet's Gloſſary.*

Calcetum, Calceata, *calcea & catia*, A cauſey or cauſway, a hard way: *de ligno & tabulis* calcetum *ſolidum viatoribus fecit.* Du Freſne. See **Cauſey.**

Calcyth, The place where a council was held, ſuppoſed to be *Kelcheth* in *Lancaſhire.*

Caldaria, A cauldron, or copper.——*Inſtituebant fieri ſtrepitum maximum & rugſum tundentibus ſingulis & flagellantibus clipeos & galeas, ſellas & aſſeres, dolia & flaſcones, pelves & ſcutellas &* caldarias, *& quodcunque ad manum erat inſtrumentum.* Gaufr. vineſauf. Ric. Reg. Iter. Jeroſ. l. 4. c. 13,

Calefagium, A right to take fuel yearly: *Confirmamus panagium, herbagium &* calefagium *in foreſta noſtra. Blount.*

Calendar. *Stat.* 24 *Geo.* 2. *cap.* 23. *ſect.* 1. Throughout all his majeſty's dominions in *Europe*, *Aſia*, *Africa*, and *America*, ſubject to the crown of *Great Britain*, the ſupputation, according to which the year of our Lord beginneth on the 25th of *March*, ſhall not be made uſe of after the laſt day of *December* 1751, and the firſt of *January* next following the ſaid laſt day of *December* ſhall be deemed the firſt day of the year of our Lord 1752, and ſo on, the firſt day of *January* in every year ſhall be deemed the firſt day of the year. And after the ſaid firſt of *January* 1752, the days of each month ſhall be reckoned in the ſame order; and the feaſt of *Eaſter*, and other

moveable feaſts thereon depending, be aſcertained according to the ſame method as they now are, until the ſecond of *September* in the ſaid year 1752 incluſive; and the natural day next immediately following the ſaid ſecond of *September* ſhall be called the 14th day of *September*, omitting for that time only the eleven intermediate nominal days of the common calendar; and the natural days following the ſaid 14th of *September* ſhall be numbered forwards in numerical order from the ſaid 14th of *September*, according to the order now uſed in the preſent calendar; and all acts, deeds, writings, notes, and other inſtruments executed or ſigned, upon or after the ſaid firſt of *January* 1752, ſhall bear date according to the ſaid new method of ſupputation; and the two fixed terms of St. *Hillary* and St. *Michael* in *England*, and the courts of great ſeſſions in the counties palatine, and in *Wales*, and the courts of the general quarter-ſeſſions and general ſeſſions of the peace, and all other courts, and all meetings of any bodies politic, which by law or uſage within this kingdom, or the dominions ſubject to the crown of *Great-Britain*, are to be holden on any fixed day of any month, or on any day depending upon any certain day of any month (except ſuch courts as are uſually holden with fairs or marts) ſhall, after the ſaid ſecond of *September*, be holden upon the ſame reſpective nominal days, whereon or according to which the ſame are now to be holden; but which ſhall be computed according to the new method.

Sect. 2. The years one thouſand eight hundred, one thouſand nine hundred, two thouſand one hundred, two thouſand two hundred, two thouſand three hundred, or any other hundredth years of our Lord, except only every fourth hundredth year, whereof the year two thouſand ſhall be the firſt, ſhall not be biſſextile or leap-years, but ſhall be common years, conſiſting of 365 days, and no more; and the years of our Lord two thouſand, two thouſand four hundred, two thouſand eight hundred, and every other fourth hundredth year of our Lord, which by the preſent ſupputation are biſſextile or leap-years, ſhall be biſſextile or leap years, conſiſting of 366 days.

Sect. 3. The feaſt of *Eaſter*, or any of the moveable feaſts thereon depending, ſhall be no longer obſerved in *England*, or the dominions belonging to the crown of *Great Britain*, according to the method of ſupputation now uſed, or to the table prefixed to the book of Common Prayer; and the ſaid table, and alſo the column of golden numbers as they are now prefixed to the reſpective days of the month, ſhall be left out in future editions of the book of Common Prayer; and the new calendar, table, and rules hereunto annexed ſhall be prefixed to all ſuch future editions of the ſaid book: and all the fixed feaſt-days, holy-days, and faſt-days now obſerved by the church of *England*, and alſo the ſeveral ſolemn days of thankſgiving and of faſting and humiliation, which by virtue of any act of parliament now in being are to be obſerved, ſhall be obſerved on the reſpective days marked for the celebration of the ſame in the new calendar; that is to ſay, on the ſame nominal days on which they are now obſerved, but which according to the alteration by this act made will happen eleven days ſooner than they now do. And the feaſt of *Eaſter*, and all other moveable feaſts thereon depending, ſhall be obſerved according to the new calendar, tables, and rules hereunto annexed, in *England*, and the dominions aforeſaid, wherein the liturgy of the church of *England* now is or hereafter ſhall be uſed: and the two moveable terms of *Eaſter* and *Trinity*, and all courts, and all meetings of any bodies politick, and all markets, ſuits, and marts, and courts thereunto belonging, which are uſed to be holden at any moveable times depending upon *Eaſter*, or any other moveable feaſt, ſhall be holden on ſuch days whereon the ſame happen, according to the falling of *Eaſter*, or ſuch other moveable feaſts, to be computed according to the new calendar.

Sect. 4. The meetings of the court of ſeſſion, and terms fixed for the court of Exchequer in *Scotland*, the *April* meeting of the Governor, Bailiffs, and Commonalty of the Company of Conſervators of the great level of the fens, and the holding of all markets, fairs and marts, either fixed to certain nominal days of the month, or depending upon the beginning or any certain day of any month; and all courts belonging to ſuch fairs or marts ſhall not be continued according to the nominal days of the month, computed according to the new calendar, but ſhall be holden upon or according to the ſame natural days according to which they ſhould have been holden in caſe this act had not been made.

Sect. 5. This act ſhall not accelerate the days for opening, incloſing, or ſhutting of any lands for common of paſture and other purpoſes, or the days on which any temporary or diſtinct right in any lands is to commence; but all ſuch lands ſhall be opened, incloſed, or ſhut up, and ſuch temporary and diſtinct right commence upon the ſame natural days on which the ſame ſhould have been ſo reſpectively opened, incloſed, or ſhut up, or would have commenced in caſe this act had not been made.

Sect. 6. This act ſhall not accelerate the time of payment of any rent, annuity or ſum payable by virtue of any cuſtom, deed, or agreement, or of any act of parliament made before the ſaid 14th day of *September*, or the time of doing any thing directed by any ſuch act, or accelerate the payment of, or increaſe the intereſt of any ſum payable as aforeſaid; or accelerate the time of the delivery of any goods or other things, or the time of the commencement or determination of any leaſe of lands or hereditaments, or of any other agreement, or of the accepting, ſurrendering, or delivering up poſſeſſion of any lands or hereditaments; or the commencement or determination of any annuity or rent; or of any grant for any term of years, or the time of attaining the age of one and twenty years; or any other age requiſite by any law, cuſtom, deed, will, or writing, by any perſon born before the ſaid 14th of *September*, or the time of the expiration of any apprenticeſhip or other ſervice.

The calendar, tables, and rules mentioned in the act are annexed to it, and are prefixed to all the editions of the common prayer-book 1752.

Stat. 25 *Geo.* 2. *cap.* 30. *ſect.* 2. The reſpective times for opening, uſing, incloſing, and ſhutting up lands uſed for common of paſture or other purpoſes, for the paying of rents or other payments, and for the doing of other things, if ſuch times are depending on any moveable feaſt, ſhall be computed according to the new calendar.

Sect. 3. Nothing in this act ſhall extend to the abridging, enlarging, confirming, or altering the title of any perſon or body politick to any ſuch lands, except as to the new computation of time, when the enjoyment of ſuch right ſhall commence.

Calendzing of worſteds. Spoken of 5 *H.* 8. *cap.* 4. and 35 *H.* 8. *cap.* 5. It ſignifies to ſmooth, trim, and give them a gloſs; and is a trade uſed both in *London* and *Norwich*.

Calends, (*Calendæ*) Was among the *Romans* the firſt day of every month, to which if we add *pridie*, it is the firſt day of *Auguſt*; if any number be ſet before it, as *decimo, novo, octavo, &c. calend. Sept.* it is the 22d, 23d, and 24th *of Aug.* In *March, May, July*, and *October*, the *calends* begin at the 16th day, in other months at the 14th day: and they muſt ever bear the name of the month following, and be numbered backwards from the firſt day of the ſaid following months. See more in *Hopton's Concordance, pag.* 69. See alſo **Ides** and **Nones**. *Dictum de Kennelworth* is dated the day before the *calends* of *November* 1256. In the dates of deeds, the day of the month by *nones, ides*, and *calends*, is ſufficient. 2 *Inſt. fol.* 675.

Caliburn, The famous ſword of king *Arthur*. *Hoveden, & Brompt. in vita R.*

Calipodium, (*Calapodium, gallipodia*) Gallicſhoes, galaſhoes. Among the injunctions preſcribed by *Philip Repingdon* biſhop of *Lincoln*, to vicars, ſchoolmaſters, &c. in the year 1410, it is thus ordained,——*Quod dicti vicarii & clerici quicunque, & præcipue cum fuerint reveſtiti in honeſtis togis ſuis, cum longis manicis quæ vulgariter* Pokes *nuncupantur—baſardos &* calapodia *deponant, quæ in eccleſia ſtrepitum faciunt, & generant malum ſonum.* Reg. Repingdon Epiſc. Lincoln.

Caliver, A great gun.

Callena. See **Gallena.**

Callicoes. See **Excise**, (*Linen*).

Callis. The King's highway. 'Tis mentioned in *Huntingdon, lib.* 1. viz. *Tantæ autem gratiæ inhabitantibus fuit* Britanniæ, *quod quatuor in ea* calles *a fine in finem conſtruxerunt regia ſublimatos auctoritate, &c.*

Calves. See **Cattle.**

Calumniate, To challenge, or lay claim unto.——*Iſta terra* calumniata *Will. Chernet.*——Domeſday, *tit.* Hantſcire.

Camadolunum, Ruins near *Almondbury* in *Yorkſhire.*

Camalodunum, *Malden* in *Eſſex.*

Camboricum, *Cambridge.*

Cambretonium, *Brettenham* in *Suffolk.*

Cambrick. Stat. 18 *Geo.* 2. *c.* 36. *ſect.* 1. It ſhall not be lawful for any perſon to wear in *Great Britain,* in any apparel, any cambrick or *French* lawn, under the penalty of forfeiting to the informer 5 *l.* for every offence, being convicted by the oath of one witneſs before any juſtice of peace; which juſtice ſhall, upon any information upon oath of any ſuch offence within ſix days after commitment thereof, ſummon the party accuſed, and upon his appearance or contempt proceed to examination of the fact; and upon proof either by confeſſion of the party, or by oath of one witneſs, determine the ſame; and upon conviction cauſe the penalty, by warrant, to be levied by diſtreſs and ſale of the offender's goods; nevertheleſs it ſhall be lawful for the party aggrieved, to appeal to the juſtices of peace at the next general quarter ſeſſions for the county or place where the ſaid offence is committed (giving ſix days notice of ſuch appeal to the proſecutor) whoſe determination ſhall be final.

Sect. 2. If any perſon after the 24th of *June* 1748 ſell or expoſe to ſale any cambricks or *French* lawns, made or not made up (except for exportation only) and be convicted, he ſhall forfeit 5 *l.* to be levied as aforeſaid.

Sect. 3. If any perſon be proſecuted for wearing any cambricks or *French* lawns, and diſcover upon oath before any juſtice of peace the perſon who ſold ſuch cambricks or *French* lawns, ſuch perſon ſo diſcovering ſhall be diſcharged of all penalties for wearing ſuch cambricks or *French* lawns, and the perſon ſo ſelling ſuch cambricks or *French* lawns ſhall be liable to the penalties.

Sect. 4. No cambricks or *French* lawns ſhall be admitted to be imported into *Great Britain,* until after proof upon oath by the importer, or if a quaker by affirmation, at the time of entering the ſame, before the proper officer of the cuſtoms at the port of importation, either that the ſame are the ſole property of the importer, or of ſome other of his Majeſty's ſubjects, and that no alien hath any property therein; or if any alien hath any intereſt therein, then proof ſhall be given by the importer, to the ſatisfaction of the aforeſaid officers of the cuſtoms, that the ſame were *bona fide* ſhipped for direct importation into *Great Britain* on or before the 10th of *May* 1745.

Sect. 5. It ſhall not be lawful for any perſon to import into *Great Britain* any foreign cambricks or *French* lawns, unleſs bills of loading be produced for the ſame, or ſuch other proof given to the commiſſioners of the cuſtoms, or to the chief officers of the cuſtoms at the port of importation, as they think ſufficient, that the ſaid cambricks or *French* lawns were *bona fide* ſhipped for direct importation, on or before the 1ſt of *Auguſt* 1745.

Sect. 6. It ſhall be lawful to import into *Great Britain,* after the 1ſt of *Auguſt* 1746, any cambricks, *French* lawns, or other linen of the kind uſually entered under the denomination of cambricks, upon the importer making oath, or if a quaker affirmation, that they are intended for exportation only, and that they are *bona fide* the property of the importer, or of ſome other of his Majeſty's ſubjects, and that no alien hath any intereſt therein; and alſo giving bond to the ſatisfaction of the commiſſioners, or the chief officer thereof at the port of importation, in double the value of the goods imported, to be aſcertained by the oath or affirmation of the importer, for payment of 5 *l.* for every piece of ſuch cambricks and *French* lawns which ſhall not be exported within three years after the entry of the ſame.

Sect. 7. In caſe any pieces of cambrick or lawn ſo imported ſhall, by fire or other unavoidable accident, be loſt or deſtroyed, upon proof of ſuch loſs to the ſatisfaction of the commiſſioners of the cuſtoms, or of the chief officer thereof at the port of importation; they ſhall remit the ſaid penalty of 5 *l.* payable for each piece not ſo exported as aforeſaid.

Stat. 21. *Geo.* 2. *cap.* 26. *ſect.* 2. If any wearer of cambrick or *French* lawn, who purchaſed the ſame after the 24th of *June* 1748, be proſecuted, and diſcover the ſeller, and that the ſame was ſold after the 24th of *June* 1748, ſo as ſuch ſeller be convicted, and become liable to the penalties of 18 *Geo.* 2. *cap.* 36. then and not otherwiſe, ſuch wearer ſhall be diſcharged from any penalty inflicted by the ſaid act.

Sect. 3. Whenever any perſon informed againſt for wearing ſuch cambrick or *French* lawn is excuſed from the penalty by diſcovering the ſeller, the penalty on ſuch ſeller ſhall go to the perſon who informed againſt the wearer.

Sect. 4. Where the offender at the time of the offence, or the time of conviction, be a feme-covert living with her huſband, the penalties ſhall be levied on the goods of her huſband.

Sect. 5. Any milliner, ſempſtreſs, or other perſon, who for hire, after the 24th of *June* 1748, makes up any cambrick or *French* lawn for any wearing apparel, ſhall be liable to the like penalties as the ſellers of cambrick or *French* lawn are liable to, by 18 *Geo.* 2. *cap.* 26. to be levied and applied as is directed by this or the ſaid act.

Sect. 6. Where by this act an oath is required, the ſolemn affirmation of a quaker ſhall be taken in lieu thereof; and every inſtance of wilful and corrupt falſe affirmation ſhall ſubject ſuch perſon to the ſame penalties as he would have been liable to if the ſame matter had been declared upon oath.

Stat. 32 *Geo.* 2. *cap.* 32. *ſect* 1. No cambricks, *French* lawns, or other linens of the kind uſually entered under the denomination of cambricks, ſhall be imported into any place within *Great Britain,* unleſs the ſame be packed in bales, caſes, or boxes, covered with ſackcloth or canvas, each of which contains one hundred whole pieces, or two hundred half pieces.

Sect. 2. In caſe any cambricks or *French* lawns be imported in any other manner, or in leſs quantity than before-mentioned, the cambricks or *French* lawns ſo imported, or found on board any veſſel in this kingdom ſhall be forfeited, and may be ſeized by any officer of the cuſtoms.

Sect. 3. Cambricks and *French* lawns ſhall be imported for exportation only, and be lodged in ſuch warehouſe belonging to his Majeſty as the commiſſioners of the cuſtoms, or three of them appoint; and ſhall not be delivered out of ſuch warehouſe, but under the like ſecurity and reſtrictions as *Eaſt-India* goods prohibited to be conſumed in *Great Britain* are now liable to.

Sect. 4. There ſhall be no duties paid or ſecured for any cambricks or *French* lawns imported and depoſited in ſuch warehouſe, other than one half of the old ſubſidy, which is to remain after the goods are exported again.

Sect. 5. Every perſon having in their cuſtody any cambricks or *French* lawns imported before the firſt of *Auguſt* 1759, for the importation whereof bond has been given, ſhall before the firſt of *Auguſt* next depoſite all ſuch cambricks and *French* lawns in ſuch warehouſe as aforeſaid; and upon depoſiting ſuch goods the bonds for exportation thereof ſhall be delivered up, and the perſon who gave the ſame ſhall receive from the collector of the cuſtoms at the port where ſuch bond was given, all the duties which ſuch goods would be intitled to draw back upon exportation; and ſuch goods ſhall not be again delivered out of the ſaid warehouſe but for exportation: If in any caſe any perſon ſell or expoſe to ſale, or have in his poſſeſſion for that purpoſe, any cambricks or *French* lawns (other than in ſuch warehouſe as aforeſaid) the ſame ſhall be forfeited, and ſhall be liable to be ſearched for and ſeized as other prohibited and unaccuſtomed goods are; and every ſuch perſon ſhall forfeit two hundred

pounds, over and above all other penalties inflicted by any former act.

Sect. 6. If any doubt arise with respect to the species or quality of the goods seized by virtue of this act, or where the same were manufactured, the proof shall lie on the owner.

Sect. 7. All the goods seized by virtue of this act, or any other cause of forfeiture, shall upon seizure be carried to the next custom-house, and after condemnation shall not be used in this kingdom, but exported; and shall not be sold or delivered out of such warehouse, otherwise than on condition to be exported, nor until the buyer have given security for the exportation thereof, and observing all the regulations prescribed for the exportation of *East India* goods prohibited to be used in *Great Britain*.

Sect. 8. All the penalties and forfeitures by this act imposed may be recovered in any court of record at *Westminster*, or in the court of *Exchequer* at *Edinburgh*, by action, *&c.* in the name of his Majesty's attorney-general, or in the name of his Majesty's advocate in *Scotland*, or in the name of some officer of the customs; and one moiety shall be to his Majesty, and the other moiety to such officer who shall seize, inform, or prosecute.

Sect. 9. Upon every action, *&c.* for any pecuniary penalty imposed by this act, a *capias* in the first process shall issue, specifying the sum of the penalty sued for; and the defendant shall be obliged to give bail by natural-born subjects or denisons, to appear in the court out of which such *capias* issues, at the return of such writ to answer such suit, and shall at the time of such appearance give bail in the said court, to answer and pay all the penalties incurred for such offence in case he be convicted, or to yield his body to prison.

Sect. 10. If any action be commenced for any thing done in pursuance of this act, the defendant may plead the general issue; and if the plaintiff be nonsuited, *&c.* the defendant shall recover treble costs.

Stat. 4 *Geo.* 3. *c.* 37. [Intituled, *An act for the better establishing a manufactory of cambricks and lawns, or goods of the kind usually known under these denominations, now carrying on at* Winchelsea, *in the county of* Sussex; *and for improving, regulating, and extending the manufacture of cambricks and lawns, or goods of the kind usually known under those denominations, in that part of* Great Britain *called* England.]

Sect. 1. It shall be lawful for any person to make and sell cambricks and lawns in this kingdom.

Sect. 2. The King may incorporate the persons herein named (the present subscribers) by the name of the *English* linen company, with such power of revocation as to his Majesty shall seem meet: they may choose directors, *&c.* and purchase lands, *&c.* not exceeding the value of 500 *l. per annum*; and they may sue and be sued.

Sect. 3. They may raise a capital, not exceeding 100,000 *l.*—Subscribers intitled to a share of capital in proportion to their subscriptions, and to be members of the corporation.—Subscriptions to be entered, signed, and attested.

Sect. 4. The King may grant power to enlarge the capital.

Sect. 5. Subscribers to pay a fourth at the time of subscribing, and the remainder at such calls as the directors shall appoint.—Ten days notice of every call to be published in the *London Gazette*—On neglect of first payment, subscription to be void; and on neglect of subsequent payments, one half of the first to be forfeited, *&c.*

Sect. 6. Directors may appoint a house in or near *London* or *Westminster* to transact their business.—Directors to be a court, and nominate all officers and servants; and to take apprentices.

Sect. 7. A general annual court to be held the first *Wednesday* in *March* for electing directors.

Sect. 8. Qualification of a director to be 500 *l.* capital stock; and the qualification of a person intitled to vote shall be 200 *l.* capital stock.

Sect. 9. Members voting to swear their qualifications, if required—Officers and servants to be sworn according to the form approved by a general court; and if officers and servants refuse or neglect to take such oath for ten days, their election shall be void.

Sect. 10. General courts to be called on demand of certain subscribers; and on refusal, they may call such court themselves.—General court may displace directors.

Sect. 11. No member shall be liable to any debt of the corporation further than his share in the capital.

Sect. 12. If the corporate debts shall exceed the value of the capital undivided, or if they reduce their capital so that their stock shall not be sufficient to pay their debts; persons receiving any dividend by which the capital shall be reduced, are to be personally liable to make good such deficiency, so far as the dividends they shall have received shall extend.

Sect. 13. Members not liable to bankruptcy, nor the effects of the company, or any member's share liable to foreign attachment.

Sect. 14. Shares to be assignable; but not till seven years from the constitution of the corporation, unless in case of death or bankruptcy.—Members shares, *&c.* to be personal estates.

Sect. 15. Forging the seal, *&c.* of the corporation, felony.

Sect. 16. Breaking into a shop, *&c.* with intent to steal or destroy, *&c.* any materials or implements, declared to be felony.

Sect. 17. Cambricks and lawns made in *England* after the 10th day of *May* 1764, to be sealed at both ends.

Sect. 18. Commissioners of excise, upon request, to provide seals, and appoint officers to mark the goods; who are to be paid for marking, *&c.* such goods before taken out of the loom.

Sect. 19. Manufacturer to give notice to officer of the finishing of every piece, who is to mark the ends before taken out of the loom.—Penalty on taking any piece out of the loom without giving such notice, and having the ends marked, 5 *l.* and loss of the goods.

Sect. 20. Officer, on notice of the finishing any pieces of such goods, shall forthwith mark the beginning and ends, and set a number on each piece before taken out of the loom; and shall make a true entry of the numbers, lengths, and the number of threads in the warp of each piece, on forfeiture of 10 *l.*

Sect. 21. Officers marking cambricks or lawns not made in *England*, or marking such goods after taken out of the loom, to forfeit 50 *l.* and be incapacitated.

Sect. 22. Penalty of 100 *l.* on bribing officers.

Sect. 23. Officers to transmit to the commissioners of excise an annual account of all goods they shall stamp, and a copy of all entries relating thereto.—Officers, *&c.* to deliver up seals, *&c.* to commissioners of excise, on demand, on penalty of 200 *l.*

Sect. 24. Cambricks and lawns made in *England* after the 10th of *May* 1764, found unstamped, may be seized. Persons exposing to sale, or having in their custody for sale, such goods unstamped, to forfeit 200 *l.*

Sect. 25. Goods condemned by virtue of this act not to be worn here, but sold for exportation, and the buyers to give security.

Sect. 26. Persons counterfeiting the seal, *&c.* or selling goods with a counterfeit seal, *&c.* guilty of felony.

Sect. 27. Cambricks or lawns made or begun in *England* before the commencement of this act, to be sealed.

Sect. 28. Forfeitures and penalties to be recovered in any court of Record at *Westminster*, one half to the King, and the other to the prosecutor.

Sect. 29. A *capias* to issue for the penalties in the first process.—Defendants to give bail.

Sect. 30. Action to be brought in twelve months. Defendant may plead the general issue, and shall recover treble costs, if judgment against the plaintiff.

Sect. 31. The *onus probandi* shall lie on the claimer.

Sect. 32. This act not to extend to *Scotland* or *Ireland*.

Sect. 33. This act shall be a publick act.

Cambridge.

Cambridge. By ſtat. 34 & 35 *Hen.* 8. *c.* 24. a rent is given to the knights of the ſhire of the county of *Cambridge*, inſtead of their wages.

Stat. 35 *Hen.* 8. *c.* 15. *ſect.* 2. All that hold tenements in *Cambridge* ſhall repair the pavements, *&c.* over againſt their tenements, on pain of 6 *d.* for every yard ſquare of pavement, and 12 *d.* for every pole of gravelled lanes.

Sect. 3. The chancellor, vice-chancellor, mayor, and bailiffs, or their deputies, with four aſſiſtants, two of the univerſity and two of the town, ſhall have power at *Eaſter* and *Michaelmas*, or within a month after, to ſwear twelve ſcholars, ſervants, and other inhabitants, to make preſentment of all that do not pave and amend the ſtreets and ways; and to ſet fines and amercements, which ſhall be gathered of ſcholars by the beadle, and of other inhabitants by the chamberlain.

Sect. 4. If the ſaid magiſtrates ſhall neglect for ſix weeks after either of the ſaid feaſts, they ſhall forfeit 5 *l.* one half to the King, and the other half to him that will ſue.

By ſtat. 7 *Geo.* 2. *c.* 10. and 18 *Geo.* 2. *c.* 20. *ſect.* 15. the vice-chancellor and mayor of *Cambridge* may act as juſtices for the county, without the landed qualification.

Camera, From the old German *cam, cammer,* crooked; whence our Engliſh *kembo,* arms in *kembo*; a *comb,* in the north *camb:* the preſent *Iriſh* uſe *cama* for a bed. *Camera* ſignified at firſt any winding or crooked plat of ground. *Tres* cameras *ad vineam——unam* cameram *terræ —— i. e.* a nook of ground. *Vide Du Freſne in voce.* The word was afterwards applied to any vaulted or arched building, eſpecially to an open ſtall, or ſhop for ſale of goods; and was by degrees more particularly reſtrained to an upper room, or chamber. See Mr. *Kennet's Gloſſary to Parochial Antiquities.*

Camica, Camlet, or a fine ſtuff made at firſt of camels hair. ——Richardus de Bury *epiſc.* Dunelm, *contulit eccleſiæ veſtimentum de nigra* camica, *cum tribus capis ejuſdem ſectæ.* Hiſt. Dunelm. apud Whartoni Angl. Sac. P. 1. p. 766.

Camiſia, A garment of the prieſt, called the *alb*; *inditus* camiſia *linea quæ communu nomine dicitur* alb. *Pet. Bleſenſis, ſerm.* 41.

Camoca, A garment made of ſilk, or ſomething better. *Unum veſtimentum pro ferialibus diebus album de* camoca. Monaſticon, tom. 3. part 2. p. 81.

Campana bajula, A ſmall portable hand-bell, much in uſe among other ceremonies of the *Roman* church; and ſtill retained among us by ſextons, pariſh-clerks, and public criers.—*Quatuor eas muneribus patriarcha donavit, altari videlicet portatili conſecrato,* campana bajula, *baculo inſigni, & tunica ex auro contexta. Reverſi in patriam ſua quiſque dona miraculoſe percepit.* David *quidem in monaſterio cui nomen* Langevilach *nolam & altare.* Girald. Cambr. apud Whartoni Angl. Sacr. P. 2. p. 637.

Campartum, Any part or portion of a larger field, or ground; *champerty,* a ſhare or diviſion of what would otherwiſe be in groſs or common.—*Rex cuſtodi inſularum de* Gernſey, *&c. in perpetuum reddantur decimæ de* camparto *noſtro in eadem inſula—Dat.* 27. *Nov.* 19 H. 3. Prynn's Hiſtor. Collect. vol. 3. p. 83.

Campertum, Uſed for a corn-field. *Alicia de Chapele furabatur* 35 *garbas de* camperto *regis, de quo facto indictata, fugit ad eccleſiam.* Pet. in Parl. 30 Ed. 1.

Campfight. See **Champion.** and 3 *Inſt. fol.* 221.

Campus Martii, or **Maii,** Was an aſſembly of the people every year upon *May-day,* where they confederated together to defend the kingdom againſt foreigners and all enemies. *Leges Edw. Confeſſor. cap.* 35. *Denuo in* campo martii *convenere, ubi illi qui ſacramentis inter illos pacem confirmavere, regi omnem culpam impoſuere.* Sim. Dunelm. 1094. *Du Freſne.*

Cancellare Manus, To cancellate the hands, that is, to lay them traverſe or a-croſs one another, as the poor children on the foundation of *Queen's College, Oxon,* do attend the *provoſt* and fellows at table, *manibus cancellatis,* with their hands leaning a-croſs on the one ſide of the table. *Extendit collum genu flectendo,* cancellatis manibus *ſuper pectus ſuum, ita decollatur.* Clem. de Maydeſtan, de Martyrio Ric. Scrope Arahiep. Ebor. apud Whartoni Angl. Sace. P. 2. p. 373.

Candlemas-day, (Sax. *Candlemœrre*) The feaſt of the purification of the bleſſed virgin *Mary* (2 *Feb.*) inſtituted in memory and honour, both of the preſentation of our bleſſed Lord, and the purification of the bleſſed Virgin, in the temple of *Jeruſalem,* the fortieth day after her childbirth, performed according to the law of *Moſes. Levit.* xii. 6. It is called *Candlemas,* or *a Maſs of Candles,* becauſe, before *maſs* was ſaid that day, the church bleſſed, that is, deputed or ſet apart for ſacred uſe, *candles* for the whole year, and made a proceſſion with hallowed *candles* in the hands of the faithful, in memory of the divine light, wherewith Chriſt illuminated the whole church at his preſentation, when old *Simeon* ſtiled him, *A light to the revelation of the Gentiles, and the glory of his people Iſrael.* St. *Luke* ii. 32. This feſtival day is no day in court, and is the *grand day* of *Candlemas* term in the inns of court. *Cowell, edit.* 1727.

Candles. See **Exciſe.**

Canes and Rattans, To what duties liable, 4 *Will. & Mar. c.* 5. *ſec.* 2.

Canes Opertiae.——*Et debent habere* canes opertias *ex omni genere canum, et non impediatas.* Antiq. cuſtumar. de Sutton Colfield. Dogs with whole feet not lawed.

Caneſtellus, A baſket. In the inquiſition of ſerjeancies, and knight's fees, in the 12th and 13th years of King *John,* for *Eſſex* and *Hertford.*——Johannes de Liſtone *tenet—per ſerjantiam faciendi* caneſtellos, i. e. *John of Liſton* held that manor by the ſervice of making the King's baſkets. *Ex libro Rub. Scacc. fol.* 137.

Canfara, A trial by hot iron, formerly uſed here, which ſee in *Ordeal, a candente ferro: Si inculpatio ſit, & ſe purgare velit, eat ad ferrum calidum, & adlegiet manum ad* canfaram, *quod non falſum fecit:* where *canfara* is interpreted for *candens. Du Freſne.*

Canipulus, A ſhort knife or ſword: *Ne quis viator* canipulum *deferret vel arcum.* Rad. de Diceto, anno 1275.

Canna, A rod in meaſure of ground, or diſtance.—*Papa Clem.* 4. *pont. ſui An.* 1. *concedit generali & provincialibus miniſtris ac univerſis fratribus ordinis minorum fratrum in Anglia—ut nulli ſeculari vel religioſo eccleſiam vel monaſterium ſeu oratorium jam ædificatum in aliquem locum transferre liceat infra ſpatium* 300 cannarum *ab ipſorum eccleſiis menſurandarum——volumus quamlibet ipſarum* cannarum *octo palmorum longitudinem continere.* Ex Regiſtr. Walt. Giffard Archiep. Ebor. fol. 45.

Canon, Is a law or ordinance of the church; and the *Greek* word *canon,* from which is derived the *canon law,* ſignifies a rule, becauſe it leads a man ſtraight, neither drawing him from one ſide or the other, but rather correcting him. The *canon law* conſiſts partly of certain rules taken out of the Scripture; partly of the writings of the ancient fathers of the church; partly of the ordinances of general and provincial councils; and partly of the decrees of the popes in former ages. And it is contained in two principal parts, the *decrees* and *decretals.* The decrees are eccleſiaſtical conſtitutions made by the pope and cardinals, and were firſt collected by *Ivo* biſhop of *Carnot,* who lived about the year 1114, but afterwards perfected by *Gratian,* a *Benedictine* monk, in the year 1149, and allowed by pope *Eugenius* to be read in ſchools, and alledged for law. They are the moſt ancient, as having their beginning from the time of *Conſtantine* the Great, the firſt Chriſtian Emperor of *Rome.* The decretals are *canonical,* epiſtles written by the pope, or by the pope and cardinals, at the ſuit of one or more perſons, for the ordering and determining of ſome matter of controverſy, and have the authority of a law; and of theſe are three volumes, the firſt whereof was compiled by *Rymandus Barcinius,* chaplain to *Gregory* the ninth, and at his command, about the year 1231. The ſecond volume is the work of *Boniface* the Eighth, collected in the year 1298, and the third volume, called *Clementines,* were made by pope *Clement* the Fifth, and publiſhed by him in the council of *Vienna,* about the year 1308. And to theſe may be added ſome novel conſtitutions of *John* the

Twenty-ſecond and ſome other biſhops of *Rome*. As the decrees ſet out the origin of the *canon law*, and the rights, dignities, and degrees of eccleſiaſtical perſons, with their manner of election, ordination, &c. ſo the decretals contain the law to be uſed in the eccleſiaſtical courts; and the firſt title in every of them is the title of the Bleſſed Trinity, and of the catholic faith, which is followed with conſtitutions and cuſtoms, judgments and determinations, in ſuch matters and cauſes as are liable to eccleſiaſtical cognizance, the lives and converſation of the clergy, of matrimony and divorces, inquiſition of criminal matters, purgation, penance, excommunication, &c. But ſome of the titles of the *canon law* are now out of uſe, and belong to the common law; and others are introduced, ſuch as the trials of wills, baſtardy, defamation, &c. Trials of tithes were anciently in all caſes had by the eccleſiaſtical law, though at this time this law only takes place in ſome particular caſes. See *Duck de Jure Civil. Romanor. Ridley's View of the Civil and Eccleſ. Law. Ayliff's Parergon.*

Stat. 25 *Hen.* 8. *cap.* 19. *ſ.* 1. enacts, *The clergy ſhall not preſume to claim, or put in ure, any conſtitutions or canons; nor ſhall enact, promulge, or execute any ſuch canons or ordinances in their convocations (which always ſhall be aſſembled by authority of the King's writ) unleſs the clergy may have the King's royal aſſent and licence to make, promulge, and execute ſuch canons and ordinances; upon pain of every one of the clergy, doing contrary, and being thereof convict, to ſuffer impriſonment, and make fine at the King's will.*

Sect. 2. *No canons ſhall be made or put in execution within this realm by authority of the convocation, which ſhall be repugnant to the King's prerogative, or the cuſtoms, laws, or ſtatutes of this realm.*

The King, without parliament, may make *orders and conſtitutions to bind the clergy*, and may *deprive* them if they obey not; but they cannot make any conſtitutions without the King. *Cro. J.* 37. *per omnes J. &c. Trin.* 2 *Jac. in pl.* 13.

Reſolved, that the canons of the church made by the convocation and the King, without parliament, ſhall *bind in matters eccleſiaſtical* as well as an act of parliament; for they ſay, that by the Common law every biſhop in his dioceſe, archbiſhop in his province, and convocation-houſe in the nation, may make canons to bind within their limits. When the convocation makes canons of things appertaining to them, and the King confirms them, they ſhall bind all the realm. *Mo.* 783. *pl.* 1083. *Trin.* 4 *Jac. in Canc.* with the aſſiſtance of the two chief juſtices and chief baron. *Bird* v. *Smith.*

Canons made by the pope and allowed here, yet unleſs they were *allowed by parliament* were not good. *Arg. Rol.* 454. *per Dr. Martin, Hill.* 14 *Jac.* in the Exchequer-Chamber.

Where there is a ſpecial cuſtom for the *chuſing churchwardens* (*viz.* that the parſon ſhall have the election of one) the canons cannot alter it, eſpecially in *London*, where the parſon and churchwardens are a corporation to purchaſe lands and demiſe their lands. *Cro. J.* 532. *pl.* 15. *Paſch.* 17 *Ja. B. R. Warner*'s caſe.

The canons are the eccleſiaſtical laws of the land, but ſhall not *bind* here unleſs received, as appears by ſtat. 25 *Hen.* 8. 21. and the ſtat. *De Bigamis*, and the ſtat. of *Merton*, as to one born before marriage, tho' by the canon law he was legitimate, yet by our law he is not; *per cur. Jo.* 160. *Trin.* 3 *Cur. B. R.*

The canons made 1571, in Queen *Elizabeth*'s time, and the 21 *Jac.* being confirmed by Q. *Eliz.* and K. *Jac.* are good, by the ſtat. 25 *Hen.* 8. as long as they do not impugn the Common law or prerogative of the King, and before the 25 *Hen.* 8. 19. the eccleſiaſticks might make canons without the King, but are by that ſtatute reſtrained; but ſince that ſtatute they may make canons with the aſſent of the King, ſo long as they are not contrary to the laws of the land, or derogatory of the King's prerogative. 2 *Lev.* 222. *Trin.* 30. *Car.* 2. *B. R. Cory* v. *Pepper.*

Eccleſiaſtical perſons are ſubject to the canons. Thoſe of 1640 have been *queſtioned*, but no doubt was ever made as to thoſe of 1603; *per cur.* 1 *Salk.* 134. *Paſch.* 11 *W.* 3. *B. B. The Biſhop of St. David's* v. *Lucy.*

All the *clergy are bound* by the canons confirmed only by the King; but they muſt be confirmed by the parliament to bind the laity; *per cur. Carth.* 485. 11 *W.* 3. *B. R. The Biſhop of St. David's* v. *Lucy.*

In the primitive church the laity were preſent at all ſynods. When the empire became Chriſtian, no canon was made without the Emperor's conſent. The Emperor's conſent included that of the people, he having in himſelf the whole legiſlative power, which our Kings have not; therefore if the *King and clergy make a canon, it binds the clergy* in re eccleſiaſtica; *but* it does *not* bind *laymen*; they are not repreſented in convocation; their conſent is neither aſked nor given. 2 *Salk.* 412. *pl.* 2. *Hill.* 1 *Ann. B. R. Matthews* v, *Burdett.*

No canons, *ſince* 1603, can *proprio vigore* bind laymen. *Per Holt* Ch. J. 6 *Mod.* 190. *Trin.* 3 *Ann. B. R.* in caſe of *Britton* v. *Standiſh.*

Canon was formerly uſed for any preſtation, penſion, or other cuſtomary payment.——*Si vero dicti prior & monachi aliquo prædictorum terminorum ceſſaverint a ſolutione firmæ dictæ eccleſiæ de* Rading, *præter debitum* canonem *illius termini dimidiam marcam argenti,*—Cartular. Rading MS.——Willielmus *epiſc.* Wigorn. *conceſſit abbati & conventui de* Eveſham annuum canonem *xv. marc. ad conſtructionem operis eccleſiæ de* Eveſham, *& eccleſiæ de* Ambreſbury. *Teſt.* Simone Abb. Perfore. Petro Archid. Wigorn. *Ex Cartul. de* Eveſham *MS. Cotton, fol.* 13.

Canonium, *Chelmsford* in *Eſſex.*

Canon Religioſorum, A book wherein the religious of every greater convent had a fair tranſcript of the rules of their order frequently read among them as their local ſtatutes; which book was therefore called *Regula*, and *Canon*. The public books of the religious were theſe four: 1. *Miſſale*, which contained all the offices of devotion. 2. *Martyrologium*, a regiſter of their peculiar ſaints and martyrs, with the place and time of paſſion. 3. *Canon* or *Regula*, the inſtitution and rules of their order. 4. *Necrologium* or *Obituarium*, in which they entered the death of their founders and benefactors, to obſerve the days of commemoration for them. But as the two firſt, ſo likewiſe the two latter were ſometimes joined in the ſame volume.——*Kennet's Gloſſary.*

Cantel, (*Cantellum*, velut *quantillum*) Is that which is added above meaſure. *Nullum genus bladi vendatur per cumulum ſeu* cantellum, *præter avenum, braſium & farinam.* Stat. *de Piſtor. cap.* 9. It ſeems alſo ſometimes to ſignify the ſame with that we now call lump. See *Polton, Temps H.* 3. *Ed.* 1. or *Ed.* 2. *cap.* 4. & 9. It ſignifies alſo a piece of any thing, as a *cantel* of bread, cheeſe, and the like.

Canterbury. See **Dozobernia.**

Cantred, or rather **Cantref** (*Cantredus*) Signifies an hundred villages, being a *Britiſh* word compounded of the adjective *cant. i. e.* an hundred, and *tret*, a town or village. In *Wales*, the counties are divided into *cantreds*, as in *England* into *hundreds*. The word is uſed *anno* 28 *H.* 8. *cap.* 3. See **Commote.** See alſo Mr. *Kennet's Gloſſary, in verbo* Cantredum.

Capacity (*Capacitas*) An ability or fitneſs to contain or receive. In law it ſignifies, when a man, or body politick, is able to give or take lands, or other things, or to ſue actions. As an alien born hath a ſufficient capacity to ſue in any perſonal action; but in a real action it is a good plea to ſay, *he is an alien born*; and pray, *if he ſhall be anſwered. Dyer, f.* 3. *pla.* 8. If a man enfeoffs an alien and another man, to the uſe of themſelves, or, &c. it ſeems that the King ſhall have the moiety of the land for ever, by reaſon of the incapacity of the alien. *Dyer, fol.* 383. *pla.* 31. By the Common law, no man hath capacity to take tithes but ſpiritual perſons, and the King, who is a perſon mixt; our law allowing him two *capacities*, a natural, and a politick. In the firſt he may purchaſe lands to him and his heirs; in the latter, to him and his ſucceſſors; and a parſon hath the like: but a layman, who is not capable of taking tithes, was yet capable to diſcharge tithes at the Common law in his own land, as well

well as a ſpiritual perſon. See *Co. lib.* 2. *fol* 44. Perſons attainted of treaſon or felony, idiots, lunaticks, infants, feme coverts without their huſbands, *&c.* are not capable to make any deed of gift, grant, or conveyance, unleſs it be in ſome ſpecial caſes. But all other perſons void of impediments are capable of making grants and conveyances, and to ſue and be ſued, being twenty-one years of age; and at fourteen, their age of diſcretion, they are capable by law to marry, be a witneſs, *&c.* See *Co. Lit. ſect.* 259, 402, 403.

Caparo, A hood, cap, or covering for the head. It is mentioned in *Mat. Paris, anno* 1227, *viz. Concedant eis pannos probationis, videlicet duas tunicas ſine capucio, & cingulum & braccas* & caparonem *uſque ad cingulum. Blount, edit.* 1717.

Cape, Is a writ judicial touching plea of lands or tenements; ſo termed (as moſt writs are) of that word in itſelf, which imports the chiefeſt end and intention thereof. And this is divided into *cape magnum*, and *cape parvum*, both which take hold of things immoveable, and ſeem to differ between themſelves in theſe points: *Firſt*, Becauſe *cape magnum*, or the *grand cape*, lieth before appearance, and *cape parvum* afterwards. *Secondly*, The *cape magnum* ſummoneth the tenant to anſwer to the default, and over to the demandant. *Cape parvum* ſummoneth the tenant to anſwer the default only; and therefore is called *cape parvum*, or in the *French Engliſh petit cape*, *Old Nat. Brev. fol.* 161, 162. Yet *Ingham* ſaith, that it is called *petit cape*, not becauſe it is of a ſmall force, but for that it conſiſteth of few words. *Cape magnum*, in the *Old Nat. Brev.* is thus defined; this is a judicial writ, and lieth where a man hath brought a *præcipe quod reddat* of a thing that toucheth plea of land, and the tenant makes default at the day to him given in the writ original, then this writ ſhall go for the King to take the land into the King's hands, and if he comes not at the day given him by the *grand cape*, he has loſt his land, *&c.* A precedent and form of this writ you may ſee in the *Regiſter Judicial*, *f.* 2. *b*, it ſeemeth after a ſort to contain in it the effect of *miſſionis in poſſeſſionem, & primo et ſecundo decreto* among the Civilians: for as the firſt decree ſeizeth the thing, and the ſecond giveth it from him that the ſecond time defaulteth in his appearance; ſo this *cape* both ſeizeth the land, and alſo aſſigneth to the party a farther day of appearance; at which, if he come not in, the land is forfeited; yet is there a difference between theſe two courſes of the Civil and Canon law. *Firſt*, For that *miſſio in poſſeſſionem* toucheth both moveable and immoveable goods, whereas *cape* is extended only to immoveable. *Secondly*, That the party being ſatisfied of his demand, the *remanet* is reſtored to him that defaulted; but by the *cape* all is ſeized without reſtitution. *Thirdly*, *miſſio in poſſeſſ.* is to the uſe of the party agent, the *cape* is to the uſe of the King. Of this writ, and the explication of the true force and effect thereof, read *Bracton, lib.* 5. *tract.* 3. *ca.* 1. *n.* 4, 5, 6. See **Cape ad valentiam.**

Cape parvum, In the *Old Nat. Brev. fol.* 162, is thus defined: This writ lieth in caſe where the tenant is ſummoned in plea of land, and cometh at the ſummons, and his appearance is of record, and after he maketh default at the day that is given to him, then ſhall go this writ for the King, *&c.* The difference between the *grand cape* and *petit cape* (which in effect or conſequence are alike) is that the *grand cape* is awarded upon the defendant or tenant's not appearing or demanding the view in ſuch real actions, where the original writ does not mention the parcels or particulars demanded; and the *petit cape* after appearance or view is granted. Of this likewiſe you may ſee the form in the *Regiſter Judicial*, fol. 2. Of both theſe writs read *Fleta, lib.* 2. *cap.* 24. *ſect. magnum & ſect. Cowell.*

Cape ad valentiam, Is a ſpecies of *cape magnum*, ſo called of the end whereunto it tendeth. In the *Old Nat. Brev.* fol. 161, 162. it is thus deſcribed: This writ lieth where any is impleaded of certain lands, and I vouch to warrant another, againſt whom the ſummons *ad warrantizandum* hath been awarded, and the ſheriff cometh not at the day given; then if the demandant recover againſt me, I ſhall have this writ againſt the vouchee, and ſhall recover ſo much in value of the land of the vouchee, if he have ſo much; and if he have not ſo much, then I ſhall have execution of ſuch lands and tenements as deſcend to him in fee-ſimple; or if he purchaſe afterward, I ſhall have againſt him a re-ſummons; and if he can ſay nothing, I ſhall recover the value. Here note, that this writ lieth before appearance. Of theſe writs and their divers uſes, ſee the table of the *Reg. Judicial, verbo Cape. Cowell.*

Capella, Before the word *chapel* was reſtrained to an oratory, or depending place of divine worſhip, it was uſed for any ſort of cheſt, cabinet, or other repoſitory of precious things, eſpecially of religious relicks.——*Regnante* Stephano, Nigellus *Epiſc.* Elienſis, *pro imminenti ſibi negotio auxilium dominæ Imperatricis, & ſuorum colloquium requirendum putavit. Qui dum pergerit homines regis invadunt, abſque miſeratione bonis ſuis diſpoliant, equos & indumenta, inſuper* capellam *optimam, quam epiſcopus ſecum de eccleſia tulerat, in contaminatis manibus rapiunt.* Hiſt. Elien. apud Wartoni Angl. Sacr. p. 1. p. 622. The inſtitution and dependence of chapels, and their *capellanes*, with the dignities and liberty of mother-churches, is treated of at large in Mr. *Kennet's Paroch. Antiq. p.* 580. *Cowell, edit.* 1727.

Capella de floribus, A chaplet, or coronet, or garland of flowers for the head.—*Tanta varietas & laſcivia apparet in familia prælatorum multorum in veſtibus partitis, & virgatis*, capellis de floribus, *& corrigiis deauratis, &c.* Opuſcul. Tripartit. apud Faſciculum Rerum, &c. Append. p. 225.

Capella lineata, A head-piece lined, *Abbas de* Nevele *tenet in Com.* Lincoln.——*per ſervitium reddendi domino regi unam* capellam lineatam *de Syndone, & unum par calcarium deauratorum*—Tenures, p. 64. an. 9 Ed. 1.

Capellus, A cap, bonnet, hat, or other covering for the head.——*Capite diſcooperto, ſine* capello, *cum una garlanda de latitudine minoris digiti ſui*——15 Joh. Tenures, p. 32.

Capellus militis, A helmet, or military head-piece.——*Quando moritur, dabit ſimiliter relevium modo quo prius, niſi habuerit equum, & tunc hæres ejus veniet ad curiam domini cum equo meliori, ſella, fræno, &* capello, *gladio & calcaribus.*——Conſuetud. Domus de Farendon, MS. f. 21.

Capias, Is a writ of two ſorts; one whereof is called *capias ad reſpondendum*, before judgment, where an original is ſued out, *&c.* to take the defendant, and make him anſwer the plaintiff; and the other a writ of execution, after judgment, being of divers kinds, as *capias ad ſatisfaciendum, capias utlagatum, &c. Cowell.* See *The Attorney's Practice in the Court of Common Pleas*, vol. 1. p. 63, *&c.* See alſo *The Attorney's Practice in the Court of King's Bench*, vol. 1. page 304.

Form of a Writ of *Capias* in C. B. in Treſpaſs.

GEORGE *the Third, &c. to the ſheriff of* Middleſex, *greeting. We command you, that you take* A. B. *late of the pariſh of* ——— *in your county,* ———, *if he ſhall be found in your bailiwick, and keep him ſafely, ſo that you have his body before our juſtices at* Weſtminſter *on the octave of St.* Hillary, *to anſwer* W. P. *in a plea, wherefore with force and arms he broke the cloſe of the ſaid* W. *at* Weſtminſter, *and did other injuries to him, to his great damage, and againſt our peace; and have there this writ.* Witneſs *Sir* Charles Prat, *knight, at* Weſtminſter, *the* ——— *day of* ——— *in the* ——— *year of our reign.*

Capias ad ſatisfaciendum, Is a writ of execution after judgment, lying where a man recovers in an action perſonal, as for debt or damages, or *detinue* in the King's court; and he againſt whom the debt is recovered hath no lands nor tenements, nor ſufficient goods, whereof the debt may be levied. For in this caſe, he that recovereth ſhall have this writ to the ſheriff, commanding him that he take the body of him againſt whom the debt is recovered, and he ſhall be put in priſon, until ſatisfaction made. *Cowell.*

This writ was by the Common law only in treſpaſſes, *quare vi & armis*, being direct and wilful wrongs; but now by the ſtatute 25 *Ed.* 3. may iſſue in other caſes. It is deemed a full execution, and in the law ſufficient for the whole debt; for *corpus humanum non recipit æſtimationem:* and where the body is taken on a *capias ad ſatisfaciendum*, no other execution can be had againſt the defendant's lands or goods. But in caſe the defendant dies in execution, the plaintiff, his executors or adminiſtrators may, by ſtat. 21 *Jac.* 1. *c.* 24. ſue forth execution againſt the lands and tenements, goods and chattels of the defendant ſo dying in execution, in like manner as if the deceaſed defendant had never been taken in execution; in this caſe the judgment muſt be revived by *ſcire facias*. *Attorn. Pract. in C. of Common Pleas*, vol. 1. p. 222, 223.

If two be bound jointly and ſeverally to me, and I ſue them jointly, I may have a *capias* againſt them both, and the death or eſcape of one ſhall not diſcharge the other; but I cannot have a *capias* againſt the one, and another kind of execution againſt the other, becauſe though they be two ſeveral perſons, yet they make but one debtor when I ſue them jointly; but if I ſue them ſeverally, I may ſever them in their kinds of execution; though if once ſatisfaction be had of one, or againſt the ſheriff for an eſcape of one, the reſt may be relieved upon an *audita querela*. *Hob.* 59.

Form of *Capias ad Satisfaciendum* in Debt.

GEORGE *the Third, by the grace of God, of* Great Britain, France, *and* Ireland, *King, Defender of the Faith*, &c. *to the ſheriffs of* London, *greeting. We command you, that you take* W. B. *late of* London, *cabinet-maker, otherwiſe called* W. B. *late of the pariſh of in the county of* Middleſex, *cabinet-maker, if he be found in your bailiwick, and keep him ſafely, ſo that you may have his body before our Juſtices at* Weſtminſter *on the morrow of the* Holy Trinity, *to ſatisfy* R. R. *as well of a certain debt of fifty pounds, which the ſaid* R. *in our court before our Juſtices at* Weſtminſter *recovered againſt him, as of ſixty-three ſhillings, which in our ſaid court were adjudged to the ſaid* R. *for his damages, which he had by occaſion of the detaining the debt, whereof the ſaid* W. *is convicted; and have there this writ. Witneſs Sir* Charles Prat, *knight, at* Weſtminſter, *the day of in the year of our reign.*

Capias conductos ad proficiſcendum, Is an original writ, which lies by the Common law againſt any ſoldier that hath covenanted to ſerve the King in his wars, and appears not at the time and place appointed, directed to two of the King's ſerjeants at arms, to arreſt and take him whereſoever he may be found, and to bring him *coram concilio noſtro*; with a clauſe of aſſiſtance. 4 *Inſt. fol.* 128.

Capias ad ſatisfaciendum infinite (22 & 23 *Car.* 2. Act for relief of ſoldiers.)

Capias in Withernamium de Averiis, Is a writ lying for cattle in *Withernam. Reg. of writs, fol.* 82. & 83. See **Withernam.**

Capias in Withernamium de Homine, Is a writ that lies for a ſervant in *Withernam. Reg. fol.* 79. & 80. See **Withernam.**

Capias pro fine, Is where one, being by judgment fined to the King upon ſome offence committed againſt a ſtatute, does not diſcharge it according to the judgment. By this therefore his body is to be taken, and committed to priſon until he pay the fine. *Coke, lib.* 3. *fol.* 12. or where, upon a *non eſt factum* pleaded, his plea is by evidence, or his own ſubſequent acknowledgment, not made out or verified, and the like.

Capias utlagatum, Is a writ which lies againſt him who is outlawed upon any action, perſonal or criminal; by which the ſheriff apprehends the party outlawed for not appearing upon the *exigent*, and keeps him in ſafe cuſtody till the day of return, and then preſents him to the court, there farther to be ordered for his contempt, who (if in the Common Pleas) was in former times to be committed to the *Fleet*, there to remain till he had ſued out the King's charter of pardon, and appeared to the action. At preſent, in the *King's Bench*, the *outlawry* cannot be reverſed, unleſs the defendant appear in perſon, and by a preſent of gloves to the judges obtain their favour to reverſe it. And in the *Common Pleas*, the defendant (not being an executor or adminiſtrator) is now to give good bail (which he is allowed to do by attorney) to anſwer the action, if the debt or damage demanded be 20 *l.* or above, and to pay the plaintiff's charges, before the *outlawry* be reverſed. And by a ſpecial *capias utlagatum* in the ſame writ, the ſheriff is commanded, and may ſeize all the defendant's lands, goods, and chattels for the contempt to the King; and the plaintiff may (after an inquiſition taken thereupon, and returned into the *Exchequer*) obtain a leaſe of the lands extended, and a grant of the goods, whereby to compel the defendant to appear; which, when he ſhall have ſo done, and reverſe the outlawry, are to be reſtored to him. See *Old Nat. Brev. fol.* 154. and *Table of Reg. Judic. verbo Capias*. Cowell, edit. 1727. See **Outlawry.**

Capiatur pro fine, Taken away, and other proviſions in lieu thereof, 5 *Will. & Mar. c.* 12.

Capita Baroniarum, The chief ſeats of barons. *Bracton.*

Capitagium. See **Chevage.**

Capitale, The thing which is ſtolen, or the value of it. It is mentioned in *Leg. H.* 1. *cap.* 59. viz. *Si furtum redimendum*, capitale *redimentis conjectent*; i. e. if the theft be redeemed, let the thing ſtolen, or the value of it, be returned.

Capitale vivens, Live cattle. *In Leg. Æthelſtani. Reddam de meo proprio decimas Deo, tam in* vivente capitali, *quam in mortuis fructibus terræ.*

Capite, From *caput*, the head; and ſo *tenure in capite*, is to hold of the King, the *head* of the commonwealth. It is a tenure that holds immediately of the King, as of his crown, be it by knight-ſervice or ſocage, and not of any honour, caſtle, or manor, and for this it is called a tenure, which holds merely of the King; for as the crown is a corporation, a ſeigniory in groſs, ſo the King, who poſſeſſes the crown, is in the eye of the law perpetually King, never in his minority. *F. N. B. fol.* 5. Yet a man may hold of the King, and not *in capite*; that is, not immediately of the crown in groſs, but by means of ſome honour, caſtle, or manor belonging to the crown. Of this *Kitchin, fol.* 129. ſaith well, that a man may hold of the King by knight-ſervice, and not *in capite*; becauſe that is in the King's hands, by deſcent from his anceſtors, and not immediately of the King, as of his crown. And this *tenure in capite* is otherwiſe called, tenure holding of the perſon of the King. *Dyer, fol.* 41. *Broke*, tit. *Tenure, nu.* 65, 99. But this tenure is now aboliſhed, and by 12 *Car.* 2. *cap.* 24. all tenures are turned into free and common ſocage. The ancient *tenure in capite* was of two ſorts, the one principal and general, which is of the King; as *caput regni, & caput generaliſſimum omnium feodorum*, the fountain whence all feuds and tenures have their main original; the other *ſpecial* and *ſubaltern*, which was of a particular ſubject, as *caput feudi, ſeu terræ illius*; ſo called, becauſe he was the firſt that created and granted that feud or land in ſuch manner of tenure: he was thereupon called *Capitalis Dominus, & Caput terræ illius*; among the *Feudiſts, Capitaneus Feudi illius.* Vide *Spelman of Feuds, cap.* 4.

Capitilitium. See **Chevage.** It is what we now call *poll-money.*

Improba Romani poſcunt a Rege tributa,
Cujus ad arbitrium diſponitur omne tributum,
Et capitalitium *cogunt appendere ſummam.* Du Freſne.

Capititium, A covering for the head; ſometimes it ſignifies a collar of a coat. It is mentioned in the ſtatute *H.* 4. *anno* 1. *Quod ſi aliquis miles, vel aliqua perſona minoris ſtatus, det aliquam liberatam panni vel* capititiorum *contra formam ſtatuti, &c.*

Capituli Agri, The had-lands, or head-lands, that lie at the head, or upper end of the lands or furrows.—*Canonici* (Burceſter) *conceſſerunt hominibus de* Wrechwike *duas acras prati pro* capitibus *ſuarum croftarum tenus rivulum*

hm verſus molendinum, &c. Mr. *Kennet's Paroch. Antiq.* p. 137. See **Havedelond.**

Capitula Ruralia, Clerical aſſemblies, or chapters held by the rural dean, and parochial clergy within the precinct of every diſtinct deanery; at firſt every three weeks, then once a month, and more ſolemnly once a quarter, of which ſee the practice at large in Mr. *Kennet's Paroch. Antiq. p.* 640.

Caps. See **Hats.**

Captain (*Capitaneus*) Is one that leadeth, or hath command of a company of ſoldiers; and is either general, as he that hath the governance of the whole hoſt; or ſpecial, as he that leads but one band. There is another ſort of captains, *qui urbium præfecti ſunt, quibus plebs ab aliquo ſuperiorum gubernanda committitur.* So we have captains of caſtles here in *England,* as of *Dover,* the iſles of *Jerſey, Guernſey, Wight,* &c. *Cowell, edit.* 1727. See **Soldiers.**

Captale. It is mentioned in *Leg. Inæ, cap.* 42. *apud Brompton*; and it ſignifies cattle, *viz. Ruſtici curtillum debet eſſe clauſum æſtate ſimul & hyeme; ſi diſclauſum ſit & introeat alicujus vicini ſui* captale, *&c. nihil inde recipiat.* See **Capitale.**

Caption (*Captio*) When a commiſſion is executed, and the commiſſioners names ſubſcribed to a certificate, declaring when and where the commiſſion was executed, that is called the *caption,* which commonly begins thus:—*By virtue of this commiſſion, we,* &c. *or, the execution of this commiſſion appears in a certain ſchedule hereunto annexed, &c.*

Captives. An act made for relief of captives taken by *Turkiſh, Mooriſh,* and other pirates, and to prevent taking of others in time to come. 16 & 17 *Car.* 2. *cap.* 24.

Capture (*Captura*) the taking of a prey, an arreſt, or ſeizure; and it particularly relates to prizes taken by privateers in time of war, which are to be divided between the captors, *&c.*

Caputagium,—*In cujus facti memoriam etiam quatuor denarios de* caputagio *meo, ſicut mos eſt ſecularibus talibus facere, ſuper altare dominicum prædicti loci gratanter imponens.* Dugdale Warwickſh. *f.* 193. *a.* Some think it may ſignify head or poll-money, or the payment of it.—But it is indeed the ſame with *chevagium, chevage.*

Caput anni, New-year's-day; upon which of old was obſerved the *feſtum ſtultorum.* So *caput kalendarum Maii,* May-day.

Caput baronіae, Is the caſtle or chief ſeat of a nobleman, which is not to be divided among daughters (if there be no ſon) but muſt deſcend to the eldeſt daughter, *cæteris filiabus aliunde ſatisfactis.*

Caputia (from *caput,* the head) Is uſed for the head, or hade of any land:——*Cum* caputiis *& ſidlingis prati.* See **Buttum terrae.**

Caput jejunii, Aſh-Wedneſday, being the head, the beginning or firſt day of the *quadrageſimal,* or *Lent* faſt. Some annual payments were aſſigned to be made *in capite jejunii.* Mr. Kennet's Paroch. Antiq. pag. 132.

Caput loci, The end of any place. *Ad caput villæ,* at the end of the town; the end or upper head.

Car, and **Char,** The names of places beginning with *car* and *char* ſignify a city; from the Brit. *caer,* i. e. *civitas*; as *Carliſle,* and many others.

Caravana, A caravan, or joint company of travellers in the Eaſtern countries, for mutual conduct and defence: —*Egreſſa* caravana *noſtra de* Joppa *verſus exercitum veniebat onuſta victualibus & aliis clitellis neceſſariis.*——— Gaufrid. Vineſauf. Richardi Regis Iter Hieroſol, lib. 5. cap. 52.

Carcan, Is ſometimes expounded for a pillory.

Carcannum, A priſon. *LL. Canuti regis.*

Carcatus, Loaden; as a ſhip with her freight.——— *De corpore cujuſlibet magnæ navis* carcatæ *cum rebus venalibus.* 4 *denar.* Pat. 10 R. 2. par. 1. m. 30.

Carcellage, The fees paid to a gaoler when the priſoner is diſcharged.

Cards and Dice, Importation of them prohibited, 3 *Ed.* 4. *c.* 4. enforced by 10 *Ann. c.* 19. *ſect.* 167. Every pack of cards to pay 6 *d.* and every pair of dice 5 *s.* 9 *Ann. c.* 23. *ſect.* 39. Penalty for not giving notice of the place where cards or dice are made, or removing cards or dice before they are marked, except in order for exportation, 9 *Ann. c.* 23. *ſect.* 4. 10 *Ann. c.* 19. *ſect.* 166, 170, Limitation of the time of proſecution upon bonds for exporting cards and dice, 5 *Geo.* 1. *c.* 19. *ſect.* 48. Penalty on defacing the ſtamp of cards or new-ſpotting dice, 6 *Geo.* 1. *c.* 21. *ſect.* 55. An additional duty of 6 *d.* on every pack of cards, and 5 *s.* on every pair of dice, 29 *Geo.* 2. *c.* 3. See **Stamps.**

Carecta and **Carectata** (Sax. *cret,* hence cart) A cart or cart-load.——*Facient precarias de caruca & carecta, i. e. de aratro & carro.* Cuſtumar. prior. Lewes *MS.* —*Quinque* carectatas *clauſturæ, ad prædictæ terræ clauſturam ſuſtinendam.* Mon. Angl. 2 Par. f. 340. a.

Carectata plumbi, A pig, or maſs of lead, weighing 128 ſtone, or 2100 pounds——*Saccus lanæ debet ponderare* 28 *petras, & ſolebat ponderare ſummam frumenti, & ſic ſaccus lanæ ponderat ſextam partem* caractatæ plumbi, *ſcil.* 20 *petras, ſexies viginti & octo petræ faciunt* carectatam plumbi London. *ſumma librarum* caractatæ London. *duo mille & centum libræ, ſcil. de* Waterfothmalet, *ſex ſacci lanæ faciunt* carectatam plumbi,—Ex Cartular. S. Albani, MS. Cotton. Tiber. T. 6. fol. 260.

Caretarius or **Carectarius,** A carter. *Sciant——Quod ego* Herewardus Pril. dedi——*In liberam, puram & perpetuam eleemoſynam Deo & altari B. Mariæ in conventuali eccleſiæ Leominſtr.* 12 *d. annui redditus provenientes de quodam meſſuagio in mariſco quod fuit Richardi* caretarii, *&c. Sine dat.* Ex Libro Chart. Priorat. Leominſtr. See **Carreta.**

Cariſtia, Dearth, ſcarcity, dearneſs,——*Rex majori & vic. London, ſalutem. Querela archiepiſcoporum, comitum,——quod de bobus, vaccis, mulionibus &c. magna & quaſi intollerabilis eſt* cariſtia *hiis diebus ſub, &c.* Pat. 8 Ed. 1. m. 14. intus.

Caritas, *Ad caritatem, poculum caritatis,* A grace-cup, or an extraordinary allowance of wine, or other good liquor, wherein the religious at feſtivals drank in commemoration of their founders and benefactors. So among the cuſtoms of the abbey of Glaſtonbury:——*In diebus ſolemnibus quum fratres fuerunt in cappis, medonem habuerunt in juſtis, & ſimulas ſuper menſam, & vinum ad* caritatem, *et tria generalia, & quatuor vel quinq; pietantias—& hæc eſt aſſiſa quum pro cereviſia vinum debent habere, unuſquiſque ſcilicet habere debet duas* caritates *in die.* Cartular. Abbat. Glaſton. MS. f. 29.

Carke, Seems to be a quantity of wool. whereof thirty make a ſarpler, 27 *H.* 6. *cap.* 2. See **Sarpler.**

Carliſle. The ſtatute of *Carliſle,* of fines, 15 *Ed.* 2. *ſt.* 1. Aſſizes for *Cumberland* to be held in *Carliſle,* 14 *Hen.* 6. *c.* 3. See **Luguvallum.**

Carmenia wool, To what duties liable, 4 *Will. & M. c.* 5. *ſect.* 2.

Carnarium, A charnel-houſe, or repoſitory for the bones of the dead.——*In* carnario *autem ſubtus dictam capellam ſancti* Johannis *(in civitate* Norwicenſi) *conſtituto, oſſa humana in civitate* Norwici *humata de licentia ſacriſtæ qui pro tempore fuerit, qui dicti* carnarii *clavem & cuſtodiam habebit ſpecialem, ut uſq; ad reſurrectionem generalem honeſtius conſerventur, a* carnibus *integre denudata reponi volumus & obſervari.*——Cartular. Fundationis Capellæ Sancti Johannis in Occid. Parte Eccl. Norwic. per Joh. Norwic. Epiſ. dat. 4 Pon. Oct. 1316.

Carno, Seems to ſignify an immunity or privilege. *Cromp. Juriſd. fol.* 191. *Prior de Melton ſe & homines ſuos immunes clamat ab omnibus amerciamentis in foreſta & ab omnibus geldis, footgeldis, buckſtalls, tritis,* carno *& ſumag. &c.* Itin. Pick. fol. 168. b. *Tributum aliquod fundi domino debitum,* ſays *Spelman.*

Carola, A little pew, cloſet, or other ſafe-hold.—— *In correctionibus factis apud* Kirkman *A.* 1279. *Injunctum fuit ut prior, vel ſubprior ſæpius, vel ſaltem aliquotiens in anno,* carolas *canonicorum in clauſtro & alibi in monaſterio faciat in ſua præſentia aperiri, & res incluſas oculis ſubjiciat, ne per ſurrurum hujuſmodi operiatur facultas ſeu occaſio delinquendi.* Ex Regiſtr. Will. Wickwane Archiepiſc. Ebor. f. 76. See **Carrels.**

Carolina in America. See **Plantations** and **Rice.**

Carpemeales, A coarſe ſort of cloth made in the North of *England,* mentioned in 8 *Jac. c.* 16.

Carr (*Carrus*) In ſome places it is a kind of cart with wheels; in others a ſled, drawn and ſliding on the ground.—*In loco, in quo ſumetur quod opus fuerit ad reparationem domorum, carucarum,* carrorum, *& cæterorum ſupellectilium domus.* Charta Gaufredi de Lamay mil. Abbati de Burgo.

Carragium, The ſame with *carriagium,* a carriage.

Carrat, or **Carect.** The word was formerly uſed for any weight or burthen, though now appropriated to the weight of four grains in diamonds.

Carrectata terrae. See **Carucata terrae.** *Quod cum ipſa teneat de ipſo duas* carrectatas terræ *in Coningſtone per homagium, unde duodecim carucatæ faciunt unum feodum militis.* Co. Litt. ſect. 95. See **Carecta.**

Carreta (alias *Carecta*) Was anciently uſed for a carriage, wain, or cart-load. *Sciant præſentes & futuri, quod ego* Henricus de Ribesford *dedi,*——Rogero *filio* Ade *piſtoris pro homagio & ſervitio ſuo totum pratum meum de* Wiggemore. *Reddend. inde annuatim mihi & hæredibus meis ipſe & hæredes ſui unam* carretam *fœni rationabilem & bene fœnatam, &c.* Sine dat. Penes Tho. Bridgwater, Gen.

Carrels, Cloſets, or apartments for privacy and retirement.——Three pews or *carrels,* where every one of the old monks had his *carrel* ſeveral by himſelf, to which, having dined, they did reſort, and there ſtudy:——Theſe pews or *carrels* were finely wainſcotted, and very cloſe. *Davies Mon. of* Durham, *p.* 31. Vid. **Cazola.**

Carrick, or **Carrack** (*Carrucha*) A ſhip of great burthen, ſo called of the *Italian* word *carico,* or *carco,* a burthen or charge; mentioned 2 *Rich.* 2. *cap.* 4. *Walſ. in R.* 2. *pag.* 322. *Obviat magnis coggonibus, & ſex* carricis *refertis vini ſpeciebus.* And as they were uſed in trade, ſo they were alſo in war; as *Walſing. in H.* 5. *fol.* 394. viz. *Galli conduxerant claſſem magnarum navium* carricarum, *&c. qua regnum Angliæ moleſtarent.*

Carriers. All perſons carrying goods for hire, as a maſter and owners of ſhips, lightermen, ſtage-coachmen, *&c.* come under the denomination of common carriers, and are chargeable on the general cuſtom of the realm for their faults and miſcarriages. *Co. Lit.* 89. 1 *Rol. Abr.* 2,338. And if a perſon, who is no common carrier, takes upon himſelf to carry my goods, though I promiſe him no reward, yet if my goods are loſt or damaged by his default, I ſhall have an action againſt him. See title **Bailment.**

But the maſter of a ſtage-coach who only carries paſſengers for hire, ſhall not be liable for the goods of his paſſengers that are loſt; and therefore, where *A.* delivered a trunk to the driver or ſervant, who loſt it out of his poſſeſſion, it was held, that the maſter was not liable in an action upon the caſe on the cuſtom of the realm; for though the ſervant received money for it, yet that was but a gratuity, and the maſter ſhall not be chargeable with the acts of his ſervant, otherwiſe than he acts in execution of the authority given him. See 2 *Show. Rep.* 128. 1 *Salk.* 282.

1. *In what caſes carriers are chargeable for goods delivered to them.*

2. *How carriers are regulated by acts of parliament.*

1. *In what caſes carriers are chargeable for goods delivered to them.*

If a man delivers goods to a common carrier, to carry them to a certain place, if he loſes them, an action upon the caſe lies againſt him; for by the common cuſtom of the realm, he ought to carry them ſafely. 1 *Rol. Abr.* 2. *Hob.* 17. *Cro. Jac.* 262.

Alſo if a common carrier, who is offered his hire, and who has convenience, refuſes to carry goods, he is liable to an action in the ſame manner as an inn-keeper who refuſes to entertain a gueſt, or a ſmith who refuſes to ſhoe a horſe. 2 *Show. Rep.* 327.

If a man delivers goods to a common hoyman, who is a common carrier of goods, to carry them to a certain place, and pays him according to the cuſtom for the carriage of them, and after, for default of good keeping, they are loſt, an action upon the caſe lies againſt him; for by the common cuſtom of the realm, he ought to have kept and carried them ſafely. *Cro. Jac.* 330. *Hob.* 17.

If a man delivers goods to ſuch common hoyman to carry to a place, and after delivers them (being of good value) to another to keep ſafely in the boat, and does not diſcharge the hoyman, and after they are loſt through negligence, an action on the caſe lies againſt him. 1 *Rol. Abr.* 2. *Hob.* 17. *Cro. Jac.* 330.

If *A.* delivers goods at *York* to *B.* (who is a water carrier between *Hull* and *London*) though the agreement is to carry the goods from *Hull* to *London,* and no mention is made of the carriage to *Hull,* yet if the goods are loſt, *B.* ſhall anſwer for them; for upon his general receipt of them at *York,* he is liable. 1 *Sid.* 36. 2 *Show.* 129. See 1 *Rol. Abr.* 338.

If a merchant lades goods aboard a ſhip, to be tranſported at a reaſonable reward of freight to be paid to the owners, and in the night-time, while the ſhip rides in the river *Thames,* notwithſtanding a competent number of men are left aboard for the guard of the ſhip and goods, yet ſeveral perſons, under the pretence of preſſing ſeamen, ſeize on the men aboard, and take away the goods; an action will lie againſt the maſter, for in effect he is paid by the merchant, for the merchant pays the owners, and the owners pay the maſter; ſo that the money of the merchant is but handed over by them to the maſter; adjudged, and ſaid, that though by the admiral law, the maſter is not chargeable *pro damno fatali,* as in caſe of pirates, ſtorm, *&c.* where there is no negligence in him; yet becauſe this ſhip was *infra corpus comitatus,* this caſe muſt not be meaſured by the rules of that law. 1 *Vent.* 190, 223.

If *A.* and ſeveral others take their paſſage in a ferry-boat, and being upon the water a tempeſt ariſes, ſo that they are in danger of being drowned; upon which, to preſerve their lives, ſeveral of the goods were caſt over board, among which a pack of goods of *A.*'s of great value is thrown over; *A.* ſhall have no action againſt the bargemen. 2 *Bulſt.* 280.

It is clearly reſolved, that if a carrier be robbed he ſhall forfeit the value of the goods, for he hath his hire, which implies an undertaking for the ſafe cuſtody and delivery of them, which charges him at all events, and this political inſtitution was introduced the better to ſecure people in their dealings, and to prevent carriers, who are often intruſted with things of the greateſt value, from confederating with robbers, *&c. Co. Lit.* 89. 4 *Co.* 84. *Owen* 57. 8 *Co.* 84. 1 *Rol. Abr.* 2, 124. 2 *Rol. Abr.* 367.

So if *A.* delivers a box to a carrier to carry, and he aſks what is in it, and *A.* tells him, a book and tobacco, and in truth there is 100 *l.* beſides, yet if the carrier is robbed, he ſhall anſwer for the money; for *A.* was not bound to tell him all the particulars in the box, and it was the buſineſs of the carrier to have made a ſpecial acceptance. Ruled by *Roll,* at the *niſi prius* at *Guildhall*; but in regard of the intended cheat to the carrier, he told the jury, they might conſider of it in damages; but yet the jury gave the plaintiff 97 *l.* damages, abating 3 *l.* only for carriage; *quod durum videbatur circumſtantibus,* Allen 93.

But if *A.* being a common carrier, receives by his book-keeper, from the ſervant of *B.* two bags of money ſealed up, containing, as was told him, 200 *l.* and the book-keeper gives a receipt for his maſter to this effect, *Received of, &c. two bags of money ſealed up, ſaid to contain* 200 l. *which I promiſe to deliver on ſuch a day at* at Exeter, *unto* ——— *he to pay* 10 *s.* per cent *for carriage and riſque*; though the bags contained 450 *l.* and the carrier is robbed, he ſhall be anſwerable only for 200 *l.* for this is a particular undertaking; and as it is by reaſon of the reward that the carrier is liable, which when the plaintiff endeavours to defraud him of, it is but reaſonable he ſhould be barred of that remedy, which is only founded on the reward. *Carth.* 485.

It

It hath been holden, that a carrier imbezilling goods which he has received to carry to a certain place, is not guilty of felony, becauſe there was not a felonious *taking*; but is liable only to a civil action. 1 *Hawk.* 89, 90. But it has been reſolved, that if a carrier open a pack, and take out part of the goods, with intent to ſteal it, he may be guilty of felony; in which caſe it may be ſaid, not only that ſuch poſſeſſion of a part diſtinct from the whole, was gained by wrong, and not delivered by the owner; but alſo that it was obtained baſely, fraudulently, and clandeſtinely, in hopes to prevent its being diſcovered at all, or fixed upon any one when diſcovered. 1 *Hawk.* 90.

2. *How carriers are regulated by acts of parliament.*

Stat. 3. *Car.* 1. *c.* 1. No carrier with any horſe or horſes, nor waggon-man, car-man, or wain-man, with their reſpective carriages, ſhall by themſelves, or any other, travel on the *Lord*'s day; on pain of 20*s.* on conviction in ſix months, before one juſtice or the mayor, on view, confeſſion, or oath of two witneſſes, to be levied by the conſtable or churchwardens by diſtreſs to the uſe of the poor; but the juſtice may reward the informer with any ſum not exceeding a third part.

Stat. 3. *W. & M. c.* 12. *ſect.* 24. The juſtices in *Eaſter* ſeſſions yearly, ſhall rate the prices of all land carriage of goods to be brought into any place within their juriſdiction, by any common waggoner or carrier; and ſhall certify the rates ſo made to the mayors and other chief officers of the ſeveral market-towns within their juriſdiction, to be hung up in ſome publick place to which all perſons may reſort: and no ſuch common waggoner or carrier ſhall take for carriage above the rates ſo ſet, on pain of five pounds by diſtreſs, by warrant of two juſtices where ſuch waggoner or carrier ſhall reſide, to the uſe of the party grieved.

Stat. 21 *Geo.* 2. *c.* 28. *ſect.* 3. If any common waggoner or carrier ſhall demand and take any greater price for bringing goods to *London*, or to any place within the bills of mortality, than is allowed and ſettled by the juſtices for the place from whence the ſame is brought for the carrying of goods from *London*, to the ſaid place, he ſhall forfeit five pounds to the party grieved, to be recovered as by the ſaid act of 3 *W. & M.* or by diſtreſs and ſale of his goods, by warrant from two juſtices of *Middleſex*, *Surry*, *London*, or *Weſtminſter*; and the clerk of the peace for every county and place ſhall, immediately after *Eaſter* ſeſſions, yearly, certify to the lord mayor of *London*, and to the reſpective clerks of the peace for *Middleſex*, *Surry*, and *Weſtminſter*, the rates made for the carriage of goods in their reſpective counties and places; which certificate, or any atteſted copy thereof, ſigned by the officer to whom the ſame ſhall be tranſmitted, ſhall be ſufficient evidence of the prices ſo ſet.

Sect. 4. And every common waggoner or carrier ſhall have his chriſtian and ſurname and place of abode, in large or capital letters, placed upon ſome conſpicuous part of his carriage, before he ſhall drive the ſame; on pain of twenty ſhillings, to be levied and recovered as aforeſaid.

Stat. 24 *Geo.* 2. *c.* 8. *ſect.* 9. Commiſſioners for regulating the navigation of the river *Thames* to rate the price of water carriage.

Stat. 30 *Geo.* 2. *c.* 22. *ſect.* 3. Juſtices of the city of *London* to aſſeſs the rates of carrying goods between *London* and *Weſtminſter*. See **Carts**, **Highways.**

Carts. What ſort of cartwheels ſhall be uſed in *London*, &c. 2 *Will. & Ma. ſt.* 2. *c.* 8. *ſect.* 19. 3 *W. & M. c.* 12. *ſect.* 16. Penalty on carmen riding on their carts within the bills of mortality, 1 *Geo.* 1. *ſt.* 2. *c.* 57. *ſect.* 8. or within ten miles of *London*, 24 *Geo.* 2. *c.* 43. *ſect.* 8. Riding on carts generally prohibited, 27 *Geo.* 2. *c.* 16. *ſect.* 7. 30 *Geo.* 2. *c.* 22. *ſect.* 9. The loads of carts in *London* reſtrained, 6 *Geo.* 1. *c.* 6. Carts to be drawn with three horſes only, 5 *Geo.* 1. *c.* 12. *ſect.* 1. 14 *Geo.* 2. *c.* 42. *ſect.* 6. 18 *Geo.* 2. *c.* 33. *ſect.* 3. Carts to be drawn with four horſes, 16 *Geo.* 2. *c.* 29. With five horſes having broad wheels, 26 *Geo.* 2. *c.* 30. *ſect.* 4 & 6. Carts to be numbered, and to have the owner's name upon them, 18 *Geo.* 2. *c.* 33. *ſect.* 4. On changing property new owner's name to be affixed, 30 *Geo.* 2. *c.* 22. *ſect.* 5. Carriages travelling with goods for hire to be deemed common ſtage waggons, 30 *Geo.* 2. *c.* 28. *ſect.* 13. See **Highways, Waggons.**

Carroway-ſeeds, alias **Carruway-ſeeds**, Is a ſeed ſpringing of an herb ſo called. It is reckoned among the merchandize that ought to be garbled, by 1 *Jac. cap.* 19.

Cartatus, *Carcatus*, The word is uſed of a ſhip, or veſſel laden with a cargo of goods.——*Quandam navem* Ceſtriæ, *quæ in poteſtate veſtra applicuit* cartata *blado & aliis victualibus, arreſtari feciſtis.* Clauſ. 25 *H.* 3. Brady Hiſt. Engl. Append. 193. Hence *cartare* to load, *diſcarcare* to unload a ſhip.

Cartel. See **Chattel.**

Carvage, *Carvagium.* **Carucata.**

Caruca, (French *Charrue*) A plough; from the old Gallic *carr*, a plough, which is the preſent *Iriſh* for any ſort of wheeled carriage. From whence the Sax. *ceorl*, a ploughman, the northern *kurl*, our ſouthern *churl*, and in corruption of places *charl*, as *Charlton*, *Charlbury*, &c. *Carl* in the modern Welſh, is a ruſtick or clown.

Carucage, (*Carucagium*) Was a tribute impoſed on every plough for the public ſervice. *Regi conceſſum eſt per totam Angliam* carucagium *de qualibet caruca duo ſolidi argenti.* As hidage was a taxation by hides of land, ſo *carucage* was by carucats of land, which at firſt was but 4*d.* for every plough.———*Dederunt S. Edmundo de qualibet carucata terræ in toto epiſcopatu quatuor denarios annuos, quod uſque modo, ea de cauſa, carucagium eſt appellatum.* Mon. Angl. 1 par. fol. 294, a.

Carucate, or **Carve of land**, (*Carucata terræ*) A plough-land, *Domeſday.* It is a certain quantity of land by which the ſubjects have been ſometimes taxed; whereupon the tribute levied upon a carve of land, was called *carucagium. Bracton, lib.* 2. *cap.* 26. *n.* 8. & *cap.* 17. It may contain houſes, mills, paſture, meadow, wood, &c. *Co.* on *Litt. ſect.* 119. It is ſometimes uſed for a cart-load, as *una* carucata *ligni in foreſta noſtra.* Mon. Angl. 2 par. *f.* 311. *Littleton, cap.* Tenure in ſocage ſaith, that *ſoca idem eſt quod* caruca: yet *Stow* in his *Annals*, *pag.* 271. ſaith, the ſame King *Henry* took *carvage*; that is to ſay, two marks of ſilver of every knight's fee towards the marriage of his ſiſter *Iſabella* to the emperor, where *carvage* cannot be taken for a plough-land, except there were ſome other further diviſion, whereby to raiſe of every plough-land ſo much, and ſo conſequently of every knight's fee, that is, of every 680 acres, two marks of ſilver. *Raſtal*, in his *Expoſition of Words*, ſaith, that to be quit of *carvage* is a privilege whereby a man is exempted, if the King ſhall tax all the land by *carves. Skene de verb ſignif. verb.* Carucata *terræ*, deriveth it from the French *charrow* (more truly *charrue*) a plough, and ſaith, that it contains as great a portion of land as may be tilled and laboured in a year and a day with one plough; which alſo is called *hilda*, or *hida terræ*, a word very frequently uſed in the *Britiſh* laws. *Lambard* among his precedents, towards the end of his *Eirenarcha*, tranſlates *carucatam terræ*, a plough-land. The word *carve* is mentioned in the ſtatute of wards and reliefs, made 28 *Ed.* 1. and in *Magna Charta, cap.* 5. See *Co.* on *Littl. fol.* 69. *a.* See Mr. *Kennet's Gloſſary, in voce* Carucata.

Carucata boum, A team or draught of oxen for drawing or ploughing, which in ſome weſtern parts of *England* is ſtill called a plough of oxen. *Gilbert Baſſet*, founder of *Burceſter* priory, grants to it————*Paſturam in mea dominica paſtura ad tres* carucatas boum *trahentium una cum bobus meis trahentibus.* Paroch. Antiquit. p. 135. They are called *boves de caruca*, in a charter of *Aubery de Vere* to the abbey of *Noteley. Ibid. p.* 155.

Carucatarius, He that held land in carvage, in ſocage, or plough-tenure.——*Summa redditiuum* carucatariorum, *ſi fuerint ad firmam* xxii *ſol.*——*Summa gallina*

rum carucatariorum *& cotariorum* cxiv *gallinæ*. Paroch. Antiq. p. 354.

Caſſatum and **Caſſata**, (from the Ital. *Caſa, i. e. domus*) *Habitaculum cum terra idonea ad unam familiam alendam*; *alias* caſamentum: *Saxonibus noſtris* hide; Beda, *familia*.

Ego Forterus, *famulus famulorum Dei, pro redemptione animæ meæ unum* caſſatum *dedi Alberto abbati, quæ ſita eſt juxta fluvium* Æſce, ad portam quæ dicitur Bledenithe *ad inſulam parvam, & ad eccleſiam beati* Martini *confeſſoris, in propriam ſubſtantiam. Habendum, donandumque cuicumque voluerit. Qui hanc chartam infringere temptaverit, ſciat ſeipſum a communione ſanctorum ſeparatum & ab omnipotenti Deo. Ego* Forterus *conſenſi & ſubſcripſi. Acta eſt autem hæc donatio anno* Dccxii *indictione prima.* Ex. Reg. Glaſton Cœnob. penes Rad. Sheldon, arm.

Caſſata, Is the ſame with *hida*. *Rex. Angl. Ethelred. de* 310 caſſatis *unum trierem, &c. Hoveden, anno* 1008, and *Henry Huntingdon* mentioning the ſame thing, inſtead of *caſſata* writes *hilda*. Du Freſne.

Caſk. See **Beer** and **Coopers**.

Caſhlite, Is a Saxon word, and ſignifies a mulct; *Si autem poſt excommunicationem, &c. venerit, ſorisfacturam ſuam quæ Anglice voatur* Thferhynneſſe *ſeu* caſhilite, *pro unaquaq; vocatione epiſcopo reddat, &c.* Du Freſne.

Caſſena. See **Drugs.**

Caſſia fiſtula, Is a tree that beareth black round and long cods, wherein is contained a pulp, ſoft and pleaſantly ſweet, ſerving for many uſes in phyſick. The fruit is mentioned in the ſtat. 1 *Jac. cap.* 19. among the drugs and ſpices to be garbled.

Caſſia lignea, Is a ſweet wood, not unlike the cinnamon, and comprized among merchandize to be garbled.

Caſſidile, A little ſack, purſe, or pocket: *Protulit in* caſſidili *toxicum mellitum.* Matt. Weſtm.

Caſſii, The hundred of *Caiſhow*, in *Hertfordſhire*.

Caſſiterides. The iſles of *Scylly*.

Caſtel, or **Caſtle**, *Caſtellum*, Is well known. In the time of *Henry* the Second there were in *England* 1115 *caſtles*, every *caſtle* contains a manor; ſo that the conſtable of a *caſtle* is the conſtable of a manor. 2 *Part. Inſt. fol.* 31.

Caſtellam, (French *Chaſtellain*) The lord, owner, or captain of a caſtle, and ſometimes the conſtable of a caſtle, or fortified houſe. *Bracton, lib.* 5. *tract.* 2. *cap.* 16. and *lib.* 2. *cap.* 32. *num.* 2. and is uſed in like ſenſe 3 *Ed.* 1. *cap.* 7. It is ſometimes taken for him that hath the cuſtody of one of the king's manſion houſes, tho' not a caſtle or place of defence. 2 *Part. Inſt. fol.* 31. *Manwood, part* 1. *pag.* 113. ſaith, there was an officer of the foreſt called *caſtellanus*, who had the command of all or part of the foreſt. Of the uſe and extent of this officer in *France*, ſee *Cotgrave's Dictionary, verbo* Chaſtellain.

Caſtellarium, (*Caſtellarium & Caſtellatus.*)———*Et unum toftum juxta* caſtellarium. Mon. Angl. 2 par. fol. 402. a. Comes Alanus *habet in ſuo* caſtellatu 200 *maneria.* Domeſday. The precinct or juriſdiction of a caſtle.

Caſtellatio, This was the building any caſtle without the leave of the king; which it was unlawful to do. *Hæc mittant hominem in miſericordia regis*, viz. *Infractio pacis, infidelitas & proditio, deſpectus de eo*, caſtellatio *ſine licentia*. Du Freſne.

Caſtellorum operatio, Caſtle-work, or ſervice and labour done by inferior tenants, for the building and upholding caſtles and public places of defence; toward which ſome gave their perſonal aſſiſtance, and others paid their contribution. This was one of the three neceſſary charges to which all lands among our *Saxon* anceſtors were expreſsly ſubject——*Liberi ab omni ſervitio, excepta trinoda neceſſitate——pontis & arcis conſtructione & expeditione contra hoſtem.* After the conqueſt, an immunity from this burden was ſometimes granted: ſo King *John*, to the nunnery of St. *Catherine* without the city of *Exeter* ——*Quietos eſſe de operationibus* caſtellorum *& pontium.* Mon. Angl. tom. 1. f. 503. b. So King *Hen.* 2. to the tenants within the honour of *Wallingford*,——*Ut quieti ſint de operationibus* caſtellorum. *Paroch. Antiq. p.* 114.

Caſter and **Cheſter**, The names of places ending in *caſter* and *cheſter* are derived from the Sax. *ceaſter*, which ſignifies a city, town, or caſtle; or rather from the Latin *caſtrum*: for the names which end with this termination, were given by the *Romans* to thoſe places where they built caſtles.

Caſtle. See **Caſtel**.

Caſtle-guard rents, Are rents paid to thoſe that dwell within the precincts of any *caſtle*, towards the maintenance of ſuch as watch and ward the ſame. *Act for ſettling certain rents in truſtees*, 22 & 23 *Car.* 2.

Caſtleward (*Caſtleguardium*, vel *wardum caſtri*) Is an impoſition laid upon ſuch of the king's ſubjects as dwell within a certain compaſs of any *caſtle*, towards the maintenance of ſuch as do watch and ward the caſtle. *Mag. Chart. cap.* 20. and 32 *H.* 8. *cap.* 48. It is uſed ſometimes for the very circuit itſelf, which is inhabited by ſuch as are ſubject to this ſervice; as in *Stow's Annals, pa.* 632. *Et capere ibidem caſtleward*, viz. *De qualibet diſtrictione infra feodum ipſius ducis ad* caſtellum *de* Halton *ducti, & ibidem una de cauſa, ſi per totam noctem pernoctaverit, quatuor denarios.* Pl. apud Ceſtr. 31 *Ed.* 3. See **Stagium.**

Caſtor and **Caſtitius**, A weather ſheep ——Caſtores *enim bonis velleribus communiti cum matricibus bidentibus.* Du Freſne. Monaſticon, pag. 888. 55 *acras terræ & paſturam ad ducentas oves, octo* caſtritos *& ſexdecim boves, &c.*

Caſu conſimili, Is a writ of entry granted where the tenant by curteſy, or tenant for term of life, or for the life of another, doth alien in fee or in tail, or for term of another's life, and it hath this name; for that the clerks of Chancery did by their common conſent frame it to the likeneſs of the writ called *In caſu proviſo*, according to the authority given them by the ſtat. *Weſt.* 2. *cap.* 24. which, as often as there chanceth any new caſe in Chancery ſomething like to a former caſe, and yet not eſpecially fitted by any writ, licenſeth them to frame a new form anſwerable to the new caſe, and as like ſome former caſe as they may. And this writ is granted to him in the reverſion againſt the party to whom the ſaid tenant ſo alienateth to his prejudice, and in the life-time of the ſaid tenant. The form and effect whereof read more at large in *F. N. B. fol.* 206.

Caſula, A certain garment belonging to the prieſts, *quaſi minor caſa*; becauſe it covered him over. Sometimes it is taken for *cuculla*; for both have the ſame ſignification; *cucullam nos eſſe dicimus quam alio nomine* caſulam *vocamus.* And from hence we call it a caſſock:

———*Caſulaque capax a forſice forma*
Poſt longas habitura plicas contracta miniſtris.

Caſu proviſo, Is a writ of entry given by the ſtatute of *Glouceſter, cap.* 7. in caſe where a tenant in dower alieneth in fee; or for term of life, or in tail, and lieth for him in reverſion againſt the alienee, whereof read *F. N. B. fol.* 205.

Catals. See **Chattels.**

Catallis captis nomine diſtrictionis, Is a writ that lieth within a borough or within a houſe, for rent going out of the ſame, and warranteth a man to take the doors, windows, or gates, by way of diſtreſs for the rent. *Old. Nat. Brev. fol.* 66.

Catallis reddendis, Is a writ which lieth where goods are delivered to any man to keep unto a certain day, and are not upon demand delivered at the day. And it may be otherwiſe called *a writ of detinue.* See more of it *Reg. Orig. fol.* 139. and *Old Nat. Brev. f.* 63. This is anſwerable to *actio de poſiti* in the Civil law.

Catapanus, Catepanus, Catipanus, The ſame with *capitaneus*, a captain.

Partibus Auſoniis Gallorum terror habetur
Ex quo Normannos catacan *abſcedere fecit.*

Catapulta.—Edmundus Willoughby *tenet unum meſſuagium & ſex bovatas terræ in* Carletun *ut de manerio de* Shelford *per ſervitium unius* catapultæ *per annum pro omni ſervitio.*

ſervitio. Lib. Schedul. de term. Mich. 14 *H.* 4. Notr. f. 210.—Some render it a warlike engine to ſhoot darts; a ſling.—I rather take it for a croſs-bow.

Cataſcopus, Signifies an archdeacon: *Adulfus Herefordenſis eccleſiæ* cataſcopus. *Du Freſne.*

Catch-land. In *Norfolk* they have ſome grounds where it is not known to what pariſh they certainly belong, ſo that the miniſter who firſt ſeizes the tithe, does by that right of pre-occupation enjoy it for that one year: the land of this dubious nature is there called *catch-land.*

Catch-pol, (*Catchpollus* and *cacepollus*, *quaſi* one that *catches* by the *poll*) Though now taken as a word of contempt, yet in ancient times it was uſed without reproach, for ſuch as we now call *ſerjeants of the mace*, bailiffs, or any other that uſe to arreſt men upon any action. *An.* 25 *Ed.* 3. *ſtat.* 4. *cap.* 2.——*Hoſpitalarii tenent in Hereford unum meſſuagium quod Philippus filius Odonis tenuit per ſerjantiam* cachepolli, *quod eis legavit in puram eleemoſynam.* Rot. de Serjantiis in Heref. temp. Hen. 3.

Cathedra marmorea. See **Lapis marmoreus.**

Cathedral. See **Church.**

Cathedratick, (*Cathedraticum*) Is a ſum of two ſhillings paid to the biſhop by the inferior clergy, *in argumentum ſubjectionis*, & *ob honorem* cathedræ. See *Hiſt. of Procurations and Synodals*, *p.* 82.

Cattieuchlari, Were the inhabitants of *Hertfordſhire*, *Bedfordſhire*, and *Buckinghamſhire*. *Cowell edit.* 1727.

Cattle. Stat. 28 *Hen.* 8. *cap.* 13. For the encouragement of tillage, and to prevent the ingroſſing of farms in a few hands, no man ſhall keep above 2000 ſheep, at ſix ſcore to the hundred, over and above what is neceſſary for his houſhold, except it be upon his own proper eſtate, on pain of 3*s.* 4*d.* for every ſheep above that number; half to the king, and half to him that ſhall ſue for the ſame in any court of record.

Sect. 2. Provided that lambs ſhall not be accounted ſheep, ſo long as they be under the age of a year.

Stat. 3 & 4 *Ed.* 6. *cap.* 19. *ſect.* 1. No perſon ſhall buy any ox, ſteer, runt, cow, heifer, or calf, and ſell the ſame again alive in the ſame market or fair, on pain of forfeiting double value, half to the king, and half to him who ſhall ſue.

Continued indefinitely by 3 Car. 1. cap. 4. *and* 16 Car. 1. c. 4.

Stat. 5 & 6 *Ed.* 6. *cap.* 14. *ſect.* 9. If any perſon ſhall buy any ox, runt, ſteer, cow, heifer, calf, ſheep, lamb, goat, or kid living, and ſell the ſame again alive, unleſs he keep and feed the ſame for five weeks, he ſhall forfeit double value, half to the king, and half to him that ſhall ſue in any court of record.

Sect. 10. The juſtices of the peace in ſeſſions may determine the ſame by inquiſition, preſentment, bill, or information, and by examination of two witneſſes, and make proceſs thereupon as upon indictments; and make eſtreats for the king's moiety, and award execution of the other moiety for the complainant by *fieri facias* or *capias*, as the courts at *Weſtminſter* may do.

Sect. 16. Provided, that it ſhall be lawful to any perſon known for a common drover, being licenſed, authorized, and allowed in writing by three juſtices of the peace (whereof one to be of the *quorum*) of the county where ſuch drover ſhall be moſt abiding and dwelling, to buy cattle in any ſuch counties, where drovers have been wont in times paſt accuſtomably to buy cattle at their free liberty and pleaſure, and to ſell the ſame at reaſonable prices in common fairs and markets, diſtant from the place where he bought the ſame forty miles at the leaſt, ſo that they be not bought by foreſtalling.

Sect. 17. Such licence ſhall not endure above one year.

Stat. 2 & 3 *P.* & *M. cap.* 3. *ſect.* 2. Every perſon who ſhall keep above ſix-ſcore ſheep, above what is for his houſhold, ſhall for every three-ſcore ſhear ſheep keep one milch cow, and bring up yearly for every ſix-ſcore ſhear-ſheeep one calf; upon pain of forfeiting 20*s.* a month.

Sect. 3. And every perſon who ſhall keep above twenty oxen, runts, ſhrubs, ſteers, heifers, or kine, ſhall for every ten of them keep one milch cow yearly, and rear one calf for the ſpace of one year (unleſs it die in the mean time) for every ſuch two milch cows, on pain of forfeiting 20*s.* a month; one half of which ſaid forfeiture ſhall be to the king, and the other half to him who ſhall ſue in the ſeſſions or other court of record.

Made perpetual by 13 Eliz. cap. 2. ſect 6.

Stat. 5 *Eliz. cap.* 12. *ſect.* 4. No drover of cattle ſhall be licenſed but in the ſeſſions of the county where he dwells, and hath dwelt for three years laſt paſt; nor unleſs he be or have been a married man, and he be an houſholder, and not a houſhold ſervant, or retainer to any perſon, and of the age of thirty years at the leaſt: and ſuch licence ſhall be good only for one year.

Stat. 5. Which licence ſhall bear date of the day and place where the ſeſſions ſhall be holden; and ſhall be ſigned and ſealed by three juſtices preſent (whereof one to be of the *quorum*); on pain that every perſon who ſhall take any licence otherwiſe ſhall forfeit 5*l.* and the licence to be void.

Sect. 6. And the ſeſſions may take bond and ſurety by recognizance, that they ſhall not foreſtal or ingroſs, or do any thing contrary to this act, and the above act of 5 & 6 *Ed.* 6. *c.* 14. which licence ſhall be made and written by the clerk of the peace; for which he ſhall have one ſhilling, and for the recognizance eight-pence, and for regiſtering the ſame four-pence; for which ſaid fee he ſhall keep a regiſter-book of the names and dwelling-places of the perſons licenſed, with an entry of the day, time, and place where the licence was granted; which book he ſhall have at the ſeſſions.

Stat. 13 *Eliz. cap.* 5. *ſect.* 10. No perſon ſhall be licenſed to be a buyer of cattle otherwiſe than by 5 *Eliz. cap.* 12.

Stat. 7 *Jac.* 1. *cap.* 8. *ſect.* 2. The ſtat. 2 & 3 *P.* & *M. cap.* 3. ſhall extend to all grounds apt for milch kine, and not to be laid open common at any time of the year.

Stat. 3 *Car.* 1. *cap.* 1. No drover with any cattle ſhall travel on the Lord's day on pain of 20 *s.* which may be levied by the conſtable or churchwardens, by warrant of one juſtice, on conviction, on his view, or by confeſſion, or the oath of two witneſſes; one third to the informer, and two thirds to the poor.

Stat. 18 *Car.* 2. *cap.* 2. *ſect.* 1. Importation of cattle from *Ireland* and other places beyond the ſea, is a public nuiſance, and ſhall be ſo adjudged; and if any cattle ſhall be imported, it ſhall be lawful for any conſtable, tithingman, headborough, churchwarden, or overſeers of the poor to ſeize and keep the ſame 48 hours in ſome public place where ſuch ſeizure ſhall be made; within which time, if the owners or any of them ſhall make it appear unto ſome juſtice of the peace, by oath of two witneſſes, that the ſame were not imported from beyond the ſeas, the ſame ſhall be delivered; but in default of ſuch proof the ſame to be forfeited; one half to the uſe of the poor of the pariſh, the other to his uſe that ſhall ſeize the ſame.

Sect. 3. This act not to extend to the *Iſle of Man*, ſo as the number to be imported ſhall not exceed ſix hundred head yearly.

Made perpetual by 32 Car. 2. ſect. 2.

Stat. 20 *Car.* 2. *cap.* 7. *ſect.* 3. Any inhabitant of the place where importation of cattle ſhall be, may take the cattle ſo imported, and after ſeizure ſhall deliver them to the conſtable, tithingman, headborough, churchwardens, or overſeers of the poor, to be kept and diſpoſed in the manner in this act, and in the act 18 *Car.* 2. *cap.* 2. mentioned.

Sect. 4. If no ſeizure ſhall be made by the officers or inhabitants where ſuch cattle ſhall be firſt imported, then ſuch place ſhall forfeit 100 *l.* to the uſe of the houſe of correction.

Sect. 5. And the ſhips bringing cattle ſhall be forfeited, and any perſon may ſeize and ſell them; half to the poor, and half to himſelf. And a juſtice of peace may by warrant apprehend the ſeamen, and all others concerned, and commit them to gaol for three months.

Stat. 22 & 23 *Car.* 2. *cap.* 7. *ſect.* 2. If any perſon ſhall in the night-time maliciouſly, unlawfully, and willingly kill or deſtroy any horſes, ſheep, or other cattle, he ſhall be guilty of felony.

Sect.

Sect. 3. But no attainder on this act ſhall make or work any corruption of blood, or loſs of dower.

Sect. 4. And to avoid judgment of death, or execution thereupon, the offender may chuſe to be tranſported to ſome of the plantations, to be mentioned in the judgment, for ſeven years.

Sect. 5. And if any perſon ſhall in the night-time maliciouſly, unlawfully, and wilfully maim, wound, or otherwiſe hurt any horſes, ſheep, or other cattle, whereby the ſame ſhall not be killed or utterly deſtroyed, he ſhall forfeit treble damages, by action of treſpaſs, or upon the caſe.

And three juſtices (one whereof to be of the *quorum*) may inquire by a jury and witneſſes; and may iſſue warrants for ſummoning jurors, and for apprehending perſons ſuſpected, and take their examination, and cauſe witneſſes to come before them to give information on oath, ſo as no perſon to be examined ſhall be proceeded againſt for any offence concerning which he is examined as a witneſs, and ſhall make a true diſcovery: and if ſuch witneſs, being ſummoned, refuſe to appear, they may commit him till he ſubmit to be examined upon oath.

Stat. 32 *Car.* 2. *cap.* 2. *ſect.* 3. Any perſon may ſeize cattle imported contrary to the ſtatute 18 *Car.* 2. *cap.* 2.

Sect. 5. And the ſeizor, within ſix days after conviction and forfeiture, ſhall cauſe ſome to be killed; and the hide and tallow ſhall be to the uſe of the ſeizor, and the remainder ſhall be diſtributed amongſt the poor of the pariſh by the churchwardens and overſeers, upon notice to be given them by the ſeizor.

Sect. 6. And the ſeizors, churchwardens, or overſeers neglecting their duty herein ſhall forfeit 40 *s.* for every one of the great cattle, and 10 *s.* for ſheep and ſwine; half to the poor, and half to the informer, to be levied by diſtreſs and ſale of goods by warrant of a juſtice of peace where the offence ſhall be committed, upon confeſſion of the party, view of the juſtice, or oath of one witneſs; and for want of diſtreſs, the offenders to be committed to the common gaol for three months without bail.

Stat. 9 *Geo.* 1. *c.* 22. See **Black act.**

Stat. 14 *Geo.* 2. *cap.* 6. *ſect.* 1. If any perſon ſhall feloniouſly drive away, or in any other manner feloniouſly ſteal, one or more ſheep or other cattle, with a felonious intent to ſteal the whole carcaſe or carcaſes, or any part or parts of the carcaſe or carcaſes of any one or more ſheep or other cattle that ſhall be ſo killed, or ſhall aſſiſt or aid any perſon or perſons to commit any ſuch offence or offences, he ſhall be guilty of felony without benefit of clergy.

Stat. 15 *Geo.* 2. *cap.* 34. Whereas it is doubtful to what ſorts of cattle beſides ſheep the ſaid act (14 *Geo.* 2. *cap.* 6.) was meant to extend; it is therefore enacted, *&c.* That the ſaid act was made and intended, and ſhall be conſtrued, deemed, and taken to extend to any bull, cow, ox, ſteer, bullock, heifer, calf, and lamb, as well as ſheep, and no other cattle whatſoever.

His majeſty to make regulations for preventing the ſpreading of the diſtemper among the cattle, 19 *Geo.* 2. *c.* 5. 20 *Geo.* 2. *c.* 4. 23 *Geo.* 2. *c.* 23. 24 *Geo.* 2. *c.* 54. 25 *Geo.* 2. *c.* 31. 26 *Geo.* 2. *c.* 34. 27 *Geo.* 2. *c.* 14. 28. *Geo.* 2. *c.* 14. 28 *Geo.* 2. *c.* 18. 29 *Geo.* 2. *c.* 28. 30 *Geo.* 2. *c.* 20.

His majeſty impowered to prevent the killing of cow calves, 22 *Geo.* 2. *c.* 46. *ſect.* 26. Regulations for the ſelling and driving cattle, 22 *Geo.* 2. *c.* 46. *ſect.* 27, *&c.* 30 *Geo.* 2. *c.* 20.

Stat. 31 *Geo.* 2. *cap.* 40. *ſect.* 4. No ſaleſman or other broker or factor, imployed to buy or ſell cattle for others by commiſſion or reward, ſhall by himſelf, or any ſervant or agent, directly or indirectly, on his own account, buy any live ox, bull, cow, ſteer, bullock, heifer, calf, ſheep, lamb, or ſwine in *London*, or within the limits of the weekly bills of mortality, or at any place whilſt any ſuch cattle ſhall be upon the road, or be coming up to be offered to ſale in *London*, or within the limits of the weekly bills of mortality (other than ſuch cattle which ſuch ſaleſman, *&c.* ſhall purchaſe for the proviſion of his family, and ſhall uſe accordingly) and no ſuch ſaleſman, *&c.* ſhall ſell or offer to ſale on his own account in *London*, or within the limits of the weekly bills of mortality, by himſelf, or his ſervant or agent, any live ox, *&c.* upon pain that every perſon who ſhall ſo offend ſhall, every time he be convicted, forfeit double the value of any live cattle which he ſhall ſo buy or ſell, on his own account, contrary to this act.

Sect. 15. On complaint on oath to any juſtice of peace of any offence againſt this act within his juriſdiction, ſuch juſtice is to iſſue his ſummons to convene the perſon charged, and any witneſſes for any of the parties, at a time and place in ſuch ſummons ſpecified; and if any one ſo ſummoned ſhall not appear, or offer ſome reaſonable excuſe for the default, then ſuch juſtice ſhall iſſue his warrant for apprehending the party ſo making default within the juriſdiction of ſuch juſtice; and upon the party complained againſt appearing or being brought before ſuch juſtice on his warrant, or in caſe the party complained againſt ſhall not appear on ſuch ſummons being ſerved on him, or left at his uſual place of abode, and proof be made thereof by oath before ſuch juſtice, then ſuch juſtice is to make inquiry touching the matters complained of by the oaths of any perſons requiſite, and to determine ſuch complaint; and, upon confeſſion or proof of one witneſs upon oath, to convict on acquit the party againſt whom complaint is made; and if the money forfeited be not paid on conviction, ſuch juſtice ſhall iſſue his warrant for levying thereof within his juriſdiction by diſtreſs on the goods of ſuch offender, and to cauſe ſale to be made of ſuch goods in caſe the money forfeited with the charges be not paid within five days after ſuch diſtreſs, rendering the overplus to the owner after deducting the charges of diſtreſs and ſale; and if any ſuch offender have not goods within the juriſdiction of ſuch juſtice, any juſtice within whoſe juriſdiction ſuch offender ſhall be, ſhall iſſue a warrant on the application of any informer to apprehend ſuch offender, and ſo commit him to ſome public priſon or houſe of correction of the county or place in which ſuch offence is committed, for any time not exceeding one calendar month, nor leſs than ten days, unleſs ſuch offender ſooner pay the money forfeited: and if any witneſs refuſe to be examined, he may be committed by ſuch juſtice to ſome priſon of the county, *&c.* where ſuch witneſs ſo makes a default, for any time not exceeding ten days.

Sect. 16. If any perſon convicted of any offence puniſhable by this act, or for ſelling any truſs of hay of leſs weight than the ſame ought to be, think himſelf aggrieved by the judgment of any juſtice, ſuch perſon may appeal to the general or quarter ſeſſions of the peace of the county or place in which ſuch conviction is made, next after ſuch conviction, unleſs ſuch next ſeſſions be held within ſix days after ſuch conviction, and then ſuch perſon may appeal to the ſecond general or quarter ſeſſions next after ſuch conviction; but the party ſo appealing, ſhall, before ſuch appeal be received, enter into a recognizance with two ſureties before ſuch juſtice, in double the ſum which ſuch perſon is adjudged to forfeit, to proſecute ſuch appeal with effect, and to abide the judgment of the ſeſſions, and ſhall alſo give three days notice in writing of ſuch appeal to, or leave the ſame at the uſual place of abode of, the perſon who proſecuted to conviction the party ſo appealing; and the juſtices at ſuch ſeſſions are finally to determine ſuch appeal, and to make ſuch order, and award ſuch coſts, as they deem meet; and the determination of ſuch ſeſſions on every ſuch appeal ſhall be final: and no *certiorari* ſhall be allowed to remove any ſuch proceedings or determination.

Sect. 17. One moiety of all money forfeited by this act ſhall be paid to the perſon proſecuting to conviction any offender, and the other moiety to the uſe of the poor of the pariſh where the offence is committed.

Sect. 18. Any inhabitant of the pariſh or place in which any offence is committed againſt this act, ſhall be a competent witneſs.

Sect. 19. If any action be commenced for any thing done in purſuance of this act, the ſame ſhall be commenced within ſix months after the offence committed, and ſhall be laid in the county or city where the offence

is committed; and the defendant may plead the general iſſue; and if a verdict be found for the defendant, &c. the defendant ſhall recover treble coſts.

Cat-water. See **Harbour.**

Catzurus, A hunting horſe.———Willielmus *filius* Alani *dat regi duos bonos* catzurus, *pro habendis duobus Feriis apud* Norton. An. 6 R. Joh.———Tenures, p. 68. vid. **Chaturus.**

Cauda terrae, A land's end, or the bottom, or extreme part of a ridge or furrow in arable land.——— *Duæ acræ & dimidia ad* caudam *ſex acrarum ſimul jacentium——item dimidia acra ad* caudam *unius acræ.* Cartular. Abbat. Glaſton. MS. fol. 117. b.

Caveat, Is a caution entered in the ſpiritual court, to ſtop probates, adminiſtrations, licences, diſpenſations, faculties, inſtitutions, and ſuch like, from being granted without the knowledge of the party that enters it: And a caveat is of ſuch validity by the *Canon* law, that if an inſtitution, adminiſtration, or the like, be granted pending ſuch caveat, the ſame is void. *Ayl. Par.* 145, 146. 1 *Lev.* 157. *Owen* 50. But not ſo by the Common law. For by the Common law, an admiſſion, inſtitution, probate, adminiſtration, or the like, contrary to a caveat entered, ſhall ſtand good; in the eye of which law, the caveat is ſaid to be only a caution for the information of the court (like a caveat entered in Chancery againſt the paſſing of a patent, or in the Common Pleas againſt the levying of a fine); but that it doth not preſerve the right untouched, ſo as to null all ſubſequent proceedings, becauſe it doth not come from any ſuperior; nor hath it ever been determined, that a Biſhop became a diſturber, by giving inſtitution without regard to a caveat; on the contrary, it was ſaid by *Coke* and *Doderidge,* in the caſe of *Hutchins* and *Glover, Hil.* 14 *Jac.* that they have nothing to do with a caveat in the Common law. *Gibſ.* 778. 2 *Bac. Abr.* 404. *Ayl. Par.* 145, 146.

When a church becomes void, and a *caveat* is entered with the regiſter of the biſhop of the dioceſe, that none be inſtituted to that church until he be made privy thereto, and the biſhop, before he hath notice of the *caveat,* doth inſtitute a clerk, ſuch inſtitution is void in the ſpiritual law; becauſe the regiſter ought to give notice to the *biſhop* that a *caveat* was entered, and his negligence ſhall not prejudice him who entered; but if the biſhop hath notice of the *caveat,* and gives a day to him who put it in, and before that day he inſtitutes another, the entering a *Caveat* is a *ſuperſedeas* in our law. *Goldſ.* 146. *in the lord* Zouch's *caſe.*

The King was patron of the church of *C.* and one who pretended to a right of preſentation entered a *caveat in the life-time of the incumbent,* who was then very ſick, and ſoon after died; then a ſtranger preſented his clerk, who was inſtituted and inducted, and he who entered the *caveat* preſented his clerk who was likewiſe inſtituted; and it being a queſtion in the ſpiritual court, which of theſe clerks, had a good title, it was referred to a trial at law, in which the leſſee of the preſentee of the King, was plaintiff in ejectment; and it was adjudged, that the *caveat* was void, it being entered in the *life-time of the incumbent*; that the church was full by *inſtitution* againſt all perſons but the King; that the preſentation of him who entered the *caveat* was void, by reaſon of the ſuper-inſtitution of the clerk of the ſtranger, and ſo the preſentation of the King was good. *Poph.* 113. *Morgan* verſus *Roan.*

Where any controverſy may ariſe concerning the *probate of a will,* or the right of any *adminiſtration* may come in queſtion, it is uſual for one of the parties to enter a *caveat* in the ſpiritual court, which, as a doctor of the Civil law affirmed in *Hitchins*'s and *Glover*'s caſe, ſtands in force for three months. 2 *Roll. Rep.* 6.

The entering a *caveat,* being at the inſtance of the party, is only for the benefit of the ordinary, that he may do no wrong; it is a cautionary act for his better information, to which the temporal courts have no manner of regard; therefore, if after a *caveat* entered, the ordinary ſhould grant adminiſtration or probate of a will, it is not void by our law; it is true, it is void by the Canon law; but our law takes no notice of a *caveat.* 1 *Rol. Rep.* 191. *Hitchins* verſus *Glover.*

Cavers.

And two great courts of Berghmote *ought to be*
In every year, upon the minery,
To puniſh miners that tranſgreſs the law,
To curb offenders, and to keep in awe
Such as be cavers, *and do rob men's coes;*
Such as be pilferers, or do ſteal men's ſtoes.
Manlove's *Poem on* Derb. *Mines.*

Caulceis, (in ſtat. 6 *Hen.* 6. *cap.* 5. *Cauciés,* 1 *Ed.* 4. *cap.* 1.) It ſhould probably be written *cauſeways,* from the old French word *cauz,* now *cailiou* a flint; and is well known to ſignify ways pitched with flint, or other ſtone; for the *via Appia* in *Italy* is a *cauſeway,* made of black *flint ſtones,———pro ponte* & calceto *reparand.* pat. 18 Hen. 6. p. 2. m. 22. I have ſeen it written *calceya, caſea,* and *calſetum,* in old records: Perhaps from the Ital. *calzata. Cowell. edit.* 1727.

Caurſines, *Caorcini, caurſini, corſoni,* Italian merchants, ſo called from *Caorſium, Caorſi,* a town in *Lombardy,* where they firſt practiſed their arts of uſury and extortion; and thence ſpreading themſelves, and their curſed trade through moſt parts of *Europe,* were a common plague to every nation where they came. *Mathew Paris* gives a charcter of their odious practices in *England,* under the year 1237. And *Matth. Weſtm. ſub. an.* 1232. King *Hen.* 3. baniſhed them from this kingdom in the year 1240, but being the pope's ſollicitors, procurers, and money changers, they were permitted to return in the year 1250; but in a very ſhort time were expelled for their intolerable cheats and exactions. *Cowell, edit.* 1727.

Cauſa matrimonii praelocuti, Is a writ which lies in caſe where a woman giving lands to a man in fee-ſimple, to the intent he ſhall marry her, and he refuſeth ſo to do, in reaſonable time, being required thereunto by the woman; for the form and other uſe thereof, ſee *Reg. Orig. f.* 233, *and F. N.* 205.

Cauſam nobis ſignifices, Is a writ which lieth to a mayor of a town or city, &c. that formerly by the King's writ, being commanded to give ſeiſin unto the King's grantee of any lands or tenements, doth delay ſo to do, willing him to ſhew cauſe why he ſo delayeth the performance of his charge. *Co. lib.* 4. *caſu* Commonalty *de* Sadlers, *f.* 55. *b.*

Cauſea, The ſame with *calcea, calceta,* which we call a *cauſeway: Quotidie venerunt Franci ad* cauſeam, *inire haſtiludium cum Anglis.* Knighton. So in the *Monaſticon,* 1 *tom. p.* 275. *Inceptum fuit* cauſetum *novi vici ante portas Abbatiæ.*

Cauſennae. See **Gauſennae.**

Cauſea. See **Cauſea,** and **Highways.**

Cavear. See **Kotargo.**

Cauſes and effects. In moſt caſes the law hath reſpect to the *cauſe,* or beginning of a thing, as the principal part on which all other things are founded: and herein the next, and not the remote *cauſe* is moſt looked upon, except it be in covinous and criminal things: and therefore that which is not good at firſt, will not be ſo afterwards; for ſuch as is the *cauſe,* ſuch is the *effect. Plowd.* 208, 268. If an infant or feme-covert make a will, and publiſh it, and after die of full age, or ſole, the will is of no force, by reaſon of the original *cauſe* of infancy and coverture. *Finch* 82. A lord diſtrains his tenant for rent before due, the tenant may juſtify to make reſcous, the lord having no juſt *cauſe* to diſtrain. *Co. Lit.* 106. And if a man acknowledge a ſtatute by *dureſs,* &c. he may have an *audita querela* to avoid it. *Fitz. Abr.* 104. Where the *cauſe* ceaſeth, the *effect* or thing will ceaſe: As wedlock or matrimony ceaſing, the dower ceaſes, &c. 1 *Co. Inſt.* 13.

Cautione Admittenda, Is a writ that lieth againſt the biſhop, holding an excommunicate perſon in priſon for his contempt, notwithſtanding that he offereth ſufficient caution or pledges to obey the commandments and orders of holy church from henceforth. The form and effect whereof you may find in *Reg. Orig. pag.* 66. and *F. N. B. fol.* 63.

Cay, A key or water-lock; ſometime it ſignifies an houſe; *De quadam* caia *& domo, &c.* from Brit. *cae*, which is a fence, and not from the Sax. *cæg*, *clavis*.

Cayagium, A toll or duty paid to the king for landing goods at ſome key or wharf. King *Edward* 1. grants by charter to the barons of the Cinque ports,—— *Ut quieti ſint de omni thelonio, & omni conſuetudine, videl. ab omni laſtagio, tallagio, paſſagio*, cayagio, *rivagio, ſponſagio, & omni wiree, &c.* Placit. temp. Ed. 1. & Ed. 2. MS. Penes Dominum *Fountains*.

Ceapgilde, A word derived from the Saxon *ceap*, ſignifying *pecus* cattle; and *gild*, *ſolutio*; that is, *ſolutio pecudis* or *pecudis ſeu mercimonii reſtitutio*. From this *Saxon* word *gild*, perhaps we may have our common *Engliſh* word *yield*; as, *yield* or *pay*.

Celdra, A certain meaſure among the *Scotch*, called by them a chalder: whence our chaldron of *Scotch* and *Newcaſtle* coals. *Rex* Scotiæ *honoris gratia, dedit (Epiſc.* Sariſber. & Rouceſtr. *tunc in* Scotia *agentibus*) *octoginta* celdras *frumenti, & ſexaginta ſex de braſio, & octoginta de avena*. Cron. Mailros, ſub an. 1209.

Celer lecti, The top, head, teſte, or teſter of a bed. ——*Dedit ad Cameram prioris unum lectum, cum* celere *& curtenis blodei coloris*. Hiſt. Elien. apud Wartoni Angl. Sac. p. 1. p. 673.

Cellerarius, alias **Cellarius**, *Officialis eſt in monaſterio qui fratrum ſtipendia ſervat & adminiſtrat. MS.* In monaſteries he was in nature of a ſteward, *qui totius abbatiæ curam gerebat*. Cellerarius *propter dignitatem officii, ſecundus pater eſt in monaſterio*. Mon. Angl. Par. f. 302. a. In the univerſities of *England* they are ſometimes called manciples, ſometimes caterers, and ſometimes ſtewards.

Celeſtrine, A ſort of ſky-coloured cloth, ſo called from *cæruleo* vel *cæleſti colore*. 1 Ric. 3. cap. 8.

Cendulae, Shingles, ſhindles, *ſcandulæ*, ſmall pieces of wood, laid in form of tiles, to cover the roof of a houſe. ——*Mandatum ad* cendulas *& lattas noſtras cariandas de parco ad domus reficiendas*. Pat. 4 H. 3. p. 1 m. 10.

Cenegild, This is an expiatory mulct, paid by one who kills another, to the kindred of the deceaſed; from the Sax. *cinne*, *cognatio*, and *gild*, *ſolutio*. See **Wegboce** and **Kenegild**.

Cenellae, Acorns; ſo called from the oak, Fr. *cheſne*: whence in our old writings, *peſſona cenellarum*, is put for the pannage of hogs, or running of ſwine, to feed on acorns.——*habeant xxx porcos*.

Ceni magni. See **Iceni**.

Cenio, The river near *Tregony* in *Cornwall*.

Cenninga, This is notice given by the buyer to the ſeller, that the thing ſold is claimed by another, that he might appear and juſtify the ſale; from the Saxon *cennen tean*, i. e. *auctorem advocare*: it is mentioned in the laws of *Athelſtan apud Brompton, cap.* 4. viz. *Diximus de ignotis pecoribus ut nemo habeat ſine teſtimonio hominis hundredi, &c. & ſit hoc bene credibile, & niſi alterutrum habeat, nolumus ei permittere* Cenningham *aliquam*.

Cenſaria, A farm, or houſe and land, let *ad cenſum*, at a ſtanding rent.——Henricus Sturmy *tenet maneria in com.* Wilt. *per ſervitium cuſtodiendi ballivam totius foreſtæ de* Savernake, *& cenſariam, quæ vocatur* la farme *in foreſta prædicta, temp. Ed.* 3. Tenures, p. 88. *Et debent habere mortuum boſcum in* cenſaria, *de la Verre in forreſta de Savorgne, &c.* Pet. Parl. temp. Ed. 3.

Cenſarii, ——*Domeſday.* tit. *Everwic. Achum* —— *Ibi ſunt nunc* 14 cenſarii, *habentes ſeptem carucatas*. Farmers, ſuch as might be taxed.

Cenſer of the college of phyſicians. See **Phyſicians**.

Cenſumorthidus, *i. e.* A dead rent like that we call *mortmain*: it is mentioned in the *Monaſticon*, 1 *tom. pag.* 61. *Sint omnino liberæ cellæ eccleſiæ cum redditibus & ſervitiis, debitis &* cenſumorthidis.

Cenſure, or *cuſtuma vocata* Cenſure, (from the Lat. *cenſus*, which *Heſychius* expounds to be a kind of perſonal money paid for every poll) Is, in divers manors in *Cornwall* and *Devon*, the calling of all reſiants therein, above the age of ſixteen, to ſwear fealty to the lord, to pay 2 *d. per poll*, and 1 *d. per an.* ever after, as *cert-money* or *common fine*; and theſe thus ſworn, are called *cenſors*.—Item *erat quædam* cuſtuma *quæ vocatur* cenſure. *proven. de illis qui manent in burgo de* Loſtreythiel. *Survey of the Dutchy of* Cornwall.

Centenarii, Were petty judges under ſheriffs of counties, that had rule of an *hundred*, and judged ſmaller matters among them. 1 *Vent.* 211.

Century. See **Hundred**.

Ceola, A great ſhip. It is mentioned in *Malmesbury, lib.* 1. *c.* 1. viz. *Placidoque ventorum favore, tribus longis navibus, quas illi* ciolas *alias* ceolas *vocant, Britanniam advehebantur*.

Ceorl, *i. e.* Churl. See **Cheorl**: *Ruſtici ſi* ceorli *& fœminæ pueros habent*.

Cepi corpus, Is a return made by the ſheriff, that upon a *capias*, *exigent*, or other proceſs, hath taken the body of the party. *F. N. B. fol.* 26.

Ceppagium, The ſtumps or roots of trees which remain in the ground after the trees are felled. In *Fleta, lib.* 2. *c.* 41. *par.* 24. *Qui foreſtarii ceperint coopertiones,* ceppagia *& eſcheates quercuum ſive aliarum arborum, &c.*

Ceragium, *Cerage*, *i. e.* Waxſcot, or a payment to find wax-candles in the church. See **Warſhot**. It is mentioned in *Matt. Pariſ.* viz. *Si eccleſia petat* ceragium *vel herietum, &c.*

Certainty, Is a plain, clear, and diſtinct ſetting down of things, ſo that they may be underſtood. 5 *Rep.* 121. A convenient *certainty* is required in writs, declarations, pleadings, *&c.* But if a writ abate for want of it, the plaintiff may have another writ. It is otherwiſe, if a deed become void by uncertainty, the party may not have a new deed at his pleaſure. 11 *Rep.* 25, 121. *Dyer* 84. That has certainty enough, which may be made certain. 4 *Rep.* 97. See **Incertainty, Pleadings**.

Certificando de recognitione ſtapulae, Is a writ directed to the mayor of the *ſtaple*, *&c.* commanding him to certify the Lord Chancellor of a ſtatute of the *ſtaple*, taken before him between ſuch and ſuch, in caſe where the party himſelf detaineth it, and refuſes to bring it in. *Reg. Orig. fol.* 152. *b.* In like manner may be ſaid of *certificando de ſtatuto mercatorio*. Eod. f. 148. And *de* certificando *in cancellarium de inquiſitione de idemptitate nominis*, fol. 195. And *certificando quando recognitio, &c.* And *certificando quid actum eſt brevi ſuper ſtatutum mercatorium, f.* 151. And *certificando in loquela warrantiæ, fol.* 13.

Certificate, (*Certificatorium*) Is uſed for a writing made in any court, to give notice to another court of any thing done therein: as for example; a *certificate* of the cauſe of attaint is a tranſcript made briefly, and in few words, by the clerk of the crown, clerk of the peace, or clerk of aſſize, to the court of the King's Bench, containing the tenor and effect of every indictment, outlawry, or conviction, and clerk attainted, made or pronounced in any other court. 34 *H.* 8. 14. Of this ſee more *Certif. d' Eveſq*; *Bro. f.* 119.

Certificate of attainders, indictments, outlawries or convictions, by whom and where to be made, 34 & 35 *Hen.* 8. *c.* 14. 3 *W. & M. c.* 9. *ſect.* 7.

Certificates from eccleſiaſtical perſons to the King's courts, in whoſe name and under whoſe ſeal to be made, 1 *Ed.* 6. *c.* 2. *ſect.* 7.

Certificates on convictions for robberies, *&c.* 4 *W. & M. c.* 8. 6 & 7 *W.* 3. *c.* 30. 10 & 11 *W.* 3. *c.* 23. 5 *Ann. c.* 31. 6 *Geo.* 1. *c.* 23.

Certificates concerning poor perſons, 13 & 14 *Car.* 2. *c.* 12. *ſect.* 3. 8 & 9 *W.* 3. *c.* 30. 9 & 10 *W.* 3. *c.* 11. 12 *Ann. ſt.* 1. *c.* 18. *ſect.* 2.

Certification of aſſiſe of novel diſſeiſin (*Certificatio aſſiſæ novæ diſſeiſinæ*) Is a writ granted for the re-examining or review of a matter paſſed by *aſſiſe* before any juſtices, and is called *certificatio novæ diſſeiſinæ*. *Old Nat. Brev. fol.* 181. Of this ſee alſo *Reg. Orig. fol.* 200. and the New Book of Entries, *verb. Certificate of aſſiſe*. This word hath uſe, where a man appearing by his bailiff to an *aſſiſe* brought by another, hath loſt the day, and having ſomething more to plead for himſelf, as a deed of releaſe, *&c.* which the bailiff did not, or might not plead for him, deſireth a farther examination of the cauſe, either before the ſame juſtices or others, and obtaineth letters patent

patent to them to that effect. The form of these letters patent you may see *F. N. B. f.* 181. and that done, bringeth a writ to the sheriff, to call both the party for whom the *assise* passed, and the jury that was impanelled upon the same, before the said justices at a certain day and place. And it is called a *certificate*, because in it there is mention made to the sheriff, that upon the parties complaint of the defective examination, or doubts yet remaining upon the *assise* passed, the King hath directed his letters patent to the justices, for the better certifying of themselves, whether all points of the said *assise* were duly examined. See farther, *Old Nat. Brev.* and *F. N. B. ubi supra.* Of this you may also read *Bract. lib.* 4. *c.* 19. *n.* 4. *in fine*, & 5, 6. where he discusseth the reason of this point very learnedly. And lastly, *Horne* in his *Mirror of Just. lib.* 3. *cap. final. sect. En Ayde des Memoyres*, &c.

Certiorari. The writ of *certiorari* is an original writ, and issueth sometimes out of the Chancery, and sometimes out of the King's Bench, and lieth where the King would be certified of any record which is in the Treasury, or in the Common Pleas, or in any court of record, or before the sheriff and coroners, or of a record before the commissioners, or before the escheator; then the King may send that writ to any of the said courts or officers, to certify such record before him *in banco*, or in the Chancery, or before other justices, where the King pleaseth to have the same certified. And he or they to whom or who the *certiorari* is directed, ought to send the same record according to the tenor of the writ, and as the writ doth command him; and if he or they fail so to do, then an *alias* shall be awarded, and afterwards a *pluries*, *vel causam nobis significes*, and after an attachment, if a good cause be not returned upon the *pluries*, wherefore they do not send the record. *F. N. B.* 245.

Also the King might by such writ of *certiorari* send for the tenor of the record, or for the tenor of the tenor of the record, at his election; and those writs ought to be obeyed, and the records sent, as the writ commandeth them to do. *F. N. B.* 245.

1. *Out of what court a* certiorari *ought to issue, and in what cases grantable.*

2. *In what cases the court of King's Bench is restrained from granting a* certiorari *by acts of parliament.*

3. *What the party, who applies for a* certiorari, *must do before it is granted and allowed.*

1. *Out of what court a* certiorari *ought to issue, and in what cases grantable.*

The court of *King's Bench* has a superintendency over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have an indictment removed and brought before itself; and where such *certiorari* is allowable, ought of right to award it at the instance of the King, because every indictment is the suit of the King, and he has a prerogative of suing in what court he pleases. 1 *Vent.* 63. 1 *Mod.* 4. 2 *Hawk. P. C.* 287.

But though the court is to grant it at the suit of the King, yet it has a discretionary power in granting or refusing it at the suit of the defendant, and agreeable hereto it is laid down as a general rule, that the court will never grant it for the removal of an indictment before justices of gaol-delivery, without some special cause; as where there is just reason to apprehend that the court below may be unreasonably prejudiced against the defendant; or where there is so much difficulty in the case, that the judge below desires that it may be determined in the King's Bench; or where the King himself gives special direction that the cause shall be removed; or where the prosecution appears to be for a cause not properly criminal. 2 *Hawk. P. C.* 287. 1 *Salk.* 144, 149, 150, 151. 1 *Keb.* 4.

Neither will the court of King's Bench ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment of perjury, or forgery, or other heinous misdemeanor; for such crimes deserve all possible discountenance, and the *certiorari* might delay, if not wholly discourage their prosecution. 1 *Sid.* 54. 2 *Hawk. P. C.* 287.

Nor will the court of King's Bench grant it for a conviction of recusancy on a default at the sessions, because by the statute such convictions are to be removed into the Exchequer, and process on them is to go from thence. 2 *Hawk, P. C.* 287, 288. 2 *Salk.* 145.

Also it is said to be a good objection against granting a *certiorari*, that issue is joined, and a *venire* awarded for the trial in the court below. 2 *Hawk. P. C.* 288.

A *certiorari* shall not be granted to remove an indictment or appeal after a conviction, unless for some special cause; as where the judge below is in doubt what judgment to give. 1 *Salk.* 149. 6 *Mod.* 17.

An indictment was removed into the court of King's Bench by *certiorari*, after conviction, and before judgment; upon which a doubt arose, what the court could do, the *certiorari* being brought before judgment; and this court not being apprized of the circumstances of the offence, could not tell what judgment to give: and in *Carth.* 6. it is said, they cannot give judgment. A rule therefore was made, to shew cause why the *certiorari* should not be quashed, so as to remit it back to the sessions; which was afterwards made absolute. *Stra.* 1227.

The court has refused to grant a *certiorari* to remove a recognizance of appearance before justices of *oyer* and *terminer*, &c. because the court below is most proper to judge upon the whole circumstances of the case, which are equitably to be considered, whether it ought to be estreated or not. 2 *Hawk. P. C.* 288.

By a rule of the King's Bench, no order of commissioners of sewers is to be filed without notice to the parties concerned; neither will the court suffer the return of a *certiorari* for such order to be filed, without hearing affidavits of the facts; whereon, if the matter appear doubtful, it is usual to order a trial of feigned issues, and after such trial, either to file the return, or supersede the *certiorari*, and grant a *procedendo*, and give costs, &c. as shall appear reasonable. 2 *Hawk. P. C.* 288. See 2 *Keb.* 500.

The courts of Chancery and King's Bench may award a *certiorari* to remove the proceeding from any inferior courts, whether they be of ancient or newly created jurisdiction, unless the statute or charter, which creates them, exempts them from such jurisdiction. *S. P. C.* 70. 1 *Salk.* 144. *pl.* 3. 2. *Lev.* 86. 1 *Lev.* 312. *Cro. Car.* 265. 3 *Mod.* 93.

And therefore it is agreed, That the King's Bench may award such *certiorari* to justices in *eyre*, or of gaol-delivery, or of a county palatine, and to the college of physicians, having a special power by statute to impose fines, &c. and to justices of the peace, &c. even in such cases, which they are empowered by statute finally to hear and determine; and to commissioners of sewers, for the clause in 13 *Eliz. cap.* 9. *That such commissioners shall not be compelled to make any return of their ordinances*, had been construed to intend only to exempt them from returning their order into Chancery, as by the statute of *H.* 8. they were obliged to do. 1 *Bac. Abr.* 351.

Also it seems settled at present, that a *certiorari* lies to the courts of *Cinque ports*, to remove an indictment from those courts, and that the privilege of the *Cinque ports*, which they have enjoyed time out of mind, that the King's writs do not run there, is to be intended only of civil causes between party and party. *Cro. Car.* 252, 291. 1 *Rol. Abr.* 395.

Also a *certiorari* lies from the King's Bench to the courts of grand sessions, and to other courts in *Wales*, whether in the old *Welch* counties, or in the lordships marches; and whether such indictments be for inferior crimes or for felony. 2 *Hawk. P. C.* 287.

2. *In what caſes the court of King's Bench is reſtrained from granting a* certiorari *by acts of parliament.*

By ſtat. 1 & 2 *Ph. & M. c.* 13. it is enacted, That no writs of *habeas corpus*, or *certiorari*, ſhall be granted to remove any priſoner out of any gaol, or to remove any recognizance, except the ſame writs be ſigned with the proper hands of the Chief Juſtice, or in his abſence, of one of the Juſtices of the court out of which the ſame writ ſhall be awarded or made; upon pain, that he that writeth any ſuch writs, not being ſigned, as is aforeſaid, to forfeit for every ſuch writ five pounds.

If a *certiorari* be taken out of the vacation and teſted of the precedent term, the *fiat* for it muſt be ſigned by ſome judge of the court ſome time before the eſſoin day of the ſubſequent term; otherwiſe it is irregular; and the court, upon motion, will order a *procedendo*; but it is ſaid, that there is no need for any judge to ſign the writ of *certiorari* itſelf, but only in ſuch caſes wherein it is required by ſtatute. 1 *Salk.* 150.

And by ſtat. 5 & 6 *W. & M. cap.* 11. "No *certiorari* in term-time, at the proſecution of the defendant, ſhall be granted out of the King's Bench, to remove any indictment or preſentment from any general or quarter-ſeſſions before trial, but on motion and rule in open court; but in vacation ſuch writ may be granted by any judge of the ſaid court, whoſe name ſhall be indorſed thereon, and alſo the party's name at whoſe inſtance it is granted.

It is enacted by ſtat. 22 *Car.* 2. *c.* 12. "That all defects of repairs of cauſeways, pavements, highways, or bridges, ſhall be preſented in the county only where ſuch cauſeways, *&c.* lie, and not elſewhere; and that no indictment or preſentment ſhall be removed by *certiorari* or otherwiſe out of the ſaid county, till ſuch indictment or preſentment ſhall be traverſed, and judgment thereupon given." And it is farther enacted by 3 & 4 *W. & M. cap.* 11. "That all matters concerning highways, *&c.* ſhall be determined in the county where they lie, and not elſewhere; and no preſentment, indictment, or order made by virtue of that act, ſhall be removed by *certiorari.*" But it is enacted by the 5 & 6 *W. & M. cap.* 11. "That if the right or title to repair ſuch cauſeways, *&c.* may come in queſtion, upon ſuggeſtion and affidavit of the truth thereof, a *certiorari* may be granted to remove ſuch indictment or preſentment into the King's Bench.

By the 7 & 8 *W. & M. cap.* 6. made for the recovery of ſmall tithes before juſtices of the peace, it is enacted, "That no proceedings, or judgment by virtue thereof, ſhall be removed or ſuperſeded by any writ of *certiorari* out of any court whatſoever, unleſs the title of the tithes, *&c.* ſhall come in queſtion. If the party inſiſts on any matter of law before the juſtice of peace, which is any way doubtful, as on a queſtion in a pariſh to be diſcharged of a certain kind of tithe, *&c.* the order may be removed, within the intent of the ſtatute. 2 *Hawk. P. C.* 289.

Certiorari ſhall not be granted to ſuperſede proceedings of juſtices on exciſe laws, 12 *Car.* 2. *c.* 23. *ſ.* 36. 22 & 23 *Car.* 2. *c.* 5. *ſect.* 14. 6 *Geo.* 1. *c.* 21. *ſect.* 21, 22. 5 *Will. & M. c.* 5. *ſect.* 17.

Nor to remove judgments in ſuits for tithes, unleſs the title come in queſtion, 7 & 8 *W.* 3. *c.* 6. *ſect.* 7.

Nor proceedings by virtue of the act to compel quakers to pay tithes, 7 & 8 *Will.* 3. *c.* 34. *ſect.* 4.

Nor on preſentment for not repairing bridges, *&c.* 1 *Ann. ſt.* 1. *c.* 18. *ſect.* 5.

Nor on proceedings on the act for laying duties on hides, *&c.* 9 *Ann. c.* 11. *ſect.* 47.

Nor on proceedings of commiſſioners for licenſing coaches, 1 *Geo.* 1. *c.* 57. *ſect.* 6.

Nor no order of juſtices on the malt act, 12 *Ann. ſt.* 1. *c.* 2. *ſect.* 37.

Nor on judgments of commiſſioners for inland duties on coffee, *&c.* 10 *Geo.* 1. *c.* 10. *ſect.* 42.

Nor on proceedings on the act for regulation of the woollen manufacture, 13 *Geo.* 1. *c.* 23. *ſect.* 6.

Nor on convictions on the act to prevent diſturbances by ſeamen, 1 *Geo.* 2. *c.* 25. *ſect.* 15.

Nor on any proceedings on the act for the better regulation of attornies, 2 *Geo.* 2. *c.* 23. *ſect.* 25.

Nor on the act againſt deſtroying turnpikes, *&c.* 8 *Geo.* 2. *c.* 20. *ſect.* 16.

Nor on the act for more eaſy aſſeſſing county rates, 12 *Geo.* 2. *c.* 29. *ſect.* 21.

Nor on orders of juſtices for regulating houſes of correction, 17 *Geo.* 2. *c.* 5. *ſect.* 31.

Nor on conviction for ſwearing, 19 *Geo.* 2. *c.* 21. *ſect.* 8.

Nor on conviction on the act for preſerving of havens, *&c.* 19 *Geo.* 2. *c.* 22. *ſect.* 5.

Nor on the proceedings on the act to prevent frauds, *&c.* in the admeaſurement of coals, 19 *Geo.* 2. *c.* 35. *ſect.* 23.

Nor on proceedings on the act for the more eaſy recovery of ſervants wages, 20 *Geo.* 2. *c.* 19. *ſect.* 6.

Nor on proceedings on the act againſt ſeducing artificers, *&c.* 23 *Geo.* 2. *c.* 13. *ſect.* 9.

Nor on the act againſt the clandeſtine importation of ſoap, candles, and ſtarch, 23 *Geo.* 2. *c.* 21. *ſect.* 33.

Nor on the act for more ſpeedy recovery of ſmall debts in county courts, 23 *Geo.* 2. *cap.* 33. *ſect.* 4.

Nor for removing indictment for keeping a bawdy-houſe, 25 *Geo.* 2. *c.* 36. *ſect.* 10.

Nor on conviction on the act for preventing frauds, *&c.* in clocks and watches, 27 *Geo.* 2. *c.* 7. *ſect.* 4.

Nor on the act againſt ſtealing lead, iron, *&c.* 29 *Geo.* 2. *c.* 30. *ſect.* 7.

Nor for offenders againſt the act for widening *London* bridge, 29 *Geo.* 2. *c.* 40. *ſect.* 39.

Nor againſt the act for preſerving fiſh in the *Thames*, 30 *Geo.* 2. *c.* 21. *ſect.* 13.

Nor on conviction of ale-houſe-keepers for permitting gaming, 30 *Geo.* 2. *c.* 24. *ſect.* 20.

Nor on orders of lieutenants in the militia, 30 *Geo.* 2. *c.* 25. *ſect.* 58. *& ſeq.*

Nor on the act for the due making of bread, *&c.* 31 *Geo.* 2. *c.* 29. *ſect.* 37. *& ſeq.*

Nor on the act concerning laſtage and ballaſtage in the *Thames*, 32 *Geo.* 2. *c.* 16. *ſect.* 24, 27.

Nor on the act for widening the ſtreets, *&c.* in *London*, 33 *Geo.* 2. *c.* 30. *ſect.* 31.

Nor on convictions on the act for preventing theſts by perſons navigating boats on the *Thames*, 2 *Geo.* 3. *c.* 28. *ſect.* 11.

3. *What the party who applies for a* certiorari *muſt do before it is granted and allowed.*

Stat. 21 *Jac.* 1. *cap.* 8. *ſect.* 5 & 6. Whereas indictments of riot, forcible entry, or aſſault and battery found at the quarter-ſeſſions, are often removed by *certiorari*; all ſuch writs of *certiorari* ſhall be delivered at ſome quarter-ſeſſions in open court; and the parties indicted ſhall before allowance of ſuch *certiorari* become bound unto the proſecutors in ten pounds, with ſuch ſureties as the juſtices ſhall think fit, with condition to pay to the proſecutors, within one month after the conviction, ſuch coſts as the juſtices of peace ſhall allow; and in default thereof it ſhall be lawful for the juſtices to proceed to trial. And the like recognizance in the ſum of 40 *l.* is required by ſtat. 13 & 14 *Car.* 2. *c.* 6. on *certiorari's* for indictments on that ſtatute concerning the highways.

Theſe ſtatutes do not extend to all indictments at ſeſſions in general, but only to thoſe particular ones therein mentioned; but this defect was in a great meaſure ſupplied by the rules of the court of King's Bench, which, upon the removal of an indictment from *London* to *Middleſex*, required a recognizance from the defendant, to carry down the record to trial the ſame term on which the *certiorari* was returnable, or the ſittings after, and, on the removal of an indictment from other counties, required ſuch recognizanee for a trial at the next aſſizes. 2 *Hawk. P. C.* 291.

Stat. 5 & 6 *W. & M. cap.* 11. *ſect.* 2. In term time no *certiorari* at the proſecution of any perſon indicted ſhall be granted out of the court of *King's Bench*, to remove any indictment or preſentment of treſpaſs or miſ-

demeanor

demeanor before trial from the quarter-seſſions, unleſs upon motion of counſel and rule of court; and the parties proſecuting ſuch *certiorari* ſhall find two manucaptors before one or two juſtices of the county in 20 *l.* with condition to plead to the Indictment in the *King's Bench*, and at their own charges to procure the Iſſue to be tried at the next aſſizes for the county, if not in *London*, *Weſtminſter*, or *Middleſex*; and if in the ſaid cities or county, then to be tried the next term, or at the ſitting after the ſaid term, if the *King's Bench* ſhall not appoint any other time; and if any other time, then at ſuch other time, and to give due notice of trial to the proſecutor; and the ſaid recognizance and *certiorari* ſhall be certified into the *King's Bench*, and there filed, and the name of the proſecutor indorſed; and if the party proſecuting ſuch *certiorari*, being the defendant, ſhall not, before allowance thereof, procure ſuch manucaptors, the juſtices of peace may try the indictment at the ſeſſions, notwithſtanding ſuch *certiorari*.

Sect. 3. If the defendant proſecuting ſuch *certiorari* be convicted, the *King's Bench* ſhall give coſts to the proſecutor, if he be the party grieved, or any civil officer who ſhall proſecute upon account of any fact that concerned him as officer; and within ten days after demand upon oath and refuſal, he ſhall have an attachment againſt the defendant for contempt; and the recognizance ſhall not be diſcharged till the coſts be paid.

Sect. 4. In the vacation writs of *certiorari*, may be granted by any of the judges of the *King's Bench*, whoſe names ſhall be indorſed, and the name of the party at whoſe inſtance it is granted; and before the allowance of ſuch writ the party indicted proſecuting ſuch *certiorari* ſhall find ſureties as before-mentioned.

Sect. 5. Upon every *certiorari* granted within *Cheſter*, *Lancaſter* or *Durham* to remove indictments, the parties indicted proſecuting ſuch *certiorari* ſhall find ſureties to try the ſaid indictment at the next aſſizes or general gaol-delivery; and if convicted, ſhall be liable to like coſts.

Sect. 6. If any indictment be againſt any perſon for not repairing highways, cauſeways, pavements, or bridges, and the title to repair the ſame may come in queſtion; upon which ſuggeſtion, and affidavit made thereof, a *certiorari* may be granted to remove the ſame into the *King's Bench*; provided, that the parties proſecuting ſuch *certiorari* ſhall find rwo manucaptors to be bound in a recognizance, with condition as aforeſaid.

Made perpetual by 8 & 9 W. 3. cap. 33.

Stat. 8 & 9 *W.* 3. *cap.* 33. *ſect.* 2. The party proſecuting any *certiorari* to remove an indictment from the quarter-ſeſſions, may find two manucaptors to enter into a recognizance before any of the juſtices of the *King's Bench*, in the ſame ſum, and under the ſame condition, as is required by the act 5 & 6 *W.* & *M. cap.* 11. whereof mention ſhall be made on the back of the writ, under the hand of the juſtice who took the ſame, which ſhall be as effectual to ſtay proceedings, as if taken before a juſtice of peace in the county; and it ſhall be added to the condition of the recognizance, that the party ſhall appear from day to day in the *King's Bench*, and not depart till diſcharged by the court.

In the conſtruction of theſe ſtatutes, the following points ſeem moſt remarkable.

That notwithſtanding the expreſs words are, That juſtices may proceed to trial, &c. if a proper recognizance be not given, notwithſtanding ſuch *certiorari*, yet they will be in contempt if they make no return to it, for all writs muſt be obeyed, unleſs good cauſe ſhewn to the contrary. 1 *Keb.* 225. 1 *Sid.* 70. 2 *Hawk. P. C.* 292.

That theſe ſtatutes extend only to *certiorari's* procured by defendants, and therefore thoſe procured by proſecutors remain as they were at Common law. 6 *Mod.* 246,

That theſe ſtatutes being in the affirmative, as to the recognizances, do not take away the power which the juſtices of the *King's Bench* had before; and therefore if ſuch a juſtice take a recognizance variant from the form preſcribed by the ſtatute, it will be as effectual as before; but it is ſaid, that in ſuch caſe the *certiorari*, if procured by the defendant, will be no *ſuperſedeas*, becauſe the ſtatutes ſeem to be expreſs, that the ſeſſions may proceed notwithſtanding any *certiorari* procured by a defendant, whereon ſuch recognizance is not given as is preſcribed. 1 *Hawk. P. C.* 292. 1 *Salk.* 564.

That if the perſons offering to be ſureties appear to be worth 20 *l.* the juſtices cannot refuſe them. *March* 27. 2 *Hawk. P. C.* 292.

That if there be ſeveral defendants, and ſome find ſureties, and others not, the indictment ſhall be removed as to thoſe at leaſt who find ſureties, becauſe they ſhall not be prejudiced by the fault of others; and as ſome ſay, it ſhall be removed as to all. 2 *Hawk. P. C.* 292. *March* 27.

That in taxing the coſts, thoſe only are to be conſidered that were ſubſequent to the *certiorari*. 1 *Salk.* 55.

That the proſecutor, by accepting the coſts, ſo taxed is not reſtrained from aggravating the fine, becauſe he has a right to them by the expreſs words of the ſtatute; but in other caſes, if a proſecutor accept coſts from a defendant, he cannot afterwards aggravate the fine, becauſe having no right to the coſts, if he take them at all, he muſt take them in ſatisfaction of the wrong, after which it is unreaſonable for him to harraſs the defendant. 2 *Hawk. P. C.* 292.

That notwithſtanding the condition of the recognizance be, that the defendant ſhall procure a new trial at the next aſſizes, yet the recognizance ſhall not be forfeited, unleſs the proſecutor gives rules, &c. 1 *Salk.* 370.

That after the recognizance is forfeited for not procuring a trial, &c. no motion ſhall be made to quaſh the indictment. 1 *Salk.* 380. 2 *Hawk. P. C.* 293.

By ſtat. 3 & 4 *Will.* & *M. c.* 10. againſt deer ſtealers it is enacted, That no *certiorari* ſhall be allowed to remove any proceedings on that act, unleſs the party convict ſhall become bound with good ſureties in 5 *l.* to pay full coſts and damages within one month after the conviction ſhall be confirmed, or a *procedendo* granted.

Stat. 5. *Geo.* 2. *c.* 19 *ſ.* 1. Upon appeal to the general ſeſſions for any county or precinct within *England* againſt orders made by juſtices of peace, ſuch juſtices aſſembled at any general ſeſſions ſhall cauſe any defects of form in ſuch orders to be amended without coſts, and proceed to hear the merits of ſuch orders, and to make ſuch determinations thereupon, as by law they ought in caſe there had not been ſuch defect of form.

Sect. 2. No *certiorari* ſhall be allowed to remove any order, unleſs the party proſecuting ſhall enter into a recognizance with ſureties before one juſtice of peace, where ſuch order ſhall have been made, or before one of his Majeſty's juſtices of the *King's Bench*, in the ſum of 50 *l.* with condition to proſecute without wilful delay, and to pay the party, in whoſe favour that order was made, within one month after the ſaid order ſhall be confirmed, their coſts to be taxed; and in caſe the party proſecuting ſuch *certiorari* ſhall not enter into ſuch recognizance, or ſhall not perform the conditions aforeſaid, it ſhall be lawful for the juſtices to proceed, and make further orders, as if no *certiorari* had been granted.

Sect. 3. The recognizance to be taken as aforeſaid ſhall be certified into the *King's Bench*, and filed with the *certiorari*, and order removed thereby; and if the order ſhall be confirmed, the perſons intitled to ſuch coſts, within ten days after demand made, upon oath made of the making ſuch demand and refuſal of payment, ſhall have an attachment for contempt, and the recognizance ſhall not be diſcharged until the coſts ſhall be paid, and the order complied with.

Stat. 13 *Geo.* 2. *cap.* 18. *ſect.* 5. For the better preventing vexatious delays and expence occaſioned by the ſuing forth writs of *certiorari*, no *certiorari* ſhall be granted to remove any conviction, judgment, order, or other proceedings, before any juſtice of the peace, or quarter-ſeſſions, unleſs it be applied for in ſix calendar months after ſuch proceedings had or made, and unleſs it be

duly proved upon oath, and notice thereof in writing, to the juſtice or juſtices, or two of them (if ſo many there be) before whom ſuch proceedings have been, to the end that ſuch juſtices, or the parties therein concerned, may ſhew cauſe, if they ſo think fit, againſt the iſſuing the *certiorari*.

Cert-money, (*Quaſi, certain money*) *Head money*, or common fine, paid yearly by the reſiants of ſeveral manors to the lords thereof, *pro certo letæ*, for the certain keeping of the *leet*; and ſometimes to the *hundred*. As the manor of *Hook* in *Dorſetſhire* pays *cert-money* to the hundred of *Egerton*. This in ancient records is called *certum letæ*. See **Common fine.**

Cervisarii, The *Saxons* had a duty called *drincelean* or *drinkelean*, i. e. *Dona potationis honoraria, quibus ſcilicet prædiorum dominus a vaſſallo honoratur & excipitur.* Whence thoſe tenants were in *Domeſday* called *cervisarii*, from *cervisia*, ale, their chief drink; though *cervisarius* vulgarly ſignifies a beer or ale brewer.

Cerura, A mound, fence, or incloſure——Willielmus de Lucey, *miles*, *dedit* Thomæ *miniſtro domus de* Theleſford *licentiam domos & portas levare, ædificare, & cum* ceruris *& muris includere viam quæ ducit ad eccleſiam de* Thelesford, *ſicut per muros dictorum miniſtri & fratrum juxta pontem extenditur.* Cart. prioratus de Thelesford, M. S. Though poſſibly *cerura* is here for *ferrura*, and is to ſignify a water-lock.

Ceſſavit, Is a writ that lies in divers caſes, as appears by *Fitz. Nat. Br. fol.* 280. Upon this general ground, *i. e.* that he againſt whom it is brought hath for two years neglected to perform ſuch ſervice, or to pay ſuch rent as he is tied to by his tenure, and hath not upon his lands or tenements ſufficient goods or cattle to be diſtrained. See *Fleta, lib.* 5. *cap.* 34. *ſect. Viſa ſunt.* See *Ceſſavit de cantaria, Ceſſavit de feodi firma, Ceſſavit per biennium, in Reg. of Writs, f.* 237, 238. and *New Book of Entries, verbo Ceſſavit.* It lies not but for annual ſervice, rent, and ſuch like, not for homage or fealty. *Cowell. Ceſſavit* granted againſt tenant in fee farm, *St. Glouc.* 6 *Ed.* 1. *c* 4. And for the ceſſer of any ſervices, and ſhall paſs to the heirs, *St. Weſtm.* 2. 13 *Ed.* 1. *c.* 21. for ceſſer of performing alms, *St. Weſtm.* 2. 13 *Ed.* 1. *c.* 41.

Ceſſes. By 22 *H.* 8. *cap.* 3. it ſeems to ſignify aſſeſſment or taxes: *ceſſe* or *ceaſſe* in *Ireland* is an exaction of victuals, at a certain rate, for the deputy's family, and the ſoldiers in garriſon. See *The Earl of Straffora's trial.*

Ceſſion (*Ceſſio*), A ceaſing, yielding up, or giving over. *Si un parſon ou dean en Angliterre priſt un Everſquery en Ireland, ceo fait le primier Eſgliſe void per* ceſſion Latch's Rep. f. 234.——*Ratione vacationis prioratus prædicti, per* ceſſionem *patris Rogeri de Wellington, ultimi prioris, &c.* Chauſ. 13 Ed. 3. p. 1. m. 38. *Ceſſion* is alſo where an eccleſiaſtical perſon is created biſhop, or when a parſon of a parſonage takes another benefice without diſpenſation, or otherwiſe not qualified, *&c.* in both caſes their firſt benefices are become void, and are ſaid to become void by *ceſſion:* and to thoſe that he had who was created biſhop, the King ſhall preſent for that time, whoever is patron of them; and in the other caſe the patron may preſent. See **Avoidance.**

Ceſſor, (Lat.) A loiterer or idle fellow; but we uſe it for him that ceaſeth or neglecteth ſo long to perform a duty belonging unto him, as that by his *ceſſe* or *ceſſing*, he incurreth the danger of law, and hath or may have the writ *ceſſavit* brought againſt him. *Old Nat. Brev. fol.* 136. And note, that where it is ſaid in divers places, the tenant ceſſeth, without any more words, that is to be underſtood, the tenant ceaſeth to do what he might, or is bound to do by the tenure of land or tenement.

Ceſſure, or **Ceſſer**, Is likewiſe to ſignify a giving over, or giving of place. *Weſt.* 2. *cap.* 41.

Ceſtui qui vie, Is in true French *ceſtui à vie de qui*, that is, he for whoſe life any land or tenement is granted. *Perkins, Grants* 97.

Ceſtui qui uſe, (*Ille cujus uſui, vel ad cujus uſum*) Is broken French, and this may be better modelled (*ceſtui à l'uſe de qui*). It is an ordinary ſpeech among lawyers, ſignifying him to whoſe uſe any other man is enfeoffed in any lands or tenements. See the *New Book of Entries*, verbo *Uſes*; and in *Replevin, f.* 508. *col.* 3. verbo *Treſpaſs, fol.* 606. & 123. *col.* 3. *num.* 7. And ſee 1 *R.* 3. *cap.* 1. and *Co. lib.* 1. 133. *An.* 12 *Car.* 2. *cap.* 30.

Ceſtui qui truſt, Is he who hath a *truſt* in lands or tenements committed to him, for the benefit of another. 12 *Car.* 2. *cap.* 30.

Chacea, The way through which cattle are drove to paſture, commonly called in ſome places a *droveway*. *Ut ſi quis omnino viam obſtruat vel* chaceam *per quam ingredi ſolet paſturæ.* Bracton, lib. 4. c. 44. It is alſo taken for a *chaſe*, or ſtation of game, more extended than a park, and leſs than a foreſt. *Chacea* is ſometimes taken for the liberty of *chaſing*, or hunting within ſuch a diſtrict. *Boſcum in quo abbates* Glaſtoniæ chaceam *ſuam canibus ſuis & procurſum ſuum cum porcis ſuis habebant.*——Cartular. Abbat. Glaſton. MS. fol. 70. b.——*Donec amicabili compoſitione* chaſſiam *& communiam, quam dictus abbas & anteceſſores ſui in boſcis habuerant, quietum clamavit.* Ibid.

Chaceare, *Ad lepores vel vulpes*, To hunt hare or fox. ——*Licet abbatis & ſuis* chaceare *ad lepores & vulpes, in mancrio ſuo de* Donham. *Cartular. Abbat. Glaſton. MS. f.* 87.

Chacurus, (Fr. *Chaſſeur*) A horſe for the chace, or a hunter, unleſs poſſibly it rather ſignifies a ſwift dog, or fleet hound.——Willielmus de Breoſa *dedit regi octingentas marcas, tres dextrarios, quinque* chacuros, *quatuor cenſas, & decem leporarios, anno* 7 *Joh.*——Tenures, p. 134. See **Dextrarius.**

Chafewa, Is an officer in *Chancery* that fitteth the wax for the ſealing of the writs, and ſuch other inſtruments as are there made to be ſent out. This officer is borrowed from the French; for there *Calefactores ceræ ſunt qui regiis litteris in cancellaria ceram imprimunt.* Coraſius.

Chaffers, Seem to ſignify wares or merchandize, 3 *Ed.* 4. 4. and we yet uſe *chaffering* for buying and ſelling.

Chairs. See **Coaches.**

Chaldron, or *Chalder of coals*, Contains thirty-ſix buſhels of coals heaped up, and according to the ſealed buſhel kept at *Guildhall, London*, for that purpoſe, 16 & 17 *Car.* 2. *c.* 2. It is written *chawdren*, 9 *H.* 5. 10. And in *Pat.* 10 *R.* 2, *pag.* 1. *m.* 13. *chaldre.* It ſhould weigh 2000 lb. weight.

Chalking. The merchants of the ſtaple require to be eaſed of divers new impoſitions, as *chalking*, ironage, wharfage, *&c.*. *Rot. Parl.* 50 *Ed.* 3.

Challenge, (*Calumnia*) Cometh of the French word *chalenger*, that is, *ſibi aſſerere*; and in a legal ſenſe ſignifies an exception, taken either againſt perſons or things: perſons, as in aſſiſe to the jurors, or any one or more of them; or in a caſe of felony, by a priſoner at the bar. *Smith, de Rep. Angl. lib.* 2. *cap.* 11. *Britton, ca.* 52. *Bracton, lib.* 2. *tract.* 2. *c.* 22. Againſt things, as a declaration. *Old Nat. Brev. f.* 76. *Challenge* made to the jurors, is either made to the *array*, or to the *polls*: *Challenge* to the *array* is when the whole number is excepted againſt as partially impanelled: *Challenge* to or by the *polls* is when ſome one or more are excepted againſt as not indifferent. *Terms de la Ley. Challenge* to the jurors is alſo divided into *challenge principal*, and *challenge pur cauſe*; that is, upon cauſe or reaſon. *Challenge principal* (otherwiſe by *Staundf. Plac. Cor. fol.* 157, 158. called *peremptory*) is that which the law allows without cauſe alledged, or farther examination, *Lamb. Eiren. lib.* 4. *cap.* 14. as a priſoner at the bar, arraigned upon felony, may peremptorily *challenge* to the number of 20, one after another, of the jury impanelled upon him, alledging no cauſe but his own diſlike, and they ſhall be ſtill put off, and new jurors taken in their places. But in caſe of high treaſon, no *challenge peremptory* is allowed. 33 *Hen.* 8. 35. *Forteſcue* ſaith, that a priſoner in this caſe may challenge thirty-five men, *cap.* 27. But that law was abridged by 25 *Hen.* 8. *c.* 3. And here obſerve, that there is ſome difference between *challenge principal* and *challenge peremptory*; *peremptory* being uſed only in matters

matters crim'nal, and alledged without other cauſe than barely the priſoner's fancy. *Staundf. Pl. Cor. f.* 124. But *principal*, in civil actions for the moſt part, and with aſſigning ſome ſuch cauſe of exception, as being found true, the law alloweth, without farther ſcanning: for example, if either party ſay, that one of the jurors is the ſon, brother, couſin, or tenant to the other, or eſpouſed his daughter; this exception is good, and ſtrong enough, if it be true, without farther examination of the party's credit: and how far this challenge upon kindred reacheth, you have a notable example in *Plowden*, in the caſe of *Vernon* againſt *Manors*, *fol.* 425. Alſo in the plea of the death of a man, and in every action real, as every action perſonal, where the debt or damages amount to 40 marks, it is a good challenge to any man, that he cannot diſpend forty ſhillings by the year of freehold. 11 *H.* 7. *c.* 21. The ground of this *challenge* you may ſee farther in *Fleta*, *lib.* 4. *cap.* 8. Challenge *upon reaſon or cauſe* is when the party doth alledge ſome ſuch exception againſt one or more of the jurors, as is not forthwith ſufficient upon acknowledgment of the truth thereof, but rather arbitrable and conſiderable by the reſt of the jurors; as for example, if the ſon of a juror have eſpouſed the daughter of the adverſe party. *Terms de la Ley*, verbo *Challenge*. This *challenge pur cauſe* ſeems by *Kitchin*, *fol.* 92. to be termed *challenge for favor*; or rather, *challenge for favor* is ſaid there to be one ſpecies of *challenge pur cauſe*, where you may read what *challenges* are commonly only accounted *principal*, and what not. See the *New Book of Entries*, verbo *Challenge*, and the *Old Nat. Brev. fol.* 158, 159. That this word *challenge* is turned into *Lat.* by the word *calumnia*, appeareth by *Bracton*, *lib.* 3. *tract.* 2. *cap.* 18. & *lib.* 4. *tract.* 3. *cap.* 6. & *lib.* 5. *cap.* 6. See farther *Fleta*, *lib.* 1. *cap.* 32. *Co. on Litt.* 156, 157, *&c.* See **Jury**,

Chamberdekins, or *Chamberdakins*, Were *Iriſh* beggars, who by the ſtatute of 1 *H.* 5. *cap.* 8. were by a certain time, within the ſtatute limited, to depart this land. *Terms de la Ley*, *fol.* 114. Obſerve this deſcription of them: *Anno* 1413. *Univerſitatem* Oxonienſem *vexabant flagitioſi quidam* Chamberdekyns *dicti, qui non alii erant, quam mendici quidam* Hiberni, *habitu ſcholarium pauperculorum induti, ſub uullo autem præſide viventes. Iis ſolenne erat domi de die latitare, noctu vero circa Oenopolia domoſque infames obvium quemque ſpoliare, vel etiam trucidare.* Antiq. Oxonienſis, lib. 1. p. 207.

Chamber depinct. Under this name in our parliament rolls is often mentioned, the room which was anciently St. *Edward's chamber*, and is now the *painted chamber*.

Chamberer, Is uſed for a chamber-maid. 33 *H.* 8. *cap.* 21.

Chamberlain, (*Camerarius*) Cometh of the French *chambellan*; that is, *cubicularius vel præfectus cubiculi*. It is variouſly uſed in our chronicles, laws, and ſtatutes; as Lord Great *Chamberlain* of *England*, Lord *Chamberlain* of the Houſhold, the King's *Chamberlain*, (13 *Ed.* 1. *c.* 41. 17 *Rich.* 2. *c.* 16.) to whoſe office it eſpecially appertaineth to look to the King's chambers and wardrobe, and to govern the under-ſervants belonging to the ſame. *Fleta*, *lib.* 2. *c.* 6, 7.

To the Lord Chamberlain the keys of *Weſtminſter-Hall*, and the court of *Requeſts* are delivered upon all ſolemn occaſions. He diſpoſes of the ſword of ſtate to be carried before the King when he comes to the parliament, and goes on the right hand of the ſword next to the King's perſon. He has the care of providing all things in the houſe of lords in the time of parliament. To him belong livery and lodgings in the King's court, *&c.* and the gentleman uſher of the black rod, yeoman uſher, *&c.* are under his authority. He has the overſight and government of artificers retained in the King's ſervice, meſſengers, comedians, revels, muſick, *&c.* The ſerjeants at arms are likewiſe under his inſpection; and the King's chaplains, phyſicians, ſurgeons, barbers, *&c.* And he hath under him a *vice-chamberlain*; both being always privy counſellors.

There were formerly *Chamberlains* of the King's courts, 7 *Ed.* 6. 1. *Chamberlain* of the *Exchequer*, 51 *H.* 3. *ſtat.* 5. 10 *Ed.* 3. 11. 14 *Ed.* 3. 14. 26 *H.* 8. 2. *Chamberlain* of *North Wales*, *Stow. p.* 641. *Chamberlain* of *Cheſter*, *Cromp. Jur. fol.* 7. *Chamberlain* of *London*. This officer is commonly the receiver of all rents and revenues belonging to that city whereto he is *chamberlain*. *Vide Fleta*, *lib.* 2. *cap.* 70. To the *Chamberlain* of *Cheſter*, when there is no Prince of *Wales* and Earl of *Cheſter*, belongs the receiving and returning of all writs, coming thither out of any of the King's courts. The *Lat.* word ſeemeth to expreſs the function of this officer; for *Camerarius dicitur a camera*, i. e. *Teſtudine ſive fornice, quia cuſtodit pecunias quæ in cameris præcipue reſervantur.* Onuphrius de Interpret. Voc. Eccleſ. It ſeemeth to be borrowed from the Feudiſts, who define the word *camera* thus: *Camera eſt locus in quem theſaurus colligitur, vel conclave in quo pecunia reſervatur.* Zaſius de Feudis, par. 4. num. 7. And *Peregrinus de Jure Fiſci*, *lib.* 6. *tit.* 3. ſaith, that *Camerarius*, *vel* chamberlingus (*quem quæſtorem antiqui appellarunt*) *in rebus fiſci primum locum tenet, quia Theſaurarius & cuſtos eſt publicæ pecuniæ.* There are two officers of this name in the King's *Exchequer*, who were wont to keep a controulment of the *pells of receipt*, and *exits*, and certain keys of the treaſury and records: They kept alſo the keys of that treaſury, where the leagues of the King's predeceſſors, and divers ancient books, as *Domeſday*, *Black Book of the Exchequer*, remain. There is mention of this officer in the ſtatute 34 & 35 *H.* 8. *cap.* 16. There are alſo *Under-Chamberlains* of the *Exchequer*; for which ſee in **Under-chamberlain.**

Chamberlain and chamber of London. See **London.**

Chamberlaria, (*Chamberlangeria*) Chamberlainſhip, or office of chamberlain. —— *Commiſimus civi noſtro* Willielmo Joyner chamberlariam *noſtram* London. *Pat.* 7 *H.* 3. Brady Hiſt. Angl. Append. pag. 168.—— Jerem. del Ho & Radulphus de Coggeſhale *tenent feodum* del Ho *in* Rivandule *per ſervitium* chamberlangeriæ, *in com.* Devon. *anno xi H.* 3. Tenures, p. 48.

Chambers of the King, (*Regiæ cameræ*) The havens or ports of the kingdom, ſo called in our records. V. *Mare clauſum*, *fol.* 242.

Chambre depinct. See **Chamber depinct.**

Champarty, or **Champerty**, (from the Fr. *champ*, a field, and *parti* divided, or the Lat. *campus* and *partitio*, becauſe the parties in *Champerty* agree to divide the thing in queſtion) Signifieth in our Common law a maintenance of any man in his ſuit depending, upon condition to have part of the things (be it lands or goods) when it is recovered. *F. N. B. fol.* 171. This ſeems to have been an ancient grievance in our realm; for notwithſtanding the ſtatutes of 3 *Ed.* 1. 25. 13 *Ed.* 1. 49. 28 *Ed.* 1. 11. 32 *Ed.* 1. *ſtat.* 2 & 3. and 1 *R.* 2. *cap.* 4. and a form of a writ framed unto them; yet by ſtat. 4 *Ed.* 3. *c.* 11. it was again enacted, That whereas the former ſtatute provided redreſs for this in the *King's Bench* only (which at that time followed the court) from thenceforth it ſhould be lawful for the juſtices of the Common Pleas likewiſe, and juſtices of aſſizes, in their circuits, to inquire, hear, and determine this, and ſuch like caſes, as well at the ſuit of the King, as of the party. How far this writ extendeth, and the divers forms thereof applied to ſeveral caſes, ſee in *F. N. B. fol.* 171. *Reg. Orig. f.* 183. and the Book of Entries, *verbo Champerty*. Every *champerty* implieth maintenance. *Cromp. Jur. fol.* 39. See alſo *Cromp. Juſtice of Peace*, *fol.* 155. 2 *par. Inſt. fol.* 208. But every maintenance is not *champerty*, for *champerty* is but a *ſpecies* of maintenance, which is the *genus*. See **Maintenance.**

Champertors, *vel campi participes, ſunt qui per ſe vel per alios placita movent, uel moveri faciunt, & ea ſuis ſumptibus proſequuntur ad campi partem, vel pro parte lucri habenda.* 33 Ed. 1. ſtat. 2. Artic. ſuper Chart. cap. 11. Alſo it was ordained by the ſtat. 33 *H.* 8. confirmed by 37 *H.* 8. *c.* 7. The juſtices of peace, at their quarter-ſeſſions, ſhould have authority as well by oaths of twelve men, as by the information of any other perſon, to inquire of the offenders and offences againſt the laws and ſtatutes made and provided touching *champerty*, *maintenance*, *&c.* Termes de la Ley, fol. 114, 115.

Champion,

Champion, (*Campio*) Is taken not only for him that fights the combat in his own cauſe, but for him alſo that does it in the place or quarrel of another. *Bracton, lib.* 3. *part* 2. *c.* 21. *numb.* 24. who alſo ſeems to uſe this word for ſuch as held of another by ſome ſervices; as, *Campiones faciunt homagium domino ſuo, lib.* 2. *cap.* 35. *Hottoman, de verbis feudalibus*, defines it thus, *Campio eſt certator pro alio datus in duello, a* campo *dictus, qui circus erat decertantibus definitus.* And therefore it is called *camfight.* See *Combat*, and Sir *Edward Byſhe*'s Notes upon *Upton*, where, *fol.* 36, you will find, that *Henricus de Fernbureg*, for thirty marks fee, did by a charter under the ſeal covenant to be champion for *Roger*, abbot of *Glaſtonbury*, *anno* 42 *H.* 3. See 3 *Inſt. f.* 221.

And here it may not be improper to mention a few things concerning *champions*, which I find in our law books and hiſtories, *viz.* they were uſually hired, and therefore they were accounted infamous perſons. *Bracton, lib.* 3. *cap.* 18.

Nunc caput in mortem vendunt, & funus arenæ.

Monks, eccleſiaſticks, and generally any perſons might hire them, except parricides, and thoſe who were accuſed of very great offences, but churchmen were firſt to have leave of the biſhop.

Before the *champion* came into the field, he was to ſhave his head, and make oath that he believed that the perſon who hired him was in the right, and that he would defend the cauſe to the utmoſt of his power; which was always done on foot, and with no other weapon but with a ſtick or club, and a ſhield. And before he engaged with his adverſary he always made an offering to the church, that God might aſſiſt him in the battle.

The puniſhment of a *champion* overcome in battle, and likewiſe of the perſon for whom he fought, was various: If it was the *champion* of a woman, ſhe was burnt, and the *champion* hanged: if it was of a man, and not for a capital crime, he not only made ſatisfaction, but had his right hand cut off; and the man was to be cloſe confined in priſon till the battle was over.

Champion of the King, (*Campio Regis*) Whoſe office is at the coronation of our Kings to ride into *Weſtminſter-hall*, armed *cap-a-pe*, when the King is at dinner there, and throw down his gauntlet by way of challenge, pronounced by a herald, that if any man ſhall deny or gainſay the King's title to the crown, he is there ready to defend it in ſingle combat, *&c.* which being done, the King drinks to him, and ſends him a gilt cup, with a cover, full of wine, which the champion drinks, and hath the cup for his fee.

This office (ever ſince the coronation of King *Richard* the Second, when *Baldwin Frevile* exhibited his petition for it) was adjudged from him to Sir *John Dymocke*, his competitor, both claiming from *Marmion*, as producing better records and evidence, and hath continued ever ſince in the worthy family of *Dymocke*, who hold the manor of *Scrivelſbury* in *Lincolnſhire*, hereditary from the *Marmions*, by grand ſerjeanty, *viz.* that the lord thereof ſhall be the King's *champion*, as aboveſaid. *Camd. in part. Fin. Mich.* 1. *H.* 6. Accordingly Sir *Edward Dymocke* performed this office at the coronation of his Majeſty King *Charles* the Second, *April* 23, 1661, and —— *Dymocke*, Eſq; performed it at the coronation of his preſent Majeſty King *George* the Third.

Chancellor (*Cancellarius*) Cometh of the French *chancelier*. Vincent Lupanus *de magiſtratibus* Francorum, ſaith, that *cancellarius* is no Latin word, though he citeth Latin writers that uſe it: with him agreeth *Petrus Pithæus*, lib. 2. *Adverſariorum*, cap. 12. And whereas *Lupanus* would derive it from the verb *cancello*, *Pithæus* thinks he hath ſome (though not ſufficient) colour for his opinion: and therefore derives it from *cancelli*, an incloſed or ſeparated place, a chancel, or place incompaſſed with bars, to defend the judges and other officers from the preſs of the people. *Cancellarius* at firſt, as *Lupanus* thinks, ſignified, the regiſters in court; *Grapharios, ſcil. qui conſcribendis & excipiendis judicum actis dant operam.* But this officer in late times is greatly advanced, not only in our, but in other kingdoms; for he is the chief adminiſtrator of juſtice, next to the Sovereign. All other juſtices in this kingdom are tied to the law, but the *chancellor* hath the King's abſolute power to moderate the written law, governing his judgment by the law of nature and conſcience, and ordering all things *juxta æquum & bonum.* Wherefore *Stamford* (in his *Prærog. c.* 20. *fol.* 25.) ſays, the *chancellor* hath two powers, one abſolute, the other ordinary; meaning, that though by his ordinary power, in ſome caſes, he muſt obſerve the form of proceeding as other inferior judges, yet in his abſolute power he is not limited by the written law, but by conſcience and equity, according to the circumſtances of the matter.

There were *Chancellors in England before the coming of the Normans* into this realm, *Jan. Anglorum* 127. for it is cited, that *Reimbold* was Chancellor to King *Edward the Confeſſor*; and there are divers other Chancellors cited to have been before this *William.*

As to the antiquity of this office in this kingdom, it is of no leſs date, as our learned *Selden* conceives, than King *Ethelbert*'s time, who was the firſt Chriſtian King of the *Saxons*; for in a charter of his to the church of *Canterbury*, bearing date in the year of Chriſt 605, amongſt other witneſſes thereto, there is *Augemundus Referendarius* mentioned; where *Referendarius* (ſaith he) may well ſtand for *Cancellarius*; and the office of both (as the words applied to the court, are uſed in the code, novels, and hiſtory of the declining empire) ſignifying an officer who received petitions and ſupplications to the King, and made out his writs and mandates as a *cuſtos legis*; and though (ſaith he) there were divers *Referendarii*, as ſometimes 13, then 8, then more again, and ſo divers Chancellors in the empire; yet one eſpecially here exerciſing an office of the nature of thoſe many, might well be ſtiled by either of thoſe names. *Dugd. Orig. Jurid.* 32. *cap.* 16. *ſect.* 2.

Mich. 14 *Jac. B. R.* upon evidence at the bar, a *charter of William the Conqueror* was ſhewn, under the ſeal of the ſaid King, which was ſubſcribed by ſeveral Lords as witneſſes, in which I ſaw that it was ſubſcribed *per Mauricium Regis Cancellarium*, after the biſhops, and before the abbots. 1 *Rol. Abr. fo.* 384.

The Chancellor ſhall have the *preſentation to all benefices* of the King *under* 20 *marks.* Br. Preſentation, pl. 17. cites 38 Ed. 3. 3, 4.

Of what *power and authority* the Chancellor was in theſe elder times, or what his office, is not eaſily made out; the reading, allowing, and perhaps *dictating royal grants, charters, writs, &c. keeping and affixing the King's ſeal to them*, as the learned Sir *Henry Spelman* thought, and may alſo be gathered from Mr. *Dugdale*'s diſcourſe of the Chancery, was the greateſt part of their truſt and employment, and that he had *no cauſes pleaded before him until the time of Ed.* 3. and thoſe not many till the reign of *Hen.* 4. Nor are there any decrees to be found in Chancery before the 20th of *Hen.* 6. Be *his power and office* what it would then, it *was leſs than that of the juſticiar*, who was next to the King in place of judicature; by his office he preſided in the Exchequer, the Chancellor ſitting on his left hand, as *Gervaſe* of *Tilbury* tells us, and by his office was the firſt man in the kingdom after the King; and that under his own *teſte* he could cauſe the King's writ to be made out, to deliver what ſum he would out of the Exchequer. The Chancellor was the firſt in order on the left hand of the juſticiar; and as he was a great perſon in court, ſo he was in the Exchequer, for no great thing paſſed but with his conſent and advice, that is, nothing could be ſealed without his allowance or privity, as it there appears. *Brady's Preface to the Norman Hiſtory*, 152 (F) 153 (A.)

Conſtituting a Chancellor does not *conſtitute a court of equity*, as in the caſe of Chancellor of the garter, *&c.* There was a Chancellor of the court of augmentations, and yet neither of them ever held a court of equity; *per Hale* Ch. J. 2 *Lev.* 24. *Mich.* 23 *Car.* 2. *B. R.*

The Chancellor (during the time of the grand *juſticiary*) before the breaking the courts into diſtinct juriſdictions, *had the cuſtody of the ſeal*, and therefore *iſſued all originals returnable*

returnable before the juſticiar. But when the juriſdictions were diſtinguiſhed, the originals *relating to civil pleas* were returnable *before the juſtices of C. B.* But the originals *in treſpaſs* might be returnable in either court, becauſe the plea was criminal as well as civil; but *B. R.* themſelves *made out the proceſs in criminal matters*; for in this they ſhared with the power of the Chancery, though the Chancery continued to be the foot and baſis of a civil juriſdiction; but the criminal juriſdiction was returned *coram rege*, and not *coram juſticiariis de banco.* Gib. Hiſt. View of Exch. 7, 8.

He that bears this magiſtracy is called *High Chancellor of England* (which is the higheſt honour of the long robe) being made ſo *per traditionem magni ſigilli ſibi per dominum regem*, and by taking his oath. And by the ſtatute 5 *Eliz. cap.* 18. the *Lord Chancellor* and *Keeper* have one and the ſame power; and therefore ſince that ſtatute, there cannot be a *Lord Chancellor* and *Lord Keeper* at one and the ſame time; but before there might, and hath been. See **Keeper**. See *Fleta, lib.* 2. *cap.* 12, 13. and *Coke's* 4 *Inſtit. fol.* 78, 79. See **Chancery.**

Chancellor in cathedral churches. His office is thus deſcribed in the *Monaſticon*, 3 *tom. pag.* 24. in the ſtatutes of *Litchfield, viz.* whether he is reſident, or not, his duty is *Lectiones legendas in eccleſia per ſe vel per ſuum vicarium auſcultare, male legentes emendare, ſcholas conferre, ſigilla ad cauſas conferre, literas capituli facere & conſignare, libros ſervare, quotieſcunque voluerit prædicationes in eccleſia vel extra eccleſiam prædicare, & cui voluerit prædicationis officium aſſignare.* Ibid. p. 339.

Chancellor of the dutchy of Lancaſter. This officer is mentioned in ſtat. 3 *Ed.* 6. *c.* 1. and *anno* 5 *ejuſdem, c.* 26. His office is principally in that court to judge and determine all controverſies between the King and his tenants of the dutchy land, and otherwiſe to direct all the King's affairs belonging to that court. The Chancellor is the chief judge of the dutchy court, who in difficult points of law is uſually aſſiſted by two judges of the Common law, out of one court or other, to decide the matter in queſtion. This court is held in *Weſtminſter-Hall*, and was formerly much uſed in relation to ſuits between tenants of dutchy lands, and againſt accountants and others for the rents and profits of the ſaid lands. Under the *Chancellor of the dutchy* are an attorney of the courts, one chief clerk or regiſter, and ſeveral auditors, *&c.*

Chancellor of the Exchequer, Is mentioned in ſtat. 25 *H.* 8. *c.* 16. His office hath been thought by many to have been created for the qualifying extremities in the *Exchequer.* He ſits in the court, and in the *Exchequer-Chamber*; and, with the reſt of the court, orders things to the King's beſt benefit. He is always in commiſſion with the Lord Treaſurer for letting the lands that came to the crown by the diſſolution of abbies, or otherwiſe; and hath, by the ſtatute of 33 *H.* 8. *c.* 39. power with others to compound for the forfeitures upon penal ſtatutes, bonds, and recognizances entered into to the King; he hath alſo a great authority and juriſdiction in the management and diſpoſal of the royal revenue, and concerning the firſt-fruits, as appears by the acts for uniting them to the crown.

Chancellor of the order of the garter. *Stow's Annals, p.* 706. *Chancellor of the Univerſities, an.* 9 *H.* 5. *c.* 8. and *an.* 2 *H.* 6. *c.* 8. *Chancellor of the court of Augmentations,* 27 *H.* 8. *c.* 27.—32 *ejuſdem, c.* 20. and 33 *ejuſdem, c.* 39. *Chancellor of Courts,* 32 *H.* 8. *c.* 28. *Chancellor of the Dioceſe,* 32 *H.* 8. *c.* 15, *&c.* anciently called *Epiſcopi Ecdicus.*

Chance-medley, Signifies the caſual killing of a man, not altogether without the killer's fault, though without an evil intent. *Staunf. Pl. Cor. lib.* 1. *cap.* 8. calls it *homicide by miſadventure*; *Weſt. Symb. par.* 2. tit. *Indictments, ſect.* 5. calls it *homicide mixt.* It is alſo called *manſlaughter by miſadventure*, for which the offender ſhall have his pardon of courſe, as appears by the ſtatute of 6 *Ed.* 1. 9. But here is to be conſidered, whether he that commits this manſlaughter by *chance-medley* was doing a lawful thing: for if the act were unlawful, it is felony. As if two were fighting together, and a third man comes to part them, and is killed by one of the two without any malice, forethought, or evil intent in him that killed the man; yet this is murder in him, and not manſlaughter by chance-medley, or miſadventure; becauſe they two that fought together were doing an unlawful act: and if they were met with prepenſed malice, the one intending to kill the other, then it is murder in them both. See *Skene de Verb. Signif. verb.* Melletum, where he ſays, this in *Scotland* is called *chaudmelle.* See **Homicide.**

Chancery. *(Cancellaria)* Is a court of equity and conſcience, moderating the rigour of other courts, that are ſtrictly tied to the letter of the law, whereof the Lord Chancellor of *England* is the chief judge. *Cromp. Jur. fol.* 41. Or elſe the Lord Keeper of the Great Seal, 4 *Eliz. cap.* 18. The officers belonging to this court are the Lord Chancellor, or Keeper of the Great Seal, who is ſole judge here; the Maſter of the Rolls (anciently called *Gardein des Rolls*) who in the Lord Chancellor's abſence heareth cauſes and gives orders. 4 *Inſt. f.* 97. Twelve Maſters of the *Chancery*, who are aſſiſtants, and ſit by turns on the bench; the Six Clerks, who have each of them about 12 clerks under them, in nature of attornies in the court; two chief examiners, who have five or ſix clerks a-piece; one chief regiſter, who hath uſually four or five deputies; the clerk of the crown; the warden of the *Fleet*, the uſher, ſerjeant at arms, and crier of the court; the curſitors and their clerks; the clerks of the petty bag; the clerk of the hanaper; the controller of the hanaper; the clerk of the appeals; the clerk of the faculties, the ſealer, the chaſe-wax; the clerk of the patents, clerk of preſentations, clerk of diſmiſſions, clerk of licences to alienate, clerks of the enrolments, clerks of the protections, clerks of the ſubpœna's, clerks of the affidavits, *&c.* which ſee deſcribed in their ſeveral places. See *Coke's* 4 *Inſt. fol* 82. The juriſdiction of this court is of two kinds; ordinary, or legal; and extraordinary, or abſolute.

1. *Of the ordinary and limited court, proceeding according to law, commonly called The Petty Bag.*

2. *Of the extraordinary court, proceeding according to equity.*

3. *Statutes concerning the court of Chancery.*

1. *Of the ordinary and limited court, proceeding according to law, commonly called The Petty Bag.*

To underſtand the nature of this court we muſt obſerve, that in ancient times the Chancellor was likewiſe chaplain to the King, and it was his buſineſs, in the time of the *juſticiar*, to write *Diplomata*, that is, all charters and commiſſions from the King; therefore when the power of the *juſticiar* was broke, he obtained the *Officina Brevium & Chartarum Regiarum*; from thence all the extraordinary juriſdictions, touching granting of charters, as likewiſe all inqueſts of office to intitle the crown, were returned into this office; and the Exchequer, in which theſe things were anciently tranſacted, became only an ordinary court of revenue, to ſet leaſes to the King's farmers, and to get in the King's debts; and therefore the office in the Exchequer was only an office of inſtruction, of what lands were in the King in particular counties; but to veſt lands in the crown *de novo*, it was neceſſary to have an office under the great ſeal, and ſo to grant lands from the crown, unleſs it were merely farms that were granted for years. 1 *New Abr.* 587. See 2 *Co.* 16. *Plowd.* 320. 4 *Co.* 93.

From hence, at this day, this court has a juriſdiction to hold plea upon a *ſcire facias*, to repeal the King's letters patents upon petitions, *monſtrans de droit*, traverſes of offices, *ſcire facias* upon recognizances, executions upon ſtatutes, *&c.* which being regiſtered in this court, the proceſs thereupon iſſued out of the ſame, and were returnable there, and entered in the office called the Petty Bag; whereas the writs, which were the foundation of

the buſineſs of the other courts, were put together in the hamper, which gave the diſtinction to thoſe names, and begot diſtinct officers in the court. 4 *Inſt.* 80.

If in this court the parties deſcend to iſſue, the chancellor cannot try it, but is to deliver the record, with his proper hand, into the King's Bench, where judgment is to be given; and the reaſon hereof ſeems to be, that the Chancery being *officina brevium*, if it could both make writs returnable here, and alſo try iſſues, it would incroach too much on other juriſdictions; beſides, there was no jury proceſs in the antient *Aula regis*, but upon demurrer the chancellor ſhall give judgment. 4 *Inſt.* 80.

An inquiſition was taken, and a forfeiture of the office of warden of the *Fleet* found, and the defendant pleaded to iſſue, and after iſſue joined, ſeveral other perſons came in by way of *monſtrans de droit*, and pleaded, and a demurrer to them, and the record was carried into *B. R.* by the clerk of the Petty Bag, without any order of the court, in order to have the iſſue tried; and it was reſolved, *Firſt*, That though the clerk had committed a fault to the court of Chancery, in carrying the record without any order, yet that it was well removed; for that which is done by the proper officer, is done by my lord chancellor, and may be ſaid to be done *propria manu*. *Secondly*, That though there were an iſſue and demurrer both, yet the removing the whole record was proper and well enough, on the authorities herein cited; by which it appears that judgment is moſt properly to be given in *B. R.* both on the iſſue and the demurrer; otherwiſe there might be two diſtinct judgments, and conſequently diſtinct executions taken out. 1 *New Abr.* 588.

Alſo all perſonal actions, by or againſt any officer or miniſter, in reſpect of their ſervice or attendance, may be determined in this court; but in theſe no jury proceſs can iſſue, but the record is to be removed, as before. 4 *Inſt.* 80.

2. *Of the extraordinary court, proceeding according to equity.*

This court was newly erected after the diviſion of the courts, and from a very ſmall and inconſiderable beginning hath (though impugned even towards its firſt original creation) grown up to that degree, as to ſwallow up moſt of the other buſineſs of the Common law. 1 *New Abr.* 588.

That there were ſome footſteps in the ancient *Curia regis*, which were the foundation of this juriſdiction, appears from the *Engliſh* juriſdiction exerciſed in the court of Exchequer, where, on informations on the King's behalf, articles are adminiſtered, to which the party is to anſwer upon oath; as likewiſe by impeachments in the houſe of Lords, where articles are exhibited in *Engliſh* for the party to anſwer to. 1 *New Abr.* 588. *Reg.* 25.

But notwithſtanding this, the eſtabliſhment of this juriſdiction ſeems to be owing to the ſtatute of *Weſtm.* 2. *cap.* 24. by which a power was given, in new and extraordinary caſes, to invent a new writ: hence it was, that *John Waltham*, then biſhop of *Saliſbury*, and chancellor, as the Commons mention in their petition, out of his ſubtilty, found out and began a novelty againſt the form of the Common law, and that was the invention of the writ of *ſubpœna*; which writ ſummoned the party to appear, under a pain, to anſwer to ſuch things as ſhould be objected againſt him, and a petition was lodged in Chancery, containing the articles to which he was obliged to anſwer, and upon ſuch articles this new invented writ iſſued. 1 *New Abr.* 588.

By this conſtruction, not only a new writ was framed, but a new juriſdiction erected, and this was towards the time of *R.* 2. occaſioned chiefly by the ſtatute of *Mortmain*; for when that ſtatute had reſtrained the growing riches of the clergy, they found out this invention to avoid it, by giving away lands to truſtees for pious uſes, and the feoffees of ſuch truſt did the duties of ſuch tenure in behalf of the truſt; but if they perverted the truſt, the ordinary juriſdiction not reaching a thing that was againſt the ſtatute of *Mortmain*, the chancellor exerted this extraordinary juriſdiction, and examined them as to the ſeveral facts alledged againſt them. 1 *New Abr.* 588, 589.

After the eſtabliſhment of this court, it was thought reaſonable to give damages to ſuch perſons as were drawn into it by falſe ſuggeſtions, and therefore by the 17 *R.* 2. *cap.* 6. reciting, "For as much as people be compelled to come before the King's council, or in the Chancery, by writs grounded upon untrue ſuggeſtions, *it is enacted*, That the chancellor for the time being, preſently after that ſuch ſuggeſtions be duly found and proved untrue, ſhall have power to ordain and award damages, according to his diſcretion, to him which is ſo troubled unduly." For the conſtruction of this ſtatute, ſee 4 *Inſt.* 83.

The juriſdiction of this court was not only impugned towards its original creation, but even in the reign of queen *Elizabeth* it was ſtrongly holden by the judges of the Common law courts, that the chancellor could not by his decree ſequeſter the party's lands; that is, could only *agere in perſonam*, but not in *rem*; and agreeably hereunto it was reſolved 16 *Eliz.* in the caſe of *Coleſton* and *Gardner*, that if a man killed a ſequeſtrator in the execution of ſuch proceſs, it was no murder. *Cro. Eliz.* 651. 4 *Inſt.* 84. 1 *Rol. Rep.* 86, 190. *Lit. Rep.* 166.

But theſe were ſuch bloody and deſperate reſolutions, and ſo much againſt common juſtice and honeſty, which requires that the decrees of this court, which preſerved men from deceit, ſhould not be rendered illuſory, that they could not long ſtand; but this proceſs got the better of thoſe reſolutions on theſe grounds: *Firſt*, That the extraordinary juriſdiction might puniſh contempts by the loſs of eſtates, as well as impriſon the perſon, becauſe that liberty being a greater benefit than property; if they had power to commit the perſon, they might take from him his eſtate till he had anſwered his contempt. *Secondly*, To ſay that a court ſhould have power to decree about things, and yet ſhould have no juriſdiction *in rem*, is a perfect ſoleciſm in the conſtitution of the court itſelf. 1 *New Abr.* 589.

Alſo in the reigns of Queen *Elizabeth* and King *James* the firſt there are ſeveral ſtrong opinions, that a court of equity could not examine, or give any redreſs in a cauſe after judgment at law, and that ſuits in equity, to relieve againſt a judgment at law, are within the ſtatutes, which make it a *præmunire* to appeal to any foreign court, eſpecially if the end thereof be to controvert the very point determined at law, or to ſeek relief after judgment in a caſe wherein the law may relieve, as againſt exceſſiveneſs of damages, *&c.* 1 *New Abr.* 589.

But as theſe opinions tended to render the juſtice of this court illuſory, whoſe peculiar province it is to give remedies in caſes not remedial by the ordinary juriſdiction, and to relax and mitigate the rigour of the Common law, they ſeem now to be wholly exploded; and this ſeems highly reaſonable, when it is conſidered how uncertain and doubtful the law in many caſes is before it is determined; and conſequently that before ſuch determination it would be impoſſible to relax and mitigate the rigour thereof. *Hard.* 125. 1 *Mod.* 59. 3 *Keb.* 221. 1 *Lev.* 241. 2 *Ch. Ca.* 97. *Abr. Eq.* 130.

The ancient rule for the juriſdiction of the extraordinary court of Chancery was confined to frauds, accidents, and truſts; and though at this day, by its power in granting injunctions, it curbs the juriſdiction of other courts, and thereby has ſwallowed up the greateſt part of the buſineſs of the Common law, yet it is ſtill under ſome of theſe notions, that it exerciſes a juriſdiction in relieving againſt forfeitures and penalties, where a compenſation can be made, in preventing multiplicity of ſuits, decreeing a ſpecific execution of agreements, aſſiſting defective conveyances, *&c.* but in no caſe will relieve againſt an act of parliament, directly againſt a fundamental rule or maxim of the Common law, and retain a ſuit where the party appears to have a plain and adequate remedy at law. 1 *New. Abr.* 590.

All

All matters of truſt are peculiarly within the juriſdiction of the court of Chancery; but if a truſtee does by fraud and combination with the *ceſtui que truſt* endeavour to evade any penal law, under pretence that a truſt is only cognizable in equity, and that equity ſhould not aſſiſt a penalty or forfeiture, yet Chancery will aid remedial laws, and not ſuffer its own notions to be made uſe of to elude any beneficial law. 1 *New. Abr.* 590.

Three things, ſays Lord *Coke*, are to be adjudged in a court of equity: 1. All covins, frauds, and deceits, for which there is no remedy by the ordinary courſe of law. 2. Accidents, as when a ſervant, obligor, or mortgagor, is to pay money on a certain day, and they happen to be robbed in going to pay it. 3. Breaches of truſt and confidence. 4 *Inſt.* 84.

3. *Statutes concerning the court of Chancery.*

Stat. 28 *Ed.* 2. *c.* 5. The chancellor and the juſtices of the King's Bench ſhall follow the King.

Stat. 18 *Ed.* 3. *ſt.* 5. The oaths of the clerks of the Chancery and of the clerks of courſe.

YE ſhall ſwear that well and lawfully ye ſhall ſerve our Lord the King and his people in the office of clerk of the Chancery, to which ye be attitled: and ye ſhall not aſſent nor procure the King's diſheriſon, nor perpetual damage to your power; nor ye ſhall do, nor procure to be done, any fraud to any man's wrong, nor thing that toucheth the keeping of the ſeal; and ye ſhall lawfully give counſel the things that touch the King, when ye ſhall be thereto required; and the counſel which you know touch him ye ſhall conceal. And if you know the King's diſheriſon, or perpetual damage or fraud to be done upon the things which touch the keeping of the ſeal, ye ſhall put your lawful power to repreſs and amend it: and if ye cannot do it, then ye ſhall certify the chancellor or other, which may do the ſame, to be amended to your intent. And for the clerks of courſe ſhall be added; And ye ſhall not bring, nor to your knowledge ſuffer to be brought, any writs which ye make out of the court not ſealed, thereof to do execution: nor ſhall record any attorney by writs, nor without writs, without ſpecial licence, if he have not lawfully examined the party and the attorney in proper perſon, or at the leaſt him that ſhall make attorney in proper perſon; nor ye ſhall deliver any writ which ſhall be of commandment to the examiners, nor to the ſeal, before that the ſame writ be ſent to you by the commander, which thereof hath power, unleſs it be to the chancellor, or to one of the maſters, which commandeth you to make the writs. And all the writs that ye ſhall make, ye ſhall deliver to the examiners by your own hand, or by one companion which is ſworn to the King, if ye yourſelf be out of the court becauſe of ſickneſs, or other cauſe neceſſary, ſo that ye cannot do it. And no writ written of another man's hand ſhall be delivered to the examiners, under your name, as yours, nor no name ſhall be put under your writs, but your own, as God you help, &c.

Stat. 31 *Ed.* 3. *ſt.* 1. *c.* 12. The chancellor and treaſurer may correct errors in the Exchequer. See **Error.**

Stat. 36 *Ed.* 3. *cap.* 9. If any man think himſelf grieved contrary to any of the articles therein above-written, or others contained in divers ſtatutes, and cometh into the Chancery, or any for him, and thereof makes his plaint, he ſhall have remedy there by force of the ſaid ſtatutes, without purſuing elſewhere.

Stat. 15 *Ric.* 2. *c.* 12. None of the King's ſubjects ſhall be conſtrained to appear before the council of any lord, to anſwer for his freehold, nor any other thing real or perſonal which belongeth to the law of the land; and if any find himſelf grieved contrary to this ordinance, he ſhall ſue to the chancellor, who ſhall give remedy.

Stat. 17 *Ric.* 2. *cap.* 6. When people are made to come in the Chancery by writs founded on untrue ſuggeſtions, the chancellor ſhall have power to award damages to him who is ſo unduly troubled.

Stat. 4 *Hen.* 4. *c.* 9. Commiſſioners diſtrained to return commiſſions that never came to their hands, to be redreſſed in Chancery. See **Commiſſioners.**

Stat. 15 *H.* 6. *cap.* 4. No writ of *ſubpœna* ſhall be granted, until ſurety be found to ſatisfy the party grieved his damages, if the matter cannot be made good which is contained in the bill.

Stat. 14 & 15 *Hen.* 8. *cap.* 8. *ſect.* 2. All which ſhall be in the office of ſix clerks of chancery may marry, and hold their office.

Sect. 3. Provided, that the maſter of the rolls be not prejudiced in the diſpoſition of the ſaid officers, the forfeiture by marriage only excepted; and that the ſaid officers give ſuch attendance to the maſter of the rolls as hath been accuſtomed.

Stat. 5. *Eliz. cap.* 18. *ſect.* 2. The keeper of the great ſeal may have, uſe, and execute, as of right belonging to his office, the ſame place, authority, pre-eminence, juriſdiction, execution of laws, and all other cuſtoms and advantages as the lord chancellor.

Stat. 16 *Car.* 1. *c.* 10. Chancellor diſabled from hearing or determining any matter in the Star chamber.

Stat. 13 *Car.* 2. *ſtat.* 1. One office ſhall be kept near the Rolls, in which the maſters, or one of them, ſhall conſtantly attend for the adminiſtering of oaths, caption of deeds and recognizances, and diſpatch of all matters incident to their office (references upon accounts and ſufficient anſwers, only excepted) from ſeven a-clock in the morning until twelve at noon, and from two in the afternoon until ſix at night: and the ſaid maſters may take the fees following, *viz.*

For every oath taken in the ſaid office 12*d.*

For every bill of coſts taxed for the plaintiff's not putting in his bill, or not proceeding to reply, or for the defendant's not appearing, 2*s.* 6*d.*

For the acknowledgment of every deed to be inrolled, 2*s.*

For the caption of every recognizance, 2*s.*

For every exemplification examined by two maſters, to each of the maſters who ſhall examine, for every ſkin, 2*s.*

For every report or certificate in purſuance of any order upon hearing, 20*s.*

For every other certificate or report of any order made upon petition or motion, 10*s.*

And if any maſter receive any reward otherwiſe, ſuch maſter, after conviction, ſhall be diſabled from the execution of his office, and forfeit to the party grieved ſo much as he ſhall take contrary to this act, and 100*l.* one moiety to the King, and the other to the party grieved. And tables of the ſaid fees ſhall be ſet up in the office, and in the chapel of the Rolls.

Stat. 1 *W. & M. ſtat.* 1. *cap.* 21. *ſect.* 2. Commiſſioners for executing the office of Lord Chancellor, or Lord Keeper of the Great Seal, may uſe and exerciſe, as of right belonging to Lords Commiſſioners of the Great Seal, the ſame offices, authority, juriſdiction, and execution of laws, and all other cuſtoms, privileges, and advantages, which the Lord Chancellor or Lord Keeper ought; and ſhall have place next after the peers of the realm and Speaker of the houſe of commons, unleſs any of them be a peer, and then to take place according to his peerage.

Sect. 3. Any one commiſſioner may hear motions and give orders touching interlocutory proceedings in any cauſe, ſo as he ſhall not in the abſence of the others make any decrees, or put the Great Seal to any thing whereunto the whole broad ſeal ought to be affixed, unleſs there be two commiſſioners preſent.

Stat. 4 *Ann. cap.* 16. *ſect.* 22. No *ſubpœna* or proceſs for appearance ſhall iſſue out of any court of equity till the bill is filed (except in caſes of bills for injunctions) and a certificate thereof brought to the *ſubpœna* office under the hand of the Six clerks, or other officer who uſually file bills, for which certificate he ſhall receive no fee.

Sect. 23. Upon the plaintiff's diſmiſſing his own bill, or the defendant's diſmiſſing the ſame for want of proſecution, the plaintiff ſhall pay coſts to be taxed. And

no

no copy or tenor of any bill ſhall go with the *dedimus* for taking the anſwer, but in lieu thereof the clerks of court ſhall take the whole term-fee of 3*s*. 4*d*. and the whole fees of all ſmall writs made by them.

Stat. 12 *Geo*. 2. *cap*. 32. Whereas the Lords Commiſſioners did, on the 26th of *May* 1725, make an order for the maſters to deliver into the Bank the money and effects under their care; and the Lord Chancellor did, by an order dated the 4th of *November* following, direct the ſaid order of the 26th of *May* to be obſerved, with the additions in the ſaid order of the 4th of *November* contained, which, among other things, contains as follows.

Jovis quarto die Novembris 1725.

Ordo curiæ.

WHEREAS the Right Hon. the late Lords Commiſſioners, *&c*. did on the 26th day of *May* laſt order and direct, among other things,

"That when any money or tallies, orders or bonds, at or after the hearing of any cauſe, ſhall be taken under the care of this court, the maſter ſhall direct the payment of ſuch money, *&c*. into the Bank; and the monies ſo paid, and the orders, tallies, and bonds ſo delivered, ſhall be entered in the maſter's accounts kept with the Bank; but the maſters ſhall have no power to iſſue any money entered in their ſaid accounts, or to direct the ſecurities to be delivered out.

"And when any money ſhall be paid, *&c*. into the Bank, purſuant to the directions aforeſaid, the party paying ſuch money, *&c*. ſhall take a certificate from one of the caſhiers of the Bank of their being placed to the proper maſter's account; and ſhall carry the ſaid certificate to ſuch maſter, who ſhall thereupon make his report of the payment of ſuch money, *&c*. into the Bank, and file the ſame at the report-office, and the clerk of the ſaid office ſhall enter the ſame in the maſter's book cauſewiſe.

"And when any money ſhall be directed to be laid out on government ſecurities, the ſpecies of the ſecurities ſhall be mentioned in the order: and in caſe any of them ſhall conſiſt of *Eaſt-India* bonds, *South-Sea* bonds, or Exchequer tallies and orders, the ſame ſhall be delivered in at the Bank; and if any ſuch ſecurities ſhall conſiſt of ſtock in any of the companies, ſuch ſtock is to be transferred to ſuch maſter, who ſhall make a declaration of truſt in the companies books, and ſhall take a certificate thereof from the proper officer, and enter the ſame in his book at the Bank, that the Bank may receive the dividends thereupon; and ſhall alſo make a report of all ſuch ſecurities; which certificate and report ſhall be filed at the report-office; and the clerk of the report-office is to enter the dates, ſums, and the number of the bonds, tallies, and orders, and quantities of ſtock in ſuch report mentioned, in the proper maſter's books kept there.

"And when any ſecurities depoſited at the Bank ſhall be directed to be delivered out, the regiſter ſhall certify to the maſter what ſecurity is to be delivered out, and the name of the cauſe; which certificate the clerk in court or ſolicitor ſhall deliver to the maſter, who ſhall counterſign the ſame; and ſuch certificate ſhall be a proper authority for the Bank to deliver over ſuch ſecurity, and enter the delivery of ſuch ſecurities in the maſter's accounts cauſewiſe; and it is the duty of the maſter to ſuperviſe ſuch entry, and to certify the ſame into the report office to be filed.

"Bonds, tallies, and orders ſhall be taken in and delivered out on Wedneſdays and Fridays between ten in the forenoon and one in the afternoon, and the maſter ſhall receive from the ſuitor the uſual fees for the report and filing the ſame, and ſhall anſwer for filing to the report-office.

"And when any ſtock ſhall be ordered to be transferred by any of the maſters to the ſuitors, the regiſter ſhall certify to the maſter what ſtock he is to transfer, and to whom; which certificate the clerk in court, *&c*. ſhall carry to the maſter, who ſhall within one week, or at the next opening of the books, attend in perſon, and deliver ſuch certificate to the officer of ſuch company, and transfer ſuch ſtock, or give ſufficient authority ſo to do.

"And ſuch certificate ſhall be an authority to the companies to permit the maſter, *&c*. to transfer ſuch ſtocks, of which transfer the maſter is to make his report, and procure the ſame to be filed in the report-office; for the making and filing of which the maſter ſhall receive the uſual fees, and anſwer the fee for filing to the report-office; and the transfer of ſuch ſtock ſhall be certified by the maſter to the Bank, that ſuch may be diſcharged out of the account of the maſter there.

"And when any money belonging to the ſuitors received by the Bank be directed to be paid, the clerk in court or ſolicitor ſhall carry the order to the maſter, who ſhall make a certificate thereof, which certificate ſuch clerk or ſolicitor ſhall file in the report-office; and the maſter ſhall by note draw on the Bank for ſuch money, which note ſhall be carried to the report office, and an entry made thereof in the maſter's book there, and *intratur* ſhall be written thereon, and ſigned by the regiſter; which note ſo entered and ſigned ſhall be ſufficient authority to the Bank to pay ſuch money, as likewiſe to write off the ſame from ſuch maſter's account; but when any money ſhall be directed to be paid to any ſuitor out of money to be received by the Bank, for intereſt or maintenance, the maſter ſhall by note, without any certificate, draw on the Bank; and ſuch note being ſigned by the maſter, and entered in the report-office, and counterſigned by the regiſter, ſhall be a proper authority.

"And every maſter ſhall, on the firſt day of every term, give an account to the ſecretary of the Lord Chancellor of all monies and ſecurities or ſtocks that the have iſſued or transferred in the reſpective cauſes ſince their laſt account, together with the dates of ſuch orders, and the maſters ſhall compare ſuch account with their books kept at the report office and at the Bank.

"And no perſon ſhall take any fee for doing any thing in purſuance of this order, other than the maſters and the clerk of the report-office; and the maſters ſhall only take the ſame fee for a certificate, as they have been intitled to for a report; and the clerk of the report-office ſhall only take the ſame fee for filing the certificate or report, as the clerk of the report-office has been intitled unto for filing the ſame.

"And whereas the ſaid order is for the benefit of the ſuitors; it is ordered by the right hon. the Lord High Chancellor, that the ſaid order of the 26th of *May* laſt, wherein it is not here varied, ſhall be firmly obſerved, with the additions following:

"And it is hereby ordered, that the Bank is to receive the intereſt and dividends on all ſtocks, bonds, tallies, and other ſecurities, whereof any of the maſters ſhall be poſſeſſed in truſt for the ſuitors; and each maſter ſhall impower one of the caſhiers to the Bank to receive the ſame; and ſuch intereſts and dividends ſhall be entered in the reſpective maſter's account at the Bank; and at the end of every term, but oftener if there be occaſion, the bank ſhall certify cauſewiſe to each maſter the ſums ſo received, to the end each maſter may make like entries in the books kept by themſelves, and likewiſe deliver a copy thereof to the clerk of the report-office, who is to cauſe the ſame to be entered cauſewiſe in the maſter's books at the report office; and as to all mortgages, the particular truſts ſhall be inſerted in the body of the mortgage deed; and all intereſt and principal on ſuch mortgage ſhall by the party be paid into the Bank.

"And all monies, tallies, or orders, bonds, ſecurities, and effects, directed to be brought before, or delivered in, or paid to, any maſter, ſhall not be brought before, or paid to ſuch maſter; but when any ſecurity, ſum of money, or other effects are ready to be delivered or paid in, in obedience to ſuch order, the maſter ſhall, on application of the party, certify the date of ſuch order, and the ſum of money, tallies, orders, bonds, depoſites, ſecurities, and other effects then to be paid or delivered in, and the name of the cauſe to the account of which the ſame is to be placed; and upon the party's delivering ſuch certificate, and payment of ſuch money, or delivering of

ſuch tallies or other effects into the Bank, the ſame ſhall be entered in the reſpective maſter's accounts.

" When the maſter is by note to draw on the Bank for money, ſuch note ſhall be limited to be paid within a month after date; and if it be not be paid within ſuch time, the note ſhall be void; and when ſuch note is carried to the report-office, there ſhall alſo be carried with it the order whereby ſuch payment was directed to be made, and an entry ſhall be made in the maſter's book at the office, not only of the note, but alſo a memorandum that it was drawn by virtue of ſuch order; and thereupon an *intratur* is to be made, *&c.*

" When the maſters certify to the report-office any entry of the delivering out ſecurities, the clerk of the report-office ſhall make entries according to ſuch certificate in the reſpective maſter's books kept in that office, of the delivering out ſuch ſecurities.

" The Bank is to receive the intereſt and dividends of all ſtocks, bonds, tallies, orders, annuities, and other ſecurities, whereof the uſher ſhall be poſſeſſed in truſt for any of the ſuitors, the uſher authorizing one of the caſhiers of the Bank to receive the ſame; and ſuch entries are to be made thereof, and ſuch rules to be obſerved, as herein and in the ſaid recited order are ſet down for the maſters; and as to mortgages, which the uſher either ſingly or jointly may have in truſt for the ſuitors, the ſame rules ſhall be obſerved by the uſher, as in the like caſes are preſcribed to the maſters.

" All monies, tallies, orders, bonds, ſureties, and other effects, directed to be brought into court, or to be taken under the care of the uſher, ſhall not be brought before or paid to the uſher, but ſhall be paid or delivered into the Bank, under the regulations as the maſters are required to do: and the uſher ſhall on his part, in all things relating hereunto, act in like manner as the maſters are in ſuch caſes obliged to do.

" If any money or effects of the ſuitors ſhall by the uſher be inveſted in any ſecurities, the ſame methods ſhall be obſerved by the uſher and others in relation thereto, as are in like caſes preſcribed to the maſters.

" When any ſtock or annuities in the name of the uſher ſhall be transferred, or any depoſites, intereſts, or dividends, or other thing contained in the ſaid uſher's account, ſhall be paid or delivered out of the Bank, the ſame method ſhall be obſerved as the maſters are appointed to do; and in general the ſame rules which are preſcribed to be obſerved by the maſters, ſhall be in like caſes, *mutatis mutandis*, obſerved by the uſher.

" When any money or effects belonging to the ſuitors, paid into the Bank on account of the uſher, ſhall be directed to be paid out, and the uſher is to make a certificate thereof to be filed in the report-office, the uſher ſhall ſhall have 2 *s.* for ſigning ſuch certificate; and for every draught that he ſhall make on the Bank he ſhall receive 2 *d.* in the pound of all money contained in ſuch draught, draughts for intereſt or maintenance excepted.

" And it is further ordered, that in all orders to be hereafter made relating to the monies or effects of the ſuitors, the ſeveral directions of this order ſhall be followed, although the ſame ſhonld not be particularly expreſſed in any ſuch future order.

Sect. 1. The ſaid two orders ſhall be obſerved, unleſs in ſuch points as ſhall be varied in this act, or be hereafter changed by the Court of Chancery.

Sect. 2. There ſhall be one perſon appointed by the conrt of Chancery to do all ſuch things relating to the delivery of the ſuitors money and effects into the Bank, and taking them out, and the keeping the accounts with the Bank, as by the ſaid orders are directed to be done by the maſters and uſher; which officer ſhall be called The accountant general of the court of Chancery, and ſhall hold ſuch office during the pleaſure of the court, and an account ſhall be kept in his name with the Bank of *England* on behalf of the ſuitors, in ſuch manner as is directed by the ſaid orders with reſpect to the maſters; and the ſame rules as are preſcribed by the ſaid orders to the maſters, uſher, and Bank, as to the delivering in and taking out the monies and effects of the ſuitors, and other matters therein contained, ſhall be obſerved by the ſuitors, the Bank, and the accountant general, unleſs where the court ſhall otherwiſe determine.

Sect. 3. The accountant general ſhall ſtand in the place of the maſters and uſher, and ſhall receive no other fee from the ſuitors than what is allowed to the maſters by the ſaid order of the 26th of *May*.

Sect. 4. All mortgages, tallies, orders, ſtocks, annuities, and other transferrable ſecurities to be taken by direction of the court for the benefit of the ſuitors, ſhall, if appointed to be taken in the name of any officer of the court, be taken in the name of the accountant general; and in all ſuch aſſignments the particular truſt ſhall be ſpecified; and ſuch other rules in reſpect to ſuch transferrable ſecurities ſhall be obſerved by the accountant general and others, as by the ſaid orders are appointed to be obſerved by the maſters, uſher, and others.

Sect. 5. The court of Chancery ſhall have power to vary the regulations in the ſaid orders, or herein before contained, and to make ſuch farther regulations about the premiſſes as to the court ſhall ſeem meet.

Sect. 6. After the death or removal of any accountant general, all mortgages, *&c.* veſted in him in truſt for the ſuitors ſhall veſt in the ſucceeding accountant general, ſubject to the ſame truſts, without any aſſignment or transfer; and all monies and effects of the ſuitors, for which he ſhall have credit in his account with the Bank, ſhall be carried to the accountant of the ſucceeding accountant general.

Sect. 7. The accountant general ſhall not meddle with the actual receipt of any of the ſuitors money or effects, but ſhall only keep the account with the Bank, and obſerve the rules hereby preſcribed, or hereafter to be preſcribed by the court; he ſhall not be anſwerable for any money or effects he ſhall not actually receive; and the Bank ſhall be anſwerable for the money and effects of the ſuitors received by them.

Stat. 12 *Geo.* 1. *cap.* 33. *ſect.* 15. If the court of Chancery ſhall judge it neceſſary, for the payment of the demands of the ſuitors, to borrow money on the duties or fund hereby granted (ſee **Stamps**.) it ſhall be lawful for the ſaid court to borrow any money thereon, not exceeding 60,000*l.* and to make ſuch order or ſecurity on the ſaid fund, for re-payment of the money borrowed, with intereſt not exceeding 5 *l. per cent.* as the ſaid court ſhall direct; which money ſo borrowed ſhall be paid into the Bank of *England*, and be made part of the common caſh of the court for the benefit of the ſuitors, and ſhall be iſſued by the Bank for the like benefit, as the court of Chancery ſhall direct.

Sect. 16. A book ſhall be kept in the Bank, in which an account of the monies borrowed on this act ſhall be entered. And all perſons who ſhall lend money on this act ſhall, on producing a receipt under the hand of the caſhier of the Bank, have an order of the Chancery for re-payment of their principal money with intereſt, to be accounted from the time of advancing the principal, and to be payable by half-yearly payments, till the re-payment of the principal: and ſuch orders ſhall be regiſtered, as the court ſhall direct; and all perſons ſhall be paid in courſe, according as their orders ſhall ſtand regiſtered; and no fee ſhall be taken for providing ſuch books, or making ſuch entries, or for any ſearch of the ſame, or for the payment of any money lent on this act, or the intereſt thereof, on penalty of treble damages to the party grieved, with coſts; or if the officer himſelf take or demand any ſuch fee, he ſhall loſe his place alſo: and if any undue preference ſhall be made by any ſuch officer, the party offending ſhall be liable, by action on the caſe, to pay the value of the debt, damages, and coſts, to the party grieved, and ſhall be forejudged from his office; and if ſuch preference be unduly made by his deputy or clerk, ſuch deputy or clerk only ſhall be liable to ſuch action, and ſhall be incapable of his place.

Sect. 17. If ſeveral orders for payment be brought the ſame day, it ſhall be no undue preference which of them be entered firſt, ſo he enters them the ſame day.

Sect. 18. It ſhall not incur any penalty to pay ſubſequent orders to perſons that demand their money and bring their orders, before other perſons that did not come, ſo as there be money reſerved to ſatisfy precedent orders, which ſhall be kept for them; the intereſt upon loans being to ceaſe from the time the money is kept in bank for them.

Sect. 19. Every perſon, *&c.* to whom money ſhall be due by this act, and orders entered for payment thereof, *&c.* by indorſement of their orders may aſſign their intereſt, or any part thereof, to any other; which being entered in the office for ſuch orders, and an entry thereof alſo made in the book of entry of ſuch orders (which the officer ſhall upon requeſt without fee make) ſhall intitle ſuch aſſignees to the benefit thereof; and ſuch aſſignees may in like manner aſſign again *toties quoties*; and afterwards it ſhall not be in the power of the perſons who made ſuch aſſignments to make void the ſame.

Sect. 20. All the money depoſited in the Bank on account of the ſuitors of the court of Chancery, and by order of the court, and all monies ariſing by the duties given by this act, or borrowed thereon, and paid into the Bank, ſhall be one common and general caſh, and ſhall be promiſcuouſly iſſued, as the court ſhall direct, for anſwering the demands of any of the ſuitors.

Stat. 3 *Geo.* 2. *cap.* 30. All orders and decrees made by the Maſter of the Rolls, except orders and decrees of ſuch nature, as according to the courſe of the court ought only to be made by the Lord Chancellor, Lord Keeper, or Lords Commiſſioners, ſhall be deemed valid orders and decrees of the court of Chancery; ſubject nevertheleſs to be diſcharged or altered by the Lord Chancellor, *&c.* ſo as no ſuch orders or decrees be inrolled, till the ſame are ſigned by the Lord Chancellor, *&c.*

Stat. 5 *Geo.* 2. *cap.* 25. *ſect.* 1. If in any ſuit in equity, any defendant, againſt whom proceſs ſhall iſſue, ſhall not cauſe his appearance to be entered, according to the rules of the court in caſe ſuch proceſs had been ſerved; and affidavit ſhall be made that ſuch defendant is beyond the ſeas, or that upon enquiry at his uſual place of abode he could not be found ſo as to be ſerved, and that there is juſt ground to believe that ſuch defendant is gone out of the realm, or abſconds, to avoid being ſerved; the court may make an order, appointing ſuch defendant to appear at a day therein to be named: and a copy of ſuch order ſhall within fourteen days be inſerted in the *London Gazette*, and publiſhed on ſome Lord's day after divine ſervice in the pariſh church where ſuch defendant made his uſual abode within thirty days next before his abſenting; and a copy of ſuch order ſhall be poſted up, *viz.* a copy of ſuch order made in Chancery, Exchequer, or Dutchy Chamber, ſhall be poſted up at the Royal Exchange; and a copy of ſuch order made in any of the courts of equity of the counties palatine, or of the Great Seſſions in *Wales*, ſhall be poſted up in ſome market-town within the juriſdiction of the court neareſt to the place where ſuch defendant made his uſual abode, ſuch place of abode being alſo within the juriſdiction of the court: and if the defendant do not appear within ſuch time as the court ſhall appoint, then on proof made of ſuch publication of ſuch order as aforeſaid, the court may order the plaintiff's bill to be taken *pro confeſſo*, and make ſuch decree thereupon as ſhall be juſt: and the court may order ſuch plaintiff to be paid his demands out of the eſtate ſequeſtred according to the decree, ſuch plaintiff giving ſecurity to abide ſuch order touching the reſtitution of ſuch eſtate, as the court ſhall make upon the defendant's appearance; but in caſe ſuch plaintiff ſhall refuſe to give ſecurity, then the court ſhall order the effects ſequeſtred to remain under the direction of the court, until the appearance of the defendant to defend ſuch ſuit.

Sect. 2. If any defendant, by virtue of *habeas corpus*, or other proceſs of any court of equity, ſhall be brought into court, ſuch court may appoint a clerk in court to enter an appearance for ſuch defendant.

Sect. 3. If the perſon, againſt whom a decree ſhall be made upon refuſal to enter his appearance, ſhall be in cuſtody or forthcoming, ſo that he may be ſerved with a copy of ſuch decree, then he ſhall be ſerved with a copy thereof before proceſs ſhall be taken out to compel the performance thereof.

Sect. 4. If any decree ſhall be made in purſuance of this act againſt any perſon out of the realm or abſconding, and ſuch perſon ſhall within ſeven years return or become publickly viſible, he ſhall likewiſe be ſerved with a copy of ſuch decree within a reaſonable time after his return ſhall be known to the plaintiff; and in caſe any defendant againſt whom ſuch decree ſhall be made, ſhall within ſeven years happen to die before his return, or ſhall die in cuſtody before his being ſerved with a copy of ſuch decree, then his heir, if ſuch defendant ſhall have any real eſtate ſequeſtered, or whereof poſſeſſion ſhall have been delivered to the plaintiff, or the huſband, guardian, or committee of ſuch heir; or if the perſonal eſtate of ſuch defendant be ſequeſtered, or poſſeſſion thereof delivered, then his executor or adminiſtrator may be ſerved with a copy of ſuch decree, within a reaſonable time after it ſhall be known to the plaintiff that the defendant is dead, and who is his or her heir, executor, or adminiſtrator, or where they may be ſerved.

Sect. 5. If any perſon ſo ſerved ſhall not within ſix months after ſuch ſervice appear, and petition to have the cauſe reheard, ſuch decree ſhall ſtand abſolutely confirmed againſt the perſon ſo ſerved, and all perſons claiming under him by any act ſubſequent to the commencement of ſuch ſuit.

Sect. 6. If any perſon ſerved with a copy of ſuch decree ſhall within ſix months after ſuch ſervice, or if any perſon not being ſo ſerved ſhall within ſeven years next after the making ſuch decree, appear in court, and petition to be heard with reſpect to the matter of ſuch decree, and pay down, or give ſecurity for, ſuch coſts as the court ſhall think reaſonable; the perſon ſo petitioning, or any perſon claiming under him by any act done before the commencement of the ſuit, may be admitted to anſwer the bill, and iſſue may be joined, and witneſſes examined, and ſuch other proceedings had thereon, as might have been in caſe the party had originally appeared.

Sect. 7. If any perſon againſt whom ſuch decree ſhall be made, his heirs, executors, or adminiſtrators, ſhall not within ſeven years after the making ſuch decree, appear and petition to have the cauſe reheard, and pay or give ſecurity for ſuch coſts as the court ſhall think reaſonable, ſuch decree ſhall ſtand abſolutely confirmed againſt the perſons againſt whom ſuch decrre ſhall be made, and all claiming under them by any act done ſubſequent to the commencement of ſuch ſuit.

Sect. 8. This act ſhall not make good any proceeding againſt any perſon beyond the ſea, unleſs it ſhall appear to the court by affidavit before the making ſuch decree, that ſuch perſon had been in *England* within two years next before the *ſubpœna* iſſued.

Sect. 9. This act ſhall not make good any proceeding againſt any perſon in any court of equity having a limited juriſdiction, unleſs it ſhall appear to ſuch court by affidavit before the making ſuch decree, that ſuch perſon had reſided within the juriſdiction of ſuch court within one year next before the *ſubpœna*.

Stat. 7 *Geo.* 2. *cap.* 8. *ſect.* 2. Where perſons are obliged to anſwer on oath for diſcovering unlawful contracts, *&c.* See this ſtatute under title **Brokers.**

Stat. 12 *Geo.* 2. *cap.* 24. *ſect.* 1. To provide a juſt ſupport for the accountant general of the court of Chancery; be it enacted, That out of the caſh in the Bank of *England*, belonging to the ſuitors of the court of Chancery, a ſum not exceeding 35,000 *l.* ſhall by order of the court be placed out on ſuch government or parliament ſecurities as by ſuch order ſhall be directed; to the intent that the intereſt thereof may be applied for the purpoſes herein after-mentioned; and the ſaid court may from time to time change the ſecurities on which the ſaid monies ſhall be placed.

Sect. 2. And the intereſt ariſing from the ſaid ſecurities ſhall be received by the governor and company of the Bank of *England*, and placed to the credit of an account

count to be raiſed in the books kept there for the ſuitors of the ſaid court, of intereſt ariſing from money placed out in purſuance of this act; and out of ſuch intereſt there ſhall be paid by huarterly qayments the annual ſum of 1020 *l.* which payment ſhall be made by the Bank by order of the court, *videlicet*, to the accountant general 650 *l.* to his firſt clerk 250 *l.* to his ſecond clerk 120 *l.* which ſalaries ſhall commence from the 29th of *September* 1739, and ſhall be in lieu of all fees, and the reſidue of the intereſt ariſing from the ſaid ſecurities ſhall be accounted for, as part of the common and general caſh of the ſuitors of the ſaid court.

Sect. 3. After the ſaid 29th of *September* no fees ſhall be taken in the ſaid office for any thing directed to be done therein by 12 *Geo.* 1. *cap.* 32. and if any perſon belonging to the ſaid office preſume to take any fee, he ſhall be looked upon as guilty of extortion, and be liable to be proſecuted for the ſame by indictment or information, or upon complaint to the court of Chancery ſhall be puniſhed as for a contempt.

Sect. 4. If hereafter the whole or any part of the ſaid ſum of 35,000 *l.* be wanted to anſwer the demands of the ſuitors of the ſaid court, then the court may direct the ſame or any part thereof to be called in, or the ſecurities on which the ſame ſhall be placed to be diſpoſed of.

Stat. 23 *Geo.* 2. *c.* 25. *ſ.* 1. Whereas by 12 *Geo.* 1. *cap.* 33. for relief of the ſuitors of the court of Chancery, and to make good the deficiencies of the offices of the maſters, certain ſtamp duties were granted for ſixteen years, and by 9 *Geo.* 2. *cap.* 32. the ſaid duties were continued for four years from *Aug.* 2, 1742. and it was thereby enacted, That when the deficiency of the ſuitors money, and all money borrowed on the credit of the ſaid acts. ſhould be ſatisfied, then the ſurplus money raiſed out of the ſaid duties ſhould be reſerved for the benefit of the publick; and whereas the ſaid deficiency, and all the money directed to be paid by the ſaid acts out of the fund thereby appropriated, have been ſatisfied, and there remains in the Bank of *England* as a ſurplus of the ſaid fund unapplied the ſum of 13,698 *l.* 1 *s.* 11 *d.* And whereas the revenue of the office of the Hanaper hath not for ſeveral years paſt been ſufficient to pay the diſburſements iſſuing out of the ſame: and there remained in arrear at *Michaelmas* 1749, the ſum of 10,590 *l.* 12 *s.* 11 *d.* due from the ſaid office; be it enacted, That out of the ſaid ſum of 13,698 *l.* 1 *s.* 11 *d.* now remaining in the Bank of *England*, as the ſurplus unapplied o the fund given by the 12 *Geo.* 1. *c.* 33. and the 9 *Geo.* 2. *c.* 32. reſerved for the diſpoſition of parliament, there ſhall be paid ſuch ſums not exceeding in the whole 10,590 *l.* 12 *s.* 11 *d.* to the creditors upon the office of the Hanaper, when and as the court of Chancery ſhall order, in ſatisfaction of the ſaid debt and arrears And as often as the accountant general of the ſaid court ſhall, in purſuance of any order of the court, give a draught upon the Bank for any of the ſaid debts, certificates thereof from the ſaid accountant general (which he is to make without fee) ſhall be tranſmitted to the clerk of the Hanaper, together with the proper vouchers of the payments of the ſaid debts, ſpecifying to whom ſuch payments have been made, and to what time they extend; to the end the ſame may be brought into the account of the clerk of the Hanaper, to be by him paſſed before one of the auditors of the ſaid revenue: and all ſuch certificates ſhall be filed in the office of the Hanaper, and the vouchers tranſmitted therewith are to be delivered over to the ſaid auditor.

Sect. 2. The duties granted by the 12 *Geo.* 1. *cap.* 33. for fourteen years, and continued by the 9 *Geo.* 2. *c.* 32. for the farther term of four years, and which expired in *Auguſt* 1746, ſhall be revived, and ſhall be payable upon the ſeveral writs and law proceedings in the ſaid former acts mentioned, from the 24th of *June* 1750, for ever; and all the penalties and proviſions in the ſaid former acts concerning the levying and managing the ſame ſhall be revived.

Sect. 3. All the officers concerned in the levying and managing the duties ariſing by virtue of this act ſhall keep diſtinct accounts thereof, and pay the ſame into the receipt of the Exchequer at *Weſtminſter* weekly, on every *Wedneſday*, unleſs it be an holy-day, and in that caſe on the next day after, not being any holy-day.

Sect. 4. There ſhall be kept in the ſaid Exchequer books wherein a diſtinct account of all the money paid in weekly in purſuance of this act ſhall be entered. And out of the money ariſing by the duties granted by this act, there ſhall be paid unto the clerk of the Hanaper office, or his deputy, a yearly ſum not exceeding 3000 *l.* by equal half-yearly payments, on the 25th of *March* and 29th of *September* in every year (for the iſſuing of which no fee ſhall be taken) and the receipt of the clerk of the Hanaper, or his depnty, ſhall be a ſufficient diſcharge for the ſame.

Sect. 5. The reſidue of the ſaid 13,698 *l.* 1 *s.* 11 *d.* ſurplus caſh in the Bank of *England*, after ſatisfaction of the ſaid debt due from the clerk of the Hanaper in Chancery at *Michaelmas* 1749, ſhall be placed out at intereſt on government ſecurities, under the direction of the court of Chancery, in the name and with the privity of the accountant general, and placed to the account of the clerk of the Hanaper in Chancery; and the intereſt ariſing therefrom ſhall be paid to the clerk of the Hanaper, or his deputy, to be applied in aid of the ſaid revived duties, to make good the ſaid annual ſum of 3,000 *l.* granted to his majeſty out of the ſaid duties, and the receipt of the clerk of the Hanaper, or his deputy, ſhall be a ſufficient diſcharge for the ſame.

Sect. 6. The ſaid yearly ſum of 3,000 *l.* and the yearly intereſt ariſing from the ſurplus caſh in the Bank as aforeſaid, ſhall be iſſued and accounted for as part of the revenue of the Hanaper office, for the ſame purpoſes and in the ſame manner as the revenue from the ſaid office hath from time to time been iſſued and accounted for: and alſo for the payment of the yearly ſum of 1,200 *l.* to the Maſter of the Rolls, by equal half-yearly payments, on the 25th of *March* and the 29th of *September* in every year.

Sect. 7. In caſe the yearly revenue of the ſaid office of clerk of the Hanaper, augmented by this act, be at any time more than ſufficient to pay the ſaid yearly ſum of 1,200 *l.* to the Maſter of the Rolls, and alſo the ſeveral fees, ſalaries, and allowances payable out of the ſame, then the clerk of the Hanaper ſhall be accountable for ſuch ſurplus; and upon a certificate thereof from one of the auditors of the Impreſt (which ſuch auditor is to make and tranſmit to the commiſſioners of the Treaſury) ſuch overplus ſhall be carried on to the account of the ſubſequent year of the clerk of the Hanaper, who ſhall ſtand charged therewith: and only ſo much of the ſaid yearly ſum of 3,000 *l.* ſhall be paid to the ſaid clerk of the Hanaper towards the next ſubſequent year, as with ſuch overplus aſcertained by ſuch certificate will anſwer the ſaid yearly ſum of 1,200 *l.* to the Maſter of the Rolls, and the ſeveral fees, *&c.* payable out of the ſame.

Sect. 8. In caſe the yearly revenue of the ſaid office of clerk of the Hanaper, augmented by this act, at any time prove deficient to pay the ſaid yearly ſum of 1,200 *l.* to the Maſter of the Rolls, and the ſeveral fees, *&c.* payable out of the ſame, then it ſhall be lawful for the commiſſioners of the Treaſury, out of any money in the Exchequer ariſen from the ſaid revived duties granted by this act, not otherwiſe applied by parliament, to direct ſuch ſum, not exceeding what has been ſaved in former years, by leſs having been paid to the clerk of the Hanaper than the annual ſum of 3,000 *l.* as aforeſaid, to be iſſued to the clerk of the Hanaper, as ſhall be neceſſary for the ſupplying ſuch deficiency, to be aſcertained by a certificate from one of the auditors of the impreſt, directed to the commiſſioners of the Treaſury in manner aforeſaid; and the receipts of ſuch clerk of the Hanaper, or his deputy, ſhall be a ſufficient diſcharge for all ſums ſo iſſued.

Sect. 9. In caſe the ſaid revived duties, and the intereſt of the ſaid ſurplus caſh in the Bank, ſhall in any one year produce leſs, and in another more than 3,000 *l.* it ſhall be lawful for the commiſſioners of the Treaſury, to order

ſuch

ſuch deficiencies to be made good out of ſuch ſurpluſſes, ſo as the whole money iſſued to the clerk of the Hanaper out of the ſaid monies ariſing from the ſaid revived duties, and the intereſt of the ſaid ſurplus caſh in the Bank, do not one year with another exceed the yearly ſum of 3,000 *l.*

Sect. 10. All the reſidue and ſurplus of the money ariſing by the duties and other proviſions of this act, not applied in the payment of the ſeveral yearly and other ſums hereby directed, ſhall be reſerved for the benefit of the publick, and ſhall not be applied to any other uſe than ſuch as ſhall be hereafter directed by parliament.

Stat. 1 *Geo.* 3. *c.* 1. *ſect.* 6. His Majeſty ſhall be impowered from time to time to grant a ſum not exceeding 5,000 *l. per annum*, to the Lord Chancellor, Lord Keeper, or Commiſſioners for the cuſtody of the Great Seal of *Great Britain*, in the uſual and accuſtomed manner, to be from time to time paid by the paymaſter or receiver of the revenues of the general letter-office, or poſt-office, or office of Poſt-maſter General for the time being, out of the ſaid revenues, according to the tenor of ſuch grant; and ſuch payment ſhall be conſidered as part of, and ſhall be deducted from the annual rent or ſum by this act granted to his Majeſty, for the ſupport of his civil government.

Stat. 4 *Geo.* 3. *c.* 32. *ſect.* 1. Whereas by 12 *Geo.* 2. *c.* 24. a proviſion is made for the ſupport and maintenance of the office of accountant general of the court of Chancery, by directing certain payments to be made, in the manner therein mentioned, to the ſaid accountant general and his two clerks for their ſalaries, in lieu of, and in recompence for, all fees whatſoever that would be due and payable to the ſaid office by the ſuitors: and whereas ſince the paſſing the ſaid act, the money and effects belonging to the ſuitors of the ſaid court, under the care and direction of the ſaid accountant general, are greatly increaſed; by reaſon whereof the neceſſary buſineſs of the ſaid office is grown ſo extenſive and laborious, and the proviſions made by the ſaid act is become inſufficient to anſwer the charges attending the execution of the ſaid office. Wherefore, in order to provide for the further ſupport of the ſaid office, be it enacted, That out of the caſh that now lies, or ſhall hereafter lie dead and unemployed in the Bank of *England*, belonging to the ſuitors of the ſaid court of Chancery, a ſum not exceeding five thouſand pounds ſhall and may, by virtue of any order or orders of the ſaid court to be made for that purpoſe, from time to time to be placed out in one intire ſum, or in parcels, on ſuch government or parliament ſecurities as in and by ſuch order or orders ſhall be directed, to the intent that the intereſt and annual profits ariſing from the money ſo to be placed out as aforeſaid may be applied for the purpoſes herein after mentioned; and that the ſaid court of Chancery may from time to time change the ſecurity orſecurities on which the ſaid monies ſhall be ſo placed out, as the ſaid court ſhall think expedient.

Sect. 2. And the intereſt and annual profits ariſing and to be produced from the ſaid ſecurities ſhall from time to time be received by the governor and company of the Bank of *England*, and placed to the credit of the ſame account as was raiſed in the books kept there for the ſuitors of the ſaid court, by virtue of the ſaid act herein before mentioned, of the intereſt ariſing from money placed out in purſuance of the ſaid act; and that out of ſuch intereſt money and annual profits there ſhall be paid by quarterly payments, by the governor and company of the Bank of *England*, by virtue of an order or orders of the court of Chancery to be made for that purpoſe, the annual ſum of one hundred and twenty pounds to the ſaid accountant general's third clerk; which ſaid ſalary ſhall commence from the 8th day of *April* in the year of our Lord 1764, and ſhall, together with the ſalaries appointed by the ſaid act herein before mentioned, be in lieu of and in recompence and ſatisfaction for all fees whatſoever, which from that time ſhall or would be due or payable to the ſaid office by the ſuitors; and that the reſidue of the intereſt and annual profits, ariſing and to be produced from the ſaid ſecurities, ſhall be accounted for and taken as part of the common and general caſh of and belonging to the ſuitors of the ſaid court of Chancery, and ſhall be iſſued and applied purſuant and according to the directions of an act of parliament, paſſed in the 12th year of the reign of his late Majeſty king *George* the Firſt, intituled, *An act for the relief of the ſuitors of the High Court of Chancery.*

Sect. 3. Provided, that if at any time hereafter the whole, or any part of the ſaid ſum of five thouſand pounds, ſhall be wanted to anſwer any of the demands of the ſuitors of the ſaid court of Chancery, then and in ſuch caſe the ſaid court may and ſhall direct the ſame, or any part thereof, to be called in, or the ſecurities on which the ſame ſhall be placed, to be diſpoſed of, in order that the ſuitors of the ſaid court may at all times be paid their reſpective demands out of the common and general caſh belonging to ſuch ſuitors.

Chandler. See **Candles.**

Changer, Is an office belonging to the king's mint, mentioned in the ſtatute 2 *H.* 6. *c.* 12. where it is alſo written after the old way *changour*, whoſe buſineſs was chiefly to exchange coin for bullion brought in by merchants or others.

Chantry, (*Cantaria,*) *Ædes ſacra*; *ideo inſtituta & dotata prædiis, ut miſſa ibidem* cantaretur *pro anima fundatoris & propinquorum ejus.* Theſe were uſually little chapels, or particular altars, in ſome cathedral or parochial church, and endowed with lands or other revenues for the maintenance of one or more prieſts to officiate as aboveſaid. It is mentioned in 37 *H.* 8. *c.* 4.—1 *Ed.* 6. *cap.* 14. and 15 *Car.* 2. *cap.* 6. Of theſe *chauntries* there were 47 belonging to St. *Paul*'s church in *London*; for which ſee Mr. *Dugdale*'s hiſtory of that church. *Sciatis —quod ego* Reginaldus Suard *dedi*—Willielmo Crumpe *capellano* cantariæ *beatæ Mariæ de Yarpol unam parcellam paſturæ, &c. Dat. apud Leominſtre die Martis prox. poſt feſtum ſancti Hillarii, anno* 7 *H.* 6.

Chantry-rents. See **Chauntry-rents.**

Chapel, (*Capella*, Fr. *Chapelle*) Is of two ſorts, either adjoining to a church as a parcel of the ſame, which men of quality build, *ut ibidem familaria ſepulchra ſibi conſtituant*; or elſe ſeparate from the mother church, where the pariſh is wide, and commonly called *A chapel of eaſe*, becauſe it is built for the eaſe of one or more pariſhioners that dwell too far from the church, and ſerved by ſome inferior curate, provided at the charge of the rector, or them that have benefit by it, as the compoſition or cuſtom is. Whence the word is derived, the *canoniſts* differ in opinion, neither will we trouble ourſelves about it, ſince it makes not much to our purpoſe. There is a *free chapel*, which ſeemeth to be ſuch as hath maintenance perpetual towards the upholding thereof, and wages of the curate, by ſome lands charitably beſtowed on it, without the charge of the rector or pariſh. 37. *H.* 8. *c.* 4. *ann.* 1 *Ed.* 6. *cap.* 14. See *Dr. Burn's Eccleſiaſtical Law, vol.* 1. tit. *Chapel.*

Chapellain or **Chaplain** (*Capellanus*) Is he that performeth divine ſervice in a *chapel*; and therefore in the Common Law it is uſed moſt ordinarily for him that is depending upon the king, or other man of worth, for the inſtructing him and his family to pray and preach in his private houſe, where commonly they have a *chapel* for that purpoſe. *Cowell.*

What number of perſons may be privileged by peers, *&c.* 21 *Hen.* 8. *c.* 13. The judges, the attorney and ſolicitor general may each privilege one chaplain for non-reſidence, 25 *Hen.* 8. *c.* 16. Chancellor of the Dutchy and other great officers may each privilege one chaplain. 33 *Hen.* 8. *c.* 28.

Chapelry, (*Capellania*) Is the ſame thing to a *chapel*, as a pariſh to a church, *i. e.* the precinct and limits of it, mentioned in the ſtat. 14 *Car. cap.* 9.

Chaperon, Fr. (in Lat. *Humerale* and *Caputium*) mentioned in the ſtat. 1 *R.* 2. Is the hood anciently worn by the knights of the *Garter*, being part of the habit of that noble order. Alſo the little eſcutcheon fixed in the forehead of the horſes that draw the hearſe at a funeral.

Chapiters,

Chapiters, *Capitula*, cometh from the French *chapitre, i. e. caput libri.* It ſignifies in our Common law a ſummary, or content of ſuch matters as are to be inquired of or preſented before juſtices in *eyre*, juſtices of *aſſiſe*, or of *peace*, in their ſeſſions: ſo it is uſed ſtat. 3 *Ed.* 1. *c.* 27. in theſe words; "And that no clerk or any juſtice, eſcheator, or commiſſioners in eyre, ſhall take any thing for delivering chapiters, but only clerks of juſtices in their circuits." And again, ſtat. 13 *E.* 1. *c.* 10. in theſe words; "And when the time cometh the ſheriff ſhall certify the chapiters before the juſtices in eyre, how many writs he hath, and what, *&c.*" *Britton* alſo uſeth the word in the ſame ſenſe, *c.* 3. *Chapiters*, or *capitula*, are now moſt commonly called *articles*, and are delivered as well by the mouth of the juſtice in his charge, as by the clerks in writing, to the inqueſt; whereas in ancient times, as appeareth by *Bracton*, they were, after an exhortation given by the juſtices, for the good obſervation of the laws, and the King's peace, firſt read diſtinctly and openly in the whole court, and then delivered in writing to the grand inqueſt; which the grand jury or inqueſt were likewiſe to anſwer upon their oath affirmatively and negatively, and not as they do now, put the judges to make long and learned *charges* to little or no purpoſe; who not remembering the tranſgreſſors againſt the deſign of thoſe *articles*, do think their oaths and duty to God and the King, and their country, well enough performed, if they only preſent thoſe few, of many more, miſdemeanors, which are brought unto them by way of indictment. The ſame *order of articles Lambard* wiſhes might ſtill be obſerved. *Eiren. lib.* 4. *cap.* 4. *pag.* 391. *Horne* in his *Mirrour of Juſtices* calleth them *articles*, and expreſſeth what they were wont to contain, *lib.* 3. *cap. de Articles in Eyre.* An example of theſe *chapiters* or *articles* you have in the book of *Aſſiſes*, *fol.* 138. *num.* 44. As alſo in *Roger Hoveden, parte poſter. ſuor. Annal. in Richardo primo, fol.* 423.

Chaplain. See **Chapellain.**

Chapter, *Capitulum*, Signifieth in our Common law (as in the Canon law, whence it was borrowed) *Congregationem clericorum in eccleſia cathedrali, conventuali, regulari vel collegiata*; and in another ſenſe, *Locum in quo fiunt communes tractatus collegiatorum.* It hath other ſignifications, though not worth the repeating in this place, which you may read in *Lyndewode's Provincialis Gloſſ. in ca. Quia incontinentiæ, de conſtitutionibus verb.* Capitulum. Such a collegiate company is metaphorically termed *capitulum*, that is, a little head, for ſuch a corporation is a kind of head, not only to rule and govern the dioceſe in the vacation of a biſhoprick, but alſo in many things to adviſe the biſhop, when the ſee is full. *Panormitan. in cap.* Capitulum *extra de reſcriptis. Ad dedicationes, ad ſynodos, ad capitula venientibus ſit ſumma pax.* LL. Edwardi Confeſſ. cap. 3.

Charcoals. See **Coals.**

Charea, a charr, car, or cart.——*Conceſſum eſt ut prædicti abbas & conv. tradant* Johanni & Agneti *uxori ſuæ, ac hæredibus ſui tres* chareas *clauſturæ* de Subboſco ſuo annuatim per liberatioriem Ballive vel præpoſiti—— *Itaque nec prefatus* Johannes & Agnes *uxor in præd. boſcum cum carris ſuis de cætero aliquem ingreſſum habeant, nec eſtoverium boſchiæ niſi tantum tres* charas, annuatim, ut prædictum eſt. Cartular. Abbat. Glaſton. MS. f. 91. a. *Cowell, edit.* 1727.

Charge. See **Chapiters.**

Charge and Diſcharge. A *charge* is ſaid to be a thing done that bindeth him that doth it, or that which is his, to the performance thereof: And *diſcharge* is the removal, or taking away of that *charge. Terms de Ley.* Land may be *charged* divers ways; as by grant of rent out of it, by ſtatutes, judgments, conditions, warranties, *&c.* Lands in fee-ſimple may be *charged* in fee; and where a man may diſpoſe of the land itſelf, he may *charge* it by a rent, or ſtatute, one way or other. *Lit. ſect.* 648. *Moor ca.* 129. *Dyer* 10. If one *charge* land in tail, and land in fee ſimple, and die, the land in fee only ſhall be chargeable. *Bro. Cha.* 9. Lands intailed may be *charged* in fee if the eſtate-tail be cut off by recovery: if tenant in tail *charge* the land, and after levy a fine, or ſuffer a recovery of the lands, to his own uſe; this confirms the *charge*, and it ſhall continue. 1 *Co. Rep.* 61. A tenant for life *charges* the land, and then makes a feoffment to a ſtranger, or doth waſte, *&c.* whereby it is forfeited, he in reverſion ſhall hold it *charged* during his life: and if one have a leaſe for life or for years of land, and grant a rent out of it; if after he ſurrenders his eſtate, yet the *charge* ſhall continue ſo long as the eſtate had endured, in caſe it had not been ſurrendered. 1 *Rep.* 67, 145. *Dyer* 10. If a feme ſole leſſee for years takes huſband, and he *charges* the land, and dies, ſhe may avoid it; for the huſband might have given or forfeited, but he may not *charge* it. *Bro. Cha.* 41. If one joint-tenant *charge* land, and after releaſe to his companion, and die, the ſurvivor ſhall hold it *charged*: but if it had come to him by ſurvivorſhip, it would be otherwiſe. 6 *Rep.* 76. 1 *Shep. Abr.* 325. He that hath a remainder or reverſion of land, may *charge* it; becauſe of the poſſibility that the land will come into poſſeſſion, and then the poſſeſſion ſhall be *charged.* But where one leaſes land for life, and grants the reverſion or remainder over to *A. B.* who *charges* the land, and dies, and the tenant for life is heir to the fee; in this caſe, he ſhall hold it *diſcharged*, for he had the poſſeſſion by purchaſe, though he had the fee by deſcent. *Bro.* 11, 16. 1 *Rep.* 62. If a rent be iſſuing out of a houſe, *&c.* and it falls down, the charge ſhall remain upon the ſoil. 9 *Ed.* 4. 20. But when the eſtate is gone upon which the *charge* was grounded, there generally the charge is determined. *Co. Litt.* 349. And in all caſes where an executory thing is created by deed, there by conſent of all the parties it may be by deed defeated and *diſcharged.* 10 *Rep.* 49. See **Diſcharge.** And ſee 4 *Vin. title* Charge.

Charitable Corporation. A ſociety of perſons who engaged to lend money to *induſtrious poor* at 5 *l. per cent.* intereſt on pawns and pledges, to prevent their falling into the hands of the pawnbrokers, and therefore they were called the *Charitable Corporation:* but they likewiſe took 5 *l. per cent.* for the charge of officers, warehouſes, *&c.* And in the fifth year of King *Geo.* 2. the chief officers of this corporation, by connivance of the principal directors, abſconded and broke, and defrauded the public proprietors of great ſums. For relief of ſufferers therein, as to part of their loſſes, ſeveral ſtatutes were made and enacted. See ſtat. 5 *Geo.* 2. *cap.* 31. 32. 6 *Geo.* 2. *cap.* 35 & 36. 7 *Geo.* 2. *cap.* 11.

Charitable Uſes, Where any lands, *&c.* are given to *charitable uſes*, commiſſions of inquiry, and deeds how made and taken, *&c.* Stat. 39 *Eliz. c.* 6. 43 *Eliz. c.* 4. Lands given to alms and aliened may be recovered by the donor, 13 *Ed.* 1. *c.* 41. Lands, *&c.* may be given for the maintenance of houſes of correction, or of the poor, 35 *Eliz. c.* 7. *ſect.* 27. Commiſſioners to inquire of money given to poor priſoners, 22 & 23 *Car.* 2. *c.* 20. *ſect.* 11. 32 *Geo* 2. *c.* 28. *ſect.* 9, 10. Money given to put out apprentices, either by pariſhes or publick charities, to pay no duty, 8 *Ann. c.* 9. *ſect.* 40. Mr. *Norton*'s Will to Charitable Uſes, 6 *Geo.* 2. *c.* 32. 11 *Geo.* 2. *c.* 37. See **Mortmain.**

Charks. Wood when charred is properly char coal; the pit-coal, when ſo charred or charked in *Worceſterſhire* is called *charks*, as the ſea-coal ſo prepared about *Newcaſtle*, is called *coke.*

Charles the Firſt. His murderers puniſhed, and a yearly faſt appointed, 12 *Car.* 2. *c.* 11. 13 *Car.* 2. *c.* 15.

Charlotte (Queen) His Majeſty impowered to grant the Queen an annuity of 100,000 *l.* for her life, to take place from his Majeſty's deceaſe, 2 *Geo.* 3. *c.* 1.

Charolare, To dance; *Cogens quamplurimos viros & mulieres Anglicos mixtim* charolare *nudos & pſallere ante ſe.* See *Mat. Weſtm. anno* 1305.

Charre of lead, A *charre of lead* conſiſts of thirty pigs, each pig containing ſix ſtone wanting two pounds, and every ſtone being twelve pounds. *La* charre *de plumbo conſtat ex* 30 fotinellis, *& quælibet* fotinella *continet* 6 petras

6 petras, *exceptis duabus libris, & quælibet* petra *conſtat ex* 12 *libris*. Aſſiſa de ponderibus Rob. 3. R. Scot. cap. 22. ſect. 2.

Charta, The word was taken not only for a charter or deed in writing, but any ſignal or token by which an eſtate was held. As——Willielmus *filius* Nigelli *tenuit cuſtodiam foreſtæ de* Bernwode, *de domino rege per unum cornu quod eſt* charta *prædictæ foreſtæ*. Paroch. Antiq. p. 73.

Charta Magna, Contains ſeveral privileges and liberties which were granted to the church and ſtate by *Edward* the Confeſſor, and ſome which were granted by *Henry* 1. but thoſe were only relating to the feudal laws which were impoſed on the people by *William* 1. ſo that nothing new was added by him.

King *Stephen* and King *Henry* 2. confirmed the *Magna Charta* of *Henry* 1. and *Richard* 1. took an oath at his coronation to aboliſh all evil cuſtoms, and to obſerve all juſt laws; which was an implicit confirmation of the *charter* itſelf.

King *John* took the like oath: but a difference ariſing between him and pope *Innocent* 3. concerning the election of an archbiſhop of *Canterbury*, he was for the moſt part of his reign embroiled in wars both at home and abroad; till at length at *Runingmede* (a place between *Windſor* and *Stanes*) he confirmed the *charter*; and ſoon after broke it; and thereupon the barons took up arms again; ſo that his reign ended in wars, and *Henry* 3. an infant, ſucceeded; in whoſe reign it was ſeveral times confirmed, and as often abrogated, even after the moſt ſolemn engagements to obſerve it. As for inſtance; in the 37th year of his reign he came to *Weſtminſter-Hall*, and there (in the preſence of the nobility, and of the archbiſhop and biſhops in their pontifical habits, with lighted candles in their hands) the *charter* was read, the King all that while laying his hand on his breaſt; and when it was read, the biſhops extinguiſhed the candles, and threw them on the ground; and every one ſaid, *Thus let him be extinguiſhed, and ſtink in hell, who violates this* charter. Then the bells rung, as a ſign that every one rejoiced, and approved what was done. And the King himſelf ſaid, *So help me God; I will faithfully and inviolably obſerve all theſe things, as I am a man, a Chriſtian, a ſoldier, and a King.* And yet the next year he invaded the rights of the people. And at length the barons took up arms, and beat his army at the battle of *Lewes* in *Suſſex*, and took him and his ſon *Edward* 1. priſoners; but the Prince eſcaping, he beat the barons in a battle at *Eveſham*, and reſtored his father to his royal dignity. And then the King, though conqueror, confirmed this *charter*, and the *charter* of the foreſt, in the parliament of *Marlbridge*, in the 52d year of his reign, and died afterwards in peace. And his ſon *Edward* 1. not only confirmed theſe *charters*, but in the 25th year of his reign he made an explanation of the liberties and privileges therein granted to the people; and added ſome which were new, and are called *Articuli ſuper Chartas*. And thus *Magna Charta* was then confirmed, and more than thirty times ſince. See **Magna Charta.**

Charta pardonationis ſe defendendo, Is the form of pardon for ſlaying another man in his own defence. *Reg. Orig. fol.* 287.

Charta pardonationis utlagariae, Is the form of a pardon for a man that is outlawed. *Reg. Orig. fol.* 288, 388.

Charte (*Charta*) Paper, parchment, or any thing to write on; alſo a card which mariners uſe at ſea, mentioned 14 *Car.* 2. *cap.* 33. See **Charter.**

Chartel, A letter of defiance, or challenge to a duel, in uſe heretofore, when combats were in practice, to decide difficult controverſies, which could not otherwiſe be determined.

Charter (*Charta,* French *chartres,* that is, *inſtrumenta*) Is taken in our law for written evidence of things done between man and man; whereof *Bracton. lib.* 2. *cap.* 16. *num.* 1. ſaith thus, *Fiunt aliquando donationes in ſcriptis, ſeu* chartis, *ad perpetuam rei memoriam propter brevem hominum vitam, &c.* And a little after, *num.* 12. *Et ſciendum quod* chartarum, *alia regia, alia privatorum, & regiarum alia privata, alia communis & alia univerſalis. Item privatorum alia de feoffamento puro & ſimplici, alia de feoffamento conditionali, & ſecundum omnia genera feoffamentorum fieri poteſt. Item privatorum alia de recognitione pura vel conditionalis. Item alia de quieta-clamantia; item alia de confirmatione, &c.* and ſo through the whole chapter. *Britton* likewiſe in his 39th chapter divideth *charters* into the *charters* of the King, and *charters* of private perſons: *Charters* of the King, are thoſe whereby the King paſſeth any grant to any perſon or more, or to any body politick; as a *charter* of exception, that a man ſhall not be impanelled upon any jury. *Kitchin, fol.* 114. & *fol.* 177.

Charterer, So in *Cheſhire* they call a freeholder. *Ex Pet. Leg. Antiq. p.* 356.

Charter of pardon, Whereby a man is forgiven a felony, or other offence committed againſt the King's crown and dignity. *Bro.* tit. *Charter of pardon.*

Charter of foreſt, Wherein the laws of the foreſt are comprized, *anno* 9 *H.* 3. *Cromp. Jur. fol.* 147. *Pupilla oculi, par.* 5. *cap.* 22. *Manwood, par.* 1. of his Foreſt Laws, *fol.* 1. where he ſetteth down the charter of *Canutus*, and *fol.* 11. where he ſets down that which was made 9 *H.* 3. with the *charter of the foreſt* which we uſe. *Skene* ſaith, that the laws of the foreſt in *Scotland* do agree with ours, *de verb. ſignif. verbo* Veniſon. *Charter of land, Brooke, eodem titulo.* That which we call a *charter*, the *Lombards, in libris feudalibus,* call *præceptum, præceptionem. Hottoman, verbo Præceptum in verbo Feudalibus.* Of theſe *charters* you have alſo a long diſcourſe in *Fleta, lib* 3. *cap.* 14. who expoundeth every ſubſtantial part of a deed of gift particularly in order. See **Magna Charta.**

Charter-land, *Terra per chartam,* Is ſuch as a man holdeth by charter; that is, by evidence in writing, otherwiſe called *freehold*, ſtat. 19 *H.* 7. *cap.* 13. and *Kitchin, fol.* 86. And theſe in the *Saxons* times were called *bock-land,* which *Lamb*, in his explication of *Saxon* words, *verb. Terra ex ſcripto,* ſaith, was held with more commodious and eaſy conditions than *folkland* was; that is, land held without writing; and the reaſon is, becauſe that was *Hæreditaria, libera atque immunis,* whereas *fundus ſine ſcripto cenſum penſitabat annuum, atque officiorum quadam ſervitute eſt obligatus; priorem viri plerumque nobiles atque ingenui, poſteriorem ruſtici ferè & pagani poſſidebant.—— Illum nos vulgo* freehold *& per* chartam, *hanc ad voluntatem domini appellamus.* Thus far Mr. *Lambard.*

Charter-party, (Lat. *charta partita,* Fr. *chartre parti, i. e.* a deed or writing divided) Is what among merchants and ſeafaring men, we commonly call *a pair of indentures,* containing the covenants and agreements made between them touching their merchandize and maritime affairs. *Termes de la Ley.* 32 *Hen.* 8. *c.* 14. 12 *Car.* 2. *c.* 18. 2 *Inſt.* 673. And *charter-parties* of affreightment ſettle agreements, as to the cargo of ſhips, and bind the maſter to deliver the goods in good condition at the place of diſcharge, according to agreement; and the maſter ſometimes obliges himſelf, ſhip, tackle and furniture for performance. The Common law conſtrues *charter-parties,* as near as may be, according to the intention of them, and not according to the literal ſenſe of traders, or thoſe that merchandize by ſea, but they muſt be regularly pleaded. In covenant by *charter-party,* that the ſhip ſhould return to the river of *Thames* by a certain time, *dangers of the ſea excepted,* and after in the voyage, and within the time of the return, the ſhip was taken upon the ſea by pirates, ſo that the maſter could not return at the time mentioned in the agreement; it was adjudged, that this impediment was within the exception of the *charter-party,* which extends as well to any danger upon the ſea by pirates and men of war, as dangers of the ſea by ſhipwreck, tempeſt, *&c.* *Stile* 132. 2 *Roll. Abr.* 248. A ſhip is freighted at ſo much *per* month for the time that ſhe ſhall be out, covenanted to be paid after her arrival at the port of *London*; the ſhip is caſt away coming up from the *Downs,* but the lading is all preſerved; the freight ſhall in this caſe be paid; for the money becomes due monthly by the contract, and the place mentioned is only to aſcertain where the money is to be paid, and the ſhip is intitled to wages, like a mariner that ſerves by the month, who,

who, if he dies in the voyage, his executors are to be answered *pro rata*. *Molloy de Jur. Maritim.* 260. If a part-owner of a ſhip refuſe to join with the other owners in ſetting out of the ſhip, he ſhall not be intitled to his ſhare of the freight; but by the courſe of the admiralty, the other owners ought to give ſecurity if the ſhip periſh in the voyage, to make good to the owner ſtanding out his ſhare of the ſhip. Sir *Lionel Jenkins*, in a caſe of this nature certified, that by the law marine and courſe of the admiralty, the plaintiff was to have no ſhare of the freight; and that it was ſo in all places; for otherwiſe there would be no navigation. *Lex Mercat.* 100 See **Freight.**

Form of a *charter-party* of *affreightment.*

THIS Charter-party indented, made, &c. between A. B. *of, &c. mariner, maſter and owner of the good ſhip or veſſel called, &c. now riding at anchor at, &c. of the burden of two hundred tons, or thereabouts, of the one part, and* C. D. *of, &c. merchant, of the other part, witneſſeth, That the ſaid* A. B. *for the conſiderations herein after mentioned, Hath granted and to freight letten, and by theſe preſents doth grant and to freight let unto the ſaid* C. D. *his executors, adminiſtrators, and aſſigns, the whole tonnage of the hold, ſternſheets and halfdeck of the ſaid ſhip or veſſel called, &c. from the port of* London *to, &c. in a voyage to be made by the ſaid* A. B. *with the ſaid ſhip, in manner hereafter mentioned; (that is to ſay) to ſail with the firſt fair wind and weather that ſhall happen after, &c. next from the ſaid port of* London, *with the goods and merchandize of the ſaid* C. D. *his factors or aſſigns, on board to, &c. aforeſaid, (the dangers of the ſea excepted) and there unlade and make diſcharge of the ſaid goods and merchandizes: And alſo ſhall there take into and aboard the ſaid ſhip again, the goods and merchandizes of the ſaid* C. D. *his factors or aſſigns, and ſhall then return to the port of* London *with the ſaid goods, in the ſpace of, &c. limited for the end of the ſaid voyage. In conſideration whereof the ſaid* C. D. *for himſelf, his executors and adminiſtrators, doth covenant, promiſe and grant, to and with the ſaid* A. B. *his executors, adminiſtrators, and aſſigns, by theſe preſents, that the ſaid* C. D. *his executors, adminiſtrators, factors or aſſigns, ſhall and will well and truly pay or cauſe to be paid, unto the ſaid* A. B. *his executors, adminiſtrators, and aſſigns, for the freight of the ſaid ſhip and goods, the ſum of, &c. or ſo much per ton) within twenty-one days after the ſaid ſhip's arrival, and goods returned and diſcharged at the port of* London *aforeſaid, for the end of the ſaid voyage: And alſo ſhall and will pay for demurrage (if any ſhall be by the default of him the ſaid* C. D. *his factors or aſſigus) the ſum of, &c. per day, daily and every day, as the ſame ſhall grow due. And the ſaid* A. B. *for himſelf, his executors and adminiſtrators, doth covenant, promiſe, and grant, to and with the ſaid* C. D. *his executors, adminiſtrators, and aſſigns, by theſe preſents, that the ſaid ſhip or veſſel ſhall be ready at the port of* London, *to take in goods by the ſaid* C. D. *on or before, &c. next coming. And the ſaid* C. D. *for himſelf, his, &c. doth covenant and promiſe, within ten days after the ſaid ſhip or veſſel ſhall be thus ready, to have his goods put on board the ſaid ſhip, to proceed on in the ſaid voyage: And alſo on the arrival of the ſaid ſhip at, &c. within, &c. days, to have his goods ready to put on board the ſaid ſhip, to return on the voyage. And the ſaid* A. B. *for himſelf, his executors and adminiſtrators, doth further covenant and grant, to and with the ſaid* C. D. *his executors, adminiſtrators, and aſſigns, that the ſaid ſhip or veſſel now is, and at all times during the ſaid voyage ſhall be, to the beſt endeavours of him the ſaid* A. B. *his executors and adminiſtrators, and at his and their own proper coſts and charges, in all things made and kept ſtiff, ſtaunch, ſtrong, well apparelled, furniſhed, and provided, as well with men and mariners, ſufficient and able to ſail, guide, and govern the ſaid ſhip, as with all manner of rigging, boats, tackle, apparel, furniture, proviſion, and appurtenances, fitting and neceſſary for the ſaid men and mariners, and for the ſaid ſhip during the voyage aforeſaid.* In witneſs, *&c.*

Chartis reddendis, Is a writ which lies againſt him that hath charters of feoffment delivered to him to be kept, and refuſeth to deliver them. *Old Nat. Brev. fol.* 66. *Orig. fol.* 159.

Chaſe (*Chacea*, from the Fr. *chaſſer*, that is, *ſectari belluas*) Signifies in the Common law two things, *Firſt*, As much as *actus* in the Civil law, that is, a driving of cattle to or from any place, as to *chaſe* a diſtreſs to a fortlet. *Old Nat. Brev. fol.* 45. *Secondly*, It is uſed for a place of receipt for deer and wild beaſts, of a middle nature, between a foreſt and a park, being commonly leſs than a foreſt, and not having ſo many liberties; as the courts of *attachment*, *ſwainemote*, and *juſtice ſeat*; and yet of a larger compaſs, and ſtored with greater diverſity both of keepers and wild beaſts or game than a park. And *Crompton*, in his *Juriſdiction*, *fol.* 148. ſaith, that a foreſt cannot be in the hands of a ſubject, but it forthwith loſeth the name, and becometh a *chaſe*; yet *fol.* 197. he ſaith, that a ſubject may be lord and owner of a foreſt, which, though it ſeems a contrariety, yet are both his ſayings in ſome ſort true; for a King may give or alienate a foreſt to a ſubject, yet ſo, as when it is once in a ſubject, it loſeth the true property of a foreſt, becauſe the courts, called a *juſtice-ſeat*, the *ſwainemote*, and *attachment* forthwith do vaniſh; none being able to make a Lord Chief Juſtice in *Eyre* of the foreſt but the King, as *Manwood* well ſheweth in his *Foreſt Laws*, *cap.* 3. & 4. and yet it may be granted in ſo large a manner, that there may be *attachment* and *ſwainemote*, and a court equivalent to a *juſtice-ſeat*, as appeareth by him in the ſame chapter, *num.* 3. ſo that a *chaſe* differeth from a foreſt in this, becauſe it may be in the hands of a ſubject, which a foreſt in its proper and true nature cannot; and from a park, in that it is not incloſed, and hath not only a larger compaſs, and more ſtore of game, but of keepers alſo and officers. See **Foreſt.**

Chaſor, An hunting horſe.——*Dederet mihi unum* chaſorem, &c. Leg. Will. 1. c. 22. and in another chapter it is written *cacorem.*

Chaſtellaine, A noble woman; *quaſi* caſtelli *domina.*

Chatham, A moiety of the duty payable by foreign built ſhips to be applied to the uſe of the cheſt at *Chatham*, 1 *Jac.* 2. *c.* 18. Commiſſioners to purchaſe lands for the better fortifying of *Chatham.* 7 *Ann. c.* 26. And ſuch lands how veſted in truſtees for that purpoſe, 8 *Ann. c.* 21. See **Fortifications.**

Chattels, or **Catals** (*Catalla*) Comes from the Normans; for in the 87th chapter of the *Grand Cuſtumary*, we ſhall find that all moveable goods with them are called *chattels*; the contrary whereof is *fief*; *ibid.* which we call *fee.* But as it is uſed in our Common law, it comprehends not all goods moveable and immoveable, but ſuch as are in the nature of freehold, or parcel thereof, as may be gathered out of *Staunf. Prærog. cap.* 16. and ſtat. 1 *Eliz. cap.* 2. Howbeit, *Kitchin*, in his chapter *Catalla*, *fol.* 32. ſaith, that ready money is not accounted any goods or *chattels*, nor hawks nor hounds; the reaſon for hawks and hounds he gives, is becauſe they are *feræ naturæ*; but why money is not, though he ſet not down the cauſe, yet it may be gathered to be, for that money of itſelf is not of worth, but as by conſent of men for their eaſier traffick, or permutation of things neceſſary for life. It is reckoned a thing rather conſiſting in imagination, than in deed. And here note, that *chattels* be either perſonal or real: Perſonal may be ſo called in two reſpects; one becauſe they belong immediately to the perſon of a man; as a bow, a horſe, *&c.* the other, for that being any way with held injuriouſly from us, we have no means to recover them, but by perſonal action: *Chattels* real are ſuch, as either do not appertain to the perſon, but to ſome other thing by way of dependency, as a box with charters of land, the body of a ward, apples upon a tree, or a tree itſelf growing on the ground, *Cromp. Juſtice of Peace*, *f.* 33. *b.* or elſe ſuch as are neceſſary, iſſuing out of ſome immoveable thing to a perſon, as a leaſe or rent for a term of years. And alſo to hold at will, is a *chattel* real. *Terms de la Ley*, *verbo* Chattel.

Chattel. The Civilians comprehend theſe things, as alſo land, of what kind or tenure ſoever, under *bona*; *Bona autem dividuntur in mobilia & immobilia*; *mobilia vero in ea quæ ſe movent vel ab aliis moventur*. V. Legem. 49. & L. 208. de verb. ſignif. & interpretes ibid. *Bracton* alſo *cap.* 3. *lib.* 3. *n.* 3 & 4. ſeemeth to be of the ſame judgment. *Chattels* are *Bona quæcumque mobilia & immobilia; proprie tamen ea bonorum pars quæ in animalibus conſiſtit*; *a quorum* capitibus res ipſæ alias capita, alias capitalia *dictæ ſunt*. Spelm.

Chaumpert,——*Et quod tam v'ginti virgatæ terræ, qnam terræ unde dicta quaterviginti quarteria frumenti annua proveniunt de nobis in capite per ſervitium vocatum* chaumpert. *Vid. undecimæ garbæ nobis per manus tenentium terrarum earundem annuatim ſolvendæ tenentur*. Pat. 35 Ed. 3. Pat. 2. m. 18. Hoſpital *de* Bowes *infra inſulam de* Guernſey.

Chaunce-medley. See **Chance-medley.**

Chaunderia —— *Et ſi cerviſiam putidam braſiabit, amittere debet* chaunderium *& braſii valorem ad voluntatem Ballivorum*. MS. de legibus liberi Burgi villæ de *Montgomery*.——

Chaunter, *Cantator*, A ſinger in the choir, 13 *Eliz. c.* 10. At St. *David's* in *Pembrok-ſhire*, the *chanter* is next the biſhop, for there is no dean. *Camb. Britan.*

Chauntry. See **Chantry.**

Chauntry-rents, Are rents paid to the crown by the ſervants or purchaſers of *chauntry-lands*. 22 *Car.* 2. *c.* 6.

Chaus, Manchet, white bread.——*Conceſſerunt mihi ſingulis diebus vitæ meæ unum ſimenellum de* chaus, *& unum ſurum michum, & unum galonem de cereviſia conventus, & alium de cerviſia mixta*. Cartular. Rading. MS. f. 103.

Chaudren of ſea-coals. 9 *H.* 5. 10. See **Chaldron.**

Cheats, Are deceitful practices, in defrauding or endeavouring to defraud another of his known right by means of ſome artful device, contrary to the plain rules of common honeſty; as by playing with falſe dice; or by cauſing an illiterate perſon to execute a deed to his prejudice, by reading it over to him in words different from thoſe in which it was written; or by perſuading a woman to execute writings to another as her truſtee, upon an intended marriage, which in truth contained no ſuch thing, but only a warrant of attorney to confeſs a judgment; or by ſuppreſſing a will; and ſuch like. 1 *Haw.* 188.

Stat. 33 *H.* 8. *cap.* 1. *ſect.* 2. If any perſon falſly and deceitfully get into his hands or poſſeſſion any money or other things of any other perſons by colour of any falſe token or counterfeit letter made in any other man's name, ſuch perſon being convicted by witneſſes taken before the Lord Chancellor, or by examination of witneſſes, or confeſſion before the juſtices of aſſize, or before the juſtices of peace in their general quarter ſeſſions, or by action in the courts of record, ſhall have ſuch puniſhment by impriſonment, ſetting upon the pillory, or by any corporal pain (except pains of death) as ſhall be adjudged by the perſons before whom he ſhall be convict.

Sect. 3. As well the juſtices of aſſize, as alſo two juſtices of peace in every county, whereof one to be of the *quorum*, ſhall have power to convent to the aſſizes or ſeſſions any perſons ſuſpected of the offences aforeſaid, and to commit them to ward, or let them to bail till the next aſſizes or general ſeſſions.

Sect. 4. Juſtices of peace within every city, town, and franchiſe ſhall have like juriſdiction as juſtices of aſſize, or juſtices of peace in the counties, for the puniſhment of offenders by this act, ſaving to the party grieved by ſuch deceit ſuch remedy as he might have had.

Get into his hands or poſſeſſion] A perſon endeavouring by a counterfeit letter to defraud another of goods, and being apprehended on ſuſpicion of ſuch fraud, before he hath got the goods into his poſſeſſion, ſeems not to be within this ſtatute. *Seſſ. Ca.* 2 *vol.* 27. *Eaſt.* 3 *Geo.* 2.

Falſe token] On motion to quaſh an indictment, which was, that the defendant came pretending that ſuch a perſon had ſent him to receive 20 *l.* and received it, whereas ſuch perſon did not ſend him. By the court, it is not indictable, unleſs he came with *falſe tokens*; for we are not to indict one man for making a fool of another. *Blackerby's Juſtice* 79.

It was adjudged, that an indictment averring the offence to be by falſe tokens, without ſhewing what thoſe falſe tokens are, is not ſufficient; and that the fraudulently procuring a note from a perſon, by falſly affirming that there was one in the next room that would pay the money due upon it, whereas in fact there was no ſuch perſon in the next room, is not a *falſe token*, but a falſe affirmation only. *Seſſ. Ca.* 2 *vol.* 201. *Str.* 1127.

Corporal pain] Lord *Coke* obſerves hereupon, that for this offence the offender cannot be fined, but corporal pain only inflicted. 3 *Inſt.* 133.

But Mr. ſerjeant *Hawkins* (p. 188.) obſerves, that a perſon has been fined 500 *l.* for this offence, and cites the following precedent:

Terrey, a merchant, was indicted upon the ſtatute of the 33 *Henry* 8. of falſe tokens, becauſe that he by a falſe note in the name of *John Du-boys*, obtained into his hands a wedge of ſilver of the value of 200 *l.* The defendant being found guilty, exception was taken by *Charles Jones* and *Holbourn* againſt the ſaid indictment for variance therein, in ſeveral words, from the ſtatute; but becauſe there was not any recital, nor miſrecital of the ſtatute, but it was only an inducement to the ſetting down thereof, and not in any point material, the court reſolved it to be good enough; and thereupon it was adjudged, that he ſhould ſtand upon the pillory in *Cheapſide*, and upon the pillory in *Cornhill* near to the Exchange upon the *Saturday* following, and ſhould pay fine to the King of 500 *l.* and be impriſoned during the king's pleaſure, and to be bound with good ſureties for his good behaviour. *Cro. Car.* 564. See 1 *Bulſtr.* 149.

Commit or bail him] See *ſect.* 3. of the laſt mentioned ſtatute. In this caſe the juſtices ſhall do well to take examination of the offence, and to certify the ſame to the ſeſſions or gaol-delivery, and withal to bind over the informer and witneſſes to give evidence therein. *Dalt. c.* 32.

On an indictment againſt the defendant, a miller, for changing corn delivered to him to be ground, and giving bad corn inſtead of it, it was moved to quaſh the ſame, becauſe it is only a private cheat, and not of a publick nature. It was anſwered, that being a cheat in the way of trade, it concerned the publick, and therefore was indictable. And the court unanimouſly agreed not to quaſh it. *Seſſ. Ca.* 1 *vol.* 217. *Trin.* 16 *Geo.* 2.

A perſon falſly pretending that he had power to diſcharge ſoldiers, took money of a ſoldier to diſcharge him; and being indicted for the ſame, the court held the indictment to be good. *Latch* 202.

As there are frauds which may be relieved civilly, and not puniſhed criminally (with the complaints whereof the courts of equity do generally abound); ſo there are other frauds, which in a ſpecial caſe may not be helped civilly, and yet ſhall be puniſhed criminally. Thus, if a minor goes about the town, and pretending to be of age, defrauds many perſons, by taking credit for a conſiderable quantity of goods, and then inſiſting on his nonage; the perſons injured cannot recover the value of their goods, but they may indict and puniſh him for a common cheat. *Barl.* 100.

It ſeems to be the better opinion, that the deceitful receiving of money from one man, to another's uſe, upon a falſe pretence of having a meſſage and order to that purpoſe, is not puniſhable by a criminal proſecution, becauſe it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is ſaid to be needleſs to provide ſevere laws for ſuch miſchiefs, againſt which common prudence and caution may be a ſufficient ſecurity. 1 *Haw.* 188.

A perſon

A perſon for a counterfeit paſs was adjudged to the pillory and fined. *Dalt. c.* 32.

Stat. 30 *Geo.* 2. *cap.* 24. *ſect.* 1. All perſons who knowingly and deſignedly, by falſe pretence or pretences, ſhall obtain from any perſon money, goods, wares, or merchandizes, with intent to cheat or defraud any perſon of the ſame; or ſhall knowingly ſend or deliver any letter or writing with or without a name ſubſcribed thereto, or ſigned with a fictitious name, letter or letters, threatening to accuſe any perſon of any crime puniſhable by law with death, tranſportation, pillory, or any other infamous puniſhment, with intent to extort from him any money or other goods, ſhall be deemed offenders againſt law and the publick peace: and the court before whom any ſuch offender ſhall be tried, ſhall on conviction order him to be fined and impriſoned, or to be put in the pillory; or publickly whipped, or to be tranſported as ſoon as conveniently may be for ſeven years.

Sect. 2. And any juſtice, before whom any perſon charged on oath with having committed any of the offences intended by this act to be puniſhed ſhall be brought, ſhall examine by oath and ſuch other lawful means as to him ſhall ſeem meet touching the matters complained of, and deal with the offender according to law: and if the party charged as being the offender ſhall be committed to priſon, or admitted to bail to anſwer the matters complained of at the next ſeſſions or aſſizes, the ſaid juſtice ſhall bind over the proſecutor to appear and proſecute ſuch offender with effect; and if ſuch goods ſo fraudulently obtained, appear to ſuch juſtice to exceed twenty pounds, the recognizance ſhall be in no leſs than double the value of the goods.

Sect. 3. And if any perſon ſhall knowingly or deſignedly pawn or exchange, or unlawfully diſpoſe of the goods of any other perſon, not being employed or authorized by the owner ſo to do, and ſhall be thereof convicted by the oath of one witneſs, or confeſſion before one juſtice, he ſhall forfeit 20*s.* and if not forthwith paid, the juſtice ſhall commit him to the houſe of correction, or ſome other publick priſon of the place where he ſhall reſide or be convicted, there to remain and be kept to hard labour for fourteen days, unleſs the forfeiture ſhall be ſooner paid; and if within three days before the expiration of the ſaid fourteen days, the ſaid forfeiture ſhall not be paid, the ſaid juſtice, upon application of the proſecutor ſhall order him tb be publickly whipt in ſuch houſe of correction or priſon, or in ſome other publick place of the city, diviſion, town, or place wherein the offence ſhall have been committed, as to ſuch juſtice ſhall ſeem proper; the ſaid forfeitures, when recovered, to be applied towards making ſatisfaction thereout to the party injured, and defraying the coſts of the proſecution, as ſhall be adjudged reaſonable by ſuch juſtice; and if the party injured ſhall decline to accept of ſuch ſatisfaction and coſts, or if there be any overplus of the ſame, then ſuch forfeitures or overplus ſhall be paid to the overſeer for the uſe of the poor of the pariſh or place where the offence was committed.

Sect. 4. Every perſon who ſhall take any goods by way of pawn, pledge, or exchange, ſhall forthwith enter or cauſe to be entered in a fair and regular manner, in a book to be kept for that purpoſe, a deſcription of ſuch goods, and the ſum advanced thereon, the day and year, and the name of the place of abode of the perſon by whom they were pawned, and alſo the name and place of abode of the owner, according to the information of the perſon ſo pawning the ſame; and ſhall at the ſame time give a duplicate or copy to the perſon ſo pawning the ſame if required, on paying him an halfpenny if the goods are pawned for leſs than 20*s.* and one penny if pawned for 20*s.* and not more than 5*l.* and two pence if for any larger ſum; and in default of making ſuch entry and giving ſuch duplicate or copy if required, he ſhall forfeit 5*l.* by diſtreſs by warrant of one juſtice, to be applied to the uſe of the poor as aforeſaid.

Sect. 5. If in the courſe of any of the aforeſaid proceedings before any juſtice in purſuance of this act, it ſhall appear or be proved to the ſatisfaction of ſuch juſtice upon oath, that any of the goods ſo pawned are become or have been rendered of leſs value than the ſame were at the time of pawning thereof, through the default, neglect, or wilful miſbehaviour of the perſon to whom they were pawned, his executors, adminiſtrators, or aſſigns, agents or ſervants; the ſaid juſtice ſhall award a reaſonable ſatisfaction to the owner in reſpect of ſuch damage, and the ſum ſo awarded ſhall be deducted out of the principal and intereſt and allowance for warehouſe-room, which ſhall appear to be due to the perſon to whom they were pawned, his executors, adminiſtrators, or aſſigns; and it ſhall be ſufficient for the pawner, his executors, adminiſtrators, or aſſigns, to pay or tender the money upon the balance, after deducting out of the principal and intereſt, and money paid for warehouſe-room as aforeſaid, ſuch reaſonable ſatisfaction in reſpect of ſuch damage as ſuch juſtice ſhall order, and upon ſo doing, the juſtice ſhall proceed as if he had tendered the whole.

Sect. 6. If any perſon ſhall knowingly buy, or take in as a pledge, any linen or apparel intruſted to any other perſon to waſh, ſcour, iron, mend, or make up, and ſhall be convicted thereof on the oath of one witneſs, or confeſſion before one juſtice, he ſhall forfeit double the ſum given or lent on the ſame to the uſe of the poor, to be recovered as other forfeitures by this act, and ſhall be obliged to reſtore the goods to the owner in preſence of the juſtice.

Sect. 7. And if any perſon who ſhall offer by way of pawn, pledge, exchange, or ſale, any goods, ſhall not be able or ſhall refuſe to give a ſatisfactory account of himſelf, or of the means by which he became poſſeſſed thereof; or if there ſhall be any other reaſon to ſuſpect that ſuch goods are ſtolen, or otherwiſe illegally or clandeſtinely obtained; it ſhall be lawful for any perſon, his ſervants or agents, to whom the ſame ſhall be offered, to ſeize and detain ſuch perſon and the ſaid goods, and to deliver him as ſoon as conveniently may be into the cuſtody of the conſtable or other peace officer, who ſhall immediately convey ſuch perſon and the ſaid goods before a juſtice; and if ſuch juſtice ſhall upon examination and inquiry have cauſe to ſuſpect that the ſaid goods were ſtolen or illegally or clandeſtinely obtained, he may commit him to ſafe cuſtody for any time not exceeding ſix days, in order to be further examined; and if upon either of the ſaid examinations, it ſhall appear to the ſatisfaction of ſuch juſtice, that the ſaid goods were ſtolen, or illegally or clandeſtinely obtained, he ſhall commit the offender to the common gaol or houſe of correction, there to be dealt with according to law.

Sect. 8. Provided nevertheleſs, that if ſuch goods ſeized and detained as aforeſaid, ſhall afterwards appear to be the property of the perſon who offered the ſame to be pawned, exchanged, or ſold, or that he was authoriſed by the owner thereof to pawn, exchange, or ſell the ſame; the perſon who ſhall ſo ſeize or detain the party who offered the ſaid goods, ſhall be indemnified for having ſo done.

Sect. 9. And if the owner of any goods unlawfully pawned, pledged, or exchanged ſhall make out, either on his oath or by the oath of one witneſs before one juſtice, that ſuch owner hath or hath had goods unlawfully obtained or taken from him, and that there is juſt cauſe to ſuſpect, that any perſon within the juriſdiction of ſuch juſtice hath knowingly and unlawfully taken to pawn, or by way of pledge, or in exchange, any goods of ſuch owner, and without his privity or authority; and made appear to the ſatisfaction of ſuch juſtice probable grounds for ſuch the owner's ſuſpicion, ſuch juſtice may iſſue his warrant for ſearching in the day-time the houſe, warehouſe, or other place of any ſuch perſon ſo charged as aforeſaid; and if the occupier of ſuch houſe, warehouſe, or other place ſhall, on requeſt to him made to open the ſame by any peace officers authoriſed to ſearch there by warrant of ſuch juſtice, refuſe to open and permit the ſame to be ſearched, it ſhall be lawful for ſuch peace officer to break open any ſuch houſe, warehouſe, or other place in the day-time, and to ſearch as he ſhall think fit therein for the goods ſuſpected to be there, doing no wilful damage; and if any perſon ſhall oppoſe or hinder any ſuch ſearch, and ſhall be thereof convicted before one

juſtice by the oath of one witneſs, he ſhall forfeit five pounds; and if the ſame ſhall not be immediately paid down, or within the ſpace of 24 hours, the juſtice ſhall commit him to the houſe of correction or ſome other publick priſon, there to be kept to hard labour for any time not exceeding one month, nor leſs than five days, unleſs in the mean time the forfeiture ſhall be paid; and ſuch forfeiture, when recovered, ſhall go to the poor: and if upon ſuch ſearch any of the goods ſhall be found, and the property of the owner ſhall be made out to the ſatisfaction of ſuch juſtice, by the oath of one witneſs, or confeſſion, ſuch juſtice ſhall thereupon cauſe the ſame to be forthwith reſtored to the owner.

Sect. 10. And if any goods ſhall be pawned or pledged for ſecuring any money lent thereon, not exceeding in the whole the principal ſum of ten pounds, and the intereſt thereof, and if within two years after the pawning thereof (proof having been made on oath by one witneſs, or by producing a duplicate of the entry directed to be given by this act as aforeſaid, before any ſuch juſtice, of the pawning of ſuch goods within the ſaid ſpace of two years) any ſuch pawner who was the real owner of ſuch goods at the time of pawning thereof, his executors, adminiſtrators, or aſſigns, ſhall tender to the perſon who lent on ſecurity of the ſaid goods, his executors, adminiſtrators, or aſſigns, the principal money borrowed thereon, and all intereſt due for the ſame, together with ſuch charges for the warehouſe room of the goods pawned, as ſhall be agreed on at the time of pawning the ſame, and the perſon who took the goods in pawn, his executors, adminiſtrators, or aſſigns, ſhall thereupon neglect or refuſe to deliver back the goods ſo pawned for any ſum not exceeding the ſaid principal ſum of ten pounds to the perſon who borrowed the money thereon, his executors, adminiſtrators, or aſſigns; then and in ſuch caſe, on oath thereof made by the pawner, his executors, adminiſtrators, or aſſigns, or ſome other credible perſon, any juſtice of the place where the perſon who took ſuch pawn, his executors, adminiſtrators, or aſſigns, ſhall dwell, on the application of the borrower, his executors, adminiſtrators, or aſſigns, ſhall cauſe ſuch perſon to come before him, and ſhall examine on oath the parties themſelves, and ſuch other credible perſons as ſhall appear before him touching the premiſſes: and if tender of the principal and intereſt, and charges for warehouſe room as aforeſaid, ſhall be proved by oath to have been made as aforeſaid within the ſpace of two years; and the lender on payment by the borrower, his executors, adminiſtrators, or aſſigns, of ſuch principal money, and the intereſt due thereon, together with ſuch charges for warehouſe room as aforeſaid to the lender, his executors, adminiſtrators, or aſſigns, ſhall refuſe to accept thereof on tender before ſuch juſtice, the ſaid juſtice ſhall thereupon, by order under his hand, direct the goods ſo pawned forthwith to be delivered to the pawner, his executors, adminiſtrators, or aſſigns; and if the lender ſhall neglect or refuſe to deliver up, or make ſatisfaction for ſuch goods as aforeſaid, as ſuch juſtice ſhall order, then he ſhall commit the party refuſing to the houſe of correction, or ſome other publick priſon, until he ſhall deliver up the ſaid goods according to the order of ſuch juſtice, or make ſatisfaction for the value thereof to the party intitled to the redemption.

Sect. 11. But if any pawn or pledge of goods made by or for the proprietor ſhall remain unredeemed for two years, the ſame ſhall be forfeited; and the perſon to whom they were pawned may ſell the ſame, ſubject nevertheleſs to account for the overplus, if any ſhall be, of ſuch goods which have been pledged for two pounds or upwards, as by this act is directed.

Sect. 12. And he ſhall enter in his book to be kept for that purpoſe, a juſt account of the ſale of all ſuch goods, expreſſing the day when, the money for which, and the name and place of abode of the perſon to whom the ſame were ſold, and if they be ſold for more than the principal and intereſt, and charge of warehouſe room, the overplus ſhall be paid on demand to the perſon on whoſe account ſuch goods were pawned, his executors, adminiſtrators, or aſſigns; who ſhall for his ſatisfaction be permitted to inſpect the entry to be made as aforeſaid of ſuch ſale, paying for his inſpection the ſum of one penny, and no more; and if any perſon ſhall refuſe to permit ſuch perſon who pawned the goods to inſpect ſuch entry (ſuch perſon if he be an executor, adminiſtrator or aſſignee, at ſuch time producing his letters teſtamentary, letters of adminiſtration or aſſignment) and if the goods were ſold for more than the ſum entered in ſuch book, or if ſuch perſon ſhall not make ſuch entry, or ſhall not have *bona fide* ſold the goods for the beſt price that he might have reaſonably got for the ſame, without his wilful default; or ſhall refuſe to pay ſuch overplus on demand as aforeſaid, he ſhall forfeit treble the value of ſuch goods to the perſon by whom or on whoſe account they were pawned, his executors, adminiſtrators, and aſſigns, to be recovered in any of his Majeſty's courts of record at *Weſtminſter*.

Sect. 13. Provided, that no fee or gratuity ſhall be taken for any ſummons or warrant granted by any juſtice in purſuance of this act, ſo far as the ſame relates to goods pawned, pledged, taken in exchange, or unlawfully diſpoſed of.

Sect. 16. And any juſtice, unto whom complaint upon oath ſhall be made of any offence committed againſt this act, ſhall iſſue his warrant for bringing before him or ſome other juſtice of ſuch place, the perſon charged with ſuch offence, and the juſtice before whom he is brought ſhall hear and determine the matter, and proceed to judgment and conviction; and if it ſhall appear upon oath to the ſatisfaction of ſuch juſtice, that any perſon within his juriſdiction can give any material evidence on behalf of the proſecutor, or of the perſon accuſed, and who will not voluntarily appear; he ſhall iſſue his ſummons to convene him to give his evidence; and if he ſhall neglect or refuſe to appear on ſuch ſummons, and no juſt excuſe ſhall be offered, then, on proof upon oath of the ſummons having been duly ſerved upon him, he ſhall iſſue his warrant to bring ſuch witneſs before him; and on his appearance, if he ſhall refuſe to be examined on oath, without offering juſt cauſe for his refuſal, the juſtice ſhall commit him to the publick priſon for any time not exceeding three months; and if on ſuch examination the juſtice ſhall deem the evidence of any ſuch witneſs to be material, he may bind over ſuch witneſs, unleſs a feme covert, or under the age of twenty-one years, by recognizance in a reaſonable penalty, to appear and give evidence at the next ſeſſions or aſſizes.

Sect. 17. And no perſon charged on oath with being guilty of any of the offences puniſhable by this act, and which ſhall require bail, ſhall be admitted to bail before twenty-four hours notice, at leaſt, ſhall be proved by oath to have been given in writing to the proſecutor, of the names and places of abode of the perſons propoſed to be bail for any ſuch offender; unleſs the bail offered ſhall be well known to the juſtice, and he ſhall approve of them; and every ſuch offender who ſhall be bound over to the ſeſſions or aſſizes, ſhall be tried at the next ſeſſions or aſſizes to be held after his being apprehended, unleſs the court ſhall think fit to put off the trial on juſt cauſe made out to them.

Sect. 18. And in all proceedings on this act, any perſon ſhall be admitted to be a witneſs, notwithſtanding his being an inhabitant of the place wherein the offence ſhall have been committed.

Sect. 19. And the juſtice before whom any perſon ſhall be convicted upon this act, ſhall cauſe the conviction to be drawn up in the form, or to the effect following:

To wit, { *BE it remembered, that on this* ——— *day of* ———, *in the* ——— *year of his Majeſty's reign,* ——— *is convicted before* ——— *of his Majeſty's juſtices of the peace for the ſaid county of* ——— [*or for the riding or diviſion of the ſaid county of* ———, *or for the city, liberty, or town of* ———, as the caſe ſhall be] *for* ———, *and* ——— *the ſaid* ——— *do adjudge*

adjudge him or her to pay and forfeit for the ſame, the ſum of ———. *Given under* ———, *the day and year aforeſaid.*

The ſame to be written on parchment, and tranſmitted to the next ſeſſions, to be kept amongſt the records; and if any perſon ſhall appeal to the ſaid ſeſſions the juſtices there ſhall, upon the receiving the ſaid conviction, proceed to hear and determine the matter.

Sect. 20. And no *certiorari* ſhall be granted to remove any proceedings on this act.

Sect. 21. And if any perſon convicted of any offence puniſhable by this act, ſhall think himſelf aggrieved by the judgment of the juſtice before whom he ſhall have been convicted, he may appeal to the next ſeſſions, and the execution of the judgment ſhall, in ſuch caſe, be ſuſpended; the perſon convicted entering into recognizance at the time of the conviction, with two ſureties, in double the ſum he ſhall have been adjudged to pay, upon condition to proſecute ſuch appeal with effect, and to be forth-coming to abide the judgment and determination of the ſaid ſeſſions; and the ſeſſions ſhall award ſuch coſts as ſhall appear juſt and reaſonable to be paid to either party. And if the judgment ſhall be affirmed, the appellant ſhall immediately pay the ſum adjudged to be forfeited, together with ſuch coſts as the court ſhall award, or in default thereof ſhall ſuffer the pains and penalties by this act inflicted upon perſons reſpectively, who ſhall neglect to pay, or ſhall not pay the forfeitures by this act to be paid.

Sect. 22. And perſons ſued for any thing done on this act may have double coſts.

Sect. 23. And juſtices acting under this ſtatute ſhall be indemnified as by the 24 *Geo.* 2. *cap.* 44. And no ſuit ſhall be commenced againſt any peace-officer for any thing done in the execution of this act, until notice in writing ſhall have been given to him, or left at his uſual place of abode, by the attorney employed againſt him: which notice ſhall contain the name and place of abode of the perſon who is to bring the action, together with the cauſe of action, and the name and place of abode of the attorney ſhall be underwritten or indorſed thereon; and ſuch peace-officer may, at any time within fourteen days after ſuch notice, tender, or cauſe to be tendered, any ſum or amends for the injury complained of, to the party complaining, or to the ſaid attorney; and if the ſame is not accepted of, the defendant may plead ſuch tender in bar of ſuch action, together with the general iſſue, or any other plea, with leave of the court; and if the jury ſhall find the amends to have been ſufficient, or otherwiſe the plaintiff ſhall fail in the action, he ſhall have his coſts; and if the plaintiff ſhall prevail, he ſhall have ſuch damages as the jury ſhall think proper, together with full coſts.

Check-roll, Is a *roll* or book, containing the names of ſuch as are attendants and in pay to the King, or other great perſons, as their houſhold ſervants. *Anno* 19 *Car.* 2. *c.* 1. It is otherwiſe called the *chequer-roll*, *an.* 24 *H.* 8. *c.* 13. *An.* 3 *Hen.* 7. *c.* 13. and ſeems to be a word abſtracted or derived from the *Exchequer*; which ſee. **Clerk of the Check**, ſee in **Clerk**.

Checkerelli panni, Cloth chequered, or variegated in the weaving.———*Henricus prior & conv. eccle. Chriſti Cant. conſtituunt Raymundum filium Raynoldi procuratorem & mercatorem ſuum ad emendum ſingulis annis ducentos pannos quos Friſones vocant, unde triginta erunt* checkerelli, *& alii plani; & quilibet pannus continebit in longitudine quatuor ulnas, & in latitudine ulnam unam & dimidium ad minus.*—Dat. 13 Rul. Sept. 1313. Ex Regiſtr. Eccl. Chriſti Cantuar. MS.

Cheeſe and Cheeſe-mongers. See **Butter and Cheeſe**.

Chelindra, A ſort of ſhip. *Obligavit ſe imperator ad* 100 chelindras *&* 50 *galeias ducendas ultra mare.* Mat. Pariſ. anno 1238.

Chelmsford. See **Canonium**.

Chelſea hoſpital. A college ſhall be erected at *Chelſea*, and a trench made to convey water from the river *Lee* to *London*, to maintain the ſame, by ſtat. 7 *Jac.* 1. *c.* 9. By late ſtatutes concerning the army, one day's pay in a year is to be deducted out of every officer's and ſoldier's pay, for *Chelſea* hoſpital. By ſtatute 28 *Geo.* 2. *c.* 1. aſſignments of out-penſions in *Chelſea* hoſpital before due are void; and by the ſame ſtatute penſions ſhall be paid half yearly in advance, without any other deduction than one ſhilling in the pound.

Chelſea water works. Commiſſioners of *Chelſea* water works incorporated, 8 *Geo.* 1. *c.* 26.

Chemin. See **Chimin**.

Chenſers, mentioned in 27 *H.* 8. *c.* 7. Are ſuch as pay tribute or *cenſe*, chief-rent or quit-rent.

Cheozles verding, The curtilage of a countryman or clown.

Chepſtow. *French* wines may be brought into *Chepſtow* in ſtrangers bottoms. 5 *El. c.* 5.

Cherchez, A ſort of tribute.

Cherſet. See **Churcheſſet**.

Cherſetum, Any cuſtomary oblation paid (at firſt perhaps in lieu of church-ſeed or corn) to the pariſh prieſt or appropriators.——*Inter ſervitia conſuetudinaria tenentium in Blebury de dominio abbatis & conv.* Rading. ——*Et ſolebant dare* cherſetum, *ſcil. tres gallinas & unum gallum.*——*Cartular.* Rading. MS. f. 221.

Cheſt, An uncertain quantity of merchandize, wine, *&c.*

Cheſter. Where felony, *&c.* is committed by any inhabitant of the palatine of *Cheſter* in another county, proceſs ſhall be made to the *exigent* where the offence was done, and if the offenders then fly to the county of *Cheſter*, the outlawry ſhall be certified to the officers there. Stat. 1 *Hen.* 4. *c.* 18. The ſeſſions for the county palatine of *Cheſter* is to be kept twice in the year, at *Michaelmas* and *Eaſter*: and juſtices of peace, *&c.* in *Cheſter* ſhall be nominated by the Lord Chancellor. Stat. 27 *Hen.* 8. *c.* 5. 32 *Hen.* 8. *c.* 43. Recognizance of ſtatutes merchant may be acknowledged, and fines may be levied before the mayor of *Cheſter*, *&c.* for lands lying there, and may be reverſed for error before the chief juſtice. 2 *&* 3 *Ed.* 6. *c.* 31. 43 *El. c.* 15. When juſtices and bailiffs of *Cheſter* to account in the Exchequer, 51 *Hen.* 3. *ſtat.* 5. Dioceſe of *Cheſter* united to the province of *York*, and diſſevered from *Canterbury*, 33 *Hen.* 8. *c.* 31. Knights and citizens to be elected for the county and city of *Cheſter*, 34 *&* 35 *Hen.* 8. *c.* 13. The widows and children of citizens of *Cheſter*, to be provided for according to the cuſtom, 4 *&* 5 *W. & M. c.* 12. Proviſions for the election of knights, *&c.* in *Cheſter*, 10 *Ann. c.* 23. Where plaintiff may enter defendant's appearance, 6 *Geo.* 2. *c.* 14. When defendant to appear on writs returnable in the vacation, 22 *Geo.* 2. *c.* 46. Mayor, *&c.* when to be elected, 26 *Geo.* 2. *c.* 34. See **Counties Palatine**.

Chevage (*Chevagium*, from the Fr. *chef*, *i. e.* caput, *cenſus capitis*) Signifies a tribute or ſum of money, formerly paid by ſuch as held lands in villenage, or otherwiſe, to their lords in acknowledgment; and was a kind of head or poll-money; whereof *Bracton*, *lib.* 1. *c.* 10. ſays thus; *Chevagium dicitur recognitio in ſignum ſubjectionis & dominii de capite ſuo.* It ſeems alſo to be uſed for a ſum of money yearly given to a man of power, for his countenance and protection, as to their chief *head* or leader. *Lambard* (*lib.* 2. *c.* 5. *Eirenarch.*) writes it *chivage*. We now call it *chiefage*. *Eſt & apud Wallos* chevagii *genus quod* Amabyr *vocant, principi Walliæ pro maritandis filiabus, olim ab omnibus (ut aſſerunt) hodie a quibuſdam (etiam liberis) perſolutum*, ſays *Spelman*, on the word *chevagium*. See *Coke on Littl. fol.* 140.

That it is taken for a ſum of money appears in a charter of *H.* 3. *Mandatum eſt quod prædictum feſtum Sancti Edwardi vice regia teneant & ſolenniter celebrent ad cuſtum* (the coſts) *regis &* capitagium *regis & reginæ, &c. Du Freſne.* Cowell, edit. 1727.

The *Jews*, whilſt they were admitted to live in *England*, paid *chevagium* or poll-money to the King; as appears by *Pat.* 8 *Ed.* 1. *par.* 1. *m.* 15. And it was 3*d.* for every head, paid yearly at *Eaſter*, in token of their ſervitude. *Stat. de Judaiſmo.*

Chevantia,

Chevantia, A loan or advance of money upon credit, goods, ſtock.—— *Idem prioratus pene deſtructus, & poſſeſſiones ſuæ ad plurimos terminos pro plurimis* chevanciis *alienatæ exiſtunt.* (Mon. Angl. 1 tom. p. 629.) *i. e.* Are mortgaged out for debts, or ſums of money borrowed ——*Rex. rever. in Chriſto patri W. Archiepiſc.* Cant.—*Nos ſuper executione effectus prædicti ceperimus propoſitum ad partes exteras perſonaliter tranſmeare; & nos advertentes hujuſmodi propoſitum noſtrum abſque* chevantia *competenti ad optatum finem commode deduci non poſſe*——*Necnon qualiter dicta* chevantia *quietius & citius fieri, ac creditoribus noſtris in hac parte melior & firmior ſecuritas ſolutionum dari poterit.* Summon, ad Parl. 5 R. C.

Chevaſia *(Cheveſcium)* The ſame with *chacea; Donationes etiam fecit abbati, &c. de tota terra ſua arabili cum* cheveſciis. *Mon.* 2 *tom. p.* 629.

Cheverillus, A young cock or cockling, a *cheveril. Mandatum eſt vicecom.* Southampton. *quod in balliva ſua perquiri faciat ad opus Regis contra inſtans paſcha quinquaginta gallinas & viginti* cheverillos *liberandos apud* Clarendo 1 *ſeneſchallis noſtris.*——*Eodem modo ſcribitur vicecom.* Wilts. *de tot. gallinis & tot* cheverellis. *Pat.* 15 *H.* 3.

Cheviſance (Fr. *cheviſſance)* An agreement or compoſition made; an end or order ſet down between a creditor and a debtor; or ſometimes taken for an indirect gain or booty. Lord *Verulam* in his *H.* 7. But in our ſtatutes it is moſt commonly uſed for an unlawful bargain or contract. As 37 *H.* 8. *cap.* 9. 13 *Eliz. cap.* 5. & 8. and 12 *Car.* 2. *cap.* 13. In *Rot. Parl.* 21 *Ed.* 3. it is written *cheevances.*

Chevitiae and **Cheviſcae** *(Chevez)* Heads at the end of ploughed lands.——*Novem acras terræ cum* cheviſcis *ad ipſas pertinentibus.* Mon. Angl. 2 par. fol. 116. *and* Pat. 9 *Ed.* 2. par. 2. m. 2.

Chicheſter, How paved, 18 *Eliz. c.* 19. The water to be brought thither, 27 *Eliz. c.* 22.

Chief. See **Capite.**

Chiefage. See **Chevage.**

Chief pledge *(Plegius, vel vas capitalis)* Mentioned in 20 *H.* 6. *c.* 8. See **Borough-head.**

Childzen, Are in law a man's iſſue begotten on his wife. In caſe land be given by will to a man and his *children* who has ſuch alive, the deviſee takes only an eſtate for life; but if there be no child living, it is held to be an eſtate tail. 1 *Vent.* 214, 225. A deviſe to one's *children, prima facie*, refers only to ſuch as are alive at the the time of making the will; though were the ſame to *children living at his death*, a child *in ventre ſa mere* may be looked upon as living. 1 *P. Williams* 342, 244. Alſo a ſon, with which a wife is *priviment enſient*, is adjudged living at the time of the teſtator's death, to prevent an eſtate going over to another, *&c. Ibid.* 486. If a ſum of money is given in truſt for the *children* of another perſon, and he had only one child and ſeveral *grandchildren*, the child only ſhall take; yet it is ſaid if ſuch perſon had not any child living, the grandchildren might have taken by the name of *children.* 2 *Vern.* 106. *Abr. Caſ. Eq.* 202. A father being about to make his will, and thereby intending to have made proviſions for his younger children; his ſon and heir diſſuaded him from doing it, and promiſed that he would take care his brothers and ſiſters ſhould have proviſions; upon which the father forbore making them, and they were decreed in Chancery againſt the heir; his promiſe being a fraud. *Preced. Canc.* 4. And where a perſon going to ſuffer a recovery, in order to provide for younger *children*, was kept from it by the heir in tail, he promiſing to do for them himſelf; it has been ruled he ſhould do it after the father's death. *Prec. Chanc.* 5. See **Adminiſtrator, Poſthumous.**

Childwit *(Sax.)* Signifies a power to take a fine of a bond-woman, unlawfully begotten with child. *Prior habeat gerſumam de nativa ſua impregnata ſine licentia maritandi.* Ex Regiſtro Priorat. de Cokesford. Every reputed father of a baſe child, gotten within the manor of *Writtel*, in *com. Eſſex.* pays to the lord for a fine 3 *s.* 4 *d.* where it ſeems to extend as well to free as bond-women; and the cuſtom is there yet called *Childwit. Quicunq; illam culpam fecerit, vocat.* childwit, *archiepiſcopus aut tam aut dimidiam emendationis partem habebit quietum eſſe de* childwit. *Du Freſne.*

Chimin (Fr. *chemin)* Signifies in law phraſe a way: It is divided into two ſorts; the King's highway, and a private way. *Kitchin, fol.* 35. The King's highway, *chiminus Regius*, is that by which the King's ſubjects, and all under his protection, have free liberty to paſs, though the property of the ſoil on each ſide where the way lieth, may perhaps belong to ſome private man. A way private is that, by which one man or more have liberty to paſs, either by preſcription or by charter, through another man's ground. And this is divided into *chimin in groſs*, and *chimin appendant. Kitchin, fol.* 117. *Chimin in groſs* is that way which a man holdeth principally and ſolely in itſelf; *chimin appendant* is that which a man hath adjoined to ſome other thing or appurtenant thereto. For example; if a man hire a cloſe or paſture, and covenant for ingreſs and egreſs to and from the ſaid cloſe, through ſome other ground, by which otherwiſe he cannot paſs: Or *chimin in groſs* may be that, which the *civilians* call *perſonal*; as when one covenanteth for a way through another man's ground for himſelf and his heirs: *Chimin appendant*, on the other ſide, may be that which they call *real*; as when a man purchaſeth a way through another man's ground, for ſuch as do or ſhall dwell in this or that houſe, for ever, or be owners of ſuch a manor. See *Co. on Litt. fol.* 56. and 4 *Vin.* tit. *Chimin.*

Chiminage *(Chiminagium)* Signifies a toll for wayfarage through the foreſt. *Cromp. Juriſd. fol.* 189. *Telonium quod in foreſtis exigebant foreſtarii a plauſtris & equis oneris cauſa eo venientibus.* Charta Foreſtæ, c. 14. *Nullus foreſtarius de cætero, qui non ſit foreſtarius de feodo reddens nobis firmam pro baliva ſua, capiat* chiminagium *aliquid in baliva ſua, &c.*——*Et quædam conſuetudo vocat.* The ſuediſts call it *pedagium.* This in *Pulton, fol.* 8. is falſly printed *chimmage*; and in a record in the *tower* I find *chimage. Cowell, edit.* 1727.

Chiminage, *inter Reſtormal & Leſtreithiel quondam ad xii d. per ann.* MS. Survey of the Duchy of *Cornwall.*

Chimney-money, otherwiſe called *hearth-money*, A duty to the crown on houſes. By ſtat. 14 *Car.* 2. *cap.* 12. Every fire-hearth and ſtove of every dwelling or other houſe within *England* and *Wales* (except ſuch as pay not to church and poor) ſhall be chargeable with 2 *s. per annum*, payable at *Michaelmas* and *Lady-day* to the King, his heirs and ſucceſſors, *&c.* which payment was commonly called *chimney-money.* This tax being much complained of, as burthenſome to the people, hath been long ſince taken off, and others impoſed in its ſtead; among which that on *windows* of houſes, laid 7 & 8 *Will.* 3. has by ſome perſons been eſteemed almoſt equally grievous. See **Fuage.**

Chimnies. What duties payable for ſmall and large backs of chimnies, 2 *Will. & Mar. ſeſſ.* 2. *c.* 4.

China and Japan wares, To what duties liable, *&c.* 3 & 4 *Ann. c.* 4. 7 *Geo.* 1. *ſt.* 1. *c.* 21.

Chip, Cheap, Chipping, Signifies the place to be a market-town: from the Sax. *ceapen, cyppan, emere*; as *Chippenham, Cheapſide, &c.*

Chippingavel, rectius *Cheapingavel*, Toll for buying and ſelling. See **Bagavel.**

Chirgemote, Circgemote, Chirchemote, A *Saxon* word ſignifying *forum eccleſiaſticum*; *Quouſque* chirgemote *diſcordantes inveniet, vel amore congreget, vel ſequeſtret judicio.* Leg. H. 1. cap. 8. *and* 4 Inſt. fol. 321.

Chirograph, *(Chirographium,* or *ſcriptum chirographatum)* Signifies any publick inſtrument of gift or conveyance, atteſted by the ſubſcription and croſſes of the preſent witneſſes, and was in the *Saxon* times called *chirographum*; which being ſomewhat changed in form and manner by the *Normans*, was by them ſtiled *Charta*; of which *Ingulph* gives this account.———Chirographorum *confectionem* Anglicanam, *quæ antea uſque ad* Edwardi *Regis tempora fidelium præſentium ſubſcriptionibus cum crucibus aureis aliiſque ſacris ſignaculis firma fuerunt*, Normanni *condemnantes* chirographa *chartas vocabant, & chartarum firmitatem cum cerea impreſſione per uniuſcujuſcunque ſpeciale ſigillum ſub inſtillatione trium vel quatuor teſtium ad-*

adſtantium conficere conſtituebant. Hiſt. Ingulph. edit. Gale, pag. 901. Anciently, when they made a *chirograph* or deed, which required a counterpart, as we call it, they engroſſed it twice upon one piece of parchment contrary-wiſe, leaving a ſpace between, in which they wrote in great letters the word *chirograph*; and cut the parchment in two, ſometimes even, ſometimes with *indenture*, through the midſt of the word, concluding the deed with,——*In cujus rei teſtimonium utraq; pars mutuo ſcriptis præſentibus, fide media ſigillum ſuum fecit apponi.* This was afterwards called *dividenda*, becauſe the parchment was ſo divided or cut. And the firſt uſe of the *chirographs* was in *Henry* the Third's time. See **Indenture.** *Chirograph* was alſo of old uſed for a fine.——*Promittens fideliter fidæ media ſub juramento præſtiti, quod in adventu juſticiariorum prox. errantium levari faciam* chirographum *de prædicta remiſſione, &c.* Charta Neſtæ de Stanley ſine dat. in Regiſtro de Wormley. And the manner of engroſſing the fines, and cutting the parchment in two pieces, is ſtill obſerved in that office, which is called the *Chirographer's office.* But as to deeds, that was anciently called a *Chirograph*, which was deſcribed by the proper hand-writing of the vendor or debtor, and delivered to the buyer or creditor; and it differed from *ſyngraphus*, which was in this manner, *viz.* both parties, as well the creditor as debtor, wrote their names, and the names of the witneſſes, and the ſum of money borrowed, either on paper or on a piece of wood, and the word *ſyngraphus* in capital letters in the middle; which letters were cut in the middle, and one part delivered to each party, that upon comparing them (if any diſpute ſhould ariſe) they might tally, and ſo put an end to the difference. When this prudent cuſtom had for ſome time prevailed, then the word *chirographum* was appropriated to ſuch bipartite writings or indentures—*Et in hujus rei teſtimonium huic ſcripto in modum* chirographi *confecto viciſſim ſigilla noſtra appoſuimus.* Kennet's Paroch. Antiq. p. 177.—*Ut autem iſta conventio tuta & inconcuſſa perpetuo permaneat, præſentis ſcripti ſerie & utriuſque monaſterii ſigilli teſtimonium una cum ſigillis abbatum diviſo inter eos* chirographo *confirmata eſt.* Ibid. pag. 223. The *chirographs* were called *Chartæ diviſæ, ſcripta per* chirographum *diviſa, chartæ per alphabetum diviſæ*, as the *chirographs of all fines* are at this day.

Chirographer of Fines *(Chirographus finium & concordiarum;* from the Greek χειρ, *manus*, a hand, and γραφω, *ſcribo*, to write) Signifies in the Common law, that officer of the Common Pleas who engroſſeth *fines* in that court, acknowledged into a perpetual record, after they are acknowledged and fully paſſed by thoſe officers by whom they were formerly examined, and that writeth or deliver eth the indentures of them unto the party. 2 *H.* 3. *c.* 8. and *Weſt. Symbol. par.* 2. tit. *Fines, ſect.* 114 & 129. *F. N. B. fol.* 147. This officer alſo makes two indentures, one for the buyer, another for the ſeller, and makes one other indented piece, containing alſo the effect of the *fine*, which he delivereth over to the *cuſtos brevium*, that is called *the foot of the fine.* The chirographer alſo, or his deputy, doth proclaim all the *fines* in the court every term, according to the ſtatute; and then repairing to the office of the *cuſtos brevium*, there indorſeth the proclamations upon the backſide of the foot thereof; and always keepeth the writ of covenant, as alſo the note of the fine. *Cowell, edit.* 1727. Chirographer's fees, 13 *Ed.* 1. *ſt. c.* 44. 46 *Ed.* 3. *fo* 342. 2 *Hen.* 4. *c.* 8. Chirographer ſhall write a table of the contents of every fine, to be ſet up in the Common Pleas and at the aſſizes. 23 *Eliz. c.* 3.

Chirurgeons See **Phyſicians.**

Chitte, A ſhift, ſhirt, or ſhroud.——*Thomas Cumberworth*, knight, of the dioceſe *Lincoln*, by his laſt will made in the year 1450, thus provides for his ſelf-denying funeral.——'Furſt I gyff my ſawle to God my Lord 'and my Redemptur, and my wrechid body to be beryd 'in a *chitte* without any kyſte *(i. e. coffin)* in the North 'yle of the parych kirke of *Somerethy, &c.*' Ex Reg. Marmaduci Lumley Epiſc. Linc.

Chivage. See **Chevage.**

Chivalry *(Servitium militare,* from the French *chevalier)* Signifieth in our Common law tenure of land by knight's ſervice: for the better underſtanding whereof, it is to be known, that there is no land, but is holden mediately or immediately of the crown by ſome ſervice, and therefore all our freeholds that are to us and our heirs are called *feuda* or *feoda*, fees, as proceeding from the beneficence of the King, for ſome ſmall yearly rent, and the performance of ſuch ſervices as originally were laid upon the land at the donation thereof; for the King gave to the great nobles, his immediate tenants, large poſſeſſions for ever, to hold of him for this or that ſervice or rent: and they again in time parcelled it out to ſuch other as they liked, the ſame lands, for rents and ſervices, as they thought good. And theſe ſervices are by *Littelton* divided in two ſorts, *chivalry* and *ſocage*; the former is martial and military, the other clowniſh and ruſtical: *chivalry* therefore is a tenure of ſervice, whereby the tenant is bound to perform ſome noble or military office unto his lord; and is of two ſorts, either regal, that is, ſuch as may hold only of the King, or ſuch as may hold only of a common perſon: that which may hold only of the King is properly called *ſervitium* or *ſerjeantia*, and is again divided into *grand* or *petit*, great or ſmall; great, commonly called *grand ſerjeanty*, is that where one holdeth lands of the King by ſervice, which he ought to do in his own perſon, as to bear the King's banner or his ſpear, or to lead his hoſt, or to find a man at arms to fight within the four ſeas, *&c. Littl.* tit. *Serjeanty. Petit ſerjeanty* is where a man holdeth land of the King, to yield him annually ſome ſmall thing towards his wars. as a ſword, dagger, bow, *&c. Littl.* tit. *Petit ſerjeanty. Chivalry*, whereby a man may hold of a common perſon, is called *ſcutagium, eſcuage*, that is, ſervice of the ſhield, and this is either uncertain or certain. *Eſcuage* uncertain is likewiſe twofold, firſt, where the tenant is bound to follow his lord, going in perſon, to the King's wars againſt his enemies, either himſelf, or to ſend a ſufficient man in his place, there to be maintained at his coſt ſo many days, as were agreed upon between the lord and firſt tenant at the granting of the fee. And the days of ſuch ſervice ſeem to have been rated by the quantity of the land ſo holden; as if it extended to a whole knight's fee, then the tenant was bound to follow his lord forty days, and a knight's fee was ſo much land, as in thoſe days was accounted a ſufficient living for a knight, and that was 680 acres as ſome hold, or as others 800, or 15 pounds *per annum. Camb. Brit. p.* 110. Sir *Thomas Smith* ſaith, *cenſus equeſtris* is forty pounds revenue in free lands. But if it extends to half a knight's fee, then the tenant is bound to follow his lord but twenty days; if to a fourth part, then ten days. *F. N. B. fol.* 83, 84. The other kind of this *eſcuage uncertain* is called *caſtle-ward*, where the tenant by his land is bound either by himſelf, or ſome other, to defend a caſtle as often as it ſhall come to his courſe. *Eſcuage certain*, is where the tenant is ſet at a certain ſum of money to be paid in lieu of ſuch uncertain ſervice; as that a man ſhall pay yearly for every knight's fee twenty ſhillings. *Stow. Annal. pag.* 233. For half a knight's fee ten, or ſome like rate. And this ſervice, becauſe it is drawn to a certain rent, groweth to be of a mixt nature; not merely ſocage, for that it ſmelleth not of the plough, and yet ſocage in effect, is now neither perſonal ſervice nor uncertain. *Lit.* tit. *ſocage.* This tenure called *chivalry* hath other conditions annext toit, as *homage, fealty, wardſhip, relief*, and *marriage. Bract. lib.* 2. *cap.* 35. which ſee in their reſpective places. *Chivalry* is either *general* or *ſpecial. Dyer, f.* 161. *num.* 47. *General* ſeemeth to be where it is only ſaid in the feoffment, that the tenant holdeth *per ſervitium militare*, without ſpecification of *ſerjeanty, eſcuage, &c. Special*, that which is declared particularly, what kind of knight's ſervice he holdeth by. But there is a great alteration made in theſe things by the ſtatute made 12 *Car.* 2. *cap.* 24. which ſaith, All tenures by knight's ſervice of the King or of any other perſon, knight's ſervice *in capite* or *ſocage*; *in capite* of the King, and the fruits and conſequences thereof happened, or which ſhall or may happen

or ariſe thereupon, or thereby, are taken away and diſcharged: and all tenures of houſes, manors, lands, &c. ſhall be conſtrued and adjudged to be turned into free and common ſocage, &c.

Chocolate. See **Coffee.**

Chop-church *(Eccleſiarum permutatio)* Is a word uſed 9 *H.* 6. *cap.* 65. *a.* by the ſenſe of which book it was in thoſe days a kind of trade; for the judges ſay it was a lawful occupation, and a good addition: yet *Brook* in his *Abridgment* calls it not an occupation, but a thing permiſſible by law. It was (without doubt) a nickname given to thoſe that uſed to change benefices; for to *chop and change* is an uſual expreſſion to this day. We have alſo read *church chopper* for him that uſed to make ſuch changes,——*Alii vero quorundam ſatorum zizaniæ, ſubverſorum juſtitiæ, & inauditæ abuſionis inventorum, ut illis verbis utamur,* choppe churches, *communiter appellati. mediatione doloſa interveniente, execrabili ardore avaritiæ, quandoque in ſubdolis permutationibus, hos nimia inæqualitate beneficiorum, ac illis quandoque obtentis beneficiis, fucatis coloribus totaliter deſtituunt & defraudant.* Litera miſſa omnibus Epiſcopis Suffraganeis Domini contra *choppe-churches.* An. 1391. Spelm. de Conc. vol. 2. fol. 642.

Choral, *Choralis,* Is ſuch a perſon of whom Mr. *Dugdale* in his *Hiſt. of St.* Paul's *Church, pag.* 172. ſays, there were ſix, whom he calls *vicars chorals,* belonging to that church, and ſignifies that one by virtue of any of the orders of clergy, was in ancient time admitted to ſit and ſerve God in the choir, which in *Latin* is termed *chorus.*

Chorepiſcopi, Suffragan or rural biſhops, delegated by the prime dioceſan; their authority was reſtrained by ſome councils, and their office by degrees aboliſhed. After whom the rural deans were ſo commiſſioned to exerciſe epiſcopal juriſdiction, till inhibited by P. *Alexander* the Third, and the council of *Tours.* See *Kennet's Paroch Antiq. p.* 639.

Choſe (Fr. *Thing*) It is uſed with divers epithets; as *choſe local* is ſuch a *thing* as is annexed to a *place.* For example, a mill is *choſe local. Choſe tranſitory* ſeems to be that thing which is moveable, and may be taken away or carried from place to place. *Kitchin, fol.* 18. *Choſe in action*; is a thing incorporal, and only a right; as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all cauſes of ſuit for any debt or duty, treſpaſs or wrong, are to be accounted *choſes in action.* And it ſeems *choſe in action* may be alſo called *choſe in ſuſpence*; becauſe it hath not real exiſtence or being, nor can properly be ſaid to be in our poſſeſſion. *Br. tit.* Choſe in action.

When a man can bring an action for ſome duty, *viz.* debt upon bond, or for rent; or action of covenant, or treſpaſs for goods taken away, or ſuch like; theſe are *choſe in action:* and as they are things whereof a perſon is not poſſeſſed, but is put to his action for recovery of them, they are therefore called *choſes in action.* 1 *Lil. Abr.* 264. A perſon diſſeiſes me of land, or takes away my goods; my right or title of entry into the lands, or action and ſuit for it, and ſo for the goods, is a *choſe in action:* ſo a debt on an obligation, and power and right of action to ſue for the ſame. 1 *Brownl.* 33. And a condition and power of re-entry into land upon feoffment, gift, or grant, before the performance of the condition, is of the nature of a *choſe in action. Co. Lit.* 214. 6 *Rep.* 50. *Dyer* 244. If one have an advowſon, when the church becomes void, the preſentation is but as a *choſe in action,* and not grantable: but it is otherwiſe before the church is avoid. *Dyer* 296. Where a man hath a judgment againſt another for money, or a ſtatute, theſe are *choſes in action.* An annuity in fee to a man and his heirs is grantable over: but it has been held, that an annuity is a *choſe in action,* and not grantable. 5 *Rep.* 89. *Fitz. Grant,* 45. A *choſe in action* cannot be transferred over, nor is it deviſeable; nor can a *choſe in action* be a ſatisfaction, one bond cannot be pleaded to be given in ſatisfaction for another, but in equity *choſe in action* may be aſſignable; and the King's grant of a *choſe in action* is good. *Cro. Jac.* 170, 171. *Chanc. Rep.* 169. When bonds are aſſigned, it is done with power of attorney to receive and ſue in the aſſignor's name; ſo that though in this caſe a *choſe in action* is ſaid to be aſſignable over, yet it amounts to little more than a letter of attorney to ſue for the debt. *Wood's Inſt.* 282. A man may authorize another to ſue for a debt by ſpecialty in his name, and by agreement promiſe it to him when recovered; or he may give, grant, or aſſign the writing, and ſo deprive himſelf of the means to recover the debt, though ſuch a debt itſelf, being a *choſe in action,* cannot be regularly aſſigned over. 2 *Shep. Abr.* 337. Charters, where the owner of the land hath them in poſſeſſion, are grantable; a poſſibility of an intereſt or eſtate in a term for years, is near to a *choſe in action,* and therefore may not be granted; but a poſſibility joined with an intereſt may be a grantable chattel. *Co. Lit.* 265. 4. *Rep.* 66. *Moor Ca.* 1128. And this the law doth provide to avoid multiplicity of ſuits and the ſubverſion of juſtice, which would follow if theſe things were grantable from one man to another. *Dyer* 30. *Plowd.* 185. But by releaſe *choſes in action* may be releaſed for ever; but then it muſt be to parties and privies in the eſtate, &c. For no ſtranger may take advantage of things in action; ſave only in ſome ſpecial caſes; as upon the *ſtat.* 32 *H.* 8. *c.* 8. *Co. Lit.* 214. *Yelv.* 9, 95. A *choſe in action,* as an obligation, &c. is not within the *ſtat.* 21. *H.* 8. concerning larceny by ſervants, in going away with or imbezilling their maſter's goods, to the value of 40*s.* and generally theſe are of no uſe to any but the owner. 1 *Hawk. P. C.* p. 92. But ſee *ſtat.* 2 *Geo.* 2. *cap.* 25. under tit. **Felony.**

Chriſme, Was the holy oil, with which heretofore all infants baptized were anointed: this was made by the biſhop, and by a conſtitution of archbiſhop *Pecham* was to be renewed once every year. Dr. *Burn.*

Chriſmale, *Chriſmal, Chriſom, Cryſom,* the face-cloth, or piece of linen laid over the child's head at baptiſm, which of old was a cuſtomary due to the pariſh prieſt.——*Mulieres ſequentes debent offerre* chriſmalia *infantum, nec* chriſmalia *debent alienari, nec in aliquos uſus mitti debent, niſi in uſus eccleſiæ——ſtatuta* Ægidii *Epiſc.* Sariſbur. *anno* 1256.

Chriſmatis denarii, *Chriſom pence,* Money paid to the dioceſan, or his ſuffragan, by the parochial clergy for the *chriſm* conſecrated by them about *Eaſter,* for the holy uſes of the year enſuing. This cuſtomary payment being made in *Lent* near *Eaſter,* was therefore in ſome places called *quadrageſimals,* and in other *paſchals* and *Eaſter pence.* The biſhops exaction of it was condemned by Pope *Pius* III. for ſimony and vile extortion; and therefore the cuſtom was releaſed and quit-claimed by ſome of our *Engliſh* biſhops.——As *Robert* biſhop of *Lincoln* by expreſs charter.——*Sciatis nos remiſiſſe clericis omnibus infra epiſcopatum* Lincolnienſem *paſchalem conſuetudinem quam* chriſmatis denarios vocant——Teſtidus Waltero *abbate de Kirkſtede.* Radulpho *abbate de Ludu.* David *abbate de Barling. Magiſtro* Gilberto *de Sembringham. Cartular. Mon.* Berdeny. MS. *Cotton.*

Chriſtenings. See **Births, Regiſter.**

Chriſtianitatis curia, The court *chriſtian* or eccleſiaſtical judicature, oppoſed to the civil courts or lay tribunal, or *curia domini regis.* Theſe courts of *chriſtianity* were not only held by biſhops in ſynods, and their archdeacons and chancellors in conſiſtories; but in the rural chapters, where the rural dean or *decanus chriſtianitatis* preſided, and the pariſh-prieſts were aſſeſſors or aſſiſtants. See *Kennet's Diſcourſe of Rural Deans,* in his *Paroch. Antiq. p.* 641. Hence *Juſtitiam chriſtianitatis facere* was to proſecute and cenſure a criminal in the eccleſiaſtical court. As *anno* 28 *Ed.* 1.—Alex. Linc. *epiſc. Guidoni de* Charing *parochiano ſuo ſalut. Mando tibi & præcipio ut cito reddas eccleſiæ de* Egneſham, & Waltero *abbati eccl. ſuam de* Meritona——*Quod ni cito feceris, præcipio ut* Walterus *archidiac. nobis juſtitiam* chriſtianitatis *faciat donec reddas.* Ib. p. 90.

Chriſtophers (St.) See **Nevis.**

Chuepa, Chop or change——*Dedi eſſarta de dominio patris mei & unam virgatam terr æ de* cheuppa *quam* Andreas tenet.——Cartular. Radings. *fol.* 94.

Church, (from the Sax. *circe*, or from the Greek κυριου οικος, the Lord's houſe) The place which chriſtians conſecrate to the worſhip of God; or it is the collective body of chriſtians, uſually termed the catholick church, or the body of chriſtians adhering to one particular opinion, or form of worſhip; and ſometimes the ſame word means a ſynod of biſhops, or of preſbyters; and in ſome places it is the pope and a general council. *Johnſ. Dict.* Under this head is conſidered,

1. *Of founding and conſecrating churches.*

2. *Statutes concerning the church and church-yard in general.*

3. *Statutes concerning the churches of particular places.*

1. *Of founding and conſecrating churches.*

Lord *Coke* ſays, by the Common law and general cuſtom of the realm, it was lawful for biſhops, earls, and barons to build churches or chapels within their fees; and hereof King *John* informed Pope *Innocent* the Third (naming only, *honoris cauſa*, the biſhops and baronage of *England*, albeit this liberty extended to all) with requeſt, that this liberty to the baronage might be confirmed. To theſe letters the pope made this anſwer, *Quod enim conſuetudine regni Anglorum procedere regia ſerenitas per ſuas literas intimavit, ut liceat tam epiſcopis, quam comitibus & baronibus, eccleſias in feodo ſuo fundare; laicis quidem principibus id licere nullatenus denegamus, dummodo diœceſani epiſcopi eis ſuffragetur aſſenſus, & per novam ſtructuarum veterum eccleſiarum juſtitia non lædatur.* Whereas the baronage had abſolute liberty before, now the pope addeth the conſent of the biſhop: but that addition bound not, ſeeing it was againſt the liberty of the baronage warranted by the Common law: and he ſays, he would not have rehearſed this epiſtle, but that it is a proof what the general cuſtom of the realm was, concerning the building of churches without the King's licence, yet could they not erect a ſpiritual politick body to continue in ſucceſſion, and capable of endowment, without the King's licence; but by the Common law, before the ſtatutes of mortmain, they might have endowed this ſpiritual body once incorporated, *perpetuis futuris temporibus*, without any licence from the King, or any other. 3 *Inſt.* 201, 202. which body ſo incorporated, is not diſſolved, though the church is drowned, or otherwiſe deſtroyed; but, in that caſe, one may be preſented to the rectory, and ſhall be liable to annuities and other charges: the church, in conſideration of law, being properly the *cure of ſouls* and the *right of tithes*. *Gibſ.* 189.

But Dr. *Gibſon* obſerveth on the contrary, that no perſon may erect a church without the leave and conſent of the biſhop. And this, he ſays, is agreeable to the rules both of the Civil and Canon law, and was made an expreſs law of the church of *England* many years before the reign of King *John*, *viz.* in the council of *Weſtminſter* in the time of King *Stephen*. Nor would this right of the biſhop be defeated by the exemptions of religious perſons from epiſcopal juridiction; who might not, under colour of ſuch exemptions, erect churches in any part of their poſſeſſions not exempt without leave from the biſhop, as we find it ſpecially adjudged in the body of the Canon law. And to this, the pope's anſwer to King *John* is exactly agreeable, *Laicis quidem principibus id licere nullatenus denegamus, dummodo diœceſani epiſcopi eis ſuffragetur aſſenſus.* And King *John*'s letter doth not relate to a right of erecting with or without licence; ſince the occaſion of it was, the building of a collegiate chapel by the archbiſhop, who was his own licence; and the only objection was, that the building of it would be prejudical to the church of *Canterbury*. *Gibſ.* 188.

But it is to be obſerved, that theſe two aſſertions are not contradictory; for the one ſays only that by the Civil and Canon law it might not be done, and the other ſays that it might be done by the Common law: altho' Lord *Coke* produceth no inſtances, before the reign of King *John* or after, of churches erected without the licence of the dioceſan. And it ſeemeth to amount to the ſame thing, ſo long as the biſhop hath power (unto which Lord *Coke* aſſenteth) after the church is erected, to withhold or deny the conſecration.

And not only the biſhop, by refuſing to conſecrate, may hinder the eſtabliſhment of a new church or chapel in any pariſh; but alſo any other perſon thinking himſelf injured thereby, as by incroaching upon his ground, ſtopping his way, or the like, may apply to the temporal courts, who (as they ſee cauſe) will grant him redreſs.

The ancient manner of founding churches was, after the founders had made their application to the biſhop of the dioceſe, and had his licence, the biſhop or his commiſſioners ſet up a croſs, and ſet forth the ground where the church was to be built; and then the founders might proceed in the building of the church: and when the church was finiſhed, the biſhop was to conſecrate it, but not till it was endowed; and before, the ſacraments were not to be adminſtered in it. *Degge, part* 1. *c.* 12.

For though churches or chapels may be built by any of the King's ſubjects, yet, before the law takes knowledge of them to be churches or chapels, the biſhop is to conſecrate or dedicate the ſame: and this is the reaſon, a church or not a church, a chapel or not a chapel, ſhall be tried and certified by the biſhop. 3 *Inſt.* 203.

The law takes no notice of churches or chapels till they are conſecrated by the biſhop: but the Canon law ſuppoſes, that with conſent of the biſhop, divine ſervice may be performed, and ſacraments adminiſtered in churches and chapels not conſecrated; inaſmuch as it provides, that a church ſhall have the privilege of immunity, in which the divine myſteries are celebrated, altho' it be not yet conſecrated: and there are many licences to that effect (granted on ſpecial occaſions) in our eccleſiaſtical records. *Gibſ.* 190.

And after a new church is erected, it may not be conſecrated without a competent endowment: and this was made a law of the church of *England* in the 16 canon of the council of *London*; *A church ſhall not be conſecrated until neceſſary proviſion be made for the prieſt.* And the canon law goes further; requiring the endowment, not only to be made before conſecration, but even to be aſcertained and exhibited before they begin to build. And the Civil law is yet more ſtrict; enjoining, that the endowment be actually made before the building be begun *Gibſ.* 189.

2. *Statutes concerning the church and church-yard in general.*

Stat. *Mag. Chart.* 2 *Hen.* 3. *c.* 1. The church of *England* ſhall be free, and ſhall have all her rights and liberties inviolable.

Stat. 5 *Ed.* 3. Holy church ſhall have all her liberties without ſubſtance.

Stat. *Wint.* 13 *Ed.* 1. *ſtat.* 2. *c.* 6. Fairs and markets ſhall not be kept in church-yards.

Stat. 3 *Ed.* 1. *ſt.* 2. intitled, *Statutum ne rector proſternat arbores in cœmiterio*: "Becauſe we do underſtand, that controverſies do oftimes grow between parſons of churches and their pariſhioners, touching trees growing in the church-yard, both of them pretending that they do belong unto themſelves; we have thought it good, rather to decide this controverſy by writing than by ſtatute. Foraſmuch as a church-yard that is dedicated is the ſoil of a church, and whatſoever is planted belonging to the ſoil, it muſt needs follow, that theſe trees which be growing in the church-yard are to be reckoned amongſt the goods of the church, the which laymen have no authority to diſpoſe; but, as the holy ſcripture doth teſtify, the charge of them is committed only to prieſts to be diſpoſed of: and yet, ſeeing thoſe trees be often planted to defend the force of the wind from hurting of the church, we do prohibit the parſons of the church, that they do not preſume to fell them down unadviſedly, but when the chan-

cel

cel of the church doth want neceſſary reparations: neither ſhall they be converted to any other uſe, except the body of the church doth need repair; in which the parſons of their charity ſhall do well to relieve the pariſhioners, with beſtowing upon them the ſame trees; which we will not command to be done, but we will commend it when it is done."

Stat. *Confirm. Chart.* 21 *Ed.* 1. *c.* 3. The great charters ſhall be ſent under ſeal to cathedral churches, and be read before the people twice in the year.

Art. Cler. 6 *Ed.* 2. *ſt.* 1. *c.* 10. Thoſe who abjure the realm, ſhall be protected while in the church or highway. See **Abjuration.**

Stat. 50 *Ed.* 3. *c.* 5. Perſons of holy church, whilſt they attend divine ſervice in churches, church-yards, and other places dedicated to God, ſhall not be arreſted by royal authority or commandment of temporal lords, in offence of the liberty of holy church, upon grievous forfeiture, ſo as colluſion be not found in the ſaid perſons of holy church.

Stat. 1 *Ric.* 2. *c.* 5. If any ſhall arreſt any perſon of holy church in churches or church-yards, againſt the liberty of holy church, and thereof be convicted, he ſhall have impriſonment, and be ranſomed at the King's will.

Stat. 15 *R.* 2. *c.* 15. Whereas it is contained in the ſtatute *de religioſis*, (7 *Ed.* 1. *ſt.* 2.) That no religious, nor other whatſoever he be, do buy or ſell, or under colour of gift, or term, or any other manner of title whatſoever, receive of any man, or in any manner by gift or engine cauſe to be appropriated unto him any lands or tenements, upon pain of forfeiture of the ſame, whereby the ſaid lands and tenements in any manner might come to mortmain; and if any religious, or any other, do againſt the ſaid ſtatute by art or engine in any manner, that it be lawful to the King and to other lords, upon the ſaid lands and tenements to enter, as in the ſaid ſtatute doth more fully appear: and now of late by ſubtle imagination, and by art and engine, ſome religious perſons, parſons, vicars, and other ſpiritual perſons have entered in divers lands and tenements, which be adjoined to their churches, and of the ſame, by ſufferance and aſſent of the tenants, have made church-yards, and by bulls of the biſhop *Rome* have dedicated and hallowed the ſame, and in them do make continually parochial burying without licence of the King and of the chief lords; thereof it is declared in this parliament, that is manifeſtly within the compaſs of the ſaid ſtatute.

Stat. 5 & 6 *Ed. cap.* 4. *ſect.* 1. If any perſon ſhall by words only, quarrel, chide, or brawl in any church or church-yard, it ſhall be lawful for the ordinary to ſuſpend him; if he be a layman, *ab ingreſſu eccleſiæ*; and if a clerk, from the miniſtration of his office.

Sect. 2. If any perſon ſhall ſmite or lay violent hands upon another in church or church-yard, he ſhall be deemed excommunicate.

Sect. 3. If any ſhall maliciouſly ſtrike any perſon with a weapon in church or church-yard, or ſhall draw any weapon in church or church-yard, with intent to ſtrike another; every perſon ſo offending, and convict by verdict, his own confeſſion, or two witneſſes, before the juſtices of aſſize, of *oyer and terminer*, or juſtices of peace in their ſeſſions, ſhall have one of his ears cut off; and if he have no ears, he ſhall be burned in the cheek with the letter F, and ſhall ſtand excommunicated.

Stat. 1 *Eliz. c.* 2. *ſect.* 25. Such ornaments of the church, and of the miniſters thereof, ſhall be retained and be uſed, as was in the church of *England*, by authority of parliament in the ſecond year of the reign of King *Edward* the Sixth, until other order ſhall be therein taken by authority of the Queen's Majeſty, with the advice of her commiſſioners appointed and authorized under the great ſeal of *England* for cauſe eccleſiaſtical, or of the metropolitan of this realm.

By Stat. 14 *Ed.* 3. *ſt.* 1. *c.* 1. 2 *Hen.* 4. *c.* 1. 1 *Will. & Ma. ſt.* 2. *c.* 2. the liberties of the church are confirmed.

3. *Statutes concerning the churches of particular places.*

For making the church at *Whitegate* in *Cheſhire* a diſtinct pariſh, and appointing a vicar there, 33 *H.* 8. *c.* 32.

For building a church at *Melcombe Regis*, 1 *Jac.* 1. *c.* 30.

The church of *Covent Garden* made parochial, 12 *Car.* 2. *c.* 37.

For building St. *Paul's*, 22 *Car.* 2. *c.* 11. *ſect.* 61. 1 *Jac.* 2. *c.* 15. 8 *W.* 3. *c.* 14. Additional duties for carrying it on, 1 *Ann. ſt.* 2. *c.* 12. declared to be finiſhed, 9 *Ann. c.* 22. *ſect.* 9.

For building the church of St. *Ann, Weſtminſter*, 1 *Jac.* 2. *c.* 20.

Of St. *James, Weſtminſter*, 1 *Jac.* 2. *c.* 22. Enlarging the church-yard, 22 *Geo.* 2. *c.* 29.

For repairing *Weſtminſter* abbey and finiſhing *Greenwich* hoſpital, 8 & 9 *W.* 3. *c.* 14. 6 *Ann. c.* 22. *ſect.* 2. 10 *Ann. c.* 11. *ſect.* 32. 6. *Geo.* 2. *c.* 25. *ſect.* 20.

The ſtatutes of cathedral and collegiate churches aſcertained, 6 *Ann. c.* 21.

Subject to revocation, 6 *Ann. c.* 21. *ſect.* 3.

For building 50 churches about *London*, 6 *Ann. c.* 22 12 *Ann. c.* 11. 1 *Geo.* 1. *c.* 23. 5 *Geo.* 1. *c.* 9.

Proviſion for poor churches in the Weſt riding of *Yorkſhire*, by the incloſure of commons, 12 *Ann. ſt.* 1. *c.* 4.

For building St. *Mary Woolnoth*, 10 *Ann. c.* 11 *ſect.* 33 1 *Geo.* 1. *c.* 23. *ſect.* 5.

For building St. *Mary le Strand*, 12 *Ann. ſt.* 1. *c.* 17. 12 *Geo.* 1. *c.* 39.

For finiſhing the tower of St. *Michael's, Cornhill*, in *London*, 4 *Geo.* 1. *c.* 5.

For St. *George's* chapel in *Yarmouth*, 7 *Geo.* 1. *c.* 11.

Proviſion for the curate of St. *Catherine Cree* church, *London*, 13 *Geo.* 1. *c.* 35.

Proviſion for the rector of the church at *Milbank* in St. *Margaret's, Weſtminſter*, 1 *Geo.* 2. *c.* 15.

For the rector of *Spitalfields*, 2 *Geo.* 2. *c.* 10.

Trinity chapel in *Leeds* made a perpetual cure, 2 *Geo. c.* 16.

The King may viſit the collegiate church of *Mancheſter* when the wardenſhip is held by the biſhop of *Cheſter*, 2 *Geo. c.* 29.

Wapping Stepney made diſtinct pariſh, 2 *Geo.* 2. *c.* 30.

Proviſion for the miniſter of *Stratford, Bow*, 3 *Geo.* 2. *c.* 3.

Limehouſe made a diſtinct pariſh, 3 *Geo.* 2. *c.* 17.

Proviſion for the miniſter of *Bloomſbury*, and for rebuilding St. *Giles's in the Fields*, 3 *Geo.* 2. *c.* 16.

For the miniſter of the new church at *Deptford*, 3 *Geo.* 2. *c.* 33.

For rebuilding the church at *Graveſend*, 4 *Geo.* 2. *c.* 20.

For rebuilding *Woolwich* church, 5 *Geo.* 2. *c.* 4. 12 *Geo.* 2. *c.* 23.

For rebuilding St. *George's* in *Southwark*, 6 *Geo.* 2. *c.* 8.

For the maintenance of the miniſter of *Horſleydown*, 6 *Geo.* 2. *c.* 11

For making *Tiverton* chapel a perpetual cure, 6 *Geo.* 2. *c.* 19.

For providing a maintenance for the miniſter of the church in *Old Street* in the pariſh of St. *Giles, Cripplegate*, 6 *Geo.* 2. *c.* 21.

Bablack church in *Coventry* made a pariſh church, 7 *Geo.* 2. *c.* 27.

For rebuilding *Shoreditch* church, 8 *Geo.* 2. *c.* 27. 11 *Geo.* 2. *c.* 23.

For rebuilding *Gainſburgh* church, 9 *Geo.* 2. *c.* 22. 14 *Geo.* 2. *c.* 15.

For rebuilding St. *Olave's* church, 10 *Geo.* 2. *c.* 18.

For making the chapel at *Abthorpe* in *Northamptonſhire* a pariſh church, 10 *Geo.* 2. *c.* 21.

For rebuilding *All Saints* in *Worceſter*, 11 *Geo.* 2 *c.* 5.

For

For rebuilding *Rotherhithe* church, 11 *Geo.* 2. *c.* 13.
For rebuilding *Chriſt's Church* in *Surrey*, 11 *Geo.* 2. *c.* 21.
For payment of debts contracted by building St. *Nicholas* in *Worceſter*, 12 *Geo.* 2. *c.* 4.
For building the church at *Ealing* in *Middleſex*, 12 *Geo.* 2. *c.* 7.
For rebuilding St. *Catherine Coleman* in *Fenchurch-ſtreet*, *London*, 12 *Geo.* 2. *c.* 17. 15 *Geo.* 2. *c.* 12.
A chapel at *Sheffield* made a perpetual cure, 13 *Geo.* 2. *c.* 12.
The chapelry of *Nether Knutsford* in *Cheſhire* made a ſeparate pariſh, 14 *Geo.* 2. *c.* 5.
For making the chapel at *Market-ſtreet* in *Hertfordſhire* a perpetual cure, 14 *Geo.* 2. *c.* 26.
For rebuilding St. *Botolph* without *Aldgate*, 14 *Geo.* 2. *c.* 27.
For building *Bethnall-Green* church, 16 *Geo.* 2. *c.* 28. 19 *Geo.* 2. *c.* 5.
For finiſhing the church of St. *Margaret* in *Lynn*, 18 *Geo.* 2. *c.* 31.
For building *Wednesfield* chapel near *Wolverhampton*, 20 *Geo.* 2. *c.* 27.
For purchaſing an additional burying ground for St. *Andrew*, *Holborn*, 20 *Geo.* 2. *c.* 33.
For building a church at *Liverpoole*, 21. *Geo.* 2. *c.* 24.
A ſtipend appointed to the rector of St. *George*, *Southwark*, in lieu of tithes, 23 *Geo.* 2. *c.* 36.
For rebuilding *Iſlington* church, 24 *Geo.* 2. *c.* 15.
For building St. *George*'s church in *Kingswood*, 24 *Geo.* 2. *c.* 37.
For rebuilding the church at *Stone* in *Staffordſhire*, 26 *Geo.* 2. *c.* 38.
For building a church at *Mancheſter*, 26 *Geo.* 2. *c.* 45.
For building a chapel at *Porſea*, 26 *Geo.* 2. *c.* 58.
For rebuilding *Alderſgate* church, 26 *Geo.* 2. *c.* 94.
For building a chapel in *Wolverhamptou*, 28 *Geo.* 2. *c.* 34.
For rebuilding the church at *Guildford* in *Surrey*, 28 *Geo.* 2. *c.* 56.
For enlarging the church-yard of St. *Mary*, *Newington Butts* in *Surrey*, 29 *Geo.* 2. *c.* 42.
For building a church in the iſland of *Portland*, 29 *Geo.* 2. *c.* 75.
For rebuilding St. *John*, *Wapping*, 29 *Geo.* 2. *c.* 89.

For other matters, ſee **Burials**, **Churchwardens**, **Clergy**, **Eccleſiaſtical perſons**, **King**, **Liberties**, **Mortmain**, **Nonconformiſts**, **Service**, **Tithes**, **Vicar**, **Union of churches**, **Univerſities**.

Church-reve, Is the ſame with *churchwarden*; *reve* in the *Saxon* being as much as guardian in the *French*, and ſignifies the guardian or overſeer of the church, as *ſhire-reve* is the *gardein* of ſhire or county, and *port-reve* of the port or haven, though afterwards it became a name of office. The word is now out of uſe, but uſed by *Chaucer* ſpeaking of the juriſdiction of archdeacons. See **Churchwardens**.

Churchwardens (*Eccleſiarum guardiani*) Are officers yearly choſen by the conſent of the miniſter and pariſhioners, according to the cuſtom of every ſeveral place, to look to the *church*, *church-yard*, and ſuch things as belong to both, and to obſerve the behaviours of their pariſhioners for ſuch faults as appertain to the juriſdiction or cenſure of the court eccleſiaſtical. Theſe are a kind of corporation, enabled by law to ſue for any thing belonging to their church, or poor of their pariſh. *Cowell.*

Churchwardens are officers inſtituted for the benefit and advantage of religion, whoſe chief duty it is to ſuppreſs all prophaneneſs and immorality, and to ſee that the publick worſhip be performed with due decency and reverence. But though they deal chiefly in matters relating to the church, yet are they every where treated of in our law books as temporal perſons, and are undoubtedly to be conſidered as a lay corporation veſted with a temporal right in their offices, and a ſpecial property in the goods belonging to the church, which farther appears by the duties enjoined them by ſeveral acts of parliament herein after mentioned. 1 *New. Abr.* 379.

In the ancient epiſcopal ſynods, the biſhops were wont to ſummon divers credible perſons out of every pariſh, to give information of, and to atteſt the diſorders of clergy and people. Theſe were called *teſtes ſynodales*, and were in after times a kind of impanelled jury, conſiſting of two, three, or more perſons in every pariſh, who were upon oath to preſent all hereticks and other irregular perſons. *Ken. Par. Ant.* 649. And theſe in proceſs of time became ſtanding officers in ſeveral places, eſpecially in great cities, and from hence were called ſynodſmen, and by corruption *ſideſmen*. They are alſo ſometimes called *queſtmen*, from the nature of their office, in making inquiry concerning offences: and theſe ſideſmen or queſtmen are to be choſen yearly in *Eaſter* week by the miniſter and pariſhioners (if they can agree) otherwiſe to be appointed by the ordinary of the dioceſe. But for the moſt part, this whole office is now devolved upon the churchwardens, together with that other office which their name more properly importeth, of taking care of the church and of the goods thereof, which they had of very ancient time. *Dr. Burn's Eccleſ. Law*, tit. *Churchwardens.*

1. *Of the right and manner of chooſing churchwardens.*
2. *Who are exempted from being churchwardens.*
3. *Of their intereſt in and power over the things belonging to the church.*
4. *Of their power and duty in making rates and preſentments, hindering irreverence in the church, and ſeveral other matters.*
5. *Of their accounts, and of actions brought by and againſt them.*

1. *Of the right and manner of chooſing churchwardens.*

By the Common law, the right of chooſing churchwardens belongs to the pariſhioners, who are to be at the charge of repairing the church, &c. and therefore it is but fitting that they ſhould have it in their power to determine what perſons are proper to be intruſted in theſe concerns; nor does any canon deprive them of this right; for though by cuſtom the pariſhioners in ſome places chooſe one, and the parſon another, yet this is by virtue of the cuſtom; the validity of which, as of all other cuſtoms, muſt be determined in the King's temporal courts; nor can the archdeacon, or any others, who by virtue of their offices are to ſwear and admit them, controul any ſuch election, for herein their offices are purely miniſterial. 1 *New Abr.* 371. cites *Cro. Jac.* 532, 670. *Cro. Car.* 552. *Noy* 31, 139. 2 *Rol. Abr.* 234. *Hard.* 379. *Raym.* 439.

And though by cuſtom the rector or vicar may name one, yet where the vicar of St. *Giles*'s in *Northampton* was under a deprivation for not taking the oaths to King *William* and Queen *Mary*, and the church being vacant, the pariſhioners proceeded to the election of two churchwardens, and preſented them to be ſworn; but the regiſter of the conſiſtory court being a friend to the vicar, refuſing to ſwear them unleſs that perſon whom the late vicar approved were nominated one, a *mandamus* was granted. *Carth.* 118.

The pariſhioners are alſo judges of the fitneſs and qualifications of the perſons they chooſe for that office; and therefore where to a *mandamus* to ſwear a churchwarden choſen according to cuſtom, the archdeacon returned, that the perſon preſented was a poor dairyman, who had no eſtate, and was *perſona minus habilis & idonea* for that office; the court granted a peremptory *mandamus*. *Carth.* 393. *Comb.* 417. *S. C.* 1 *Salk.* 166. *S. C.* 5 *Mod.* 325. *S. C.*

But where a prohibition was granted *niſi* to the eccleſiaſtical court, where *J. S.* ſued as churchwarden of, &c. in *Colcheſter*, on a ſuggeſtion, that in *Colcheſter* there is a cuſtom for the inhabitants to elect the churchwardens, and that *A.* and *B.* were duly elected, which matter the

defendant

defendant had pleaded in the ſpiritual court, but the plea was refuſed; but it appearing that *J. S.* was church warden *de facto*, choſen by the parſon, and that he all the year acted as ſuch, and that he, with the inhabitants and another churchwarden, made the tax for which the defendant was ſued in the eccleſiaſtical court, the rule for a prohibition was diſcharged; for *per cur'*, Where the queſtion is only, who is churchwarden, if ſuch cuſtom is alledged, a prohibition ſhall be granted; but the matter here is for a tax for the repair of the church, and it is not material now whether he was duly elected or not; it is ſufficient that he was guardian *de facto*; and it may be as well put in iſſue, whether the miniſter was a rightful miniſter; beſides, this tax is not rated by the churchwardens, for they have no ſuch power, but it is a common charge, impoſed by the major part of the pariſhioners, and the churchwardens do no more in aſſeſſing them, than the other pariſhioners, and the tax will be well aſſeſſed by the major part of the inhabitants, though the churchwardens are againſt it; their chief buſineſs is in collecting of it, and the matter is a matter of eccleſiaſtical cognizance, for the ſpiritual judge may inquire touching the want of reparations of the church. And *note*, that upon the rule for diſcharging the prohibition, all this matter was ordered to be entered, for fear it ſhould be afterwards thought, that a prohibition was decreed where a cuſtom was in queſtion. 3 *Keb.* 533, 542.

In an action for a falſe return, a ſpecial verdict found the cuſtom to be for the pariſhioners of annually to elect a churchwarden; that *S.* the plaintiff, was elected by the pariſhioners to ſerve for churchwarden for the year 1734, and until another be choſen; that at a veſtry the enſuing year, he was re-elected by the pariſhioners, but at the veſtry then holden, the vicar and one churchwarden adjourned the veſtry to the next day, and the vicar then choſe *Chapman*. A *mandamus* had been directed to to admit and ſwear in the plaintiff. It was argued for the plaintiff, that the 89th canon of 1603, that all churchwardens and queſtmen ſhall be choſen by the joint choice of the miniſter and pariſh, if it may be, if not, then the miniſter to chooſe one, and the pariſh the other, has never been received at law, and cited *Cro. Jac.* 532. *Warner*'s caſe. *Cro. Car.* 551. *Hard.* 378. and *Carth.* 118. where *Holt* Ch. J. ſays, that where the incumbent chooſes one, it is only by uſage, and that a churchwarden is a temporal officer. *Per Lee* J. In all councils and elections the general rule is, that the major part binds, and cited 18 *E.* 4. 2. and *Hackwell's Modus tenendi Parliament'*. The Ch. J. ſaid, that the queſtion is, whether the adjourning by vicar jointly with one churchwarden, was a valid and a good adjournment; and he thought not; and that if vicar and churchwarden had ſuch a power, it muſt be by cuſtom or by rule of Common law; but no cuſtom is found, nor is there any rule of Common law to veſt this power in the vicar, nor is it in the power of the churchwarden to adjourn; and then the right is in the aſſembly itſelf. *Per Probyn* J. The vicar is not a neceſſary party at the veſtry; and judgment for the plaintiff *per tot' cur'*. *Trin.* 1736. *in B. R.* 4 *Vin.* 528.

By Can. 89. All churchwardens or queſtmen in every pariſh ſhall be choſen by the joint conſent of the miniſter and the pariſhioners, if it may be; but if they cannot agree upon ſuch a choice, then the miniſter ſhall chooſe one, and the pariſhioners another: and without ſuch a joint or ſeveral choice none ſhall take upon them to be churchwardens.

Warner, one of the churchwardens of *Allhallows* in *London*, prayed a prohibition; for that, whereas by the cuſtom of the ſaid pariſh, the pariſhioners uſed every year to elect one of the pariſh, who had borne the office of ſcavenger, ſideſman, or conſtable, to be churchwarden; and that every year one who had been ſo elected churchwarden, was to continue a year longer, and to be the upper churchwarden, and another was to be choſen to him, who is called the under churchwarden; that ſuch a choice being made in that pariſh of the ſaid *Warner* to be churchwarden, the parſon notwithſtanding that election nominated one *Carter* to be churchwarden, and procured him to be ſworn in the eccleſiaſtical court to be churchwarden, and denied the ſaid *Warner* to be churchwarden according to the election of the pariſhioners; and this by colour of the late canon, that the parſon ſhould have the election of one of the churchwardens; and this being againſt the cuſtom, a prohibition was prayed, and a precedent ſhewn in the common bench, *E.* 5. *Ja.* for the pariſhioners of *Walbrook* in *London*, where ſuch a prohibition was granted; for it being a ſpecial cuſtom, the canons cannot alter it, eſpecially in *London*, where the parſon and churchwardens are a corporation, to purchaſe and demiſe their lands; if every parſon might have election of one churchwarden, without the aſſent of the pariſhioners, they might be much prejudiced thereby. *Cro. Jac.* 532. *Eaſt.* 17 *Jac.* 1. *Warner's Caſe.*

But although the greateſt part of the pariſhes in *London* chooſe the churchwardens by cuſtom; yet in all the new erected pariſhes the canon ſhall take place (unleſs the act of parliament, in virtue of which any church was erected, ſhall have ſpecially provided that the pariſhioners ſhall chooſe both;) inſomuch as no *cuſtom* can be pleaded in ſuch new pariſhes. *Gibſ.* 215.

The cuſtom was, for the parſon to appoint one, and the two old churchwardens the other: but it went no further. In this caſe the two churchwardens could not agree, ſo the one preſents *Barwick*, and the pariſhioners at large chooſe *Catten*. It was inſiſted for *Barwick*, that his caſe was like that of coparceners, where if they diſagree, the ordinary may admit the preſentee of which he will, except the eldeſt alone preſents. On the other ſide it was ſaid, that the caſes widely differed; for in the caſe of a preſentation, the ordinary hath a power to refuſe, but he hath not ſo in the caſe of churchwarden, for they are a corporation at Common law, and more temporal than ſpiritual officers. And a caſe was cited to have been adjudged in the King's Bench, where to a *mandamus* to ſwear in a churchwarden, the ordinary returned that he was a very unfit perſon; but a peremptory *mandamus* was granted, becauſe the ordinary was not a judge in that caſe. And the court held, that by this diſagreement the cuſtom was laid out of the caſe; and then they muſt reſort to the canon: under which, *Catten* being duly elected, they decreed for him, with 60 *l.* coſts. *Stra.* 145. *Hill.* 5 *Geo.* 1. *Catten* and *Barwick*, at a court of delegates.

In ſome caſes the lord of a manor preſcribeth for the appointment of churchwardens; and this ſhall not be tried in the eccleſiaſtical court, although it be a preſcription of what appertains to a ſpiritual thing. *God.* 153.

Prohibition was granted to the ſpiritual court, where it was libelled againſt the defendant, for not appearing to take upon him the office of churchwarden, though thereunto *appointed by the ordinary*. And it was held, that although the pariſhioners and parſon neglect for ever ſo long to chooſe churchwardens, yet the ordinary hath no juriſdiction; for churchwardens were a corporation at Common law, and they are different from queſtmen, who were the creatures of the reformation, and came in by the Canon law. The canons ſay, that churchwardens ſhall be choſen by the parſon and pariſhioners; and if they diſagree, then one by the parſon, and the other by the pariſhioners; and otherwiſe they ſhall not be. By the court, The proper way is, to take a *mandamus* out of the King's Bench. *Str.* 52.

2. *Who are exempted from being churchwardens.*

All *peers* of the realm, by reaſon of their dignity, are exempt from the office of churchwarden. *Gibſ.* 215. So are all *clergymen*, by reaſon of their order. *Id.* In like manner all *parliament men*, by reaſon of their privilege. *Id.*

If an *attorney* of the King's Bench be made a churchwarden of a pariſh, he ſhall have a writ of privilege out of the King's Bench, ſhewing his privilege to be diſcharged thereof, by reaſon of his attendance in the ſaid court. *Felix Wilſon*, being an attorney of the King's Bench, was made churchwarden of *Hanwell*, and he refuſed,

fuſed, and was ſued in the ſpiritual court to take upon him the office; and a prohibition was granted. So in like manner, Mr. *Baker* being choſen churchwarden of *Aldermanbury* in *London*, ſuch writ was granted. 2 *Rol. Abr.* 272. *Eaſt.* 14 *Car.* 1. and *Trin.* 15 *Car.* 1.

Stampe, *clerk of the King's Bench*, was choſen churchwarden of *Kingſton*, and had a writ of privilege to the ſpiritual court, requiring them not to compel him to take the oath; which writ being diſobeyed, he had a prohibition. 1 *Rol. Abr.* 368.

By ſtat. 6 *Will.* 3. *c.* 4. *ſect.* 2, 3. Every perſon that ſhall uſe and exerciſe the art of an *apothecary* within the city of *London* and ſeven miles thereof, being free of the company of Apothecaries, and who ſhall be duly examined of his ſkill in the ſaid myſtery, and ſhall be approved for the ſame, ſhall, for ſo long as he ſhall uſe and exerciſe the ſaid art, and no longer, be freed and exempted from all pariſh offices, nor be diſquieted or diſturbed by reaſon thereof; he ſhall, on producing a teſtimonial under the common ſeal of the ſaid corporation of ſuch his examination, approbation, and freedom, to the perſon by whom he ſhall be ſo elected and appointed, or by or before whom he ſhall be ſummoned, returned, or required to ſerve or hold any ſuch office, be abſolutely diſcharged from the ſame, and ſuch nomination, election, return, and appointment ſhall be void and of none effect. And all perſons that ſhall uſe and exerciſe the ſaid art of an apothecary within any other part of the realm, and have been brought up and ſerved in the ſaid art as apprentices for ſeven years, according to the ſtatute of the 5 *Eliz. cap.* 4. ſhall be freed and exempted from all ſuch offices within the ſeveral places where they live, ſo long as they ſhall uſe and exerciſe the ſaid art, and no longer; and if any perſon ſo qualified ſhall be elected or choſen into any ſuch office, ſuch nomination, election, return, and appointment ſhall be void, unleſs he ſhall voluntarily conſent and agree to hold the ſame.

By ſtat. 1 *Will. & M. c.* 18. *ſect.* 7, 11. If any perſon *diſſenting from the church of* England ſhall be choſen, or otherwiſe appointed to bear the office of churchwarden, or any other parochial office, and ſuch perſon ſhall ſcruple to take upon him ſuch office in regard of the oaths, or any other matter or thing required by the law to be taken or done in reſpect of ſuch office, he ſhall and may execute the ſame by a ſufficient deputy by him to be provided, that ſhall comply with the laws in that behalf: provided, that the ſaid deputy be allowed and approved by ſuch perſons, and in ſuch manner, as ſuch officer ſhould by law have been allowed and approved. And every teacher or preacher in holy orders, or pretended holy orders, that is a miniſter, preacher, or teacher of a congregation, and duly qualified by the ſaid act, ſhall be exempted from being choſen or appointed to bear the office of churchwarden, or any other parochial office.

By ſtat. 10 & 11 *W.* 3. *cap.* 23. All perſons who have *proſecuted a felon* to conviction, are exempted from the office of churchwarden in the pariſh where the offence was committed.

No perſon *living out of the pariſh*, although he occupies lands within the pariſh, may be choſen churchwarden; becauſe he cannot take notice of abſences from church, nor diſorders in it, for the due preſenting of them. *Gibſ.* 215.

3. *Of their intereſt in, and power over the things belonging to the church.*

The churchwardens, when choſen, are a corporation intruſted with the care and management of the goods belonging to the church, which they are to order for the beſt advantage of the pariſhioners; they are likewiſe enabled to take goods for the benefit of the church, but cannot diſpoſe of them without the pariſhioners. 1 *Rol. Abr.* 393. 2 *Inſt.* 492. 1 *Rol. Rep.* 67. *Yelv.* 173.

They have ſuch a ſpecial property in the organ, bells, pariſh-books, bible, chalice, ſurplice, *&c.* belonging to the church, that for the taking away, or for any damage done any of theſe, they may bring an action at law, and therefore the parſon cannot ſue for them in the ſpiritual court. 1 *New Abr.* 372.

If two churchwardens ſue in the ſpiritual court for a levy towards the reparation of their church, and have ſentence to recover, and coſts aſſeſſed, and after one of them releaſes, yet the other may proceed for the coſts, *&c.* for churchwardens have nothing but to the uſe of the pariſh, and the corporation conſiſts of both; and one only cannot releaſe or give away the goods of the church. *Cro. Jac.* 235. *Yelv.* 173. 2 *Brownl.* 215. *S. C.*

Alſo they have ſuch a ſpecial property in the goods of the church, that when they are ſtolen they may bring an appeal of robbery for them: they may alſo ſue the offender in the ſpiritual court, *pro ſalute animæ*, but not to recover damages. 2 *Hawk. P. C.* 167.

But the churchwardens have no right to, or intereſt in the freehold or inheritance of the church, which alone belongs to the pariſh or incumbent. *Comp. Incumb.* 381.

Alſo the ſeats in the church being fixed to the freehold, the churchwardens cannot diſpoſe of them alone, nor can the churchwardens and rector jointly diſpoſe of them without the conſent of the ordinary; and though ſuch diſpoſitions have been made, yet it has been always preſumed that it was ſo done with the conſent and approbation of the ordinary. See 12 *Co.* 105. *Hetl.* 94. *Godb.* 200. 2 *Bulſt.* 150. *Hob.* 69. *Moor* 878. *Comp. Incumb.* 1 *Salk.* 167.

But as ſeats are erected for the more convenient attending of divine ſervice, and as the pariſhioners are at the expence of erecting them, and keeping them in repair, if any of them be taken away, though they are fixed to the freehold, yet the churchwardens, and not the parſon, ſhall bring the action againſt the wrong-doer. *Comp. Incumb.* 382.

It is ſaid to have been holden, that at Common law a churchwarden may maintain an action upon the caſe for defacing a monument in the church, *Godb.* 279.

4. *Of their power and duty in making rates and preſentments, and hindering irreverence in the church, and their power in ſeveral other matters.*

The churchwardens have no power to make any rate themſelves, excluſive of the pariſhioners, their duty being to ſummon the pariſhioners, who are to meet for that purpoſe, and when they are aſſembled, a rate made by the majority preſent ſhall bind the whole pariſh, although the churchwardens voted againſt it. See *Comp. Incumb.* 389.

But if the churchwardens give the pariſhioners due notice, that they intend to meet for that purpoſe, and the pariſhioners refuſe to come, or being aſſembled, refuſe to make any rate, they may make one without their concurrence; for as they are liable to be puniſhed in the eccleſiaſtical courts for not repairing the church, it would be unreaſonable that they ſhould ſuffer by the wilfulneſs and obſtinacy of others. 1 *Vent.* 367. 1 *Mod.* 79, 194.

The churchwardens in ſummoning the pariſhioners need not to do it from houſe to houſe, but a general public ſummons at the church is ſufficient, and the major part of them that appear upon ſuch ſummons, will bind the whole pariſh. 1 *Vent.* 367. *Comp. Incumb.* 389.

On a motion for a prohibition it appeared, that the libel recited that the dean of, *&c.* had preſented that the church and chancel of *D.* was out of repair, *&c.* and that the churchwardens of the ſaid pariſh did make, or cauſe to be made, a certain rate upon the inhabitants thereof, towards the charge of repairing the ſaid church and chancel; and that the churchwardens had accordingly repaired the church and chancel, and beautified the ſame with ornaments, and that *H.* was a pariſhioner of the ſaid pariſh, and refuſed to pay his proportion of the ſaid rate; and it being objected, *firſt*, That the churchwardens only could not make a rate; *ſecondly*, That the parſon

parſon alone ought to repair the chancel; a prohibition was granted generally, though it was ſtrongly inſiſted on that the prohibition ought to go *quoad* the rate for repairs of the chancel only. *Carth.* 360. 1 *Salk.* 165. *Comb.* 344. 5 *Mod.* 384. *S. C.*

Preſentments made by churchwardens relate to the church, the parſon, and pariſhioners, in which they are to be guided by the articles delivered them; but theſe articles muſt be agreeable to the laws of the church, and particularly to the canons made and agreed on in the year 1603, they need not take a particular oath upon all the preſentments they make, but may do it by virtue of their general oath of churchwardens. *Cro. Car.*. 291. 1 *Vent.* 114. 2 *Vent.* 42.

The oath is to be general, *viz.* to do all things which appertain to their office; and therefore if the oath tendered requires them to preſent matters not preſentable by law, they are not obliged to take it, nor are they to be required to preſent or accuſe themſelves. *Hard.* 364.

Alſo if the eccleſiaſtical court proceeds againſt the churchwardens in matters not within their juriſdiction, an action on the caſe lies againſt them. *Hard.* 364.

And if the churchwardens maliciouſly preſent an innocent perſon for any crime, by which he is put to expence, or ſuffers in his good name or reputation, an action on the caſe lies. *Cro. Gar.* 285. 1 *Sid.* 463. 1 *Vent.* 86.

In aſſault and battery againſt a churchwarden, he juſtified that the plaintiff was at church in time of prayers with his hat on, and that he demanded of him to pull it off, and becauſe he did not do it, the churchwarden took off his hat, and laid it by him; and the court held this a good juſtification; and that churchwardens may juſtify to wake a man, to ſwitch boys that are at play, and turn an excommunicated perſon out of the church. 1 *Lev.* 196.

Churchwardens may reſtrain and hinder any ſtranger not licenſed, from preaching in their church or chapel. *Compt. Incumb.* 335. See 2 *Bulſt.* 49.

Every churchwarden is alſo an *overſeer of the poor*; by the ſtatute of the 43 *El. c.* 2.

The churchwardens, or the conſtable, ſhall levy the penalty for keeping an unlicenſed *alehouſe*; by the 3 *C. c.* 3.

They ſhall receive the penalties, for hawking *ſpirituous liquors*; by the 9 *G.* 2. *c.* 23.

They (or the overſeers of the poor) ſhall levy the penalty, for ſelling *corn* by wrong meaſure; by the 22 *C.* 2. *c.* 8.

They, and the overſeers of the poor, ſhall diſtribute amongſt the poor foreign cattle imported, forfeited, and killed; by the 32 *C.* 2. *c.* 2.

They, or the overſeers of the poor, ſhall levy the penalties relating to *weights* and *meaſures*; by the 16 *C.* 2. *c.* 19. and 22 *C.* 2. *c.* 8.

They ſhall carry hawkers and pedlars trading without licence before a juſtice of the peace; by the 9 & 10. *W.* 3. *c.* 27.

They, or the overſeers of the poor, ſhall pay to the high conſtables the general *county rate* out of their money collected for the poor; by the 12 *G.* 2. *c.* 29.

They ſhall receive the penalties for *ſervants carelſsly firing houſes*; by the 6 *Ann. c.* 31.

They ſhall receive the penalties for *tracking hares in the ſnow*, and other game penalties; by the reſpective game acts.

They ſhall join with the conſtable and ſurveyor of the highways in chooſing and returning new ſurveyors. Stat. 3 *Will. & Ma. c.* 12.

Two churchwardens ſue in the ſpiritual court for a levy towards the reparation of their church, and had a ſentence to recover, and coſts aſſeſſed; the one releaſeth, and the other ſues for the coſts, and there this releaſe was pleaded, and diſallowed. Whereupon he prays a prohibition; and all this matter was diſcloſed in the prohibition; and the defendant thereupon demurred in law. And now it was moved, that this releaſe by the one, being in the perſonalty, ſhould diſcharge the intire. But it was reſolved by all the court to the contrary; for churchwardens have nothing but to the uſe of the pariſh, and therefore the corporation conſiſts in the churchwardens; and the one ſolely cannot releaſe, nor give away the goods of the church; and the coſts are of the ſame nature, which the one without the other cannot diſcharge. And of that opinion was all the court of King's Bench; wherefore it was adjudged for the defendant. *Cro. Ja.* 134.

5. *Of their account, and of actions brought by and againſt them.*

By *Can.* 89. "All churchwardens at the end of their year, or within a month after at the moſt, ſhall before the miniſter and the pariſhioners give up a juſt account of ſuch money as they have received, and alſo what particularly they have beſtowed in reparations, and otherwiſe for the uſe of the church. And laſt of all, going out of their office, they ſhall truly deliver up to the pariſhioners whatſoever money, or other things of right belonging to the church or pariſh, which remaineth in their hands; that it may be delivered over by them, to the next churchwardens, by bill indented."

A juſt account] If the cuſtom of the pariſh is, for a certain number of perſons to have the government thereof, and the account is given up to them, the cuſtom is good in law, and the account given to them is a good account, *Gibſ.* 216.

By bill indented] *Lindwood*, ſpeaking of the inventory of the goods of the church to be delivered in writing to the archdeacon, ſays, It were good that theſe writings ſhould be indented, ſo that one part might remain with the archdeacon, and the other with the pariſhioners; from whence this branch of the preſent canon ſeemeth to have been taken. *Gibſ.* 216.

If money be diſburſed by churchwardens for repairing the church, or any thing elſe merely eccleſiaſtical, the ſpiritual courts ſhall allow their accounts; but if there be any thing elſe that is an agreement between the pariſhioners, the ſucceeding churchwardens may have an action of account at law, and the ſpiritual court in ſuch caſe hath not juriſdiction. 12 *Mod.* 9.

If the churchwardens, by the conſent and agreement of the pariſhioners, take a ruinous bell and deliver it to a bell-founder, and that he by their agreement ſhall have for the caſting thereof 4 *l.* and ſhall retain it till the 4 *l.* be paid; this agreement of the pariſhioners ſhall excuſe the churchwardens in a writ of account brought againſt them by their ſucceſſors. 1 *Rol. Abr.* 121. *pl.* 9.

If the churchwardens and pariſhioners make an aſſeſſment, and the churchwardens lay out the whole money, but before the whole is collected their time is expired, and new churchwardens are choſen, the former churchwardens, by having preſented ſuch pariſhioners as refuſed to pay before the determination of their time, may ſtill proceed againſt them; otherwiſe the new churchwardens muſt collect ſuch arrears, and reimburſe their predeceſſors. See *Prec. in Chan.* 42. 2 *Ven.* 262.

If goods belonging to the church are taken away, and the churchwardens for the time being neglect to bring an action, the ſucceeding churchwardens may, by virtue of their office, bring an action againſt the wrong doer, but they muſt declare *ad damnum parochianorum*, and not *ipſorum*; though the old churchwardens, in whoſe time the fact was done, may lay it either way. *Cro. Eliz.* 145, 179. 1 *Leon.* 177.

If *A.* was churchwarden of *B.* and at the end of the year gave up his accounts to his ſucceſſor, and yet *A.* is falſly and maliciouſly cited by *D.* into the eccleſiaſtical court to render an account, and at the requeſt of *D.* he is excommunicated for not rendering up his account, an action lies againſt *D.*

If a churchwarden in any caſe is maliciouſly ſued in the ſpiritual court for not making up his account, and is excommunicated, when in fact it hath been duly made, he may have a prohibition; and alſo an action upon the caſe will lie. *Gibſ.* 216. *Bunb.* 247.

Where

Where churchwardens have paſſed their accounts at a veſtry, the ſpiritual court ſhall not afterwards proceed againſt them to account upon oath. *Bunb.* 289.

The churchwardens were cited into the court of *Litchfield* to account. They pleaded, that they had accounted at the veſtry, according to law; which was rejected; and a prohibition was granted. For the ordinary is not to take the account; he can only give a judgment that they do account; and to what purpoſe ſhould they be ſent back to thoſe who have taken their account already? *Str.* 974.

The ſpiritual court hath no juriſdiction to ſettle the churchwardens accounts. And a prohibition was granted, after ſentence allowing the accounts, and an appeal to the arches. *Str.* 1133.

And if the churchwardens have laid out the pariſh money imprudently and improvidently; yet if it be truly and honeſtly laid out, they muſt be reimburſed again: and the pariſhioners can have no remedy herein, unleſs ſome fraud or deceit be proved againſt them; becauſe the pariſh have made them their truſtees. But if they be going on in an expenſive way, the pariſhioners may complain to the ordinary, in order to give a check to them, or to procure (Dr. *Gibſon* ſays) a removal of them from their office. *Gibſ.* 196.

Adjudged, that the churchwardens *Prudence* and *Bond* could not cite the defendant *Dent* into the ſpiritual court, for non-payment of his church-rate, after their year was expired; for they can only ſue in their politick capacity, and cannot inſtitue any ſuit after that capacity is gone. It was agreed, that if the ſuit had been begun within their year, they might have proceeded in it after their year was out, this being of neceſſity to prevent people from delays in order to wear out the year; but in regard this ſuit was not commenced till the year was out, and no precedents were ſhewn to warrant this ſuit, the defendant *Dent* was diſmiſſed. *Str.* 852.

If the churchwardens for the time being neglect to bring an action for any of the goods of the church taken away; their ſucceſſors may bring treſpaſs for them, in reſpect of their office: but then the new churchwardens muſt ſay, to the damage *of the pariſhioners*, and not *of themſelves*; though the old churchwardens, in whoſe time the goods were taken away, might ſay either. *Watſ.* c. 39.

And if any of the goods of the church are detained, or not delivered by the predeceſſor; the ſucceſſor hath an action againſt him alſo. *Gibſ.* 216.

On a bill in Chancery againſt ninety pariſhioners, by the executrix of one of the churchwardens of *Woodford*, to be reimburſed money laid out by the teſtator as churchwarden, for rebuilding the ſteeple of the church; it was objected, that this matter was proper for the eccleſiaſtical court, and not for this court. But by *Harcourt* Chancellor, The plaintiff is proper for relief in this court, and there are many precedents of the like nature. And it was decreed, that the pariſhioners ſhould reimburſe the plaintiff the money laid out by her teſtator, with coſts of this ſuit; and that the money ſhould be raiſed by a pariſh rate. 4 *Vin.* tit. *Churchwardens.*

The churchwardens, as being a corporation for the goods of the pariſh, commenced a ſuit, with the conſent and by order of the pariſh, concerning a charity for the poor; in which ſuit they miſcarried. And then they brought a bill againſt the ſubſequent churchwardens, to be repaid the coſts by them expended; and had a decree for it. It was proved, that from time to time the pariſh was made acquainted with what they did; and though there was no veſtry by preſcription, yet a veſtry-book, kept for the pariſh acts, was allowed as evidence of their conſent. They are the truſtees of the pariſh; and the pariſhioners ought to contribute, and not lay the burden upon thoſe poor people the churchwardens: and the annual ſucceſſive churchwardens need not to be made parties, as they are renewed. By the Maſter of the Rolls. 4 *Vin.* tit. *Churchwardens.* C.

By ſtat. 11 *Geo.* 2. *c.* 26. Churchwardens, *&c.* are required to carry hawkers of brandy, *&c.* before juſtices of peace.

By the ſtat. 3 & 4 *W. & M. cap.* 11. In all actions to be brought in the courts of *Weſtminſter*, or at the aſſizes, for money miſpent by churchwardens, the evidence of the pariſhioners, other than ſuch as receive alms, ſhall be taken and admitted.

Churchwardens are comprehended within the purview of the ſtatutes 7 *Jac.* 1. *cap.* 5. and 21. *Jac.* 1. *cap.* 12. as to pleading the general iſſue to actions brought againſt them, and as to double coſts when they have judgment.

But in action on the caſe againſt a churchwarden for a falſe and malicious preſentment, though there be judgment for him, yet he ſhall not have double coſts; for the ſtatute does not extend to ſpiritual affairs. *Cro. Car.* 285, 286.

Church-yard. See **Church.**

Churcheſſet, (*Ciricſceat, chirſet,* or *curcſcet,*) A Saxon word mentioned in *Domeſday*, and interpreted, *quaſi ſemen eccleſiæ*, corn paid to the church. *Fleta* call it *circſed, lib.* 1. *cap.* 47. and thereof writes thus: it ſignifies a certain meaſure of wheat, which in times paſt every man on St. *Martin*'s day gave to the holy church, as well in times of the *Britains* as of the *Engliſh*; yet many great perſons after the coming of the *Romans* gave that contribution, according to the ancient law of *Moſes*, in the name of firſt-fruits; as in the writ of King *Canutus* ſent to the pope is contained, in which they call that contribution *church-ſed*, as one would ſay *church-ſeed. Seld. Hiſt. of Tithes. p.* 216.

Church-ſcot, *Churſot*, or cuſtomary obligations to the pariſh-prieſt: from which duty the religious had ſometimes purchaſed an exemption for themſelves and their tenants.——*Ita quod ego* Willielmus *de Putot & aſſignati mei in Eſſora erimus ſoluti & quieti de decimis minutis præſtandis & de* churſot *in villa de Neubold.*——Cartular. domus de Thelesford, MS.

Churl, Ceorle, Carl, Was in the *Saxons* time a tenant at will, of free condition, who held ſome land from the *Thane*, on condition of rent and ſervices; which *ceorles* were of two ſorts; one that hired the lord's outland or tenementary land, like our farmers; the other that tilled and manured the *inland* or *demains* (yielding *operam* not *cenſum*, work and not rent) and were thereupon called his ſockmen or ploughmen. *Vide Spelman of Feuds.*

Cillurnum, *Collerford* in *Northumberland.*

Cinders. See **Coals.**

Cinnamon, (*Cinnamomum*) Is a tree whereof the bark is known to be a pleaſant, comfortable, and medicinal ſpice, which you have deſcribed in *Gerard's Herbal, lib.* 3. *cap.* 142. This is reckoned among garbleable ſpices by ſtat. 1 *Jac. c.* 19.

Cinque Ports, (*Quinque Portus*) Are thoſe ſpecial havens that lie toward *France*, and therefore have been thought fit by our Kings from time to time to be ſuch as ought moſt vigilantly to be guarded againſt invaſion; in which reſpect the places where they are, have an eſpecial governor or keeper called, by his office, *Lord wardens of the Cinque Ports*, and divers privileges granted unto them as a particular juriſdiction, their *warden* having the authority of an admiral among them, and ſending out writs in his own name. *Crompton* in his *Juriſdictions, fol.* 28. nameth *Haſtings, Rumney, Rye, Dover, Sandwich, Winchelſea* and *Hythe*; whereof ſome, becauſe the number exceedeth five, muſt either be added to the firſt inſtitution by ſome later grant, or be accounted as appendants to ſome of the reſt.

Camden tells us, that *Kent* is accounted the key of *England*; and that *William*, called *The Conqueror*, was the firſt who made a conſtable of *Dover* caſtle, and warden of the *Cinque ports*, which he did to bring that county under a ſtricter ſubjection to his government; but King *John* was the firſt who granted the privileges to thoſe ports, which they ſtill enjoy: however, it was upon condition that they ſhould provide a certain number of ſhips at their own charge for forty days, as often as the King ſhould have occaſion for them in the wars, he being then under a neceſſity of having a navy for paſſing into *Normandy*, to recover that dukedom which he had loſt. And this ſervice the *barons of the Cinque ports* acknowledged and performed, upon the King's ſummons, attending with their

their ſhips the time limited at their proper coſts, and ſtaying as long after as the King pleaſed at his own charge. *Sommer of Rom. ports in Kent.* The *Cinque ports*, as we now account them, are *Dover*, *Sandwich*, *Rumney*, *Winchelſea*, and *Rye*, and to theſe we may add *Hythe* and *Haſtings*, which are reckoned as a part or members of the *Cinque ports:* though by the firſt inſtitution it is ſaid, that *Winchelſea* and *Rye* were added as members, and that the others were the *Cinque Ports*. There are ſeveral other towns adjoining that have the privileges of the *ports*.

The *Cinque Ports* have many *privileges*, *liberties*, and *franchiſes*, which may be ſeized and forfeited for a miſdemeanor, as where the mayor and jurats of *Hythe* ſpoke contemptibly of a *certiorari* delivered to them to remove an indictment, and refuſing to allow it, ſaying, it was no time in the year for *green plumbs*, alluding to the *green wax* with which the writ was ſealed; they were in danger of loſing their privileges for this contempt. *Cro. Car.* 252, 264, 291.

Debt by two plaintiffs, viz. *Hecker* and *Harriſon* againſt *Tyrrel*, as heir, who pleaded *riens per deſcent*, upon which they were at iſſue; and the jury found, that the defendant had aſſets by deſcent in the *Cinque ports*, and ſhewed how, *&c.* thereupon the plaintiff had judgment, and brought a *certiorari* to remove the record into Chancery, and from thence by *mittimus* to the conſtable of *Dover*, to extend a moiety of the lands in the *Cinque ports*. 1 *And.* 28.

A *contract* was made between the parties in *London*, afterwards one of them left the city, and dwelt within the *Cinque Ports*; and an action being brought againſt him upon this contract, he prayed his privilege to be ſued there; but it was denied, for though he might be ſued there, and not elſewhere, for a matter ariſing within their juriſdiction, yet where the original cauſe ariſeth in another place, he ſhall not have this privilege. *Mich.* 29 *Eliz.*

Appeal, *&c.* brought in *B. R.* by original, of a murder done in *Sandwich*, in the county of *Kent*, the writ was directed to the *ſheriff of* Kent, who having brought in the defendant by *cepi corpus*, he pleaded, that *Sandwich* (where the murder was ſuppoſed to done) is parcel of the *Cinque Ports*, *ubi breve domini regis non currit*, *qui quidem portus de Sandwich non eſt in com' Kanciæ*, and ſo prayed judgment of the writ, and pleaded over to the felony; adjudged an ill plea, for if it ſhould be good, there would be a failure of juſtice, becauſe thoſe of the *Cinque Ports* could not try the defendant, he not being within their juriſdiction; for after the murder was done at *Sandwich*, he fled into *Kent*, and was there taken: it is true, if he had pleaded, that at the time of the ſuppoſed murder he had been an inhabitant, and commorant within the *Cinque Ports*, the plea had been good, becauſe this had given a juriſdiction to the court there, who might have tried the defendant, and given ſentence of death, if he had been found guilty on the appeal; but by this plea the defendant had not ſhewed that the court there had any manner of juriſdiction in this caſe. *Yelv.* 12.

Certiorari's to remove the indictments taken in the *Cinque Ports* muſt be directed to the *mayor and jurats* before whom they are taken, and not to the *lord-warden*, becauſe they hold plea of it as juſtices of peace by virtue of their commiſſion, and not by their antient charter. *Cro. Car.* 184.

Certiorari to remove a judgment in the court at *Dimchurch*, being a member of the *Cinque Ports*, which being removed into *B. R. aſcire facias* iſſued againſt the defendant, to ſhew cauſe why the plaintiff ſhould not have execution; and there being an *alias certiorari* in this caſe, the defendant objected againſt it, for that it was *ſicut prius*, when it ought to be *ſicut alias*; but the exception was diſallowed, and the plaintiff had execution.

Habeas corpus was directed to the *lord-warden* of the *Cinque Ports* to remove the body of *T. B.* who had been a long time in cuſtody there, but no return being made, another *habeas corpus* was granted, and a pain for the contempt in not returning the firſt; for though it is uſually ſaid, that in ſome places *breve domini regis non currit*, that muſt be underſtood *breve regis ordinarium*, between party and party; but an *habeas corpus* is a prerogative writ, by which the King commands an account of the liberty of the ſubject; thereupon this writ was returned, *viz.* that time out of mind the warden of the *Cinque Ports* had a court of *admiralty* belonging to his office, and an officer to determine matters which appertain to the court, *ſecundum leges maritimas*, and that an anchor and cable were thrown in the ſea, and caſt *ſuper arenas maris*; that the priſoner took them up, and being cited to the court, and deſired to reſtore them, he refuſed, and thereupon he was committed until he pay 40 *l.* whereupon the party was remanded; for here was a cauſe returned, *viz.* that the man was cited in a matter of which they had juriſdiction, and being required to reſtore it, he refuſed, that judgment was given againſt him *ſecundum leges maritimas*, this court will intend the judgment juſt; and if it was not they cannot relieve him upon an *habeas corpus*. *Palm.* 54, 96. *Burne's Caſe.*

Prohibition to the court of *Dover*, for that they held plea there by *plaint*, in nature of a writ of partition between *tenants in common*, and proceeded to judgment and execution; for that reaſon it was held too late to move for a prohibition, he ought to bring a writ of error; but it was held, that *tenants in common* may be compelled to make *partition* in thoſe inferior courts, though not by the ſtatute; becauſe that extends only to injoin partition by writ. *Sid.* 165.

Prohibition to the *Cinque Ports*, for that they held plea there, partly by the *Chancery*, and partly by the *Admiralty*, in the ſame cauſe, *viz.* an *Admiralty proceſs* upon a *Chancery bill*; it is true, they have thoſe diſtinct courts there, but that they cannot thus confound their juriſdiction; it is true likewiſe, that in this caſe the defendant had appeared, and the cauſe was ready for ſentence; but yet ſince *a prohibition* will lie to the *Cinque Ports*, it is not the appearance of the party, and owning their juriſdiction by ſuch appearance, that will exclude *B. R.* from juriſdiction. *Sid.* 355.

Certiorari to the *mayor, jurats, and commonalty of* Winchelſea, to remove an order by them made, who return that time out of mind there have been in *Kent* five antient towns, *viz. Haſtings*, *Sandwich*, *Dover*, *Rumney*, and *Hythe*, always called the *Cinque Ports*, and in *Suſſex* two ancient towns, called *Rye* and *Winchelſea*, which are members of the ſaid *Cinque Ports*; that the town of *Winchelſea* hath been time out of mind incorporated by the name of *mayor, jurats, and commonalty*; that all the *Cinque Ports*, with their members, have been time out of mind places for ordering the preſervation of ſhipping, and by reaſon of their ſituation have always, and ought to keep beacons and *watch-houſes*; and for the better maintenance thereof, the town of *Winchelſea* uſed to make taxes and rates on every *occupier* of houſe or land within their town or liberty; that *May* 1, 32 *Car.* 2. they made a tax of 6 *d. per pound for maintaining the ſaid beacons and watch-houſes. &c.* The objection was, that this order did non ſet forth, that the *beacon and watch-houſes were in decay, or out of repair, for* if they were not, then this tax is unneceſſary; but adjudged, that it might be dangerous to the people to ſtay till the beacons were in decay, for then there would be none till repaired; and it is not to be intended that the inhabitants would charge themſelves with an unneceſſary tax, eſpecially when the major part of them concur in the taxation. *Raym.* 448. *Town of Winchelſea's Caſe.*

An *habeas corpus ad faciend' & recipiend'*, will not lie to the *Cinque Ports*, but an *habeas corpus ad faciendum & ſubjiciendum* will. *Sid.* 431.

The barons of the *Cinque Ports* ſhall have all their liberties *Mag. Chart. H.* 3. *c.* 9. 5 *El. c.* 5. *ſect.* 44, 45.

The juriſdiction of the conſtable of *Dover* caſtle reſtrained. 28 *Ed.* 1. *ſt.* 3. *c.* 7.

Wardens, *&c.* have the ſame powers as juſtices to inquire into annoyances of bridges. 22 *H.* 8. *c.* 5. *ſect.* 6, 7.

Commiſſion how to be directed to the lord warden of the *Cinque Ports* for the trial of robberies, *&c.* committed on the ſea. 27 *Hen.* 8. *c.* 4. *ſect.* 5 & 6. 28 *H.* 8. *c.* 15. *ſect.* 5 & 6. 11 & 12 *Will.* 3. *c.* 7. *ſect.* 16.

Wardens, *&c.* to take bond of recuſants going beyond ſea. 3 *Jac.* 1. *c.* 4. *ſect.* 42.

Recommendations from the lord wardens of perſons to ſerve as members for the *Cinque Ports* declared void. 2 *W. & M. ſeſſ.* 1. *c.* 7.

Six days allowed from the receipt of the writ of ſummons for calling a parliament for the delivery of the precept. 10 & 11 *Will.* 3. *c.* 7. *ſect.* 1.

Two ſhillings payable by the returning officer of the clerk of the crown, for every burgeſs of the *Cinque Ports.* 10 & 11 *W.* 3. *c.* 7. *ſect.* 1.

Lord warden, *&c.* to put Militia law in execution within the ports. 15 *Car.* 2. *c.* 4. *ſect.* 19. 30 *Geo.* 2. *c.* 25, *ſect.* 68.

For other matters, ſee **Dover, Quinque portus.** And ſee 4 *Inſt.* 222.

Cippus, A pair of ſtocks to put offenders in.——— *Habeant, necnon* cippos *& concluſoria in ſingulis villis, ad correctionem delinquentium.* Mon. Angl. 2 par. f. 349. a.

Circa, *i. e.* A watch: from which *circuitor: Quatuor circuitores monaſterii quos alio nomine* circas *vocant juxta preceptum Sancti Benedicti, certis horis circuire debent monaſterii officinas.* Du Freſne.

Circada, A tribute which was paid to the biſhop or archdeacon of viſiting the churches. *Du Freſne.*

Circuit courts in Scotland. See **Scotland** (courts).

Circuity of Action, (*Circuitus actionis*) Is when an *action* is rightfully brought for a duty, but yet about the buſh, as it were, for that it might have been as well otherwiſe anſwered and determined, and the ſuit ſaved; and becauſe the ſame action is more than needful, it is called *circuity of action*; as if a man grant a rent-charge of ten pounds out of his manor of *Dale,* and after the grantee diſſeiſes the grantor of the ſame manor, and he brings an aſſize, and recovers the land and twenty pounds damages, which twenty pounds being paid, the grantee of the rent ſues his action for ten pounds of the rent due during the time of his diſſeiſin, which if no diſſeiſin had been, he muſt have had. This is call *circuity of action,* becauſe it might have been more ſhortly anſwered; for whereas the grantor ſhall receive 20*l.* damages, and pay 10*l.* rent, he might have received but the ten pounds only for the damages, and the grantee might have cut off, and kept back the other 10*l.* in his hands, by way of detainer for his rent, and ſo thereby might have ſaved his *action.*

Circumſpecte agatis, Is the title of a ſtatute made 13 *Ed.* 1. *anno domini* 1285. preſcribing ſome caſes to the judges, wherein the King's prohibition lies not. *Co. lib.* 7. *fo.* 44. *lib.* 5. *f.* 67. and 2 *par. Inſt. fol.* 487.

Circumſtantibus, *By-ſtanders,* Is a word of art, ſignifying the ſupply or making up of the number of jurors (if any impanelled do not appear, or appearing, be challenged by either party) adding to them ſo many other of thoſe that are preſent or ſtanding by, as will ſerve the turn. 35 *H.* 8. *cap.* 6. 5 *Eliz. cap.* 25.

Cirencester. See **Corinium.**

Ciriſceat, (Sax. *Ciric-ſceat, vectigal eccleſiaſticum, frumenti tributum*) *Church-Scot,* A certain portion, tribute, or payment made to the *church* of corn, fruit, or any other thing. *Fleta* called it *Circſed, quaſi ſemen ecleſia debitum. Joh. Southam ad Feſtum S. Martini in yeme debet* 1 *gallinam (de reditu)* & 5 *gallinas de* chirſeat. *Cuſtum. Monaſt. de Bello. fol.* 87. *a.* This tribute was anciently payable at the feaſt of St. *Martin,* as appears by *Domeſday,* and called by Sir *Edw. Coke* church ſeed. *Coke on Littl.* fol. 88. b. See **Churcheſſet.**

Ciriſchus, *homon* Churl, or coutry-man.

Ciſimus, A beaſt, whoſe ſkin was uſed to make rich garments.

Ciſimus *obrepſit & veſtitura potenter*
Marturis, & ſpolio non leviore bever.

Citation, (*Citation* A ſummons to appear, applied particularly to proceſs in the ſpiritual court. The eccleſiaſtical courts proceed according to the courſe of the Civil and Canon law, *citation, libel, &c.* A perſon is not generally to be cited to appear out of the dioceſe or peculiar juriſdiction where he lives, unleſs it be by the archbiſhop, in default of the ordinary; where the ordinary is party to the ſuit, in caſes of appeal, *&c.* And by law a defendant may be ſued where he lives; tho' it is for ſubſtracting tithes in any other dioceſe, *&c.* 1 *Nelſ.* 449. By the *ſtat.* 23 *Hen.* 8. *c.* 9. Every archbiſhop may cite any perſon dwelling in any biſhop's dioceſe within his province for hereſy, *&c.* if the biſhop or other ordinary conſents, or if the biſhop or ordinary, or judge, do not his duty in puniſhing the offence. Where perſons are cited out of their dioceſe, and live out of the juriſdiction of the biſhop, a prohibition or conſultation may be granted: but where perſons live in the dioceſe, if when they are cited they do not appear, they are to be excommunicated, *&c.* The above ſtatute was made to maintain the juriſdiction of inferior dioceſes; and if any perſon is cited out of the dioceſe, *&c.* where the Civil or Canon law doth not allow it, the party grieved ſhall have double damages. If one defame another within the peculiar of the archbiſhop, he may be puniſhed there; although he dwell in any remote place out of the archbiſhop's peculiar. *Godb.* 190.

Citatio ad inſtantiam partis, Is mentioned in ſtat. 22 & 23 *Car.* 2. for laying impoſitions on proceedings at law.

City, in Lat. *Urbs, civitas* and *oppidum:* It is named *civitas,* in regard it is governed in juſtice, and order of magiſtracy. *Oppidum,* for that it contains a great number of inhabitants; and *urbs,* becauſe it is in due form ſurrounded with walls. *Civitas,* according to *Ariſtotle lib. Politicor. cap.* 1. is defined to be a certain or uniform government of the inhabitants, & *Cæſar civitatem vocat populum eodem jure utentem.* Camb. Brit. p. 310. But this is the general definition of a commonwealth, and not of a *city,* at leaſt as we now a-days take it. *City* is a word which hath obtained ſince the conqueſt: for in the time of the *Saxons* there were no *cities,* but all great towns were called *burghs*; and even *London* was then called *Lunden burgh, i. e. London borough.* And long after the conqueſt the word *city* is uſed promiſcuouſly with *burgh,* as in the charter of *Leiceſter,* it is called both *civitas* and *burgus*; which ſhews that my Lord *Coke* was miſtaken, when he tells us that every *city* was or is a biſhop's ſee: nor had *Glouceſter* then any biſhop, though it is called a *city* in *Domeſday.* And himſelf obſerves in another place, that *Cambridge* was a *city* by ancient record, *viz. Mich.* 7 *R.* 1. *Rot.* 1. though it never had a biſhop. And in the ſtat. 11 *H.* 7. *c.* 4. it is called *Cambridge* town.

So that though the word *city* ſignifies with us ſuch a town corporate as hath uſually a biſhop and cathedral church, yet it is not always ſo: and *Crompton* reckoning our *cities,* leaves out *Ely,* though it has a biſhop and a cathedral church. In ſtat. 35 *Eliz. cap.* 6. *Weſtminſter* is called a *city*; and it appears by the ſtatute 35 *H.* 8. *c.* 10. that then there was a biſhop of *Weſtminſter.* But by letters patent, dated *May* 21, 2 *Eliz.* (purſuant to an act of parliament of 1 *Eliz.* not printed) the revenues of that late monaſtery were veſted in the *dean and chapter of the collegiate church of* Weſtminſter, which hath cauſed error in the pleading of ſome caſes, by ſtiling it the *cathedral,* for *collegiate* church of *Weſtminſteri Caſſanæus de Conſuetud. Burgun. pag.* 15. ſaith that *France* hath within its territories one hundred and four *cities*; and gives his reaſon, becauſe there are ſo many ſees of archbiſhops and biſhops. *Cowell, ed.* 1727.

Citizens (*Cives*) Of *London,* are either freemen, or ſuch as reſide and keep a family in the city, *&c.* and ſome are citizens and freemen, and ſome are not, who have not ſo great privileges as the others. The citizens of *London* may preſcribe againſt a ſtatute, becauſe their liberties are reinforced by ſtatute. 1 *Roll. Rep.* 105.

Civil law, Is defined to be that *law* which every particular nation, commonwealth, or city, has eſtabliſhed peculiarly

peculiary for itſelf: *Jus civile quod quiſque populus ſibi conſtituit*. But more ſtrictly the *Civil law* is that which the old *Romans* uſed, compiled from the laws of nature and of nations. The twelve tables were the foundation of this law, which for its great wiſdom is as it were the Common law, or the foundation of it, in all well-governed kingdoms, a very few only excepted: and no other laws are eſteemed comparable to it for its equity. The *Civil law* is either *written* or *unwritten*; and the *written law* is publick or private: publick, which immediately regards the eſtate of the commonwealth, as the enacting and execution of laws, conſultations about war and peace, eſtabliſhment of things relating to religion, *&c.* private, that more immediately has reſpect to the concerns of every particular perſon. The *unwritten law* is cuſtom introduced by the tacit conſent of the people only, without any particular eſtabliſhment: the authority of it is great, and it is equal with a written law, if it be wholly uninterrupted, and of a long continuance. The whole *Civil law* is contained in four books or tomes, 1. *The Code*. 2. *The Pandects* or *Digeſts*. 3. *The Inſtitutes*. 4. *The Novels* or *Authenticks*. The *Code* is divided into twelve books, and was the firſt book of the *Civil law*, which the emperor *Juſtinian* ordered to be collected. It was publiſhed in the year 534, and contains the conſtitutions, *&c.* of fifty-ſix emperors, and their wiſe councils. The firſt book of it treats of religion, prieſts, *&c.* other books are upon trade, merchandize, the Exchequer, *&c.* *The Digeſt* or *Pandects* was collected from the works and commentaries of the ancient lawyers, ſome whereof lived before the coming of our Saviour. This tome is divided into fifty books; and upon a more particular diviſion, the whole digeſt is divided into ſeven parts: the firſt part contains the elements of the law, as what is juſtice, right, *&c.* the ſecond part treats of judges and judgments; the third part of perſonal actions, *&c.* the fourth part of contracts, pawns, and pledges; the fifth part of wills, teſtaments, *&c.* the ſixth part of the poſſeſſion of goods; the ſeventh part of obligations, crimes, puniſhments, *&c.* *The Inſtitutes* contain a ſyſtem of the whole body of law, and are an epitome of the Digeſt, divided into four books; but ſometimes they correct the Digeſt. They are called *Inſtitutes*, becauſe they are of inſtruction, and ſhew an eaſy way to the obtaining a knowledge of the *Civil law:* but they are not ſo diſtinct and comprehenſive as they might be, nor ſo uſeful at this time as they were at firſt. The *Novels* or *Authenticks* were publiſhed at ſeveral times without any method. They are termed *Novels* as they are new laws, and *Authenticks*, being authentically tranſlated from the Greek into the Latin tongue; and the whole volume is divided into nine collations, conſtitutions, or ſections, and they again into 168 novels, which alſo are diſtributed into certain chapters: the firſt collation relates to heirs, executors, *&c.* the ſecond to the eſtate of the church; the third is againſt bawds; the fourth concerns marriages, *&c.* the fifth forbids the alienation of the poſſeſſions of the church; the ſixth ſhews the legitimacy of children, *&c.* the ſeventh determines who ſhall be witneſſes; the eighth ordains wills to be good, though imperfect, *&c.* and the ninth contains matter of ſucceſſion in goods, *&c.* To theſe tomes of the *Civil law* we may add the book of *Feuds*, which contains the cuſtom and ſervices that the ſubject or vaſſal doth to his prince or lord for ſuch lands or fees as he holdeth of him. *The Conſtitution of the Emperors* are either by a *reſcript*, which is the letter of the Emperor, in anſwer to particular perſons who inquired the law of him; or by *edict*, which the Emperor eſtabliſhes of his own accord, that it may be generally obſerved by every ſubject; or by *decrees*, which the Emperor pronounces between plaintiff and defendant upon hearing a particular cauſe. The power of iſſuing forth reſcripts, edicts, and decrees was given to the Prince by the *Lex Regina*, wherein the people of *Rome* wholly ſubmited themſelves to the government of one perſon, viz. *Julius Cæſar*, after the defeat of *Pompey*, *&c.* And by this ſubmiſſion, the Prince could not only make laws, but was eſteemed above all coercive power of them. The matters wherein the whole *Civil law* is generally exerciſed, relate either to *perſons* in the commonwealth, or the *things* belonging or not belonging to them; or to the *actions* whereby men claim ſuch things as are due to them by the law, *&c.* The *Civil law* is allowed in the kingdom in the two univerſities, for the training up of ſtudents, *&c.* in matters of foreign treaties between princes; marine affairs *civil* and criminal; in the ordering of martial cauſes; the judgment of enſigns and arms, rights of honour, *&c.* See *Duck de Jure Civil. Roman. paſſim. Ayliff's Pandect. Strahan's Domat, Harris's Juſtin. in Præf. Liv. Hiſt. Rom. lib.* 3. *c.* 22.

Civil liſt. See **King.**

Clack; as, to *clack*, *force*, or *bard*, alias *beard*, good wool. Stat. 8 *H.* 6. *c.* 22. whereof the firſt, viz to. *clack wool* is to cut off the ſheep's mark, which makes it weigh leſs, and ſo yield the leſs cuſtom to the King. To *force wool* is to clip off the upper and hairy part of it. To *bard* or *beard* it, is to cut the head and neck from the reſt of the fleece. *Noverit univerſitas veſtra nos vendidiſſe & conceſſiſſ.* 62 *ſaccos lanæ de collecta monaſterii noſtri ſine* clack *& lok god & card nigra griſſa vilem tuyſem, &c. ſine pelle.* Du Freſne.

Clades. See **Cleia.**

Cladus, *Clades*, *Clada*, *Cleta*, *Clida*, *Cleia*, From the Brit. *clie*; the preſent Iriſh *clia*, a wattle or hurdle; whence *Dublin* was formerly called *Biurle Cliet*, i. e. *Watlington*, the town of hurdles.——A hurdle for penning or folding ſheep is ſtill in ſome counties of *England* called a *cley*.——*Et in* 12 cladis ovilibus *emptis de* Nicolao Aleyn *hoc anno* 18 *den. & in ſolutis pro putatione & factura triginta* cladorum ovilium *apud parcum de* Midlington *hoc anno* 19 *den.*——Paroch. Antiq. p. 577.

Claiga. See **Cleia.**

Claim (*Clameum*) Is a challenge of intereſt in any thing that is in the poſſeſſion of another, or at leaſt out of a man's own; as *claim* by charter, by deſcent, *&c.* *Old Nat. B. f.* 11. And *claim* is either verbal, where one doth by words *claim* and challenge the thing that is ſo out of his poſſeſſion; or it is by an action brought, *&c.* and ſometimes it relates to lands, and ſometimes to goods and chattels. *Litt. ſect.* 414. Where any thing is taken wrongfully from a perſon, this *claim* is to be made; and the party making it may thereby avoid deſcents of lands, diſſeiſins, *&c.* and preſerve his title, which otherwiſe would be in danger of being loſt. *Co. Litt.* 250. A man which hath preſent right or title to enter, muſt make a *claim*; and in caſe of reverſions, *&c.* one may make a *claim* where he hath a right, but cannot enter on the lands. When a perſon dares not make an entry on land, for fear of being beaten or other injury, he may approach as near as he can to the land, and *claim* the ſame; and it ſhall be ſufficient to veſt the ſeiſin in him. 1 *Inſt.* 25. If nothing doth hinder a man having right to land from entering or making his *claim*; there he muſt do ſo, before he ſhall be ſaid to be in poſſeſſion of it, or can grant it over to another. But where the party who hath right, is in poſſeſſion already, and where an entry or *claim* cannot be made, it is otherwiſe. 1 *Rep.* 157. A *claim* will deveſt an eſtate out of another, when the party muſt enter into ſome part of the land; but if it be only to bring him into poſſeſſion, he may do it in view. By *claim* of lands in moſt caſes is intended, a *claim* with an entry in part of the land, or by a near approach to it. *Co. Litt.* 252. 254. *Poph.* 67. One in reverſion after an eſtate for years, or after a ſtatute merchant, ſtaple, or *elegit*, may enter and make a *claim* to prevent a deſcent, or avoid a collateral warranty. And *claim* of a remainder by force of a condition muſt be upon the land, or it will not be ſufficient. *Co. Lit.* 202. If a man ſeiſed of lands in right of his wife, make a feoffment in fee on condition, and the huſband dieth, and then the condition is broken, and the heirs enter; in this caſe the wife need not *claim* to get poſſeſſion of her eſtate, for the law doth veſt it in her without any *claim*. *Co. Lit.* 202. 8 *Rep.* 43. The *claim* of the particular tenant ſhall be good for him in reverſion or remainder; and of him in reverſion, *&c.* for the particular tenant. So *claim* of a copyholder, will be good

good for the lord, *&c.* But if tenant for years in a court of record *claim* the fee of his land, it is a forfeiture of his eſtate. *Plowd.* 359. *Co. Litt.* 251. A *Claim* may be made by the party himſelf; and ſometimes by his ſervants or deputy: And a guardian in ſocage, *&c.* may make a *claim* or enter in the name of the infant that hath right, without any commandment. *Co. Litt.* 245. *Claim* or entry ſhould be made as ſoon as may be; and by the Common law it is to be within a year and a day after the diſſeiſin, *&c.* and if the party who hath unjuſtly gained the eſtate, do afterwards occupy the land, in ſome caſes an aſſiſe, treſpaſs, or forcible entry may be had againſt him. *Litt. ſect.* 426, 430. If a fine is levied of lands, ſtrangers to it are to enter and make a *claim* within five years, or be barred: Infants after their age, feme coverts after the death of their huſbands, *&c.* have the like time, by ſtat. 1 *R.* 3. *cap.* 7. If a diſſeiſor levy a fine, and the diſſeiſee enters his *claim* in the record of the foot of the fine, this is not ſuch a *claim* as ſhall avoid the ſtatute. 4 *Hen.* 7. *cap.* 24. 1 *Lill. Abr.* 270.

By ſtat. 4 *Ann. c.* 16. *ſect.* 16. No claim or entry ſhall be of force to avoid any fine levied with proclamations in the Common Pleas, or in the court of ſeſſions in the counties palatine, or of grand ſeſſions in *Wales*, or ſhall be a ſufficient entry or claim within the ſtatute of limitations, 21 *Jac.* 1. *cap.* 16. Unleſs upon ſuch entry or claim an action be commenced within one year after making ſuch entry or claim, and proſecuted with effect. See *Plowd. fo.* 359. and title **Continual claim.**

Clamea admittenda in itinere per atturnatum, Is a writ whereby the King commands the juſtices in *eyre* to admit one's *claim* by attorney, who is employed in the King's ſervices, and cannot come in his own perſon. *Reg. of Writs, fol.* 19. *b.*

Clap-board, Is board cut in order to make caſks or veſſels. Stat. 35 *Eliz. c.* 11.

Clarentius. See **Herald.**

Claretum, A liquor made of wine and honey, clarified or made clear by decoction, *&c.* which the *Germans*, *French*, and *Engliſh* called *hippocras*. And it was from this, the red wines of *France* we called *clairet* and *claret*. — *Ad hæc etiam in tanta abundantia vinum hic videas, & ſiceram, pigmentum, &* claretum, *muſtum & medonem.* Girald. Cambr. *apud* Whartoni Angl. Sac. p. 2. p. 280.

Clarigarius armorum, An herald.

Clario, A trumpet. ——*Statimque clangebant* clariones *& tubæ.* Knighton, anno 1346.

Claſſiarius, A ſeaman or ſoldier ſerving at ſea.—— *Omneſque ejus capitaneos, milites &* claſſiarios.——Charta Caroli 5 Imperatoris Thomæ Comiti Surr. dat. in urbe Londinenſi, 8 Junii 1522.

Claſſicum, A ring of bells. *Proprie eſt concentus omnium inſtrumentorum ſimul ſonantium, campanis per totam civitatem ad* claſſicum *pulſantibus.*

Claud, (Brit.) A ditch.—— *Per illum rivulum uſque ad quoddam* claud *juxta* Coitmaur. *Carta Lewellei Principis Wall. dat. an.* 1198.

Claudere, To encloſe, or turn open fields into cloſes and encloſures. —— *Dedt & conceſſi totam culturam ad* claudendum *& faciendum quicquid inde dictis canonicis placuerit.* Paroch. Antiq. p. 236.

Claves inſulae, *i. e.* The keys of the iſland. In the iſle of *Man*, all ambiguous and weighty caſes are referred to twelve, whom they call *Claves inſulæ.*

Clavia, The clovery, or mace, or club. In the inquiſition of ſerjeanties in the 12th and 13th year of King *John*, within the counties of *Eſſex* and *Hertford*—— Boydin Aylet *tenet quatuor libr. terræ in* Bradwell, *per manum* Willielmi de Dona *per ſerjantiam* claviæ, *i. e.* by the ſerjeanty of the club or mace. See *Dr. Brady's Append. to Introduct. to Engl. Hiſt. p.* 22.

Clavigeratus, *i. e.* A treaſurer of a church. *Aliter* Willielmus Wallingford clavigeratus. *Monaſt.* 1 *tom. p.* 184.

Clauſe rolls *(Rotuli clauſi)* Preſerved in the *Tower*, and containing ſuch matters of records as were committed to *cloſe writs.*

Clauſentum, *Southampton.*

Clauſick, *Clauſike,* The claw-ſickneſs or foot-rot in ſheep.——*An.* 1277. *invaluit generalis ſcabies ovium per univerſam regionem* Angliæ, *quæ a vulgo dicebatur* clauſick, *per quam infectæ ſunt omnes terræ, ad quarum ſcabiem abolendam adinventa eſt quædam unctio confecta ex vivo argento & uncto porcino.* Annal. Warverle, ſub an. —— We have not loſt the diſeaſe, nor found a better receipt for it. *Cowell, edit.* 1727.

Clauſtura, Bruſh-wood for hedges or fences.—— King *Henry* the Third gave to the prior and canons of *Chetwode,*——*Quinque carucatas* clauſturæ *ad præd. terræ* clauſturam *ſuſtinendam.* Paroch. Antiq. p. 247. This ſort of wood is in many parts of *England* called *teenage*, from the Sax. *tynan*, to encloſe or ſhut; whence to *tine* the door, *i. e.* to ſhut it. It alſo ſignifies an encloſure, or that which fences it. *In ſepibus, in* clauſturis, *in communibus, &c.* Mon. Angl. tom. 2. fol. 409.

Clauſum fregit, Signifies an action of treſpaſs; and ſo called, becauſe in the writ ſuch a one is ſummoned to anſwer *quare clauſum fregit*, that is, why he did ſuch a treſpaſs. Mr. *Somner*, in his *Saxon Dictionary*, conceives the original of thoſe much-uſed words in our law pleading might come from the Saxon *eder-bryce*, which ſignifies *hedge-breaking*, the boughs which cloſe the top of the hedge being uſually called *etherings.*

Clauſum paſchae, *Stat. of Weſtm.* 1. *Lendemaine de la cluſe de paſcha*; that is, *In craſtino clauſi paſchæ*, or, *in craſtino octabis paſch.* which is all one; *viz.* the morrow of the *utas of Eaſter.* 2 *part. Inſt. f.* 157.——*Ac curiam cum viſu Franci pleg. tent. apud* Maurdin *die Jovis prox. poſt feſtum* clauſi paſchæ, anno 17 Ed. 4. *Teſtatum fuit quod, &c.* clauſum paſchæ, *i. e. Dominica in albis; ſic dictum, quod paſcha* claudat.

Clauſura heyae, The incloſure of a hedge.——*Johannes Stanley ar. clamat quod ipſe & hæredes ſui ſint quieti de* clauſura Heyæ *de* Maucclesfield, *ſcil.* clauſura *unius rodæ terræ circiter* hayam *prædict.* Rot. plac. *in itinere apud Ceſtriam. An.* 14 *H.* 7.

Clawa, A cloſe, or ſmall encloſure.——*Ego Adam Heleman frater Willielmi Heleman pro animæ meæ ſalute dedi——Deo & eccleſiæ beat. apoſtolorum Petri & Pauli de Plimpton.——Unam Domum cum horto in villa de Ovreden & unam* clawam *terræ cum pertinentiis in terra de Ovreden.——Quæ ſcilicet* clawa *terræ ſic jacet per partes.*— Ex Regiſtr. de Plimton. MS. probably from the Saxon *clea, angulus*, a nook of land.

Cleia, Cleta, Claves, A hurdle. *Si murdrum inveniatur alicubi, cuſtodiatur 7 diebus ſuper* cletam. Leges H. 1. cap. 92. *Item pro* 18 cladibus *faciendis ad ovile ſex denar.* Somner Gavel, fo. 190.

Cleptor, A thief or rogue. *Dum ſuum dapiferum a manibus peſſimi* cleptoris *ne occideretur vellet eripere.* Hoveden, anno 946. Flor. Worc. pag. 604.

Clergy *(Clerus)* Is diverſly taken; ſometimes for the whole number of thoſe who are *de clero Domini*, of our Lord's lot or ſhare, as the tribe of *Levi* was in *Judæa*; ſometimes for a plea to an indictment or an appeal, and is by *Staunford* (*Pl. Cor. lib.* 2. *c.* 41.) thus defined:—— Clergy is an antient liberty of the church, which hath been confirmed by divers parliaments, and is, when a prieſt, or one in orders, is arraigned of felony before a ſecular judge, he may pray his *clergy*; which is as much as if he prayed to be delivered to his ordinary, to purge himſelf of the offence objected. And this might be done in caſe of murder. *Coke, lib.* 4. *fol.* 46. *a.* This liberty is mentioned *in Articulis Cleri, An.* 9 *Ed.* 2. *c.* 26. And note, that the ancient courſe of law in this point is much altered: for by the ſtatute of 18 *El. c.* 7. Clerks are no more delivered to their ordinaries to be purged; but now every man to whom this benefit is granted, though not in orders, is put to read at the bar after he is found guilty, and convicted of ſuch felony, and ſo burnt in the hand, and ſet free for the firſt time, if the ordinary's commiſſioner or deputy ſtanding by do ſay,——*Legit ut clericus*; or otherwiſe he ſuffers death for his tranſgreſſion.

As to the *clergy* in general, though they claim an exemption from all ſecular juriſdiction, yet *Mathew Paris* tells us, that ſoon after *William* the Firſt had conquered

Harold, he ſubjected the biſhopricks and abbeys who held *per baroniam* (and who till then were exempted from all ſecular ſervice) that they ſhould be no longer free from military ſervices; and for that purpoſe he in an arbitrary manner regiſtered how many ſoldiers every biſhoprick and abbey ſhould provide, and ſend to him and his ſucceſſors in time of war; and having placed theſe regiſters of eccleſiaſtical ſervitude in his treaſury, thoſe who were aggrieved, departed out of the realm.

But the *clergy* were not till then exempted from all ſecular ſervice; becauſe by the laws of King *Edgar* they were bound to obey the ſecular magiſtrate in three caſes; *viz.* upon any expedition to the wars, and to contribute to the building and repairing bridges and caſtles for the defence of the kingdom.

It is probable that by *expedition to the wars*, it was not intended that they ſhould perſonally ſerve, but contribute towards the charge. One they muſt do; as appears by the petition to the King, *anno* 1267, *viz. Ut omnes* clerici *tenentes per baroniam vel feudum laicum, perſonaliter armati procederent contra regios adverſarios; vel tantum ſervitium in expeditione regis invenirent, quantum pertineret ad tantam terram vel tenementum.* Their anſwer was, That they ought not to fight with the military, but with the ſpiritual ſword, that is, with prayers and tears; that they ought to maintain peace, and not war, and that their baronies were founded in charity, for which reaſon they ought not to perform any military ſervice. *Blount. Cowell, edit.* 1727.

1. *Original of the benefit of clergy.*

2. *In what offences benefit of clergy was allowed or not, before and by the ſtat.* 25 Ed. 3. c. 4.

3. *In what offences benefit if clergy is taken away by acts of parliament, ſubſequent to ſtat.* 25 Ed. 3. c. 4.

4. *In what offences benefit of clergy is now allowed.*

5. *What perſons are or are not capable of the benefit of clergy.*

6. *At what time clergy is to be allowed, and of the manner and effect of allowing it.*

1. *Original of the benefit of clergy.*

Anciently princes and ſtates, converted to chriſtianity, in favour of the clergy, and for their encouragement in their offices and employments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and exemptions; particularly, an exemption of their perſons from criminal proceedings in ſome capital caſes before ſecular judges; which was the true original of the benefit of clergy.

The clergy increaſing in wealth, power, honour, number, and intereſt, afterwards ſet up for themſelves; and that which they obtained by the favour of princes and ſtates at firſt, they now begin to claim as their right, and a right of the higheſt nature, namely, by the law of God; and by their canons and conſtitutions endeavoured, and in ſome places obtained, vaſt extenſions of theſe exemptions both with regard to the perſons concerned, to wit, not only to perſons in holy orders, but alſo to all that had any kind of ſubordinate miniſtration relative to the church; and likewiſe in reſpect of the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately, and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtiture from *Chriſt*, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdiction.

And by this means they endeavoured, and in ſome kingdoms, and for ſome ages obtained, that there was a double ſupreme power in every kingdom; the one eccleſiaſtical, abſolute, and independent upon any but the pope, over eccleſiaſtical men and cauſes; and the other ſecular, of the King, or civil magiſtrate.

But this claim of exemption, although it obtained much in this kingdom, yet it grew ſo burthenſome, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in ſome caſes, ſometimes by the interpretation and conſtruction of the judges, and ſometimes by the contrary uſage of the kingdom: for eccleſiaſtical canons never bound in *England* farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms of the kingdom that admitted them, and only ſo far forth as they were ſo admitted.

And therefore as to the exemption of the clergy from civil ſuits between party and party only, if upon the *diſtringas* he was returned *clericus & beneficiatus non habens laicum feodum*, proceſs iſſued to the biſhop to bring him in; and in caſe of a ſtatute merchant they were by ſpecial acts exempted from arreſts by *capias*: but yet they were not exempt from the juriſdiction of civil courts in civil cauſes; yet anciently they attempted this alſo in the King's courts, but with ill ſucceſs, and ſo they never attempted it after. 2 *Hale's Hiſt. P. C.* 323, 324, 325. *M.* 7 & 8 *Ed.* 1. *R. Rot.* 13. *Cant. William Joyce* plaintiff brought an action againſt *Guy Mortimer*, rector of *Kingston*, for beating him, and cutting off his upper lip with a knife; the defendant pleaded *quod ipſe eſt clericus, & non debet hic reſpondere*, and that was all the anſwer he would give; *Et quia querela iſta non tangit vitam & membrum, ſed eſt quædam tranſgreſſio perſonalis, nec ipſe vult in curia domini regis reſpondere ad querelam iſtam:* judgment was given for the plaintiff to recover 100 *l.* damages taxed by the court, and the defendant was committed to gaol, and afterwards paid twenty marks to the King for a fine. 2 *H. H. P. C.* 325.

If the clergy were indicted in caſes criminal, but not capital, nor wherein they were to loſe life or limb, their *privilegium clericale* was not allowed them, and therefore not in indictments of treſpaſs, petty larceny, or killing *ſe defendendo*. *Stamf. P. C. fol.* 124. *a.*

If they were indicted of high treaſon, clergy was not allowable, and therefore *Hil.* 2 *H.* 4. *Rot.* 4. *B. R. Rex*, where the biſhop of *Carliſle* was indicted of high treaſon, and inſiſted upon his *privilegium clericale, quia epiſcopus unctus*, yet this claim was diſallowed, and he put upon his trial, and convicted. 2 *H. H. P. C.* 326.

Yet *Hil.* 17 *Ed.* 2. *Rot.* 87. *in dorſo, Heref. coram rege*, the biſhop of *Hereford*, indicted of high treaſon for levying war againſt the King, alledged, that he was *epiſcopus* Heref. *ad voluntatem Dei & ſummi pontificis*, and could not anſwer *abſque offenſa divina & ſanctæ eccleſiæ*. Thereupon the plea was adjourned into parliament, where the biſhop anſwered as before, and the archbiſhop of *Canterbury* claimed him, and had him; thereupon it was ordered, that day ſhould be given in the King's Bench to the biſhop, and the archbiſhop was to have him there at the day, and in the mean time a writ iſſued to the ſheriff of *Heref.* to return twenty-four to inquire, as if he had pleaded, *quod venire faciat tot & tales, &c. ad inquirendum prout moris eſt, &c. pro quali, &c.* returnable at the ſame day; the biſhop appeared accordingly in the cuſtody of the archbiſhop, and the jury found him guilty, *Ideo conſideratʼ eſt, quod prædictus epiſcopus tanquam convictus, &c. remanet penes prædictum archiepiſcopum ut prius, &c.* and all his goods and chattels, lands and tenements were ſeized into the King's hands by writ directed to the ſheriff: upon which it is obſervable, 1. That a kind of allowance is made of clergy in high treaſon. 2. That notwithſtanding his claim of clergy, yet a writ iſſued to ſummon a jury, who inquired whether guilty or not. 3. That upon this plea, and this inquiſition, though he had his clergy, it was *ut clericus convictus*. 2 *H. H. P. C.* 326, 327.

Note, In the parliament of the 1 *Ed.* 3. this judgment was reverſed for this cauſe, that the juſtices took the inquiſition, *licet idem epiſcopus in aliquam inquiſitionem ſe non poſuiſſet. Clauſ.* 1 *Ed.* 3. *part.* 1. *M.* 13. So that the judgment was given upon the inquiſition, and not upon *nihil dicit* for ſtanding mute, and therefore erroneous. 2 *H. H. P. C.* 327.

But

But afterwards *T.* 21 *Ed.* 3. *Rot.* 23. *Hertford, Rex, John Gerberge* was indicted for a conſtructive treaſon, namely, accroaching royal power, and thereupon claimed the privilege of clergy, *Et quia privilegium clericale in hujuſmodi caſu ſeditionis ſecundum legem & conſuetudinem regni hactenus obtentas & uſitatas non eſt allocandum, &c. quæſitum eſt ab eo ſæpius qualiter ſe velit acquietare*; he ſtill replied, that he was a clerk, *aſſerens ſe nolle aliam reſponſionem exhibere*; and thereupon he is committed to the marſhal *ad pœnitentiam ſuam ſecundum legem & conſuetudinem regni ſubiturum, &c.*

Note, Clergy denied in ſuch a treaſon, yet penance awarded, though the charge was treaſon.

Yet at Common law before the ſtatute of 25 *Ed.* 3. *cap.* 4. *pro clero*, it ſeems that clergy was allowable to him that was indicted for counterfeiting coin, or for counterfeiting money. *B. Clergy* 31. But that is altered by the ſtatute of 25 *Ed.* 3. *pro clero.*

If clerks were indicted with theſe clauſes, *inſidiatores viarum & depopulatores agrorum*, clergy was denied them, and therefore the act of 4 *H.* 4. *cap.* 2. was made to put theſe clauſes out of indictments, and to allow clergy, if they were in the indictment. 2 *H. Hiſ. P. C.* 328.

Again, as it was denied in reſpect of ſome offences, ſo this *privilegium clericale* was by the Common law abridged in reſpect of the perſon; for certainly by the Canon laws nuns had the exemption from temporal juriſdiction, but the privilege of clergy was never allowed them by our law. See ſtat. 21 *Jac. c.* 28. *ſect.* 6 & 7.

Again, though the ordinary took himſelf to be the judge of the allowance of the clergy, and of the purgation of the clerk, yet the King's courts took that courage to make the ordinary but a miniſter, and themſelves judges of the allowance of the clergy and purgation. 21 *Ed.* 4. 21. *b.* 9 *Ed.* 4. 28. *a.*

And ſo the judges of the Common law would oftentimes deliver the clerk to the ordinary, but *abſque purgatione*; as where the clerk is attainted by outlawry, or by judgment, or convict by his own confeſſion, or upon appeal. *Stamf. P. C. lib.* 11. *cap.* 49. 3 *H.* 7. 12. *a.* 10 *Ed.* 3. *Coron.* 247. *Hob. Rep.* 288. *Searl* and *Williams*; or if he were a notorious malefactor, *Vide* 10 *Ed.* 3. *Coron.* 247. or if he be convict by verdict of counterfeiting the ſeal or coin at Common law before the ſtatute of 25 *Ed.* 3. *lib. parl.* 18 *Ed.* 1. *Berton's Caſe*; or if he be committed by record to the ordinary *abſque purgatione. Hob. ubi ſupra.* 2 *H. H. P. C.* 328.

And in theſe caſes, if the ordinary admitted him to his purgation, he was fineable for it as a great miſdemeanor, and the party delivered by ſuch purgation ſhall be again committed to priſon, *M.* 34 & 35 *Ed.* 1. *Rot.* 59 *Kanc. B. R.* The caſe of *Hugh Forſham* delivered by *William Teſta*, and another commiſſionated from the pope; and the entry in ſuch caſes is, *Liberatur ordinario tanquam clericus convictus & utlegatus ad ſalvo cuſtodiend' periculo, quod incumbit, &c. & inhibitum eſt eidem ordinario, ne ad aliquam purgationem ipſius* A. B. *procedat domino rege inconſulto, eo quod prædictus* A. B. *pro feloniis, &c. utlegatus eſt, &c. H.* 14 *Ed.* 3. *B. R. Rot.* 19. *Rex. Suff. Lond.* The caſe of *John de Hemmyngeſton*, chaplain. But indeed, if the clerk had his clergy, and were generally delivered to the ordinary, he might admit him to make his purgation, and upon ſignification thereof by the ordinary into the Chancery, a writ ſhould iſſue to the ſheriff to deliver unto the party ſo purged all his goods and chattels ſeized into the King's hands upon that occaſion, *niſi fugam fecerit ea occaſione. F. N. B.* 66. *a.* And this is to ſhew, that whatſoever weight the clergymen laid upon their canons and their exemptions from the ſecular juriſdictions, yet their canons or conſtitutions, or pretenſions or claims of this kind were not binding here, nor ſo taken farther than either by acts of parliament, or the common acceptation of the kingdom they were received, and therefore theſe privileges received divers alterations and corrections, and reſtrictions by the temporal judges, as the occaſion required. 2 *H. H. P. C.* 329, 330.

2. *In what offences benefit of clergy was allowed or not, before and by the ſtat.* 25 Ed. 3. *c.* 4.

In caſe of high treaſon againſt the King, clergy was never allowable in this kingdom. 2 *Ha. H. P. C.* 330.

The ſtatute of 25 *Ed.* 3. *for the clergy*, was made in the parliament held in *Hil.* 25 *Ed.* 3. which was in the ſame parliament, wherein the ſtatute of declaration of treaſon was made, commonly called *the ſtatute of purveyance. Id. ib.*

By this ſtatute *pro Clero, cap.* 4. it is enacted, "That all manner of clerks, as well ſecular as religious, which ſhall be from henceforth convict before ſecular judges, for any treaſons or felonies touching other perſons than the King himſelf or his royal Majeſty, ſhall from henceforth have and enjoy the privilege of holy church, and ſhall be without impeachment or delay delivered to the ordinaries demanding them; and upon this the archbiſhop promiſeth, that upon the puniſhment and ſafe keeping of ſuch clerks offenders, which ſhall be delivered to the ordinaries, he ſhall thereof make a convenient ordinance, whereby they ſhall be ſafely kept and duly puniſhed, ſo that no clerk ſhall take courage to offend for default of correction."

At the ſame parliament it was declared what was treaſon, and amongſt the reſt, counterfeiting the great or privy ſeal, or the King's coin, is declared treaſon, and put in the ſame rank with compaſſing the King's death or levying of war, and it is thereby enacted, that no other offences than what are therein declared, be treaſon, till declared by parliament. 2 *H. H. P. C.* 331.

Before this ſtatute, there were two ſorts of treaſons that concerned the King, one was of great note, and another of leſs note.

Thoſe of the greater note were *conſpiring the King's death, levying of war againſt the King, adhering to his enemies*, and two others, that are ſince abrogated by the ſtatute of 25 *Ed.* 3. which came under the general and obſcure names of *ſedition*, and *accroaching of royal power.* 2 *H. H. P. C.* 331.

In any of theſe a party convict had not his clergy at Common law. This appears by the judgment, *T.* 21 *Ed.* 3. *B. R. Rot.* 23 *Rex. Id. ib.*

But there were other treaſons that concerned the King, which were of an inferior note, namely *counterfeiting the ſeal* and *counterfeiting the coin*, and theſe (the latter eſpecially) had only judgment as in caſe of petit treaſon, namely, to be drawn and hanged. *Id. ib.*

And it ſeems before the ſtatute of 25 *Ed.* 3. *of treaſons*, clergy was allowed in both theſe caſes, as appears by the old book of *E.* 3. *B. R.* tit. *Clergy, placito ultimo*, and the judgment in parliament of 18 *Ed.* 1. in *Berton*'s caſe, who being convict for counterfeiting the King's ſeal, had his clergy, but *tradatur ordinario ſine purgatione. Id. ib.*

But now, as to the ſtatute of 25 *Ed.* 3. *pro clero*, and the ſtatute of 25 *Ed.* 3. at the ſame parliament *de proditionibus*, laying them both together in all caſes of treaſon touching the King himſelf or his royal Majeſty, clergy is wholly taken away, and in all other caſes of treaſon or felony, clergy is allowed; and conſequently in murder, robbery, petit treaſon, clergy is reſtored and ſettled by this act of parliament. 2 *H. H. P. C.* 332.

But whatſoever is declared treaſon againſt the King by the ſtatute of 25 *Ed.* 3. *de proditionibus*, as well counterfeiting the ſeal or the money of the kingdom, as any other treaſon therein declared, is wholly exempted from clergy. 2 *H. H. P. C.* 332. cites 19 *H.* 6. 47. *b. Staunf. P. C. lib.* 2. *cap.* 42. *fol.* 124. *a. M.* 31 *Ed.* 3. *coram Rege Rot.* 18. *Rex, in dorſo, Bucks*; *caſus abbatis de Muſenden pro reſecatione & falſificatione legalis Monetæ*, 24 *H.* 8. Spelman's Reports accordant adjudge, 2 Co. Inſt. 635, 636. ſuper Artic' Cleri.

So that at this day, in all caſes of high treaſon, whether thoſe declared by the ſtatute of 25 *Ed.* 3. *de proditionibus*, or other treaſons newly enacted ſince, the privilege of clergy is wholly taken away. 2 *H. H. P. C.* 332.

In all felonies, that were at Common law before the ſtatute of 25 *Ed.* 3. *pro Clero*, and in all caſes of petit

treaſon

treaſon by that ſtatute, the privilege of clergy is reſtored and ſettled.

And therefore in all ſuch felonies or petit treaſons, which were ſuch at the time of the ſtatute of 25 *Edw.* 3. *cap.* 4. *pro Clero*, clergy is allowable, unleſs in ſuch caſes where it is taken away by ſubſequent acts of parliament, and ſo far forth only as the ſame is ſo taken away. *Id. ib.*

But there ſeem to be two felonies, where clergy was not allowable notwithſtanding this act, namely, certain acts, that by interpretation of law were hoſtile acts, viz. 1. *Inſidiatio viarum & depopulatio agrorum.* 2. Wilful burning of houſes.

Concerning the former of theſe it appears, that *inſidiatores viarum* and *depopulatores agrorum* were ouſted of their clergy, notwithſtanding the ſtatute of 25 *Ed.* 3. *cap.* 4. *pro Clero.*

Rot. Parl. 4 *H.* 4. *n.* 3. There was a complaint in parliament by the archbiſhop of *Canterbury* and clergy, whereupon it was enacted, that that general clauſe ſhould be left out in indictments, and words of the ſame effect inſerted, and that notwithſtanding the indictment carried the ſame effect, yet benefit of clergy ſhould not be denied, as appears at large by the ſtatute of 4 *H.* 4. *cap.* 2.

As to wilful burning of houſes, clergy was not allowable by the common law. 2 *H. H. P. C.* 333.

As to *ſacrilege*, though ſome later ſtatutes were made to ouſt clergy in that crime, yet it ſeems at Common law, or at leaſt after the ſtatute of 25 *Ed.* 3. *c.* 4. *pro Clero*, it was allowable, as appears 26 *Aſſiſe* 27. where it is agreed by the juſtices, that a perſon indicted of robbing a chapel and breaking a church ſhould have his clergy; but it ſeems, it was with this difference, that if the ordinary refuſed him, as he might, he ſhould not have his clergy, 20 *Ed.* 2. *Coron.* 283. *Staunf. P. C.* 123, 124. but otherwiſe the court will allow it him. 26 *Aſſiſe* 27.

3. *In what offences benefit of clergy is taken away by acts of parliament, ſubſequent to* 25 Ed. 3. c. 4.

As to new felonies made by acts of parliament ſince 25 *Ed.* 3. this general rule holds, that if an act of parliament make a felony, and doth not take away clergy in expreſs words, in all theſe caſes clergy is allowable. And if it doth make a felony, and takes away clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes clergy is allowable; as if it take away clergy in caſe the party be convicted by verdict, yet he ſhall have his clergy if he ſtand mute. 2 *Hale's Hiſ. P. C.* 334, 335.

But as to ſtanding mute, this is in part remedied by the 3 *W. c.* 9. *ſect.* 2. which enacts, that if any perſon be *indicted* of any offence, for which by virtue of any *former* ſtatute he is excluded from clergy, if he had been convicted by verdict or confeſſion; if he ſtand mute, or will not anſwer directly, or challenge peremptorily above 20 of the jury, or be outlawed, he ſhall not be admitted to his clergy. But this extends not to *appeals*, nor to offences made felonies by ſubſequent ſtatutes. 2 *Haw.* 348.

But if the ſtatute enacts generally, that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſe of felony without benefit of clergy, this excludes it in all circumſtances, and to all intents. 2 *H H.* 335.

It follows farther, from what has been ſaid, that in all caſes where an act of parliament ouſteth clergy, in caſe of any felony, the indictment muſt preciſely bring the party within the caſe of the ſtatute; otherwiſe, although poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not ſo alledged in the indictment, the party, though convict, ſhall have his clergy. 2 *H. H.* 336.

But although the caſe be ſo laid in the indictment, that it comes within the ſtatute, to exempt the priſoner from clergy, yet if upon the evidence it fall out, that though it be a felony, yet it is not ſo qualified as laid in the indictment, the jury ought to find him guilty of the felony ſimply, but not as to the matter laid in the indictment, and thereupon the priſoner ſhall be admitted to his clergy; and this is commonly done. 2 *H. H.* 336.

But if the offence was capital at Common law, and a ſtatute only excludes it from clergy, the indictment in ſuch caſe need not conclude *againſt the form of the ſtatute*, becauſe the ſtatute doth not alter the nature of the offence, but leaves it to its proper judgment, and only takes away a perſonal privilege of exemption from ſuch judgment. 2 *Haw. P. C.* 342.

Furthermore, from what hath been obſerved above, it follows, that where an act taketh away clergy from the principal, and ſaith nothing of the acceſſary, the acceſſaries, as well before as after, ſhall have their clergy. 11 *Co.* 37.

For the ſeveral offences which have been excluded the benefit of clergy by acts of parliament made ſince 25 Ed. 3. c. 4. ſee title **Felony.**

4. *In what offences benefit of clergy is now allowed*, ſee title **Felony.**

5. *What perſons are or are not capable of clergy.*

By a favourable interpretation of the ſtatutes relating to the benefit of clergy, not only thoſe actually admitted into ſome inferior order of the clergy, but alſo thoſe who were never qualified to be admitted into orders (which was formerly tried by putting them to read a verſe) have been taken to have a right to this privilege, as much as perſons in holy orders. 2 *Haw.* 338.

By the Common law, a woman could not have the benefit of clergy; but now by the ſtatute of 3 *Will. & M. c.* 9. a woman convicted or outlawed for any felony, for which a man might have his clergy, ſhall, upon praying the benefit of that ſtatute, be ſubject only to ſuch puniſhment as a man would be in the like caſe.

A perſon convicted of hereſy, a Jew, or a Turk, ſhall not have their clergy; but a perſon excommunicate ſhall have his clergy. 2 *H. H.* 373.

Alſo every perſon (not being within orders) who hath been once admitted to his clergy, ſhall not be admitted to the ſame a ſecond time. 4 *H.* 7. *cap.* 13.

And if he is convicted of murder, he ſhall be marked (unleſs he is a peer, 2 *H. H.* 376) with an M, on the brawn of the left thumb; and if for any other felony with an F, by 4 *H.* 7. *c.* 13.

But he ſhall not be ouſted of his clergy, by the bare mark in his hand, or by a parol averment, without the record teſtifying it, or a tranſcript thereof, according to the following ſtatutes. 2 *H. H.* 373.

By ſtat. 34 & 35 *H.* 8. *cap.* 14. The clerk of the crown, or of the peace, or of aſſiſe, ſhall certify a tranſcript briefly of the tenor of the indictment, outlawry, or conviction, and attainder, into the King's bench in 40 days: and the clerk of the crown, when the judges of aſſiſe or juſtices of the peace write to him for the names of ſuch perſons, ſhall certify the ſame, with the cauſes of the conviction or attainder.

Another method is given by the ſtat. 3 *Will. & M. c.* 9. *ſect.* 7. which enacts, that the clerk of the crown, clerk of the peace, or clerk of aſſiſe, where a perſon admitted to clergy ſhall be convicted, ſhall at the requeſt of the proſecutor, or any other on the King's behalf, certify a tranſcript briefly and in few words, containing the effect and tenor of the indictment and conviction, of his having the benefit of clergy, and the addition of the party, and the certainty of the felony and conviction, to the judges where ſuch perſon ſhall be indicted for any ſubſequent offence.

Alſo it ſeems, that if the party deny that he is the ſame perſon, iſſue muſt be joined upon it, and it muſt be found upon trial that he is the ſame perſon, before he can be ouſted of clergy. 2 *H. H.* 373.

6. At what time clergy is to be allowed, and the effect of allowing it.

By the ancient Common law, the benefit of clergy was demanded as ſoon as the priſoner was brought to the bar, before any indictment or other proceeding againſt him; but this was found a great inconvenience to the priſoner, becauſe poſſibly he might have been acquitted of the felony; or if not, yet in caſe of an inqueſt of office he loſt his challenges to ſuch inqueſt, and yet upon ſuch inqueſt found, he forfeited his goods, and the profits of his lands; and therefore *Priſot* Ch. J. with the advice of the other judges, in the reign of *Hen.* 6. for the ſafety of the innocent, would not allow the priſoner the benefit of clergy before he had pleaded to the felony, and (having the benefit of his challenges and other advantages) had been convicted thereof; which courſe hath been generally obſerved ever ſince. 2 *Inſt.* 164. 2 *H. H.* 378.

And this benefit of clergy may be allowed by the court in diſcretion, though the party challenge it not. *Hale's Pl.* 239.

Perſons admitted to their clergy may be continued in priſon as a further puniſhment, not exceeding one year. 18 *El. cap.* 7.

By ſtat. 4 *Geo.* 1. *cap.* 11. Perſons convicted of offences within benefit of clergy (except receivers and buyers of ſtolen goods) may, inſtead of being whipped and burnt in the hand, be tranſported for ſeven years.

A perſon admitted to his clergy forfeits all his goods that he hath at the time of the conviction. 2 *H. H* 388.

But preſently upon burning in the hand, he ought to be reſtored to the poſſeſſion of his lands, and from thenceforth to enjoy the profits thereof. 2 *H. H.* 388.

Alſo, it reſtores him to his credit; and conſequently enables him to be a good witneſs. 2 *Haw.* 364.

And it is holden, that after a man is admitted to his clergy, it is actionable to call him felon; becauſe his offence being pardoned by the ſtatute, all the infamy and other conſequences of it are diſcharged. 2 *Haw.* 365.

Clerico admittendo, Is a writ to the biſhop for the admitting of a *clerk* to a benefice upon a *ne admittas* tried and found for the party that procureth the writ. *Reg. Orig. fol* 31.

Clerico capto per ſtatutum mercatorum, &c. Is a writ directed to the biſhop, for the delivery of a *clerk* out of priſon that is in cuſtody upon the breach of a *ſtatute merchant*. *Reg. Orig. fol.* 147.

Clerico convicto commiſſo gaolae in defectu ordinarii deliberando, &c. Is a writ for the delivery of a clerk to his ordinary that formerly was convicted of felony, by reaſon his ordinary did not challenge him according to the privileges of clerks. *Reg. Orig. fol.* 69. *a.*

Clerico infra ſacros ordines conſtituto non eligendo in officium, Is a writ directed to the bailiffs, &c. that have thruſt a bailiwick or beadleſhip upon one in holy orders, charging them to releaſe him again. *Reg. Orig. fol.* 143. *a.*

Clericus. This word was uſed for a ſecular prieſt, in oppoſition to a religious or regular, King *John*; in the time of the *interdict*, committed to *William de Cornhull*, and *Gerard de Camvill*,——*Omnes terras & res abbatum & priorum, & omnium religioſorum, & etiam* clericorum *de epiſcopatu Linc.* Paroch. Antiq. p. 171.

Clericus ſacerdotis, A pariſh clerk, or inferior aſſiſtant to the parochial prieſt, who uſually took an oath of fidelity from this ſervant. Before the Reformation, the rector was ſometimes obliged to provide and maintain his own *clerk*; and ſometimes the religious appropriators were bound to find and ſupport a *clerk*, as a menial ſervant to the vicar. So in the churches appropriated to the abbey of *Oſeney*,——*Canonici vero* clericum *vicario, & eccleſiæ miniſterio, & ejus obſequio devotum invenient, qui juramentum fidelitatis ipſo vicario præſtabit.*——*Ubi autem non fuerint canonici reſidentes*, clericus, *qui ut ſupra dictum eſt, expenſis eorum procurabitur, clavem eorum deferet in domo eorum, &c.* Paroch. Antiq. p. 304. The *pariſh clerks* were formerly to be men of letters, and to teach a ſchool in the pariſh, and were ſometimes elected by the pariſhioners, two for each church, as the *ſacriſtan* or *ſexton*, and *clerk* in our city churches, being ſuppoſed to live upon the alms and voluntary contributions of their electors. So *John Peckham* archbiſhop of *Canterbury*, *anno* 1280, ordained the church of *Banquel*, and the chapels annexed to it.——*Volumus inſuper ibidem eſſe duos* clericos *ſcholaſticos per parochianorum, de quorum habeant vivere eleemoſynis, induſtriam eligendos, qui aquam benedictam circumferent in parochiam ac capellis diebus dominicis & feſtivis, in divinis miniſtrantes officiis, & profeſtis diebus diſciplinis ſcholaſticis indulgentes.* Mon. Angl. tom. 3. p. 237. *Pariſh clerks* were to be ſchoolmaſters in country villages, by the conſtitutions of *Alexander* biſhop of *Coventry*, *anno* 1237, *&c.* Hence the ſchool-houſe or place of teaching was often in the belfrey, in the church-porch, or ſome contiguous building; and hence the prophaner uſe of teaching in the chancels. It would however be of good ſervice to the church and nation to reſtore this ancient practice, eſpecially in remote country villages, where the clerk would do more to the ſervice of God and the benefit of the people, if he were able to inſtruct the children in reading and writing, and underſtanding the church catechiſm; thus they might be bred to ſome ſenſe of Chriſtianity and good manners. *Cowell, edit.* 1727.

Clerk *(Clericus)* Hath two ſignifications; one as it is the title of him that belongeth to the holy miniſtry of the church, that is (as we reckon) either miniſter or deacon, or what other degree or dignity ſoever; though according to former times, not only *ſacerdotes & diaconi* but alſo *ſubdiaconi, lectores, acholythi, exorciſtæ, & oſtiarii* were within this account, as they be at this day, where the canon law hath full power. And in this ſignification a clerk is either religious (otherwiſe called regular) or ſecular. *An.* 4 *H.* 4. *c.* 12. This word *clericus* comprehends all ſorts of prieſts, deacons, and others in holy orders, either ſecular or regular; but more properly a miniſter or prieſt, or one who is more peculiarly called *in ſortem Domini*. *Poor Vicar's Plea, fol.* 13. Yet *Johannes Sawell clericus Domini Regis, (ſcil. E.* 1.*)* was ſuppoſed to ſignify ſecretary or *clerk* of his council. *Antiq. of Nottinghamſhire, fol.* 317. The other ſignification of this word noteth thoſe that by their function, or courſe of life, practiſe their pen in any courts, or otherwiſe; as namely, the *clerk* of the rolls of parliament; *clerks* of the Chancery, and ſuch like; whoſe offices ſhall be ſet in order. *Cowell, edit.* 1727.

Clerk of the acts, Is an officer of good account in the Navy-office, who receives and records all orders, contracts, bills, warrants, and other buſineſſes tranſacted by the Lord Admiral and commiſſioners of the navy; and is mentioned in the ſtat. 16 *Car.* 2. *cap.* 5. and 22 & 23 *Car.* 2.

Clerk of the affidavits, In the court of Chancery, is an officer that files all affidavits made uſe of in court.

Clerk of the aſſiſe *(Clericus aſſiſarum)* Is he that writes all things judicially done by the juſtices of *aſſiſe* in their circuits. *Cromp. Juriſd. fol.* 227.

Clerk of the bails, Is an officer belonging to the court of King's Bench, mentioned in ſtat. 22 & 23 *Car.* 2. *c.* 9.

Clerk of the check, Is an officer in the King's Court, ſo called, becauſe he hath the *check* and controlment of the yeomen belonging either to his Majeſty, the Queen, or Prince; either giving leave, or allowing their abſences or defects in attendance, or diminiſhing their wages for the ſame. He alſo nightly, by himſelf or deputy, takes the view of thoſe that are to watch in the court, and hath the ſetting of the watch. This officer is mentioned in ſtat. 33 *H.* 8. *cap.* 12. Alſo there is an officer of the ſame name in the King's navy, and mentioned in ſtat. 19 *Car.* 2. *c.* 1.

Clerk of the cheſt, Keeps an account of the monies collected, and kept in a *cheſt*, for the uſe of ſick and maimed ſeamen and mariners, mentioned in ſtat. 16 *Car.* 2. *c.* 5.

Clerk of the crown *(Clericus coronæ)* Is a clerk or officer in the King's Bench, whoſe function is to frame, read, and record all indictments againſt traitors, felons, and

and other offenders there arraigned or indicted upon any publick crime. He is otherwiſe termed *clerk of the crown office*. And in ſtat. 2 *Hen.* 4. *cap.* 10. he is called *clerk of the crown of the King's Bench.*

Clerk of the crown in Chancery *(Clericus coronæ in Cancellaria)* Is an officer there, who, by himſelf or deputy, is continually to attend the Lord Chancellor or Lord Keeper; writes and prepares, for the great ſeal of *England*, ſpecial matters of ſtate by commiſſion, or the like, either immediately from his Majeſty, or by order of his council, as well ordinary as extraordinary, *viz.* commiſſions of lieutenancy, of juſtices itinerant, and of aſſiſe of *oyer* and *terminer*, of gaol-delivery, and of the peace, with their *writs of aſſociation*, and the like. Alſo, all general pardons upon grants of them, at the King's coronation, or at the parliament, where he ſits in the Lords houſe in parliament-time; into whoſe office the writs of parliament, made by the clerks of the petty-bag, with the names of the knights and burgeſſes elected thereupon, are to be returned and filed. He hath alſo the making of all ſpecial pardons and writs of execution upon bonds of ſtatute-ſtapel forfeited, which was annexed to his office in the reign of Queen *Mary*, in conſideration of his continual and chargeable attendance: both theſe before being common for every curſitor and clerk of the court of Chancery to make. See **Chancery.**

Clerk of the declarations, An officer in the court of King's Bench that files all declarations in cauſes there depending after they are ingroſſed, *&c.*

Clerk of the deliveries, Is an officer in the *Tower*, who takes indentures of all ſtores iſſued thence.

Clerk of the errors *(Clericus errorum)* In the court of Common Pleas, does tranſcribe and certify into the King's Bench the tenor of the records of the cauſe of action, upon which the *writ of error* (made by the curſitor) is brought, there to be adjudged and determined. The *clerks of the errors* in the King's Bench does likewiſe tranſcribe and certify the records of ſuch cauſes in that court into the Exechequer, if the cauſe or action were by *bill*; if by *original*, the Lord Chief Juſtice certifies the record into the houſe of peers in parliament, by taking the tranſcript from the *clerk of the errors*, and delivering it to the Lord Keeper, there to be determined, according to the ſtatutes 27 *El.* 8. and 31 *El.* 1. The *clerk of the errors in the Exchequer* does tranſcribe the records, certified thither out of the King's Bench, and prepares them for judgment in the court of Exchequer, to be given by the juſtices of the Common Pleas, and barons there. See 16 *Car.* 2. *cap.* 2. and 20 *Car.* 2. *cap.* 4.

Clerk of eſſoins *(Clericus eſſoniorum)* Is an officer belonging to the court of Common Pleas, who keeps the *eſſoin rolls*, and hath for every execution to bar the *eſſoin*, in caſe where the party hath omitted his time, ſix pence. He hath alſo the providing of parchment, and cutting it out into rolls, and marking the numbers upon them, and the delivering out of all the rolls to every officer, the receiving them again when they are written, and the binding and making up the whole bundles of every term; and this he doth as ſervant of the Chief juſtice. For the Chief Juſtice is at charge for the parchment of all the rolls; for which he is allowed, as the Chief Juſtice of the King's Bench, beſides the penny for the ſeal of every writ of privilege and outlawry, the ſeventh penny taken for the ſeal of every writ under the green wax, or petit ſeal, in the court of King's Bench and Common Pleas reſpectively; the ſaid Lord Chief Juſtices having annexed to their ſeveral offices or places the cuſtody of the ſaid ſeals belonging to each court.

Clerk of the eſtreats *(Clericus extractorum)* Is a clerk belonging to the Exchequer, who termly receives the *eſtreats* out of the Lord Treaſurer's Remembrancer's office, and writes them out to be levied for the King. He alſo makes ſchedules of ſuch ſums *eſtreated* as are to be diſcharged. See the *Practice of the Exchequer, pag.* 82

Clerk of the hamper or **hanaper** *(Clericus hanaperii)* Is an officer in Chancery (mentioned in ſtat. 2. *E.* 4. *c.* 1.) otherwiſe called *warden of the hamper*, in the ſame ſtatute, whoſe function is to receive all the money due to the King for the ſeals of charters, patents, commiſſions, and writs; as alſo fees due to the officers for enrolling and examining the ſame, with ſuch like. He is tied to attendance on the Lord Chancellor, or Lord Keeper daily in the term-time, and at all times of ſealing, having with him a leather bag, wherein are put all charters, *&c.* after they are ſealed; thoſe bags, being ſealed up with the Lord Chancellor's private ſeal, are delivered to the controller of the *hanaper*, who upon receipt of them doth, as you ſhall read in his office. This *hanaper* repreſents a ſhadow of that which the *Romans* termed *fiſcum*, which contained the Emperor's treaſure.

The *Exchequer* was anciently ſo called, becauſe *in eo reconderentur* hanapi *& ſcutræ, cæteraque vaſa quæ in cenſum & tributum perſolvi ſolebant;* thus we read in the *Monaſt.* 1 *tom. p.* 943. *Rex, &c. Cum de gratia noſtra ſpeciali & pro quodam fine, &c. ſolut. &c. in* hanaperio *noſtro, conceſſerimus.* Or it may be ſo called, becauſe the yearly tribute which princes received was in *hampers* or large veſſels full of money. *Cowell, edit.* 1727.

Clerk of the juries *(Clericus juratorum)* An officer belonging to the court of Common Pleas that inrolls and exemplifies all fines and recoveries, and returns writs of entry, ſummons, and ſeiſin, *&c.*

Clerk of the juries, or jurata-writs *(Clericus juratorum)* Is an officer belonging to the court of Common Pleas, who makes up the *writs* called *habeas corpora* and *diſtringas* for appearance of *juries*, either in court, or at the aſſizes, after the *jury* or pannel is returned upon the *venire facias*. He enters alſo into the rolls the awarding of theſe *writs*, and makes all the continuances from the going out of the *habeas corpora*, until the verdict be given.

Clerk comptroller of the King's houſe, Whereof there are two, is an officer in the court that hath authority to allow or diſallow the charges and demands of purſuivants, meſſengers of the *green-cloth*, or other like. He hath alſo the overſight and controlling of all defects and miſcarriages of any of the inferior officers, and to ſit in the counting-houſe with the ſuperior officers, *viz.* the Lord Steward, Mr. Treaſurer, *Comptroller*, and Cofferer, either for correcting or bettering things out of order. This officer is mentioned in ſtat. 33 *H.* 8. *c.* 12.

Clerk marſhal of the King's houſe, Seems to be an officer that attends the *marſhal* in his court, and records all his proceedings. Stat. 33 *H.* 8. *c.* 12.

Clerk of the King's ſilver *(Clericus argenti Regis)* Is an officer belonging to the court of Common Pleas, to whom every fine is brought, after it hath been with the *cuſtos brevium*, and by whom the effect of the writ of covenant is entered into a paper-book; and according to that note, all the fines of that term are alſo recorded in the rolls of the court. And his entry is in this form; he puts the ſhire in the margin, and then ſaith, A. B. *dat domino Regi dimidiam marcam* (or more, according to the value) *pro licentia concordandi cum* C. D. *pro talibus terra in tali villa, & habet chirographum per pacem admiſſum, &c.*

Clerk of the King's great wardrobe *(Clericus magnæ garderobæ Regis)* Is an officer of the King's houſe that keeps an account or inventory in writing of all things belonging to the *King's wardrobe*, mentioned in ſtat. 1 *Ed.* 4. *cap.* 1.

Clerk of the market *(Clericus mercati hoſpitii Regis)* Is an officer of the King's houſe (mentioned in ſtat. 1 *Ed.* 4. *cap.* 1. and in ſtat. 13 *Rich.* 2. *cap.* 4.) whoſe duty is to take charge of the King's meaſures, and to keep the ſtandards of them, that is, the examples of all the meaſures that ought to be through the land: as of ells, yards, lagens, quarts, pottles, gallons, *&c.* of weights, buſhels, and ſuch like; and to ſee that all meaſures in every place be anſwerable to the ſaid ſtandard. *Fleta, lib.* 2. *cap.* 8, 9, 10, 11, 12. Of which office, as alſo of our diverſity of weights and meaſures, you may there find a treatiſe worth the reading. *Britton* alſo, in his 30 *ca.* ſaith in the King's perſon, to this effect: *We will that none have meaſures in the realm, but we ourſelves; but that every man take his meaſures and weights from our ſtandards.* And ſo goes on with a diſcourſe of this matter, that

that well ſhews the ancient law and practice in this point.

By ſtat. 13 *Ric.* 2. *cap.* 24. The clerk of the market of the King's houſe ſhall execute his office duly, and all falſe weights and meaſures ſhall be burnt. And the ſaid clerk ſhall take no common fine, but every one ſhall be puniſhed according to their deſert; and he ſhall not ride with above ſix horſes, and ſhall tarry no longer in a place than need requireth; and if he offend againſt this ſtatute, he ſhall pay to the King for the firſt time 5 *l.* for the ſecond time 10 *l.* for the third 20 *l.*

Stat. 16 *Car.* 1. *cap.* 19. *ſect.* 2. There ſhall be one weight and one meaſure, according to the ſtandard of the Exechequer throughout the realm; and every meaſure of corn ſhall be ſtriked without heap; and whoſoever ſhall ſell, buy, or keep any other weight or meaſure whereby any thing is bought or ſold, ſhall forfeit for every offence 5 *s.* being thereof convicted by the oath of one witneſs before a juſtice of peace, mayor, or other head officer, which forfeiture ſhall be levied by the churchwardens and overſeers of the poor (or one of them) where the offence ſhall be committed, to the uſe of the poor, by diſtreſs and ſale of goods; and in default of diſtreſs, the juſtice, mayor, or head officer, may commit the offender to priſon, until he pay the ſum forfeited.

Sect. 3. The clerk of the market of the King's or Prince's houſhold ſhall only execute their offices within the verge; and head officers of corporations, and lords of liberties, and their deputies, may execute the ſaid office in their precincts.

Sect. 4. If any of the officers aforeſaid ſhall ſeal any weight or meaſure which is not agreeable to the ſtandard, or ſhall refuſe to ſeal ſuch as are agreeable (paying only ſuch fees as are warranted by ſtatute or ancient cuſtom) they and their deputies ſhall forfeit 5 *l.* to be levied as aforeſaid, to the uſe of the poor.

Sect. 5. If they ſhall take any common fine, fee, or other ſum of money, than what are allowed by ſtatute or ancient cuſtom, for the ſigning or examination of any weights or meaſures which have been formerly marked or ſealed, or ſhall impoſe any fine or amerciament without a legal trial of offence, or ſhall otherwiſe miſdemean themſelves in their office, they ſhall forfeit for the firſt offence 5 *l.* the ſecond offence 10 *l.* and for every other offence 20 *l.* to be levied as aforeſaid, to the uſe of the poor.

Sect. 6. He that is fined or amerced by this act, ſhall not be again puniſhed for the ſame offence by any former law.

Sect. 7. This act ſhall not extend to the meaſure of rent-corn, nor to water meaſure in ports.

Sect. 8. If any officer authorized to execute this ſtatute ſhall be impleaded for any act he ſhall do therein, he may plead the general iſſue *not guilty*.

Sect. 9. If he be found *not guilty*, or if the plaintiff be nonſuited, he ſhall recover treble coſts. See **Weights and Meaſures.**

Whether clerk of the market can *break pots not being meaſure?* Attorney general ſaid, that he could not, but muſt order them according to the form of the ſtatute. *Savil* 57. *pl.* 122. *Paſch.* 25 *Eliz. Anon.*

At the motion of *Coke*, attorney of the Queen, all the juſtices of *England* aſſembled at *Serjeants Inn*, upon extortions committed by the clerks of the markets, becauſe they took 1 *d. fee for the view of veſſels, though they found not any defect in them*, and ſealed them not, and if they did ſeal them they took 2 *d.* And all the juſtices agreed, that this was grand extortion, and that *no preſcription can ſerve for taking a fee for the view only*, unleſs they found default, or ſealed them. *Mo.* 523. *pl.* 690. *Mich.* 39 & 40 *Eliz. Anon.*

Clerk of the market has to do with nothing but *victuals. Het.* 145. *Trin.* 5 *Car. C. B. Cambridge Univerſity's Caſe.*

In treſpaſs defendant juſtified as clerk of the market within, &c. for a *diſtreſs* of 3 *s.* 4 *d.* for not uſing *meaſures marked according to the ſtandard* of the Exchequer. On demurrer it was urged for the defendant, that this was an authority given by the 14 *Ed.* 3. *c.* 12. *ſect.* 2. and held *per Holt*, Ch. J. that the clerk of the market could not have power to eſtreat fines and amerciaments otherwiſe than as a franchiſe, and it is more reaſonable the clerk ſhould bring the ſtandard with him, than that the people ſhould follow him, or attend at a place out of the market. 1 *Salk.* 327. *Trin.* 8 *Ann. B. R. Burdet's Caſe.*

Clerk of the Nichils, or **Nihils** (*Clericus nihilorum*) Is an officer in the *Exchequer*, who makes a roll of all ſuch ſums as are *nihiled* by the ſheriffs upon their eſtreats of *green-wax*, and delivers the ſame into the Lord Treaſurer's Remembrancer's office, to have execution done upon it for the King. See the ſtat. 5 *R.* 2. *cap.* 13. *ſtat.* 1. and *Practice of the Exchequer, pag.* 101. See **Nihil.**

Clerk of the Ordnance, Is an officer in the *Tower* who regiſters all orders touching the King's *ordnance.*

Clerk of the Outlawries (*Clericus utlagariarum*) Is an officer belonging to the court of *Common Pleas*, being only the ſervant or deputy of the King's attorney general, for making out writs of *capias utlagatum*, after *outlawry*; the King's attorney's name being to every one of thoſe writs. And whereas ſeven pence is paid for the ſeal of every other writ betwixt party and party, there is but a penny paid for the ſeal of this writ, becauſe it goes out at the King's ſuit.

Clerk of the Paper-Office, Is an officer in the court of *King's Bench*, that makes up the paper-books of ſpecial pleadings and demurrers in that court.

Clerk of the Papers, An officer in the *Common Pleas* who hath the cuſtody of papers of the Warden of the *Fleet*, enters commitments and diſcharges of priſoners, delivers out day-rules, &c.

Clerk of the Parcels, Is an officer in the *Exchequer.*

Clerk of the Pariſh. See **Clericus ſacerdotis.** It was held, that a pariſh clerk *is a mere layman*, and ought to be *deprived by them that put him in*, and no other; and if the eccleſiaſtical court meddle with deprivation of the pariſh clerk, they incur a præmunire, and the Canon, which wills that the parſon ſhall have election of the pariſh clerk, is merely void to take away the cuſtom that any had to elect him. 2 *Brownl.* 38. *Paſch.* 8 *Jac. C. B. Gaudy* v. *Newman.*

Reſolved, that if the pariſh clerk *miſdemean himſelf in his office*, or in the church, he may be ſentenced for it in the eccleſiaſtical court to excommunication, but not to deprivation. 2 *Brownl.* 38. *Paſch.* 8 *Jac. C. B. Gaudy* v. *Newman.*

Pariſh clerk may *ſue in court chriſtian for his fees*, which are called *largitiones charitativæ.* Arg. cites the Regiſter, fol. 52. for he is *quodam modo* an officer ſpiritual, cites 21 *Ed.* 4. 47. 2 *Rol. Rep.* 71. *Hill.* 18 *Jac. B. R.* in *Biſhop's Caſe.*

The clerk of a pariſh *preſcribed*, that he and his predeceſſors had uſed to have 5 *s. per ann. of the parſon for tithes of a certain place within the pariſh*, but a conſultation was awarded, becauſe a clerk dative and removeable cannot preſcribe. *Mo.* 908. *pl.* 1274. 29 & 30 *Eliz. Savell* v. *Wood. Cro. E.* 71. *pl.* 26. *S. C.* and it was moved, that it was a good preſcription, becauſe the parſonage was a parſonage impropriate, and by intendment it commenced by the act of the parſon, *viz.* that he made a compoſition that the tithe of that land ſhould be paid to the clerk in diſcharge of himſelf, and that he had uſed time out of mind, &c. to pay to the clerk 5 *s.* in diſcharge of all tithes, &c. and the court ſaid, if this ſpecial matter be ſhewn in the ſurmiſe, perhaps it might be good, by reaſon of the continuance, and that by this the parſon is diſcharged from finding the clerk, with which, perhaps, he ſhall be charged, and ſo is as a payment of tithes to the parſon himſelf; but ſuch matter is not ſhewn, and by common intendment tithes are not be paid to the pariſh clerk, and he is no party in whom a preſcription can be alledged, and thereupon they awarded a conſultation.——*Le.* 94. *pl.* 122. *S. C.* accordingly.

In *caſe* the plaintiff declared, *quod cum extitiſſet* clerk of ſuch a pariſh; the *defendant diſturbed him in the exerciſe of his office, and hindered him to ſit in the clerk's ſeat, per quod he loſt the profits of his office.* It was objected, that this was rather a ſervice or employment than an office; and if it be an office, it is eccleſiaſtical, for of common right the parſon appoints the clerk, and the court will not intend a cuſtom; and unleſs a clerk comes in by the election of the pariſhioners, according to cuſtom, he has not a temporal right, and the court will *not grant a mandamus* for a clerk, without an affidavit that he is appointed by the pariſh. 2. It does *not appear that any fees appertain unto his office*, and no action lies at Common law for diſturbance in the enjoyment of a ſeat in the church without a temporal right, and ſo it is here; *adjornatur.* 2 *Salk.* 468. *pl.* 7. *Trin.* 4 *Ann. B. R. Lee* v. *Drake.*

Pariſh clerk nominated by the parſon is by Common law an officer, and in *for life*, without deed. 2 *Salk.* 536. *pl.* 27. *Hill.* 10 *Ann. B. R. Pariſh of Gatton v. Milwick.*

The parſon libelled in the ſpiritual court to have the clerk eſtabliſhed according to the Canon, which gave the parſon authority to chooſe and place the clerk, and that the pariſhioners diſturbed him, upon a pretence of a cuſtom of the veſtry to chooſe one; the pariſhioners ſuggeſted this cuſtom for a prohibition, which was granted; for it was held to be a good cuſtom, and that the Canon ſhall not take it away. 2 *Cro.* 670. *Jermyn* verſus *Hammond.*

Libel by a *pariſh clerk* againſt the churchwardens, for ſo much money due yearly to him by *cuſtom*, and to be levied by them on the pariſhioners, *&c.* the defendants ſuggeſted for a prohibition, that there was no ſuch cuſtom; it was objected, that this is now too late, it being after ſentence, eſpecially ſince the cuſtom was not pleaded in the ſpiritual court as it ought; for if it had, and they would have proceeded, then it had been proper to move for a prohibition: but adjudged, where they have no original juriſdiction, it is never too late for a prohibition, and they can have no ſuch juriſdiction in this caſe, becauſe the *clerk of the pariſh* is not *a ſpiritual perſon*, neither is the duty ſpiritual, but founded on a *cuſtom:* and if there is ſuch a cuſtom, it is triable at law, for he may have an action on the caſe againſt the churchwardens for not making a rate, and levying it: or if levied it, for not paying it. *Mod. Caſes* 252. *Parker* verſus *Clerk.*

Clerk of the Parliament-rolls *(Clericus Rotulorum Parliamenti)* Is he that records all things done in the high court of parliament, and engroſſeth them fairly in *parchment rolls*, for their better preſervation to poſterity. Of theſe there are two, one of the *Lords Houſe*, another of the *Houſe of Commons. Cromp. Juriſ. f.* 4 & 1. *Smith de Rep. Angl. pag.* 38. See alſo *Vowel's* book, touching the order of the *Parliament.* See *Fleta, lib.* 2. *cap.* 12. *pag.* 31.

Clerk of the Patents, Or of the letters patent under the great ſeal of *England*, was erected 18 *Jac.*

Clerk of the Peace *(Clericus pacis)* Is an officer belonging to the ſeſſions of the peace. His duty is, in the ſeſſions, to read the indictments, to enroll the acts, and draw the proceſs: to record the proclamation of rates for ſervants wages, to enroll the diſcharge of apprentices, to keep the counterpart of the indentures of armour, to keep the regiſter-book of licences given to badgers and laders of corn, and of thoſe that are licenſed to ſhoot in guns, and to certify into the *King's Bench* tranſcripts of indictments, outlawries, attainders, and convictions had before the juſtices of the peace, within the time limited by ſtatute. *Lambard's Eiren. lib.* 4. *cap.* 3. *fol.* 379.

By ſtat. 37 *Hen.* 8. *cap.* 1. *ſect.* 3. Every *cuſtos rotulorum* ſhall appoint the clerk of the peace, and grant the office to ſuch able perſons inſtructed in the laws, as ſhall be able to exerciſe the ſame, during the time that the *cuſtos rotulorum* ſhall exerciſe the office of *cuſtos rotulorum*, ſo that the ſaid clerk demean himſelf in the office juſtly; and it ſhall be lawful to ſuch grantee of the ſaid clerkſhip to occupy the office by himſelf, or by his deputy inſtructed in the laws, ſo that the deputy be admitted by the *cuſtos rotulorum.*

Stat. 1 *W. & M. ſtat.* 1. *cap.* 21. *ſect.* 4. The appointing of the *cuſtos rotulorum* through all the counties ſhall be as is directed by ſtat. 37 *H.* 8. *c.* 1.

Sect. 5. The *cuſtos rotulorum*, or other perſon to whom it ſhall belong to appoint the clerk of the peace, ſhall, where the office of clerk of the peace ſhall be void, nominate a ſufficient perſon reſiding in the county or place, to exerciſe the ſame by himſelf or his ſufficient deputy, for ſo long time as ſuch clerk of the peace ſhall well demean himſelf in his office.

Sect. 6. If any clerk of the peace ſhall miſdemean himſelf in the office, and a complaint in writing of ſuch miſdemeanor ſhall be exhibited to the quarter ſeſſions; it ſhall be lawful for the juſtices upon examination and proof, to ſuſpend or diſcharge him from the office; and the *cuſtos rotulorum*, or other perſon to whom it ſhall belong, ſhall appoint another ſufficient perſon reſiding in the county, *&c.* to be clerk of the peace. And in caſe of neglect to make ſuch appointment before the next quarter-ſeſſions, it ſhall be lawful for the juſtices to appoint one.

Sect. 7. He ſhall be ſubject to the penalties and proviſions herein mentioned.

Sect. 8. It ſhall be lawful for any *cuſtos rotulorum*, *&c.* to ſell the place of clerk of the peace, or to take any bond or aſſurance to have any reward or profit for ſuch appointing. But every *cuſtos rotulorum*, *&c.* that ſhall ſo ſell, and every clerk of the peace who ſhall ſo buy his place, are diſabled to hold their places; and ſhall each of them forfeit double the value ſo given or taken, to be recovered by them that ſhall ſue for the ſame.

Sect. 9. Every clerk of the peace, before he enter upon the execution of his office, ſhall in open ſeſſions take the oath following, *viz.*

I A. B. *do ſwear, that I have not, nor will pay any ſum or ſums of money, or other reward whatſoever, nor given any bond or other aſſurance to pay any money, fee, or profit, directly or indirectly, to any perſon or perſons whomſoever for ſuch nomination or appointment.* So help me God.

Sect. 10. Nothing in this act ſhall affect the clerk of the peace for the duchy and county palatine of *Lancaſter*, who holds his office for lives by grants from King *Charles* II.

The clerk of the peace *muſt make out all proceſs*, and when they are compleat muſt *deliver them to the cuſtos*, but as long as they are in proceſs they are not to be with the clerk, but for refuſing to deliver the rolls to the *cuſtos*, he was indicted and *removed*, and a *mandamus* to reſtore him was denied *per* three juſtices againſt the Chief Juſtice. 4 *Mod.* 31. *Paſch.* 3 *W. & M. in B. R. The King and Queen* v. *Evans.*

Indebitatus aſſumpſit, and *non aſſumpſit* pleaded, the jury found the ſtat. 27 *H.* 8. and 1 *W. & M.* and the ſeveral clauſes in them about the clerk of the peace; that the Earl of *Clare* was *cuſtos rotulorum* of *Middleſex*, and that he *named the plaintiff to be clerk of the peace*, to exerciſe the office by him or his deputy, *Quamdiu ſe bene geſſerit*; that the plaintiff *was capable of the office, and duly admitted*; *that the Earl of Clare was afterwards removed, and the Earl of Bedford made* cuſtos rotulorum, *who conſtituted*, by writing under hand and ſeal, *the defendant* during the time he was *cuſtos rotulorum, quamdiu* the defendant *ſe bene geſſerit*; and on ſolemn argument, judgment *pro quer' per tot. cur.* for that he had an eſtate for life, and was not removeable by the new *cuſtos.* 12 *Mod.* 42. *Trin.* 5 *W. & M. Harcourt* v. *Fox.*

By the *ſtatute* 1 *W. & M.* the *cuſtos rotulorum is to appoint a clerk of the peace for ſo long time only as he ſhall demean himſelf well. Owen* brought a *mandamus* to the juſtices to reſtore him to that office. The return was, that the Earl of *Winchelſea*, who was *cuſtos rotulorum*, did *appoint* O. *to be clerk of the peace durante bene placito, &c.* that the ſaid Earl being dead, the Lord *Sydney* was made *cuſtos*, who appointed *S.* to be clerk of the peace

of

of *Kent*, purſuant to the ſaid act. The queſtion was, whether a grant of this office during pleaſure, which is only an eſtate at will, ſhall be ſo governed by the ſtatute as to make it an eſtate for life, when once the perſon is admitted to the office; ſo that let the *cuſtos* make what appointment he will, though not purſuant to the ſtatute, it is the ſtatute, and not the *cuſtos*, which gives an intereſt and eſtate to the nominee. Adjudged, that no peremptory *mandamus* ſhall go; for, by the act, the *cuſtos* is to nominate a clerk to execute the office ſo long as he ſhall demean himſelf well, *&c.* and if he appoint him in any other manner, he is no clerk of the peace, ſo that appointment during pleaſure is not purſuant to the act; for he has not executed the authority given him by the act, and ſo the defendant has no title. 4 *Mod.* 293. *Trin.* 6 *W. & M. in B. R. The King* v. *Owen*,

It always belonged to the *cuſtos rotulorum* to *nominate* the clerk of the peace, but the clerk of the peace was *removeable* whenever the *cuſtos* was removed or changed, and moreover was removeable at the will of the *cuſtos* till 37 *H.* 8. 1. which makes him to continue in *quouſque* the *cuſtos* ſhall continue in; but now, by the late act, he is to continue for life, and though the words are, *give and grant to him*, yet it is only an appointment, and conſequently may be *without deed.* 2 *Salk.* 467. *Trin.* 10 *W.* 3. *B. R. Sanders* v. *Owen.*

He is no more than a *miniſterial officer*, and a record made by him is not to be pleaded as a *record*, and will not conclude the judgment of *B. R. Arg.* 8 *Mod.* 43. *Paſch.* 7 *Geo.* 1. in the caſe of *Colvin* v. *Fletcher.*

By ſtat. 34 & 35 *Hen.* 8. *c.* 14. The clerk of the peace ſhall certify into the King's Beneh the names of ſuch as be outlawed, attainted, or convicted of felony.

By ſtat. 22 & 23 *Car.* 2. *c.* 22. *ſect.* 7. The clerk of the peace ſhall deliver to the ſheriff, within ten days after *Sept.* 29. yearly, a perfect eſtreat or ſchedule of all fines and other forfeitures in ſeſſions.

Sect. 8. And alſo ſhall yearly, on or before the ſecond *Monday* after the morrow of *All Souls*, deliver into the Exchequer a duplicate of ſuch eſtreats ſo delivered to the ſheriffs, that the ſheriffs may be charged therewith on their appoſals, on pain to forfeit 50 *l.* the one moiety to the King, the other to the proſecutor.

Sect. 9. And if he ſhall ſpare, take off, diſcharge, or conceal any ſuch fine or forfeiture, unleſs it be by rule of court, he ſhall forfeit treble value; half to the King, and half to him that ſhall ſue; and ſhall alſo forfeit his office, and be incapable to be employed in any office where the revenue is concerned.

By ſtat. 4 & 5 *Will. & M. c.* 24. *ſect.* 5. The clerk of the peace ſhall, upon delivery of the eſtreats into the court of Exchequer, take the following oath, to be adminiſtered by one of the barons:

YOU ſhall ſwear, that theſe eſtreats, now by you delivered, are truly and carefully made up and examined, and that all fines, iſſues, amerciaments, recognizances, and forfeitures, which were ſet, loſt, impoſed, or forfeited, and in right and due courſe of law ought to be eſtreated in the court of Exchequer, are, to the beſt of your knowledge and underſtanding, therein contained; and that in the ſame eſtreats are alſo contained and expreſſed all ſuch fines as have been paid into the court, from which the ſaid eſtreats are made, without any wilful or fraudulent diſcharge, omiſſion, miſnomer, or defect whatſoever.

By ſtat. 3 *Geo.* 1. *c.* 15. *ſect.* 12. The barons of the Exchequer may amerce the clerk of the peace for neglecting to return the eſtreats according to the ſaid two acts of 22 & 23 *Car.* 2. *c.* 22. and 4 & 5 *Will. & M. c.* 24. See **Eſtreats.**

By ſtat. 10 & 11 *W.* 3. *ſect.* 7, 8. Clerk of the peace ſhall have only 2 *s.* for drawing an indictment of felony; and if it is defective, he ſhall draw a new one *gratis*, on pain of 5 *l.* with full coſts to him that ſhall ſue.

By ſtat. 2 *Geo.* 2. *c.* 46. *ſect.* 14. No clerk of the peace, or his deputy, ſhall act as ſolicitor, attorney, or agent, or ſue out any proceſs at any general or quarter ſeſſions, when he ſhall execute the office of clerk of the peace or deputy, on pain of 50 *l.* to him who ſhall ſue in 12 months, with treble coſts.

Clerk of the Pell (*Clericus pellis*) Is a clerk belonging to the Exchequer, whoſe office is to enter every teller's bill into a parchment-roll, (called *pellis receptorum*) and alſo to make another roll of payments, which is called *pellis exituum*, wherein he ſets down by what warrant the money was paid. He is mentioned in the ſtatute 22 & 23 *Car.* 2. for *ſubſidy*. This officer is called in ancient records *Clericus Domini Theſaurarii.*

Clerk of the petty-bag (*Clericus parvæ bagæ*) Is an officer of the Chancery, of which ſort there are three, and the Maſter of the Rolls their chief. Their office is to record the return of all inquiſitions out of every ſhire; to make all patents of cuſtomers, gaugers, controllers, and aulnegers; all *conge d'eſlires* for biſhops; all *liberates* upon extents of ſtatute-ſtaples; the recovery of recognizances forfeited, and all *elegits* upon them; the ſummons of the nobility, clergy, and burgeſſes to the parliament; commiſſions directed to the knights, and others of every ſhire, for aſſeſſing ſubſidies; writs for the nomination of collectors for taxes; and all traverſes upon any office, bill, or otherwiſe; to receive the fees for homages due to the Lord Great Chamberlain, of the nobility, biſhops, *&c.* This officer is mentioned in ſtat. 33 *H.* 8. *cap.* 22.

Clerk of the pipe (*Clericus pipæ*) Is an officer in the Exchequer, who, having all accompts and debts due to the King delivered and drawn out of the remembrancers offices, charges them down into the great roll; and is called *clerk of the pipe* from the ſhape of that roll, which is put together like a *pipe*: formerly he was called *Ingroſſator magni rotuli*, *contrarotulator* pipæ, duplex *ingroſſator*, and now *clerk of the pipe*. He alſo writes ſummons to the ſheriff to levy the ſaid debts upon the goods and chattels of the debtors; and if they have no goods, then he draws them down to the Lord Treaſurer's remembrancer, and writes eſtreats againſt their lands. The ancient revenue of the crown remains in charge before him, and he ſees the ſame anſwered by the farmers and ſheriffs. He makes a charge to all ſheriffs of their ſummons of the *pipe* and green wax, and ſees it anſwered upon their accounts. He hath the drawing and ingroſſing all leaſes of the King's land. In *Henry* the Sixth's time he was called *Ingroſſator magni rotuli.*

Clerk of the pleas (*Clericus placitorum*) Is an officer in the Exchequer, in whoſe office all the officers of the court (upon eſpecial privilege belonging unto them) ought to ſue, or to be ſued upon any action, *&c.* See the *Practice of the Exchequer*, *p.* 86. and 4 *Inſt. fol.* 107.

Clerk of the privy ſeal (*Clericus privati ſigilli*) There are four of theſe officers that attend the Lord *Privy Seal*, or (if none ſuch) the principal ſecretary, writing and making out all things that are ſent by warrant from the ſignet to the *privy ſeal*, and are to be paſſed to the *great ſeal*; as alſo to make out (as they are termed) *privy ſeals* upon any ſpecial occaſion of his Majeſty's affairs; as for loan of money, and ſuch like. Of this officer and his function, you may read the ſtatute 27 *Hen.* 8. *c.* 11. He that now is called the *Lord Privy Seal*, ſeems in ancient time to have been called *clerk of the privy ſeal*, and to have been reckoned, notwithſtanding, in the number of the great officers of this realm. Read the ſtatute 12 *R.* 2. *c.* 11.

Clerk of the recognizances. See **Statutes.**

Clerk of the remembrance, An officer in the Exchequer, who is to ſit againſt the clerk of the pipe to ſee the diſcharges made in the pipe, *&c.* Stat. 37 *Ed.* 3. *c.* 4. The clerk of the pipe and remembrancer ſhall be ſworn to make a ſchedule of perſons diſcharged in their offices, 5 *Ric.* 2. *ſt.* 1. *c.* 15. See **Remembrancer.**

Clerk of the rules, In the court of King's Bench is he who draws up and enters all the rules and orders made in court, and gives rules of courſe on divers writs. This officer is mentioned 22 & 23 *Car.* 2.

Clerk of the ſewers (*Clericus ſuerarum*) Is an officer appertaining to the commiſſioners of *ſewers*, writing all things that they do by virtue of the commiſſion; for which ſee **Sewers**: and ſee the ſtatute of 13 *Eliz. c.* 9.

In *caſe* the plaintiff declared, *quod cum extitiſſet* clerk of ſuch a pariſh; the *defendant diſturbed him in the exerciſe of his office, and hindered him to ſit in the clerk's ſeat, per quod he loſt the profits of his office.* It was objected, that this was rather a ſervice or employment than an office; and if it be an office, it is eccleſiaſtical, for of common right the parſon appoints the clerk, and the court will not intend a cuſtom; and unleſs a clerk comes in by the election of the pariſhioners, according to cuſtom, he has not a temporal right, and the court will *not grant a mandamus* for a clerk, without an affidavit that he is appointed by the pariſh. 2. It does *not appear that any fees appertain unto his office*, and no action lies at Common law for diſturbance in the enjoyment of a ſeat in the church without a temporal right, and ſo it is here; *adjornatur.* 2 *Salk.* 468. *pl.* 7. *Trin.* 4 *Ann. B. R. Lee* v. *Drake.*

Pariſh clerk nominated by the parſon is by Common law an officer, and in *for life*, without deed. 2 *Salk.* 536. *pl.* 27. *Hill.* 10 *Ann. B. R. Pariſh of Gatton v. Milwick.*

The parſon libelled in the ſpiritual court to have the clerk eſtabliſhed according to the Canon, which gave the parſon authority to chooſe and place the clerk, and that the pariſhioners diſturbed him, upon a pretence of a cuſtom of the veſtry to chooſe one; the pariſhioners ſuggeſted this cuſtom for a prohibition, which was granted; for it was held to be a good cuſtom, and that the Canon ſhall not take it away. 2 *Cro.* 670. *Jermyn* verſus *Hammond.*

Libel by a *pariſh clerk* againſt the churchwardens, for ſo much money due yearly to him by *cuſtom*, and to be levied by them on the pariſhioners, *&c.* the defendants ſuggeſted for a prohibition, that there was no ſuch cuſtom; it was objected, that this is now too late, it being after ſentence, eſpecially ſince the cuſtom was not pleaded in the ſpiritual court as it ought; for if it had, and they would have proceeded, then it had been proper to move for a prohibition: but adjudged, where they have no original juriſdiction, it is never too late for a prohibition, and they can have no ſuch juriſdiction in this caſe, becauſe the *clerk of the pariſh* is not *a ſpiritual perſon*, neither is the duty ſpiritual, but founded on a *cuſtom:* and if there is ſuch a cuſtom, it is triable at law, for he may have an action on the caſe againſt the churchwardens for not making a rate, and levying it: or if levied it, for not paying it. *Mod. Caſes* 252. *Parker* verſus *Clerk.*

Clerk of the Parliament-rolls *(Clericus Rotulorum Parliamenti)* Is he that records all things done in the high court of parliament, and engroſſeth them fairly in *parchment rolls*, for their better preſervation to poſterity. Of theſe there are two, one of the *Lords Houſe*, another of the *Houſe of Commons. Cromp. Juriſ. f.* 4 & 1. *Smith de Rep. Angl. pag.* 38. See alſo *Vowel's* book, touching the order of the *Parliament.* See *Fleta, lib.* 2. *cap.* 12. *pag.* 31.

Clerk of the Patents, Or of the letters patent under the great ſeal of *England*, was erected 18 *Jac.*

Clerk of the Peace *(Clericus pacis)* Is an officer belonging to the ſeſſions of the peace. His duty is, in the ſeſſions, to read the indictments, to enroll the acts, and draw the proceſs: to record the proclamation of rates for ſervants wages, to enroll the diſcharge of apprentices, to keep the counterpart of the indentures of armour, to keep the regiſter-book of licences given to badgers and laders of corn, and of thoſe that are licenſed to ſhoot in guns, and to certify into the *King's Bench* tranſcripts of indictments, outlawries, attainders, and convictions had before the juſtices of the peace, within the time limited by ſtatute. *Lambard's Eiren. lib.* 4. *cap.* 3. *fol.* 379.

By ſtat. 37 *Hen.* 8. *cap.* 1. *ſect.* 3. Every *cuſtos rotulorum* ſhall appoint the clerk of the peace, and grant the office to ſuch able perſons inſtructed in the laws, as ſhall be able to exerciſe the ſame, during the time that the *cuſtos rotulorum* ſhall exerciſe the office of *cuſtos rotulorum*, ſo that the ſaid clerk demean himſelf in the office juſtly; and it ſhall be lawful to ſuch grantee of the ſaid clerkſhip to occupy the office by himſelf, or by his deputy inſtructed in the laws, ſo that the deputy be admitted by the *cuſtos rotulorum.*

Stat. 1 *W. & M. ſtat.* 1. *cap.* 21. *ſect.* 4. The appointing of the *cuſtos rotulorum* through all the counties ſhall be as is directed by ſtat. 37 *H.* 8. *c.* 1.

Sect. 5. The *cuſtos rotulorum*, or other perſon to whom it ſhall belong to appoint the clerk of the peace, ſhall, where the office of clerk of the peace ſhall be void, nominate a ſufficient perſon reſiding in the county or place, to exerciſe the ſame by himſelf or his ſufficient deputy, for ſo long time as ſuch clerk of the peace ſhall well demean himſelf in his office.

Sect. 6. If any clerk of the peace ſhall miſdemean himſelf in the office, and a complaint in writing of ſuch miſdemeanor ſhall be exhibited to the quarter ſeſſions; it ſhall be lawful for the juſtices upon examination and proof, to ſuſpend or diſcharge him from the office; and the *cuſtos rotulorum*, or other perſon to whom it ſhall belong, ſhall appoint another ſufficient perſon reſiding in the county, *&c.* to be clerk of the peace. And in caſe of neglect to make ſuch appointment before the next quarter-ſeſſions, it ſhall be lawful for the juſtices to appoint one.

Sect. 7. He ſhall be ſubject to the penalties and proviſions herein mentioned.

Sect. 8. It ſhall be lawful for any *cuſtos rotulorum*, *&c.* to ſell the place of clerk of the peace, or to take any bond or aſſurance to have any reward or profit for ſuch appointing. But every *cuſtos rotulorum*, *&c.* that ſhall ſo ſell, and every clerk of the peace who ſhall ſo buy his place, are diſabled to hold their places; and ſhall each of them forfeit double the value ſo given or taken, to be recovered by them that ſhall ſue for the ſame.

Sect. 9. Every clerk of the peace, before he enter upon the execution of his office, ſhall in open ſeſſions take the oath following, *viz.*

I A. B. *do ſwear, that I have not, nor will pay any ſum or ſums of money, or other reward whatſoever, nor given any bond or other aſſurance to pay any money, fee, or profit, directly or indirectly, to any perſon or perſons whomſoever for ſuch nomination or appointment.* So help me God.

Sect. 10. Nothing in this act ſhall affect the clerk of the peace for the duchy and county palatine of *Lancaſter*, who holds his office for lives by grants from King *Charles* II.

The clerk of the peace *muſt make out all proceſs*, and when they are compleat muſt *deliver them to the cuſtos*, but as long as they are in proceſs they are not to be with the clerk, but for refuſing to deliver the rolls to the *cuſtos*, he was indicted and *removed*, and a *mandamus* to reſtore him was denied *per* three juſtices againſt the Chief Juſtice. 4 *Mod.* 31. *Paſch.* 3 *W. & M. in B. R. The King and Queen* v. *Evans.*

Indebitatus aſſumpſit, and *non aſſumpſit* pleaded, the jury found the ſtat. 27 *H.* 8. and 1 *W. & M.* and the ſeveral clauſes in them about the clerk of the peace; that the Earl of *Clare* was *cuſtos rotulorum* of *Middleſex*, and that he *named the plaintiff to be clerk of the peace*, to exerciſe the office by him or his deputy, *Quamdiu ſe bene geſſerit*; that the plaintiff *was capable of the office, and duly admitted*; *that the Earl of Clare was afterwards removed, and the Earl of Bedford made* cuſtos rotulorum, *who conſtituted*, by writing under hand and ſeal, *the defendant* during the time he was *cuſtos rotulorum, quamdiu* the defendant *ſe bene geſſerit*; and on ſolemn argument, judgment *pro quer' per tot. cur.* for that he had an eſtate for life, and was not removeable by the new *cuſtos.* 12 *Mod.* 42. *Trin.* 5 *W. & M. Harcourt* v. *Fox.*

By the *ſtatute* 1 *W. & M.* the *cuſtos rotulorum is to appoint a clerk of the peace for ſo long time only as he ſhall demean himſelf well. Owen* brought a *mandamus* to the juſtices to reſtore him to that office. The return was, that the Earl of *Winchelſea*, who was *cuſtos rotulorum*, did *appoint* O. *to be clerk of the peace durante bene placito, &c.* that the ſaid Earl being dead, the Lord *Sydney* was made *cuſtos*, who appointed *S.* to be clerk of the peace of

of *Kent*, purſuant to the ſaid act. The queſtion was, whether a grant of this office during pleaſure, which is only an eſtate at will, ſhall be ſo governed by the ſtatute as to make it an eſtate for life, when once the perſon is admitted to the office; ſo that let the *cuſtos* make what appointment he will, though not purſuant to the ſtatute, it is the ſtatute, and not the *cuſtos*, which gives an intereſt and eſtate to the nominee. Adjudged, that no peremptory *mandamus* ſhall go; for, by the act, the *cuſtos* is to nominate a clerk to execute the office ſo long as he ſhall demean himſelf well, *&c.* and if he appoint him in any other manner, he is no clerk of the peace, ſo that appointment during pleaſure is not purſuant to the act; for he has not executed the authority given him by the act, and ſo the defendant has no title. 4 *Mod.* 293. *Trin.* 6 *W. & M. in B. R. The King* v. *Owen*,

It always belonged to the *cuſtos rotulorum* to *nominate* the clerk of the peace, but the clerk of the peace was *removeable* whenever the *cuſtos* was removed or changed, and moreover was removeable at the will of the *cuſtos* till 37 *H.* 8. 1. which makes him to continue in *quouſque* the *cuſtos* ſhall continue in; but now, by the late act, he is to continue for life, and though the words are, *give and grant to him*, yet it is only an appointment, and conſequently may be *without deed.* 2 *Salk.* 467. *Trin.* 10 *W.* 3. *B. R. Sanders* v. *Owen.*

He is no more than a *miniſterial officer*, and a record made by him is not to be pleaded as a *record*, and will not conclude the judgment of *B. R. Arg.* 8 *Mod.* 43. *Paſch.* 7 *Geo.* 1. in the caſe of *Colvin* v. *Fletcher.*

By ſtat. 34 & 35 *Hen.* 8. *c.* 14. The clerk of the peace ſhall certify into the King's Beneh the names of ſuch as be outlawed, attainted, or convicted of felony.

By ſtat. 22 & 23 *Car.* 2. *c.* 22. *ſect.* 7. The clerk of the peace ſhall deliver to the ſheriff, within ten days after *Sept.* 29. yearly, a perfect eſtreat or ſchedule of all fines and other forfeitures in ſeſſions.

Sect. 8. And alſo ſhall yearly, on or before the ſecond *Monday* after the morrow of *All Souls*, deliver into the Exchequer a duplicate of ſuch eſtreats ſo delivered to the ſheriffs, that the ſheriffs may be charged therewith on their appoſals, on pain to forfeit 50 *l.* the one moiety to the King, the other to the proſecutor.

Sect. 9. And if he ſhall ſpare, take off, diſcharge, or conceal any ſuch fine or forfeiture, unleſs it be by rule of court, he ſhall forfeit treble value; half to the King, and half to him that ſhall ſue; and ſhall alſo forfeit his office, and be incapable to be employed in any office where the revenue is concerned.

By ſtat. 4 & 5 *Will. & M. c.* 24. *ſect.* 5. The clerk of the peace ſhall, upon delivery of the eſtreats into the court of Exchequer, take the following oath, to be adminiſtered by one of the barons:

YOU ſhall ſwear, that theſe eſtreats, now by you delivered, are truly and carefully made up and examined, and that all fines, iſſues, amerciaments, recognizances, and forfeitures, which were ſet, loſt, impoſed, or forfeited, and in right and due courſe of law ought to be eſtreated in the court of Exchequer, are, to the beſt of your knowledge and underſtanding, therein contained; and that in the ſame eſtreats are alſo contained and expreſſed all ſuch fines as have been paid into the court, from which the ſaid eſtreats are made, without any wilful or fraudulent diſcharge, omiſſion, miſnomer, or defect whatſoever.

By ſtat. 3 *Geo.* 1. *c.* 15. *ſect.* 12. The barons of the Exchequer may amerce the clerk of the peace for neglecting to return the eſtreats according to the ſaid two acts of 22 & 23 *Car.* 2. *c.* 22. and 4 & 5 *Will. & M. c.* 24. See **Eſtreats.**

By ſtat. 10 & 11 *W.* 3. *ſect.* 7, 8. Clerk of the peace ſhall have only 2 *s.* for drawing an indictment of felony; and if it is defective, he ſhall draw a new one *gratis*, on pain of 5 *l.* with full coſts to him that ſhall ſue.

By ſtat. 2 *Geo.* 2. *c.* 46. *ſect.* 14. No clerk of the peace, or his deputy, ſhall act as ſolicitor, attorney, or agent, or ſue out any proceſs at any general or quarter ſeſſions, when he ſhall execute the office of clerk of the peace or deputy, on pain of 50 *l.* to him who ſhall ſue in 12 months, with treble coſts.

Clerk of the Pell (*Clericus pellis*) Is a clerk belonging to the Exchequer, whoſe office is to enter every teller's bill into a parchment-roll (called *pellis receptorum*) and alſo to make another roll of payments, which is called *pellis exituum*, wherein he ſets down by what warrant the money was paid. He is mentioned in the ſtatute 22 & 23 *Car.* 2. for *ſubſidy*. This officer is called in ancient records *Clericus Domini Theſaurarii.*

Clerk of the petty-bag (*Clericus parvæ bagæ*) Is an officer of the Chancery, of which ſort there are three, and the Maſter of the Rolls their chief. Their office is to record the return of all inquiſitions out of every ſhire; to make all patents of cuſtomers, gaugers, controllers, and aulnegers; all *conge d'eſlires* for biſhops; all *liberates* upon extents of ſtatute-ſtaples; the recovery of recognizances forfeited, and all *elegits* upon them; the ſummons of the nobility, clergy, and burgeſſes to the parliament; commiſſions directed to the knights, and others of every ſhire, for aſſeſſing ſubſidies; writs for the nomination of collectors for taxes; and all traverſes upon any office, bill, or otherwiſe; to receive the fees for homages due to the Lord Great Chamberlain, of the nobility, biſhops, *&c.* This officer is mentioned in ſtat. 33 *H.* 8. *cap.* 22.

Clerk of the pipe (*Clericus pipæ*) Is an officer in the Exchequer, who, having all accompts and debts due to the King delivered and drawn out of the remembrancers offices, charges them down into the great roll; and is called *clerk of the pipe* from the ſhape of that roll, which is put together like a *pipe*: formerly he was called *Ingroſſator magni rotuli*, *contrarotulator* pipæ, duplex *ingroſſator*, and now *clerk of the pipe*. He alſo writes ſummons to the ſheriff to levy the ſaid debts upon the goods and chattels of the debtors; and if they have no goods, then he draws them down to the Lord Treaſurer's remembrancer, and writes eſtreats againſt their lands. The ancient revenue of the crown remains in charge before him, and he ſees the ſame anſwered by the farmers and ſheriffs. He makes a charge to all ſheriffs of their ſummons of the *pipe* and green wax, and ſees it anſwered upon their accounts. He hath the drawing and ingroſſing all leaſes of the King's land. In *Henry* the Sixth's time he was called *Ingroſſator magni rotuli.*

Clerk of the pleas (*Clericus placitorum*) Is an officer in the Exchequer, in whoſe office all the officers of the court (upon eſpecial privilege belonging unto them) ought to ſue, or to be ſued upon any action, *&c.* See the *Practice of the Exchequer*, *p.* 86. and 4 *Inſt. fol.* 107.

Clerk of the privy ſeal (*Clericus privati ſigilli*) There are four of theſe officers that attend the Lord *Privy Seal*, or (if none ſuch) the principal ſecretary, writing and making out all things that are ſent by warrant from the ſignet to the *privy ſeal*, and are to be paſſed to the *great ſeal*; as alſo to make out (as they are termed) *privy ſeals* upon any ſpecial occaſion of his Majeſty's affairs; as for loan of money, and ſuch like. Of this officer and his function, you may read the ſtatute 27 *Hen.* 8. *c.* 11. He that now is called the *Lord Privy Seal*, ſeems in ancient time to have been called *clerk of the privy ſeal*, and to have been reckoned, notwithſtanding, in the number of the great officers of this realm. Read the ſtatute 12 *R.* 2. *c.* 11.

Clerk of the recognizances. See **Statutes.**

Clerk of the remembrance, An officer in the Exchequer, who is to ſit againſt the clerk of the pipe to ſee the diſcharges made in the pipe, *&c.* Stat. 37 *Ed.* 3. *c.* 4. The clerk of the pipe and remembrancer ſhall be ſworn to make a ſchedule of perſons diſcharged in their offices, 5 *Ric.* 2. *ſt.* 1. *c.* 15. See **Remembrancer.**

Clerk of the rules, In the court of King's Bench is he who draws up and enters all the rules and orders made in court, and gives rules of courſe on divers writs. This officer is mentioned 22 & 23 *Car.* 2.

Clerk of the ſewers (*Clericus ſuerarum*) Is an officer appertaining to the commiſſioners of *ſewers*, writing all things that they do by virtue of the commiſſion; for which ſee **Sewers:** and ſee the ſtatute of 13 *Eliz. c.* 9.

Clerk of the ſignet (*Clericus ſigneti*) Is an officer attendant continually on his Majeſty's principal ſecretary, who always hath the cuſtody of the *privy ſignet*, as well for ſealing his Majeſty's private letters, as alſo ſuch grants as paſs his Majeſty's hand by bill ſigned. Of theſe there are four that attend in their courſe, and have their diet at the ſecretary's table. More largely you may read of their office in the ſtatute made *anno* 27 *H.* 8. *cap.* 11.

Clerk of the ſuperſedeas, Is an officer belonging to the court of Common Pleas, who makes out the writ of *ſuperſedeas* (upon the defendant's appearing to the *exigent*) whereby the ſheriff is forbidden to return the *exigent*.

Clerk of the Treaſury (*Clericus Theſaurarii*) Is an officer belonging to the Common Pleas, who hath the charge of keeping the records of the court, and makes out all the records of *niſi prius*, hath the fees due for all ſearches, and hath the certifying all records into the King's Bench, when a writ of error is brought. Alſo he makes all exemplifications of records being in the Treaſury. He is taken to be the ſervant of the Chief Juſtice, and removeable at his pleaſure, whereas all other officers are for term of life. There is alſo a ſecondary or under-clerk of the Treaſury for aſſiſtant, who hath ſome allowances; and likewiſe an under keeper, who always keeps one key of the Treaſury-door, and the chief clerk of the ſecondary another; ſo as the one cannot come in without the other.

Clerk of the warrants (*Clericus warrantorum*) Is an officer belonging to the court of Common Pleas, who entereth all *warrants* of attorney for plaintiff and defendant, and inrols all deeds of indentures of bargain and ſale, which are acknowledged in the court, or before any judges out of the court. And he eſtreats into the Exchequer all iſſues, fines, and amerciaments, which any way grow due to the King in that court, and hath a ſtanding fee of ten pounds of the King for making the ſame eſtreats. See *Fitz. Nat. Br. fol.* 76.

Clerkenwell-Green. The highway leading from the Eaſt ſide of *Clerkenwell-Green* to *St. John's Street*, to be paved. 2 *Will. & M. ſeſſ.* 2. *c.* 8. *ſect.* 24.

Cleronimus, An heir. In the *Monaſticon*, 3 *tom. pag.* 129. we read, That K. *Edgar* gave another a certain portion of land for life, with liberty, that *poſt vitæ ſuæ terminum quibuſcunq*; cleronymis *impune derelinquat.*

Cletae (Fr. *clays*) Hurdles to fold or keep ſheep in. *Tenentes de Hampton debent quærere ſex ſummas virgarum apud boſcum de Haya juxta Heref. ad* cletas *nundinarum faciendas.* Lib. Niger Heref. fol. 61.

Clevum, *Glouceſter.*

Client and attorney. Attorney being to draw a deed, has writings brought to him, and among them is one that concerns himſelf and his title; tho' the *deed concerned the attorney's own title*, yet they forced him to *deliver it up*, and left him to take his proper remedy at law. 9 *Show.* 165. *pl.* 156. *Mich.* 33 *Car.* 2. *B. R. Tyack*'s caſe.

Attorney having *money due* to him *from his client*, ſhall not be compelled to deliver up the papers before he is paid his fees, *&c. Comb.* 48. *Hill.* 2 *&* 3 *Jac.* 2. *B. R. Anon.*

Attorney having writings delivered to him to draw a mortgage, *&c.* may *detain* them *till the money is paid* for his drawing them; but he cannot detain any writings, which are *delivered to him on a ſpecial truſt* for the money due to him in that very buſineſs; and if he does, an *attachment* will go, and he will be ordered to pay *coſts and damages* to the party. 8 *Mod.* 306. *Mich.* 11 *Geo.* 1. *Lawſon* v. *Dickenſon.*

A Client delivered a deed to his attorney, in order to bring an action of covenant. The attorney *loſt the deed*, as he pretended. On a motion for an *attachment* againſt the attorney for not delivering the deed, it was propoſed by Mr. *Strange*, the attorney's counſel, that the plaintiff ſhould bring a bill of diſcovery, to make him ſet out whether there was not ſuch deed, and what the deed was; but he agreed, that it ought to be at the attorney's coſts, and moved that the court would not grant an *attachment*. *Page* J. ſaid, he thought the attorney himſelf ought to procure a diſcovery by bill in Chancery, but that the plaintiff ſhould allow him to make uſe of his name for that purpoſe; accordingly the court granted an *attachment*, but to lie in the officer's hands till further directions given. 2 *Barnard. Rep. in B. R. Paſch.* 6 *Geo.* 2. *Court* v. *Gilbert.*

He may *expend money as attorney, but not as ſolicitor*; *per Popham, Clench* and *Gawdy. Cro. E.* 459. *pl.* 4. *Hill.* 38 *Eliz. B. R. Rolls* v. *Germin.*

If the client in any ſuit furniſhes his attorney with a *plea*, which the attorney finds to be *falſe*, ſo that he cannot plead it for the ſake of his conſcience, the attorney *may plead* in this caſe, *quod non fuit veracitèr informatus*, and in ſo doing he does his duty. *Jenk.* 52. *pl.* 100.

If the attorney *confeſs the action without conſent and will of his client*, this ſhall bind the client; but otherwiſe it is in collateral matters; *per* two juſtices. 2 *Roll. Rep.* 63. *Hill.* 16 *Jac. B. R.*

An attorney may take fees, but he may not lay out or *expend money* for his client; and if he does, *Hobart* doubted what remedy he might have. *Winch.* 53. *Mich.* 2 *Jac. C. B. Gage* v. *Johnſon*, cites *Sam. Leeche*'s caſe.

A client brought *action ſur le caſe againſt his attorney* for delivering to the ſheriff a *fi. fa.* againſt him in a ſuit in which he was attorney for him, and procuring it to be executed. It was inſiſted after verdict, that the ſuit was determined by judgment being given, and conſequently the truſt repoſed in the defendant. Adjudged the truſt ſtill continued; for the defendant might have ſhewed cauſe why there ſhould not be execution; and his procuring the writ to be executed, ſhews that he *combined againſt his client*; and judgment for the plaintiff. *Niſi. Sty.* 426. *Mich.* 1654. *B. R. Lawrence* v. *Harriſon.*

It was ſaid and admitted, that an attorney's *aſſent to an award* ſhall bind his client. *Ch. Caſes* 87. *Paſch.* 19 *Car.* 2. in caſe of *Colwell* v. *Child.*

Money recovered, paid to the attorney on record, is good payment; for it is a payment to the client himſelf. 2 *Show.* 139. *Mich.* 32 *Car.* 2. —— v. *Morton.*

Bill by adminiſtrator for relief, after a *ſpecial plea* adm. pleaded, and verdict and judgment, pretending that his attorney without direction pleaded, that the defendant (now the plaintiff) had no notice of the original till the 12th of *March*, and had then fully adminiſtered. Iſſue was, that the defendant had notice before the 12th, *viz.* on the 6th of *March*; whereas he had in truth fully adminiſtered before the 6th of *March*, and in truth before the original purchaſed; ſo that *by the falſe plea by the attorney the right was never tried.* The Maſter of the Rolls diſmiſſed the bill, and Lord *Somers* affirmed the diſmiſſion. 2 *Vern.* 325. *pl.* 314. *Mich.* 1695. *Stephenſon* v. *Wilſon.*

In aſſumpſit the defendant pleaded *non aſſumpſit infra ſex annos.* The plaintiff replied; and the defendant not joining iſſue in due time, the plaintiff's attorney ſigned judgment, but afterwards conſented to accept the iſſue; but upon a motion to compel him to accept the iſſue, it was oppoſed, becauſe the plea was a hard plea, and the client having notice of this advantage, ordered his attorney to inſiſt upon it, and the court ſaid they would not have held him to it, had he not conſented; but now they would, and the client is bound by the attorney's conſent, and they could take no notice of him. 1 *Salk.* 86. *Mich.* 8 *W.* 3. *B. R. Latouch* v. *Paſherant.*

An attorney *may undertake for* his client, *but not releaſe his cauſe of action*; *per Holt* Ch. J. 12 *Mod.* 384. *Paſch.* 12 *W.* 3. in caſe of *Stanhope* v. *Pemberton.*

Action againſt an attorney for *money received to plaintiff's uſe*; *the attorney ſhewed* to the court *that he had been employed as an attorney for the plaintiff, and had applied ſome of his money towards paying for his labour, and ſome to a ſolicitor* in the cauſe; and moved to have his bill taxed, and an allowance of what ſhould then appear due to him. *Per cur.* If the plaintiff had applied by *motion* to have us compel an attorney by virtue of our power over him as our officer, to pay the money, there, foraſmuch as that is diſcretionary in us, we would not help the plaintiff, unleſs he did the fair thing on his ſide; but here, when he demands no favour of us, we cannot deny

deny him the law, and let the defendant take his legal remedy againſt the plaintiff. 12 *Mod.* 657. *Hill.* 13 *W.* 3. *Craddock* v. *Glin.*

As an attorney has a privilege not to be examined as to the ſecrets of his client's cauſe, ſo the *attorney's privilege is the client's privilege*; and an attorney, though he would, yet ſhall not be allowed to diſcover his client's ſecrets; *per cur.* 12 *Mod.* 41. *Mich.* 10 *Ann. B. B.* in the caſe of Lord *Say and Seal*,——and cites it as ſo adjudged in *Holbeche's Caſe.*

But as to the *time of executing a deed*, which was of a date long before the execution, that is not a thing of ſuch a nature as to be called the ſecret of his client. 10 *Mod.* 41. *Mich.* 10 *Ann. B. R.* the Lord *Say and Seal's Caſe.*

For more of client and attorney in general, ſee **Attorney.**

Clipping money. See **Coin.**

Clitones, Not only the eldeſt, but all the ſons of Kings; we meet with it often in old authors, *viz.* in the charter of King *Æthelred, in Matt. Pariſ. pag.* 158. *Ethelſtanus Ecbryth, &c. cum* clitonibus *Epitheto ſubſcribunt.* So in Mr. *Selden*'s Notes upon *Eadmerus, Ego Edgar, &c. Ego Edmond* Clito *legitimus præfati regis, &c.*

Clive, Cliff, The names of places beginning or ending with *clivo* or *cliff*, ſignify a rock, from the Sax. *cliff, rupes.*

Clocks and watches. Stat. 9 & 10 *W.* 3. *c.* 28. *ſ.* 2. No perſon ſhall export, or endeavour to export, out of this kingdom, any outward or inward box, caſe or dial-plate, of gold, ſilver, braſs, or other metal, for clock or watch, without the movement in or with every ſuch box, *&c.* made up fit for uſe, with the maker's name engraven thereon; nor ſhall any make up any clock or watch, without putting their name and place of abode or freedom, and no other name or place, on every clock or watch, on penalty of forfeiting every ſuch empty box, caſe and dial-plate, clock and watch, not made up and engraven as aforeſaid, and 20 *l.* one moiety to the King, the other to them who ſhall ſue for the ſame.

Stat. 27 *Geo.* 2. *cap.* 7. *ſect.* 1. If any perſon who ſhall be hired or employed by any perſon practiſing in the trade of clockmaking or watchmaking, or any other branch or branches of ſuch trade, to make, finiſh, alter, repair, or clean any clock or clocks, watch or watches, or any part or parts of a clock or clocks, watch or watches, or be intruſted by any perſon practiſing the ſaid trade or trades, with any gold, ſilver, or other metals or materials, to be, or that ſhall be in the whole or in part wrought or manufactured, for any part or parts of a clock or clocks, watch or watches, or any diamond or other precious ſtone, to be, or that ſhall be ſet or fixed in or about any clock or clocks, watch or watches, ſhall purloin, imbezzle, ſecrete, ſell, pawn, exchange, or otherwiſe unlawfully diſpoſe of any clock or watch, or any part or parts of any clock or watch, or any gold, ſilver, or any other metal or material, or any part thereof, or any diamond or other precious ſtone, with which ſuch perſon ſhall be intruſted by any perſon practiſing the ſaid trade or trades, or any part or branch, or any parts or branches of ſuch trade or trades, and ſhall be thereof convicted by the oath of the owner of ſuch goods, or by oath of any other credible witneſs or witneſſes, or by confeſſion of the perſon or perſons charged with ſuch offence, before any one or more juſtice or juſtices of the peace of the county, riding, liberty, city, diviſion, town, or place where ſuch offence ſhall be committed, or where the perſon ſo charged ſhall reſide or inhabit (which oath the ſaid juſtice or juſtices is and are hereby impowered and required to adminiſter); every ſuch offender ſhall for the firſt offence forfeit 20 *l.* and in caſe the ſaid forfeiture ſhall not be forthwith paid, the juſtice or juſtices before whom ſuch conviction ſhall be had, ſhall commit the party or parties ſo convicted to the houſe of correction, or other publick priſon of ſuch county, riding, diviſion, city, liberty, town, or place, there to be kept to hard labour for the ſpace of fourteen days, unleſs ſuch forfeiture ſhall be ſooner paid; and if within two days before the expiration of ſuch fourteen days, ſuch forfeiture ſhall not be paid, the ſaid juſtice or juſtices is and are hereby impowered to order the perſons ſo convicted to be publickly whipped at the market-place, or ſome other publick place of the city, town, or place where ſuch offender or offenders ſhall be reſpectively committed; and in caſe of a further conviction, in manner before preſcribed by this act, for or upon a ſecond or other ſubſequent offence of the ſame kind, the perſon or perſons ſo again offending, being thereof convicted in manner aforeſaid, ſhall for every ſecond or other ſubſequent offence forfeit forty pounds; and in caſe the forfeiture ſhall not be forthwith paid, the juſtice or juſtices before whom ſuch conviction ſhall be had, ſhall commit the perſon or perſons ſo again offending to the houſe of correction, or other publick priſon, for any time not exceeding three months, nor leſs than one month, unleſs the ſaid forfeiture ſhall be ſooner paid; and if within ſeven days before the expiration of the time for which ſuch offender or offenders ſhall be committed, the ſaid forfeiture ſhall not be paid, the juſtice and juſtices is and are hereby impowered to order the perſon ſo again offending to be publickly whipped at the market-place, or ſome other publick place of the city, town, or place where ſuch offender or offenders ſhall be reſpectively committed, twice or oftener, as to ſuch juſtice or juſtices ſhall appear reaſonable.

Sect. 2. And if any perſon ſhall buy, receive, accept, or take by way of gift, pawn, pledge, ſale, or exchange, or in any other manner whatſoever, of or from any perſon whomſoever, any clock or watch, or any part or parts of a clock or watch, or any gold, ſilver, or other metal or material as aforeſaid, whether the ſame or any part thereof be or be not wrought or manufactured, or any diamond or other precious ſtone, which ſhall have been intruſted with any perſon or perſons hired or employed as aforeſaid by any perſon practiſing the ſaid trade or trades; he, ſhe, or they ſo buying, receiving, accepting, or taking any ſuch goods, materials, or effects, knowing the ſame to be purloined or embezzled, being thereof lawfully convicted, in manner before preſcribed for the conviction of perſons purloining or imbezling the ſaid goods, materials, or effects, ſhall for the firſt offence forfeit 20 *l.* and in caſe the forfeiture ſhall not be forthwith paid, the juſtice or juſtices before whom ſuch conviction ſhall be had, ſhall commit the party or parties ſo convicted to the houſe of correction, or other public priſon as aforeſaid, there to be kept to hard labour for the ſpace of fourteen days, unleſs the forfeiture ſhall be ſooner paid; and if within two days before the expiration of the ſaid fourteen days, the ſaid forfeiture ſhall not be paid, the ſaid juſtice or juſtices is and are hereby impowered and required to order the perſon or perſons ſo convicted to be publickly whipped at the market-place, or ſome other publick place of the city, town, or place where ſuch offender or offenders ſhall be reſpectively committed, once or oftener, as to ſuch juſtice or juſtices ſhall appear reaſonable: and in caſe of any further conviction, for or upon a ſecond or any other ſubſequent offence of the ſame kind, the perſon or perſons ſo again offending, being thereof convicted in manner before preſcribed, ſhall for every ſecond or other ſubſequent offence forfeit 40 *l.* and in caſe the ſaid forfeiture ſhall not be forthwith paid, the juſtice or juſtices before whom ſuch conviction ſhall be had, ſhall commit the party or parties ſo convicted to the houſe of correction, or other public priſon as aforeſaid, there to be kept to hard labour for any time not exceeding three months, nor leſs than one month, unleſs the ſaid forfeiture ſhall be ſooner paid; and if within ſeven days before the expiration of the time for which ſuch offender or offenders ſhall be committed, the ſaid forfeiture ſhall not be paid, the ſaid juſtice or juſtices is and are hereby impowered and required to order ſuch offender or offenders to be publickly whipped at the market-place, or ſome other publick place of the city, town, or place where ſuch offender or offenders ſhall be reſpectively committed, twice or oftener, as to ſuch juſtice or juſtices ſhall appear reaſonable; and the ſaid reſpective forfeitures when recovered, after ſatiſfaction

faction ſhall have been made thereout to the party or parties injured, together with ſuch coſts of proſecution as ſhall be judged reaſonable by the juſtice or juſtices before whom ſuch conviction ſhall have been had, ſhall be paid and applied to and for the uſe of the poor of the pariſh or place where the perſon or perſons ſo convicted ſhall reſide or inhabit.

Sect. 3. Provided, that if any perſon convicted as aforeſaid of purloining, imbeziling, ſecreting, ſelling, pawning, exchanging, or otherwiſe unlawfully diſpoſing of, or buying, receiving, or taking to pawn any of the goods, materials, or effects herein before mentioned, ſhall think himſelf or herſelf aggrieved by the judgment of the juſtice or juſtices before whom he or ſhe ſhall have been convicted, ſuch perſon ſhall have liberty to appeal to the juſtices at the next general or quarter ſeſſions of peace which ſhall be held for the county, riding, diviſion, city, liberty, town, or place where ſuch judgment ſhall have been given; and the execution of the ſaid judgment ſhall in ſuch caſe be ſuſpended; the perſon ſo convicted entering into a recognizance at the time of ſuch conviction, with two ſufficient ſureties, in double the ſum which ſuch perſon ſhall be adjudged to forfeit, upon condition to proſecute ſuch appeal with effect, and to be forthcoming to abide the judgment and determination of the juſtices in the ſaid general or quarter ſeſſions; which recognizance the ſaid juſtice or juſtices before whom ſuch conviction ſhall be had, is and are hereby required and impowered to take; and the juſtices in the ſaid general or quarter ſeſſions are hereby authorized and required to hear and finally determine this matter of the ſaid appeal, and to award ſuch coſts as to them ſhall appear juſt and reaſonable to be paid by either party; and if upon the hearing of the ſaid appeal, the judgment of the juſtice or juſtices before whom the appellant ſhall have been convicted, ſhall be affirmed, ſuch appellant ſhall immediately pay the ſum which he or ſhe ſhall have been adjudged to forfeit, together with ſuch coſts as the juſtices in their general or quarter ſeſſions ſhall award to be paid by him or them, for defraying the expences ſuſtained by the defendant or defendants in ſuch appeal; or in default of making ſuch payments, ſhall ſuffer the reſpective pains and penalties by this act inflicted upon perſons reſpectively who ſhall neglect to pay, or ſhall not pay the reſpective forfeitures by this act impoſed upon ſuch perſons reſpectively, who ſhall be convicted of purloining, imbeziling, ſecreting, ſelling, pawning, exchanging, or otherwiſe unlawfully diſpoſing of any of the goods, materials, or effects herein before mentioned, or of perſons buying, receiving, or taking to pawn any of ſuch goods, materials, or effects.

Sect. 4. And the juſtice or juſtices of the peace before whom any perſon ſhall be convicted, in manner preſcribed by this act, of purloining, imbeziling, ſecreting, ſelling, pawning, exchanging, or otherwiſe unlawfully diſpoſing of, or of buying, receiving, or taking to pawn any of the goods, materials, or effects aforeſaid, ſhall cauſe ſuch reſpective conviction to be drawn up in the form and words following; that is to ſay:

Middleſex, } *BE it remembered, that on the* ——— *day*
to wit, } *of* ——— *in the* ——— *year of his Majeſty's reign,* ——— *was convicted before me* (or us) ——— *of his Majeſty's juſtices of the peace for the ſaid county of* ———, *or for the riding* (or diviſion) *of the ſaid county of* ——— *or for the city, liberty, or town of* ——— *in the ſaid county of* ——— [as the caſe ſhall be] *of purloining, imbeziling, ſecreting, ſelling, pawning, exchanging, or unlawfully diſpoſing of, or of buying, receiving, or taking to pawn* [as the caſe ſhall happen to be] ——— [ſpecifying the reſpective goods, materials, or effects] *the property of* ——— *of* ——— *in the county of* ———. *Given under my hand and ſeal* [or our hands and ſeals] *the day and year aforeſaid.*

Which ſaid form and conviction ſhall not be liable to be removed by *certiorari* into his Majeſty's court of King's Bench; and the ſaid juſtice or juſtices before whom ſuch conviction ſhall be had, ſhall cauſe the ſame, drawn up in the form aforeſaid, to be fairly written on parchment, and tranſmitted to the next general or quarter ſeſſions of the peace to be held for the county, riding, diviſion, city, town, or liberty, wherein ſuch conviction was had, to be filed and kept among the records of the ſaid general or quarter ſeſſions; and in caſe any perſon or perſons ſo convicted ſhall appeal from the judgment of the ſaid juſtice or juſtices to the ſaid general or quarter ſeſſions, the juſtices in ſuch general or quarter ſeſſions are hereby required, upon receiving the ſaid conviction drawn up in the form aforeſaid, to proceed to the hearing and determination of the matter of the ſaid appeal, according to the directions of this act; any law or uſage to the contrary notwithſtanding.

Sect. 5. And it ſhall and may be lawful to and for any one juſtice of the peace of any county, riding, diviſion, city, liberty, town, or place, and he is hereby required, upon complaint to him made upon oath of any offence committed againſt this act within the ſame county, riding, diviſion, city, liberty, town, or place, to iſſue his warrant for apprehending and bringing before him, or before any other juſtice or juſtices of the peace of the ſame county, riding, diviſion, city, liberty, town, or place, the perſon or perſons charged with ſuch offence, and the juſtice or juſtices before whom ſuch perſon or perſons ſhall be brought, is and are hereby authorized and required to hear and determine the matter of every ſuch complaint, and to proceed to conviction and judgment thereupon.

Cloere, A priſon or dungeon; I believe of ſome *Britiſh* original, which might give name to the old Latin *cloeria*, which *Du Freſne* unaptly conjectures to have been a corruption of *clauſeria*, a cloſe place of reſtraint. The dungeon, or inner priſon in *Wallingford-Caſtle, temp. H.* 2. was called *Cloere-Brien*, i. e. *carcer Brieni, fil. com. Domini de Wallingford.*

Hence ſeems to come the Lat. *cloaco*, which was originally the cloſeſt ward, the naſtieſt part of a priſon. The old *cloacarius* is interpreted in a MS. gloſſary, *carceris cuſtos.* The preſent *cloacarius*, or keeper of a jakes, is an officer in ſome religious houſe, impoſed on an offending brother, or voluntarily choſen by him as an exerciſe of humility and mortification; and in ſome of our *Engliſh* convents beyond the ſeas, this ſweet officer is called *Count of Holt. Cowell, ed.* 1727.

Cloſh, Is an unlawful game, forbidden by the ſtatute, made in the 17th year of *Ed.* 4. *cap.* 3. and is inhibited alſo by the ſtatute of 33 *H.* 8. *c.* 9. But there it is more properly called *claſh*; for it is the throwing of a bowl at nine pins of wood, or nine ſhank-bones of an ox or horſe; and it is now ordinarily called *kailes*, or *nine-pins. Termes de la Ley.*

Cloth. No cloth made beyond ſea ſhall be brought into the King's dominions, on pain of forfeiting the ſame, and the importers to be farther puniſhed. Stat. 12 *Ed.* 3. *c.* 3. See **Drapery** and **Woollen manufactures.**

Clothiers. See **Drapery.**

Clove, Is the two and thirtieth part of a weigh of cheeſe, that is, eight pounds. 9 *H.* 6. *cap.* 8.

Cloves (*Caryophylli*) Are a ſpice known by ſight to every man; they are flowers of a tree gathered and hardened by the ſun. Of their nature you may read in *Gerard's Herbal, lib.* 3. *cap.* 144. This is compriſed among ſuch ſpices as are to be garbled. 1 *Jac. c.* 19.

Clough, A valley. *Domeſday-Book.*

Clown. See **Colonus.**

Clunch, *Blew Clunch.* At *Wedneſbury* in *Staffordſhire*, upon ſinking a coal-pit near the ſurface, they met firſt with earth and ſtone, then with a ſubſtance called *blew clunch*, and thirdly with coal.

Cluta (Fr. *Clous*) Shoes, clouted ſhoes; moſt commonly horſe-ſhoes, and the ſtreakers of iron with which cart-wheels are ſhod.——*In uno pari rotarum computo ii. ſol. ii. denar. in eodem ferro ligando v. ſol. iv. denar. in axibus emptis iv. den. in* clutis, *& clavis ad idem emptis, iv. den. ob.* —— Conſuetud. domus de Farendon. MS. f. 16. Hence *Clutarium.*

Clutarium (*Cluarium*) A forge, or ſmithy, or ſmith's ſhop, where the *clous*, or iron ſhoes are made or applied. *Tenuit duas carucatas terræ de Domino Rege, in capite*

capite per tale ſervitium deferendo palefridum Domini Regis ſuper quatuor pedes de cluario *Domini Regis quotieſcunque ad manerium ſuum de* Maunsfield *venerit, & ſi inclaudet* (if he lame) *palefridum Domini Regis, dabit ei palefridum quatuor marcarum.* Mon. Angl. tom. 2. p. 598.

Clypeus, One of a noble family. Clypei *proſtrati,* a noble family extinct. *Sic nobilis* clypeus *ille mareſcallorum tot & tantis hoſtibus Angliæ formidabilis evanuit.* Matt. Paris 463. And *Matt. Weſtm.* ſpeaking of the family of *Pembroke* being extinct.

Cnipulus *(Kniipulus, knipus, knivus)* A knife.—— Thomas Matyr *tam cancellarium ſuum quam notarios cunctos ſacramento conſtrinxit, quod valens* cnipulum Anglicanum *propter literas a nemine reciperent.* Giral. Cambrenſ. apud Whartoni Angl. Sacr. P. p. 625.

Coaches, and **Chairs.** Stat. 9 *Ann. cap.* 23. *ſect.* 1. The crown may nominate under the great ſeal commiſſioners for regulating and licenſing hackney coaches, not exceeding five, who ſhall regulate and licenſe all hackney coaches within the bills of mortality for thirty-two years.

Made perpetual, 3 Geo. 1. cap. 7. ſect. 1.

Sect. 2. The commiſſioners may, under their hands and ſeals, or of the major part of them, licenſe not exceeding eight hundred hackney coaches, and upon every licence there ſhall be reſerved the weekly ſum of 5 *s.* to be monthly paid.

Sect. 3. The commiſſioners for thirty-two years may licenſe two hundred hackney chairs within the bills of mortality, reſerving to the crown the yearly ſum of 10 *s.* to be paid quarterly.

Made perpetual, 3 Geo. 1. cap. 7. ſect. 1. *part of the* general fund.

Sect. 4. No perſon ſhall drive or let to hire any hackney coaches or coach-horſes within the weekly bills, *&c.* without a licence from the commiſſioners, upon forfeiture of 40 *s.* and no horſe ſhall be uſed in any hackney coach under the ſize of fourteen hands; and every licenſed coach and chair ſhall have a mark or figure on each; and if one perſon ſhall be licenſed to keep ſeveral hackney coaches or chairs, he ſhall have diſtinct figures; and no perſon ſhall put the ſame figure on his coach or chair which is appointed for another, or ſhall deface the figure, upon forfeiture of 5 *l.* one moiety to the informer, and the other to the crown.

Sect. 5. Commiſſioners licenſing more than eight hundred coaches or two hundred chairs, ſhall forfeit 100 *l.* to be recovered in the courts at *Weſtminſter* by any who will ſue.

Sect. 6. No hackney coachman ſhall take for his hire in and about *London* and *Weſtminſter*, or within ten miles thereof, above ten ſhillings *per* day, reckoning twelve hours to the day; and not above 1 *s.* 6 *d.* for the firſt hour, and 12 *d.* for every hour after. And no perſon ſhall pay from any of the inns of courts, or thereabouts, to any part of *St. James*'s or *Weſtminſter* (except beyond *Tuttle-ſtreet*) above 12 *d.* and from any of the inns of court, or thereabouts, to the *Royal Exchange*, 12 *d.* and if to the *Tower*, *Biſhopſgate*, or *Aldgate*, or thereabouts, 1 *s.* 6 *d.* and the like rates from and to any places of the like diſtance.

Sect. 7. No perſon ſhall be obliged to pay for a hackney coach above 12 *d.* for any diſtance not exceeding one mile and four furlongs; and if above that diſtance, and not exceeding two miles 1 *s.* 6 *d.* and the commiſſioners ſhall cauſe the diſtance to be meaſured between the moſt noted places within the weekly bills.

Sect. 8. Hackney chairmen ſhall have no more than the rate of a hackney coach driven two-third parts of the ſame diſtance; and any hackney coachman or chairman exacting more, or refuſing to go at that rate, forfeits 40 *s.*

Sect. 9. The commiſſioners ſhall appoint under officers, and they are not to take for their licences any gratuity or any fee, other than what is to be paid to the crown, upon pain to forfeit their offices, and to be incapable of any grant thereof, or of any other office; only the clerks may take 2 *s.* 6 *d.* for ingroſſing each licence.

Sect. 10. The commiſſioners and other officers ſhall take an oath for the due execution of their offices.

Sect. 11. The commiſſioners ſhall pay the money into the Exchequer, and upon oath deliver to the Treaſury books of accounts, containing all the licences granted, and the names and ſurnames of the perſons to whom granted, *&c.* once in every year.

Sect. 12. The weekly and other rents and ſums of money, and all forfeitures and penalties by this act, or by any by-laws made by the commiſſioners (the penalties to be incurred by the commiſſioners excepted) ſhall be levied by warrant of three of the commiſſioners, by diſtreſs of the goods of the offender, which ſhall be ſold within ten days after the diſtreſs, *&c.* and if no diſtreſs can be had, the offender ſhall be committed by like warrant till the penalty paid; and if the rent be behind fourteen days, the commiſſioners (without demanding the arrear) may revoke the licence.

Sect. 13. Offences againſt this act may be heard and determined by three commiſſioners in a ſummary way, upon the oath of one witneſs or upon confeſſion (the party being ſummoned) one moiety to the crown, the other to the informer.

Sect. 14. Perſons ſued for any thing done in purſuance of this act may plead the general iſſue; and if judgment be againſt the plaintiff, the defendant ſhall have double coſts.

Sect. 15. No *certiorari* ſhall ſuperſede execution or other proceeding upon any order of the commiſſioners.

Sect. 16. The commiſſioners may make by-laws to bind the perſons who have licences, and annex penalties for the better putting in execution this act, and for the good government of the perſons licenſed.

Sect. 17. The by-laws ſhall be approved by the Lord Chancellor and the two Chief Juſtices and Chief Baron, or any three of them, and then printed; and the breach of ſuch by-laws ſhall be puniſhable by any juſtice of peace, mayor, or head officer, where the offence ſhall be committed.

Sect. 18. That part of the penalties which belongs to the Queen ſhall be tranſmitted to the receiver general of the revenues of the hackney coaches, and certified to the commiſſioners within ten days after levied, upon forfeiture of double the ſum; two thirds to the crown, the other third to the informer.

Sect. 19. Upon complaint to the commiſſioners that a coachman or chairman hath offended, he ſhall be ſummoned, and if he refuſe to appear, or is found guilty of a miſbehaviour, they may revoke his licence for giving abuſive language, or otherwiſe.

Sect. 20. Coachmen or chairmen licenſed may ply on the Lord's day, notwithſtanding the act 29 *Car.* 2. *c.* 7.

Sect. 21. An account of the profits ariſing by licenſing coaches and chairs ſhall be made annually before the auditors of the impreſt.

Sect. 22. If any refuſe to pay a coachman or chairman his juſt hire, or ſhall cut or break any coach or chair willfully, any juſtice of peace may grant a warrant againſt the offender, and upon proof on oath award ſatisfaction; and upon refuſal to make ſatisfaction, may bind him over to the next ſeſſions, which ſhall finally determine, and for non-payment levy by diſtreſs.

Sect. 49. If any perſon driving a coach, or carrying a chair for hire, under the licence of another perſon as his ſervant, ſhall be guilty of any miſbehaviour, by demanding more than his fare, or giving abuſive language or other rude behaviour, and being convicted by oath of one witneſs before the commiſſioners, or one Juſtice for *London*, *Weſtminſter*, *Middleſex*, or *Surrey*, he ſhall forfeit not exceeding 20 *s.* to the poor of the pariſh; or if not able to pay, ſhall be ſent to *Bridewell*, or ſome houſe of correction, to be kept to hard labour for ſeven days, and have the publick correction of the houſe.

The commiſſioners powers are continued by 33 Geo. 2. c. 25. *ſo long as any part of the acts for licenſing hackney coaches.*

Stat. 10 *Ann. cap.* 19. *ſect.* 158. The commiſſioners for hackney coaches may licenſe (over and above the

number of chairs by the former act) any additional number not exceeding one hundred hackney chairs, during thirty-one years, ſo that the number ſhall not exceed three hundred at one time.

Made perpetual, 3 Geo. 1. cap. 7. ſect. 1. *part of the* general fund.

Stat. 12 *Ann. ſtat.* 1. *cap.* 14. *ſect.* 1. The commiſſioners for licenſing coaches and chairs ſhall in the firſt place licenſe the widows of hackney chairmen who died poſſeſſed of any licences, unleſs ſuch widows ſhall neglect to take licences, *&c.* within a reaſonable time to be limited by the commiſſioners, but not leſs than twenty days.

Sect. 2. Such widows, and their chairs and ſervants, ſhall be liable to ſuch rules, penalties, and orders, as any other chairmen are by the act 9 *Ann. cap.* 23. and 10 *Ann. c.* 19.

Stat. 1 *Geo.* 1. *cap.* 57. *ſect.* 1. The commiſſioners authorized to put the act 9 *Ann. cap.* 23. in execution, may make ſuch by-laws to bind perſons licenſed to keep hackney coaches, the renters of ſuch licences and drivers of ſuch coaches, and annex ſuch penalties as they ſhall think fit, ſo as ſuch by-laws be agreeable to the intent of this and former acts; and for the good government of the perſons licenſed, the renters and drivers, the ſaid by-laws to be approved and put in execution, as by the act 9 *Ann. cap.* 23.

Sect. 2. If any hackney coachman or driver ſhall refuſe to go at, or ſhall exact more for his hire than ſhall be appointed, he ſhall forfeit a ſum at the diſcretion of the commiſſioners, not exceeding 3 *l.* nor under 10 *s.* the ſaid offences to be determined, and the penalties levied as by the ſaid act is directed concerning the 40 *s.* penalty.

Sect. 3. No perſon ſhall ply or drive for hire with any coach or coach-horſes, to attend at any funeral in *London*, *Weſtminſter*, or the bills of mortality, except perſons licenſed by the commiſſioners, on pain to forfeit 5 *l.* as by the ſaid act 9 *Ann. cap.* 23.

Sect. 4. If any perſon ſhall drive a mourning coach or hearſe to any funeral, except the ſame have a number fixed on the fore-ſtandard, or in ſome other place to be appointed by the commiſſioners, or except the ſame be the coach of ſome gentleman attending the maſter or any of the family, the commiſſioners upon information may ſummon the driver, againſt whom, not appearing, they are impowered to proceed; and though no expreſs hiring ſhall be proved, yet unleſs the party appear and prove a previous order from the owner of ſuch coach, *&c.* to attend at ſuch funeral, it ſhall be adjudged a driving for hire, and the party ſhall forfeit 5 *l.* to be recovered of the driver or the undertaker of ſuch funeral, to be levied and applied as aforeſaid.

Sect. 5. If any perſon be ſued for any thing done in purſuance of this act, he may plead the general iſſue; and if the plaintiff be nonſuit, *&c.* the defendant ſhall have double coſts.

Sect. 6. No *certiorari* ſhall ſuperſede execution, or other proceeding upon any order of the commiſſioners in purſuance of this act.

Sect. 7. The alderman of every ward of the city, and every juſtice of peace in the ſaid cities and counties, may inflict and levy the like penalties for any offences contrary to this act, as the commiſſioners may, provided that no perſon be puniſhed twice for the ſame offence.

Stat. 12 *Geo.* 1. *cap.* 12. *ſect.* 15. The commiſſioners for hackney coaches are (over and above the number of chairs authorized by the acts 9 *Ann. cap.* 13. and 10 *Ann. cap.* 19.) to licenſe an additional number of hackney chairs not exceeding one hundred, which after the 24th of *June* 1726, during eighteen years, ſhall be uſed for hire within *London* and *Weſtminſter*, and the bills of mortality; ſo that the number of all the chairs to be licenſed ſhall not exceed four hundred.

Sect. 16. On every of the licences to be granted in purſuance of this act for keeping any hackney chair, there ſhall be reſerved to his majeſty the annual ſum of 10 *s.* to be paid quarterly at the four uſual feaſts: and the chairs ſhall have the ſame rates, and be ſubject to the ſame rules, as are by the former acts preſcribed.

Sect. 17. All monies to ariſe by rents of the additional number of chairs ſhall be added to the funds ſettled by the act of 9 *Ann. cap.* 13.

Continued by 16 Geo. 2. c. 26. ſect. 3. *to* June 24, 1760, *&c. and by* 33 Geo. 2. c. 25. *ſo long as any act for licenſing hackney coaches.*

Stat. 20 *Geo.* 2. *cap.* 10. *ſect.* 1. There ſhall be paid unto his majeſty the ſmall duties herein after expreſſed, *viz.*

For every coach, berlin, landau, chariot, calaſh, with four wheels, chaiſe marine, chaiſe with four wheels, and caravan, or by what name ſoever ſuch carriage may be called, that ſhall be kept by or for any perſon for his own uſe, or to be let out to hire (except ſuch coaches and other carriages as may be licenſed by the commiſſioners for the duties on hackney-coaches) the yearly ſum of 4 *l.*

And for every calaſh and chair with two wheels, or by what name ſoever ſuch carriage may be called, to be drawn by one or more horſes, that ſhall be kept by or for any perſon for his own uſe, or to be let out to hire, the yearly ſum of 40 *s.*

Which ſeveral duties ſhall be paid by the perſons who keep the ſame.

Sect. 2. No perſon ſhall be obliged to pay the yearly ſum of 4 *l.* for more than five ſuch carriages on which the duty of 4 *l.* a year is charged, to be kept for his own uſe only; but all perſons who keep the ſame for ſupplying any waiting jobb by the day, week, month, quarter, or any other time, or to be lett out to hire, ſhall pay the ſaid yearly ſum of 4 *l.* for every ſuch coach, *&c.* kept to be lett to hire, though exceeding the number of five; and every perſon who ſhall keep any chaiſe, *&c.* with two wheels, to be drawn by one or more horſes to be lett out to hire, ſhall pay the ſaid yearly ſum of 40 *s.* for every ſuch chaiſe, *&c.* kept to be lett out for hire, though exceeding the number of five.

Sect. 3. Such of the ſaid duties as are chargeable upon coaches, *&c.* kept in *England*, *Wales*, or *Berwick*, ſhall be under the management of the commiſſioners and officers of exciſe in *England*; and ſuch as are impoſed upon coaches, *&c.* in *Scotland*, ſhall be under the management of the commiſſioners and officers of exciſe in *Scotland*, who are to appoint officers for charging and collecting the ſame. And all monies ariſing by the ſaid duties (the charges of raiſing and accounting excepted) ſhall be paid into the receipt of the Exchequer at *Weſtminſter*, apart from all other revenues.

Sect. 4. Every perſon who ſhall keep any coach, *&c.* for his own uſe, or the uſe of any perſon for whom he is committee, truſtee, or guardian, or to lett out to hire in *London*, *Weſtminſter*, or within the weekly bills of mortality, ſhall within thirty days after the 25th of *March* 1747, or within twenty days after he begins to keep ſuch coach, *&c.* give notice in writing at the chief office of exciſe in *London*; and every perſon who ſhall keep any ſuch coach, *&c.* in any other part of *Great Britain*, ſhall within ſixty days after the 25th of *March* 1747, or within twenty days after he begins to keep ſuch carriage (not being in the place of a former) give notice in writing at the office of exciſe next to the place where ſuch perſon for whoſe uſe the ſame is kept inhabits, of his keeping the ſame, and of the number of the coaches, *&c.* with four wheels, or chaiſes, *&c.* with two wheels, and of the pariſh or place where he reſides, and ſhall at the ſame time pay the annual duties.

Sect. 5. Every perſon obliged to give ſuch notice, ſhall, within twenty days after the expiration of twelve kalendar months after the times of ſuch firſt notices, give a freſh notice in manner aforeſaid, and pay the annual duties; and in the ſame manner renew ſuch notice, and make ſuch payment from year to year, as long as he keeps any ſuch carriages; and if any perſon keep any coach, *&c.* without giving ſuch firſt notice, and making ſuch payments, or without renewing ſuch notice and payments yearly, he ſhall forfeit 20 *l.* for each offence.

Sect.

Sect. 6. Upon the payment of the duties by the owners, the names of the perſons paying the ſame, and the number of the coaches, *&c.* kept, and the name of the pariſh or place where he and any perſon for whom he is committee, truſtee, or guardian reſides, ſhall be entered in a regiſter to be kept at the reſpective offices of exciſe for that purpoſe by the perſon receiving the ſame; and a receipt (of which an indented duplicate ſhall be kept by the perſon receiving the money) ſhall be given to every perſon ſo paying ſuch rates; which receipt ſhall contain the number of the regiſter, the number of the coaches, *&c.* paid for, the ſum paid, and the time for which it is paid, and be a diſcharge to the owner.

Sect. 7. Nothing in this act ſhall charge with the ſaid duty any publick ſtage coach, conſtantly employed in carrying paſſengers for hire to and from different places in this kingdom, on certain fixed days in every week, and not let out to hire by way of by-jobb for a day, or any longer time.

Sect. 8. This act ſhall not charge with the ſaid duty any poſt-chaiſe kept for hire by the poſt-maſter general, or by any deputy poſt-maſter in *Great Britain* authorized by him.

Sect. 9. All poſt-chaiſes ſo kept by ſuch poſt-maſter general, or any deputy poſt-maſters for hire, ſhall within thirty days after the letting out of ſuch chaiſes be entered by the owners at the office of exciſe next to the place where ſuch perſons inhabit; and ſhall (beſides his majeſty's arms to be painted upon every ſuch poſt-chaiſe) have ſuch figure or mark of diſtinction as ſhall be appointed by the ſaid commiſſioners; and in caſe any ſuch poſt-maſter ſhall lett out to hire any ſuch poſt-chaiſe before the ſame is entered, and have ſuch arms painted, or ſuch mark fixed thereupon, he ſhall for ſuch offence forfeit 20 *l.*

Sect. 10. It ſhall be lawful for the ſaid commiſſioners to cauſe ſuch figure or mark of diſtinction as they think proper, to be fixed upon every ſuch carriage ſo lett out to hire as aforeſaid; and in caſe any perſon lett out to hire any ſuch carriage, not having ſuch figure or mark fixed thereupon, or take off the ſame when fixed, he ſhall for every offence forfeit 20 *l.*

Sect. 11. Nothing in this act ſhall charge with any of the ſaid duties any coach licenſed by the commiſſioners for regulating and licenſing hackney coaches within *London* and *Weſtminſter*, and the ſuburbs thereof, and having the proper number thereon, and which ſhall not be employed in carrying any perſon more than ten miles from the ſaid cities.

Sect. 12. Nothing in this act ſhall charge with any of the ſaid duties any coach or carriage kept for ſale, and remaining unſold in the poſſeſſion of the owner, or of any coach-maker the purchaſer thereof: and no ſuch carriage ſhall whilſt in ſuch poſſeſſion be employed for his own uſe, or the uſe of any perſon, other than ſuch perſon whoſe like carriage ſhall be then repairing by ſuch coach-maker, or be let out to hire; on pain of forfeiting 20 *l.* for every time ſuch carriage ſhall be ſo employed, or lett out to hire.

Sect. 13. All the ſaid duties, forfeitures, and offences ſhall be heard and determined as hereafter is directed; *viz.* all proſecutions for the recovery of the duties and forfeitures within the limits of the chief office of exciſe in *London* ſhall be determined by the commiſſioners of exciſe, or by the commiſſioners for appeals in caſe of appeal; and all proſecutions for the duties and forfeitures in any other place in *Great Britain* ſhall be determined by any two juſtices of peace reſiding near the place where ſuch forfeitures ſhall be made; and if the party finds himſelf aggrieved, he may appeal to the next quarter-ſeſſions, whoſe judgment therein ſhall be final: which ſaid commiſſioners for appeals, and the commiſſioners of exciſe and juſtices of peace, are, upon information upon oath of any forfeiture or offence, to ſummon the party accuſed, and upon his appearance or contempt, and upon proof either by confeſſion, or by oath of one witneſs, to give judgment, and to iſſue warrants for levying ſuch forfeitures upon the goods of the offender, and to cauſe ſale to be made of the ſaid goods, if not redeemed within fourteen days, rendering to the party the overplus; and for want of ſufficient diſtreſs to impriſon the party offending till ſatisfaction be made.

Sect. 14. All forfeitures and penalties mentioned in this act (the charges for recovery being firſt deducted) ſhall be employed, one moiety to his Majeſty, and the other moiety to the informer.

Sect. 15. In every caſe where the duty ſhall be paid and entry made before any information laid of its not having been made within the time mentioned, no perſon having made ſuch payment and entry ſhall be afrerwards proſecuted for not having made it within the time limited.

Sect. 16. If any perſon, having made due entry and payment of the duty for any coach or carriage, die before the end of the year for which ſuch entry and payment is made, the perſon claiming title to ſuch coach or carriage may make uſe of it during the reſidue of the year.

Sect. 53. If any perſon be proſecuted for any thing done in purſuance of this act, he may plead the general iſſue; and if a verdict paſs for the defendant, *&c.* the defendant ſhall have treble coſts.

Coachmakers. The wares of coachmakers ſhall be ſearched by perſons appointed by the Sadlers Company. Stat. 1 *Jac.* 1. *c.* 22.

Coadjutor, A fellow-helper or aſſiſtant; particularly applied to one appointed to aſſiſt a biſhop, being grown old and infirm, ſo as not to be able to perform his duty.

Coals and Coal trade. Stat. 9 *Hen.* 5. *ſtat.* 1. *cap.* 10. The keels at *Newcaſtle*, which ought to be of twenty chalders burthen, being made of twenty-two or twenty-three chalders, and the cuſtom of 2 *d.* a chalder to the king upon ſea coals ſold to people not free there, being taken according to the burthen of twenty chalder; all keels in the ſaid port ſhall be meaſured by commiſſioners aſſigned by the king, and marked of what burthen they are; upon pain of forfeiture of all keels in which coals ſhall be carried before they be marked.

Stat. 16 & 17 *Car.* 2. *cap.* 2. *ſect.* 1. All ſea coals brought into the *Thames* and ſold, ſhall be ſold by the chalder, containing thirty-ſix buſhels heaped according to the buſhel ſealed for that purpoſe at *Guildhall*; and all other coals commonly ſold by weight ſhall be ſold after the proportion of a hundred and twelve pounds to the hundred *avoirdupoize*; upon pain of forfeiture of all coals otherwiſe ſold or expoſed to ſale by any wood-monger or retailer, and double the value thereof; to be recovered by any perſon in any court of record, or by complaint unto the lord mayor and juſtices of peace of *London*, or any two of them, or to the juſtices of peace of the places where ſuch coals ſhall be expoſed to ſale; who are upon due proof to convict the offenders, and to give warrant for levying the forfeitures; the one half for the uſe of the perſon proſecuting, and the other half for the poor, or repairing the highways within the ſame or adjoining pariſh; and the lord mayor and court of aldermen, and the juſtices of peace of the ſeveral counties, or three of them, one of the *quorum*, are to ſet the prices of coals ſold by retail from time to time. See 17 *Geo.* 2. *cap.* 35. in this title.

Sect. 2. If any retailer of coals refuſe to ſell as aforeſaid, the lord mayor and aldermen, and juſtices of peace reſpectively, are to appoint perſons to enter into any place where ſuch coals are ſtored; and in caſe of refuſal, take a conſtable to force entrance; and the ſaid coals to ſell at ſuch rates, rendering to ſuch retailer the money, charges deducted.

Sect. 4. No perſon ſued by virtue of this act ſhall be ſued upon any other law for the ſame offence; and if any action ſhall be commenced for any thing done by colour of this act, the defendant may plead the general iſſue; and if the verdict be found for him, *&c.* ſhall have his damages and double coſts.

Sect. 5. No perſon having intereſt in any wharf uſed for the receiving or uttering of coals, or that ſhall trade in the ſale of coals, ſhall act in the ſetting the price of coals.

Made perpetual, 7 & 8 Will. 3. cap. 36. ſect. 2.

Stat.

Stat. 30 *Car.* 2. *cap.* 8. *ſect.* 2. Commiſſioners ſhall from time to time be appointed by his Majeſty for meaſuring and marking keels, boats, carts and wains, uſed for carriage of coals in the port of *Newcaſtle*, and places to the ſaid port belonging, by the bowl-tub of *Newcaſtle*, containing twenty-two gallons and a pottle *Wincheſter* meaſure, and being twenty-ſeven inches diameter upon the top from out to out, and allowing twenty-one bowls heap-meaſure to each chalder.

Sect. 3. The content of each wain ſhall be ſeven bowls, and of each cart three bowls and one buſhel heaped meaſure; and three wains or ſix carts ſhall be a chalder; and the coals made uſe of in ſuch admeaſurement ſhall be one moiety dry, and the other moiety wet, as accuſtomed.

Sect. 5. The mayor of *Newcaſtle* is to adminiſter an oath to every perſon employed by commiſſioners for the admeaſuring or marking of boats and keels in the river *Tine*, for the faithful diſcharge of their truſts; and the commiſſioners ſhall adminiſter the like oath to every perſon appointed for the meaſuring or marking of boats, keels, wains or carts.

Stat. 6 & 7 *Will.* 3. *cap.* 10. *ſect.* 2. Commiſſioners ſhall be appointed by the King for meaſuring all keels, pan-keels, pan-boats, and other boats, wains and carts, uſed for carriage of coals in the ports of *Newcaſtle*, *Sunderland*, *Cullercoats*, *Seaton-Sluice*, *Blyth-Nook*, and all other places in the counties of *Northumberland* and *Durham*; which admeaſurement ſhall be by a dead weight of lead or iron, or otherwiſe as ſhall ſeem meet to three of the commiſſioners, allowing three and fifty hundred weight to every chalder of coals.

Sect. 3. The weight of coals carried by ſuch wains ſhall be ſeventeen hundred weight and a half, by every ſuch cart eight hundred and three quarters. And three ſuch wains or ſix carts ſhall be reckoned as one chalder, and no other wains are intended to be admeaſured or marked but ſuch as are employed in carrying coals to the ſtaiths.

Sect. 4. Three days notice ſhall be given of the time of the admeaſurement.

Sect. 5. No keel or boat ſhall be marked but between the 25th of *March* and the 29th of *September*, nor marked to carry more than ten chalders; and keels in the port of *Newcaſtle* ſhall be marked at the new quay, and in the *Weare* at *Lambton* ſtaiths.

Sect. 6. All keels, boats, wains or carts, that ſhall carry coals before they be admeaſured, marked, and nailed, ſhall be forfeited, together with the coals laden upon them, unleſs by default of commiſſioners; one moiety of the forfeiture to the King, and the other to him that will ſue for the ſame.

Sect. 7. If after marking, *&c.* the mark ſhall be removed or altered, to fruſtrate the intent of this act, the party ſo offending ſhall, upon proof of one witneſs before one juſtice of peace, forfeit 10*l.* to be levied by diſtreſs and ſale of goods by warrant from the ſaid juſtice; and for want of diſtreſs the party to be committed for three months; one moiety of the ſaid forfeiture to the King, the other to the party that ſhall make the diſcovery. And the ſaid keels, boats, *&c.* to be admeaſured and marked, *&c.* anew.

Stat. 6 & 7 *Will.* 3. *cap.* 18. *ſect.* 19. There ſhall be allowed yearly from the 15th of *April* till the firſt of *January*, free from impreſſing, to every maſter of a ſhip imployed in the coal trade two able ſeamen (ſuch as the maſter ſhall nominate) for every ſhip under 100 tun, and one for every 50 ton, for every ſhip of 100 ton and upwards, according to the meaſurement which the ſhip ſhall appear to be of by certificate from the cuſtomhouſe. And if any officer ſhall impreſs any of the men allowed by this act, he ſhall forfeit to the maſter or owner of ſuch ſhip 10*l.* for every man, to be recovered with coſts by action of debt, *&c.* and ſhall be incapable of holding office in his Majeſty's ſhips of war.

Quære if in force. *See* ſect. 20. *as alſo ſtat.* 11 & 12 Will. 3. cap. 13. ſect. 8. *and* 6 Ann. cap. 22. ſect. 8.

Stat. 9 & 10 *Will.* 3. *cap.* 13. *ſect.* 1. For five years, from the 15th of *May* 1698, there ſhall be paid to his Majeſty for coal and culm (except charcoal made of wood, and cinders made of pit-coal) the duties mentioned in the act.

Sect. 7. The duties upon coals and culm ſo imported or water-born, ſhall be under the management of the commiſſioners, and ſhall be paid into the Exchequer diſtinct from all other monies.

Sect. 8. The ſaid duties ſhall be paid to ſuch as his Majeſty, or the commiſſioners of the cuſtoms, or four of them, ſhall appoint, before bulk be broken, or any coals or culm unladen, meaſured, or weighed; and entries ſhall be made of all ſuch coals and culm at the cuſtom-houſe where they are imported (if any there be) or elſe in the cuſtom-houſe of the next port; and if ſuch coals or culm be unſhipped before the duties be paid or ſecured, the ſaid coals and culm, and the ſhip with tackle, ſhall be forfeited; one moiety to the King, the other to ſuch perſons as ſhall ſeize or ſue for the ſame.

Sect. 9. His Majeſty, or four of the commiſſioners of the cuſtoms, may appoint in every port weighers or meaſurers of the ſaid coals and culm, who, upon the unlading of any ſuch ſhip, ſhall deliver a certificate to the collector of the ſorts and quantity of coals and culm delivered from any ſuch ſhip, under the penalty of 100*l.* And in caſe there was on board a greater number of chalders or tons of coals and culm, than for which the duty had been anſwered, there ſhall be paid for every chalder or ton ſo concealed, over and above the duty, 10*s.* under the penalty of attaching and detaining ſuch ſhip or veſſel till payment thereof, and of ſelling the ſaid ſhip in caſe all the ſaid duties for ſuch concealed coals or culm be not paid with coſts.

Sect. 10. If the importer ſhall within ſix days after the delivery of ſuch ſhip, and before her departure, give in his poſt-entry and pay the whole duty for the ſurpluſage, the penalty ſhall be diſcharged.

Sect. 11. The officers for receiving the ſaid duties, and for weighing and meaſuring ſuch coals and culm, ſhall in every ſuch port enter an account of the duties paid and of the diſburſements, and the number of the chalders and tons ſo imported.

Sect. 12. There ſhall be allowed to every maſter of any ſhip three months for payment of the duty, giving ſuch ſecurity as the collector or chief officer of the place ſhall approve of, with an allowance of 10 *per cent. per annum* for prompt payment. And if any of the coals and culm, for which the duty ſhall be once paid or ſecured, be again exported to any other place of this kingdom, there ſhall be no further duty paid; and if any of the coals, for which the duty ſhall be once paid or ſecured, be afterwards carried beyond ſea, an allowance out of the overſea duties or repayment ſhall be made of ſo much as was before paid for the ſame.

Sect. 13. If any perſon be proſecuted for any thing done in execution of this act, he may plead the general iſſue; and if a verdict paſs for the defendant, *&c.* the defendant ſhall have treble coſts.

Continued per 1 Ann. ſtat. 2. cap. 4. *together with ſo much* 10 Will. 3. cap. 21. *as concerns cinders, until* 15 May 1708.

Stat. 10 & 11 *Will.* 3. *cap.* 21. *ſect.* 28. There ſhall be paid to his Majeſty for all cinders made of pit-coal, which for four years from the 15th of *May* 1699, ſhall be ſhipped, or water-born in order to be ſhipped, within *England*, *&c.* or brought into the ſame, 5*s.* for every chalder to conſiſt of thirty-ſix buſhels *Wincheſter* meaſure, and after that rate; to be paid at the places of importation or landing, and to be charged on the owner or maſter of the ſhip; and the duties upon cinders ſhall be under the management of the commiſſioners of the cuſtoms, and ſhall be collected, *&c.* as by the act 9 & 10 *Will.* 3. *cap.* 13.

Continued with ſtatute 9 & 10 Will. 3. cap. 13. *by* 1 Ann. ſtat. 2. cap. 4. *Exp.*

Stat. 8 *Ann. cap.* 4. *ſect.* 1. For thirty-two years from the 29th of *September* 1710, there ſhall be paid to her Majeſty upon all coals, culm, and cinders herein after expreſſed (except charcoals made of wood) the new impoſitions

ſitions herein mentioned (over and above other duties) *viz.* for all coals imported from beyond ſea, uſually ſold by weight, 4 *s. per* ton; for all coals ſo imported uſually ſold by meaſure, 4 *s.* 6 *d. per* chalder, to be paid by the importer; and for all coals carried by ſea from port to port within *Great-Britain* uſually ſold by meaſure, 3 *s. per* chalder; and for all coals ſo carried uſually ſold by weight, 2 *s. per* ton, to be paid at the place of landing, and charged upon the owners and maſter of the ſhip. And for all culm ſo carried, 7 *d.* and two-tenths of a penny, to be paid at the place of landing, *&c.* and for all cinders made of pit-coal ſhipped within *Great-Britain* or brought into the ſame, 3 *s. per* chalder, to be paid at the place of landing, *&c.*

Made perpetual by 5 Geo. 1. cap. 9 *and part of the* South-Sea *fund.*

Sect. 2. Such of the ſaid duties as ſhall ariſe within *England, Wales, &c.* ſhall be under the management of the commiſſioners of the cuſtoms in *England*: and the receiver general of the cuſtoms ſhall pay the ſame into the Exchequer weekly on *Wedneſday, &c.* And ſuch of the ſaid duties as ſhall ariſe in *Scotland*, ſhall be under the management of the commiſſioners of the cuſtoms in *Scotland*, and the receiver general ſhall pay the ſame into the Exchequer in *England.*

Sect. 3. The ſaid duties ſhall be collected in manner, *&c.* appointed by any law in force concerning the duties upon the like coals, *&c.* which have continuance until the 30th of *September* 1710 by ſtat. 1 *Ann. cap.* 6. And all directions, *&c.* contained in that act (*which only contains the powers contained in* 9 & 10 Will. 3. cap. 13. *and* 10 Will. 3. cap. 21.) for collecting the ſaid duties, ſhall be in force.

Sect. 39. Coals, culm and cinders carried from *Stirling* to *Dunbar*, or other part betwixt, ſhall not by ſuch carriage be liable to theſe duties.

Stat. 9 *Ann. cap.* 6. *ſect.* 5. The duties herein mentioned, and no other, ſhall be paid to her Majeſty upon coals, which during thirty-two years, from the 8th of *March* 1710, ſhall be exported beyond the ſeas, *viz.* for coals of *Wales* or the weſt of *England* ſhipped for *Ireland* or the *Iſle of Man*, 1 *s. per* chalder; for every chalder of coals ſhipped for the plantations 2 *s.* for every chalder of coals *Newcaſtle* meaſure ſhipped for other parts beyond ſea in foreign bottoms, 12 *s.* and in *Engliſh* bottoms 3 *s.* and for ſuch coals, which ſhall be ſo ſhipped for *Ireland*, and the *Iſle of Man*, the plantations, or other parts beyond ſea (if ſuch as are uſually ſold by weight) the rates following, *viz.* for ſuch coals exported for *Ireland* or the *Iſle of Man*, 8 *d. per* ton. and for ſuch coals ſhipped for the plantations, 16 *d. per* ton; and for ſuch coals ſhipped for other parts beyond the ſeas, one third of the rates charged thereupon in caſe they were ſhipped by *Newcaſtle* meaſure: the ſaid duties to be collected, *&c.* as the cuſtoms upon exportation of merchandize in *England* or *Scotland* reſpectively.

Made perpetual, 3 Geo. 1. cap. 7. general fund.

Sect. 6. Security ſhall be given to the officers of the cuſtoms in the ports where coals ſhall be ſhipped for *Ireland*, the *Iſle of Man*, or the plantations, for landing ſuch coals at ſuch places reſpectively; the danger of the ſeas and of enemies excepted. And in caſe the ſhip depart without giving the ſame, ſuch ſhip and the coals, or the value thereof, ſhall be forfeited; one moiety to the Queen, and the other moiety to ſuch perſon as will ſeize or ſue for the ſame.

Sect. 7. During the ſaid thirty-two years, no duties ſhall be charged to the uſe of her Majeſty upon exportation of coals for the plantations by the act 15 *Car.* 2. *cap.* 7. Or for coals exported in foreign bottoms by ſtat. 6 *Ann. cap.* 22. Or for any coals upon exportation, other than the duties by this act impoſed, during the continuance thereof.

Sect. 8. During 32 years from the 8th of *March* 1710, there ſhall be paid to her Majeſty upon all coals, culm, and cinders (except charcoal made of wood) which ſhall be ſhipped and carried from place to place in *Great-Britain*, and for coals imported, the ſums hereafter mentioned (over and above all duties already payable) *viz.* for coals imported, uſually ſold by weight, 2 *s. per* ton; for coals imported, uſually ſold by meaſure, 3 *s.* per chalder, to be paid by the importer: for coals carried by ſea from place to place in *Great-Britain*, uſually ſold by meaſure, 2 *s. per* chalder; and for coals ſo carried, uſually ſold by weight, 1 *s.* 4 *d. per* ton; to be paid at the place of landing, and charged upon the owners and maſters of ſhips: and for all culm ſhipped in *Great-Britain*, or brought into the ſame, four-pence and eight-tenths of a penny *per* chalder; and for all cinders made of pit-coal ſhipped in *Great-Britain*, or brought into the ſame, 2 *s. per* chalder; to be paid at the places of landing, and charged upon the owners and maſters of ſhips.

Made perpetual, 3 Geo. 1. cap. 7. General fund.

Sect. 9. The ſaid duties ſhall be collected, *&c.* as by ſtat. 4 *Ann. cap.* 6. (*which re-enacts the powers contained in ſtat.* 9 & 10 Will. 3. cap. 13.) or any other law for collecting the like duties upon coals, *&c.* which had continuance till the 30th of *September* 1710.

Sect. 10. Coal, culm, and cinders carried from *Stirling* to *Dunbar* or *Bedhead*, or any part betwixt, ſhall not by reaſon of ſuch carriage be liable to the duties.

Sect. 4. All coals uſed for melting copper and tin ores in *Cornwall* and *Devon*, for which duties have been anſwered, ſhall upon oath made before the cuſtomer or collector, have a drawback of all the duties, to be paid by the collector.

Stat. 9 *Ann. cap.* 23. *ſect.* 90. Coals exported from the Weſt of *Scotland* to *Ireland*, or the *Iſle of Man*, ſhall be charged with the ſame duties as coals exported from the Weſt of *England* to *Ireland*, or the *Iſle of Man*, by ſtat. 9 *Ann. cap.* 6. *ſect.* 5.

Stat. 9 *Ann. cap.* 28. *ſect.* 1. All contracts or agreements between any coal-owners, lightermen, fitters, maſters or owners of ſhips, crimps, coal-factors, or other perſons concerned in the coal-trade, or ingroſſing coals, or reſtraining any perſons from freely ſelling, buying, loading or unloading, navigating or diſpoſing of coals, are declared illegal and void: and if any perſon ſhall keep up, continue, act in, make, enter into, ſign, ſeal, or be knowingly concerned in any ſuch contract or agreement, or ſhall keep up any office or place for the management of ſuch contract or agreement, as party to, or knowingly intereſted in the ſame, or ſhall act or officiate therein as clerk, agent, or ſervant to the perſons contracting, *&c.* the perſons offending ſhall forfeit as follows, *viz.* every coal owner 100 *l.* every fitter 50 *l.* and every maſter or owner of a ſhip, clerk, agent, *&c.* 20 *l.*

Sect. 2. Every fitter or other perſon vending coals ſhall give a certificate to every ſhip-maſter every voyage, ſigned by him, containing the day and year of ſuch loading, the maſter's and ſhip's name, and quantity, and names of the collieries out of which the coals are gotten, and the price paid by the maſter for every ſort of coals; which certificate, upon arrival in the port of *London*, or other delivering port, ſhall be regiſtered, and if in *London* then at the cocket-office; if at any other port, then at the cuſtom-houſe with the keeper of the cockets, for which ſhall be paid 6 *d.* to which regiſter any may have recourſe without fee; and the perſon refuſing to make ſuch certificate, or making a falſe one, or any maſter of a ſhip knowingly giving a falſe certificate to be regiſtered, or who ſhall not within forty-eight hours after entry of his ſhip at the cuſtom-houſe in *London*, or other delivering port, give in his certificate to be regiſtered; or if the perſon who ought to regiſter it, neglect it twenty-four hours after the delivery of the certificate, or ſhall make a falſe entry of ſuch certificate, or ſhall refuſe to ſhew the certificate and regiſter to any perſon coming at the uſual office-hours, he ſhall pay 10 *l.*

Sect. 3. If any lighterman, maſter of a ſhip, crimp, coal-factor, or other peaſon dealing in coals, or otherwiſe concerned in the coal-trade, ſhall receive any ſalary or reward from any coal-owner, fitter, maſter of a ſhip, *&c.* or for the diſpatch, delivery, or diſpoſal of coals before any other, or ſhall knowingly ſell coals for a ſort they are not, he ſhall forfeit 50 *l.*

Sect. 4. If any perſon guilty of thoſe offences ſhall, within three months after the offence committed, make diſcovery

diſcovery of any coal-owner, or of any fitter, their officer or ſervant, or of any maſter of a ſhip, or any lighterman, crimp, coal-factor, or other perſon concerned in the coal-trade, ſo as they be convicted of any of the ſaid offences, ſuch diſcoverer ſhall be diſcharged of the penalties, and ſhall have the ſame benefit as any other perſon by virtue of this act.

Sect. 5. If more than fifty ſhips loaden with coal ſhall continue either in the port of *Newcaſtle*, or in any other port between that and *London*, above ſeven days, unleſs they ſhall be unloaded or prevented by wind or weather, or for want of convoy, repairs, or ſome other unavoidable cauſe; every maſter of every ſhip ſhall forfeit 50 *l.*

Sect. 6. Any ſhip-maſter, whoſe ſhip is loaden with coals only, and has given bond to deliver them in ſome port of *Great Britain*, may, upon producing his coaſt cocket and making oath before an officer of the cuſtoms of the quantity of coals (ſuch quantity not being leſs than expreſſed in the cocket) pay the over-ſea duty, and ſhall have a certificate from the cuſtomer for ſuch duty paid; which being given into the cuſtom-houſe of the port where ſuch coals were laid aboard, ſhall diſcharge the coaſt-bond.

Sect. 7. If any crimp, ſhufband, agent or factor for any ſhip-maſter, importing coals in *London*, ſhall ſell to his own agents, partners, or ſervants, or to any other in truſt for him, the coals, *&c.* intruſted with him to ſell, he ſhall forfeit 50 *l.*

Sect. 8. Every fitter or other perſon loading coals on any ſhip in *Newcaſtle*, *Sunderland*, *Seaton Sluice*, or *Blyth Nook*, in any keel, cart, or wain not gauged and marked, ſhall forfeit 10 *l.*

Sect. 9. No coal-owner of any coal-mine in *Northumberland*, *Durham*, or town and county of *Newcaſtle upon Tine*, or his overmen, ſtaithmen, fitter or agent, ſhall knowingly ſet on work any overman, pitman, ſinker, carriage-man, waggon-driver, keelman, labourer, wright or other perſon, who ſhall be agreed with, hired or actually employed by any other coal-owner in the ſaid coal-trade in any coal-mines in the ſaid counties, during the time he ſhall be employed under ſuch retainer, and his wages paid, or knowingly keep ſuch perſon; upon forfeiture of 5 *l.* for every ſix days.

Sect. 10. Any perſon thus retained, and whoſe wages ſhall not be paid fourteen days after it is due, may be hired by any other perſon.

Sect. 11. The penalties in this act ſhall be one moiety to the crown, the other moiety to the proſecutor, within three months after the offence committed, to be recovered in the courts at *Weſtminſter* with coſts.

Sect. 12. This act ſhall continue three years.

Made perpetual, 1 Geo. 1. cap. 26.

Stat. 12 *Ann. ſtat.* 2. *cap.* 9. *ſect.* 9, 10, 12. There ſhall be paid to her majeſty upon all coals, which during thirty-two years from the ſecond of *Auguſt* 1714 ſhall be ſhipped to be exported beyond ſea (except to *Ireland*, the *Iſle of Man*, and the plantations) the duties following, *viz.* for ſuch coals exported in foreign bottoms, 5 *s. per* chalder *Newcaſtle* meaſure; and in *Britiſh* bottoms, 3 *s. per* chalder *Newcaſtle* meaſure, over and above the preſent duties: under the management of the commiſſioners of the cuſtoms in *England* and *Scotland* reſpectively; to be collected as the preſent duties upon coals exported, or other cuſtomable goods.

Made perpetual, 6 Geo. 1. cap 4. *in order to be ſubſcribed into the* South-Sea *fund.*

Stat. 12 *Ann. ſtat.* 2. *cap.* 17. *ſect.* 11. The coal-buſhel ſhall be round with a plain bottom, and be nineteen inches and a half from out to out, and ſhall contain one *Wincheſter* buſhel, and one quart of water, according to the ſtandard deſcribed by *ſtat.* 13 *Will.* 3. *cap.* 5. *ſect.* 28. [See **Weights**, *&c.*] And all ſea coals and culm, chargeable with duties by *Wincheſter* meaſure, ſhall be chargeable, ſold, and meaſured by the chalder, containing thirty-ſix ſuch buſhels heaped, under the like penalties.

Sect. 12. The commiſſioners of the Treaſury ſhall cauſe a buſhel to be made of braſs, of the dimenſions aforeſaid, to be ſealed and kept in the Exchequer.

Stat. 5 *Geo.* 1. *cap.* 9. *ſect.* 1. For all coals and culm, which after the twenty-ſeventh of *September* 1725, and before the annunciation 1751, ſhall be brought into the port of *London*, or the river of *Thames*, within the liberty of the city upon the river, there ſhall be paid to his majeſty, (over and above all other duties) for all coals and culm uſually ſold by the chalder, for every chalder containing thirty-ſix buſhels *Wincheſter* meaſure, 3 *s.* and for coals ſold by the ton, for every ton, 3 *s.*

Made perpetual, 6 Geo. 1. cap. 4. South-Sea *fund*, and *charged with* Bank *annnities*, *by* Geo. 2. cap. 8.

Sect. 2. Theſe duties ſhall be under the management of the commiſſioners of the cuſtoms, according to the directions from the Treaſury; and ſhall be collected, *&c.* as by any law in force for any other duty payable to his majeſty upon coals and culm brought into the port of *London.*

Sect. 3. This act ſhall not extend to charge ſuch coals, not exceeding one hundred chalders by the year, as ſhall be brought for the uſe of the Royal Hoſpital at *Chelſea.*

Stat. 8 *Geo.* 1. *cap.* 14. *ſect.* 14. Coals carried from *Ellenfoot* to *Bank End*, in the county of *Cumberland*, or any place between, ſhall not in reſpect of ſuch carriage be liable to the duties in any other act.

Sect. 15. Provided, that the maſter or owner of every boat or veſſel carrying ſuch coals do firſt enter into bond with ſureties, at leaſt once a year, in a penalty not exceeding 360 *l.* with a general condition, that all ſuch coals as he ſhall take on board his veſſel by virtue of a ſufferance, ſhall be landed at ſome place in the bay or firth of *Eden* in *Cumberland* to the northward of *Ellenfoot*; and he ſhall bring a return ſigned by the proper officer, that ſuch coals were there landed; the perſon concerned paying for each bond, 1 *s.* beſides the ſtamps, and to the officers granting the ſufferance and return, for each boat, 4 *d.*

Stat. 3 *Geo. cap.* 26. *ſect.* 1. It ſhall be lawful for any perſon who ſhall keep wharfs on the *Thames*, or any branch thereof, and for any other perſons who ſhall deal in coals or other goods, to employ their own lighters and other craft in carrying of coals and goods to and from any ſhip in the *Thames*, and to and from any wharf where ſuch goods might be lawfully landed or ſhipped off, ſo as the perſons employed in navigating ſuch lighter, *&c.* be duly qualified to row the ſame on the *Thames.*

Sect. 2. All perſons (not being lightermen) who by virtue of this act ſhall become entitled to uſe their own lighters, ſhall before their working the ſame make before the company of Watermen, or ſome other whom the company are required to appoint for that purpoſe, an entry of their lighters or their craft; for each of which entries the officer ſhall receive for the company 5 *s.* and thereupon he ſhall regiſter the ſame, with the owner's name and place of abode, and the number or mark intended to be affixed on ſuch lighters or other great craft; and after the entry the owner ſhall affix ſuch number in metal or colours on the outſide of the lighter, viſible above water when loaded, there to remain without alteration (except with conſent of the company, or in caſes of involuntary accidents); and afterwards ſuch lighter and the owners thereof ſhall be ſubject to the rules of the company in regard to the entries, numbers, or marks.

Sect. 3. No lighterman, or buyer of coals for ſale, nor any of their partners, agents, or ſervants, or any in truſt for them, ſhall act as a crimp, agent, or factor for any maſter of any ſhip importing coals into the port of *London*, on forfeiture of 200 *l.* and every maſter, *&c.* who ſhall employ them to act as ſuch, ſhall forfeit the like ſum.

Sect. 4. Every perſon who ſhall take any premium or allowance from any coal-owner, fitter, or maſter of a ſhip for buying, vending, or diſpoſing of any particular ſort of coals, or ſhall otherwiſe offend, contrary to the clauſe in the act of 9 *Ann. cap.* 28. *ſect.* 3. ſhall, over and above the penalty inflicted by the ſaid act, forfeit 300 *l.* and every coal-owner, or fitter, who ſhall give, or agree to give, to any ſhip-maſter, lighterman, crimp, or

or buyer of coals, or to any perſon in truſt for ſuch ſhip-maſter, *&c.* any premium, *&c.* for buying, vending, *&c.* any particular ſort of coals, or for the loading of any veſſel with ſuch coal-owner's coals, or for the diſpatch, delivery, or diſpoſal of ſuch coals from ſuch coal-owners, collieries, or ſtaiths, and every perſon who ſhall knowingly ſell one ſort of coals for another, ſhall forfeit 500 *l.*

Sect. 5. Nothing in this act ſhall hinder any coal-owner from imploying or giving any ſalary or reward to any fitter for the vending and diſpoſing of his coals from his colliery and ſtaiths; or to prevent any maſter or owners of any ſhip, uſing the coal trade, from imploying crimps or factors (not being lightermen, or buyers of coal for ſale, or any of their partners, agents, or ſervants, or any in truſt for them) to ſell or diſpoſe of their loadings of coals, or pay them their crimpage or factorage as uſual.

Sect. 6. All bargains or contracts for coals between buyer and ſeller at the market of *Billingsgate*, or other place of ſale within the bills of mortality, ſhall by the crimp or factor be entered, with the conditions thereof, in the book of ſuch crimp, ſubſcribed by the ſeller and buyer, and witneſſed by the crimp, who ſhall at the ſame time deliver *gratis* a copy atteſted by him of ſuch bargain to the ſeller and buyer; and the entries ſo made, and the copies ſo given, ſhall be admitted as evidence on trials in any court of law; and if any crimp or factor ſhall neglect to enter ſuch contract, and to ſubſcribe and atteſt the ſame, or to give copies thereof, he ſhall forfeit 50 *l.*

Sect. 7. All lightermen and other buyers of coals on board any ſhip in the port of *London*, ſhall at the time of the delivery of ſuch coals pay for the ſame in ready money; or for ſuch part thereof as ſhall not be ſo paid for ſhall give their promiſſory notes, expreſſing the words *Value received in coals*, payable at ſuch days as ſhall be agreed upon; and all ſuch notes may be proteſted as inland bills of exchange; and in the default of ſuch proteſting, and notice by the indorſee to the indorſor within twenty days after failure of payment, the indorſor ſhall not be liable to pay ſuch money as ſhall be mentioned in ſuch note.

Sect. 8. All lightermen and other buyers of coals, who ſhall refuſe to give their notes for coals to them delivered, and to inſert the words *Value received in coals*, and every maſter who ſhall take ſuch note from any dealer in coals, in which note the ſaid words are not inſerted, ſhall forfeit 100 *l.*

Sect. 9. Every maſter of a ſhip uſing the coal trade ſhall be ſubject to the direction of the owners of the major part of his ſhip, and ſhall keep, and once a year render to ſuch owners, if required, a true account in writing of the produce and expence of every voyage; and if he ſhall refuſe to obey the owner's directions, given under their hands, or to give ſuch account, being required by order under their hands, he ſhall forfeit 100 *l.* provided, that in ſuch directions there be nothing which ſhall relate to the reſtraining or inhancing the price of coals in the *Thames*, or to keeping of turn in delivering of coals there.

Sect. 10. All lightermen and others dealing in coals, who ſhall ſell any parcel of coals for pool meaſure, including the *ingrain*, *&c.* one chalder, which by an ancient cuſtom in the port of *London* is allowed in every ſcore bought on board ſhip, and ſhall not deliver to the buyers the full quantity meaſured to the lighterman, *&c.* by the maſter, together with the *ingrain*, ſhall forfeit 100 *l.*

Sect. 11. All coals which ſhall be landed at any place on the *Thames*, or on any branch near thereto, and which ſhall be carried to any place within the cities of *London* or *Weſtminſter*, or the bills of mortality, in any cart or carriage, ſhall be carried to the buyers in linen ſacks, ſealed or marked with white paint in oil at *Guildhall*, *London*, or at the *Exchequer* at *Weſtminſter*, which ſacks ſhall be four feet and two inches in length, and ſix and twenty in breadth, after they ſhall be made; which ſacks all dealers in and carriers of coals ſhall uſe for carriage of coals within the ſaid limits; and all makers of coal ſacks ſhall make them of the ſaid dimenſions at leaſt; and every dealer in, and carrier of coals, who ſhall make uſe of any other ſacks for carriage of coals within the limits aforeſaid, ſhall for every ſack forfeit 20 *s.*

Sect. 12. This act ſhall not extend to hinder any conſumer of coals from fetching home his coals by porters, or in his own or hired carts, without being obliged to uſe ſuch ſacks,

Sect. 13. All dealers in, and ſellers of coals by the chalder or leſſer quantity, within the cities of *London* and *Weſtminſter*, or ten miles of the ſame, ſhall keep and uſe at their wharfs, and other places for ſale of coals, a buſhel, as deſcribed in the act 12 *Ann. ſtat.* 2. *cap.* 17. *ſect.* 11. with which buſhel ſellers of coals ſhall meaſure all the coals they ſhall ſell by the chalder, or leſſer quantity, and ſhall put three buſhels of coals into each ſack: and all dealers in coals who ſhall offend in the premiſſes, ſhall forfeit 50 *l.* and if any ſervant of ſuch dealer in coals ſhall fill coals into ſacks without meaſuring the ſame by ſuch buſhel, he ſhall be committed to the houſe of correction to hard labour, not exceeding thirty days, nor leſs than fourteen days.

Sect. 14. All perſons dealing in coals, and uſing coal buſhels, and ſmaller meaſures, ſhall before they uſe them have them fitted for work and uſe with iron or copper; and after they are ſo fitted, ſhall carry them to *Guildhall*, or to the *Exchequer Office*, to be ſealed with a ſteel inſtrument on the uppermoſt iron or copper hoop and ſtrap; which meaſures ſhall be kept by them, without alteration, at their places of ſale, which places of ſale are declared to be the wharfs, warehouſes, docks, ſheds, cellars, or other repoſitories for coals of ſuch as are dealers therein: and all dealers in coals who ſhall offend herein ſhall forfeit 50 *l.* and all perſons who ſhall alter any ſuch buſhel, or other meaſure, or any of the ſacks after they have been ſealed or marked, ſhall forfeit 50 *l.*

Sect. 15. Any perſon who ſhall be guilty of any of the offences declared by this act, and ſhall within ſix calendar months after ſuch offence make diſcovery of any coal-owner, proprietor of a colliery, or of their agents or ſervants, or of any of their fitters, officers or clerks, or of any maſter of a ſhip, or of any lighterman, crimp, coal-factor, or ſeller or retailer of coals, or other perſon concerned in the coal-trade, who ſhall have committed any offence contrary to this act, ſo as they be convicted: the perſon making ſuch diſcovery ſhall be diſcharged from the penalties for all ſuch offences by him before that time committed, and ſhall be intitled to the ſame benefit from ſuch diſcovery and conviction as any other perſon.

Sect. 16. All penalties in this act above 5 *l.* ſhall be one moiety to the crown, and the other to him who ſhall ſue for the ſame within ſix calendar months after ſuch offences committed, to be recovered with double coſts, by action of debt, *&c.* in any of his majeſty's courts of record; and all penalties in this act under 5 *l.* ſhall be recovered by complaint made to the Lord-mayor of *London*, or one juſtice of peace within the city of *London*, or one juſtice of the ſeveral places where ſuch offender ſhall live, who are to call the parties before them, and examine ſuch complaint on oath, and on due proof thereof made to his ſatisfaction, to grant a warrant for levying ſuch forfeitures; one moiety to the informer, and the other to the poor of the pariſh where ſuch offence ſhall be committed; and if ſuch forfeitures ſhall not be forthwith paid, the ſame ſhall be levied by diſtreſs and ſale of goods by warrant of the Lord-mayor, or ſuch juſtice of the peace; and for want of ſufficient diſtreſs, the offender ſhall be committed to the houſe of correction for any time not exceeding thirty days, and not leſs than fourteen, to be kept to hard labour.

Sect. 17. This act ſhall be a publick act.

Sect. 4. *Geo.* 2. *cap.* 30. *ſect.* 1. It ſhall not be lawful for any owners of any ſhip employed in the coal-trade, or any other perſon, to give any directions to any maſter of ſuch ſhip, or to any agent employed in the ſelling of coals, which ſhall relate to keeping turn in ſelling or deliver-

delivering coals in the *Thames*; and no maſter or other perſon having command of ſuch ſhip ſhall obey ſuch orders, or keep turn as aforeſaid, upon pain to forfeit 100*l* one moiety to his majeſty, and the other moiety to him who ſhall ſue for the ſame within ſix months after the offence committed, to be recovered with treble coſts by action of debt, *&c.*

Sect. 2. The maſter of every ſhip loaded with coals, or other perſon having charge thereof, ſhall deliver to the proper officers of the cuſtoms at *London*, cocquets containing the lading of ſuch ſhip, within four days after the arrival of ſuch ſhip as high as *Graveſend*; on pain of forfeiting 50 *l.* to be recovered and diſpoſed of in manner before directed.

Sect. 3. This ſhall be a publick act.

Stat. 10 *Geo.* 2. *cap.* 32. *ſect.* 6. During the continuance of 9 *Geo.* 1. *cap.* 22. if any perſon ſhall wilfully and maliciouſly ſet on fire, or cauſe to be ſet on fire any mine, pit, or delph of coal, he ſhall be adjudged guilty of felony without benefit of clergy.

Made perpetual by 31 Geo. 2. c. 42. ſect. 6.

Stat. 11 *Geo* 2. *cap.* 15. *ſect.* 6. If any buyer or ſeller of coals at *Billingsgate*, or other place of ſale within the bills of mortality, being required, ſhall neglect to ſign the contracts as by the act 3 *Geo.* 2. *cap.* 26. is directed; every ſuch buyer and ſeller ſhall forfeit 50 *l.* one moiety to his majeſty, and the other moiety to ſuch as ſhall ſue for the ſame in any of his majeſty's courts of record at *Weſtminſter*, within ſix months after ſuch offence.

Sect. 7. Every maſter of a ſhip carrying coals as aforeſaid ſhall after every voyage produce to his owners (when required) a copy of ſuch contracts ſigned by the crimp; and in caſe of refuſal, ſuch maſter ſhall forfeit 50 *l.* as aforeſaid.

Sect. 8. It ſhall be lawful for the commiſſioners appointed in purſuance of 6 *Will. cap.* 10. or any three of them, to admeaſure and mark all waggons, barrows, and other carriages uſed in loading ſhips with coals in the port of *Newcaſtle* and members thereunto belonging.

Sect. 9. This ſhall be a publick act.

Stat. 13 *Geo.* 2. *cap.* 21. *ſect.* 1. If any perſon wilfully and maliciouſly divert, or cauſe to be diverted, water from any river, brook, watercourſe, channel or land flood, or convey or cauſe to be conveyed water into any coal-work and mine, pit or delph of coal, or into any ſubterraneous cavities or paſſages, or make any ſubterraneous cavities, with deſign thereby to deſtroy or damage any coal-work, *&c.* belonging to any other perſon, or wilfully and maliciouſly deſtroy or obſtruct any ſough or ſewer (which has been a ſough or ſewer in common for fifty years) made for draining any coal-work, *&c.* or attempt any ſuch miſchievous practice, or aſſiſt therein; every ſuch perſon ſhall for every offence forfeit to the party aggrieved treble damages, and coſts of ſuit, to be ſued for by action of debt, *&c.* in any court of record at *Weſtminſter*.

Sect. 2. Nothing in this act ſhall reſtrain any perſon, being the owner of any ſough, drain or ſewer, from deſtroying, obſtructing, or diverting any ſuch ſough, drain, or ſewer, as he may now lawfully do.

Stat. 14 *Geo. cap.* 41. *ſect.* 3. For all coals which ſhall be uſed in fire-engines for draining water out of the mines of tin and copper in *Cornwall*, and for which duties have been firſt paid, a drawback ſhall be allowed of all ſuch duties, upon proof by oath before the cuſtomer or collector of the ſaid duties that ſuch coals have been ſo uſed; which drawback ſhall be paid by the collector of the ſaid duties to the perſon ſo making proof.

Stat. 17 *Geo.* 2. *cap.* 35. *ſect.* 1. The juſtices of peace of the ſeveral counties in *England*, *Wales*, and of *Berwick*, or three of them, whereof one to be of the *quorum*, ſhall be impowered to ſet the prices of coals called ſea-coals, brought by ſea into any rivers, creeks or ports, and ſold by retail in any places in *England*, *Wales*, and *Berwick*; and if any ingroſſer or retailer of ſuch coals refuſe to ſell as aforeſaid, the juſtices are to appoint perſons to enter into any place where ſuch coals are ſtored; and in caſe of refuſal, take a conſtable to force entrance, and the ſaid coals to ſell at ſuch rates, rendering to ſuch ingroſſer or retailer the money, charges deducted; and if any actor be commenced againſt the juſtice, conſtable, or any perſon for any thing done in purſuance of this act, the defendant may plead the general iſſue, and if the verdict be found for him ſhall recover his damages and treble coſts.

Sect. 2. No perſon having intereſt in any wharf uſed for receiving and uttering coals, or that trades in the ſale of coals, ſhall act in the ſetting the price of coals. See *the ſecond act under this title.*

Stat. 19 *Geo.* 2. *c.* 35. *ſect.* 1. There ſhall be erected and continued within the city and liberty of *Weſtminſter*, one publick office, which ſhall be called *The land coal-meters office for the city and liberty of Weſtminſter*, which ſhall be managed by two perſons appointed by his majeſty, who ſhall be called *The principal land coal-meters for the city and liberty of Weſtminſter*; and ſuch office ſhall be kept open every day (*Sundays* excepted) from the 25th of *March* to the 29th of *September* yearly, from ſix till twelve in the forenoon, and from one till eight in the afternoon; and from the 29th of *September* to the 25th of *March* yearly, from ſeven till twelve in the forenoon, and from one till eight in the afternoon.

Sect. 2. No perſon ſhall be capable of acting as one of the principal land coal-meters, until he ſhall before two juſtices of the peace for *Weſtminſter* take an oath in the words following; to wit,

I A. B. *do ſwear, that I will truly and faithfully, according to the beſt of my judgment and ability, execute the office of one of the principal land coal-meters for the city and liberty of* Weſtminſter, *and for that part of the duchy of* Lancaſter *adjoining thereto; and for the ſeveral pariſhes of Saint* Giles in the Fields, *Saint* Mary le Bone, *and for ſuch part of the pariſh of Saint* Andrew, Holborn, *as lies in the county of* Middleſex. *So help me God.*

Sect. 3. It ſhall be lawful for the ſaid principal land coal-meters, or any one of them, to appoint a ſufficient number of perſons to be labouring coal-meters within the ſaid city and liberty, and the aforeſaid part of the duchy of *Lancaſter*, and in the ſaid pariſhes, and the aforeſaid part of the pariſh of Saint *Andrew*, *Holborn*; one of whom ſhall attend every day (*Sundays* excepted) at ſuch of the coal wharfs, or other place of ſale, within the ſaid limits, at which he ſhall be ſtationed by the principal land coal-meters, from the twenty-fifth of *March* to the twenty-ninth of *September* yearly, from five till twelve in the forenoon, and from one till eight in the afternoon; and from the twenty-ninth of *September* to the twenty-fifth of *March* yearly, from ſeven till twelve in the forenoon, and from one till ſix in the afternoon, to meaſure out the coals ſold at the wharfs or warehouſes where he is ſtationed.

Sect. 4. No perſon ſhall be capable of acting as a labouring coal-meter, until he ſhall, before two juſtices of the peace for *Weſtminſter*, take an oath in the words following; to wit,

I A. B. *do ſwear, that I will duly and faithfully, to the beſt of my ſkill and knowledge, execute the office of one of the labouring coal-meters for the city and liberty of* Weſtminſter, *and for that part of the duchy of* Lancaſter *adjoining thereto, and for the ſeveral pariſhes of Saint* Giles in the Fields, *and for Saint* Mary le Bone, *and for ſuch part of the pariſh of Saint* Andrew, Holborn, *as lies in the county of* Middleſex; *and will well and truly, according to the beſt of my ſkill and judgment, meaſure coals between buyer and ſeller, without favour or ill-will. So help me God.*

And the juſtices who adminiſter the ſaid oaths, ſhall certify the taking thereof to the general quarter ſeſſions for *Middleſex*, there to remain on record.

Sect. 5. If any lighterman or other perſon, after coals delivered on board any lighter or craft of any ſhip, break bulk before the time of delivery at the wharf in the abſence of the maſter (or of the conſumer or his agent, where the maſter is not obliged to attend the delivery) he ſhall for every offence forfeit 5*l.*

Sect. 6.

Sect. 6. The ſtations for the ſaid labouring coal-meters at the ſaid wharfs ſhall be varied as the principal coal-meters, or any of them, think fit.

Sect. 7. All contracts for coals to be delivered within the city and liberty of *Weſtminſter*, or the aforeſaid part of the ſaid duchy, or the ſaid pariſhes, or the aforeſaid part of the pariſh of Saint *Andrew*, *Holborn*, directly from any lighter, *&c.* to the conſumer (not being leſs than five chalder) ſhall be for pool meaſure, including the ingrain of one chalder in every ſcore, according to the cuſtom of the port of *London*, though the term of pool meaſure be omitted in any written or verbal contract for that purpoſe.

Sect. 8. All coals delivered as pool meaſure at any wharf within the ſaid city and liberty, or the ſaid part of the ſaid duchy, ſhall be loaded ſeparately in the craft with the ingrain, and ſhall be ſo filled and delivered without being meaſured by the buſhel, unleſs the buyer deſire to have the ſame meaſured.

Sect. 9. All coals ſold as wharf meaſure within the ſaid city and liberty, or the aforeſaid part of the ſaid duchy, or the ſaid pariſhes, or the aforeſaid part of the pariſh of Saint *Andrew*, *Holborn*, ſhall be meaſured in the preſence of one of the labouring coal-meters, as is directed by 16 & 17 *Car.* 2. *cap.* 2. and the labouring coal-meters ſhall fill up any buſhel that appears deficient out of the ſtock of the perſon vending the ſaid coals.

Sect. 10. Four-pence by the chalder, for every chalder of coals ſold and delivered at any wharf or place within the ſaid limits, ſhall be paid by the ſeller to the principal land coal-meters, or to the labouring coal-meters, for the purpoſes following, *viz.* one moiety for the uſe of the principal coal-meters, and the other moiety for the uſe of the labouring coal-meters; and thereupon ſuch principal land coal-meters ſhall deliver to every ſeller of ſuch coals, or the carman who carries the ſame, a ticket ſigned by the principal land coal-meters, or one of them, and counterſigned by the labouring coal-meter attending the ſame; in which ſhall be contained as well the Chriſtian and ſurname of the ſellers, as of the conſumers, the quantity and quality, the price *per* chalder, and the day of the week, month, and year of the ſales, delivery, and admeaſurement, the amount of the metage charge, and the names of the carmen; which ticket, the metage being paid, ſhall be delivered by the labouring coal-meter counterſigning the ſame to the carman, and by the carman to the conſumer or his ſervant; and thereupon he ſhall pay to the ſeller the metage therein ſpecified: and if the labouring coal-meter counterſigning ſuch ticket ſhall after payment of the metage refuſe to deliver ſuch ticket to the carman, he ſhall for every ſuch offence forfeit 5 *l.* and if ſuch carman either alter or neglect to deliver the ſame ticket to the conſumer, or to the ſervant who attends to receive the coals, he ſhall forfeit for every ſuch offence 5 *l.*

Sect. 11. If any cart in which more than eight buſhels ſhall be ſent from any place within the ſaid limits, without firſt having obtained ſuch ticket, the vender of the ſaid coals, and the driver of ſuch cart being convicted by the oaths (or if by quakers, by affirmation) of two witneſſes before one juſtice of peace for *Weſtminſter* or *Middleſex*, ſhall for every offence forfeit as follows, *viz.* the vender 50 *l.* and the driver 5 *l.*

Sect. 12. If any meter appointed by virtue of this act deliver any falſe ticket, or wilfully make any falſe meaſure, and be convicted by the oaths (or if by quakers, affirmations) of any two witneſſes before any juſtice of peace for the ſaid liberty or county, he ſhall be incapable of acting as a coal-meter, and forfeit 5 *l.*

Sect. 13. No coals belonging to any dealer above eight buſhels under any one contract, ſhall be ſent from any wharf or ſtorehouſe within the ſaid limits, except in the preſence of one labouring coal-meter.

Sect. 14. This act ſhall not extend to the owners of any works for raiſing water by fire, nor who at any time have twenty chalders of coals or upwards, in any lighter or other crafts, and who ſhall not vend ſuch coals, but they may have twenty chalders of coals or more delivered under the inſpection of their own agent in the ab-

ſence of a meter, and in that caſe ſuch perſons are hereby exempted from payment of metage charge; and if they require the attendance of any meter appointed in purſuance of this act, then they ſhall pay the metage of 4 *d.* by the chalder.

Sect. 15. If any ſuch labouring coal-meter wilfully ſuffer any coals ſold as wharf-meaſure (exceeding the quantity of eight buſhels) to be ſent from any wharf or warehouſes within the ſaid limits, without being meaſured as is herein directed, and give not information thereof to the principal land coal-meters, or their deputies, at the ſaid office within two days after, and be convicted thereof by the oaths of two witneſſes, ſuch labouring coal-meter ſhall from thenceforth be incapable of acting as a labouring coal-meter within the ſaid limits, and forfeit 5 *l.*

Sect. 16. If any dealer in coals directly or indirectly give to any labouring coal-meter, appointed in purſuance of this act, any fee (other than the ſum of 4 *d.* by the chalder) or if any labouring coal-meter directly or indirectly receive from any dealer any ſuch fee, other than the ſum of 4 *d.* by the chalder; every ſuch dealer ſhall for every ſuch offence forfeit 50 *l.* and the labouring coal-meter who received ſuch fee ſhall be from thenceforth incapable of acting as a coal-meter within the ſaid limits, and forfeit 5 *l.*

Sect. 17. If the driver of any cart loaded with coals, or any perſon belonging thereto or employed therewith, deliver any coals under his care, otherwiſe than for the uſe of the owner, and be convicted, he ſhall for every ſuch offence forfeit 5 *l.*

Sect. 18. If any perſon be diſſatisfied with the meaſure of any coals under this act, the ſame coals ſhall (either upon acquainting the ſeller or the carman, at any time during the delivery thereof, and before the carman be diſcharged, be remeaſured, either in the preſence of a ſea-coal-meter, from the ſea coal-meters office in *London*, or one of the meters, or their agents, appointed in purſuance of this act; for which ſhall be paid 4 *d.* and no more, for every chalder; and in caſe the coals thus remeaſured amount not to the meaſure for which they were originally ſold, the ſellers are hereby liable to the penalties inflicted by law for offences of this ſort.

Sect. 19. After notice given in writing to the ſeller of ſuch coals, or to the carman, and whilſt ſuch coals remain in either of their poſſeſſion, of ſuch diſſatisfaction, ſuch ſeller or carman ſhall not leave the cart in which ſuch coals are laden, but ſhall remain with the ſame, and take care both of the coals and cart, till a meter appointed in purſuance of this act can be procured to remeaſure ſuch coals; and they are on notice delivered, or left at the office in writing, in any of the office hours, to attend for that purpoſe.

Sect. 20. No perſon who ſhall be a ſeller of coals, or dealer in, or employed in the carrying of coals, or a wharfinger, or intereſted in any wharf, ſhall be capable of acting either as a principal or labouring coal-meter.

Sect. 21. The penalties impoſed by this act ſhall be recovered and applied for the purpoſes following, *viz.* ſuch of the penalties as exceed 5 *l.* by action of debt, *&c.* in any court of record at *Weſtminſter*; one moiety of which penalties (that is, where each of them exceed 5 *l.*) ſhall be to the uſe of his Majeſty, and the other moiety (with coſts) to the uſe of ſuch perſon who ſhall inform or ſue: and all other penalties ſhall be recovered by way of complaint unto any juſtice of peace for *Weſtminſter* or *Middleſex*, who ſhall call the parties before him, and examine ſuch complaint upon oath (or upon affirmation, in the caſe of quakers) and upon proof grant a warrant for levying ſuch penalties; one moiety to the uſe of the informer, and the other moiety to the uſe of the poor of the pariſh in which ſuch offences are committed; and in caſe ſuch penalties be not after conviction forthwith paid, they ſhall be levied by diſtreſs and ſale of goods of the offenders by warrant of ſuch juſtice, and for want of ſufficient diſtreſs ſuch offenders ſhall be committed to the houſe of correction for any time not exceeding thirty days, and not leſs than fourteen days, there to be kept to hard labour.

Sect. 22. If any perſon ſo convicted think himſelf aggrieved, he may appeal to the general quarter ſeſſions for *Middleſex* next after ſuch conviction (but not afterwards) and that ſeſſions ſhall, at the next ſeſſions after bringing ſuch appeal, finally determine the ſame; and if the appellant ſhall not make good his appeal, or proſecute the ſame with effect, the ſeſſions ſhall award coſts, to be then, with the penalty adjudged on ſuch conviction, paid to the informer, and for want thereof commit the perſon appealing to the common gaol of *Middleſex*, there to remain until he pay ſuch coſts and penalty; but in caſe the appellant make good his appeal and be acquitted of his conviction, the ſame court ſhall award to ſuch appellant reaſonable coſts, to be paid by the perſon on whoſe information ſuch conviction was founded; and for want of ſuch payment ſhall commit ſuch informer to the common gaol of *Middleſex*, there to remain until he pay the coſts ſo awarded; but no conviction by virtue of this act ſhall be quaſhed for want of form only.

Sect. 23. No writ of *certiorari* ſhall iſſue to remove the record of any conviction or proceeding thereon, in purſuance of this act, into any court of record at *Weſtminſter*.

Sect. 24. If any action be brought for any thing done in purſuance of this act, the ſame ſhall be commenced within ſix months after the fact, and be laid in *Middleſex*, and the defendant may plead the general iſſue, and if the plaintiff be nonſuited, *&c.* the defendant ſhall have full coſts.

Sect. 25. This act ſhall be deemed a publick act.

Sect. 26. This act ſhall continue for three years from the 24th of *September* 1746, and from thence to the end of the then next ſeſſion of parliament.

Continued to the 24th of June 1759 *by* 31 Geo. 2. cap. 35. ſect. 4. *and for ſeven years more, and to the end of the next ſeſſion, by* 32 Geo. 2. cap. 27. ſect. 2.

Stat. 22 *Geo.* 2. *cap.* 37. *ſect.* 1. No officer of the cuſtoms in *Great Britain* ſhall clear outwards any ſhip wherein coals, culm, or cinders ſhall have been exported from *Great Britain* to any place beyond the ſeas, nor grant any warrant, cocquet, or other diſpatch for the clearing outwards, either for a coaſting or foreign voyage, any ſuch ſhip, or for the loading on board thereon any goods, nor permit any ſuch ſhip to go out of any port in *Great Britain*, until all the duties payable for ſuch coals, *&c.* exported beyond the ſeas in ſuch ſhip the laſt preceding voyage be paid, or until an authentic certificate under the hands and ſeals of the collector, cuſtomer, and comptroller, or other chief officer of the cuſtoms of the port where the the coals, *&c.* ſo exported were firſt ſhipped, ſignifying that the ſaid duties are paid, be produced; and every officer acting contrary to the meaning of this act ſhall for every ſuch offence forfeit 100 *l.* to his Majeſty, to be recovered by bill, *&c.* in any court of record at *Weſtminſter*, or in the Exchequer at *Edinburgh* reſpectively, wherein no eſſoin, *&c.* ſhall be allowed.

Sect. 2. If any action be commenced for any thing done in purſuance of this act, the defendant may plead the general iſſue, and if the plaintiff be nonſuited, *&c.* the defendant ſhall recover treble coſts.

Sect. 3. If any maſter or other perſon taking charge of any veſſels whereon coals, culm, and cinders are laden in any port in *Great Britain*, in order to be carried coaſtwiſe to ſome other port within the realm, or having given bond accordingly, proceed with his ſaid loading of coals, *&c.* to parts beyond the ſeas, and there unlade and diſpoſe of the ſame, not being compelled by ſtreſs of weather, or other lawful neceſſity, he ſhall for every ſuch offence forfeit for every chalder of coals, *&c.* ſo exported contrary to this act 5 *s.* over and above all duties payable for the ſame, to be recovered by action of debt, *&c.* in any court of record at *Weſtminſter*, or in the Exchequer at *Edinburgh* reſpectively, wherein no eſſoin, *&c.* ſhall be allowed; one moiety to the uſe of his Majeſty, and the other moiety to the uſe of ſuch perſon as ſhall inform or ſue.

Stat. 23 *Geo.* 2. *cap.* 26. *ſect.* 4. If either of the principal land coal-meters appointed by virtue of 19 *Geo.* 2. *cap.* 35. neglect to ſtation labouring coal-meters at the wharfs, and at the times by the ſaid act directed, he ſhall for every ſuch offence forfeit 10 *l.* and if any labouring coal-meter ſo ſtationed ſhall not attend and perform his duty, he ſhall for every ſuch offence forfeit 40 *s.* which penalties ſhall be recovered and applied as any other penalty is directed by the ſaid act.

Stat. 30 *Geo.* 2. *cap.* 19. *ſect.* 28. There ſhall be paid to his Majeſty for every chalder of coals, *Newcaſtle* meaſure, ſhipped for exportation beyond the ſeas, except to *Ireland*, the *Iſle of Man*, or his Majeſty's plantations, an additional duty of 4 *s.* and after the ſame rate for any greater or leſs quantity, over and above the duties now payable: to be collected and paid in the ſame manner and under ſuch penalties, as the former duties on the exportation of coals.

Sect. 29. The monies ariſing from the additional duty, and paid into the receipt of the Exchequer, ſhall be entered apart from all other monies, and ſhall be part of the fund eſtabliſhed by this act.

Stat. 31 *Geo.* 2. *cap.* 15. *ſect.* 1. It ſhall be lawful for any perſon during fifteen years, and from thence to the end of the then next ſeſſion of parliament, to export any quantity of culm to *Liſbon* in *Portugal*, upon payment of a duty of 1 *s.* for every chalder, *Newcaſtle* meaſure, and after that rate for any greater or leſſer quantity; ſo as the exporter before the loading of ſuch culm become bound with other ſufficient ſecurity, in treble the value, to the commiſſioners or chief officer of the cuſtoms belonging to the port where ſuch culm is ſhipped (who have hereby power to take ſuch ſecurity, in his Majeſty's name to his uſe, and for which ſecurity no fee ſhall be given) that ſuch culm ſhall be landed at *Liſbon* in *Portugal*, and not elſewhere; and that a certificate under the hand and ſeal of the *Britiſh* conſul-general, or deputy-conſul reſiding at *Liſbon*, ſhall within twelve calendar months from the date of the ſaid bonds (danger of the ſeas excepted) be returned to the officers who took the ſaid bonds, that ſuch culm hath been landed at *Liſbon*; and in caſe the ſhip on which any culm is put on board, for which ſuch ſecurity ought to be given, go out of the port before ſuch ſecurity is given, the ſhip and the culm therein or the value ſhall be forfeited, and may be recovered; one moiety to the uſe of the King, and the other moiety to the perſon who will ſeize, inform, or ſue.

Sect. 2. The ſaid duty on culm exported to *Liſbon* ſhall be raiſed in the ſame manner and under ſuch penalties as the duties payable upon the exportation of coals.

Sect. 3. If any action be commenced for any thing done in purſuance of this act, the defendant may plead the general iſſue, and if the plaintiff be nonſuit, *&c.* the defendant ſhall recover treble coſts.

Stat. 32 *Geo.* 2. *cap.* 27. *ſect.* 1. If the driver of any cart loaded with coals, or any perſon belonging thereto or employed therewith, deliver or ſuffer to be delivered from ſuch cart any coals under his care, otherwiſe than for the uſe of the owner, and be convicted, as in the 19 *Geo.* 2. *cap.* 35. is mentioned, he ſhall for every ſuch offence be publickly whipt, or committed to the houſe of correction for three months.

Sect. 2. In caſe any perſon be diſſatisfied with the meaſure of any coals, and ſuch coals be remeaſured in purſuance of the 19 *Geo.* 2. *cap.* 35. and upon ſuch remeaſuring fall ſhort of the quantity for which the ſame were originally ſold and meaſured, then the principal coal-meter ſhall for every buſhel which they fall ſhort forfeit 40 *s.* to be recovered and applied as the penalties inflicted by the 19 *Geo.* 2. *cap.* 35.

Sect. 3. If any labouring coal-meter deliver a ticket for any quantity of coals, without having ſeen the meaſuring of the whole quantity expreſſed in ſuch ticket, the principal coal-meters ſhall forfeit 5 *l.* to be recovered and applied as the penalties inflicted by the 19 *Geo.* 2. *cap.* 35. And every labouring coal-meter ſo offending, upon complaint to a juſtice of peace for *Weſtminſter* or *Middleſex*, and upon proof to his ſatisfaction, ſhall be committed to the houſe of correction, and be kept to hard labour for any time not exceeding 30 days, and ſhall be for ever incapable of acting as a labouring coal-meter under this act.

Sect.

PH
MVSEVM
BRITANNICVM

Sect. 4. After the 24th of *December* 1759, all ſacks made uſe of for the carriage of coals within the limits mentioned in 3 *Geo.* 2. *cap.* 26. *par.* 67. ſhall be four feet four inches in length, and 26 inches in breadth after they are made; nor ſhall any of leſs dimenſions be ſealed or marked at *Guildhall* in *London*, or the Exchequer-office at *Weſtminſter*: and if any perſon dealing in coals within the limits aforeſaid, uſe ſacks of any leſs dimenſions than before directed, every ſuch perſon ſhall for every offence forfeit 40 *s.* to be recovered and applied as the penalties inflicted by 19 *Geo.* 2. *cap.* 35.

Sect. 5. If any perſon as a labouring coal-meter ſuffer any coal-ſacks to be made uſe of for the carriage of coals, leſs than four feet in length and two feet in breadth, within-inſide the ſack, or neglect to perform his duty at the wharfs, as in the 19 *Geo.* 2. *cap.* 35. is directed, he ſhall for every ſuch offence forfeit 40 *s.* to be recovered and applied as the penalties inflicted by the ſaid act.

Sect. 6. Such juſtice upon every ſuch complaint is to ſummon the parties before him, and to examine ſuch complaint upon oath (or affirmation, if the witneſs be a quaker) and upon proof of ſuch offence to his ſatisfaction, to grant a warrant for the commitment of ſuch offender to the houſe of correction, there to be dealt with as aforeſaid.

Sect. 7. After the commencement of this act, none of the proviſions made by the 19 *Geo.* 2. *cap.* 35. or by this act relating to the payment of any ſums of money for the admeaſurement or inſpection of the admeaſurement of coals, or to the puniſhment of any dealer in coals or carter, on account of ſending coals from any place within the limits aforeſaid, ſhall be in force; except where the buyer ſhall have ſignified, by notice in writing to one of the principal coal-meters, or one of the labouring coal-meters, his deſire to have the attendance of a coal-meter to inſpect the admeaſurement of his coals, and where a coal-meter ſhall purſuant to ſuch notice attend and inſpect the admeaſurement of the whole quantity of ſuch coals.

Sect. 8. The 19 *Geo.* 2. *cap.* 35. continued by 23 *Geo.* 2. *cap.* 25. and 24 *Geo.* 2. *cap.* 57. and 31 *Geo.* 2. *cap.* 35. and all the proviſions in the ſaid acts which are now in force (other than ſo far as any of them are varied by this act) ſhall be put in execution during the continuance of this act; and this act ſhall take effect from the 24th of *June* 1759, for ſeven years next enſuing, and to the end of the then next ſeſſion of parliament; and ſhall be a publick act.

Stat. 33 *Geo.* 2. *cap.* 15. *ſect.* 1. If any perſon have occaſion to carry any culm to be uſed for the burning of lime in any veſſels not exceeding thirty tons burthen, from any place within the port of *Milford* or the limits thereof, to any other place within the counties of *Pembroke*, *Caermarthen*, *Cardigan*, or *Merioneth*; the maſter of ſuch veſſel may apply to the collector of the ſaid port or his deputy for a ſufferance to ſhip ſuch culm; and the ſaid collector or his deputy are to grant every ſuch maſter a ſufferance accordingly, in which ſhall be inſerted the quantity of culm ſo to be ſhipped; and the officer to whom the ſufferance ſhall be directed is to attend the ſhipping all the culm expreſſed in the ſufferance, and to certify on the back of the ſufferance the quantity: and the maſter or owner ſhall pay to the collector 1 *s.* for every chalder of ſuch culm: and the collector or his deputy ſhall, upon receipt of ſuch duty, grant a certificate under the ſeal of his office to ſuch maſter, ſetting forth the quantity of culm ſhipped, and that the duties have been paid; and ſuch certificate ſhall be a clearance for ſuch veſſel to any place within the counties aforeſaid; for which certificate it ſhall be lawful for ſuch collector or his deputy to receive 1 *s.* and no more; and it ſhall not be lawful for the ſaid collector or any other officer to take any other fee.

Sect. 2. The maſter of every ſuch veſſel, on board whereof any culm ſhall have been ſhipped within the limits aforeſaid, ſhall, upon his return to *Milford*, make oath before the collector of the ſaid port or his deputy of the place where and the time when he landed his former cargo of culm; and ſuch maſter ſhall not be permitted to ſhip any other cargo of culm until he have made oath as aforeſaid: and in caſe ſuch maſter ſhall fraudulently change either his own name or the name of the veſſel, to prevent a diſcovery of the place to which he carried his former cargo of culm, and ſhall be convicted, either upon confeſſion, or upon the oath of one witneſs, before any juſtice of peace of the county where the offence ſhall be committed, he ſhall for every ſuch offence forfeit 5 *l.* and it ſhall be lawful for the ſaid collector, or any perſon he ſhall appoint, to ſeize ſuch veſſel and detain the ſame until the ſaid 5 *l.* be paid, and the charges of ſeizing and detaining; which penalty of 5 *l.* ſhall be applied as other penalties by the laws relating to the cuſtoms.

Sect. 3. Whenever any culm ſhipped at any place within the limits aforeſaid, for which the duty hath been paid, ſhall be loſt, proof being made upon oath before the collector of ſuch port or his deputy, ſuch collector or his deputy ſhall permit the owner to ſhip the like quantity of culm duty-free, and without any charge other than the fee of one ſhilling.

Cobler. See **Shoemaker.**

Coca (*Coquia*) A cogge or boat. Vid. **Coggle.**

Cocceum, *Ribcheſter* in *Lancaſhire.*

Cocherings, An exaction or tribute in *Ireland*; now reduced to chief rents. See **Bonaght.**

Cochineal. Statutes for the free importation of it, 6 *Ann. c.* 33. 13 *Geo.* 1. *c.* 25. 7 *Geo.* 2. *c.* 18. 27 *Geo.* 2. *c.* 18. *ſect.* 2.

Cocket, or **Coket** (*Cockettum*) Is a ſeal belonging to the King's cuſtom-houſe. *Reg. of Writs*, *fol.* 192. *a.* Alſo a ſcroll of parchment ſealed and delivered by the officers of the cuſtom-houſe to merchants, as a warrant that their merchandizes are cuſtomed, *ann.* 11 *H.* 6. *cap.* 16. Which parchment is otherwiſe called *Literæ de cocketto*, or *Literæ teſtimoniales de cocketto*; Reg. f. 179. a. So is the word uſed, *an.* 5 & 6 *Ed.* 6. *c.* 14. and 14 *Ed.* 3. *ſtat.* 1. *cap.* 21. None ſhall make wools to be cocketted, but in the name of him to whom the wools belong. Stat. 13 *Rich. c.* 9. *Inquiſitio & placitum contra quoſdam qui lanas non* cockettatas *cuſtumatas extra regnum duxerunt.* Inter recorda de Reg. Scacc. Mich. 25 Ed. 3. *Et ballivi ſui capiant ad caput pontis de* Berewyk *omnes homines venientes cum lanis, coreis vel pellibus vendendis ſine ligno quod vocatur* coket. *Pla. Parl.* 21. *Ed.* 1.

Cocket is uſed for a ſort of meaſure, as we may ſee in *Fleta*, *lib.* 2. *cap.* 9. *Panis vero integer quadrantalis frumenti ponderabit unum* coket *& dimidium* It is alſo uſed for a diſtinction of bread in the ſtatute of bread and ale, made 51 *Hen.* 3. The words are, "When a quarter of wheat is ſold for 12 *d.* the waſtel-bread of a farthing ſhall weigh 6 pound and 16 *s.* but bread-cocket of a farthing, of the ſame corn and bultel, ſhall weigh more than waſtel by 2 *s.* and cocket-bread made of corn of lower price ſhall weigh more than waſtel by 5 *s.* Bread made into a ſimnel ſhall weigh 2 *s.* leſs than waſtel. Bread made of the whole wheat ſhall weigh a cocket and a half; ſo that a cocket ſhall weigh more than a waſtel by 5 *s.* Bread of treet ſhall weigh two waſtels, and bread of common wheat ſhall weigh two great cockets. When a quarter of wheat is ſold for 18 *d.* then waſtel-bread of a farthing, white and well baked, ſhall weigh 4 *l.* 10 *s.* when for 2 *s.* 3 *l.* 8 *s.* *&c.*" by which we may perceive that *waſtel-bread* was the fineſt, *cocket-bread* next, then bread of treet, and laſtly, bread of common wheat; as we now call the fineſt bread wheaten or *French* bread, the ſecond ſort white bread, the third brown, or houſhold bread, *&c.* In *Oxford* anciently they had a coarſe bread called *tuteſtyn, hoc eſt panem ſurfuraceum vel atrum.* Hiſt. Oxon. fol. 158. b.

Cocket-bread, Cocket.——*Quando quarterium frumenti venditur pro xii denariis, tunc panes quadrantes de Waſtello ponderabunt vi. libras, & xvi. ſol. Panis autem de* coket, *de eodem blado & eodem bultello ponderabit plus waſtello ii. ſol. & de blado minoris pretii ponderabit plus waſtello v. ſol. Panis de ſymenel ponderabit minus waſtello ii. ſol. panis integer de frumento de quadrante ponderabit* coket *& dimidium. Panis de treyt ponderabit ii.* cokettes. *Conſuetud. Domus de Farendon, MS. fol.* 42. *Cocket-bread* or *cocket* was only hard ſea-biſket, ſo called becauſe *cocketted* or marked with a peculiar ſtamp or cocket; or alſo be-

cauſe made for the uſe of *cock-ſwains* or ſeamen. This is but my conjecture; for no author has yet hit upon the ſenſe of the word, or derivation of it. *Cowell, ed.* 1727.

Cockettum, Cockett, Cocketum. The cuſtom-houſe or office where goods to be tranſported were firſt entered, and paid their cuſtom, and had a *cocket* or certificate of diſcharge.——Rolandus Trentacoſt *ad cuſtodiam* cocketti, *ad Novum Caſtrum ſuper Tynam per ſocietatem* Lucanicam *deputatur, poſtquam lanæ et pelles per præceptum Regis fuerunt arreſtatæ, & transfretatio earum inhibita.* Mem. in Scaccar. 23 Ed. 1. by Sir *John Maynard.*

Cockettata lana, Wool duly entered and *cocketted*, or authorized to be tranſported.——*Mandatum quod lanæ non* cockettatæ, *vel non* cuſtumatæ *ſub forisfactura capiantur.* Trin. 16 Ed. 3. m. 37.

Cocklets, *i. e.* The meaneſt ſort of men, corruptly for *cotſetts*, that is, cottagers. *Villani vero vel* cocſeti, *vel perdingi, vel qui ſunt viles vel inopes perſonæ, non ſunt inter legum judices numerandi.* Leges H. 1. c. 29.

Cocoa-nuts. See **Coffee**, *&c.*

Cocodones, Was a ſort of *French* money, very bad: *Prohibita eſt moneta alienigenarum ſurreptitia & illegitima, quam polardos,* cocodones *& roſarios appellabant, qui paulatim & latenter loco irrepſerunt ſterlingorum.* Walſingham in Ed. 1. 1300. See **Pollards.**

Cocſetus, A cock-ſwain, coxon, boat-man, or ſeaman. Vid. **Coggle.**

Cocula, *Coculum,* A cogue, or little drinking-cup, in form of a ſmall boat, uſed eſpecially at ſea, and ſtill retained in a cogue of brandy.

Codicil (*Codicillus*) A ſchedule or ſupplement to a will, or ſome other writing: ſome writers, comparing a teſtament and a *codicil* together, call a teſtament a great will, and a *codicil* a little one; and compare a teſtament to a ſhip, and the *codicil* to a boat tied to it.

Codicil is uſed as an addition annexed to a teſtament, when any thing is omitted, which the teſtator would add, explain, alter or retract; and is the ſame with a teſtament, but that it is without an executor. See *Swinb. p.* 1. *ſect.* 1. and *Touchſtone of Wills, pag.* 21, 22.

Coffee, mentioned in ſtat. 15 *Car.* 2. *cap.* 11. A kind of drink, originally uſed among the *Turks* and *Perſians*, and from them brought to us: it is thick, blackiſh, and bitter, made from berries of that nature and name, and now agreeably in uſe as a wholeſome liquor. See **Exciſe.**

Cofez, *Cottages.* See *Domeſday-Book.*

Cofferer of the King's houſhold, Is a principal officer of his Majeſty's court, next under the comptroller, that in the counting-houſe, and elſewhere at other times, hath a ſpecial charge and overſight of other officers of the houſe, for their good demeanor and carriage in their offices, to all which he pays their wages. He is made mention of 39 *Eliz. cap.* 7.

Cofra, A coffer, cheſt, or trunk.——*Cuſtos collegii & domus eleemoſynariæ de* Pontefracto, *& miniſtri ejuſdem non ſunt dotati quacunque dote temporali ſeu ſpirituali, vivente fundatore ejuſdem. Sed fuerunt ſtipendiarii capientes certam ſummam pecuniæ de* cofris *dicti fundatoris.* Munimenta Hoſpit. SS. Trin. de Pontefracto, MS. f. 50.

Coggle. Upon ſome of the ſea-coaſts in *Yorkſhire*, a ſmall fiſhing-boat is called a coggle, *i. e.* a little *cogge*; and in ſome places by corruption a *cobble*, from the old Teuton. *kogge*, a ſhip, whence the Lat. *coggo, cogga, &c. Anno* 1066. *venit ad hoc in* Angliam (Rex Noricorum) *trecentis* coggonibus *advectus. Mat. Weſt. ſub ann. Præparatis* cogonibus, *galleis & aliis navibus onerariis*—— 600 *naves, &* 24 *coggas bene præparatas. Mat. Paris ſub An.* 1218. Hence our old Sax. *cockede*, a ſeaman; called in the laws of King *Henry* 1. *c.* 29. *cocſeti*; and *cap.* 81. *cothſeti.* The old gloſſary to theſe laws, made in the reign of *Edward* III. interprets *cocſade*, by *Cocarius*, which *Du Freſne* ſeems to miſunderſtand for *coquus*, a cook; whereas *cocarius* is indeed a cocker, or boat-man, from *coca, coquia*, a boat: as with little variation, a *coggeſuanne*, a cock-ſwain, now a *coggeſon*, or *coxon*, is an officer in a ſhip. Hence the old Lat. *cogcio, coccio*, a wandering and begging ſeaman; which Sir *Henry Spelman* (who rarely trifles) believes to have been ſo called from the Greek κωκυω, *lugeo, ploro.* But the true name and original was *cogciones*, cog-men, or boat-men, who after ſhipwreck, or loſſes by ſea, travelled about to defraud the people by begging and ſtealing, till they were reſtrained by many civil and good laws.——*Ut iſti mangones &* cogciones, *qui ſine omni lege vagabundi vadunt per iſtam terram, non ſinantur vagari, & deceptiones hominibus agere.* Vide *Spelm. in voce, & Du Freſne.*

Coggleſhall, in *Eſſex.*

Cognatione. See **Coſinage.**

Cogniſor, or **Conuſor,** Is he that paſſeth or acknowledgeth a fine of lands or tenements to another. *Cogniſee* or *Conuſee* is he to whom the fine is acknowledged. *Weſt. Symb. par.* 2. *tit.* Fines, *ſect.* 2. 32 *H.* 8. 5.

Cogniſance (Fr. *Connuſance*, Lat. *Cognitio*) Is uſed diverſly; ſometimes ſignifying a badge on a waterman or ſerving-man's ſleeve, which is commonly the giver's, whereby he is diſcerned to belong to this or that maſter. Sometimes an acknowledgment of fine, or confeſſion of a thing done, as *Cognoſcens latro.* Bract. lib. 3. tract. 2. cap. 3. 20. 32. *Cognoſcere ad villanum.* Id. lib. 4. tract. 3. cap. 16. As alſo to make *cogniſance* of taking a diſtreſs: ſometimes as an audience, or hearing of a matter judicially, as to take *cogniſance.* Sometimes a power or juriſdiction, as *cogniſance* of pleas is an ability to call a cauſe or plea out of another court, which no man can do but the King, except he can ſhew charters for it; for ſuch *cogniſance* lies not in preſcription. *Manwood, cap.* 3. *num.* 2. See *The Terms of the law*, and *New Book of Entries*, verb. *Conuſance.*

Cognitiones, Enſigns, arms, or rather a military coat, painted with arms: *Cum viderunt hoſtes Chriſti armis, vexillis &* cognitionibus *picturatis, &c.* Mat. Pariſ. 1250.

Cognitionibus mittendis, Is a writ to a juſtice, or other that hath power to take a fine, who having taken acknowledgment thereof, deferreth to certify it into the court of *Common Pleas*, commanding him to certify it. *Reg. Orig.* 68. *b.*

Cogs (*Cogones*) Seems to be a kind of veſſel or boat upon the river *Ouſe* and *Humber*, mentioned in *Matth. Weſtm. An. Dom.* 1066.——*Venit ad hoc in Angliam* (Rex Noricorum) *trecentis* coggonibus *advectus.* About *Scarborough* they have ſtill a ſort of ſmall veſſels which they call *coggles*, the little *cogs.*

Cogware, Seems to be a ſort of coarſe clothes made in the north of *England*, mentioned in the ſtat. 13 *R.* 2. *c.* 10. where there is mention alſo of *cogmen*, that is, buyers of, makers or dealers in ſuch *cogware.*

Cohua, Is a promiſcuous multitude of men in a market or fair, and *cohuagium* is a tribute paid by thoſe who meet there: *Quieti ab omni thelonio, paſſagio, pontagio,* cohuagio, *pallagio, &c.* Du Freſne.

Coif (*Coifa*, Fr. *Coiffe*) Our ſerjeants at law are otherwiſe called *Serjeants of the coif*, from the *lawn coif* they wear on their heads, under their cap, when they are created, and always after. See **Serjeant**, and *Mat. Paris in an.* 1259. and *Forteſcue de LL. Angliæ, cap.* 50.

The uſe of it was to cover *tonſuram clericalem*; otherwiſe called *corona clericalis*, becauſe the crown of the head was cloſe ſhaved, and a border of hair left round the lower part, which made it look like a crown. See **Tena.**

Coin (*Cuneus, vel cuna*) Seems to come from the old French *Coigne, Angulus*, a corner; which probably verifieth the opinion of ſuch as hold the ancienteſt ſort of *coin* to be cornered, and not round; of this lawyers ſubſtantive *cuna*, comes their verb *cunare*, to *coin. Cromp. Juſt. of Peace, fol.* 220. See **Money.**

Coinage (*Cunagium*) Is the ſtamping and making of *money* by the King's authority. Beſides this general ſignification relating to money, it is by a law provided, that all the tin in *Cornwall*, after it is caſt and wrought, ſhall be weighed, and marked by the King's officer with a lion rampant, which is called *coinage. Britton, f.* 186. and *anno* 11 *H.* 7. *cap.* 4. Some authors write it *cunage.* See **Money.**

Cointeſes,

Cointeſes, Are garments made of ſilk or fine linen: *Mille enim milites & amplius, veſtiti ſerico ut vulgariter loquamur* cointeſes, *in nuptiis ex parte regis apparuerunt.* Matt. Pariſ. 1252.

Cokettatio. The *cocketting*, or taking account of goods to be tranſported, in order to receive the due cuſtom, and give the ticket of diſcharge.——*Ordinatio de* cockettatione *lanarum facta.* Clauſ. 33 Ed. 3. m. 37.

Colbroke. See **Pontes.**

Colcheſter. For erecting hoſpitals and workhouſes there. 15 *Geo.* 2. *c.* 18.

Cole-ſeed, To what duties liable. 2 *Will. & M. ſeſſ.* 2. *c.* 4 *ſect.* 31.

Coliander-ſeed, or rather *Coriander-ſeed*, *ſemen coriandri*, is the ſeed of an herb ſo called; medicinal, and wholſome for divers good purpoſes; which ſee in *Gerard's Herbal*, *lib.* 2. *ca.* 379. It is numbered among the drugs that are to be garbled. *Ann.* 1 *Jac. c.* 19.

Colibertus, *Collibertus*, *Con-libertus.* Theſe *coliberts* in the Civil law were only thoſe freemen, who at the ſame time had been manumiſed by their lord or patron. But the condition of a *colibert*, in *Engliſh* tenure, was (as Sir *Edward Coke* aſſerts) the ſame with a *ſokeman*, or one who held in free ſocage; but yet was obliged to do cuſtomary ſervices for the lord. The word occurs in *Domeſday*; though I think no gloſſographer has cited it from thence.——*Lib. Domeſday.* Somerſet——*Epiſcopus* Winton. *tenet Fantone*, *ibi quater xx villani*, *& quater xxii bordarii*, *& lxx ſervi*, *xvi* coliberti, *& xviii porcarii.* ——So again Glouceſtreſcire:——Brictric, *filius* Algari *tenebat* Turnebiri *T. R. E. ibi xxiii bordarii*, *& xv ſervi & iv* coliberti, *ibi ii molendini*, *&c.*——They were certainly a middle ſort of tenants between ſervile and free, or ſuch as held their freedom of tenure under condition of ſuch works and ſervices, and were therefore the ſame landholders whom we meet with under the name of *conditionales.*

Libertate carens colibertus *dicitur eſſe.* Du Freſne. It ſeems alſo to be the ſame with **Colonus**, which ſee.

Collateral (*Collateralis*) Is derived from the Lat. *laterale*, that which hangeth by the ſide; and in the legal ſenſe it differs not from the ſame acceptation; for *collateral* aſſurance is that which is made over and beſide the deed itſelf. For example, If a man covenants with another, and enters into bond for the performance of his covenant, the bond is termed *collateral aſſurance*, becauſe it is external, and without the nature and eſſence of the covenant. And *Cromp. Jur. fol.* 185. ſaith, That to be ſubject to the feeding of the King's deer is *collateral* to the ſoil within the foreſt. In like manner we ſay, That the liberty to pitch booths, or ſtandings for a fair in another man's ground, is *collateral* to the ground. The private woods of a common perſon within a foreſt may not be cut without the King's licence; for it is a prerogative *collateral* to the ſoil. *Manwood's Foreſt Laws*, *c.* 8. *num.* 2.

Collateral warranty. See **Warranty.**

Collation of benefice (*Collatio beneficii*) Signifies properly the beſtowing of a *benefice* by the biſhop that hath it in his own gift or patronage, and differeth from inſtitution in this, that inſtitution into a *benefice* is performed by the biſhop, at the motion or preſentation of another who is patron of the ſame, or hath the patron's right for the time; yet is *collation* uſed for preſentation, 25 *Ed.* 3. *ſtat.* 6. And there is a writ in the *Regiſter*, 31. *b.* called *De* collatione *facto uni poſt mortem alterius*, *&c.* directed to the juſtices of the *Common Pleas*, commanding them to direct their writ to the biſhop for the admitting a clerk in the place of another preſented by the King, who died during the ſuit between the King and the biſhop's clerk; for judgment once paſſed for the King's clerk, and he dying before he be admitted, the King may give his preſentation to another. See **Benefice.**

Collation of Seals. This was, when upon the ſame appending ribbon, or thread, or label, one *ſeal* was ſet on the back, or reverſe of the other.——*Ad majorem ſecuritatem præmiſſorum ſigillum diſcreti viri officialis domini* Patho-Well. *Epiſcopi filo medio per modum* collationis *ſigillo meo apponi procuravi.* Cartular. Abbat. Glaſton. MS. fol. 105. b.

Collatione facta uni poſt mortem alterius, Is a writ directed to the juſtices of the *Common Pleas*, commanding them to direct their writ to a biſhop for the admitting a clerk in the place of another preſented by the King, who during the ſuit between the King and the biſhop's clerk is departed this life; for judgment once paſt for the King's clerk, and he dying before admittance, the King may beſtow his preſentation to another. *Regiſ. of Writs*, *fol.* 31. *b.*

Collectors of the cuſtoms, Being ſued by any but the King, may plead the general iſſue. 13 & 14 *Car.* 2. *c.* 17.

Collatione heremitagii, Is a writ whereby the King conferreth the keeping of an *hermitage* upon a clerk *Reg. Orig. fol.* 303, 308.

College (*Collegium*) A particular corporation, company, or ſociety of men, having certain privileges founded by the King's licence; and for college in reputation, ſee 4 *Rep.* 106, 108. See **Leaſe**, **Viſitor**, **Univerſity.**

Collegiate church, A *church* built and endowed for a ſociety, or body corporate of a dean, or other preſident and ſecular prieſts, as canons or prebendaries in the ſaid *church*. There were many of theſe ſocieties diſtinguiſhed from the religious or regulars before the *Reformation*; and ſome are now eſtabliſhed, as *Weſtminſter*, *Windſor*, *Ripon*, *Wolverhampton*, *Southwell*, *Manchester*, *&c.*

Colloquium (*a Colloquendo*) A talking together or affirming of a thing, laid in declarations for words in actions of ſlander, *&c.* 1 *Mod. Ca.* 203. *Carth.* 90.

Colluſion (*Colluſio*) Is, in our Common law, a deceitful agreement or compact between two or more, for the one party to bring an action againſt the other to ſome evil purpoſe, as to defraud a third of his right, *&c.* See the *Terms of the Law*, *fol.* 142. and *Brit.* tit. *Colluſion.* See alſo the caſe of *Colluſion*, *Reg. Orig. f.* 179. *a. Weſt.* 2. *ca.* 32. and 8 *H.* 6. *ca.* 26. which gives the *Quale Jus*, and inquiry in ſuch caſes: gifts made by *colluſion.* See 50 *E.* 3. *c.* 6. See **Covin**, **Fraud.**

Colonia, *Colcheſter* in *Eſſex.*

Colonus, A huſbandman or villager, who was bound to pay yearly a certain tribute; or at certain times in the year to plough ſome part of the lord's land, and from hence comes the word *clown:* he was called by the Saxons *gebure*, and by the Dutch *boure.*

Colour (*Color*) Signifies, in a legal acceptation, a probable plea, but in truth falſe, and hath this end, to draw the trial of the cauſe from the jury to the judges. As for example, *A.* brings an aſſiſe of land againſt *B.* and *B.* ſaith he himſelf did let the ſame land to one *C.* for term of life, and afterwards did grant the reverſion to *A.* the demandant; and afterwards, *C.* the tenant for term of life died, after whoſe deceaſe *A.* the demandant, claiming the reverſion by force of the grant (whereto *C.* the tenant did never attorn) entered, upon whom *B.* entered, againſt whom *A.* for that entry brings this aſſiſe, *&c.* This is a good *colour*, becauſe the common people think the land will paſs by the grant without attornment, where indeed it will not paſs, *&c.* Alſo in an action of treſpaſs, *colour* muſt be given, of which there are an infinite number; take this one for an example of the reſt. In an action of treſpaſs, for taking away the plaintiff's beaſts, the defendant ſaith, that before the plaintiff had any thing in them, he himſelf was poſſeſſed of them as of his proper goods, and delivered them to *A.* to deliver to him again, when, *&c.* and *A.* gave them to the plaintiff, and the plaintiff ſuppoſing the property to be in *A.* at the time of the gift, took them, and the defendant took them from the plaintiff, whereupon the plaintiff brings an action; that is a good *colour* and a good plea. See more hereof, *Doctor and Student*, *lib.* 2. *cap.* 13. and *Broke*, tit. *Colour*, *in Aſſiſe*, *Treſpaſs*, *&c. fol.* 104.

Colour of office (*Color officii*) Is always taken in the worſt part, and ſignifies an act evilly done by the countenance of an office, and it bears a diſſembling face of the right of an office, whereas the office is but a veil to the falſhood;

falſhood; and the thing is grounded upon vice, and the office is a ſhadow to it, it is but *colore officii*; whereas *virtute officii*, by virtue of the office, is taken always in the beſt part; and where the office is the juſt cauſe of the thing, and the thing is purſuing the office. *Plowd.* in *Dive* and *Manningham*'s caſe, *fol.* 64. *a.*

Colpare arbores, To lop or top trees.——*Poterant etiam* colpare, *& habere ramiliam* (*i. e.* to lop, and to have the lop, or boughs cut off) *& omnia genera arborum quæ in eodem mariſco fuerant.* Contin. Hiſt. Croyland. p. 473.

Colpatura (*Colpatura, colpatio*) Lopping or topping of trees; a treſpaſs within the foreſt.—*Qui autem forisfecerit in foreſta Regis de viridi ſive per* colpaturam, *ſive per eſbrumataram, ſive per foditionem turvarum, ſive per eſchoriationem moræ, ſive per* culpationem *ſub memore, &c.* Aſſiſa de Foreſtis temp. Rich. 1. Rog. Hoved. p. 784.

Colpicium.—*Hæc charta chirographata teſtatur quod Dominus* Willielmus de Herle *dedit*——R. Peny *ſervienti ſuo capitale meſſuagium de* B. *cum una carucata terræ, & paſtura ad octo boves infra boſcum de* W. *ſalvis* colpiciis *infra boſcum prædictum factis & in poſterum faciendis, donec ad perfectionem pervenerint, quod ſe contra omnimoda animalia defendere poſſint.*——I ſuppoſe by *colpiciis* is meant ſamplars, or young poles, which being cut down, make levers or liſters; in *Warwickſhire* called *colpices* to this day. *Cowell, edit.* 1727.

Colpo, A cruſt, or rather a ſmall wax candle, a *copo de cere*; *Hoveden* tells us, that when the King of *Scots* came to the *Engliſh court*, as long as he ſtaid there, he had every day, *De liberatiane triginta ſol. & duodecim vaſſellos dominicos, & quadraginta groſſos longos* colpones *de dominica candela Regis, & octoginta* colpones *de alia candela* An. 1194.

Coltrops (*Coltraps*) An inſtrument of three iron ſpikes, ſo contrived that when thrown out of hand, one of the ſpikes is always erect, invented to caſt in the road, for galling the enemy's horſe. They were uſed by the *Romans*, and called *Murices.*

Comatio, *i. e.* Cutting off the hair.——*Si quis Dominum ſuum occidat, ſi capiatur, nullo modo ſe redimat; ſed de ejus* comatione, *&c. damnatur.* Leg. H. 1.

Combarones, The fellow-barons or commonalty of the Cinque ports. King *Henry* 3. grants to the barons, or freemen of the port of *Feverſham*,——*Quietantium de omni theolonio, & conſuetudine——ſicut ipſi & anteceſſores ſui, &* combarones *ſui de quinque portibus eam melius & plenius habuerunt tempore Regis* Edwardi.——Placit. tempore Ed. 1. & Ed. 2. MS. Penes Dom. *Fountains.* Now the title of *Barons of the Cinque ports* is reſtrained from the common inhabitants, to diſtinguiſh their repreſentatives in parliament; the word *combaron* is now likewiſe uſed for a fellow member, the *baron* and his *combaron.*

Combat (*Duellum*) Is a *French* word, ſignifying the ſame with *certamen, prælium, pugna*; and in our ancient law was a formal trial of a doubtful cauſe or quarrel by the ſwords or baſtons of two champions. Of this you may read at large both in divers Civilians, as *Paris de Puteo de re militari & duello*; *Alciat. de duello*; *Hottoman diſputatio feudalium, cap.* 42. and others; and common lawyers, namely *Glanvill, lib.* 14. *c.* 1. *Bract. lib.* 3. *tract.* 2. *ca.* 3. *Britton, c.* 22. *Horne's Mirror of Juſtice, lib.* 3. *cap. des Exceptions in fine prox. & cap. Juramentum duelli. Dyer, fo.* 301. *num.* 41, 42. *Camden* in his *Brit. fol.* 519. mentions a *combat* between *Alan de la Zouch* and *John* Earl of *Warren*, in the year 1269. The laſt trial by combat in *England* was in the ſixth year of King *Charles the Firſt*, between *Donal* Lord *Rey* appellant, and *David Ramſey*, Eſq; defendant, both *Scotchmen*; but after many formalities, the matter was referred to the King's will and pleaſure, whoſe favour inclined to *Ramſey. Baker's Chron. f.* 500. See *Co. on Litt'. fo.* 294. *b. Origines Juridiciales, fo.* 65. and *Spelman's Gloſſary at large* verbo *Campus.*

Comba terrae, and **Cumba terrae**, Does in ſome old charters occur for a low piece of ground, from Sax. *cumbe*, Brit. *kum* or *cuum*, Engl. *comb*, a valley or low place between two hills; ſo called in *Devonſhire* and *Cornwall.* And may villages in other parts of *England* obtained their name of *comb* from their ſituation. So *Compton, Combwell, &c.* See *Kennet's Gloſſary in voce Combe.*

Combe, *in Domeſday*, ſignifies a valley, as Mr. *Agar* reports.

Combinations to do unlawful acts, are puniſhable before the unlawful act is executed; which is to prevent the conſequence of *combinations* and conſpiracies, *&c.* 9 *Rep.* 57. See **Confederacy.**

Combuſtio pecuniae, The old way of trying mixt and corrupt money, by melting it down upon pavements into the Exechequer. In the time of *Hen.* 2. the biſhop of *Salisbury* being Treaſurer, conſidered, that though the money did anſwer *numero & pondere*, it might be deficient in value, becauſe mixed with copper or braſs. Therefore (*Conſilio regis & regiæ ſimul & publicæ providere utilitati*) a conſtitution was made, called *The trial by combuſtion*; the practice of which differed little or nothing from the preſent method of *aſſaying* ſilver. *Vide Lownde's Eſſay upon Coin, p.* 7. Whether this examination of money by *combuſtion* was to reduce an equation of money only of *ſterling, viz.* a due proportion of allay with copper; or to reduce it to fine pure ſilver without allay, doth not ſo eaſily appear. *Vide. Hale of Sheriffs Accounts, p.* 23.

Comin-ſeed (*Semen cumini*) Is a ſeed brought forth by an herb ſo called, which you may ſee deſcribed in *Gerard's Herbal, lib.* 2. *cap.* 416. This is placed among the drugs to be garbled, by 1 *Jac.* 19.

Comitatu commiſſo Is a writ, or *commiſſion*, whereby the ſheriffs is authorized to take upon him the command of the county. *Reg. Orig. fol.* 295. *Co. Rep. lib.* 3. *fol.* 72.

Comitatu et caſtro commiſſo, Is a writ whereby the charge of a county, together with the keeping of a caſtle, is committed to the ſheriff. *Reg. Orig. f.* 295. *a.*

Comitatus, A county. *Ingulphus* tells us, that *England* was firſt divided into counties by King *Alfred*, and counties into hundreds, and thoſe again into tithings; and *Forteſcue* writes, that *Regnum Angliæ per* comitatus *ut regnum Franciæ per ballivatus diſtinguitur.* Sometimes it is taken for the county court, as in *Magna Charta, cap.* 35. and *Fleta, lib.* 2. *ca.* 52. *Nullus* comitatus *teneatur niſi de menſe in menſem.* Sometimes it is taken for a territory or a juriſdicton of a particular place, as in *Matt. Pariſ. anno* 1234. *Infra metas illas continentur quædam predia & etiam civitates & caſtra, quas comitatui ſuo aſſignare præſumunt.* So in *Charta H.* 2. *apud Hoveden: Caſtellum de Notingham cum* comitatu, *&c. De firmis mortuis & debitis, de quibus non eſt ſpes, fiat unus rotulus, & intituletur* comitatus *& legatur ſingulis annis ſuper compotum* vicecomitum. Clauſ. 12 Ed. 1. m. 7. Dorſo.

Comitatus. "Of dead farms, and debts deſperate, whereof there is no hope, one roll be ſhall made and intituled *comitatus*, and read every year upon the account of ſheriffs." 10 *Ed.* 1. *cap. unico.*

Comitiva, A companion or fellow-traveller. It is mentioned in *Brompton* in *Hen.* 2. viz. *Filio ſuo mandavit ut ſororem ſuam &* comitivam *ejus reverenter ſuſciperet.* Sometimes it ſignifies a troop or company of robbers, as in *Walſingham, anno* 1366. *Interpellaverunt auxilium Regis Angliæ contra magnas* comitivas, *&c.*

Commandment (*Preceptum*) Is uſed diverſly in the Common law; ſometimes for the *commandment of the King*, when upon his mere motion, and from his own mouth, he ſendeth any man to priſon. *Staundf. Pl. Cor. fol.* 72. *Commandment* of the juſtices; and this *commandment* of the juſtices is either *abſolute* or *ordinary. Abſolute*, as when upon their own authority, in their wiſdom and diſcretion, they commit a man to priſon for a puniſhment. *Ordinary*, is when they commit one rather for ſafe cuſtody than puniſhment: and a man committed upon an *ordinary commandment* is bailable. *Staundf. Pl. Cor.* 73. Again, *commandment* is uſed for the offence of him that willeth another man to tranſgreſs the law, or to do any thing contrary to the law, as theft, murder, and ſuch like. *Bract. lib.* 3. *tract.* 2. *cap.* 19. *Les civilians appellent ce* commandment, *Angelus de maleficiis.* Termes de la Ley 145.

He

He that *commandeth* any one to do an unlawful act, is acceſſary to it and all the conſequences, if it be executed in the ſame manner as commanded: but if the commander revoke the command; or if the execution varies from it, or in the nature of the offence, in ſuch caſe he will not be acceſſary. 3 *Inſt.* 51, 57. 2 *Inſt.* 182. If a man command another to commit a felony on a particular perſon, and he doth it on another, as to kill *A.* and he kills *B.* or to burn the houſe of *A.* but he burns the houſe of *B.* or to ſteal one thing, and he ſteals another; or. to commit a felony of one kind, and he commits another; it is ſaid that the commander is not an acceſſary, becauſe the act done varies in ſubſtance from that which was commanded. *H. C. P.* 217. *Plowd* 475. But where a perſon commands or adviſes another to kill ſuch a one in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poiſon him, and he ſtabs or ſhoots him; theſe acts being the ſame felony in ſubſtance with that which was intended, and varying only in circumſtances, in reſpect to time, place, *&c.* the commander is as much an acceſſary as if there had been no variance at all between the command and the execution of it. 2 *Hawk.* 316. If I command a man to rob another, and he kills him in the attempt, though he doth not rob him, I am guilty of the murder; it being the direct and immediate effect of an act done in execution of my command to commit a felony: and if the command be to beat a perſon, and the perſon commanded beat him in ſuch a manner that he dies thereof, I am an acceſſary before to the felony; becauſe it happened in the execution of a command, which intended to endanger the life of the other. Alſo it is ſaid, that if one command another to burn the houſe of a certain perſon, and he by burning it burn likewiſe the houſe of another, the commander is equally acceſſary to the ſubſequent felony, as to that which was directly commanded. *Ibid.* 315, 316. To command or councel any one to commit burglary is felony without the benefit of clergy. Stat. 3 & 4 *Will. & Mar.* In forcible entries, *&c.* an infant or feme covert may be guilty in reſpect of actual violence done by them in perſon; though not in regard to what ſhall be done by others at their command, becauſe all ſuch commands of theirs are void. *Co. Lit.* 357. 1 *Hawk.* 147.

In treſpaſs, *&c.* the maſter ſhall be charged criminally for the act of the ſervant done by his command; but ſervants ſhall not be excuſed for committing any crime, when they act by command of their maſters who have no authority over them to give ſuch command. *Doct. & Stud. cap.* 42. *H. C. P.* 66. *Kel.* 13. And if a maſter commands his ſervant to diſtrain, and he abuſeth the diſtreſs, the ſervant ſhall anſwer it to the party injured, *&c. Kitch.* 372.

Commandry (*Præceptoria*) Was a manor or chief meſſuage, with lands and tenements appertaining thereto, belonging to the priory of *St. John of Jeruſalem in England*; and he who had the government of any ſuch manor or houſe was called the *commander*, who could not diſpoſe of it but to the uſe of the priory, only taking thence his own ſuſtenance, according to his degree, who was uſually a brother of the ſame priory. *New Eagle* in the county of *Lincoln* was, and ſtill is called the *Commandry of Eagle*, and did anciently belong to the priory. So were *Slebach* in *Pembrokeſhire*, and *Shengay* in *Cambridgeſhire*, *commandries* in the time of the Knights Templars, ſays *Camden* ——Theſe in many places of *England* are termed *Temples*; as *Temple Bruere* in *Lincolnſhire*, *Temple Newſum* in *Yorkſhire*, *&c.* becauſe they formerly belonged to the ſaid *Templars*. Of theſe read ſtat. 26 *H.* 8. *c.* 2. and 32 *ejuſdem*, *c.* 24. See **Preceptories.**

Commarchio, The confines of the land. *Imprimis de noſtris landimeris*, commarchionibus. *Du Freſne.*

Commeatura, A commandry, preceptory, or portion of houſe and lands, for the acommodation of ſome Religious, eſpecially the Knights Templars.—*Dominis ordinis Divæ Mariæ Virginis* (*quos vulgo fratrum Teutonicorum vocant*) *certa bona temporalia ac redditus empta ſunt.— Unde ex bonorum eſſe præfectura ejus ordinis aliquot* (*quas vulgo balivas, ac a* commeatu *ordini parando* commeaturas *vocant*) *diſtinctæ ſunt & terminatæ per claſſes.*——Append ad Faſcic. Rerum. vol. 2. p. 363.

Commendam (*Eccleſia* commendata, *vel cuſtodia ecclefia alicui commiſſa*) Is a benefice or church-living, and being void, is *commended* to the care of ſome ſufficient clerk, to be ſupplied till it may be conveniently provided with a paſtor: and that this was the true original of this practice, may be read at large in *Durandus de Sacris Eccleſiæ Miniſteriis & Beneficiis*, *lib.* 5. *c.* 7. He to whom the church is *commended* hath the fruits and profits thereof only for a certain time, and the nature of the church is not changed thereby, but is as a thing depoſited in the hands of him to whom it is *commended*, who hath nothing but the cuſtody thereof, which may be revoked. When a perſon is made biſhop, there is a ceſſion of his benefice by the promotion; but if the King gives him power to retain his benefice, he ſhall continue parſon, and is ſaid to hold it *in commendam*. *Hob. Rep.* 144. *Latche's Rep.* 237. See *Eccleſia* commendata *in Gloſſ.* 10 *Script.*

As the King is the cauſe of avoidances on promotions to dignities, and the preſentations thereon belong to him, he often on the creation of biſhops grants them licences to hold their benefices *in commendam*; but this is uſually where the biſhopricks are ſmall, for the better ſupport of the dignity of the biſhops promoted: and it muſt be always before conſecration; for afterwards it comes too late, becauſe the benefice is then abſolutely void. A *commendam*, founded on the ſtatute 25 *Hen.* 8. is a diſpenſation from the ſupreme power to hold or take an eccleſiaſtical living *contra jus poſitivum:* and therere are ſeveral ſorts of *commendams*, as a *commendam ſemeſtris*, which is for the benefit of the church without any regard to the *commendatory*, being only a proviſional act of the ordinary for ſupplying the vacation of ſix months, in which time the patron is to preſent his clerk, and is but a ſequeſtration of the cure and fruits until ſuch time as the clerk is preſented: a *commendam retinere*, which is for a biſhop to retain benefices on his preferment; and theſe *commendams* are granted on the King's mandate to the archbiſhop, expreſſing his conſent, which continues the incumbency, ſo that there is no occaſion for inſtitution. A *commendam recipere* is to take a benefice *de novo* in the biſhop's own gift, or in the gift of ſome other patron, whoſe conſent muſt be obtained. *Dyer* 228. 3 *Lev.* 381. *Hob.* 143. *Danv.* 79. A *commendam* may be temporary for ſix or twelve months, two or three years, *&c.* or it may be perpetual, *i. e.* for life, when it is equal to a preſentation, without inſtitution or induction. But all diſpenſations beyond ſix months were only permiſſive at firſt, and granted to perſons of merit. The *commendam retinere* is for one or two years, *&c.* and ſometimes for three or ſix years, and doth not alter the eſtate which the incumbent had before: a *commendam retinere*, as long as the *commendatory* ſhould live and continue biſhop, hath been held good. *Vaugh.* 18. The *commendam recepere* muſt be for life, as other parſons and vicars enjoy their benefices; and as a patron cannot preſent to a full church, ſo neither can a *commendam recipere* be made to a church that is then full. *Show.* 414. A benefice cannot be *commended* by parts; any more than it may be preſented unto by parts; as that one ſhall have the glebe, another the tithes, *&c.* nor can a *commendatory* have a *juris utrum* or take to him and his ſucceſſors, ſue or be ſued, in a writ of annuity, *&c.* But a *commenda perpetua* may be admitted to do it. 11 *H.* 4. *Compl. Incumb.* 360. See *Nelſ. Abr.* 454. 4 *Vin. tit. Commendam. Dr. Burn's Eccleſiaſtical Law*, *tit. Commendam.*

Commendatary (*Commendatarius*) Is he that hath a church-living *in commendam.*

Commendatory letters, Are ſuch which are writ by one biſhop to another in behalf of any of his clergy, or other of his dioceſe travelling thither, that they may be received among the faithful, or that the clerk made be promoted, or that neceſſaries may be adminiſtered to both. Several forms of theſe letters may be ſeen in our hiſtorians, as in *Bede*, *lib.* 2. *c.* 18. *Simeon* of *Durham*, *Anno* 1125, *&c.*

Commendati homines, Perſons who by voluntary homage put themſelves under the protection of any ſuperior

perior lord; for ancient homage was either *predial*, due for ſome tenure; or *perſonal*, which was either by *compulſion*, as a ſign of neceſſary ſubjection; or *voluntary*, with a deſire of protection. And thoſe who by doing voluntary homage put themſelves under the protection of any man of power, were ſaid *commendare ſe in manus ejus*, and were therefore ſometimes called *homines ejus commendati*; and ſometimes ſimply *commendati*, as often in *Domeſday-Book*. Though we have loſt the meaning of the phraſe, yet we uſe it in this compliment, *Commend me to ſuch a friend*, which is no leſs than, let him know I am his humble ſervant. Vide *Spelman of Feuds*, *cap.* 20.

Commendati dimidii, Perſons who depended on two ſeveral lords, and were to pay one half of their homage to *this*, the other to *that*. *Subcommendati* were ſuch as, like under-tenants, were under command of thoſe who were themſelves depending on a ſuperior lord. And again, *Dimidii Subcommendati*, who bear a double relation to ſuch depending lords.——— *Lib. Domeſday*, *Suffolk*.———*In parva* Thornham *duo liberi homines*, *unus eorum fuit* commendatus *Ulrevæ & alter* dimidius ſubcommendatus *antecеſſori* Malet.

Commendatus. *In eadtm villa tenet Ailvi* commendatus *anteceſſori* (Mallet) 60 *acras pro manerio*. *Domeſday*, *Suffolk*. One that lives under the protection of a great man. *Differre videntur* vaſſallus, affidatus, & commendatus; *hic nempe patrono teneri fide & obſequio*, *ſine juramento aut aliqua tenura*; *ille fide & juramento*, *ſed itemque ſine tenura*; vaſſalus *autem his omnibus*, ſays *Spelman*.

Commerciones, Commarciones, Thoſe who live in the confines or utmoſt limits of a place. *Si quis inter* commarciones *regni noſtri roberiam faciat*. Du Freſne.

Comminalty, or rather *Communalty*, or *Commonalty*; Signifies the middle ſort of the King's ſubjects, 2 *Inſt. fol.* 539. *Tout le commune d'Engleterre*, are ſuch of the commons as, raiſed beyond the ordinary peaſants, come to have the managing of offices, and by that means are one degree under burgeſſes, which are ſuperior to them both in order and authority, as in companies incorporated, they are ſaid to conſiſt of maſter, wardens, and *commonalty*; the firſt two being the chief, the middle ſort ſuch as are uſually called *of the livery*. See *Communitas Regni*. *Blount* ſays that this word *commonalty* includes all the King's ſubjects. As in *Articul. ſuper chart.* 28 *Ed.* 1. *cap.* *Tout le commune d'Engleterre* ſignifies all the people of *England*.

Commiſſary (*Commiſſarius*) Is a title of eccleſiaſtical juriſdiction, appertaining to ſuch a one as exerciſeth ſpiritual juriſdiction (at the leaſt ſo far as his commiſſion permitteth) in places of the dioceſe ſo far diſtant from the chief city, as the chancellor cannot call the ſubjects to the biſhop's principal conſiſtory without their too great moleſtation. This *commiſſary* is by the Canoniſts termed *commiſſarius*, or *officialis foraneus*. *Lyndewoode's Provin. c.* 1. *de Accuſat.* &c. And he is ordained to this eſpecial end, that he ſupply the biſhop's juriſdiction and office in the out places of his dioceſe, or elſe in ſuch pariſhes as are peculiar to the biſhop, and exempted from the juriſdiction of the archdeacon; for where either by preſcription or compoſition, there are archdeacons that have juriſdiction within their archdeaconries, as in moſt places they there have, this commiſſary is ſuperfluous, and moſt commonly doth rather vex and diſturb the country for his lucre, than through conſcience ſeek to redreſs the lives of offenders. And therefore the biſhop taking preſtation-money of his archdeacons yearly *pro exteriori juriſdictione*, as it is ordinarily called, doth, by ſuperonerating their circuit with a *commiſſary*, not only wrong the archdeacons, but the poorer ſort of ſubjects much more, as common practice too frequently teacheth. *Cowell*, *edit.* 1727.

Commiſſion (*Commiſſio*) Is for the moſt part in the underſtanding of the law, as much as *delegatio* with the Civilians (ſee *Broke*, tit. *Commiſſion*) and is taken for the warrant, or letters patent, that all men exerciſing juriſdiction, either ordinary or extraordinary, have for their power to hear, or determine any cauſe or action. Of theſe, ſee divers in the table of the *Regiſter Original* *verbo Commiſſio*; yet this word ſometimes is extended further than to matters of judgment; as the *commiſſion* of purveyors. 11 *H.* 4. *cap.* 28. But with the epithet (*high*) is uſed for the honorable *commiſſion-court*, inſtituted and founded upon the ſtatute 1 *Eliz. cap.* 1. but for divers reaſons utterly aboliſhed and taken away by the ſtatute made 16 & 17 *Car.* 1. *cap.* 10. and that again explained by another act, 13 *Car.* 2. *cap.* 2.

Stat. 4 2 *Ed.* 3. In all inquiries the commiſſions ſhall be made to ſome of the juſtices of the one bench or of the other, or juſtices of aſſize, or juſtices of peace, with other of the moſt worthy of the country, ſaving in the office of eſcheatorſhip.

Stat. 4 *Hen.* 4. *cap.* 9. Becauſe many commiſſions be made in Chancery, ſometimes to inquire and certify, ſometimes to inquire, hear, and determine, and ſometimes to ſeize lands and goods, which commiſſions never come to the hands of the commiſſioners, whereupon writs iſſue out of the Exchequer to diſtrain ſuch commiſſioners, ſometimes to yield eſtreats of the fines, ſometimes to certify that which is found before them by inqueſt, and ſometimes to account of certain things contained in the commiſſions, to the great damage of the people; it is ordained that the chancellor uſe his power, as before time, in this caſe; and in other caſes the chancellor, calling to him ſuch juſtices as him ſhall pleaſe, or the chief baron of the Exchequer, ſhall have power by authority of parliament to provide remedy.

Stat. 7 *Hen.* 4. *cap.* 11. Whereas people be aſſigned by commiſſions, ſome to hear and determine, ſome to inquire and certify, and otherwiſe, whereby the commiſſioners be greviouſly diſtrained by proceſs of the Exchequer, where the ſaid commiſſioners were never knowing of ſuch commiſſions, nor the ſame commiſſions never came to their hands, it is ordained, that the barons of the Exchequer ſhall have power to receive the oath of ſuch commiſſioners, of their excuſe and diſcharge of the receipt of the ſaid commiſſions; and alſo that the barons and the juſtices of one bench and the other ſhall have power, by *dedimus poteſtatem*, to receive ſuch oath in the country, and the juſtices ſhall thereof certify the barons in the Exchequer, and the barons ſhall diſcharge the commiſſioners. And in likewiſe it ſhall be done for their heirs, executors, or land-tenants, provided that ſuch oaths be not taken but in the caſe of commiſſions of *oyer* and *terminer*, and of enquiry and certifying only.

Stat. 6 *Ann. cap.* 7. *ſect.* 27. No greater number of commiſſioners ſhall be made for the exceution of any office, than have been employed in the execution of ſuch office before the firſt day of this parliament.

Commiſſion of anticipation, Was a commiſſion under the great ſeal, to collect a ſubſidy before the day. ſtat. 5 *Hen* 8. *Co.* 12 *Rep. fol.* 120.

Commiſſion of aſſociation, Mentioned 18 *Eliz. cap.* 9. is a commiſſion under the great ſeal, to aſſociate two or more learned perſons, with the ſeveral juſtices in the ſeveral circuits and counties in *Wales*.

Commiſſion of bankrupts. Where any perſon is become a bankrupt within any of the ſtatutes againſt bankrupts, on ſecurity given to prove the party a bankrupt, &c. this commiſſion iſſues from the Lord Chancellor to certain commiſſioners appointed to take order with the bankrupt's lands and goods for the ſatiſaction of the creditors. Stat. 34 *Hen.* 8. 13 *Eliz. c.* 7. 1 *Jac.* 1. See **Bankrupt.**

Commiſſion of charitable uſes, Goes out of the Chancery to the biſhop and others, where lands given to charitable uſes are miſemployed, or there is any fraud or diſputes concerning them, to enquire of and redreſs the abuſe, &c. 43 *Eliz. cap.* 4.

Commiſſion of delegates, Is a commiſſion under the great ſeal to certain perſons, uſually two or three temporal lords, as many biſhops, and two judges of the law, to hit upon an appeal to the King in the court of Chancery, where any ſentence is given in any eccleſiaſtical cauſe by the archbiſhop. Stat. 25 *Hen.* 8. *c.* 19.

Commiſſion to enquire of faults gainſt the law, Was an ancient commiſſion ſent forth on extraordinary occaſions and corruptions.

Commiſſion

Commiſſion of lunacy, A commiſſion out of Chancery to inquire whether a perſon repreſented to be a lunatick be ſo or not, that if lunatick, the King may have the care of his eſtate, *&c.* 17 *Ed.* 2. *c.* 10.

Commiſſion of Rebellion (*Commiſſio rebellionis*) Is otherwiſe called *a writ of rebellion, breve rebellionis,* and iſſues when a man (after proclamation iſſued out of the Chancery or Exchequer, and made by the ſheriff, to preſent himſelf, under pain of his allegiance, to the court by a certain day) appears not; and this *commiſſion* is directed by the way of command to certain perſons, to the end that they, three, two, or one of them, do apprehend or cauſe to be apprehended the party, as a rebel and contemner of the king's laws, whereſoever they find him within the kingdom, and bring him, or cauſe him to be brought to the court, upon a day therein aſſigned. The true copy of this *commiſſion* or writ is in *Cromp. Juriſd. Court de Star-Chamber,* as alſo in *Weſt's Sym.* touching Proceedings in *Chancery, ſect.* 24.

Commiſſion of ſewers, Is directed to certain perſons, to ſee drains and ditches well kept and maintained in the marſhy and fenny parts of *England,* for the better conveyance of the water into the ſea, and preſerving the graſs upon the land. Stat. 23 *H.* 8. *c.* 5. 13 *Eliz. c.* 9.

Commiſſion of treaty with foreign princes, Is where leagues and treaties are made and tranſacted between ſtates and kingdoms, by their ambaſſadors and miniſters, for the mutual advantage of the kingdoms in alliance.

Commiſſion to take up men for war, Was a commiſſion to preſs or force men into the King's ſervice.

Commiſſioner (*Commiſſionarius*) Is he that hath *commiſſion,* as letters patent, or other lawful warrant to execute any publick office, as *commiſſioners* of the office of *fines* and *licences. Weſt. par.* 2. *Symbol.* tit. *Fines, ſect.* 106. *Commiſſioners* in *eyre,* ſtat. 3 *Ed.* 1. *cap.* 26. *Commiſſioners* of ſewers, 23 *H.* 8. 5. 12 *Car.* 2. *ca.* 6. with infinite other ſuch like.

Commiſſioners of the admiralty. See **Admiral.**

Commiſſioners of charitable uſes. See **Charitable uſes.**

Commiſſioners for eccleſiaſtical cauſes. See **High-commiſſion-court.**

Commiſſioners of the cuſtoms, To be appointed in every port, 1 *Jac.* 2. *c.* 4. *ſect.* 11. The cuſtoms may be put under one or more commiſſions, 9 *Geo.* 1. *c.* 21. *ſect.* 1. See **Cuſtoms.**

Commiſſioners of excile. See **Excile.**

Commiſſioners of the great ſeal, How to execute the power of the Lord Chancellor, and what place to take, 1 *Will. & M. ſeſſ.* 1. *c.* 21. See **Chancery.**

Commiſſioners of the land-tax. See **Land-tax.**

Commitment, Is the ſending of a perſon to priſon by warrant or order, either for a crime, or for contumacy in refuſing to do a thing required. Where a man is committed for a crime, the commitment muſt be *until diſcharged according to law*; but for contumacy, *until he comply* and perform the thing required; for in that caſe he ſhall not lie till ſeſſions, but ſhall be diſcharged upon the performing his duty. *Carth.* 153. *Trin.* 2 *Will. & Ma. in B. R.*

All perſons who are apprehended for offences not bailable, as alſo perſons who neglect to offer bail for offences which are bailable, muſt be committed: and where-ever a juſtice of peace is impowered to bind a perſon over, or to cauſe him to do a certain thing, he may commit him *quouſque, &c.* if in his preſence he ſhall refuſe to be ſo bound, or to do ſuch thing. 2 *Haw. P. C.* 116.

1. *Who may commit, and to what place.*

2. *Examination of the perſon committed, and form of the commitment.*

3. *Charges of the commitment, and duty of the gaoler.*

4. *How party committed may be diſcharged.*

1. *Who may commit and to what place.*

It is laid down by ſerjeant *Hawkins,* as a matter which ſeems agreed by all the old books, that whereſoever a conſtable or private perſon may juſtify the arreſting another for a felony or treaſon, he may alſo juſtify the ſending or bringing him to the common gaol; and that every private perſon has as much authority in caſes of this kind, as the ſheriff, or any other officer, and may juſtify ſuch impriſonment by his own authority, but not by the command of another. 2 *Hawk. P. C.* 116, 117.

But inaſmuch as it is certain, that a perſon lawfully making ſuch an arreſt may juſtify bringing the party to the conſtable, in order to be carried by him before a juſtice of peace; and inaſmuch as the ſtatutes of 1 & 2 *P. & M. cap.* 13. and 2 & 3 *P. & M. cap.* 10. which direct in what manner perſons brought before a juſtice of the peace for felony, ſhall be examined by him, in order to their being committed or bailed, ſeem clearly to ſuppoſe, that all ſuch perſons are to be brought before ſuch juſtice for ſuch purpoſe; and inaſmuch as the ſtatute of 31 *Car.* 2. commonly called the *habeas corpus* act, ſeems to ſuppoſe that all perſons, who are committed to priſon, are there detained by virtue of ſome warrant in writing, which ſeems to be intended of a commitment by ſome magiſtrate, and the conſtant tenor of the late books, practice, and opinions are agreeable hereto; it is certainly moſt adviſeable at this day, for any private perſon who arreſts another for felony, to cauſe him to be brought, as ſoon as conveniently he may, before ſome juſtice of peace, that he may be committed or bailed by him. 2 *Hawk. P. C.* 117. *H. P. C.* 91, 112. *Dalt. c.* 118.

It is certain, that the privy council, or any one or two of them, or ſecretary of ſtate, may lawfully commit perſons for treaſon, and for other offences againſt the ſtate, as in all ages they have done. 2 *Hawk. P. C.* 117.

By the ſtat. 31 *Car.* 2. *cap.* 2. it is enacted, "That no ſubject of this realm, being an inhabitant or reſiant of this kingdom of *England,* dominion of *Wales,* or town of *Berwick upon Tweed,* ſhall or may be ſent priſoner into *Scotland, Ireland, Jerſey, Guernſey, Tangier,* or into any parts, garriſons, iſlands, or places beyond the ſeas, which then were, or at any time hereafter ſhould be within or without the dominions of his Majeſty, his heirs or ſucceſſors; and that every ſuch impriſonment is by the ſaid ſtatute enacted and adjudged to be illegal; and that every ſubject ſo impriſoned ſhall have an action of falſe impriſonment, and recover treble coſts, and no leſs damages than 500 *l.* againſt the perſon making ſuch warrant, who ſhall alſo incur a *præmunire.*

By ſtat. 14 *Ed.* 3. *cap.* 10. it is enacted as followeth, "In the right of the gaols which were wont to be in ward of the ſheriffs, and annexed to their bailiwicks, it is aſſented and accorded, that they ſhall be rejoined to the ſheriffs, and the ſheriffs ſhall have the cuſtody of the ſame gaols as before this time they were wont to have, and they ſhall put in ſuch under-keepers for whom they will anſwer." And this is confirmed by 19 *Hen.* 7. *cap.* 10. Alſo it is recited by 5 *Hen.* 4 *cap.* 10. That divers conſtables of caſtles within the realm, being aſſigned juſtices of the peace by the King's commiſſion, had, by colour of ſuch commiſſion, uſed to take people, to whom they bore evil will, and impriſon them within the ſaid caſtles, till they had made fine and ranſom with the ſaid conſtables for their deliverance: and thereupon it is enacted, "That none be impriſoned by any juſtice of the peace, but only in the common gaol, ſaving to lords, and others which have gaols, their franchiſe in this caſe."

Since this ſtatute it has been held, that regularly no one can juſtify the detaining a priſoner in cuſtody out of the common gaol, unleſs there be ſome particular reaſon for ſo doing, as if the party be ſo dangerouſly ſick, that it would apparently hazard his life to ſend him to the gaol; or there be evident danger of a *reſcous* from rebels, *&c.* yet conſtant practice ſeems to authorize a commitment to a meſſenger; and it is ſaid, that it ſhall be intended to have been made in order for the carrying of the party to gaol. 2 *Hawk. P. C.* 118.

And it is ſaid, that if a conſtable bring a felon to gaol, and the gaoler refuſe to receive him, the town where he is conſtable ought to keep him till the next gaol-delivery. *H. P. C.* 114.

If a perſon arreſted in one county for a crime done in it, fly into another county, and be retaken there, he may be committed by a juſtice of the firſt county to the gaol of ſuch county. *H. P. C.* 93.

But by the better opinion, if he had before any arreſt fled into ſuch county, he muſt be committed to the gaol thereof by a juſtice of ſuch county. 2 *Hawk. P. C.* 118. *Dalt. c.* 118.

Alſo it ſeems to be laid down as a rule by ſome books, that any offender may be committed to the gaol next to the place where he was taken, whether it lie in the ſame county or not. 2 *Hawk, P. C.* 118.

As priſoners ought to be committed at firſt to the proper priſon, ſo ought they not to be removed thence, except in ſome ſpecial caſes; and to this purpoſe it is enacted by 31 *Car.* 2. *cap.* 2. "That if any ſubject of this realm ſhall be committed to any priſon, or in cuſtody of any officer or officers whatſoever, for any criminal, or ſuppoſed criminal matter, that the ſaid perſon ſhall not be removed from the ſaid priſon and cuſtody into the cuſtody of any other officer or officers, unleſs it be by *habeas corpus*, or ſome other legal writ, or where the priſoner is delivered to the conſtable or other inferior officer, to carry ſuch priſoner to ſome gaol; or where any perſon is ſent by order of any judge of aſſize, or juſtice of the peace, to any common workhouſe, or houſe of correction; or where the priſoner is removed from one priſon or place to another within the ſame county, in order to a trial or diſcharge by due courſe of law; or in caſe of ſudden fire or infection, or other neceſſity; upon pain that he who makes out, ſigns, or counterſigns, or obeys or executes ſuch warrant, ſhall forfeit to the party grieved 100 *l.* for the firſt offence, 200 *l* for the ſecond, *&c.* 2 *Hawk. P. C.* 118.

By ſtat. 6 *Geo.* 1. *c.* 19. Vagrants and other criminals, offenders, and perſons charged with ſmall offences, may for ſuch offences, or for want of ſureties, be committed either to the common gaol, or houſe of correction, as the juſtices in their judgment ſhall think proper.

By ſtat 24 *Geo.* 2. *c.* 55. If a perſon is apprehended, upon a warrant indorſed, in another county, for an offence not bailable, or if he ſhall not there find bail, he ſhall be carried back into the firſt county, and be committed, or if bailable, bailed by the juſtices in ſuch firſt county.

2 *Examination of the perſon committed, and form of the commitment.*

By ſtat. 2 & 3 *Ph. & M. c.* 10. it is enacted, That every juſtice or juſtices, before whom any perſon ſhall be brought for manſlaughter or felony, or for ſuſpicion thereof, before he or they ſhall commit or ſend ſuch priſoner to ward, ſhall take the examination of ſuch priſoner, and information of thoſe that bring him, of the fact and circumſtances thereof, and the ſame, or as much thereof as ſhall be material to prove the felony, ſhall be put in writing, within two days after the ſaid examination, and the ſame ſhall certify in ſuch manner and form, and at ſuch time as they ſhould and ought to do; if ſuch priſoner ſo committed or ſent to ward had been bailed, or let to mainprize; upon ſuch pain as in 1 & 2 *Ph. & M. c.* 13. is limited and appointed, for not taking or not certifying ſuch examinations, *&c.* And it is further enacted, That the ſaid juſtices ſhall have authority to bind all ſuch by recognizance or obligation as do declare any thing material to prove the manſlaughter or felony, to appear at the next general gaol delivery to be holden within the county, city, or town corporate where the trial of the ſaid manſlaughter or felony ſhall be, then and there to be given in evidence againſt the party; and that the ſaid juſtices ſhall certify the ſaid bonds taken before them, in like manner as they ought to certify bonds mentioned in ſaid former act, *&c.*

A juſtice of the peace may detain a priſoner a reaſonable time, in order to examine him; and it is ſaid that three days is a reaſonable time for this purpoſe. 2 *Hawk. P. C.* 119. *Dalt. c.* 125. 2 *Inſt.* 52, 591.

Every commitment muſt be in writing, and under the hand and ſeal, and ſhew the authority of him that made it, and the time and place, and muſt be directed to the keeper of the priſon. *Hawk. P. C.* 119. It may be either in the King's name, and only teſted by the juſtice, or in the juſtice's name. 2 *Hawk. P. C.* 119.

It may command the gaoler to keep the party in ſafe and cloſe cuſtody; for this being what he is obliged to do by law, it can be no fault to command him ſo to do. 2 *Hawk. P. C.* 119.

It ought to ſet forth the crime with convenient certainty, whether the commitment be by the privy council, or any other authority, otherwiſe the officer is not puniſhable by reaſon of ſuch *mittimus* for ſuffering the party to eſcape; and the court, before whom he is removed by *habeas corpus*, ought to diſcharge or bail him; and this doth not only hold where no cauſe at all is expreſſed in the commitment, but alſo where it is ſo looſely ſet forth, that the court cannot adjudge whether it were a reaſonable ground for impriſonment. 2 *Hawk. P. C.* 119.

A commitment for high treaſon or felony in general, without expreſſing the particular ſpecies, has been held good. 2 *Hawk. P. C.* 119. But now ſince the *habeas corpus act*, it ſeems that ſuch a general commitment is not good; and therefore where *A.* and *B.* were committed for aiding and abetting Sir *James Montgomery* to make his eſcape, who was committed by a warrant of a Secretary of State for high treaſon, on a *habeas corpus* they were admitted to bail, becauſe it did not appear what ſpecies of treaſon Sir *James* was guilty of. *Skin.* 596. 1 *Salk.* 347. *S. C.*

It is ſafe to ſet forth that the party is charged upon oath; but this is not neceſſary; for it hath been reſolved, that a commitment for treaſon, or for ſuſpicion of it, without ſetting forth any particular accuſation or ground of the ſuſpicion, is good. 2 *Hawk. P. C.* 120.

Every ſuch *mittimus* ought to have a lawful concluſion, *viz.* that the party be ſafely kept till he be delivered by law, or by order of law, or by due courſe of law, or that he be kept till further order, (which ſhall be intended of the order of law) or to the like effect; and if the party be committed only for want of bail, it ſeems to be a good concluſion of the commitment, that he be kept till he find bail; but a commitment till the perſon who makes it ſhall take further order, ſeems not to be good; and it ſeems that the party committed by ſuch or any other irregular *mittimus* may be bailed. 2 *Hawk. P. C.* 120.

Alſo a commitment grounded on an act of parliament ought to be conformable to the method preſcribed by ſuch ſtatute; as where the churchwardens of *Northampton* were committed on the 43 *Eliz. cap.* 2. and the warrant concluded in the common form, *viz. Until they be duly diſcharged according to law*; but the ſtatute appointing, *that the party ſhould there remain until he ſhould account*, for want of ſuch concluſion they were diſcharged. *Carth.* 152, 153.

So where one *Bracey* was committed by the commiſſioners of bankrupts for refuſing to anſwer, and they concluded their warrant, *viz. Until he conform himſelf to our authority, and be thence delivered by due courſe of law*; and upon the return of *habeas corpus*, he was diſcharged; for the ſtatute only impowers them to commit *until he ſubmit himſelf to be by them examined.* 1 Salk. 348.

So where the warrant returned of a commitment by commiſſioners of bankrupt for refuſing to be examined by them, was, *viz. or otherwiſe diſcharged by due courſe of law*, it was held naught; for the ſtatute is, he ſhall be committed until he ſubmit himſelf to be examined by the commiſſioners. 1 *Salk.* 351.

Defendant was committed, upon a conviction for deerſtealing, for a year, and till ſuch time as he ſhould be ſet in the pillory, whereas the act ſays for a year only, and therefore he was diſcharged. *Comb.* 395.

Record of commitment ſhould be the in preſent tenſe; *per Holt* Ch. J. 12 *Mod.* 516.

Mr.

Mr. *Baxter* being committed by two juſtices of the peace of *Middleſex* to *Clerkenwell priſon*, was brought by *habeas corpus* to *C. B.* the gaoler returns, that he keeps him by virtue of a warrant from the juſtices of the peace, in theſe words, *Whereas it hath been proved unto us, upon oath, that* Richard Baxter, *clerk, hath taken upon him to preach in an unlawful aſſembly, conventicle, or meeting, under colour or pretence of exerciſe of religion, contrary to the laws and ſtatutes of this realm, at* Acton, *where he now liveth in the ſaid county, not having ſubſcribed the oath by act of parliament in that caſe appointed to be taken; and whereas we having tendered to him the oath and declaration appointed to be taken by ſuch as ſhall offend againſt the ſaid ſtatute, which he has refuſed to take, we therefore ſend you herewith the body of* Richard Baxter, *ſtrictly charging and commanding you, in his Majeſty's name, to receive him the ſaid* Richard Baxter *into his Majeſty's ſaid priſon, and him there ſafely to keep ſix months, without bail or mainprize; and hereof, &c.* This return the court held inſufficient, the warrant being vicious throughout. Firſt, There is nothing in the warrant to certify to the court on what ſtatute the juſtices proceed. Secondly, Admit they did proceed on the ſtatute 17 *Car.* 2. (which they muſt intend, if any) yet the commitment is ill, for ſeveral reaſons. Firſt, It does not appear that *Baxter* was guilty of any offence at all againſt this act. This law does not forbid conventicles, nor enjoin the taking of any oath, nor ſubſcribing any declaration; (nay, there is no ſuch thing as a declaration in the act) the preaching at conventicles is only one of the deſcriptions that are there given of ſuch perſons as are not to come within five miles, *&c.* and the taking the oath is only allowed them as a remedy to ſecure themſelves againſt the penalty of the law; the only offence then is, of perſons ſo deſcribed, to come within five miles of a corporation, or the place where they have taken upon them to preach, *&c.* Now it does not appear by the warrant, that Mr *Baxter* did either of theſe; it is only ſaid that he took upon him to preach at *Acton*, where he now liveth, which laſt words are only the ſuggeſtion of the juſtices, and not any part of that which is proved unto them, upon oath, as the crime intended to be puniſhed by the law muſt be. Secondly, It does not appear that he preached, *&c.* ſince the act of oblivion; neither is there any other deſcription given of him to make him the perſon intended to be reſtrained by the act; the time ſhould have been expreſſed. Thirdly, It is not ſaid who made the oath before the juſtices; ſo that the priſoner can have no remedy in caſe the oath were falſe. Fourthly, If his being at *Acton* were proved after, *&c.* yet it does not appear how long he continued there; poſſibly he might be ſent for before the juſtices, and committed immediately after his preaching, and then he could not be guilty of any reſidence puniſhable within this act; and for theſe reaſons he was diſcharged. 1 *Bac. Abr.* 382. See **Bail**.

3. *Charges of the commitment, and duty of the gaoler.*

By ſtat. 3 *Jac.* 1. *cap.* 10. *it is enacted*, "That every perſon and perſons that ſhall be committed to the common or uſual gaol within any county or liberty within this realm, by any juſtice or juſtices of the peace, for any offence or miſdemeanor, having means or ability thereunto, ſhall bear their own reaſonable charges for ſo conveying or ſending them to the ſaid gaol; and the charges alſo of ſuch as ſhall be appointed to guard them to ſuch gaol, and ſhall ſo guard them thither; and if any ſuch perſon or perſons ſo to be committed, ſhall refuſe, at the time of their commitment, and ſending to the ſaid gaol, to defray the ſaid charges, or ſhall not then pay or bear the ſame, that then ſuch juſtice or juſtices of the peace ſhall and may, by writing under his or their hand and ſeal, or hands and ſeals, give warrant to the conſtable or conſtables of the hundred, or conſtable or tithingman of the tithing or townſhip where ſuch perſon or perſons ſhall be dwelling and inhabit, or from whence he or they ſhall be committed, or where he or they ſhall have any goods within the county or liberty, to ſell ſuch and ſo much of the goods and chattels of the ſaid perſons, as by the diſcretion of the ſaid juſtice or juſtices of the peace ſhall ſatisfy and pay the charges of ſuch his or their conveying or ſending to the ſaid gaol; the appraiſement to be made by four of the honeſteſt inhabitants of the pariſh or tithing where ſuch goods or chattels ſhall remain and be; and the overplus of the money which ſhall be made thereof, to be delivered to the party to whom the ſaid goods ſhall belong.

And it is further enacted, "That if the ſaid perſons ſhall not have or be known to have any goods or chattels which may be ſold for the purpoſe aforeſaid, within the county or liberty, an indifferent aſſeſſment ſhall be made by the conſtables and churchwardens, and two or three other honeſt inhabitants of the pariſh or tithing where ſuch offenders ſhall be taken or apprehended; the ſaid taxation being allowed under the hand of one or more juſtice or juſtices of the peace, if there be ſuch conſtables or churchwardens there inhabiting; and in default of them, by four of the principal inhabitants of the ſaid pariſh, townſhip, or tithing, where ſuch offender ſhall be taken or apprehended; and if any ſo aſſeſſed ſhall refuſe to pay their ſaid taxation, then the juſtice or juſtices of the peace by whom the ſaid offender ſhall be committed to priſon, or any juſtice of the peace near adjoining, ſhall and may give warrant as aforeſaid to the conſtable, tithingman, or other officer, there to diſtrain the goods of any ſo aſſeſſed which ſhall refuſe to pay the ſame, and to ſell the ſame; and that ſuch perſon or perſons ſo authorized ſhall have full power ſo to diſtrain; and by appraiſement of four ſubſtantial inhabitants of the ſaid place, to ſell a ſufficient quantity of the goods and chattels of the perſon ſo refuſing for the levying of the ſaid taxation; and if any overplus of the money come by the ſale thereof, the ſame to be delivered to the owner."

By ſtat. 27 *Geo.* 2. *c.* 3. When any perſon, not having goods or money in the county where he is taken ſufficient to bear the charges of himſelf and of thoſe who convey him, is committed to gaol, or to the houſe of correction, by warrant from a juſtice, then on application by the conſtable or other officer who conveyed him, to any juſtice for ſuch county or place, ſuch juſtice ſhall upon oath examine into and aſcertain the reaſonable expences, and ſhall without fee by his warrant order the treaſurer to pay the ſame. But in *Middleſex*, the ſame ſhall be paid by the overſeers of the poor of the pariſh where the perſon was apprehended.

By the *habeas corpus* act, the charges of conveying an offender is limited not to exceed 12*d.* a mile; which may be an argument for allowing as much in this caſe, eſpecially as ſecurity is to be given before a man is removed on that act by *habeas corpus*, that he ſhall not eſcape by the way, which renders guards in that caſe not ſo neceſſary.

By ſtat. 3 *Hen.* 7. *cap.* 3. *it is enacted*, "That every ſheriff, bailiff of franchiſe, and every other perſon having authority or power of keeping of gaol, or of priſoners for felony, do certify the names of every ſuch priſoner in their keeping, and of every priſoner to them committed for any ſuch cauſe, at the next general gaol-delivery, in every county or franchiſe where any ſuch gaol ſhall be, there to be calendered before the juſtices of the deliverance of the ſame gaol, whereby they may, as well for the King as for the party, proceed to make deliverance of ſuch priſoners according to the law; on pain to forfeit to the King for every default there recorded, one hundred ſhillings.

4. *How party committed may be diſcharged.*

A perſon legally committed for a crime, certainly appearing to have been done by ſome one or other, cannot be lawfully diſcharged by any other but by the King, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to proſecute him on a proclamation for that purpoſe, by the juſtices of gaol-delivery. 2 *Hawk. P. C.* 121.

But

But if a perſon be committed on a bare ſuſpicion, without any appeal or indictment for a ſuppoſed crime, where afterwards it appears that there was none; as for the murder of a perſon thought to be dead, who afterwards is found to be alive, it hath been holden that he may be ſafely diſmiſſed without any farther proceeding; for that he who ſuffers him to eſcape is properly puniſhable only as an acceſſory, where there can be no principal; and it would be hard to puniſh one for a contempt founded on a ſuſpicion appearing in ſo unconteſted a manner to be groundleſs. 2 *Hawk. P. C.* 121.

Committee, Is he or they to whom the conſideration or ordering of any matter is referred, either by ſome court, or conſent of parties to whom it belongeth. As in parliament, a bill being read, is either conſented unto and paſſed, or denied, or neither, but referred to the conſideration of ſome diſcreet men appointed by the houſe farther to examine it, who thereupon are called *committees: Committee* of the King. *Weſt. Par.* 2. *Symb.* tit. *Chancery, ſect.* 144. This word ſeemeth to be ſomething ſtrangely uſed in *Kitchin, fol.* 160. where the widow of the King's tenant being dead, is called *The committee of the King*; that is, one *committed* by the ancient laws of the land to the King's care and protection.

Commoigne (*Fr.*) a fellow-monk that lives in the convent. 3 *Part, Inſt. f.* 15.

Common (*Commune, i. e. quod ad omnes pertinet*) Signifies that ſoil or water whereof the uſe is *common* to this or that town or lordſhip; as *common of paſture*, (commune paſturæ). *Bracton, lib.* 4. *cap.* 19 & 40. *Common of fiſhing* (commune piſcariæ). *Idem, lib.* 2. *c.* 34. *Common of turbary*, (commune turbariæ, *i. e.* of digging turves). *Idem, lib.* 4. *c.* 41. *Common of eſtovers* (commune eſtoveriorum). *Kitch. fol.* 94, *&c.*

Common is a right or privilege which one or more perſons claim to take or uſe, in ſome part or portion of that which another man's lands, waters, woods, *&c.* do naturally produce, without having an abſolute property in ſuch land, waters, wood, *&c.* It is called an incorporeal right, which lies in grant, as if originally commencing on ſome agreement between lords and tenants for ſome valuable purpoſes, which by age being formed into a preſcription continues, although there be no deed or inſtrument in writing which proves the original contract or argeement. 4 *Co.* 37. 2 *Inſt.* 65. 1 *Vent.* 387.

1. *Of the ſeveral kinds of commons.*

2. *How far owner of the ſoil is intereſted.*

3. *How far the commoner is intereſted in the ſoil; and of the remedies given him by law.*

4. *Of approvement, incloſure, apportionment, and extinguiſhment.*

1. *Of the ſeveral kinds of commons.*

The general diviſion of common, according to ſome books is into, firſt, *Common of Paſture*, which is a right or liberty that one or more have to feed or fodder their beaſts or cattle in another man's lands; ſecondly, A *common of Turbary*, or a liberty of cutting turves in another man's land or ſoil; thirdly, *Common of Piſcary*, or a right and liberty of taking fiſh in another's fiſh-pond, pool, or river; fourthly, *Common of Eſtovers*, which is a right of taking trees or loppings, ſhrubs, underwood in another's woods, coppices, *&c.* and fifthly, A liberty which in ſome manors the tenants have of digging and taking ſand, gravel, ſtone, *&c.* in the lord's ſoil. 1 *Bac. Abr.* 385.

But the word *common* is uſually underſtood of common of paſture, of which there are four kinds; firſt, *Common appendant*; ſecondly, *Common appurtenant*; thirdly, *Common in groſs*; fourthly, *Common by reaſon of vicinage.*

Common appendant and *common appurtenant* are in a manner confounded, as appears by *Fitz. Nat. Br. fol.* 180. and are defined to be a liberty of *common appertaining* to, or *depending* on, ſuch and ſuch a freehold, which *common* muſt be taken with beaſts commonable, as horſes, oxen, kine, and ſheep, being accounted fitteſt for the ploughman; and not of goats, geeſe, and hogs. But ſome make this difference, that *common appurtenant* may be ſevered from the land whereunto it appertains, but not *common appendant*; which (according to Sir *Edward Coke, lib.* 4. *f.* 37.) had this beginning: ——When a lord enfeoffed another in arable lands, to hold of him in *ſocage*, the feoffee, to maintain the ſervice of his plough, had at firſt, by the courteſy or permiſſion of his lord, *common* in his waſte for neceſſary beaſts, to ear and compoſt his land; and that for two cauſes: one, for that it was tacitly implied in the feoffment, by reaſon the feoffee could not till or compoſt his land without cattle, and cattle could not be ſuſtained without paſture; ſo by conſequence the feoffee had, as a thing neceſſary and incident, *common* in the waſtes and land of the lord. And this appears by the ancient books, *temp. Ed.* 1. tit. *Common* 24. and 17 *Ed.* 2. tit. *Common* 23. and 20 *Ed.* 3. tit. *Admeaſurement* 8. and by the ſtatute of *Merton, c.* 4. The ſecond reaſon was, for maintenance and advancement of tillage, which is much regarded and favoured by the law.

Common appendant of common right belongs to arable lands for beaſts that ſerve for maintenance of the plough; as horſes and oxen to plough the land, kine and ſheep to compoſt it; and for ſuch common there is no need to preſcribe. *Co. Lit.* 122. *a.* 26 *Hen.* 8. 4.

This kind of common is regularly appendant only to arable land, yet it may be claimed by that name, as appendant to a manor, farm, a plough-land, or a carve of land, though it may contain paſture, meadow, and wood; for it ſhall be preſumed to have been all originally arable land, though afterwards converted into meadow, paſture, *&c.* 1 *Bac. Abr.* 386.

It can only be for ſuch catle as are neceſſary in tillage; as oxen and horſes to plough the land, and cows and ſheep to compoſt it; and therefore a preſcription to have common appendant for all manner of cattle is not good, becauſe it comprehends goats, geeſe, and ſuch like, which is more properly common appurtenant. 1 *Bac. Abr.* 386.

Common appendant may by uſage be limited to any certain number of cattle. 1 *Bac. Abr.* 386.

A man may have common appendant for thirty cattle in one place, and to the ſame land common appendant alſo in another place, for part of his ſaid cattle, and ſo may take it where he pleaſes. 1 *Bac. Abr.* 386.

Common appendant may be through all the year, ſaving at a certain time in which the lord uſes it. 1 *Bac. Abr.* 386.

So it may be to common in the meadow, carried off till *Candlemas*. 1 *Bac. Abr.* 387.

If an inhabitant of one pariſh hath common appendant in certain waſte grounds, which lie in another pariſh, he ſhall be aſſeſſed and pay taxes in that pariſh where his farm lies, and not in that in which he hath common; for the common is only incident to it, and will paſs by a grant of the common; and is therefore to be conſidered as part of the farm to be taxed the higher. 1 *Salk.* 169.

A man preſcribed for common for all commonable beaſts as *to his houſe* appertaining, and in arreſt after verdict the court ſaid, that upon demurrer it might perhaps have been ill; but after verdict, *though it be neither appendant nor appurtenant, &c. in ſtrictneſs of law*, yet it is good enough, and they ought to intend it appurtenant; and judgment for the plaintiff. 2 *Sid.* 87. *Trin.* 1658. *Stoneby* v. *Muſſenden.*

A preſcription in common for all cattle, levant and couchant, as appendant *to his cottage*, which was held a good preſcription, by *Holt* Ch. J. and the court; and by *Powell* J. a *cottage contains a curtilage*, and ſo there may be a levancy and couchancy upon a cottage, and it has been ſo ſettled, and there is no difference between a meſſuage and a cottage as to this matter; the ſtatute *De extentis Manerii* ſays, that a cottage contains a curtilage, and that they will ſuppoſe a cottage has at leaſt a court to it. 2 *Ld. Raym. Rep.* 1015.

In replevin the plaintiff declares for taking 64 ſheep in a place called *Somer-Lees* in the pariſh of *D.* in *Somerſet-ſhire*

ſtire. The defendant avow the taking, for the place where, &c. contains 100 acres of land; that at and before the taking *Rich. Bowes* was ſeiſed in fee, &c. and that the cattle were damage feaſant, and that they diſtrained them as his bailiffs. The plaintiff in bar to this avowry pleads, that long before, and at the time when, &c. one *Philip Biggs* was ſeiſed in fee of a certain acre of land called *Old Haſter*, ſituate in *D.* and *that he, and all thoſe whoſe eſtate he hath, have uſed to have a right of common for all manner of ſheep, &c. as appendant to the ſaid acre*; and that the ſaid *Biggs* being ſo ſeiſed on the —— day of —— 5 *W.* 3. made a demiſe to *J. S.* for 99 years, if three lives ſo long lived; and that afterwards in 1704 *J. S.* made an under-leaſe to the plaintiff's father *Robert Bennet* for the reſidue of the term, who entered and was poſſeſſed, and afterwards died, leaving the plaintiff his executor, who thereupon, as ſuch, entered, and then avers that the lives are ſtill in being; and the ſaid plaintiff being ſo poſſeſſed upon the 28th of *Sept.* 1737, (being the day of the ſuppoſed taking) did put his cattle in the ſaid place to depaſture, and enjoy the common appendant to the ſaid acre; and that while they were ſo depaſturing the defendant ſeized them, and this he is ready to verify. The defendants reply, *proteſting as to the common, and ſay, that before and at the time of the taking, the ſaid ſheep, nor any of them, were not levant or couchant on the land.* To this the plaintiff demurs, and the defendants join in demurrer. *Per cur.* The ſingle queſtion upon this demurrer is, *whether levancy and couchancy is incident to common appendant as well as to common appurtenant?* If it be incident, then the plaintiff having by his plea in bar ſet forth, that they were levant and couchant, the defendant's replication has put a material matter in iſſue, and the demurrer muſt be over-ruled. Whether the plaintiff was bound to have pleaded levancy and couchancy is another queſtion, and might be very doubtful; but that is not now neceſſary to be determined, ſuppoſing the defendant's replication material, as we think it is. So likewiſe as to ſome other objections which have been made to the defendant's plea, I ſhall paſs them over as of no great weight. And as to the point in queſtion, I think it could never have been made a doubt at the bar, had the nature and original of common appendant been rightly underſtood. It was ſaid, that *common appendant took its riſe* from hence, that tenants of manors being by their tenure obliged to plough and till the lord's land, therefore they had the liberty of putting their cattle to be maintained in the lord's waſte, as they were to be employed in his ſervice. But I think that this opinion is a miſtake, and not warranted either by law or reaſon, and that were it to prevail, it would be attended with the utmoſt abſurdity and inconvenience. I admit that common appendant is incident only to arable land; ſo is *Co. Litt.* 122. *b.* and ſo are all the books as to this point, though in other matters of common appendant they differ widely. Therefore, as it is incident, it cannot be ſevered from the land, and then the conſequence of that will be, that if land be divided into never ſo many parts or parcels, the tenant of each diſtinct parcel has a right to ſuch common, as appendant to the land, in the ſame extent and degree as the tenant of the whole land had before the tenancy was divided; and ſo every tenant of the manor muſt keep the ſame number of horſes or oxen to plough and cultivate the lord's land, and on that account to feed them on the waſte, whether he be tenant of 100 acres or only of a ſingle acre, which ſhews the abſurdity of ſuch an opinion, and as fell out to be the very caſe at preſent. There is another anſwer to be given againſt that opinion, and that is, that a man may have common appendant for cows and ſheep as well as horſes and oxen, as appears by 1 *Roll. Abr.* 397. and ſeveral other books, and was admitted by the plaintiff's counſel very rightly; becauſe elſe, this being a replevin for ſheep, they would have made an end of their own caſe. But if there may be common appendant for ſheep, then ſuch common can never be enjoyed upon account of keeping them to plough the lord's land, becauſe they are not capable of being uſed in that manner. But I take this to be the true reaſon, that every tenant had a right to this common for his own benefit, and that, as he had no place for keeping his cattle after they had done ploughing his land, he might turn ſuch cattle as were employed by him that way upon the waſte of the lord, till the hay or corn was cut and the ground cleared; and this appears to be the caſe in *Co. Litt.* 122. before cited, and ſeems to be a clear and intelligible account of the matter. For if this account be true, that it was a right of common for ſuch cattle as were employed in ploughing the tenant's land, then it can extend to ſuch only as are levant and couchant on it: and there will be no abſurdity as in the former caſe; for then if the land be divided into parcels, the common will be divided into parcels likewiſe; and a tenant of one acre of land will never be able to claim common for 64 ſheep, as in the preſent caſe, becauſe the original tenant (perhaps) of 100 acres had a right to it. The conſequence of this will likewiſe be, that a tenant ſhall not be at liberty to borrow a ſtranger's cattle and put them on the common, at leaſt unleſs borrowed for a conſiderable time, ſo as to be employed, and be levant and couchant on the tenant's own land at other times. Having thus explained the nature and origin of common appendant, it becomes a very plain caſe for the defendants; but I will juſt add a caſe or two in confirmation of our opinion, tho' I think the caſe does not need it; and that is 4 *Co.* 38. *b.* and 1 *Rol. Abr.* 398. with ſeveral year-books there cited, all to prove, that common appendant is only for cattle levant and couchant on the land, for the reaſons I have before mentioned. Therefore we are all of opinion, that there muſt be judgment for the defendants. 4 *Vin.* 583. cites *MS. Rep. Mich.* 14 *Geo.* 2. *in C. B.*

Common appurtenant can only be claimed by preſcription, and is a right of commonage for beaſts, not only commonable, as horſes, oxen, cows, and ſheep, but likewiſe for beaſts not commonable, as ſwine, goats, and geeſe. *Co. Litt.* 122.

He that claims a common by force of a preſcription, as an inhabitant of a town, ſhall have no other cattle to common there, but what are levant and couchant within the ſame town. 1 *Rol. Abr.* 398.

If a man claims common by preſcription for all manner of commonable cattle in the land of another, as belonging to a tenement, this is a void preſcription; becauſe he does not ſay that it is for cattle levant and couchant upon the land to which he claims it to be appurtenant; for a man cannot have common *ſans* number appurtenant to land; and when he claims the common for all cattle commonable, and does not ſay for cattle levant and couchant upon the tenement, this ſhall be intended common *ſans* number, according to the words; for there is not any thing to limit it, when it does not ſay for cattle levant and couchant. 1 *Rol. Abr.* 398.

It ſeems agreed, that if a man has a grant of common for a certain number of beaſts, that the commoner may take the beaſts of a ſtranger, and put them upon the common, ſo that it exceed not the number. 1 *Bac. Abr.* 387.

Alſo in caſe of a common appurtenant it is ſaid, that where the number of the beaſts to be commoned is certain, the commoner may grant over the commonage of part, and reſerve the reſt for himſelf. 1 *Jones* 375. *Cro. Car.* 342.

It is clear, that if a commoner borrows cattle to manure his land, he may uſe the common with them; for by the borrowing he has a ſpecial property in them. 2 *Aſſ.* 84. 1 *Rol. Abr.* 396, 402. *S. P.*

It was ruled by *Holt* Ch. J. at *Wincheſter* Lent aſſize, 10 *Will.* 3. that a man cannot *preſcribe for common appurtenant to a farm*, becauſe it is uncertain of what a farm conſiſts, perhaps of 10 acres, or of 100 acres; but the preſcription ought to be laid to a meſſuage, and ſo many acres of land. *But* if there is *an ancient farm, and the ſame lands always occupied with it*, a man may have common of paſture to depaſture his cattle tilling that farm. *Ld. Raym. Rep.* 726. *Hockley* v. *Lamb.*

If there are two manors in one vill, the tenants of each may intercommon; and this is likewiſe called common by reaſon of vicinage. See 2 *Bulſt.* 87.

Every common by reaſon of vicinage is common appendant, and therefore a man need not preſcribe in a

common *pur cauſe de vicinage*; but it is ſufficient to ſay, that he and all thoſe whoſe eſtate, &c. have uſed to intercommon *cauſa vicinagii*. 1 *Rol. Abr.* 399.

Common in groſs is a right of commonage which muſt be claimed by deed or preſcription, and has no relation to any land belonging to the commoner; it may be for a certain number of cattle, or *ſans* number. *Co. Litt.* 122. 2 *Inſt.* 427.

He that hath common in groſs for a certain number of cattle, may put in the cattle of a ſtranger, and uſe the common with them. 11 *Hen.* 6. 22. *b.* 1 *Rol. Abr.* 402. *S. C.*

Common appendant cannot be made common in groſs; for this is for cattle levant upon the land, to which, &c. and therefore it cannot be ſevered without extinguiſhment. 1 *Rol. Abr.* 401.

So common appurtenant for cattle levant and couchant upon the land cannot be made in groſs. 1 *Rol. Abr.* 402.

If *A.* and all thoſe whoſe eſtate he hath in the manor of *D.* have had time out of mind a fold-courſe, *ſſ.* common of paſture for any number of ſheep, not exceeding 300 in a certain field, as appurtenant to the ſaid manor, he may grant over his fold-courſe to another, and ſo make it in groſs; becauſe the common is for a certain number, and by the preſcription the ſheep are not to be levant and couchant upon the manor, but it is a common for ſo many ſheep appurtenant to the manor, which may be ſevered from the manor as well as an advowſon, without any prejudice to the owner of the land where the common is to be taken. 1 *Rol. Abr.* 402.

Common by reaſon of vicinage or neighbourhood is a liberty that the tenants of one lord in one town have to common with the tenants of another lord in another town. Thoſe that challenge this kind of common (which is uſually called *intercommoning*) may not put their cattle in the common of the other town; for then they are diſtrainable; but turning them into their own fields, if they ſtray into the neighbour *common*, they muſt be ſuffered. *Cowell, edit.* 1727.

Common by reaſon of vicinage is but an excuſe of treſpaſs, and no man can put his beaſts into the land in which he has ſuch common, but they muſt eſcape thither themſelves, and either of the parties that has ſuch neighbouring grounds may incloſe againſt the other. *Co. Lit.* 122. *a.*

But if there be common by reaſon of vicinage between two manors, and the lord of one manor incloſes, yet he ſhall not bind a copyholder of the ſame manor, but that he may have common *pur cauſe de vicinage* as he had before. 1 *Rol. Abr.* 399.

If there be common by reaſon of vicinage between the towns of *A.* and *B.* and *A.* hath 50 acres of common, and *B.* hath 100 acres of common, the inhabitants of *A.* cannot put more cattle into their common than the 50 acres will depaſture, without any regard to the common of *B.* for the original cauſe of this common was not the profit of either town, but to prevent ſuits in open countries for reciprocal eſcapes from one field into the other. 7 *Co.* 3. *b.*

2. *How far owner of the ſoil is intereſted.*

The lord of the ſoil hath ſuch an intereſt therein, that it ſeems agreed, that a cuſtom or preſcription totally to exclude him from all manner of profit is void, as unreaſonable and againſt law. *Co. Lit.* 122. *a.*

But one may preſcribe or alledge a cuſtom to have *ſolam veſturam terræ*, from ſuch a day to ſuch a day, and exclude the owner of the ſoil. *Co. Lit.* 122. *a.*

Alſo it ſeems by the better opinion, that a preſcription for *ſol. & ſeparal' paſtur'* at all times, ſo as to exclude the lord from feeding there, is good; for this does not exclude the lord of all the profits, for he ſhall have the mines, trees, &c. and is not like a preſcription for the the whole common to exclude the lord, for that is repugnant. See 1 *Vent.* 383. *Vaugh.* 251. 1 *Sand.* 350. 1 *Lev.* 268.

The lord without preſcription cannot agiſt the cattle of a ſtranger in the common. 1 *Rol. Abr.* 396.

But he may licenſe a ſtranger to put in his cattle, if he leaves ſufficient common for the commoners. 12 *Mod.* 6, 7.

If the lord alien in fee the ſoil where the common is taken, ſaving his power of paſture as lord, he ſhall have common there as lord; *aliter* without any ſaving; but the alienee of the ſoil may depaſture it, as the lord had done before. 1 *Rol. Abr.* 396.

If *A.* grants common to *B.* in a certain place, *A.* cannot afterwards erect a rick there; for by the grant the cattle of *B.* are to range over the whole place without reſtraint, and it ſhall not be in the power of *A.* to defeat his own grant. *Cro. Jac.* 271.

3. *How far the commoner is intereſted in the ſoil; and of the remedies given him by law.*

A commoner hath only a ſpecial and limited intereſt in the ſoil, but yet he ſhall have ſuch remedies as are commenſurate to his right, and therefore may diſtrain beaſts damage-feaſant, bring an action on the caſe, &c. but not being abſolute owner of the ſoil he cannot bring a general action of treſpaſs for a treſpaſs done upon the common. See *Bridg.* 10, 11. *Godb.* 123, 124. 2 *Leon.* 201, 202.

A commoner cannot regularly do any thing on the ſoil which tends to the melioration or improvement of the common, as cutting down of buſhes, fern, &c. 1 *Sid.* 251. 12 *Hen.* 8. 2. 13 *Hen.* 8. 15.

Therefore if a common every year in a flood is ſurrounded with water, the commoner cannot make a trench in the ſoil to avoid the water, becauſe he has nothing to do with the ſoil, but only to take the graſs with the mouth of the cattle. 1 *Rol. Abr.* 405. 2 *Bulſt.* 116.

Every commoner may break the common if it be incloſed, and although he does not put his cattle in at the time, yet his right of commonage ſhall excuſe him from being a treſpaſſer. *Lit. Rep.* 38. See 1 *Rol. Abr.* 406.

If a tenant of the freehold ploughs it, and ſows it with corn, the commoner may put in his cattle, and therewith eat the corn growing upon the land; ſo if he lets his corn lie in the field beyond the uſual time, the other commoners may notwithſtanding put in their beaſts. 2 *Leon.* 202, 203.

In treſpaſs by the lord, the defendant juſtified the taking the cattle damage-feaſant, ſetting forth a *cuſtom that the plaintiff, who was lord of the manor, had the ſole right to the place where, &c. entirely to himſelf until Lammas day, but that afterwards it was common to the tenants, ſo as the plaintiff could put in three horſes, and no more; and becauſe after Lammas day, &c. he put in more, the defendant took them damage feaſant.* This cuſtom was found for the defendant. It was moved, that defendant being only a commoner, could not take cattle, and the place where, &c. is the ſoil of the plaintiff, ſo as his cattle cannot be damage-feaſant on his own ſoil. Two juſtices held the taking good, becauſe the lord is to be excluded by cuſtom for all but his ſtint, and the commoners have no other remedy to preſerve their right; but two other judges doubted, becauſe the commoners ought not only to *ſhew the cuſtom, but alſo the uſage to diſtrain the lord's cattle damage-feaſant* when he exceeded his ſtint. *Cro. J.* 201. *pl.* 1. *Trin.* 6 *Jac. B. R. Kenrick* v. *Pargiter.*

If a grant be made to *J. S.* of common, and after the the ſaid grant the *grantor erects a ſtack of corn there, the grantee may put in his cattle* to uſe his common, and may uſe the whole place for his common, and eat the hay. Reſolved. But for want of ſhewing the indenture of grant, which is the ground of his title, judgment was given againſt him. *Yelv.* 201. *Hill.* 8 *Jac. B. R. Farmer* v. *Hunt.*

Treſpaſs for carrying away thirty load of thorns in a place called the common waſte; the defendant juſtifies for that he was ſeiſed of a meſſuage and three acres of land, and that he and all thoſe, &c. have *uſed to cut down* omnes ſpinas creſcentes *upon the ſaid place, to ſpend*

in

in their houſes, or about the ſaid lands, as pertaining to the ſaid houſe and lands; the plaintiff replied, that *R. S.* was ſeiſed in fee of the manor of *C.* whereof, *&c.* and granted licence to him to take the thorns, whereupon he cut them down, and the defendant afterwards took them. It was held, that the *lord may not cut* down any thorns, nor licenſe *any other* to cut them, for that his preſcription excludes the lord; *but* if the defendant had claimed *common of Eſtovers only*, then if the lord had firſt cut down the thorns, the commoner might not take them; wherefore it was adjudged for the defendant. *Cro. J.* 256. *pl.* 15. *Mich.* 8 *Jac. B. R. Douglas* v. *Kendal.*

A man had *common* for his cattle levant and couchant upon his land *in a field* called *B. when it was ſowed with corn*, and he put in his cattle when *part of it was ſowed*; the court held, that ſowing parcel of the field ſhould not hinder him from uſing his common in the reſidue, becauſe part of the field might be ſowed by covin, on purpoſe to hinder the commoner from taking his common. *Brownl.* 189. *Mich.* 8 *Jac. Truelock* v. *Rigsby.*

A commoner cannot generally juſtify the *cutting and carrying away buſhes* from the common, but *by a ſpecial preſcription* he may juſtify the ſame; *per tot. cur. Godb.* 182. *pl.* 258. *Mich.* 9. *Jac. C. B. Anon'.*

The *King cannot grant free warren to the prejudice of a commoner.* 2 *Jo.* 5. Arg. and admitted. *Trin.* 21 *Car.* 2. *C. B.* in the caſe of *Timberly* v. *How*, cites 3 *Cro.* 462. *Highman* v. *Beſt*; and ſaid, that the grant cannot enable the grantee to erect an houſe.

Commoner *may abate hedges* made on his common, for that is not a meddling with the ſoil, but only a pulling down the erection. 2 *Mod.* 65. *Hill.* 27 & 28 *Car.* 2. *C. B. Maſon* v. *Cæſar.*

The lord or commoner may *drive the beaſts* of a commoner mixed with the beaſts *of a ſtranger* to a convenient place to ſever them, and may drive the beaſts of the ſtranger out of the common without any cuſtom. 3 *Lev.* 40. *Hill.* 33 *Car.* 2. *C. B. Thomas* v. *Nichols.*

Treſpaſs for *burning turfs*; defendant juſtifies that the turfs were on the land where he has common (and ſhews title to it) and for *damage-feaſant* he burnt the turfs. Adjudged on demurrer that defendant cannot burn the turfs for this cauſe. 2 *Jo.* 193. *Paſc.* 34 *Car.* 2. *B. R. Bromhall* v. *Norton.*

A. hath right of common in ſuch a *cloſe*, which *belongs to* B. *who after the corn taken away ſows peaſe* in it; he cannot by ſuch a trick deprive *A* of the benefit of his common. *Per cur.* 12 *Mod.* 648. *Trin.* 6 *Will. & Ma. Anon'.*

If a ſtranger who had no right of common put in cattle, any commoner might diſtrain. *Freem. Rep.* 273. *pl.* 300. *Paſch.* 1698. *Dixon* v. *James.*

If a commoner finds conies on the ſoil ſpoiling the graſs, he may kill and take them, though they are put there by the lord of the manor; for he has no remedy by way of action againſt the lord; but this was a matter long doubted of, becauſe the property was thought to be in the lord *ratione ſoli*, and the beaſts were not at their natural liberty; but it was allowed, that there could be no incloſure on the common to diſturb the right of commoning; and ſo in reſpect of the commoner the beaſts were uninclоſed. 1 *Rol. Abr.* 405. 1 *Bac. Abr.* 390.

It is a general rule, that a commoner cannot diſtrain or chaſe out the cattle of the lord, or tertenant, damage-feaſant, and that if the lord ſurcharges the common, his proper remedy is an action on the caſe. See 2 *Leon.* 203. *Yelv.* 104, 129. *Cro. Jac.* 208. 1 *Brownl.* 187. *Godb.* 182.

And if there be a cuſtom, that a cloſe ought to lie freſh and hained every ſecond year till *Lady-day* after the corn cut and carried away; and *J. S.* hath uſed time out of mind to have common in the ſaid cloſe after *Lady-day*, till it is ſowed again with corn, for his cattle *levant* and *couchant* upon a certain tenement as appurtenant thereto; in this caſe, if the lord of the ſoil of the ſaid cloſe puts in his cattle in the ſaid cloſe, againſt the cuſtom, when it ought to lie freſh and hained by cuſtom, the ſaid *J. S.* though he be but a commoner, yet he may take the cattle of the lord there damage-feaſant, and juſtify in an action of treſpaſs brought againſt him by the lord of the cloſe where he took the cattle; for if the lord may eat the graſs before the common is to be taken purſuant to the cuſtom, the tenant would be defeated of all the benefit of his common. 1 *Rol. Abr.* 405, 406.

If I have common of Eſtovers in the woods of *J. S.* and *J. S.* cuts part, or all the wood, yet I cannot take any part of this which is cut, but ſhall be put to my aſſiſe, or caſe, as my eſtate is. 1 *Rol. Abr.* 406. *Cro. Eliz.* 826. *S. P.*

The writ of admeaſurement lies by one commoner againſt another; but if the tenant ſurcharges the common, the lord ſhall not have a writ of admeaſurement againſt the tenant. *F. N. B.* 125.

So if the lord ſurcharge the common, or approve without leaving ſufficient, the tenant ſhall not have a writ of admeaſurement againſt him, but an aſſiſe. *F. N. B.* 125.

No writ of admeaſurement lies againſt a commoner *ſans number*, nor ſhall his common be admeaſured. *F. N. B.* 125.

One commoner cannot diſtrain the cattle of another, for the right of commonage which every commoner has, runs through the whole land. *Style* 428. *Yelv.* 104. 2 *Lutw.* 1240. 22 *Aſſ. pl.* 25.

A commoner may juſtify the taking of the cattle of a ſtranger damage-feaſant upon the common in his own name, for the intereſt which he has in the common. 1 *Rol. Abr.* 405, 320. *Yelv.* 130. *Godb.* 185. *Jenk.* 144.

But in his avowry he muſt alledge a particular damage, as that he could not have common *in tam amplo modo quo debuit & conſuevit*, for without a particular damage he can no more diſtrain the beaſts of a ſtranger than bring an action upon the caſe. 3 *Lev.* 104.

If in an action of treſpaſs brought by a commoner againſt a ſtranger, for putting his cattle in the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleads a licence from the lord to put his cattle there, but does not aver there is ſufficient common left for the commoners; this is a good plea; for though it may be objected, the plaintiff may reply thereto, yet being the very giſt of the action, the defendant ſhould have pleaded thereto. 2 *Mod.* 6.

But in an action againſt the lord, the plaintiff muſt particularly ſhew the ſurcharge. 2 *Mod.* 7.

4. *Of approvement, incloſure, apportionment, and extinguiſhment.*

By the order of the common law, there could be no approvement, becauſe the common iſſued out of the whole waſte. 2 *Inſt.* 85. See the ſtat. of *Merton*, 20 *Hen.* 3. *c.* 4. ſtat. *Weſt.* 2. *c.* 46. and ſtat. 3 *Ed.* 6. *c.* 3. under title **Approvement.**

There need not be a year before the offenders ſhould be indicted upon the ſtat. *Weſt.* 2. *c.* 46. but there ought to be *a convenient time for the country to inquire* who were the proſterners, and the court ſhall adjudge what time is convenient; *per Banks.* Att. Gen. cites a reſolution in 12 *Jac. Cro. c.* 440. *pl.* 10. *Hill.* 11 *Car. B. R.* in caſe of the *King* v. *Epworth.*

Judgment was had againſt the inhabitants of *S.* to repair at their own proper coſts the fences and dykes thrown down, and becauſe it was not done, a writ of inquiry of damages iſſued, and 500 *l.* damages found, and *diſtringas* to the ſheriff to levy it upon the vills; upon which they came by their counſel, and *prayed to have liberty to plead*, inaſmuch as by this way they are condemned unheard, and that by an inqueſt againſt which no attaint lies. And it was doubted, whether a *ſcire facias* ought to have iſſued before the *diſtringas*; but upon conſideration the court thought, that the *diſtringas ought to have contained a ſcire facias* in it, and ſo they obtained leave to plead. *Sid.* 107. *pl.* 19. *Hill.* 14 & 15 *Car.* 2. *B. R. Queen Mother* v. *Somerſham inhabitants.*

The

The court was moved for a *diſtringas* againſt the inhabitants of *H.* for throwing down of banks of the Earl of *Bedford*'s in his drained land. *Per Roll* Ch. J. Take it, but *at the return of the diſtringas the inhabitants may plead to you* notwithſtanding. *Noy*, the late King's attorney, would not have ſuffered it. *Sty.* 417. *Trin.* 1645. *Anon'*.

After *money levied by diſtringas containing fieri facias* grounded on *W.* 2. *cap.* 46. for throwing down incloſures, and inquiſition taken by the ſheriff; *Jones* prayed that the *money* might be *brought into court*, and remain, and that he might have *time to plead*, which the court granted. *Keb.* 479. *pl.* 7. *Paſch.* 15 *Car.* 2. *B. R. The King* v. *The inhabitants of the foreſt of* Dean.

Upon an inquiſition for throwing down fences, and 80 *l. damages aſſeſſed*, a *diſtringas* iſſued, and defendants came in, and *pleaded*, that it was *not done nocłanter*, which was *found againſt them, and ſecond damages given*; and it was moved to ſet aſide the firſt damages, firſt, Becauſe the inquiſition is only to aſcertain what vills have done it, to the intent that a *diſtringas* may go out, and it was never intended to conclude any in point of damages, being only an inqueſt of office, againſt which no attaint lies. Secondly, Becauſe thoſe damages are aſſeſſed upon us before we were ſummoned, and ſo we were not heard for our excuſe, and to mitigate them, but condemned and concluded not heard, nor not ſummoned, and they cited *Cro. C.* 280. and *Cro. E.* 859. 2 *Inſt.* 477. *Cro. Car.* 580. And they ſaid, that they might plead to the right upon the *diſtringas*, ſo that it is not reaſon that they ſhould be concluded as to the damages by the inquiſition; but *per cur.* The firſt damages ſhould ſtand, and ſhall not be vitiated by the ſecond, becauſe the *ſecond verdict as to the damages is void*, inaſmuch as the *ſole matter to be inquired upon the ſecond iſſue is the nocłanter*; but for better ſecurity they directed the proſecutors to releaſe the ſecond damages, and as to the miſchief objected, that the damages being aſſeſſed by inqueſt of office no attaint lies, that is true, but cannot be properly ſaid miſchief, becauſe it is ſo enacted by parliament, that the damages ſhall be aſſeſſed as before; yet if they are exceſſive, the party is not without remedy; for when they come in to plead to the *nocłanter*, if the *damages* were *outragious*, they ought to have taken in their plea, *viz. Proteſtando, that the damages were outragious*; and after might have pleaded, firſt, The damages were *only of ſuch a value*, and upon this other iſſue ſhould be taken; wherefore the counſel for the defendants in this cauſe moved, that they may now plead to the exceſſiveneſs of the damages; but inaſmuch as they have not taken it by *proteſtando before the firſt iſſue found* againſt them, the court would not ſuffer them, but gave judgment for the plaintiff, and that the 80 *l.* being levied upon the *diſtringas*, they ſhall have it out of the court, notwithſtanding the ſecond damages given by the ſecond verdict. *Sid.* 212. *pl.* 10. *Trin.* 16 *Car.* 2. *B. R. The King* v. *Upwood and Ravely, vills in Com. Huntington.*

It has been ruled in Chancery, that a common which has been incloſed for thirty years ſhall not afterwards be thrown open. 1 *Vern.* 32.

Common appendant, becauſe it is of common right, ſhall be apportioned by the commoner's purchaſe of part of the land in which he hath ſuch common; but common appurtenant ſhall be extinct by the commoner's purchaſe of part of the land, *&c.* both common appendant and appurtenant ſhall be apportioned by alienation of part of the land to which the common is appendant or appurtenant. *Co. Lit.* 122. *Hob.* 235. 8 *Co.* 78. *Owen* 122. 4 *Co.* 37.

A releaſe of common in one acre, is an extinguiſhment of the whole common. See 4 *Co.* 37.

A copyholder had common in his lord's waſte, the lord grants and confirms the copyhold land and meſſuage to him and his heirs *cum pertinentiis*; it was reſolved, that the common was extinct, for it was annexed to his cuſtomary eſtate by the cuſtom: which eſtate being determined, the common is alſo gone, and cannot continue without words to that intent, and *cum pertinentiis* will not do, for the common was not appurtenant to the freehold eſtate granted by the lord. *Hob.* 190. *Cro. Jac.* 253. *Yelv.* 189. *Noy* 136. 2 *Rol. Abr.* 61. 2 *Brownl.* 210. *Cro. Eliz.* 794.

But if *A.* as appurtenant to a certain meſſuage and twenty acres of land, hath common in the lands of *B.* and after *B.* enfeoffs *A.* of the ſaid lands in which, *&c. per quod* the common is extinguiſhed; and after *A.* leaſes to *B.* the ſaid meſſuage and twenty acres of land, with all commons, profits, and commodities thereto appertaining, *vel occupat' vel uſitat' cum præd' meſſuagio*, this is a good grant of a new common for the time; for though it were not common in the hands of the leſſor, yet it is *quaſi* common uſed therewith; and although it be not the ſame common as was uſed before, yet it is like the common; but yet becauſe it was not there averred, that this common was therewith uſed at the time of the leaſe, it was adjudged againſt the defendant who claimed the common. *Cro. Eliz.* 570.

A copyholder that has common of paſture in the waſtes of the lord out of the manor, has the ſame, as belonging to his land, and if he enfranchiſe the copyhold eſtate, ſtill his common remains; but where a copyholder has common in the waſtes within the manor, that belongs to his eſtate, and if the eſtate be enfranchiſed, the common is extinct. 1 *Salk.* 170, 364.

Alſo it hath been ruled in equity, that if the lord of the manor enfranchiſes a copyhold with all commons thereunto belonging or appertaining, and afterward buys in all the other copyholds, and then diſputes the right of common with the copyholders he had enfranchiſed, and recovers at law; tho' the common be extinct at law, yet it ſhall ſubſiſt in equity, and the ſame right of common as belonged to the copyhold will be decreed. 2 *Vern.* 250.

In a *nocłanter* the defendants pleaded, that the manor of *F.* is parcel of the demeſnes of the duchy of *Cornwall*, and that the King, *&c.* was ſeiſed of the manor in fee, as parcel of the ſaid duchy, and that *H.* common, in which, *&c.* was parcel of the ſaid manor, and that all the tenants of any tenements held of the ſaid manor lying in the vill of *H.* have, time out of mind, had common of paſture for all the cattle levant and couchant, *&c.* at all times of the year in *Hermitage Common*, and that the proſecutor *de ſon tort* had encloſed it, ſo as they could not enter, *&c.* and had not left them ſufficient common, and iſſue was taken upon this preſcription *modo & forma, &c.* and upon evidence at the bar it appeared, firſt, that all the tenements in *Hermitage*, unto which the common of paſture was claimed, were heretofore *parcel of the abbey of Sarum*, and that *by the diſſolution of that abbey*, the ſame *came to H.* 8. before the birth of *Ed.* 6. *ſo that the duchy of Cornwall was likewiſe, at the ſame time, in the poſſeſſion of H.* 8. *for want of a Duke of Cornwall, and hereby an unity of poſſeſſion*, both of the tenements to which the common of paſture appertained, and alſo of *Hermitage Common* (the place where the common of paſture was to be had) was at that time in poſſeſſion of King *H.* 8. and it likewiſe appeared, that *the tenements in Hermitage were granted to the ſeveral tenants after the unity of poſſeſſion*, and thereupon the counſel of the proſecutor inſiſted, that by this unity the preſcription was deſtroyed, and the common of paſture quite extinct. But after much debate it was unanimouſly reſolved, *per Holt* Ch. J. and the whole court, that this was not ſuch an unity of poſſeſſion as would deſtroy the preſcription; for though King *H.* 8. had an eſtate in fee in the lands *a qua*, and alſo in the lands *in qua*, yet he had not as perdurable an eſtate in one as he had in the other; for the quality of the eſtate differed; becauſe in the manor of *Fordington*, which was a parcel of the duchy of *Cornwall*, and *in Hermitage Common in qua, &c.* which was a parcel of that manor, King *H.* 8. *had only a fee determinable on the birth of a Duke of Cornwall*, which is a baſe fee; *but in the tenements in Hermitage parcel of the abbey a qua, he had a pure fee ſimple indeterminable jure coronæ*, and therefore an unity of ſuch eſtates work no extinguiſhment; for *where an unity of poſſeſſion doth extinguiſh a preſcriptive right, it is requiſite that the party ſhould have an eſtate in the lands a qua, and in the lands in qua, equal in duration, quality, and all other circumſtances*

cumſtances of right. Carth. 240, 241, Paſch. 4 W. & M. B. R. The King *v.* Hermitage inhabitants & al'.

Common *ſans nombre in groſs* cannot be extinguiſhed by purchaſe of parcel of the land; *per Powel* J. *Lord Raym. Rep.* 207. *Mich.* 10 *Will.* 3.

Commonalty. See **Comminalty.**

Common Bench (*Bancus communis*, from the Sax. *banc*, *i. e.* a bank or hillock, and metaphorically a *bench*, high ſeat, or tribunal.) The court of *Common Pleas* was anciently ſo called, *an.* 2 *Ed.* 3. *cap.* 11. becauſe (ſaith *Camden* in his *Britan. p.* 113.) Communia *placita inter ſubditos ex jure noſtro, quod* commune *vocant, in hoc diſceptantur*, that is, the pleas or controverſies between *common* perſons are there tried. And the juſtices of that court in legal records are termed *juſticiarii de banco. Coke on Littl. fo.* 71. *b.* See **Common Pleas.**

Common day in plea of land (Mentioned in 13 *Rich.* 2. *ſtat.* 1. *cap.* 17.) Signifies an ordinary day in court, as *Octabis Hillarii*, *Quindena Paſchæ*, *&c.* which you may ſee in the ſtatute of 51 *H.* 3. concerning general days in the bench.

Common fine (*Finis communis.*) of this *Fleta*, *lib.* 1. *c.* 48. *ſect. Quibus*, hath theſe words, *Quibus expeditis* (ſpeaking of the buſineſs finiſhed by juſtices in *eyre*) *conſueverunt juſticiarii imponere villatis, juratoribus, hundredis & toti comitatui concelamentum, et omnes ſeparatim amerciare, quod videtur voluntarium, cum de perjurio & concelamento non fuerint convicti, ſed potius diſpenſandum eſſet cum eis quod animas in ſtatera poſuerint pro pacis conſervatione.* And a little following he ſaith, *Quod communes miſericordiæ, vel* fines *comitatuum amerciatorum in* finibus *itinerum juſticiariorum, &c. Common fine* is a certain ſum of money which the reſiants, within the view of ſome leets, pay to the lord thereof, called in divers places *head-ſilver*, in others *cert-money*, or *certum letæ*, and *head-pence*; and was firſt granted to the lord towards the charge of his purchaſe of the court-leet, whereby the reſiants had now the eaſe to do their ſuit royal nearer home, and not to be compelled to go to the ſheriff's turn: as in the manor of *Sheapſhead*, in *com. Leic.* every reſiant pays 1 *d. per poll* to the lord at the court held after *Michaelmas*, which is there called *common fine*. There is alſo *common fine* of the county; for which ſee *Fleta*, *lib.* 7. *c.* 48. and the ſtatute of 3 *Ed.* 1. *cap.* 18. But the clerk of the market ſhall take no *common fine*, ſtat. 13 *R.* 2. *cap.* 4. For *common fine* the lord cannot diſtrain without a preſcription. *Godfrey*'s caſe, *Coke*'s *Reports*. See **Cert-money.**

Commons houſe of parliament, Is ſo called, becauſe the *commons* of the realm, that is, knights, citizens, and burgeſſes repreſenting them, do ſit there. *Cromp. Juriſd.* 9.

Common intendment, Is common underſtanding or meaning according to the ſubject matter, not ſtrained to an exotick ſenſe. *Bar to common intendment* is an ordinary or general bar, which commonly diſables the declaration of the plaintiff. Of *common intendment*, a will ſhall not be ſuppoſed to be made by colluſion. *Coke on Littl. fol.* 78. *b.* See **Intendment.**

Common law. After the decay of the *Roman* empire, three ſorts of the *German* people invaded the *Britons*, *viz.* the *Saxons*, the *Angles*, who were a neighbouring people, and the *Jutes*: from the laſt came the *Kentiſh* men, and the inhabitants of the iſle of *Wight*; from the *Saxons* came the people called *Eaſt*, *South*, and *Weſt Saxons*; and from the *Angles* came the *Eaſt Angles*, *Mercians*, and *Northumbrians*. As the people had different cuſtoms, ſo they inclined to the different laws by which their anceſtors were governed; but the cuſtoms of the *Weſt Saxons* and *Mercians*, who dwelt in the midland counties, being preferred before the reſt, were for that reaſon called *Jus Anglorum*; but the particular names were *Weſt Saxonlage*, and *Merchenlage*; and by theſe laws thoſe people were governed for many ages. But the *Eaſt Saxons* being afterwards ſubdued by the *Danes*, their cuſtoms were introduced, and a third law was ſubſtituted, which was called *Dane-lage*.

The *Danes* being overcome by the *Normans*, *Henry* biſhop of *Wincheſter*, who was nearly related to the Conqueror, told our hiſtorian *Gervas* of *Tilbury* that upon due conſideration of all thoſe laws and cuſtoms, the Conqueror abrogated ſome, and eſtabliſhed others; to which he added ſome of his country laws, which he adjudged moſt to conduce to the preſervation of the peace, and the quiet and eaſe of the people. And this is what we now call the *Common law*. But this was not the original of the *Common law*; for *Ethelbert*, the firſt Chriſtian king of this nation, who lived in the 6th century, made the firſt *Saxon laws*, which were publiſhed in *Engliſh* by the advice of ſome wiſe men, whom he called to his aſſiſtance, and which continue to this day. It is true, King *Alfred*, who lived 300 years afterwards, is called *Magni Juris Anglicani Conditor*; not becauſe he firſt made that *law*, but becauſe, being the firſt ſole monarch after the *Heptarchy*, he collected all the *Saxon laws* (which were made in the ſpace of 300 years) into one book; that is, he collected the beſt, and rejected the reſt, and commanding them to be obſerved through the whole kingdom, which before affected only ſeveral parts thereof, it was therefore properly called the *Common law*, becauſe it was *common* to the whole nation; and ſoon after it was called the *folc right*, *i. e.* the *people's right*. The word *Common law* hath three ſignifications: firſt, it is taken for the laws of this realm ſimply, without any other law joined to it; as when it is diſputed what ought of right to be determined by the *Common law*, and what by the *Spiritual law*, or Admiral's court, or the like. Secondly, For the *King's court*, as the *King's Bench* or *Common Pleas*, only to ſhew a difference between them and the baſe courts, as cuſtomary courts, court-barons, county-courts, piepowders, and ſuch like; as when a plea of land is removed out of ancient demeſne becauſe the land is frank-fee, and pleadable at the *Common law*, that is, in the King's court, and not in ancient demeſne, or any other baſe court. Thirdly, and moſt uſually, By the *Common law* is underſtood ſuch laws as were generally taken and holden for law, before any ſtatute was made to alter the ſame; as, neither tenant for life, nor for years, were puniſhable by the *Common law* for doing *waſte* till the ſtatute *Glouc. cap.* 5. was made, which gives action of *waſte* againſt them: but tenant by *courteſy*, and tenant in *dower*, were puniſhable for it before the ſaid ſtatute.

In the reign of *Ed.* 1. *Britton* wrote his learned book of the *Common law* of this realm, which was done by the King's command, and runs in his name, anſwerable to the *Inſtitutions* of the *Civil law*, which *Juſtinian* aſſumes to himſelf, though compoſed by others. *Staundf. Prærog.* 6, 21. This *Britton* is mentioned by *Gwin* to be biſhop of *Hereford*. *Bracton*, a great lawyer, in the time of *Hen.* 3. wrote a very learned treatiſe of the *Common law of England*, held in great eſtimation: and he is ſaid to be Lord Chief Juſtice of the kingdom. And the famous and learned *Glanvil*, Lord Chief Juſtice in the reign of *Hen.* 2. wrote a book of the *Common law*, which is ſaid to be the moſt ancient compoſition extant on that ſubject. Beſides theſe, in the time of *Ed.* 4. the renowned lawyer *Littleton* wrote his excellent book of *Engliſh Tenures*. In King *James* the Firſt's reign, the great oracle of the law Sir *Edward Coke* publiſhed his learned and laborious *Inſtitutes* of our law, and *Commentaries* on *Littleton*. About the ſame time likewiſe, Dr. *Cowell*, a civilian, wrote an *Inſtitute* of our law. And in the reign of King *George* the Firſt, Dr. *Thomas Wood*, a civilian and common lawyer, and at laſt a divine, wrote an *Inſtitute* of the laws of *England*, which is ſomething after the manner of the Inſtitutes of the Civil law.

Common Pleas, *Communia placita*, Is the King's court now held in *Weſtminſter-hall*, but in ancient time moveable; as appears by *Magna charta*, *cap.* 11. and alſo 2 *Ed.* 3. *cap.* 11. & *Pupilla oculi*, *part* 5. *cap.* 22. But Mr. *Gwin* in the *Preface to his Reading* ſaith, that until the time that *Henry* the Third granted the Great charter, there were but two courts in all, called the *King's courts*; whereof one was the *Exchequer*, the other the *King's Bench*, which was then called *Curia Domini Regis*, and *Aula Regia*, becauſe it followed the King and court; and that upon the grant of that charter, the court of *Common Pleas* was erected, and ſettled in one certain place, *viz. Weſtminſter*. And becauſe this court was

ſettled at *Weſtminſter*, therefore after that all writs ran, *Quod ſit coram juſticiariis noſtris apud Weſtmonaſterium*; whereas before it was, *Coram me vel juſticariis meis*, ſimply without addition of place, as he well obſerveth out of *Glanvil* and *Bracton:* the one writing in *Henry* the Second's time, before the court was erected; the other in the later time of *Henry* the Third, who erected this court. All civil cauſes, both real and perſonal, are or were in former times tried in this court according to the ſtrict law of the realm. And by *Forteſcue*, *cap.* 50. it ſeemeth to have been the only court for real cauſes. The chief judge of that court is called *The Lord Chief Juſtice of the Common Pleas*, aſſiſted with three aſſociates, which are created by letters patent from the King, and, as it were, inſtalled or placed upon the bench by the Lord *Chancellor* and Lord *Chief Juſtice of the court*; as appeareth by *Forteſcue*, *cap.* 51. who expreſſes all the circumſtances of this admiſſion. The reſt of the officers belonging to this court are the *cuſtos brevium*, the *prothonotaries* and their *ſecondaries*, the clerk of the *warrants*, clerk of the *eſſoins*, 14 *filazers*, four *exigenters*, a clerk of the *juries*, the *chirographer*, clerk of the *King's ſilver*, clerk of the *treaſury*, clerk of the *ſeal*, of *outlawries*, and the clerk of the *inrolment of fines and recoveries*, clerk of the *errors*, *&c.*

The *cuſtos brevium* is the chief clerk in this court, who receives and keeps all writs returnable therein; and all records of *niſi prius*, which are delivered to him by the clerks of the aſſize of every circuit, *&c.* and he files the rolls together, and carries them into the treaſury of records: he alſo makes out exemplifications, and copies of all writs and records, *&c.* The *prothonotaries* enter and inrol all declarations, pleadings, judgments, *&c.* and they make out all judicial writs, writs of execution, writs of privilege, *procedendo's*, *&c.* The *ſecondaries* are aſſiſtants to the *prothonotaries* in the execution of their offices; and they take minutes, and draw up all orders and rules of court. The *filazers*, who have the ſeveral counties of *England* divided among them, make out all meſne proceſs, as *capias*, *alias*, *pluries*, *&c.* between the original writ and the declaration; and they make all writs of view, *&c.* The *exigenters*, appointed for ſeveral counties, make out all exigents and proclamations in order to outlawry. The *clerk of the warrants* enters all warrants of attorney, inrols deeds of bargain and ſale, and eſtreats all iſſues. The *clerk of the eſſoins* keeps the roll of the eſſoins, wherein he enters them, and nonſuits, *&c.* The *clerk of the juries* makes out all writs of *habeas corpora jurator'*, for juries to appear; and he enters the continuance till the verdict given. The *clerk of the Treaſury* keeps the records of the court, and makes exemplifications of records, copies of iſſues, judgments, *&c.* The *clerk of the ſeals* ſeals all writs and meſne proceſs; alſo writs of outlawry and *ſuperſedeas*, and all patents. The *clerk of the outlawries* makes out the writs of *capias utlagatum.* The *clerk of the errors* is for the allowance of writs of error, *&c.* The *clerk of the Inrolments* of fines and recoveries returns all writs of covenant, writs of entry and ſeiſin, and inrols and exemplifies fines, *&c.* The *clerk of the King's ſilver* enters the ſubſtance of the writ of covenant. And the *chirographer* ingroſſeth all fines, and delivers the indentures to the parties, *&c.* And to theſe officers may be added, *a proclamator*, a *keeper* of the court, *cryer*, and *tipſtaffs*; beſides the *warden of the Fleet.* There are *attornies* of this court, whoſe number is unlimited; and none may plead at the bar of the court, or ſign any ſpecial pleadings, but *ſerjeants* at law.

Common Prayer (*Preces Publicæ*) Is the liturgy, or *prayers* uſed in the church of *England.* It is the particular duty of clergymen every *Sunday*, *&c.* to uſe the publick form of *prayer* preſcribed by the book of *Common Prayer:* and if any incumbent be reſident upon his living, as he ought to be, and keep a curate, he is obliged by the *act of uniformity* once every month at leaſt, to read the *common prayers* of the church, according as they are directed by the book of *Common Prayer*, in his pariſh church, in his own perſon, or he ſhall forfeit 5 *l.* for every time he fails therein. Stat. 14 *Car.* 2. *cap.* 4. Alſo by that ſtatute the book of *Common Prayer* is to be provided in every pariſh, under the penalty of 3 *l.* a month: and the *Common Prayer* muſt be read before every *lecture*; the whole appointed for the day, with all the circumſtances and ceremonies, *&c.* and, by one of the *canons of the church*, miniſters before all *ſermons* are to move the people to join in a ſhort *prayer* for the catholick church; and the whole congregation of chriſtian people, *&c.* for the King and royal family; the miniſters of God's word, nobility, magiſtrates, and whole commons of the realm, *&c.* and concludes with the *Lord's prayer*. *Can.* 55. Refuſing to uſe the *Common Prayer*, or uſing any other open *prayers*, *&c.* is puniſhable by ſtat. 1 *Eliz. c.* 2. See **Church, Publick Worſhip Service and Sacraments.**

Common Recovery. See **Fine.**

Common weal, Is underſtood in our law to be *bonum publicum*, and is a thing much favoured; and therefore the law doth tolerate many things to be done for *common good*, which otherwiſe might not be done: and hence it is, that monopolies are void in law; and that bonds and covenants to reſtrain free trade, tillage, or the like, are adjudged void. 11 *Co. Rep.* 50. *Plowd.* 25. *Shep. Epit.* 270.

Commorancy (*Commorantia*, from *Commoner*) An abiding, dwelling, or continuing in any place; as an inhabitant of a houſe in a vill, *&c.* And *commorance* for a certain time may make a ſettlement in a pariſh. *Dalt.* See **Poor.**

Commorth. See **Comorth.**

Commote (from the Britiſh *Cwmmwd*, *i. e. Provincia*) in *Wales*, Is half a *cantred* or hundred, containing fifty villages. *Stat. Walliæ*, 12 *Ed.* 1. and 21 *H.* 8. *c.* 26. *Wales*, was anciently divided into three *provinces*, *North Wales*, *South Wales*, and *Weſt Wales*, otherwiſe called *Powyſland*; and each of theſe were again ſubdivided into *cantreds*, and every cantred into *commotes.* Sir *Jo. Dodridge's Hiſtory of Wales*, *fol.* 2. So *Brecknockſhire* is found to have three *cantreds*, and eight *commotes. Hiſtory of Wales.* It ſignifies alſo a great ſeigniory, and may include one or divers manors. *Coke on Lit. fol.* 5. It is Sir *Henry Spelman's* opinion, that a *commote* is half an hundred; but *Silveſter Giraldus*, in his *Itinerary of Wales*, tells us it is but a quarter of an hundred, *viz. Gruffino filio Reſi unius* commoti *ſolum*, *id eſt*, *quartæ partis cantredi*, *&c.* Itinerar. *lib.* 1. c. 2.

Communance, The commoners, or tenants and inhabitants, who had the right of *common*, or *commoning* in open fields, or woods, were formerly called the *communance*, and *commaunce*, *communa* or *communia paſturæ*, the common paſture: and *communare*, to enjoy the right of *common.*

Commune. See **Comminalty.**

Commune Concilium Regni Angliæ. The common council of the King and people aſſembled in parliament. See **Parliament.**

Communia placita non tenenda in ſcaccario, Is a writ directed to the Treaſurer and Barons of the *Exchequer*, forbidding them to hold plea between *common* perſons in that court, where neither of them belong thereto. *Reg. of Writs*, *fol.* 187. *b.*

Communication (*Communicatio*) A talking, conſultation, or conferring with. Where there is only a *parley* betwixt two, and no perfect agreement, that is, no ſuch contract between them as on which to ground an action, it is called a *communication.*

Communi cuſtodis, Is a writ that did lie for that lord whoſe tenant, holding by knight's ſervice, died, and left his eldeſt ſon under age, againſt a ſtranger that entered the land, and obtained the ward of the body. *Old Nat. Br. fol.* 89. But this writ is become obſolete ſince wardſhips were taken away by the ſtat. 12 *Car.* 2 *c.* 24.

Communion. See **Lord's Supper.**

Communitas Regni. *Tota terræ communitas*, *regni totius communitas.* Theſe phraſes have been of late years thought to ſignify the ordinary people and freeholders; or at beſt knights and gentlemen, under the degree of *barons*, as if they were the *community* of the land, and had been always eſteemed. But anciently the *barons* only, and tenants *in capite*, or military men, were the *community*

nity of the kingdom, and those only meant, taken and reputed as such in our most ancient historians and records. See Dr. *Brady's Glossary*, at the end of his *Introduction to Eng. Hist.*

Community of the kingdom. See **Communitas regni.**

Comorth (*Comortha*) from the British *Cymmorth*, (*subsidium*) a contribution; *subsidium a pluribus collatum.* Stat. 4 *H.* 4. *c.* 27. 26 *H.* 8. *c.* 6. prohibits the levying any such in *Wales*, or the marches, *&c.* It seems this *comorth* was gathered at the marriages, and when young priests said or sung their first masses, and sometimes for redemption of murders or felonies.

Companage, *Fr.* all kind of food, except bread and drink. Some tenants of the manor of *Feskerton* in *Com. Nott.* when they performed their boons or work-days to their lord, had three boon loaves with *companage* allowed them. *Reg. de Thurgarton*, cited in the *Antiquity of Nottinghamshire.* Yet the learned *Spelman* interprets it to be *Quicquid cibi cum pane sumitur.* But in the *Cartular. Abbat. Glaston. MS. pag.* 74. we find *In pane, vino, & cervisia, pisce, sive alio quocunque genere* companagii, *sive leguminis.*

Companion of the garter, Is one of the knights of that most honourable order. 24 *H.* 8. *c.* 15. See **Garter.**

Compellativum, An adversary or accuser. Among the laws of King *Athelstan* we read that the bishop should *in* compellativum *adlegiationem docere nequis alium perperam cogat jurejurando vel in ordalio.*

Compertorium, A judicial inquest in the Civil law, made by delegates, or commissioners to find out, or relate the truth of a cause.——*Et in carnibus porcinis emptis pro clericis domini archiepiscopi super* compertorium apud Burcestre.——Paroch. Antiq. p. 575.

Composition (*Compositio*) An agreement or contract between a parson, patron, and ordinary, *&c.* for money or other things in lieu of tithes. Land may be exempted from the payment of tithes, where *compositions* have been made: and real compositions for tithes are to be made by the concurrent consent of the parson, patron, and ordinary. Real *compositions* are distinguished from personal contracts; for a *composition* called a personal contract is only an agreement between the parson and the parishioners to pay so much instead of tithes; and though such agreement is confirmed by the ordinary, yet that doth not make it a real *composition*, because he ought to be a party to the deed of *composition. March's Rep.* 87. The *compositions* for tithes made by the consent of the parson, patron, and ordinary, by virtue of 13 *Eliz. c.* 10. shall not bind the successor unless made for twenty-one years or three lives, as in case of leases of ecclesiastical corporations, *&c. Compositions* were at first for a valuable consideration, so that though in process of time, upon the increase of the value of the lands such *compositions* do not amount to the value of the tithes, yet custom prevails, and from hence arises what we call a *modus decimandi. Hob.* 29. The word *composition* hath likewise another meaning, *i. e. decisio litis.* See **Tithes.**

Compositio mensurarum, Is the title of an ancient ordinance for measures, not printed, and mentioned in the statute of 23 *H.* 8. *cap.* 4.

Compostum, Compost, or dung. *Compostare*, to lay on such *compost.*——Walterus *archiepiscopus* Cantuar. *remisit* H. *priori & conventus ecclesiæ* Cantuar. *manerium suum de* Caldecote,——*& prædicti prior & conventus*——*terras prædicti manerii faldabunt &* compostabunt *de exitu bestiarum ibidem. Dat.* 15 Jul. 1326. Reg. Ecclesiæ Christi Cantuar. MS.

Compriut, Properly signifies to print together; but as it is used in common speech among dealers in books, it intends a surreptitious *printing* of another's copy, to make a gain thereby to himself. This is contrary to the stat. made 14 *Car.* 2. *cap.* 33. 16 *Car.* 2. *cap.* 6. and 16 *&* 17 *Car.* 2. *cap.* 7. and 17 *Car.* 2. *cap.* 4. *apud Oxon.*

Compromise (*Compromissum*) We usually say *compromise* is a mutual promise of two or more parties at difference, to refer the ending of their controversies at the arbitrament and equity of one or more arbitrators. *West. Par.* 2. *Symb.* tit. *Compromise, sect.* 1. defines it thus; A *compromise* or submission is a faculty or power of pronouncing sentence between parties at controversy, given to arbitrators by the parties mutual private consent, without publick authority.

Comptroller. See **Controller.**

Compurgator, One that by oath justifies another's innocence. See **Law** and **Oath.**

Computation, Is used in the Common law for the true and indifferent account and construction of time, so that neither the one party or the other shall do wrong, nor the determination of times referred at large be taken one way or other, but computed according to the just judgment of the law. As if indentures of demise are ingrossed, bearing date the 11th of *May* 1669. *To have and to hold* the land in *S.* for three years from henceforth, and the indentures are delivered the 4th day of *June* in the year aforesaid; in this case, *from henceforth* shall be accounted from the day of the delivery of the indentures, and not by any *computation* from the date: And if the said indenture be delivered at four of the clock in the afternoon of the said fourth day, this lease shall end in the third day of *June* in the third year, for the law in this *computation* rejects all fractions, or divisions of the day, for the uncertainty, which always is the mother of contention; so where the statute of inrolments, made *anno* 27 *H.* 8. *c.* 16. is, that the writings shall be inrolled within six months after the date of the same writings indented; if such writings have date, the six months shall be accounted from the date, and not from the delivery; but if it want date, then shall it be accounted from the delivery. *Co. lib.* 5. *fol.* 1. If any deed be shewed to a court in *Westminster*, the deed, by judgment of law, shall remain in court all the term in which it is shewed, for all the term in law is but as one day. *Co. lib.* 5. *fol.* 1. If a church be void, and the true patron doth not present within six months, then the bishop of the diocese may collate his chaplain; but these six months shall not be *computed* according to 28 days to the month, but according to the *Calendar:* and there is a great diversity in our common speech in the singular number, as a *twelvemonth*, which includes all the year, according to the *Calendar*; and *twelve months*, which shall be *computed* according to 28 days to every month. *Co. lib.* 6. *fol.* 61. *b.*

Computo, Is a writ so called of the effect, because it compelleth a bailiff, receiver, or chamberlain to yield his account. *Old Nat. Brev. fol.* 58. It is founded upon the statute of *West.* 2. *cap.* 2. *an.* 13 *Ed.* 1. And it lieth also for executors of executors. 15 *Ed.* 3. stat. *de provis. victual. cap.* 5. Thirdly, against the guardian in socage, for waste made in the minority of the heir. *Marlb. cap.* 7. And see farther, where, how, and for what it lies, *Reg. Orig. f.* 135. *Old Nat. Brev. ubi supra, & F. N. B. fol.* 116.

Con, The same with *Ken.*

Conable (Fr. *convenable, i. e.* convenient or fitting) — "We ordain, that there be made a hache or conabyl heythe, crestyd with pikes of herne, to fore the entry of your kechyne, that no strange peopille may enter with certain clekets, advised by you, and be your steward to such persons, as you and them think honest and *conable.* Artic. Decani & Capit. Sti, Pauli Priorat. S. Helenæ dat. 21 *Junii* 1439.

Conragii, The barony of *Kendall.*

Concealers (*Concelatores*) Are such as find out *concealed* lands, that is, such lands as are privily kept from the King by common persons, having nothing to shew for their title or estate therein. Stat. 39 *Eliz. cap.* 22. and 21. *Jac. cap.* 2. They are so called from *concelando*, as *mons* from *movenda, per Antiphrasin.* See 3 *part Inst. fol.* 188. where the author calls them *Turbidum hominum genus.*

Concess, A word of frequent use in conveyances, creating a covenant in law; as *dedi* makes a warranty *Co. on Littleton, fol.* 384. This word is of general extent, and said to amount to a grant, feoffment, lease and release, *&c.* 2 *Saund.* 96.

Concionator,

Concionator, A common-council-man, a *mot-worthy*, a freeman called to the hall, or aſſembly.——*Quodam tempore cum conveniſſent* concionatores Angliæ *apud* Londoniam, *&c. Hiſtor. Elien. edit. Gale, cap.* 46.

Concluſion (*Concluſio*) Is when a man upon his own act upon record hath charged himſelf with a duty, or other thing. As if a freeman confeſs himſelf to be the villain of *A.* upon record, and afterward *A.* takes his goods, he ſhall be concluded to ſay in any other action or plea afterwards, that he is free, by reaſon of his own confeſſion. So if the ſheriff, upon a *capias* to him directed, returns that he hath taken the body, and yet hath not the body in court at the day of the return, he ſhall be amerced; and if it were upon a *capias ad ſatisfac.* the plaintiff may have his action againſt the ſheriff for the eſcape; for by ſuch returns the ſheriff hath *concluded* himſelf. And this word *concludes* is taken in another ſenſe, as for the end or latter part of any declaration, bar, replication, *&c.* As where to the bar there ought to be a replication, the *concluſion* of his plea ſhall be, *Et hoc paratus eſt verificare.* If in dower, the tenant plead, that he was never ſeized to render dower, the *concluſion* ſhall be *Et de hoc ponit ſe ſuper patriam.* And in what manner the *concluſion* ſhall be, according to the nature of ſeveral actions, ſee *Kitchin, fol.* 219, 220.

Concord (*Concordia*) Is the common law, by a peculiar ſignification, defined to be the very agreement between parties, that intend the levying of a fine of lands one to the other, how, and in what manner the land ſhall paſs; in the form whereof many things are to be conſidered. *Weſt. part* 2. *Symb.* tit. *Fines* and *Concords, ſect.* 30. whom read at large. *Concord* is alſo an agreement made upon any treſpaſs committed between two or more, and is divided into a *concord executory*, and *concord executed.* See *Plowd. fol.* 5 & 6. *Reniger* and *Fogaſſa*'s caſe, where it appeareth by ſome opinions, that the one bindeth not, as being imperfect; the other abſolute, and ties the parties: and yet by ſome opinions in the ſame caſe, it is affirmed, that agreements executory are perfect, and no leſs bind than agreements executed, *fo.* 8. *b.*

Concubaria, A fold, a pen, or place where cattle lie together.——Willielmus de Putot *concedit hoſpitali de* Thelesford *unam dimidiam virgatæ terræ in* Eſſora—— *quiete & integre in viis, ſemitis, terris, pratis,* concubariis *& paſturis, cum omnibus ayſiamentis.*——Cartular. de Thelesford. MS.

Concubinage (Fr.) Signifies properly the keeping a whore for one's own filthy uſe: but it is uſed as an exception againſt her who ſues for dower, alledging thereby, that ſhe was not a wife, lawfully married to the party, in whoſe lands ſhe ſeeks to be endowed, but his *concubine. Britton, cap.* 107. *Bracton, lib.* 4. *tract.* 6. *cap.* 8. who tells us, That *concubinage* may be lawful, *quoad hæredem & hæreditatis ſucceſſionem*; but not *quoad dotem, lib.* 3. *c.* 28. By which it muſt not be intended ſuch *concubinage* which tends to fornication; but ſuch as was allowed in ſcripture to the patriarchs, *viz. Secundum legem matrimonii, infra dignitatem tamen uxoris ducitur.*

Condate, *Congleton* in *Cheſhire.*

Condercum, *Cheſter upon the Street*, in the biſhoprick of *Durham.*

Conders, May ſeem to proceed from the French *conduire*, i. e. *gubernare*; they are ſuch as ſtand upon high places near the ſea-coaſts, at the time of herring-fiſhing, to make ſigns with boughs, *&c.* in their hands unto the fiſhers, which way the ſhoal of herrings paſſeth; for that doth appear better to ſuch as ſtand upon ſome high cliff on the ſhore, by a kind of blue colour that the ſaid fiſh cauſeth in the water, than to thoſe that are in the ſhips. Theſe are otherwiſe called *hewers* (probably from the French *huyer, exclamare*) and *balkers, directors*, and *guiders*, as appeareth by the ſtatute *anno* 1 *Jacobi, c.* 23.

Condis, A ridge of land: *Quandam parcellam cujuſdam* condis *juxta campum ipſorum.* Du Freſne.

Condition (*Conditio*) Is a reſtraint or bridle annexed to a thing, ſo that by the not performance, the party to it ſhall receive prejudice and loſs, and by the performance, commodity and advantage. *Weſt. part* 1. *Symb. lib.* 2. *ſect.* 156. and *Co. lib.* 3. *Pennant*'s caſe, *fol.* 64. Of theſe *conditions* there are divers kinds, *condition collateral, condition in fact, condition in law, condition expreſt, and condition implied, &c. Condition collateral* is that which is annexed to any collateral act, as that the leſſee ſhall not go to *Canterbury. Co. lib.* 3. *fol.* 65. *Condition in fact* is that which is expreſt in plain words in any feoffment, leaſe, or grant: *Condition in law* is implied, though not at all expreſt in the grant. Alſo *conditions* are either precedent and going before the eſtate, and are executed, or elſe ſubſequent and executory. *Condition precedent* doth get and gain the thing or eſtate made upon that *condition*, by the performance of it. *Condition ſubſequent* keeps and continues the thing or eſtate made upon *condition*, by the performance of it. *Condition precedent* is, when a leaſe is made for life to one upon *condition*, that if the leſſee will pay to the leſſor 20*l.* at ſuch a day, then he ſhall have fee-ſimple. Here the *condition* precedes the eſtates in fee-ſimple, and upon performance of the *condition* gains the fee-ſimple. *Condition ſubſequent* is, when one grants to *J. S.* his manor of *Dale* in fee-ſimple, upon *condition*, that the grantee ſhall pay to him at ſuch a day 20*l.* or elſe that his eſtate ſhall ceaſe; here the *condition* is *ſubſequent*, and following the eſtate in fee, and upon the performance thereof continues the eſtate. *Cowell, edit.* 1727.

By the word *condition* is uſually underſtood ſome quality annexed to a real eſtate, by virtue of which it may be defeated, enlarged, or created upon an uncertain event. *Co. Lit.* 201.

Alſo qualities annexed to perſonal contracts and agreements are frequently called *conditions*, and theſe muſt alſo be interpreted according to the real intentions of the parties, and are uſually taken moſt ſtrongly againſt the party to whom they are meant to extend, leſt by the obſcure wording of his own contract he ſhould find means to evade and elude it. 1 *Bac. Abr.* 395.

1. *By what words conditions are created by a deed, and in a will.*

2. *Of conditions precedent and ſubſequent.*

3. *What ſhall excuſe the performance of conditions*, viz. *the act of God, act of the law, act of the parties, and act of a ſtranger.*

1. *By what words conditions are created in a deed, and in a will.*

Lord *Coke* ſays, that by inſerting the very word *condition* or *ſub conditione*, conditions are moſt properly created, but there are alſo others, ſays he, that will do as effectually as the word *proviſo*, but then it muſt not depend upon another ſentence; alſo it muſt be the words of the grantor, and compulſory to enforce the grantee to do ſome act. *Co. Lit.* 203.

It is ſaid to have been adjudged, that a feoffment *ea intentione* does not make a condition, and it is only a confidence or truſt, unleſs an expreſs re-entry be limited. 1 *Rol. Abr.* 407.

Recoveries to an uſe before 27 *Hen.* 8. leaſed by indenture for ninety-nine years, and the leſſee, by the ſame deed, covenanted with the recoverors to pay the rent to *ceſtui que uſe*, his heirs and aſſigns; *proviſo ſemper*, that if *ceſtui que uſe* makes not his heirs male his aſſigns, that then he ſhall pay his rent to the recoverors, their heirs and aſſigns; this *proviſo* makes not a condition, but only abridges the covenant. *Cro. Eliz.* 73.

If a man leaſes to a woman for forty years, upon condition that *ſi illa tamdiu viveret & cuſtodiret ſe ipſam* a ſole widow, and ſhould inhabit upon the premiſſes; this is not any condition, for the word *ſi* makes the intention uncertain, whether another thing was intended beſides the ceſſer of the term, or the re-entry. 1 *Rol. Abr.* 410.

So if a man leaſes lands to another, *proviſo ſi* the rent be arrear, this is not a condition, becauſe the word *ſi* makes the intention uncertain; for where the *proviſo* is hypothetical, it ought to be ſhewed what he would have. 1 *Rol. Abr.* 410.

If

If a man leaſes land to another, *proviſo if the rent be behind, it ſhall be lawful for him to reſtrain, and not being ſufficient, the ground to re-enter into the premiſſes, and the ſame to have again in his former eſtate*; that is no good condition, for the words are not, that he ſhall reſtrain the goods upon the tenement; nor is it known what is intended by the word *ſufficient, ſcilicet*, ſufficient reparation, rent, *&c.* and the words *the ground to re-enter into the premiſſes*, are inſenſible. 1 *Rol. Abr.* 410.

A. and *B.* were bound to ſtand to the award of certain perſons, who *awarded that A. ſhould pay unto B.* 20 *s. per ann. during ſix years, towards the education and bringing up of ſuch a one an infant, and within the two firſt years* of the ſaid term *the infant died*, ſo as now there needeth not any ſupply towards his education; yet it was adjudged, that the yearly ſum ought to be paid for the whole term after, for the words (towards his education) are but to ſhew the intent and conſideration of the payment of that ſum, and no words of condition, *&c.* 2 *Le.* 154. *in pl.* 186. 19 *Eliz. C. B. Anon'.*

In ſome caſes this word *pro* does not make a condition; as if before the ſtat. of *Will.* 3. land was given *pro homagio ſuo*, there, if the homage be not done, the feoffor could nor re-enter, but he ought to diſtrain. *Arg.* 2 *Le.* 128. *Mich.* 29 *Eliz.*

Divers words of themſelves make eſtates upon condition; among which is *ſub conditione*; as if *A.* enfeoffs *B.* to have to *B.* and his heirs, upon condition that *B.* and his heirs pay, *&c.* to the ſaid *A.* annually ſuch a rent, *&c.* the feoffee has an eſtate upon condition. *Litt. ſ.* 328.

Regularly the word (*pro*) does not import a condition, tho' it has the force of a condition *when the thing granted is executory, and the conſideration of the grant is a ſervice, or ſome ſuch thing, for which there is no remedy, but the ſtopping the thing granted*, as in the caſe of an annuity granted *pro conſilio*, or for executing the office of a ſteward of a court, or the ſervice of a captain or keeper of a fort; here the failure of giving counſel, or performing the ſervice, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counſel, or recompence for it, but by ſtopping the annuity; and in theſe caſes the condition is not precedent, and therefore the performance thereof need not be averred when the annuity is demanded. *Per Hobart* Ch. J. *Hob.* 41. *Mich.* 10 *Jac.* in the caſe of *Cowper* v. *Andrews.*

Leaſe of land paying rent is no condition; ſo a power *to dig up trees, making up the hedge again*, is not a condition, but *covenant* lies for not repairing the hedge. 2 *Show.* 202. *pl.* 209. *Paſch.* 34 *Car.* 2. *B. R. Anon'.*

If *A.* enfeoffs *B.* upon condition that he ſhall render to *C.* and his heirs, a yearly rent of 20 *s.* and if *B.* and his heirs fail of payment thereof, that then *A.* and his heirs may enter, this is a good condition; for though a rent cannot be reſerved to a ſtranger, yet yearly rent in this caſe ſhall be intended of a yearly ſum of 20 *s.* in groſs. *Lit. ſect.* 345. *Co. Lit.* 213. *a.*

If *A.* being ſeiſed in fee of the manor of *B.* and of divers lands in *C.* then in the poſſeſſion of *D.* for ſeveral years to come, makes a feoffment thereof to *E.* to the uſe of himſelf in tail male, remainder to *F.* in tail male, *&c.* provided that *F.* or the heirs male of his body, in whomſoever of them the inheritance in tail *of all the premiſſes* ſhall happen to be, ſhall pay to the daughter of *A.* 200 *l.* according to the laſt will of *A.* and *A.* makes a letter of attorney to *J. S.* to enter into the manor of *B.* and the lands in *C.* and in his name to take poſſeſſion and deliver it to *E.* whereupon poſſeſſion is given to *C.* of all but what was in the poſſeſſion of *D.* and *D.* never attorns, ſo that the lands in *C.* paſſed not; and after *A.* by will bequeaths 200 *l.* to his daughter, and dies without iſſue, yet *F.* is not bound by this condition, becauſe he hath not *all the land* according to the purport of the condition, which was, that he that had all ſhould pay, *&c.* and a condition ought to be taken ſtrictly. *Poph.* 102, 103.

If the condition of an obligation be in this manner, viz. *The condition of this obligation is ſuch, that if the obligor ſhall appear* coram Domino Rege apud Weſtmon' *ſuch a day*, ad reſpond', *&c. then the condition of this obligation ſhall be void, or elſe the ſame ſhall be in full power and virtue*; yet this is a good condition, for the ſenſe is perfect without theſe laſt words, and they ſhall be rejected for their abſurdity and repugnancy. 2 *Sand.* 78.

As the intent of the teſtator chiefly governs in wills, ſuch conſtruction is always made of the words as will beſt ſupport his intent, and therefore theſe words *ad faciendum, faciendo ea intentione, ad effectum, &c.* in a will create a condition. *Co. Lit.* 204. *a.* See **Deviſe, Will.**

So if a man ſeiſed of ſocage lands, having two daughters, deviſes it to one of the daughters, to have and to hold to her and her heirs, to pay to her ſiſter a certain ſum of money at a certain day; theſe words make a condition; ſo that the other ſiſter, if the money is not paid, may enter in moiety for the condition broke, becauſe otherwiſe ſhe ſhall be remedileſs. 1 *Rol. Abr.* 410, 411. *Cro. Eliz.* 146.

But if a man deviſes lands to *B.* for life, paying to *C.* 6 *l.* rent yearly, which he wills to be paid at two feaſts half-yearly, and if it be arrear, then it ſhall be lawful to *C.* to diſtrain; it ſeems this word *paying* makes not a condition, inaſmuch as a diſtreſs is limited for non-payment thereof. 1 *Rol. Abr.* 411.

If a man deviſes land to his executor to ſell, and to make diſtribution of the money for his ſoul, and dies; if the executor does not ſell it, the heirs may enter, for this creates a condition. 1 *Rol. Abr.* 410. 38 *Aſſ.* 3.

A. deviſed lands in *London to B. and C. to hold in common, upon condition to pay a rent to his wife at the four uſual feaſts of the year*; *and if the rent be behind by ſix weeks, being lawfully demanded, that it ſhall be lawful for the wife to diſtrain*; and added, that his full intent was that ſhe ſhould be annually paid the ſaid rent accordingly. The queſtion was, if the entry of the heir be lawful or not? or if the penalty of the expreſs condition be deſtroyed by the penalty of the diſtreſs, and ſo a limitation of the payment of the rent to the feme, and the heir to take no advantage of the breach of the condition? *Manwood* and *Mounſon* held, that the heir ſhould not enter for the breach; but *Dyer* and *Harper e contra* clearly; and ſo was the opinion of *Wray* Ch. J. and *Saunders* Ch. B. *in præſentia Manwood ad Menſam*, and that both penalties, *viz.* the condition and re-entry, and the diſtreſs to the feme for non-payment, are good remedies and ſecurities for the firm payment of the rent to the feme according to the intent of her baron; and as to the demand of the rent, they thought ſhe need not make any ſuch demand, but that it is payable by the deviſees at their peril, if they would ſave their land; but that the feme ought to demand it before ſhe makes any diſtreſs. *D.* 348. *a. b. pl.* 13. *Hill.* 18 *Eliz. Anon'.*

A. ſeiſed of land in fee, by his will in writing *granted a rent-charge* of 5 *l. per ann.* out of it *to his younger ſon, towards his education and bringing-up in learning*; and if in pleading the deviſee ought to aver, that he was brought up in learning, was the queſtion; and it was holden by *Dyer, Manwood*, and *Mounſon*, that ſuch averment needs not, for the deviſe is not conditional, and therefore, altho' he be not brought up in learning, yet he ſhall have the rent. 2 *Le.* 154. *pl.* 186. 19 *Eliz. C. B. Anon'.*

A man deviſed land to his wife, *proviſo my will is, that ſhe ſhall keep it in good repairs*, cited *per cur.* to have been adjudged. *Le.* 174. *in pl.* 242. *Trin.* 30 *Eliz.*

A. deviſed lands *to B. paying* 40 *l. to C.* it is a good condition; for *C.* has no other remedy, and a will ought to be expounded according to the intent of the deviſor, *per Wray. Le.* 174. *pl.* 242. *Trin.* 30 *Eliz. B. R.*

A man deviſed a houſe in *London* to his wife, *provided if ſhe clearly departs out of* London, *and dwells in the country, that ſhe ſhall have a rent out of the ſame, &c.* It was agreed, that this was a good proviſo to determine her eſtate, though there be no words that the eſtate ſhall ceaſe, *&c. Cro. E.* 238. *pl.* 5. *Trin.* 33 *Eliz. B. R. Allen* v. *Hill.*

2. *Of conditions precedent and ſubſequent.*

Conditions precedent are ſuch as muſt be punctually performed before the eſtate can veſt; but on a condition

Concionator, A common-council-man, a *mot-worthy*, a freeman called to the hall, or aſſembly.——*Quodam tempore cum conveniſſent* concionatores Angliæ *apud* Londoniam, *&c. Hiſtor. Elien. edit. Gale, cap.* 46.

Concluſion (*Concluſio*) Is when a man upon his own act upon record hath charged himſelf with a duty, or other thing. As if a freeman confeſs himſelf to be the villain of *A.* upon record, and afterward *A.* takes his goods, he ſhall be concluded to ſay in any other action or plea afterwards, that he is free, by reaſon of his own confeſſion. So if the ſheriff, upon a *capias* to him directed, returns that he hath taken the body, and yet hath not the body in court at the day of the return, he ſhall be amerced; and if it were upon a *capias ad ſatisfac.* the plaintiff may have his action againſt the ſheriff for the eſcape; for by ſuch returns the ſheriff hath *concluded* himſelf. And this word *concludes* is taken in another ſenſe, as for the end or latter part of any declaration, bar, replication, *&c.* As where to the bar there ought to be a replication, the *concluſion* of his plea ſhall be, *Et hoc paratus eſt verificare.* If in dower, the tenant plead, that he was never ſeized to render dower, the *concluſion* ſhall be *Et de hoc ponit ſe ſuper patriam.* And in what manner the *concluſion* ſhall be, according to the nature of ſeveral actions, ſee *Kitchin, fol.* 219, 220.

Concord (*Concordia*) Is the common law, by a peculiar ſignification, defined to be the very agreement between parties, that intend the levying of a fine of lands one to the other, how, and in what manner the land ſhall paſs; in the form whereof many things are to be conſidered. *Weſt. part* 2. *Symb.* tit. *Fines* and *Concords, ſect.* 30. whom read at large. *Concord* is alſo an agreement made upon any treſpaſs committed between two or more, and is divided into a *concord executory*, and *concord executed.* See *Plowd. fol.* 5 & 6. *Reniger* and *Fogaſſa*'s caſe, where it appeareth by ſome opinions, that the one bindeth not, as being imperfect; the other abſolute, and ties the parties: and yet by ſome opinions in the ſame caſe, it is affirmed, that agreements executory are perfect, and no leſs bind than agreements executed, *fo.* 8. *b.*

Concubaria, A fold, a pen, or place where cattle lie together.——Willielmus de Putot *concedit hoſpitali de* Thelesford *unam dimidiam virgatæ terræ in* Eſſora—— *quiete & integre in viis, ſemitis, terris, pratis,* concubariis *& paſturis, cum omnibus ayſiamentis.*——Cartular. de Thelesford. MS.

Concubinage (Fr.) Signifies properly the keeping a whore for one's own filthy uſe: but it is uſed as an exception againſt her who ſues for dower, alledging thereby, that ſhe was not a wife, lawfully married to the party, in whoſe lands ſhe ſeeks to be endowed, but his *concubine. Britton, cap.* 107. *Bracton, lib.* 4. *tract.* 6. *cap.* 8. who tells us, That *concubinage* may be lawful, *quoad hæredem & hæreditatis ſucceſſionem*; but not *quoad dotem, lib.* 3. *c.* 28. By which it muſt not be intended ſuch *concubinage* which tends to fornication; but ſuch as was allowed in ſcripture to the patriarchs, *viz. Secundum legem matrimonii, infra dignitatem tamen uxoris ducitur.*

Condate, *Congleton* in *Cheſhire.*

Condercum, *Cheſter upon the Street*, in the biſhoprick of *Durham.*

Conders, May ſeem to proceed from the French *conduire*, i. e. *gubernare*; they are ſuch as ſtand upon high places near the ſea-coaſts, at the time of herring-fiſhing, to make ſigns with boughs, *&c.* in their hands unto the fiſhers, which way the ſhoal of herrings paſſeth; for that doth appear better to ſuch as ſtand upon ſome high cliff on the ſhore, by a kind of blue colour that the ſaid fiſh cauſeth in the water, than to thoſe that are in the ſhips. Theſe are otherwiſe called *hewers* (probably from the French *huyer, exclamare*) and *balkers, directors*, and *guiders*, as appeareth by the ſtatute *anno* 1 *Jacobi, c.* 23.

Condis, A ridge of land: *Quandam parcellam cujuſdam* condis *juxta campum ipſorum.* Du Freſne.

Condition (*Conditio*) Is a reſtraint or bridle annexed to a thing, ſo that by the not performance, the party to it ſhall receive prejudice and loſs, and by the performance, commodity and advantage. *Weſt. part* 1. *Symb. lib.* 2. *ſect.* 156. and *Co. lib.* 3. *Pennant*'s caſe, *fol.* 64. Of theſe *conditions* there are divers kinds, *condition collateral, condition in fact, condition in law, condition expreſt, and condition implied, &c. Condition collateral* is that which is annexed to any collateral act, as that the leſſee ſhall not go to *Canterbury. Co. lib.* 3. *fol.* 65. *Condition in fact* is that which is expreſt in plain words in any ſeoffment, leaſe, or grant: *Condition in law* is implied, though not at all expreſt in the grant. Alſo *conditions* are either precedent and going before the eſtate, and are executed, or elſe ſubſequent and executory. *Condition precedent* doth get and gain the thing or eſtate made upon that *condition*, by the performance of it. *Condition ſubſequent* keeps and continues the thing or eſtate made upon *condition*, by the performance of it. *Condition precedent* is, when a leaſe is made for life to one upon *condition*, that if the leſſee will pay to the leſſor 20*l.* at ſuch a day, then he ſhall have fee-ſimple. Here the *condition* precedes the eſtates in fee-ſimple, and upon performance of the *condition* gains the fee-ſimple. *Condition ſubſequent* is, when one grants to *J. S.* his manor of *Dale* in fee-ſimple, upon *condition*, that the grantee ſhall pay to him at ſuch a day 20*l.* or elſe that his eſtate ſhall ceaſe; here the *condition* is *ſubſequent*, and following the eſtate in fee, and upon the performance thereof continues the eſtate. *Cowell, edit.* 1727.

By the word *condition* is uſually underſtood ſome quality annexed to a real eſtate, by virtue of which it may be defeated, enlarged, or created upon an uncertain event. *Co. Lit.* 201.

Alſo qualities annexed to perſonal contracts and agreements are frequently called *conditions*, and theſe muſt alſo be interpreted according to the real intentions of the parties, and are uſually taken moſt ſtrongly againſt the party to whom they are meant to extend, leſt by the obſcure wording of his own contract he ſhould find means to evade and elude it. 1 *Bac. Abr.* 395.

1. *By what words conditions are created by a deed, and in a will.*

2. *Of conditions precedent and ſubſequent.*

3. *What ſhall excuſe the performance of conditions*, viz. *the act of God, act of the law, act of the parties, and act of a ſtranger.*

1. *By what words conditions are created in a deed, and in a will.*

Lord *Coke* ſays, that by inſerting the very word *condition* or *ſub conditione*, conditions are moſt properly created, but there are alſo others, ſays he, that will do as effectually as the word *proviſo*, but then it muſt not depend upon another ſentence; alſo it muſt be the words of the grantor, and compulſory to enforce the grantee to do ſome act. *Co. Lit.* 203.

It is ſaid to have been adjudged, that a feoffment *ea intentione* does not make a condition, and it is only a confidence or truſt, unleſs an expreſs re-entry be limited. 1 *Rol. Abr.* 407.

Recoveries to an uſe before 27 *Hen.* 8. leaſed by indenture for ninety-nine years, and the leſſee, by the ſame deed, covenanted with the recoverors to pay the rent to *ceſtui que uſe*, his heirs and aſſigns; *proviſo ſemper*, that if *ceſtui que uſe* makes not his heirs male his aſſigns, that then he ſhall pay his rent to the recoverors, their heirs and aſſigns; this *proviſo* makes not a condition, but only abridges the covenant. *Cro. Eliz.* 73.

If a man leaſes to a woman for forty years, upon condition that *ſi illa tamdiu viveret & cuſtodiret ſe ipſam* a ſole widow, and ſhould inhabit upon the premiſſes; this is not any condition, for the word *ſi* makes the intention uncertain, whether another thing was intended beſides the ceſſer of the term, or the re-entry. 1 *Rol. Abr.* 410.

So if a man leaſes lands to another, *proviſo ſi* the rent be arrear, this is not a condition, becauſe the word *ſi* makes the intention uncertain; for where the *proviſo* is hypothetical, it ought to be ſhewed what he would have. 1 *Rol. Abr.* 410.

If

If a man leaſes land to another, *proviſo if the rent be behind, it ſhall be lawful for him to reſtrain, and not being ſufficient, the ground to re-enter into the premiſſes, and the ſame to have again in his former eſtate*; that is no good condition, for the words are not, that he ſhall reſtrain the goods upon the tenement; nor is it known what is intended by the word *ſufficient, ſcilicet*, ſufficient reparation, rent, *&c.* and the words *the ground to re-enter into the premiſſes*, are inſenſible. 1 *Rol. Abr.* 410.

A. and *B.* were bound to ſtand to the award of certain perſons, who *awarded that A. ſhould pay unto B.* 20 *s. per ann. during ſix years, towards the education and bringing up of ſuch a one an infant, and within the two firſt years* of the ſaid term *the infant died*, ſo as now there needeth not any ſupply towards his education; yet it was adjudged, that the yearly ſum ought to be paid for the whole term after, for the words (towards his education) are but to ſhew the intent and conſideration of the payment of that ſum, and no words of condition, *&c.* 2 *Le.* 154. *in pl.* 186. 19 *Eliz. C. B. Anon'.*

In ſome caſes this word *pro* does not make a condition; as if before the ſtat. of *Will.* 3. land was given *pro homagio ſuo*, there, if the homage be not done, the feoffor could nor re-enter, but he ought to diſtrain. *Arg.* 2 *Le.* 128. *Mich.* 29 *Eliz.*

Divers words of themſelves make eſtates upon condition; among which is *ſub conditione*; as if *A.* enfeoffs *B.* to have to *B.* and his heirs, upon condition that *B.* and his heirs pay, *&c.* to the ſaid *A.* annually ſuch a rent, *&c.* the feoffee has an eſtate upon condition. *Litt. ſ.* 328.

Regularly the word (*pro*) does not import a condition, tho' it has the force of a condition *when the thing granted is executory, and the conſideration of the grant is a ſervice, or ſome ſuch thing, for which there is no remedy, but the ſtopping the thing granted*, as in the caſe of an annuity granted *pro conſilio*, or for executing the office of a ſteward of a court, or the ſervice of a captain or keeper of a fort; here the failure of giving counſel, or performing the ſervice, is a kind of eviction of that which is to be done for the annuity, the grantor having no means either to exact the counſel, or recompence for it, but by ſtopping the annuity; and in theſe caſes the condition is not precedent, and therefore the performance thereof need not be averred when the annuity is demanded. *Per Hobart* Ch. J. *Hob.* 41. *Mich.* 10 *Jac.* in the caſe of *Cowper* v. *Andrews.*

Leaſe of land paying rent is no condition; ſo a power *to dig up trees, making up the hedge again*, is not a condition, but *covenant* lies for not repairing the hedge. 2 *Show.* 202. *pl.* 209. *Paſch.* 34 *Car.* 2. *B. R. Anon'.*

If *A.* enfeoffs *B.* upon condition that he ſhall render to *C.* and his heirs, a yearly rent of 20 *s.* and if *B.* and his heirs fail of payment thereof, that then *A.* and his heirs may enter, this is a good condition; for though a rent cannot be reſerved to a ſtranger, yet yearly rent in this caſe ſhall be intended of a yearly ſum of 20 *s.* in groſs. *Lit. ſect.* 345. *Co. Lit.* 213. *a.*

If *A.* being ſeiſed in fee of the manor of *B.* and of divers lands in *C.* then in the poſſeſſion of *D.* for ſeveral years to come, makes a feoffment thereof to *E.* to the uſe of himſelf in tail male, remainder to *F.* in tail male, *&c.* provided that *F.* or the heirs male of his body, in whomſoever of them the inheritance in tail *of all the premiſſes* ſhall happen to be, ſhall pay to the daughter of *A.* 200 *l.* according to the laſt will of *A.* and *A.* makes a letter of attorney to *J. S.* to enter into the manor of *B.* and the lands in *C.* and in his name to take poſſeſſion and deliver it to *E.* whereupon poſſeſſion is given to *C.* of all but what was in the poſſeſſion of *D.* and *D.* never attorns, ſo that the lands in *C.* paſſed not; and after *A.* by will bequeaths 200 *l.* to his daughter, and dies without iſſue, yet *F.* is not bound by this condition, becauſe he hath not *all the land* according to the purport of the condition, which was, that he that had all ſhould pay, *&c.* and a condition ought to be taken ſtrictly. *Poph.* 102, 103.

If the condition of an obligation be in this manner, viz. *The condition of this obligation is ſuch, that if the obligor ſhall appear* coram Domino Rege apud Weſtmon' *ſuch a day*, ad reſpond', *&c. then the condition of this obligation ſhall be void, or elſe the ſame ſhall be in full power and virtue*; yet this is a good condition, for the ſenſe is perfect without theſe laſt words, and they ſhall be rejected for their abſurdity and repugnancy. 2 *Sand.* 78.

As the intent of the teſtator chiefly governs in wills, ſuch conſtruction is always made of the words as will beſt ſupport his intent, and therefore theſe words *ad faciendum, faciendo ea intentione, ad effectum, &c.* in a will create a condition. *Co. Lit.* 204. *a.* See **Deviſe, Will.**

So if a man ſeiſed of ſocage lands, having two daughters, deviſes it to one of the daughters, to have and to hold to her and her heirs, to pay to her ſiſter a certain ſum of money at a certain day; theſe words make a condition; ſo that the other ſiſter, if the money is not paid, may enter in moiety for the condition broke, becauſe otherwiſe ſhe ſhall be remedileſs. 1 *Rol. Abr.* 410, 411. *Cro. Eliz.* 146.

But if a man deviſes lands to *B.* for life, paying to *C.* 6 *l.* rent yearly, which he wills to be paid at two feaſts half-yearly, and if it be arrear, then it ſhall be lawful to *C.* to diſtrain; it ſeems this word *paying* makes not a condition, inaſmuch as a diſtreſs is limited for non-payment thereof. 1 *Rol. Abr.* 411.

If a man deviſes land to his executor to ſell, and to make diſtribution of the money for his ſoul, and dies; if the executor does not ſell it, the heirs may enter, for this creates a condition. 1 *Rol. Abr.* 410. 38 *Aſſ.* 3.

A. deviſed lands in *London to B. and C. to hold in common, upon condition to pay a rent to his wife at the four uſual feaſts of the year*; *and if the rent be behind by ſix weeks, being lawfully demanded, that it ſhall be lawful for the wife to diſtrain*; and added, that his full intent was that ſhe ſhould be annually paid the ſaid rent accordingly. The queſtion was, if the entry of the heir be lawful or not? or if the penalty of the expreſs condition be deſtroyed by the penalty of the diſtreſs, and ſo a limitation of the payment of the rent to the feme, and the heir to take no advantage of the breach of the condition? *Manwood* and *Mounſon* held, that the heir ſhould not enter for the breach; but *Dyer* and *Harper e contra* clearly; and ſo was the opinion of *Wray* Ch. J. and *Saunders* Ch. B. *in præſentia Manwood ad Menſam*, and that both penalties, *viz.* the condition and re-entry, and the diſtreſs to the feme for non-payment, are good remedies and ſecurities for the firm payment of the rent to the feme according to the intent of her baron; and as to the demand of the rent, they thought ſhe need not make any ſuch demand, but that it is payable by the deviſees at their peril, if they would ſave their land; but that the feme ought to demand it before ſhe makes any diſtreſs. *D.* 348. *a. b. pl.* 13. *Hill.* 18 *Eliz. Anon'.*

A. ſeiſed of land in fee, by his will in writing *granted a rent-charge* of 5 *l. per ann.* out of it *to his younger ſon, towards his education and bringing-up in learning*; and if in pleading the deviſee ought to aver, that he was brought up in learning, was the queſtion; and it was holden by *Dyer, Manwood*, and *Mounſon*, that ſuch averment needs not, for the deviſe is not conditional, and therefore, altho' he be not brought up in learning, yet he ſhall have the rent. 2 *Le.* 154. *pl.* 186. 19 *Eliz. C. B. Anon'.*

A man deviſed land to his wife, *proviſo my will is, that ſhe ſhall keep it in good repairs*, cited *per cur.* to have been adjudged. *Le.* 174. *in pl.* 242. *Trin.* 30 *Eliz.*

A. deviſed lands *to B. paying* 40 *l. to C.* it is a good condition; for *C.* has no other remedy, and a will ought to be expounded according to the intent of the deviſor, *per Wray. Le.* 174. *pl.* 242. *Trin.* 30 *Eliz. B. R.*

A man deviſed a houſe in *London* to his wife, *provided if ſhe clearly departs out of* London, *and dwells in the country, that ſhe ſhall have a rent out of the ſame, &c.* It was agreed, that this was a good proviſo to determine her eſtate, though there be no words that the eſtate ſhall ceaſe, *&c. Cro. E.* 238. *pl.* 5. *Trin.* 33 *Eliz. B. R. Allen* v. *Hill.*

2. *Of conditions precedent and ſubſequent.*

Conditions precedent are ſuch as muſt be punctually performed before the eſtate can veſt; but on a condition

ſubſequent the eſtate is immediately executed; yet the continuance of ſuch eſtate dependeth on the breach or performance of the condition. *Co. Lit.* 218. *Eq. Abr.* 108.

As if I grant, that if *A.* will go to ſuch a place about my buſineſs, that he ſhall have ſuch an eſtate, or that he ſhall have 10 *l. &c.* this is a condition precedent. 1 *Roll. Abr.* 414.

So if I retain a man for 40 *s.* to go with me to *Rome*, this is a condition precedent, for the duty commences by going to *Rome*. 1 *Roll. Abr.* 914.

So if a man by will deviſes certain legacies, and then deviſes all the reſidue of his eſtate to his executor, after debts, legacies, *&c.* paid and diſcharged, this is a condition precedent; ſo that the executor cannot have the reſidue of the eſtate before the debts and legacies are diſcharged. 1 *Roll. Abr.* 415. 1 *Jones* 327. *Cro Car.* 335.

But if a man deviſes a term to *A.* and that if his wife ſuffers the deviſee to enjoy it for three years, that ſhe ſhall have all his goods as executrix; but if ſhe diſturbs *A.* then he makes *B.* executor, and dies, his wife is executrix preſently; for though in grants the eſtate ſhall not veſt till the condition precedent is performed, yet it is otherwiſe in a will, which muſt be guided by the intent of the parties; and this ſhall not be conſtrued as a condition precedent, but only as a condition to abridge the power of being executrix, if ſhe perform it not. *Cro. Eliz.* 219.

If *A.* tenant for life, and *R.* in reverſion in fee, covenant to levy a fine, and that it ſhall be to the uſe of *A.* and his heirs, *ſi R.* does not pay 10 *s.* to *A.* the tenth of *September* after; and if he does pay, then to the uſe of *A.* for life, and after to the uſe of *R.* in fee; in this caſe, this word *ſi, &c.* is a condition ſubſequent, and not precedent; ſo that *A.* hath an eſtate in fee till *R.* pays the 10 *s.* becauſe there is a day limited for the payment of the 10 *s.* and the ſubſequent words explain the intent to be a ſubſequent condition, *ſſ.* And if he pays it, then it ſhall be to *A.* for life, and after to the uſe of *R.* in fee, which ſhews the intent to be that *A.* ſhall have an eſtate in fee till the 10 *s.* paid. 1 *Roll. Abr.* 415, 416.

Deviſe to the firſt ſon of *A. if he takes my name, if not to B. A.* dies without iſſue. *B.* ſhall take; for the refuſal of *A.*'s ſon is not a condition precedent, but a precedent eſtate attended with theſe limitations. *Per Treby* Ch. Juſtice, and judgment accordingly. 1 *Salk.* 230. *pl.* 8. *Trin.* 9 *Will.* 3. C. B. *Scattergood* v. *Edge*.

Where the *one promiſe* is the conſideration *of the other*, and where the performance and not the promiſe is, *muſt be gathered from the words and nature of the agreement*, and depends intirely thereupon; for, if in caſe there were a poſitive promiſe that one ſhould releaſe his equity of redemption, and on the other ſide that the other would pay 7 *l.* then the one might bring his action without any averment of performance; but where the agreement is, that the plaintiff ſhould releaſe his equity of redemption, in conſideration whereof the defendant was to pay him 7 *l.* ſo that the *releaſe is the conſideration*, and therefore being *executory*, it is a condition precedent, which muſt be averred. 12 *Mod.* 455, 460. *Paſch.* 13 *Will.* 3. by *Holt* Ch. Juſtice, in delivering the opinion of the court in the caſe of *Thorp* v. *Thorp*.

If there be a *day ſet for the payment* of money, *or doing the thing* which one promiſes, agrees, or covenants to do *for* another thing, and that day *happens to incur before* the time, *the thing* for which the promiſe, agreement, or covenant *is made, is to be performed by tenor of the agreement*, there, though the words be, that the party ſhall pay the money, or do the thing for ſuch a thing, or in conſideration of ſuch a thing; after the day is paſt the other ſhall have action for the money, or other thing, though the thing for which the promiſe, agreement, or covenant was made be not performed; for it would be repugnant there to make it a condition precedent: and therefore they are in that caſe left to mutual remedies, on which, by the expreſs words of the agreement, they have depended. *Per Holt* Ch. Juſtice. 12 *Mod.* 461. *Paſch.* 13 *W.* 3. in the caſe of *Thorp* v. *Thorp*.

M. agrees *to give* A. *ſo much for the uſe of a coach and horſes for a year*, and *A. agreed* further with *M. to keep the coach in repair*; it was averred the coach and horſes were delivered to *M.* but nothing of the repair; and *Holt* Ch. Juſtice held upon this evidence, that *repairing* was not a condition precedent, and therefore need not be averred. *Per Holt* Ch. Juſtice at *Guildhall*, and judgment *pro querente*. 12 *Mod.* 503. *Paſch.* 13 *Will.* 3. *Atkinſon* v. *Morrice*.

But if the agreement had been that *A.* had agreed *to give* M. *a coach and horſes for a year, and to repair the coach, and* that *for that* M. *promiſed ſo much money*, then the repairing had been a condition precedent neceſſary to be averred. *Per Holt* Ch. Juſtice. 12 *Mod.* 503. *Paſch.* 13 *W.* 3. in *S. C.*

Condition that *A.* ſhall do, and *for the doing* B *ſhall pay*, is a condition precedent, but *time fixed for payment* will verify the condition; *per Holt* Ch. Juſtice. 1 *Salk.* 171. *Paſch.* 13 *Will.* 3. *B. R. Thorp* v. *Thorp*.

Where an *award* conſiſts *of divers things*, and one of them is void, and it be expreſly ſaid, *that upon performance of* that *void thing, the other party ſhall do* ſuch a thing, there the doing of the void thing is a condition precedent, and muſt be averred before action againſt the other for not doing his part; *but where* there be ſeveral things in an award, and *ſome are good*, and others not, and it is further ſaid, *that upon performance præmiſſorum* the other ſhall releaſe for the purpoſe, there it ſuffices to make *averment of performance of what is well awarded* without more; *per Powell* Juſtice. 12 *Mod.* 588. *Mich.* 13 *W.* 3. in *C. B. Lee* v. *Elkins*.

A copyholder in a *borough engliſh* ſurrenders to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon and his heirs, if he lives twenty-one years; provided that upon condition, that if he dies before twenty-one, that it ſhall remain to the ſurrenderer and his heirs; though by the firſt words it ſeems to be a condition precedent; yet, upon all the words taken together, it is not, but a ſurrender to the uſe of the eldeſt ſon, to be defeated by a condition ſubſequent. 3 *Lev.* 132.

If *A.* makes a leaſe for five years to *B.* upon condition, that if *B.* pays him 10 *l.* within two years, that then he ſhall have a fee-ſimple in the lands, and make livery and ſeiſin to *B.* this paſſes the freehold immediately, and *B.* has a fee conditional; becauſe if the freehold was not to veſt in *B.* till the condition performed, it would be difficult to determine in whom the freehold lay; for conditions may be inſerted in ſuch deeds as are perfected privately, as might prove greatly prejudicial to ſtrangers. *Lit. ſect.* 350. *Co. Lit.* 216, 217.

But in caſe of a leaſe for life, with ſuch a condition, the freehold paſſes not before the condition performed; becauſe the livery may preſently work upon the freehold.

But if a man grants an adowſon, *&c.* (which lie in grant) for years upon ſuch condition, the grantee ſhall have no fee till the condition performed. *Co. Lit.* 217.

If *A.* leaſes to *B.* for years, upon condition, that if *B.* pays money to *A.* or his heirs, at a day that *B.* ſhall have the fee, and before the day *A.* is attainted of treaſon and executed; now though the condition became impoſſible by the act and offence of *A.* yet *B.* ſhall not have a fee, becauſe a precedent condition to increaſe an eſtate muſt be performed; and if it becomes impoſſible, no eſtate ſhall riſe. *Co. Lit.* 210.

Alſo in equity, with reſpect to conditions precedent and ſubſequent, the prevailing diſtinction ſeems to be, to relieve againſt the breach or non-performance, whether the condition be precedent or ſubſequent, where a compenſation can be made. 1 *Vern.* 79, 167.

As if *A.* conveys lands to *B. &c.* and their heirs, upon truſt, that if *C.* the ſon of *A.* within ſix months after the death of *A.* ſhould ſecure to truſtees 500 *l.* for the younger children of *C.* then after ſuch ſecurity given, to convey to *C.* and his heirs, and until the time for giving ſuch ſecurity, in truſt for the eldeſt ſon of *C.* and in default of ſuch ſecurity, to convey to ſuch eldeſt ſon and his heirs, if *C.* dies before any ſuch ſecurity given, yet this condition, though precedent, being only in nature of a penalty, the intent of the truſt ſhall be regarded, which

was to ſecure 500 *l.* for the younger children. 1 *Chan. Ca.* 89.

A leaſe for years to Sir *Edward Waldgrave* and lady, on truſt to *raiſe* 900 *l.* for a feme ſole, *in caſe ſhe did not marry contrary to good liking of Sir* Edward *and lady*; *if ſhe did, then* to go *to ſuch perſons as Sir* Edward and lady, or ſurvivor, *ſhould nominate, and for want of nomination to Sir* Edward and lady, or ſurvivor of them; *ſhe marries without their conſent, they die without nomination*; bill was preferred by *Sandall*, who had a general deed of gift by lady *W.* who ſurvived, of all her goods and chattels, againſt *F. Copledite*, who had adminiſtration to the feme, and lady *W.* to have the benefit of this leaſe; which was decreed for *Copledite*. *Comyn's Rep.* 739, 740. *Paſch.* 13 *Geo.* 2. in caſe of *Harvey* v. *Aſten*, cites Chan. Caſes 58. [*Mich.* 16 *Car.* 2.] *Fleming* v. *Waldgrave.*

The daughter of Lord *Kilmury* and the ſon of Lord *K.* prefer a bill to have the benefit of a *ſettlement* made by Lord *K.* and his ſon, whereby *truſtees were to raiſe* 1500 *l. a-piece for portions of two daughters*, the plaintiffs and the ſiſters, *payable at their marriage with conſent of truſtees*, or major part of them, and maintenance in mean time; and if truſtees had raiſed the portions before they married, they were to improve them to the beſt advantage, till they might receive the increaſe for maintenance till marriage; *and if they married without conſent, the portion of her ſo marrying ſhould remain over to another.* The truſtees received the rents ever ſince the death of Lord *K.* and raiſed the portions; and the plaintiffs *being in years, and intending not to marry*, would lay out their portions in purchaſe of annuities for their larger maintenance. Queſtion was, whether plaintiffs ought to have portions at their own diſpoſal before they married with conſent? *And it being admitted, if either died before marriage, her portion ſhould go to her executor or adminiſtrator*, and they *offering ſecurity to indemnify truſtees from claim by defendants*, who were infants, children of *Charles* Lord *K. to whom the portions after marriage without conſent were limited* by the ſettlement, *the court decreed it on giving* ſuch ſecurity. *Comyn's Rep.* 740, 741. Lord Ch. B. *Comyn's* cites *Fin. Rep.* 62. [*Hill.* 25 *Car.* 2] *Needham* v. *Vernon.*

A ſettlement was made by *W.* by deed and will, reciting a marriage intended between *A.* and *B.* the daughter of *W.* and then comes a clauſe, that *if* B. *ſhould live to* 16 *years of age, and ſhould refuſe to marry* A. *then* A. *ſhould have* 20,000 *l. out of the perſonal eſtate*; and afterwards comes another clauſe, that *if it happen that the ſaid intended marriage be not had till after* B.*'s age of* 16 *years*, then the real and perſonal eſtate is ſettled on *A.* and *B.* for their lives, *&c.* The marriage was had before *B.* was 16 years old, but ſhe lived to 16, and died before 17, without iſſue. It was urged, that *A.* and *B.* marrying before 16, the perſonal eſtate was not veſted ſo as to intitle the adminiſtrator of *B.* and that the grantor's intent was to reſtrain *B.* from *marrying before* 16; but Lord *Jeffries* took it, that a marriage between *A.* and *B.* was the chief intent, and of the 20,000 *l.* penalty for refuſal, and that the latter clauſe was only to bring back that 20,000 *l.* into the perſonal eſtate to be ſettled to the ſame uſes with the reſt, in caſe the marriage ſhould be after 16, and decreed an account. *Vern.* 338. *pl.* 332. *Mich.* 1685. *Duke of Southampton* v. *Crammer & al'.*

A. by marriage ſettlement provided 2000 *l. a-piece.* and after, by will, directs the making up their portions 3000 *l. a piece*, and charges his real and perſonal eſtate, *provided they marry with conſent* of their mother; *per* Lord *Wright* and Maſter of the Rolls, it is a condition ſubſequent. *Ch. Prec.* 226. *pl.* 186. *Trin.* 1703. *Aſhton* v. *Aſhton.*

A. by will leaves his grand-daughter 200 *l. provided ſhe continued with his executors until* 21, *but if taken from them by her father, who was a papiſt, before* 21, *or if ſhe married againſt the conſent of* his executors, then he gave her but 10 *l.* and made *B.* and *C.* executors. She was placed by the executors with *D.* a clergyman, and before ſhe was 21, *D.* and one of the executors conſented that ſhe ſhould make a viſit to her father, when the *father, unknown to the executors, married her to a papiſt.* Decreed at the Rolls for payment of the 200 *l.* to the daughter; but on appeal Lord *Cowper* decreed her only the 10 *l.* he held that the continuance with *D.* by direction of the executors was well, and that this was a marriage againſt their conſent, they not having opportunity to declare their diſlike before marriage, and declaring it upon notice after; and that the condition, deſcribing the qualifications of the perſon who was to take, was in its nature a *condition precedent.* 2 *Vern.* 572. *pl.* 518. *Hill.* 1706. *Creagh and ux'* v. *Wilſon.*

The teſtator deviſed his eſtate to the defendants, in truſt, for the uſe and benefit of the plaintiff; but declared his will to be, that the plaintiff ſhould have no benefit of the deviſe, unleſs the plaintiff's father ſhould ſettle on the plaintiff two full thirds of the eſtate ſettled on the father on his marriage; and in default thereof the eſtate to the defendants: the father made no ſettlement on the plaintiff, but deviſed all his eſtate to him for life, but ſubject to the payment of debts; it was admitted, and ſo adjudged by the court, that this eſtate was executed in the plaintiff by the ſtatute of uſes; and conſequently that this is a condition ſubſequent; yet the court declared, that though conditions ſubſequent, which are to diveſt an eſtate, need not be literally performed; yet, even in ſuch caſe, if the party cannot be compenſated in damages, it would be againſt conſcience to relieve; and therefore ordered the maſter to examine the value of the eſtate deviſed, and the amount of the debts which that eſtate was charged with, and to report to the court, whether after debts paid there would be two full thirds of the father's eſtate, which was ſettled on him in marriage, left to the plaintiff; and upon a re-hearing, would not vary the former order, declaring that the difference was, whether this caſe lay in compenſation or not; and if a compenſation was made, he would relieve againſt the breach of the condition; but in caſe a ſufficient compenſation was made, he would then conſider farther of it.

If a feme covert, having power by will to deviſe lands, deviſes them to her executors, to pay 500 *l.* out of them to her ſon; provided, that if the father gives not a ſufficient releaſe of certain goods to her executors, that then the deviſe of the 500 *l.* ſhould be void, and go to the executors, and after her death a releaſe is tendered to the father, and he refuſes, yet upon making the releaſe after, the money ſhall be paid to the ſon; for it was ſaid to be the ſtanding rule of the court, that a forfeiture ſhould not bind where a thing may be done after, or a compenſation made for it; as where the condition is to pay money, *&c.* and though it is generally binding, where there is a deviſe over, yet here, it being to go to the executors, it is no more than the law implies. 2 *Vent.* 352.

If a man deviſes lands to *J. S.* upon condition to pay 20,000 *l.* to his heir at law, *viz.* 1000 *l. per annum* for the firſt ſixteen years, and 2000 *l. per ann.* after till the whole ſhould be paid, and the heir enters for non-payment of one of the 1000 *l. per ann. J. S.* ſhall be relieved upon payment of the 1000 *l.* together with the intereſt from the time it became payable, without any deduction for taxes; the court declaring, that whereever they can give ſatisfaction or compenſation for the breach of a condition, they can relieve. 1 *Salk.* 156.

If one having three daughters, deviſes lands to his eldeſt, upon condition that ſhe, within ſix months after his death, pay certain ſums of money to her two other ſiſters; and if ſhe failed, then he deviſed the land to the ſecond daughter on the like condition, *&c.* The court may inlarge the time of payment, though the lands are deviſed over; and in all caſes that lie in compenſation, the court may diſpenſe with the time, though even in caſe of a condition precedent. 2 *Vern.* 222.

So where one deviſed lands to *J. S.* his kinſman, paying 1000 *l.* a-piece to his two daughters, who were his heirs at law, and *J. S.* made default, and the daughters recovered in ejectment, yet *J. S.* was relieved on payment of principal, intereſt, and coſts; though it was inſiſted,

ſſted, that this was a condition precedent, and to the diſinheriſon of the heir at law, and in favour of a voluntary deviſee. 2 *Vern.* 366.

A man having two daughters, deviſed to each of them 2000 *l.* payable at the age of twenty-five years; but if they, or either of them married before the age of ſixteen, or if the marriage were without the conſent of their mother and truſtees, then they ſhould loſe 1000 *l.* of the portion, which ſhould go to his other children; one of them married before the age of ſixteen, but with the conſent of all the parties; and it was held, that the time being only a circumſtance might be diſpenſed with. *Skin.* 285.

A. deviſed his lands to truſtees for three years, and if within the three years there happened a marriage between *G.* who was a diſtant relation, and of the ſame blood with the teſtator, and *W.* his niece, and heir at law, then to *W.* for life, remainder to her firſt ſon, *&c.* in tail male, by *G.* to be begotten; but if the marriage ſhould not take effect within the three years; or if the marriage ſhould be before the years of conſent, and not ratified, when of competent age, then to *F.* in tail, who was likewiſe a remote relation of the teſtator, but not of the ſame blood; the marriage between *G.* and *W.* did not take effect, though the ſeveral propoſals were within the time made by her friends to his guardians, but not accepted by them; and though ſhe herſelf had preſſed the match as far as the modeſty of her ſex would permit. She afterwards married the plaintiff, and by her bill prayed the benefit of the deviſe; the condition being anſwered by her to what ſhe was capable of doing, having married a perſon, as was urged, equal in circumſtances, *&c.* but her bill was diſmiſſed by the advice of *Holt* and *Treby*, Ch. Juſtices. 3 *Chan. Ca.* 129.

3. *What ſhall excuſe the performance of conditions*, viz. *the act of God, act of the law, act of the parties, and act of a ſtranger.*

Regularly, If a condition, which was poſſible at the making thereof, becomes impoſſible by the act of God, the obligation is diſcharged. 1 *Rol. Abr.* 449.

If a man be let to mainprize, it is a good plea at the day when the manucaptors ought to have the body, *&c.* for the manucaptors to ſay, that he who was let to mainprize was dead before the day, ſo that they could not have his body at the day. 1 *Rol. Abr.* 449.

If a man covenants to build an houſe before ſuch a day, and after the plague is there before the day, and continues there till after the day, this ſhall excuſe him from the breach of the covenant, for the not doing thereof before the day; for the law will not compel a man to venture his life for it, but he may do it after. 1 *Rol. Abr.* 450.

If the condition conſiſts of two parts in the disjunctive, in which the party hath an election which of them to perform, and both poſſible at the time of making the condition, and one becomes impoſſible afterwards by the act of God, this ſhall excuſe the performance of that and the other alſo; for otherwiſe his election ſhould be taken away by the act of God. 5 *Co.* 22.

But it hath been held, where the condition was to make the obligee a leaſe for life by ſuch a day, or pay him 100 *l.* that though the obligee die before the day, that his executor ſhall have the 100 *l.* and the ground of *Laughter*'s caſe was denied to be univerſal. 1 *Salk.* 170.

If a condition conſiſts of two parts, of which one was not poſſible at the making of the condition to be performed, he ought to perform the other. 5 *Co.* 22.

As if the condition be to enfeoff *J. S.* or his heirs, when he comes to ſuch place, he is bound to enfeoff *J. S.* when he comes, becauſe the other is not poſſible; for he cannot have an heir during his life, and ſo he had not any election. 1 *Rol. Abr.* 450.

If a condition of an obligation be to make an aſſurance of certain lands to the obligee and his heirs, and after the obligee dies, yet he ought to make the aſſurance to his heir; for this copulative *and his heirs* ſhall have the ſignification of a disjunctive. 1 *Jones* 180. *Palm.* 252. See *Cro. Eliz.* 399.

If the condition of an obligation be to enfeoff two before ſuch a day, and one dies before the day, yet he ought to enfeoff the other. 1 *Rol. Abr.* 451.

Condition that *A.* (a ſtranger) ſhall pay ſo much ſuch a day, or perſonally appear ſuch a day at ten in the morning at *B.*'s houſe; though *Ægrotus fuit ex viſitatione Dei, &c.* is a good plea as to that part of the *disjunctive*, yet being in the caſe of a ſtranger the other part ought to be performed. *Raym.* 373. *Trin.* 32 *Car. B. R. Soham* v. *Pannel.*

Debt upon bond conditioned *to give the plaintiff a true account of all money received by him, &c. by the 28th day of November, &c. or render his body to priſon at the plaintiff's ſuit in any action he ſhall then commence againſt him*, then, *&c.* The defendant *pleaded*, that he was *always ready* to render an account; *but farther, that the plaintiff had not commenced any action againſt him ad vel ante 28th of November præd', whereupon he might render himſelf to priſon*; the plaintiff *replied*, that 300 *l.* was due to him, *&c.* and *that after the ſaid 28th of November, viz. 12 Aprilis, he ſued out an original in account; and the defendant not appearing he ſued out a capias, whereof he gave the defendant* notice, *and required to render himſelf* according to the condition. Upon a demurrer, judgment was given *per tot. cur.* for the defendant; becauſe he being to do the firſt act, has election either to give an account, or render himſelf on the action; beſides, the breach is not well aſſigned; for the defendant is not obliged to render himſelf on an action which ſhall not be ſued againſt him 28th of *November*; the word in the condition being (then commenced) and is not to be conſtrued then, or from thenceforth; for that would be to give the plaintiff liberty to commence an action at any time during his life; and conditions are always made for the advantage of the obligor. 3 *Lev.* 137. *Mich.* 35 *Car.* 2. *C. B. Stanley* v. *Fern.*

If *A.* binds himſelf apprentice to *B.* for ſeven years, and *B.* enters into a bond to *A.* conditioned to pay *A.* his executors or aſſigns, 10 *l.* at the time of the end or determination of his apprenticeſhip, and *A.* ſerves ſix years, and then dies, the money ſhall not be paid to his executor, though it was objected, that his apprenticeſhip ended at his death. 2 *Brownl.* 97.

If *A.* enters into a bond to *B.* conditioned that *C.* ſhall perform an award to be made between *B.* and *C.* and it is awarded that *C.* ſhall pay to *B.* 10 *l.* at *Michaelmas*, and 10 *l.* at *Lady-day*, yet becauſe the ſum awarded is a duty, it is as if a condition of a bond had been for the payment of the money; and if not paid, the bond is forfeited. 2 *Leon.* 155.

But if the condition of an obligation be, that the obligor ſhall enfeoff the obligee at ſuch a day, and before the day the obligor dies, and the land deſcends to his heir, the condition is become impoſſible by the act of God, and the performance thereof excuſed. 2 *Leon.* 155.

But it has been held in equity, that if the condition of a bond be to ſettle certain lands in ſuch a manor by ſuch a day, though the obligor die before the day, by which the bond is ſaved at law, yet an execution ought to be decreed in ſpecie. *Eq. Abr.* 18.

One deviſed to his eldeſt daughter, upon condition ſhe ſhould marry his nephew on or before ſhe attained the age of twenty; the nephew died young, and the daughter never refuſed, and indeed never was required to marry him; after the death of the nephew, the daughter being about ſeventeen, married *J. S.* and it was adjudged that the condition was not broken, being become impoſſible by the act of God. 1 *Salk.* 170.

C. binds himſelf apprentice to *S.* for ſeven years, and *S.* bound himſelf *to pay C.* his executors or aſſigns, 10 *l.* at the time of the end or determination of his apprenticeſhip. *C.* ſerves ſix years, and dies; the money ſhall not be paid to his executor. The whole court (*abſente* the Ch. J.) held, that the obligation was diſcharged, and that the money ſhould not be paid. *Brownl.* 97. *Mich.* 5 *Jac. Cheney* v. *Sell.*

If

If leſſee *covenants to repair* a houſe, though it be burnt by lightning, or thrown down by enemies, yet he muſt repair it; for when the party by his own contract creates a duty or charge upon himſelf, he is bound to make it good if he can, notwithſtanding any accident by inevitable neceſſity, becauſe he might have provided againſt it by his contract. *Allen* 29. *Mich.* 23 *Car. B. R. Paradine* v. *Jane.*

The condition of the bond was, that *whereas Chriſtopher the anceſtor did affirm, that he had paid* 60l. *to H. L. which H. L. did deny, if Chriſtopher by the* 10*th of November did not legally prove the money paid, then if he paid the money the ſaid* 10*th of November the bond ſhould be void.* The defendant *pleaded, that Chriſtopher died before the* 10*th of November.* The plaintiff demurred; but the court held this was not like a disjunctive condition, though it did depend upon a condition, and the party having undertaken to make proof, it was at his peril if he did not; and though he was prevented by the act of God, yet the bond was forfeited; judgment *pro quer'*. *Freem. Rep.* 269. *pl.* 297. *Hill.* 1679. *Vinier* v. *Joyner.*

If an annuity be granted upon condition that the grantee ſhall be attorney for the grantor in all pleas, if he be after made ſheriff, yet this ſhall not excuſe him from the performance of the condition; but he ought to be his attorney; otherwiſe the condition is broken. 1 *Rol. Abr.* 451.

If *A.* deviſes lands to *B.* and his heirs, upon condition that he, his heirs and aſſigns, with the iſſues and profits of the land, ſhall pay yearly ſo much for certain charitable uſes, and dies, and after the deviſee dies, his heir within age, and in ward to the King, the payment ſhall be excuſed during the time the King hath him in ward; for by the intent of the condition, the payment ought to be made with the iſſues and profits, which are transferred by act in law, to the King. 1 *Rol. Abr.* 451.

If a recognizance be conditioned for the appearance of *B.* at the next aſſize held for the county of *S.* and before the next aſſize, *B.* ſues a *certiorari* out of the King's Bench to remove the recognizance, and at the next aſſizes delivers the *certiorari* to the judge, yet this does not excuſe his appearance; for though the *certiorari* was the command of the King, yet the purchaſe thereof was the act of *B.* and he could by no ſuch ſlight ſave his recognizance. *Yelv.* 207.

If a man hath good title to lands by virtue of a fine, and ſells the ſame, and covenants with the vendee, his heirs and aſſigns, that he ſhall enjoy againſt him and *B.* and all claiming under him; and after by an act of parliament, reciting that *B.* had ſettled this eſtate upon *C.* and that certain perſons had unduly procured the ſaid fine from her, it is enacted, that the fine ſhall be void, and that every perſon may enter, as if no ſuch fine had been; and after one enters, claiming title under *C.* this is a breach of the covenant; for the act makes no new title, but removes the obſtruction of the old; and it was ſaid, that doubtleſs *B.* was named in the covenant for this purpoſe, in caſe this fine unduly obtained ſhould be avoided. 2 *Lev.* 26.

If the condition of an obligation be, that the obligor ſhall enfeoff the obligee of the land before ſuch a day, and after before the day the obligee diſſeiſes the obligor, and keeps it by force till after the day, ſo that the obligor cannot enter, this will excuſe the performance of the condition. 8 *Co.* 92.

If leſſee for years covenants to drain the water which is upon the land before ſuch a day, and after the leſſor enters before the day, and there continues till the day is paſt, yet this ſhall not excuſe the performance of the covenant, becauſe this is collateral to the land. 1 *Rol. Abr.* 453.

If a man be bound to build a houſe, *&c.* he is excuſed if the obligee will not ſuffer him to build it; for he cannot come upon the land againſt his will. 1 *Rol. Abr.* 453.

So if a condition be to repair a houſe, he is excuſed thereof, if a ſtranger, by the command of the obligee himſelf, diſturbs him, and will not ſuffer him to do it. 1 *Rol. Abr.* 453.

If the condition be to erect a mill, and after he comes to the obligee, and ſays all is ready for the erecting thereof, and demands of him when he ſhall come with the mill to erect it; if the obligee ſays he will not have the mill, and entirely diſcharges him of the mill, this ſhall excuſe him of the performance. 1 *Rol. Abr.* 453, 454.

If leſſee for years of a houſe covenants to repair it, and to leave it in as good plight as he found it, and after certain ſparks of fire came out of the chimney of the leſſor into a houſe not much remote, by which the houſe of the leſſee is burnt, this will excuſe the performance of the covenant to the leſſee; ſo that he is not bound to rebuild, becauſe this comes by the act of the leſſor himſelf. 1 *Rol. Abr.* 454.

If a leaſe be made upon condition that the leſſee ſhall not permit to harbour any whore within the houſe to him let, and that if he ſuffers ſuch woman to ſtay there ſix weeks after warning, *&c.* it ſhall be lawful for the leſſor to enter; and after the leſſee ſuffers ſuch woman to be there, and warning is given him by the leſſor, although after the leſſor commands the woman to ſtay there ſix weeks, yet this ſhall not excuſe the performance of the condition, becauſe the leſſor did not do any act; and notwithſtanding the command the leſſee might have removed her. 8 *Co.* 91. *b.*

But if the leſſor ouſts the leſſee, and with force, and againſt the will of the leſſee, puts in the woman, and violently makes her ſtay there with force, againſt the will of the leſſee, for ſix weeks, this ſhall excuſe the performance of the condition. 8 *Co.* 92.

If *A.* is bound to *B.* that *J. S.* ſhall marry *Jane G.* before ſuch a day, and before the day *B.* marries her, he ſhall take no advantage of the condition, becauſe by his means it could not be performed. *Co. Lit.* 206. *b.*

If a man makes a feoffment in mortgage, upon condition to be void upon payment of money by the feoffor, *&c.* to the feoffee at a day, if at the day the feoffee is out of the realm, the feoffor is not bound to ſeek him, or to go out of the realm to him; and therefore becauſe the feoffee is the cauſe that the feoffor cannot tender the money, the feoffor may enter into the land, as if duly tendered. *Co. Lit.* 210. *b.*

Regularly, if the condition be to be performed by a ſtranger, and he refuſes, the obligation is forfeited; for the obligor has taken upon him that the ſtranger ſhall do it. 1 *Rol. Abr.* 452.

As, if the condition be that my ſon ſhall ſerve *J. S.* if he will not, my obligation is forfeited. 22 *E.* 4. 26. *b.*

A. and *B.* ſubmit themſelves to the award of *C.* and *A.* enters into an obligation to *C.* to ſtand to the award, and *B.* alſo, and *C.* awards *A.* to pay 10*s.* to *B.* who tenders it, and *B.* refuſes, the obligor is excuſed becauſe *B.* is not a mere ſtranger, but privy, and ſo is the obligee. 1 *Rol.* 452.

But if the condition be, that the ſon of the obligor ſhall marry the daughter of the obligee, if the daughter of the obligee refuſes the ſon, yet the condition is forfeited; for the daughter is a mere ſtranger, and the obligor hath taken upon him that his ſon ſhall marry her. *Hutt.* 48. *Winch* 30. 3 *Bulſ.* 30.

So if the condition be to enfeoff a ſtranger, who refuſes, yet the obligation is forfeited. *Co. Lit.* 209.

If there be a feoffment upon condition to enfeoff a ſtranger, if the ſtranger refuſes, yet the condition is broke; becauſe the intent was not that the feoffee ſhould retain it. *Co. Lit.* 209.

But otherwiſe it had been, if the condition was to make a gift in tail to a ſtranger, and he refuſes; for there the intent was that he ſhould have the reverſion. *Co. Lit.* 209.

In debt on obligation conditioned *to make ſuch a releaſe* at *Mich.* term next, *as the judge of the prerogative court ſhould think meet*, the defendant ſaid, that *J. S.* was judge there at that time, and that he did not appoint or deviſe any releaſe; adjudged no plea, becauſe *not alledged that he cauſed a releaſe to be drawn and tendered to the judge*, for he ought to get ſuch a leaſe drawn as the judge ſhall allow of. *Cro. E.* 716. *pl.* 41. *Mich.* 41 & 42 *Eliz. C. B. Lamb* v. *Brownwent.*

ſſted, that this was a condition precedent, and to the diſinheriſon of the heir at law, and in favour of a voluntary deviſee. 2 *Vern.* 366.

A man having two daughters, deviſed to each of them 2000 *l.* payable at the age of twenty-five years; but if they, or either of them married before the age of ſixteen, or if the marriage were without the conſent of their mother and truſtees, then they ſhould loſe 1000 *l.* of the portion, which ſhould go to his other children; one of them married before the age of ſixteen, but with the conſent of all the parties; and it was held, that the time being only a circumſtance might be diſpenſed with. *Skin.* 285.

A. deviſed his lands to truſtees for three years, and if within the three years there happened a marriage between *G.* who was a diſtant relation, and of the ſame blood with the teſtator, and *W.* his niece, and heir at law, then to *W.* for life, remainder to her firſt ſon, *&c.* in tail male, by *G.* to be begotten; but if the marriage ſhould not take effect within the three years; or if the marriage ſhould be before the years of conſent, and not ratified, when of competent age, then to *F.* in tail, who was likewiſe a remote relation of the teſtator, but not of the ſame blood; the marriage between *G.* and *W.* did not take effect, though the ſeveral propoſals were within the time made by her friends to his guardians, but not accepted by them; and though ſhe herſelf had preſſed the match as far as the modeſty of her ſex would permit. She afterwards married the plaintiff, and by her bill prayed the benefit of the deviſe; the condition being anſwered by her to what ſhe was capable of doing, having married a perſon, as was urged, equal in circumſtances, *&c.* but her bill was diſmiſſed by the advice of *Holt* and *Treby*, Ch. Juſtices. 3 *Chan. Ca.* 129.

3. *What ſhall excuſe the performance of conditions*, viz. *the act of God, act of the law, act of the parties, and act of a ſtranger.*

Regularly, If a condition, which was poſſible at the making thereof, becomes impoſſible by the act of God, the obligation is diſcharged. 1 *Rol. Abr.* 449.

If a man be let to mainprize, it is a good plea at the day when the manucaptors ought to have the body, *&c.* for the manucaptors to ſay, that he who was let to mainprize was dead before the day, ſo that they could not have his body at the day. 1 *Rol. Abr.* 449.

If a man covenants to build an houſe before ſuch a day, and after the plague is there before the day, and continues there till after the day, this ſhall excuſe him from the breach of the covenant, for the not doing thereof before the day; for the law will not compel a man to venture his life for it, but he may do it after. 1 *Rol. Abr.* 450.

If the condition conſiſts of two parts in the disjunctive, in which the party hath an election which of them to perform, and both poſſible at the time of making the condition, and one becomes impoſſible afterwards by the act of God, this ſhall excuſe the performance of that and the other alſo; for otherwiſe his election ſhould be taken away by the act of God. 5 *Co.* 22.

But it hath been held, where the condition was to make the obligee a leaſe for life by ſuch a day, or pay him 100 *l.* that though the obligee die before the day, that his executor ſhall have the 100 *l.* and the ground of *Laughter*'s caſe was denied to be univerſal. 1 *Salk.* 170.

If a condition conſiſts of two parts, of which one was not poſſible at the making of the condition to be performed, he ought to perform the other. 5 *Co.* 22.

As if the condition be to enfeoff *J. S.* or his heirs, when he comes to ſuch place, he is bound to enfeoff *J. S.* when he comes, becauſe the other is not poſſible; for he cannot have an heir during his life, and ſo he had not any election. 1 *Rol. Abr.* 450.

If a condition of an obligation be to make an aſſurance of certain lands to the obligee and his heirs, and after the obligee dies, yet he ought to make the aſſurance to his heir; for this copulative *and his heirs* ſhall have the ſignification of a disjunctive. 1 *Jones* 180. *Palm.* 252. See *Cro. Eliz.* 399.

If the condition of an obligation be to enfeoff two before ſuch a day, and one dies before the day, yet he ought to enfeoff the other. 1 *Rol. Abr.* 451.

Condition that *A.* (a ſtranger) ſhall pay ſo much ſuch a day, or perſonally appear ſuch a day at ten in the morning at *B.*'s houſe; though *Ægrotus fuit ex viſitatione Dei, &c.* is a good plea as to that part of the *disjunctive*, yet being in the caſe of a ſtranger the other part ought to be performed. *Raym.* 373. *Trin.* 32 *Car. B. R. Soham* v. *Pannel.*

Debt upon bond conditioned *to give the plaintiff a true account of all money received by him, &c. by the 28th day of November, &c or render his body to priſon at the plaintiff's ſuit in any action he ſhall then commence againſt him*, then, *&c.* The defendant *pleaded*, that he was *always ready* to render an account; *but farther, that the plaintiff had not commenced any action againſt him ad vel ante 28th of November præd', whereupon he might render himſelf to priſon*; the plaintiff *replied*, that 300 *l.* was due to him, *&c.* and *that after the ſaid 28th of November, viz. 12 Aprilis, he ſued out an original in account*; *and the defendant not appearing he ſued out a capias, whereof he gave the defendant* notice, *and required to render himſelf* according to the condition. Upon a demurrer, judgment was given *per tot. cur.* for the defendant; becauſe he being to do the firſt act, has election either to give an account, or render himſelf on the action; beſides, the breach is not well aſſigned; for the defendant is not obliged to render himſelf on an action which ſhall not be ſued againſt him 28th of *November*; the word in the condition being (then commenced) and is not to be conſtrued then, or from thenceforth; for that would be to give the plaintiff liberty to commence an action at any time during his life; and conditions are always made for the advantage of the obligor. 3 *Lev.* 137. *Mich.* 35 *Car.* 2. *C. B. Stanley* v. *Fern.*

If *A.* binds himſelf apprentice to *B.* for ſeven years, and *B.* enters into a bond to *A.* conditioned to pay *A.* his executors or aſſigns, 10 *l.* at the time of the end or determination of his apprenticeſhip, and *A.* ſerves ſix years, and then dies, the money ſhall not be paid to his executor, though it was objected, that his apprenticeſhip ended at his death. 2 *Brownl.* 97.

If *A.* enters into a bond to *B.* conditioned that *C.* ſhall perform an award to be made between *B.* and *C.* and it is awarded that *C.* ſhall pay to *B.* 10 *l.* at *Michaelmas*, and 10 *l.* at *Lady-day*, yet becauſe the ſum awarded is a duty, it is as if a condition of a bond had been for the payment of the money; and if not paid, the bond is forfeited. 2 *Leon.* 155.

But if the condition of an obligation be, that the obligor ſhall enfeoff the obligee at ſuch a day, and before the day the obligor dies, and the land deſcends to his heir, the condition is become impoſſible by the act of God, and the performance thereof excuſed. 2 *Leon.* 155.

But it has been held in equity, that if the condition of a bond be to ſettle certain lands in ſuch a manor by ſuch a day, though the obligor die before the day, by which the bond is ſaved at law, yet an execution ought to be decreed in ſpecie. *Eq. Abr.* 18.

One deviſed to his eldeſt daughter, upon condition ſhe ſhould marry his nephew on or before ſhe attained the age of twenty; the nephew died young, and the daughter never refuſed, and indeed never was required to marry him; after the death of the nephew, the daughter being about ſeventeen, married *J. S.* and it was adjudged that the condition was not broken, being become impoſſible by the act of God. 1 *Salk.* 170.

C. binds himſelf apprentice to *S.* for ſeven years, and *S.* bound himſelf *to pay C.* his executors or aſſigns, 10 *l.* at the time of the end or determination of his apprenticeſhip. *C.* ſerves ſix years, and dies; the money ſhall not be paid to his executor. The whole court (*abſente* the Ch. J.) held, that the obligation was diſcharged, and that the money ſhould not be paid. *Brownl.* 97. *Mich.* 5 *Jac. Cheney* v. *Sell.*

If

If leſſee *covenants to repair* a houſe, though it be burnt by lightning, or thrown down by enemies, yet he muſt repair it; for when the party by his own contract creates a duty or charge upon himſelf, he is bound to make it good if he can, notwithſtanding any accident by inevitable neceſſity, becauſe he might have provided againſt it by his contract. *Allen* 29. *Mich.* 23 *Car. B. R. Paradine* v. *Jane.*

The condition of the bond was, that *whereas Chriſtopher the anceſtor did affirm, that he had paid* 60l. *to H. L. which H. L. did deny, if Chriſtopher by the* 10*th of November did not legally prove the money paid, then if he paid the money the ſaid* 10*th of November the bond ſhould be void.* The defendant *pleaded, that Chriſtopher died before the* 10*th of November.* The plaintiff demurred; but the court held this was not like a disjunctive condition, though it did depend upon a condition, and the party having undertaken to make proof, it was at his peril if he did not; and though he was prevented by the act of God, yet the bond was forfeited; judgment *pro quer'*. *Freem. Rep.* 269. *pl.* 297. *Hill.* 1679. *Vinier* v. *Joyner.*

If an annuity be granted upon condition that the grantee ſhall be attorney for the grantor in all pleas, if he be after made ſheriff, yet this ſhall not excuſe him from the performance of the condition; but he ought to be his attorney; otherwiſe the condition is broken. 1 *Rol. Abr.* 451.

If *A.* deviſes lands to *B.* and his heirs, upon condition that he, his heirs and aſſigns, with the iſſues and profits of the land, ſhall pay yearly ſo much for certain charitable uſes, and dies, and after the deviſee dies, his heir within age, and in ward to the King, the payment ſhall be excuſed during the time the King hath him in ward; for by the intent of the condition, the payment ought to be made with the iſſues and profits, which are transferred by act in law, to the King. 1 *Rol. Abr.* 451.

If a recognizance be conditioned for the appearance of *B.* at the next aſſize held for the county of *S.* and before the next aſſize, *B.* ſues a *certiorari* out of the King's Bench to remove the recognizance, and at the next aſſizes delivers the *certiorari* to the judge, yet this does not excuſe his appearance; for though the *certiorari* was the command of the King, yet the purchaſe thereof was the act of *B.* and he could by no ſuch ſlight ſave his recognizance. *Yelv.* 207.

If a man hath good title to lands by virtue of a fine, and ſells the ſame, and covenants with the vendee, his heirs and aſſigns, that he ſhall enjoy againſt him and *B.* and all claiming under him; and after by an act of parliament, reciting that *B.* had ſettled this eſtate upon *C.* and that certain perſons had unduly procured the ſaid fine from her, it is enacted, that the fine ſhall be void, and that every perſon may enter, as if no ſuch fine had been; and after one enters, claiming title under *C.* this is a breach of the covenant; for the act makes no new title, but removes the obſtruction of the old; and it was ſaid, that doubtleſs *B.* was named in the covenant for this purpoſe, in caſe this fine unduly obtained ſhould be avoided. 2 *Lev.* 26.

If the condition of an obligation be, that the obligor ſhall enfeoff the obligee of the land before ſuch a day, and after before the day the obligee diſſeiſes the obligor, and keeps it by force till after the day, ſo that the obligor cannot enter, this will excuſe the performance of the condition. 8 *Co.* 92.

If leſſee for years covenants to drain the water which is upon the land before ſuch a day, and after the leſſor enters before the day, and there continues till the day is paſt, yet this ſhall not excuſe the performance of the covenant, becauſe this is collateral to the land. 1 *Rol. Abr.* 453.

If a man be bound to build a houſe, *&c.* he is excuſed if the obligee will not ſuffer him to build it; for he cannot come upon the land againſt his will. 1 *Rol. Abr.* 453.

So if a condition be to repair a houſe, he is excuſed thereof, if a ſtranger, by the command of the obligee himſelf, diſturbs him, and will not ſuffer him to do it. 1 *Rol. Abr.* 453.

If the condition be to erect a mill, and after he comes to the obligee, and ſays all is ready for the erecting thereof, and demands of him when he ſhall come with the mill to erect it; if the obligee ſays he will not have the mill, and entirely diſcharges him of the mill, this ſhall excuſe him of the performance. 1 *Rol. Abr.* 453, 454.

If leſſee for years of a houſe covenants to repair it, and to leave it in as good plight as he found it, and after certain ſparks of fire came out of the chimney of the leſſor into a houſe not much remote, by which the houſe of the leſſee is burnt, this will excuſe the performance of the covenant to the leſſee; ſo that he is not bound to rebuild, becauſe this comes by the act of the leſſor himſelf. 1 *Rol. Abr.* 454.

If a leaſe be made upon condition that the leſſee ſhall not permit to harbour any whore within the houſe to him let, and that if he ſuffers ſuch woman to ſtay there ſix weeks after warning, *&c.* it ſhall be lawful for the leſſor to enter; and after the leſſee ſuffers ſuch woman to be there, and warning is given him by the leſſor, although after the leſſor commands the woman to ſtay there ſix weeks, yet this ſhall not excuſe the performance of the condition, becauſe the leſſor did not do any act; and notwithſtanding the command the leſſee might have removed her. 8 *Co.* 91. *b.*

But if the leſſor ouſts the leſſee, and with force, and againſt the will of the leſſee, puts in the woman, and violently makes her ſtay there with force, againſt the will of the leſſee, for ſix weeks, this ſhall excuſe the performance of the condition. 8 *Co.* 92.

If *A.* is bound to *B.* that *J. S.* ſhall marry *Jane G.* before ſuch a day, and before the day *B.* marries her, he ſhall take no advantage of the condition, becauſe by his means it could not be performed. *Co. Lit.* 206. *b.*

If a man makes a feoffment in mortgage, upon condition to be void upon payment of money by the feoffor, *&c.* to the feoffee at a day, if at the day the feoffee is out of the realm, the feoffor is not bound to ſeek him, or to go out of the realm to him; and therefore becauſe the feoffee is the cauſe that the feoffor cannot tender the money, the feoffor may enter into the land, as if duly tendered. *Co. Lit.* 210. *b.*

Regularly, if the condition be to be performed by a ſtranger, and he refuſes, the obligation is forfeited; for the obligor has taken upon him that the ſtranger ſhall do it. 1 *Rol. Abr.* 452.

As, if the condition be that my ſon ſhall ſerve *J. S.* if he will not, my obligation is forfeited. 22 *E.* 4. 26. *b.*

A. and *B.* ſubmit themſelves to the award of *C.* and *A.* enters into an obligation to *C.* to ſtand to the award, and *B.* alſo, and *C.* awards *A.* to pay 10*s.* to *B.* who tenders it, and *B.* refuſes, the obligor is excuſed becauſe *B.* is not a mere ſtranger, but privy, and ſo is the obligee. 1 *Rol.* 452.

But if the condition be, that the ſon of the obligor ſhall marry the daughter of the obligee, if the daughter of the obligee refuſes the ſon, yet the condition is forfeited; for the daughter is a mere ſtranger, and the obligor hath taken upon him that his ſon ſhall marry her. *Hutt.* 48. *Winch* 30. 3 *Bulſ.* 30.

So if the condition be to enfeoff a ſtranger, who refuſes, yet the obligation is forfeited. *Co. Lit.* 209.

If there be a feoffment upon condition to enfeoff a ſtranger, if the ſtranger refuſes, yet the condition is broke; becauſe the intent was not that the feoffee ſhould retain it. *Co. Lit.* 209.

But otherwiſe it had been, if the condition was to make a gift in tail to a ſtranger, and he refuſes; for there the intent was that he ſhould have the reverſion. *Co. Lit.* 209.

In debt on obligation conditioned *to make ſuch a releaſe* at *Mich.* term next, *as the judge of the prerogative court ſhould think meet*, the defendant ſaid, that *J. S.* was judge there at that time, and that he did not appoint or deviſe any releaſe; adjudged no plea, becauſe *not alledged that he cauſed a releaſe to be drawn and tendered to the judge*, for he ought to get ſuch a leaſe drawn as the judge ſhall allow of. *Cro. E.* 716. *pl.* 41. *Mich.* 41 & 42 *Eliz. C. B. Lamb* v. *Brownwent.*

Audita querela, that he was *obliged in a ſtatute of* 600*l.* to the defendant, to the uſe of *J. B. defeaſanced, that if he paid ſuch ſums, at ſuch days, to J. B. it ſhould be void*; *and ſhewed that at every of the ſaid days and places he was paratus to pay the ſaid ſums, and obtulit them*; all the court held, that the tender was a ſufficient performance; the defeaſance being made to the uſe of *J. B.* but if he had been a mere ſtranger, and was not to have any benefit thereof, it would be otherwiſe; and judgment for the plaintiff. *Cro. E.* 754. *pl.* 18. *Paſch.* 42 *Eliz. C. B. Huiſh* v. *Phillips.*

In debt upon bond conditioned *to deliver* to the plaintiff *all the tackle of ſuch a ſhip under the hands of four perſons, or in default thereof, to pay to the plaintiff ſo much money, &c. as the four perſons ſhall value the tackle to be worth*, the defendant *pleaded, that the four perſons had not valued the tackle*; and upon demurrer to this plea the plaintiff had judgment: for where the defendant has election by the condition to do one of the two things, if by any default of a ſtranger, or of himſelf, or of the obligee, or by the act of God, he cannot do one of them, there he ought to do the other, and the defendant in the principal caſe ought to have got the four perſons to value the tackle. *Mo.* 645. *pl.* 892. *Paſch.* 43 *Eliz. Moore* v. *Morecombe.*

If *A. is bound to build a houſe for B. before ſuch a time, and A. dies before the time*, his executors are bound to perform this; *per Coke* Ch. J. 3 *Bulſt.* 30. *Paſch.* 13 *Jac.*

If the condition of an obligation be, that whereas the obligor and obligee are jointly ſeiſed of the office of admiralty, if the obligor ſhall permit the obligee to uſe the ſaid office, and to take the profits thereof only to his uſe during his life, without interruption made by the obligor, then, *&c.* although after the admiral dies, and the new admiral grants the ſaid office to a ſtranger (as he may by law) and he interrupts and ouſts the obligee, yet if the obligor after this interrupts the obligee alſo, the condition is broke. 1 *Rol. Abr.* 453.

If *A.* is bound to *B.* to pay 10*l.* to *C.* if *A.* tenders it to *C.* and he refuſes, the bond is forfeited. *Co. Lit.* 208.

If *A.* diſſeiſes *B.* and after leaſes to *C.* for years, and *C.* covenants at the end of term to have and yield up the tenements well repaired to *A.* and after *B.* enters, *&c. C.* is excuſed. *Cro. Eliz.* 656.

If *A.* leaſes his land for forty years, rendering rent, and deviſes the reverſion to *J. S.* in tail, *&c.* provided that *B.* and his wife ſhall have the rent to their own uſe till *J. S.* comes of age, upon condition that *B.* and his wife, within three months after his death, enter into a bond to his overſeers for the payment of 34*l. per ann.* in ſuch penalty, and as his overſeers ſhall adviſe, and *A.* dies, *B.* and his wife muſt give notice of this to the overſeers, and at their peril procure them to adviſe. *Winch* 26, 69. *For more matter under this title, ſee* 5 Vin. Abr. *and* 1 Bac. Abr. *tit.* Condition.

Conduits for water in *London*, ſhall be made and repaired, and the lord mayor and aldermen may inquire into defaults therein, *&c.* by ſtat. 35 *Hen.* 8. *c.* 10.

Cone and key. *Bracton, lib.* 2. *c.* 37. *num.* 3. *Fœmina in tali ætate (i. e.* 14 *&* 15 annorum) *poteſt diſponere domui ſuæ & habere* cone and key. *Colne*, in the *Saxon*, ſignifies *calculus, computus*; and *key, clavis.* So that a woman was then held to be of competent years, when ſhe was able to keep the *accounts* and *keys* of the houſe: and *Glan. lib.* 7. *c.* 9. hath ſomewhat to the ſame purpoſe.

Confederacy *(Confœderatio)* Is when two or more confederate or combine themſelves to do any damage to another, or to commit any unlawful act. And though a writ of conſpiracy does not lie, if the party be not indicted, and in lawful manner acquitted, for ſo are the words of the writ; yet falſe *confederacy* between divers perſons ſhall be puniſhed, though nothing be put in execution; which appears by the book of 27 *Aſſiſ. Placit.* 44. where two were indicted of *confederacy*, each to maintain the other, whether their matter were true or falſe; and though nothing were ſuppoſed to be put in practice, the parties were enjoined to anſwer, ſince the thing is forbidden by law. So in the next *article*, in the ſame book, enquiry ſhall be made of *conſpirators* and *confederators* which bind themſelves together, *&c.* This *confederacy*, puniſhable by law before it be executed, ought to have four incidents: Firſt, It muſt be declared by ſome matter of profecution, as by making of bonds or promiſes the one to the other. Secondly, *Malicious*, as for unjuſt revenge. Thirdly, It ought to be *falſe*, againſt an innocent. Laſtly, To be out of court, voluntarily. *Terms de la Ley.*

Confeſſion of offence, Is when a priſoner is appealed or indicted of treaſon or felony, and brought to the bar to be arraigned, and his indictment is read unto him; and the court demands what he can ſay thereto, then either he *confeſſes* the *offence*, and the indictment to be true, or pleads *Not guilty*, or elſe gives an indirect anſwer, and ſo in effect ſtands mute. *Confeſſion* may be made in two ſorts, and to two ſeveral ends. The one is, he may *confeſs* the *offence* whereof he is indicted openly in the court before the judge, and ſubmit himſelf to the cenſure and judgment of the law, which *confeſſion* is the moſt certain anſwer, and beſt ſatisfaction that may be given to the judge to condemn the *offender*; ſo that it proceeds freely of his own accord, without any threats, force, or extremity uſed: for if the *confeſſion* ariſe from any of theſe cauſes, it ought not to be recorded. As if a woman was indicted for the feloniouſly taking of bread to the value of two ſhillings, and being thereof arraigned, ſhe *confeſt* the felony, and ſaid, That ſhe did it by the commandment of her huſband; and the judges, in pity, would not record her *conceſſion*, but cauſed her to plead *Not guilty* to the felony; whereupon the jury found, that ſhe ſtole the bread by compulſion of her huſband againſt her will, for which cauſe ſhe was diſcharged. 27 *Aſſiſ. pl.* 50. The other kind of *confeſſion* is, when a priſoner *confeſſes* the indictment to be true, and that he committed the *offence* whereof he is indicted, and then becomes an approver, that is, an accuſer of others who have committed the ſame *offence* whereof he is indicted, or offences with him; and then prays the judge to have a coroner aſſigned him, to whom he may make relation of thoſe offences, and the full circumſtances thereof. There is alſo a third kind of *confeſſion* made by an *offender* in felony, which is not in court before the judge, as the other two are; but before a coroner in a church, or other privileged place, upon which the *offender*, by the ancient law of the realm was to abjure. *Cowell, edit.* 1727.

Confeſſion, according to ſome writers, is twofold, either *expreſs*, or *implied.*

An *expreſs* confeſſion is, where a perſon directly confeſſes the crime with which he is charged; which is the higheſt conviction that can be. 2 *Haw.* 333.

But it is uſual for the court, eſpecially if it be out of clergy, to adviſe the party to plead and put himſelf upon his trial, and not preſently to record his confeſſion, but to admit him to plead. 2 *H. H.* 225.

An *implied* confeſſion is, where a defendant, in a caſe not capital, doth not directly own himſelf guilty, but in a manner admits it by yielding to the King's mercy, and deſiring to ſubmit to a ſmall fine; which ſubmiſſion the court may accept of if they think fit, without putting him to a direct confeſſion. 2 *Haw.* 233.

It ſeems that the confeſſion of the defendant taken upon examination before juſtices of the peace, or in diſcourſe with private perſons, may be given in evidence againſt the party confeſſing, but not againſt others. 2 *Haw.* 429.

All thoſe who on their examination own themſelves guilty of a felony alledged againſt them, and are charged in their *mittimus* with the felony ſo confeſſed, ſeem to be excluded from bail; for bail is only proper where it ſtands indifferent whether the party be guilty or innocent. 2 *Haw.* 97.

For the effect of confeſſion in civil pleas, ſee 5 Vin. Abr. *title* Confeſſion.

Confeſſor, *Confeſſarius, à Confeſſionibus.* The prieſt, who received the auricular *confeſſion* had the title of *confeſſor*;

feſſor; though improperly; for he is rather the *confeſſee*, ing the perſon paſſive, to whom the confeſſion is made, or at leaſt the *confeſſary*, who receives the *confeſſion*, or the *confeſſionar*. This receiving the *confeſſion* of a penitent, was in the old Engl. *to ſhreve*, or *ſhrive*, Sax. *ſcrifan*; whence the party *confeſſed* was *beſcrifen*; whence our Engl. *beſhrieved*, or looking like a *confeſſed* or ſhrieved perſon, impoſed ſome uneaſy penance; hence to *beſhrew* is to imprecate, or denounce the curſe of ſin as *confeſſion*. The act of *confeſſion* was called *ſcrifde*, whence poſſibly to *ſhift*, or ſhuffle in diſcourſe, like people who are aſhamed or afraid to tell all their faults. The moſt ſolemn time of *confeſſing* was the day before *Lent*, which from thence is called *Shrove-Tueſday*. *Cowell, edit.* 1727.

Confirmation, (*Confirmatio*) From the verb *confirmare, quod eſt firmum facere*; and therefore it is ſaid, That *confirmatio omnes ſupplet defectus, licet id quod actum eſt, ab initio non valuit. Co.* on *Litt. lib.* 3. *cap.* 9. *ſect.* 515. It is a conveyance of an eſtate or right *in eſſe*, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is increaſed: nay, it is a ſtrengthening of an eſtate formerly, and yet voidable, though not preſently void. For example, a biſhop granteth his chancellorſhip by patent for the term of the patentee's life; this is no void grant, but voidable by the biſhop's death, except it be ſtrengthened by the *confirmation* of the dean and chapter. *Quælibet* confirmatio *aut eſt perficiens, creſcens aut diminuens.* 1. *Perficiens*, as if a feoffee upon condition make a feoffment, and the feoffor confirm the eſtate of the ſecond feoffee: ſo if diſſeiſee confirm the eſtate of the diſſeiſor, or his feoffee. 2. *Creſcens*, doth always enlarge the eſtate of a tenant; as tenant at will to hold for years; or tenant for years to hold for life. 3. *Diminuens*, as when a lord of whom the land is holden confirms the eſtate of his tenant to hold by a leſs rent. See more of this in *Weſt. Symb. part* 1. *lib.* 1. *ſect.* 2. 500. *F. N. B. fol.* 169, 226, 271. and *Litt. lib.* 3. *cap.* 9. *Co.* 9. *Rep. Beaumont's Caſe.*

See 5 Vin. *tit.* Confirmation.

Confirmation of judicial proceedings. See ſtat. 1 *Ed.* 4. *c.* 1. 12 *Car.* 2. *c.* 12.

Confirmation of the parliament. See 12 *Car.* 2. 13 *Car.* 2. *ſt.* 1. *c.* 7, 11, 14.

Confiſcate, *Confiſcatus*, May be derived either from the Lat. *confiſcare*, or the French *confiſquer*; that is, *in publicum adducere*. All theſe words are drawn from *fiſcus*, which (as *Minſhew* ſaith) originally ſignifieth a *hamper* or *baſket*, but *metonymically*, the emperor's treaſure; becauſe it was anciently kept in hampers. And though our King doth not put his treaſure in ſuch things; yet as the *Romans* have ſaid, that ſuch goods as are forfeited to the emperor were *bona confiſcata*; in like manner do we ſay of ſuch goods as are forfeited to the King's *Exchequer*. And the title to have theſe goods is given to the King by ſuch law, when they are not claimed by ſome other. As if a man be indicted, that he feloniouſly ſtole the goods of another man, when in truth they are the proper goods of him indicted; and they are brought into court againſt him as the manner is, and he is then aſked, what he ſays to the ſaid goods, to which he diſclaims; by this *diſclaimer* he ſhall loſe the goods, although afterwards he be acquitted of the felony, and the King ſhall have them as *confiſcated*: but otherwiſe it is, if he do not diſclaim them. The ſame law is, where goods are found in the felon's poſſeſſion, which he diſavows, and afterwards is attainted of other goods, and not of them, there the goods which he diſavows are *confiſcated* to the King; but had he been attainted of the ſame goods, they ſhould have been ſaid to be *forfeited*, and not *confiſcate*, notwithſtanding his diſavowment. So if an appeal of robbery be brought, and the plaintiff leaves out ſome of his goods, he ſhall not be received to enlarge his appeal, and foraſmuch as there is none to have the goods ſo left out, the King ſhall have them as *confiſcate*, according to the old rule, *Quod non capit Chriſtus, capit fiſcus*; and as in the caſe aforeſaid, the law puniſhes the owner for his negligence and connivancy, ſo alſo the law abhors malice in ſeeking the life of any without juſt cauſe. And therefore if *A.* hath the goods of *B.* by delivery or finding, and *B.* brings an appeal againſt *A.* for taking them felonioufly, and it is found, that they were the plaintiff's goods, and that the defendant came lawfully by them: in this caſe the goods are not *confiſcate* to the King, becauſe of the falſe and malicious appeal. See more in *Staundf. Pl. Cor. l.* 3. *ca.* 24. 3 *Inſt. f.* 227. Note, *Confiſcare* and *forisfacere* are ſynonyma's; and *bona confiſcata* are *bona forisfacta.*

Conformity to the church of *England.* See ſtat. 1 *Eliz. c.* 2 and **Recuſant.**

Confrairie, *Confraternitas*, A fraternity or brotherhood, as the *confrairie de S.* George, or *les chivaliers de la blue gartier.* Selden.

Confreres, *Confratres*, Brethren in a religious houſe, fellows of one ſociety. 32 *Hen.* 8. *c.* 24.

Congeable, Is derived from the French *conge*, that is, *venia*; and ſignifies in our common law as much as lawful, or lawfully done, or done with leave; as, *the entry of the diſſeiſee* is congeable, and ſo *Littleton* uſes it in his 410 *ſection*, and *Cro.* 2 *par. fol.* 31.

Conge d'accorder, Signifies leave to accord or agree; it is mentioned in the *ſtatute of fines*, 18 *Ed.* 3. in theſe words, *when the original writ is delivered in preſence of the parties before the juſtices, a pleader ſhall ſay this*, Sir Juſtice, conge d'accorder; *and the juſtice ſhall ſay to him*, What will Sir *R.* give? *and ſhall name one of the parties, &c.* See *Ruff.* Stat. *vol.* 9. *page* 1. *of Pref.*

Conge d'Eſlire, *Venia Eligendi*, Is *French*, and ſignifieth in our common law the King's permiſſion royal to a dean and chapter, in time of vacation, to chooſe a biſhop; or to an abbey or priory of his own foundation to chooſe the abbot or prior. *F. N. B. fol.* 169, 170. Touching this matter, *Gwin* in his *Preface to his Readings*, ſaith, *That the King of* England, *as ſovereign patron of all archbiſhopricks and other eccleſiaſtical benefices, had of ancient time free appointment of all eccleſiaſtical dignities, whenſoever they chanced to be void, inveſting them firſt*, per Bacculum & Annulum, *and afterwards by his letters patent*; *and in proceſs of time, he made the election over to others, under certain forms and conditions*; *as, that they ſhould at every vacation, before they chooſe, demand of the King* conge d'Eſlire; *that is, licence to proceed to election, and then after election to crave his royal aſſent, &c.* And further, he affirmeth by good proof, out of common law books, that King *John* was the firſt that granted this, and that it was afterwards confirmed by *Weſt.* 1. *cap.* 1. which *ſtatute* was made *An.* 3. *Ed.* 1. And again, by the *ſtat. Articuli Cleri, cap.* 2. which was ordained, 25 *Ed.* 3. *ſtat.* 3. It is certain all the prelacies in *England* were conferred at the pleaſure of the prince, and the perſons were inveſted by the King's delivery of a ſtaff and ring, till archbiſhop *Anſelm* denied this royal prerogative, and prevailed with pope *Paſchal* to abrogate this cuſtom by a ſolemn *canon*; after which, the firſt biſhop who came in by a regular election, was *Roger* biſhop of *Saliſbury*, in 3 *H.* 1. *An.* 1102.

By ſtat. 25 *Hen.* 8. *c.* 20. No man is to be preſented to the ſee of *Rome* for the dignity of a biſhop, *&c.* but election is to be by the King's *conge d'eſlire*, or licence, to elect the perſon named by the King; which the dean and chapter muſt do in twenty days, or they will incur a *præmunire*: and if they fail to make election, the King is to nominate by his letters patent. The ſtat. 1 *Ed.* 6. *c.* 6. ouſted the writ of *conge d'eſlire*, and impowered the King to collate to an archbiſhoprick or biſhoprick abſolutely by letters patent. But this ſtatute was repealed by ſtat. 1 *Ma. c.* 2.

Congildon. It is mentioned in *Leg. Inæ, c.* 23. and ſignifies joint payment, or one who is a companion with another in ſuch a payment or tribute.

Congius, An ancient meaſure of ſix *ſextaries*, which is about a gallon and a pint. *Et reddat quinque* congios *ceræ & unum ydromelli, & triginta panes cum pertinentibus pulmentariis.* Charta Edmundi Regis de anno 946. See **Sextary.**

Conjectare, To contribute. *Waram & compoſitionem mortis* conjectare. *In Legibus Alured. cap.* 21 & 32.

Coningeria,

Coningeria, A cony-borrow, or warren for rabbits.—*Item dicunt, quod idem Dominus poteſt capere in duabus* coningeriis *quas habet infra inſulam de* Vecta 100 *cuniculos per annum, & valet quilibet cuniculus ii. den.*——Inquiſ. de anno. 47 H. 3. n. 32.

Conizance. See **Cognizance.**

Conizor. See **Cognizor.**

Conjurare, Is where ſeveral confirm a thing by oath.

Conjuratio, Is an oath; and *conjuratus* is the ſame with *conjurator, viz.* one who is bound with the ſame oath. *Ernaldus mareſcallus juratus idem dicit per omnia quod filius Andreæ* conjuratus *ſuus, &c.* Mon. 1 tom. pag. 207.

Conjuration (*Conjuratio*) Is a compound of *con* and *juro*, and ſo it ſignifieth a plot or compact made by men, combining themſelves together by oath or promiſe to do any publick harm: but in our Common law it is eſpecially uſed for ſuch as have perſonal conference with the Devil or evil ſpirits, to know any ſecret, or to effect any purpoſe. Stat. 5 *Eliz. cap.* 16. And the difference between *conjuration* and *witchcraft* ſeems to be this, that the one by prayers and invocations of God's powerful names, compels the Devil to ſay or do what he commandeth him; the other dealeth rather by a friendly and voluntary conference and agreement between him or her and the Devil or familiar, to have her or his deſires or turns ſerved, in lieu of blood or other gift offered unto him, eſpecially of his or her ſoul. And both theſe differ from enchantments or ſorceries, becauſe they are perſonal conferences with the Devil, as is already ſaid; but theſe are but medicines, and ceremonial forms of words, called commonly *charms*, without apparition. *Cowell.*

Mr. Serjeant *Hawkins*, in his *Pleas of the Crown, lib.* 1. *pag.* 5. ſays, that *conjurors* are thoſe who by force of certain magick words endeavour to raiſe the Devil, and oblige him to execute their commands. *Witches* are ſuch who by way of conference bargain with an evil ſpirit to do what they deſire him: and *ſorcerers* are thoſe who by the uſe of certain ſuperſtitious words, or by the means of images, *&c.* are ſaid to produce ſtrange effects above the ordinary courſe of nature. All which were anciently puniſhed in the ſame manner as *hereticks*, by the writ *de hæretico comburendo*, after a ſentence in the eccleſiaſtical court: and they might be condemned to the pillory, *&c.* upon an indictment at Common law. 3 *Inſt.* 44. *H. P. C.* 38. But by ſtat. 1 *Jac.* 1. *c.* 12. theſe offenders are divided into two degrees; and thoſe in the *firſt degree*, and their acceſſaries before, and ſhall ſuffer as felons without benefit of clergy; and theſe are the four following ſpecies. 1. Such as ſhall uſe any invocation or *conjuration* of any evil ſpirit. 2. That conſult, covenant with, entertain, employ, or reward any evil ſpirit to any intent. 3. As take up any dead perſon's body, or any part thereof, to be uſed in any manner of witchcraft. 4. Or that exerciſe any witchcraft, inchantment, charm, or ſorcery, whereby any perſon ſhall be killed, deſtroyed, conſumed, or lamed in his body, or any part thereof. And if a ſpirit doth not actually appear upon invocation, *&c.* or if a dead perſon or part of it be taken up to be uſed, and not actually uſed, they are within the ſtatute: but one muſt actually effect the miſchief to be within the clauſe of killing, laming, *&c.* 3 *Inſt.* 45. *H. P. C.* 6, 7. Thoſe in the *ſecond degree* ſhall for the firſt offence ſuffer a year's impriſonment and the pillory; and for the ſecond, be adjudged felons, excluded clergy. And theſe offenders are divided into the following kinds, ſuch as take upon them by witchcraft, charm, *&c.* to tell where treaſure, or things loſt or ſtolen, may be found; or to do any thing to the intent to provoke any perſon to unlawful love; or to hurt any perſon in his body; or whereby any cattle or goods of any perſon ſhall be deſtroyed or impaired, *&c.* but thoſe who take upon them to do the laſt, are not within the act, unleſs they actually accompliſh it. 3 *Inſt.* 46. Stat. 1 *Jac.* 1. *c.* 12. This *ſtatute* of King *James* 1. againſt *conjuration* and witchcraft is repealed; and no proſecution ſhall be commenced on the ſame: but where perſons pretend to exerciſe any kind of witchcraft or *conjuration, &c.* or undertake to tell fortunes, or from their ſkill in any crafty ſcience to diſcover where goods ſtolen or loſt may be found, upon conviction, they ſhall be impriſoned a year, and ſtand in the pillory once in every quarter in ſome market town, and may be ordered to give ſecurity for their good behaviour, by ſtat. 9 *Geo.* 2. *c.* 5.

Conobium urbs, *Caerleon upon Conwey* in *Caermarthenſhire.*

Conobius fluvius, *Conwey* in *Wales.*

Conqueſt. *Franchiſes* are extinguiſhed immediately on the conqueſt, but not the laws of the land without proclamation; and ſo *William the Conqueror* extinguiſhed all franchiſes in *England* but of churches, which the Pope would not permit him to take; for which reaſon they ſtand as before the conqueſt. *Arg. Mo.* 670. *pl.* 918. *Mich.* 43 & 44 *Eliz. B. R.*

It was agreed, that according to *Calvin*'s caſe, 7 *Rep.* 17. upon the conqueſt of an *infidel country*, all the *old laws are abrogated ex inſtanti*, and *the King impoſes what laws he pleaſes*; and in caſe of the conqueſt of a *Chriſtian country*, he may *change them at pleaſure*, and appoint ſuch as he thinks fit; though *Coke* quotes no authority for it, yet it was agreed, that this might be conſonant to reaſon. *Show. Parl. Caſes* 31. in caſe of *Howell* v. *Dutton.*

In the caſe of an infidel country, their laws by conqueſt do not entirely ceaſe, but only ſuch as are againſt the laws of God, and in ſuch caſe where the laws are rejected or ſilent, the conquered country ſhall be governed according to the rule of natural equity; held *per cur.* 2 *Salk.* 412. *pl.* 1. *Trin.* 5 *W. & M. in B. R.*

Where the King of *England* conquers a country, it is of a different conſideration from a new and uninhabited country being found out by *Engliſh* ſubjects; for in the firſt caſe the conqueror, *by ſaving the lives of the people conquered, gains a right and property in ſuch people*, and conſequently may impoſe upon them what laws he pleaſes. 2 *Wms's Rep.* 75. cites it as ſaid by the Maſter of the Rolls, *Auguſt* 1722, to have been ſo determined by the Lords of the Privy Council upon appeal from the foreign plantations.

But till ſuch laws given by the conquering Prince, the *laws* and cuſtoms *of the conquered country ſhall hold place, unleſs* where theſe are *contrary to our religion, or enact any thing that is malum in ſe*, or are ſilent; for in all ſuch caſes the laws of the conquering country ſhall prevail. *Ibid.*

Conreata pellis, A hide or ſkin dreſſed, *a conreatore*, by the currier.——*Una* pellis *ovina ſigna datur* conreata, *valet denarium, obolum; una* pellis *agnina ſigna datur* conreata, *valet i. den.*——Regulæ Compoti Domus de Farendon. MS.

Conredium, The ſame with **Corody**; which ſee. *Abbas & monachi ejus loci per totum annum poſt obitum ſuum totum* conredium (*ſicut in vita ſua perceperint*) *habere debent quod alicui indigenti pro anima ſua erogabitur.* Mon. 1 tom. pag. 149.

Conſanguineo, Is a writ, for which ſee *Reg. Orig. de atavo, proavo, &* conſanguineo, *f.* 226. *a.*

Conſanguinity (*Conſanguinitas*) Is a kindred by blood or birth; as affinity is a kindred by marriage and it is conſiderable in the deſcent of lands, who ſhall take it as next of blood, *&c.* And alſo in adminiſtrations, which ſhall be granted to the next of kin. See **Adminiſtration, Deſcent.**

Conſecration of Biſhops. See **Biſhops.**

Conſent. In all caſes when any *thing executory* is created by *deed*, it may, by conſent of all perſons that were parties to the creation of it by their deed, be *defeated* and annulled; and therefore it was ſaid, that *warranties, recognizances*, rents, charges, annuities, covenants, leaſes for years, uſes at common law, *&c.* may, by a *defeaſance* made with the mutual conſent of all that were parties to the creation of them by deed, be annulled, diſcharged, and defeated. 1 *Rep.* 113. *Hill.* 28 *Eliz. in Albany's Caſe.*

A conſent *ex poſt facto* is not of any ſignification; for it cannot be had for things which cannot be otherwiſe; *per Vaughan* Ch. J. *Mod.* 312. *Paſch.* 22 *Car.* 2. *in Chanc. in caſe of Fry* v. *Porter.*

The consent of the *heir* makes good a *void deviſe*. *Chanc. Caſes, Trin.* 23 *Car.* 2. *Lord Cornbury* v. *Middleton.*

Conſent of remainder-man for life, though but *verbal*, is binding, and decreed to confirm building leaſes accordingly. 2 *Chanc. Caſes* 28. *Paſch.* 32 *Car.* 2. *Sidney* v. *The Earl of Leiceſter.*

Conſent *to a trial* of a title to land *in another county than where the land lies*, will not help, it being an error, though ſuch conſent be of record; agreed *per cur'*. 2 *Show* 98. *pl.* 97. *Paſch.* 32 *Car.* 2. *B. R. Lord Clare* v. *Reach.*

A *burgeſs of a corporation conſenting to be turned out* from his burgeſs's place, and the common council of the corporation removing him accordingly, does not amount to a reſignation, and a peremptory *mandamus* was granted to reſtore him. *Holt's Rep.* 450. *Hill.* 8 *Ann. B. R. The Queen* v. *Mayor of Glouceſter.*

Conſequential loſſes or damages. If I have a *pond*, I cannot ſo let it out that it ſhall drown my neighbour's land. Arg. *Het.* 119. cites 6 *Ed.* 4. 6.

If a ſtranger *drive my cattle upon your land, whereby they are diſtrained* by you, I ſhall recover againſt the ſtranger for this diſtreſs by you; *per Baron Altham.* Arg. *Lane* 67. cites 9 *Ed.* 4. 4.

Action lies for *calling one baſtard* whoſe grandfather had lands in tail, though the plaintiff was *youngeſt ſon* of the father; yet being offered a ſum of money by a purchaſer to join in the ſale, and afterwards the purchaſer refuſing to give him any thing by reaſon of thoſe words; it was held, though he has no preſent title, yet it appears he is, by a poſſibility to join in the aſſurance; but it being afterwards refuſed to be given him by reaſon of thoſe words, is a preſent damage, and *he may receive prejudice thereby in futuro*, in caſe he were to *claim any land by deſcent*. Affirmed in error. *Cro. J.* 213. *pl.* 6. *Mich.* 6 *Jac. B. R. Vaughan* v. *Ellis.*

A *ſmith pricks the horſe* of a ſervant being on his journey to pay money for his maſter to ſave the penalty of a bond, both the maſter and ſervant may have their ſeveral actions on the caſe for the ſeveral wrongs they have thereby ſuſtained; *per Coke* Ch. J. 2 *Bulſ.* 344. *Hill.* 12 *Jac. in Caſe of Everard* v. *Hopkins.*

Where one is *party to a fraud*, all which follows by reaſon of that fraud ſhall be ſaid as done by him. Arg. *Cro. J.* 469. *Hill.* 15 *Jac. B. R. in Caſe of Southern* v. *How.*

Action lies *for threatening workmen* to maim and proſecute them, whereby the maſter loſt the ſelling of his goods, the men not daring to go on with their work. *Cro. J.* 567. *pl.* 4. *Paſch.* 18 *Jac. B. R. Garret* v. *Taylor.*

A. *contracts with* B. *to make an eſtate of* Bl. Acre *at* Mich. *to* B. *if* C. *enters into* Bl. Acre. *A.* may have an action on the caſe againſt *C.* for the ſpecial damage which may happen to him by reaſon that he is *diſabled to perform* his contract, by reaſon of *C.*'s entry, and he ſhall declare *contra pacem*, but not *vi & armis*. *Per Doderidge*, J. *Godb.* 426. *pl.* 492. *Trin.* 21 *Jac. B. R.*

A. *breaks the fence of* B. by which cattle gets into *C.*'s ground, *C.* ſhall have caſe againſt *A.* but not treſpaſs. *Per Roll. Sty.* 131. *Mich.* 24 *Car. B. R. in the Caſe of Sir A. A. Cowper* v. *St. John.*

Though a man does a lawful thing, yet if any damage do thereby befal another, he ſhall anſwer *if he could have avoided it*; and this holds *in all civil caſes*. As if a man *lops a tree*, and the boughs fall upon another *ipſo invito*, yet an action lies. So if a man *ſhoots at butts*, and hurts another unawares. So if I have land through which a river runs to your mill, and I lop the ſallows growing on the river-ſide, which accidentally *ſtop the water*, ſo as your *mill is hindered*. So if I am building my own houſe, and *a piece of timber falls on my neighbour's houſe*, and breaks part of it. So if a man aſſaults me, and *I lift up my ſtaff to defend myſelf, and ſtrike another* in lifting it up. But it is otherwiſe *in criminal caſes*, for there *actus non facit reum niſi mens ſit rea*. *Per Raymond* J. Arg. *Raym.* 422, 423. *Hill.* 33 & 34 *Car.* 2. *B. R.*

If A. *beats my horſe, by which he runs on* B. *A.* is the treſpaſſor, and not I. 2 *Salk.* 638. *Per Cur. Paſch.* 7 *W.* 3. *B. R. in caſe of Gibbon* v. *Pepper.*

He that makes a *fire in his field* muſt ſee that it does no harm, and anſwer the damage if it does; but if a ſudden ſtorm had riſen which he could not ſtop, it was a matter of evidence, and he ſhould have ſhewed it. 1 *Salk.* 13. *pl.* 4. *Mich.* 9 *Will.* 3. *B. R. Turbervil* v. *Stamp.*

A. contracts with *B.* to bring timber in *A.*'s cart, and deliver it in *B.*'s yard; it was brought in a cold day; *B.* refuſed to come and unload it, whereby the *horſes got cold, and two died*; *A.* brought action, but could not obtain judgment. Cited *per Holt* Ch. J. *Cumb.* 481. 10 *Will.* 3. *B. R. as in the caſe of Bertue* v. *Burn.*

If a *conſtable places a dragoon* where it is *unlawful* for him ſo to do, he muſt make ſatisfaction for the conſequential damages, as letting drink about the cellar, *&c.* for ſince the placing him there is unlawful, it ſhall be taken as if the conſtable had put him there on purpoſe to do an unlawful act. *Per Holt* Ch. J. 5 *Mod.* 430. *Hill.* 10 *W.* 3. *in caſe of Parkhouſe* v. *Foſter.*

Action on the caſe for *ſtopping a way* leading to his colliery, by which he loſt his cuſtomers, lies not without ſpecial damages. *Cumb.* 480. *Trin.* 10 *Will.* 3. *B. R. Tveſon* v. *Moor.*

After recovering damages in aſſault and battery, *&c.* no action will lie for conſequential damages, as that he was afterwards forced to be trepanned, and had a bone taken out of his ſkull. 12 *Mod.* 542. *Trin.* 13 *Will.* 3. *Fitter* v. *Veal.*

If *A.* enters into my grounds, and *breaks down my wall, which keeps out the ſea*; and I bring my treſpaſs, and *recover damages*, and I *rebuild* my wall, but *by reaſon of the newneſs thereof it is broke down by a new ſtorm*, which the old wall would have reſiſted; *per cur'* the plaintiff ſhall recover for the overflowing of his lands, and to rebuild his wall; and the danger of the new wall, if there be any thing in that too, may be conſidered; but this *muſt be all at once*. *Arg.* 12 *Mod.* 543. *Trin.* 13 *W.* 3. in the caſe of *Fitter* v. *Veal.*

It is a *fundamental principle* in law and reaſon, that he that does the firſt wrong ſhall anſwer for all conſequential damages. 12 *Mod.* 639. *Per cur'. Hill.* 13 *Will.* 3. in caſe of *Roſwell* v. *Prior.*

If *one takes* another *priſoner by wrong*, and then *turns him over to another officer, who detains him*, the firſt taker ſhall anſwer for all the conſequential damages. *Per cur'.* 12 *Mod.* 640. *Hill.* 13 *Will.* 3. in the caſe of *Roſwell* v. *Prior.*

He that *keeps goods by wrong* muſt anſwer for them at his peril at all events, for his detainer is the reaſon of the loſs. 2 *Salk.* 523. *Per Holt* Ch. J. *Trin.* 2 *Ann. B. R.* in the caſe of *Coggs* v. *Bernard.*

If *A. wrongfully impriſons B.* and the *gaoler detains him till ſo much is paid*; in this caſe he who was the priſoner ſhall have an action of falſe impriſonment againſt *A.* for impriſoning and detaining him until he paid ſo much money; and this is a taking by *A.* and it muſt be illegal to uſe any unlawful means to oppreſs another, and *A.* is guilty of the oppreſſion and extortion committed by the gaoler. 3 *Salk.* 193. in caſe of *The Queen* v. *Tracy.*

A. has a market and toll, and *B.* is coming with *goods to the market*, for which, if ſold, *toll* would be due, and *C. hinders B. coming to the market*; the lord of the market may have an action, becauſe of the *poſſibility* of damages. *Per Powell* J. 6 *Mod.* 49. *Mich.* 2 *Ann. B. R.* in the caſe of *Aſhby* v. *White.*

Where a man does a *lawful act*, and a damage *reſults from* ſuch act, an action of *caſe* lies, and not an action of *treſpaſs*. 8 *Mod.* 272. *Trin.* 10 *Geo.* 1. *Reynold* v. *Clerk.* If a man keeps a *beaſt of a ſavage nature*, as a lion, *&c.* it is at his peril to keep him up, and he is anſwerable for all the conſequences of his getting looſe. *Per Raymond* Ch. J. *Gilb.* 187. *Mich.* 4 *Geo.* 2. *B. R.* in the caſe of *The King* v. *Huggins.*

Conſervator, A delegated umpire, or ſtanding arbitrator, who, as a third impartial friend, was choſen or appointed

appointed a guarantee to compoſe and adjuſt differences that ſhould ariſe between two other parties.——*Ego* Simon *rector eccleſiæ de* Heyford Warine——*Subjiciendo me coercioni & compulſioni, civilibus judicibus vel delegatis, ſeu* conſervatori, *quem dicti Religioſi & eorum ſucceſſores duxerint eligendum*——Paroch. Antiq. pag. 513.

Conſervator of the peace (*Conſervator vel cuſtos pacis*) Is he that hath an eſpecial charge, by virtue of his office, to ſee the King's peace kept; which peace *Lambard* in effect defineth to be a with-holding or abſtinence from that injurious force and violence which boiſterous and unruly perſons are in their natures prone to uſe towards others, were they not reſtrained by laws, and fear of puniſhment. Of theſe *conſervators* he farther ſaith thus, that before the time of King *Edward* the Third, who firſt erected *juſtices of peace*, there were ſundry perſons, that by the Common law had intereſt in keeping the *peace:* of thoſe ſome had that charge, as incident to their offices which they did bear, and ſo included within the ſame; that they were nevertheleſs called by the name of their office only: ſome others had it ſimply, as of itſelf, and were therefore named *cuſtodes pacis*, wardens, or *conſervators of the peace:* the former and latter ſort he again ſubdivideth, which read in his *Eirenarcha*, *lib.* 1. *cap.* 3. The corporation of the great level of the *fens* doth conſiſt of a governor, ſix bailiffs, twenty *conſervators* and commonalty, as by act of parliament, 15 *Car.* 2. *cap.* 17. appears. The chamberlain of *Cheſter* is a *conſervator of the peace* in that county by virtue of his office. 4 *Inſt. fol.* 212. And petty conſtables are by the Common law *conſervators of the peace*, &c. There were likewiſe *conſervators* of privileges of the Hoſpitalers and Templars, &c. *Weſt.* 2. *cap.* 43. 4 *Inſt. fo.* 341.

Conſervator of the truce and ſafe-conducts (*Conſervator induciarum & ſalvorum Regis conductuum*) Was an officer appointed in every port of the ſea by the King's letters patent, and had 40 *l.* for his yearly ſtipend at the leaſt. His charge was to enquire of all offences done againſt the King's *truce and ſafe conducts* upon the main ſea, out of the liberties of the *Cinque ports*, as the admirals by cuſtom were wont to do, and ſuch other things as are declared in 2 *H.* 5. *cap.* 6. touching this matter. See alſo the ſtatute of 4 *H.* 5. *c.* 7.

Conſideratio curiae. It is often mentioned in law-pleadings; *Ideo* conſideratum *eſt per* curiam, *i. e.* It is adjudged by the court; for *conſideratio curiæ* is the judgment of the court, *viz.* as in *Matt. Pariſ. Addit. pa.* 97. *Semper paratus eſt ſtare ad* conſiderationem *parium ſuorum*; and in the 2 *Mon. pa.* 221. *Abſtulit ei dictam terram per* conſiderationem curiæ *ſuæ*, &c.

Conſideration (*Conſideratio*) Is the material cauſe of a contract, without which it would not be effectual or binding. This *conſideratien* is either expreſſed, as if a man bargain to give twenty ſhillings for a horſe; or elſe implied, as when the law itſelf enforceth a *conſideration*; as if a man come into a common inn, and there ſtaying ſome time, taking both meat and lodging for himſelf and his horſe, the law preſumeth that he intends to pay for both, though nothing be farther covenanted between him and his hoſt; and therefore, if he diſcharge not the houſe, the hoſt may ſtay his horſe. *Fulbeck's Parall. Tract. Contract. fol.* 6. Alſo there is a *conſideration* of nature and blood, and valuable *conſideration:* and therefore if a man be indebted to divers others, and yet in *conſideration* of natural affection gives all his goods to his ſon or couſin, this ſhall be conſtrued a fraudulent gift, within the act of 13 *Eliz. c.* 5. becauſe this act intends a valuable *conſideration. Cowell, edit.* 1727.

A conſideration is neceſſary *to create a debt*, otherwiſe it is *nudum pactum. Jenk.* 290. *in pl.* 27.

Where *debt* is brought *for money due, without any circumſtance of forbearance of ſuit* by the plaintiff for a time, a *particular conſideration* ought to be ſhewn in the declaration. *Jenk.* 292. *pl* 37.

A *bond implies* a conſideration in itſelf, and therefore it was held by the court, that a man was not bound to diſcover what was the conſideration. *Hard.* 200. *Trin.* 13 *Car.* 2. in the Exchequer, *Turner* v. *Binion.*

Nudum pactum will not *raiſe an uſe*, nor can an uſe be raiſed without a conſideration; agreed. *Arg. Cart.* 141. *Mich.* 18 *Car.* 2. *C. B.*

If *leſſee for life or years aſſigns his eſtate*, there needs no conſideration, becauſe the aſſignee is ſubject to the ancient forfeitures and to payment of the rent, and that a loan is ſufficient to veſt an uſe in him; but otherwiſe in caſe of a fee-ſimple; *per North* Ch. J. *Mod.* 263. *pl.* 15. *Trin.* 29. *Car.* 2. *C. B.* in the caſe of *Barker* v. *Keate.*

A *leaſe for a year* upon no other conſideration than *reſerving a pepper-corn, if it be demanded*, is a ſufficient conſideration to raiſe a uſe, and ſhall operate as a bargain and ſale, and ſo make the leſſee capable of a releaſe. 2 *Vent.* 35. *Paſch.* 32 *Car.* 2. *C. B. Barker* v. *Keate.*

A *voluntary ſettlement may be ſurrendered* without conſideration, and ſuch ſurrender may be aided in a court of equity, and an agreement ſo to do will be decreed; *per Ld. Somers. Ch. Prec.* 69. *pl.* 62. *Hill.* 1696. *Wentworth* v. *Deverginy.*

Bargain and ſale, *proviſo you pay to me at a future day* 100 *l.* This, though ſet down in form of a condition, is as effectual as if formally expreſſed in the uſual terms. *Arg. Le.* 6. *pl.* 10. *Mich.* 25 & 26 *Eliz. B. R.* in caſe of *Stonely* v. *Bracebridge.*

Love is not a conſideration on which an action may be grounded on a promiſe to pay money, and the ſame of *friendſhip*; *per cur'*. 2 Le. 30. pl. 35. Trin. 30 Eliz. B. R. Harford *v.* Gardiner.

A *bargain and ſale was pleaded of* land, *without ſaying pro quadam pecuniæ ſumma*, and exception being taken thereto, the court doubted of it, and demanded of the prothonotaries what is their form of pleading; and by *Nelſon* chief prothonotary, theſe words *pro quadam pecuniæ ſumma* ought to be in the pleading. *Scot* prothonotary *contra. Anderſon* conceived it was either way good, but *pro quadam pecuniæ ſumma* is the beſt; and ſo *Leonard cuſtos brevium* conceived. And the opinion of the juſtices was, that a bargain and ſale *for divers cauſes ond conſiderations* is not good without a ſum of money. And by *Wyndham*, bargain and ſale *pro quadam pecuniæ ſumma*, although no money be paid, is enough, for the payment or not payment is not traverſable; and by *Periam*, if *pro quadam pecuniæ ſumma* be not in the indenture of bargain and ſale, yet the *payment thereof is averrable*; and for this exception the judgment was ſtaid. *Le.* 170. *in pl.* 237. *Mich.* 30 & 31 *Eliz. C. B.* in the caſe of *Smith* v. *Lane.*

Other conſiderations being but general parlance imply nothing, except expreſs conſiderations were ſhewn; for otherwiſe none ſhall be intended; *per cur'*. *Cro. E.* 344. *Mich.* 36 & 37 *Eliz. B. R.* in caſe of *Lacy* v. *Whetſtone.*

An *uſe* is raiſed upon conſiderarion of blood, but the *conſideration of blood will not create a debt*, though a deed will, without mentioning a conſideration. An *aſſumpſit* to pay *A.* his couſin 100 *l.* is void, if there be no other conſideration; the reaſon of the difference is, the land goes to the blood, but ſo do not the debts. *Jenk.* 81, 82. *in pl.* 60.

A leſs conſideration will ſerve to *raiſe an uſe* than to *deſtroy* an uſe; *per Bacon* C. 2 *Roll. Rep.* 106. *Trin.* 17 *Jac. in Canc.* in caſe of *Reynolds* v. *Peacock.*

The plaintiff intitled himſelf by a *bargain and ſale in conſideration of certain articles of agreement*, and does not ſay for money; and for that reaſon judgment was reverſed. *Freem. Rep.* 344. *pl.* 427. cites *Sty.* 188. [*Hill.* 1649. *Watts* v. *Dixey.*]

A bargain and ſale was *pro diverſis conſiderationibus* generally, and this was admitted in evidence to prove money really *paid, and if it be paid by one of the bargainees*, it is ſufficient for all to raiſe the uſe to all. *Vide*, if it is to *one of the bargainees*, if that be not good alſo. *Clayt.* 145. *pl.* 263. *Mich.* 1650. *Harley* v. *Thompſon.*

Conuſee of a ſtatute extended the land, and in conſideration of 3000 *l.* received by the conuſor (which was the *money due on the ſtatute*) the conuſor conveyed part of lands abſolutely; and this *debt being ſatisfied* by ſuch conveyance, the conuſee aſſigned the reſt of the lands to the conuſor; this is a good and valuable conſideration, and it is

is as effectual as if he had been a purchaſer with money. *N. Ch. R.* 91. 15 *Car.* 2. *Churchill* v. *Grove.*

Five ſhillings is a *valuable*, but yet no *equitable* conſideration for a purchaſe of lands. *Arg. Chan. Caſes* 34. *Mich.* 15 *Car.* 2. in caſe of *More* v. *Mayhow.*

Loſs is as good a conſideration for a promiſe as a benefit or profit. *Chan. Caſes* 78. *Mich.* 18 *Car.* 2. in caſe of *Underwood* v. *Staney.*

Marriage is a good conſideration to make a feme a purchaſer; *per cur'*. *Chan. Caſes* 100. *Hill.* 19 & 20 *Car.* 2. *Duglas* v. *Wood.*

In conſideration *that one was bound for him for money owing, he did bargain and ſell*; this is no good conſideration. But *per Hale* Ch. J. If there be a *covenant in conſideration of money to convey, and a bargain and ſale purſuant to that covenant*, that will be a good conſideration. *Freem. Rep.* 344. *pl.* 427. *Trin.* 1673. *B. R. Tutthill* v. *Roberts.*

In purchaſes the queſtion is not, whether the conſideration be *adequate*, but whether it is *valuable*; for if it be ſuch a conſideration as will make a defendant a purchaſer within the ſtatute of Queen *Eliz.* and bring him within the protection of that law, he ought not to be impeached in equity; *per Finch* K. *Fin. Rep.* 104. *Hill.* 25 *Car.* 2. in caſe of *Baſſet* v. *Noſworthy.*

If one ſeals a *releaſe* or other aſſurance *to one in poſſeſſion* for never ſo *unequal conſideration*, it ſhall not be relieved becauſe of a new title *diſcovered*, unleſs there be ſome ſpecial fraud; *per* Ld. Keeper. 2 *Chan. Caſes* 161. *Paſch.* 22 *Car.* 2. *Hobert* v. *Hobert.*

A *pepper corn* (in a leaſe for a year) if demanded, is conſideration ſufficient for a bargain and ſale to make the leſſee capable of a releaſe, and ſuch reverſion is ſufficient conſideration to *raiſe a uſe*, as by bargain and ſale. 2 *Vent.* 35 *Paſch.* 32 *Car.* 2. *C. B. Barker* v. *Keate.*

Where there are *ſeveral* conſiderations, and *one is good*, that will ſupport the whole deed at law; but it is not ſo in Chancery. *Arg. Ch. Prec.* 105, 106. *Mich.* 1699.

If an *annuity* is *granted* by one to his *houſekeeper, with a bond for payment* of it, and the *bond is loſt*, equity will decree payment of the annuity; for *ſervice is a conſideration*, and *no turpis contractus* ſhall be preſumed, unleſs proved. *Abr. Equ. Caſes* 24. *pl.* 7. *Hill.* 1700. *Lightbone* v. *Weedon.*

Though a ſum of *money is mentioned* in a deed as the conſideration of the grant, a court of equity will not *ſupply any defect* in ſuch deed, if *no money was paid* or ſecured. See *Ch. Prec.* 275. *pl.* 298. *Mich.* 1717. *Furſaker* v. *Robinſon.*

Bill for diſcovery of the conſideration *of a promiſſory note for* 275 *l.* ſuggeſting, that it was given *ex turpi cauſa*, to ſmother and make up a felony, *&c.* defendant by his anſwer ſays, *that he loſt ſuch a ſum of money, and verily believes that it came to the plaintiff's hands, and that was the real conſideration of giving the note, &c.* *Per Cowper* C. The bill muſt be diſmiſſed, for there is no equity againſt the defendant, ſince he has ſworn, and it is not diſproved, that he loſt ſuch a ſum of money, and verily believes that it came to the plaintiff's hands; that is a ſufficient conſideration to ſupport the note. Bill diſmiſſed with coſts. 5 *Vin.* 408. cites *MS. Rep. Mich.* 4 *Geo. in Canc. Guiborn* v. *Fellows & al'*

Conſign, Is a word uſed by merchants, where goods are aſſigned, or ſent or delivered to a factor. *Lex Mercat'.*

Conſilium (*Dies conſilii*) Was a time allowed for the accuſed to make his defence, and anſwer the charge of the accuſer. — *In aliis quærat accuſatus* conſilium, *& habeat ab amicis & paribus ſuis, quod nullo jure debet defendi, &c.* Leges H. 1. cap. 46. And in the next chapter, *Si quis a juſtitia regis implacitatus ad* conſilium *exierit.* It is now uſed for a ſpeedy day appointed to argue a demurrer; which the court grants after the demurrer joined on reading the record of the cauſe, *&c.*

Conſiſtor, A magiſtrate ſo called; as *teſtibus Rogero de Gant, Willielmo* conſiſtore *Ceſtriæ, &c.*

Conſiſtory (*Conſiſtorium*) Signifies as much as *prætorium*, or tribunal. It is commonly uſed for a council-houſe of eccleſiaſtical perſons, or the place of juſtice in the court-chriſtian; a ſeſſion or aſſembly of prelates. Every archbiſhop and biſhop of every dioceſe hath a *conſiſtory court* held before his chancellor or commiſſary in his cathedral church, or other convenient place of his dioceſe, for eccleſiaſtical cauſes. See 3 *Inſt. fol.* 338.— *Sciatis vos omnes & cæteri Dei fideles qui in Anglia manent, quod epiſcopales leges, quæ non bene ſecundum ſanctorum canonum præcepta, uſque ad meâ tempora, in regno Anglorum fuerunt, communi concilio archiepiſcoporum meorum & cæterorum epiſcoporum & abbatum & omnium principum regni mei, emendendas judicavi. Propterea mando & regia authoritate præcipio, ut nullus epiſcopus vel archidiaconus de legibus epiſcopalibus amplius in* hundret *placita teneant, nec cauſam, quæ ad regimen animarum pertinet, ad judicium ſecularium hominum adducant, &c.* This law, made by the *Conqueror*, ſeems to give the original of the *biſhop's conſiſtory*, as it ſits with us, divided from the *hundred* or *county court*, wherewith in the *Saxon* time it was joined. And, in the ſame law of his is further added, *Hæc etiam defendo, ut nullus laicus homo de legibus quæ ad epiſcopum pertinent, ſe intromittat, &c.* Selden's Hiſt. of Tithes, p. 413, 414.

Conſolidation (*Conſolidatio*) It is uſed for uniting two benefices in one. *Broke*, tit. *Union*, and ſtat. 37 *H.* 8. *c.* 21. This is taken from the Civil law, where it ſignifies properly an uniting of the poſſeſſion or profit with the property. For example; If a man have by legacy *uſum-fructum fundi*, and afterwards buy the property or fee-ſimple of the heir, *hoc caſu* conſolidatio *fieri dicitur.* See **Union** and **Unity of poſſeſſion**, and the ſtat. 22 *Car.* 2. *cap.* 11.

Conſpiracy (*Conſpiratio*) Though both in *Latin* and *French* it is uſed for an agreement of men to do any thing either good or bad; yet in Common law it is always taken *in pejorem partem.* It is defined by ſtat. 33 *Ed.* 1. *ſtat.* 2. to be an agreement of ſuch as do confeder, and bind themſelves by oath, covenant, or other alliance, that every one of them ſhall bear and aid the other falſly and maliciouſly to indict, or falſly to move or maintain pleas; and alſo ſuch as cauſe children within age to appeal men of felony, whereby they are impriſoned and ſo grieved; and ſuch as retain men in the countries with liveries or fees to maintain their malicious enterprizes: and this extendeth as well to the takers, as to the givers. And ſtewards and bailiffs of great lords, which by their ſeigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other parties, than ſuch as touch the eſtate of their lords, or themſelves. See 4 *Ed.* 3. *cap.* 11. 3 *H.* 7. *cap.* 13. and alſo 1 *H.* 5. *cap.* 3. and 18 *H.* 6. *cap.* 12. and the *New Book of Entries, verb. Conſpiracy.* In the places before mentioned, *conſpiracy* is taken more generally, and is confounded with *maintenance* and *champerty*: but in a more ſpecial ſignification, it is taken for a *confederacy* of two at the leaſt, falſly to indict one, or to procure one to be indicted of felony.

From the above definition of conſpiracy by ſtat. 33 *Ed.* 1. it ſeems clearly to follow, contrary to the opinion of Lord *Coke*, that not only thoſe who actually cauſe an innocent man to be indicted, and alſo to be tried upon the indictment, whereupon he is acquitted, are properly conſpirators, but that thoſe alſo are guilty of this offence, who barely conſpire to indict a man falſely and maliciouſly, whether they do any act in proſecution of ſuch conſpiracy or not. 1 *Haw.* 189. *Ld. Raym.* 1169.

But an *action* will not lie for the conſpiracy, unleſs it be put in execution; for in ſuch caſe, the *damage* is the ground of the action. *L. Raym.* 378.

Alſo it plainly appears from the words of the ſtatute, that one perſon alone cannot be guilty of conſpiracy, within the purport of it; from whence it follows, that if all the defendants who are proſecuted for ſuch a conſpiracy be accquitted but one, the acquittal of the reſt is the acquittal of that one alſo: and upon the ſame ground it hath been holden, that no ſuch proſecution is maintainable againſt a huſband and wife only, becauſe they are eſteemed but as one perſon in law; but it is certain, that an action on the caſe, in the nature of a conſpiracy, may be brought againſt one only. Alſo, it hath been reſolved, that if ſuch an action be brought

againſt

againſt ſeveral perſons, and all but one be acquitted, yet judgment may be given againſt that one only. 1 *Haw.* 192.

In the caſe of *K.* againſt *Kinnerſly* and *Moore*, *Trin.* 5 *Geo.* 1. an information was brought, ſetting forth, that the defendants, being evil diſpoſed perſons, in order to extort money from my Lord *Sunderland*, did conſpire together to charge my Lord with endeavouring to commit ſodomy with the ſaid *Moore*. The defendant *Kinnerſly* only appears, and pleads to iſſue, and is found guilty. And now exception was taken in arreſt of judgment, that to every conſpiracy there muſt be two perſons at leaſt, whereas here is only one brought in and found guilty, and the other poſſibly may be acquitted. But it was anſwered, that this is arguing from what has not happened, and probably never will; for though *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſly* is, yet as the matter now ſtands, *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be given againſt one before the trial of the other. And a caſe was quoted, where ſeveral were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there muſt be three to make a riot; but upon the words, *with many others*, judgment was given againſt the defendants. And the court over-ruled the exception, and the defendant had ſentence. And in the *Eaſter* term following, *Moore* alſo was convicted, and had judgment. *Stra.* 193.

And, *Eaſt.* 18 *Geo.* 2. *K.* againſt *Eliz. Niccols*. She was indicted for conſpiring with *Tho. Bygrave* unjuſtly to charge *William Frankland* with a robbery, and for that purpoſe going before a juſtice, where *Bygrave* ſwore it upon him. *Niccols* only came in, and pleaded Not guilty. And the jury found that ſhe was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conſpiracy, and here is but one convicted. But the court over-ruled this, on the authority of *Kinnerſly*'s caſe, in which caſe there was a poſſibility of contradictory verdicts, which here cannot be. *Str.* 1227.

A conſpiracy ought to be *falſo & malitioſe*, otherwiſe it will not be a conſpiracy, and ſuch malice ought to be proved; for if *A. travelling* on the highway *be robbed by B. and he knows not B.* if afterwards *A.* accuſes *J. S.* who is found Not guilty, action of conſpiracy will not lie againſt *A.* For though *J. S.* was falſly accuſed, he was not maliciouſly accuſed, and it may be he took *J. S.* to be the robber, becauſe he was like *B. Per Coke* Ch. J. and the Lord Chancellor. *Godb.* 206. *pl.* 293. *Mich.* 11 *Jac.* in the Star-chamber, *Miller* v. *Reynolds and Baſſet*.

Conſpiracy (*to ſpeak properly*) *lies only* for procuring a man to be indicted of treaſon or felony, *where life was in danger*; *per Holt* Ch. J. *Ld. Raym. Rep.* 379. *Mich.* 10 *W.* 3. in caſe of *Savil* v. *Roberts*.

Several people *may* lawfully meet and *conſult to proſecute a guilty perſon*; otherwiſe, if two charge *one that is innocent, right or wrong*, for that is indictable, and *though nothing be done in proſecution of it*, it is a compleat and conſummate offence of itſelf; *and whether* the conſpiracy be to charge *a temporal or eccleſiaſtical offence* on any innocent perſon, it is the ſame thing; agreed *per cur'*. 1 *Salk.* 174. *Trin.* 3 *Anne*, *B. R. The Queen* v. *Beſt & al'*. 3 *Mod.* 137. *S. C.* and *per cur.* the giſt is the conſpiring to change falſly, and indictment lies for the falſhood before the party is acquitted of it; but caſe lies not till acquittal, and the indictment in that caſe being for charging with a baſtard-child, the court ſaid, that it was an offence too frequent to be quaſhed upon a motion, and that they would no more quaſh it than they would for baretrry, or keeping a bawdy-houſe.

It is clear, that thoſe who are convicted of conſpiracy at the ſuit of the party, ſhall have judgment of fine and impriſonment, and to render the plaintiff his damages. 1 *Haw.* 193.

Alſo it is certain, that he who is convicted at the ſuit of the King of a conſpiracy to accuſe another of a matter which may touch his life, ſhall have judgment that he ſhall loſe the freedom and franchiſe of the law (whereby he is diſabled from being put upon any jury, or to be ſworn as a witneſs, or even to appear in perſon in any of the King's courts) and alſo that his houſes, lands, and goods ſhall be ſeized into the King's hands, and his houſes and lands ſhall be ſtripped and waſted, his trees rooted up, and his body impriſoned. And this is commonly called *villainous* judgment, and is given by the Common law, and not by any ſtatute, and is ſaid generally in ſome books to be the proper judgment upon every conviction of conſpiracy at the ſuit of the King, without any reſtriction to ſuch as endangered the life of the party; but this point doth not ſeem to be any where ſettled. 1 *Haw.* 193.

In the caſe of *Kinnerſly* and *Moore* above-mentioned, *Kinnerſly* was fined 500 *l.* a year's impriſonment, and to find ſureties for his good behaviour for ſeven years. *Moore* was ſentenced to ſtand in the pillory, ſuffer a year's imprisonment, and to find ſureties for ſeven years. *Str.* 196.

Conſpiratione, Is a writ that lies againſt conſpirators. *F. N. B. fol.* 114. *d. Cromp. de Juriſd. d. fol.* 209. See alſo the *Regiſter fol.* 134.

A writ of conſpiracy lieth where two, three, or more perſons of malice and covin do conſpire and deviſe to indict any perſon falſely, and afterwards *he who is ſo indicted is acquitted*, now he ſhall have his writ of conſpiracy againſt them who ſo indicted him. *F. N. B.* 114. 3 *Inſt.* 143. *cap.* 66. *in principio S. P.* if the party is lawfully acquitted by the verdict of 12 men.—— But ſerjeant *Hawkins* in his *Pleas of the Crown*, 1 *lib.* 189, 190. *cap.* 72. very much queſtions its being requiſite that there be a lawful acquittal, and ſays, that it is certain that an *acquittal by verdict is not always neceſſary to maintain ſuch a writ*; for it appears by the Regiſter itſelf, that where one brought ſuch a writ in the uſual form, having it in the words *quouſque acquietatus fuiſſet*, *&c.* againſt one who had been nonſuited in a malicious appeal of felony brought againſt him, his writ was abated, becauſe ſuch a nonſuit would not make good the words *quouſque acquietatus fuiſſet*, and yet he afterwards brought a new writ, wherein he uſed the words *quietus receſſit*, inſtead of *acquietatus fuiſſet*, and recovered; and why may not a writ as well be formed in any other caſe, which is as much within the miſchief of the ſtatute as this. *Hawk. Pl.* 190. *cap.* 72. *ſ.* 2.

But the writ lieth *againſt two perſons at the leaſt* who do ſo conſpire; for if one perſon of malice and falſe imagination do labour, and cauſe another falſly to be indicted, the party who is ſo indicted ſhall not have a writ of conſpiracy, *&c.* but an action upon the caſe againſt him who ſo cauſed him falſly to be indicted. *F. N. B.* 114.

A writ of conſpiracy.

GEORGE *the Third, &c. to the ſheriff of* B. *greeting: If* A. B. *ſhall make you ſecure in proſecuting, &c. then put* C. D. *and* E. F. *to find pledges and ſufficient ſureties, that they be before us at* Weſtminſter *on the day, &c. to ſhew, why by conſpiracy between them had at* Weſtminſter, *they falſly and maliciouſly procured the ſaid* A. B. *to be indicted of a certain felony of, &c. and him on that occaſion to be taken, and in our priſon of* R. *to be detained, until in the court before our beloved and faithful, &c. our juſtices, &c. according to the law and cuſtom of our realm he was acquitted; to the great damage of him the ſaid* A. B. *and againſt the form of the ſtatute or ordinance in ſuch caſe made and provided; and have you there the names of the pledges, and this writ.* Witneſs, *&c.*

Conſpirators, Are (according to the ſtatute) "Thoſe that do confeder, or bind themſelves by oath, covenant, or other alliance, that every of them ſhall aid and bear the other falſly and maliciouſly to indict, or cauſe to be indicted, or falſly to move or maintain pleas: and alſo ſuch as cauſe children within age to appeal men of felony, whereby they are impriſoned and ſore grieved; and ſuch as retain men in the country with liveries or fees to maintain their malicious enterprizes: and this extendeth as well to the takers, as to the givers. And ſtewards and bailiffs

bailiffs of great lords, which by their ſeigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than ſuch as touch the eſtate of their lords or themſelves Stat. 33 *Ed.* 1. *ſtat.* 2.——2 *part Inſt. fol.* 384 & 562.

Conſtable (*Conſtabularius*,) Is a *Saxon* word, compounded of *cyning* or *cyng*, and *ſtaple*, which ſignify the ſtay and hold of the King. *Lamb. Duty of Conſtables, num.* 4. But ſome have derived it from *comes ſtabuli*; which ſeems more probable, becauſe we had this officer, and many others, from the *Cæſarean* laws and cuſtoms of the empire, as well as from the *Saxons*. But this dignity, which originally was to take care of the King's ſtables, was afterwards made military; and the *comes ſtabuli* was then the chief general, called by our *Saxon* anceſtors *Heretochii*.

The word is diverſly uſed: Firſt, for the *Conſtable of England*; of whoſe great dignity and authority we find many proofs in our ſtatutes and chronicles. His function conſiſts in the care of the common peace of the land, in deeds of arms, and matters of war. *Lamb. ubi ſupra.* With whom agrees the ſtatute of 13 *R.* 2 *cap.* 2. *ſtat.* 1. which ſays, To the court of the *Conſtable* and Marſhal it appertains to have the conuſance of contracts, and deeds of arms and of war out of the realm, and alſo of things that touch war within, as combats, blaſonry of arms, *&c.* But it may not meddle with battle in appeals, nor generally with any other thing that may be tried by the laws of the land. See *Forteſcue, cap.* 32. and 4 *Inſt. fol.* 123. and eſpecially *Pryn's Animad. on* 4 *Inſt. fol.* 71. Anciently he was called *Princeps militiæ domus Regis*. The *Conſtable of England* was firſt created by *William* the Conqueror, and continued till 13 *H.* 8. It was an hereditary dignity, and deſcended to females; and the *Conſtable* held ſeveral manors of the King, as being *Conſtable of England*. But it being ſo powerful a dignity, it became troubleſome to the crown, and therefore was laid aſide by *Henry* 8. and not created ſince, but upon particular occaſions.

Out of this high magiſtracy of *Conſtable of England*, (ſays *Lambard*,) were drawn thoſe inferior *conſtables*, which we call *conſtables of hundreds* and franchiſes; and firſt ordained by the ſtatute of *Weſtminſter*, 13 *Ed.* 1. which appoints, for conſervation of the peace, and view of armour, two *conſtables* in every hundred and franchiſe, who in Latin are called *conſtabularii capitales, high conſtables*, becauſe in proceſs of time, the increaſe both of people and offences, under theſe made others in every town called *petit conſtables*, in Latin *ſub-conſtabularii*, who are of like nature, but of inferior authority to the others. The making a *petty conſtable* belongs to the lords of divers manors *jure feudi*. Of theſe read *Smith de Rep. Angl. lib.* 2. *c.* 22. Beſides theſe, there are officers of particular places, called by this name, as *Conſtables of the Tower*. Staundf. Pl. Cor. fol. 152. anno 1 H. 4. c. 13. *Conſtable of the Exchequer*, anno 51. H. 3. ſtat. 5. *Conſtable of Dover Caſtle*, Cam. Britan. pag. 239. *Conſtable* of the caſtle of *Windſor*; *Conſtable* of the caſtle of *Carnarvon*; *Conſtable* of the caſtle of *Conway*; *Conſtable* of the caſtle of *Hardlaigh*, in the county of *Merioneth*; *Conſtable* of the caſtle of *Beaumaris*; *Conſtable* of the caſtle of *Caermarthen*; *Conſtable* of the caſtle of *Cardigan*; *Conſtable* of the caſtle of *Launceſton*; *Conſtables* of the caſtles of *Rothlan, Cheſter*, and *Flint*, *&c. Conſtable* of the caſtle of *London* (for ſo *Baynard*'s caſtle was anciently called) and *Robert Fitz Walter* was *conſtable* thereof, and banner-bearer of that city by inheritance. But theſe are *Caſtellani* properly, as *Lambard* notes, though confounded in name with the other. See the ſtatute 32 *H.* 8. *c.* 38. ——*Manwood par.* 1. *cap.* 13. mentions a conſtable of the foreſt. And *Henry* Lord *Beaumont* was *conſtable* of the King's army. 10 *Ed.* 3. *Baronage of England*, 2 *part*, *fol.* 51. *b. Cowell, edit.* 1727.

As to high and petty conſtables, they appear to have been officers of great antiquity; for by the laws of King *Alfred*, the freemen were to diſtribute themſelves into decennaries and hundreds, and every ten freeholders choſe an annual officer, whom they called conſtable, horſholder, tithingman or headborough, as head of the decennary; theſe in every hundred where there was a feudal lord, were ſworn in, and admitted by the lord or his ſteward, in his leet; but where there was no ſuch feudal lord, the ſheriff in his torn had the ſwearing and placing of them in; alſo if there was no feudal lord of the hundred, an annual officer was choſen, who was to preſide over the whole hundred, who was called the high conſtable; but if the hundred was feudal, as it often anciently was, then ſuch lord of the hundred adminiſtred the office himſelf. 1. *Bac. Abr.* 438.

At Common law, before the making of the ſtatutes by which juſtices of peace were ordained to keep the peace, the *Chief Juſtice of England* was appointed by the King, and he had authority, and was ordained to determine matters touching the crown, and *for conſervation of the peace throughout the realm*, and he thereby is the Ch. J. of peace. *Alſo* by the Common law, before there was any juſtice of the peace, *conſtables of every town* were keepers of the peace within their towns. *Kitch. of Courts* 96.

An *high conſtable* is not ſuch an officer or conſervator of the peace whereof the Commo n law takes any notice; for he is not mentioned in any book; *per Anderſon. Cro. E.* 375. *pl.* 25. *Hill.* 37 *Eliz.* in the caſe of *Sarrock* v. *Hannamer*.

High conſtables were not *ab origine*, but came in with juſtices of peace; *per Twiſden* J. *Mod.* 13. *pl.* 26. *Mich.* 21 *Car.* 2. *B. R.*

As to the *antiquity* of the office of a conſtable, it ſeems to be the better opinion, that both conſtables of hundreds, which are commonly called *high conſtables*, and alſo conſtables of tithings, which are at this day commonly called petit-conſtables or tithingmen, and were anciently called chief pledges, were by the Common law, and not firſt ordained by the ſtatute of *Wincheſter*, *cap.* 6. as it is holden by ſome that they were; for that ſtatute does not ſay there ſhall be ſuch officers conſtituted, but clearly ſeems to ſuppoſe that there were ſuch before the making of it. 2 *Hawk. Pl. C.* 61. *ca.* 10. *ſ.* 33.

1. *Who is obliged to ſerve as conſtable, and how puniſhed for not ſerving.*
2. *By whom choſen, appointed, ſworn and removed.*
3. *His power and authority without a warrant.*
4. *His power and duty in executing warrants.*
5. *How favoured and protected in his office, or puniſhed for neglect of duty.*

1. *Who is obliged to ſerve as conſtable, and how puniſhed for not ſerving.*

It ſeems agreed, that all ſworn attornies, and all other officers, whoſe attendance is required in the courts of *Weſtminſter Hall*, are not obliged to ſerve or execute any inferior pariſh office, and that where they are choſen, though by a particular cuſtom, with reſpect to their eſtates or otherwiſe, they may have a writ of privilege; for no cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them. 1 *Bac. Abr.* 440.

So if an alderman of *London* has an houſe at *D.* in the county of *Eſſex*, and he as an inhabitant there is choſen conſtable, yet he is not compellable to ſerve, for that as an alderman he is bound to be preſent in the city, for the good government thereof. *Cro. Car.* 585. 1 *Jones* 462. *S. C.*

But a captain of the King's guards, being preſented to ſerve as conſtable, in purſuance of a cuſtom in reſpect of his lands in a town, cannot claim this privilege; for though by his office he is bound to a perſonal attendance on the King, yet ſuch office being of late inſtitution, ſhall not prevail againſt an ancient cuſtom. See *Keb.* 309. 1 *Sid.* 272, 355. 1 *Lev.* 233. 1 *Keb.* 933.

Yet if ſuch an officer, or a gentleman of quality, who hath no ſuch office, or a practiſing phyſician be choſen conſtable of a town, which has ſufficient perſons beſides to execute this office, and no ſpecial cuſtom concerning it,

againſt ſeveral perſons, and all but one be acquitted, yet judgment may be given againſt that one only. 1 *Haw.* 192.

In the caſe of *K.* againſt *Kinnerſly* and *Moore*, *Trin.* 5 *Geo.* 1. an information was brought, ſetting forth, that the defendants, being evil diſpoſed perſons, in order to extort money from my Lord *Sunderland*, did conſpire together to charge my Lord with endeavouring to commit ſodomy with the ſaid *Moore*. The defendant *Kinnerſly* only appears, and pleads to iſſue, and is found guilty. And now exception was taken in arreſt of judgment, that to every conſpiracy there muſt be two perſons at leaſt, whereas here is only one brought in and found guilty, and the other poſſibly may be acquitted. But it was anſwered, that this is arguing from what has not happened, and probably never will; for though *Moore* may have an opportunity to acquit himſelf, and is not concluded by the verdict as *Kinnerſly* is, yet as the matter now ſtands, *Moore* himſelf is found guilty, for the conſpiracy is found as it is laid, and therefore judgment may be given againſt one before the trial of the other. And a caſe was quoted, where ſeveral were indicted for a riot, *with many others*, and two only were found guilty; and it was objected, that there muſt be three to make a riot; but upon the words, *with many others*, judgment was given againſt the defendants. And the court over-ruled the exception, and the defendant had ſentence. And in the *Eaſter* term following, *Moore* alſo was convicted, and had judgment. *Stra.* 193.

And, *Eaſt.* 18 *Geo.* 2. *K.* againſt *Eliz. Niccols*. She was indicted for conſpiring with *Tho. Bygrave* unjuſtly to charge *William Frankland* with a robbery, and for that purpoſe going before a juſtice, where *Bygrave* ſwore it upon him. *Niccols* only came in, and pleaded Not guilty. And the jury found that ſhe was guilty, but that *Bygrave* died before the indictment was preferred. Exception was taken, that one alone cannot be guilty of a conſpiracy, and here is but one convicted. But the court over-ruled this, on the authority of *Kinnerſly*'s caſe, in which caſe there was a poſſibility of contradictory verdicts, which here cannot be. *Str.* 1227.

A conſpiracy ought to be *falſo & malitioſe*, otherwiſe it will not be a conſpiracy, and ſuch malice ought to be proved; for if *A. travelling* on the highway *be robbed by B. and he knows not B.* if afterwards *A.* accuſes *J. S.* who is found Not guilty, action of conſpiracy will not lie againſt *A.* For though *J. S.* was falſly accuſed, he was not maliciouſly accuſed, and it may be he took *J. S.* to be the robber, becauſe he was like *B. Per Coke* Ch. J. and the Lord Chancellor. *Godb.* 206. *pl.* 293. *Mich.* 11 *Jac.* in the Star-chamber, *Miller* v. *Reynolds and Baſſet*.

Conſpiracy (*to ſpeak properly*) *lies only* for procuring a man to be indicted of treaſon or felony, *where life was in danger*; *per Holt* Ch. J. *Ld. Raym. Rep.* 379. *Mich.* 10 *W.* 3. in caſe of *Savil* v. *Roberts*.

Several people *may* lawfully meet and *conſult to proſecute a guilty perſon*; otherwiſe, if two charge *one that is innocent, right or wrong*, for that is indictable, and *though nothing be done in proſecution of it*, it is a compleat and conſummate offence of itſelf; *and whether* the conſpiracy be to charge *a temporal or eccleſiaſtical offence* on any innocent perſon, it is the ſame thing; agreed *per cur'*. 1 *Salk.* 174. *Trin.* 3 *Anne*, *B. R. The Queen* v. *Beſt & al'*. 3 *Mod.* 137. *S. C.* and *per cur.* the giſt is the conſpiring to change falſly, and indictment lies for the falſhood before the party is acquitted of it; but caſe lies not till acquittal, and the indictment in that caſe being for charging with a baſtard-child, the court ſaid, that it was an offence too frequent to be quaſhed upon a motion, and that they would no more quaſh it than they would for baretrry, or keeping a bawdy-houſe.

It is clear, that thoſe who are convicted of conſpiracy at the ſuit of the party, ſhall have judgment of fine and impriſonment, and to render the plaintiff his damages. 1 *Haw.* 193.

Alſo it is certain, that he who is convicted at the ſuit of the King of a conſpiracy to accuſe another of a matter which may touch his life, ſhall have judgment that he ſhall loſe the freedom and franchiſe of the law (whereby he is diſabled from being put upon any jury, or to be ſworn as a witneſs, or even to appear in perſon in any of the King's courts) and alſo that his houſes, lands, and goods ſhall be ſeized into the King's hands, and his houſes and lands ſhall be ſtripped and waſted, his trees rooted up, and his body impriſoned. And this is commonly called *villainous* judgment, and is given by the Common law, and not by any ſtatute, and is ſaid generally in ſome books to be the proper judgment upon every conviction of conſpiracy at the ſuit of the King, without any reſtriction to ſuch as endangered the life of the party; but this point doth not ſeem to be any where ſettled. 1 *Haw.* 193.

In the caſe of *Kinnerſly* and *Moore* above-mentioned, *Kinnerſly* was fined 500 *l.* a year's impriſonment, and to find ſureties for his good behaviour for ſeven years. *Moore* was ſentenced to ſtand in the pillory, ſuffer a year's imprisonment, and to find ſureties for ſeven years. *Str.* 196.

Conſpiratione, Is a writ that lies againſt conſpirators. *F. N. B. fol.* 114. *d. Cromp. de Juriſd. d. fol.* 209. See alſo the *Regiſter fol.* 134.

A writ of conſpiracy lieth where two, three, or more perſons of malice and covin do conſpire and deviſe to indict any perſon falſely, and afterwards *he who is ſo indicted is acquitted*, now he ſhall have his writ of conſpiracy againſt them who ſo indicted him. *F. N. B.* 114. 3 *Inſt.* 143. *cap.* 66. *in principio S. P.* if the party is lawfully acquitted by the verdict of 12 men.—— But ſerjeant *Hawkins* in his *Pleas of the Crown*, 1 *lib.* 189, 190. *cap.* 72. very much queſtions its being requiſite that there be a lawful acquittal, and ſays, that it is certain that an *acquittal by verdict is not always neceſſary to maintain ſuch a writ*; for it appears by the Regiſter itſelf, that where one brought ſuch a writ in the uſual form, having it in the words *quouſque acquietatus fuiſſet*, *&c.* againſt one who had been nonſuited in a malicious appeal of felony brought againſt him, his writ was abated, becauſe ſuch a nonſuit would not make good the words *quouſque acquietatus fuiſſet*, and yet he afterwards brought a new writ, wherein he uſed the words *quietus receſſit*, inſtead of *acquietatus fuiſſet*, and recovered; and why may not a writ as well be formed in any other caſe, which is as much within the miſchief of the ſtatute as this. *Hawk. Pl.* 190. *cap.* 72. *ſ.* 2.

But the writ lieth *againſt two perſons at the leaſt* who do ſo conſpire; for if one perſon of malice and falſe imagination do labour, and cauſe another falſly to be indicted, the party who is ſo indicted ſhall not have a writ of conſpiracy, *&c.* but an action upon the caſe againſt him who ſo cauſed him falſly to be indicted. *F. N. B.* 114.

A writ of conſpiracy.

GEORGE *the Third, &c. to the ſheriff of* B. *greeting: If* A. B. *ſhall make you ſecure in proſecuting, &c. then put* C. D. *and* E. F. *to find pledges and ſufficient ſureties, that they be before us at* Weſtminſter *on the day, &c. to ſhew, why by conſpiracy between them had at* Weſtminſter, *they falſly and maliciouſly procured the ſaid* A. B. *to be indicted of a certain felony of, &c. and him on that occaſion to be taken, and in our priſon of* R. *to be detained, until in the court before our beloved and faithful, &c. our juſtices, &c. according to the law and cuſtom of our realm he was acquitted; to the great damage of him the ſaid* A. B. *and againſt the form of the ſtatute or ordinance in ſuch caſe made and provided; and have you there the names of the pledges, and this writ.* Witneſs, *&c.*

Conſpirators, Are (according to the ſtatute) "Thoſe that do confeder, or bind themſelves by oath, covenant, or other alliance, that every of them ſhall aid and bear the other falſly and maliciouſly to indict, or cauſe to be indicted, or falſly to move or maintain pleas: and alſo ſuch as cauſe children within age to appeal men of felony, whereby they are impriſoned and ſore grieved; and ſuch as retain men in the country with liveries or fees to maintain their malicious enterprizes: and this extendeth as well to the takers, as to the givers. And ſtewards and bailiffs

bailiffs of great lords, which by their ſeigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates, that concern other parties than ſuch as touch the eſtate of their lords or themſelves Stat. 33 *Ed.* 1. *ſtat.* 2.——2 *part Inſt. fol.* 384 & 562.

Conſtable (*Conſtabularius*,) Is a *Saxon* word, compounded of *cyning* or *cyng*, and *ſtaple*, which ſignify the ſtay and hold of the King. *Lamb. Duty of Conſtables, num.* 4. But ſome have derived it from *comes ſtabuli*; which ſeems more probable, becauſe we had this officer, and many others, from the *Cæſarean* laws and cuſtoms of the empire, as well as from the *Saxons*. But this dignity, which originally was to take care of the King's ſtables, was afterwards made military; and the *comes ſtabuli* was then the chief general, called by our *Saxon* anceſtors *Heretochii*.

The word is diverſly uſed: Firſt, for the *Conſtable of England*; of whoſe great dignity and authority we find many proofs in our ſtatutes and chronicles. His function conſiſts in the care of the common peace of the land, in deeds of arms, and matters of war. *Lamb. ubi ſupra.* With whom agrees the ſtatute of 13 *R.* 2 *cap.* 2. *ſtat.* 1. which ſays, To the court of the *Conſtable* and Marſhal it appertains to have the conuſance of contracts, and deeds of arms and of war out of the realm, and alſo of things that touch war within, as combats, blaſonry of arms, &c. But it may not meddle with battle in appeals, nor generally with any other thing that may be tried by the laws of the land. See *Forteſcue, cap.* 32. and 4 *Inſt. fol.* 123. and eſpecially *Pryn's Animad. on* 4 *Inſt. fol.* 71. Anciently he was called *Princeps militiæ domus Regis*. The *Conſtable of England* was firſt created by *William* the Conqueror, and continued till 13 *H.* 8. It was an hereditary dignity, and deſcended to females; and the *Conſtable* held ſeveral manors of the King, as being *Conſtable of England*. But it being ſo powerful a dignity, it became troubleſome to the crown, and therefore was laid aſide by *Henry* 8. and not created ſince, but upon particular occaſions.

Out of this high magiſtracy of *Conſtable of England*, (ſays *Lambard*,) were drawn thoſe inferior *conſtables*, which we call *conſtables of hundreds* and franchiſes; and firſt ordained by the ſtatute of *Weſtminſter*, 13 *Ed.* 1. which appoints, for conſervation of the peace, and view of armour, two *conſtables* in every hundred and franchiſe, who in Latin are called *conſtabularii capitales, high conſtables*, becauſe in proceſs of time, the increaſe both of people and offences, under theſe made others in every town called *petit conſtables*, in Latin *ſub-conſtabularii*, who are of like nature, but of inferior authority to the others. The making a *petty conſtable* belongs to the lords of divers manors *jure feudi*. Of theſe read *Smith de Rep. Angl. lib.* 2. *c.* 22. Beſides theſe, there are officers of particular places, called by this name, as *Conſtables of the Tower*. Staundf. Pl. Cor. fol. 152. anno 1 H. 4. c. 13. *Conſtable of the Exchequer*, anno 51. H. 3. ſtat. 5. *Conſtable of Dover Caſtle*, Cam. Britan. pag. 239. *Conſtable* of the caſtle of *Windſor*; *Conſtable* of the caſtle of *Carnarvon*; *Conſtable* of the caſtle of *Conway*; *Conſtable* of the caſtle of *Hardlaigh*, in the county of *Merioneth*; *Conſtable* of the caſtle of *Beaumaris*; *Conſtable* of the caſtle of *Caermarthen*; *Conſtable* of the caſtle of *Cardigan*; *Conſtable* of the caſtle of *Launceſton*; *Conſtables* of the caſtles of *Rothlan, Cheſter*, and *Flint*, &c. *Conſtable* of the caſtle of *London* (for ſo *Baynard*'s caſtle was anciently called) and *Robert Fitz Walter* was *conſtable* thereof, and banner-bearer of that city by inheritance. But theſe are *Caſtellani* properly, as *Lambard* notes, though confounded in name with the other. See the ſtatute 32 *H.* 8. *c.* 38. ——*Manwood par.* 1. *cap.* 13. mentions a conſtable of the foreſt. And *Henry* Lord *Beaumont* was *conſtable* of the King's army. 10 *Ed.* 3. *Baronage of England*, 2 *part*, *fol.* 51. *b. Cowell, edit.* 1727.

As to high and petty conſtables, they appear to have been officers of great antiquity; for by the laws of King *Alfred*, the freemen were to diſtribute themſelves into decennaries and hundreds, and every ten freeholders choſe an annual officer, whom they called conſtable, horſholder, tithingman or headborough, as head of the decennary; theſe in every hundred where there was a feudal lord, were ſworn in, and admitted by the lord or his ſteward, in his leet; but where there was no ſuch feudal lord, the ſheriff in his torn had the ſwearing and placing of them in; alſo if there was no feudal lord of the hundred, an annual officer was choſen, who was to preſide over the whole hundred, who was called the high conſtable; but if the hundred was feudal, as it often anciently was, then ſuch lord of the hundred adminiſtred the office himſelf. 1. *Bac. Abr.* 438.

At Common law, before the making of the ſtatutes by which juſtices of peace were ordained to keep the peace, the *Chief Juſtice of England* was appointed by the King, and he had authority, and was ordained to determine matters touching the crown, and *for conſervation of the peace throughout the realm*, and he thereby is the Ch. J. of peace. *Alſo* by the Common law, before there was any juſtice of the peace, *conſtables of every town* were keepers of the peace within their towns. *Kitch. of Courts* 96.

An *high conſtable* is not ſuch an officer or conſervator of the peace whereof the Common law takes any notice; for he is not mentioned in any book; *per Anderſon. Cro. E.* 375. *pl.* 25. *Hill.* 37 *Eliz.* in the caſe of *Sarrock* v. *Hannamer*.

High conſtables were not *ab origine*, but came in with juſtices of peace; *per Twiſden* J. *Mod.* 13. *pl.* 26. *Mich.* 21 *Car.* 2. *B. R.*

As to the *antiquity* of the office of a conſtable, it ſeems to be the better opinion, that both conſtables of hundreds, which are commonly called *high conſtables*, and alſo conſtables of tithings, which are at this day commonly called petit-conſtables or tithingmen, and were anciently called chief pledges, were by the Common law, and not firſt ordained by the ſtatute of *Wincheſter, cap.* 6. as it is holden by ſome that they were; for that ſtatute does not ſay there ſhall be ſuch officers conſtituted, but clearly ſeems to ſuppoſe that there were ſuch before the making of it. 2 *Hawk. Pl. C.* 61. *ca.* 10. *ſ.* 33.

1. *Who is obliged to ſerve as conſtable, and how puniſhed for not ſerving.*
2. *By whom choſen, appointed, ſworn and removed.*
3. *His power and authority without a warrant.*
4. *His power and duty in executing warrants.*
5. *How favoured and protected in his office, or puniſhed for neglect of duty.*

1. *Who is obliged to ſerve as conſtable, and how puniſhed for not ſerving.*

It ſeems agreed, that all ſworn attornies, and all other officers, whoſe attendance is required in the courts of *Weſtminſter Hall*, are not obliged to ſerve or execute any inferior pariſh office, and that where they are choſen, though by a particular cuſtom, with reſpect to their eſtates or otherwiſe, they may have a writ of privilege; for no cuſtom ſhall be intended to be more ancient than the uſages of thoſe courts, and therefore ſhall give way to them. 1 *Bac. Abr.* 440.

So if an alderman of *London* has an houſe at *D.* in the county of *Eſſex*, and he as an inhabitant there is choſen conſtable, yet he is not compellable to ſerve, for that as an alderman he is bound to be preſent in the city, for the good government thereof. *Cro. Car.* 585. 1 *Jones* 462. *S. C.*

But a captain of the King's guards, being preſented to ſerve as conſtable, in purſuance of a cuſtom in reſpect of his lands in a town, cannot claim this privilege; for though by his office he is bound to a perſonal attendance on the King, yet ſuch office being of late inſtitution, ſhall not prevail againſt an ancient cuſtom. See *Keb.* 309. 1 *Sid.* 272, 355. 1 *Lev.* 233. 1 *Keb.* 933.

Yet if ſuch an officer, or a gentleman of quality, who hath no ſuch office, or a practiſing phyſician be choſen conſtable of a town, which has ſufficient perſons beſides to execute this office, and no ſpecial cuſtom concerning it,

it, perhaps he may be relieved by the King's Bench. 2 *Hawk.* 63.

By ſtat. 5 *H.* 8. *cap.* 6. The wardens and fellowſhip of ſurgeons infranchiſed in *London*, and all barbar-ſurgeons admitted and approved according to the ſtatute made in that behalf, not exceeding the number of twelve, ſhall be diſcharged of conſtableſhip and watch, *&c.*

By ſtat. 33 *Hen.* 8. *cap.* 43. The preſident of the commonalty and fellowſhip of phyſick in *London*, and the commons and fellows of the ſame, ſhall not be choſen conſtables in the city of *London*, or ſuburbs of the ſame, *&c.*

By ſtat. 6 *W.* & *M. cap.* 4. All perſons uſing the art of an apothecary, who have been brought up, and ſerved as apprentices in the ſaid art for ſeven years, according to the ſtatute of 5 *Eliz.* ſhall be freed and exempted from the office of conſtable.

A. was indicted for not taking on him the office of high conſtable; and the queſtion on a ſpecial verdict was, whether a tenant in ancient demeſne may be made conſtable of an hundred, which reaches farther than the demeſnes; and it was adjudged that it might. 2 *Show.* 754. 1 *Vent.* 344. *S. C.*

By ſtat. 1 *Will.* & *M. c.* 18. *ſect.* 7. If any perſon diſſenting from the church of *England*, ſhall be choſen conſtable, and ſhall ſcruple to take upon him the office, in regard of the oaths, or any other matter required to be done in reſpect of ſuch office; he may execute it by a ſufficient deputy by him to be provided, to be allowed by ſuch perſons, and in ſuch manner, as ſuch officer ſhould have been allowed. And by *ſect.* 11. of the laſt mentioned ſtatute, every teacher or preacher in holy orders, or pretended holy orders, in a congregation tolerated by law, ſhall from the time of his ſubſcription and taking the oaths, be exempted from the office of conſtable.

By ſtat. 10 & 11 *W.* 3. *c.* 23. *ſect.* 2, 3. The proſecutor of a felon to conviction, or perſon to whom he ſhall aſſign the certificate thereof, ſhall be diſcharged from the office of conſtable.

The privilege of exemption from being ſworn conſtable extends to a parliament man's ſervant; agreed and admitted by *Twiſden* J. but he ſaid he did not think it extended to his tenant. *Mod.* 13. *pl.* 36.

By ſtat. 5 *Hen.* 6. *c.* 6. The ſurgeons of *London* are exempt from bearing the office of conſtable; and the act likewiſe extends to barber-ſurgeons approved and admitted according to the ſtatute of 3 *Hen.* 8. *c.* 11. ſo that they exceed not the number of twelve perſons.

Mr. Serjeant *Hawkins* ſays, it ſeems, that by the equity of this ſtatute, and the ancient cuſtom of the realm, all ſurgeons have been allowed the like privilege. 2 *Hawk. P. C.* 64.

A ſurgeon was indicted for refuſing to ſerve the office of conſtable, whereupon a *noli proſequi* was moved for and granted *niſi*; and the reporter ſays, that no cauſe was ſhewn, as ever he heard. *Comyn. Rep.* 312. *pl.* 161.

A perſon duly elected conſtable, refuſing to take upon him the office, may, if preſent, be fined by the court, and if abſent, on having a certain time and place appointed him for the taking of the oath before a juſtice of peace, may, after notice of ſuch appointment and preſentment at the next court, be amerced. *Cro. Car.* 567. *Co. Ent.* 572. 5 *Mod.* 130. *Salk.* 175. 8 *Co.* 38.

Alſo in either caſe he may be indicted, either before juſtices of *oyer* and *terminer*, or at the ſeſſions of the peace; but ſuch indictment ought ſpecially to ſet forth the manner of every ſuch election, appointment, notice and refuſal, and before whom the court was holden. 2 *Hawk. P. C.* 64.

Neither is an indictment, for not finding a ſufficient perſon to ſerve the office of conſtable, good, unleſs ſuch indictment ſhew that the party refuſed to ſerve it himſelf. 1 *Keb.* 416. 2 *Hawk. P. C.* 64.

It ſeems by the better opinion, that a cuſtom in a town, that the inhabitants thereof ſhall ſerve the office of a conſtable by turns, is good, and that the objection, that by ſuch means it may come to a woman's turn to ſerve, is of no force, ſince ſhe is allowed to make a deputy, or procure one to ſerve for her, who ſhall be conſidered as the proper officer. 2 *Keb.* 304. 1 *Sid.* 355. 2 *Hawk. P. C.* 63. *Cro. Car.* 389. *cont.*

2. *By whom choſen, appointed, ſworn and removed.*

The office of conſtable being neceſſary for the preſervation of the peace, juſtices of the peace, have by an uninterrupted uſage, not now to be diſputed, taken upon them not only to ſwear conſtables who have been choſen at a torn or leet, but alſo to nominate and ſwear conſtables, where none have been ſworn at ſuch courts, through the neglect of the ſheriff or lord, and alſo to diſplace thoſe who have been ſo choſen; and this point has been carried ſo far as to allow the ſeſſions of the peace to ſwear one conſtable who had been elected at the leet, and unduly rejected by the ſteward, who had ſworn another in his place. 1 *Bac. Abr.* 439.

And by the ſtat. 13 & 14 *Car.* 2. *cap.* 12. *par* 15. reciting, "That the laws and ſtatutes for apprehending rogues and vagabonds, had not been duly executed, ſometimes for want of officers, by reaſon lords of manors do not keep court leets every year for making of them; it is enacted, "That in caſe any conſtable, headborough, or tithingman, ſhall die, or go out of the pariſh, any two juſtices of the peace may make and ſwear a new conſtable, headborough, or tithingman, until the lord ſhall hold a court or until next quarter-ſeſſions, who ſhall approve of the ſaid officers ſo made and ſworn as aforeſaid, or appoint others, as they ſhall think fit; and if any officer ſhall continue above a year in his or their office, that then in ſuch caſe the juſtices of the peace in their quarter-ſeſſions may diſcharge ſuch officers, and may put another fit perſon in his or their place, until the lord of the manor ſhall hold a court as aforeſaid."

The juſtices of the peace of the county of *Northampton*, at their general ſeſſions choſe a conſtable for *Holmby*, and for not coming in to take the oath, proceeded againſt him; which proceeding being removed by *certiorari* into *B. R.* it was moved on affidavits that there had not been a conſtable there for fifty years before, and that he might be diſcharged, alledging likewiſe, that *Holmby* was a privileged place, and that all the inhabitants were the Duke of *York*'s tenants: But the court held, that they could not diſcharge him on motion, and ſaid, that they muſt determine the matter by action of falſe impriſonment, or ſome other way, and inclined ſtrongly, that he could not any way be diſcharged; for *per cur'*, though originally conſtables were choſen in leets; yet the conſtable being an officer, whoſe duty it is to keep the peace, the juſtices may chooſe him in caſes of neceſſity; as in the Hamlets about the *Tower*, the juſtices, by reaſon of the increaſe of buildings, where there was formerly but one conſtable, did chooſe five; and it was ruled they might do ſo; and they ſeemed to incline, that tho' formerly there had been none, yet they might chooſe one if they ſhould think it convenient. 1 *Bac. Ab.* 439. 1 *Mod.* 13. *S. C.* 2 *Keb.* 557. *S. C.*

Information againſt *K.* for *refuſing to take the oath* of a conſtable of the hundred, being choſen in the leet. The defendant *pleads that W. is an ancient borough, and that they have a leet there, and uſed to chooſe their own officers, &c.* within the borough. The queſtion was, *Whether the living within* the juriſdiction of *an inferior leet ſhould exempt* a man *from being choſe high conſtable in the hundred. Hale* Ch. J. ſaid, the caſe will be very *different* if this be really a *borough*, and if it be an *upland town*; for formerly in *England* every hundred uſed to ſend their jury, and every borough to ſend four men of their own, and conſtables were before the ſtatute, but that gives them view of armour; and he ſaid that the ſuperior leet ſhall not meddle in the inferior, of matters inquirable there, unleſs it be in caſe of omiſſion; but he ſaid, a conſtable of an hundred was an article that the inferior court could not meddle in, becauſe it is an office that

that extends beyond their juriſdiction, and ſo judgment was againſt the defendant *niſi*. *Frem. Rep.* 348, 349. *pl.* 433. *Mich.* 1675. *Keen*'s *Caſe*.

And an information was brought againſt *King* for refuſing the office of conſtable of *Nortonferris* within which was an ancient borough that had a leet, *viz. Wincanton*, and he *pleaded, that* he *being within, and reſiant in the leet of the borough, ought not to do the office of conſtable of the hundred*; but judgment was given againſt him, and it was ſaid, that if there were a ſpecial cuſtom to be diſcharged, it might be good. 3 *Keb.* 197, 230, 231. *Trin. & Mich.* 25 *Car.* 2. *B. R. King* v. *King*.

A ſpecial verdict found, that within the manor of the hundred of *Farnham* there are ſeveral other manors belonging to divers lords, the inhabitants whereof uſed to be elected for the ſaid hundred; they find alſo, that there is the *manor of the town of* Farnham, *within the manor of the ſaid hundred*, in which there is a court-leet, and that the *defendant is an inhabitant within the ſaid town of* Farnham, *& non alibi*; *and that no inhabitant of the town* of Farnham *ever ſerved* as high conſtable *for the hundred of Farnham*. The queſtion ariſing upon the ſpecial verdict was, Whether *the defendant, being in a particular leet, is excuſed* from *ſerving* as high conſtable *of the hundred?* And on debate the court held, that he is not excuſed. 11 *Mod.* 215. *pl.* 3. *Paſch.* 8 *Ann. B. R. The Queen.* v. *Jennings*.——1 *Salk.* 383. *pl.* 33. *The Queen* v. *Jennings* is a different caſe.

S. *was preſented conſtable by the homage* of a leet in *Eſſex*, the *ſteward refuſed to ſwear him*; *and nominated and ſwore in his place one R.* The juſtices of peace at the quarter *ſeſſions, upon an examination* into this matter, *order that* S. *ſhould ſerve the office, and ſwear him* accordingly; this order was removed by a *certiorari*, and exception was taken to it, that the juſtices had intermeddled in a matter of which they had no conuſance; for the appointment and ſwearing of a conſtable did properly belong to the lord of the leet. *Per. cur.* The election of a conſtable properly belongs to the homage, and though the juſtices of the peace have not originally the making of a conſtable, yet *this is a matter of the peace within their general juriſdiction*, and they have power to examine this matter at the ſeſſions; and as to the ſwearing of a conſtable, any ſingle juſtice of the peace may do it; and the order was confirmed. 2 *Jones* 212 *Trin.* 34 *Car.* 2 *B. R. The King* v. *Stephens*.

Seſſions may chooſe a conſtable, and the order here appointing him to take the oaths is an election of him, *&c. Per tot. cur.* He may be a perſon not living within any leet. And *per Holloway* J. they might have compelled him to take the oaths by encreaſing his fine. *Cumb.* 20. *Trin.* 2 *Jac. B. R. Anon'.*

The *ſteward of the leet* uſually certifies under his hand what perſon is choſe, which *certificate* is carried to a juſtice of peace, and if the party refuſe, the *juſtice ſends his warrant* to compel him, but the ſteward may, during the court, ſwear the conſtable as well as a juſtice of peace after. 5 *Mod.* 128. *Mich.* 7 *W.* 3. in the caſe of *Fletcher* v. *Ingram*.

At common law all conſtables were choſen at the leet, and where there is *no leet*, at the *torn*, but whether by the ſteward or the homage has made a great queſtion; but without queſtion, a *corporation* of common right cannot *chooſe* a conſtable; by *cuſtom* they may, but then they muſt *preſcribe* for it. *Per Holt.* 2 *Salk.* 502. *pl.* 2. *Mich.* 8 *W.* 3. *B. R. The King* v. *Bernard*.

The village of *C. having no conſtable*, the juſtices by order of ſeſſions *appointed one* to ſerve there; and *per Holt* Ch. J. The juſtices have all along exerciſed this power, and the court will intend they have a ſufficient authority for it; but the 13 & 14 *Car.* 2. *cap.* 12. gives them authority to do it only in particular caſes. 1 *Salk.* 175, 176. *pl.* 2. *Trin.* 11. *W.* 3. *B. R. The village of Chorley's* caſe.

High conſtables are removable as well as petty conſtables, and the juſtices of peace at ſeſſions are the beſt judges of that matter; *per cur'*. 1 *Salk.* 150. *pl.* 19. *Paſch.* 4 *Ann. B. R.* in the caſe of *The Queen* v. *White*.

The mayor of *A.* ſet up a *cuſtom, that the court-leet there ought to make a liſt every year of five perſons to be preſented to the mayor, and that he ought to chooſe one out of them for conſtable, and* that *the jury ſhould chooſe the other out of the remaining four*: Now this year the jury had made *no liſt*, but the pariſhioners *choſe conſtables themſelves*. Upon the mayor's applying to the ſeſſions, they made an *order of diſcharge* of one of the conſtables, and *that the mayor*'s conſtable, whom he nominated in default of the jury's giving him a liſt, *ſhould be confirmed*. The court now quaſhed this order; for they ſaid, the only ſtatute that gives the juſtices power at all in relation to conſtables, is the ſtatute of 13 & 14 *Car.* 2. *cap.* 12. *ſ.* 15. and that act only gives juſtices power to put in conſtables in default of the court-leet, but does not impower them to diſcharge conſtables already put in. Accordingly the order was quaſhed. *Barnard. Rep. in B. R.* 51. *Paſch.* 1 *Geo.* 2. *The King* v. *Burden and Wakeford*.

By ſtat. 1 *Geo.* 1. *ſt.* 2. *c.* 13. High conſtables are to take the oaths of allegiance, ſupremacy, and abjuration, as other perſons who qualify for offices.

3. *His power and authority without a warrant.*

As conſtables were originally inſtituted for the better preſervation of the peace, they may by the Common law arreſt felons, and all ſuſpicious perſons that go abroad in the night and ſleep by day, or reſort to bawdy-houſes, or keep ſuſpicious company. 2 *Hawk. P. C.* 61, 62.

Alſo by the ancient Common law, the conſtable was to preſent at the torn or leet, all thoſe within his precinct who were not admitted into ſome tithing, and who had not ſworn to the King's allegiance; and it ſeems, that by the law in uſe at this day, he ought to preſent all offences inquirable in the torn or leet. 1 *Bac. Abr.* 441.

A conſtable is not only impowered, as all private perſons are, to part an affray in his preſence, but is bound at his peril to endeavour it, not only by doing his utmoſt himſelf, but alſo by demanding the aſſiſtance of others, which they are bound to give him, under pain of fine and impriſonment, 1 *Bac. Abr.* 441.

And it is ſaid, that if he ſee perſons actually engaged in an affray, whether the violence were done or offered to another, or even to himſelf, or ſee them upon the very point of entering upon an affray; as where one threatens to beat another, *&c.* he may either carry the offender before a juſtice of peace, in order to his finding ſureties for the peace, *&c.* or may impriſon him himſelf a reaſonable time till the heat be over, and afterwards detain him till he give ſuch ſurety by bond; but he ſeems to have no power to commit the offender in any other manner, or for any other purpoſe, for he cannot commit him to gaol till he ſhall be puniſhed; neither ought he to lay hands on thoſe who barely contend with words, without any threats of perſonal hurt; but all he can do in ſuch caſe is to command them, under pain of impriſonment, not to fight. 1 *Bac. Abr.* 441.

If an affray be in a houſe, the conſtable may break open the doors to preſerve the peace, and if affrayers fly to a houſe, and he freſhly follow, he may break open the doors to take them. 1 *Bac. Abr.* 441.

But he cannot of his own authority compel a man to find ſureties who is delivered into his hands, as having broken the peace in his abſence, but ought to carry him before a juſtice of the peace; neither can he arreſt a man for an affray out of his view, without warrant from a juſtice of the peace, unleſs a felony were done, or likely to be done. 1 *Bac. Abr.* 441, 442.

If a conſtable ſee a perſon expoſe an infant in the ſtreet who refuſes to take it away, he may lawfully apprehend and detain ſuch perſon till he or ſhe ſhall conſent to take care of it. 2 *Hawk. P. C.* 77.

Neither the high or petit conſtable can *take any man's oath* that he is in fear of his life; *per Anderſon* Ch. J. *Cro. E.* 375. *pl.* 25. *Hill.* 37 *Eliz.*

Common fame is enough to apprehend any man; but if you arreſt a man *poſſeſſed of money*, and he dies, you are chargeable with the money; *per Williams* J. cites 2 *H.* 7. And where in the principal caſe the conſtable took from the felon the money of which he had robbed the party, and was afterwards robbed of it himſelf, trover

and converſion lies for the party againſt the conſtable for the money, but not treſpaſs. *Ow.* 121. *Mich.* 3 *Jac. Walgrave* v. *Skinner.*

A. was poſſeſſed of corn in *S.* and *W.* the ſervant of *B.* by command of *B.* carried away the corn. *A.* prayed the conſtable to *detain W. till he could procure a warrant from a juſtice of peace*, which he did; but held, that a conſtable cannot detain any perſon but for *felony. Brownl.* 198. 11 *Jac. Ringhall* v. *Wolſey.*

An action of *falſe impriſonment* brought againſt a conſtable, who pleaded Not guilty, and ſhewed in evidence, that he *came to ſearch in time of the plague for lodgers in* the town, *and found a ſtranger and queſtioned him* which way he came into the town; who anſwered, Over the bridge; and the judge conceived this to be a ſcornful anſwer to an officer; and *becauſe he had not a paſs*, but travelled without one, and gave ſuch a *ſcornful anſwer*, the defendant did offer *to apprehend him*, and the plaintiff thereupon, being preſent, ſaid to the defendant, *he ſhall not go to priſon*, but yet *offered to paſs his word for his forthcoming, upon which the defendant did commit the plaintiff*; and it was ruled upon evidence, that there was good cauſe to commit the plaintiff *for oppoſing the conſtable, though but verbally, in his office*, who is ſo ancient an officer in the commonwealth. *Clayt.* 10. *pl.* 9. before *Davenport* Ch. B. *Mich.* 8 *Car. Sheffield*'s caſe.

A. loſes goods, and charges B. with ſtealing them; the conſtable *ſearches B.'s houſe*, but finds none of the goods, yet upon the charge of *A.* and at his requeſt, the *conſtable may arreſt B.* though he may in diſcretion refuſe, he having found no cauſe of ſuſpicion on his ſearch. *Clayt.* 44. *pl.* 69. *Auguſt* 1639. *coram Berkley* J. *Ward*'s caſe.

In treſpaſs for *taking ſalmon*, the defendant *juſtified by the ſtat.* 1 *Eliz. cap.* 17. *for that* he was a conſtable, and that *the ſalmon were caught at an undue ſeaſon.* Upon a demurrer, the plea was adjudged ill, becauſe he *did not ſhew a warrant*; for a conſtable cannot intermeddle without a warrant, nor the leet without a preſentment. 1 *Salk.* 407. *pl.* 1. *Mich.* 2 *W. & M. in B. R. Atkinſon* v. *Crouch.*

Conſtable has no power to require aſſiſtance of whom he pleaſes in ſearching for *nets* and other engines to take conies, *&c. Comb.* 309. *Mich.* 6 *W. & M. in B. R. The King* v. *Wildbore.*

Whenever a conſtable may take up any perſon, it muſt be an *actual breach of the peace, or upon good grounds of ſuſpicion*, and the *cauſe* of his ſuſpicion *muſt be ſhewn*, becauſe it is traverſable; and in caſe of ſuſpicion, where there is a *felony done*, there is no difference between a publick and a private perſon; agreed. 11 *Mod.* 248. *Mich.* 1709. 8 *Ann. B. R.* in caſe of *The Queen* v. *Tooly.*

4. *His power and Duty in executing warrants.*

As the conſtable is the proper officer to a juſtice of peace, he is bound to execute his warrants. Hence it hath been reſolved, that where a ſtatute authorizes a juſtice of the peace to convict a man of a crime, and to levy the penalty by warrant of diſtreſs, without ſaying to whom ſuch warrant ſhall be directed, or by whom it ſhall be executed, the conſtable is the propet officer to ſerve ſuch warrant, and indictable for diſobeying it. 1 *Bac. Abr.* 442.

Yet inaſmuch as the office of conſtable is wholly miniſterial, and no way judicial, it ſeems that he may appoint a deputy to execute a warrant directed to him, when by reaſon of ſickneſs, abſence, or otherwiſe, he cannot do it himſelf; but without ſome ſuch ſpecial cauſe a conſtable cannot make a deputy. 1 *Bac. Abr.* 442.

A ſworn conſtable, in executing a warrant, need not ſhew it to the party, although he demand a ſight of it; but in making an arreſt, he ought to acquaint him with the ſubſtance of it. 6 *Co.* 54. 9 *Co.* 69.

An unlawful arreſt, without a juſtice's warrant cannot be made good by a warrant taken out afterwards. 1 *Bac. Abr.* 442.

If the conſtable, after he hath arreſted the party by force of a warrant, ſuffer him to go at large on his promiſe to return again, he cannot, by force of the ſame warrant, arreſt him again. 1 *Bac. Abr.* 442.

A conſtable cannot juſtify an arreſt by force of a warrant from a juſtice of the peace, which expreſsly appears in the face of it to be for an offence, whereof a juſtice of peace hath no juriſdiction, or to bring the party before him, at a place out of the county for which he is juſtice. 1 *Bac. Abr.* 442.

But it ſeems that he ought to execute a general warrant to bring a perſon before a juſtice, to anſwer ſuch matters as ſhall be objected againſt him on the part of the King. 1 *Bac. Abr.* 442.

Alſo by the better authorities it ſeems holden, that it is not material whether the party arreſted by virtue of a warrant from a juſtice of peace, were guilty or innocent, or whether the felony, *&c.* were actually committed or not; for it would be a great diſcouragement to officers to ſubject them to actions in ſuch caſes, for doing what they apprehend to be their duty; and the liberty of the ſubject ſeems ſufficiently ſecured by ſubjecting the juſtice to an action. 1 *Bac. Abr.* 442.

A conſtable is an officer but for his own particular will, and though he may *execute warrants in any other part of the county*, (as any other perſon may) yet he is not compellable to do it, though the contrary is practiſed in *London* by cuſtom. *Per Holt.* Ch. J. *Cumb.* 446. *Trin.* 9 *W.* 3. *B. R. Anon'.*

If a warrant be directed to a conſtable *by name*, he may execute it *out of his precinct*; [that is, any where within the juriſdiction of the juſtice of peace, 11 *Mod.* 246.] *per Holt* Ch. J. 1 *Salk.* 176. *Trin.* 11 *W.* 3. *B. R.* in *Chorly Vill.*'s caſe.

But if a warrant is directed *to all conſtables generally*, ſuch warrant cannot be executed by any conſtable out of the precincts of his pariſh, for he is a conſtable no where elſe. *Carth.* 508. *Hill.* 11 *W.* 3. *B. R.* in caſe of *The King* v. *Chandler.*

One might take a warrant to *ſearch a ſuſpicious houſe upon a felony committed*, but it is at his peril *to execute it in due time, and at ſuſpected houſes only*; and though a conſtable may by virtue of ſuch a warrant ſearch the houſe, and do all other things that his warrant doth authoriſe him to do, yet if he *goes beyond his warrant*, by which any body is damaged, he is anſwerable for it; *per Holt* Ch. J. 12 *Mod.* 344. *Mich.* 11 *W.* 3. at *Niſi prius.*

When a conſtable *has a warrant*, he is tied up to that warrant, to *act only as that directs.* 11 *Mod.* 248. *Mich.* 1709. in caſe of *The Queeen* v. *Tooly.*

It ſeems that a conſtable may and *ought to execute a general warrant to bring a perſon before the juſtice of peace, to anſwer ſuch matters as ſhall be objected againſt him on the part of the King*; for that the officer ought to preſume, that the juſtice has a juriſdiction of the matter which he takes conuſance of, unleſs the contrary appear, and it may often endanger the eſcape of the party to make known the crime he is accuſed of; but it ſeems to be very queſtionable, whether a conſtable can juſtify the execution of a general warrant to *ſearch for felons* or ſtolen goods, becauſe ſuch warrant *ſeems to be illegal* on the very face of it; for that it would be extremely hard to leave it to the diſcretion of a common officer, to arreſt what perſons, and to ſearch what houſes he thinks fit; and if a juſtice cannot legally grant a *blank warrant* for the arreſt of a ſingle perſon, leaving it to the party to fill it up, ſurely he cannot grant ſuch a general warrant which might have the effect of a hundred blank warrants. 2 *Haw. Pl. C.* 81, 82. *cap.* 15. *ſect.* 10.

He cannot juſtify an *arreſt* by force of a juſtice's *warrant for a matter appearing to be out of his juriſdiction.* 2 Hawk. Pl. C. 81. cap. 13. ſ. 10.

He may juſtify by force of a *general warrant* expreſſing no certain time. 2 *Hawk. Pl. C.* 81. *cap.* 13. *ſ.* 10.

It ſeems that the arreſt of an innocent perſon may be juſtified by the warrant of a juſtice of peace particularly naming him. 2 *Hawk. Pl. C.* 82. *cap.* 13. *ſect.* 11.

5. *How*

5. How favoured and protected in his office; or puniſhed for neglect of duty.

Stat. 7 *Jac.* 1 *cap.* 5. If any action is brought againſt a conſtable, for any thing done by virtue of his office, he, and alſo all others which in his aid, or by his command, ſhall do any thing concerning his office, may plead the general iſſue, and give the ſpecial matter in evidence, and if he recovers he ſhall have double coſts.

Stat. 21 *Jac.* 1. *cap.* 12 *ſect.* 5. An action brought againſt a conſtable, headborough, or tithingman for any matter done by virtue of their office, ſhall be laid in the county where the fact was committed, and not elſewhere.

Stat. 24 *Geo.* 2. *cap.* 44. *ſect.* 6. No action ſhall be brought againſt any conſtable or other perſon acting by his order, and in his aid, for any thing done in obedience to the warrant of a juſtice of the peace, until demand hath been made, or left at the uſual place of his abode, by the party, or by his attorney, in writing, ſigned by the party demanding the ſame, of the peruſal and copy of ſuch warrant, and the ſame hath been refuſed or neglected for ſix days after ſuch demand: And if after compliance, any ſuch action ſhould be brought, without making the juſtice who ſigned ſuch warrant defendant, on producing and proving ſuch warrant at the trial, the jury ſhall give their verdict for the defendant, notwithſtanding any defect of juriſdiction in the juſtice. And if ſuch action be brought jointly againſt the juſtice and conſtable; on proof of ſuch warrant, the jury ſhall find for the conſtable, notwithſtanding ſuch defect of juriſdiction as aforeſaid; and if the verdict be given againſt the juſtice, the plaintiff ſhall recover his coſts againſt him, to be taxed in ſuch manner by the proper officer, as to include ſuch coſts as the plaintiff is liable to pay to ſuch defendant, for whom ſuch verdict ſhall be found as aforeſaid.

Sect. 8. No action ſhall be brought againſt any conſtable, but within ſix months after the act committed.

Stat. 27 *Geo.* 2. *cap.* 20. *ſect.* 2. The conſtable executing a juſtice's warrant for levying a penalty, or other ſum of money directed by any act of parliament, by diſtreſs, may deduct his own reaſonable charges of taking, keeping, and ſelling the goods diſtrained; returning the overplus on demand, after ſuch penalty or ſum of money, and charges deducted. See **Commitment, Countyrate, Juſtices of peace.**

C. was indicted for that a *burglary was committed in the night by perſons unknown*, and *J. S. gave notice* to him being conſtable, *and required him to make hue and cry*, and he refuſed, but becauſe he did *not ſhew the place of notice* the party was diſcharged. *Cro. E.* 654. *pl.* 16. *Hill.* 41 *Eliz. B. R. Crowther*'s caſe.

Another exception was taken to the matter of the indictment, becauſe it has been adjudged, that an hundred ſhall not be charged with a robbery *committed in the night*, for they be not bound to give attendance; no more ought a conſtable to do it in the night. But all the court held the indictment to be good notwithſtanding; for it is not like the caſe of an hundred; becauſe it is the *conſtables duty upon notice given* unto him, *preſently to purſue*. *Cro. E.* 16, 17. *pl.* 16. *Hill.* 41 *Eliz. Crowther*'s caſe.

Several conſtables were indicted for *refuſing to execute the warrant of a juſtice of peace directed to them to apprehend one for a contempt*, and the indictment was allowed. 2 *Roll. Rep.* 78. *Hill.* 16 *Jac. B. R. Coleman*'s caſe.

A conſtable is not *ſuable out of the county* for what he does in execution of his office. Held *per cur'*. *Sty.* 393. *Mich.* 1653. *B. R. Anon'*.

The defendant being a conſtable was *indicted for that he contemptuouſly and voluntarily neglected to execute diverſa præcepta et warranta directed to him* by juſtices of peace under their hands and ſeals; but it was quaſhed, becauſe it did *not ſet forth the nature and tenor of the warrants*, for unleſs the defendant can know what particularly he is charged with, he cannot tell how to make his defence. *Vent.* 305. *Hill* 28 & 29 *Car. B. R. Burrough*'s caſe.

In an *habeas corpus* and *certiorari* for the body of *J. S.* who had been impriſoned for not paying of a fine of 20*l.* ſet at the quarter ſeſſions, the return was, that he, being conſtable and demanded by the court to preſent an *highway*, which was ſworn before him by two witneſſes to be *out of repair*, ſaid in contempt of the court, that he *would not preſent it*; for which and certain other contemptuous words, a fine was ſet on him. The court were of opinion, that the fine was not well ſet; for conſtables are to preſent upon their own knowledge, and the two witneſſes ſhould have been carried to the grand jury; for the conſtable was not obliged to preſent upon their teſtimony. *Vent.* 336. *Paſch.* 31 *Car.* 2. *B. R. Anon'*.

Motion to quaſh an indictment *againſt divers inhabitants in* Derby, *for refuſing to meet and make a rate upon the ſeveral pariſhes in* Derby *to pay the conſtables tax*; firſt, becauſe they are not compellable, but the ſtatute only ſays that they may, ſo they have their election and no coercion ſhall be; *ſed non allocatur*; for *may* in the caſe of a publick officer is tantamount to ſhall, and if he does not do it, he ſhall be puniſhed upon an information, and though he may be commanded by a writ, this is but in aggravation of his contempt; but the court refuſed to quaſh it. *Skinner* 370. *pl.* 17. *Mich.* 5 *W. & M. in B. R. The King* v. *The inhabitants of Derby*.

If a *juſtice of the peace adjudged that to be an offence which is no offence*, the inferior officer ſhall anſwer; as if one be adjudged the putative father of a baſtard, where after it appears to be born in matrimony, this is void, & *coram non judice, &c. Per Holt* Ch. J. *Skin.* 445. *Trin.* 6 *W. & M. in B. R.* in caſe of *Crump* v. *Holford*.

A leet may *ſet a fine* on a conſtable, but the ſeſſions cannot. 5 *Mod.* 96. *Trin.* 7 *W.* 3. in a *nota* at the end of the caſe of *The King* v. *Harpur*.

Falſe impriſonment againſt a conſtable *for executing a warrant of Sir* James Butler, *after he was out of the commiſſion* of the peace. *Per Holt*, Conſtable at his peril is to *take notice*, that his warrant is by one in commiſſion; but all the favour we can do is, ſince it was a warrant executed a day or two after Sir *James* was out of commiſſion, that if he has *behaved himſelf honeſtly and civilly*, to be mild to him; and he ſaid, the conſtable ought to ſhew the juſtice of peace's commiſſion, though heretofore it were held, common reputation would be enough; and here the conſtable *coming out of his own pariſh to execute* the warrant, betrays his officiouſneſs. 12 *Mod.* 347. *Mich.* 11 *W.* 3. *Normond* v. *Mills*.

A conſtable was indicted, for that one *Naſh* was convicted of *deer ſtealing* upon the ſtatute 3 & 4 *W.* 3. *cap.* 10. and that the defendant being a conſtable, *the juſtice directed his warrant* to him *to levy the penalty*, which he did, but had *not returned the warrant, or made any certificate thereof*; he was found guilty; and it being removed by *certiorari*, it was reſolved, that though the conſtable is not named in the ſtatute, yet the juſtices may command him to execute the warrant, becauſe, as at Common law a conſtable was a ſubordinate officer to the conſervator of the peace, ſo he is now a proper officer to the juſtice; and that where an officer neglects a duty incumbent upon him, either by the common law or ſtatute, he is indictable, and further that the conſtable *need not return the warrant itſelf*; becauſe it may be neceſſary for him to keep it in his own defence; but he muſt *either return that or certify* what he has done upon it; for otherwiſe the proſecutor cannot attain the end of his proſecution, and the defendant cannot be diſcharged. 1 *Salk.* 380. *pl.* 28. 2 *Ann. B. R. The Queen* v. *Wyatt*. 11 *Mod.* 53. *pl.* 30. *Paſch.* 4 *Ann the S. C.* Exception was taken that there ought to have been a *time and place, when and where the conſtable ſhould have returned his warrant* to the juſtices; for he is not bound to travel over *England* to find them. But judgment was given againſt the defendant, *diſſentiente Holt* Ch. J. not but that he ſaid it was an offence; but he ſaid, that in all proceſs, there out to be a place and time for the return.——2 *Ld. Raym. Rep.* 1189. *S. C.* adjudged for the Queen by three juſtices.———If an officer be negligent in doing of his office, it is an offence at Common law, and upon the 4 & 5 *W. & M. c.* 10. an high conſtable was indicted for not returning his warrant, and theſe points were reſolved, that a conſtable was an officer at Common law; and *per Powell*, ſo was an high conſtable, *contra* to the opinion

opinion of *Coke* in his 4th *Inſtitute*; and he is a ſubordinate officer to a juſtice of peace, and whenever a juſtice of peace is commanded to do any thing, he is the perſon who is to put this in execution for the juſtice cannot command the ſheriff or the party, unleſs there be expreſs words of an act of parliament for it; and matters being left ſo indifferent, if the conſtable doth not do his duty, he is puniſhable at Common law. 2dly. That the indictment reciting the record of conviction, need not conclude *patet per recordum*, for this is but matter of inducement, and where *nul tiel record* cannot be pleaded, there need, not proof *per recordum*. 3dly, Here is a great offence, for the warrant ſays, that the officer ought to return the warrant, becauſe by the act the juſtice is to do ſome other thing afterwards, in caſe there be not goods out of which the penalty can be levied; and *though no place is mentioned where the warrant is to be returned*, it is well enough, for the officer is to find out the juſtice, and to give him an account what he has done upon his warrant, as the juſtice may require him to do; and upon Not guilty pleaded, the officer may prove that he went to ſeek the juſtice, but could not find him; and this will be a good excuſe *per* three juſtices as to this laſt point, againſt the Ch. Juſtice, who thought, that both a place where, and the time when the return ſhould be, ought to be mentioned. 4thly, If the offender have but 50 *l.* worth of goods, and the ſum is 100 *l.* the officer cannot levy the 50 *l.* only. The act doth not require that the juſtices muſt diſtribute the money themſelves, but the officer may well do it, as the act directs. If there be three ſeveral convictions, and the offender hath no more goods than will anſwer two of thoſe convictions, he may pay the two, and ſtand in the pillory for the other; the money cannot be levied by parcels. So it is in caſe there be but two convictions and the offender hath only goods to anſwer one of them, he may be pilloried for the other. 5thly, That though the indictment were that he did never return the warrant, nor cauſe it to be returned, yet this was well enough, for the neglect was the offence. 6thly, That the juſtice muſt make a warrant to levy the penalty, and that the juſtice cannot do it himſelf. *The Queen* v. *Wyatt*.

Conſtables of London (which city is divided into twenty-ſix wards, and every ward into the like number of precincts, in each whereof is a *conſtable*) are nominated by the inhabitants of each precinct on St. *Thomas*'s day, and confirmed, or otherwiſe, at the court of wardmote; and after they are confirmed, they are ſworn in their offices at a court of aldermen, on the next *Monday* after Twelfth day; the ſubſtance of their oath is, to keep the King's peace, to the utmoſt of their power; to arreſt affrayers, rioters, and ſuch as make conteſts to the breach of the peace, and carry them to the houſe of correction, or compter of one of the ſheriffs; and in caſe of reſiſtance, to make outcry on them, and purſue them from ſtreet to ſtreet, and from ward to ward, till they are arreſted: To ſearch for common nuſances, in their reſpective wards, being required by ſcavengers, *&c.* And upon requeſt to aſſiſt the beadle and raker in collecting their ſalaries and quarterage; to preſent to the lord mayor and miniſters of the city, defaults relating to the ordinances of the city; to certify once a month into the mayor's court, the names and ſurnames of all freemen deceaſed; and alſo of the children of ſuch freemen, being orphans: And by the articles of the wardmote inqueſt, *conſtables* are to certify the names, ſurnames, place of dwelling, poſſeſſion and trade of every perſon, who ſhall newly come to inhabit in their precincts, and to keep a roll thereof; in order to which they are to make inquiry at leaſt once a month into what perſons are come to loge, and ſojourn there; and if they find by their own confeſſions, or the record of the alderman's books, that ſuch new comers are ejected from any other ward for bad living, or any miſdemeanor, and refuſe to find ſureties for their good behaviour, warning is to be given to them and their landlords, that they depart; and on refuſal, they may be impriſoned, and the landlords fined a year's rent agreed for by ſuch new comers. *Calth. Rep.* 129, 138. *Conſtables of* London in each ward are to attend the watch by turns, and go the rounds; and with the beadles every night are to warn ſuch perſons as are to ſerve upon the watch in their precincts; and if they refuſe to appear, the *conſtable* may hire others in their ſtead, and they ſhall pay him according to the cuſtom of the city: But the common council appoint the watchmen. Watchmen are to apprehend night-walkers, vagabonds, perſons going armed, *&c.* and may arreſt ſtrangers in the night, and carry them before the *conſtable* to be examined, and finding cauſe of ſuſpicion ſecure them till the morning; and whether they are horſemen or footmen, or drivers of carriages, or perſons that carry burdens, the watch may ſtay them till the morining, unleſs they can render a good account of themſelves, their company, and carriage, *&c.* And *conſtables &c.* are to be aiding and aſſiſting to the watch; and the watchmen are to obey their orders, in conveying offenders to the Compter, which is the common priſon for offenders for the breach of the peace, till they are examined, and puniſhed by the lord mayor, *&c.* But *conſtables* ought to be careful whom they ſend to the Compter, for fear of action for falſe impriſonment, proſecution for damages, *&c.* If any will not obey the arreſt of the watch, they may make hue and cry after them; and for ſuch arreſt of a ſtranger, (eſpecially one ſuſpected) none is liable to puniſhment. *Dalt.* 240. The court of common council are to meet the firſt of *October* yearly, and order a proper number of watchmen, beadles, and night *conſtables*, for the city of *London* and liberties, and determine ſums to be levied to bear the charge thereof upon each ward; and for raiſing money, the aldermen and common council-men of wards, ſhall make a rate and aſſeſſment upon the inhabitants by diſtreſs; and ſhall appoint their watchmen, ſet down in writing their ſtands and number of rounds, and make orders for regulating the watch, *&c.* *Conſtables* to keep watch and ward, from the 10th of *September*, to the 10th of *March* from nine in the evening till ſeven the next morning; and from the 10th of *March* to the 10th of *September*, from ten in the evening till five next morning. The *conſtables* ſhall uſe their beſt endeavours, for preventing fires, robberies and diſorders, and arreſt malefactors; and go twice or oftener about their wards, in every night; and the watchmen are to apprehend all ſuſpected perſons, *&c.* and deliver them to the *conſtable* of the night, who ſhall carry them before a juſtice of peace; conſtables miſbehaving themſelves, to forfeit 20 *s.* and the lord mayor, and two juſtices for the city, may hear and determine offences, and levy penalties by diſtreſs and ſale of goods, *&c.* *Stat.* 10 *Geo.* 2. *cap.* 22. *Conſtables* are to certify to the lord mayor, and common council of the city, the names of all ſuch perſons as ſhall interrupt them in the diſcharge of their offices: And a *conſtable of* London has power to execute warrants, *&c.* thoughout the whole city, upon occaſion. Such as are choſen into the office are obliged to place the King's arms, and the arms of the city over their doors; and if they reſide in alleys, at the end of ſuch alleys, toward the ſtreets, to ſignify that a *conſtable* lives there, and that they may be the more eaſily found when wanted.

Conſtat, *Lat.* Is the name of a certificate, which the clerk of the *Pipe*, and the auditors of the *Exchequer*, make at the requeſt of any perſon who intends to plead or move in that court, for diſcharge of any thing. *Anno* 3 & 4 *Ed.* 6. *cap.* 4. and 13 *Eliz. c.* 6. The effect of a *conſtat* is the certifying what does *conſtare* upon record, touching the matter in queſtion; and the auditor's fee for it is 13*s.* 4*d.*

A *conſtat* his held to be ſuperior to a *certificate*; becauſe this may err or fail in its contents, that cannot; as certifying nothing but what is evident upon *record*. Alſo the exemplification under the great ſeal of the inrolment of any letters patent is called a *conſtat*. *Coke on Littl. fol.* 225. *b.* The difference between a *conſtat*, *inſpeximus*, and *vidimus*, you may read at large in *Page*'s caſe. 5 *Report*.

Conſuetudinarius, A ritual or book, containing the rites and forms of divine offices, or the cuſtoms of abbies and monaſteries. 'Tis mentioned in *Brompton*, who writing

writing of *Oſmond*, biſhop of *Salilsbury*, tells us, that *Compoſuit ordinalem eccleſiaſtici officii quem* conſuetudinarium *vocant.*

Conſuetudinibus & ſerviciis, Is a writ of right cloſe, which lies againſt the tenant that deforceth his lord of the rent or ſervice due to him. Of this ſee more in *Old Nat. Br. fol.* 77. *Fitz. Nat. Br. fol* 151. and *Reg. of Writs, fol.* 159.

Conſuetudo, *Dies de Conſuetudine*, A day's work to be done for the Lord, as a cuſtomary ſervice by the tenant.—— *i. e. debent redditum & quinque dies*, conſuetudine——*i. e.* five days work in a year. *Paroch. Antiq. pag.* 229.

Conſul, in our law books, ſignifies an earl: For *Bracton, lib.* 1. *cap* 8. tells us, that as *comes* is derived from *comitatu, ſive a ſocietate*, ſo *conſul* is derived from *conſulendo*; *reges enim tales ſibi aſſociant, ad* conſulendum *& regendum populum Dei.* So in the laws of *Edward* the Confeſſor, *c.* 2. *Quod modo vocatur* comitatus, *olim apud Britones temporibus Romanorum vocabatur* conſulatus, *& qui modo* vicecomites, *tunc temporis* viceconſules *vocabantur.*

Conſulage. The duty of conſulage at *Lisbon* regulated, 8 *Geo.* 1. *c.* 17. For collecting the *Britiſh* conſulage at *Cadiz.* 9 *Geo.* 2. *c.* 25. For collecting the conſulage at *Leghorn*, 10 *Geo.* 2. *c.* 14.

Conſulta eccleſia, A church full, or provided for. ——*Abbas dicit quod prædicta eccleſia eſt* conſulta *deipſo abbate & conventu qui eam tenent in proprios uſus.*———— Cartular. Rading. MS. *fol.* 211. *a.*

Conſultation, *Conſultatio*, Is a writ whereby a cauſe being formerly removed by prohibition from the eccleſiaſtical court, or court chriſtian, to the King's court, is returned thither again; for the judges of the King's court, if upon comparing the libel with the ſuggeſtion of the party, they do find the ſuggeſtion falſe, or not proved, and therefore the cauſe to be wrongfully called from the court chriſtian, then upon this *conſultation* or *deliberation*, they decree to be returned again: Whereupon the writ in this caſe obtained, is called a *conſultation.* Of this you may read the *Reg. Orig.* 44, 45. *uſque ad* 58. *Old Nat. Brev. fol.* 32. *F. N. B. fol.* 50. See alſo the ſtatute of the writ of *Conſultation Anno* 24 *Ed.* 1. and 1 *Inſt. fol.* 105. See **Prohibition.**

Contempt, *(Contemptus)* Is a diſobedience to the rules and order of a court, which hath power to puniſh ſuch offence: And one may be impriſoned for a *contempt* done in court; but not for a *contempt* out of court, or a private abuſe. *Cro. Eliz.* 689. Attachment alſo lies againſt one for *contempt* to the court, to bring the offender to an anſwer on interrogatories, *&c.* and if he cannot acquit himſelf, ſhall be fined. 1 *Lill.* 305. If a ſheriff being required to return a writ directed to him, doth not return the writ, it is a *contempt:* And this word is uſed for a kind of miſdemeanor, by doing what one is forbidden; or not doing what he is commanded. 12 *Rep.* 36. And as this is ſometimes a greater, and ſometimes a leſſer offence; ſo it is puniſhed with greater or leſs puniſhment, by fine, and ſometimes impriſonment. *Dyer* 177, 128. 1 *Bulſt.* 85. See 5 *Vin.* 442, *&c.* 1 *Hawk. P. C.* 56, *&c.*

By ſtat. *Marleb.* 52 *Hen.* 3. *c.* 1, 2, 3. None ſhall diſtrain for amends without award of court, nor refuſe to permit the ſervice of proceſs on pain of ranſom.

Biſhops to be puniſhed for contempts by fine only, 25 *Ed.* 3. *ſtat.* 3. *c.* 6.

Contempts excepted out of general pardon, 20 *Geo.* 2. *c.* 52. *ſ.* 58, 59.

Contenement *(Contenementum*, as, ——*ſalvo contenemento ſuo)* Signifies his countenance, credit, or reputation, which he hath, together with, and by reaſon of his freehold. And in this ſenſe does the ſtatute of 1 *Ed.* 3. and 34 *Ed.* 3. *c.* 7. and *Old Nat. Br.* uſe it, where *countenance* is uſed for *contenement.* The armour of a ſoldier is his countenance; the book of a ſcholar, his countenance, and the like. *Coke*, 2 *part. Inſt. fol.* 28. *Bracton. lib.* 3. *tract*, 2. *cap.* 1. *numb.* 3. And Sir *Henry Spelman* ſays, *Contenementum eſt æſtimatio & conditionis forma, qua quis in repub. ſubſiſtit.*

But *contenement* ſeems rather to ſignify that which is neceſſary for the ſupport and maintenance of men according to their ſeveral qualities, conditions, or ſtate of life: For in *Magna Charta, cap.* 14. you have theſe words, *A freeman ſhall not be amerced for a ſmall fault, but after the quantity of the fault, and for a great fault after the manner thereof, ſaving to him his* contenement, *or freehold. And a merchant likewiſe ſhall be amerced, ſaving to him his merchandiſes; and a villain, ſaving to him his waynage.* And *Bracton, lib.* 3. *tract.* 2. *cap.* 1. *nu.* 3. hath theſe words, *Et ſciendum quod miles & liber homo non amerciabitur niſi ſecundum modum delicti, ſecundum quod delictum fuit magnum vel parvum, & ſalvo* contenemento *ſuo, mercator vero non niſi ſalva merchandiſa ſua, & villanus niſi ſalvo wainagio:* Which *mercy* ſeemeth to have been learned from the Civil law, where *Executio non poteſt fieri in boves, aratra, aliave inſtrumenta ruſticorum. Cowell, edit.* 1727.

Contingent uſe, Is a *uſe* limited in a conveyance of land, which may, or may not happen to veſt, according to the *contingency* expreſſed in the limitation of ſuch *uſe:* A *uſe* in *contingency* is ſuch which by poſſibility may happen in poſſeſſion, reverſion or remainder. 1 *Rep.* 121. A *contingent remainder* is where an eſtate is limited to take place *in futuro*, upon an uncertain event; as where a particular eſtate which doth ſupport a remainder, may or may not determine before the remainder may commence. 10 *Rep.* 85. A remainder *contingent* is ſaid to be an eſtate veſted; but on ſuch remainder in executory deviſes, the eſtate deſcends till the *contingency* happens, and nothing is veſted till then. 1 *Vent.* 119.

Continual claim, Is a *claim* made from time to time within every year and day, to land or other thing, which, in ſome reſpect, we cannot attain without danger. As if I be diſſeiſed of land, into which, though I have right unto it, I dare not enter, for fear of death or beating. It behoveth me to hold on my right of entry at the beſt opportunity of me and mine heir, by approaching as near it as I can once every year, as long as I live; and ſo I ſave the right of entry to my heir. *Termes de le Ley.* Again, if I have a ſlave or villain taken from me, and remaining any where within the *demeſne* of the King, being in the hands of the King, I cannot maintain the writ *De nativo habendo*, as long as he continueth there; but if I *claim* him within the year and day, and ſo continue my *claim*, until I can find him without that compaſs, I may lawfully lay hold of him as mine own. *F. N. B. fol.* 7, 9. See more in *Lit. verb. Continual Claim.* And the *New Book of Entries, tit, Eodem*; and *Fleta, lib.* 6. *cap.* 53. See *Littl. lib.* 3. *c.* 7. and ſtat. 32 *H.* 8. *cap.* 33. See **Deſcent.**

Continuance is the ſame as *prorogatio* in the Civil law: Example; *continuance* until the next aſſiſe. *Fitz. Nat. Br. fol.* 154. *F.* and 244. *D.* in both which places it is ſaid, if a record in the Treaſury be alledged by the one party, and denied by the other, a *certiorari* ſhall be ſued to the treaſurer, and the chamberlain of the *Exchequer*; who, if they certify not in the *Chancery* that ſuch a record is there, or that it is likely to be in the *Tower*, the King ſhall ſend to the juſtices, repeating the certificate, and will them to *continue* the aſſiſe. In this ſignification it is likewiſe uſed by *Kitchin, fol.* 202, and 199. and *an.* 11 *H.* 6. *ca.* 4. and *continuuce of a writ* or *action* is from one term to another, in caſe where the ſheriff hath not returned or executed a former writ, iſſued out in the ſaid action. See **Diſcontinuance.**

Continuando is a word uſed in a ſpecial declaration of treſpaſs, when the plaintiff would recover damages for ſeveral treſpaſſes in the ſame action: For, to avoid multiplicity of ſuits, a man may in one action of treſpaſs recover damages for forty or more treſpaſſes, laying the firſt to be done with a *continuance* to the whole time in which the reſt of the treſpaſſes were done; and is in this form, *Continuando tranſgreſſionem prædictam, &c. a prædicto die, &c. uſque* ſuch another day, including the laſt treſpaſs.

In treſpaſs with a *continuando* of divers things, though of ſome of thoſe things there could be no *continuando*; yet,

yet it ſhall be good for thoſe things for which the *continuando* could be, and not for the others: but if the *continuando* had been particularly of ſuch things whereof a *continuando* could not be, then it had been naught. 3 *Lev.* 94. Every day's treſpaſs is ſaid to be a ſeveral treſpaſs; though a *continuando* may not be of a man's continuing a treſpaſs day and night, for ſome time together; for mankind muſt take ſome reſt: Where cattle do treſpaſs upon ground, they are continually treſpaſſing night and day, and therefore the *continuando* in that caſe is good. 1 *Lill. Abr.* 307. Treſpaſs for breaking an houſe with a *continuando*, is good; and until a re-entry is made, the continuation of the poſſeſſion is a continuation of the treſpaſs. *Lutw.* 1312. It is uſual in practice to lay the *continuando* for longer time than you can prove; but damages ſhall be given only for what can be proved. 2 *Mod.* 253.

Contours. See **Countors.**

Contraband goods, (from *contra*, and the Ital. *bando*, an edict or proclamation,) are thoſe which are prohibited by act of parliament or the King's proclamation, to be imported into, or exported out of this or other nations. Stat. 27 *Ed.* 3. *c.* 3. 13 & 14 *Car.* 2. 7 & 8 *Will.* 3. *&c.*

Contracauſator, A criminal, or one proſecuted for a crime. 'Tis mentioned in *Leg. H.* 1. *cap.* 61.

Contract, is a covenant or agreement with a lawful conſideration or cauſe. *Weſt. Symb. part.* 1 *lib.* 1. *ſect.* 10. Or elſe one thing muſt be given for another, which is called *quid pro quo*; as if I ſell my horſe for money, or covenant to make you a leaſe of my manor of *Dale*, in conſideration of twenty pounds; theſe are *good contracts*, becauſe one thing is given for another. But if a man make a promiſe to me, that I ſhall have twenty ſhillings, and that he will be debtor to me thereof, and after I aſk the twenty ſhillings, and he will not deliver it; yet I ſhall never have an action to recover, becauſe the promiſe was *no contract*, but a bare promiſe; and, *ex nudo pacto non oritor actio.* But if any thing were given for the twenty ſhillings, tho' it were but to the value of a penny then had it been *a good contract. Uſurious contract* is *contract* to pay more intereſt for money than the laws and ſtatutes of this realm allow. It is a *devaſtavit* in an executor to pay a debt upon an *uſurious contract. Noy's Reports, fol.* 129.

A *contract* is an agreement entred into by ſeveral perſons, inducing an obligation by it's nature, and the obligations ariſing from contracts are *divided and diſtinguiſhed* according as they are perfected, either by the ſole conſent of the contractors, or by the intervention or tradition of things, or laſtly by word or writing, and are either *ex re*, from a thing done; *ex verbis*, from words; *ex literis*, from writing; *ex conſenſu*, from conſent. But as all obligations cannot be bound up under general and regular names of contracts, the law allows ſome obligations to paſs under the name of *quaſi contractus*, becauſe they have ſome reſemblance, and are of the nature of contracts. 5 *Vent. Abr.* 504.

If *A. ſells a horſe to B. for* 10l. *and has no horſe*, yet *A.* ſhall have an action of debt for it; but if *A.* has a horſe, *B.* may take it, and ſo it may be a perfect contract, and yet there is not *quid pro quo. Br. Contracts, pl.* 17. cites 37 *H.* 6. 8.

Leaſe for years rendering rent is a contract. *Br. Contract. pl.* 43. 7 *H.* 7. 4.

An agreement *concerning perſonal things* is a mutual aſſent of the parties, and *ought to be perfect*, full and compleat; for when it concerns perſonal things 'tis the mutual conſent of the parties, and ought to be *executed with recompence, or* elſe to be ſo *certain as to give* an action or other *remedy* for a recompence, otherwiſe it is a naked communication without effect. *Pl. C.* 5. *a. Hill.* 4. *Ed.* 6. in caſe of *Reniger* v. *Fogaſſa.*

Recital of Whereas he was poſſeſſed of certain lands, he aſſigned the ſame, *&c. amounts* to an agreement. *Le.* 122. *pl.* 164. *Trin.* 30. *Eliz. B. R. Severn* v. *Clark.*

If one have wares purpoſing to ſell them, and another deſiring to buy them ſaith unto him, *Do not ſell them away, but tarry till ſuch a day, and I will pay you then for them*, this is a good promiſe and conſideration, for by this he is hindered in the *interim* from the ſale of them, *per Dodderidge* J. 3 *Bulſt.* 70. *Trin.* 13 *Jac. B. R.* in the caſe of *Copper* v. *Dickenſon.*

If *I ſay the price of a cow is* 4l. and *you ſay you will give me* 4l. and do not pay me preſently, you may not have her afterwards except I will, for it is no contract; but if you go preſently to tell your money, if I ſell her to another, you ſhall have your action of the caſe againſt me. *Noy's Max.* 87.

A *forced* agreement of the party *is* accounted to be *no agreement*, and therefore the court will not compel him that did thus agree to perform his agreement; (22 *Car.* 1. *B. R.*) for the law abhors all force and violence. *L. P. R.* 48.

Agreement of parties *cannot prevent* a court of equity of it's juriſdiction; as in caſe of a mortgage it cannot be agreed that this court ſhall not give relief *Arg. Chan. Caſes* 141. *Mich.* 21 *Car.* 2. in the caſe of *Fry* v. *Porter.*

Delivery in conſideration of being paid the value is a ſale. 1 *Salk.* 25. *pl.* 11. *Trin.* 2 *Ann. B. R.* in the caſe of *Herbert* v. *Borſtow.*

If two men *ſubmit* to the *award* of a third perſon, they two do alſo thereby promiſe expreſsly to abide by their determination, for *agreeing to refer is a promiſe* in itſelf. 6 *Mod.* 35. *per Holt* Ch. J. *Mich.* 2 *Ann. B. R.* in the caſe of *Squire* v. *Grevell.* See **Agreement.** See alſo 5 *W.* tit. *Contract and agreement.*

Contrafactio, Counterfeiting. As *contrafactio ſigilli Regis* counterfeiting the King's ſeal. *Blount.*

Contra formam collationis, Is a writ that lies, where a man hath given lands in perpetual alms to any late houſes of religion, as to an abbot and convent, or to the warden or maſter of an *hoſpital* and his convent, to find certain poor men, and do other divine ſervice; if they alien the land, then the donor or his heirs ſhall have the ſaid writ to recover the lands. But this writ ſhall be always brought againſt the abbot or his ſucceſſor, and not againſt the alienee, altho' he be tenant; but in all other actions, where a man demands freehold, the writ ſhall be brought againſt the tenant of the land. This is founded upon the ſtatute of *Weſtm.* 2. *cap.* 1. and of this ſee *Reg. Orig. f.* 238. and *F. N. B. fol.* 210.

Contra formam feoffamenti, Is a writ that lies for the heir of a tenant, infeoffed of certain lands and tenements, by charter of *feoffment* of a lord, to make certain ſervices and ſuits to his court, and is afterwards diſtrained for more than is contained in the ſaid charter. *Reg. Orig. f.* 176. *Old Nat. Brev.* 162. This writ lies not for the plaintiff, who claims by purchaſe from the firſt feoffee, but for the heir to the firſt feoffee.

Contra formam ſtatuti, (againſt the form of the ſtatute) is the uſual concluſion of every indictment, *&c.* for an offence created by ſtatute.

If an *offence* be at *Common law, and alſo prohibited by ſtatutes*, the indictment may conclude *contra formam ſtatuti*, or *ſtatutorum*; thus in *barretry*, though there be no direct ſtatute againſt it by that name, yet the general tenor of the ſeveral acts running againſt it by *circumlocutions*, the indictment concluding *contra formam ſtatuti*, or *diverſorum ſtatutorum* is good, and it is the uſual form. 2 *Hale's Pl. C.* 191.

P. was indicted upon the ſtatute of 5 *Ed.* 6. *cap.* 4. for *drawing his dagger in the church* of *B.* againſt *J. S.* and does *not ſay* (according to the ſtatute) *to the intent to ſtrike him*; for this cauſe it was void; but then it was moved, if this were not good as for an aſſault, that he might be fined upon it; but *per curiam* it is void in all; for being indicted upon the ſtatute, it is void as to an offence at the Common law. *Cro. E.* 231. *pl.* 23. *Paſch.* 33 *Eliz. B. R. Penhallo's* caſe.

In an indictment on the ſtatute of 8 *H.* 6. the *ſtatute* was *miſrecited*, and the concluſion was *contra formam ſtatuti*, and therefore held inſufficient; but then it was moved, that though the indictment was void for the entry with force, yet it being that they with others *riotoſe* and *routoſe* entred, *&c.* it ſhould be good for the riot; but *curia contra*; for the indictment beginning with the ſtatute of 8 *H.* 6. and concluding *contra formam ſtatuti* this

this *can have no relation to any offence except upon this ſtatute.* Cro. E. 307. pl. 10. Mich. 35 & 36 Eliz. B. R. Hall *v.* Gawen & al'.

Information upon the ſtatute 33 H. 8. cap. 16. *and* 1 Ed. 6. c. 6. *for buying of worſted yarn, not being a weaver,* and the information concluded *contra formam ſtatuti*; it was ſaid it was not good, but it ought to be *contra formam ſtatutorum*; but the court as to that held it good, but becauſe he did not ſhew in his information, that it was not yarn ſpun upon the rock (for otherwiſe it is not an offence) it was held the information was not good. *Cro. E.* 750. *pl.* 6. *Paſch.* 42 *Eliz. B. R. Dingley* v. *Moore.*

If *one ſtatute be relative to another, as* where the *former makes the offence, the latter adds a penalty,* as the ſtatutes of 1 & 23 *Eliz.* the indictment ought to conclude *contra formam ſtatutorum.* 2 *Hale's Pl. C.* 173. *cap.* 24. cites *Paſch.* 42 *Eliz. B. R. Croke, n.* 6. *Dingley* v. *Moore.*

Where there are *ſeveral ſtatutes,* and it does not appear on which the *information* is founded, the concluding *contra formam ſtatuti* is ill. *Cro. J.* 142. *pl.* 19. *Mich.* 4 *Jac. B. R. Broughton* v. *Moor,* cites as is adjudged in the caſe of *Talbot & al'.*

But *Dy.* 347. *pl.* 9. *contra, Topcliff* v. *Waller,* cites 5 *H.* 7.——If there are *divers ſtatutes* in the point of *information, contra formam ſtatuti* is good; becauſe the beſt ſhall be taken for the King; *per Coke. Ow.* 135. *Trin.* 9 *Jac.* cites *New Book of Entries* 182. and 5 *H.* 7. 17. and 8 *Ed.* 3. 47. *a.*

Where *one act makes the offence, and another gives the penalty,* an information muſt be *contra formam ſtatutorum,* and cited 33 *Eliz. Talbot* v. *Sheldon,* who was indicted for recuſancy *contra formam ſtatuti,* 23 *Eliz.* and the judgment was reverſed becauſe the penalty was demanded; for the 10 *Eliz.* made the offence, and the 23d gave the penalty; but if the information be for the offence only, it had been good; *per Coke. Ow.* 135. *Trin.* 9 *Jac.* See 5 *Vin. Abr.* 552—556.

Contramandatio placiti. In *Leg. H.* 8. *c.* 59. it ſeems to ſignify a reſpiting, or giving the defendant further time to anſwer: an imparlance, or countermanding what was formerly ordered.

Contramandatum, Is ſaid to be a lawful excuſe, which the defendant in a ſuit by attorney alledgeth for himſelf, to ſhew that the plaintiff hath no cauſe of complaint. *Blount.*

Contrapoſitio, A plea to anſwer. *Si quis in placito per juſtitium poſito ſui vel ſuorum cauſam injuſtis conterminationibus vel* contrapoſitionibus *difforciet, hanc perdat.* Leg. H. 1. cap. 34.

Contrarients. *Thomas* Earl of *Lancaſter,* taking part with the *barons* againſt King *Edward* the Second, it was not thought fit in reſpect of their power, to call them rebels or traitors, but *contrarients:* And accordingly we have a record of thoſe times, called *Rotulus Contrarientium.*

Contratenere, To withhold. *Si quis decimas* contrateneat. *Leg. Alfredi apud Brompton, cap.* 9.

Contribules, *(Contribunales,)* Kindred, or couſins. *Si quiſquam cognationis ſuæ firmet eum poſtea, reus ſit omnium quæ habebit erga Regem, & portet faidam erga* contribunales *mortui*; that is, let him be accounted as an enemy to the kindred of the dead man. *Lamb. pag.* 75.

Contribution, *(Contributio)* Is where every one pays his ſhare, or *contributes* his part to any thing. One parcener ſhall have *contribution* againſt another; one heir have *contribution* againſt another heir, in equal degree; and one purchaſer have *contribution* againſt another. Alſo conuſors in a ſtatute ſhall be equally charged, and not one of them ſolely extended. 3 *Rep.* 12, 13, *&c.* On a ſtatute or recognizance, there is a *contribution* and ſtay till the full age of the heir, *&c.* and this doth extend to the leſſee for life or years of the conuſor, who has part of the land liable, and the heir within age the reſidue: for the land of every one of them ought to be charged equally, becauſe the whole is liable to the judgment; and this cannot be, if during the nonage the burden ſhall fall upon one only. *Jenk. Cent.* 36. If lands are mortgaged, and then deviſed to one perſon for life, with remainder to another; both deviſees ſhall make *contribution* to payment of the mortgage-money. *Chan. Caſ.* 224, 271. Where goods are caſt into the ſea for the ſafeguard of a ſhip, or other goods, *&c.* aboard, in a tempeſt, there is a *contribution* among merchants towards the loſs of the owners. 32 *H.* 8. *c.* 14. And where a robbery is committed on the highway, and damages are recovered againſt one or a few perſons, in action againſt the hundred, the reſt of the inhabitants ſhall make *contribution* to the ſame. 27 *Eliz. cap.* 13. See title **Average,** and 5 *Vin. Abr.* tit. *Contribution and average.*

Contributione faciendâ, Is a writ that lieth where more are bound to one thing, and yet one is put to the burden. *Fitz. Nat. Brev. fol.* 162. bringeth theſe examples; If joint-tenants, or tenants in common, hold a mill *pro indiviſo,* and equally take the profits thereof, the mill falling to decay, and one or more of them refuſing to contribute towards the reparation, the reſt ſhall have this writ to compel them. And if there be three coparceners of land that owe ſuit to the lord's court, and the eldeſt perform the whole, then may ſhe have this writ to compel the other two to a *contribution* of the charge or to one of them, if one only refuſe. The *Old Nat. Brev.* frameth this writ to a caſe, where one only ſuit is required for land, and that land being ſold to divers, ſuit is required of them all, or ſome of them by diſtreſs, as intirely as if all were ſtill in one, *fol.* 103. See *Reg. Orig. fol.* 167.

Controller, (*Contrarotulator,*) Is deriv'd from the Fr. *contreroleur, antigraphus,* which in *Rome* was us'd for him, *Cui id muneris injunctum erat, ut obſervet pecuniam. quam in uſam principis vel civitatis collegerunt exactores.* Budæus in Annot. prio. in Pand. *tit.* De quæſtoris officio. In *England* we have divers officers of this name, as *Controller of the King's houſe,* Staundf. Pl. Cor. 52. *and* 6 H. 4. 3. *Controller of the King's navy,* 35 El. c. 4. *Controller of the Cuſtoms,* Cromp. Juriſd. f. 105. *Controller of Calais,* 21 R. 2. cap. 18. *Controller of the Mint,* 2 H. 6. 12. *Controller of the caſtle of* Cheſter; *Controllor of* North Wales; *Controller of the Exciſe, &c.*

Controller of the hamper, who is an officer in the Chancery, daily attending in term-time on the Lord Chancellor or Lord Keeper, to take all things ſealed from the *Clerk of the hamper* to note the juſt number and effect of all things ſo received, and to enter the ſame into a ſpecial book, with all the duties appertaining to his Majeſty, and other officers for the ſame, and ſo chargeth the *Clerk of the hamper* therewith.

Controller of the pipe, (*Contrarotulator pipæ,*) Is an officer of the Exchequer, that writeth out ſummons twice every year to the ſheriffs, to levy the farms and debts of the *pipe*; and alſo keepeth a *contra-rollment* of the *pipe.*

Controller of the pell, Is an officer in the Exchequer, of which ſort there are two, *viz.* the two chamberlains clerks, that do, or ſhould keep a *controllment of the pell of of receipts and goings-out.* See *Fleta, lib.* 1 *c.* 18. and 12 *Ed.* 3. *ca* 3. who ſay, This officer was originally one that took notes of any other officer's accounts of receipts, to the intent to diſcover him, if he dealt amiſs; and was ordained for the Prince's better ſecurity, however the ſame ſince may be in ſome things otherwiſe apply'd.

Controvor, (French *controuveur*) He that of his own head deviſes or invents falſe or feigned news. 2 *Inſt. fo.* 227.

Convenable, (*Fr.*) Agreeable, ſuitable, convenient, or fitting. Stat. *Ed.* 3. *ſtat.* 2. *cap.* 21. and 2 *H.* 6. *cap.* 2. See **Covenable.**

Conventicle, *(Conventiculum,)* A little private aſſembly or meeting for the exerciſe of religion; firſt attributed in diſgrace to the ſchools of *Wickliff* in this nation, above 200 years ſince; and now applied to the illegal meetings of the non-conformiſts, and is mentioned in the ſtat. 2 *H.* 4. *c.* 15. 1 *H.* 6. *c.* 3. 16 *Car.* 2. *c.* 4. And by ſtat. 22 *Car.* 2. *c.* 1. it is enacted, That if any perſons of the age of ſixteen years, ſubjects of this kingdom, ſhall be preſent at any *conventicle,* where there are five or more aſſembled, they ſhall be fined 5*s.* for the firſt offence, and 10*s.* for the ſecond; and perſons preach-

ing incur a penalty of 20*l.* Alſo ſuffering a meeting to be held in a houſe, *&c.* is liable to 20*l.* penalty. Juſtices of peace have power to enter ſuch houſes and ſeize perſons aſſembled, *&c.* And if they neglect their duty, they ſhall forfeit 100*l.* And if any conſtable, *&c.* know of ſuch meetings, and do not inform a juſtice of peace or chief magiſtrate, *&c.* he ſhall forfeit 5*l.* But 1 *W. & M. cap.* 18. ordains, That the proteſtant diſſenters ſhall be exempted from penalties: though if they meet in a houſe, with the doors lock'd, barr'd, or bolted, ſuch diſſenters ſhall have no benefit from the 1 *W. & M.* Officers of the government, *&c.* preſent at any conventicle, at which there ſhall be ten perſons, if the Royal Family be not prayed for in expreſs words, ſhall forfeit 40*l.* and be diſabled. Stat. 10 *Ann. cap.* 2. See Hereſy.

Conventio, Is a word much uſed both in ancient and modern law pleadings for an agreement or covenant. For example take this pleaſant record.

Ex libro rotulorum curiæ Manerii de Hatfield (juxta inſulam de Axholme) in com. Ebor.

Curia tenta apud *Hatfield* die Mercurii prox. poſt feſtum ——Ann. xi Ed. 3.

RObertus de Roderham *qui optulit ſe verſus* Johannem de Ithen *de eo quod non teneat* conventionum *inter eos factam, & unde queritur, quod certo die & anno apud* Thorne *convenit inter prædictum* Robertum & Johannem, quod prædictus Johannes *vendidit prædicto* Roberto *diabolum ligatum in quodam ligamine pro iii. ob. & ſuper eo prædictus* Robertus *tradidit prædicto* Johanni *quoddam* obolum earles (*i. e.* earneſt-money) *per quod proprietas dicti diaboli commoratur in perſona dicti* Roberti *ad habendam deliberationem dicti diaboli, infra quartam diem prox. ſequent. Ad quam diem idem* Robertus *venit ad præfatum* Johannem, *& petit deliberationem dicti diaboli ſecundum* conventionem *inter eos factam; idem* Johannes *prædictum diabolum deliberare noluit, nec adhuc vult, &c. ad grave dampnum ipſius* Roberti lx *s. Et inde producit ſectam, &c. Et prædictus* Johannes *venit, &c. & non dedicit* conventionem prædictam. *Et quia videtur curiæ quod tale placitum non jacet inter chriſtianos, ideo partes prædicti adjournantur uſque in infernum, ad audiendum judicium ſuum, & utraque pars in miſericordia, &c. Per Willielmum de Scargell Seneſchallum.*

Convention, Is properly where a parliament is aſſembled, but no act is paſſed, or bill ſigned. *Jacob.*

Conventione, Is a writ that lieth for any covenant in writing not performed. *Reg. Orig. fol.* 185. *Old Nat. Brev. fol.* 101. *Fitzherbert* calls it *a writ of covenant. Nat. Brev. fo.* 145. where he divideth *covenants* into perſonal and real, making a large diſcourſe of them both; as alſo how this writ lieth for both.

Convention parliament. On the abdication of King *James* II. *An.* 1689. the aſſembly of the ſtates of the kingdom, to take care of their rights and liberties, and who ſettled King *William* and Queen *Mary* on the throne, was called the *convention:* And the lords and commons thus *convened* were declared the two houſes of parliament, notwithſtanding the want of any writ of ſummons, *&c.* Stat. 1 *Will. & M. Jacob.*

Conventuals, Are religious perſons united together in a convent, or houſe of religion. See Fryer Obſervant.

Conventual church. See Pariſh.

Converſos. The *Jews* here in *England* were formerly called *converſos, viz.* becauſe they were converted to the chriſtian religion. *Henry* III. built an houſe for them in *London*, and allowed them a competent proviſion or ſubſiſtence for their lives; and this houſe was called *domus converſorum.* 'Tis mentioned by our hiſtorians *Mat. Pariſ.* and *Matt. Weſt. Anno* 1244. But by reaſon of the vaſt expences of the wars, and the increaſe of theſe converts they became a burthen to the crown; and therefore they were placed in abbies and monaſteries for their ſupport and maintenance. But the *Jews* being afterwards baniſhed, *Edward* III. in the fifty-firſt year of his reign, gave this houſe for the keeping of the rolls; and 'tis the ſame which is at this time poſſeſſed by the Maſter of the Rolls. *Cowell, edit.* 1727.

Conveyance, Is a deed which paſſes land from one to another. *Conveyance* by *feoffment* and *livery*, was the general *conveyance* at Common law; and if there was a tenant in poſſeſſion, ſo that livery could not be made, then was the reverſion granted, and the tenant always attorned: Alſo upon the ſame reaſon, a *leaſe* and *releaſe* was held to be a good *conveyance*, to paſs an eſtate; but the leſſee was to be in actual poſſeſſion, before the releaſe. And by the Common law, when an eſtate did not paſs by feoffment, the vendor made a leaſe for years, and the leſſee actually entered; and the leſſor granted the reverſion to another, and the leſſee attorned: Afterwards, when an inheritance was to be granted, then likewiſe was a leaſe for years uſually made, and the leſſee entered (as before) and then the leſſor releaſed to him: But after the *ſtatute of uſes*, it became an opinion, that if a *leaſe for years* was made upon a valuable conſideration, a releaſe might operate upon it without an actual entry of the leſſee, becauſe the ſtatute did execute the leaſe, and raiſed an uſe preſently to the leſſee. And *Serjeant Moor* was the firſt who practiſed this way. 2 *Mod.* 251, 225. The moſt common *conveyances* now in uſe are *deeds of gift, bargain and ſale, leaſe and releaſe, fines and recoveries, ſettlements to uſes, &c.* A ſon did *give* and *grant* lands to his mother, and her heirs; though this was a defective *conveyance* at Common law, yet it was adjudged good by way of *uſe* to ſupport the intention of the donor; and therefore by theſe words an uſe did ariſe to the mother by way of covenant to ſtand ſeiſed. 2 *Lev.* 225. A feoffment without *livery and ſeiſin*, will not inure as a grant; but where made in conſideration of a marriage, *&c.* it has been adjudged, that it did inure as a covenant to ſtand ſeized to uſes. 2 *Lev.* 213. Tenant in fee, in conſideration of marriage, *covenanted, granted* and *agreed* all that meſſuage to the uſe of himſelf for life, then to his wife for life, for her jointure, then to their firſt ſon in tail male, *&c.* Now by theſe words it appeared, that the huſband intended ſome benefit for his wife, wherefore the court ſupplied other words to make the *conveyance* ſenſible. 1 *Lutw.* 782. The words *give* and *grant, &c.* are proper for a *conveyance* at Common law; but it has been held, that tho' ſome books warrant that *conveyances* ſhall operate according to the words, yet of late the judges have a greater conſideration of the paſſing the eſtate, than the manner by which 'tis paſſed. 2 *Lutw.* 1209. A *conveyance* cannot be fraudulent in part, and good as to the reſt: For if it be fraudulent and void in part, it is void in all, and it cannot be divided. 1 *Lill. Abr.* 311. Fraudulent *conveyances* to deceive creditors; defraud purchaſers, *&c.* are void, by *ſtat.* 50 *Ed.* 3. *cap.* 6. 13 *Eliz. c.* 5. 27 *Eliz. cap.* 4. See Deeds, and *Wood's Convey. vol.* 1.

Convict, *Convictus,* Is he that is found guilty of an offence by verdict of the jury. *Staundf. Pl. Cor. fol.* 186. See Attaint.

Conviction, Is either when a man is outlawed, or appeareth and confeſſeth, or elſe is found guilty by the inqueſt. *Cromp. Juſt.* 9.

The law implies a conviction, before puniſhment, though not mentioned in a ſtatute: And where any ſtatute makes a ſecond offence felony, or ſubject to a heavier puniſhment than the firſt, it is always implied that ſuch ſecond offence ought to be committed after a *conviction* for the firſt. 1 *Hawk. P. C.* 13, 107. Judgment amounts to a *conviction*; though it doth not follow that ever one who is convict, is adjudged. 1 *Hawk. P. C.* 14. See Acquittal.

Conviction, before juſtices of peace. When an act of parliament orders the conviction of offenders before juſtices of peace, *&c.* it muſt be intended after ſummons to bring them in, that they may have an opportunity of making their defence; and if it be otherwiſe the conviction ſhall be quaſhed. *Mod. Ca.* 41. *Mich.* 2 *Ann. B. R.*

All acts, which ſubject men to new and other trials, than thoſe by which they ought to be tried by the Common law, being contrary to the rights and liberties of Engliſhmen, as they were ſettled by *Magna Charta*, ought

ought to be taken ſtrictly, and the court of King's Bench will require, that it do appear upon the face of ſuch proceedings, that the fact was an offence within the act, and that the juſtices have proceeded accordingly. *M.* 1 *An. K.* and *Chandler*. 1 *Salk.* 378. *L. Raym.* 581.

Therefore the particular manner of the offence ought to be ſet forth. Thus in the caſe of ſwearing, before the legiſlature by the act of the 19 *Geo.* 2. had directed a ſummary form of words for the conviction, it was required not only to ſet forth that the perſon had curſed or ſworn in general, but the particular oaths and curſes were to be ſet forth, that the court might judge thereupon, whether they were indeed oaths and curſes or not. *H.* 8 *Geo. K.* and *Sparling*. *Str.* 497.

And in the caſe of *K.* and *Roberts*, *M.* 11 *Geo.* which was a conviction for ſwearing 150 oaths in theſe words *by God*, and curſing 150 curſes in theſe words *God damn you*, this matter was carried ſo far, that it was inſiſted this was not ſufficient, but that the oaths and curſes ought to have been ſet forth 150 times each. But the oaths and curſes being all only in the ſame words over again, the court held the conviction good. *Str.* 608. *L. Raym.* 1376.

And it ſeemeth, that a conviction on a penal ſtatute ought expreſsly to ſhew, that the defendant is not within any of its proviſo's; for ſince no plea can be admitted to ſuch a conviction, and the defendant can have no remedy againſt it, but from an exception to ſome defect appearing in the face of it, and all the proceedings are in a ſummary manner; it is but reaſonable that ſuch a conviction ſhould have the higheſt certainty, and ſatisfy the court, that the defendant had no ſuch matter in his favour, as the ſtatute itſelf allows him to plead. 2 *Haw.* 250.

But in the caſe of *K.* and *Ford*, *T.* 9 *Geo.* there was a conviction on the 3 *C. cap.* 3. for keeping an alehouſe without licence; and it was objected, that in the act there is a proviſo to exempt perſons who have been puniſhed by the former law of the 5 & 6 *Ed.* 6. *cap.* 25. and therefore it ſhould have been ſaid, he had not been proceeded againſt upon that act: But by the court, that coming in by way of proviſo, he ſhould have inſiſted on it in his defence; it appears he was aſked what he had to ſay, and therefore we may reaſonably preſume he had on ſuch defence to make, and the conviction was confirmed. *Str.* 555.

And in the caſe of *K.* and *Bryan*, *M.* 12 *Geo.* 2. the defendant was convicted on the gin act; and an exception was taken, that there was no averment, that it was not ſold to be uſed in medicine: And the caſes on the game act were mentioned, where in convictions it is neceſſary to exclude all the qualifications for killing game. On the other hand it was inſiſted, that the reaſon of that was, becauſe theſe were in the enacting clauſe, whereas this about medicine comes in by way of proviſo, and is by way of defence to be ſhewn on the defendant's part: And for that purpoſe was cited, *M.* 11. *Geo. K.* and *Theed*; where in a conviction for obſtructing an exciſe officer on the 8 *Ann. cap.* 9. it was objected, that it not being averred to be in the day, it ſhould have been ſhewn that there was a conſtable preſent, which is made neceſſary in the night; but was held to be well, and its being in the night, ſhould have been ſhewn on the defendant's part. And by the court, this is brought within the general enacting clauſe: And the true diſtinction is, where the extenuation comes in by way of proviſo, or exception. And the conviction was confirmed. *Str.* 1101.

In the caſe of *K.* and *Venables*, *Trin.* 11. *Geo* 1. The court were unanimouſly of opinion, that the party ought to be heard, and for that purpoſe ought to be ſummoned in fact; and that if the juſtices proceeded againſt a perſon without ſummoning him, it would be a miſdemeanor in them, for which an information would lie. *L. Raym.* 1406.

And in the caſe of *K.* and *Allington*, *H.* 12 *G.* on affidavit that no ſummons was had, the court granted an information againſt the juſtice who made the conviction. *Str.* 678.

The defendant was convicted for keeping a gun. And exception was taken, that there was not a *reaſonable* ſummons; for it was made to appear the ſame day, which might be impoſſible upon account of the diſtance, or the ſummons being ſerved late, and his witneſſes might not be got together on ſo ſhort a warning: Then it was to appear *at the pariſh aforeſaid*, whereas there were two pariſhes mentioned before; ſo the man might have gone to one, whilſt they were convicting him at the other. It was anſwered, that the defendant appeared at the time, and made defence; ſo that cures all defects in the ſummons. And by the court, the anſwer is right. *Str.* 261. *Hil.* 6. *Geo.* 1. *K.* and *Johnſon*.

The defendant was convicted for deer ſtealing; and the conviction ſet forth, that he had been ſummoned to appear before the juſtices, but it did not appear he ever was before them. Exception was taken to this, that as no appeal lies in this caſe, the juſtices ſhould not have proceeded in the abſence of the party, eſpecially where it may end in a corporal puniſhment, as it may do here for want of a diſtreſs. And at another day, on conſideration, *Parker* Ch. J. delivered the reſolution of the court: We are all of opinion, the offender may be convicted without appearing. The ſtatute is ſilent as to the method of proceeding, and the law of *England*, it is true, in point of natural juſtice, always requires the party charged with any offence, to be heard before he be condemned in judgment; but that rule muſt have this exception, unleſs it is through his own default; were it otherwiſe every criminal might avoid conviction. *Str.* 44. *Hil.* 3. *Geo.* 1. *K.* and *Simpſon*.

But generally it is not neceſſary to *ſet forth the ſummons in the conviction*; for although no ſummons is ſet forth, yet the court will intend one: But where a ſummons is ſet forth, and that ſummons appears to be irregular, the court will quaſh the conviction, there being then no room to intend any other ſummons. 11 *G. K.* and *Venables*, *Seſſ. C. v.* 1. 210. *L. Raym.* 1405.

In all convictions, being in the nature of judgments, the whole evidence ought to be ſet forth, or at leaſt ſo much thereof as is ſufficient to warrant the conviction; and the court of King's Bench may judge of the ſufficiency thereof; but otherwiſe it is in orders, which are authoritative. And ſo it was laid down in the caſe of *K.* and *Floyd*, *M.* 8. *G.* 2. which was thus; A motion was made to quaſh an order of ſeſſions, made under the ſtatute of the 1 *W. c.* 21. *ſ.* 6. whereby the defendant was adjudged guilty *upon full proof* of the charge againſt him, and that he be diſcharged from his office of clerk of the peace, upon the objection that the evidence is not ſet out: But it was adjudged after conſideration, that this was an order, and therefore the evidence need not be ſhewn; but that it would be otherwiſe if it was on a conviction. *Andr.* 82. *Str.* 996.

Convict recuſant, Is one that hath been legally preſented, indicted, and *convict* for refuſing to come to church to hear the *common prayer*, according to the ſeveral ſtatutes of 1 *Eliz.* 2. 23 *El.* 1 and 3 *Jac.* 1.

Convivium, Signifies the ſame thing amongſt the laity, as *procuratio* doth amongſt the clergy; *i. e.* when the tenant, by reaſon of his tenure, is bound to provide meat and drink for his lord once or oftner in the year.—*Potentibus vero non cauſa convivandi, ſed pro monaſterii utilitate quoties expedierit, obviandi intra infraque monaſterium licentiam habent.* Selden in Eadmer. p. 150.

Convocation, (*Convocatio*,) Is the aſſembly of all the clergy to conſult of eccleſiaſtical matters in time of parliament: And as there are two houſes of parliament, ſo are there two houſes of convocation; the one called *The higher convocation-houſe*, where all the archbiſhops and biſhops ſit ſeverally by themſelves; the other *The lower convocation-houſe*, where all the reſt of the clergy ſit; that is, all the deans and archdeacons, one proctor for every chapter, and two proctors for all the clergy of each dioceſs; in all 166 perſons. *Anno* 25 *H.* 8. *cap.* 19.

Each convocation-houſe hath a prolocutor, choſen from among themſelves, and that of the lower houſe is preſented to the biſhops, *&c.* the archbiſhop of *Canterbury* is the preſident of the convocation, and prorogues and diſſolves it by mandate from the King. The convocation exerciſes juriſdiction in making canons, with the aſſent of the King: For by the ſtat. 25 *H.* 8. the convocation is not only to be aſſembled by the King's writ, but the

canons

canons are to have the Royal aſſent. They have the examining and cenſuring of heretical and ſchiſmatical books, and perſons, &c. but appeal lies to the King in Chancery, or to his delegates. 4 *Inſt.* 322. 2 *Roll. Abr.* 225. The clergy called to the convocation, and their ſervants, &c. have the ſame privileges as members of parliament. Stat. 8 *H.* 6. *cap.* 1.

Conus, Coin. *Eos etiam qui* conos *faciunt in occultis & vendunt falſariis pro pecunia.* Leg. Ethelredi. cap. 36.

Conuſance of pleas, Is when one living within a juriſdiction, may implead another within it for a cauſe ariſing there; *per Holt* Ch. J. 12 *Mod.* 643. *Hill.* 13 *Will.* 3. in the caſe of *Croſs* v. *Smith.*

Where a franchiſe, either by letters patent or preſcription, hath a privilege of holding pleas within their juriſdiction, if the courts at *Weſtminſter* intrench on their privileges, they muſt demand conuſance, that is, deſire that the cauſe may be determined before them. *Gilb. H. C. B.* 191.

There are *three ſorts of inferior juriſdictions*, one whereof is *tenere placita*, and this is the loweſt ſort; for it is only a concurrent juriſdiction, and the party may ſue there, or in the King's courts, if he will. The ſecond is *conuſance of pleas*, and by this a right is veſted in the lord of the franchiſe to hold the plea, and he is the only perſon who can take advantage of it. The third ſort is an *exempt juriſdiction*, as where the King grants to a great city, that the inhabitants thereof ſhall be ſued within their city, and not elſewhere; this grant may be pleaded to the juriſdiction of this court, if there be a court within that city which can hold plea of the cauſe, and *no-body can take advantage of this privilege but a defendant*, for if he will bring a *certiorari*, that will remove the cauſe, *but he may wave it if he will*, ſo that the privilege is only for his benefit. 3 *Salk.* 79, 80. *pl.* 4. *Hill.* 1 *Ann B. R. Croſſe* v. *Smith.*

King *Hen.* 8. by *letters patent* of the 14th of his reign, and confirmed by parliament, *granted to the univerſity of* Oxford *conuſance of pleas, in which a ſcholar or ſervant of a college ſhould be party, Ita quod juſticiarii de utroque banco ſe non intromittant.* An *attorney of C. B. ſued a ſcholar in C. B. for battery*; per cur. This general grant does not extend to take away the ſpecial privilege of any court without ſpecial words. *Litt. Rep.* 304. *Mich.* 5 *C. C. B. Oxford* (Univerſity's) caſe.

If a *ſcholar* of *Oxford* or *Cambridge* be *ſued in Chancery for a ſpecial performance of a contract to leaſe lands in Middleſex*, the univerſity ſhall not have conuſance, becauſe they cannot ſequeſter the lands. *Gild. Hiſt. of C. B.* 194. cites 2 *Vent.* 363.

Conuſance muſt be demanded *before an imparlance*, and *the ſame term the writ is returnable, after the defendant appears*, becauſe till he appears there is no cauſe in court, otherwiſe there would be a delay of juſtice; for if after imparlance, when the defendant has a day already allowed him, he would have two days, ſince when the conuſance is allowed, the franchiſe prefixes a day to both parties to appear before them, and it is the lords laches if he does not come ſoon enough not to delay the parties. *Gilb. Hiſt. of C. B.* 196.

In *indeb. aſſ.* the *bail was put in in Eaſter term. The 5th day in Trinity term the univerſity of Cambridge* came and *demanded conuſance*, (in a proper manner). The *entry is of the laſt term.* It being objected, that this was irregular, becauſe the defendant not pleading within four days of Trin. term, he ought to have an imparlance; to which it was anſwered, that *the demand* of conuſance *was ſo late becauſe of an agreement between the plaintiff and defendant's attorney*; but it was ſaid *per cur.* That the *demanding a conuſance is a tranſaction between the two courts, and* it *muſt be done in court, and not between the attornies.* It *muſt be demanded either by the party that claims it, or by his bailiff or attorney. and not by the defendant.* (*N. B.* The record here was entered up without an imparlance, but it was now pray'd to be done). This cannot be a plea of Eaſter term, becauſe it came not within four days. The ancient practice was, to make all pleading at the bar, but now the giving the pleadings to the plaintiff's attorney in writing is inſtead thereof. In this matter the former method is to be purſued, becauſe the court may ſee that there is juſt ground of conuſance. The party may reply, that the cauſe does not come within the conuſance demanded, but ſtill the court is concerned; for a day muſt be given over; the defendant's attorney cannot confeſs this, but the party, who claims it, muſt come into court, and produce his letters patents; here the plaintiff might reject the imparlance, and yet upon praying that imparlance, an allowance of conuſance is demanded. This demand by the attorney is nothing. It is a queſtion of juriſdiction between the two courts. If the court here ſees that there is ſuch a juriſdiction, they are to ſend a tranſcript of the record to the court below, and to give the parties a day. If the lord will not proceed at the day given, the court here may ſummon the party, &c. Hereupon a rule was made, that the record ſhould be ſet right, and an imparlance entred, and then it will be the ſame thing as if the lord had come into court the 5th day. *Mich.* 11 *Ann. B. R. Pern* v. *Manners.*

And in Hill. term the charters were produced, and an exemplification of an act of parliament which confirmed them. It *appeared, that this was an excluſive juriſdiction* granted, &c. viz. *That no juſtices or judges ſhould intermeddle, &c. and that the party ſhould be ſued before the Chancellor, &c. ſolummodo & non allibi.* There is a difference between a conuſance generally, and an *excluſive conuſance*; for the latter may be either demanded by the lord, or pleaded by the party; the lord ought to come the day he knows that his franchiſe is invaded. The juriſdiction here granted by the charter being ſuch as was inconſiſtent with the Common law, there wanted an act of parliament, or elſe the charter could not ſubſiſt. There is no hardſhip in coming in the firſt day, *viz.* the day the declaration is delivered, which day is enlarged, and if the party comes in within four days of the ſubſequent term, it is as if he came in of the former term; if the party lives within the juriſdiction, it muſt be known when he was arreſted; if he did not live there, no juſtice can be done by them; the caſe of an eſſoin is the ſame with the caſe here; for that is an excuſe to the court to let them know he cannot come, and therefore it would be odd that he ſhould be excluded from pleading any plea that he lawfully might; but though this is the firſt day to the party, it is the ſecond day to the lord; ſo it is in caſe of imparlance, for that is the ſecond day to the lord. *As to the manner and time of demanding it, the charters and act are ſilent*, but every thing ought to be laid before the court, together with the condition and circumſtances of the party, whether he be a member or ſervant of the univerſity; this is a fact triable by the court here. The *lord need not come at the return of the writ, for nothing in this caſe appears, till the declaration, how the debt did ariſe*; but if he might come at any time, the plaintiff would be at a great diſadvantage. The authority of *Hard.* 505. 506. as to what Ld. Ch. B. *Hale* ſays, is of little weight, neither is there any thing in that caſe to the purpoſe here; what *Hale* ſays, that any one may demand conuſance, cannot be maintained; it is not only the right of the univerſity, but it is alſo of the party, if he will plead it; and ſhall a ſtranger come and obtain this? *The proceedings here, in caſe of an excluſive juriſdiction, are not merely null and void, though the charter ſays, that all writs ſhall be null*; it is but a franchiſe which doth not take away the juriſdiction of *Weſtminſter-hall*, unleſs it be claimed; *a conuſance generally muſt be demanded, but an excluſive one may be either pleaded by the party, or demanded by the lord.* If it were a mere nullity, treſpaſs would lie againſt the ſheriff or officer; but it is a franchiſe, which muſt be claimed, and if it is ſo, it ſhall be allowed, but it doth not take away the juriſdiction of the courts here. In caſe of a bare conuſance, a day is given to the parties only, and a tranſcript is ſent hence; and if upon this there is a failure of juſtice below, there ſhall be a re-ſummons, but in the other caſe there is a ſtop, for there is no day given, as where the party pleads it. The crown could not grant pleas to proceed *ſecundum leges & conſuetudines* of that place, but it could be only to proceed according to law, and therefore the act was of uſe to enable them

to

to proceed by another method than the law did allow of, whereupon coſts were prayed; *ſed non allocatur. Hill* 11 *Ann. B. R. Pern* v. *Manners*, alias *Cambridge* (univerſity's) caſe. 5 *Vin. Abr.* 588.

An action of treſpaſs was brought in Trin. term 12 & 13 *Geo.* 2. for an *aſſault and battery, and falſe impriſonment*, by an attorney of this court.

Defendant in the ſame term pleaded a joint plea, *viz.* as to the wounding, and part of the impriſonment, Not guilty, and as to the reſt, they *pleaded ſpecially the priviledges of the univerſity* of *Oxford*, and ſet forth the charter, and the act of parliament of the 13 *Eliz.* by which the charter is confirmed; *the defendant* Trahern *is proctor* of the univerſity, *and, as ſuch, has power to apprehend any perſon making diſturbance within the univerſity; that finding the plaintiff making an affray late at night, he commanded him to keep the peace, but that inſtead thereof the plaintiff beat the defendant, whereupon the defendant laid his hands gently upon him, and committed him to gaol*; that the other defendant *Etty*, is a gaoler of the gaol, and received him, being ſo lawfully committed, and traverſe their being guilty of any other treſpaſs.

Plaintiff imparles till Mich. term, and the nreplies, and admits the privileges of the univerſity, *&c.* but *denies the facts* for which they impriſoned him, *and ſays, they took him of their own wrong without ſuch cauſe, and tenders an iſſue upon the fact* of the diſturbance.

After this the univerſity of *Oxford*, (by the Chancellor) comes and *claims conuſance*, ſetting forth the privileges of the univerſity, and relying principally upon a charter of the 1ſt of *April* 14 *H.* 8. by which the King grants to the univerſity the conuſance of all cauſes, where either plaintiff or defendant is a member thereof, though the cauſe of action ariſe in any part of the kingdom, with an excluſive cauſe, that no juſtice (and particularly mentions the judges of this court) ſhall preſume to intermeddle in any caſe ariſing within the juriſdiction of the univerſity. They then ſet forth the ſtat. of *Eliz.* which confirms all their privileges, and conſequently this of the excluſive juriſdiction, and that this conuſance was allowed to them in Eaſter term, 9 *Ann. B. R.* and thereupon claim conuſance of the cauſe. *Willes* Ch. J. delivered the opinion of the court.

Upon this two queſtions ariſe, 1ſt, Whether the univerſity have claimed this conuſance in time or not? 2dly, If they have, whether they are intitled to the conuſance of this particular cauſe?

But the firſt only has been ſpoke to, becauſe if we are of opinion againſt the univerſity upon that, it will be unneceſſary to determine the ſecond.

And upon great conſideration we are of opinion, that the univerſity have not claimed in time, both from the reaſon of the thing, and from ſeveral authorities in which this had been determined.

The time required for the univerſity to come in is before imparlance, whereas in this caſe they have not come till after plea and replication.

And though this is ſaid to be hard upon the univerſity, becauſe they may not know any cauſe was depending, and therefore could not come ſo early, yet we think it would be much harder, on the other ſide, if it was otherwiſe; for if not till after imparlance, or plea pleaded, when are they to come? they may as well come at any time before judgment; and this would create great delay and expence, if after matters are brought to a ſingle iſſue to be tried, the univerſity can come and make all go for nothing.

Beſides, the univerſity, when they come to judge, muſt judge not according to the law of the land, but the Civil law, and though it muſt be that the party be tried by another law then that of the land, when an act of parliament gives ſuch a juriſdiction, and 'tis not in the power of the courts of *Weſtminſter* to help it, yet we are to take care to keep it in due bounds, and that it be claimed in proper time. This juriſdiction is ſo contrary to the laws of the land, that it could not be granted even by the King himſelf, unleſs by act of parliament? for it has been determined, that it is *not in the power of the crown to create a new court of equity*, becauſe ſuch a court does not proceed according to the rules of law. And the ſame reaſon holds as to this court of the univerſity, which determines men's properties without juries, and by a different law; ſo that without an act of parliament, no ſuch conuſance at all could be allowed to the univerſity; and this was the opinion of the court in the caſe of *Bourne* v *Manners*, *Hill.* 11 *Ann. B. R.* where the univerſity came five days after imparlance, and the court held it was too late; that they ought to come the firſt day, to prevent a delay of juſtice, and becauſe it took away the law of the land; and accordingly the claim was diſallowed. Indeed, it was not the caſe of this univerſity but of *Cambridge*; but upon comparing the two charters, that of *Cambridge* has rather, if poſſible, a larger excluſive juriſdiction, ſo that it is a caſe in point.

In that caſe were cited two caſes in the year-books, one in 6 *H.* 7. 9. *b.* the other in 16 *H.* 7. 16. *a.* where it was expreſsly adjudged, that to claim conuſance the party muſt come before imparlance.

This caſe was cited and allowed, and the court were of the ſame opinion in the caſe of——— v. *Warren* 12 *Geo.* 1. *B. R.*

The ſame point was determined in the caſe of this univerſity, *Trin.* 1 *Geo.* 2. *Wood* v. *Graham*, according to a note I have had of it from a gentleman at the bar.

As to the caſes cited, that in *Latch* 83, 84. where 'tis ſaid, that an ancient demeſne may be pleaded after imparlance, was cited as a parallel caſe. But it is remarkable, that the court in allowing it admitted it to be a ſingle caſe, and ſaid it was otherwiſe in all other caſes except that; and when one conſiders the particular caſe of *ancient demeſne*, it *ſtands upon a quite different reaſon*, inſomuch that a man may come after judgment; for though a fine be perfected, or a judgment in a real action given, yet the tenant may come and reverſe the fine or judgment by writ of deceit; and the reaſon is, becauſe if he was not allowed to do it, he would loſe the privilege of ancient demeſne for ever; for ſo long as ſuch fine or judgment ſtands in force, it appears to be land pleadable at Common law. But the preſent caſe is very different, for though we ſhould diſallow this claim of conuſance, the univerſity will only loſe it as to this particular caſe; but their juriſdiction remains the ſame in any other cauſe, provided they come in time.

Another caſe was laid before me, determined ſo long ago as *Hill.* 12 *Ed.* 3. in the court of Exchequer, where in an action of treſpaſs, the court granted a writ, directed to the univerſity of *Oxford*, to have the conuſance of the cauſe, *non obſtante* that they did not claim it at the return of the writ, but ſtaid till the parties had pleaded; but this determination is expreſsly contrary to the opinion we are of, and eſpecially as it is not only before the ſtat. of Queen *Eliz.* but even before the charter of *H.* 8. upon which the univerſity put their caſe, ſo that I can pay no regard to the authority of it, but muſt conſider it as the effect of power, and not of judgment.

One more was mentioned, and that was the caſe of *Aldridge* v. *Dr. Stradtford, in Canc. Trin.* 12 *Ann.* where Lord *Harcourt* determined contrary to our opinion; but as it was a judgment given without one ſingle reaſon, and contrary to ſtrong and unanſwerable reaſons given by himſelf a little before in the ſame cauſe, I have no regard to it. I ſhall never pay any regard to a judgment founded either on fear or favour.

As to the ſecond queſtion, whether the univerſity's privilege will hold in the caſe of an attorney, as we have rejected the claim of conuſance, being made too late, it is not neceſſary to ſay any thing upon it, but as it may hereafter come into queſtion, I would mention ſome caſes which may be proper to be conſidered, *viz.* in *Litt. R.* 304. 1 *Rol.* 489. 3 *Leon.* 149. The privilege of an attorney's ſuing in his proper court will be preferred; for it is a privilege time out of mind, and is for the ſake of juſtice, and all the people of *England*, and that therefore a King's charter will not deprive him of it, nor even an act of parliament, without expreſs words.

I ſhall be as tender of the privileges of the univerſity as any man living, and have a great veneration for that body, yet I ſhall always endeavour to ſupport trials by

juries upon which all that we have, our liberties and properties, and lives depend, and prevent the incroachment of any juriſdiction whatever. The conuſance was diſallowed *per Willes* Ch. J. *Mich.* 14 *Geo.* 2. *C. B. Wells* v. *Trahern and Etty.* 5 *Vin. Abr.* 590.

By ſtat. 9 *Hen.* 4. *cap.* 5. In aſſizes and writs before juſtices at the Common law, in which mayors, bailiffs and commonalties, or lords or bailiffs of ancient demeſne be named, to exclude them of their conuſance, ſuch juſtices ſhall firſt enquire by the aſſizes in the country, whether the ſaid mayors, bailiffs and commonalty, or lords or bailiffs of ancient demeſne (if they require it before ſuch juſtices) be diſſeiſors or tenants in ſuch caſe, or be named by colluſion. And if it be found that they be not diſſeiſors nor tenants, but be named by colluſion, the juſtices ſhall cauſe the ſaid aſſiſes, or other writs, to be abated and the plaintiffs ſhall be grievouſly amerced.

By ſtat. 8 *Hen.* 6. *cap.* 26. In aſſiſes and actions perſonal, ſued before the King in his Bench, or any the King's juſtices, of lands, or of any thing riſing within any franchiſes or ancient demeſne, whereof the conuſance ought to pertain to any lords, mayors, bailiffs, citizens, or burgeſſes or commonalty; if any defendant in ſuch aſſiſe or other actions make default, to exclude the aforeſaid lords, *&c.* of their conuſance, the juſtices, at the requſt of the ſaid lords, *&c.* ſhall make inquiry by the aſſiſe, where ſuch exceptions are alledged in aſſiſes, and in actions perſonal, by inqueſt to be taken before the juſtices, whether ſuch defaults be made as aforeſaid, or not; in which aſſiſe and inqueſt, as well the plaintiffs as the lords, *&c.* may have their challenges. And if it be found by ſuch aſſiſes or inqueſts, that ſuch defaults be made by colluſion, to exclude lords, *&c.* of their conuſance or juriſdiction, the ſaid writs ſhall be abated, and the plaintiff ſhall be in the King's mercy.

Conuſant, Knowing or underſtanding; as, *if the ſon be* conuſant *and agree to the feoffment, &c. Co. on Litt. fo.* 139. *b.*

Conuſor. See **Cognizor.**

Coopers. Stat. 23 *Hen.* 8. *cap.* 4. *ſect.* 10. No brewer, that ſhall brew to ſale beer or ale, ſhall occupy the miſtery of coopers, nor make any barrels or other veſſels whereby they ſhall put their beer or ale to ſale: But all ſuch barrels, and other veſſels of wood, ſhall be made and marked by the coopers, upon pain to forfeit for every ſuch barrel, or other veſſel, 3*s.* 4*d.*

Sect. 2. Every cooper, that will make any of the ſaid veſſels for beer or ale to be put to ſale, ſhall make the ſame of good and ſeaſonable wood, and put his mark upon them: And every barrel for beer ſhall contain thirty-ſix gallons, every kilderkin for beer eighteen gallons, and every firkin for beer nine gallons, of the King's ſtandard. And every barrel of ale ſhall contain thirty-two gallons, every kilderkin for ale ſixteen gallons, and every firkin for ale eight gallons. And no cooper ſhall make any other veſſel for beer or ale to be ſold of greater or leſſer number of gallons, unleſs he cauſe to be marked upon every ſuch veſſel the true number of gallons ſuch veſſel ſhall contain.

Sect. 3. No cooper ſhall inhance the prices of ſuch barrels or veſſels, but keep the prices as hereafter enſueth, upon pain to forfeit for every barrel, kilderkin, and firkin, defective or inhanced in price 3*s.* 4*d. viz.* for every beer-barrel 9*d.* for every beer-kilderkin 5*d.* and for every beer-firkin 3*d.* and the ale-barrel 16*d.* and the ale-kilderkin 9*d.* and the ale-firkin 5*d.*

Sect. 4. No beer-brewer, nor ale-brewer, ſhall put their beer or ale to be ſpent within this realm in barrels, or veſſels of wood, other than ſhall be made and marked by a cooper.

Sect. 5. Every beer-brewer and ale-brewer ſhall not take for ſuch barrel, kilderkin or firkin, of ale and beer, but after ſuch prices as ſhall be thought convenient by the juſtices of peace; and in every city and town where there be mayors, ſheriffs or other head officers, the ſame prices to be ceſſed by them, and the ſaid ale-brewers or beer-brewers ſhall not ſell their beer nor ale at any higher prices upon pain to forfeit for every barrel 6*s.* for every half-barrel or kilderkin 3*s.* 4*d.* and for every firkin 2*s.* and for every veſſel containing greater number of gallons 10*s.* and for every veſſel containing leſſer number of gallons 12*d.* the one half to the King, and the other half to him that will ſue for the ſame.

Sect. 6. Sope-makers which ſhall put to ſale any ſope by barrel, half-barrel, firkin or other veſſel, ſhall make their barrels and other veſſels according to the contents accuſtomed, *viz.* every empty barrel to hold thirty-two gallons or above, and to be in weight twenty-ſix pounds, and every half-barrel empty to be in weight thirteen pounds, and to hold ſixteen gallons; and every firkin empty to weigh ſix pounds and a half, and to hold eight gallons, upon pain of forfeiture for every ſuch barrel or other veſſel 3*s.* 4*d.*

Sect. 7. The wardens of the miſtery of coopers in *London*, taking with them an officer of the mayor's, ſhall have power to ſearch and gauge all ſuch barrels and other veſſels to be made for ale, beer and ſope, to be put to ſale in *London*, and within two miles without the ſuburbs; and to mark every ſuch barrel and other veſſel with St. *Anthony's* croſs. The ſame wardens to have, for the ſearch and gaging of every ſuch barrel and other veſſel, one farthing of the owners or makers, and ſhall have authority to retain every ſuch veſſel as they ſhall ſo gage and mark, until they be ſatisfied thereof. And in caſe they ſhall find any of the ſaid veſſels defective, they may ſeize and retain every ſuch veſſel, and cauſe the ſame to be marked or amended, or elſe to be burned.

Sect. 8. The owner of ſuch veſſel ſhall forfeit for every ſuch veſſel not being of the full contents, 12*d.* to be recovered and imployed as aboveſaid.

Sect. 9. In all other cities and towns wherein no wardens of coopers be, the mayors, ſheriffs, bailiffs, conſtables, or other head officers, ſhall have power to ſearch and gauge all ſuch barrels and other veſſels, and to have all ſuch advantage thereby as the wardens of coopers in *London* may have.

Sect. 10. Every beer-brewer may keep in his houſe one or two ſervants of the miſtery of coopers, to hoop and mend his veſſels.

Sect. 11. If any perſon do diminiſh any barrel, kilderkin or firkin, to the deceit of any, by taking out the head of ſuch veſſel, or taking out of any ſtaff, every ſuch veſſel ſhall be burnt, and the offender forfeit 3*s.* 4*d.* one moiety to the King, and the other to him that will ſue for the ſame, *&c.* And the party offending ſhall be further puniſhed by the diſcretion of the head officers before whom ſuch default ſhall be preſented.

Sect. 12. It ſhall be lawful to every ale-brewer to have in his ſervice one perſon of the miſtery of coopers, to exerciſe the craft, in binding, hooping and pinning his maſters ale-veſſels.

Sect. 13. Every cooper, which ſhall make any ale-veſſel, ſhall make ſuch veſſel according to the aſſiſe ſpecified in the treatiſe called *Compoſitio menſurarum, viz.* every barrel for ale to contain thirty-two gallons, of which eight gallons make the buſhel, every kilderkin for ale ſixteen gallons, and every firkin eight gallons or above, upon pain of forfeiture of 3*s.* 4*d.* for every veſſel untruly made; the one half to the King, and the other to him that will ſue for the ſame.

Sect. 14. Every cooper ſhall mark his veſſel with his own mark, on pain of 3*s.* 4*d.* to be levied as aboveſaid. And no perſon for gauging any veſſel ſhall put out the ale, whereby the ſame ſhall be worſe. And it ſhall be lawful to every ale-brewer to bring their ale to honourable men's houſes, in tuns, hogſheads, or other veſſels of larger quantity; and to bring their ale to every man's houſe in barrels, kilderkins and firkins, holding their true contents.

Stat. 8 *Eliz. cap.* 9. *ſect.* 3. As much of the ſtatute 23 *Hen.* 8. *cap.* 4. as doth concern the prices of barrels and other veſſels, for ſuch places as new prices ſhall be ſet, ſhall be repealed.

Sect. 4. The prices of barrels and other veſſels for ale, beer or ſope, to be uttered therein, ſhall be rated by mayors, bailiffs, and other head officers of every city and town corporate, where ſuch veſſels ſhall be made, or offered to be ſold.

Sect.

Sect. 5. Where ſuch veſſels ſhall be made or ſold out of any city or town corporate the prices ſhall be rated by the juſtices of peace in quarter ſeſſions yearly after *Eaſter.*

Sect. 6. If the coopers ſhall not make ſale according to ſuch prices as ſhall be rated after proclamation thereof made; every perſon offending ſhall incur the forfeitures mentioned in the ſaid ſtatute 23 *H.* 8. *cap.* 4.

Copper and copper ore. Stat. 9 & 10 *Will.* 3. *cap.* 26. *ſect.* 19. It ſhall be lawful for his Majeſty's ſubjects, to export all ſuch copper bars as ſhall be imported from foreign parts [*as well as copper made of* Engliſh *ore*] and upon exportation ſhall draw back all duties, ſaving half the old ſubſidy.

To continue thirteen years from June 24, 1698, *and to the end of the next ſeſſion of parliament.*

Continued by 12 Ann. ſtat. 1. cap. 18. *for fourteen years, and to the end of the next ſeſſion. And farther continued by* 13 Geo. 1. cap. 27. *for fourteen years, and to the end of the next ſeſſion. And farther continued by* 32 Geo. 2. c. 23. ſect. 1. *to* June 24, 1766, *&c.*

Stat 12 *Ann. ſtat.* 1. *cap* 18. *ſect.* 5. No drawback ſhall be allowed on the exportation of any copper, but ſuch as ſhall be imported from the *Eaſt Indies* and the coaſt of *Barbary* only.

Continued as above.

Stat. 8 *Geo.* 1. *cap.* 18. *ſect.* 22. Copper ore of the production of the *Britiſh* plantations ſhall be reſtrained to be imported in this kingdom, as by 12 *Car.* 2. *cap.* 18. *ſect.* 28. 25 *Car.* 2. *cap.* 7. & 3 & 4 *Ann. cap.* 5. *ſect.* 12.

Continued by 8 *Geo.* 2. *cap.* 21. *to* Sept. 29, 1742. *and to the end of the next ſeſſion. Continued by* 33 Geo. 2. c. 16. *to* Sept. 29, 1767, *and to the end of the next ſeſſion.*

Copper plates and copper fully wrought, to what duties liable, 4 & 5 *W.* & *M. c.* 5. *ſect.* 2. All copper may be exported paying the lawful duties and cuſtoms, 5 *W.* & *M. c.* 17.

Coopertio arborum, The bark of trees.——*Debent habere retro panagium a feſto Sancti* Martini, *uſque ad feſtum* purificationis *Beatæ* Mariæ, & *omnes* coopertiones *de maeremio proſtrato, (i. e.* all bark of timber trees felled) *ad opus domini regis. Blount of tenures, pa.* 189. who by miſtake renders *coopertiones* coverings, or crops of timber. The ſame word occurs in the *Additaments to Matthew Paris.—Inquiratur qui ceperint* coopertiones, *ceppagia & eſcaetas quercuum, ſive aliarum arborum (i. e.* the barks, the chumps, and the broken wood); though Dr. *Watts*, in his *Gloſſary*, interprets *coopertiones* to be the heads and boughs of trees. And the elaborate *Du Freſne* is as much in the dark for the ſenſe of this word. *Quercus diſcoperta*, is an oak debarked. *Cowell, edit.* 1727.

Coopertorium, *i. e. Culmen. Conceſſi eiſdem fragium, focalia,* & coopertia *ſufficientia in omnibus mariſcis & communibus villæ.* Monaſt. 2 tom. pag. 813.

Coopertorium pellium.——*In pelliaria ſunt pelles &* coopertorium, *una pellis ovina ſiqua datur conreata valet i. den. ob*——*Unum* coopertorium pellium *ovimum quod grangiis liberatur valet xii. den.* Regulæ Compoti Domus de Farendon MS.

Coopertorium ad lectum, A blanket, a coverlet. ——*Inter conſuetudines abbatiæ* Glaſtonienſis,——*habere debet in cœna domini unuſquiſque diurnales ſotulares, & in hieme nocturnales, & duo* coopertoria *ad lectum.* Cartular. Abbat. Glaſton. MS. fol. 10.

Coopertura. a thicket or covert of wood. *Charta de Foreſta, cap.* 12. *Equus coopertus*, a horſe covered or harneſſed.

Coparceners, *Participes*, Are otherwiſe called *parceners*, and in Common law are ſuch as have equal portions in the inheritance of their anceſtor; and as *Littleton* in the beginning of his third book ſaith, *parceners* be either by *law*, or by *cuſtom: Parceners by law*, are the iſſue female, which (there being no heir male) come in equally to the lands of their anceſtors. *Brac. lib.* 2. *cap.* 30. *Parceners by cuſtom*, are thoſe that by cuſtom of the country challenge equal part in ſuch lands; as in *Kent*, by the cuſtom called *gavel-kind.* This among the *Feudiſts* is called *adæquatio, Hot. in verbis* Feud. verb. *adæquatio.* See *Lit. lib.* 3. *c.* 2, 3. and *Britton, cap.* 27. intitled, *De Heritage diviſable.* The crown of *England* is not ſubject to *coparcenary.* 25 *H.* 8. *cap.* 22.

If one ſeiſed of an eſtate of inheritance die, leaving only daughters, ſiſters, aunts, or other females of kin in equal degree, and the eſtate deſcends to any of theſe, they are ſaid to hold in *coparcenary*, and to make but one heir to their anceſtor. *Bract. lib.* 2. *c.* 30. *Co. Lit.* 241.

In this inheritance ſometimes the deſcent is *in capita*; as where a man hath iſſue two daughters, and dies, the deſcent is *in capita*; therefore each ſhall inherit alike; and ſometimes the deſcent is *in ſtirpes*; as if a man hath iſſue two daughters, and dies, and the eldeſt daughter hath iſſue three daughters, and the youngeſt one daughter; all theſe four ſhall inherit, but the daughter of the youngeſt ſhall have as much as the three daughters of the eldeſt. *Co. lit.* 164. *b.*

If a man hath iſſue two daughters, and the eldeſt hath iſſue ſeveral ſons and daughters, and the youngeſt hath iſſue ſeveral daughters, the eldeſt ſon of the eldeſt daughter, ſhall only inherit his anceſtor, but all the daughters of the youngeſt ſhall hold their mother's moiety in coparcenary with him. *Co. Lit.* 164. *b.*

If a man ſeiſed of lands in fee, hath iſſue two daughteers, and one of them is attainted of felony, and the father dies, both daughters being alive, one moiety ſhall deſcend to the innocent daughter, and the other moiety ſhall eſcheat; but if a man make a leaſe for life, remainder to the right heirs of *A.* being dead, who hath iſſue two daughters, whereof one is attainted of felony, it ſeems the remainder is not good for a moiety, but void for the whole. *Co. Lit.* 163.

Parceners, in reſpect of their anceſtors make but one heir; and therefore to recover the poſſeſſion of the common anceſtor, they muſt join in the *præcipe*; ſo when they come into poſſeſſion before partition, they are ſeiſed of an undivided poſſeſſion, though having a right to a writ *De partitione faciendo*, they have a right to ſever and divide the poſſeſſion that before was joint in them. *Co. Lit.* 164.

In replevin, the plaintiff declared for taking of bricks, *&c.* and the defendant made conuzance as bailiff to one *John Bennet* and *Grace* his wife, ſetting forth, that one *Simon Bennet* was ſeized in fee of the lands, *&c.* and made a leaſe thereof for forty years, rendring rent, and died, the lands deſcended to his daughters and coheireſſes, one whereof married the ſaid *John Bennet*, and the other was counteſs of *Saliſbury*, and ſo made conuzance for a moiety of the rent; and upon demurrer judgment was given for the plaintiff, becauſe one coparcener cannot make avowry for a moiety of the rent before partition, though they have ſeveral inheritances. 5 *Mod.* 141. *For more matter concerning Coparceners, ſee* 1 *Bac. Abr.* 444, *&c.*

Copartnerſhip, Is a deed of covenants between merchants, or others, for carrying on a joint trade, *&c.* See **Partner.**

Cope, By *Domeſday-Book*, as Mr. *Agar* hath interpreted it, ſignifies a hill. It denotes alſo, according to Mr. *Manlove*, in his *Treatiſe of the Liberty and Cuſtoms of the Mint, &c.* printed 1653, a cuſtom or tribute due to the lord of the ſoil, or elſe to the King, out of the *lead-mines* in ſome part of *Devonſhire:* His words are theſe,—

——*Egreſs and regreſs to the King's highway,*
The miners have; and lot *and* cope *they pay.*
The thirteenth diſh of oar within their mine,
To the lord for lote, *they pay at meaſuring time.*
Sixpence a load for cope *the lord demands,*
And that is paid to th' berghmaſter's *hands, &c.*

See alſo Sir *John Pettus's Fodinæ Regales*, on this ſubject. And *cope* is taken for the ſupreme cover, as the *cope of heaven.* It is alſo uſed for the roof and covering of a houſe; the upper garment of a prieſt, *&c.*

Copia libelli deliberanda, Is a writ that lieth, in caſe when a man cannot get the copy of a libel at the hands of the judge eccleſiaſtical. *Reg. Orig. fol.* 51.

Coppa,

Coppa, A cock of graſs, hay, or corn, ſo divided into tithable portions. This is the true ſenſe of the word in that paſſage of *Will. Thorn, inter x ſcript. col.* 1820. *An.* 1177.——*Pacti ſunt homines de Halmoto de Menſtre in Thaneto*——*furges omnes ſuas* coppare *extunc & deinceps, (i. e.* to ſet out their hay and corn into *copps* or cocks) *& ſic per* coppas *omnes decimas ſuas ipſi & hæredes ſui a modo, & in æternum legitime dare, i. e.* by a juſt and equal proportion of tithing to pay the tenth cock. This authority the learned *Du Freſne* cites *in voce coppa*; but ſeems to underſtand it only of cutting down their corn; whereas it ſtrictly denotes the gathering or laying up the corn in *copes* or heaps, (as they do barley, oats, *&c.* not bound up) that it might be the more fairly and juſtly tithed. In *Kent* they ſtill retain the word, *a cap of hay, a cap of peaſe, a cap of ſtraw.*

Coppire domum, To *cope* a houſe, or to lay on the roof and covering on the top of it.——Johanni Bunbury *tegulatori, capienti in groſſo ad* coppiendam *prædictam domum, iv. lib. i. den.* Paroch. Antiq. pag. 575. From the Saxon *coppe*, the height or top of a thing; *cop*, the head or crown, *&c.* all from the Brit. *koppa*, the top or higheſt part. In *Chaucer*, *cope* is uſed for a cloak. *Cowell, ed.* 1727.

Copy, *(Copia)* Is in a legal ſenſe the tranſcript of an original writing; as the *copy* of a *patent*, of a *charter*, *deed*, *&c.* A clauſe out of a patent, taken from the chapel of the Rolls cannot be given in evidence; but you muſt have a true copy of the whole charter examined: it is the ſame of a record. And if upon a trial, you will give part of an office copy in evidence to prove a deed, which deed is to prove the party's title to the land in queſtion, the court will not admit of it: for the court will have a *copy* of the whole given, or no part of it ſhall be admitted. 1 *Lill. Abr.* 312, 313. Where a deed is inrolled, certifying an atteſted *copy* is proof of the inrollment, and ſuch copy may be given in evidence. 3 *Lev.* 387. A common deed cannot be proved by a copy or counterpart, where the original may be procured. 10 *Rep.* 92. And a copy of a will of lands, or the probate, is not ſufficient; but the will muſt be ſhewn as evidence. 2 *Roll. Abr.* 74. Copies of court-rolls admitted as evidence. See **Evidence.**

Copyhold, *(Tenura per* copiam *rotuli curiæ)* Is a tenure for which the tenant hath nothing to ſhew but the *copy* of the rolls made by the ſteward, as he inrolleth and maketh remembrances of all other things done in the lord's court; ſo he doth alſo of ſuch tenants as are admitted in the court, to any parcel of land or tenement belonging to the manor; and the tranſcript of this is called *The copy of the court-roll*, which is all the tenant taketh from him, and keeps as his only evidence. *Co. lib.* 4. *f.* 25. *b.* This tenure is called a *baſe tenure*, becauſe he holdeth at the will of the lord, *Kitchen fol.* 80. *cap. Copyholds. F. N. B. f.* 12. where 'tis ſaid, that it is wont to be called *tenure in villenage*, and that of *copyhold* is but a new name: yet it is not ſimply at the will of the lord, but according to the cuſtom of the manor; ſo that if a *copyholder* break not the cuſtom of the manor, and thereby forfeit his tenure, he ſeemeth not ſo much to ſtand at the lord's courteſy for his right, that he may be diſplaced at his pleaſure. Theſe cuſtoms of manors are infinite, varying in one point or other almoſt in every ſeveral manor: Firſt, ſome *copyholds* are *fineable* at will, and ſome *certain:* that which is fineable at will, the lord taketh at his pleaſure; but if it exceed two years revenue, the *Chancery*, *King's Bench*, *Common Pleas*, or *Exchequer*, may reduce them to reaſon. That which is *certain*, is a kind of inheritance, and called in many places *cuſtomary*, becauſe the tenant dying, and the *hold* being void, the next of blood, paying the *cuſtomary fine*, as two ſhillings for an acre, or ſuch like, may not be deny'd his admiſſion. Secondly, Some *copyholders* have by cuſtom, the wood growing upon their own land, which by law they could not have. *Kitchin, ubi ſupra.* Thirdly, Some *copyholders* are ſuch as hold by the *verge* in ancient demeſne; and altho' they hold by *copy*, yet are they accounted a kind of *freeholders*; for if ſuch a one commit felony, the King hath *annum, diem & vaſtum* as in caſe of *freehold.* Some others hold by *common tenure*, called *mere copyhold*, and they committing felony, their land eſcheateth to the lord of the manor. *Kitchin f.* 81. *cap. Tenant per verge in ancient demeſne.* What *ancient demeſne* is, ſee in the proper place. See *Tenant by copy of court-roll.* This is the land that in the *Saxons* times was called *folk-land. Lamb.* Explication of *Saxon* words, *verbo Terræ ex ſcripto. Weſt. Symb. par.* 1. *lib.* 2. *ſect.* 646. defines a *copyholder* thus; Tenant by *copy* of court-roll, *is he which is admitted a tenant of any lands or tenements within a manor, that, time out of mind, by uſe and cuſtom of the manor, have been demiſable, and demiſed to ſuch as will take the ſame in fee, or fee-tail, for life, years, or at will according to the cuſtom of the manor*; by copy *of court-roll of the ſaid manor*; where you may read more of theſe things. *Cowell, edit.* 1727.

1. *Of the nature of copyhold eſtates.*

2. *Of intailing copyhold eſtates, and the ſtatutes concerning them.*

1. *Of the nature of copyhold eſtates.*

The original of this tenure aroſe from grants of lands made by lords to their villains to hold of them by baſe tenure; thoſe villains or tenants were capable of taking no greater eſtate than at the will of the lord; for otherwiſe they had been infranchiſed; yet to prevent the frequent ending of theſe eſtates, they granted them in fee, but ſtill at the will of the lord; who notwithſtanding ſuch grant, might have ouſted them when he pleaſed, which being a very great inconvenience, was, it ſeems, altered by ſome poſitive law, (though ſuch law does not now appear) which preſerved their eſtates to them and their heirs, doing their ſervices, but yet in other reſpects left them only eſtates at will. 1 *Bac. Abr.* 457.

Land, parcel of the manor of *C.* in *Wilts*, and parcel of the dutchy of *Cornwall*, although they paſs by ſurrender and copy of court-roll, yet if by the rolls or copies they appear only to have been granted *tenendum ſecundum conſuetudinem manerii*, and not *ad voluntatem domini manerii*, they are not copyhold, but a cuſtomary freehold. 1 *Bac. Abr.* 457.

The biſhop of *N.* 10 *H.* 8. was ſeiſed of the manor of *N.* in the right of his biſhoprick, and at a court holden within the ſame manor, granted parcels of the demeſnes of the ſaid manor to one *T.* and his heirs, by copy; whereas in truth the land was never demiſed before, and ſo the land continued in copy till 23 *Hen.* 8. when *T.* committed a forfeiture, and the biſhop ſeiſed the land, and granted the ſame again by copy to *T.* in fee, from which time it continued in copy till the 8th of *Eliz.* which was forty-ſeven years; and it was held by the whole court, that fifty years continuance is requiſite to faſten a cuſtomary condition upon the land againſt the lord, and that though the original commencement of granting thoſe lands by copy, was 10 *Hen.* 8. from which time to 8 *Eliz.* was above ſixty years; yet that the ſeiſure for a forfeiture which happened 23 *H.* 8. interrupted utterly the continuance from the time, which might by the law have perfected the cuſtomary intereſt; ſo that the commencement of the copyhold was to be reckoned from the 23 *H.* 8. which not being ſufficient time to make good a cuſtom, the lord might enter upon the copyholder as upon his tenant at will. 3 *Leon.* 107. *Style* 141.

Lord *Coke* ſays, that copyholders have only a fee ſimple, *ſecundum quid*, that though they are tenants at will, yet their eſtates ſhall deſcend to their heirs, and ſuch deſcent ſhall be governed by the rules of Common law; but not *ſimpliciter* to have all the collateral qualities of eſtates in fee ſimple. 4 *Co.* 22 *a. Co. Copyh.* 114.

Therefore where a copyholder by licence made a leaſe for years, and the leſſee entred, and the leſſor died, having iſſue a ſon and a daughter, by one venter, and a ſon by another, the eldeſt ſon dies, it was adjudged the daughter of the whole blood ſhould inherit; for the poſſeſſion of the leſſee for years was the poſſeſſion of the elder brother, who may have poſſeſſion before admittance. 2 *Co.* 21. *a. Moor* 125.

But

But though it be governed by the rules of Common law, concerning deſcents, yet it partakes not of the nature of freehold lands in other reſpects; for it is not aſſets in the heir's hands; neither ſhall a woman be endowed of it, nor a man be tenant by the courteſy unleſs by ſpecial cuſtom; nor ſhall a deſcent take away entry. 4 *Co.* 23. *a.* 30. *b.* 6 *Mod.* 64.

A man ſeiſed of copyhold lands, in right of his wife, ſurrenders to the uſe of another in fee, this is no diſcontinuance, but the wife may enter after the death of her huſband; for this is not like a feoffment at Common law, which by the notoriety of it took away the entry of the wife, for the benefit of ſtrangers, that they might not be at a loſs againſt whom to bring their *præcipes*; but in caſe of copyhold lands, as there is no ſuch inconvenience, ſo the nature of the conveyance will not admit of ſuch expoſition. 4 *Co.* 23. *Co. Copyh.* 141.

So if a tenant for life ſurrender to the uſe of another in fee, it is no forfeiture; for it may be ſeen by the court rolls who is tenant; and ſo the ſtranger is at no loſs to ſue. *Moor* 753. 4 *Co.* 23.

If a copyholder in fee ſurrenders to the uſe of *A.* and *B.* and the longer liver of them, and that for want of iſſue of *A.* the lands ſhould remain to the youngeſt ſon of *J. S.* in this caſe *A.* has but an eſtate for life; for an eſtate tail in copyhold lands ſhall not paſs by implication. *Co. Copyh.* 97. *Cro. Car.* 366. 1 *Brownl.* 127. *Noy* 152.

A man may ſurrender a copyhold eſtate to the uſe of his wife; for ſhe takes the eſtate from the lord, as an inſtrument to convey the eſtate to her; and ſo it comes not within the reaſon of other caſes, that they being but one perſon cannot contract; for he gives the eſtate to the Lord, and he admits the feme to it. *Style* 145. 4 *Co.* 29. *b.*

There can be no occupant of a copyhold eſtate, becauſe of the prejudice it would do the lord; and therefore if a copyholder being tenant *pur auter vie* die, the lord ſhall enter. 1 *Salk.* 188.

2. *Of intailing copyhold eſtates, and the ſtatutes concerning them.*

The intailing of copyholds, and whether they are within the ſtatute *De donis*, appears to have been matter of great controverſy; and it ſeems now agreed, that the ſtatute *De donis* creates no intail of copyhold lands, becauſe they are intirely ſubject to the cuſtom of the manor, and governable by it; and becauſe they are not within the word *tenementa*, which comprehends only an eſtate of freehold. 1 *Bac. Abr.* 459.

Alſo it ſeems now agreed, that if the cuſtom of the manor has admitted of limitations of remainders upon ſuch gifts, that then the cuſtom of the manor; purſuing the model of the ſtatute, creates a good intail; but ſuch intail doth not ariſe by virtue of the ſtatute; but it ſhall be preſumed there was the ſame law of that manor by cuſtom time immemorial, as began in the kingdom by the ſtatute. 1 *Bac. Abr.* 459.

A copyhold was ſurrendered to the uſe of the copyholder's laſt will, who deviſed it to *J. S.* in tail, *&c.* *J. S.* hath iſſue, and ſurrenders to the uſe of his wife for life; and it was adjudged, that ſince the jury found it was not the cuſtom of the manor to have an eſtate tail in the copyhold, that *J. S.* had a fee conditional; and that by his having of iſſue he had performed the condition; and the ſurrender to the uſe of his wife was good. *Cro. Car.* 44, 45.

But though by cuſtom, time out of mind, copyholds may be intailed, yet it is no proof of ſuch cuſtom, that an eſtate hath been granted to a man and the heirs of his body; for that may be a fee conditional; but it muſt be ſhewn that a remainder hath been limited over and enjoyed, or that the iſſue hath recovered after the alienation of his anceſtor, or the like. 3 *Co.* 8. *b.* *Co. Lit.* 60.

Theſe intails, like all others, may be docked; but the manner of doing it differs according to the cuſtom of the manor; the more common way of barring ſuch intails is by recovery in the lords courts, which is always allowed where the cuſtom of intailing prevails, to avoid the danger of perpetuity in ſuch copyholds. *Co. Lit.* 60. 1 *Sid.* 314. *Moor* 358.

Alſo, according to the cuſtom of ſome manors, a ſurrender to the lord is equivalent to a recovery at Common law, and ſhall bar ſuch intails. *Co. Lit.* 60. *b.* *Moor* 188. 2 *Vern.* 705.

And in ſome manors; a forfeiture committed by tenant in tail, of the copyhold, and the lord's making three proclamations, and ſeizing the copyhold, and re-granting it to the copyholder, has been allowed a good cuſtom to bar the intail. So it is if tenant in tail ſurrender to the purchaſer and his heirs, who commits a forfeiture, and the lord as before ſeized it, and makes proclamations, this is a bar of the intail, and the cuſtom allowed good. *Co. Copyh.* 135. *Style* 450. 1 *Sid.* 314. 2 *Sand.* 422.

The general rule laid down for the expoſition of ſtatutes, as to their extending or not extending to copyhold eſtates, is this, that where an act of parliament alters any eſtate, intereſt, tenure or cuſtom, or ſervice of the manor, or doth any thing in prejudice either to the lord or tenant, there the general words of an act of parliament will not extend to copyhold eſtates; but when an act is generally for the public good, and no prejudice accrues to the lord, *&c.* there copyholders are bound by them. 1 *Bac. Abr.* 460.

Copyholders are within the ſtatute of limitation; for that is an act made for the preſervation of the publick quiet, and no ways tending to the prejudice of the lord or tenant. *Moor* 410. But debt for a fine is not within the ſtatute of limitations. 2 *Keb.* 536.

It ſeems formerly to have been the better opinion, that grantees or ſurrendrees of reverſions of copyholds could not take advantage of a covenant broken, by 32 *H.* 8. becauſe he comes in the *poſt*, and not in the *per*; and the lord would have a tenant put upon him without his admittance; but it has been ſolemnly adjudged, that this being a beneficial law, it ſhall extend to copyholds. 1 *Bac. Abr.* 460.

The ſtat. 38 *H.* 8. *cap.* 28. of the huſband's diſcontinuing of the wife's land, extends to copyhold eſtates. *Co. Copyh.* 152. 4 *Co.* 23.

Copyholds are not within the 11 *Hen.* 7. *cap.* 20. which makes the alienation of the wife void of any eſtate which ſhe hath in dower, for life or in tail, jointly with her huſband, *&c.* for thereby an entry being given to the next heir, he would come in to be tenant, without the admittance of the lord. 2 *Sid.* 41. 73. 2 *Lev.* 327. 4 *Mod.* 85.

The 27. *H.* 8. For uniting uſes to the poſſeſſion, extends not to copyholds, neither doth that branch of the act concerning jointures extend to them; for that if a jointure be made to a woman of copyhold lands, that will be no bar to her dower. *Cro. Car.* 44. 4 *Mod.* 85.

But yet the ſtatute of *Merton*, that gives damages in a writ of dower, where the huſband died ſeiſed, extends to copyholds, though the word *ſeiſed* is properly applicable to freeholds; but this is by force of the equity of the ſtatute. 2 *Inſt.* 325. *Cro. Car.* 43. 4 *Co.* 30. *b.* *Co. Copyh.* 152.

The ſtatute of *Weſtm.* 2. *cap.* 3. in all its branches extends to copyhold lands, for it is an act made to redreſs wrong, and no way prejudicial to the intereſt either of the lord or tenant, either in the *cui in vita* given to the wife upon the huſband's diſcontinuance, the receipt of the wife, *&c.* or *quod ei deforciat* to particular tenants. *Co. Lit.* 369. *b.* *Co. Copyh.* 152. 4 *Mod.* 84. 3 *Lev.* 327.

It is enacted by 31 *H.* 8. *cap.* 13. That if any abbot, *&c.* ſhall make any leaſe of lands, *&c.* in the which any eſtate for life, *&c.* then had its being and continuance, then every ſuch leaſe to be void. A copyhold was let by copy for life, and then the religious houſe granted a leaſe of it to another for eighty years; and the queſtion was whether a copyhold eſtate for life was within the words of the act, *in the which any eſtate or intereſt*, *&c.* and if was reſolved, that the leaſe was void, and that the copyholder had an eſtate or intereſt for life. 3 *Co.* 7. 1 *Leon.* 4. *Moor* 128. *Cro. Car.* 42, 43.

The 32 *H.* 8. *cap.* 9. againſt *Champerty*, extends to copyholds, for the words *if any bargain, buy or ſell any right or title*; ſo that they are within the words of the act, being made to ſuppreſs wrong, and within the equity of it, neither lord nor tenant being prejudiced by it. *Co. Lit.* 369. *Co. Copyh.* 152. 4 *Mod.* 84. 3 *Lev.* 327.

The 31 & 32 *H.* 8. concerning partitions, extends not to copyholds, becauſe the act provides it ſhall be done by writ of *partition*; and copyhold lands are not impleadable at Common law. *Cro. Car.* 44. *Co. Copyh.* 151. 4 *Mod.* 85.

The ſtatute of *Weſtm.* 2. *cap.* 20. which gives the *elegit*, extends not to copyhold lands; for then the lord would have a tenant brought in upon him without his admittance or conſent. 3 *Co.* 9. *Co. Copyh.* 149.

By the 2 *Ed.* 6 *cap.* 8. it is expreſsly provided, that copyholders ſhall have the like traverſe and remedy where their intereſt is not found by the office, as freeholders and others have; and ſo alſo upon 12 *Eliz. cap.* 8. *Co. Copyh.* 145.

By the 1 *Ed.* 6. *cap.* 14. it is expreſsly provided, that no copyhold ſhould come into the King's hands by diſſolution of monaſteries; which clauſe was put in for the benefit of lords of manors. *Co. Copyh.* 146.

The forging of court-rolls is expreſsly within 5 *Eliz. cap.* 14. as well as forging any other charter, deed, or writing ſealed, whereby to defeat a copyholder or freeholder. *Co. Copyh.* 146.

Copyholds are within the ſtatutes of bankrupts; for the ſtatute of 13 *Eliz.* expreſsly mentions them; and though other ſtatutes do not, yet they being made for further remedy, are to be expounded by the former, eſpecially ſince that hath taken care that no prejudice ſhould happen to the lord. *Cro. Car.* 550, 568. *Co. Copyh.* 146.

Copyholds are within the 35 *Eliz. cap.* 5. againſt recuſancy, and forfeitable for the recuſant's life, but the forfeiture goes to the lord, not to the King, by the expreſs words of the ſtatute; but it ſeems that copyholds are not within the 29 *Eliz.* or 3 *Jac.* 1. in reſpect of the prejudice that would accrue to the lord by the loſs of his ſervices. 1 *Bac. Abr.* 461.

The 16 *Rich.* 2. *cap.* 5. which makes it a forfeiture of lands, *&c.* to purchaſe bulls of the Pope, extends not to copyhold lands for the prejudice the lord would ſuſtain, if the King ſhould have the lands. *Co. Copyh.* 149.

The ſtatute of fines extends to copyhold lands, becauſe it was made to avoid controverſies, and is no ways prejudicial to the lord. 9 *Co.* 105. *a. Co. Copyh.* 153.

Copyholds are not within 31 *Eliz. cap.* 7. of cottages. 1 *Bulſt.* 50.

The ſtat. 27 *Ed.* 2. *cap.* 10. which giveth the wardſhip of ideots lands to the King, he finding them convenient maintainance out of the profits thereof, extends not to copyhold lands, for the prejudice that would thereby enſue to the lord: but yet all alienations made by an ideot of his copyhold land, after office found, ſhall be avoided by the King. *Co. Copyh.* 152. 4 *Co.* 126. *b.*

A copyholder is not within the ſtatute 12 *Car.* 2. *cap.* 24. to diſpoſe of the cuſtody of his infant heir; becauſe of the meanneſs of his eſtate, and the prejudice that would accrue to the lord of the manor; and therefore the lord, or thoſe intitled by the cuſtom, ſhall have the cuſtody of him. 3 *Lev.* 395. 2 *Lutw.* 1181. *Comb.* 243.

Stat. 9 *Geo.* 1. *cap.* 29. *ſect.* 1. Where any perſons under the age of twenty-one years, or femes covert, ſhall be intitled by deſcent, or ſurrender to the uſe of a laſt will, to be admitted tenants of any copyhold tenements, ſuch infant or feme covert, in their proper perſons, or ſuch feme covert by her attorney, or ſuch infant by his guardian, or in caſe he have no guardian, then by his attorney (for which purpoſe they are impower'd, by writ to appoint attornies) ſhall appear at one of the three next courts, which ſhall be kept for ſuch manor, whereof ſuch tenements ſhall be parcel, and ſhall there tender themſelves to be admitted tenants; and in default of ſuch appearance and of acceptance of ſuch admittance, the lord or his ſteward, after three courts holden and proclamations made, may nominate at any ſubſequent court any fit perſon to be guardian or attorney for ſuch infant or feme covert, for that purpoſe only; and by ſuch guardian or attorney may admit ſuch infant or feme covert, and impoſe ſuch fine as might have been impoſed, if ſuch infant had been of full age, or ſuch feme covert unmarry'd.

Sect. 2. The fine ſet thereon may be demanded by the bailiff, by a note ſign'd by the lord and his ſteward, to be left with ſuch infant or feme covert, or with the guardian of ſuch infant, or huſband of ſuch feme covert, or with the tenant of the tenements to which they were admitted; and if the fine be not paid to the lord or his ſteward within three months after demand, the lord may enter upon ſuch copyhold eſtate, and hold the ſame and receive the rents; but without liberty to ſell any timber; till by ſuch rents he be paid the fine with coſts, although ſuch infant or feme covert happen to die before ſuch coſts and fine be raiſed; of all which rents received, the lord ſhall yearly on demand render an account, and pay the ſurplus to ſuch perſons as ſhall be intitled.

Sect. 3. As ſoon as ſuch fine and coſts be ſatisfied, or if after ſuch ſeizure and entry, the fine and coſts ſhall be tender'd, then ſuch infant or feme covert, or other perſon intitled, may enter and take poſſeſſion; and if the lord, after the fine and coſts ſatisfy'd or tender'd, ſhall refuſe to deliver poſſeſſion, he ſhall be liable to make ſatisfaction for all damages and coſts.

Sect. 4. Where any infant or feme covert ſhall be admitted to any copyhold tenements, if the guardian of ſuch infant, or huſband of ſuch feme covert, ſhall pay the lord the fine and the coſts, then the guardian or the huſband, their executors, *&c.* may enter into and hold the ſaid copyhold tenements, and receive the rents, till they be ſatisfy'd all the money they ſhall diſburſe on the account aforeſaid, notwithſtanding the death of ſuch infant or feme covert.

Sect. 5. No infant or feme covert ſhall forfeit any copyhold for neglect or refuſal to come to any court, and be admitted; or for the omiſſion or refuſal, to pay any fine impoſed on their admittance.

Sect. 6. If the fine impoſed in any of the caſes beforementioned ſhall not be warranted by the cuſtom of the manor, ſuch infant or feme covert ſhall be at liberty to controvert the legality of ſuch fine, as they might have done if this act had not been made.

Stat. 31 *Geo.* 2. *cap.* 14. *ſect.* 1. No perſon who holds his eſtate by copy of court-roll, ſhall be intitled thereby to vote at the election of any knight of the ſhire in *England* or *Wales*: And if any perſon vote in any ſuch election contrary to the intent hereof, every ſuch vote ſhall be void; and every perſon ſo voting, ſhall forfeit to any candidate for whom ſuch vote ſhall not have been given, and who ſhall firſt ſue for the ſame 50*l.* to be recovered by him his executors and adminiſtrators, with coſts, by action of debt in any court of record at *Weſtminſter*, wherein no eſſoin, *&c.* ſhall be allowed; and in every ſuch action the proof ſhall lie on the perſon againſt whom ſuch action ſhall be brought.

Sect. 2. It ſhall be ſufficient for the plaintiff in any ſuch action of debt, to ſet forth in the declaration, that the defendant is indebted to him the ſum of 50*l.* and to alledge the offence for which the action is brought, and that the defendant hath acted contrary to this act; without mentioning the writ of ſummons to parliament or the return thereof: and upon trial the plaintiff ſhall not be obliged to prove the writ of ſummons to parliament or the return thereof, or any warrant to the ſheriff grounded upon any ſuch writ of ſummons.

Sect. 3. Provided that every ſuch action be commenced within nine calendar months next after the fact upon which the ſame is grounded.

Sect. 4. All the ſtatutes of jeofails ſhall extend to all proceedings in any ſuch action.

Sect. 5. In caſe the plaintiff in ſuch action diſcontinue or be nonſuited, or judgment be given againſt him, the defendant ſhall recover treble coſts.

For more matter concerning Copyhold Eſtates, ſee 1 Bac. Abr. 462—490. 6 Vin. Abr. 5—241.

Coraage, Is an impoſition extraordinary, growing upon

upon ſome unuſual occaſion, and ſeems to be of certain meaſures of corn. *Bract. lib.* 2. *cap.* 16. *num.* 6. uſes *corus tritici*, for a meaſure of corn; and in the ſame chapter, *num.* 8. hath theſe words, *Sunt enim quædam communes, &c.* In *Engliſh* thus, *There are certain common* preſtations, *which are not called* ſervices, *neither do they ariſe from* cuſtom, *unleſs ſome neceſſary occaſion happen, or that the King comes. Such are* hidage, coraage, *and* carvage, *and many others, which are performed in caſe of neceſſity, by the common conſent of the whole kingdom, and which appertain not to the lord of the fee; nor is he bound to acquit his tenant thereof, unleſs he hath eſpecially ty'd himſelf thereto by his own deed.* Cowell, edit. 1727.

Coracle, A ſmall boat, uſed by fiſhermen upon the river *Severn*, near *Roſſal* in *Shropſhire*; of a form almoſt oval, made of ſplit ſallow twigs interwoven, and on that part next the water covered with leather, or horſe hide, (the true *Britiſh* faſhion), in which one man being ſeated in the middle, will row himſelf ſwiftly with one hand, while with the other he manages his net or fiſh-tackle: And coming off the water, will take the light veſſel on his back, and carry it home.

Coral and coral beads, To what duties liable, 4 *W. & M. c.* 5. *ſect.* 2.

Coram non judice, Is when a cauſe is brought in a court, whereof the judges have not any juriſdiction; there it is ſaid to be *coram non judice. Croke*, 2 *par. f.* 351. *Powel's* caſe.

Corbel-ſtones, *Corbelli, corbels, corbetels.* They ſeem to be the ſame with what Dr. *Skinner* calls *corbels*, and from ſome authority expounds them to be *ſtones whereon images ſtand.* The old Engliſh *corbel* and *corbetel*, was properly a nich in the wall of a church, or other ſtructure, in which an image was placed for ornament or ſuperſtition; and the *corbel-ſtones* were the ſmooth and poliſh'd ſtones, laid for the front and out-ſide of the *corbels* or niches. Theſe niches remain on the out-ſide of very many churches and ſteeples in *England*, though the little ſtatues and reliques, are moſt of them broken down. —— *Et in ſolutis* Johanni Chepyn *Latamo aptanti & facienti xviii.* corbel-ſtonys, *ponendis in prædicto muro v. ſol. iv. den.* See Mr. *Kennet's Paroch.* 575. and *Gloſſary*, *in voce* Corbel-ſtones.——*Licebit prædictis abbati & conventui, ſi ſibi placuerit, in principio fabricæ ejuſdem muri* corbellos *ſumptibus eorum propriis in eodem inſtruere, ſed poſtquam conſtructus fuerit, nequaquam aliquos* corbellos *facient, nec aliquis eorum fuciet.*——Cart. 50 Edw. 3. inter. Munimenta Hoſpitalis SS. Trin. in Pontefracto, MS.

Cord of wood, Ought to be eight foot long, four foot broad, and four foot high, by ſtatute.

Cordage, Is generally applied to all ſtuff for the making of ropes, and alſo to all kind of ropes belonging to the rigging of ſhips, mentioned 15 *Car.* 2. *c.* 13. *Seaman's Dictionary.* See **Cables.**

Cordeletta roba.——*Ad comitatum tantum apud* Leſtroythiel com. Cornub. *an. regni Regis* Ed. *fil. Reg.* Ed. *ſecundo*, Mageria *quæ fuit uxor* Walteri de Treverbyn, *appellat* Thomam Geveil, Rogerum de Tyndal, *&c. quod ipſam ſpoliaverint de una* cordeletta roba *pro muliere mixta, & uno firmaculo aureo, &c.* Liber Placitorum temp. Ed. 1. & Ed. 2. MS. Penes Dom. Fountains.

Cordewan, Skins of leather, dreſſed at *Corduba* in *Spain*, and imported hither for the uſe formerly of boots and other calceature, and now chiefly for gloves.—— *Nec ſotulares de* cordewan *ab aliquo accipiant.* Stat. Ordinis Semplingham, p. 783.——*Calceamenta quæ de vili corio, quod vulgariter Bazan dicitur, in alutam, id eſt,* cordewan, *civiliter commutavit.* Matt. Pariſ. in vit. Abbatum St. Albani.

Cordiner, Is deriv'd from the French *cordouannier*, i. e. *ſutor calcearius*, a ſhoemaker, (we call him vulgarly a *cordwainer*) and is ſo uſed in divers ſtatutes, as in 3 *H.* 8. 10. 5 *H.* 8. *c.* 7. 27 *Hen.* 8. *c.* 14. 5 & 6 *Ed.* 6. *c.* 13. 1 *Jac.* 1. *c.* 22. *&c.*

Cordubanarius, (French *cordouannier, cordonnier,*) A Shoemaker.——*De illa ſelda cum pertinentiis quam* Walterius cordubanarius *de me tenuit.*——Cartular. Abbatiæ de Radinges, MS. f. 31. a.

Cordwainers. See **Shoemakers.**

Coretes, Pools, ponds, *&c.*——*Conſtituerunt ei epiſcopalem ſedem——apud pagum* Landaff, *totum infra Taf & Elei, cum piſcibus &* coretibus *ſuis omnibus, & cum omni ſua dignitate.* Hiſtor. Eccleſ. Landaven. apud Whartoni Angl. Sacr. P. 1. pag. 667. from the Britiſh *cored. Et cum corporibus ſuis ad ſepulturam ſuam in eleemoſyna, & cum ſuis piſcibus &* coretibus *anguillarum, & cum toto territorio ſuo.* Du Freſne.

Corinium, *Cirenceſter* in *Glouceſterſhire.*

Coriſcus, for *Codiſcus*, A little book.

Coritani, *Northampton, Leiceſter, Rutland, Lincoln, Nottingham*, and *Derby ſhires.*

Corium forisfacere, i. e. Condemned to be whipp'd; which was the puniſhment of a ſervant.—*Si quis* corium *ſuum* forisfaciat, *& ad eccleſiam incurrat, ſit ei verberatio condonata.* Corium *perdere*, the ſame. *Corio carere*, the ſame. *Corium redimere*, to compound for a whipping. *Corio componere*, to be whipp'd. *Cowell. ed.* 1727.

Corn. Stat. 5 *Eliz. cap.* 12. *ſect.* 4. No badger, lader, kidder, carrier, buyer, or tranſporter of corn or grain ſhall be licenſed only in the open ſeſſions of the ſhire where he hath dwelt for three years laſt paſt; and no perſon ſhall be licenſed but only ſuch who is or hath been a married man, and is an houſholder, and not an houſehold ſervant, nor retainer to any perſon, and of the age of thirty years at the leaſt. Such licence ſhall be only of force for one year.

Sect. 5. Which licence ſhall bear date of the day and place where the ſeſſions ſhall be holden, and ſhall be ſigned and ſealed by three juſtices at ſuch ſeſſions, one whereof to be of the *quorum*; and any perſon taking licence contrary to this act, ſhall forfeit to the King five pounds; and the licence ſhall be void.

Sect. 6. And the juſtices at ſuch ſeſſions may take recognizance that the perſons licenſed ſhall not, by colour thereof foreſtall or ingroſs, or do any thing contrary to the act againſt foreſtalling, ingroſſing, and regrating, of the 5 & 6 *Ed.* 6. *cap.* 14. and the licence and recognizance ſhall be written by the clerk of the peace, or his deputy, and no other perſon; for which he ſhall have 12*d.* for the licence, and 8*d.* for the recognizance, and for regiſtring them both 4*d.* for which fee he ſhall alſo keep a regiſter book, and therein enter the names and dwelling-places of the perſons licenſed, with a brief declaration of the licence, and of the day, time, and place when granted; which book he ſhall have at the ſeſſions.

Sect. 7. And no perſon, by authority of ſuch licence, ſhall buy corn out of open fair or market, to ſell again, unleſs he be thereunto particularly licenſed, and have ſpecial and expreſs words in the licence, that he may ſo do; on pain of five pounds, half to the King, and half to him that will ſue.

Sect. 8. And the ſeſſions may hear and determine the offences aforeſaid, by inquiſition, preſentment, bill, or information, and by examination of two witneſſes, and make proceſs thereupon, as upon indictment, and eſcheat the King's moiety, and award execution of the other moiety to the party, by *fieri facias*, or *capias*, as the courts at *Weſtminſter* may do.

Sect. 9. Provided, that nothing in this act ſhall extend to prejudice the liberty of a city or town corporate, but that they may licence purveyors, for the proviſion thereof, as before this act.

Stat. 13 *Eliz. cap.* 25. *ſect.* 20. No perſon ſhall be a buyer, badger, kidder, or carrier of corn, in other manner than is contained in the ſtatute made in the 5 *Eliz. c.* 12. nor ſhall be any other ways admitted or licenſed to be a buyer, badger, kidder, or carrier as aforeſaid, than is mentioned and appointed by the ſaid ſtatute.

Stat. 43 *Eliz. cap.* 7. *ſect.* 1. Every perſon who ſhall unlawfully cut or take away corn or grain growing, being convicted thereof by confeſſion, or oath of one witneſs, before one juſtice, ſhall for the firſt offence pay ſuch damages as the juſtice ſhall appoint: And if the juſtice ſhall think him not able or ſufficient, or if he do not pay ſuch damages, he ſhall commit him to the conſtable where the offence is committed, or where the party is apprehended,

apprehended, to be whipped; and for every other offence he ſhall in like manner be whipped. The conſtable refuſing ſhall be committed by the juſtice, till he conform.

Stat. 15 *Car.* 2. *cap.* 7. *ſect.* 2. When the prices of corn *Wincheſter* meaſure do not exceed the rates following, *viz.* the quarter of wheat 48*s.* of barley or malt 28*s.* of buck-wheat 28*s.* of oats 13*s.* 4*d.* of rye 32*s.* of peaſe or beans 32*s.* it ſhall be lawful for all perſons to tranſport the ſaid corn to any parts beyond ſea as merchandiſe.

Sect. 3. When the prices of the ſaid corns do not exceed the rates abovementioned at the place where they ſhall be imported, there ſhall be paid for cuſtom of every quarter of wheat 5*s.* 4*d.* of rye 4*s.* of barley or malt 2*s.* 8*d.* of buck-wheat 2*s.* of oats 1*s.* 4*d.* and for peaſe or beans 4*s.*

Sect. 4. When the prices do not exceed the ſaid rates, it ſhall be lawful for all perſons (not foreſtalling or ſelling the ſame in the ſame market within three months after the buying) to buy in open market, lay up, and ſell again, ſuch corn aforeſaid, as ſhall have been bought at or under the prices before expreſſed.

Stat. 22 & 23 *Car.* 2. *cap.* 7. If any perſon ſhall, in the night-time, maliciouſly and wilfully burn or cauſe to be burnt, any rick or ſtack of corn, he ſhall be guilty of felony: But to avoid judgment of death, he may make his election to be tranſported for ſeven years. And three juſtices, one whereof to be of the *quorum*, may determine the ſame. See the 9 *Geo.* 1. *cap.* 22. under Black act.

Stat. 22 *Car.* 2. *cap.* 8. *ſect.* 2. If any perſon ſhall ſell corn otherwiſe than by *Wincheſter* meaſure, ſealed and ſtriken by the brim, he ſhall forfeit forty ſhillings on conviction before one juſtice, on the oath of one witneſs, to be levied by the churchwardens and overſeers, or ſome of them, to the uſe of the poor, by diſtreſs and ſale: And in default of diſtreſs to be impriſoned till paid.

Sect. 3. And if any mayor, or other head officer, ſhall knowingly permit the ſame, he ſhall, upon conviction thereof at the county ſeſſions, forfeit five pounds, half to the proſecutor, and half to the poor, by diſtreſs and ſale; and for want of diſtreſs to be impriſoned by warrant of the juſtices till payment be made.

Stat. 22 & 23 *Car.* 2. *cap.* 12. *ſect.* 2. Every perſon who ſhall buy or ſell corn without meaſuring, being thereunto required, or in other manner than is by 22 *Car.* 2. *cap.* 8. directed, and that without ſhaking of the meaſure by the buyer, he ſhall, beſides the penalty of that act, forfeit all the corn ſo bought or ſold, or the value thereof, to the party complaining.

Sect. 3. And on complaint made to a juſtice of the peace, that corn hath been bought, ſold or delivered contrary to this act, the proof ſhall lie upon the defendant, to make it appear by the oath of one witneſs, that he ſold or bought the ſame lawfully; wherein if he ſhall fail, he ſhall forfeit as is ſaid before, to be levied by diſtreſs and ſale; which ſhall by the juſtices be diſtributed, half to the poor and half to the informer.

Stat. 22 *Car.* 2. *cap.* 13. *ſect.* 1. It ſhall be lawful for every perſon, native or foreigner, at any time to tranſport as merchandize all ſorts of corn, although the prices exceed the rates in 15 *Car.* 2. *c.* 7. and when the prices of corn, at the places where the ſame ſhall be imported, exceed not the rates following, there ſhall be paid for cuſtom theſe rates, *viz.* for every quarter of wheat when the ſame ſhall not exceed 53*s.* 4*d.* 16*s.* when the ſame ſhall exceed 53*s.* 4*d.* and not exceed 4*l.* there ſhall be paid 8*s.* for every quarter of rye when the ſame doth not exceed 40*s.* 16*s.* for every quarter of barley, malt or buckwheat, when the ſame doth not exceed 32*s.* 16*s.* for every quarter of oats when the ſame doth not exceed 16*s.* 5*s.* 4*d.* for every quarter of peas and beans when the ſame doth not exceed 40*s.* 16*s.* each quarter to contain eight buſhels, and each buſhel eight gallons.

Sect. 2. When the prices of corn ſhall exceed the rates aforeſaid, there ſhall be paid the duties payable before the making of this act.

Sect. 3. There ſhall be paid for the cuſtom of every hundred weight of *French* or pearl barley, 5*s.*

Continued by 2 W. & M. ſtat. 1. cap. 4. ſect. 3. 1 Ann. ſtat. 1. cap. 13. ſect. 2. *and* 9 Ann. cap. 6. ſect. 2. *and made perpetual by* 3 Geo. 1. c. 7.

Stat. 1 *Jac.* 2. *cap.* 19. *ſect.* 3. The juſtices of peace for the ſeveral counties wherein foreign corn may be imported, are required at their quarter ſeſſions after *Michaelmas* and *Eaſter* yearly, by the oath of two ſubſtantial perſons of the counties, being neither merchants nor factors for importing corn, nor intereſted in the corn imported, and each having a freehold eſtate of 20*l.* or a leaſehold of 50*l.* *per annum*, and by ſuch other ways as to them ſhall ſeem fit, to determine the common market prices of middling *Engliſh* corn of the reſpective ſorts in the act 20 *Car.* 2. *cap.* 13. mentioned; and to certify the ſame, with two ſuch oaths made as aforeſaid in writing annexed, to the chief officer and collector of the cuſtoms reſiding in the ports where corn ſhall be imported, to be hung up in the cuſtom-houſe.

Sect. 4. The cuſtom of foreign corn imported ſhall be paid according to the prices contained in ſuch certificates.

Sect. 5. All that is to be done by the juſtices of peace at their quarter ſeſſions in the counties, ſhall be done in like manner in *London* in *October* and *April* yearly, by the mayor, aldermen and juſtices; and the perſons making ſuch oaths ſhall be no corn-chandler, meal-man, factor, merchant or perſon intereſted in ſuch corn to be imported, but ſhall be ſubſtantial houſe-keepers in *Middleſex* or *Surry*, qualified as aforeſaid.

Continued as 22 Car. 2. cap. 13.

Stat. 11 *Will. & Mar. ſtat.* 1. *cap.* 12. *ſect.* 2. When malt or barley ſhall be at 24*s.* *per* quarter, rye at 32*s.* *per* quarter, and wheat at 48*s.* *per* quarter, or under, in any part of this kingdom, every perſon who ſhall put on board in *Engliſh* ſhipping, the maſter and two thirds of his mariners being their Majeſties ſubjects, any ſorts of the corn aforeſaid, with intent to export the ſame, ſuch perſon ſhall bring a certificate under his hand containing the quantity and quality of corn ſo ſhipped, to the collectors of the cuſtoms; and upon proof of ſuch certificate by one perſon upon oath, and upon bond given of 200*l.* for every hundred tons of corn ſhipped, that the ſaid corn (danger of the ſeas excepted) ſhall be exported beyond ſea, and not again landed in *England*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*; every merchant ſo ſhipping, *&c.* ſhall receive from the collectors for every quarter of barley or malt 2*s.* 6*d.* for rye 3*s.* 6*d.* for wheat ground or unground 5*s.* without any fee. And upon certificate returned under the common ſeal of the chief magiſtrate of any place beyond ſea, or under the hands and ſeals of two known *Engliſh* merchants upon the place, that ſuch corn was there landed, or upon proof that ſuch corn was taken by enemies, or periſhed upon the ſeas, the bond ſhall be delivered up without fee.

Stat. 1 *Will. & Mar. ſtat.* 1. *cap.* 24. *ſect.* 18. Where malt or barley of *Engliſh* growth ſhall be at 24*s.* the quarter or under, rye at 32*s.* wheat at 48*s.* in *Berwick*; every perſon who ſhall put in *Engliſh* ſhipping, the maſter and two thirds of his mariners being their Majeſties ſubjects, any of the corn aforeſaid from the port of *Berwick*; to export the ſaid corn, and ſhall purſue the methods preſcribed by the 1 *Will. & Mar. cap.* 12. ſhall have the benefit of the ſaid act.

Stat. 11 & 12 *Will* 3. *cap.* 20. *ſect.* 4. The ſubſidy, and all duties payable upon exportation of wheat, rye, barley, malt, beans, peaſe and other corn, ground or unground, bread, biſcuit and meal, ſhall ceaſe.

Stat. 12 & 13 *Will.* 3. *cap.* 10. *ſect.* 23. If the collector of the cuſtoms have not ſufficient in his hands to ſatisfy ſuch money as ſhall be due to any exporter of corn by 1 *Will. & Mar. ſtat.* 1. *cap.* 12. ſuch collector ſhall give the perſon demanding ſuch money, without fee, a certificate of what is due to ſuch perſon for the corn exported from ſuch port, certifying to the commiſſioners that he hath not money ſufficient; which certificate

cate being affixed to the *debenture* for the corn, and produced, the commiſſioners are required to cauſe the monies to be paid in three months by the general receiver, out of monies ariſing out of ſuch duties in the port of *London* as are chargeable with the ſame.

Stat. 5 *Ann. cap.* 29. *ſect.* 10. For all oatmeal and grain called beer or bigg, which ſhall be exported from *England*, *Wales*, or *Berwick*, there ſhall be the like *premium* given upon exportation, as is to be given by the articles of union upon exportation of oatmeal and beer from *Scotland*; the merchant bringing a certificate under his hand, containing the quantity of ſuch oatmeal and beer, to the collector of the cuſtoms, and making proof of ſuch certificate by one perſon upon oath, and giving bond in 10*l.* for every ton of oatmeal, and for every forty buſhels of beer, that the ſame ſhall be exported beyond ſea, and not relanded, which *premium* the merchant ſhall receive of ſuch collector; and upon certificate returned under the common ſeal of the chief magiſtrate in any place beyond ſea, or under the hands and ſeals of two known *Engliſh* merchants upon the place, that ſuch oatmeal or beer was there landed, the bond ſhall be delivered up without fee.

Sect. 15. Every perſon exporting malt made of wheat ſhall receive of the collectors of the cuſtoms, *&c.* 5*s.* for every quarter ground or unground.

Stat. 2 *Geo.* 2. *cap.* 18. *ſect.* 3. If the juſtices of peace ſhall neglect to determine the prices of corn at their quarter ſeſſions after *Michaelmas* and *Eaſter* yearly, and to certify the ſame to the chief officer and collector of the cuſtoms, reſiding in the ports where foreign corn may be imported, to be hung up in the cuſtom-houſe as is directed by 1 *Jac.* 2. *cap.* 19. in ſuch caſe the collector of the cuſtoms at the port of importation is impowered to receive the duties of the corn imported, according to the loweſt price of the ſame ſort of corn mentioned in 22 *Car.* 2. *cap.* 13.

Sect. 4. The officers of the cuſtoms ſhall admeaſure all corn whereon there is an allowance payable for exportation; and ſuch admeaſurement ſhall be made by a meaſure containing four *Wincheſter* buſhels; and if ſuch corn ſhall be brought to be ſhipped in ſacks, the officers are to make choice of two of theſe ſacks, out of any number not exceeding twenty, before the ſame ſhall be put on board, and thereby compute the quantity intended to be ſhipped; and according to ſuch computation the allowance ſhall be paid to the exporter, upon his producing a certificate from the officers of the cuſtoms, atteſting the quantity and quality of the corn ſhipped for exportation.

Sect. 5. The like regulations ſhall be extended to the aſcertaining the prices and quantity of beer or bigg, oatmeal and wheat meal intended for exportation. Provided, that nothing in this act ſhall alter the preſent practice of ſhipping corn from the port of *London*; but the ſame may be meaſured by ſworn meters, by whoſe certificate the ſearchers or other officers of the cuſtoms are to certify the quantity of corn ſhipped for exportation, as hath been practiſed.

Stat. 5 *Geo.* 2. *cap.* 12 *ſect.* 1. It ſhall be lawful for the juſtices of peace for the ſeveral counties within *England*, *Wales* and *Berwick*, wherein foreign corn ſhall be imported, at their quarter ſeſſions, to give in charge to the grand jury, to make preſentment of the market prices of middling *Engliſh* corn, of the ſorts mentioned in an act 22 *Car.* 2. *cap.* 13.

Sect. 2. Such preſentment ſhall be certified by the juſtices to his majeſty's chief officers of the cuſtoms in every port where ſuch corn ſhall be imported, and be hung up in the cuſtom-houſe.

Sect. 3. The duty of foreign corn imported, ſhall be paid according to the prices contained in ſuch certificates.

Sect. 4. Nothing in this act ſhall prejudice the authority given by the act 1 *Jac.* 2. *cap.* 19. to the mayor, aldermen and juſtices of peace in the city of *London*.

Sect. 5. No warrant, cocket, *&c.* ſhall be granted for carrying to ſea from any port within *England*, *Wales*, and *Berwick*, to any port of the ſame, any foreign corn after importation thereof; and no perſon ſhall tranſport any foreign corn, or foreign corn mixed with *Engliſh*, under penalty that all ſuch corn that ſhall be tranſported or laden contrary to this act ſhall be forfeited, and every offender ſhall forfeit 20*s.* for every buſhel of ſuch corn, and the ſhip upon which ſuch corn ſhall be laden ſhall be forfeited; one moiety of which forfeitures ſhall be to the King, and the other moiety to them who will ſue for the ſame; and the maſter and mariners of ſuch ſhip wherein ſuch offence ſhall be committed, knowing ſuch offence, and aſſiſting thereunto, ſhall be impriſoned three months.

Stat. 11 *Geo.* 2. *cap.* 22. *ſect.* 1. If any perſons ſhall wilfully and maliciouſly beat, wound, or uſe any other violence to any perſon, with intent to deter or hinder him from buying of corn: or ſhall unlawfully ſtop or ſeize upon any waggon, cart or other carriage, or horſe loaded with wheat, flour, meal, malt or other grain, in the way to or from any city, market-town or ſea-port, and wilfully and maliciouſly break, cut, ſeparate or deſtroy the ſame, or any part thereof, or the harneſs of the horſes; or ſhall unlawfully take off, drive away, kill or wound any of ſuch horſes, or unlawfully beat or wound the drivers in order to ſtop the ſame; or ſhall ſcatter ſuch wheat, flour, meal, malt or other grain, or ſhall take or carry away, ſpoil or damage the ſame, or any part thereof; every ſuch perſon being thereof convicted before any two juſtices of peace ſhall be ſent to the common gaol or houſe of correction, to be kept to hard labour for any time not exceeding three months, nor leſs than one month; and ſhall by the juſtices be ordered to be once publickly whipped by the keeper of ſuch gaol or houſe of correction, on the firſt convenient market-day, at the market-place, between the hours of eleven and two.

Sect. 2. If any perſon ſo convicted ſhall commit any of the offences aforeſaid a ſecond time, or if any perſon ſhall wilfully and maliciouſly pull, throw down, or otherwiſe deſtroy any ſtorehouſe or place where corn ſhall be then kept in order to be exported; or ſhall unlawfully enter any ſuch place and carry away any corn, flour, meal or grain, or ſhall throw abroad, or ſpoil the ſame; or ſhall unlawfully enter on board any ſhip, barge or veſſel, and wilfully and maliciouſly take and carry away, caſt or throw out therefrom, or otherwiſe ſpoil or damage, any meal, flour, wheat or other grain therein intended for exportation; every perſon ſo offending, and being thereof convicted, ſhall be adjudged guilty of felony, and ſhall be tranſported for ſeven years; and if ſuch offender ſhall return into this kingdom before the expiration of the ſeven years, he ſhall ſuffer death without benefit of clergy.

Sect. 3. No attainder for any offence made felony by this act ſhall work corruption of blood, loſs of dower or diſinheritance of heirs.

Sect. 4. No perſon puniſhed for any offence by this act ſhall be puniſhed for the ſame offence by any other law.

Sect. 5. The inhabitants of every hundred in *England*, wherein any ſuch offence ſhall be committed, ſhall make ſatisfaction to all perſons, their executors and adminiſtrators, for the damages they ſhall have ſuſtained by any injury done to their properties by any offender againſt this act; the ſum to be recovered not exceeding 100*l.* ſuch damages to be levied by the like methods as are preſcribed in caſe of actions for robberies on the highway, by 27 *Eliz. cap.* 13. and 8 *Geo.* 2. *cap.* 16. except ſo much thereof as relates to giving notice, or making freſh ſuit and hue and cry, or any other matter otherwiſe provided for by this act.

Sect. 6. Provided, that no perſons be enabled to recover damages by this act, unleſs they be themſelves or their ſervants, within two days after damage done, ſhall give notice of ſuch offence to one of the conſtables of the hundred, or to the conſtable, borſholder, headborough or tithingman of the town, hamlet or tithing, in or near which ſuch fact ſhall be committed; and ſhall within ten days after ſuch notice, give in their examination upon oath, or the examination upon oath of their ſervants,

apprehended, to be whipped; and for every other offence he ſhall in like manner be whipped. The conſtable refuſing ſhall be committed by the juſtice, till he conform.

Stat. 15 *Car.* 2. *cap.* 7. *ſect.* 2. When the prices of corn *Wincheſter* meaſure do not exceed the rates following, *viz.* the quarter of wheat 48*s.* of barley or malt 28*s.* of buck-wheat 28*s.* of oats 13*s.* 4*d.* of rye 32*s.* of peaſe or beans 32*s.* it ſhall be lawful for all perſons to tranſport the ſaid corn to any parts beyond ſea as merchandiſe.

Sect. 3. When the prices of the ſaid corns do not exceed the rates abovementioned at the place where they ſhall be imported, there ſhall be paid for cuſtom of every quarter of wheat 5*s.* 4*d.* of rye 4*s.* of barley or malt 2*s.* 8*d.* of buck-wheat 2*s.* of oats 1*s.* 4*d.* and for peaſe or beans 4*s.*

Sect. 4. When the prices do not exceed the ſaid rates, it ſhall be lawful for all perſons (not foreſtalling or ſelling the ſame in the ſame market within three months after the buying) to buy in open market, lay up, and ſell again, ſuch corn aforeſaid, as ſhall have been bought at or under the prices before expreſſed.

Stat. 22 & 23 *Car.* 2. *cap.* 7. If any perſon ſhall, in the night-time, maliciouſly and wilfully burn or cauſe to be burnt, any rick or ſtack of corn, he ſhall be guilty of felony: But to avoid judgment of death, he may make his election to be tranſported for ſeven years. And three juſtices, one whereof to be of the *quorum*, may determine the ſame. See the 9 *Geo.* 1. *cap.* 22. under Black act.

Stat. 22 *Car.* 2. *cap.* 8. *ſect.* 2. If any perſon ſhall ſell corn otherwiſe than by *Wincheſter* meaſure, ſealed and ſtriken by the brim, he ſhall forfeit forty ſhillings on conviction before one juſtice, on the oath of one witneſs, to be levied by the churchwardens and overſeers, or ſome of them, to the uſe of the poor, by diſtreſs and ſale: And in default of diſtreſs to be impriſoned till paid.

Sect. 3. And if any mayor, or other head officer, ſhall knowingly permit the ſame, he ſhall, upon conviction thereof at the county ſeſſions, forfeit five pounds, half to the proſecutor, and half to the poor, by diſtreſs and ſale; and for want of diſtreſs to be impriſoned by warrant of the juſtices till payment be made.

Stat. 22 & 23 *Car.* 2. *cap.* 12. *ſect.* 2. Every perſon who ſhall buy or ſell corn without meaſuring, being thereunto required, or in other manner than is by 22 *Car.* 2. *cap.* 8. directed, and that without ſhaking of the meaſure by the buyer, he ſhall, beſides the penalty of that act, forfeit all the corn ſo bought or ſold, or the value thereof, to the party complaining.

Sect. 3. And on complaint made to a juſtice of the peace, that corn hath been bought, ſold or delivered contrary to this act, the proof ſhall lie upon the defendant, to make it appear by the oath of one witneſs, that he ſold or bought the ſame lawfully; wherein if he ſhall fail, he ſhall forfeit as is ſaid before, to be levied by diſtreſs and ſale; which ſhall by the juſtices be diſtributed, half to the poor and half to the informer.

Stat. 22 *Car.* 2. *cap.* 13. *ſect.* 1. It ſhall be lawful for every perſon, native or foreigner, at any time to tranſport as merchandize all ſorts of corn, although the prices exceed the rates in 15 *Car.* 2. *c.* 7. and when the prices of corn, at the places where the ſame ſhall be imported, exceed not the rates following, there ſhall be paid for cuſtom theſe rates, *viz.* for every quarter of wheat when the ſame ſhall not exceed 53*s.* 4*d.* 16*s.* when the ſame ſhall exceed 53*s.* 4*d.* and not exceed 4*l.* there ſhall be paid 8*s.* for every quarter of rye when the ſame doth not exceed 40*s.* 16*s.* for every quarter of barley, malt or buckwheat, when the ſame doth not exceed 32*s.* 16*s.* for every quarter of oats when the ſame doth not exceed 16*s.* 5*s.* 4*d.* for every quarter of peas and beans when the ſame doth not exceed 40*s.* 16*s.* each quarter to contain eight buſhels, and each buſhel eight gallons.

Sect. 2. When the prices of corn ſhall exceed the rates aforeſaid, there ſhall be paid the duties payable before the making of this act.

Sect. 3. There ſhall be paid for the cuſtom of every hundred weight of *French* or pearl barley, 5*s.*

Continued by 2 W. & M. ſtat. 1. cap. 4. ſect. 3. 1 Ann. ſtat. 1. cap. 13. ſect. 2. *and* 9 Ann. cap. 6. ſect. 2. *and made perpetual by* 3 Geo. 1. c. 7.

Stat. 1 *Jac.* 2. *cap.* 19. *ſect.* 3. The juſtices of peace for the ſeveral counties wherein foreign corn may be imported, are required at their quarter ſeſſions after *Michaelmas* and *Eaſter* yearly, by the oath of two ſubſtantial perſons of the counties, being neither merchants nor factors for importing corn, nor intereſted in the corn imported, and each having a freehold eſtate of 20*l.* or a leaſehold of 50*l.* *per annum*, and by ſuch other ways as to them ſhall ſeem fit, to determine the common market prices of middling *Engliſh* corn of the reſpective ſorts in the act 20 *Car.* 2. *cap.* 13. mentioned; and to certify the ſame, with two ſuch oaths made as aforeſaid in writing annexed, to the chief officer and collector of the cuſtoms reſiding in the ports where corn ſhall be imported, to be hung up in the cuſtom-houſe.

Sect. 4. The cuſtom of foreign corn imported ſhall be paid according to the prices contained in ſuch certificates.

Sect. 5. All that is to be done by the juſtices of peace at their quarter ſeſſions in the counties, ſhall be done in like manner in *London* in *October* and *April* yearly, by the mayor, aldermen and juſtices; and the perſons making ſuch oaths ſhall be no corn-chandler, meal-man, factor, merchant or perſon intereſted in ſuch corn to be imported, but ſhall be ſubſtantial houſe-keepers in *Middleſex* or *Surry*, qualified as aforeſaid.

Continued as 22 Car. 2. cap. 13.

Stat. 11 *Will. & Mar. ſtat.* 1. *cap.* 12. *ſect.* 2. When malt or barley ſhall be at 24*s.* *per* quarter, rye at 32*s.* *per* quarter, and wheat at 48*s.* *per* quarter, or under, in any part of this kingdom, every perſon who ſhall put on board in *Engliſh* ſhipping, the maſter and two thirds of his mariners being their Majeſties ſubjects, any ſorts of the corn aforeſaid, with intent to export the ſame, ſuch perſon ſhall bring a certificate under his hand containing the quantity and quality of corn ſo ſhipped, to the collectors of the cuſtoms; and upon proof of ſuch certificate by one perſon upon oath, and upon bond given of 200*l.* for every hundred tons of corn ſhipped, that the ſaid corn (danger of the ſeas excepted) ſhall be exported beyond ſea, and not again landed in *England*, *Wales*, *Guernſey*, *Jerſey*, or *Berwick*; every merchant ſo ſhipping, *&c.* ſhall receive from the collectors for every quarter of barley or malt 2*s.* 6*d.* for rye 3*s.* 6*d.* for wheat ground or unground 5*s.* without any fee. And upon certificate returned under the common ſeal of the chief magiſtrate of any place beyond ſea, or under the hands and ſeals of two known *Engliſh* merchants upon the place, that ſuch corn was there landed, or upon proof that ſuch corn was taken by enemies, or periſhed upon the ſeas, the bond ſhall be delivered up without fee.

Stat. 1 *Will. & Mar. ſtat.* 1. *cap.* 24. *ſect.* 18. Where malt or barley of *Engliſh* growth ſhall be at 24*s.* the quarter or under, rye at 32*s.* wheat at 48*s.* in *Berwick*; every perſon who ſhall put in *Engliſh* ſhipping, the maſter and two thirds of his mariners being their Majeſties ſubjects, any of the corn aforeſaid from the port of *Berwick*; to export the ſaid corn, and ſhall purſue the methods preſcribed by the 1 *Will. & Mar. cap.* 12. ſhall have the benefit of the ſaid act.

Stat. 11 & 12 *Will* 3. *cap.* 20. *ſect.* 4. The ſubſidy and all duties payable upon exportation of wheat, rye, barley, malt, beans, peaſe and other corn, ground or unground, bread, biſcuit and meal, ſhall ceaſe.

Stat. 12 & 13 *Will.* 3. *cap.* 10. *ſect.* 23. If the collector of the cuſtoms have not ſufficient in his hands to ſatisfy ſuch money as ſhall be due to any exporter of corn by 1 *Will. & Mar. ſtat.* 1. *cap.* 12. ſuch collector ſhall give the perſon demanding ſuch money, without fee, a certificate of what is due to ſuch perſon for the corn exported from ſuch port, certifying to the commiſſioners that he hath not money ſufficient; which certificate

cate being affixed to the *debenture* for the corn, and produced, the commiſſioners are required to cauſe the monies to be paid in three months by the general receiver, out of monies ariſing out of ſuch duties in the port of *London* as are chargeable with the ſame.

Stat. 5 *Ann. cap.* 29. *ſect.* 10. For all oatmeal and grain called beer or bigg, which ſhall be exported from *England*, *Wales*, or *Berwick*, there ſhall be the like *premium* given upon exportation, as is to be given by the articles of union upon exportation of oatmeal and beer from *Scotland*; the merchant bringing a certificate under his hand, containing the quantity of ſuch oatmeal and beer, to the collector of the cuſtoms, and making proof of ſuch certificate by one perſon upon oath, and giving bond in 10*l.* for every ton of oatmeal, and for every forty buſhels of beer, that the ſame ſhall be exported beyond ſea, and not relanded, which *premium* the merchant ſhall receive of ſuch collector; and upon certificate returned under the common ſeal of the chief magiſtrate in any place beyond ſea, or under the hands and ſeals of two known *Engliſh* merchants upon the place, that ſuch oatmeal or beer was there landed, the bond ſhall be delivered up without fee.

Sect. 15. Every perſon exporting malt made of wheat ſhall receive of the collectors of the cuſtoms, *&c.* 5*s.* for every quarter ground or unground.

Stat. 2 *Geo.* 2. *cap.* 18. *ſect.* 3. If the juſtices of peace ſhall neglect to determine the prices of corn at their quarter ſeſſions after *Michaelmas* and *Eaſter* yearly, and to certify the ſame to the chief officer and collector of the cuſtoms, reſiding in the ports where foreign corn may be imported, to be hung up in the cuſtom-houſe as is directed by 1 *Jac.* 2. *cap.* 19. in ſuch caſe the collector of the cuſtoms at the port of importation is impowered to receive the duties of the corn imported, according to the loweſt price of the ſame ſort of corn mentioned in 22 *Car.* 2. *cap.* 13.

Sect. 4. The officers of the cuſtoms ſhall admeaſure all corn whereon there is an allowance payable for exportation; and ſuch admeaſurement ſhall be made by a meaſure containing four *Wincheſter* buſhels; and if ſuch corn ſhall be brought to be ſhipped in ſacks, the officers are to make choice of two of theſe ſacks, out of any number not exceeding twenty, before the ſame ſhall be put on board, and thereby compute the quantity intended to be ſhipped; and according to ſuch computation the allowance ſhall be paid to the exporter, upon his producing a certificate from the officers of the cuſtoms, atteſting the quantity and quality of the corn ſhipped for exportation.

Sect. 5. The like regulations ſhall be extended to the aſcertaining the prices and quantity of beer or bigg, oatmeal and wheat meal intended for exportation. Provided, that nothing in this act ſhall alter the preſent practice of ſhipping corn from the port of *London*; but the ſame may be meaſured by ſworn meters, by whoſe certificate the ſearchers or other officers of the cuſtoms are to certify the quantity of corn ſhipped for exportation, as hath been practiſed.

Stat. 5 *Geo.* 2. *cap.* 12 *ſect.* 1. It ſhall be lawful for the juſtices of peace for the ſeveral counties within *England*, *Wales* and *Berwick*, wherein foreign corn ſhall be imported, at their quarter ſeſſions, to give in charge to the grand jury, to make preſentment of the market prices of middling *Engliſh* corn, of the ſorts mentioned in an act 22 *Car.* 2. *cap.* 13.

Sect. 2. Such preſentment ſhall be certified by the juſtices to his majeſty's chief officers of the cuſtoms in every port where ſuch corn ſhall be imported, and be hung up in the cuſtom-houſe.

Sect. 3. The duty of foreign corn imported, ſhall be paid according to the prices contained in ſuch certificates.

Sect. 4. Nothing in this act ſhall prejudice the authority given by the act 1 *Jac.* 2. *cap.* 19. to the mayor, aldermen and juſtices of peace in the city of *London*.

Sect. 5. No warrant, cocket, *&c.* ſhall be granted for carrying to ſea from any port within *England*, *Wales*, and *Berwick*, to any port of the ſame, any foreign corn after importation thereof; and no perſon ſhall tranſport any foreign corn, or foreign corn mixed with *Engliſh*, under penalty that all ſuch corn that ſhall be tranſported or laden contrary to this act ſhall be forfeited, and every offender ſhall forfeit 20*s.* for every buſhel of ſuch corn, and the ſhip upon which ſuch corn ſhall be laden ſhall be forfeited; one moiety of which forfeitures ſhall be to the King, and the other moiety to them who will ſue for the ſame; and the maſter and mariners of ſuch ſhip wherein ſuch offence ſhall be committed, knowing ſuch offence, and aſſiſting thereunto, ſhall be impriſoned three months.

Stat. 11 *Geo.* 2. *cap.* 22. *ſect.* 1. If any perſons ſhall wilfully and maliciouſly beat, wound, or uſe any other violence to any perſon, with intent to deter or hinder him from buying of corn: or ſhall unlawfully ſtop or ſeize upon any waggon, cart or other carriage, or horſe loaded with wheat, flour, meal, malt or other grain, in the way to or from any city, market-town or ſea-port, and wilfully and maliciouſly break, cut, ſeparate or deſtroy the ſame, or any part thereof, or the harneſs of the horſes; or ſhall unlawfully take off, drive away, kill or wound any of ſuch horſes, or unlawfully beat or wound the drivers in order to ſtop the ſame; or ſhall ſcatter ſuch wheat, flour, meal, malt or other grain, or ſhall take or carry away, ſpoil or damage the ſame, or any part thereof; every ſuch perſon being thereof convicted before any two juſtices of peace ſhall be ſent to the common gaol or houſe of correction, to be kept to hard labour for any time not exceeding three months, nor leſs than one month; and ſhall by the juſtices be ordered to be once publickly whipped by the keeper of ſuch gaol or houſe of correction, on the firſt convenient market-day, at the market-place, between the hours of eleven and two.

Sect. 2. If any perſon ſo convicted ſhall commit any of the offences aforeſaid a ſecond time, or if any perſon ſhall wilfully and maliciouſly pull, throw down, or otherwiſe deſtroy any ſtorehouſe or place where corn ſhall be then kept in order to be exported; or ſhall unlawfully enter any ſuch place and carry away any corn, flour, meal or grain, or ſhall throw abroad, or ſpoil the ſame; or ſhall unlawfully enter on board any ſhip, barge or veſſel, and wilfully and maliciouſly take and carry away, caſt or throw out therefrom, or otherwiſe ſpoil or damage, any meal, flour, wheat or other grain therein intended for exportation; every perſon ſo offending, and being thereof convicted, ſhall be adjudged guilty of felony, and ſhall be tranſported for ſeven years; and if ſuch offender ſhall return into this kingdom before the expiration of the ſeven years, he ſhall ſuffer death without benefit of clergy.

Sect. 3. No attainder for any offence made felony by this act ſhall work corruption of blood, loſs of dower or diſinheritance of heirs.

Sect. 4. No perſon puniſhed for any offence by this act ſhall be puniſhed for the ſame offence by any other law.

Sect. 5. The inhabitants of every hundred in *England*, wherein any ſuch offence ſhall be committed, ſhall make ſatisfaction to all perſons, their executors and adminiſtrators, for the damages they ſhall have ſuſtained by any injury done to their properties by any offender againſt this act; the ſum to be recovered not exceeding 100*l.* ſuch damages to be levied by the like methods as are preſcribed in caſe of actions for robberies on the highway, by 27 *Eliz. cap.* 13. and 8 *Geo.* 2. *cap.* 16. except ſo much thereof as relates to giving notice, or making freſh ſuit and hue and cry, or any other matter otherwiſe provided for by this act.

Sect. 6. Provided, that no perſons be enabled to recover damages by this act, unleſs they be themſelves or their ſervants, within two days after damage done, ſhall give notice of ſuch offence to one of the conſtables of the hundred, or to the conſtable, borſholder, headborough or tithingman of the town, hamlet or tithing, in or near which ſuch fact ſhall be committed; and ſhall within ten days after ſuch notice, give in their examination upon oath, or the examination upon oath of their ſervants,

vants, preſent at the time of the fact being committed, or having the care of ſuch their properties to which ſuch damage ſhall be done, before any juſtice of peace where ſuch fact ſhall be committed, whether they know the perſons that committed ſuch fact or any of them; and if upon ſuch examination it be confeſſed that they do know the perſons, or any of them, they ſhall be bound by recognizance to proſecute ſuch offenders.

Sect. 7. Where any offence ſhall be committed againſt this act, and any one of the offenders ſhall be apprehended and convicted within twelve months after the offence, no hundred ſhall be ſubject or liable to make ſatisfaction.

Sect. 8. No perſon ſhall be enabled hereby to ſue or bring any action againſt any hundred till after the expiration of one year, nor unleſs the parties ſuſtaining ſuch damage ſhall commence their action within two years after the offence.

Stat. 24 *Geo.* 2. *cap.* 56. *ſect.* 1. The proper officers of the cuſtoms ſhall allow the ſame bounty and no more, upon the exportation of 224lb. weight of wheat meal, or other ground corn whereon there is a bounty, as is allowed upon the exportation of four buſhels of wheat or other corn unground, and ſo in proportion for any greater or leſſer quantity: And in caſe ſuch ground corn be brought to be ſhipt off in ſacks, the proper officers may make choice of and weigh two ſacks out of any number not exceeding twenty ſacks, and ſo in proportion for any greater quantity, before or after the ſame be put on board for exportation, and thereby compute the weight of the ground corn ſo ſhipt for exportation; and the bounty-money upon ſuch wheat meal or other ground corn, ſhall be paid to the exporter for ſo much upon his producing a certificate from the proper officers of the cuſtoms, atteſting the quantity, quality and weight thereof, according to the ſaid computation.

Stat. 26 *Geo.* 2. *cap.* 15. *ſect.* 1. If any debenture for the bounty on corn exported, payable by the general receiver of the cuſtoms, according to 12 & 13 *Will.* 3. *cap.* 10. remain unſatisfied more than ſix months next following the day when produced to the commiſſioners of the cuſtoms at *London*, according to the directions of the ſaid act; intereſt after the rate of three *per cent. per ann.* ſhall be allowed to the proprietor, his executors, adminiſtrators or aſſigns, to be computed from the end of the ſaid ſix months, until the money due on ſuch debenture with ſuch intereſt be paid, or until money ſufficient be in the hands of the general receiver of the cuſtoms for that purpoſe, and notice be given thereof.

Sect. 2. When money ſufficient ſhall be in the hands of the ſaid general receiver of the cuſtoms for payment of ſuch debentures, as after the expiration of the ſaid ſix months remain unſatisfied, the ſaid general receiver ſhall give notice in writing to be affixed on three or more doors of ſome publick places in the cuſtomhouſe *London*, and to be advertiſed in the *London Gazette*, that on a certain day to be limited in the ſaid notice, and on the four days next following ſuch day (ſo as ſix days intervene between the day of ſuch notice and the day ſo limitted, and ſo as *Sundays* and holydays be not included in ſuch four days) he ſhall be ready to pay the principal and intereſt due on ſuch debentures; after the expiration of which five days, if payment be not demanded, all intereſt on ſuch debentures ſhall ceaſe.

Sect. 3. The principal due on ſuch debentures, with the intereſt due before the expiration of the time limited in the ſaid notice, ſhall at any time afterwards upon demand be paid to the proprietor, his executors, adminiſtrators or aſſigns.

Sect. 4. If at any time after the day prefixed by order of the commiſſioners of the cuſtoms, for the payment of ſuch debentures, and before the end of ſix months next following the day on which the ſame are produced to them, the general receiver of the cuſtoms have money in his hands ſufficient to ſatisfy the ſame; and the like notice be given that he is ready to make payment; and no demand be made within the time limited in ſuch notice, then no intereſt ſhall be allowed on ſuch debentures.

Sect. 5. All debentures for corn exported payable by the general receiver of the cuſtoms, according to the ſaid act, with the intereſt payable by this act, ſhall be paid in courſe, reſpect being had to the times when ſuch debentures have been produced to the commiſſioners of the cuſtoms, without any other preference.

Sect. 6. When any certificate under the hand of the collector of the cuſtoms of any port, affixed to any debenture for corn exported, certifying that he hath not monies in his hands ſufficient to pay what is due for corn ſo exported, ſhall be produced to the commiſſioners, they ſhall immediately cauſe an indorſement to be made on the ſaid debenture, of the day when the ſame was ſo produced; and ſhall, as ſoon as may be, ſign their order to the ſaid general receiver for payment thereof, and of ſuch intereſt as grows due thereon by this act.

Sect. 7. The ſaid general receiver of the cuſtoms, when he makes payment of the principal due on any ſuch debenture, is to pay alſo without fee the intereſt due thereon by this act, out of ſuch duties as are chargeable with the payment of any money for the exportation of corn.

Sect. 8. Every perſon to whom any money ſhall be payable by virtue of any ſuch debenture, his executors, adminiſtrators or aſſigns, by aſſignment indorſed upon ſuch debenture, may transfer his right therein to any other, and ſuch aſſignee may in like manner aſſign again.

For the penalty of adulterating corn or flour, ſee 31 *Geo.* 2. *c.* 29. *ſect.* 22. (explained and amended by 3 *Geo.* 3. *c.* 11.) under title Bread. See Foreſtalling.

Cornage, (*Cornagium*, from the Lat. *cornu*,) And in our Common law ſignifies a kind of *grand ſerjeanty*: The ſervice of which tenure is to blow a horn, when any invaſion of the Northren enemy is perceived. And by this many men hold their land Northward, about the Wall commonly called The Picts Wall. *Cambd. Brit. pa.* 609. and *Littl. fol.* 65. But by ſtat. 12 *Car.* 2. *c.* 24. all tenures are turned into fee and common ſocage. *Co. on Littl. fol.* 107. ſaith, that in old books it is called *horn-geld*; *ſed quære.* See Horn-geld. 2 *Inſt. f.* 9. This old ſervice of *horn-blowing* was afterwards paid in money, and the ſheriff accounted for it under the title of *Cornagium. Memorand. quod cum vicecomes* Cambriæ *ſederet compotum ad Scaccarium apud Salop, idem vicecomes fecit tallagium ſub nomine ſuo lx. lib. tam. de* cornagio, *quam de aliis debitis.* Mem. in Scacc. 6 Ed. 1.

Cornare, To blow in the horn. *Faciat* cornare *ne videatur furtive facere.* Mat. Pariſ. p. 181.

Cornavi, *Warwick*, *Worceſter*, *Staffordſhire*, and *Cheſhire.*

Corner-tile. See Gutter-tile.

Cornu, A drinking-horn. *Et* cornu *menſæ meæ ut ſenes monaſterii bibant inde in feſtis ſanctorum.* Du Freſne. Sometimes it ſignifies an ink-horn. *Ipſo Domino Raduſfo teſtante qui tenuit* cornu *dum ſcriptor notavit, &c.* Mon. 1 tom. pag. 559.

Cornwall. Power to make leaſes of the dutchy of *Cornwall*, 21 *Jac.* 1. *c.* 29. 1 *Car.* 1 *c.* 2. 13 *Car.* 2. *ſt.* 2. *c.* 4. 22 *Car.* 2. *c.* 7. 25 *Car.* 2. *c.* 3. 1 *Jac.* 2. *c.* 9. 5 *Will. & Ma. c.* 18. 12 & 13 *Will.* 3. *c.* 13. 1 *Ann. ſt.* 1. *c.* 7. *ſect.* 8. 6 *Ann. c.* 25. 12 *Ann. ſt.* 2. *c.* 22. 24 *Geo.* 2. *c.* 50. 1 *Geo.* 3. *c.* 11. Aſſizes for *Cornwall* not confined to *Launceſton*, 1 *Geo.* 1. *c.* 45. Leaſes of Princes of *Wales* of land in *Cornwall* where good, 10 *Geo.* 2. *c.* 29. *ſect.* 9, 10, 11.

Stat. 33 *Geo.* 2. *c.* 10. *ſect.* 1. Whereas his Majeſty now ſtands ſeiſed of the dutchy of *Cornwall*; for obviating doubts relating to his Majeſty's granting leaſes, and making copies of offices, lands, and hereditaments, parcel of his ſaid dutchy, or thereunto annexed, Be it enacted, That all leaſes or grants, made or to be made by copy of court-roll, according to the cuſtom of the reſpective manors of the ſaid dutchy, or thereunto annexed, and all leaſes and grants made or to be made within ſeven years next enſuing, by letters patents or indentures under the great ſeal or ſeal of the Exchequer, or by copy of court-roll, according to the cuſtom of the reſpective manors, of any offices, meſſuages, parks, lands, tenements or hereditaments (other than honours, lordſhips or manors) parcel of the poſſeſſions of the ſaid dutchy or annexed to the ſame, ſhall be good againſt the King, his heirs and ſucceſſors,

ceſſors, and againſt all other perſons that ſhall hereafter inherit or enjoy the ſaid dutchy, by force of any act of parliament or other limitation.

Sect. 2. Provided that every ſuch leaſe or grant be not for more than one, two or three lives, or for one and thirty years or under, or for ſome term of years determinable upon one, two or three lives; and if ſuch leaſes or grants be made in reverſion, that then the ſame, together with the eſtates in poſſeſſion, do not exceed three lives, or the term of one and thirty years, and be not diſpuniſhable of waſte; and ſo as upon every ſuch leaſe or grant be reſerved the uſual rent or more, or ſuch rent as hath been reſerved for the ſame hereditaments, for the greater part of twenty years next before the making the ſaid leaſes; and where no ſuch rent hath been reſerved, that then upon every ſuch leaſe there be reſerved a reaſonable rent, not under the twentieth part of the clear yearly value; and all leaſes and grants otherwiſe ſhall be void.

Sect. 3. All covenants, conditions, and other agreements in every leaſe, grant, or copy of court-roll made as aforeſaid, ſhall be good as well for and againſt them to whom the reverſions of the ſame hereditaments ſhall come, as for and againſt them to whom the intereſt of the ſaid leaſes, grants or copies ſhall come, as if the King at the time of making ſuch covenants, &c. were ſeiſed of an abſolute eſtate in fee ſimple.

Sect. 4. Saving to all perſons (other than the King, and his heirs and ſucceſſors; and the Dukes of *Cornwall* and their heirs; and all perſons that ſhall hereafter have the ſaid dukedom of *Cornwall* by force of any act of parliament or other limitation) all rights.

Corody, *(Corodium)* ſignifies in the Common law, a ſum of money, or allowance of meat, drink and cloathing, due to the King from an abbey, or other houſe of religion, whereof he is the founder, towards the reaſonable ſuſtenance of ſuch a one of his ſervants, being put to his penſion, as he thinketh good to beſtow it on. And the difference between a *corody* and a *penſion* ſeemeth to be, that a *corody* is allowed towards the maintenance of any of the King's ſervants that liveth in the abbey; a *penſion* is given to one of the King's chaplains, for his better maintenance in the King's ſervice, until he may be better provided of a benefice. Of both theſe, read *F. N. B.* *f.* 230, 231, 233. who there ſetteth down all the *corodies* and *penſions* certain, that any abbey, when they ſtood, was bound to perform unto the King. There is mention alſo of a *corody* in *Staundf. Prærog.* 44. And this appears an ancient law; for in *Weſt.* 2. *cap.* 25. it was ordained, that an aſſiſe ſhall lie for a *corody:* It is alſo apparent in the ſtatute 34 & 35 *H.* 8. *cap.* 26. that *corodies* belonged ſometimes to biſhops from monaſteries. And by the *New Terms of the law*, that *corody* may be due to a common perſon, by grant from one to another, or of common right, to him that is a founder of a religious houſe, not holden in *frank-almoine*, for that tenure was diſcharged of all *corodies* in itſelf: By which book it appeareth alſo, that a *corody* is either certain or uncertain, and that it may be for life, for years, in tail, or in fee. See *Terms de la Ley.*

Corody ſeems to be ancient in our laws; for in *Weſt.* 2. *c.* 5. it is ordained, that an aſſiſe ſhall lie for a corody, It is alſo apparent by the ſtatute 34 & 35 *Hen.* 8. *c.* 26. that corodies belonged ſometimes to biſhops and noblemen from monaſteries. See 2 *Inſt.* 630.

SCiant—*quod nos* Radulphus *abbas monaſterii St.* Johannis de Haghmon & *ejuſdem loci conventus ad inſtantiam & ſpeciale rogatum excellentiſſimi & reverendiſſimi domini noſtri* Thomæ *comitis* Arundeliæ & Surreiæ, *dedimus* —Roberto Lee *unum* corodium *pro termino vitæ ſuæ, eſſendo cum abbate monaſterii prædicti* armigerum, *cum uno* garcione & *doubus equis*; *capiendo ibidem eſculenta & poculenta ſufficientia pro ſeipſo, ſicut armigeri abbatis, qui pro tempore fuerint, capiunt & percipiunt*; & *pro garcione ſuo, ſicut garciones abbatis & armigerorum ſuorum capiunt & percipiunt*; *capiendo etiam pro equis ſuis fœnum & præbendam.* —*Et quod idem* Robertus *habeat veſturam armigerorum*, &c. Dat. 3 H. 5. Mon. Angl. 2 part. f. 933. a.

Corodio habendo, Is a writ, whereby to exact a *corody* of an abbey or religious houſe. See **Corody**; ſee alſo *Reg. Orig. f.* 264.

Corona mala, or *Mala corona.* The clergy were formerly ſo called, who abuſed their character. Radulphus *cognomento clericus quia copioſe literatus fuit*, & mala corona *quia militaribus exercitiis inſerviens.* Willus Gemel. lib. 7. c. 10.

Corona clericalis. See **Toſk.**

Coronare filios. The old *villains*, or thoſe who held in villenage, were forbid *coronare filios*, *i. e.* to make their ſons prieſts, to let them be ordained; becauſe ordination changeth their condition, and gave them liberty to the prejudice of the lord, who could before claim them as his natives or born ſervants.——*Homo coronatus*, was one who received the firſt *tonſure*, as preparatory to ſuperior orders. *Injuſtum mihi videbatur illa tam ſancta loca in quibus nutritus*, & coronatus *fueram, atque ad ultimum ordinatus, relinquere.* Aſſer. de rebus geſtis Alfredi. p. 14. The *tonſure* was in form of a *corona*, or crown of thorns. ——Wilfridus——*Tonſuræ formulam in modum* coronæ *ſpineæ*, *caput* Chriſti *cingentis*, *ab archiepiſcopo ſuſcepit.* Eddius in vita Wilfrid. c. 6.

Coronatore eligendo, Is a writ, which after the death or diſcharge of any *coroner*, is directed to the ſheriff out of the *Chancery*, for the choice of a new *coroner*, and to certify into the *Chancery* both the election and name of the party elected, and to give him his oath. See *Weſt.* 2. *cap.* 10. and *F. N. B. fol.* 163. and *Reg. Orig. fol.* 177.

Coroner, *(Coronator, a corona)* Is an ancient officer of this land, (for mention is made of his office in King *Athelſtan*'s charter to *Beverley*, *an.* 925).) and is ſo called, becauſe he deals wholly for the King and Crown. There are four of them commonly in every county, in ſome fewer, and in ſome counties but one: They are choſen by the freeholders of the ſame by the King's writ, and not made by letters patent. *Crompt. Juriſd. f.* 126. This officer, by the ſtatute of *Weſtm. c.* 10. ought to be a ſufficient perſon, that is, the moſt wiſe and diſcreet knight that beſt would and might attend upon ſuch an office. There is a writ in the *Regiſt. niſi ſit miles*, *f.* 177. *b.* whereby it appears, it was ſufficient cauſe to remove a *coroner* choſen, if he were not a knight, and had not an hundred ſhillings rent of freehold. The Lord Chief Juſtice of the *King's Bench* is the *ſovereign coroner* of the whole realm in perſon, *i. e.* whereſoever he is. *Lib. Aſſiſarum*, *f.* 49. *Coke*, *lib.* 4. *caſe of Wardens*, &c. *of Sadlers*, *f.* 57. *b.* The office of a *coroner* eſpecially concerns the pleas of the crown: but what anciently belonged to him, read at large in *Bracton*, *lib.* 3. *tract.* 2. *cap.* 5, 6, 7 & 8. *Britton*, *cap.* 1. *Fleta*, *lib.* 1 *cap.* 18. and *Horn's Mirror*, *lib.* 1. *cap. Del Office del Coroners.* But more aptly for the preſent times, *Staundf. Pl. Cor. lib.* 1. *cap.* 51.

There are alſo certain ſpecial *coroners* within divers liberties, as well as thoſe ordinary officers in every county; as *the coroner of the verge*, which is a certain compaſs about the King's court, whom *Crompt.* in his *Juriſd. fol.* 102. calls *the coroner of the King's houſe*; of whoſe authority ſee *Coke's Rep. lib.* 4. *f.* 46. By certain charters belonging to ſome colleges and corporations, they are licenſed to appoint their *coroner* within their own precincts. Of this office ſee alſo 4 *Inſt. fol.* 271. *Smith de Rep. Angl. lib.* 2. *cap.* 21. and *Lamb. Eiren. cap.* 3. *pag.* 380. And of the coroner's office in *Scotland* read *Skene*, *verbo Iter.*

The coroner, tho' *in original later than the ſheriff*, was nevertheleſs very ancient; he was of the two the greater ſervant or officer. His work was to inquire upon view of manſlaughter, and by indictment of all felonies as done *contra coronam*, which formerly were only *contra pacem*, and triable only by appeal; as alſo he was to inquire of all eſcheats and forfeitures, and them to ſeize; he was alſo to receive appeals of felonies, and to keep the rolls of the Crown pleas within the county. It is evident he was an officer in *Alfred*'s time; for that King put a judge to death for ſentencing one to ſuffer death upon the coroner's record, without allowing the delinquent liberty of traverſe. This officer was made alſo by election of the freeholders in their county-court, as the ſheriff was,

and

and from amongſt the men of chiefeſt rank in the county, and ſworn in their preſence, but the King's writ lead the work. *Bacon of Government* 66.

His *name is derived a corona*, and ſo called becauſe he is an officer of the crown, and hath conuſance of ſome pleas which are called *placita coronæ*. 2 *Inſt.* 31.

Coroners in every county, and ſheriffs were ordain'd to keep the peace, when the earls diſmiſſed themſelves of the cuſtody of the counties and bailiffs in place of hundreds. 2 *Inſt.* 31. cites *The Mirror*, *c.* 1 *ſ.* 3.

They are of ſo great antiquity, that their *commencement* is not known; *per Dodderidge* J. 3 *Bulſt.* 176. *Paſch.* 14 *Jac.*

1. *Who may be a coroner, how elected, and in what places he hath juriſdiction.*

2. *Of his duty and authority in taking inquiſitions; and of traverſing and quaſhing ſuch inquiſitions.*

3. *His power and duty in returning writs, and in other matters.*

4. *How puniſhed for miſdemeanors; and how diſcharged or removed.*

5. *Of the fees that he may lawfully take.*

1 *Who may be a coroner, how elected, and in what places he hath juriſdiction.*

By ſtat. *Weſtm.* 1. *c.* 10. made 3 *Ed.* 1. it is enacted, "That through all ſhires ſufficient men ſhall be choſen to be coroners, of the moſt loyal and wiſe knights, which know, will, and may beſt attend upon ſuch offices, and which lawfully ſhall attach and preſent pleas of the crown."

In ancient time none under this degree were choſen. 2 *Inſt.* 32, 176. The ſtatute of *Merton*, made before this act, ſuppoſes them to have been knights. 23 *Aſſ. pl.* 7.—And in the writ *De coronatore exonerando*, his not being a knight is mentioned as a ſufficient cauſe for the diſcharge of a coroner. *Regiſter* 177. *F. N. B.* 164. 4 *Inſt.* 271. But as the chief intent of this ſtatute was to prevent the chooſing of perſons of mean ability, it ſeems the deſign of it is ſufficiently anſwered, by chooſing men of ſubſtance and credit; and as the conſtant uſage for ſeveral ages paſt has been accordingly, it ſeems to be no objection at this day, that the perſon choſen is not a knight. 2 *Leon.* 160. 2 *Hawk. P. C.* 42, 43.

By ſtat. 14 *Ed.* 3. *cap.* 10. it is enacted, That no coroner be choſen unleſs he have land in fee ſufficient in the ſame county, whereof he may anſwer to all manner of people.

By ſtat. 28 *Ed.* 3. *cap.* 6. it is enacted, "That all coroners of the counties ſhall be choſen in the full counties, by the commons of the ſame counties, of the moſt meet and lawful people that ſhall be found in the ſame counties, to execute the ſaid office; ſaved always to the King and other lords, who ought to make ſuch coroners, their ſeignories and franchiſes."

By the commons] But none but freeholders have votes. *F. N. B.* 164. *S. P. C.* 19. 2 *Hawk. P C.* 43. for none but ſuch are ſuitors to the county court. 22 *Inſt.* 99. 2 *Rol. Abr.* 121.

Saved to the King, &c. their franchiſes] Such franchiſe may be claimed by the King by preſcription; but it is a privilege of ſo high a nature, that no one can well intitle to it otherwiſe than by grant from the crown. *Co. Lit.* 144. *a.* 2 *Hawk. P. C.* 44.

Although they are choſen by the county, yet it muſt be purſuant to the King's writ iſſuing out of and returnable into Chancery; but as their authority proceeds from the election, it does not determine by the demiſe of the King: Hence alſo, if they prove inſufficient to anſwer the fines and duties incumbent on them, the county, as their ſuperior, ſhall anſwer for them. 22 *Hawk. P. C.* 43. 2 *Inſt.* 174.

The writ for the election of a coroner firſt recites the death or diſcharge of one or more former coroners, and then commands the ſheriff to cauſe one other, or more, as the caſe is, to be choſen in a full county-court, by the aſſent of the county, according to the form of the ſtatute in that caſe made and provided; who having taken his oath (which is adminiſtred to him by the ſheriff) in the uſual manner, may do all things which belong to the office of a coroner, *&c.* and then it concludes with commanding the ſheriff to certify to the court the name of the perſon choſen. 2 *Hawk. P. C.* 43.

A *common merchant* being choſen a coroner was removed, for that he was *communis mercator*. 2 *Inſt.* 32.

A coroner hath no juriſdiction of offences committed on the open ſeas, between the high and low water mark when the tide is in, but he hath an authority over offences committed in ſuch places when the tide is out. 3 *Inſt.* 113. 5 *Co.* 107. 2 *Hawk. P. C. c.* 45.

By ſome it is laid down as a rule, that he may inquire of a felony committed on the arms of the ſea where a man may ſee from the one ſide to the other. *Owen* 124. *Moor* 892. *H. P. C.* 171. *S. P. C.* 51. And by others his power is confined to ſuch parts of the ſea, where a man ſtanding on the one ſide, may ſee what is done on the other. *Fitz. Coron.* 399. 4 *Inſt.* 140. 2 *Rol. Abr.* 169.

At Common law, the coroner or the county could not intermeddle with offences done within the verge of the King's court; nor the coroner of the hoſtel or King's houſe, with thoſe committed in the county without the verge; which proved inconvenient, by reaſon of the removal of the King's court before an inqueſt could be taken. 2 *Inſt.* 550. 2 *Hawk. P. C. c.* 45. And therefore by ſtatute of *Articuli ſuper chartas*, *cap.* 3. It is ordained that from thenceforth in caſes of the death of men, whereof the coroner's office is to make view and inqueſt, it ſhall be commanded to the coroner of the county, that he, with the coroner of the King's houſe, ſhall do as belongeth to his office, and inroll it, *&c.*

If an indictment, taken before the coroner of the county, and the coroner of the King's houſe, does not appear, on the face of it, to have been of an offence within the verge, it is ſufficient; for it ſhall not be ſaid to be good, as taken before the coroner of the county; and void as taken before the other: for it was taken intirely between them both, and perhaps the coroner of the houſe was the principal actor, and the jury moſtly ſwayed by his directions. 4 *Co.* 46. 2 *Inſt.* 550. 2 *Hawk. P. C. c.* 45.

If the ſame perſon be coroner of the county, and alſo of the King's houſe, an indictment of death within the verge, taken before him as coroner both of the county and of the King's houſe, is good. 4 *Co.* 46. 3 *Inſt.* 134. 2 *Leon* 160.

By ſtat. 33 *Hen.* 8. *cap.* 12. it is enacted, "That all inquiſitions upon the view of perſons ſlain within any of the King's palaces or houſes, or any other houſe or houſes, at ſuch time as his Majeſty ſhall appear to be there demurrant or abiding in his royal perſon, ſhall be taken by the coroner for the time being of the King's houſhold, without any adjoining or aſſiſting of another coroner of any ſhire within this realm, by the oath of twelve or more of the yeomen, officers of the King's houſhold, returned by the two clerks controllers, the clerks of the check, and the clerks marſhals, or one of them for the time being of the ſaid houſhold; to whom the ſaid coroner of the ſame houſhold ſhall direct his precept, which coroner ſhall be from time to time appointed by the lord great maſter, or lord ſteward for the time being; and that the ſaid coroner ſhall certify under his ſeal, and the ſeals of ſuch perſons as ſhall be ſworn before him, all ſuch inquiſitionsbefore the ſaid lord maſter, or lord ſteward."

2. *Of his duty and authority in taking inquiſitions; and of traverſing and quaſhing ſuch inquiſitions.*

No coroners ſhall hold pleas of our crown. *Mag. Chart. c.* 17.

Before this ſtatute, the coroner had the ſame authority he now hath, in caſe any man come to a violent or untimely death, *ſuper viſum corporis*, *&c.* abjurations and out-

outlawries, &c. appeals of death by bill, &c. This authority of the coroner, *viz.* the coroner ſolely to take an indictment *ſuper viſum corporis*, and to take an appeal, and to enter the appeal, and the court remains to this day; but he can proceed no further either upon the indictment or appeal, but to deliver them over to the juſtices; and this is ſaved to them by the ſtatute of *W.* 1. *cap.* 10. And this appears by all our old books, book-caſes, and continual experience. 2 *Inſt.* 32. *Ibid.* 176. *S. P.*

By ſtat. 4 *Ed.* 1. commonly called *De officio coronatoris*, it is enacted, "That the coroner, upon information, ſhall go to the places where any be ſlain, or ſuddenly dead, or wounded, and ſhall forthwith command four of the next towns, or five or ſix to appear before him in ſuch a place; and when they are come hither, the coroner upon the oath of them, ſhall inquire in this manner, that is to wit, if they know where the perſon was ſlain, whether it were in any houſe, field, bed, tavern, or company, and who were there; likewiſe it is to be inquired who were culpable, either of the act, and who were preſent, either men or women, and of what age ſoever they be (if they can ſpeak, or have any diſcretion) and how many ſoever be found culpable by inquiſition, in any the manners aforeſaid, they ſhall be taken and delivered to the ſheriff, and ſhall be committed to the gaol; and ſuch as be found and be not culpable, ſhall be attached until the coming of the juſtices, and their names ſhall be written in the coroner's rolls: If it fortune any ſuch man to be ſlain, which is found in the fields, or in the woods; firſt, it is to be inquired, whether he were ſlain in the ſame place or not; and if he were brought and laid there, they ſhall do as much as they can to follow their ſteps that brought the body thither, whether he were brought upon a horſe or in a cart; it ſhall be inquired alſo, if the dead perſon were known, or elſe a ſtranger, and where he lay the night before; and if any be found culpable of the murder, the coroner ſhall immediately go into his houſe, and ſhall inquire what goods he hath, and what corn he hath in his grange; and if he be a freeman, they ſhall inquire how much land he hath, and what it is worth yearly; and further, what corn he hath upon the ground; and when they have thus inquired upon every thing, they ſhall cauſe all the land, corn and goods to be valued in like manner, as if they ſhould be ſold incontinently; and thereupon they ſhall be delivered to the whole townſhip, which ſhall be anſwerable before the juſtices for all; and likewiſe of his freehold, how much it is worth yearly, over and above the ſervice due to the lord of the fee, and the land ſhall remain in the King's hands until the lords of the fee have made fine for it; and immediately upon theſe things being inquired, the bodies of ſuch perſons being dead or ſlain, ſhall be buried; in like manner, it is to be inquired of them that be drowned or ſuddenly dead, and after ſuch bodies are to be ſeen, whether they were ſo drowned or ſlain, or ſtrangled, by the ſign of a cord tied ſtrait about their necks, or about any of their members, or upon any other hurt found upon their bodies; whereupon they ſhall proceed in the form aforeſaid; and if they were not ſlain, then ought the coroner to attach the finders, and all other in company.

"Alſo all wounds ought to be viewed, the length, breadth and deepneſs, and with what weapons, and in what part of the body the wound or hurt is, and how many be culpable, and how many wounds there be, and who gave the wound; all which things muſt be inrolled in the roll of the coroners; alſo horſes, boats, carts, &c. whereby any are ſlain, that properly are called deodands, ſhall be valued and delivered unto the towns, as as before is ſaid."

In the conſtruction of this ſtatute, the following points ſeem to be agreed upon;

That the ſtatute being wholly directory, and in affirmance of the Common law, the coroner is not thereby reſtrained from any branch of his power, nor excuſed from any part of his duty not mentioned in it, which was incident to his office before; and therefore though the ſtatute mentions only inquiries of the death of perſons ſlain, drowned or ſuddenly dead, yet the coroner ought alſo to inquire of the death of thoſe who die in priſon. 2 *Hawk. P. C.* 47 *Fitz. Coron.* 421. 3 *Inſt.* 52, 91. *Bro. Coron* 168. *S. P. C.* 51.

An inquiſition of death, by the oaths of lawful men of the county, is ſufficient, without ſaying that they were of the next towns; ſo that it appear at what place, and by what jurors, by name, it was taken, and that ſuch jurors were ſworn. 2 *Hawk. P. C.* 47.

It is clearly agreed, that the inqueſt ſhall be taken on the view of the dead body, although the ſtatute be ſilent in this matter; and that an inqueſt otherwiſe taken by the coroner, is void. 2 *Hawk. P. C.* 48.

If a dead body, whereon an inqueſt ought to be taken, be interred, or ſuffered to putrify, before the coroner hath viewed it, the gaoler or townſhip ſhall be amerced. 2 *Hawk. P. C.* 494.

Alſo it hath been reſolved, that a coroner may lawfully within convenient time, as the ſpace of fourteen days after the death, take up a dead body out of the grave, in order to view it, not only for the taking of an inqueſt, where none hath been taken before, but alſo for the taking of a good one, where any inſufficient one hath been taken before. 2 *Hawk. P. C.* 48.

It is not neceſſary that the inquiſition be taken in the very ſame place where the body was viewed; and it hath been reſolved, that an inquiſition taken at *D.* on the view of the body lying dead at *L.* may be good. 2 *Hawk. P. C.* 48.

A coroner cannot inquire of any acceſſories after the fact; and therefore it hath been reſolved, that an indictment of *J. S.* before a coroner, for having received and comforted one who had been guilty of a murder, is void. —But he may make inquiry of the acceſſories before the fact; and alſo may inquire whether any ſo guilty have fled for the ſame; for which they forfeit all their goods and chattels. 2 *Hawk. P. C.* 48.

A coroner may, and ought to inquire of all the circumſtances of the party's death, and alſo of all things which occaſioned it; and therefore it is ſaid, that if it be found by his inqueſt, that the perſon deceaſed was killed by a fall from a bridge into a river, and that the bridge was out of repair, by the default of the inhabitants of ſuch a town, and that thoſe inhabitants are bound to repair it, the townſhip ſhall be amerced. 2 *Hawk. P. C.* 48.

The law gives ſuch high credit to an inquiſition of death, found before a coroner, that anciently the judges would not receive a verdict, acquitting a perſon of the death of a man found againſt him by the coroner's inqueſt, unleſs the jury finding ſuch acquittal, had alſo found what other perſon did the fact, or by what other means the party came to his death; becauſe it appeared by the coroner's view, on record, that a perſon was killed: But it is agreed, that the judges cannot compel a jury to make ſuch farther inquiry on an acquittal of a defendant from any other indictment, becauſe it doth not in ſuch manner appear of record by any ſuch inquiſition that a perſon is dead: And it ſeems hard to reconcile the ſaid practice of compelling a jury to find ſuch farther matter with reaſon in any caſe, unleſs it appear in the courſe of the evidence by what other means not mentioned in the indictment, the party loſt his life; for it ſeems hard, that a jury ſhould be in any caſe compelled to find a matter upon their oaths, which they have no evidence to ſupport; and therefore if it no way appear to them, by what other means the death in queſtion was occaſioned, it ſeems difficult to maintain that it ſhall not be ſufficient for them to declare ſo to the court. 2 *Hawk. P. C.* 49, 50.

Alſo it hath been formerly held, that if a perſon were ſlain, and upon the coroner's inqueſt *ſuper viſum corporis*, it were found that *J. S.* fled, though *J. S.* were afterwards acquitted both of the felony and flight, yet he forfeited his goods; for the coroner's inqueſt is ſo ſolemn, that it is not traverſable; alſo when the goods are once lawfully veſted in the King by that inqueſt, the property of them cannot be diveſted. But this opinion is harſh and unreaſo-

reaſonable, that a man ſhall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inqueſt taken in his abſence, without either hearing him, or giving him an opportunity of defending himſelf. 2 *Hawk. P. C.* 53, 54.

The coroner's record of an abjuration, or of the confeſſion of breaking priſon, or of the confeſſion of a felony by an approver, eſtops the party, not only from traverſing the confeſſion, but alſo from alledging that it was taken from him by *dureſs*, &c. And it is ſaid that if the party plead that he is not the ſame perſon, he ſhall be concluded by the coroner's recording that he is the ſame perſon; yet in theſe caſes it ſeems, that the judge may in diſcretion, to inform his conſcience, take an inquiry from the people living next the place, of the whole circumſtances of the matter. See 2 *Hawk. P. C.* 53.

If it be found by a coroner's inqueſt, that a murder was committed in ſuch a town, and that the murderer eſcaped untaken, the townſhip cannot traverſe ſuch eſcape, becauſe it makes them only liable to an amercement, & *de minimis non curat lex.* 2 *Haw. P. C.* 53. *S. P. C.* 34.

Alſo it is ſtrongly holden in ſome books, that an inqueſt of ſelf-murder, found before a coroner, cannot be traverſed; but the contrary opinion being alſo holden by books of as great authority, and ſeeming alſo to be more agreeable to the general tenor of the law in other caſes, it ſeems to be the better opinion that ſuch inqueſt being moved into the King's Bench by *certiorari*, may be there traverſed by the executor or adminiſtrator of the perſon deceaſed; or in caſe the coroner's inqueſt find him to have been a lunatic, by the King or the lord of the manor. 2 *Hawk. P. C.* 54.

If a coroner appear to have been corrupt in taking an inqueſt, it ſeems that a *melius inquirend'* ſhall go to the ſpecial commiſſioners, who ſhall proceed not on view, but upon teſtimony, and the coroner ſhall have nothing to do with ſuch inqueſt; but where his inqueſt is quaſhed for want of form only, he ſhall take a new one in like manner, as if he had taken none before. 2 *Hawk. P. C.* 54.

Inquiſition was taken before the coroner in *Oxfordſhire*, upon the death of the Earl of *B.* and being remov'd into *B. R.* it was mov'd to quaſh it, for that it was *præſentatum exiſtit per juramentum* A. B. C. *naming the reſt of the jury, but omitted (proborum & legalium hominum) nor did it ſay Quod ſeipſum percuſſit. Dodderidge* and *Haughton* held it inſufficient for both reaſons, and though the indictment is *virtute officii* by the coroner, yet he is bound to the rule of the law in the execution of his office, and cannot impanel outlaws and villains, and the words in the writ commanding the ſheriff to inquire *per ſacramentum proborum & legalium hominum*, ſhew that the law intended of what condition it ſhould be. *Palm* 282. *Paſch.* 20 *Jac. B. R. The Earl of Berkſhire*'s caſe.

Inquiſition before the coroner *found, that* S. H. *paſſing a bridge between* W. *and* B. *in com.* H. *by reaſon of a breach in the bridge fell into the river, where he was drowned, and that the bridge is in the vill. of*, &c. *and in magno decaſu by default of the inhabitants there*; it was held, that the coroner may find ſuch a nuſance as occaſions the death of a man, and that the townſhip ſhall be amerced thereupon; but becauſe it was not found that the town was bound to repair this bridge, the indictment as to that was quaſhed. *Allen* 51. *Hill.* 23 *Car. B. R. Samuel Hall*'s caſe.

M. B. of *Gray's Inn*, being drowned in a ducking-pond, the *coroner's inqueſt found* him *felo de ſe*; but upon ſeveral *affidavits produced that he was diſtemper'd in his head*, the court was moved, that the inquiſition might not be filed, eſpecially ſince the *coroner would not ſuffer any witneſſes* to be examined in the behalf of the adminiſtrator of *B. to prove that he was diſtemper'd* in mind, and for that reaſon they granted a *new trial*; but becauſe the inqueſt could not be *ſuper viſum corporis*, it was *ordered that the inqueſt ſhould be made by ſix of the former jury, of which there were* 18; that 14 *of them had found him* felo de ſe *but* 4 *diſſented*; *ſo* 3 *of thoſe* 4, *and* 3 *more of thoſe who had found him guilty, and* 6 *new jurors were appointed, and that they ſhould have counſel and witneſſes on both ſides*, which ought to be done by all coroners, ſince the law has ſo great a regard to inquiſitions taken before them, that they are not traverſable; and it was inſiſted for the adminiſtrator, that this new inquiſition might be taken before the Chief Juſtice, who admitted, that he could do it in any place, he being Chief Coroner of *England*, but would not grant that part of the motion, becauſe it was the ignorance of the coroner not to hear any witneſſes againſt the King, and not any miſbehaviour of him in his office, which was the occaſion of this complaint; thereupon the jury proceeded before the coroner, and upon this ſecond inqueſt he was found *felo de ſe.* 2 *Sid.* 90, 101, 144. *Hill* 1658. *Berkley's* caſe.

It was moved to *amend an inquiſition* taken by a coroner in *York ſuper viſum corporis*; the court order'd that the coroner attend ſuch a day, and amend it *in court, in all points but the matter of the verdict.* Sid. 225. pl. 18. Mich. 16 Car. 2. B. R. The King *v.* Harriſon.

Where a coroner *omits to inquire, B. R.* as ſupreme coroner throughout *England* may inquire, or may make commiſſioners to inquire, or commiſſioners of oyer or terminer may inquire, but then it is not *ſuper viſum corporis*, and therefore may be traverſed. *Per cur. Vent.* 182.. *Hill.* 23 & 24 *Car.* 2. *B. R. Stanlack's* caſe.

A motion was made to quaſh an inquiſition taken before the coroner's *ſuper viſum corporis* of one that had killed himſelf, which found that he was *felo de ſe*; but the court were informed, that the party was *non compos mentis*, and that there had been an *undue practice by the coroner*, of both which great proof was made, and upon that it was *quaſhed. Vent.* 352. *Mich.* 32 *Car.* 2 *B. R. Anon'.*

The defendant was *felo de ſe*, and the coroner's inqueſt found him a *lunatic*, and now, Mr. *Jones* moved for a *melius inquirendum*, but it was *denied*, becauſe there was no defect in the inquiſition; but the court told him, that if he could produce an *affidavit that the jury did not go according to their evidence, or of any indirect proceedings of the coroner*, then they would grant it: but it was afterwards quaſhed, becauſe they had *omitted the year of the King.* 3 *Mod.* 80. *Paſch.* 1 *Jac.* 2. *B. R. The King* v. *Hetherſall.*

If a coroner's inqueſt is *quaſhed*, he muſt *take a new one* ſuper viſum corporis, *but if a* melius inquirendum *is granted upon a* male ſe geſſit of the coroner, the new inquiry muſt be before the ſheriffs or commiſſioners, upon affidavits, and not *ſuper viſum corporis*, becauſe *none but a coroner can inquire ſuper viſum corporis*, and he is not to be truſted again. 1 *Salk.* 190. *Mich.* 1 *W. & M. in B. R. The King* v. *Bunney.*

Caption of an inquiſition is not to be amended; *per Aſtry and cur. Comb.* 70. *Mich.* 3 *Jac. B. R. Anon'.*

It was moved to quaſh an inquiſition taken before a coroner, whereupon the jury find that a *poſt in the highway was unica cauſa movens ad mortem*, and he excepted to it, becauſe it was *nos certe credimus eſſe cauſam mortis*, whereas it ought *to be certain*, and therefore it was quaſhed. 22 *Mod.* 112. 1 *Hill.* 8 *Will.* 3. *Anon.'*

The *coroner ought to accept ſuch a preſentment as the jury makes*; per cur. abſente *Holt* Ch. j. *Comb.* 386. *Mich.* 8 *Will.* 3. *B. R. Smith*'s caſe.

A perſon having killed himſelf, as there was reaſon to believe, felonioufly, for that he had made a formal will juſt before, and the coroner *having ſworn the jury to inquire*, finding the evidence given very ſtrong, *took off ſome of the inqueſt*; and *per Holt*, It is not in a judge's power to take off a juryman after he was ſworn; and tho' this coroner be a weak ſilly man, yet that is no reaſon why there ſhould not be an information againſt him; for ſuch men muſt learn, they muſt not truſt themſelves into offices; and the return of the inquiſition, finding the deceaſed *non compos*, not being filed, it was quaſhed *per cur.* 12 *Mod.* 423. *Paſch.* 13 *Will.* 3. *The King* v. *Stukely.*

If the inquiſition ſhall be quaſhed in the court of King's Bench, the coroner, by leave of the court, may take up the body again, and take a new inquiſition. *Stran.* 167. 533.

By

By ſtat. 1 & 2 *P. & M. cap.* 13. *ſect.* 5. Coroner muſt take the evidence in writing, and bind over the witneſſes.

3. *His power and duty in returning writs, and in other matters.*

Extendi facias upon a ſtatute merchant *iſſued*, and the *ſheriff did not return the writ*, and the party made thereof ſuggeſtion, and pray'd writ to the coroners, and could not have it, but only a re-extent. *Br. Statute Merchant, pl.* 34. cites 27 *Ed.* 3. and *Fitz. Suggeſtion.* 20.

If the *ſheriff does not ſerve the replevin at the pluries*, proceſs ſhall iſſue to the coroners, and there the ſheriff has loſt his power to ſue any proceſs in it after, by the beſt opinion. *Br. Office and Off. pl.* 43. cites 43 *Ed.* 3. 26.

Where the *ſheriff does nothing in replevin at the alias, nor at the pluries, proceſs ſhall iſſue to the coroners to attach the ſheriff*, and to make replevin. *Br. proceſs, pl.* 21. cites 43 *Ed.* 3. 26.

Note: that proceſs *directed to the coroners* to ſerve, this *ought to be ſerved by all* the coroners; *but* where they are to *give judgment*, the judgment of two of them ſuffices where they are four; for in the one caſe they are judges, and in the other only miniſters. *Br. proceſs, pl.* 172. cites 14 *H.* 4. 34.

Proceſs ſhall not be made to the coroners *where there is no ſheriff, or where* the ſheriff is *dead*; for the ſheriff is an officer immediate to the court, for proceſs ſhall not iſſue to the coroners unleſs *in ſpecial caſes*; as where the plaintiff ſays, that the ſheriff is his couſin, and prays proceſs to the coroners, and the other does not deny it, there proceſs ſhall iſſue to the coroners, and otherwiſe not. *Br. Proceſs*, 70. cites 22 *H.* 6. 51 by all the juſtices.

If a *ſheriff of a county in a city be in contempt*, the attachment is to go to the coroner, and not to the mayor or chief officer of the corporation in ſuch city or town; and if the offender *be out of his office*, the attachment ſhall be directed to the new ſheriff. 2 *Vent.* 216. *Mich.* 2 *W. & M. in C. B. Anon'.*

In the caſe of two *coroners*, if the one *be challenged*, the other muſt act, and yet both make one officer. 1 *Salk.* 152. *pl.* 2. *Paſch.* 3 *W. & M. in B. R.* in caſe of *The King and Queen* v. *Warrington.*

By the Common law, the coroner might, without the concurrence of any other, receive an appeal of felony or mayhem, on the plaintiff's finding ſufficient pledges to the ſheriff for the proſecution; but it being provided by *Weſtm.* 1. *cap.* 10. that the ſheriff ſhall have counter-rolls with the coroner, it ſeems that no appeal, ſince that ſtatute, is well commenced before the coroner, unleſs the ſheriff be preſent to make a counter-roll of the proceedings; yet the coroner ſeems ſtill to be the only judge. 2 *Hawk. P. C.* 50, 51.

A coroner cannot receive a bill of appeal of an offence done out of the county, becauſe there can be no trial thereof by the county; but he may receive the appeal of an approver, or take the abjuration of one who confeſſes a felony done in any county; becauſe after ſuch confeſſions there is no need of any trial. 2 *Hawk. P. C.* 51.

A coroner may certainly award proceſs, till the *exigent* on a bill of appeal before him, and ſuch proceſs ſhall be awarded by him only, and not by him and the ſheriff jointly, and he may proceed thereon till outlawry; but ſince *Magna Charta*, by which it is enacted, *cap.* 17. *That no ſheriff, conſtable, coroner, or other bailiff of the King, ſhall hold pleas of the crown*, he cannot proceed to the trial of the appellee. 2 *Hawk. P. C.* 51.

An appeal before the coroner may be removed into the King's Bench or Chancery by *certiorari* directed to the coroners and ſheriff, but not by one directed to the ſheriff only.

The coroner may receive the appeal of an approver, for an offence in the ſame or in a different county; and if the appellee be in the ſame county, he may award a proceſs againſt him to the ſheriff, till it come to the exigent; but if the appellee be in a foreign county, the coroner cannot award proceſs againſt him but muſt leave it to the juſtices of gaol-delivery, or others before whom the appeal is afterwards recorded. 2 *Hawk. P. C.* 52.

A coroner may take the confeſſion and abjuration of a felon, and alſo the confeſſion of a felony by an approver. And as to abjuration, it is to be obſerved, that at the Common law, if a perſon accuſed of any felony, (except ſacrilege) whether in the ſame or any other county, for which he was liable to judgment of death, and not charged with treaſon, had fled to any church or church-yard, and within forty days confeſſed himſelf guilty before the coroner, and declared all the particular circumſtances of the offence, and thereupon taken the oath in that caſe provided, (the ſubſtance whereof was, that he abjured the realm, and would depart as ſoon as poſſible, at the port which ſhould be aſſigned him, and never return without leave from the King, *&c.*) he ſaved his life, if he obſerved the terms of the oath, by going with all convenient ſpeed, the neareſt way to the port aſſigned, *&c.* but he was attainted of the felony by ſuch abjuration without more, and conſequently forfeited his lands, goods, *&c.* And now by 21 *Jac.* 1. *cap.* 28. it is enacted, *That no ſanctuary, or privilege of ſanctuary, ſhall be admitted or allowed in any caſe.* 2 *Haw.* 52.

4. *How puniſhed for miſdemeanors; and how diſcharged or removed.*

An *attachment* was awarded againſt the coroners of *York*, becauſe *A.* was 5°. *exactus*, but they *would not give judgment* of the outlawry, and an affidavit of that was made. And *Millington*, an ancient attorney ſaid, that the coroners of *Stafford* for ſuch an offence were fined every one 10*l.* but after the judgment of the outlawry pronounced they *may ſtay the return* of the *exigent* for to be adviſed, if the caſe requires. *Noy* 113. *Trin.* 2. *Jac. C. B. Anon'.*

In *caſe againſt four coroners*; for that *J. S.* was outlaw'd at the plaintiff's ſuit, and a *capias utlagatum* delivered to the coroner, *and tho'* they might eaſily have arreſted him, and *he was once in company with one of them, falſly returned a non eſt inventus.* It was objected that the action ought not to be brought againſt all four, for it was ſaid the writ was deliver'd but to one, and the allegation was, that the plaintiff was in company with one of them, *&c.* but it was anſwered, that all four made but one officer, and beſides, they *all join'd in making the falſe return*; and judgment for the plaintiff *Niſi. Freem. Rep.* 191, 192. *pl.* 195. *Paſch.* 1675. *C. B. Naylor's* caſe.

By ſtat. 3 Hen. 7. cap. 1. *A coroner ſhall not be remiſs, but ſhall duly execute his office according to law, on pain of* 5l.

Stat. 1 Hen. 8. c. 7. *Juſtices of aſſize and peace have power to enquire of and puniſh the defaults and extortions of coroners.*

The coroner *is to return his inquiſition at the next gaol delivery*, and becauſe he did not, the *court diſcharged him*, and *ſet a fine of* 100l. *upon his head*, they having found it murder, and that he kept the inquiſition in his pocket. *Per cur'*, in a *nota. Keb.* 280. *pl.* 81. *Paſch.* 14 *Car.* 2. *B. R. The King* v. *Buckhurſt & al'.*

For more of *Coroner* in general, ſee 2 *Hawk. Pl. C.* 42 *to* 55. *cap.* 9. and 2 *Hale's Hiſt. of Pl. of the Crown*, 53 *to* 69. *cap.* 8. concerning the coroner, and his court and authority in pleas of the crown.

A coroner *is not made by commiſſion but by writ*, and when he is elected by writ, it is *return'd in Chancery, and is a judicial act of record*; and therefore, when the King dies, this ſhall remain, where all manner of commiſſions ceaſe by demiſe of the King, as commiſſions of juſtices, and the like; but judicial acts ſhall remain, and ſo the coroner *ſhall remain, till he be remov'd by writ of the King.* Br. Office and Off. pl. 25. *cites* 4 Ed. 4. *and* 44.

On ſuggeſtion that a coroner *had not ſufficient lands* within the hundred, a writ iſſued to chooſe another, and one was choſen. *Rhodes* and *Windham* held that this is a good

a good *diſcharge*; tho' *F. N. B.* 163. (N) ſays, that he ought to be diſcharged by writ. *Godb.* 105. *pl.* 123. *Mich.* 28 & 29 *Eliz. C. B. Anon'.*

The coroner ſhall be diſcharged of his office by the King's writ ſent unto him, and thereupon ſhall iſſue another *writ* directed *unto the ſheriff to chooſe a new coroner*, and that writ *ſhall recite the cauſe of the diſcharge of the other* coroner. *F. N. B.* 163. (G).

If a coroner is *in a languiſhing condition, or ſo broken with old age that he cannot exerciſe the office, or becomes paralytick, it is good cauſe to remove him.* 8 Rep. 41. b. in a *nota* of the Reporter.

If a coroner be *diſcharged* of his office *by falſe ſuggeſtion, by the King's writ directed to the ſheriff*, then *the party may come into the Chancery, and require a commiſſion to inquire of the ſaid falſe ſuggeſtion*, and to return the inquiry before the King into the Chancery, and if it be found to be falſe, then the King may make a *ſuperſedeas* to the ſheriff, that he do not remove the coroner if, *&c.* and if he be removed, that he ſuffer him to exerciſe his office as he did before. *F. N. B.* 164. (D).

If any coroner be ſo far engaged in any other public buſineſs in the county, that he cannot have leiſure enough to attend the office of a coroner, or if he be choſen verderor of a foreſt, or if he have not ſufficient lands in the ſame county whereon to live according to his ſtate and degree; or if he be diſabled, either by old age or any inveterate diſeaſe, as the palſy, or the like, to execute his office as he ought; and, as ſome ſay, if he follow any common trade; he may be diſcharged by the writ *De coronatore exonerando*, which being directed to the ſheriff, after a recital of the particular cauſe of the diſcharge of ſuch coroner, commands him to cauſe another to be choſen in his room. *F. N. B.* 163. *S. P. C.* 48. 8 *Co.* 41. 2 *Inſt.* 32.

But if any writ of this kind be grounded on any untrue ſuggeſtion, the coroner may procure a commiſſion from the Chancery, to inquire of the truth of it, and to return the inquiry before the King into Chancery; and if upon ſuch commiſſion the ſuggeſtion be diſproved, the King may make a *ſuperſedeas* to the ſheriff, that he do not remove ſuch coroner, or if he have removed him, that he ſuffer him to execute the office as he did before. *Reg.* 177, 178. *F. N. B.* 164. *S. P. C.* 49.

If a coroner be remiſs in coming to do his office, when he is ſent for, *&c.* he ſhall be amerced by virtue of the above-mentioned ſtatute *De coronatoribus*. *S. P. C.* 51. *Salk.* 377. *H. P. C.* 170.

5. *Of the fees that he may lawfully take.*

By ſtat. *Weſtm.* 1. 3 *Ed.* 1. *c.* 10. *it is enacted*, That no coroner demand or take any thing of any man to do his office, upon pain of great forfeiture to the King. See 2 *Inſt.* 176.

But it is enacted by 3 *Hen.* 7. *cap.* 1. That a coroner have for his fee, upon every inquiſition taken upon the view of a body ſlain, 13*s.* 4*d.* of the goods and chattels of the ſlayer and murderer, if he have any goods; and if he have no goods, of ſuch amercements, as ſhall fortune any townſhip to be amerced for the eſcape of the murderer, *&c.*

But the coroners endeavouring to extend this ſtatute to perſons ſlain by miſadventure, it was enacted by the 1 *Hen.* 8. *cap.* 7. That upon a requeſt made to a coroner to come and inquire upon the view of any perſon ſlain, drowned, or otherwiſe dead by misfortune, the ſaid coroner ſhall diligently do his office, without taking any thing therefore, upon pain to every coroner that will not endeavour himſelf to do his office, (as afore is ſaid) or that taketh any thing for doing his office upon every perſon dead by miſadventure. for every time forty ſhillings.

Stat. 25 *Geo.* 2. *cap.* 29. *ſect.* 1. Whereas the office of coroner is a very ancient and neceſſary office: And whereas by an act made in the third year of the reign of King *Hen.* VII. reciting, that coroners had not, nor ought to have any thing by the law for their office doing; which oft time had been the occaſion that coroners had been remiſs in doing their office; it was ordained, that a coroner ſhould have for his fee, upon every inquiſition taken upon the view of the body ſlain, 13*s.* 4*d.* of the goods and chattels of him that is the ſlayer and murderer, if he have any goods; and if he have no goods, of ſuch amerciaments as ſhould fortune any townſhip to be amerced, for the eſcape of the murderer: And whereas the ſaid fee of 13*s.* 4*d.* due only upon an inquiſition taken upon the view of the body ſlain or murdered, and payable only out of the goods and chattels of the ſlayer or murderer, or out of the amerciaments impoſed upon the townſhip, if the murderer eſcape, is not an adequate reward for the general execution of the ſaid office: Therefore for every inquiſition, not taken upon view of a body dying in gaol, the coroner ſhall have 20*s.* and alſo 9*d.* for every mile he ſhall be compelled to travel from his uſual place of abode to take ſuch inquiſition; to be paid by order of the juſtices in ſeſſions out of the county rates; for which order no fee ſhall be paid.

Sect. 2. And for every inquiſition taken on view of a body dying in priſon, he ſhall be paid ſo much not exceeding twenty ſhillings, as the juſtices in ſeſſions ſhall allow, to be paid in like manner.

Sect. 3. And for every inquiſition on a body ſlain 13*s.* 4*d.* payable by the ſaid act of 3 *H.* 7. out of the goods and chattels of the ſlayer or murderer.

Sect. 4. Coroners taking more than their fees here limited ſhall be deemed guilty of extortion.

Sect. 5. But no coroner of the King's houſhold, and of the verge of the King's palaces, nor any coroner of the admiralty, or of the county palatine of *Durham*; nor of the city of *London* and borough of *Southwark*, nor any franchiſes belonging to the ſaid city; nor of any city, town or franchiſe, not contributing to the county rates, or within which ſuch rates have not been uſually aſſeſſed, ſhall be intitled to any benefit of this act: but they ſhall have ſuch fees and ſalaries as they were allowed before this act, or as ſhall be allowed by the perſons by whom they have been appointed.

Sect. 6. If any coroner, not appointed by an annual election or nomination, or whoſe office is annexed to any other office, ſhall be convicted of extortion for taking more than his lawful fees, or of wilful neglect of his duty or miſdemeanor in his office; the court may adjudge him to be amoved from his office; and thereupon, if he ſhall have been elected by the freeholders, a writ ſhall iſſue for removing him, and electing another in his ſtead; and if he hath been appointed by the lord of any liberty or franchiſe, or in any other manner than by the freeholders, the perſon intitled to nomination, ſhall on notice of ſuch judgment of amoval, nominate another perſon in his ſtead.

Corporal oath. See Oath.

Corporation, *(Corporatio,)* A body politick, or a body *incorporate*; ſo called, becauſe the perſons are made into a *body*, and of capacity to take and grant *&c.* And this body politick or *incorporate* may commence and be eſtabliſhed three manner of ways, *viz. by preſcription*, by *letters patent*, or by *act of parliament.* Every body politic or *corporate* is either *eccleſiaſtical* or *lay: Eccleſiaſtical* is either *regular*, as abbots, priors, *&c.* or *ſecular*, as biſhops, deans, archdeacons, parſons, vicars, *&c. lay*, as mayor, commonalty, bailiff, and burgeſſes, *&c.* alſo every body politic or *corporate* is either elective, preſentative, collative, or donative. And again, it is either ſole or aggregate of many, which laſt is by the *Civilians* called *collegium* or *univerſitas. Coke on Litt. fol.* 250. and 3 *Inſt. fol.* 202.

Corporation ſpiritual, and of dead perſons in the law, is where the *corporations* conſiſt of an abbot and convent, which had beginning of the King and the pope, when he had to do here; *corporation ſpiritual, and of able perſons in the law*, is where it conſiſts of a dean and chapter, a maſter of a college or hoſpital; and this had beginning from the King only.

Corporation temporal by the King, Is where there is a mayor and commonalty. *Corporation temporal* by authority of the Common law, is the parliament, conſiſting of the *King* the head; the lords *ſpiritual* and *temporal*, and *commons* the body.

Corpo-

Corporations are of ſeveral natures; all of them inſtituted for the better government of a people combined together, and living under a regular ſyſtem of laws. 10 *Co.* 29. *b.* 31 *b.*

Of corporations ſome are ſole, and ſome are aggregate; a ſole corporation conſiſts of one perſon only as the King; ſo a clergyman, by being made a biſhop, prebend, parſon or vicar, is ſaid to be a ſole corporation. 1 *Rol. Abr.* 512.

A corporation aggregate is an artificial body of men, compoſed of divers conſtituent members *ad inſtar corporis humani*, the ligaments of which body politick or artificial body are the franchiſes and liberties thereof, which bind and unite all its members together; and the whole frame and eſſence of the corporation conſiſt therein. 4 *Mod.* 54. *Carth.* 217. 1 *Show.* 280.

Alſo corporations are ſaid to be eccleſiaſtical or lay; of eccleſiaſtical corporations ſome were called *Regular*, as abbots, priors, *&c.* others *Secular*, as biſhops, deans, *&c.* *Co. Lit.* 250. *a.* 3 *Inſt.* 202.

Of lay corporations ſome are ſaid to be for general government; as thoſe of mayor and commonalty, *&c.* Some for a particular purpoſe; as for the advancement of learning, charity, or ſome particular trade or branch of buſineſs: Theſe receive their ſanction from the crown, and muſt be by the King's licence; though a private perſon may be founder, and may give them laws to which they muſt ſquare themſelves in their future conduct. 1 *Bac. Abr.* 500.

1. *Who may make a corporation.*
2. *Of the names of corporations.*
3. *Statutes concerning corporations.*

1. *Who may make a corporation.*

The King by virtue of his prerogative, is the only perſon that can erect either an eccleſiaſtical or lay corporation. 10 *Co.* 33 *b.*

But alſo the King may give power to a common perſon to name the corporation, and the perſons it is to conſiſt of; but when he hath ſo done, this corporation does not take its eſſence from the common perſon, but from the King. 10 *Co.* 33 *b.*

Alſo by the 3 *Eliz. cap.* 5. Every perſon ſeiſed of an eſtate in fee-ſimple, may by deed inrolled in the high court of Chancery erect an hoſpital or houſe of correction, which ſhall be incorporated, and have perpetual ſucceſſion, and ſhall be viſited by ſuch perſons as ſhall be nominated by the founders thereof, *&c.* See 2 *Inſt.* 720.

In the creating a corporation, the law does not ſeem to require any ſet form of words to be made uſe of as *incorporo*, *fundo*, *erigo*, *&c.* but any words equivalent will be ſufficient. 10 *Co.* 30. *Style* 198.

The King may grant to the commonalty of *D.* that they ſhall be incorporated by the name of Mayor, *&c.* and that they may chooſe a mayor, *&c.* and this is a good corporation, though the election of a mayor is *in futuro*; for there is a diverſity between a power, liberty, franchiſe, or other thing newly created, which may take effect *in futuro*, and an eſtate or intereſt which none can take without a preſent capacity. 10 *Co.* 27. *b.* 31. *a. b.*

A patent procured by ſome few perſons only, ſhall not bind the reſt, nor can the inhabitants of a town be incorporated without the aſſent of the major part of them. 1 *Rol. Rep.* 226. 2 *Brownl.* 100.

As it is the King's charter that creates corporations, ſo ſuch charter may mould and frame them as it ſhall think fit. 3 *Mod.* 13.

One corporation may be made out of another; but it muſt be by the King's charter; therefore where the mayor and commonalty of *London* preſcribe to make another corporation in the city, though their cuſtoms are confirmed by parliament, yet it was held not to be good, without the King's charter. 10 *Co.* 31. 49 *Ed.* 3, 4. 9 *Aſſ.* 8. *Moor* 584. 1 *Sid.* 291. 2 *Keb.* 52, 63, 88. 1 *Salk.* 192.

2. *Of the names of corporations.*

The names of corporations are given of neceſſity; for the name is as it were, the very being of the conſtitution; for though it is the will of the King that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is no body to plead and be impleaded, to take and give, until it hath got a name. 1 *Leon.* 163. *Gilb. Hiſt. C. B.* 225.

The names of corporations are uſually taken, firſt, From the perſons of which they conſiſt; ſecondly, From the uſe and deſign of their being; thirdly, From the names of the patrons that firſt procured their inſtitution; fourthly, From the place they reſide in; fifthly, From the names of ſaints. See *Gilb. H. C. B.* 226, 227.

But though a corporation muſt have a name, yet that muſt be underſtood to be either expreſſed in the patent, or implied in the nature of the thing; as if the King ſhould incorporate the inhabitants of *Dale* with power to chuſe a mayor annually, though no name be given, yet it is a good corporation by the name of Mayor and commonalty. So the city of *Norwich* is incorporated to be a mayor and ſheriffs by the charter of *Henry* the Fourth, and are called Mayor, ſheriff and commonalty. 1 *Salk.* 191.

Alſo the King may incorporate a town by name, and after by another name, and then they ſhall uſe their name according to their ſecond corporation; and yet they ſhall continue their poſſeſſions they had before by the other name. 21 *E.* 4. 59. *Fitz. Grant*, 30. *S. C.*

So a corporation may be incorporated by one name, and power given them to ſue and purchaſe land by another name. 1 *Jones* 261.

The college of phyſicians were incorporated by the name of The preſident, college or commonalty of the faculty of phyſick, and afterwards in the patent it was granted, that the preſident of the college ſhould ſue and be ſued in behalf of the college. The college brought an action againſt Dr. *Salmon* upon the ſtatute for practiſing without licence, under the ſeal of the college, and declared by the name of The preſident and college, or by the name of The preſident of the college; and the court allowed to ſue by either, and ſo were the precedents; for though it was a rare inſtance that the corporation ſhould be incorporated by one name, and have leave to ſue by another name; yet when it is ſo, it is very natural and proper. 5 *Mod.* 327.

Although the names of corporations are not merely arbitrary ſounds, yet if there be enough ſaid to ſhew that there is ſuch an artificial being, and to diſtinguiſh it from all others, the body politick is well named, tho' the words and ſyllables are varied from; and this the rather in grants which are to have a favourable conſtruction. 10 *Co.* 125. *Gouldſ.* 122.

So if the name be expreſſed by words ſynonymous, it is ſufficient; as if a college be inſtituted by the name of *Guardianus & ſcholares domus ſive collegii ſcholarium de Merton*, and they make a leaſe by the name of *Cuſtos ſcholares*, it is good. 10 *Co.* 125.

If there be a corporation founded by the name of Mayor and *burgenſes burgi dom' regis de Lynn Regis*, and an obligation is made to them by the name of Mayor and *burgenſes de Lynn Regis*, without ſaying *burgi dom' regis*, it is well enough; for the parties are ſufficiently expreſſed; and all boroughs are founded by the King. 10 *Co.* 125.

If a houſe be founded by the name of *Miniſter Dei pauperis Domus*, and a leaſe be made by the name of *Miniſter pauperis domus Dei*, this is well enough; for the ſame deſign is ſpecified by both names. *Hob.* 124.

But if a houſe be founded by the name of *Guardianus & ſcholares domus ſive collegii ſcholarium de Merton*; and a leaſe be made by them by the name of *Guardianus & ſcholares domus ſive collegii de Merton*, it is a material variance of the name, ſince they have not expreſſed the deſign of the houſe, which is a ſubſtantial part of the name. 10 *Co.* 125.

But if a college be inſtituted by the name of *Aula ſcholarum reginæ*, to be governed by a provoſt, and they are confirmed by the King, by the name of *Præpoſitus & ſcholares aulæ reginæ*, and they make a grant of an advowſon by that name, this is good; for that college would never have a name according to the words of the firſt charter, for then it would be a ſole corporation, which is contrary to the general convenience of ſuch a body; for the name would be *Præpoſitus ſcholarum aulæ reginæ*, which cannot be intended, and the word *ſcholares* is not required, as in the former caſe; and the placing it where it is confirms the eſtabliſhment, and this confirmation of the King, and common appellation, are good interpreters of the original intent of the name. 11 *Co.* 20.

Edward the Fourth incorporated the deans and canons of *Windſor*, by the name of The *King's Free Chapel of St. George the Martyr*; and in the time of *Philip and Mary*, made a leaſe by the name of *The Deans and Canons of the King's and Queen's Free Chapel, &c.* This was held a material miſtake of the name; for it takes its name from the founder that is here miſtaken, and the name of a different perſon ſubſtituted in his room. 1 *Co.* 124.

If a corporation be founded by the name of The dean and chapter of the cathedral church in *Oxford*, and they make a leaſe by the name of The dean and chapter of the cathedral church in the univerſity of *Oxford*, this is well enough; for the place of the ſituation is well and ſufficiently ſhewn. *Poph.* 57.

If the prior of *St. Michael of Coventry* makes a leaſe by the name of The dean of *Coventry*, this is good; if they had granted an annuity or corody, and the name of the ſaint had been omitted. 10 *Co.* 124.

If there be an immaterial addition, this doth not hurt; for if the preſident of ſcholars of *Corpus Chriſti* college in *Oxford*, make a leaſe by the name of Preſident and ſcholars of *Corpus Chriſti college in com' Oxon*, this is good; for *utile per inutile non vitiatur*. *Cro. Eliz.* 816.

In deviſes, if the name of the corporation be miſtaken, yet if there be words ſufficient to ſhew that the teſtator could only mean and intend ſuch a one, it will be ſufficient; as a deviſe to *George* biſhop of *Norwich*, when his name is *John, &c.* 11 *Co.* 21. 1 *Leon.* 307. *Dyer* 106. *Perk.* 8.

But if a deviſe be to the abbot of St. *Peter* where it is really the abbot of St. *Paul*, the deviſe is void; for here the ſaint's name is the only ſpecification of the party in the deviſe, which is miſtaken. *Hob.* 33. 19 *Hen.* 8. 8.

A parſon muſt be impleaded by chriſtian and ſurname, and not *John*, parſon of *D. &c.* but in other ſole corporations, the chriſtian name only is ſufficient; as *John biſhop of Canterbury*, *Thomas abbot of D. &c.* 2 *Inſt.* 666. *Yelv.* 34, 49.

But where the corporation is aggregate of many capable perſons, as Mayor and commonalty, Dean and chapter, *&c.* none of them in pleading, are named by their proper chriſtian and ſurnames; and the reaſon is, becauſe in the firſt place, the death of the individual is a good plea in *abatement*, for a new ſucceſſor comes in his place, that was not party to the former writ; but bodies aggregate are immortal and invariable; and therefore the parties to the firſt writ are always the ſame. 2 *Inſt.* 666. *Skin.* 2.

3. *Statutes concerning corporations.*

By ſtat. 1 *Ed.* 3. *ſt.* 2. *c.* 9. Corporations are to enjoy their franchiſes as uſual.

By ſtat. 15 *Hen.* 6. *c.* 6. They are to be reſtrained by juſtices of the peace from making unreaſonable by-laws.

Stat. 19 *Hen.* 7. *c.* 7. No maſters, wardens and fellowſhips of crafts, nor rulers of guilds or fraternities, ſhall make any acts, nor execute any made, in diſheritance or diminution of the prerogative of the King nor of other, nor againſt the common profit of the people; except the ſame acts be examined and approved by the Chancellor, Treaſurer, or Chief Juſtices of either bench, or three of them, or before both the juſtices of aſſize in their circuit; upon pain of forfeiture of 40*l.* and none of the ſame bodies corporate ſhall make any acts or ordinances to reſtrain any perſon to ſue to the King or any of his courts for due remedy, nor put nor execute any penalty or puniſhment for ſuch ſuit, upon pain of forfeiture of 40*l.*

By ſtat. 28 *H.* 8. *c.* 5. Corporations are not to make any acts or ordinances, except the ſame be approved by the Chancellor, *&c.*

Stat. 33 *Hen.* 8. *c.* 27. Every order and ſtatute made or to be made by any founder of any hoſpital or other corporation, whereby the grant or election of the governor of ſuch hoſpital or corporation, with the aſſent of the more part of ſuch of the ſame hoſpital or corporation as ſhall have voice of aſſent to the ſame, ſhould be hindred by any one or more, being the leſſer number of ſuch corporation, ſhall be void; and all oaths for the obſervance of any ſuch order or ſtatute ſhall be void. And no perſons of any ſuch hoſpital or corporation ſhall be compelled to take any oath for the obſerving of any ſuch order or ſtatute; upon pain of every perſon giving ſuch oath to forfeit 5*l.* the one moiety to the King, and the other moiety to any that will ſue.

By ſtat. 34 & 35 *Hen.* 8. *c.* 22. Their power of inrolling bargains and ſales by huſband and wife is confirmed.

Stat. 2 & 3 *Phil. & Mar. c.* 18. *ſect.* 2. All commiſſions to be granted to any city or town corporate, not being a county in itſelf, for the keeping of their peace, and delivery of the gaols, ſhall be good in law, notwithſtanding the granting of any like commiſſions to any commiſſioners for the ſhire.

By ſtat. 1 *Ed.* 6. *c.* 14. *ſect.* 10. The King may grant commiſſions to ſurvey corporations.

By ſtat. 7 *Jac.* 1. *c.* 5. 21 *Jac.* 1. *c.* 12. Mayors, *&c.* of towns corporate being ſued, may plead the general iſſue, and have double coſts.

Stat. 13 *Car.* 2. *ſtat.* 2. *c.* 1. *ſect.* 12. No perſon ſhall be placed or choſen in any office of mayor, alderman, recorder, bailiff, town-clerk, common-council man or other office of magiſtracy, place, truſt or imployment, concerning the government of any city, corporation, borough, cinque port and their members, or other port town; that ſhall not have, within one year next before ſuch choice, taken the Sacrament of the Lord's Supper, according to the rites of the church of *England*: And every ſuch perſon ſhall likewiſe take the oaths of allegiance and ſupremacy at the time when the oath for the due execution of the office ſhall be adminiſtred. And in default thereof every ſuch placing and choice is declared to be void.

By ſtat. 9 *Ann. c.* 20. *ſect.* 8. Officers having the return of members of parliament, ſhall not be choſen a ſecond time.

Stat. 5 *Geo.* 1. *c.* 6. *ſect.* 3. No perſon who ſhall be placed or choſen in any of the offices mentioned in ſtat. 13 *Car.* 2. *ſtat.* 2. *cap.* 1. *par.* 4. ſhall be removed by the corporation, or otherwiſe proſecuted for their omiſſion to take the Sacrament of the Lord's Supper within one year next before ſuch choice; nor ſhall any incapacity or penalty be incurred, unleſs ſuch perſon be ſo removed, or ſuch proſecution be commenced, within ſix months after ſuch perſons being placed or elected into ſuch office, and that in caſe of a proſecution, the ſame be carried on without wilful delay.

By ſtat. 6 *Geo.* 1. *c.* 18. *ſect.* 18. Acting as corporate bodies to the prejudice of trade is prohibited.

Stat. 11 *Geo.* 1. *c.* 4. *ſect.* 1. If in any city, borough or town corporate, in *England*, *Wales*, and *Berwick*, no election ſhall be made of the mayor, bailiff or chief officer, on the day, or within the time, appointed by charter or uſage; or ſuch election being made, ſhall afterwards become void; the corporation ſhall not be diſſolved: but where no election ſhall be made, the members of ſuch city, *&c.* who have a right to vote, or be preſent at, or to do any other act neceſſary to the compleating of ſuch election, are required to aſſemble in the town-hall or uſual place of meeting, on the day next after the expiration of the time within which ſuch election ought to have been made, unleſs ſuch day be *Sunday*, and then on *Monday* following, between ten in the morning and two in the afternoon, and proceed to the election of a mayor, *&c.* and

and do every act neceſſary to the compleating ſuch election; and if upon ſuch day of meeting hereby appointed, the mayor or other officer who ought to have held the court, ſhall be abſent, then ſuch other perſon having a right to vote, being the neareſt then preſent, ſhall hold the court, and have the ſame power as belongs to the mayor, &c.

Sect. 2. If in any city, &c. no election be made of the mayor, &c. on the day, or within the time appointed by charter or uſage, and no election ſhall be made, purſuant to the directions before preſcribed; or ſuch election being made ſhall afterwards become void; it ſhall be lawful for the court of King's Bench, on motion made to award a *mandamus*, requiring the members of ſuch city, &c. having a right to vote, to aſſemble themſelves on a day and time to be prefixed in ſuch writ, and to proceed to election, or to ſignify to the court good cauſe to the contrary; and thereupon to cauſe ſuch proceedings to be made as in other caſes of *mandamus* for the election of officers of corporations; and of the day and time appointed by the writ, publick notice in writing ſhall, by ſuch perſon as the ſaid court ſhall appoint, be affixed in the market-place, or ſome other publick place, ſix days before the day appointed; and ſuch officer ſhall preſide in the aſſembly as ought to have preſided at the election of ſuch mayor, &c. in caſe the election had been made on the day herein preſcribed.

Sect. 3. In boroughs and towns corporate, where the mayor or other chief officer is to be nominated or ſworn at a court-leet or ſome other court, and it happens that no due nomination or ſwearing of ſuch mayor, &c. ſhall be made, it ſhall be lawful for the court of King's Bench, upon motion to award a *mandamus*, requiring the lord, or his ſteward or other officer, to hold ſuch court-leet or other court, at ſuch time as ſhall be judged proper by the court of King's Bench, or to ſignify to the court good cauſe to the contrary, and thereupon to cauſe ſuch proceedings to be made as in other caſes of *mandamus* for holding of any court; and of the time appointed by ſuch writ for holding ſuch court, publick notice in writing ſhall, by ſuch perſon as the court of King's Bench ſhall appoint, be affixed in the market or ſome other publick place, ſix days before the day appointed; and where a nomination of perſons in order to the election of any mayor, &c. is to be made at ſuch court-leet or other court; after ſuch nomination made, all other acts neceſſary to ſuch election ſhall be done at ſuch aſſembly, as the ſame ought to have been done if ſuch election had been made on the day next after the expiration of the time preſcribed by charter or uſage.

Sect. 4. The mayor or other chief officer, elected purſuant to this act, ſhall take the oaths required at the time of his admiſſion, before the officer who preſides at ſuch election; and ſhall have the ſame powers as any mayor, &c. of the ſame city, &c. elected on the day fixed by charter or uſage.

Sect. 5. No ſuch election ſhall be valid, unleſs as great a number of perſons having right to be preſent and vote therein ſhall be preſent and concur, as would have been neceſſary in caſe the ſame had been made within the time appointed by charter or uſage, ſaving only that the preſence of the mayor or other chief officer ſhall not be neceſſary.

Sect. 6. If any mayor, bailiff, or other chief officer of any city, &c. ſhall voluntarily abſent himſelf from, or knowingly and deſignedly hinder, the election of any other mayor, &c. within the time appointed by charter or uſage, being lawfully convicted, he ſhall ſuffer impriſonment ſix months, and be diſabled to hold any office belonging to the ſame corporation.

Sect. 8. Nothing herein ſhall invalidate any charter accepted by any city, &c. nor make good the election of any officer or member againſt whom judgment of *ouſter* ſhall have been given upon any information in nature of a *quo warranto*, or whoſe election ſhall have been avoided on any writ of *mandamus*, on or before the laſt day of *Michaelmas* term 1724.

Sect. 9. Where any writ of *mandamus* ſhall iſſue out of the King's Bench, in any of the ſaid caſes, the perſons to whom ſuch writ ſhall be directed, ſhall make their return to the firſt writ. See **By-laws**. *And for more matter concerning Corporations, ſee* 1 Bac. Abr. *and* 6 Vin. Abr. *tit.* Corporations.

Corporation of the ſons of the clergy. They and their tenants how excepted from the land-tax, 30 *Geo.* 2. *c.* 3. *ſect.* 22, 23.

Corporeal inheritance. See **Inheritance.**

Corpus Chriſti day, (being always on the next *Thurſday* after *Trinity-Sunday*) Is a feaſt inſtituted in the year 1264, in honour of the Bleſſed Sacrament: to which a college in *Oxford* is dedicated. It is mentioned in 32 *H.* 8. *c.* 21. by which ſtatute *Trinity* term is appointed for ever to begin the morrow after this feaſt.

Corpus cum cauſa, Is a writ iſſuing out of *Chancery*, to remove both the body and the record, touching the cauſe of any man lying in execution upon a judgment for debt, into the King's Bench, &c. there to lie until he have ſatisfied the judgment. *Fitz. Nat. Brev. f.* 251. *a.* See **Habeas corpus.**

Corrector of the ſtaple, Is a clerk belonging to the *ſtaple*, which writeth and recordeth the bargains of merchants there made. 27 *Ed.* 3. *ſtat.* 2. *cap.* 22 & 23. The Romans call them *Menſarios.*

Corredium. and **Conredium,** The ſame with *Corrodium.* See **Corody.** —— *Et decimam totius* conredii *mei.* Mon. Angl. 1 vol. f. 587. a.

Corrody. See **Corody.**

Corruption of blood, *(Corruptio ſanguinis)* Is an infection growing to the ſtate of a man attainted of felony or treaſon; for as he loſeth all to the Prince, or other lord of the fee, as his caſe is; ſo his iſſue cannot be heirs to him, or to any other anceſtor, of whom they might have claimed by him. And further, if he were noble, or a gentleman before, he and his children are made ignoble. But if the King will pardon the offender, it will cleanſe the *corruption of the blood* of thoſe children, which are born after the pardon, and they may inherit the land of their anceſtor purchaſed at the time of the pardon, or afterwards; but ſo cannot they who were born before the pardon. But there are divers limitations even in treaſon, made by ſtatutes which ſave *corruption of blood*, though a man be attainted. 27 *Ed.* 3. *cap.* 77. 13 *H.* 7. *cap.* 17. 5 *Eliz. cap.* 1. 11. 18 *Eliz. cap.* 1. 6. 14. 31 *Eliz. cap.* 4. 1 *M. cap.* 12. 1 *Jac. cap.* 12. See **Attaint.**

Corſelet, Is a *French* word ſignifying a little body, in Lat. *corpuſculum*; we generally uſe it for an armour to cover the whole body, 4 & 5 *P.* & *M. cap* 2. wherewith pikemen, commonly ſet in the front and flanks of the battle, are armed, for the better reſiſtance of the enemies aſſaults, and the ſurer guard of the gunners placed behind, who were more ſlightly armed for their ſpeedier advancing and retreating to fire. *Cowell, ed.* 1727.

Corſned bread, (from the Sax. *Cors, execratio*, and *nedde, compulſus,*) Was a kind of ſuperſtitious trial, uſed by our *Saxons*, by a piece of barley bread, firſt execrated by the prieſt, and then offered to the ſuſpected guilty perſon, to be ſwallowed by way of purgation: For they believed a perſon if guilty, could not poſſibly ſwallow a morſel ſo accurſed; or if he did, it would choak him. The form was thus: *We beſeech thee, O Lord, that he who is guilty of this theft, when the exorciſed* bread *is offered to him in order to diſcover the truth, that his jaws may be ſhut, his throat ſo narrow that he may not ſwallow, and that he may caſt it out of his mouth, and not eat it.* Du Freſne. Theſe pieces of *bread* were conſecrated or devoted by the prieſt, to ſuch religious uſes, of which the old form, or *exorciſmus panis hordeacei vel caſei ad probationem veri*, is extant in *Lindenbrogius, p.* 107. In the laws of King *Canute, c.* 6. *Si quis altari miniſtrantium accuſetur, & amicis deſtitutus ſit, cum ſacramentales non habeat, vadat ad judicium quod Anglice dicitur* corſned, *& fiat ſicut Deus velit, niſi ſuper ſanctum corpus domini permittatur, ut ſe purget.* From which, and ſome other authorities, it is conjectured that this *corſned* was at firſt the very ſacramental *bread*, conſecrated and received with ſolemn adjuration, and with devout expectance it would prove mortal to thoſe who had dared to ſwallow it with a lie

a lie in their mouth: Preſuming on the continued judgment of ſickneſs and death to unworthy receivers, mentioned by the apoſtle, 1 *Cor.* xi. 29, 30. till poſſibly the biſhops and clergy were afraid to proſtitute the communion *bread* to ſuch raſh and conceited uſes: but however to indulge the people in their ſuperſtitious fancies, and beloved cuſtoms, they did allow them to practiſe the ſame judicial rite, in eating ſome other morſels of *bread*, or cheeſe, bleſt or curſt to the like uſes. There is a famous ſtory of the perfidious *Godwyn* Earl of *Kent*, in the time of *Edw. Confeſſ.* who abjuring the death or murder of the King's brother, did appeal at laſt to his *corſned* or imprecated *bread*, which as a judgment of his ſolemn perjury, ſtuck in his throat, and choaked him. This purgation ſtory is thus in ſhort told by a contemporary writer, *Ingulph.*——*Cum* Godwinus *comes in menſa regis de Nece ſui fratris impeteretur, ille poſt multa ſacramenta, tandem per buccellam deglutiendam abjuravit, & buccella guſtata continuo ſuffocatus interiit*——This among other rude and barbarous ways of purgation, was often condemned, and by degrees aboliſhed. And yet we have ſtill ſome remembrance of this horrid cuſtom in ſome of our uſual phraſes of adjuration; as *I will take the ſacrament upon it,——may this bread be my poyſon, may this bit be my laſt, &c.*

Coſſepreſent, (from the Fr. *Corps preſente*, *i. e.* the body preſent) Signifies *a mortuary*, *an.* 21 *H.* 8. *cap.* 6. and the reaſon why it was thus termed ſeems to be, that where a *mortuary* after any man's death became due, the *body* of the beſt or ſecond beſt beaſt was, according to the cuſtom offered or preſented to the prieſt, and carried along with the corps.

IN nomine patris, & filii, & ſpiritus ſancti, ego Brianus de Brompton, ſen. Anno Domini 1262. *in vigilia apoſtolorum* Simonis & Judeæ *condo teſtamentum meum. Volo corpus meum ſepeliri in prioratu Majoris Malverniæ inter prædeceſſores meos, & cum corpore meo* palefridum *meum cum herneſio, &* equum ſummarium, cum lecto meo, &c. In codice MS. penes Gul. Dugdale, mil.

Coſſtopitum, *Morpeth* in *Northumberland.*

Coſtis, *(Curtis)* A court or yard before the houſe.

Coſtularium, *Certarium*, *Curtilagium*, A yard or court, adjoining to a country farm.——*Abbas* Glaſton. *apud* Ginneledon, conſtruxit—*grangium, boverium, vacarium, ſtabulum, columbarium, &* cortularium, *cum domo, duo melendina, &c.* Cartul. Glaſton. MS. f. 42.

Coſvelarii, Coblers, *Qui corio veteri utuntur, viz. Prohibeo ut nec mercator nec inſtitor, nec permentarius, nec* corveſarius, *&c. volens emere vel vendere non vendat.*

Cozus, A certain corn meaſure heaped up, from the *Hebrew cora*, which ſignifies a hill: For eight buſhels of wheat, in a heap, are of the ſhape of a little hill; and probably a *corus* of wheat was eight buſhels. *Decem* coros *triciti ſive decem quarteria.* Bracton, lib. 2. cap. 16. parag. 7.

Coſces and **Coſcet**, The ſame with **Cottage.**

Coſduna, The ſame with *cuſtom* or *tribute. In curte vero de Foria habere ſolebat quinque ſolidos* coſdunales *in anno.* Mon. 1 tom. pag. 562.

Coſenage, *Cognatione*, Is a writ that lies, where the *Treſayle*, (that is, *Tritavatus*, the father of the *Beſayle*, or of the great grandfather) is ſeiſed in his demeſne, as of fee, at the day of his death, of certain lands or tenements, and dieth, and then a ſtranger entereth, and abateth; for then ſhall his heir have this writ of *coſenage*; the form whereof ſee in *F. N. B. f.* 221. Of this, read alſo *Britton* at large, *cap.* 89. *nor is there any affinity or couſinage between them.* Stat. 4 H. 3. cap. 8.

Coſening, Is an offence whereby any thing is done deceitfully, whether belonging to contracts or not, which cannot be properly termed by any ſpecial name. *Weſt. Symbol. part.* 2. tit. *Indictments, ſect.* 68. It is called in the Civil law, *ſtellionatus*, of *ſtellio*, a beaſt, which is *lacertæ genus verſutiſſimum*, as *Cujacius* in his *Particles* calleth it: And *Pliny, lib.* 3. *c.* 10. ſays, *Nullum animal invidet homini fraudulentius.*

Coſhering. As in the feudal law, there were many privileges inherent by right and cuſtom, ſo were there ſeveral other grievous exactions impoſed by the lords, by a ſort of prerogative or ſeignioral authority, as to lie and feaſt themſelves and their followers (called *coſhering*) at their tenants houſes. Sir *Henry Spelman* of *Parliament*, MS.

Coſmus, Clean. *Blount.*

Coſtard, An apple, whence *coſtard*-monger, *i. e.* a ſeller of apples.——*Reddendo inde annuatim nobis & hæredibus noſtris unum pomum* coſtard *de forgabulo* ad feſtum S. Michaelis. Cartular. Abbat. Radings. MS. f. 916.

Coſtera, Coaſt, ſea-coaſt.——*Per* coſteram *maris, & partium adjacentium in comitatu Kantiæ.* Ordinat. Mariſc. Romney.——Richardum Thorney *ad cuſtodiam* coſteræ *maris in com.* Eſſex, *per literas noſtras patentes aſſignavimus.* Memor. in Scaccar. Paſch. 24 Ed. 1.

Coſtrellus, *(Coſtarez)* A flagon. *Habebit de cellerario* 5 *albos panes &* coſtrellos *ſuos plenos cerviſiæ.* Mon. 2 tom. 550.

Coſts. There were no coſts at Common law; but if the plaintiff did not prevail he was amerced *pro falſo clamore*; if he did prevail, then the defendant was *in miſericordia*, for his unjuſt detention of the plaintiffs right, and therefore was not puniſhed with the *expenſa litis* under that title. But it being thought exceeding hard, that the plaintiff, for the coſts which he was out of pocket in obtaining his right, could not have any amends; therefore by the ſtatute of *Glouceſter*, made 6 *Ed.* 1. *cap.* 1. by which in an aſſiſe, *&c.* damages, upon the inſufficiency of the diſſeiſor, are given againſt him that is found tenant, and damages are given in a writ of *mort d'anceſtor, aiel, &c.* reciting that whereas before that time, damages were not taxed but to the value of the iſſues of the land, it is provided the demandant may recover againſt the tenant the coſts of his writ, together with his damage; and that this act ſhall hold place in all caſes where the party is to recover damages. 1 *New Abr.* 511.

Coſts of his writ] This extends to all legal coſts of ſuit, but not to his expences of travel, loſs of time, *&c.* 2 *Inſt.* 288.

This was the original of coſts *de incremento*; for when the damages were found by the jury, the judges held themſelves obliged to tax the moderate fees of counſel and attorneys that attended the cauſe. *Gilb. H. C. B.* 261.

And this was done in all real actions in which there were damages at Common law, and alſo in all perſonal actions; for even in an action of debt, there are damages given for the unjuſt detention. 10 *Co.* 116.

Alſo by the 8 & 9 *W.* 3. *c.* 10. in all actions of waſte and debt upon the ſtatute for not ſetting forth tithes, wherein the ſingle value or damages found by the jury ſhall not exceed twenty nobles; and in all writs of *ſcire facias*, and ſuits upon prohibitions, the plaintiff obtaining judgment or any award of execution, after plea pleaded or demurrer joined, ſhall recover coſts.

Where the chancellor finds a plaintiff's ſuggeſtion untrue, he ſhall award damages to the defendant. 17 *R.* 2. *c.* 6.

Defendant in error to have coſts. 3 *Hen.* 7. *c.* 10. 19 *Hen.* 7. *c.* 20.

Coſts given to avowants, 7 *Hen.* 8. *c.* 4. 21 *Hen.* 8. *c.* 19. alſo to the defendant upon nonſuit or verdict in ſeveral ſpecies of actions. 23 *Hen.* 8. *c.* 15. In all actions where the plaintiff may have coſts. 4 *Jac.* 1. *c.* 3. On a nonſuit for want of a declaration in the King's Bench or Common Pleas. 13 *Car.* 2. *ſt.* 2. *c.* 2. *ſect.* 3.

Plaintiffs that ſue to the uſe of the King ſhall not pay coſts. 24 *H.* 8. *c.* 8.

The King ſhall recover his debts with coſts. 33 *Hen.* 8. *c.* 39. *ſect.* 54.

If the plaintiff do not declare or is nonſuit in the King's Bench, Marſhalſea, or any inferior court, the defendant ſhall have coſts. 8 *El. c.* 2.

Coſts and damages to be recovered againſt an informer on a penal ſtatute. 18 *Eliz. c.* 5. *ſect.* 3.

Attornies

Attornies where liable to costs. 3 *Jac.* 1. *c.* 7. *sect.* 1. 2 *Geo.* 2. *c.* 23. *sect.* 23. 12 *Geo.* 2. *c.* 13. *sect.* 7.

Defendants to have costs, where plaintiff might have had them. 4 *Jac.* 1. *c.* 3. *s.* 2.

Full costs against inferior tradesmen and apprentices for trespasses in hunting. 4 & 5 *Will.* & *M.* *c.* 23. *sect.* 10.

Six shillings and eight-pence to be taken instead of the *Capias pro fine*, and added to the plaintiff's costs. 5 *Will.* & *M.* *c.* 12.

How costs shall be awarded to the plaintiff where the defendant has pleaded several pleas. 4 *Ann.* *c.* 16. *sect.* 5.

Costs given on quashing a writ of error. 3 *Ann.* *c.* 16. *sect.* 25.

Costs given for not going on to trial. 14 *Geo.* 2. *c.* 17. *sect.* 4.

1. *In what cases the plaintiff shall have no more costs than damages.*

2. *Where costs shall be doubled or trebled.*

1. *In what cases the plaintiff shall have no more costs than damages.*

By stat. 43 *Eliz.* *cap.* 6. it is enacted, "That if upon actions personally to be brought in any of her Majesty's courts at *Westminster*, not being for any title nor interest of lands, nor concerning the freehold, nor inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered there in the same court, shall not amount to the sum of forty shillings or above; that in every such case the judge and justices, before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

The intent of this statute was to reduce all actions where the debt or damages were under 40*s.* into the court-baron, or other county courts, whereby it was thought the profits of landlords would be increased, and the costs of defendants diminished; but the statute failed of effecting that purpose; for it does not put it merely upon the damages given by the jury under 40*s.* (for it would be hard when the jury gave too little damages, to have punished the plaintiff with the loss of his costs) but leaves it to the judge to certify the damages proved were not above 40*s.* in approbation of the verdict; but the judges though it extremely hard to certify, in order to make plaintiffs lose their costs where they had prevailed, unless the action were exceedingly impertinent and vexatious; and therefore seldom made use of this power. *Gilb. Hist. C. B.* 261.

By the 22 & 23 *Car.* 2. *cap.* 9. For preventing trivial suits contrary to the intention of 43 *Eliz.* commenced in the courts at *Westminster*, [extended to the principalities of *Wales*, and counties palatine, by stat. 11 & 12 *W.* 3. *c.* 9.] it is enacted, for the making the said law effectual, "That in all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial shall not find, and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question, if the jury find damages under 40*s.* the plaintiff shall not recover more costs than the damage, and if more costs given, the judgment shall be void, *&c.* and the defendant may have his action for such vexatious suit."

This statute seems to have pursued the same purpose with that of the 43 *Eliz.* but neither of them repealed the statute of *Gloucester*, (for a statute cannot be repealed by implication); nor did the statute of *Car.* 2. take away costs *de incremento*, except where the judge's certificate was necessary, and that was only where the trespass was done to the freehold, or to things fixed to the freehold, and the damages were under 40*s.* and in battery, where the damages were under such sum; for the wording of the statute is, that there should be no costs in battery, trespass, or other personal actions, unless the judge certify the battery to be proved, or the title of the freehold to have come in question; hence these words in the act, *other personal actions*, were construed to extend no farther than to cases where the judge was permitted to certify, which was only in battery and actions of trespass, relating to the freehold, and things fixed to the freehold. 1 *New Abr.* 512.

Therefore in trover, or action of trespass *de bonis asportatis* of goods and chattels not fixed to the freehold, the plaintiff shall have his full costs, though the damages be found to be under 40*s.* and though the judge does not certify pursuant to the statute. 1 *Salk.* 208.

So if an action of trespass to the freehold, and an action of trespass *De bonis asportatis*, are joined, and the plaintiff recovers in general upon both counts, he hath no need of a certificate to obtain his costs; and therefore costs *De incremento* shall go upon the statute of *Gloucester*. 2 *Vent.* 48.

As in trespass for breaking his close, and impounding his cattle, the plaintiff shall have his full costs; for the impounding his cattle is an injury to his personal property, in which no right of freehold can come in question. 3 *Mod.* 39.

So in trespass for chasing his sheep, and that he the defendant *ad loca ignota eos abduxit & elongavit*, after verdict for the plaintiff, and 2*d.* damages, he had his full costs principally upon the word *abduxit*, which is the same in signification with *asportavit*. *Carth.* 225. 1 *Salk.* 208.

So in trespass *quare vi & armis* the defendant flung down certain stalls of the plaintiff's, in a market-place, on Not guilty, and verdict for the plaintiff, but damages under 40*s.* the court held that the plaintiff, without the judge's certificate, should have full costs; for this is a trespass done to a chattel in which no title of freehold can come in question; and though they had been fixed to the freehold, yet if the defendant had carried them away, it would be out of the statute. *Raym.* 487. 2 *Jones* 232.

But where the trespass is merely to the freehold; as where in trespass the plaintiff declared, that the defendant *Herbam depascendo, & solum & fundum carucis subvertendo, & in solo fodiendo, & cum terra inde project' aquæ cursum suum obstupand', per quod clausum suum inundat' fuit, &c.* the plaintiff shall have no more costs than damages. 1 *Salk.* 193. 5 *Mod.* 74, 316.

So in trespass *Quare clausum fregit, & quendam taurum personæ ignotæ fugavit, per quod* the plaintiff's gooseberry bushes, *necnon quinque perticas (Angl.* poles) *in eodem clauf. erect', officiat' & existent' fregit, laceravit & spoliavit*, after verdict, and one penny damages, the court held that the taking and pulling up the poles was not such an asportation as amounted to conversion; and that though the trespass began by chasing the bull, yet the damage is laid to be done to the freehold; and so the title thereof might well come in question. *Trin.* 11 *Geo.* 1. *in C. B.* 1 *New Abr.* 513.

So in trespass for breaking and entring the plaintiff's house, and keeping him out of possession and use of the said house, with a *continuando* for a month, *per quod* he was put to great expence to gain the possession of his house, and in the mean time lost the profit and use thereof; after verdict for the plaintiff, and 2*s.* 6*d.* damages, the court held that this was a plain trespass *quare clausum fregit* within the statute, and that the *per quod* was only matter of aggravation. *Mich.* 12 *Geo.* 1. *in C. B,* 1 *New Abr.* 514.

Also if there be a trespass upon the freehold, and likewise a count laid *de bonis asportat'*, in order to put in for costs merely, if there be no evidence of the carrying away of the goods, by which the defendant is acquitted as to that, though he is found guilty as to the trespass to the freehold, yet if the damages be under 40*s.* the plaintiff shall recover no more costs than damages. 1 *Vent.* 180, 195.

It is farther to be observed in the construction of the statute 22 & 23 *Car.* 2. that there is no need of a judge's certi-

certificate, where by the pleading it appears, that the title or intereſt of the land is in queſtion; as in an action for eating his graſs, *per quod* his common was impaired; ſo if the defendant juſtifies by any thing that brings the title of the land in queſtion, the judge need not certify to intitle the plaintiff to his coſts. 1 *New Abr.* 514.

Alſo by the 8 & 9 *Will.* 3. *cap.* 10. For preventing wilful and malicious treſpaſſes, it is enacted, "That in all actions of treſpaſs, to be commenced and proſecuted from and after the 25th of *March* 1697, in any of his Majeſty's courts of record at *Weſtminſter*, wherein at the trial of the cauſe at *Weſtminſter* it ſhall appear and be certified by the judge, under his hand, on the back of the record, that the treſpaſs upon which any defendant ſhall be found guilty, was wilful and malicious, the plaintiff ſhall recover not only his damages, but his full coſts of ſuit, any former law to the contrary notwithſtanding.

If an action be commenced in an inferior court, and removed by *habeas corpus* or *certiorari*, into the courts at *Weſtminſter*, the plaintiff ſhall have full coſts, although the damages are under 40*s.* 4 *Mod.* 378.

By the ſtat. 21 *Jac.* 1. *cap.* 16. it is enacted, "That in caſes for ſlanderous words to be ſued or proſecuted in the courts of *Weſtminſter*, or other courts that have power to hold plea thereof, after the end of that ſeſſion of parliament, if the damages are found to be under 40*s.* the plaintiff ſhall recover no more coſts than damages."

By this act the power of the judges is taken away, as to giving coſts *de incremento*, where the damage is under 40*s.* but it is ſaid to have been the reſolution of the judges, that though the court cannot increaſe the coſts, yet the jury are not bound by the ſtatute, and therefore they may give 10*l.* coſts where they give but 10*d.* damages. 1 *Salk.* 207.

In the conſtruction of this ſtatute it has been held, that it extends not to actions for ſlander of title, for that is not properly ſlander, but a cauſe of damage; and the ſlander intended by the ſtatute is to the perſon. *Cro. Car.* 141. *Ley* 82. *Palm.* 530.

So if for calling *Thief*, and cauſing him to be arreſted, *&c.* and the defendant is found guilty of both, it is not within the act. *Cro. Car.* 163, 307.

So when the plaintiff brought an action on the caſe for ſlanderous words ſpoken of his wife, viz. *That ſhe was a whore*, per quod *ſhe loſt ſuch and ſuch cuſtomers*, after verdict for the plaintiff, and damages under 40*s.* the court held that the plaintiff ſhould have full coſts; for it is not the words, but the ſpecial damage which is the cauſe of action in this caſe; and it was incumbent on the plaintiff to prove the ſpecial damage, otherwiſe the action would not have laid for the words. 2 *Salk.* 206.

By ſtat. 22 & 23 *Car.* 2. *cap.* 9. it is enacted, "That all actions of aſſault and battery, wherein the judge at the trial ſhall not find and certify, under his hand, upon the back of the record, that an aſſault and battery was ſufficiently proved, if the jury find damages under 40*s.* the plaintiff ſhall not recover more coſts than damage."

On this part of the ſtatute it has been held, that if an aſſault be only proved, the plaintiff ſhall have no more coſts than damage. 1 *Vent.* 256. 2 *Lev.* 102.

That if a man brings treſpaſs for beating his ſervant, *per quod ſervitium amiſit*, it is not an action of aſſault and battery within the ſtatute, but is an action founded upon the ſpecial damage, in which there ſhall be full coſts. 1 *Salk.* 206.

In treſpaſs of aſſault and battery, wounding and impriſonment; as alſo for entring and breaking his houſe, and opening the doors of the ſaid houſe, and breaking three locks and three bars belonging to the ſaid doors; the defendant pleaded Not guilty to all except the impriſonment, and for that he juſtifies; and on the trial the juſtification was found for the defendant, and the Not guilty for the plaintiff, and the damages 2*s.* 6*d.* and held by the court that the damages being under 40*s.* he could not have full coſts for the battery, becauſe the judge had not certified the battery to be well proved; neither could he have full coſts for breaking the houſe, becauſe this is a treſpaſs relating to the freehold. 1 *New Abr.* 515.

2. *Where coſts ſhall be doubled or trebled.*

It ſeems agreed, that where damages were before recoverable, and a ſtatute increaſes them to double or treble the value, the plaintiff ſhall recover his double or treble damages; and coſts alſo, as parcel of the damages, ſhall be trebled. 10 *Co.* 116. *a.* 2 *Inſt.* 289. *Hard.* 152. *Carth.* 297.

But where a new ſtatute gives either ſingle, double or treble damages, where there were no damages recoverable before, there no coſts ſhall be allowed, becauſe the party can have nothing more than ſuch new ſtatute has already given, and that is damages only; for the ſtatute of *Glouceſter* cannot operate to add coſts to what is given by a ſubſequent ſtatute; becauſe the new ſtatute muſt be conſtrued from itſelf, which gives damages only. 2 *Inſt.* 285. 1 *Salk.* 205. *Carth.* 297.

In an action for forcible entry, upon 8 *Hen.* 6. *cap.* 9. which gives treble damages, the plaintiff ſhall recover not only treble damages but treble coſts alſo. 2 *Inſt.* 289. 10 *Co.* 116. 1 *Vent.* 22.

But in an action of debt upon the ſtatute of 1 & 2 *Phil. & M. cap.* 12. of diſtreſſes, upon the branch of the ſtatute by which the 5*l.* and treble damages are given to the party grieved, for driving a diſtreſs out of the hundred, no coſts are to be given, becauſe the ſtatute by intendment, gives treble damages in lieu of the whole. 2 *Inſt.* 289. *Kelw.* 269. 1 *Rol. Abr.* 516.

So in an action of waſte againſt tenant for life or years, by the ſtatute of *Glouceſter*, *cap.* 6. the place waſted, and treble damages ſhall be recovered, but no coſts, becauſe no action lay againſt them at the Common law; but the action and damages are merely given. 1 *Rol. Abr.* 517. *Dyer* 159. 10 *Co.* 116.

But in waſte againſt tenant in dower, *&c.* treble damages and coſts alſo ſhall be recovered, becauſe an action of waſte lay againſt them at the Common law; and for the waſte, damages ſhould have been recovered. 2 *Inſt.* 289.

In an action upon the ſtatute of 2 *Hen.* 4. *cap.* 1. for ſuing before the Admiral for a thing done upon the land, in which caſe the ſtatute gives to the plaintiff double damages, without ſpeaking of any coſts, yet he ſhall recover as well double coſts as double damages. 1 *Rol. Abr.* 517. *Dyer* 159. 10 *Co.* 116.

So on the ſtatute 2 *W. & M. cap.* 5. by which treble damages and coſts are given againſt the reſcouſor of a diſtreſs for rent, in an action upon the caſe for a reſcous upon the ſtatute, the plaintiff ſhall recover treble coſts, as well as treble damages; for the damages are not given by the ſtatute, but increaſed, and an action upon the caſe lay for a reſcous at Common law. 1 *Salk.* 205. *Carth.* 321.

Double coſts given,

For perſons wrongfully cited out of their own dioceſe, 23 *H.* 8. *c.* 9. *ſ.* 3.

Againſt defendant convicted of forgery, 5 *Eliz. c.* 14. *ſ.* 2, 3.

On decrees againſt inſurers, 43 *Eliz. c.* 12. *ſ.* 3.

On actions againſt peace officers, 7 *Jac.* 1. *c.* 5.

Againſt monopolizers, 21 *Jac.* 1. *cap.* 3. *ſ.* 4.

For officers executing exciſe laws, 12 *Car.* 2. *c.* 25. *ſ.* 35. and ſubſequent acts.

On affirmance of judgment after verdict, 13 & 14 *Car.* 2. *ſtat.* 2. *c.* 2. *ſ.* 9.

For extortion, *&c.* in cuſtomhouſe officers, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 34.

Where in appeals in exciſe, to be paid by original proſecutors, 15 *Car.* 2. *c.* 11. *ſ.* 19.

For defendant executing the act for regulating the price, *&c.* of coals, 16 & 17 *Car.* 2. *c.* 2. *ſect.* 4.

For defendant acting in purſuance of the act for rebuilding *London*, 22 *Car.* 2. *c.* 11. *ſ.* 83.

Or of the act for regulating the making *Kidderminſter* ſtuffs, 22 & 23 *Car.* 2. *c.* 8. *ſ.* 16.

For perſons executing the act for rebuilding *Northampton*, 27 *Car.* 2. *c.* 1. *ſ.* 11.

For

For plaintiff on act concerning the highways, 3 *W. & M. cap.* 12. *ſect.* 25. 1 *Geo.* 1. *c.* 52. *ſ.* 13. 24 *Geo.* 2. *c.* 43. *ſect.* 11.

For perſons executing the act for recovery of ſmall tithes, 7 & 8 *W.* 3. *c.* 6. *ſ.* 13.

Againſt offenders on the act for ſuppreſſing lotteries, 10 & 11 *W.* 3. *c.* 17. *ſ.* 3.

For perſons executing the act for better governing watermen, 11 & 12 *W.* 3. *c.* 21. *ſ.* 11.

For perſons making ſeizure in purſuance of act for prohibiting of importation of *Scotch* linen into *Ireland*, 1 *Ann. ſt.* 2. *c.* 8. *ſ.* 8.

For perſons executing the act concerning ſalt duties. 5 *Geo.* 1. *c.* 18. *ſ.* 27.

For plaintiff recovering on game law, 8 *Geo.* 1. *c.* 19. *ſ.* 1.

For defendant executing the act for ſupplying the city with water, 8 *Geo.* 1. *c.* 26. *ſ.* 12.

For perſons ſued for any thing done in purſuance of an act for preventing abuſes in weighing butter in *York*, 8 *Geo.* 1. *c.* 27. *ſect.* 8.

On recovery for offences againſt the act for better regulating the coal trade, 3 *Geo.* 2. *c.* 26. *ſ.* 16.

Againſt defendant laying wagers, *&c.* on price of ſtocks, 7 *Geo.* 2. *c.* 8. *ſ.* 1.

For defendant ſued for diſtraining for rent, 11 *Geo.* 2. *c.* 19. *ſ.* 21.

For defendants in avowry, 11 *Geo.* 2. *c.* 19. *ſ.* 22.

Againſt offenders on the act for preventing unlawful gaming, 13 *Geo.* 2. *c.* 19. *ſ.* 2.

For defendant executing the act for recovering ſmall debts in *London*, 14 *Geo.* 2. *c.* 10. *ſ.* 6.

For defendant acting in ſuppreſſing rebellion, 19 *Geo.* 2. *c.* 39. *ſ.* 18.

For plaintiff on the act for ſupport of ſeamen, 20 *Geo.* 2. *c.* 38. *ſ.* 39. For defendant executing ſaid act, *ibid. ſ.* 40.

For perſons acting in purſuance of the act for the more eaſy recovery of ſmall debts in *Middleſex*, 23 *Geo.* 2. *c.* 33. *ſ.* 18.

For perſons executing the act for regulating the navigation of the *Thames*, *&c.* 24 *Geo.* 2. *c.* 8. *ſ.* 24.

For defendants ſued for executing the act for regulating drivers of carts, 30 *Geo.* 2. *c.* 22. *ſ.* 15,

For defendants executing the act concerning pawnbrokers, and to prevent gaming, 30 *Geo.* 2. *c.* 24. *ſ.* 22.

For plaintiff againſt juſtice of peace on judge's certifying, 24 *Geo.* 2. *c.* 44. *ſ.* 7.

For defendant acting in purſuance of the act to enforce attendance of jurymen, 29 *Geo.* 2. *c.* 19. *ſ.* 4.

For defendant acting in purſuance of an act for preſerving fiſh, 30 *Geo.* 2. *c.* 21. *ſ.* 16.

Treble coſts given,

Againſt ſuch as ſue in fictitious names, *&c.* 8 *El. c.* 2. *ſ.* 4.

For defendant executing the act for reforming weights and meaſures, 16 *Car.* 1. *c.* 19. *ſ.* 9.

In error on affirmance of judgment after verdict, 13 *Car.* 2. *ſt.* 2. *c.* 10.

For plaintiffs on act againſt gaming, 16 *Car.* 2. *c.* 7. *ſ.* 3.

For defendants executing the act againſt importation of foreign cattle, 20 *Car.* 2. *c.* 7. *ſ.* 8.

Or the act concerning highways, 22 *Car.* 2. *c.* 12. *ſ.* 3. 8 *Geo.* 2. *c.* 20. *ſ.* 18.

Or the act for burying in woollen, 30 *Car.* 2. *ſt.* 1. *c.* 3. *ſ.* 11.

Where on the acts concerning wool, 1 *W. & M. ſt.* 1. *c.* 32. *ſ.* 10. 7 & 8 *W.* 3. *c.* 28. *ſ.* 8, 10, 12. 9 & 10 *W.* 3. *c.* 40. *ſ.* 6.

For defendant executing the game act, 4 & 5 *W. & M. c.* 23. *ſ.* 9.

Or the act againſt throwing ſquibs, 9 & 10 *W.* 3. *c.* 7. *ſ.* 6.

Or the acts concerning ſilks, 9 & 10 *W.* 3. *c.* 43. *ſ.* 11. 8 *Geo.* 1. *c.* 15. *ſ.* 23. 23 *Geo.* 2. *c.* 20. *ſ.* 5. 26 *Geo.* 2. *c.* 21. *ſ.* 9.

Or for executing exciſe laws, 10 *W.* 3. *c.* 21. *ſ.* 21.

For defendant ſued for executing the act for aſcertaining the meaſures for retailing ale, *&c.* 11 & 12 *W.* 3. *c.* 15. *ſ.* 8.

On acts concerning workhouſe and hop-market in *Worceſter*, 2 *Ann. c.* 8. *ſ.* 34. 4 *Geo.* 2. *c.* 25. *ſ.* 10.

For defendant executing the act for preventing fire, 6 *Ann. c.* 31. *ſ.* 6.

Where againſt particular members of the bank, 7 *Ann. c.* 7. *ſ.* 65.

For defendant executing the acts for regulating the cloth trade, 7 *Ann. c.* 13. *ſ.* 9. 10 *Ann. c.* 16. *ſ.* 10. 1 *Geo.* 1. *c.* 15. *ſ.* 9. 11 *Geo.* 1. *c.* 24. *ſ.* 20. 11 *G.* 2. *c.* 28. *ſ.* 15.

Againſt ſtamp officers neglecting duty, 8 *Ann. c.* 9. *ſ.* 44.

Or the act concerning tobacco and ſnuff, 1 *Geo.* 1. *c.* 46. *ſ.* 6.

For defendants on the act againſt making cloth buttons, 4 *Geo.* 1. *c.* 7. *ſ.* 7. 7 *Geo.* 1. *c.* 12. *ſ.* 6.

For defendant executing the act againſt deer ſtealers, 1 *Geo.* 1 *c.* 15. *ſ.* 3.

Or the acts concerning the cuſtoms, 8 *Geo.* 1. *c.* 18. *ſ.* 26. 9 *Geo.* 2. *c.* 35. *ſ.* 37.

Or the acts concerning coffee and tea, 10 *Geo.* 1. *c.* 10. *ſ.* 44. 21 *Geo.* 2. *c.* 14. *ſ.* 6.

Or the acts concerning gunpowder, 11 *Geo.* 1. *c.* 23. *ſ.* 5. 4 *Geo.* 2. *c.* 29. *ſ.* 7. 15 *Geo.* 2. *c.* 32. *c.* 5. 22 *Geo.* 2. *c.* 38. *ſ.* 8.

Or the act for preventing frauds in dyeing, 12 *Geo.* 1. *c.* 24. *ſ.* 7.

Or the acts for improving the fiſhery, 2 *Geo.* 2. *c.* 19. *ſ.* 6. 33 *Geo.* 2. *c.* 27. *ſ.* 20. 22 *Geo.* 2. *c.* 49. *ſ.* 20. 29 *Geo.* 2. *c.* 39. *ſ.* 16.

Or the ſalt act, 3 *Geo.* 2. *c.* 20. *ſ.* 24.

Againſt offenders againſt the act for regulating coal trade, 4 *Geo.* 2. *c.* 30. *ſ.* 1.

For defendants executing the act againſt gaming, 10 *Geo.* 2. *c.* 28. *ſ.* 8.

Or for executing the acts concerning ſpirituous liquors, 11 *Geo.* 2. *c.* 26. *ſ.* 3. 16 *Geo.* 2. *c.* 8. *ſ.* 6. 33 *Geo.* 2. *c.* 9. *ſ.* 20. 33 *Geo.* 2. *c.* 28. *ſ.* 16.

Or the acts concerning gold and ſilver, 12 *Geo.* 2. *c.* 26. *ſ.* 23. 15 *Geo.* 2. *c.* 20. *ſ.* 10. 22 *Geo.* 2. *c.* 36. *ſ.* 9. 29 *Geo.* 2. *c.* 14. *ſ.* 15.

Or the act againſt lotteries, 12 *Geo.* 2. *c.* 28. *ſ.* 12.

Or the act for the more eaſy aſſeſſing county rates, 12 *Geo.* 2. *c.* 29. *ſ.* 24.

For defendant executing plantation laws, 12 *Geo.* 2. *c.* 30. *ſ.* 14. 24 *Geo.* 2. *c.* 51. *ſ.* 9. 30 *Geo.* 2. *c.* 9. *ſ.* 16.

Againſt ſheriff for not paying reward for taking ſheepſtealers, 14 *Geo.* 2. *c.* 6. *ſ.* 2.

For defendants acting under act for opening trade to *Ruſſia*, 14 *Geo.* 2. *c.* 36. *ſ.* 5.

Againſt ſheriff for not paying reward on convicting offenders counterfeiting money, 15 *Geo.* 2. *c.* 28. *ſ.* 7.

For defendant acting under the act againſt vagrants, 17 *Geo.* 2. *c.* 5. *ſ.* 34.

For defendant executing the acts for enlightening and widening the ſtreets, 17 *Geo.* 2. *c.* 29. *ſ.* 40. 33 *Geo.* 2. *c.* 30. *ſ.* 32.

For defendants proſecuting on the acts concerning elections of members of parliament, 18 *Geo.* 2. *c.* 18. *ſ.* 16. 19 *Geo.* 2. *c.* 28. *ſ.* 12. 31 *Geo.* 2. *c.* 14. *ſ.* 5.

On actions againſt juſtices of peace, 18 *Geo.* 2. *c.* 20. *ſect.* 8.

Or for executing the exciſe laws in general, 18 *Geo.* 2. *c.* 26. *ſ.* 15.

Or againſt granting duties on glaſs, *&c.* 19 *Geo.* 2. *c.* 12. *ſ.* 82.

Or the act againſt ſwearing, 19 *Geo.* 2. *c.* 21. *ſ.* 11.

Or the act for laying duties on houſes, 20 *Geo.* 2. *c.* 3. *ſ.* 66.

Or the act for making indico, 21 *Geo.* 2. *c.* 33. *ſ.* 18.

For the defendants executing the act for ſecuring duties on coals, 23 *Geo.* 2. *c.* 37. *ſ.* 2.

Or the acts for the recovery of ſmall debts, 22 *Geo.* 2. *c.* 47. *ſect.* 17. 23 *Geo.* 2. *c.* 27. *ſ.* 23. 23 *Geo.* 2. *c.* 30. *ſ.* 24.

Where

Where on the act concerning quarentine, 26 *Geo.* 2. *c.* 12. *ſ.* 16, 21.

For defendant executing the ſtamp acts, 29 *Geo.* 2. *c.* 12. *ſ.* 24. 29 *Geo.* 2. *c.* 13. *ſ.* 11. 30 *Geo.* 2. *c.* 19. *ſ.* 78. 32 *Geo.* 2. *c.* 35. *ſ.* 23.

Or the acts concerning linen and cambricks, 29 *Geo.* 2. *c.* 15. *ſ.* 13. 32 *Geo.* 2. *c.* 32. *ſ.* 10.

Or the act concerning conſtables, jurymen, *&c.* 29 *Geo.* 2. *c.* 25. *ſ.* 19. 31 *Geo.* 2. *c.* 17. *ſ.* 21.

Or the act againſt ſtealing lead, iron, *&c.* 29 *Geo.* 2. *c.* 30. *ſ.* 10.

Or the act for widening *London* bridge, 29 *Geo.* 2. *c.* 40. *ſ.* 43. 31 *Geo.* 2. *c.* 20. *ſ.* 8.

Or the act againſt retailing unlicenſed wine, 30 *Geo.* 2. *c.* 19. *ſ.* 74.

Or militia act, 30 *Geo. c.* 25. *ſ.* 72. and ſubſequent.

Or the act laying tax on houſes, *&c.* 31 *Geo.* 2. *c.* 22. *ſ.* 31. *&c.*

Or the act for eſtabliſhing corn-market, 31 *Geo.* 2. *c.* 25. *ſ.* 29.

Or for executing the act for the due making of bread, 31 *Geo.* 2. *c.* 29. *ſect.* 41.

Or the act concerning hay and ſtraw, 31 *Geo.* 2. *c.* 40. *ſ.* 19.

Or the act permitting the free importation of cattle from *Ireland*, 32 *Geo.* 2. *c.* 11. *ſ.* 2.

Or the act concerning laſtage and ballaſtage, 32 *Geo.* 2. *c.* 16. *ſ.* 29.

Againſt officers offending againſt act for the relief of debtors, 32 *Geo.* 2. *c.* 28. *ſ.* 22.

For defendant executing the act to prevent woollen goods of *France* to be imported into the *Levant* ſeas, 32 *Geo.* 2. *c.* 34. *ſ.* 15.

Or the land tax, 4 *Geo.* 3. *c.* 2. *ſ.* 36.

Or malt acts, 33 *Geo.* 2. *c.* 3. *ſ.* 24. 33 *Geo.* 2. *c.* 7. *ſ.* 61. and ſubſequent.

Or for officers executing the act of inſolvency, 1 *Geo.* 3. *c.* 17. *ſ.* 28.

For defendant ſued after due diſcharge, 1 *Geo.* 3. *c.* 17. *ſ.* 29.

Or for perſons acting under mutiny act, 4 *Geo.* 3. *c.* 3. *ſ.* 60.

See **Damages, Suits.** *For more matter concerning coſts, ſee* 1 Bac. Abr. *and* 6 Vin. Abr. *tit.* Coſts.

Cot, in the old *Saxon* ſignifies *cottage*, and ſo ſtill in many places of *England*, as *Verſtegan* teſtifies in his *Reſtitution* of decayed intelligences in antiquities. It is alſo a kind of refuſe wool, clung or clotted together, that it cannot be pulled aſunder. *Stat.* 13 *R.* 2. *ſtat.* 1. *cap.* 9.

Cotage. See **Cottage.**

Cotarius, A *cottager.*

Cotarii *debent talliari ad voluntatem domini; facere ſervitia incerta; nihil dare, nihil vendere, nihil proprium habere, nec poſſunt acquirere, niſi ad promotionem domini ſui.* Ex. libr. irrot. Eccl. Chriſti Cantuar. f. 211.

Cote, Cot, and **Coat.** The names of places beginning or ending with theſe ſyllables, ſignify a little houſe or *cottage*; from the Sax. *cote, i. e. caſa.*

Cotellus, A ſmall *cottage.*——Henricus Clericus *tenet unum* cotellum *cum croſta, & reddit per annum octo denarios.*——Conſuetud. Domus de Farendon. MS.

Coterelli, (Fr. *Cotereaux.*) This word is uſed in our records for *cottagers, quia cotagia & curtilagia tenebant*; but they were anciently a certain kind of peaſants outlawed; a ſort of ſtraggling thieves and plunderers, who ſeem at firſt to have been cottagers and country-fellows, like the moſs-troopers on the borders of *Scotland.*——*Aſſerentes igitur & affirmantes ſe cum archiepiſcopo locuturos, cum pace & pro pace intrare velle, apertis januis intraverunt capati circa decem ſuper loricas, & hi* Bragmanni & Coterelli Flandrenſes *conducti.* Girald. Cambr. de vita Galfridi Archiep. Ebor. apud Whartoni Angl. Sacr. P. 2. p. 391.

Coterellus. *Spelman* and *Du Freſne* make *cotarius* and *coterellus*, to be both ſervile tenants: But it ſeems that in the *Domeſday Regiſter*, and other ancient MSS. there appears a diſtinction, not only in their name, but in their tenure and quality. The *cotarius* had a free ſoccage tenure, and payed a ſtated firm or rent in proviſions or money, with ſome occaſional cuſtomary ſervice; whereas the *coterellus* ſeemed to have held in mere villenage, and had his perſon and iſſue, and goods diſpoſed at the pleaſure of his lord.——Edmund *Earl of* Cornwall *gave to the* Bon-hommes *of* Aſherugge, *his manors of* Cheſterton *and* Ambroſden——*una cum villanis,* coterellis, *eorum* catallis, *ſervitiis, ſectis, & ſequelis, & omnibus ſuis ubicunque pertinentibus.* Paroch. Antiq. p. 310.

Coteria, A cot, houſe, or home-ſtall.——*N. prior & capitulum eccleſiæ Chriſti* Cant. *concedunt* Roberto le Herdman *terram ſuam de feodo de* Wodetone, *& duas* coterias, *juxta terram* Burelli, & coteriam *illam quæ fuit quondam* Alani de Staple——*menſe* Aprili 1245. Regiſtr. Eccl. Chriſti Cant. MS.

Coteswold, Several ſheep *cotes*, and ſheep feeding on hills: From the Sax. *cote, caſa, i. e.* a *cottage*, and *wold*, a place where there is no wood.

Cot-gare is a kind of refuſe wool, ſo clung or clotted together, that it cannot be pulled aſunder. Sat. 13 *R.* 2. *ſtat.* 1. *cap.* 9. whereby it is provided, That neither denizen nor foreigner make any other refuſe of wools but cot-gare and villein. So the printed ſtatute. But in the parliament-roll of that year it is *cod-land* and *villein. Cot* or *cote* ſignifies as much as *cottage* in many places, and was ſo uſed by the *Saxons* according to *Verſtegan, Cowell, edit.* 1727.

Cotland, *Cot, Seth-land,* Land held by a *cottager*, whether in ſocage or villenage——*Dimidia acra jacet ibidem inter* cotland, *quam* Johannes Goldering *tenet ex una parte, &* cotland *quam* Tho. Webbe *tenet ex altera.* ——Paroch. Antiq. p. 532. Lib. Rameſ. ſect. 256. ——*Dedit prædictus abbas prædicto Hugoni pro tota terra quæ tunc temporis a S. Benedicto idem Hugo tenebat, unam* cotſethlandam *cum libero ſervitio in villa quæ dicitur* Slepe, *& unum maignagium in foro ejuſdem villæ.*—— Cothſethlandam *hic intelligo* cotæ *ſedem, & prædii quidpiam ad eandem pertinet.* Spelman. *De una* cothlanda *terræ in* Wathford. Pat. 9 Ed. 2. par. 2. m. 2.

Cotlanda and **Cotlandum,** the ſame with *cotagium.* 'Tis mentioned in the *monaſticon,* 1 *tom. pag.* 325. *Item una virgata terræ, cum dimidio unius* cotlandi, *&c.*

Cotſethla, Cotſecle, The little ſeat or manſion belonging to a ſmall farm.——*Conceſſi illam* cotſethlam *terræ quam* Petrus *filius* Jordani *tenuit de me in* Migeham. Cartular. Abbat. Radinges. MS. f. 53. a.—— *Ego* Thomas *filius* Will. *de* Culern, *dedi Deo & Eccleſiæ* Malmſbury *unam* cotſetle *in* Culern, *cum omnibus pertinentiis.* Cartular. Malmſbur. MS.

Cotſethus, A cottager, or cottage-holder, who by ſervile tenure was bound to work for the lord.——*As in the ſervices to be done by the tenants in the manor of* Blebory, *belonging to the abbot and convent of* Rading.—— *Dicit etiam prædictus abbas, quod* Henricus Boton & Agnes *uxor ejus, &c. ſunt* cotſethi ex quibus *anteceſſores eorum ſolebant operari quolibet die, excepto ſabbato & diebus feſtivis, a feſto S.* Michaelis *uſque ad tempus falcationis pratorum, ab ortu ſolis uſque ad horam tertiam, omnimoda opera manualia, ſecundum quod ballivus ejus voluerit injungere.* Cartular. Rading. MS. f. 221.

Cotſeti, (*Cotmanni,*) Thoſe who live in *cotages.* Leg. H. 1. cap. 30. *Villani vero vel* cotſeti *vel perdingi, vel qui ſunt hujuſmodi viles vel inopes perſonæ, non ſunt inter legum judices numerandi.*

Cottage, (Sax. *Cote*) Is a little houſe for habitation, without land belonging to it. *Wood, b.* 3. *c.* 3.

Stat. 31 *Eliz. c.* 7. *ſect.* 1. For the avoiding of the great inconveniencies which are found by experience to grow by erecting and building of great numbers and multitude of cottages, which are daily more and more increaſed in many parts of this realm; Be it enacted, That no perſon ſhall within this realm of *England* make, build or erect, or cauſe to be made, builded or erected, any manner of cottage for habitation or dwelling, unleſs the ſame perſon do aſſign and lay to the ſaid cottage or building four acres of ground at the leaſt, to be accounted according to the ſtatute or ordinance *De terris menſurandis,* [that is, after 16½ feet to the pole. 2 *Inſt.* 737.] being his or her own freehold and inheritance, lying near to the ſaid cottages, to be continually occupied and manured

red therewith ſo long as the ſaid cottage ſhall be inhabited; upon pain that every ſuch offender ſhall forfeit to our ſovereign lady the Queen's Majeſty, her heirs and ſucceſſors 10*l.* of lawful money of *England* for every ſuch offence.

Sect. 2. And every perſon that ſhall willingly uphold, maintain, and continue any ſuch cottage hereafter to be erected, converted, or ordained for habitation or dwelling, whereunto four acres of ground as aforeſaid, ſhall not be aſſigned and laid to be uſed and occupied with the ſame, ſhall forfeit to our ſovereign lady, the Queen's Majeſty, her heirs and ſucceſſors 40*s.* for every month any ſuch cottage ſhall be by him or them upholden, maintained and continued.

Sect. 3. Provided alſo, that there ſhall not be any inmate, or more families or houſholds than one, dwelling or inhabiting in any one cottage made or to be made or erected; upon pain that every owner and occupier of any ſuch cottage, placing or willingly ſuffering any ſuch inmate or other family than one, ſhall forfeit and loſe to the lord of the leet, within which ſuch cottage ſhall be, the ſum of ten ſhillings of lawful money of *England*, for every month that any ſuch inmate or other family than one, ſhall dwell or inhabit in any cottage as aforeſaid. And that all and every lord and lords of leet and leets, and their ſtewards within the precinct of his and their leet and leets, ſhall have full power and authority within their ſeveral leets, to enquire and to take preſentment by the oath of jurors, of all and every offence and offences in his behalf, and upon ſuch preſentment had or made to levy by diſtreſs to the uſe of the lord of the leet, all ſuch ſums of money as ſo ſhall be forfeited; and moreover that it ſhall be lawful for the lord of every ſuch leet, where ſuch preſentment ſhall be made, to recover to his own uſe any ſuch forfeiture, by action of debt in any of the Queen's Majeſty's courts of record, whereunto no eſſoin, protection or wager of law ſhall be allowed.

Sect. 4. And all juſtices of aſſiſes and juſtices of peace in their open ſeſſions, and every lord within the precinct of his leet and none others, ſhall have full power and authority within their ſeveral limits and juriſdictions, to inquire of, hear and determine all offences contrary to this preſent act, as well by indictment as otherwiſe, by preſentment or information, and to award execution for the levying the ſeveral forfeitures aforeſaid by *fieri facias*, *elegit*, *capias*, or otherwiſe, as the caſe ſhall require.

Sect. 5. This ſtatute ſhall not extend to any cottage, in any city or town corporate, or ancient borough, or market-town, nor to any cottages for the habitation of workmen in mineral works, coal-mines, quarries, or delfs, or in the making brick, tile, lime, or other coals; ſo as the ſame cottages be not above one mile diſtant from the works, and be uſed only for the habitation of workmen.

Sect. 6. This act ſhall not extend to any cottage within a mile of the ſea, or upon the ſide of any navigable river where the admiral ought to have juriſdiction, ſo long as no perſon ſhall therein inhabit, but a ſailor, or man of manual occupation, for making, furniſhing or victualling of any veſſel uſed to ſerve on the ſea; nor to any cottage in any foreſt, chaſe, warren or park, for ſo long as no perſon ſhall therein inhabit, but an under-keeper or warrener; nor to any cottage heretofore made, ſo long as no other perſon ſhall therein inhabit, but a common herdman or ſhepherd, for keeping the cattle of the town, or a poor, lame, ſick, or aged, or impotent perſon; nor to any cottage, which upon complaint to the juſtices of aſſize, or to the quarter ſeſſions, ſhall by their order be decreed to continue.

Stat. 43 *Eliz. cap.* 2. *par.* 5. enacts, That it ſhall and may be lawful for the churchwardens and overſeers, or the greater part of them, by the leave of the lord or lords of the manor, whereof any waſte or common within their pariſh, is or ſhall be parcel, and upon agreement before with him or them made in writing under the hands and ſeals of the ſaid lord or lords, or otherwiſe according to any order to be ſet down by the juſtices of peace in the ſaid county at their general quarter ſeſſions, or the greater part of them, by like leave and agreement of the ſaid lord or lords in writing, under his or their hands and ſeals; to erect, build, and ſet up in fit and convenient places of habitation in ſuch waſte or common, at the general charges of the pariſh, or otherwiſe of the hundred or county as aforeſaid, to be taxed, rated, and gathered in manner before expreſſed, convenient houſes of dwelling for the ſaid impotent poor. And alſo to place inmates, or more families than one in one cottage or houſe, on an act made in the 31ſt year of her Majeſty's reign, intitled, *An act againſt the erecting and maintaining of cottages*, or any thing therein contained to the contrary notwithſtanding; which cottages and places for inmates ſhall not at any time hereafter be uſed or employ'd to or for any other habitation, but only for impotent or poor of the ſame pariſh, that ſhall be there placed from time to time by the churchwardens and overſeers of the poor of the ſame pariſh, or the moſt part of them; upon the pains and forfeitures contained in the ſaid former act, made in the ſaid 31ſt year of her Majeſty's reign.

The inconveniencies that grow by unlawful cottages, and inmates in cottages againſt this ſtatute, as appears by the preamble, are great, being neſts to hatch idleneſs, the mother of pickings, thievings, ſtealing of wood, *&c.* tending alſo to the prejudice of lawful commoners; for that new-erected cottages within the memory of man, though they have four acres of ground or more laid to them according to the act, ought not to common in the waſtes of the lord; but the greateſt inconvenience of all this is, the ill breeding and educating of youth; which inconveniencies may be eaſily helped and remedied by the proviſions of this excellent law, if lords of leets and their ſtewards would look to the execution of this act, which we hold the readieſt means; for albeit the cottage erected or converted, cannot by any proviſion in this ſtatute be demoliſhed or pulled down, yet the execution of the penalty of this act will make it uninhabitable and work the deſired effect, and they may alſo be amerced for wrongful commoning, in the court baron. 2 *Inſt.* 740.

J. S. was indicted upon the ſtatute 31 *Eliz.* becauſe he had erected a cottage five years laſt paſt, and had not allotted four acres of land according to the ſaid ſtatute *de terris menſurandis* 33 *Ed.* 1. and had continued it ever ſince. The firſt exception was, that this indictment was for erecting a cottage five years paſt, whereas every offence ought to be puniſhed within two years by indictment or information, by the expreſs words of the ſtatute of 31 *Eliz. cap.* 5. otherwiſe it is not puniſhable, and therefore not good. 2dly, Becauſe he does not ſay that he voluntarily continued it; which are the expreſs words of the ſtatute. 3dly, For that it is to be by the ſtatute *De terris menſurandis*, whereas there is not any ſuch ſtatute, but it is an ordinance only; and for theſe cauſes the indictment was held ill; and the defendant was diſcharged. *Cro. J.* 603, 604. *pl.* 30. *Mich.* 18. *Jac. B. R. Stowe*'s caſe.

One was indicted for erecting of a cottage. It was moved that the indictment was inſufficient, for that the words of 31 *Eliz. cap.* 7. are, *ſhall willingly uphold, maintain and continue*, and the indictment is only, that he continued, and ſo wants the words *willingly uphold*, according to the ſtatute. It did not appear in the indictment that it was newly erected, for it is only that he continued, and not that he erected. The indictment was quaſhed, becauſe being a penal law, it was not purſued. *Godb.* 383. *pl.* 470. *Paſch.* 3 *Car. B. R. Day*'s caſe.

If lord of a manor will ſuffer poor men to erect cottages on his waſte, though he takes no rent for them, yet a fine ſhall be ſet upon them, and the lord of the manor ſhall pay the fine; and after the cottage built, if the manor deſcends, or is convey'd to another, if he receives any ſmall rent for the continuance of that cottage, he alſo ſhall pay the fine that ſhall be aſſeſſed, becauſe he upholds. Agreed. *Jo.* 272, 273. 8 *Car. Chriſtian Smith*'s caſe, *in Itin' Windſor.*

The ſtatute which gives power to erect cottages in the waſte for poor people, does not extend to waſte within foreſts. *Jo.* 269, *in Itinere Windſor*, 8 *Car.* in *Whitlock*'s caſe.

In *Windleſham* in the county of *Surry* there were divers cottages and incloſures made upon the King's ſoil, and afterwards the King ſells the manor; *per Noy* Attorney general, This has not diſpenſed with the purpreſtures, but the patentee muſt be fin'd for the continuance of them, and they are to be pull'd down, if they be not now arrented; for elſe the King's grant ſhould be taken by implication to continue a wrong to his foreſt, which the King never intended, and accordingly they were fin'd and arreſted. *Jo.* 277. See 6 *Vin. Abr.*

Cottonian library, How ſettled and preſerved, 12 & 13 *Will.* 3. *c.* 7. 5 *Ann. c.* 30. 26 *Geo.* 2. *c.* 22. *ſ.* 9.

Cottons. Not within 27 *Hen.* 8. concerning the true making of cloth, 27 *H.* 8. *c.* 12. *ſ.* 3.

Clauſes concerning the length, breadth, and weight of cottons in general, 43 *Eliz. c.* 10. *ſ.* 4, 5, 6.

And particularly of *Welch* and *Lancaſhire*, or *Cheſhire* cottons, 5 & 6 *Ed.* 6. *c.* 6. *ſ.* 16, 25. 4 & 5 *Phil. & Ma. c.* 5. *ſ.* 11, 13. 3 *Jac.* 1. *c.* 17. *ſ.* 5. 3 *Car.* 1. *c.* 4. *ſ.* 26.

Concerning the putting of hair, flocks, or yarn in cotton, 5 & 6 *Ed.* 6. *c.* 6. *ſ.* 26. 18 *Eliz. c.* 18. *ſ.* 3. 43 *Eliz. c.* 10. *ſ.* 1. 21 *Jac.* 1. *c.* 18. *ſ.* 5.

Reſtraint on the exportation of cotton, or offering it to ſale before it is duly ſealed, 5 & 6 *Ed.* 6. *c.* 6. *ſ.* 29, 30. 4 & 5 *Ph. & M. c.* 5. *ſ.* 21, *&c.*

Amends to be made by thoſe that ſhall export faulty cottons, 5 & 6 *Ed.* 6. *c.* 6. *ſ.* 35. 4 *P. & M. c.* 5. *ſ.* 18. 43 *Eliz. c.* 10. *ſ.* 9, 10.

Penalties on thoſe that ſhall counterfeit or unduly ſet to, or take away ſeals, 5 & 6 *Ed.* 6. *c.* 6. *ſ.* 48. 4 & 5 *P. & M. c.* 5. *ſ.* 20.

Thoſe that buy *Welch* cottons to ſell again, ſhall put them to ſheermen, cottoners, or frizers, to be wrought, 4 & 5 *Ph. & M. c.* 5. *ſ.* 12. 8 *El. c.* 7. *ſ.* 4, 5.

Workers of cottons to be paid in money, 8 *El. c.* 7. *ſ.* 6.

Penalty on manufacturers imbeziling cottons, *&c.* 1 *Ann. ſt.* 2. *c.* 18. *ſ.* 1.

Cotton manufactures to what duties liable on importation, 4 *W. & M. c.* 5. *ſ.* 2. 3 & 4 *Ann. c.* 4. *ſ.* 8.

Freed from duties on exportation, and all draperies freed from aulnage duties, 11 & 12 *W.* 3. *c.* 20.

Juſtices of peace to puniſh workmen in imbeziling cotton, and the receivers, and to hear and determine the wages, frauds, and defaults of workmen, 1 *Ann. ſt.* 1. *c.* 18. 13 *Geo.* 2. *c.* 8.

Penalties for wearing callicoes extended to ſtuffs made of or mixed with cotton, 7 *Geo.* 1. *ſt.* 1. *c.* 7. *ſ.* 10. 9 *Geo.* 2. *c.* 4.

Stealing cotton out of places uſed for whitening or drying it, felony without clergy, 4 *Geo.* 2. *c.* 16. 18 *Geo.* 2. *c.* 27.

Cottum, *(Cot,)* Coarſe or dag-wool, of which they made *cotta* or *cottos*, *i. e.* coarſe blankets. Hence in making hats, to *cotten* well, is when the wool, *&c.* works well, and incorporates together.——*Noveritis nos teneri in centum ſaccis bonæ lanæ, & placabilis ſine* cot & gard, *pro certa ſumma pecuniæ.* Cartular. Rad. MS. f. 208.

Cotuca, Coat-armour. *Ad arma proſiliunt & milites quidem ſuper armatura* cotucas *induerant, vocat.* Quarteloys. Walſing. p. 114.

Cotuchan, *Bores*, or huſbandmen. *Domeſday.*

Coucher, or Coucher, Signifies a factor that continues in ſome place or county for traffick; as formerly in *Gaſcoign*, for buying wines. Stat. 37 *Ed.* 3. *c.* 16. *Coucher* is alſo uſed for the general book, in which any religious houſe or corporation regiſter their particular acts. Stat. 3 & 4 *Ed.* 6. *cap.* 10.

Covenable, (Fr. *convenable)* Fit, convenient, or ſuitable.——That every of the ſame three ſorts of fiſh be good and *covenable*, as in old time hath been uſed. 31 *Ed.* 3. *cap.* 2. *Plowden, f.* 472. *a. Covenably* endowed, that is endowed as is fitting. It is alſo written *convenable.* 27 *Ed.* 3. *ſtat.* 2 *cap.* 17. *Plowd. fo.* 472. *a.*

Covenant, *(Conventio)* Is the conſent of two or more to one thing, to do or give ſomewhat. *Weſt. Symb. par.* 2. *lib.* 1. *ſect.* 4. It ſeemeth to be as much as *pactum conventum* with the Civilians, which we often read in *Tully*; *Pactum conventum, quod & vulgo veſtitum vocant, opponitur nudo pacto, vel ut ab omni juris ſolemnitate deſtituto. Hujus exempla, &c. Oldendorpius.* And *covenant* in this ſignification, is either a *covenant in law*, or a *covenant in fact. Coke, lib.* 4. *Noke*'s caſe, *fol.* 80. or *covenant expreſs, lib.* 6. *f.* 17. *a.* A *covenant in law* is that which the law intendeth to be made, though in words it be not expreſt; as if the leſſor do demiſe and grant, *&c.* to the leſſee for a certain term, the law intendeth a *covenant* on the leſſor's part, that the leſſee ſhall quietly enjoy his leaſe for his term againſt all incumbrances. *Covenant in fact* is that which is expreſly agreed between the parties. There is alſo a *covenant merely perſonal*, and a *covenant real. F. N. B. f.* 145. And he ſeemeth to ſay, that a *covenant real* is, whereby a man tieth himſelf to paſs a thing *real*, as lands or tenements; as a *covenant* to levy a *fine* of land, *&c.* A *covenant merely perſonal*, of the other ſide, is where a man *covenanteth* with another by deed to build him a houſe, or any other thing, or to ſerve him, or to infeoff him, *&c.* See **Convention.** *Covenant* is alſo the name of a writ; for which ſee **Convention,** and *New Book of Entries*, verbo *Covenant.*

NOverint omnes præſentes ſcriptum chirographatum viſur. vel auditur. quod 18 *die* April. *temporis gratiæ* 1260. *ita* convenit *inter nos* Hugonem de Okeleſthorp & Adam *filium* Ade de Thowes, *generum ejuſdem* Hugonis, *ſc. quod ego* Adam *non dabo, impignorabo, vendam, nec alienabo aliquam partem tenementi mei de quo fui veſtitus & ſeiſitus prædicto die, nec tenementi mihi contingentis nomine hæreditatis, ſine voluntate & aſſenſu prædicti* Hugonis *vel hæredum ſuorum, Et quod amabiliter tractabo uxorem meam, filiam prædicti* Hugonis; *Et niſi fecero, ibo per ſeptem dies ſabbati nudus per medium forum de* Harwode *quando plenius fuerit, ſecundum ordinationem dicti* Hugonis. *Omnia autem præſcripta fideliter & ſine fraude obſervanda pro me & hæredibus meis, tactis ſacroſanctis, juravi & affidavi; Et ne iſtud alicui hominum vertatur in dubium, nos prædicti* Hugo & Adam *ſigilla noſtra partium hiis mutuis ſcriptis appoſuimus. Hiis teſtibus,* Stephano Sterry, *tunc chirographar. civitatis Ebor.* Daniele de Tottie *clerico,* Richardo de Waleys *de Acculum,* Ade de Northfolche, Thoma Edwyn *allutario de Ebor. & aliis.* Ex MS. Penes Gul. Dugdale, Mil.

Covenants, contracts and agreements, are often uſed as ſynonymous words, ſignifying an engagement entred into, by which one perſon lays himſelf under an obligation to do ſomething beneficial to, or to abſtain from an act, which if done, might be prejudicial to another. 1 *New Abr.* 526.

As the good of ſociety requires a punctual performance of, and that no perſon ſhould be allowed to reſcind and break through his contracts; ſo the law has provided a remedy by action of covenant, in which the injured party is to recover damages for the violation of the contract, in proportion to the loſs he has ſuſtained. But here it may be neceſſary to obſerve, that where the covenant or agreement is for doing ſomething in *ſpecie*, as conveying lands, executing deeds, *&c.* the moſt uſual, and indeed the moſt proper remedy is by bill in Chancery; which, in caſes reaſonable, will decree an execution in *ſpecie*; whereas at Common law, the party can only be repaired in damages. But if the matter of the bill is merely in damages, the remedy is only at law, becauſe the damages cannot be aſcertained by the conſcience of the Chancellor, and therefore muſt be ſettled by a jury at law. But if there be matter of fraud mixed with the damages, as if *A.* ſues *B.* on a covenant at law for damages; and *B.* files a bill for an injunction, upon this equitable ſuggeſtion, that the covenant was obtained by fraud; if *A.* files his croſs-bill for relief upon that covenant, the court will retain it, becauſe the validity of the covenant is diſputed in that court, and on a head properly conuzable there; and therefore, if the validity of the deed be eſtabliſhed, the court will direct an iſſue for the *quantum* of the damages. 1 *New. Abr.* 526.

1. *Of*

1. *Of expreſs and implied covenants, and how created.*

2. *What ſhall be deemed a breach, or conſtrued a good performance of a covenant.*

3. *Where breach of covenant ſhall be deemed to be well aſſigned.*

1. *Of expreſs and implied covenants, and how created.*

The law does not ſeem to have appropriated any ſet form of words, which are abſolutely neceſſary to be made uſe of in creating a covenant; and therefore it ſeems that any words will be effectual for that purpoſe, which ſhew the parties concurrence to the performance of a future act; as if leſſee for years covenants to repair, &c. *Provided always, and it is agreed, that the leſſor ſhall find great timber*, &c. this makes a covenant on the part of the leſſor to find great timber, by the word *agreed*, and it ſhall not be a qualification of the covenant of the leſſee. 1 *New Abr.* 527.

So if *A.* leaſes to be for years, upon condition that he ſhall acquit the leſſor of ordinary and extraordinary charges, and ſhall keep and leave the houſes at the end of the term, in as good plight as he found them; if he does not leave them well repaired at the end of the term, an action of covenant lies. 1 *Rol. Abr.* 518.

So theſe words in a leaſe of a mill, *and the leſſee ſhall repair the mills as often as need ſhall require, and ſhall leave them ſufficiently repaired at the end of the term*, make a covenant, becauſe it is the clear agreement of the parties; for otherwiſe the words, *ſhall leave*, &c. would have no effect. 1 *Rol. Abr.* 518. 3 *Bulſt.* 163. *Cro. Jac.* 399, 521.

If *A.* leaſes to *B.* for life, with a *proviſo* that if the leſſee dies within the term of forty years, that then the executors of the leſſee ſhall have it for ſo many of the years as amount to the number of forty years, to be accounted from the date of the indenture of leaſe; this *proviſo* ſhall not be a leaſe, but only a covenant. 1 *Rol. Abr.* 518. 1 *Co.* 155. *Moor* 478.

If there are articles of agreement between *A.* and *B.* by which it is agreed upon a marriage intended between *A.* and *C.* that all the ſtock of *C.* ſhall remain in the hands of *B.* till *A.* make a certain jointure to *C. ipſo B. Annuatim ſolvendo* to *A. intereſſe proinde ſecundum ratam* 8*l. per centum*, &c. If *B.* does not pay the ſaid intereſt, an action of covenant lies againſt him upon theſe words, becauſe every agreement by deed is a covenant, otherwiſe *A.* could not have any remedy for the money. 1 *Rol. Abr.* 518, 519.

If *A.* makes a deed to *B.* in theſe words, *I have in my cuſtody one writing obligatory, in which writing obligatory, one* William *now ſtandeth bound to the ſaid* B. *for the payment of* 400l. *upon ſuch a day, being the proper money of* B. *and I will be ready at all times when I ſhall be required, to re-deliver the ſame writing obligatory to the ſaid* B. If *B.* after demands the ſaid obligation of *A.* and he refuſes to deliver it, *B.* may have an action of covenant upon this deed by force of theſe words, *And I will be ready at all times, when I ſhall be required, to re-deliver the ſame*, &c. 1 *Rol. Abr.* 519.

If *A.* enters into an obligation to *B.* and *B.* afterwards covenants not to ſue *A.* without any limitation of time, this amounts to a releaſe, and may be pleaded as ſuch. *Carth.* 64. *Comb.* 123, 124.

But if the covenant be temporary, and limited to a certain time, as if it be, that *B.* will not ſue for ninety-nine years, &c. this ſtill remains a covenant, and for the violation thereof, an action of covenant is the proper remedy, but it cannot be pleaded in bar; for if there be two obligors, and the obligee covenants that he will not ſue one of them, this is no releaſe, but only a covenant. *Carth.* 64.

A letter of licence containing theſe words following, *viz. that if the creditor ſue within ſuch a time, his debt ſhall be forfeited*, works a forfeiture by the commencement of the ſuit, and therefore may be pleaded in bar to the action. *Carth.* 64.

If *A.* enters into a ſtatute to *B.* and afterwards *B.* by his deed covenants, that upon payment of ſuch a ſum at a day to come, the ſtatute ſhall be void, and that he will deliver it in, and cauſe it to be vacated; if *B.* before the day ſues execution upon the ſtatute, *A.* may bring an action of covenant; for though it be true, that a covenant that is to take effect preſently is to ſtand or fall by the operation of law, and no action of covenant will lie; as if a man covenants that a bond ſhall be void upon doing ſuch an act, or to ſtand ſeiſed, no action of covenant will lie upon theſe words; but here the laſt words bind the party to the performance of a future act, *viz. to deliver in the ſaid ſtatute, and cauſe it to be vacated*, which without all queſtion ſound in covenant. *Raym.* 25. 1 *Keb.* 103, 118. *S. C.*

If there are articles of agreement made by indenture between *A.* and *B.* in which *A.* agrees that *B.* ſhall have a houſe in a ſtreet in *London*, for certain years; provided, and upon condition, that *B.* ſhall receive and pay the rents of the other houſes of *A.* in the ſame ſtreet, mentioned in a ſchedule annexed to the indenture; and it is further agreed, that *B.* for his labour in collecting of the ſaid rents, ſhall have the overplus of the rents, over and above ſuch a certain ſum; this is not any covenant on the part of *B.* to bind him to receive and pay the rents mentioned in the ſchedule; but the *proviſo* and condition will make the eſtate of *B.* void in the houſe. 1 *Rol. Abr.* 518. *Cro. Car.* 128, 129. *S. C.* adjudged. See *Cro. Eliz.* 242, 385. 2 *Co.* 71.

If *A.* by deed enfeoffs *B.* provided, that if *A.* pays money to *B.* by a day, the feoffment ſhall be void, and covenants to ſave harmleſs from incumbrances and arrears of rent, and to make further aſſurance; and after *A.* enters into an obligation conditioned for the performance of all covenants, payments, articles and agreements compriſed in the deed, if *A.* pays not the money, yet the bond is not forfeited; for there being no covenant to pay the money, it is a *proviſo* in advantage of the feoffor, that if he paid the money, that he ſhould have the land again; ſo that it is in his election to pay the money, or loſe the land, which is a ſufficient loſs to him, and the word *payment*, in the bond hath reference to the covenant to ſave harmleſs from arrears of rent. *Cro. Jac.* 281. *Yelv.* 206. *S. C.*

An action of covenant may be brought as well on a deed poll as on a deed indented. 1 *Rol. Abr.* 517.

But though covenant lies as well on a deed poll as upon a deed indented, yet the parties muſt be named therein; and therefore, where in covenant the plaintiff declared that *J. S.* being arreſted at his ſuit, and in the cuſtody of the bailiff, he, the defendant, promiſed and engaged to bring in the body of *J. S.* into the cuſtody of the bailiff ſuch a day; and on demurrer it was held, that the action would not lie, the plaintiff not being named in the agreement, and no averment *dehors* could avail him. 1 *Salk.* 197.

There are ſome words, which of themſelves import no expreſs covenant, yet being made uſe of in certain contracts, they amount to ſuch, and are therefore called covenants in law, and will as effectually bind the parties, as if expreſſed in the moſt explicit terms. As if a man makes a leaſe for years of land by the words *conceſſi* or *demiſi*, theſe import a covenant, and if the leſſee, or his aſſignee are evicted, they may bring an action thereupon. 1 *New Abr.* 530. 5 *Co.* 17. *a.*

So if a man leaſes for years, reſerving rent, an action of covenant lies for non-payment of the rent, for the *reddendo* of the rent is an agreement for payment of the rent, which will make a covenant. 1 *Rol. Abr.* 519. *Style* 387. *Carth.* 135.

Alſo if a man leaſes for years by the words *demiſe, grant*, &c. and in the deed there are ſeveral covenants on the part of the leſſor, and he enters into a bond conditioned for the performance of all the covenants, &c. in the ſaid deed; this extends as well to the covenants in law, as expreſs covenants. 4 *Co.* 80. *b.*

But if a man leaſes certain goods for years by the words *demiſe*, &c. and the leſſor covenants that the leſſee ſhall enjoy during the term, without eviction by the leſſor, or any claiming

claiming under him; this expreſs covenant qualifies the generality of the covenant in law, and reſtrains it by the mutual conſent of both parties, and it ſhall not extend farther than the expreſs covenant. 4 *Co.* 80. *Cro. Eliz.* 674. *Yelv.* 175.

If a man leaſes to me by indenture the land of *J. S.* of which *J. S.* is ſeiſed at the time, upon which I enter, and he re-enters, I ſhall have a writ of covenant upon this indenture, though I was not in the land by the leaſe, but by eſtoppel, for the leſſor is eſtopped to ſay that I was not in of his leaſe. 4 *Co.* 80.

So if a man leaſes to me land of *J. S.* of which *J. S.* is ſeiſed at the time, I ſhall have a writ of covenant before entry upon *J. S.* and re-entry by him; for I need not alledge an eviction, for this is a covenant in law, which is broke when he is not ſeiſed of the land at the time of the demiſe, for the word *demiſe* imports a power of letting; and it is not reaſonable to enforce the leſſee to enter into the land, and ſo to commit a treſpaſs. 1 *Rol. Abr.* 520. *Cro. Jac.* 73.

But if a man leaſes certain goods for years by indenture, which are evicted within the term, yet he ſhall not have a writ of covenant; for the law does not create any covenant upon ſuch perſonal thing. *Owen* 104. 1 *Rol. Abr.* 519.

Alſo if two or more join in making a leaſe by the words *conceſſi, &c.* this creates a covenant in law, for the breach of which, all of them ſhall be jointly ſued; but if the breach be the perſonal tort of one of them, as if one of them enters and ouſts the leſſee, the action may be brought againſt him alone; for it is unreaſonable, that the others ſhould ſuffer for the perſonal wrong of their companion. *Carth.* 97, 98. 1 *Salk.* 137. 1 *Show.* 79. *S. C.*

A. by indenture granted and demiſed to *B.* certain lands, except a little piece, upon which a pump was ſtanding, together with the uſe and occupation of the pump, in common with other the tenants of *A.* for thirty-one years; and after the pump became uſeleſs for want of repairs, and *B.* brought covenant againſt *A.* and aſſigned the breach in *A.*'s permitting the pump to run to decay; and it was held by *Kelynge*, chief juſtice, *Rainſford* and *Morton*, juſtices, that the action lay; for that when the uſe of a thing is demiſed, and it runs to decay, ſo that the leſſee cannot have the uſe and benefit thereof, he may have covenant upon the word *demiſi*; and here the leſſee himſelf could not repair, having no intereſt in the pump, or lands where it ſtood; but *Twiſden totis viribus cont'*. 1. Becauſe a covenant created by law, as this is, never lies but on an actual ouſter. 2. This covenant created by law, is not properly to recover damages, but the term itſelf, and the damages that are recovered are for the whole term, whereas the pump may be repaired the next day. 3. Leſſee may repair the pump himſelf, and may come on the ground without being a treſpaſſer; as where I grant that you ſhall fiſh in my pond, you have a liberty to come upon my ground; ſo if you have a grant to lay pipes in my ground, you may dig up the ground for that purpoſe; and for theſe reaſons of *Twiſden*'s the judgment was *una voce* reverſed *in Cam' Scac'*. See 1 *New Abr.* 531.

If *A.* leaſes a houſe to *B.* excepting two rooms, and free paſſage to them, and the leſſee aſſigns to *J. S.* who diſturbs the leſſor in the paſſage; this, though a covenant in law, ſhall bind the leſſee: for where the leſſee agrees to let the leſſor have a thing out of the demiſed premiſſes, as a way, common, *&c.* covenant lies for a diſturbance; but if the diſturbance had been in the rooms excepted, covenant would not have lain. *Carth.* 232. 1 *Salk.* 196. 1 *Show.* 388. See *Moor* 553. *Cro. Eliz.* 657.

By ſtat. 6 *Ann. c.* 35. *ſect.* 30. The words *grant, bargain and ſell*, amount to expreſs covenants.

By ſtat. 8 *Geo.* 2. *c.* 6. *ſect.* 35. Covenant is implied in deeds of bargain and ſale in the North Riding of *Yorkſhire*.

2. *What ſhall be deemed a breach, or conſtrued a good performance of a covenant.*

If *A.* leaſes to *B.* for twenty-one years, and covenants at any time during the life of *B.* upon furrender of the old leaſe, to make a new leaſe; and after *A.* leaſes to a ſtranger, he hath diſabled himſelf, and broke his covenant. 5 *Co.* 20, 21. 2 *And.* 18. *Moor* 452. *Cro. Eliz.* 450. *Poph.* 109. *S. C.*

If *A.* being a common brewer, covenants that *B.* ſhall have ſeven parts of his grains made in his brewhouſe for ſeven years; and after *A.* puts in great quantities of hops into his malt, of which the grains were made, by means whereof the grains are ſpoiled, this is a breach, becauſe in all contracts the intention of the parties is to be conſidered; and here it was the intention of the parties that *B.* ſhould have the grains for the uſe of his cattle; and they will not eat them when hops are put into them. *Raym.* 464. 2 *Jones* 191. *Skin.* 39.

If two men upon ſale of their wives lands, covenant that they and their wives have good right to convey lands, and to make further aſſurance; if one of the women is under age, this is a breach, for ſhe hath not power to convey the eſtate according to the covenant. 2 *Jones* 195.

If the leſſor covenants with the leſſee for years, that he quietly and peaceably ſhall enjoy the land, without the impediment or diſturbance of the leſſor, if the leſſor exhibits a bill in Chancery againſt the leſſee, to reſtrain his committing waſte; this is no breach, though the bill be diſmiſſed with coſts, becauſe the ſuit does not relate to his title or poſſeſſion. 2 *Vent.* 213.

If *A.* enters into a ſtatute to *B.* and afterwards *B.* by his deed covenants, that upon payment of ſuch a ſum at a day to come, that the ſtatute ſhould be void, and that he would deliver it in, and cauſe it to be vacated; if before the day *B.* ſues execution, *A.* may bring covenant; and it is no objection, that nevertheleſs *B.* at the day, may deliver it in and cauſe it to be vacated: for it is an apparent preſent breaeh; for after the ſtatute was ſet a foot, and had its courſe, it did *tranſire in rem judicatam*, and could not be vacated. 1 *Sid.* 48. *Raym.* 25. 1 *Keb.* 103, 118. *S. C.*

If a parſon leaſes his rectory for years, and covenants that the leſſee ſhall have and enjoy it during the term, without expulſion, or any thing to be done by the leſſor, and after, for not reading the articles, he is *ipſo facto* deprived by the ſtatute 13 *Eliz.* and the patron preſents another, who ouſts the leſſee, this is no breach; for he was not ouſted by reaſon of any act done by the leſſor, but for a non-feaſance; and ſo it is out of the compaſs of the covenant. 4 *Leon.* 39.

Tenant in tail of a rent, purchaſes the land out of which it iſſues, and makes a feoffment thereof, and covenants that it is free from all former incumbrances, this is a charge, though not *in eſſe* but in ſuſpenſe; for if tenant in tail dies, his iſſue may diſtrain, and then the covenant is broke. *Owen* 7. But ſee *Co. Lit.* 389. *a.*

If *A.* be tenant in tail, the reverſion in the King, and *A.* leaſes for years, and covenants that the leſſee ſhall enjoy it againſt all perſons, and without the interruption of any, except the King, his heirs and ſucceſſors, *exiſtentibus Regibus vel Reginis Angliæ*, and the King grants his reverſion to *B.* and *A.* dies without iſſue, and *B.* enters, the covenant is broke; for that extends only to the King and his ſucceſſors, in which words his patentee is not included. *Cro. Eliz.* 517.

If *A.* by the means and procurement of *B.* by fine conveys lands to *B.* and his wife, and the heirs of *B.* and after *B.* leaſes the ſame for years, and covenants that the leſſee ſhall quietly enjoy, during the term, without the diſturbance of him, his heirs or aſſigns, or of any other perſon, by or through his means, title or procurement, and *B.* dies, and his wife enters, this is a breach; for ſhe claims by the means of the baron; and therefore it is within the covenant. *Cro. Jac.* 657. *Palm.* 339. *S. C.*

3. *Where*

3. Where breach of covenant ſhall be deemed to be well aſſigned.

If in an action of covenant, the plaintiff declares upon a leaſe for twenty-one years to the defendant, and that he covenanted to pay 20*l. per annum*, by equal portions, as *Michaelmas* and *Lady-day*, and aſſigns for breach, that he did not pay the rent, *debit' ad præd' ſeparalia feſta durante termino*, this breach is ſufficiently aſſigned; and it ſhall be intended that the rent was not paid at either of thoſe days. 1 *Lev.* 78.

If in debt upon an obligation, the condition whereof is of three parts, 1. He ſhall ſerve the plaintiff well, 2. That he ſhall duly account, 3. That within three months after notice he ſhall make ſatisfaction for all loſſes ſuſtained by his apprenticeſhip; the defendant pleads performance ſpecially, and the plaintiff aſſigns for breach, that upon account he was found in arrear 60*l.* which he received and converted to his own uſe, and ſo had not ſerved the plaintiff well; this is a good replication without alledging notice; for though it might be alledged as a breach of the third part of the condition, yet the converſion of the money to his own uſe, may be alledged as an ill ſervice. *Cro. Eliz.* 830.

In an action of covenant ſeveral breaches may be aſſigned; otherwiſe in debt upon an obligation, conditioned to perform covenants. *Cro. Car.* 176.

But now, by the 8 & 9 *Will.* 3. *cap.* 11. it is enacted, "That in all actions upon any bond or bonds, or on any penal ſum, for non-performance of any covenants or agreements in any indenture, deed or writing contained, the plaintiff may aſſign as many breaches as he ſhall think fit; and the jury, upon trial of ſuch action or actions, ſhall and may aſſeſs, not only ſuch damages and coſts of ſuit as have heretofore been uſually done in ſuch caſes, but alſo damages for ſuch of the ſaid breaches ſo to be aſſigned, as the plaintiff upon the trial of the iſſues ſhall prove to have been broken, and that the like judgment ſhall be entred on ſuch verdict as heretofore hath been uſually done in ſuch like actions; and if judgment ſhall be given for the plaintiff, on a demurrer, or by confeſſion, or *nihil dicit*, the plaintiff upon the roll may ſuggeſt as many breaches of the covenants and agreements as he ſhall think fit, upon which ſhall iſſue a writ to the ſheriff of that county where the action ſhall be brought, to ſummon a jury to appear before the juſtices or juſtice of aſſize, or *Niſi prius* of that county, to inquire of the truth of every one of thoſe breaches, and to aſſeſs the damages which the plaintiff ſhall have ſuſtained thereby: in which writ it ſhall be commanded to the ſaid juſtices, *&c.* that he or they ſhall make a return thereof to the court from which the ſame ſhall iſſue, at the time in ſuch writ mentioned; and in caſe the defendant or defendants, after ſuch judgment entred, and before any execution executed, ſhall pay unto the court where the action ſhall be brought, to the uſe of the plaintiff or plaintiffs, or his or their executors or adminiſtrators, ſuch damages ſo to be aſſeſſed, by reaſon of all or any of the breaches of ſuch covenants, together with the coſts of ſuit, a ſtay of execution on the ſaid judgment, ſhall be entred upon record; or if by reaſon of any execution executed, the plaintiff or plaintiffs, or his or their executors or adminiſtrators, ſhall be fully paid or ſatisfied all ſuch damages ſo to be aſſeſſed, together with his or their coſts of ſuit, and all reaſonable charges and expences for executing the ſaid execution, the body, lands, or goods of the defendant, ſhall be thereupon forthwith diſcharged from the ſaid execution, which ſhall likewiſe be entred upon record; but notwithſtanding in each caſe ſuch judgment ſhall remain, continue, and be as a farther ſecurity to anſwer the plaintiff or plaintiffs, and his or their executors or adminiſtrators, ſuch damages as ſhall or may be ſuſtained for further breach of any covenant or covenants in the ſame indenture, deed or writing contained; upon which the plaintiff or plaintiffs may have a *ſcire facias* upon the ſaid judgment, againſt the defendant, or againſt his heir tertenants or his executors or adminiſtrators, ſuggeſting other breaches of the ſaid covenants or agreements, and to ſummon him or them reſpectively to ſhew cauſe why execution ſhould not be had or awarded upon the ſaid judgment, upon which there ſhall be like proceeding as was in the action of debt upon the ſaid bond or obligation, for aſſeſſing of damages upon trial of iſſues joined upon ſuch breaches, or enquiry thereof, upon a writ to be awarded in manner as aforeſaid, of ſuch future damages, coſts and charges as aforeſaid, all further proceedings on the ſaid judgment are again to be ſtayed, and ſo *toties quoties*; and the defendant, his body, lands or goods, ſhall be diſcharged out of execution, as aforeſaid."

If *A.* leaſes to *B.* for years, and covenants that he hath full power and lawful authority to leaſe, *&c.* and in an action upon this covenant, *B.* ſays he had not full power and lawful authority to leaſe, *&c.* the breach is well aſſigned, for he hath well purſued the words of the covenant *negative*, and what eſtate he had lies more in the knowledge of the leſſor than leſſee; and therefore he ought to ſhew what eſtate he had at the time of making the leaſe; that it may appear that he had full power, *&c.* 9 *Co.* 60, 61. *Cro. Jac.* 304.

If *A.* leaſes to *B.* for years, and *B.* covenants to repair during the term, and at the end of the term to leave the premiſſes well repaired; in an action upon this covenant, it may be aſſigned for a breach, that he did not leave them well repaired at the end of the term; and if the defendant pleads, that at the end of the term he delivered them up well repaired, then if the plaintiff will aſſign a breach, he ought to ſhew particularly in what part it was not repaired, ſo that the defendant may give a particular anſwer thereto; but it was ſaid, that in a declaration in covenant, it ſufficeth to aſſign the breach as general as the covenant is. *Cro. Jac.* 171, 661.

In an action of covenant the plaintiff declared, that Queen *Elizabeth* leaſed a meſſuage, *&c.* to the defendant for twenty-one years, and that the defendant, his executors and aſſigns, were thereby bound to repair and leave the premiſes at the end of the term in good repair; and that the Queen granted the reverſion to *B.* and that *B.* granted the ſame to the plaintiff; and for not repairing *&c.* this is a good declaration, though the plaintiff is not named aſſignee. *Cro. Jac.* 240.

If in an action of covenant the plaintiff declares, Whereas by indenture, bearing date, *&c. teſtatum exiſtit*, that the plaintiff had demiſed to the defendant a meſſuage and garden for two years, and the defendant by the ſaid indenture, covenanted not to erect any building in the garden, *&c.* and avers *in facto*, that he did erect, *&c.* this is a good declaration; though he does not expreſly ſay *Quod dimiſit & convenit*; and it is the uſual courſe in *B. R.* to declare in this manner. *Cro. Car.* 188. *Cro. Eliz.* 195. *Cro. Jac.* 383.

If baron and feme being ſeiſed of an houſe, to them and the heirs of the baron, leaſe to *A.* and he covenants with them and the heirs and aſſigns of the baron, to repair, *&c.* and the baron and feme convey the inheritance to *B.* in an action upon this covenant, *B.* may ſhew the whole matter, and conclude *quod actio ei accrevit*, as aſſignee of the baron, without ſhewing the death of the feme; for the eſtate for life being transferred with the fee, it is drowned therein. *Cro. Car.* 285. *For more of Covenant in general, ſee* 1 New Abr. *and* 6 Vin. *tit.* Covenant. *See alſo* Wood's Convey. part. 1.

Covenant, *(Fœdus)* The ſolemn league and *covenant*, firſt formed in *Scotland*, was a ſeditious conſpiracy, too well known to need any explication. It was voted illegal and irreligious by parliament in *May* 1661, and proviſion is made againſt it by the ſtatutue of 24 *Car.* 2 *c.* 4. whereby it is declared to have been impoſed on the ſubjects of this realm, againſt the known laws and liberties of the ſame. *Cowell, edit.* 1727.

Covent, *(Conventus)* Signifies the ſociety of an abbey or priory, as *ſocietas* ſignifies the number of fellows in a college. *Bract. lib.* 2. *cap.* 35. *Cowell, ed.* 1727.

Coventry, For making *Bablack* church in the city of *Coventry* a pariſh church, *&c.* 7 *Geo.* 2. *c.* 27.

Coventry-act, Made 22 & 23 *Car.* 2. *c.* 1.

Coverlets. See Norwich, York.

Coverture, Is a *French* word, ſignifying any thing that covers, as apparel, a coverlet, *&c.* and deduced from *couvrir*, that is, *tegere*. In law, it is particularly applied to the ſtate and condition of a married woman, who (by the laws of this realm) is *ſub poteſtate viri*, and therefore diſabled to make bargain with any, to the prejudice of herſelf or her huſband, without his aſſent and privity, or at leaſt without his allowance and confirmation. *Bro. boc. tit. per tot.* and *Bracton, lib.* 2. *cap.* 15. ſaith, That *Omnia quæ ſunt uxoris, ſunt ipſius viri, nec habet uxor poteſtatem ſui, ſed vir.* And again, *lib.* 4. *c.* 24. *Vir eſt caput mulieris.* And alſo, *lib.* 5. *tract.* 2. *cap.* 3. That in any law-matters, *Sine viro reſpondere non poteſt.* And in the ſame book, *tract.* 5. *cap.* 23. *Vir & uxor ſunt quaſi unica perſona, quia caro una & ſanguis unus; Res licet ſit propria uxoris, vir tamen ejus cuſtos, cum ſit caput mulieris.* And *lib.* 1 *ca.* 10. *num.* 2. *Uxores ſunt ſub virga viri.* And if the huſband alien the wife's lands, during the marriage, ſhe cannot gainſay it during his life. See **Cui ante divortium,** and **Cui in vita.**

Covin, *(Covina,)* Is a deceitful aſſent or agreement between two or more, to the prejudice of another. As if a tenant for term of life, or tenant in tail will ſecretly conſpire with another, that the other ſhall recover againſt the tenant for life, the lands which he holds, *&c.* in prejudice of him in the reverſion. It is derived from the Fr. verb. *convenir, depaciſci,* to promiſe or covenant. Dr. *Skinner* takes it to be a corruption of the Lat. *conventum,* and therefore writes it *coven. Cowell edit.* 1727.

Debt is brought *by a woman adminiſtratrix*; ſhe has judgment; *before execution this adminiſtration is revoked by covin, and committed to the ſaid woman and her ſon*; the *ſon releaſes the debt*; the *woman ſues execution*; the debtor brings an *audita querela*; it does not lie becauſe of the covin. *Jenk.* 285. *pl.* 17.

The plaintiff *a woman, who had* 150*l. given her by her brother, the defendant, upon her marriage, gives a bond privately to her brother to repay* the money; the *huſband being dead without iſſue, the defendant ſued the plaintiff bond at law* upon the bond, whereupon *ſhe preferred her bill here to be relieved* againſt it, being a fraud, by reaſon it was done without the privity of her huſband. It was urged for the defendant, that it was good reaſon for the huſband or any of his iſſue to be relieved, in caſe they had been concerned, but that was no reaſon that the woman herſelf, who gave the bond, ſhould be relieved; but ordered that the bond ſhould be delivered up; for being once a fraud, no accident of death or courſe of time ſhould alter the caſe; and the *plaintiff was relieved notwithſtanding it was her own agreement, being done in fraud of the huſband.* 1 Freem. Rep. 101. pl. 111. Mich. 1687. Gay *v.* Wendow.

Covin cannot be but between two. 39 *H.* 6. 19. *b.*

Covin may *be upon good title*; as where a feme had for her jointure an eſtate tail with warranty, and had been impleaded by action upon good title, and by covin had *confeſſed the action*; it is within the 11 *H.* 7. 20. for tho' the title of the action is good, yet if ſhe had vouched and recovered in value, this recovery in value would go in benefit of the iſſue in tail which is now loſt by the covin. *Per Hale's* J. *Pl. C.* 50. *b. Mich.* 4 *Ed.* 6 *Wimbiſh* v. *Talboys.* See 6 *Vin. Abr.* tit. *Covin.*

Council. Conſpiracies againſt privy councillors, how to be inquired into, 3 *Hen.* 7. *c.* 14. Rioters ſhall anſwer before the council on certificate of the juſtices, 13 *Hen.* 4. *c.* 7. *ſ.* 2. The juriſdiction of the privy council over eſtates, *&c.* taken away, 16 *Car.* 1. *c.* 10. *ſ.* 5. Reſolutions of the council to be ſigned by the councillors, 12 *Will.* 3. *c.* 2. repealed 4 *Ann. c.* 8. *ſect.* 24.

Council. In the city of *London*, there are common *councilmen* choſen in every ward at a court of wardmote held by the aldermen of the reſpective wards on Saint *Thomas's* day yearly; They are to be choſen out of the moſt ſufficient men; and ſworn to give true *council* for the common profit of the city, *&c. Lex Londinen.* 117. In the court of *common council* are made laws for advancement of trade; and committees yearly appointed, *&c.* but acts made by them are to have the aſſent of the lord mayor and aldermen, by ſtat. 11 *Geo.* 1. See *Laws and Cuſtoms, &c. of* London.

Councils general. None to go out of the realm for aſſemblies of religion. 25 *Hen.* 8. *c.* 21. *ſect.* 20.

Counſel, for *priſoners.* No *counſel* is allowed a *priſoner* upon a general iſſue, on indictment of felony, *&c.* unleſs ſome doubtful point of law ariſe: The court is the priſoner's only *counſel*; and the behaviour of the priſoner in his own defence, is one means of diſcovering the truth. In appeals, and upon ſpecial pleas, *&c.* the priſoner ſhall have *counſel* aſſigned him by the court: Though *counſel* is not to prompt the priſoner in matters of fact. 2 *Hawk.* 400, 401. Proviſion is made for *counſel* for priſoners in treaſon, by ſtat. 7 *W.* 3.

Counſellor, *(Conſiliarius)* Is a perſon retained by a client to plead his cauſe in a court of judicature. A *counſellor* at law hath a privilege to inforce any thing which he is informed of by his client, if pertinent to the matter, and is not to examine whether it be true or falſe; for it is at the peril of him who informs him. *Cro. Jac.* 90. But after the court have delivered their opinions of the matter in law depending before them, the *counſel* at the bar are not to urge any thing further in that cauſe. 1 *Lil. Abr.* 355. It has ben held, that the *King's counſel* ought not to be admitted to argue any cauſe againſt the King; though this was oppoſed by *ſerjeant Maynard, Hil.* 21 *Car.* 2. 1 *Mod.* 38. A *counſellor* muſt not ſet his hand to a frivolous plea, to delay a trial; which argues ignorance or foul practice. *Ibid.* And as *counſellors* have ſpecial privilege to practice the law, they are puniſhable by attachment, *&c.* for miſbehaviour. 1 *Hawk. P. C.* 157. No recuſant convict, or nonjuror, ſhall practice the law as a *counſellor*, or otherwiſe, under penalties, by ſtat. 3 *Jac.* 1. *c.* 5. 13 & 14 *Will.* 3. *c.* 6. By ſtat. 5 *Eliz. c.* 14. *ſect.* 15. a counſellor is not puniſhable for ſhewing a falſe deed in evidence.

The *fees to counſellors are not in nature of wages, or pay, or* that which we call *ſalary or hire,* which are duties certain, and grow due by contract for labour or ſervice, but *what is given him is honorarium, not merces,* being a gift which gives honour as well to the taker as the giver; nor is it certain or contracted; for no price or rate can be ſet upon counſel which is invaluable and ineſtimable, ſo as it is more or leſs according to the circumſtances, namely, the ability of the client, the worthineſs of the counſellor, the weightineſs of the cauſe, and the cuſtom of the country. It is a gift of ſuch a nature, that the able client may not neglect to give it, without ingratitude, for it is but a gratuity, or taking of thankfulneſs; yet the worthy *counſellor may not demand it without doing wrong to his reputation,* according to that moral rule *Multa honeſta accipi poſſunt, quæ tamen peti non poſſunt.* Pref. *to* Dav. Rep. 22, 23.

5 *Eliz. cap.* 14. *ſ.* 15. *Counſellor not puniſhable for pleading, or ſhewing a falſe deed in evidence, to the forging whereof he was not party nor privy.*

The counſel of the party's cauſe not to be examined in the ſame cauſe. *Toth.* 110. cites 11 *Eliz. Lee* v. *Markham.*

The counſellor's clerk not to be examined in the cauſe. *Toth.* 110. cites 13 & 14 *Eliz. fo.* 93. *Breame* v. *Breame.*

Daniel Hill having put in for his client a long *inſufficient demurrer to a bill* exhibited againſt his client, in which ſuppoſed demurrer were many matters of fact, and other things frivolous and vain; the Lord Chancellor *Egerton* awarded 5*l.* coſts againſt the party, and *ordered that neither bill, anſwer,* demurrer, nor any other plea ſhould from thenceforth *be received under the hand of the ſaid* Hill. *Cary's Rep.* 38. cites 27 *April* 1 *Jac. Hill's caſe.*

A counſellor in law retained, has a privilege to inforce any thing which he is informed of by his client, and to give it in evidence, it being pertinent to the matter in queſtion, and not to examine whether it be true or falſe; but it is at the peril of him that informs him; for a counſellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in queſtion, otherwiſe action upon the caſe lies againſt him by

by his client. *Per Popham* Ch. J. and judgment accordingly. *Cro. J.* 90. *pl.* 18. *Mich.* 3 *Jac. B. R. Brook* v. *Montague.*

But *matter not pertinent to the iſſue*, or the matter in queſtion, he need not to deliver; for he is to diſcern what he is to deliver, and what not; and although it be falſe, he is excuſable, being pertinent to the matter. *Cro. J.* 90. *pl.* 18. *Mich.* 3 *Jac. B. R.* in caſe of *Brook* v. *Montague.*

But if he *gives in evidence any thing not material to the iſſue which is ſcandalous*; he ought to aver it to be true, otherwiſe he is puniſhable; for it ſhall be intended as ſpoken maliciouſly and without cauſe; which is a good ground for an action. *Cro. J.* 91. *pl.* 18. *Mich.* 3 *Jac. B. B.* in caſe of *Brook* v. *Montague.*

So if a counſellor *objects matter againſt a witneſs which is ſlanderous*, if there be cauſe to diſcredit his teſtimony, and to be pertinent to the matter in queſtion, it is juſtifiable what he delivers by information, although it be falſe. *Cro. J.* 91. *pl.* 18. *Mich.* 3 *Jac.* in caſe of *Brook* v. *Montague.*

Counſellor may take fees of his client, but he may not *lay out money* for him; and if he does, *Hobart* Ch. J. doubted what remedy he might have. *Winch.* 53. *Mich.* 20. *Jac. C. B. Gage* v. *Johnſon.*

Counſellor brought a *bill for fees*, due to him from the defendant being a ſolicitor, and was to account with him at the end of every term; the defendant demurs. Demurrer was allowed, and the bill diſmiſſed. *Chan. Rep.* 38. 15 *Car.* 1. *Moor* v. *Row.*

A lawyer who was of counſel may be *examined upon oath as a witneſs to the matter of agreement, not to the validity of an aſſurance, or to matter of counſel.* Mar. 83. pl. 136. Paſch. 17 Car. Anon'.

If a *counſellor ſays to his client that ſuch a contract is ſimony*, and the client ſays he will make it ſimony or not ſimony; and thereupon the counſellor makes his ſimoniacal contract, it is no offence in him. *Per Reve* J. *Mar.* 83 *in pl.* 136. *Paſch.* 17 *Car. Anon'.*

A counſel was examined as a *witneſs* to prove the *death of a perſon*, yet he is not bound to anſwer to other things which may diſcloſe the *ſecrets of his client's cauſe.* Per Roll. *Ch. J.* Sti. 449. Paſch. 1655. Waldron *v.* Ward.

Coſts were taxed for ſcandal in a *bill in Chancery* at 100*l.* but though the ſcandal was very great, yet the Lord Chancellor and the judges reduced it to 50*l.* and the counſel whoſe hand was ſet to it, to pay the defendant 5*l.* more. *Cham. Rep.* 194. 12 *Car.* 2 *Emerſon* v. *Dalliſon.* See 6 *Vin. Abr.* 480, 481.

Count, Signifieth as much as the original declaration in a proceſs, though more uſed in real than perſonal actions, as a declaration is more applied to perſonal than real. *F. N. B. a.* 60. *d.* 71. *a.* 191. *e.* 217. *a. Libel* with the *Civilians* comprehends both. And yet *count* and *declaration* are ſometimes confounded, as count in debt. *Kitchin, f.* 281. *Count* in treſpaſs. *Briton. c.* 26 *Count* in an action upon the caſe for ſlander. *Kitch.* 252. The word ſeemeth to come from *France* and *Normandy*, for in the *Grand cuſtumary*, *cap.* 64. *Contours* are taken for ſuch as a man retains to ſpeak for him in any court as advocates; and *cap.* 63. *Pledeurs*, he makes another ſort of ſpokeſmen in the nature of attornies, for one that is himſelf preſent, but ſuffereth another to ſpeak in his behalf. But *contours* by *Horn's Mir. of Juſt. lib.* 2. *cap. Des Loyers*, are ſuch ſerjeants, ſkilful in the law, which ſerve the common people to defend their actions in judicature for their fee, whoſe duty, if it be as is there deſcribed, and were obſerved, men might have much more comfort of the law than they have. *Cowell, edit.* 1727.

Countee, (Fr. *Comté a comitando.* becauſe they *accompany* the King) Was next to the duke, the moſt eminent dignity of a ſubject before, as well as ſince, the conqueſt: And thoſe who in ancient time were created *countees*, were men of great eſtate and dignity: For which cauſe the law gives them privileges; as their perſons may not be arreſted for debt, treſpaſs, *&c.* (becauſe the law intends that they aſſiſt the King with their counſel for the publick good, and preſerve the realm by their proweſs and valour:) They may not be put upon juries. If iſſue be taken, whether the plaintiff or defendant be a *countee*, or not, this ſhall not be tried by the country, but by the King's writ. Alſo the defendant ſhall not have a day of grace againſt a lord of the parliament, becauſe it is intended he attends the public. And of old the *countee was præfectus*, or *præpoſitus comitatus*, and had the charge and cuſtody of the county, whoſe authority the ſheriff now hath. *Coke, lib.* 9. *fol.* 46. and is therefore called *viſcount.* See **Earl.**

Countenance ſeemeth to be uſed for *credit* or *eſtimation. Old Nat. Brev. f.* 111. in theſe words; *Alſo the attaint ſhall be granted to poor men, that will ſwear they have nothing whereof they may make* fine, *ſaving their* countenance: So it is uſed 1 *Ed.* 3. *ſtat.* 2. *cap.* 4. in theſe words, *Sheriffs ſhall charge the King's debtors with as much as they may levy with their oaths, without abating the debtor's* countenance. See **Contenement.**

Counter, *Computatorium*, May be derived from the Latin *Computare*, to account. But we uſe it for the name of the two city-priſons, commonly called the *counters*; wereunto, he that once ſlippeth, is like to account 'ere he can get out. *Cowell.*

Counterfeiters and clippers of money. See **Money.**

Counterfeits. Perſons obtaining any money, goods, *&c.* by *counterfeit* letters or falſe tokens, being convict before juſtices of aſſiſe, or juſtices of peace, are to ſuffer ſuch puniſhments as ſhall be thought fit, under death; as impriſonment, pillory, *&c.* Stat. 33 *H.* 8. *cap.* 1. It was the opinion of Sir *Edward Coke*, that upon this ſtatute the offender could not be fined; and that only corporal pains ought to be inflicted: But it hath been otherwiſe adjudged in *Terry*'s caſe, who by a falſe note in the name of another obtained into his hands a wedge of ſilver, of the value of two hundred pounds; and on conviction thereof, was ſentenced to ſtand in the pillory, pay a fine of five hundred pounds to the King, and be impriſoned during the King's pleaſure; and to be bound with ſureties for his good behaviour. *Cro. Car.* 564. The obtaining of money from one man to another's uſe, upon a falſe pretence of having a meſſage and verbal order to that purpoſe, is not puniſhable by criminal proſecution; it depending on a bare naked lie, againſt which common prudence and caution may be a ſecurity. 6 *Mod.* 105. 1 *Hawk. P. C.* 188. *Counterfeiting the King's ſeal*, or money, *&c.* which is treaſon, *vide* **Treaſon**: And *counterfeiting Exchequer bills*, bank bills, lottery orders, *&c.* which are felony.

An eſtate that is to be deveſted on a condition of payment of 100*l.* cannot be deveſted by a *ſham* payment of part, and real payment of part, but there muſt be a real payment of the whole. *Cro. Eliz.* 383. *pl.* 4.

A clothier of *G.* made cloths which were dearer and more vendible than the cloths of any other, and he put a ſpecial mark upon them; another clothier counterfeits the ſaid mark, and puts it on his cloths which were not ſo good, but yet ſells them as dear as the other; action on the caſe lies againſt him; *Doderidge* Juſtice ſays it was adjudged 23 *Eliz.* in *C. B.* but ſays not whether the action lay for the clothier or the vendee, but it ſeems it is for the vendee. 2 *Rol. Rep.* 28.

If an information lies for counterfeiting a letter ſending for a perſon in another's name to *Brentford* to come to him, when no miſchief is done or intended; Court divided. 2 *Show.* 20. *pl.* 13. See **Cheat, Felony, Fraud.**

Countermand, Is where a thing formerly executed, is afterwards by ſome acts or ceremony made void by the party that had firſt done it. As if a man has made his laſt will whereby he deviſes his land to *J. S.* and then he enfeoffs another of the ſame land; there this feoffment is a *countermand* to the will, and the will as to the diſpoſition of the land, is void. If a woman, ſeiſed of land in fee, makes a will in writing, and deviſes, that if *A.* of *B.* ſurviſes her, then ſhe deviſes and bequeaths to him and his heirs her land, and afterwards ſhe intermarries with the ſaid *A.* of *B.* thereby taking him to huſband and coverture, at the time of her death, the will is *countermanded. Cowel, edit.* 1727.

A. *purchaſed five marks per annum in the name of* B. *and* C. *with this truſt* that *A.* might *enjoy it during his life, and after* it ſhould be *to the erecting of a ſchool* in the town where the ſaid *A.* was born and buried, as the feoffees declared in their anſwer; and in his life time, after the purchaſe, he *repealed his intent* of converting the ſame to the uſe of the ſchool, and deviſed the ſame to *J. S.* which juſtice *Warburton* preſently decreed for him, ſaying his will was his declaration. But in his words there was but a meaning only expreſt *(me contradicente)*; for if *J. S.* make a feoffment to the uſe over according to articles annexed, he cannot alter the ſame by a latter will; *contra* if it be to the uſe of his will. *Cary's Rep.* 40, 41. cites 19 *June*, 1 *Jac. Littleton's Caſe.*

Defendant *promiſed* the plaintiff, *that if plaintiff would procure a feme impriſoned to be delivered out, he would repay him all ſuch monies as he ſhould diſburſe therein.* Defendant pleaded, that before the plaintiff had paid any money for her delivery, and before the plaintiff had done any thing relating to it, he revoked his promiſe, and countermanded the plaintiff, that he ſhould do nothing as to her delivery. Adjudged by three juſtices, that he could not countermand it. 2 *Rol. Rep.* 39. *Trin.* 16. *Jac. B. R. Winter* v. *Fowzacres.*

The law reſpects matters of profit and intereſt *largely, but of* pleaſure, ſkill, eaſe, truſt, authority, and limitation, *ſtrictly*; and therefore theſe may be countermanded, but ſo cannot the other. See *Fin.* 8. *b. Wing. Max.* 476 *to* 381, *&c.*

A feme ſole infeoffed a man within the view, and directed him to enter without other livery. They *intermarry before any entry* made by him, and then he enters; adjudg'd that the entry was good after marriage, and *not countermanded by the marriage.* 2 Lev. 34. Hill. 23 & 24 Car. 2 B. R. Parſons *v.* Pierce. But ſays, that perhaps it might be otherwiſe had ſhe married a ſtranger.

A man gives a *warrant of attorney* to confeſs a judgment, and dies before the judgment is confeſſed; this is a countermand. *Vent.* 310. in a *nota. Paſch.* 29 *Car.* 2. *B. R.*

A. *poſſeſſed of an office for two lives executes a deed*, appointing that after his death one *R. H.* then in his office, ſhould be deputy, *and directs ſeveral annuities to be paid out of the office.* Afterwards *A. by a ſubſequent deed made different appointments of the profits of the office. A.* kept both deeds in his own cuſtody during his life; and in ſupport of the firſt deed it was inſiſted, that it was an abſolute diſpoſition of the profits of the office without any power of revocation, and ought to ſtand; and that though both deeds were all along in his cuſtody, yet ſo (generally) voluntary ſettlements are, and yet the firſt ſhould prevail. But Lord Chancellor held, That the *firſt deed was only an authority*, and therefore clearly countermandable by the ſecond; and decreed the firſt deed to be delivered up. *Wms's Rep.* 101. *Mich.* 1707. *Young* v. *Cottle.*

Though a *letter of attorney* is revocable at Common law, yet where it *concerns payment of debts* it ſhall be continued *in equity. G. Equ. R.* 70. *Paſch.* 9 *Ann.* in caſe of *Hungerford* v *Hungerford.*

Counterplea, Is compounded of two French words, *contre*, i. e. *contra*, *adverſus*, and *plaider*, *cauſam agere*; it ſignifieth properly in our Common law, a replication to *ayde prier*; for when the tenant by courteſy, or in dower, prayeth in aid of the King, or him in the reverſion for his better defence; or elſe if a ſtranger to the action begun, deſire to be received, to ſay what he can for the ſafeguard of his eſtate; that which the demandant alledgeth againſt this requeſt, why it ſhould not be admitted is called a *counterplea*; and in this ſignification it is uſed 25 *Edward* 3. *ſtat.* 3. *c.* 7. See alſo the *Terms of the Law, f.* 172. and the ſtatute 3 *Ed.* 1. *cap.* 39.

Counter-rolls. By ſtat. 3 *Ed.* 1. *cap.* 10. Sheriffs ſhall have counter-rolls with the coroners, as well of appeals as of inqueſts, *&c.*

Countors, (Fr. *contours*) Have been taken for ſuch ſerjeants at law, as a man retains to defend his cauſe, or ſpeak for him in any court for their fee. *Horn's Mirror, lib.* 2. *cap. Des Loyers.* And of whom thus *Chaucer:*

——A ſheriff had he been, and a contour,
Was ne where ſuch a worthy vavaſour.

They were anciently called *ſerjeant contours. Coke on Littleton, f.* 17. *a.*

County, *(Comitatus,)*——*Quod modo vocatur* comitatus, *olim apud Britones temporibus Romanorum vocabatur* conſulatus; *& qui modo vocantur* vicecomites *tunc temporis* viceconſules *vocabantur.* Leg. Edw. Confeſſ. ca. 2. And even in the Confeſſor's time a county was called *conſulatus*, viz. *Fecit ſummoniri per univerſos Angliæ conſulatus nobiles ſapientes & ſua lege eruditos.* Leg. Edw. Confeſſor, cap. 1. It ſignifies the ſame with *ſhire*, the one coming from the *French*, the other from the *Saxon*; both containing a circuit or portion of the realm, into which the whole land is divided, for the better government of it, and more eaſy adminiſtration of juſtice: ſo that there is no part of this nation that lies not within ſome *county*; and every *county* is governed by a yearly officer, whom we call a ſheriff. *Forteſcue, cap.* 24. Of theſe counties there are four of ſpecial note, which therefore are termed *Counties palatine*, as *Lancaſter, Cheſter, Durham*, and *Ely.* Stat. 5 *Eliz. cap.* 23. We read alſo anciently of the *counties palatine* of *Pembroke* and *Hexam*, ſtat. 33 *Hen.* 8. *cap.* 10. (which laſt did belong to the archbiſhop of *York.)*——This act, or any thing therein contained, ſhall not extend to the county palatine of *Hexam*, within the county of *Northumberland*, ne to the county palatine of *Ely*, within the county of *Cambridge, &c.* But by the ſtatute 14 *Eliz. cap.* 15. this county palatine of *Hexam* was ſtripped of it's privileges, and reduced to a part of the county of *Northumberland.* The chief governors of theſe counties palatine, by ſpecial charter from the King, did heretofore ſend out all writs in their own names, and did all things touching juſtice as abſolutely as the Prince himſelf in other counties, only acknowledging him their ſuperior and ſovereign. But by the ſtatute 27 *Hen.* 8. *cap.* 24. this power is much abridged; to which the reader is referred, as alſo to *Cromp. Juriſd. f.* 137. and 4 *Inſt. f.* 204 *and* 221.

Beſides theſe counties of both ſorts, there likewiſe belong to ſome cities, ſome territory, lands, or juriſdiction annexed; as the county of Middleſex, by King *Henry* the Firſt, to the city of *London:* the county of the city of *York*, ſtat. 32 *H.* 8. *cap.* 13. *Cheſter*, ſtat. 45 *Eliz. cap.* 15. *Canterbury, Lamb. Eiren. lib.* 1. *cap.* 9. *Norwich, Coventry, Exeter, &c.* The county of the town of *Kingſton upon Hull*, 32 *H.* 8. *cap.* 13. *Newcaſtle upon Tyne, &c.* The county of the town of *Haverford-Weſt*, 35 *H.* 8. *cap.* 16. A county in another ſignification is uſed for the county-court, which the ſheriff keepeth every month within his charge, either by himſelf or his deputy. Stat. 2 *Ed.* 6. *cap.* 25. *Cromp. Juriſd. f.* 221. *Bract. lib.* 3. *c.* 7. *& lib.* 3. *tract.* 2. *cap.* 12. Of theſe *counties*, there are reckoned in *England* forty, beſides twelve in *Wales*, making in all fifty-two. The word *comitatus* is alſo uſed for a juriſdiction or territory among the *feudiſts.* See **Comitatus.**

Counting-houſe of the King's houſhold, *(Domus computus hoſpitii Regis,)* Is commonly called *The green-cloth*, becauſe the table ſtands always covered with a *green cloth:* Here ſit the Lord Steward, Treaſurer of the *King's houſe*, Controller, Maſter of the *houſhold*, cofferer, two clerks of the *Green cloth*, and two clerks controllers, for daily taking the accounts of all expences of the *houſhold*, making proviſions and ordering payment for the ſame; for the good government of the King's ſervants, and paying the wages of thoſe below ſtairs. Vid. 39. *Eliz. cap.* 7. and 4 *Inſt. f.* 131.

County-court, *(Curia comitatus,)* By *Lambard* is otherwiſe called *conventus*, in his Explication of *Saxon* Words, and divided into two ſorts; one retaining the general name, as the *county-court* held every month by the ſheriff, or his deputy the under-ſheriff, whereof you may read in *Cromp. Juriſd. f.* 231. The other called *The turn*, held twice a year; of which ſee more in its proper place, and *Cromp. Juriſd. ibid.* This *county-court* had in ancient times the cognizance of great matters, as may appear

appear by *Glanvill*, *lib.* 1. *cap.* 2, 3, 4. by *Bracton* and *Britton* in divers places, and by *Fleta*, *lib.* 2. *cap.* 62. but was abridged by the ſtatute of *Magna Charta*, *cap.* 17. and much more by 1 *Ed.* 4. *cap.* 1. It had alſo, and hath the determination of certain treſpaſſes and debts under forty ſhillings. *Britton*, *cap.* 27, 28. What manner of proceedings was of old uſed in this court, ſee *Fleta ubi ſupra.*

Before the courts at *Weſtminſter* were erected the *county-courts* were the chief courts of this kingdom. Amongſt the laws of King *Edgar* this is one, *viz. Let the* hundred-court *be kept as anciently, &c. and let there be two* county-courts *in a year, in which* county-court *there ſhall be a biſhop, and an alderman or earl, where one ſhall judge according to the Common law, and the other according to the eccleſiaſtical law.*

This is the foundation of the united power of the biſhop and earl to ſit and try cauſes in one *court*; the conjunction of which powers mutually to aſſiſt each other, is as ancient as the *Engliſh* government itſelf; but theſe powers were ſeparated by *William the Conqueror*, and ſoon after all the eccleſiaſtical buſineſs was brought into the *court*, ſo called, and the law buſineſs into the *King's Bench. Cowell*, *edit.* 1727.

Magna Charta, 9 *Hen.* 3. *cap.* 35. No county ſhall be held but from month to month; and where a greater term hath been uſed, it ſhall be greater. Nor ſhall any ſheriff or his bailiff make his turn by the hundred, but twice in a year in the due and cuſtomed place, to wit, once after *Eaſter* and once after *Michaelmas*. And the view of frankpledge ſhall then be made, ſo that every one have his franchiſes. And the view of frankpledge ſhall be made, ſo that the King's peace be kept; and the tithing kept intire.

Stat. *Marlbr.* 52 *Hen.* 3. *cap.* 10. Archbiſhops, biſhops, earls, barons or women, ſhall not need to come to the ſheriff's turn, unleſs their preſence be ſpecially required for ſome cauſe. And if any have tenements in divers hundreds, they ſhall not need to come to the turn, but in the bailiwicks where they be converſant.

Stat. *Weſtm.* 1. 3 *Ed.* 1. *cap.* 33. No ſheriff ſhall ſuffer any baretor or maintainer of pleas in the counties, nor ſtewards, who are not attornies of their lords to make ſuit; and if any do it, the King will grievouſly puniſh the ſheriff and him.

Stat. *Weſt.* 2. 13 *Ed.* 1. *cap.* 13. The ſheriff in their turns and elſewhere, when they have to enquire of malefactors, by the precept of the King, or of their office, ſhall make their inqueſts by lawful men, at leaſt twelve, who ſhall ſet their ſeals to their inquiſitions; and the ſheriffs ſhall take and impriſon thoſe whom by ſuch inquiſition they ſhall find guilty, as they have uſed to do. And if they ſhall impriſon others, ſuch perſons impriſoned ſhall have their action by writ of impriſonment againſt the ſheriff, as againſt any other perſon. And ſo it ſhall be obſerved of every bailiff of liberty.

Stat. 1 *Ed.* 3. *cap.* 17. Sheriffs and bailiffs of franchiſes, and all others who take indictments in their turns or elſewhere, ſhall take ſuch indictments by roll indented, whereof one part ſhall abide with the indictors, ſo that one of the inqueſt may ſhew one part of the indenture to the juſtice, when he ſhall come to make deliverance.

Stat. 31 *Ed.* 3. *ſtat.* 1. *cap.* 15. Every ſheriff ſhall make his turn once in the month after *Eaſter*, and the other time in the month after St. *Michael*; and if they hold them otherwiſe, they ſhall loſe their turn for the time.

Stat. 19 *Hen.* 7. *cap.* 24. The ſhire-court of *Suſſex* ſhall be holden one time at *Chicheſter*, and the next time at *Lewes*, and ſo *alternis vicibus*; and every ſhire-court holden to the contrary ſhall be void.

Stat. 2 & 3 *Ed.* 6. *cap.* 25. *ſect.* 2. The county-courts ſhall be kept every month, and no otherwiſe.

Sect. 3. The ſheriff of *Northumberland* ſhall keep the county-court in the town of *Alnwick*, and in no other place.

Thoſe county-courts which uſed to be held on the *Monday* for York, ſhall be held on *Wedneſday*, 7 & 8 *Will.* 3. *c.* 25. *ſ.* 9.

County-palatine. Writs of *capias* againſt riots, *&c.* in ſuch counties, how to be awarded, 2 *H.* 1. *ſt.* 1. *c.* 9. 8 *Hen.* 6. *c.* 14.

Commiſſioners of ſewers in the counties palatine, 23 *H.* 8. *c.* 5. *ſect.* 18 & 20.

The King's leaſes of lands and grants of offices, how to paſs in the county palatine of *Lancaſter*, 27 *H.* 8. *c.* 11. *ſect.* 6, 7.

Writs and indictments to be in the King's name, 27 *H.* 8. *c.* 24. *ſect.* 3, 4, 5.

The 34 & 35 *H.* 8. concerning tranſcripts of attainders, *&c.* extends not to counties palatine, 34 & 35 *H.* 8. *c.* 14. *ſect.* 5.

Fines and recoveries in them, how levied, ſuffered and exemplified, 37 *H.* 8. *c.* 19. 2 & 3 *Ed.* 6. *c.* 28. 5 *El.* *c.* 27. 27 *El. c.* 9.

Proclamations on *exigents* how awarded in the counties palatine of *Cheſter* and *Lancaſter*, 1 *Ed.* 6. *c.* 10. 5 & 6 *Ed.* 6. *c.* 26.

Cuſtos rotulorum to be appointed as formerly, 3 & 4 *Ed.* 6. *c.* 1. *ſect.* 5.

Writs of *excommunicato capiendo*, how executed, 5 *El.* *c.* 23. *ſect.* 11.

Jurors how returned, 5 *El. c.* 25. 3 *Geo.* 2. *c.* 25. *ſ.* 4, 10, 11, 14.

And where there may be a *tales*, 5 *El. c.* 25. 14 *El.* *c.* 9.

Where the jurors ſhall loſe their iſſues, and where they ſhall be diſcharged, 5 *El. c.* 25. *ſect.* 3, 4, 5.

Penalty upon ſheriffs for returning iſſues on jurors not warned, 5 *El. c.* 25. *ſect.* 6.

Inrollments of bargain and ſale of goods, 5 *El. c.* 6.

Sheriffs to account as formerly, 13 & 14 *Car.* 2. *c.* 2. *ſect.* 9. 3 *Geo.* 1. *c.* 15. *ſect.* 7 & 23.

17 *Car.* 2. concerning replevins and avowries, and 22 & 23 *Car.* 2. reſtraining frivolous ſuits, extended to counties palatine, 19 *Car.* 2. *cap.* 5. 11 & 12 *Will.* 3. *c.* 9.

Sureties to be found on granting *certiorari* in counties palatine, 5 & 6 *Will.* & *Ma. c.* 11. *ſect.* 5.

Officers within the counties palatine not to hold perſons to ſpecial bail upon writs out of the courts at *Weſtminſter* under 20*l.* 11 & 12 *Will.* 3. *cap.* 9. *ſect.* 2.

Regulations in taking the poll at elections, 10 *Ann.* *c.* 23. *ſ.* 20.

The ſheriffs of *Cheſter* to take the uſual oaths, 3 *Geo.* 1. *c.* 15. *ſ.* 20.

Judgments how ſigned, and to what time they ſhall relate, 8 *Geo.* 1. *c.* 25. *ſect.* 6.

Juries how ſummoned in counties palatine, 3 *Geo.* 2. *c.* 25. *ſ.* 10.

Priſoners in execution within the precinct of the county palatine of *Cheſter*, how relieved, 3 *Geo.* 2. *c.* 27. *ſ.* 4.

Where a bill in equity ſhall be taken *pro confeſſo*, 5 *Geo.* 2. *c.* 25. *ſ.* 9.

Small debts how recovered, 6 *Geo.* 2. *c.* 14. *ſect.* 1, 2.

And ſpecial juries appointed in ſuch counties, 6 *Geo.* 2. *c.* 37. *ſect.* 2.

Infants in counties palatine enabled to convey by order of the reſpective courts belonging to thoſe counties, 4 *Geo.* 3. *c.* 16.

County rate. Stat. 12 *Geo.* 2. *cap.* 29. *ſect.* 1. Whereas by 22 *Hen.* 8. *cap.* 5. and by 1 *Ann. ſt.* 1. *cap.* 18. it is enacted, That the juſtices of the peace at their general or quarter ſeſſions have full power and authority, upon due preſentment that any bridge is out of repair, to make aſſeſſments upon every town, pariſh, or place, in proportion as they uſually have been aſſeſſed towards the repair of bridges: And whereas by 11 & 12 *Will.* 3. *cap.* 19. it is enacted, That it ſhall be lawful for the juſtices of peace, upon preſentment of the grand jury, at the aſſize, great ſeſſions, and general gaol-delivery, held for the ſame county, of the inſufficiency of their gaol or priſon, to conclude and agree upon ſuch a ſum of money as ſhall be thought neceſſary for the building, finiſhing and repairing a public gaol; and by warrant under their hands and ſeals, to charge the ſum of money to be levied upon the ſeveral hundreds, *&c.* in the manner preſcribed by the ſaid act; which act was revived and

continued by 10 *Ann.* for ſeven years. and made perpetual by 6 *Geo.* 1. And whereas by 7 *Jac.* 1 *cap.* 4. it is enacted, That there ſhall be erected houſes of correction, by the juſtices of the peace or the greater part of them, at their reſpective quarter ſeſſions; and that maſters or governors of the ſaid houſes of correction ſhall have ſuch ſums of money yearly, as ſhall be thought meet by the ſaid juſtices, *&c.* And whereas by 43 *El. cap.* 2. it is enacted. That the juſtices of the peace, in their general ſeſſions after *Eaſter*, ſhall rate every pariſh to ſuch a weekly ſum of money as they ſhall think convenient, ſo as no pariſh be rated above 6*d.* nor under one halfpenny, and ſo as the total ſum of each taxation of the pariſhes in every county amount not above the rate of two-pence for every pariſh within the ſaid county; and it is thereby likewiſe enacted, that the juſtices of the peace at their general quarter ſeſſions to be holden at the time of ſuch taxation, ſhall ſet down what competent ſums of money ſhall be ſent quarterly out of every county or place corporate, for the relief of the poor priſoners of the *King's Bench* and *Marſhalſea*, and alſo of ſuch hoſpitals and alms-houſes as ſhall be in the ſaid county, and what ſums of money ſhall be ſent to every one of the ſaid hoſpitals and alms-houſes; ſo as there be ſent out of every county yearly twenty ſhillings, at the leaſt, to each of the ſaid priſons of the *King's Bench* and *Marſhalſea*, which ſums are rateably to be aſſeſſed upon every pariſh, and to be levied and collected as in and by the ſaid act is directed. And whereas by 14 *El. cap.* 5. it is enacted, That the juſtices of the peace of every county in their general quarter ſeſſions, ſhall rate every part at ſuch reaſonable ſums of money, for the relief of priſoners, as they ſhall think convenient, ſo as no pariſh be rated above ſix-pence or eight-pence weekly; and the churchwardens ſhall levy the ſame, and pay it to the high conſtables or other head officers, who ſhall pay it as ſhall be appointed by the ſaid juſtices in ſeſſions, to be diſtributed weekly for the relief of priſoners, *&c.* And whereas by 19 *Car.* 2. *cap.* 4. it is enacted, That the juſtices of the peace at their general ſeſſions may provide a ſtock of materials for ſetting poor priſoners to work, in ſuch manner as other county charges are levied, and provide and pay fit perſons to overſee ſuch work; provided that no pariſh be rated above 6*d.* by the week towards the premiſſes. And whereas by 12 *Ann. ſt.* 2. *cap.* 23. it is enacted, That the juſtices of the peace at their quarter ſeſſions may from time to time cauſe ſuch ſums of money to be raiſed within their juriſdiction, for the paſſing and conveying or maintaining of rogues and vagabonds, as ſhall be neceſſary for thoſe purpoſes, *&c.* And whereas it is apparent, that the manner and methods preſcribed by the ſeveral acts for collecting ſome of the ſaid rates are impracticable, the ſums charged on each pariſh being ſo ſmall, that they do not, by an equal pound rate, amount to more than a fractional part of a farthing in the pound on the ſeveral perſons thereby rateable; and if poſſible to have been rated, the expence of collecting and aſſeſſing the ſame would have amounted to more than the ſum rated: And whereas many and great doubts, difficulties and inconveniencies have ariſen in making and collecting other of the ſaid rates; therefore that the good ends and purpoſes of the ſaid ſeveral ſtatutes may be anſwered, and the ſeveral ſums of money thereby intended to be raiſed, may effectually be collected, with as much eaſe and certainty, and as little expence as can be to the parties obliged by the ſaid laws to pay the ſame; Be it therefore enacted, *&c.* That the juſtices of the peace in *England*, at their general or quarter ſeſſions, or the greater part of them, ſhall have full power and authority to make one general rate or aſſeſſment for ſuch ſum or ſums of money as they in their diſcretion ſhall think ſufficient to anſwer all and every the ends and purpoſes of the before recited acts, in ſtead and in lieu of the ſeveral ſeparate and diſtinct rates directed thereby to be made, levied and collected; which rate ſhall be aſſeſſed upon every town, pariſh, or place within the reſpective limits of their commiſſions, and ſhall be collected by the high conſtables of the reſpective hundreds and diviſions in which any town, pariſh, or place doth lie, in ſuch manner and at ſuch times as herein after directed.

Sect. 2. And that the reſpective ſums to be aſſeſſed and collected may be well and truly paid to the high conſtables, the churchwardens and overſeers of the poor for the time being of each pariſh and place within the reſpective counties, cities, and liberties in which they reſpectively lie, ſhall, out of the money collected, or to be collected for the relief of the poor of ſuch pariſh or place, pay to the high conſtables of the reſpective hundreds or diviſions of the ſaid counties, cities, and liberties, the reſpective ſums of money ſo rated and aſſeſſed upon the pariſh or place, within the ſpace of thirty days after demand thereof made in writing, to be given to the ſaid churchwardens or overſeers of the poor, or any of them, or left at their, or either of their dwelling houſe or houſes, or affixed on any of the church doors of ſuch pariſh or place to which ſuch officer ſhall belong, by the ſaid high conſtable or high conſtables of the reſpective hundreds or diviſions; which demand the reſpective high conſtable or high conſtables is and are hereby required to make, at ſuch times as the ſaid juſtices of the peace, or the greater part of them, ſhall by their order in ſeſſions direct; and the receipt or receipts of ſuch high conſtable or high conſtables ſhall be a full and ſufficient diſcharge to ſuch churchwardens and overſeers of the poor, or other perſons paying the ſame, and ſhall be allowed in their accounts as ſuch, by the juſtices of the peace before whom ſuch accounts ſhall be paſſed: And in caſe ſuch churchwardens and overſeers of the poor, or any of them, ſhall neglect or refuſe to pay any the ſum or ſums of money hereby aſſeſſed, after demand made as aforeſaid, ſuch high conſtable or high conſtables ſhall, and they are hereby impowered to levy the ſame by diſtreſs and ſale of the goods and chattels of ſuch churchwardens and overſeers, or either of them ſo refuſing or neglecting to pay the ſame as aforeſaid, by warrant under the hands and ſeals of two or more juſtices of the peace of the county, riding, diviſion, city, town corporate, liberty, or place, reſiding in or near ſuch pariſh, or place; rendering the overplus, if any there ſhall be, after deducting the money aſſeſſed, and the charges of the diſtreſs and ſale, to the owner or owners thereof.

Sect. 3. Provided, that in caſe no rate is or ſhall be made for the relief of the poor in any pariſh, townſhip, or place; the juſtices of the peace in their reſpective general or quarter ſeſſions, or the greater part of them, ſhall and may by their order direct the ſum of money aſſeſſed on ſuch pariſh, townſhip or place, for the purpoſes of this act; to be rated and levied on ſuch pariſh, townſhip, or place, by any petty conſtables, or other peace officer, of or belonging to the ſame, in ſuch manner as money for the relief of the poor is by law to be rated or levied; which ſum ſo rated and levied ſhall be paid by ſuch petty conſtable, or other peace officer, to the reſpective high conſtable for the hundred, diviſion, or liberty, wherein ſuch pariſh, townſhip, or place ſhall lie; and ſhall be demanded of, paid by, or levied on ſuch petty conſtable, or other peace officer, in the ſame manner as any rates are herein before directed to be demanded of, paid by, and levied on the churchwardens and overſeers of the poor, or any of them; and if ſuch petty conſtable or other peace officer ſhall pay ſuch ſum, before the ſame ſhall be ſo by him rated and levied as aforeſaid, he may afterwards rate and levy the ſame, or ſhall and may be allowed and re-imburſed the ſaid ſum of money out of any conſtables, or other rate made, or to be made on any ſuch pariſh, townſhip, or place, which the ſaid juſtices of the peace, or the greater part of them, in their ſeſſions ſhall order and direct.

Sect. 4. And whereas it will be very inconvenient to many towns, pariſhes, and places, in the ſeveral counties of *York*, *Derby*, *Durham*, *Lancaſter*, *Cheſter*, *Weſtmorland*, *Cumberland*, and *Northumberland*, that the rates by this act directed to be paid by and levied on the churchwardens and overſeers of the poor for the purpoſes aforeſaid, ſhould be paid out of any rate to be made for the relief of the poor in ſuch towns, pariſhes and places;

therefore, &c. it ſhall be lawful to and for the juſtices of peace for the reſpective ridings, diviſions, or counties of *York*, *Derby*, *Durham*, *Lancaſter*, *Cheſter*, *Weſtmorland*, *Cumberland*, and *Northumberland*, at their reſpective general or quarter ſeſſions, or the greater part of them, if they ſhall think convenient, to order the ſum of money directed to be aſſeſſed on any ſuch town, pariſh, or place, for all or any of the purpoſes of this act, to be paid by and levied on the petty conſtables of, or for, any ſuch town, pariſh, or place within the ſaid counties reſpectively, in ſuch manner as the ſame is herein directed to be paid and levied, in caſe where no rate is made for the relief of the poor.

Sect. 5. Provided, that this act, or any thing herein contained, ſhall not extend or be conſtrued to extend to make any perſons, liberties, diviſions, or places, liable to pay to any rate to be made in purſuance of this act, to which ſuch perſon, liberty, diviſion, or place did not, or was not liable to contribute before the paſſing hereof; but that it ſhall and may be lawful to and for the juſtices of the peace at their reſpective general or quarter ſeſſions, or the greater part of them, to order and aſcertain what proportion of any rate to be made by virtue of this act, ſhall be aſſeſſed on and paid by the ſeveral perſons, liberties, diviſions, and places, who have uſually contributed, or are liable to pay only to one or more of, and not to all, the rates hereby intended to be raiſed, and thrown into one general rate or aſſeſſment.

Sect. 6. And the reſpective high conſtables ſhall at or before the next general or quarter ſeſſions reſpectively, after they or any of them ſhall have received ſuch ſum or ſums of money, pay the ſame into the hands of ſuch perſon or perſons (being reſident in any ſuch county, riding, diviſion, city, liberty, or place, where ſuch rates ſhall be reſpectively made) whom the ſaid juſtices ſhall at their reſpective general or quarter ſeſſions, or the greater part of them, appoint to be treaſurer or treaſurers; ſuch treaſurer or treaſurers firſt giving ſufficient ſecurity in ſuch ſums as ſhall be approved of by the ſaid juſtices at their general or quarter ſeſſions, or the greater part of them, to be accountable for the ſeveral reſpective ſums of money which ſhall be paid to them in purſuance of this act, and to pay ſuch ſum or ſums of money as ſhall be ordered to be paid by the juſtices in their general or quarter ſeſſions, and for the due and faithful execution of the truſt repoſed in him or them; and all and every ſuch ſum or ſums of money as ſhall be paid into his or their hands by virtue of and in purſuance of this act, ſhall be deemed and taken to be the publick ſtock; and the ſaid treaſurer or treaſurers ſhall and are hereby required to pay ſo much of the money in their hands, to ſuch perſon and perſons as the ſaid juſtices at their reſpective general or quarter ſeſſions, or the greater part of them, ſhall by their orders from time to time direct and appoint, for the uſes and purpoſes of the ſaid recited acts, and for any other uſes and purpoſes to which the publick ſtock of any county, city, riding, diviſion, or liberty, is or ſhall be applicable by law.

Sect. 7. And the ſaid reſpective treaſurer or treaſurers ſhall and are hereby required to keep books of entries of the ſeveral ſums reſpectively received and paid by him or them in purſuance of this act; and is and are alſo hereby required to deliver in true and exact accounts upon oath, if required, of all and every the ſum and ſums of money reſpectively received and paid by him or them, diſtinguiſhing the particular uſes to which ſuch ſum or ſums of money have been applied, to the juſtices at every general or quarter ſeſſions reſpectively to be holden within the limits of their commiſſions; and ſhall lay before the juſtices at ſuch ſeſſions the proper vouchers for the ſame.

Sect. 8. And the reſpective high conſtables ſhall demand and levy ſuch rates and aſſeſſments in manner before directed, and ſhall account for the ſame before the ſaid juſtices at their reſpective general or quarter ſeſſions, if thereto required, in the like manner as the ſaid treaſurer or treaſurers is and are hereby directed to account; and in caſe ſuch high conſtables, or any of them, ſhall neglect or refuſe ſo to demand, levy, or account, then it ſhall and may be lawful to and for the ſaid juſtices at their reſpective general or quarter ſeſſions, or the greater part of them, to commit ſuch high conſtable or high conſtables to the common gaol of the county, riding, diviſion, city, town corporate, liberty or place, there to remain without bail or mainprize, until he or they ſhall have cauſed ſuch rates or aſſeſſments to be demanded and levied; and ſhall have rendered a true account or accounts in the manner hereby directed; and in caſe it ſhall appear by ſuch account or accounts, that any ſum or ſums of money is or are remaining in his or their hands, which he or they ſhall have received of the reſpective churchwardens and overſeers, or other perſons, which ought to have been paid to the reſpective treaſurer or treaſurers at the time or times limited by this act, or of the reſpective treaſurer or treaſurers, in order to be applied to the purpoſes aforeſaid; and if he or they ſhall neglect or refuſe to pay the ſame over into the hands of the reſpective treaſurer or treaſurers, or otherwiſe, if thereupon required by order of the ſaid juſtices at their reſpective general or quarter ſeſſions, or the greater part of them; then it ſhall and may be lawful for the ſaid juſtices at ſuch their general or quarter ſeſſions, or the greater part of them, to commit ſuch high conſtable or high conſtables to the common gaol of the county, riding, diviſion, city, town corporate, liberty, or place, there to remain without bail or mainpriſe, until he or they ſhall have made full payment of the ſum or ſums of money that ſhall appear to be due on ſuch account or accounts; and all the accounts and vouchers of the ſaid treaſurers and high conſtables ſhall, after having been paſſed by the ſaid juſtices at their reſpective general or quarter ſeſſions, be depoſited with the clerk of the peace for the time being, of each county reſpectively, or the town clerk, high bailiff, or chief officer of any city, town corporate, or liberty, who is or are hereby required to keep them among the records of ſuch county, city, town corporate, or liberty, to be inſpected from time to time by any of the ſaid juſtices, within the limits of their commiſſions, as occaſion ſhall require, without fee or reward.

Sect. 9. And the receipts of ſuch reſpective treaſurer or treaſurers ſhall be ſufficient diſcharges to all high conſtables; and the diſcharges of the ſaid juſtices of the peace, or the greater part of them, by their orders made at their reſpective general or quarter ſeſſions to ſuch treaſurer or treaſurers, ſhall be deemed and allowed as good and ſufficient releaſes, acquittances, or diſcharges, in any court of law or equity, to all intents and purpoſes whatſoever.

Sect. 10. And no new rate ſhall be made, until it ſhall appear to the ſaid juſtices at their reſpective general or quarter ſeſſions, or the greater part of them, by the accounts of their reſpective treaſurer or treaſurers, or otherwiſe, that three-fourths of the money collected by virtue of the preceding rate have been expended for the uſes and purpoſes aforeſaid.

Sect. 11. And it ſhall be lawful to and for the ſaid juſtices of the peace at their reſpective general or quarter ſeſſions, or the greater part of them, then and there aſſembled, to continue from time to time ſuch treaſurer or treaſurers in his or their office or offices, ſo long as they ſhall ſee convenient, and to remove him or them at their pleaſure, and to appoint any other perſon or perſons in his or their place; and to allow to him or them, and every of them inſiſting on the ſame, ſuch reaſonable ſum or ſums of money for his or their care or pains in the execution of ſuch truſt, not exceeding twenty pounds by the year, as they in their diſcretion ſhall think fit; which they are hereby impowered to direct the payment of out of the monies ariſing by the reſpective rates thereby appointed to be made.

Sect. 12. And in caſe the churchwardens and overſeers of any pariſh or place ſhall at any time have reaſon to believe the ſaid pariſh or place is over-rated, ſuch churchwardens and overſeers may appeal to the reſpective juſtices of the peace at their next general or quarter ſeſſions, againſt ſuch part of the rate only as may affect the pariſhes or places in which they ſerve ſuch offices; which

juſtices,

juſtices, or the greater part of them, then and there aſſembled, are hereby authoriſed and impowered to hear, and finally determine the ſame: Provided nevertheleſs, that upon ſuch appeal ſuch rate ſhall not be quaſhed or deſtroyed in regard to any other pariſhes or places aſſeſſed thereby.

Sect. 13. And no part of the money to be raiſed and collected in purſuance of this act, ſhall be applied to the repair of any bridges, goals, priſons, or houſes of correction, until preſentments be made by the reſpective grand juries at the aſſize, great ſeſſions, general gaol-delivery, or general or quarter ſeſſions of the peace held for any county, riding, diviſion, city, town corporate, or liberty, of the inſufficiency, inconveniency, or want of reparation of their bridges, goals, priſons, or houſes of correction.

Sect. 14. And when any publick bridges, ramparts, banks, or cops, or other works, are to be repaired at the expence of any county, city, riding, hundred, diviſion, liberty, or town corporate; it ſhall be lawful for the juſtices of the peace at their general or quarter ſeſſions reſpectively, or the greater part of them then and there aſſembled, if they think proper and convenient, after preſentment to be made as aforeſaid, of the want of reparation of ſuch bridges, ramparts, banks, or cops, to contract and agree with any perſon or perſons for rebuilding, repairing, and amending of ſuch bridges ramparts, banks, or cops, as ſhall be within their reſpective counties, cities, ridings, hundreds, diviſions, liberties, or towns corporate, and all other works which are to be repaired and done by aſſeſſment on the reſpective counties, cities, ridings, hundreds, diviſions, liberties, or towns corporate, for any term or terms of years, not exceeding ſeven years at a certain annual ſum, payment, or allowance for the ſame; ſuch contractor or contractors giving ſufficient ſecurity for the due performance thereof, to the reſpective clerk, high bailiff; or chief officer of any city, town corporate, or liberty; and that ſuch juſtices at their reſpective general or quarter ſeſſions, ſhall give publick notice of their intention of contracting with any perſon or perſons for rebuilding, repairing, and amending the bridges, ramparts, banks or cops, and other works aforeſaid; and that ſuch contract ſhall be made at the moſt reaſonable price or prices which ſhall be propoſed by ſuch contractors reſpectively; and that all contracts when agreed to, and all orders relating thereto, ſhall be entred in a book, to be kept by the reſpective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any city, town corporate or liberty, for that purpoſe; who is and are hereby required to keep them amongſt the records of ſuch county, city, town corporate or liberty, to be from time to time inſpected at all ſeaſonable times by any of the ſaid juſtices, within the limits of their commiſſions; and by any perſon or perſons employed or to be employed by any pariſh, townſhip or place contributing to the purpoſes of this act, without fee or reward.

Sect. 15. And there ſhall be but one rate made and aſſeſſed by the juſtices of the peace of the county of *Middleſex*, in the ſaid county, city and liberty of *Weſtminſter* for the ſeveral purpoſes aforeſaid, and for the repair of the gaol, commonly called *New-priſon*, in the ſaid county of *Middleſex*.

Sect. 16. Provided that the juſtices of the peace for the city and liberty of *Weſtminſter*, at their general or quarter ſeſſions, to be holden for the ſame city or liberty or the greater part of them, ſhall have full power to appoint the ſame governor or maſter of the houſe of correction within the ſaid city or liberty; who ſhall have ſuch ſum of money yearly as hath been accuſtomed for and towards the ſupport and maintenance of the priſoners in his cuſtody, who ſhall be ſick, or unable to work, (not exceeding the preſent allowance of fifty pounds by the year) and direct the repairs and management thereof as they heretofore have done; and the treaſurer or treaſurers of the money ariſing by the rates in the ſaid county of *Middleſex*, and city and liberty of *Weſtminſter*, hereby appointed to be collected, ſhall and is and are hereby required to obey all orders, which ſhall from time to time be made by the ſaid juſtices of the ſaid city and liberty, or the greater part of them, at their general or quarter ſeſſions, for the payment of any ſum or ſums of money for the allowance allotted to ſuch governor, or maſter of the houſe of correction, and the repairs thereof; which orders ſhall be good and ſufficient diſcharges to ſuch treaſurer or treaſurers.

Sect. 17. And the juſtices of the peace at their reſpective general or quarter ſeſſions, or the greater part of them, ſhall be and are hereby impowered to oblige, by their order or orders, the reſpective high conſtables and petty conſtables, or any other perſon or perſons who are or have been impowered to levy, collect, or receive any ſum or ſums of money by virtue of and for the purpoſes aforeſaid, and who have any ſum or ſums of money in their hands, to account with them at their general or quarter ſeſſions, in ſuch manner as high conſtables are directed to account by virtue of this act; and in caſe ſuch high conſtable or petty conſtables, or other perſon or perſons, ſhall refuſe to account, or to pay over the money that ſhall remain in their or any of their hands when thereunto required by order of the ſaid juſtices, or the greater part of them, in their reſpective general or quarter ſeſſions aſſembled; in either of the ſaid caſes the ſaid juſtices ſhall have the like remedy againſt them or any of them, as they have againſt the high conſtable by virtue of this act, for not accounting for or paying over the money remaining in their hands. And it ſhall be lawful for the ſaid juſtices at their reſpective general or quarter ſeſſions, or the greater part of them, to direct and order the payment of the reſpective ſums of money which ſhall appear to be remaining due, and not applied or diſpoſed of, into the hands of the reſpective treaſurer or treaſurers to be appointed by this act; which ſhall be deemed to be part of the ſtock of the ſaid counties, cities, ridings, diviſions, liberties, and places reſpectively; and to inquire what ſums of money are due and owing for the purpoſes aforeſaid; and then to order the payment of ſuch ſums as ſhall appear to them upon ſuch enquiry to be juſtly due and owing.

Sect. 18. And no action or ſuit ſhall be commenced or proſecuted againſt any perſon or perſons who has or have been or ſhall be employed in the collecting or receiving any money in purſuance of the ſaid recited act or this preſent act, on any rate or rates which has or have been or ſhall be quaſhed or diſcharged by any *certiorari*, brought or to be brought in any of his Majeſty's courts of record at *Weſtminſter*, or otherwiſe, for any money collected or received, or to be collected or received on any ſuch rate or rates, before ſuch writ of *certiorari* was or ſhall be brought and allowed; and that juſtice may be done to ſuch perſons who ſhall or may pay towards any rate which ſhall be quaſhed or diſcharged, the ſeveral ſums of money which ſhall appear to have been paid by them on ſuch rate, either in whole or in part, more than they ought to have paid, ſhall be repaid, or allowed to them in the next rate or rates which ſhall be made in purſuance of this act, as if the ſame had been paid on ſuch new rate or rates.

Sect. 19. Provided, that all and every ſuch perſon and perſons ſo employed, ſhall account for any pay over the money by them reſpectively received, in the ſame manner, and under the like penalties for any neglect or refuſal therein, as are to be inflicted by virtue of this act on any perſon or perſons neglecting or refuſing to account for, or pay over any money remaining in his or their hands, which he or they have received in purſuance thereof.

Sect. 20. And the juſtices of the peace for the ſaid county of *Middleſex*, at their general ſeſſions of the peace to be holden for the ſaid county, ſhall have the ſame powers and authorities to put this act in execution, as are hereby given them at their general quarter ſeſſions.

Sect. 21. And no writ of *certiorari* to remove any rates made in purſuance of this act, or to remove any orders or other proceedings taken or made by the ſaid reſpective general or quarter ſeſſions touching ſuch rates, ſhall be taken out or granted, but upon a motion to be made ſome time in the firſt week of the next term after

the time for appealing from ſuch rates or orders is expired; and upon making it appear to the court by affidavit or otherwiſe, that the merits of the queſtion upon ſuch appeal or orders will by ſuch removal come properly in the judgment of the ſaid court; and that no ſuch writ of *certiorari* ſhall be allowed until ſufficient ſecurity be given to the reſpective treaſurer or treaſurers appointed by virtue of this act, in the ſum of one hundred pounds, to proſecute ſuch writ of *certiorari* with effect, and to pay the coſts to be aſcertained by the court to which ſuch rates, orders, or proceedings ſhall be removed, in caſe ſuch rates or orders ſhall be confirmed; nor ſhall any ſuch rates, orders, or proceedings be quaſhed or vacated for want of form only, and all charges attending ſuch removal ſhall be defrayed out of that or any ſubſequent rate.

Sect. 22. And ſo much of the before-recited act paſſed 14 *Eliz.* as relates to the method of taxing pariſhes for the relief of priſoners; and ſo much of the ſaid act of 43 *Eliz.* as relates to the method of raiſing money for the *King's Bench* and *Marſhalſea* priſons, hoſpital, and almſhouſes; and ſo much of the ſaid act of the 19th *Car.* 2. as relates to the method of rating pariſhes for providing materials for the ſetting poor priſoners on work, ſhall be repealed, and be abſolutely null and void.

Sect. 23. Provided, that ſuch ſums as have been annually paid to the *King's Bench* and *Marſhalſea* priſons, ſhall be paid out of the monies ariſing by virtue of this act, at ſuch times, and in ſuch manner, as is preſcribed in and by 11 *Geo.* 2. *cap.* 20. and ſuch money as ſhall be judged neceſſary by the juſtices of the peace in ſeſſions, to be applied in purſuance of the ſaid recited act of 14 *Eliz.* for the relief of priſoners; and of the ſaid act of 19 *Car.* 2. for providing materials for the ſetting poor priſoners on work, ſhall be paid out of the monies ariſing by this act.

Sect. 24. And if any action or ſuit ſhall be commenced againſt any perſon or perſons, for any thing that ſhall be done in purſuance or by the authority of this preſent act, in every ſuch caſe the action or ſuit ſhall be commenced within three months next after the fact committed, and not afterwards, and ſhall be laid and brought in the reſpective county in which the cauſe of action or ſuit ſhall ariſe, and not elſewhere; and the defendant or defendants in ſuch action or ſuit to be brought, ſhall and may plead the general iſſue, and give this act and the ſpecial matter in evidence at any trial to be had thereupon; and that the ſame was done in purſuance and by the authority of this act; and if it ſhall appear ſo to be done, or that ſuch action or actions ſhall be brought after the time before limited for bringing the ſame as aforeſaid; or ſhall be brought in any other county or place; that then the jury ſhall find for the defendant or defendants; and upon ſuch verdict, or if the plaintiff or plaintiffs ſhall be nonſuited, or diſcontinue his, her, or their actions or ſuit, after the defendant or defendants hath or have appeared, or if upon demurrer judgment ſhall be given againſt the plaintiff or plaintiffs, the defendant or defendants ſhall and may recover treble coſts, and have the like remedy for the ſame, as any defendant or defendants hath or have in other caſes by law.

Stat. 14 *Geo.* 2. *cap.* 33. *ſect.* 1. The juſtices of peace at their general or quarter ſeſſions ſhall have power to purchaſe, or agree or contract with any perſon for any piece or parcel of land, adjoining or near to any county bridge, for the more commodious enlarging or convenient rebuilding the ſame; which piece ſhall not exceed one acre, and ſhall be paid for by the county treaſurer, out of the monies raiſed by virtue of 12 *Geo.* 2. *cap* 29.

Stat. 17 *Geo.* 2. *cap.* 5. *ſect.* 33. The juſtices in their general or quarter ſeſſions may cauſe ſuch ſums of money as ſhall be neceſſary for apprehending, paſſing, conveying, and maintaining rogues and vagabonds, and incorrigible rogues, and likewiſe the expences of erecting, purchaſing, hiring, enlarging, altering, and repairing houſes of correction, and of ſending perſons to and from the ſame, and employing them there, to be raiſed in the ſame manner as rates are raiſed by 12 *Geo.* 2. *cap.* 29.

Stat. 25 *Geo.* 2. *cap.* 29. The coroner's fee of ninepence a mile for travelling to take an inquiſition, and twenty ſhillings for taking it, ſhall be paid out of the county ſtock.

Stat. 25 *Geo.* 2. *cap.* 36. *ſect.* 11. Charges of proſecuting felons ſhall be paid out of the county ſtock, by order of the court.

Stat. 26 *Geo.* 2. *cap.* 19. *ſect.* 8. The charges of proſecuting and convicting perſons plundering ſhipwrecked goods, ſhall be paid by the treaſurer of the county.

Stat. 27 *Geo.* 2. *cap.* 3. Charges of proſecuting and convicting felons ſhall, by order of the court, be paid out of the county ſtock.

Charges of the ſoldiers carriages, over and above the officers pay for the ſame, by the ſeveral yearly acts againſt mutiny and deſertion, and by the militia act of 30 *Geo.* 2. *cap.* 25. ſhall be paid out of the county ſtock.

Courracier, A *French* word ſignifying a *horſe-courſer*. 2 *Inſt. fol.* 719.

Courſitor. See **Curſitor.**

Court, *(Curia,)* Derived from the French *cour*, ſignifies the King's palace or manſion; but derived from the Latin word *curia*, which among the *Romans* had divers ſignifications, and with us alſo hath diverſity of ſenſes; as the houſe where the King remaineth with his ordinary retinue, and alſo the place where juſtice is judically adminiſtred, of which we find thirty-two ſorts in *Crompton's* Book of *Juriſdictions* well deſcribed, and of them moſt are *courts of record*, ſome are not; and therefore are accounted *baſe courts*, in compariſon of the reſt. Beſides theſe, there are alſo *courts chriſtian*, *Smith de Rep. Angl. lib.* 3. *cap.* 6. which are ſo called, becauſe they handle matters eſpecially appertaining to *Chriſtianity*, and ſuch as, without good knowledge in *divinity*, cannot be well judged of, being held heretofore by archbiſhops and biſhops, as from the pope, becauſe he challenged the ſuperiority in all cauſes ſpiritual; but ſince his rejection, they hold them by the King's authority, *virtute magiſtratus ſui*, as the *admiral* of *England* holds his; whereupon it proceedeth, that they ſend out their precepts in their own names, and not in the King's, as the juſtices of the King's *courts* do; and therefore, as the appeal from theſe *courts* did lie to *Rome*, now by the ſtatute 25 *Hen.* 8. *c.* 19. it lieth to the King in his *Chancery. Cowell.*

In the Saxon times, the *Wittingham Mote* was the chief court of the kingdom, where all matters both civil and criminal, and alſo relating to the revenue, were debated and determined; but for civil and criminal matters, it was only a court in the firſt inſtance, for facts ariſing within the county where it ſate; but by way of appeal from the injuſtice of other courts, it heard and determined cauſes from all other counties. *Lamb. Archaion.* 57, 259, 245. *Mirror*, *c.* 5. *ſect.* 1.

To this court were ſummoned the earls of each county, and the lords of each leet, and likewiſe repreſentatives of towns, who appeared on the King's ſummons, which iſſued once a year at leaſt; and here new laws were enacted, or old ones repealed, after the manner of our parliaments. *Lamb. Archaion.* 239.

But *William the Conqueror* cauſed the ſtates to recognize him, and fearing that theſe parliaments, conſiſting of *Engliſhmen*, might prove dangerous, he eſtabliſhed a conſtant court in his own hall, made up of the officers of his palace, and they tranſacted the buſineſs both criminal and civil, and likewiſe the matters of the revenue; and as they ſate in the hall they were a court criminal, and when up the ſtairs a court of revenue; the civil pleas they heard in either court. *Madox*, *c.* 7.

The court conſiſted, 1. Of the *juſticiar* who preſided, and was called *Capitalis juſticiarius totius Angliæ*, and chiefly determined all pleas civil and criminal, and was alſo the chief officer of ſtate. 2. The chancellor, who formed all patents, and put the ſeal to them, and had the cuſtody thereof, both for writs and patents. 3. The treaſurer, before whom all accounts were chiefly audited; and he it was that preſided in matters relating to the revenue. 4. The conſtable and marſhal, to whom all matters of honour, and war, and peace were referred, to determine according to the law of nations and of arms.

5. The ſeneſchal, or ſteward and marſhal, who determined the quarrels and diſputes between the King's menial ſervants; the marſhal was alſo to keep the priſoners, and take care that no indecency was committed in the King's houſe. 6. The chamberlain, who was to count the King's money, as it came in, and iſſued out of the Treaſury. *Madox*, *c.* 9.

This was the ſovereign court of the Kingdom, where juſtice was adminiſtred, and where all matters of the higheſt moment were tranſacted by the King himſelf and theſe officers; yet, in ſome caſes, of great importance, as upon the levying a new war, or raiſing an eſcuage, moſt of the great perſons that held *in capite* were called, and then it was termed the *commune concilium regni*, or the parliament; to which afterwards the repreſentatives of boroughs that held *in capite* were called. *Madox*, *c.* 8.

Towards the *Norman* period, the power of the *juſticiar* became formidable, and in the barons war was turned againſt the King; the King alſo found, that the barons who held large diſtricts, were likely to grow more and more troubleſome to the crown; for though in the conqueror's time, and for ſome reigns after the conqueſt, they were kept in very good ſubjection; yet time wearing away the diſtinction, and the *Normans* growing up *Engliſh*, they became fond of thoſe liberties and privileges that the *Engliſh* had enjoyed in the *Saxon* times; hence it was neceſſary to introduce a new policy, and hence the original of our courts, as we have them at this day in *Weſtminſter Hall*. *Madox*, *c.* 8.

To give countenance to this new erection and diviſion of courts, (which was compleated by *Ed.* 1.) as alſo that it might ſtill be ſeen, that all juſtice flowed from the King, the King himſelf ſat in perſon in the court of King's Bench; and hence the power of this court, which it ſtill retains, of exerciſing a ſuperintendancy over other juriſdictions; but though the King was ſometimes preſent, yet the Chief Juſtice gave the rule, that the King might not decide in his own cauſe. *Madox*, *c.* 19. *fo.* 21. and 135. 1 *Rol. Abr.* 94. and ſee 2 *Inſt.* 24, 25. *Speed.* 521. 1 *Rol. Abr.* 535.

But however this regulation might have been begun, or however it might have been formerly, as to the Kings ſitting and determining in cauſes, it ſeems now agreed, that our Kings having delegated their whole judicial power to the judges of their ſeveral courts, they, by the long, conſtant, and uninterrupted uſage of many ages have now gained a known and ſtated juriſdiction, regulated by certain and eſtabliſhed rules, which our Kings themſelves cannot make any alteration in without an act of parliament. 2 *Inſt.* 73. 2 *Hawk. P C.* 2.

But as the King is the fountain of juſtice, and the ſupreme magiſtrate of the kingdom, intruſted with the whole executive power of the law, no court whatſoever can claim any juriſdiction, unleſs it ſome way or other derives it from the crown. *S. P. C.* 54, 55. 2 *Hawk. P. C.* 2.

But it is clearly agreed, that the King cannot give any addition of juriſdiction to an ancient court, but that all ſuch courts muſt be holden in ſuch manner, and proceed by ſuch rules, and in ſuch caſes only as their known uſage has limited and preſcribed; and hence it followeth, that the court of King's Bench cannot be authoriſed to determine a mere real action between ſubject and ſubject; ſo neither can the court of Common Pleas, to enquire of treaſon or felony. 6 *H.* 7. 4. *b.* 5. *a.* 4 *Inſt.* 125, 127. 6 *Co.* 11. *b.* 12. *a.*

And it is ſaid, that the King is ſo far reſtrained by the ancient forms, in all caſes of this nature, that his grant of a judicial office for life, which has been accuſtomed to be granted only at his will, is void. 4 *Inſt.* 87. 1 *Sid.* 338.

Alſo commiſſions to ſeize the goods, and impriſon the bodies of all perſons who ſhall be notoriouſly ſuſpected of felonies or treſpaſſes, without any indictment, or other legal proceſs againſt them, are illegal and void. 4 *Aſſ.* 5. *Bro. Commiſſ.* 3, 15, 16. 12 *Co.* 30, 31. 4 *Inſt.* 478.

And it is ſaid, that the King cannot grant any new commiſſion whatſoever that is not warranted by ancient precedents, however neceſſary it may ſeem, and conducive to the public good; and therefore commiſſions to aſſay weights and meaſures being of a new invention, were condemned by parliament; and it is ſaid, that the King could not authorize perſons to take care of rivers, and the fiſhery therein, according to the method preſcribed by the ſtatute of *Weſtm.* 2. *cap.* 47. before the making of that ſtatute. 4 *Inſt.* 163. 18 *E.* 3. 1, 4. 2 *Inſt.* 478.

The moſt general diviſion of our courts is, into ſuch as are of record, or not; thoſe of record are again divided into ſuch as are ſupreme, ſuperior or inferior. *Hale's An.* 35.

The ſupreme court of this kingdom is the high court of parliament, conſiſting of the King, lords, and commons, who are inveſted with a kind of omnipotence in making new laws, repealing and reviving old ones; and it is on the right balance of theſe three depends the well-being, and indeed, the very being of our conſtitution. *Hale's An.* 35.

Superior courts of record are again, thoſe that are more principal or leſs principal; the more principal ones are the lords houſe in parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and by *Hale*, ſuch are the juſtices *itenerant ad communia placita & ad placita foreſtæ*. Hale's An. 36.

The leſs principal ones are ſuch as are held by commiſſion of gaol-delivery, *oyer* and *terminer*, aſſiſe, *niſi prius*, *&c.* by cuſtom or charter; as the courts of the palatine of *Lancaſter*, *Cheſter*, *Durham*, or by virtue of acts of parliament, and the King's commiſſion, as the court of ſewers, juſtices of the peace, *&c.* *Hale's An.* 36.

The inferior courts of record, as ordinarily ſo called, are corporation courts, courts leet, and ſheriffs torn, *&c.* *Hale's An.* 36.

Courts not of record are the courts baron, county courts, hundred courts, *&c.*

Alſo the admiralty, and eccleſiaſtical courts, which are not courts of record, but derive their authority from the crown, and are ſubject to the controul of the King's temporal courts, when they exceed their juriſdiction.

All theſe are bounded and circumſcribed by certain laws and ſtated rules, to which, in all their proceedings and judicial determinations, they muſt ſquare themſelves. *Hale's An.* 35.

And here it may be proper to obſerve, that where a ſtatute prohibits a thing, and appoints that the offence ſhall be heard and determined in any of the King's courts of record, it can be proceeded againſt only in one of the courts of *Weſtminſter Hall*; becauſe thoſe being the higheſt courts of record, ſhall be intended only to be ſpoken of *ſecundum excellentiam*. *Dyer* 236. 6 *Co.* 19. *b. Cro. Jac.* 538. *Cro. El.* 737. *Cro. Car.* 146. *Cromp. Jur.* 132. 1 *Salk.* 178.

Every court of record is the King's court, though the profits may be another's; if the judges of ſuch courts err, a writ of error lies; the truth of its records ſhall be tried by the records themſelves, and there ſhall be no averment againſt the truth of the matter recorded. *Co. Lit.* 17. 8 *Co.* 38. *b.* 2 *Lev.* 93. 3 *Lev.* 205.

All ſuch courts are created by act of parliament, letters patent or preſcription, and every court, by having power given it to fine and impriſon, is thereby made a court of record; the proceedings of which can only be removed by writ of error or *certiorari*. *Co. Lit.* 260. *a.* 1 *Salk.* 200.

A court, that is not of record, cannot impoſe any fine on an offender, nor award a *capias* againſt him, nor hold plea of debt or treſpaſs, if the debt or damages amount to 40*s.* nor of treſpaſs done *vi & armis*, tho' the damages are laid to be under 40*s.* *Co. Lit.* 117. *b.* 260. *a.* 2 *Inſt.* 311, 312.

Alſo by the ſtatute of *Glouceſter* (made 6 *Ed.* 1. *c.* 8.) the ſuperior courts ſhall not hold plea of any treſpaſs under the value of 40*s.* The wood *treſpaſs* is put in this

this ſtatute but for an example, for debt, detinue, covenant, and the like. 2 *Inſt.* 311.

But the ſuperior courts may hold plea of treſpaſs, *&c.* though under 40*s.* relating to the freehold, as detinue for charters, *&c.* or treſpaſs *vi & armis.* 2 *Inſt.* 311.

As where in treſpaſs by way of original, the plaintiff declared, that the defendant *vi & armis clauſum ſuum apud H. fregit*, and concluded *ad damnum ipſius* 20*s.* and upon demurrer it was held well enough; for this being done *vi & armis*, if it could not be puniſhed in the ſuperior court, it could not be puniſhed at all, for an inferior court cannot aſſeſs a fine. *Carth.* 108. 3 *Mod.* 275. See **Judges.**

Court of Admiralty, See **Admiralty.**

Court-Baron, *(Curia Baronis,)* Is a *court* which every lord of a manor, (who in ancient times were called *barons)* hath within his own precincts. *Cowell.*

This court is incident to every manor, and had anciently conuzance of all pleas of land within the manor, ſo that no perſon within the manor could apply to any other juriſdiction without a *remiſit curiam* from the lord. 4 *Inſt.* 264. 4 *Co.* 33. *Co. Lit.* 58. It was at firſt inſtituted for the eaſe of the tenants, for ending controverſies where the debt or damage was under 40*s.* at home, *&c.* 4 *Inſt.* 268. *Owen* 35. 1 *Brownl.* 175. 1 *Bulſt.* 55. But at this day it is no court of record, nor can it hold plea of debt or treſpaſs, where the debt or damage amounts to 40*s.* *Co. Lit.* 118. 2 *Inſt.* 311. —Nor of treſpaſs *vi & armis*, becauſe it cannot impoſe a fine. *Co. Lit.* 118. 2 *Inſt.* 311, 312.

The ſuitors are judges, and the ſteward but as a regiſter. *Co. Lit.* 58.

The ſtile of this court is *Curia baronis E. C. militis manerii ſui prædicti* (having the manor's name written in the margin) *tent' tali die coram A. B. Seneſchallo ibidem, &c.* 4 *Inſt.* 268.

This court cannot be holden out of the manor; but if a man be lord of two or three manors, and there be a cuſtom to hold a court at one, for them all, ſuch courts are by cuſtom good. *Co. Lit.* 58.

This court is of two natures; the firſt is by Common law, and called the freeman's court, or court-baron; and of this the ſuitors are judges, and the ſteward is regiſter; and this may be kept from three weeks to three weeks: The ſecond is a cuſtomary court, and concerns copyholders, of which the lord or his ſteward is judge; as the firſt cannot be without freeholders, ſo this cannot be without copyholders; a court baron may be of this double nature, and then the roll contains matter concerning both. *Co. Lit.* 58.

All pleas in a court-baron, of common right, and by courſe of law are determinable by wager of law, but by preſcription they may be determined by jury. 4 *Inſt.* 143.

If a man recovers in a court baron, they have not power to make execution to the plaintiff, of the goods of the defendant; but they may diſtrain him, and retain the diſtreſs till ſatisfaction. 1 *Rol. Abr.* 543.

If in a court-baron the defendant appears not upon the diſtreſs, yet the goods diſtrained are not forfeited, nor can be ſold by the bailiff; for the diſtreſs is but in nature of a pledge; and though by the courſe of the Common law, where a man is attached by his goods, and appears not, they are forfeited; yet in a court-baron no attachment lies, but a diſtreſs infinite only. *Yelv.* 194. *Cro. Jac.* 255.

Court of Chancery. See **Chancery.**

Court of Chivalry, *(Curia Militaris,)* Otherwiſe called the *Marſhal-court*; the judges of it are the Lord Conſtable of *England*, and the Earl *Marſhal* of *England*: This *court* is the fountain of the *martial law*, and the Earl *Marſhal* is both one of the judges, and to ſee execution done. *Cowell, edit.* 1727. See **Conſtable,** and 4 *Inſt. f.* 123.

In the King's own court, eſtabliſhed by *William* the Conqueror, there were high officers, called the conſtable and marſhal, to whom chiefly belong the conuzance of matters of honour, war, and peace; and therefore all foreign facts committed by the King's ſubjects were referred to them to determine, according to the law of nations and arms. *Madox*, 27. *Fleta, lib.* 2. *c.* 31. *Spelm. Gloſſ.*

It ſeems agreed, that during the lunacy of the Earl Marſhal, this court may be holden before commiſſioners deputed to exerciſe this office. 1 *Lev.* 230. 2 *Haw. P. C.* 14.

It has been a matter greatly debated, whether this court can be holden before the Lord Marſhal only, without a Conſtable; and thoſe, who are for the negative, ground their opinions chiefly on the ſtatutes, ancient law books and records, which ſeem to mention the Conſtable as the only, or at leaſt, as the principal judge of this court. 1 *New Abr.* 602.

But notwithſtanding this, the conſtant practice, eſpecially ſince the extinguiſhment of the hereditary office of Conſtable in *Henry* the Eighth's time, of holding this court by the Earl Marſhal only, and the general notions of our judges and lawyers, of the legality of ſuch court, ſeem in a great meaſure to eſtabliſh a contrary opinion, and that at this day it may be holden before the Earl Marſhal only. 1 *New Abr.* 602.

But it is agreed, that appeals of capital matters cannot be brought before the Marſhal alone, becauſe the 1 *H.* 4. which ſhews how ſuch appeals ſhall be brought is expreſs, that they ſhall be tried and determined before the Conſtable and Marſhal of *England.* 2 *Haw. P. C.* 13.

If this court, holden before the Earl Marſhal only, exceed its juriſdiction, it has been reſolved, that it may be prohibited by the Common law courts. 2 *Hawk. P. C.* 602.

The juriſdiction of this court is declared by the 13 *Rich.* 2. *cap.* 2. by which it is recited, "That the commons made grievous complaints, that the court of the Conſtable and Marſhal daily incroached contracts and treſpaſſes, and many other actions at the Common law; *and thereupon it is declared*, That to the Conſtable it appertaineth to have conuzance of contracts touching deeds of arms, and of war out of the realm, and alſo of things which touch war within the realm, which cannot be determined nor diſcuſſed by the Common law; with other uſages to the ſame matters appertaining, which other Conſtaſtbles before have reaſonably uſed; joining to the ſame, that every plaintiff ſhall declare plainly his matter in his petition, before that any man be ſent to anſwer thereto; and if any will complain that any plea is commenced before the Conſtable and Marſhal, that might be tried by the common law, he ſhall have a privy ſeal to the ſaid Conſtable and Marſhal, to ſurceaſe till it be diſcuſſed by the King's counſel, if the matter of right pertain to that court, *&c.*

And it is further enacted by 1 *Hen.* 4. *cap.* 14. "That all appeals of things done within the realm ſhall be tried and determined by the good laws of the realm, and that appeals of things done out of the realm ſhall be tried and determined before the Conſtable and Earl Marſhal, and that no appeal be made or purſued in parliament.

As the juriſdiction of this court is reſtrained to things touching war within the realm, it can have no juriſdiction as to a civil matter, and therefore cannot proceed againſt a perſon for bare ſcandalous words, reflecting on the honour or gentility of families. 2 *Hawk. P. C.* 11.

Alſo though the marſhaling of publick funerals belong to the heralds, who are the attendants of this court, and no other perſons, without their licence, can lawfully intermeddle in it. Yet it ſeems to be ſettled, that this court cannot puniſh thoſe who ſhall be guilty of ſuch an incroachment, becauſe it is a proper ground for an action on matters which may be determined by the Common law. 1 *Lev.* 230. 1 *Sid.* 353. 1 *Show. Rep.* 353. *Show. P. C.* 58.

But by the conſtant practice, and the general opinion of lawyers, it ſeems at this day to have a juriſdiction as to diſputes concerning precedency and points of honour, and ſatisfaction therein, and may proceed againſt perſons for falſly aſſuming the name and arms of honourable perſons, *&c.* 2 *Hawk. P. C.* 11.

This

This court is to be governed by its own uſages, as far as they go, and in other caſes by the civil law; but ſince it is no court of Common law, no condemnation in it cauſes any forfeiture of lands, or corruption of blood; neither can an error in it be remedied by writ of error, but only by appeal to the King; yet the judges of the Common law take notice of its juriſdiction, and give credit to a certificate of its judges. 3 *Inſt.* 125. 2 *Hawk. P. C.* 13.

It is made a doubt, whether the King hath any remedy in this court againſt an offender, by way of indictment or information by the attorney general. *Hutton* 3.

Court Chriſtian, (*Curia Chriſtianitatis,*) So called, becauſe, as in ſecular *courts* the King's laws do ſway and decide cauſes; ſo in eccleſiaſtical *courts*, the laws of *Chriſt* ſhould rule and direct; for which cauſe, the judges in thoſe *courts* are Divines, as archbiſhops, biſhops, archdeacons, &c. *Lyndewood*'s words are theſe: *In curia Chriſtianitatis*, i. e. *Eccleſiæ, in qua ſervantur leges Chriſti, cum tamen in foro regio ſerventur leges mundi.* 2 *Inſt.* f. 488. See **Court.** But there was a complaint made againſt the biſhops long before the reformation, that they had extended their juriſdiction ſo far, that they had left very little buſineſs for the ſecular judges; for they aſſum'd the judicature over the clergy, and every one who had tonſure; and for that purpoſe they would cauſe a great number of boys to be ſhaved: And though they had no legal juriſdiction in criminal caſes, of the clergy, but only in the execution of the ſentence, which was degradation; yet they judged likewiſe in thoſe caſes, and in all ſpiritual cauſes whatſoever; in caſes of tithes and other profits ariſing to the church; in caſes relating to the faith and ſacraments; in caſes of hereſies; of any violence done to the church or to the clergy; of fornication and adultery; of the privileges of thoſe who had taken upon themſelves the ſign of the croſs; of all matrimonial cauſes; of baſtardy and legitimation; of laſt wills and teſtaments, and of lands and tenements which were given in alms; of uſury, &c. *Du Freſne.*

Court of Common Pleas. See **Common Pleas.**

Court of Conſcience. See **Debt.**

Court of Conſcience in the city of London. See **London.**

Court of Delegates, Is the higheſt *court* for civil affairs that concern the church; the juriſdiction whereof was eſtabliſhed by 25 *Hen.* 8. *cap.* 19. From the higheſt *court* of the archbiſhop of *Canterbury*, there lies an appeal to this *court*, and from this to no other. See **Delegates.**

Courts Eccleſiaſtical, (*Curiæ Eccleſiaſticæ,*) Are thoſe *courts* which are held by the King's authority as ſupreme governor of the church, for matters which chiefly concern religion. 4 *Inſt.* 121. And the laws and conſtitutions whereby the *Church of England* is governed are, 1. Divers immemorial *cuſtoms*. 2. Our own *provincial conſtitutions*, and the *canons* made in convocations, eſpecially thoſe in the year 1603. 3. Statutes or *acts of parliament* concerning the affairs of religion, or cauſe of eccleſiaſtical cognizance; particularly the rubricks in our Common-Prayer-Book, founded upon the act of Uniformity. 4. The *articles of religion*, drawn up in the year 1562, and eſtabliſhed 13 *Eliz. cap.* 12. 5. And 'tis ſaid, by the general *Canon law*, where all others fail. See the 25 *Hen.* 8. *cap.* 28. As to ſuits in ſpiritual or *eccleſiaſtical courts*, they are for the reformation of manners; or for puniſhing of hereſy, defamation, laying violent hands on a clerk, and the like; and ſome of their ſuits are to recover ſomething demanded, as tithes, a legacy, contract of marriage, &c. and in the cauſes of this nature, the courts may give coſts, but not damages:

Things that properly belong to their juriſdictions are matrimonial and teſtamentary, and defamatory words, for which no action lies at law; as for calling one *adulterer*, *fornicator*, *uſurer*, or the like. 11 *Rep.* 54. *Dyer* 240. The proceedings in the *eccleſiaſtical courts*, are according to the *Civil* and *Canon law*, by *citation*, *libel*, *anſwer*, *upon oath*, proof by *witneſſes*, and *preſumptions*, &c. and after *ſentence*, for contempt, by *excommunication*: and if the ſentence is diſliked, by *appeal*. The juriſdiction of theſe *courts*, is *voluntary*, or *contentious*: And the puniſhments inflicted by them, are cenſures and puniſhments *pro ſalute animæ*, by way of penance, &c. They are not courts of record. See **Conſultation** and **Prohibition.**

Court of Exchequer. See **Exchequer.**

Court of Huſtings, (*Curia Huſtingi,*) Is the high court of record holden at *Guildhall*, for the *city of London*, before the Lord Mayor and aldermen, the ſheriffs, and recorder. 4 *Inſt.* 247. This court determines all pleas, real and mixt: And here all lands, tenements and hereditaments, rents and ſervices, within the city of *London* and *ſuburbs* of the ſame, are pleaded in two *huſtings*; one called *huſtings of plea of lands*, and the other *huſtings of common pleas*. In the *huſtings* of plea of lands, are brought *writs of right patent* directed to the ſheriffs of *London*; on which writs the tenant ſhall have three ſummons at the three *huſtings* next following; and after the three ſummons there ſhall be three eſſoins at three other *huſtings* next enſuing; and at the next *huſtings* after the third eſſoin, if the tenant makes default, proceſs ſhall be had againſt him by *grand cape*, or *petit cape*, &c. And if the tenant appears, the defendant is to declare in the nature of what writ he will; without making proteſtation to ſue in nature of any writ: Then the tenant ſhall have the view, &c. and if the parties plead to judgment, the judgment ſhall be given by the recorder: but no damages, by the cuſtom of the city, are recoverable in any ſuch writ of right patent. In the *huſtings* of common pleas are pleadable, writs *ex gravi querela*, writs of *gavelet*, *of dower*, *waſte*, &c. alſo writs of *exigent* are taken out in the *huſtings*; and at the fifth *huſtings* the outlawries are awarded, and judgment pronounced by the recorder. If an erroneous judgment is given in the *huſtings*, the party grieved may ſue a commiſſion out of *Chancery*, directed to certain perſons to examine the record, and thereupon do right. See *Laws and Cuſtoms*, &c. *of London.*

Court of King's Bench. See **King's Bench.**

Court-Leet. See **Leet.**

Court of the legate, Was a court obtained by Cardinal *Wolſey*, of Pope *Leo* the tenth, in the ninth year of *Henry* the Eighth, wherein he had power to prove wills, and diſpenſe with offences againſt the ſpiritual laws, &c. and was but of ſhort continuance.

Court of Marſhalſea, (*Curia palatii,*) A court of record to hear and determine cauſes between the ſervants of the King's houſhold and others within the verge; and hath juriſdiction of all matters within the verge of the court, and pleas of treſpaſs, where either party is of the King's family; and of all other actions perſonal, wherein both parties are the King's ſervants; and this is the original juriſdiction of the *court of marſhalſea*. But the *curia palatii*, erected by King *Charles* I. by letters patent, in the ſixth year of his reign, and made a court of record, hath power to try all perſonal actions, as debt, treſpaſs, ſlander, trover, actions on the caſe, &c. between party and party, the liberty whereof extends twelve miles about *Whitehall*; which juriſdiction hath ſince been confirmed by King *Charles* the Second: and the judges of this court, are the Steward of the King's houſhold, and Knight Marſhal for the time being, and the Steward of the court, or his deputy, being always a lawyer. *Cromp. Juriſd.* 102. *Kitchin* 199, &c. 2 *Inſt.* 548. This court is kept once a week, in *Southwark*: and the proceedings here are either by *capias* or attachment; which is to be ſerved on the defendant by one of the King's marſhal's men, who takes bond with ſureties for his appearance at the next court; upon which appearance, he muſt give bail, to anſwer the condemnation of the court; and the next court after the bail is taken, the plaintiff is to declare, and ſet forth the cauſe of his action, and afterwards proceed to iſſue and trial by a jury, according to the cuſtom of the Common law courts. If a cauſe is conſiderable, it is uſually removed into *B. R.* or *C. B.* by an *habeas corpus cum cauſa*: Otherwiſe cauſes are here brought to a trial in four or five court days. *Practiſ. Solic.* 409, 410. By ſtatute, the Steward and Marſhal of the King's houſe are not to hold plea of freehold, &c. 28 *Ed.* 1. *cap.* 3. Error in the *marſhalſea* court may be removed into the *King's Bench*, 10 *Ed.* 3. and

and the fees of the *marſhalſea* are limited by the ſtat. 2 *Hen.* 4. *cap.* 23. this *marſhalſea* is that of the houſhold; not the King's *marſhalſea*, which belongs to the King's Bench. See **Marſhallea.**

Court martial, *(Curia martialis)* Is a court for puniſhing the offences of officers and ſoldiers in time of war: And it appears by our books, that if any perſon in commiſſion, in time of peace, put to death any man by martial law, it is againſt *Magna Charta*, and murder. 3 *Inſt.* 52. But temporary acts of parliament have enabled our Kings to hold courts martial in time of peace, *&c.*——Directions for trials by courts martial, 22 *Geo.* 2. *c.* 3. 30 *Geo.* 2. *c.* 6, 11. Offences on board of ſhips cognizable by a court martial, to be tried by a court martial, 29 *Geo.* 2. *c.* 34. *ſect.* 34. Officers of the militia and the army not to ſit indiſcriminately in courts martial, 30 *Geo.* 2. *c.* 25. *ſect.* 47.

Court of peculiars, *(Curia peculiarium)* Is a *ſpiritual court*, held in ſuch pariſhes as are exempt from the juriſdiction of the biſhops, and are peculiarly belonging to the archbiſhop of *Canterbury*, in whoſe province there are 57 ſuch peculiars.

Court of piepowders, *(Curia pedis pulveriſati,)* Is a court held in fairs, to do juſtice to buyers and ſellers, and for redreſs of diſorders committed in them: ſo called, becauſe they are moſt uſual in ſummer, when the ſuitors to the court have duſty feet; and from the expedition in hearing cauſes proper thereunto, before the duſt goes off the feet of the plaintiffs and defendants. 4 *Inſt.* 272. It is a court of record incident to every fair; and to be held only during the time that the fair is kept. *Doct. & Stud. cap.* 5. As to the juriſdiction, the cauſe of action for contract, ſlander, *&c.* muſt ariſe in the fair or market; and not before at any former fair, nor after the fair: It is to be for ſome matter concerning the ſame fair or market; and be done, complained of, heard and determined the ſame day. Alſo the plaintiff muſt make oath that the contract, *&c.* was within the juriſdiction and time of the fair. Stat. 17 *Ed.* 4. *c.* 2. 2 *Inſt.* 220. The court of *piepowders* may hold plea of a ſum above 40*s.* and 'tis ſaid judgment may be given at another fair, at a court held there: And a writ of error lies upon a judgment given. *Dyer* 133. *F. N. B.* 18. This court may not meddle with any thing done in a market, without ſpecial cuſtom for it; but for what is done in a fair only: and not there for ſlanderous words, unleſs they concern matter of contract in the fair; as where it is for ſlandering the wares of another, and not of his perſon in the ſame fair. *Moor, ca.* 854. The Steward before whom the court is held, is the judge, and the trial is by merchants and traders in the fair; and the judgment againſt the defendant ſhall be *quod amercietur*. If the Steward proceeds contrary to the ſtatute 17 *Ed.* 4. he ſhall forfeit 5*l.*

Court of Requeſt, *(Curia requiſitionum)* Was a court of equity, of the ſame nature with the court of *Chancery*, but inferior to it; principally inſtituted for the relief of ſuch petitioners as in conſcionable caſes addreſſed themſelves by ſupplication to his Majeſty. Of this court, the *Lord Privy Seal* was chief judge, aſſiſted by the *Maſters of Requeſts*; and it had beginning about the 9 *H.* 7. according to Sir *Julius Cæſar*'s Tract on this ſubject: Though Mr. *Gwyn*, in his *Preface to his Readings* ſaith, it began from a commiſſion firſt granted by King *Henry* 8. This court having aſſumed great power to itſelf, ſo that it became burdenſome, *Mich. anno* 40 & 41 *Eliz.* in the court of Common Pleas, it was adjudged upon ſolemn argument, that the *Court of Requeſts* was no court of judicature, *&c.* and by the ſtat. 16 & 17 *Car.* 1. *c.* 10. it was taken away. 4 *Inſt.* 97.

Court of Seſſion in Scotland. See **Scotland.**

Court of the Lord Steward of the King's houſe. The Lord Steward, or in his abſence, the Treaſurer and Controller of the King's houſe, and Steward of the marſhalſea, may inquire of, hear and determine in this court, all treaſons, murders, manſlaughters, bloodſheds, and other malicious ſtrikings, whereby blood ſhall be ſhed in any of the palaces and houſes of the King, or in any other houſe wherein his Royal perſon ſhall abide. And this juriſdiction was given by ſtat. 33 *Hen.* 8. *c.* 12. 3 *Inſt.* 140. But this court was at firſt intended to inquire of and puniſh felonies, *&c.* by the King's ſervants, againſt any lord or other perſon of the King's council. 3 *H.* 7. *c.* 14.

Court of Star-chamber, (*Curia cameræ ſtellatæ,*) A court erected by 3 *Hen.* 7. *c.* 8. which ordained, that the Lord Chancellor, Treaſurer, and Lord Privy Seal, calling a biſhop, and Lord of the King's council, and the two chief juſtices to their aſſiſtance, on bill or information might make proceſs againſt maintainers, rioters, perſons unlawfully aſſembling, and for other miſdemeanors, which through the power and countenance of ſuch as did commit them lifted up their heads above their faults, and puniſh them as if the offenders had been convicted at law by a jury, *&c.* but this act was repealed, and the court diſſolved by ſtatute 17 *Car.* 1. *c.* 10.

Court of Survey. See **Survey.**

Courts of univerſities. The courts of the univerſities of *Oxford* and *Cambridge* are of a particular nature: They were granted by charters, and confirmed by authority of parliament. See ſtat. 13 *Eliz.* 4 *Inſt.* 227. Theſe courts are called *The Chancellor's courts*, and are kept by the Vice-Chancellors of the univerſities: Their juriſdiction extends to all cauſes eccleſiaſtical and civil, (except for maihem, felony, and relating to freehold) where a ſcholar, ſervant, or miniſter of the univerſities is one of the parties to the ſuit. The cauſes are managed by advocates and proctors: and they proceed in a ſummary way, according to the practice of the Civil law; and the judges in their ſentences follow the juſtice and equity of the Civil law, or the laws, ſtatutes and cuſtoms of the univerſities, or the laws of the land, at their diſcretion. 3 *Cro.* 73. If any erroneous judgment be given in theſe courts, appeal lies to the *congregation*; thence to the *convocation*; and thence to the *King* in *Chancery*, by his delegates. *Wood's Inſt.* 526. See **Conuſance, Univerſities.**

Courts of Wales, *(Curiæ principalitatis Walliæ,)* The courts of the principality of *Wales*, and their juriſdiction, are ſettled by acts of parliament: And beſides county-courts, hundred-courts, courts-leet, *&c.* by 34 & 35 *Hen.* 8. *c.* 26. it is enacted, That there ſhall be a *court of grand ſeſſions*, kept twice in every year in every of the twelve counties of *Wales*; and the juſtices of thoſe courts may hold pleas of the crown in as large a manner as the King's Bench, *&c* And alſo pleas of aſſizes, and all other pleas and actions real and perſonal, in as large a manner as the Common Pleas, *&c.* And errors in judgment before any of the juſtices in the great ſeſſions, ſhall be redreſſed by writ of error out of the *Chancery* of *England*; returnable in *B. R.* The proceedings in theſe courts are according to the laws of *England*; and the King's writs ought not to go into *Wales*, though a *Quo minus* out of the Exchequer is often ſent thither. See **Wales.**

Courteſy of England. See **Curteſy of England.**

Courtilage. See **Curtilage.**

Court-lands, (*Terræ Curtiles,*) Demains, or land kept in demeſne, *i. e.* in the lord's own hands, to ſerve his family. See **Curtiles Terræ.**

Couſinage. See **Coſenage.**

Couſtangium, or **Couſtamentum**; the ſame with *Cuſtantia*. It ſignifies coſts.

Couthutlaugh, (from the Sax. *couth, ſciens, & utlaugh, exlex,*) Is he that willingly receives a man outlawed, and cheriſhes or conceals him; in which caſe he was, in ancient time, ſubject to the ſame puniſhment that the outlaw himſelf was. *Bracton, lib.* 3. *tract.* 2. *c.* 13. *num.* 2.

Cowela, A cowel, or coule, or tub with two ears, to be carried between two perſons on a coul-ſtaff. A *cowl* in *Eſſex*, is the appellative for any tub; whence a *cowler*, now pronounced a *cooler*, or brewing veſſel.——*Pro novo* cowele *empto ix. den.* Paroch. Antiq. pag. 549.

Cows. One milch cow is to be kept to every ten beaſts, and ſixty ſheep by farmers, *&c.* on pain of 20*s.* Stat. 2 & 3. *P. & M. c.* 3.

Craggs, *(James* Eſquire,) His eſtate how forfeited and applied, 7 *Geo.* 1. *ſt.* 1. *c.* 28.

Craſera, A veſſel of lading or burden, a hoy or ſmack. ——Richardus *Rex*, *&c.* Thomæ de Percey *Admirallo noſtro——in parliamento ordinatum extitit——percipiendi de qualibet navi &* craiera, *cujuſcunq; fuerit portagii, quæ mare tranſierit, infra dictum Admiratum eundo & redeundo pro viagio, de quolibet tonnetight ſex denarios.* Pat. 2. Rich. 2. Stat. 14 *Car.* 2. *c.* 27. See **Crayer.**

Cranage, *(Cranagium,)* Is a liberty to uſe a *crane*, for the drawing up of wares from the veſſels at any creek of the ſea or wharf, unto the land, and to make profit of it. It ſignifies alſo the money taken, and pay'd for the ſame. Stat. 22 *Car.* 2. *cap.* 11.

Crannock, *Crennoc*, An old meaſure of corn.——*Quilibet debet flagellare dimidium* crannock *frumenti ad ſemen, & duos buſſellos frumenti contra Natale in firma ſua.* Cartular. Abbat. Glaſton. MS. f. 39. a.——Rex mandat G. de Mariſco *juſticiario* Hiberniæ, *ut liberet Regi* Manniæ *ſingulis annis duo dolia vini & ſexies viginti* crennoc *bladi, pro homagio ſuo.* Clauſ. 3 H. 3. m. 2.

Crappa, *Anglice* Crap: The ſeeds of a weed in corn, *Abjectio vero bladi &* crappa *hujuſmodi, quæ in anno remanſerit, recolligitur ac potius trituretur.* Fleta, lib. 2. cap. 82.

Craſpicis, *i. e. Piſcis craſſus*, a whale.

Craſtino Sancti Vincentii, The morrow after the feaſt of St. *Vincent* the Martyr, being the 22d of *January*, is the date of the ſtatute made at *Merton*, *Anno* 20 *Hen.* 3.

Crates, An iron-grate before a priſon, uſed in the time of the *Romans.* 1 *Vent.* 304.

Cravare, *i. e.* To impeach, *viz. Si homicida divadietur ibi vel* cravetur, *fit witam, &c.* Leg. H. 1. cap. 30.

Cravent or **Craven.** In a trial by battle upon a writ of right, the ancient law was, That the victory ſhould be proclaimed, and the vanquiſhed acknowledge his fault in the audience of the people, or pronounce the horrid word *cravent*, in the name of *recreantiſe, &c.* and preſently judgment was to be given, and after this, the *recreant* ſhould loſe *liberam legem*, that is, he ſhould become infamous, *&c.* 2 *part. Inſt.* 247, 248. If the appellant join battle, and cry *craven*, he ſhall loſe *liberam legem*; but if the appellee cry *craven*, he ſhall be hanged. 3 *Inſt. f.* 221. We ſtill retain this word *craven*, for a coward.

Crayer ſeems to be a kind of a ſmall ſea veſſel or ſhip, mentioned in the ſtatute 14 *Car.* 2. *cap.* 27. *Et tranſitus* craerarum *& batellorum cum victualibus & aliis neceſſariis, &c.* Pat. 6. R. 2. part. 2. m. 13.

Creamer, A foreign merchant, a pedlar, one who hath a ſtall in a fair or market.

Creanſor, *Creditor*, (from the French *Croyance) Perſuaſio*, ſignifieth him that truſteth another with any debt, be it money or wares. This word is uſed in the *Old Nat. Brev.* in the writ of *Audita Querela*, *f.* 66. and 38 *Ed.* 3. *cap.* 5.

Creaſt, or **Creſt,** (*Criſta,*) Any imagery, or carved work, to adorn the head, or top of any wainſcot, *&c.* like our modern *corniſh*: The word is now adopted by the *heralds*, and applied to the device ſet over a coat of arms.——*Et* Willielmo Hykkedon *conducto in groſſo ad menſam domini ad dolandum & perficiendum* le creſt, *ſuper cancellum prioratus ibidem.* Kennet's Paroch. Antiq. p. 575.

Creaſt-tile. See **Rock-tile.**

Creation-money, Is mentioned in *Stat.* 12 *Car.* 2. *cap.* 1.

Creche, A drinking cup: 'Tis mentioned in the *Monaſticon*, 1 *tom. pag.* 104. *Vas vero quod* creche *nuncupatur ſeptem pollices continet*, viz. *ad profunditatem a ſummitate unius uſque ad profundum lateris alterius.*

Creditors, Shall recover their debts of executors, or adminiſtrators, who in their own wrong waſte, or convert to their uſe the eſtate of the deceaſed, *&c.* *Stat.* 30. *Car.* 2. *c.* 7. Wills and deviſes of lands, *&c.* as to creditors on bonds, or other ſpecialties, are declared void; and the *creditors* may have actions of debt againſt the heir at law and deviſees; 3 & 4 *Will. & Ma. c.* 14. and in favour of *creditors*, when ever it appears to be the teſtator's intent, in a will, that his land ſhould be liable for paying his debts; in ſuch caſe equity will make them ſubject, though there are not expreſs words, but there muſt be more than a bare declaration, or it ſhall be intended out of the perſonal eſtate. 2 *Vern. Rep.* 708. Where one deviſes that all his debts, *&c.* ſhall be firſt paid; if his perſonal eſtate is not ſufficient to pay the *creditors*, it ſhall amount to a charge on his real eſtate for that purpoſe. *Preced. Chanc.* 430. See **Frauds,** and 7 *Vin. Abr.* 42—54.

Creek, (*Creca*, Sax. *Crecca,*) Is a part of a haven, where any thing is landed from the ſea. So that when you are out of the main ſea within the haven, look how many landing places you have, ſo many *creeks* may be ſaid to belong to that haven. See *Cromp. Juriſd. fol.* 110. *a.* This word is mentioned in the ſtat. 4 *H.* 4. *cap.* 20. (where it is ſaid,——*In great ports of the ſea, and not in* crykes *or ſmall arrivals*) 5 *Eliz. cap.* 5. and 14 *Car.* 2. *cap.* 28. and in *Plow. caſe of Renyger and Fogaſſa.*

Crementum comitatus. The improvement of the King's rents above the ancient vicontiel rents, for which improvements the *ſheriff* anſwered under the title of *crementum comitatus*, or *firma de cremento* comitatus. *Hale of Sheriff's Accounts, p.* 36.

Cremil, The ſame with **Crimſon.**

Crepare oculum, To put out an eye: *Si quis alii* crepat oculum *ſolvat ei ſexaginta ſol.* Leg. H. 1. c. 93.

Cretinus, *Cretena*, A ſudden ſtream or torrent——*Crux lapidea conſtructa fuit——cujus quidem crucis corpus per* cretinum *aquæ & tempeſtatem venti obrutum, & confractum exiſtit.* Hiſtor. Croyland. Contin. pag. 485.—*Omnes inundationes & communes aquarum* cretenas, *ſufficienter defendere poſſit.* Ibid. p. 617.

Cripplegate. See **Church.**

Cro, Croy, Signifies marſh-land: *Et quia paluſtris hujus* Croyland *ut ipſum nomen indicat, nam crudam terram & cœnoſam ſignificat.* Ingulphus, pag. 853.

Crocards, A ſort of money, very baſe. See **Pollards.**

Croca cowellet, *i. e. Olla ſimul bullit*, from the *Saxon* crocca, *i. e. olla*, and *fellen, bullire. Si plures aliqui faciunt homicidium quorum* crocca cowellet, *ſi velint ſimul componant.* Leg. Hen. 1. cap. 78.

Crociarius, The crociary, or croſs-bearer, who, like our verger went before the prelate, and bore his croſs.——Robertus de Wycombe, *clericus epiſcopi* Dunelm. *quem vulgo* crociarium *ejus vocant.*——*Liber de miraculis* Tho. Cantilup. *epiſc.* Heref. *MS. ſub anno* 1290.

Crocium. This perhaps is the only word that exerciſed, and eſcaped the ſagacity of the very acute Sir *Henry Spelman*; who in his *Gloſſary*, expreſſes the meaning of it to this effect: *I hear there is in* Ireland *a charter of King* Henry II. *wherein he grants very ample privileges to a certain biſhop,——exceptis foreſtallis, theſauro invento,* crociis, *&c. What is meant here by* crociis, *I have endeavoured to find, but can make no anſwer, if it be any thing elſe than the* cro *in the Scotiſh law, that is, the* weregild, *or compoſition for manſlaughter. For though that prince had taken away the cuſtom of* weregild *from his ſubjects, yet he left them entire among the* Iriſh.——This miſtaken ſenſe of a word is yet rare in *Spelman*; but it is not ſo much a wonder, that *Du Freſne* ſhould not find the meaning of it, which yet ſeems very obvious. For *crocia* was no more than the croſier, or paſtoral ſtaff, which biſhops and abbots had the privilege to carry, as the common enſign of their religious office; as being inveſted in their prelacies, by the delivery of ſuch a *croſier*. Hence the word *crocium* and *crocia*, did ſometimes denote the collation or diſpoſal of archbiſhopricks and abbies, by the donation of ſuch paſtoral ſtaff. So as when the King granted large juriſdiction, *&c. exceptis crociis*, it is meant, except the collation or inveſtiture of epiſcopal ſees and abbies. *Cowell, edit.* 1727.

Crocus, curled hair: *Pryn. Ch. Lib. Angl. tom.* 2. *pag.* 479. *Sciatis quod poteſtatem vobis dedimus, capillos clericorum noſtrorum, longos crines habentium, & ad* crocos *capillorum ſuorum deponendos, &c.*

Croft, (Sax.) *Croftus & Crofta*, A little cloſe incloſed near a dwelling-houſe, for any particular uſe. *Poſſunt etiam*

etiam dicti monachi de eiſdem mariſcis verſus occidentem jacentibus, pro ſe & hominibus ſuis, includere croftos, *ſive pratam juxta pontem ſeparaliter quantum illis placuerit.* Ingulf. In ſome ancient deeds *cruſta* occurs, as the *Latin* word for a *croft*; but *cum toftis & croftis* is moſt frequent. *Croft* is tranſlated by *Abbo Floriacenſis*, by *prædium*, a farm. It ſeems to come from the old *Engliſh* word *creafe*, which ſignified *handicraft*, becauſe ſuch grounds are for the moſt part manured, and extraordinarily dreſſed by the labour and ſkill of the owner. *Cowell, edit.* 1727.

Croiſes, (*Cruce ſignati*) Is uſed by *Briton, cap.* 122. for *pilgrims*, becauſe they wear the ſign of the *croſs* upon their garments. Of theſe and their privileges, read *Bracton, lib.* 5. *part.* 2. *ca.* 2. and *part.* 5. *c.* 29. and the *Grand Cuſtumary of Normandy, c.* 45. Under this word are alſo ſignified the knights of St. *John* of *Jeruſalem*, created for the defence of pilgrims; and all thoſe worthy men of the nobility and gentry of *England*, who, in the reigns of King *Henry* the Second, *Richard* the Firſt, *Henry* the Third, and *Edward* the Firſt, were *cruce ſignati*, as dedicating and liſting themſelves to the wars, for the recovery of *Jeruſalem* and the *Holy Land. Greg. Syntag. lib.* 15. *cap.* 13 & 14.

Crok, *Crocus, Capellorum croci*, Turning up the hair into curls or *croks*; whence *crook, crooked, &c.*——*Rex* Willielmo de Peretot, *ſalutem, Sciatis quod conceſſimus, & plenam poteſtatem vobis dedimus ſcindendi capillos clericorum qui ſunt de hoſpitio noſtro, & familia noſtra longos crines habentium, & comas intorquentium, & ad* crocos *capillorum ſuorum deponendos; & ideo vobis mandamus quatenus ad hoc modo debito diligenter intendatis, hujuſmodi poteſtatem noſtram vobis conceſſam taliter exequentes circa prædictos capillos ſcindendos, &* crocos *deponendos, ne ad capillos veſtros ſcindendos forcipes apponere debemus: Teſte me ipſo apud Clare.* 11 *die Sept.* Pat. 21 H. 3.

Croppa, Sax. *Croppas*, A *crop* of corn, or the product in harveſt.——Johannes, *prior & conventus concedunt* Radulpho de Hok, *terram de* Yorkherſt——croppam *autem de ipſa terra provenientem ſæpe dictus* Radulphus, *tempore meſſionis in eadem terra debet reponere & cuſtodire.* Regiſtr. Cant. Eccleſiæ MS. So alſo *croppus* occurs in the ſame ſenſe. See *Kennet's Paroch. Antiq. p.* 298. Sax. *crop*, the top or head of any thing: Whence to *crop* or cut off the upper part; *crop-eared*, a *crop* of beef. In *Suſſex*, they call darnel crop; and in *Worceſterſhire*, buck-wheat goes by the like name of *crop*. The old Lat. *cropa*, was the buttock of a horſe, whence *crupper. Cowell. edit.* 1727.

Croſier, The paſtoral ſtaff of a biſhop, ſo called *a ſimilitudine crucis.*

Croſſes. It was uſual in former times for men to erect *croſſes* on their houſes, by which they would claim the privileges of the templars or hoſpitallers, to defend themſelves againſt their rightful lords; this was condemned by the ſtatute *W.* 2. *cap.* 13. It was uſual alſo in thoſe days to ſet up *croſſes* in places where the corps of any of the nobility reſted, as it was carried to be buried, that *a tranſeuntibus pro ejus anima deprecetur.* Walſingham, Anno 1291. By ſtat. 13 *Eliz. c.* 2. Croſſes, beads, *&c.* uſed by the *Roman* catholicks are prohibited to be brought into this kingdom on pain of *præmunire, &c.*

Crown and Crown Lands. Tenants of crown lands how relieved in caſes of forfeiture for non-payment of rent, 21 *Jac.* 1. *c.* 25. South Sea Company purchaſing crown lands, what to forfeit, 6 *Geo.* 1. *c.* 4. *ſect.* 66. *For other matters, ſee* King *and* Patents.

Croy. See Cro.

Crown-Office. This is an office under the King's Bench, of which the King's coroner or attorney there is commonly maſter. The attorney general and clerk of the crown exhibit informations in this office, for crimes and miſdemeanors; the one *ex officio*, and the other uſually by order of court; and here information may be laid for offences and miſdemeanors at Common law, as for *batteries, conſpiracies, libelling, nuſances, contempt, ſeditious words, &c.* wherein the offender is liable to pay a fine to the King. *Finch* 340. *Show.* 109. By ſtat. 4 & 5 *W. & M. c.* 18. the clerk of the crown in *B. R.* is not to receive or file any information for *treſpaſs, battery, &c.* without expreſs order of court; nor to iſſue any proceſs without taking a recognizance in 20*l.* penalty to proſecute with effect; and if the party appear, and the plaintiff do not procure a trial in a year, or if the verdict paſs for the defendant, *&c.* the court ſhall award the defendant coſts: But this act doth not extend to informations in the name of the King's coroner or attorney, *&c.* when a *battery* is committed privately, ſo that the perſon receiving it can make no proof thereof by witneſſes at law; it is uſual to bring an information in this office, where the party may be a witneſs for the King, it being his ſuit. Informations in the nature of *Quo warranto's* brought by the attorney general, againſt corporations, *&c.* See Quo warranto and Informations.

Cropſes. See Croiſes.

Cruſtum was a garment of purple mixed with many colours: *Duas patenas argenteas auro ornatas*, cum duobus urceolis & cruſto aureo. Mon. 1 tom. p. 210.

Crypta, A chapel or oratory under ground: *Egreſſo toto conventu, accepta abſconſa ſi nox eſt, vadit per* cryptam. *Du Freſne.*

Cucherus, *Canis prodriarius*, A coucher, ſetter, a ſetting dog.——W. *primus* Ebor.——*dilecto priori de* Birſtall, *ſalutem, &c. Rogamus dilectionem veſtram quatenus ſi placeat, cum celeritate qua poteritis, nobis provideatis in partibus veſtris tranſmarinis de duobus* canibus prodriariis, *ſeu* cucheris, *& vobis de pretio fideliter & plene reſpondebimus & de cuſtu, hoc ſicut nos diligitis nullatenus omittatis; ita quod dictos canes habeamus circa feſtum beati* Michaelis *omnimodo. Dat.* Beverlaci, 10 *Kal. Sept.* 1280. Ex Regiſtr. Will. Wickwane, Archiep. Ebor.

Cucking ſtool, or **Coke ſtool**, (*Tumbrellum*) Is an engine invented for the puniſhment of ſcolds and unquiet women by ducking them in the water, called in ancient time a *tumbrel*, and ſometimes a *trebuchet. Lamb. Eiren. lib.* 1. *ca.* 12. *Bracton* writes this word *tymborella. Kitchin (cap. Charge in Court Leet, f.* 13. *a.)* ſays, Every one having view of frank-pledge, ought to have a *pillory*, and a *tumbrel.* This was in uſe even in our *Saxons* time, by whom it was called *ſcealfingſtole*, and deſcribed to be *cathedra, in qua rixoſæ mulieres ſedentes aquis demergebantur:* It was a puniſhment anciently inflicted upon brewers and bakers tranſgreſſing the laws, who were thereupon, in ſuch a ſtool or chair, to be ducked and immerged *in ſtercore*, ſome muddy or ſtinking pond. This was alſo anciently written, *goging ſtole.* See Pandoxatrix. And in *Domeſday*, it is called *cathedra ſtercoris.* Some think it a corruption from *ducking ſtool*; others from *choaking ſtool*; *quia hoc modo demerſæ aquis fere ſuffocantur.* Cowell, edit. 1727.

Cude, A *cude* cloth is a chryſom or face-cloth for a child baptized. See Chriſmale.

Cudzeach, A pledge or ſurety.

Cui ante divortium, Is a writ, that a woman divorced from her huſband, hath to recover lands or tenements from him, to whom her huſband did alienate during the marriage, becauſe ſhe could not gainſay it. *Reg. Orig. fol.* 223. *F. N. B. f.* 240.

Cui in vita, Is a writ of entry that a widow hath againſt him, to whom her huſband aliened her lands or tenements in his life-time, which muſt contain in it, that during his life-time ſhe could not gainſay it. *Reg. Orig. fol.* 232. *F. N. B. fol.* 193. See ſtat. 13 *Ed.* 1. *c.* 3. and 7 *Vin. Abr.* 142—147.

Cuinage. See Cuynage.

Culagium, Is when a ſhip is laid up in the dock to be repaired. *MS. Ar. Trevor. Arm. de Plac. Ed.* 3.

Culm. See Coals.

Culpatura, A ſmiting or cutting, from the Fr. *couper*, to cut: *Qui autem forisfaciat in foreſta Regis de viridi, ſive per* culpaturam, *ſive per esbrancaturam, ſive per foditionem turbarum, ſive per excoriationem moræ, ſive per* culpationem *ſub nemore, ſive per eſſartum, &c.* Hoveden. p. 784.

Culprit, Is compounded of two words, *i. e. cul* and *prit*, viz. *cul*, which is the abbreviation of *culpabilis*, and is a reply of a proper officer in the behalf of the King, affirm-

affirming the party to be guilty after he hath pleaded Not guilty, without which the iſſue is not joined; The other word *prit* is derived from the *French* word *preſt*, *i. e.* ready; and 'tis as much as to ſay, that he is ready to prove the party guilty: And this we find to be often the form of pleading in civil cauſes; as in treſpaſs, the defendant pleaded Not guilty, the plaintiff replied by his counſel *cretenus preſt au que cy*, *viz.* he was ready to prove him guilty.

Culreach, The ſame with **Cudzeach.**

Cultura, A parcel of arable land: Dr. *Thoroton*, in his *Nottinghamſhire*, engliſhes it, a *wong*; it often occurs in old writings, as *totam illam* culturam *quæ vocatur* Watercroft.

Culvertage, (*Culvertagium*,) May be interpreted *cowardice*, as *Omnes cum equis & armis, juſſit ſub nomine* culvertagii *convenire.* Mat. Pariſ. fol. 233. Culvertagium *dictum puto a columbina timiditate, nam* culver *idem eſt quod* columba. *Spelm. in voce* Niderling. Others fancy it *a culum vertendo*, *i. e.* running away. Theſe are the opinions of ſome men, but without any foundation; it rather ſignifies ſome baſe ſlavery, or the confiſcation of eſtate, viz. *Rex Johannes brevi ſuo ad vicecomites juſſit, ut nullus remaneat qui arma portare poſſit ſub nomine* culvertagii *& perpetuæ ſervitutis:* And in another place, *Nihil magis quam opprobrium* culvertagii *metuentes.* Mat. Pariſ. anno 1212. It ſeems therefore to be the ſame with *couvrir le feu*, for when a lord ſeizes his vaſſal's eſtate as forfeited, he is ſaid *couvrir le feu*, to cover or put out his fire. *Du Freſne.* Therefore the true ſenſe of the word is not *cowardice*, but confiſcation, or forfeiture of lands and goods: It was a *Norman* feudal term for lands of the vaſſal eſcheated to the lord: And *ſub nomine culvertagii* was under pain of confiſcation. *Cowell, edit.* 1727.

Culward and **Culverd,** *Salva ſummonitione de* culward. *Charta Willielmi de Tabley, temp. Ed.* 1. ſeems to be the ſame with *culvertage*, or cowardice.

Cumberland, The aſſizes where to be held, 14 *Hen.* 6. *c.* 3. The penalty for relieving outlaws for felony, 43 *El. c.* 13. *ſect.* 5. The making of cogware, *&c.* how encouraged, 7 *Ja.* 1. *c.* 16.

Cuna. Domeſday, *tit.* Ceſtria. *Quando Rex ita veniebat, reddebat ei unaquæque carrucata cc. heſtas, & unam* cunam *plenam cerviſiæ.* So *Cuſtumar. de Hecham, p.* 21. *Omnis Lanceta & Toftman invęniet* cunam, *ſi habeat, ad cerviſiam domini faciendam*——Thus *Spelman* reads the word; but it truly is *cuva*, Gall. *cuve*, Angl. *keeve*, *keever*, a tub or fat for brewing. *Cowell, edit.* 1727.

Cuna cerviſiae, A tub of ale. *Domeſday.* See **Ruſta.** And to this day, in *Cheſhire*, a brewing veſſel is called a *cump.* *Cowell, edit.* 1727.

Cunage, (*Cunagium*)——*De* cunagio *ſtanneriæ & de emptione totius ſtanni in com. Devon. & Cornub.* Rot. Pat. 21 Ed. 3. See **Coinage.**

Cuneum monetae. *Otho tenet manerium de Lilleſton in com. Midd. per ſerjantiam cuſtodiendi* cuneum monetæ *domini Regis*, i. e. *Sigillum ferreum quo nummus cuditur*; the King's ſtamp for coinage. Hence comes our word *coin*, *quaſi cune. Sciatis quod conceſſimus venerabili patri noſto* Ciceſtr. *epiſcopo, quod habeat* cuneum *ſuum in civitate* Ciceſtriæ, *&c. T.* 29 *Apr.* Clauſ. 6. Joh. m. 3.

Cuneus, A mint, or place to coin money, *Mandatum eſt, &c. Sciatis quod conceſſimus venerabili patri noſtro* Ciceſtr. *epiſcopo quod habeat* cuneum *ſuum in civitate* Ciceſtriæ, *&c. T.* 29 *Apr. Clauſ.* 6. *Joh. m.* 3.

Cuntey Cuntey, Is a kind of trial, as appeareth by *Bracton*, in theſe words, *Negotium in hoc caſu terminabitur per* cuntey cuntey *ſicut inter cohæredes.* Bract. lib. 4. tract. 3. cap. 18. And again in the ſame place, *In brevi de recto negotium terminabitur per* cuntey cuntey. And thirdly, lib. 4. tract. 4. cap. 2. *Terminabitur negotium per breve de recto, ubi nec duellum nec magna aſſiſa, ſed per* cuntey cuntey *omnino*; which ſeems to be as much as by the ordinary jury. *Cowell, edit.* 1727.

Curagulus, One who taketh care of a thing: *Ego Edmundus Rex Anglorum &* curagulus *multarum gentium.* Monaſticon, 2 tom. in a Charter of King *Edmond.*

Cura monaſterii, An officer ſo called, who had the charge of the monaſtery: *Cura cum ipſis remanente qui cum ipſis manducet.* Du Freſne.

Curate, (*Curatus*,) Is he who repreſents the incumbent of a church, parſon or vicar, and officiates divine ſervice in his ſtead: And in caſe of pluralities of livings, or where a clergyman is old and infirm, it is requiſite there ſhould be a *curate* to perform the cure of the church. He is to be licenſed and admitted by the biſhop of the dioceſe, or by an ordinary, having epiſcopal juriſdiction: and when a curate hath the approbation of the biſhop, he uſually appoints the ſalary too; and in ſuch caſe, if he be not paid, the curate hath a proper remedy in the eccleſiaſtical court, by a ſequeſtration of the profits of the benefice; but if he hath no licence from the biſhop, he is put to his remedy at Common law, where he muſt prove the agreement, *&c. Right Clerg.* 127. By ſtatute, where curates are licenſed by the biſhop, they are to be appointed by him a ſtipend not exceeding 50*l. per ann.* nor leſs than 20*l.* a year, according to the value of the livings, to be paid by the rector or vicar: and the ſame may be done on any complaint made. Sat. 12 *Ann. ſt.* 2. *c.* 12. One perſon cannot be curate in two churches, unleſs ſuch may ſatisfy the law, by reading both morning and evening prayers at each place: Nor can he ſerve one cure on one Sunday and another cure on the next; for he muſt not neglect to read morning and evening prayer in his church every Lord's day; if he doth he is liable to puniſhment. *Comp. Incumb.* 572. But it is otherwiſe where a church or chapel is a member of the pariſh church; and where one church is not liable to maintain a curate. *Can.* 48. A curate having no fixed eſtate in his curacy, not being inſtituted and inducted, may be removed at pleaſure by the biſhop or incumbent. *Noy.* But there are *perpetual curates*, as well as temporary, who are appointed where tithes are appropriated, and no vicarage enowed: Theſe are not removeable; and the impropriators are obliged to find them, and ſome of them have certain portions of the tithes ſettled on them. Stat. 29. *Car.* 2. *c.* 8. See **Vicar.**

Curfew, (from the *French* words, *couvrir*, that is *tegere*, and *feu*, *ignis*, fire,) Signifies the ringing of a bell, by which *William the Conqueror* commanded every perſon to rake up, or cover over his fire, and put out his light. And in many places of *England* at this day, where a bell cuſtomarily is rung towards bed-time, it is ſaid to ring *curfew. Stow's Annals, in vita Gul. Conqueſtor'.*

Curia. It was uſual for the Kings of *England* to aſſemble the biſhops, peers, and great men of the Kingdom to ſome particular place, at the chief feſtivals in the year, and this aſſembly is called by our hiſtorians, *curia*; becauſe there they conſulted about the weighty affairs of the nation, and therefore it was ſometimes called *Solennis curia, Generalis curia, Auguſtalis curia*, and *Curia publica, &c.* This word was ſometimes taken for the perſons, or feudatory and other cuſtomary tenants, who did their ſuit and ſervice at the court of the lord: So in a charter of *Bernard de St. Walery, anno* 30 *H.* 3. we find, *Hiis teſtibus, &c. & omni curia mea.* Kennet's Paroch. Antiq. f. 139.

Curia adviſare vult, Is a deliberation which the court ſometimes takes, before they give judgment in a cauſe. *New Book Entr.* And when judgment is ſtayed, upon motion to arreſt it; then it is entred by the judges *Curia adviſare vult.* Shep. Epit. 682.

Curia baronum. See **Court baron.**

Curia canonicorum, The court-lodge, or manor-houſe in a lordſhip belonging to the Religious. *Juxta rivulum extra curiam canonicorum.* Paroch. Antiq. p. 177.

Curia claudenda, Is a writ that lieth againſt him who ſhould fence and cloſe up his ground, if he refuſe or defer to do it. *Reg. Orig. fol.* 155. *F. N. B. fol.* 127. This writ doth not lie but againſt him who hath a cloſe adjoining to the plaintiff's land, who is obliged to incloſe it; and it lieth not but for him who hath a freehold, *&c.* It may be ſued before the ſheriff in the county court, or in the Common Pleas: And the judgment is to recover the incloſure and damages. *New Nat. Brev.* 297.

Curia

Curia domini, The lords houſe, hall, or court, where all the tenants, if need require, were bound to attend every three weeks, but generally at the feaſt of the *Annunciation* and St. *Michael*; from whence the courts kept at thoſe times, were called *Curiæ generales*, the general, or more ſolemn courts. *Cowell, edit.* 1727.

Curiae adventus, The day of coming to pay ſuit and ſervice at the court of the lord: *Reddit per annum ad terminum ipſius unam marcam & unum* adventum curiæ, *i. e.* for the rent of a mark, and the ſervice of coming to the lord's court yearly. *Paroch. Antiq. pag.* 400.

Curialitas Angliae. See **Curteſy of England.**

Curia militum, A court ſo called, anciently held at *Cariſbroke caſtle* in the iſle of Wight.——*Et idem dominus Willielmus de inſula debet facere ſectam ad curiam domini caſtri de Cariſbroc, de tribus ſeptimanis in tres ſeptimanas in curia, quæ vocatur* curia militum *Inq. de anno* 47 *Hen.* 3. *n.* 32.

Curia penticiarium, Id eſt, *Curia in civitate* Ceſtriæ *coram vicecomite ibidem in* aula penticia *ejuſdem civitatis.* Pl. in Itin. apud Ceſtriam, 14 *H.* 7. It is probable this court was originally kept under a *pentice* or ſhed covered with boards, and thence took its denomination. *Cowell, edit.* 1727.

Curia perſonae, The parſonage-houſe, or manſe.——*Omnes obventiones altaris & cœmeterii prædictæ eccleſiæ, & totam terram, &* curiam perſonæ——*croftam quæ jacet juxta* curiam perſonæ. *Kennet's Paroch. Antiq. p.* 205.

Curnock, Is four buſhels, or half a quarter of corn. *Fleta, lib.* 2. *cap.* 12.

Curriculus, The year, or courſe of a year: *Actum eſt hoc annorum dominicæ incarnationis quatuor quinquagenis & quinquies, quinis luſtris & tribus* curriculis, *i. e.* the year 1028 for 4 times 50 make 200, and 5 times 200 make 1000, 5 *luſtra* are 25 years, and 3 *curriculi* are 3 years.

Curriers, Are perſons that curry and dreſs leather. No *currier* ſhall uſe the trade of a butcher, tanner, *&c.* or ſhall curry ſkins inſufficiently tanned, or gaſh any hides of leather, on pain of forfeiting for every hide or ſkin 6*s.* 8*d.* And perſons in *London* putting leather to be curried to any but freemen of the *curriers* company; and ſuch *curriers* not currying the leather ſufficiently, ſhall forfeit the wares, or the value, *&c.* Stat. 1 *Jac.* 1. The clauſe relating to freemen is repealed; but if any *currier* do not curry leather ſent him, within ſixteen days between *Michaelmas* and *Lady-Day*, and in eight days at other times, on conviction before a juſtice he ſhall forfeit 5*l.* to be levied by diſtreſs, *&c.* yet ſubject to mitigation. 12 *Car. cap.* 25. *Curriers* and ſuch as deal in leather may cut and ſell it in ſmall pieces in their ſhops to any perſons whatſoever. *Stat. ibid.* See **Leather, Skins,** and **Tanners.**

Curſer, Curſor, A courier, or expreſs meſſenger of haſte.——H. *Rex.* Angl. *&c.* L. *principi* Aberfrawe *domino de* Snoudon, *ſalutem, &c. Sit notum, quia propter inundationes aquarum & viarum diſcrimina nuncii noſtri ad nos accedere non poſſunt, per* curſer *quendam literas præſentes duximus deſtinandas.* Cart. H. 3.

Curſing. See **Swearing.**

Curſitor, *(Clericus de curſu)* Is an officer or clerk belonging to the *Chancery*, that maketh out original writs, 14 *H.* 8. *cap.* 8. They are called *clerks of courſe*, in the oath of the clerks of the *Chancery* appointed 18 *Ed.* 3. *ſtat.* 5. *cap. Unico.* There are of theſe clerks twenty-four in number; and to each allotted ſeveral counties, into which they make out original writs, and they are a corporation of themſelves. 2 *Inſt.* 670. See **Chancery.**

Curſones terrae.——*Sciant quod ego* Willielmus Cromp, *dedi*—Henrico de Sweton *unam dimidiam coram, & duos* curſones *terræ meæ in* Lyſton, *&c. Dat.* 14 *Ed.* 2. ſeems to ſignify ridges of land. *Cowell, edit.* 1727.

Curteſy of England, *(Jus curialitatis Angliæ,)* Is where a man takes a wife ſeiſed of land in fee-ſimple, fee-tail general, or as heir in tail ſpecial, and hath iſſue by her, male or female born alive; if the wife die, the huſband ſhall hold the land during his life, by the law of *England*, and he is called *Tenant by the* curteſy of *England*; becauſe this privilege is not allowed in any other realm, except *Scotland*, where it is called *Curialitas Scotiæ. Cowell.*

We do not find any ſuch privilege before the conqueſt, here in *England*; but it was a cuſtom before that time uſed in *Normandy*, and probably derived from them; it was called in their language. *Veuvete, de quo ſic jura & conſuetud.* Norman. cap. 121. viz. *Conſuetudo eſt in* Normannia *ex antiquitate approbata quod ſi quis uxorem habuerit, ex que hæredem aliquem procreaverit, quem natum vivum fuiſſe conſtiterit, ſive deceſſerit, totum foedum quod martius poſſidebat ex parte uxoris ſuæ tempore quo deceſſerit, ipſi martio quamdiu ab aliis ceſſerit nuptiis remanebit. Cowell, edit.* 1727.

Tenant by the curteſy, is he, who after his wife's death (having had iſſue by her inheritable) is introduced into her inheritance, and has an eſtate for life therein; and he is ſo called from the favour or curteſy of that law which made this proviſion for him, to which he had no natural right, nor to which any other nations, except thoſe of *Great Britain* and *Ireland*, admitted him. *Dr. and Stud. lib* 1. *c.* 7. *Co. lit.* 30. *a.* It began in *England* and *Ireland* in the time of *Hen.* 1. *Seld. Jan.* 65. and in *Scotland* in the time of *Malcom. Mecan* 56. in both by a poſitive law or inſtitution.

The words of this law, as they are found *Pat.* 11 *H.* 3. *m.* 30. exemplified are, *Si aliquis deſponſaverit aliquam hæreditatem habentem, & ex ea prolem habuerit cujus clamor auditus fuerit infra quatuor parietes, & vir ſupervixerit uxorem, habebit totâ vitâ ſuâ cuſtodiam hæreditatis, licet hæredem habuerit ex primo viro qui plenæ ætatis eſt: Præceptum eſt quod eadem lex obſervetur in Hibernia.*

The words of this law are general, and ſeem to extend to all ſorts of perſons without diſtinction; therefore ideots and lunaticks, may be tenants by the curteſy; but the King ſhall have this eſtate during the ideocy or lunacy, and provide for them and their families, as he ſhould do out of their own eſtates. 4 *Co.* 123. *Beverley's* caſe.

Perſons convict only of felony or treaſon, may be tenants by the curteſy; for they forfeit only their goods and chattles abſolutely, for of their lands the King gains but a pernancy of the profits. 5 *Co.* 110. *Co. Lit.* 92. *b.* 391. *a. Stanf.* 192.

Perſons outlawed in any civil action may be tenant by the curteſy. *Bro.* tit. *Outlawry* 26, 36, 59. *Co. Lit.* 128. For ſuch proceſs of outlawry might be eaſily ſuperſeded, and hereby the King's pernancy of the profits diſcharged.

But perſons attainted of felony or treaſon, ſhall not be tenants by the curteſy; for they being thereby *extra legem poſiti*, and their perſons forfeited to the King, they are from thenceforth become incapable of our laws in general, and by conſequence, of this in particular, which intended to give the inheritance only to thoſe who were capable of holding of it *tota vita ſua. Br.* tit. *Curt.* 15 *Staun.* 126. *Godb.* 323. All perſons attainted in a *præmunire* are excluded the benefit of this law, and alſo *aliens*, be they friends or enemies; and in theſe caſes their title ſhall never ariſe, even for the benefit of the King, but the wife's eſtate ſhall be diſcharged of it for ever. *Co. Lit.* 391. *a.* 3 *Inſt.* 43. But if an alien be made denizen, or the perſon attainted pardoned, and have iſſue after, they may be tenants by the curteſy, in reſpect to that iſſue had after, but not in reſpect of any iſſue had before. 7 *Co.* 25.

Littleton acquaints us, That it muſt be an eſtate either in fee-ſimple or fee-tail general, or where the wife has it as heir of the ſpecial tail; and lord *Coke* ſays, For the huſband to be tenant by the curteſy, is one of the incidents to an eſtate-tail, which to reſtrain by condition, were repugnant, *&c.* and therefore if a woman, tenant in tail general, marries and hath iſſue, which iſſue dieth, and then the wife dies, ſo that the eſtate is thereby determined, yet the huſband ſhall be tenant by the curteſy; the ſame law if the limitation had been to the woman and the heirs of her body, upon condition, that if ſhe die without iſſue, then to remain in another; for this is not a condition but a limitation, and no more than what the law ſaith. *Lit. Sect.* 35. *Dyer* 148. 8 *Co.* 36.

6 *Co.* 41. *Co. Lit.* 227. 8 *Co.* 34. 1 *Leon.* 167. *Co. Lit.* 30. *a.*

So if one ſeiſed of a rent in fee, makes a gift in tail general, or if a rent *de novo* be granted in tail general to a woman, who marries, and hath iſſue, the iſſue dieth and then the wife dieth without other iſſue, yet the huſband ſhall be tenant by the curteſy, of the rent, though the eſtate-tail therein be determined and ſpent; for this being an incident to ſuch an eſtate at the time of its creation, whenever the huſband has iſſue, his title is initiate, and ſhall not be loſt after by failure of iſſue, which being the act of God, ought not to turn to his prejudice; and this is within the words of our law *hæreditatem habentem*, without fixing its continuance. *Co. Lit.* 30. *a.*

As to the deſcendible quality of ſuch eſtate, the rule to be obſerved is, that the iſſue of ſuch huſband may by poſſibility inherit. This rule ſeems to have been formed after the ſtatute *De donis*, and by virtue thereof, for our ſtatute requires no ſuch property in the inheritance, neither did the Common law; but for this ſee 2 *Inſt.* 336. 8 *Co.* 35, 36. *Co. Lit.* 29. *b.* *Perk.* 469.

Therefore if lands are given to a woman, and the heirs male of her body, and ſhe has iſſue a daughter, and dies, the huſband ſhall not be tenant by the curteſy; the ſame law if it had been given to her, and the heirs females of her body, and ſhe had iſſue a ſon. 8 *Co.* 35. *Co. Lit.* 29. *b.*

But if a woman ſeiſed in fee marries, and hath iſſue, and then the huſband dies, and ſhe takes another huſband, and hath iſſue by him, and dies; though the firſt be living, yet the ſecond huſband ſhall have it by the curteſy, becauſe his iſſue, by poſſibility may inherit; as if the firſt iſſue die without iſſue, whereby it comes to the uncle, &c. *Bro.* tit. *Curteſy* 8. *Perk.* 466. 8 *Co.* 34. *Lit. ſect.* 52.

That the wife muſt be *ſeiſed* of the eſtate, is required by the very words of the law, which ſays, *aliquam hæreditatem habentem*; ſo that there muſt be a poſſeſſion of ſuch inheritance by the very words of the law; and therefore if a man die ſeiſed of lands in fee ſimple, or fee tail general, and thoſe lands deſcend to his daughter, and ſhe marries, and hath iſſue, and dies, before any entry made by her or her huſband, or any other for them, the huſband ſhall not be tenant by the curteſy; but here we muſt underſtand ſeiſin in a twofold ſenſe, *viz.* ſeiſin in fact, and ſeiſin in law; and where a ſeiſin in fact may be had, as in the above caſe, there a ſeiſin in law will not do; nay, though the huſband doth all he can to get poſſeſſion in his wife's life-time, and as ſoon as he heareth of her father's death, goeth towards the land to take poſſeſſion, and before he can come there the wife dies, yet he ſhall not be tenant by the curteſy, and therefore one book ſays [*Perk.* 470.] he ſhall have ſpoken to ſome neighbour, being near the lands, to have entred for his wife, as in her right, immediately after the father's death; and the reaſon of this is from the words of the law, which require that the wife ſhould have actual poſſeſſion of the inheritance; and of things lying in livery the wife hath not actual poſſeſſion till the entry of the huſband. *Dr. and Stud. lib.* 2. *c.* 15. *Perk.* 464. *Co. Lit.* 29. *a.* 90. 8 *Co.* 34, 36. *F. N. B.* 143. *Kelw.* 2. *a. Br.* tit. *Curt.* 7.

But now of ſuch inheritances whereof there cannot poſſibly be a ſeiſin in fact, a ſeiſin in law is ſufficient; and therefore if a man ſeiſed of an advowſon, or rent in fee, hath iſſue a daughter, who is married, and hath iſſue, and he dieth ſeiſed, and the wife die likewiſe before the rent becomes due, or the church becomes void, this ſeiſin in law in the wife ſhall be ſufficient to intitle her huſband to be tenant by the curteſy, becauſe, ſay the books, he could not poſſibly attain any other ſeiſin, as indeed he could not, and then it would be unreaſonable he ſhould ſuffer for what no induſtry of him could prevent; but the true reaſon is, that the wife hath theſe inheritances which lie in grant, and not in livery, when the right firſt deſcends upon her; for ſhe hath a thing in grant when ſhe hath a right to it, and nobody elſe interpoſes to prevent it. *Co. Lit.* 29. *Perk.* 468, 469. 7 *Ed.* 3. 66. *Kelw.* 104. 1 *Co.* 97. 6 *Co.* 68. *F. N. B.* 149. 2 *Sid.* 110.

The eſtate and ſeiſin of the wife ought to begin ſome time during the coverture; ſo the words of the law import, *Si aliquis deſponſaverit aliquam hæreditatem habentem*, &c. and therefore if a woman be diſſeiſed, and marries, and dies, leaving iſſue before any re-entry made, the huſband ſhall not be tenant by the curteſy; for here ſhe had no inheritance, but only a right to an inheritance, which is out of the words of this law; but if the huſband or wife had entred during the coverture, there, after the wife's death, he ſhould have it by the curteſy, becauſe he had *hæreditatem* during the coverture. *Co. Lit.* 29. *a* 30. *a. Perk.* 458.

As to the iſſue, if a woman be delivered of a monſter, which hath not the ſhape of mankind, this is no iſſue in law; but however deformed it may be, or if it be born deaf and dumb, or an ideot; yet this is ſuch iſſue as will intitle the huſband to be tenant by the curteſy. 8 *Co.* 35. *Co. Lit.* 29. *b. S. P.*

The iſſue muſt be born during the life of the wife; therefore if the wife die in childbed, and the iſſue is ript out of her womb, the huſband ſhall not be tenant by the curteſy, becauſe he had no iſſue during the marriage, and therefore he cannot be ſaid *ex ea prolem habere*, and in pleading he muſt alledge that he had iſſue during the marriage. 8 *Co.* 35. *Co. Lit.* 29. *b.*

The ſtatute ſays, *Cujus clamor auditus fuerit*; But this is put but for an inſtance; for if it be born alive, though dumb, and could not cry, it is within the meaning of this ſtatute; and there are other ſigns of life beſides crying, as motion, &c. but ſome books ſeem to incline that it ought to be baptized, and if it be not, thro' the huſband's neglect, he ſhall not be tenant by the curteſy; but the ſtatute requires no ſuch thing, and therefore it ſeems no eſſential part of his title. 8 *Co.* 34. *Co. Lit.* 29. *b.* *Dyer* 25. *pl.* 159. *Bendl.* 21. *Perk.* 471. See 7 *Vin. Abr.* 148—163. 1 *Bac. Abr.* 660.—668.

Curteyne, *Curtana*, Was the name of King *Edward the Confeſſor's* ſword, which is the firſt ſword carried before the Kings of *England* at their coronation. *Mat. Paris in vita Henrici Tertii.* And it is ſaid the point of it is broken, which may ſeem to be an emblem of mercy.

Curtilage, (*Curtilagium*) From the French *cour*, court, and Saxon *leagh*, *locus*: A yard, backſide or piece of ground lying near a dwelling houſe, whereby they ſow hemp, beans, and ſuch like. *Perſolvunt* (decimam) *lactis*, *hortorum*, curtilagiorum, *Lanæ*, &c. Provinciale Angl. lib. 3. tit. de Decimis.——*Et ſi in* curtilagio *alicujus bladum ſeminaretur*, *decimam garbam illius bladi*, *ſicut in campis*, *percipiet.* Inq. 36 Hen. 3. *Mihi dici videtur* curtilagium (ſays *Spelman*) *a* curtillum & *ago*, *ſcil. locus ubi curtis vel curtilli negotium agitur.* It is mentioned in ſtat. 4 *Ed.* 1. *cap. unico.* *Anno* 35 *Hen.* 8. *cap.* 4. and 39 *Eliz. c.* 2. See *Coke*, *vol.* 6. *fol.* 64. *a.* and *Bulſtrode's Reports*, 2 *part*, *fol.* 113. *Cum quodam gardino* & curtilagio, 15 *Edw.* 1. *nu.* 34. by which it ſeems to differ from a garden.

Curtiles terræ, Court-lands. Among our *Saxon* anceſtors, thoſe *thanes*, who poſſeſſed *bockland*, or hereditary lands, divided them into *inland* and *outland*. The *inland* was that which lay moſt convenient for the lord's manſion-houſe; and therefore the lords kept that part in their own hands, for ſupport of their family, and for hoſpitality. The *Normans* afterwards called theſe lands *terras dominicales*, the *demains*, or lords lands. The Germans *terras indominicatas*, lands in the lord's own uſe. The *Feudiſts terras curtiles*, or *intra curtem*, *lands* appropriated to the court, or houſe of the Lord. *Spelman of Feuds*, *c.* 5.

Curvare, and **Curvatus.** See **Crabare.**

Cuſtantia, The ſame with **Coſtagium**, which ſignifies coſts.

Cuſtode admittendo, and **Cuſtode amovendo,** are writs for the admitting or removing of guardians. *Reg. Orig.*

Cuſtodes

Cuſtodes libertatis Angliae authoritate parliamenti, Was the ſtyle wherein writs and other judicial proceedings did run during the late times of trouble, *&c.* from the murder of King *Charles* the Firſt, till the uſurpation by *Cromwell*, mentioned and declared traiterous by the *ſtat.* 12 *Car.* 2. *cap.* 3.

Cuſtodiam dare, Was a gift or grant for life: *Tradidit autem Rex Willielmo filio Aldalmi civitatem Wexfordiæ in cuſtodia, &c.* Du Freſne.

Cuſtom, *Conſuetudo*, Has the ſame ſignification with our Common lawyers and Civilians, being by both accounted a part of the law: *Conſuetudo quandocumque pro lege ſervatur*, ſaith *Bracton*, *partibus ubi fuerit more utentium approbata*; *longævi, enim temporis uſus & conſuetudinis non eſt vilis authoritas*, *lib.* 1. *cap.* 3. It may not unaptly be thus defined, *cuſtom* is a law or right not written, which being eſtabliſhed by long uſe, and the conſent of our anceſtors, hath been, and is daily practiſed; our anceſtors, that is, *majores*; and thoſe of our kindred that are *ultra tritavum:* So that allowing the father to be ſo much older than the ſon, as *pubertas*, or the years of generation do require; the grandfather ſo much elder than him, and ſo *uſque ad tritavum*; we cannot ſay, that this or that is a *cuſtom*, unleſs we can juſtify it hath continued ſo at leaſt one hundred years. For *tritavus* muſt be ſo much elder than the party that pleaded it; yet becauſe that is hard to prove, it is enough for the proof of a *cuſtom*, if two or more witneſſes can depoſe, that they heard their fathers ſay, that it was a *cuſtom* all their time, and that their fathers heard their fathers alſo ſay, that it was likewiſe a *cuſtom* in their time. If it is to be proved by record, the continuance of an hundred years will ſerve. *Davis's Rep. fol.* 32. *Cuſtom* is either *general* or *particular*. *General*, I call that which is allowed through all *England*, whereof we read divers in *Doct. and Stud. lib.* 1. *cap.* 7. very worthy to be known. *Particular* is that which belongeth to this or that county, as *Gavelkind* to *Kent*; or to this or that lordſhip, city or town. Cuſtom differeth from *preſcription*, for that *cuſtom* is common to more, and *preſcription* is particular to this or that man. Again, *preſcription* aſketh not that length of time to ſet it up as cuſtom doth, but is pleadable in a far ſhorter time, *viz.* five years, one year or leſs: an example of five years *preſcription* you have in the levying of a fine; for if a fine duly levied of land and tenements be not impugned within five years, it excludeth all claim for ever. And if a man omit his continual claim for a year and a day, then the tenant in poſſeſſion preſcribeth an immunity againſt the entry of the demandant, and his heir. *F. N. B. fol.* 79. *Termes de la Ley*, *verbo* continual claim. Out of the ſtatutes you have great diverſity, which ſee *collected* in *Cowel's Inſtitutes*, tit. *De Uſucap. & long. temp. Præſcript.* So that *Briſſenius* in his 14 *lib. de verb. ſignif.* ſaith truly; That *preſcription* is an exception founded upon ſo long time paſt, as the law limiteth for the purſuit of any action. An example may be taken from the ſtatute 1 *H.* 8. *cap.* 4. which enacteth, That in all actions popular, information ſhall be made within three years after the offence committed, or elſe be of no force. Of like nature is the ſtatute 7 *H.* 8. *cap.* 13 which in ſome caſes makes one year's *preſcription* ſufficient againſt informations. *Cowell.*

The frequent repetition of an act, which at firſt was aſſented to by the people of a certain place for their mutual conveniency and advantage, is called a cuſtom, and every ſuch cuſtom being certain and reaſonable in itſelf, and commencing time immemorial, and always continuing without interruption, has obtained the force of a law, and in ſuch places ſhall prevail, though contrary to the general laws of the kingdom. *Co. Lit.* 110. *b. Dav.* 32.

The difference between cuſtom and preſcription is, that cuſtom is local as prevailing in a certain province, county, hundred, *&c.* But preſcription is for the moſt part perſonal, being made in the name of a certain perſon, and his anceſtors, or thoſe whoſe eſtate he has, or of a body politic, and their predeceſſors. *Co. Lit.* 113. *b.* 6 *Co.* 69. 8 *Co.* 62. and ſee 2 *Bulſt.* 206. 1 *Rol. Rep.* 46.

Time and uſage are eſſential parts of a cuſtom, and therefore no cuſtom is allowable but ſuch as has been uſed by title of preſcription, *viz.* time out of mind. *Co. Lit.* 110. *b.* The continuance of an uſage from the reign of *Rich.* I. which being the time of a limitation of a writ of right, is ſaid to be a good title of preſcription. *Co. Lit.* 113.

Hence it is that though a lord of a private manor may have waifs and ſtrays by preſcription, yet he cannot have the *Bona felonum & fugitivorum* without grant from the King, becauſe no man can preſcribe for them, for every preſcription muſt be immemorial, and the goods of felons and fugitives cannot be forfeited without record, which preſuppoſes the memory of that continuance. 46 *Ed.* 3. 16. *Bro. Eſtray.* 5 *Co.* 109. *Co. Lit.* 114.

1. *What ſhall be deemed a good cuſtom, and who bound by it.*

2. *Manner of alledging and pleading a cuſtom, and how a cuſtom is deſtroyed.*

1. *What ſhall be deemed a good cuſtom, and who bound by it.*

Every cuſtom ought to appear to have had a reaſonable commencement, and that at firſt it was voluntarily agreed to for the better promotion of trade and commerce, the ſuppreſſion of fraud, the greater ſecurity of men in their eſtates and poſſeſſions, *&c.* and in ſuch caſes though the cuſtom be contrary to the Common law, or againſt the intereſt of a particular perſon, yet it ſhall be good. *Dav.* 32. *b.*

As a cuſtom that a man, in ploughing his own ground, may turn the plough on the ground of his neighbour, for this is for the general good, being in favour of huſbandry and tillage, although a particular perſon receive prejudice thereby. *Br. Cuſtom* 51. 1 *Rol. Abr.* 560. *Dav.* 32. *b. S. C.*

So a cuſtom to dry nets upon the land of another, for this is in favour of fiſhing and navigation. 5 *Co.* 84.

So a cuſtom to build bulwarks on the lands of another, for the ſafety of the kingdom, is good. *Dav.* 32. *b. Dyer* 60. *b.*

So is a cuſtom to pull down the houſes of another to prevent the ſpreading of fire. *Dav.* 32. *b.*

It is a good cuſtom in a manor, that the homage have uſed yearly to chooſe two ſurveyors, to take care that corrupt victuals are not ſold within the manor, and to deſtroy ſuch as they find expoſed to ſale there; for the preſervation of men's health is deſigned thereby, and it is at the peril of the ſurveyors if they deſtroy any meat that is not ſo. 1 *Mod.* 202. 2 *Mod.* 56. *S. C.*

A cuſtom in *Ipſwich* to chooſe yearly two burgeſſes, who uſed yearly to make a feaſt, and to fine thoſe who refuſed to make a feaſt, and to impriſon them till paid, was allowed a good cuſtom, upon an *habeas corpus*, and the priſoner remanded. *Cro. Jac.* 555.

It is a good cuſtom that every man of the town, that hath an houſe next adjoining, and abutting to the high ſtreet, may ſell all merchandizes in his ſhop within the ſaid houſe in the time of the market, which is held in the high ſtreet. 1 *Rol. Abr.* 560. But ſee 8 *Co.* 127.

A cuſtom in *Exeter*, that every woman taken in adultery ſhould be whipped, is good. 8 *Co.* 126.

But every cuſtom which appears to have been unreaſonable in itſelf, as being againſt the good of the common-wealth, or injurious to a multitude, tho' beneficial to a particular perſon, or to owe its commencement to the arbitrary will and oppreſſion of a powerful lord, and not to the voluntary agreement of the parties, is void; nor can any continuance of ſuch a cuſtom give it a ſanction, or make that good which was void in its creation. *Dav.* 32. *b.* 6 *Mod.* 124. 1 *Salk.* 203.

A cuſtom within a pariſh, that all lambs fallen and bred upon one tenement in the ſame pariſh, though belonging to ſeveral owners, ſhall be reckoned together as if

if but one man's, and the tenth ſo counted together paid for tithes, is void and unreaſonable; for by this means it might happen, that a man might have but one lamb, and that ſhould be taken for tithe, and he that had more ſhould pay nothing. *Hob.* 329.

A cuſtom to elect a ſupernumerary before any vacancy, to be admitted upon the death of the next prebendary, is ridiculous and void. *Skin.* 45. 2 *Jon.* 199. *S. C.*

A cuſtom, that no commoner ſhall put his cattle into the land before the lord, is void; for a cuſtom that leaves it to the arbitrary will of the lord, whether the tenant ſhould ever enjoy any benefit by the common, or not, can never be preſumed to have had a reaſonable commencement. 1 *Rol. Abr.* 560. *Dav.* 32.

So a cuſtom, that the lord of the manor ſhall detain a diſtreſs taken upon the demeſnes 'till a fine is paid for the damage, is void. *Lit. Sect.* 46. *Dav.* 33. *a.*

A cuſtom that every tenant of a manor, that marries his daughter without the licence of the lord, ſhall pay a fine, is againſt reaſon and void, for every freeman may marry his daughter to whom he pleaſes. *Lit. Sect.* 209.

The King by his prerogative can only make a corporation, conſervator of the peace, *&c.* therefore in theſe, or in other things which highly touch the King's prerogative, no title can be gained by cuſtom or preſcription; as a conuzance of pleas, to have a ſanctuary, to make a corporation, coroner, conſervators of the peace, *&c. Co. Lit.* 114. 1 *Rol. Abr.* 566.

But treaſure-trove, waifs, eſtraies, wreck, to hold pleas, court leets, hundreds, infangthef, a park, warren, royal fiſheries, fairs, markets, frankfoldage, keeping of a gaol, toll, *&c.* may be claimed by preſcription, without any matter of record; and a county palatine may be claimed by preſcription, and by reaſon thereof *bona felonum*, *&c.* alſo a corporation may be by preſcription. *Co. Lit.* 114. *b.*

Alſo cuſtoms that bind private perſons do not extend to the King; therefore if lands in gavelkind deſcend to the King and his brother, the King ſhall take one moiety, and his brother the other; but if the King dies, his moiety ſhall deſcend to his eldeſt ſon, and not according to the rules of deſcent in gavelkind, for the King was ſeiſed of his moiety *jure coronæ*, therefore it ſhall attend the crown, and conſequently go to the eldeſt ſon. *Plow.* 205. *a. Co. Lit.* 15. *b. Raym.* 77. 1 *Sid.* 138.

So the cuſtom of *London*, as to retaining goods mortgaged till ſatisfaction be made of the money lent on them, extends not to the King's jewels. 35 *Hen.* 6. 26. *Dav.* 33. *b.* 1 *Rol. Abr.* 566. 2 *And.* 152.

So if a man hath toll or wreck, or ſtrays by preſcription, this extends not to the King's goods. *Dav.* 33. *b.*

A cuſtom may extend to and give an infant a power of doing that, which by the rules of the Common law he could not do; as an infant at the age of 15, may make a feoffment of lands of the nature of gavelkind; but this, like all other cuſtoms, is to be conſtrued ſtrictly, and in ſuch manner as that no prejudice may accrue to the infant thereby; and therefore ſuch feoffment muſt be for valuable conſideration, muſt be made in perſon, and not by attorney, cannot be with warranty, muſt be of lands which deſcend to him in gavelkind, and not of lands by purchaſe; and muſt be of lands in poſſeſſion, not in remainder or reverſion. 1 *New Abr.* 670, 671.

It is a good cuſtom in a copyhold manor, that a feme covert with or without the conſent of her huſband, may deviſe her copyhold land to her huſband, or whom ſhe pleaſes. *Moor* 123. *pl.* 268. *Godb.* 14, 143. 3 *Leon.* 81, 83. 2 *Brownl.* 218.

Every cuſtom ought to be certain, or ſuch as may be reduced to a certainty, for an uncertain thing cannot be ſuppoſed to have had a reaſonable commencement; alſo the uncertainty of a cuſtom deſtroys the ſuppoſition of its countenance and duration time out of mind. 1 *Rol. Abr.* 565. *Dav.* 33. *Skin.* 249.

Hence it is, that a cuſtom that when an infant is of ſuch an age that he can count twelve pence, or meaſure an ell of cloth, that he may make a feoffment, is void for the uncertainty. *Dav.* 33. *a.* 3 *Leon.* 82. *Hob.* 225. *S. C.* cited, and ſaid, that ſuch cuſtom is not good, but that it ought to be at a certain age, that it may appear to be an age of diſcretion.

So a cuſtom, that the tenant of the manor who firſt comes to ſuch a place, *&c.* ſhall have all the windfalls there, is void for uncertainty. 1 *Rol. Abr.* 565. *Dav.* 33. *a.*

So of the cuſtom of *Tanniſtry* in *Ireland*, which was, that the lands of that nature of which a man died ſeiſed, ſhould deſcend *ſeniori & digniſſimo viro ſanguinis & cognominis* of him that died ſo ſeiſed; and it was held void, both for the uncertainty of the perſon and the eſtate. *Dav.* 28, 42.

2. *Manner of alledging and pleading a cuſtom, and how a cuſtom is deſtroyed.*

A cuſtom of deviſing lands borough engliſh or gavelkind, may be alledged in a city, borough, or manor, but not in an upland town, that is neither city nor borough; but a cuſtom to have a way to the church, and to make by-laws for the reparation of the church, and well ordering of the commons, and ſuch like things, may be alledged in an upland town, that is neither city nor borough. *Co. Lit.* 110. *b.* But as to the manner of laying a cuſtom, and the difference between alledging a thing by way of cuſtom, or by way of preſcription, ſee 6 *Co.* 60. *Hob.* 113. *Cro. Eliz.* 441. *Poph.* 201. *Style* 477. 1 *Lev.* 176. 1 *Vent.* 386. 3 *Lev.* 160. *Carth.* 192.

A cuſtom for a way was laid *Quod talis habetur conſuetudo quod quilibet inhabitans haberet*, *&c.* and the court held it naught, for it ſhould by laid by way of fact triable, viz. *Tempore cujus contrarium*, *&c. uſi fuerunt habere.* 1 *Sid.* 237. 1 *Keb.* 836.

The law takes notice of the cuſtoms of gavelkind and borough engliſh, and therefore it is ſufficient to alledge generally, that the lands are of the nature of gavelkind, *&c.* But other private cuſtoms muſt be ſet forth in pleading, that the judges may be apprized of them, and where they obtain, and ſo give their deciſions with proper regard to them. *Co. Lit.* 175. *b.*

One preſcription or cuſtom may be pleaded againſt another, where they are not inconſiſtent, but a preſcription pleaded againſt another, is not good without a traverſe. *Godb.* 183. 2 *Mod.* 104.

If one preſcribes to have a way over the land of *B.* to his freehold, *B.* cannot preſcribe to ſtop it. 9 *Co.* 59.

A title gained by preſcription or cuſtom, cannot be loſt by interruption of poſſeſſion ten or twenty years, unleſs there be an interruption of the right, as by unity of poſſeſſion of rent or common, and the land charged therewith of an eſtate equally high and perdurable in both. *Co. Lit.* 114. *b.*

If gavelkind lands are held in ſocage, and the tenure is after changed into knight's ſervice, yet the cuſtom is not altered, for that goes with the land, and not with the tenure. 1 *Sid.* 138. *Style* 476.

Lands in *Kent* were diſgavelled by 31 *Hen.* 8. and a a private act made 2 & 3 *Ed.* 6. to all intents, conſtructions and purpoſes whatſoever, and that they ſhould deſcend as lands at Common law, any cuſtom to the contrary notwithſtanding; and the queſtion was, whether theſe lands loſt by theſe ſtatutes all their other qualities or cuſtoms belonging to gavelkind, as well as their partibility; and it was reſolved, that they loſe only their partibility. *Raym.* 59, 76, 77. 1 *Sid.* 77, 135. 1 *Lev.* 79. 2 *Keb.* 288. *Hard.* 325.

If lands of the nature of gavelkind, or borough *Engliſh*, eſcheat to the crown, and be enjoyed in ſeveral deſcents, and are afterwards granted out by the crown in knight's ſervice, yet they deſcend in gavelkind, or borough *Engliſh*; for the law of thoſe places cannot be controlled by the King's charter, or altered without an act of parliament. 1 *New Abr.* 679.

For more learning concerning cuſtoms in general, ſee 7 *Vin. Abr. and* 1 *Bac. Abr.* tit. *Cuſtom.*

Cuſtom of London. The ancient city of *London* being the metropolis and chief town for trade and commerce within the Kingdom, it was neceſſary that it ſhould have certain cuſtoms and privileges for its better government;

ment; which though derogatory from the general law of the realm, yet being for the benefit of the citizens, and for the advantage of thoſe who trade to, and therefrom, have not only been allowed good by the judgments in the ſuperior courts, but have alſo been confirmed by ſeveral acts of parliament, viz. *Magna Charta*, *c.* 2. 7 *Ric.* 2. *&c.* 8 *Co.* 127.

If a freeman foreſtalls fiſh coming to market within the city, and upon complaint to the court of aldermen, he appears there and confeſſes the fact, and they ſay that he ſhall deſiſt, and he will not promiſe to obey, *&c.* they may commit him, until he ſignifies to the court that he will conform; and this is a good cuſtom. 1 *Vent.* 115.

Cuſtom to commit for refuſing to ſerve on the livery, is good. 2 *Lev.* 200. *Raym.* 447. 1 *Mod.* 10. 5 *Mod.* 156, 319.

Cuſtom to fine and impriſon for opprobrious words ſpoke of an alderman, is good. 1 *Vent.* 327. 1 *Lev.* 200. But ſee *Cro. Eliz.* 689. and 2 *Salk.* 425, 426. *Fareſt.* 28.

But a cuſtom to diſfranchiſe for contemptuous words ſpoken of an alderman, is void. 2 *Lev.* 200. 2 *Salk.* 426.

To impriſon until he takes the oath of an alderman of *London*, is a good cuſtom. *March* 179.

Cuſtom to impriſon for diſturbing the election of a warden of a company, and for not promiſing not to diſturb again, doubted whether good or not. *Style* 78.

By the cuſtom of *London*, a freeman or citizen might, even before the ſtatute of Wills, deviſe his lands and tenements, of which he was ſeiſed in fee-ſimple, to whom he pleaſed, and may at this time deviſe the ſame in mortmain, notwithſtanding the ſtatute of mortmain, *&c.* 1 *Rol. Abr.* 556. Several caſes to this purpoſe. *Moor* 136. 8 *Co.* 127. *S. P.*

By the cuſtom of *London*, no attaint lies for a falſe verdict given in *London*. 7 *Hen.* 6. 32. *b.* 1 *Rol. Abr.* 557. *S. C.*

A Citizen of *London*, upon an appeal brought by him, ſhall not be obliged to wage battle. *Staund. P. C.* 180. 1 *Rol. Abr.* 557. *S. C.*

It is a good cuſtom in *London*, that the mayor of *London* may take recognizances of any perſons, being of full age, or women unmarried, for he is a judge of record, although the debt was contracted out of *London*. *Fitz. Coron.* 411. 1 *Rol. Abr.* 557. And ſee *Moor* 871. But ſee *Cro. Eliz.* 186. 1 *Leon.* 130. *S. P. Dubitatur.*

It is a good cuſtom in *London*, that they, time out of mind, have had the meaſuring of coal, *infra portum London*, which extends from *Stanes-bridge* to *London-bridge*, and from thence to *Graveſend*, and from thence to *Yenland* and *Yendale*. 1 *Rol. Abr.* 557.

By the cuſtom of *London* whores are to be carted, and therefore if a perſon calls a woman *Whore* in *London*, an action on the caſe lies in reſpect of the puniſhment they are ſubject to by the cuſtom; but the party cannot be proceeded againſt in the ſpiritual court for defamation; for that would be puniſhing him twice for the ſame offence. 1 *Rol. Abr.* 550.

There is a cuſtom in *London*, that when a chaplain keeps any woman in his chamber ſuſpiciouſly, a man may come to his chamber with the beadle of the ward, and enter the chamber and ſearch. 2 *Hen.* 4. 12. *b.* 1 *Rol. Abr.* 557. *S. C.*

By the cuſtom of *London*, if a man commit a horſe to an hoſtler, and he eat out the price of his head, the hoſtler may take him as his own, upon the reaſonable appraiſement of four of his neighbours; which is a cuſtom ariſing from the abundance of traffick with ſtrangers, who could not be known to charge them with actions. *Moor.* 876. 3 *Bulſ.* 271. *Yelv.* 67. 1. *Rol. Rep.* 449.

But if a man leaves ſeveral horſes with an innkeeper in *London*, and takes them all away except one, the innkeeper cannot retain the horſe ſo left till he is ſatisfied for the keeping of the other horſes, unleſs there was an agreement to that purpoſe. 1 *Bulſt.* 207.

If *A.* commit the horſe of *B.* to an hoſtler in *London*, and he eat out his head, yet cannot the hoſtler ſell him; for all cuſtoms being derogatory to the Common law, are to be taken ſtrictly; and there is no cuſtom of *London* that hath gone ſo far as this caſe, to authorize one man to ſell and convey the property of another. 2 *Rol. Abr.* 85.

It was anciently inſiſted upon, that by cuſtom all indictments and proceedings for any cauſe, except felony, ſhould be tried and determined in *London*, and not elſewhere; but it ſeems to be now admitted, that a *certiorari* lies to remove any indictment from *London*; but it is ſaid, that by the city charters, the tenor of the indictment only ſhall be removed, and not the indictment itſelf. *Cro. Car.* 128. *Raym.* 74. 3 *Mod.* 230. *Hard.* 409. 6 *Mod.* 246. and ſee 5 & 6 *Will. & M. cap.* 11. 1 *Keb.* 252. 1. *Sid.* 155.

It is no good cuſtom in *London*, that if any perſon dies within any pariſh in *London*, and is carried out of the pariſh to be buried in any other pariſh, if he is buried in the chancel or otherways, he ſhall pay ſo much to the parſon of the pariſh where he died, as he ſhould have paid if he had been buried there in the chancel or otherways, as where he was buried; for this cuſtom is againſt reaſon, that he that is not any pariſhioner, but paſſing through the pariſh lies at an inn for a night, ſhould be forced to be buried there, or to pay as if he had been buried there. *Hobart's Reports* 283. between *Topſall* and *Ferrers*.

Beſides theſe and ſeveral other cuſtoms, there is a general cuſtom which is uſually ſet forth by the city, when any of their proceedings is called in queſtion, *viz.* that if any of their cuſtoms heretofore uſed prove hard or defective; or if any thing newly ariſing within the city where remedy was not before provided, ſhould need amendment; in either of theſe caſes, the mayor and aldermen for the time being, with the aſſent of the commonalty, may ordain fit remedy thereto, ſo as ſuch ordinance be profitable to the King, for the profit of the citizens, and agreeable to reaſon. See 8 *Co.* 126. *Skin.* 371, *&c.*

For more learning concerning the cuſtoms of London, ſee a book intitled, Laws and Cuſtoms, *&c.* of London, *and* 7 Vin. Ab.—1 Bac. Abr. *tit.* Cuſtom of London.

Cuſtom of merchants. Merchants giving characters of ſtrangers to thoſe who ſell them goods, are liable to the debts of ſuch ſtrangers for the goods ſold, by the *cuſtom of merchants*. *Lex Mercat. c.* 10. *f.* 69. If two perſons be found in arrear, upon an account grounded on the *cuſtom of merchants*, any of them may be charged to pay the whole ſum that both were found in arrear. 1 *Lill. Abr.* 376. And if two joint merchants occupy their ſtock and merchandize in common, one of them naming himſelf a merchant, ſhall have an account againſt the other, and charge him as receiver. *Co. Litt.* 172. By the *cuſtom of merchants*, where a merchant orders his factor to buy goods of a particular perſon, there the merchant is debtor and not the factor: But 'tis otherwiſe where the merchant orders his factor to buy goods generally, without ſaying of whom; here the factor is debtor, though the goods come to the uſe of the merchant. 1 *Lill.* 376. The *cuſtom of merchants* as to bills of exchange, that the indorſee ſhall charge the firſt drawer before the indorſor, *&c.* ſee **Bill of exchange** and **Merchant.**

Cuſtoms (*Cuſtuma*,) Are uſed for the tribute or toll that merchants pay to the King, for carrying out and bringing in merchandize. Stat. 14 *Ed.* 3. *cap.* 21. They are duties payable to the crown for goods exported and imported, and are due to the King of common right; firſt, becauſe the ſubject hath leave to depart the kingdom, and to export the commodities thereof; ſecondly, for the intereſt which the King hath in the ſea, and as he is guardian of, and maintains all the ports, wherein the commodities are exported or imported; and laſtly, for that the King protects merchants from enemies and pirates. *Dyer* 43. The word *cuſtoms* comprehends *magna & antiqua cuſtuma*, which is payable out of our own native commodities, as for wool, woodfels and leather; and *parva cuſtuma*, which are *cuſtoms* payable by merchants, ſtrangers, and denizens; and theſe began in the reign of *Ed.* 1. when the parliament granted him 3*d.* in the pound for all merchandizes exported and imported. *Ibid.* 165. But that which is granted by parliament, is properly called a *ſubſidy*; and ſometimes granted to the King for life; and there are ſeveral ſorts of theſe ſubſidies, as *tonnage*, a duty granted out of every ton of wine im-

ported, which was first granted by parliament to King *Edw.* 3. and *poundage*, a subsidy granted for all goods exported and imported, except wines, &c. and is usually the twentieth part of the value of the goods, or 12*d.* in the pound; and this was first given to *Hen.* 6. for life. 1 *Nelſ. Abr.* 583, 584. In the reign of *Edw.* 3. it was enacted, that no new *cuſtoms* could be levied, nor ancient increaſed, but by authority of parliament. 2 *Inſt.* 60.

By *magna charta*, 9 *Hen.* 3. *c.* 30. merchants may buy and ſell by the ancient and right cuſtoms. See 2 *Inſt.* 58.

The ancient accounting for cuſtoms, ſtat. *de Scac.* 51 *H.* 3. *ſt.* 5. *ſ.* 6.

The cuſtoms upon wine, cloth, &c. ſuſpended, *St. de Staunford*, 2 *Ed.* 2.

Credit ſhall be given to merchants papers for the value of his goods, 27 *Ed.* 3. *ſt.* 2. *c.* 26.

No maſter ſhall loſe his ſhip for a trifle not cuſtomed without his knowledge, 38 *Ed.* 3. *c.* 8.

No cuſtomer or comptroller ſhall have ſhips, or meddle with the freight, 14 *R.* 2. *c.* 10. or keep wharfs or taverns, 20 *H.* 6. *c.* 5.

Officers of the cuſtoms ſhall have their offices at will, 14 *R.* 2. *c.* 10. 17 *R.* 2. *c.* 5. 1 *H.* 4. *c.* 13. 31 *H.* 6. *c.* 5.

Cuſtomers and comptrollers ſhall reſide upon their offices, and not make deputies, 1 *H.* 4. *c.* 13. 4 *H.* 4. *c.* 20.

Ships ſhall be laden and diſcharged in the great ports, and not in creeks, 4 *H.* 4. *c.* 20.

The ſearchers ſhall reſide on their office, and make no deputy, nor take more fees than ſhall be appointed, 4 *H* 4. *c.* 21.

No common hoſtiler ſhall be an officer of the cuſtoms, 11 *H.* 4. *c.* 2.

The officers ſhall not be abſent above three weeks, 13 *H.* 4. *c.* 5.

Officers concealing the monies received to forfeit treble value, 3 *H.* 6. *c.* 3. 18 *El. c.* 9. *ſ.* 5.

Shall give diſcharges for cuſtoms paid, 11 *H.* 6. *c.* 15.

Sealing blank cocquets prohibited, 11 *H.* 6. *c.* 16.

Officers not to have ſhips, wharfs or taverns, 2 *H.* 6. *c.* 5.

Goods imported into *Wales*, and thence into *England*, without paying cuſtoms, forfeited, 20 *H.* 6. *c.* 7.

Penalty of 40*l.* on officers diſtraining ſhips or goods unduly, 28 *H.* 6. *c.* 5.

Offices how to be granted, 31 *H.* 6. *c.* 5.

Subſidies granted to the King for life, 12 *Ed.* 4. *c.* 3. 6 *H.* 8. *c.* 14.

One man's goods not to be entred in another's name, 3 *H.* 7. *c.* 7. repealed, 1 *H.* 8. *c.* 5.

Certificate to be made of goods removed to another port, 3 *H.* 7. *c.* 7. 11 *H.* 7. *c.* 6.

No common officer in a borough to be a cuſtomer, 3 *H.* 7. *c.* 7.

No alien made denizen ſhall pay alien's cuſtom. 1 *H.* 7. *c.* 2. 11 *H.* 7. *c.* 14. 22 *H.* 8. *c.* 8.

One Engliſhman may enter goods in another Engliſhman's name, 1 *H.* 8. *c.* 5. but not to defraud the King of his cuſtoms, 2 & 3 *Ed.* 6. *c.* 22.

Subjects ſworn to foreign princes to pay as aliens, 14 & 15 *H.* 8. *c.* 4.

Returning to be reſtored, and have a writ out of Chancery, 14 & 15 *H.* 8. *c.* 4. *ſ.* 3.

Penalty on officers giving falſe certificates, 33 *H.* 8. *c* 7. *ſ.* 5.

Cuſtomable goods to be laden and landed in the daytime and in an open place, 1 *El. c.* 11.

Penalty on officers concealing offences, 1 *El. c.* 11. *ſ.* 7.

This act not to prejudice certain *Welſh* counties, 1 *El. c.* 11. *ſ.* 12.

Grant of the ſubſidies of tonnage and poundage, 12 *Car.* 2. *c.* 4.

Rates on merchandize, *Car.* 2. *cap.* 4.—

Appropriation of duties to aggregate and general funds, 1 *Geo.* 1. *c.* 12. 3 *Geo.* 1. *c.* 7. 12 *Geo.* 2. *c.* 21.

Fiſh exported not to pay, 12 *Car.* 2. *c.* 4. *ſ.* 5.

Goods which may be exported, 12 *Car.* 2. *c.* 4. *ſ.* 10.

Divers goods imported in foreign ſhips deemed aliens goods, 12 *Car.* 2. *c.* 18. *ſ.* 18.

Penalty on officers of cuſtoms allowing privilege to ſhips unduly, 12 *Car.* 2. *c.* 18. *ſ.* 9.

A duty on *French* ſhips, 12 *Car.* 2. *c.* 18. *ſ.* 17.

A warrant of aſſiſtance to be granted to ſearch for uncuſtomed goods, 12 *Car.* 2. *c.* 19.

For preventing frauds in the cuſtoms, 13 & 14 *Car.* 2. *c.* 11.

No ſhips ſhall be above three days in coming from *Graveſend*, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 2.

Ships not to take on board goods outward bound before entry, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 3.

Officers of the cuſtoms may ſearch ſhips, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 4.

The penalty of abuſing officers, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 6.

Foreign built ſhips not to have the privilege of *Engliſh*, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 6.

Goods not to be landed or water borne but in preſence of an officer.—Nor carried coaſtwiſe without a cocquet, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 7. King to appoint ports for landing, *Ibid. ſ.* 14.

Officers were diſabled, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 8. 4 *W.* & *M. c.* 5. *ſ.* 23.

There ſhall be no party jury in cauſes of the cuſtoms, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 11.

Penalty on officers guilty of bribery, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 19.—Penalty on perſons offering bribe, 9 *Geo.* 2. *c.* 23. *ſ.* 24.

Goods not to be brought from the *Netherlands* or *Germany*, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 23.

Penalty on *French* ſhips not paying duty, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 24.

For the rating of vinegar, perry, rape and cyder, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 25.

Defendants may have commiſſion to examine witneſſes beyond ſea, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 29.

Penalties of extortion, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 34.

Duty on ſmall ſhips going to the Mediterranean, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 35.

Veſſels of fiſh excepted, 13 & 14 *Car.* 2. *c.* 11. *ſ.* 36.

Penalty for reſiſting officers of the cuſtoms, 15 *Car. c.* 7. *ſ.* 19.

Aliens duties taken off from native commodities, 15 *Car. c.* 6.

The impoſt 1690 laid, 2 *Will.* & *Ma. ſt.* 2. *c.* 4.

The impoſt 1690 continued and made perpetual by 9 *Ann. c.* 21. & 3 *Geo.* 1. *c.* 9. and part of the *South Sea* fund.

During the continuance of the act 2 *W.* & *M. ſt.* 2. *c.* 4. there ſhall be an office in *London* to receive the monies, 2 *W.* & *M. ſt.* 2. *c.* 10. *ſ.* 20.—Officers fees for extraordinary attendance, 6 & 7 *W.* 3. *c.* 7. *ſ.* 14.

The impoſt 1692 continued and made perpetual by 9 *Ann. c.* 21. & 3 *Geo.* 1. *c.* 9. and part of *South Sea* fund.

Notice to be given of importing alamodes, 4 *W.* & *M. c.* 5. *ſ.* 14.

Penalties on inſuring prohibited or uncuſtomed goods, 4 *W.* & *M. c.* 15. *ſ.* 14.

Commiſſioners to be ſworn before the barons of the Exchequer, 6 *W.* & *M. c.* 1. *ſ.* 5.

Any one may ſue for penalty of inſuring uncuſtomed goods, 8 & 9 *W.* 3. *c.* 36.

How debentures are to be allowed, 7 & 8 *W.* 3. *c.* 10. *ſ.* 12.

Additional duty on *French* goods, 7 & 8 *W.* 3. *c.* 20. *ſ.* 3.—Made perpetual, 1 *Geo.* 1. *c.* 12. and part of aggregate fund.

The new ſubſidy and other duties granted to King *William* for life, 9 & 10 *W.* 3. *c.* 23.—Drawback on plantation ſugar, 9 & 10 *W.* 3. *c.* 23. *ſ.* 8, 9. 2 *Ann. c.* 9. *ſ.* 3.

Continued, 1 *Geo.* 3. *ſt.* 1. during his Majeſty's life, towards civil liſt, and made part of aggregate fund.

The

The export duties upon woollen manufactures, corn, &c. taken away, 11 & 12 *W.* 3. *c.* 20.

The one third ſubſidy granted, 2 & 3 *Ann. c.* 9.

The duties, 2 *Ann. c.* 9. made perpetual, and part of the aggregate fund, 1 *Geo.* 1. *c.* 12. 3 *Geo.* 1. *c.* 18. 5 *Geo.* 2. *c.* 3.

The two third ſubſidy granted, 3 & 4 *Ann. c.* 5.— made perpetual, and part of the aggregate fund, by 7 *Ann. c.* 7. 1 *Geo.* 1. *c.* 12. &c.

Laws of the cuſtoms extended to *Scotland*, 6 *Ann. c.* 26. *ſ.* 17.

Forfeiture of treble value againſt perſons to whoſe hands uncuſtomed or prohibited goods ſhall come, 8 *Ann. c.* 7. *ſ.* 17.

Claimers of ſeized goods to give ſecurity for coſts, 8 *Ann. c.* 7. *ſ.* 63.

Forfeiture of double drawback on perſons to whoſe hands certificate goods ſhall come, 8 *Ann. c.* 13. *ſ.* 16.

Continuance of the officers fees, 8 *Ann. c.* 13. *ſ.* 26.

Penalty on officers imbeziling goods, 8 *Ann. c.* 13. *ſ.* 27.

Head officers of cuſtoms, exciſe and ſtamps, perpetuated, 9 *Ann. c.* 21. *ſ.* 12.

Deputations of the officers do not ceaſe by the death or removal of the commiſſioners, 12 *Ann. ſt.* 2. *c.* 8. *ſ.* 13.

Uncuſtomed goods that have been warehouſed twelve months to be publickly ſold, 12 *Ann. ſt.* 2. *c.* 8. *ſ.* 11.

Drawbacks to continue as long as duties, 3 *Geo.* 1. *c.* 7. *ſ.* 40.

Rum not to be imported in caſks of leſs than 20 gallons, 5 *Geo.* 1. *c.* 11. *ſect.* 2. 27 *Geo.* 2. *c.* 18. *ſ.* 4.

Penalty on taking in goods at ſea to be run, 5 *Geo.* 1. *c.* 11. *ſ.* 4.

Certificate to be produced from *Ireland* of the landing of goods, 5 *Geo.* 1. *c.* 11. *ſ.* 5.

Forfeiture on landing prohibited or certificate goods, 5 *Geo.* 1. *c.* 11. *ſ.* 6.

Package of certificate goods not to be opened in port, 5 *Geo.* 1. *c.* 11. *ſ.* 7.

Officers may enter ſhips of 50 tons hovering on the coaſt, &c. 5. *Geo.* 1. *c.* 11. *ſ.* 8.

Penalty on colluſive ſeizures, 5 *Geo.* 1. *c.* 11. *ſ.* 24.

In trial relating to cuſtom and exciſe, evidence may be given of an officer's authority, &c. as of a fact, 6. *Geo.* 1. *c.* 21. *ſ.* 24. 11 *Geo.* 1. *c.* 30. *ſ.* 32.

Reſiſting officers to the number of eight, to be tranſported, 6 *Geo.* 1. *c.* 21. *ſ.* 24. to the number of five, 8 *Geo.* 1. *c.* 18. *ſ.* 6.

Officers may ſtop and warehouſe cuſtomable goods till claimed, 6 *Geo.* 1. *c.* 21. *ſ.* 39.

Where claimer intitled to coſts, 6 *Geo.* 1. *c.* 21, 41.

Time for exporting imported goods enlarged to three years, 7 *Geo.* 1. *c.* 21. *ſ.* 10.

The export duties on goods of *Britiſh* product, except allom, &c. taken off, 8 *Geo.* 1. *c.* 15. *ſ.* 7.

Dying drugs may be imported free, 8 *Geo.* 1. *c.* 15. *ſ.* 10.

A duty on dying drugs exported, 8 *Geo.* 1. *c.* 15. *ſ.* 11.

The rates on beavers ſkins leſſened, 8 *Geo.* 1. *c.* 15. *ſ.* 13.

The duty on pepper reduced, 8 *G.* 1. *c.* 15. *ſ.* 15.

Duties on cloves, mace, and nutmegs, aſcertained, 8 *Geo.* 1. *c.* 15. *ſ.* 17.

Boats on the *Thames*, &c. with more than four oars to be forfeited, 8 *Geo.* 1. *c.* 18. *ſ.* 3.

Penalty on receiving run goods, 8 *Geo.* 1. *c.* 18. *ſ.* 10.

A *capias* to go in the firſt inſtance againſt runners of goods, 8 *Geo.* 1. *c.* 18. *ſ.* 15.

Seizures of ſmall ſhips, horſes, &c. may be proceeded on by juſtices of peace, 8 *Geo.* 1. *c.* 18. *ſ.* 16.

Goods unſhipped from coaſting veſſels before the cocquet produced, &c. forfeited, 8 *Geo.* 1. *c.* 18. *ſ.* 18.

Foreign goods unſhipped without the preſence of an officer forfeited, 8 *Geo.* 1. *c.* 18. *ſ.* 18.

Additional duty on apples, 8 *Geo.* 1. *c.* 20. *ſ.* 46. 11 *Geo.* 1. *c.* 7. *ſ.* 11. 10 *Geo.* 2. *c.* 27. *ſ.* 1.

Purchaſe of wool-key for the cuſtom-houſe, 8 *Geo.* 1. *c.* 31.

The cuſtoms in *England* and *Scotland* may be put under one or two commiſſions, 9 *Geo.* 1. *c.* 21.

Foreign goods carried coaſtwiſe, otherwiſe than by certificate, forfeited, 9 *Geo.* 1. *c.* 21. *ſ.* 8.

Goods unrated, before rated in a new book, 11 *Geo.* 1. *c.* 7.

Officers may purchaſe goods at 10 *per cent.* above the importer's rate, 11 *Geo.* 1. *c.* 7. *ſ.* 8.

Penalty of concealing run goods, 11 *Geo.* 1. *c.* 30.

Run goods offered to ſale may be ſeized by any perſon, 11 *Geo.* 1. *c.* 3. *ſ.* 18.

Run goods ſold may be ſeized by the ſeller, 11 *Geo.* 1. *c.* 30. *ſ.* 20.

Condemned tea, coffee, &c. how to be ſold, 12 *Geo.* 1. *c.* 28. *ſ.* 1.

No officer of cuſtoms or exciſe to deal in tea, coffee, brandy, &c. 12 *Geo.* 1. *c.* 20. *ſ.* 7.

The *onus probandi* to lie on the claimer of foreign goods, 12 *Geo.* 1. *c.* 28. *ſ.* 8.

Condemned ſhips may be uſed by officers of cuſtoms, &c. 12 *Geo.* 1. *c.* 28. *ſ.* 14.

The juſtices to cauſe ſeizures to be appraiſed, 12 *Geo.* 1. *c.* 28. *ſ.* 16.

Officers impowered to open the package of certificate goods, 12 *Geo.* 1. *c.* 28. *ſ.* 17.

Certificate goods ſhipped without warrant or preſence of an officer forfeited, 12 *Geo.* 1. *c.* 28. *ſ.* 18.

Warehouſe goods to be ſold, unleſs the duties be paid, &c. within ſix months, 12 *Geo.* 1. *c.* 28. *ſ.* 19.

No drawback to be allowed for tobacco, or other foreign commodities exported to the *Iſle of Man*, 12 *Geo.* 1. *c.* 28. *ſ.* 21.

Perſons in priſon for frauds relating to the cuſtoms or exciſe to plead within one term, otherwiſe judgment, 12 *Geo.* 2. *c.* 29. *ſ.* 27.

None but the attorney general or officers to file informations relating to the cuſtoms or exciſe, 12 *Geo.* 1. *c.* 28. *ſ.* 28.

Act of indemnity for offences againſt the laws of cuſtoms and exciſe, 9 *Geo.* 2. *c.* 35. 18 *Geo.* 2. *c.* 28.

Perſons deemed ſmugglers, and the penalty on ſuch, 6 *Geo.* 2. *c.* 35. *ſ.* 13.

Perſons loitering near the coaſt, &c. to run goods, to be impriſoned, 9 *Geo.* 2. *c.* 35. *ſ.* 18.

Tea, brandy, &c. offered to ſale may be ſtopped, 9 *Geo.* 2. *c.* 35. *ſ.* 20.

Penalties on carrying run goods, 9 *Geo.* 2. *c.* 35. *ſ.* 21.

Tea or brandy in ſmall parcels may be ſeized on board hovering ſhips within two leagues of the coaſt, 9 *Geo.* 2. *c.* 35. *ſ.* 22.

Foreign goods unſhipped within four leagues of the coaſt forfeited, 9 *Geo.* 2. *c.* 35. *ſ.* 23.

Penalty of bribing officers, &c. 9 *Geo.* 2. *c.* 35. *ſ.* 24.

Concealed goods not reported, forfeited, 9 *Geo.* 2. *c.* 35. *ſ.* 27.

Forcibly obſtructing officers on ſhip-board, tranſportation, 9 *Geo.* 2. *c.* 35. *ſ.* 28.

Officers may ſearch coaſting ſhips, 9 *Geo.* 2. *c.* 35. *ſ.* 35.

In trials of ſeizures, the regularity of the ſeizure ſhall be admitted, 9 *Geo.* 2. *c.* 35. *ſect.* 34.

Officers may oppoſe force by force, 9 *Geo.* 2. *c.* 35. *ſ.* 35.

Drawback on exporting foreign paper taken off, 10 *Geo.* 2. *c.* 27. *ſ.* 4.

Duty on foreign oyſters, 10 *Geo.* 2. *c.* 30.

Claimers of ſeized ſhips to give ſecurity for coſts, 15 *Geo.* 2. *c.* 31. *ſ.* 7.

Foreign goods may be taken out of warehouſes and refreſhed, 16 *Geo.* 2. *c.* 31. *ſ.* 8.

Glaſs beads to pay as great bugles, 17 *Geo.* 2. *c.* 31.

Smugglers before the 1ſt of *May* 1745, indemnified, 18 *Geo.* 2. *c.* 28. *ſ.* 1.

Perſons charged with being armed and aſſembled for the running of goods, &c. and not ſurrendring purſuant to order of council, attainted of felony, 19 *Geo.* 2. *c.* 34. 26 *Geo.* 2. *c.* 23. (continued by 4 *Geo.* 3. *c.* 12.)

Order

Order for ſurrender to be publiſhed in the Gazette, 19 *Geo.* 2. *c.* 34. *ſ.* 2.

Harbouring offenders, tranſportation, 19 *Geo.* 2. *c.* 34. *ſ.* 3.

Damage forcibly done to cuſtomhouſe officers, *&c.* to be made good by hundred, 19 *Geo.* 2. *c.* 34. *ſ.* 6.

Reward of diſcovering accomplicies, 19 *Geo.* 2. *c.* 34. *ſ.* 11.

Offenders againſt the cuſtoms indemnified on condition of entring on board his Majeſty's ſhips, 19 *Geo.* 2. *c.* 34. *ſ.* 13. 30 *Geo.* 2. *c.* 29.

On information for ſeizures the perſon who ſeized the goods not to pay coſts, if there was a probable cauſe: and in actions, *&c.* for the ſeizure, the defendant excuſed from coſts, if probable cauſe, 19 *Geo.* 2. *c.* 34. *ſ.* 16.

All offences againſt the laws of the cuſtoms, and all monies ariſing from any cuſtoms, *&c.* excepted out of general pardon, 20 *Geo.* 2. *c.* 52. *ſ.* 28, 39.

The laſt ſubſidy of poundage granted, 21 *Geo.* 2. *c.* 2.

Drawback on ſugar refined in *Great Britian* and exported, 21 *Geo.* 2. *c.* 2. *ſ.* 7. 32 *Geo. c.* 10. *ſ.* 8.

Candles, ſoap, and ſtarch, to be imported in package of two hundred weight at leaſt, 23 *Geo.* 2. *c.* 21. *ſ.* 27.

No ſpirituous liquors imported in caſks leſs than 60 gallons to be entred for exportation, 28 *Geo.* 2. *c.* 21.

Tea above ſix pounds in *Britiſh* ſhips come from abroad, and not employed by the *Eaſt-India* company, forfeited, 28 *Geo.* 2. *c.* 21.

Smugglers indemnified from offences before 1ſt of *May* 1757, on entering to ſerve as ſailors, 30 *Geo.* 2. *c.* 29.

Additional ſubſidy 1759, 32 *Geo.* 2. *c.* 10.

Allowance to the importer of tobacco, 32 *Geo.* 2. *c.* 10. *ſ.* 4.

Veſſels or goods ſeized to be publickly ſold, after condemnation, at ſuch places as commiſſioners ſhall appoint, 3 *Geo.* 3. *c.* 22.

For cuſtoms on particular commodities, ſee the reſpective heads.

Cuſtomary tenants, (*Cuſtumarii, vel tenentes per conſuetudinem,*) Are ſuch tenants as hold by the *cuſtom* of the manor, as their ſpecial evidence. Theſe were ancient bondmen, or thoſe that held *tenura bondagii: Et omnes illi qui tenuerunt in bondagii tenura ſolebant vocari* cuſtumarii. *MS. de Conſuetud. man. de Sutton-Colfeild de an.* 3 Ed. 2. See **Windas** and **Copyhold.**

Cuſtomhouſe, Is a houſe in ſeveral cities and port-towns, as *London, &c.* where the King's *cuſtoms* are received, and all buſineſs relating thereunto tranſacted. See 12 *Car.* 2. *cap.* 4.

Cuſtoms and ſervices, (*Conſuetudinibus & ſerviciis,*) Is a writ of right cloſe, which lieth againſt the tenant, that deforceth his lord of the rent or ſervice due to him. Of this ſee more at large in the *Old Nat. Brev. fol.* 77. *F. N. B. fol.* 151. and *Reg. Orig. fo.* 156.

Cuſtos brevium, Is the principal clerk belonging to the court of *Common Pleas*, whoſe office is to receive and keep all the writs, and put them on files, every return by itſelf; and at the end of every term to receive of the *prothonotaries* all the records of *Niſi prius*, called *The poſtea*; for they are firſt brought in by the clerk of the aſſiſe of every circuit to the prothonotary that entreth the iſſue in that matter for the entring of the judgment; and then do the prothonotaries get of the court a peremptory day, for every party to ſpeak what he hath to alledge in arreſt of judgment, which day being paſt, he entreth the verdict and judgment thereupon into the roll of the court; and that done, he doth at the end of the term deliver over to the *cuſtos brevium* all the records of *Niſi prius*, which came to his hand that term; which received, he bindeth into a bundle, and puts them in proper places. The *cuſtos brevium* alſo maketh entry of the writs of covenant, and the concord upon every fine, and maketh forth exemplifications and copies of all writs and records in his office, and of all fines levied. The fines after they are ingroſſed, are to be divided between the *cuſtos brevium* and the *chirographer*; whereof the *chirographer* keepeth always the writ of covenant and the note; the *cuſtos brevium* keepeth the concord and foot of the fine; upon which foot the *chirographer* doth cauſe the proclamation to be indorſed, when they are all proclaimed. This office is in the King's gift. There is alſo a *cuſtos brevium & rotulorum* in the *King's Bench*, who fileth ſuch writs as are there uſed to be filed, and all warrants of attorney, and tranſcribeth or maketh out the records of *Niſi prius, &c.*

Cuſtos cygnorum Regis. See **King's ſwan-herd.**

Cuſtos placitorum coronæ. *Bract. lib.* 2. *cap.* 5. This ſeems to be all one with him whom we call *cuſtos rotulorum*. Of this officer mention is made in the writ *De odio & atia. Reg. Orig. fol.* 133.

Cuſtos rotulorum, Is he that hath the cuſtody of the *rolls*, or records of the ſeſſions of peace; and as ſome believe, of the commiſſion of the peace itſelf. *Lamb. Eiren. lib.* 4. *cap.* 3. *pag.* 373. He is always a juſtice of peace, and *quorum*, in the county where he hath his office; and by his office is rather termed an officer or miniſter than a judge, becauſe the commiſſion of the peace layeth by expreſs words this ſpecial charge upon him. *Quod ad dies & loca prædicta, brevia, proceſſus & indictamenta prædicta coram te & aliis ſociis tuis venire fac'.* Lamb. ibid.

By ſtat. 3 & 4 *Ed.* 6. *c.* 11. *ſect.* 3. The Lord Chancellor ſhall, without any bill ſigned with the King's hand, appoint ſuch perſons to be *cuſtos rotulorum* within every ſhire as ſhall be thought meet. And the perſons ſo appointed may exerciſe the office by deputy, in as ample manner as if the act 37. *Hen.* 8. *cap.* 1. had never been made.

Sect. 5. Provided that the archbiſhop of *York*, the biſhop of *Durham*, the biſhop of *Ely*, the chancellor of the duchy of *Lancaſter*, and all perſons to whom the King or his progenitors by letters patent or act of parliament have granted any liberty to ordain any of the ſaid offices of *cuſtos rotulorum*, ſhall enjoy the ſame liberty. See **Clerk of the peace**, and 2 *Inſt.* 674.

Cuſtos of the ſpiritualities, *Cuſtos ſpiritualitatis vel ſpiritualium*, Is he that exerciſeth ſpiritual or eccleſiaſtical juriſdiction, of any dioceſe, during the vacancy of the ſee. The appointment of whom, by the Canon law appertains to the dean and chapter; but at preſent with us in *Englaud*, to the archbiſhop of the province by preſcription: Howbeit, divers deans and chapters (if what *Gwin* ſays in the Preface to his *Readings* be true) do challenge this by ancient charters from the Kings of this land. *Cowell.*

Cuſtos temporalium, *(Cuſtos temporalium)* The perſon to whoſe cuſtody a vacant ſee, or abbey, was committed by the King, as ſupreme lord: Who, as a ſteward of the goods and profits, was to give account to the *eſcheator*, and he into the *Exchequer*. His truſt continued till the vacancy was ſupplied by a ſucceſſor, who obtained the King's writ *De reſtitutione temporalium*, which was commonly after conſecration, yet ſometimes before.

Cuſtos treugarum, Keeper of the truce. *Edward* the Third conſtituted by commiſſion two *keepers of the truce* between him and the King of *Scots*, with *Nos vellentes* treugam *ſive ſufferentiam prædictam quantum ad nos pertinet obſervari, &c.* Rot. Scotiæ 10 Ed. 3. m. 56. intus.

Cuth, *i. e. Cognitus*, known.

Cutlers, The cutlers of *Hallamſhire* in *Yorkſhire* incorporated, 21 *Jac.* 1. *c* 31. What apprentices, and for how long time they may take; and penalty of making knives, *&c.* without putting ſteel into the edges, 21 *Jac.* 1. *c.* 31. *ſect.* 6, 7.

Cutter of the tallies, Is an officer in the *Exchequer*, that provideth wood for the *tallies*, and cuts the ſum payed upon them, and then caſteth the ſame into the court to be written upon.

Cutting out tongues. See **Maim.**

Cutts, Flat-bottomed boats uſed in the channel for tranſporting horſes. *A. D.* 1474. when King *Edward* 4. came to *Dover*, the duke of *Burgundy*, to help his paſſage, ſent 500 boats of *Holland* and *Zealand*, called *cutts*, which are flat and low, built very commodiouſly for tranſporting of horſes. *Stow. Annal. p.* 412.

Cut-work. See **Point.**

Cuba,

Cuba, Gall. *cuve*, Angl. *keever*, A tub or brewing-veſſel. Vid. **Cuna**. It alſo ſignifies the ſame with *cupa*, a *cup*.

Cupnage, Is a word in the ſtatute of 11 *H.* 7. *c.* 4. for the making up of tin into that faſhion, as it is uſed to be framed, for the better carriage of it into other places.

Cyclas, A long garment, cloſe upwards, and open or large below: *Matth. Paris.* ſpeaking of the citizens of *London*, tells us, they were *Sericis veſtimentis ornati*, cycladibus *auri textis circundati*. Anno 1236.

Cyder. See **Excise.**

Cynebote, The ſame with **Cenegild.**

Cyppus.——*Et debent habere amerciamenta de expeditatione canum, mel & nuces, &* cyppos *per totam foreſtam.* ——Ryley's Placit. Parl. fol. 652. *Du Freſne*, in his New Gloſſarium, ſays it ſignifies *rete*, a net; but *quære*. In the authority before cited, it ſeems rather to ſignify a ſort of berries; poſſibly *hips* and *haws*. *Cowell, edit.* 1727.

Cyreath, i. e. *Jusjurandum electum*, viz. *Quod quis cum aliis conjuratoribus a majori numero electis præſtat:* We read it amongſt the laws of King *Athelſtane*, *cap.* 15. viz. *Et jurant quod illud pecus intertiatum, (i. e* ſequeſtred) *in peculio ſuo natum eſt, ſine rimath & ſtet. theſ.* cyreath, i. e. *Jusjurandum electum ſuper* 20 *den.*

Cyrichyce, (Sax.) *Irruptio in eccleſiam.* LL. Eccl. Canuti Regis.

Cyrickleat, Is a *Saxon* word, ſignifying a tribute due to the church, *Vectigal eccleſiæ, eccleſiæ cenſus, primitias ſeminum quiſq; ex eo dato domicilio in quo ipſe natali die domini commoratur.* Spelm. de Concil. vol. 1. fol. 125. See **Churchellet.** See alſo the hiſtory of this cuſtom in *Kennet's Paroch. Antiq. p.* 603.

Cyrographer. See **Chirographer.**

Cyrus, (*Scirpus*, ruſhes.) It was in old times a common practice, (and is ſtill in ſome places retained, more eſpecially in *Wales,*) to bring ruſhes, and ſtrew the body of the church, for the convenience of warmth, and better kneeling. And hence it was laid as a cuſtomary ſervice on ſome perſons, that they ſhould find the church with ſtraw in winter, and with ruſhes in ſummer.——*In ordinatione domini* Jocelini *epiſcop.* Bath. *ſuper theſauraria eccleſiæ* Wellenſis, *facta an.* 1226.——*Ordinatum eſt ut theſaurarius inveniat* cyrpos *per æſtatem.* Reg. Dec. & Capit. Well. MS. *Cowell, edit.* 1727.

D

Da, (*Fr.*) A word affirmative for *yes*. *Law. Fr. Dict.*

Dacra. Johannes Birt *poſuit in quandam navem decem* dacras *corei laneati* 23 *Aug.* 39. *Eliz.* Placit. an. 41. Eliz.

Dagenham and Havering. The breach in the levels of *Havering* and *Dagenham* repaired, 12 *Ann. ſt.* 2. *c.* 17. And captain *Perry* how ſatisfied for ſuch repairs, 7 *Geo.* 1. *ſt.* 1. *c.* 20. *ſect.* 32.

Daggerius, (*Daggardus,*) Gall. *dagne*, Brit. *daga*, Engl. *dagger*.——*Habentes cultellos, quos* daggerios *vulgariter dicunt.* Henr. Knyghton in Ed. 3.

Dagus. See **Deis.**

Dais. See **Deis.**

Dakir. By the ſtatute *De compoſitione ponderum & menſurarum*, 51 *H.* 3. a laſt of hides conſiſts of twenty *dakirs*, and every *dakir* of ten hides: but by the 1 *Jac.* *c.* 33. a laſt of hides is twelve dozen. See **Dicker of leather.**

Dalmatica, A garment with large open ſleeves, uſed at firſt only by biſhops, ſo called, becauſe it firſt came from *Dalmatia*,

Candida ut extenſis niteat Dalmatica *rugis,*
Fimbria neve erret huic ſine lege lævis.

Dalus, (*Dailus, dayla,*) A dale, a valley, or low place. *Et in eadem villa terram trium carrucarum, &* tres dalos *prati, & unum hulmum.* Mon. Angl. tom. 1. p. 680. *Et totam* dailam *mariſci, tam de roſſa, quam de prato.* Mon. Angl. tom. 2. p. 211. The *dali prati* abovementioned, ſeem to be ſuch balks or narrow ſlips of paſture, left between the plough furrows in arable land, which in ſome parts of *England* are ſtill called *doles*, and *dools*. The old Britiſh *dol* and *doldir*, was a vale. And the preſent *Welſh* uſe the word *dol*, for a low meadow by a river ſide. And this ſeems to be the original name and nature of *Dale* in *Kent*, where *Cæſar* landed, and fought the *Britains:*—*Cæſar ad* Dole *bellum pugnavit.* Nennius. *Cowell, edit.* 1727.

Damage, (*Damnum,*) Generally ſignifieth any hurt, or hindrance that a man taketh in his eſtate; but in the Common law it is a part of what the jurors are to inquire of, and bring in, when an action paſſeth for the plaintiff: for after verdict given in the principal cauſe, the jury are aſked touching coſts (which are the charges of ſuit, called of the Civilians, *Expenſæ litis)* and damages, which comprehend a recompence for what the plaintiff or demandant hath ſuffered, by means of the wrong done to him by the defendant or tenant. *Cowell. Co. on Litt. fol.* 257. This word *damage* is taken in the law in two ſeveral ſignifications; the one *properly* and *generally*, the other *ſtrictly* and *relatively*; *properly* as it is in the caſes where damages are founded upon the ſtatute of 2 *H.* 4. *cap.* 1. and 8 *H.* 6. *cap.* 9. where coſts are included within this word *damages:* For *damage* in its proper and general ſignification, is derived *a demendo*, when a thing by diminution is made worſe; and in this ſenſe, coſts of ſuits are damages to the plaintiff, for by it his ſubſtance is diminiſhed. But when the plaintiff declares the wrong done to him, to the damage of ſuch a ſum, this is to be taken *relatively*, for the wrong which is paſſed before the writ brought, and are aſſeſſed by reaſon of the treſpaſs aforeſaid, and cannot extend to coſts of ſuit, which are future, and of another nature. See *Co. lib.* 10. *fol.* 116, 117.

Damages are a compenſation given by the jury for an injury or a wrong done the party before the action brought. *Co. Lit.* 257. 10 *Co.* 116.

1. *In what actions damages ſhall be recovered.*

2. *How much damages ſhall be recovered; and in what caſes double, treble, or quadruple damages ſhall be given.*

3. *Where the court may increaſe or mitigate the damages.*

1. *In what actions damages ſhall be recovered.*

At Common law no damages were recovered in any real action; for the detention of the poſſeſſion, *&c.* being the cauſe of damages, till the right to the land was determined, the party could not be ſaid to ſuffer any wrong; alſo the burthen of the feudal duties lay upon the tenant in poſſeſſion, and conſequently he was to receive the meſne profits until ſome other made out a better right, who after recovery might have maintained an action of treſpaſs. 10 *Co.* 116. *a.* 2 *Inſt.* 284. *Co. Lit.* 257. 2 *Rol. Abr.* 550. 11 *Co.* 51.

But in an aſſiſe, which is a mixt and compendious action, the diſſeiſee not only recovered his poſſeſſion, but alſo the meſne profits in damages. 8 *Co.* 50. *a.* 10 *Co.* 116. *a.*

In an action *againſt a reſcuer upon an alias capias* in *B. R.* the *plaintiff declar'd of a debt due to him, &c.* and had damages given him for his debt, becauſe by this reſcue he loſt it, though the writ is only in nature of a plea of treſpaſs, and though it was not ſhewn, that the reſcuer knew that the plaintiff would declare for this debt. But if in this caſe the ſheriff, *&c.* had ſuffered a negligent eſcape, he ſhould only be charg'd with the damages in the ſame plea, as the writ ſuppoſeth, and not for the debt. *Lane* 70, 71. *Trin.* 7 *Jac. in Scacc. Kent.* v. *Kelway.*

In an *account* a man ſhall recover damages upon the ſecond judgment. *Arg.* ſaid to be clear. *Mar.* 99. *in pl.* 171. *Trin.* 17 *Car. C. B.*

In an action of *debt* for 200*l. upon the ſtatute* 2 *Ed.* 6. *for tithes of lands in the pariſh of Ringſton, alias Royſton, the defendant pleaded the ſtatute* 31 *Hen.* 8. *and that the*

lands

lands were discharged in the hands of the prior of Mount Bretton, at the time of the dissolution, and issue joined upon the discharge; and upon trial at bar, *the defendant not making good his plea, the court ruled the value to be taken as confessed, because the issue is joined upon a collateral point.* And the *defendant took not the value by protestation*, and so the verdict was given for 200*l. but neither damages nor costs.* All. 88. Mich. 24 Car. B. R. Bowles *v.* Broadhead.

Attachment upon a prohibition, and the plaintiff declar'd, that the *defendant sued in the ecclesiastical court after a prohibition* granted, *for the profits of the office of register*, to the archdeacon of *Huntington*; judgment by default, and a writ of inquiry, and damages and costs tax'd; it was objected, that damages, *&c.* could not be given in a prohibition; but judgment for the plaintiff, for the damages and costs. 3 *Lev.* 360. *Pasch.* 5 *W. & M. in C. B. Heywood* v. *Foster.*

In case for *rescuing a distress for rent*, and Not guilty pleaded, verdict for the plaintiff whereupon he prayed his treble damages, on the statute 2 *W. & M. sess.* 1. *cap.* 5. But because he did *not shew that the distress was appraised, nor concluded contra formam statuti*, he could not recover them; and judgment accordingly. *Lord Raym. Rep.* 342. *Pasch.* 10. *W.* 3. *C. B. Anon.*'

Action brought in the court of *C. B. upon several promises; judgment by default*; writ of inquiry executed, and 424*l.* damages given, error brought in the court of *B. R. plaintiff in error did not proceed.* The court was moved upon 3 *Hen.* 7. *cap.* 10. that the defendant in error should, besides the costs, have interest allowed him, for the sum adjudged due to him, pending the time of writ of error, from the judgment. It was resolved by the whole court that the *defendant upon a writ of error brought into B. R. should not have interest allowed him by way of damages, for the sum adjudged due to him, from the time of the first judgment, pending the writ of error.* For at the time of making the statute 3 *H.* 7. *cap.* 10. which give damages upon the writ of error, all interest was reputed unlawful; and therefore that statute could not give it; in fact, when interest run highest, as at 10 *per cent.* interest has not been allowed. In writs of error brought into the Exchequer Chamber, interest is never allowed; and a uniformity in practice is to be wished and endeavoured. 10 *Mod.* 274, 278. *Hill.* 1 *Geo.* 1. *B. R. Halroi* v. *Ebizson.*

By the Common law, in every action of *debt*, damages are given *occasione detentionis debiti*, either by writ of inquiry, or by the court. *Parker* Ch. J. 10 *Mod.* 277. *Hill.* 1 *Geo. B. R.*

In all actions *ex delicto*, which are either trespasses founded on force, or upon fraud, in not performing of contracts, damages shall be recovered, and these are such actions as are said to sound only in damages. 2 *New. Abr.* 2.

Damages given for dower or quarentine, deforced where the husband died seised. *St.* 20. *Hen.* 3. *c.* 1.

Where a lord unjustly impleads the feoffment of his tenant suggesting the feoffment to be by fraud, to deprive him of wardship, the defendant shall have his damages and costs. *St. Marleb.* 52 *H.* 3. *c.* 6.

Damages shall be given to the party prevailing in a plea for suit of court. St. *Marleb.* 52 *H.* 3. *cap.* 9.

Damages shall be given against the tenant in a writ of entry *sur disseisin*, and in assise of *mordancester*, writ of *cosinage*, *aiel* and *besaiel*. St. *Glouceſter* 6 *Ed.* 1. *c.* 1. *Expos. St. Glouc.* 6 *Ed.* 1. Costs shall be given where damages are given. *Ibid.*

Damages given in *darrain presentment* and *quare impedit.* St. Westm. 2. 13 *Ed.* 1. *c.* 5. *s.* 3.

The recovery of damages shall not be hindred by a fradulent conveyance. 13 *El. c.* 5.

Damages to be assessed upon breach of condition of bonds. 8 *W.* 3. *c.* 11. *s.* 8.

2. *How much damages shall be recovered, and in what cases double, treble or quadruple damages shall be given.*

In all actions which sound in damages, the jury seem to have a discretionary power of giving what damages they think proper; for though in contracts the very sum specified and agreed on is usually given, yet if there are any circumstances of hardship, fraud or deceit, though not sufficient to invalidate the contract, the jury may consider of them, and proportion and mitigate the damages accordingly; as in case upon a policy of assurance, which was a cheat, for an old vessel was painted, and goods of no value put in the vessel and above 1500*l.* insured upon it, and then the ship was voluntarily sunk. So on an action brought on a promise of 1000*l.* if the plaintiff should find the defendant's owl; the court declared, though the promise were proved, that the jury may mitigate the damages; also on demurrer, by which the promise is confessed, the jury may consider of the circumstances and mitigate damages accordingly. 2 *New Abr.* 4.

The plaintiff declared upon an *assumpsit* to pay for an horse a barley corn a nail, doubling every nail, and avers, that there were thirty-two nails in every shoe, which doubling every nail, came to 500 quarters of barley; which being tried before *Hyde*, he directed the jury to give the value of the horse in damage, and accordingly they gave 8*l.* and held good. 1 *Lev.* 111. 1 *Keb.* 569. *S. C.* 6 *Mod.* 305. *S. P.*

In personal actions, the plaintiff shall recover damages only for the *tort* done before the action brought, and therein the plaintiff declares to his damage; but in a real action he recovers his damage, pending the writ, and therefore never accounts to his damage. 10 *Co.* 117. *a.* And though damages be given by statute, yet the old form remains. 2 *Inst.* 286.

Also in personal actions, the plaintiff shall recover no more than he hath counted for, although the jury give him more, for he best knows the measure of his wrong, and what he is intitled to. 10 *Co.* 116. *Owen.* 45. *Yel.* 45. *Cro. Eliz.* 544. 1 *Bulst.* 49.

In trespass for rescuing a distress, to his damage so much; if the defendant justifies the rescous upon special matter, upon which it was demurred for the plaintiff, he shall have damages as he hath counted for, for the defendant hath acknowledged the trespass, and hath not denied the damages. 1 *Rol. Abr.* 578.

Where the jury finds greater damages than the party declares for, the court may, to prevent error, give judgment for so much as the party declares for, *nullo habito respectu* to the rest, else the party may release the overplus, and take judgment for the rest. *Yelv.* 45.

Also, though the jury cannot regularly give the plaintiff more damages than he hath counted for, yet may they award him costs distinct and separate from the damages; and though such costs exceed the damages laid in the declaration, yet shall the plaintiff recover both; for the damages are given for the wrong, for which the action is brought, and the costs for the charge of the suit; the one before the suit, and the other in and for the suit. See 10 *Co.* 115. *b. Cro. Eliz.* 568. 2 *Rol. Rep.* 447. *Cro. J.* 69. *Yelv.* 70. 1 *Rol. Abr.* 578.

Ward brought an action against *Hatton Rich de Uxore abducta*, and keeping her from him *usque* such a day, which was some time after the exhibiting of the bill, and concluded *Contra formam statuti.* After verdict for the plaintiff, it was moved in arrest of judgment, and the declaration was held good, notwithstanding the impertinent conclusion of *Contra formam statuti*, there being *no statute in the case.* Secondly, the court resolved, that judgment should be stay'd; for the jury shall be intended to give damages for the whole time mentioned in the declaration. As in trespass, with a *continuando* to a day after the writ brought, the plaintiff shall have judgment after verdict, which gives damages by intendment for the whole time declared for. And *Twisden* said, These two cases were resolved; *A tradesman brought an action* in an inferior court *for slandering of him in his trade*, by which he *lost his custom within the jurisdiction of that court & alibi*, and it was held maintainable, notwithstanding the *alibi*; the other was an action brought upon the sale of several things for divers sums of money, *Quæ quidem pecuniarum summæ attingunt ad* 10*l.* whereas they came but to 9*l.* the jury gave damages less than 9*l.* and it was held good. But if the verdict had been for

for 10*l.* it had been naught. *Vent.* 103. *Mich.* 22. *Car.* 2. B. R. *Ward* v. *Rich.*

In *caſe* plaintiff *declared*, that the *ſecond of* July 6. W. 3. he was *poſſeſſed of a meadow* next *adjoining to a river*, and to *another cloſe contiguous to* the ſaid river, which time out of mind ran through his meadow to an ancient mill of the defendant's, without any over-flowing; that the *defendant the 3d of* Auguſt 6 W. 3. *enlarged* the foundation of his *mill* further into the river, whereby he *obſtructed the river*, and exalted the water, that it *drowned the plaintiff's meadow*, per quod *he loſt the uſe and profit thereof from the aforeſaid 2d day of* July *to the time of exhibiting the bill.* Not guilty pleaded, and verdict for the plaintiff. It was moved in arreſt of judgment, that intire damages are given to the plaintiff, and from the 2d of *July* to the 3d of *Auguſt*, he had no damages at all by his own ſhewing; and it ſhall not be intended, that the damages given by the jury are only for the time after the 3d of *Auguſt*, for the damages ſhall be underſtood to be given not according to law, but according to the allegation of the plaintiff, who layeth his damages; as reſolved in *Harbin* and *Green*'s caſe. *Hob.* 191. *Moor* 887. And firſt, all the court except *Rookby*, ſeemed to think it well enough; for it may be the plaintiff laid up his meadow for graſs from the 2d of *July*; but after judgment was arreſted; for *though he might loſe the profits from that time*, he notwithſtanding *could not loſe the uſe*; if he had ſaid (*uſum*) they might have given judgment for him. This caſe is the very ſame with *Harbin* and *Green*. Judgment arreſted. 12 *Mod.* 131. *Prince* v. *Molton.*

In treſpaſs, *aſſault, battery, and falſe impriſonment*, the plaintiff *declares, that the defendant aſſaulted, beat, and impriſoned the plaintiff, the firſt of* October 9 W. 3. *and detained him in priſon four months.* Upon not guilty pleaded, verdict for the plaintiff, and intire damages were given by the jury. It was moved in arreſt of judgment, that *the declaration was* a declaration of *Mich.* 9. *Will.* 3. *and therefore the damages being intire, and given for the impriſonment of four months from the firſt of* October, it appears that the damages *were given for impriſonment after the action was commenced.* And judgment was arreſted. *Lord Raym. Rep.* 329. *Paſch.* 10 *W.* 3. *Braſfield* v. *Lee.*

In an action *upon the ſtatute of* Wincheſter, in which the *plaintiff ſhewed he was robbed of a bank bill.* Upon evidence at the trial, ſummer aſſiſes, 10 *W.* 3. at *Brentwood* in *Eſſex*, before *Hatſell*, Baron of the Exchequer, he *directed the jury to give damages for the whole value of the bill*, which they did accordingly. *Ld. Raym. Rep.* 727. *Windler* v. *Chelmsford Hundred.*

Action upon the *caſe for diverting a water-courſe*, 1 Jan. 1 Geo. *and continuing it to* March 1715. *per quod the plaintiff loſt the benefit of the water-courſe abinde till Apr. tunc prox' ſequen'.* And after verdict for the plaintiff, it was moved in arreſt of judgment, that intire damages were given, when *part of the time was to come at the time of the trial*; ſed non allocatur; for *per cur. The time mentioned* March 1715, *not being then incurred, it was impoſſible*; for at the time of the action it was not poſſible that the diverſion of the water-courſe had continued till a time then not come; and therefore when he alledges, that he loſt the benefit of the water-courſe till *Apr' prox' ſequen'*, this is alſo impoſſible, *and therefore the jury could not have any conſideration of it.* Comyn's Rep 221, 232. pl. 129. Mich. 2 Geo. 1. Yalden *v.* Hubbard.

In an action of *treſpaſs* brought by the plaintiff in the court of *C. B. for entring on his* (the plaintiff's) *land, the 25th of* March 4 Geo. *with a* continuando *the ſaid treſpaſs to the 25th of* March 6 Geo. (which was two years), *&c. ad damnum, &c.* the defendant *juſtified, by the command of one* Green; the plaintiff *replied, and ſet forth a ſurrender made to him (the lands being copyhold) and that he was admitted a whole year before he brought this action of treſpaſs, &c.* and at a trial there was a verdict for the plaintiff; and the *jury gave damages for that year only, whereas the plaintiff had declared for two years damages*; and now, upon a writ of error brought, it was inſiſted, that though the plaintiff had a verdict, yet if the jury did not find enough, it is an inſufficient finding, and here they had found damages only for one year, where the plaintiff had declared for two years damages, and the jury cannot *ſever the damages for which the plaintiff had declared*; but this was over-ruled by the court, and the judgment affirmed. 8 *Mod.* 78, 79. *Trin.* 8 *Geo. Moor* v. *Thompſon.*

A judgment in *C. B.* was reverſed, becauſe the jury, on the writ of inquiry, had given damages *for a longer time than laid* in the declaration, and *alſo to a time after the writ of inquiry was executed.* 2 Ld. Raym. Rep. 1382. Paſch. 11 Geo. 1. B. R. Baker *v.* Bache.

The judge *certified the damages* (which were 50*l.*) *to be exceſſive*; *but the action appearing to be* brought for a very *malicious* proſecution *for felony*; *and the plaintiff having been impriſoned*, and tried for felony, *the court were of opinion, that* in the nature of the thing, *the damages appeared to be moderate*, and therefore refuſed to grant a new trial. *Barnes's Notes in C. B.* 312, 313. *Mich.* 7 *Geo.* 2. *Anon'.*

Double damages given,

In treſpaſs againſt eccleſiaſtical perſons, 3 *Ed.* 1. *c.* 1.

Againſt officers guilty of unwarrantable diſſeiſins, 3 *Ed.* 1. *c.* 24.

Againſt bailiffs for attaching perſons out of their juriſdiction, 3 *Ed.* 1. *c.* 35.

Where againſt diſſeiſors in aſſiſe, 13 *Ed.* 1. *c.* 25. 1 *Rich.* 2. *c.* 9.

In writs of re-diſſeiſin, 13 *Ed.* 1. *c.* 26.

Againſt perſons pleading jointenancy in abatement of aſſiſe, 34 *Ed.* 1. *ſt.* 1.

Againſt perſons diſturbing merchants, 19 *Ed.* 3. *ſt.* 1. *c.* 1. 2 *R.* 2. *ſt.* 1. *c.* 1.

Againſt the King's butler taking more wine than appointed, 25 *Ed.* 3. *ſt.* 5. *ſ.* 21.

Againſt officers of the foreſt for illegal impriſonments, 7 *R.* 2. *c.* 4.

Againſt buyers and ſellers of wool by undue weight, 13 *R.* 2. *c.* 9.

For illegal proſecution in the Admiralty, 2 *Hen.* 4. *c.* 11.

Againſt diſſeiſor in ſpecial aſſiſe, 4 *H.* 4. *c.* 8.

Againſt perſons aſſaulting members of parliament, 11 *H.* 6. *c.* 11.

Againſt perſons ſeizing goods of felons before conviction, 1 *R.* 3. *c.* 3.

Againſt officers citing perſons out of their dioceſe, 23 *H.* 8. *c.* 9. *ſ.* 3.

For withdrawing tithes, *&c.* 2 & 3 *Ed.* 6 *c.* 13. *ſ.* 2.

Againſt offenders guilty of forgery, 5 *El. c.* 14. *ſect.* 2, 3.

Againſt perſons making wrongful diſtreſs, 2 *W.* & *M. ſt.* 1. *c.* 5. *ſ.* 5.

Againſt officers making falſe or double returns, 7 & 8 *W.* 3. *c.* 7. *ſ.* 2, 3.

Againſt officers of Exchequer not keeping account of monies appropriated to bank, 8 & 9 *W.* 3. *c.* 20. *ſ.* 37.

For perſons ſuffering by non-attendance of officers of the Exchequer, 8 & 9 *W.* 3. *c.* 28. *ſ.* 4.

Againſt perſons making undue payment to workmen, 1 *Ann. ſt.* 2. *c.* 18. *ſ.* 3. and againſt workmen guilty of frauds, *Ibid.*

Againſt commiſſioners neglecting to make payment according to 2 *Ann. c.* 3. *ſ.* 5.

Againſt perſons hindering the ſaving a ſhip in diſtreſs, 12 *Ann. ſt.* 2. *c.* 18. *ſ.* 3.

Againſt perſons concealing bankrupts effects, 5 *Geo.* 2. *c.* 30. *ſ.* 21.

Againſt perſons claiming debts of bankrupts falſely, 5 *Geo.* 2. *c,* 30. *ſ.* 29.

Againſt workmen in leather imbeziling materials, 13 *Geo.* 2. *c.* 8.

Or guilty of neglect, *&c. Ibid. ſ.* 6.

Treble damages given,

For waſte againſt tenant for life, *&c. St. Glouc.* 6. *Ed.* 1. *c.* 5.

Againſt

Aainſt offenders convicted of maintenance, 13 *Ed.* 1. *c.* 36.

Againſt eſcheators taking undue fees, *&c.* 36 *Ed.* 3. *c.* 13.

Againſt ſheriffs, *&c.* not ſhewing eſtreats, 42 *Ed.* 3. *c.* 9.

For diſſeiſees againſt patentees before title found, 1 *H.* 4. *c.* 8.

Againſt cyrographers, *&c.* taking more than their fees, 2 *H.* 4. *c.* 8.

Againſt officers of marſhalſea, taking more than their fees, 2 *H.* 4. *c.* 23.

Againſt accountants guilty of fraud, 6 *H.* 4. *c.* 3.

Perſons grieved by proviſions, 3 *H.* 5. *c.* 4.

For forcible entry or detainer, 8 *H.* 6. *c.* 9. *ſ.* 6.

For perſons ſued for acting under commiſſion of ſewers, 23. *H.* 8. *c.* 5. *ſ.* 12.

Againſt treſpaſſers for cutting off water, *&c.* maiming cattle, *&c.* 37 *H.* 8. *c.* 6. *ſ.* 4. 22 & 23 *Car.* 2. *c.* 7. *ſ.* 5.

For not ſetting forth tithes, 2 & 3 *H.* 6. *c.* 13. *ſ.* 1.

For undue impounding of diſtreſs, 1 & 2 *P.* & *M.* *c.* 12. *ſ.* 1.

Againſt offenders againſt game-laws, 5 *El.* *c.* 21. *ſ.* 2, 3. 22 & 23 *Car.* 2. *c.* 25. *ſ.* 4, 7.

Againſt ſuch as ſue in fictitious names, or in another's name without his conſent, 8 *El.* *c.* 2. *ſ.* 4.

For perſons ſued for acting under poor laws, 43 *El.* *c.* 2. *ſ.* 19. 13 & 14 *Car.* 2. *c.* 12. *ſ.* 20.

Againſt attornies delaying clients ſuits, *&c.* 3 *Jac.* 1. *c.* 7. *ſ.* 1.

For perſons acting under the act for conveying malefactors, *&c.* to gaol, 3 *Jac.* 1. *c.* 10. *ſ.* 3.

Againſt offenders unlawfully hunting in parks, *&c.* 3 *Jac.* 1. *c.* 13. *ſ.* 2.

Againſt monopoliſts, 21 *Jac.* 1. *c.* 3. *ſ.* 4.

For offences againſt the act taking away the Star chamber, 16 *Car.* 1. *c.* 10. *ſ.* 7, 8.

Againſt perſons taking unlawful purveyance, 12 *Car.* 2. *c.* 24. *ſ.* 14.

For pound-breach and reſcous, 2 *W.* & *M.* *ſt.* 1. *c.* 5. *ſ.* 4.

Againſt perſons receiving payments after the death of their nominee, 4 *W.* & *M.* *c.* 3. *ſ.* 16. 5 *W.* & *M.* *c.* 5. *ſ.* 4. 2 *Ann.* *c.* 3. *ſ.* 25.

Againſt officers demandtng fees, *&c.* 4 *W.* & *M.* *c.* 3. *ſ.* 17. 2 *Ann.* *c.* 3. *ſ.* 26. 3 *Ann.* *c.* 2. *ſ.* 12. 6 *Geo.* 1. *c.* 11. *ſ.* 34.

Againſt members of the Bank lending money to the Crown on funds, not having clauſe of credit, 5 & 6 *W.* & *M.* *c* 20. *ſ.* 30.

Againſt mayors, *&c.* not marking meaſures, 11 & 12 *W.* 3. *c.* 15. *ſ.* 5.

Againſt controller of ſtamp duties for unjuſt charge, 1 *Ann.* *ſt.* 2. *c.* 22. *ſ.* 11.

Againſt regiſter neglecting duty, 2 *Ann.* *c.* 4. *ſ.* 14. 7 *Ann.* *c.* 20. *ſ.* 4.

Againſt offenders ſtealing goods from ſhips in diſtreſs, 12 *Ann.* *ſt.* 2. *c.* 18. *ſ.* 4.

Againſt unlawful undertakers by publick ſubſcription, 6 *Geo.* 1. *c.* 18. *ſ.* 20.

Extended to *America*, 14 *Geo.* 2. *c.* 37. *ſ.* 1.

For deſtroying *Chelſea* water-works, 8 *Geo.* 1. *c.* 26. *ſ.* 2.

Againſt offenders concealing run goods, 11 *Geo.* 1. *c.* 30. *ſ.* 16.

Againſt offenders drowning coals, 13 *Geo.* 2. *c.* 21. *ſ.* 1.

Againſt officers of cuſtoms, *&c.* imbeziling goods performing quarantine, 26 *Geo.* 2. *c.* 6. *ſ.* 11.

Quadruple damages given,

Againſt ſheriffs, *&c.* wrongfully moleſting merchants, 27 *Ed.* 3. *ſt.* 2. *c.* 26.

Againſt perſons ſelling by under-weight and meaſure, 27 *Ed.* 3. *ſt.* 2. *c.* 10.

Againſt workmen in leather imbeziling materials, the ſecond offence, 13 *Geo.* 2. *c.* 8.

3. *Where the court may increaſe or mitigate the damages.*

In all actions at *niſi prius*, where damages are the principal, as the court can have no certain conuzance of the cauſe, either by record or other matter apparent, they can neither mitigate nor increaſe the damages. 1 *Rol. Ab.* 572.

In treſpaſs for cutting his trees, upon Not guilty pleaded, the court cannot increaſe the damages given by the jury, becauſe it lies not in their conuſance. 3 *Hen.* 4. *c.* 4. *Bro. Coſts* 7.—Nor can they diminiſh them, becauſe the treſpaſs is local, and it cannot appear to them what the damage was. 1 *Brownl.* 204.—So in caſe for words, though the court thought the damages exceſſive, yet they would not mitigate them. *Palm.* 314. And though at firſt they inclined to do it, yet upon great conſideration they reſolved to leave ſuch matters of fact to the trial of a jury, who beſt know the quality and eſtate of the perſon and the damages he hath ſuſtained.

But in battery *pro amputatione manus dextræ*, the court may increaſe the damages, for it is apparent to the court by the record and view of the perſon. 1 *Rol. Abr.* 572.

So in treſpaſs, if judgment be given upon *nihil dicit*, and a writ of inquiry of damages ſerved, the court may increaſe or diminiſh the damages found by the inqueſt; for that they might have awarded damages acording to their diſcretion, without ſuch writ, adjudged in an action of aſſault, battery and wounding; the manner of doing thereof being ſpecially laid in the declaration, tho' the inqueſt gave 200*l.* damages, yet upon examination of ſurgeons, and upon view of the wound in court, and for the heinouſneſs of the fact, being done in the high ſtreet in the day-time with a *ſtilletto* with an intent to kill him; and the ſurgeon by agreement being to have 150*l.* for the cure; the plaintiff being in great danger of death, and having loſt a pottle of blood, as the ſurgeons ſaid, the court increaſed the damages to 400*l.* *in toto*; and judgment given accordingly. 19 *Hen.* 6. 10. 1 *Rol. Abr.* 573.

In treſpaſs for an aſſault and battery againſt *A.* and *B.* *A.* appeared, *&c.* and a verdict was given againſt him, and damages taxed to 30*l.* and the court upon view of the mayhem increaſed the damages to 40*l.* and after a verdict was given againſt *B.* and damages taxed; and then it was moved that the court, upon another view of the wound, would increaſe damages againſt *B.* for that *A.* had murdered the officer that came to ſerve the execution upon him for the 40*l.* ſo that poſſibly the plaintiff might recover nothing againſt *A.* But it was denied by the court, for that they could have the view but once in the ſame action; tho' if he had brought ſeveral actions, it would have been otherwiſe; but the court directed the plaintiff to ſtay till *A.* was hanged, and then they might have the view and increaſe the damages. *Lit. Rep.* 51, 52.

In treſpaſs *Quare inſultum fecit et maletractavit* the wife of the plaintiff, *et equam*, upon which the wife rode, *percuſſit*; ſo that the wife was thrown, and another trod upon her, *per quod* ſhe loſt the uſe of three fingers, *&c.* there was a verdict for the plaintiff and 8*l.* damages; and the court refuſed to increaſe the damages upon view of the mayhem and hearing ſurgeons, becauſe there was no mayhem or wounding directly done by the party, but rather by accident, *viz.* by the coming, *&c.* of another horſe, which whether he came, *&c.* or the wife might have avoided him, is matter of evidence. 1 *Sid.* 433.

In treſpaſs for taking his goods to the damage of 20*l.* if the defendant pleads an arbitrament made in another county, and this is tried againſt the defendant, and damages aſſeſſed for the treſpaſs; yet inaſmuch as this foreign jury could not have a full conuzance of the treſpaſs, and the defendant hath not denied the damage to be according to the count, the court with the aſſent of the plaintiff may increaſe the damages, and to ſo much as the plaintiff hath counted. 1 *Rol. Abr.* 578.

On ſtat. of *Weſt.* 2. 13 *Ed.* 1. *c.* 12. which gives damages to an appellee on a falſe and malicious appeal; if the jury gives too great damages, the court may abridge them; or

or if they give too ſmall damages, the court may increaſe them; for after the acquittal of the appellee, their inquiry as to damages is to be conſidered only as an inqueſt of office; alſo the words of the ſtatute are, *Damages ſhall be given* to the diſcretion of the juſtices, &c. 2 *Hawk. P. C.* 201.

Adjudged in action of *aſſault*, &c. that where the plaintiff *declares of a wounding by the word maihemiavit*, it is clear the damages may be increaſed, though damages are given by the jury. 3 *Salk.* 115. *pl.* 6. *Cook* v. *Beale.*

So it is *where the plaintiff ſets forth a wound ſo particular in his declaration, that by the deſcription it appears to be a maihem*; and *ſo* it is *where the wound is viſible and apparent*; and this may be done, whether damages be given by the jury upon an iſſue joined, or upon a writ of inquiry. 3 *Salk.* 115. *pl.* 7. *Cook* v. *Beale.*

But this increaſe of damages *muſt be given by the courts at Weſtminſter upon view* of the wounding, *or upon affidavits* made thereof; and *it cannot be done by the juſtices of* niſi prius, *who, if the wound is very great, muſt indorſe the evidence on the poſtea, and upon ſuch evidence the damages will be increaſed, though the wound was not ſet forth in the* maihemiavit *in the declaration.* 3 Salk. 115. S. C.

And *ſo* it is *without ſuch indorſement, where the caſe was tried before a judge of that court, where the motion is made* for increaſe of damages. 3 *Salk.* 115. *pl.* 8. *Cook* v. *Beale.*

Treſpaſs, *aſſault and battery.* The plaintiff *declares, that the defendant cum manu ſua ipſum* Thomam Cook *ſuper ſiniſtrum oculum percuſſit* et violavit, *ita quod* the ſaid Thomas Cook, *viz.* the plaintiff, *penitus inhabilis devenit ad ſcribendum vel legendum, being an officer of the exciſe*, &c. Not guilty pleaded, verdict for the plaintiff. And *Birch* ſerjeant, moved that the court would increaſe the damages, upon affidavit, that the plaintiff had loſt his eye. But the court ordered the plaintiff to appear in court in perſon, for otherwiſe they could not increaſe the damages; upon which the plaintiff was brought into court. And afterwards the court, after ſeveral motions reſolved, that the *court may increaſe the damages, if the wound be apparent, though it be not a maim.* And ſo it was done in the caſe of the lord *Foliot.* Therefore in this caſe, becauſe the wound is viſible, though it be no mayhem, (for it is not a mayhem, becauſe the eye is not wholly out, but the plaintiff only declares, *Quod inhabilis ad legendum vel ſcribendum devenit* by the wound,) yet damages may be increaſed. And *Powell* J. ſaid, that *Holt.* Ch. J. was of that opinion. *Ld. Raym. Rep.* 176. *Hill.* 8 & 9 *W.* 3. *Cook* v. *Beale.*

So (per Powell J.) though *the loſs of a noſe* is not a mayhem to bring an action *felonice* for the loſs of it, yet the court may in ſuch caſe increaſe the damages. *Ibid.*

And he ſaid, that the *court might increaſe the damages upon a writ of inquiry*, becauſe that was an inqueſt of office. And *Sty.* 345. 1 *Le.* 139. *Bend.* 158. *Litt. Rep.* 51. *Hutt* 121. 53. 1 *Sid* 423. 1 *Mod.* 24. were cited, and a caſe between *Smally* and *Babington*, where in a general action of aſſault, battery and wounding, upon view the damages were increaſed about four years ago, upon the motion of ſerjeant *Lovell. Lord Raym. Rep.* 176. *Hill* 8 & 9 *W.* 3. *Cook* v. *Beale.*

Jury gave the defendant 80 *l. damages*; and upon a motion in arreſt of judgment, becauſe the damages were exceſſive, it was oppoſed by the plaintiff's counſel, and inſiſted, that he might have the benefit of the verdict, which was granted, and accordingly the plaintiff had judgment. 8 *Mod.* 296. *Trin.* 10 *Geo.* 1725. *Herbert* v. *Morgan.*

On a contract for ſtock between the plaintiff and *J. S.* they each depoſit 200 *l.* in the hands of the defendant, and *J. S.* not performing his agreement, the plaintiff ſues for the depoſit, and had judgment on demurrer, and took out a writ of inquiry, and proved his caſe; but the jury, on a notion that the defendant could not pay out the money without conſent of both parties, gave 1 *d.* damages; which was now ſet aſide, the court ſaying, that the rule of not ſetting aſide verdicts for the ſmallneſs of the damages did not extend to this caſe, where the jury miſtook in point of law; and the Chief Juſtice ſaid, he knew no reaſon why the court ſhould not interpoſe in the other caſe. *Stran.* 425.

For more learning concerning Damages in general, ſee 7 Vin. Abr. *and* 2 Bac. Abr. *tit.* Damages.

Damage cleer, *(Damna clericorum)* Was a fee aſſeſſed of the tenth part in the *Common Pleas*, and the twentieth part in the *King's Bench* and *Exchequer*, of all *damages*, (exceeding five marks) recovered either by verdict, confeſſion, or judgment of the court, in all actions upon the caſe, covenant, treſpaſs, battery, falſe impriſonment, dower, and all others, wherein the *damages* are uncertain, which the plaintiff muſt pay to the *prothonotary*, or chief officer of that court, wherein they are recovered, before he ſhall have execution for them. This was no other originally than a gratuity given to the *prothonotaries* and their clerks for drawing ſpecial writs and pleadings, which afterwards grew to a certainty; and was, as ſome have fancied, of old, a tenth part of the *damages* recovered: For it appears by ancient records, that it hath been uncertain, ſometimes a ſixth, and at other times a third part. This is taken away by 17 *Car.* 2. *cap.* 6. *ſect.* 2. by which it is enacted, That no *damage cleer* ſhall be taken in any action ſued in any of his Majeſty's courts; and the ſaid fee of *damage cleer* ſhall be aboliſhed: And if any officer ſhall take any money in the name of *damage cleer* or in lieu thereof; or ſhall delay to ſign any judgment until *damage cleer* be paid; he ſhall forfeit treble the ſum ſo taken or demanded to the party grieved.

Damage feaſant, or **faiſant,** That is, doing hurt or *damage*; and is when a ſtranger's beaſts are in another man's ground, without licence of the tenant of the ground, and there do feed, tread and otherwiſe ſpoil the corn, graſs, woods, and ſuch like: In which caſe the tenant, whom they *damage*, may therefore take, diſtrain, and impound them, as well in the night as in the day. But in other caſes, as for rent and ſervices, and ſuch like, none can diſtrain in the night. Stat. *De Diſtrictione Scaccar. an.* 51 *Hen.* 3. 1 *Inſt.* 142.

If a man takes my cattle, and puts them into the land of another, the tenant of the land may take theſe cattle *damage-feaſant*, though I who was the owner, was not privy to the cattle's being there *damage-feaſant*; and he may keep them againſt me till ſatisfaction of the damages. 2 *Danv. Abr.* 364. But if one comes to diſtrain *damage-feaſant* and to ſeize the cattle, and the owner drives them out before they are taken, he cannot deſtrain them *damage-feaſant*, but is put to his action of treſpaſs; for the cattle ought to be actually upon the land *damage-feaſant*, at the time of the diſtreſs. 1 *Inſt.* 161. 9. *Rep.* 22. He that hath but the poſſeſſion of, and no title to land, may juſtify taking a diſtreſs *damage-feaſant*. *Plowd.* 431. If a man puts cattle to paſture at ſo much a week with another, who after gives notice that he will not have them there any longer, in this caſe, the owner of the ground may diſtrain them *damage-feaſant*, though the cattle be in lawfully at firſt: So where a leſſee holds after his eſtate is ended. 43 *Edw.* 3. *Kelw.* 69. Beaſts belonging to the plough, or beaſts of huſbandry, ſheep, horſes joined to a cart, and 'tis ſaid a horſe with a rider on it, may be deſtrained *damage-feaſant*, though not for rent. 1 *Sid.* 422, 440. But the owner may tender amends, before the cattle are impounded; and then the detainer is unlawful: Alſo if when impounded the pound door is open, the owner may take them out. 5 *Rep.* 76. A greyhound may be taken *damage-feaſant*, running after conies in a warren. So a man may take a ferret that another hath brought into his warren, and taken conies with. If a perſon bring nets and gins through my warren, I cannot take them out of his hands. 2 *Danv.* 633. But if men are rowing up my water, and endeavouring with nets to catch fiſh in my ſeveral piſcary, I may take their oars and nets, and detain them as *damage-feaſant*, to ſtop their further fiſhing; though I cannot cut their nets. *Cro. Car.* 228. See **Diſtreſs.**

Damiſella, A light damoſel, a miſs.——Willielmus Hoppeſhort *tenet dimidiam virgatam terræ in* Bockhamton

de domino rege, per ſervitium cuſtodiendi ſex damiſellas, *ſcil. meretrices, ad uſum domini regis*, 12 *Ed.* 1. *i. e.* by pimp-tenure. See *Blount's Tenures, pag.* 39.

Damnum, *Infra damnum ſuum*, within the bounds, or limits of his own property or juriſdicton.—*Si quis invenerit in* damno ſuo *aucas, gallinas aut capras, &c.* Bract. lib. 2. de Coron. ca. 37.——*Animalia in* damnis *dictorum fratrum inventa.* Mon. Angl. tom. 2. p. 862. Hence a *dam*, a boundary or confinement; to dam up, to dam out.

Dan. The better ſort of men had the title of *dan*, as the Spaniards *don*, from the Latin *dominus*.

Dane. See **Rivers.**

Danegelt, or **Dane-geld**, (Gelt in *Dutch* ſignifies money) Was a tribute laid upon our anceſtors of 1 *s.* for every hide of land, through the realm, for clearing the ſeas of *Daniſh* pirates, which heretofore greatly annoyed our coaſts. *Camb. Britan.* 142. King *Etheldred* being much diſtreſſed by the continual invaſion of the *Danes*, to procure his peace, was compelled to charge his people with heavy payments, called *danegelt*. As firſt he paid 10,000 *l.* then 16,000 *l.* then 24,000 *l.* after that 36,000 *l.* and laſtly, 48,000 *l.* to the *Danes*. This *danegelt* was releaſed by St. *Edward* the Confeſſor, but levied again by *William* the Firſt and Second; Releaſed by *Henry* the Firſt, and finally by King *Stephen*. See *Hoveden, par. poſt. Annal. fol.* 344. *a. Spelman's Gloſſarium*, and *Selden's Mare Clauſum. fol.* 196.——*Et ſint quieti de Lene, Danegeld & Gaywithitne & de omnibus aliis conſuetudinibus, &c.* Charta Hen. 7. Ballivis & Burgenſ. Mountgomer.

Danelaga. See **Merchenlage.**

Danger, *Dangeria.* A payment in money, made by the foreſt-tenants to the lord, that they might have leave to plough and ſow in time of *pannage*, or maſt-feeding; in ſome places called lyef-ſilver, and *lef-ſilver*.

Danmonii. *Cornwall* and *Devonſhire.*

Danmoniorum promontorium, The *Lizard in Cornwall.*

Danum, *Doncaſter* in *Yorkſhire.*

Dapifer *A dapes ferendo.* At firſt a domeſtick officer, like our *ſteward of the houſhold*, or rather *clerk of the kitchen*; then by degrees, any fiduciary ſervant, eſpecially the chief ſteward or head bailiff of any honour, barony, or manor. There is mention made in our records of *dapifer regis*, which is taken for *ſteward of the King's houſhold.*

Dardus, *i. e.* A dart. In *Wales* an oak is called *dar*, and *dart* is *telum.*

Scuta tonant, dardique volant.

Dare ad remanentiam, (*Glanvil, lib.* 7. *cap.* 1.) To give away in fee, or for ever. See **Remainder.**

Darreine, Is a corruption from the French *deriner*, *i. e. ultimus*: And we uſe it in the ſame ſenſe; as

Darrien continuance. See **Continuance.**

Darrein preſentment, *Ultima præſentatio.* See **Aſſiſe of Darrein preſentment.**

Darweut. See **Rivers.**

Date of a deed, Is the deſcription of the time, *viz.* the day, month, year of our Lord, year of the reign, *&c.* in which the deed was made. 1 *Inſt.* 6. The ancient deeds had no dates, but only the month and the year, to ſignify that they were not made in haſte, or in the ſpace of a day, but upon longer and more mature deliberation; and the King's grants began with theſe words, *Præſentibus & futuris, &c.* But the grants of the common perſons began with *Omnibus præſentes literas inſpecturis, &c. Cowell, edit.* 1727.

If in the *date* of a deed, the year of our Lord is right, though the year of the King's reign be miſtaken it ſhall not hurt it. *Cro. Jac.* 261. A deed was *dated* the 30th of *March* 1701 without *Anno Domini* and *Anno Regni*; and it was adjudged, that both the year of the Lord and of the King were implicitly in the deed. 2 *Salk.* 652. A deed is good, though it hath no *date* of the day or place, or if the *date* be miſtaken, or though it hath an impoſſible *date*, as the 30th of *February, &c.* But he that doth plead ſuch a deed, without any *date*, or with an impoſſible *date*, muſt ſet forth the time when it was delivered. 2 *Rep.* 5. 1 *Inſt.* 46. If no *date* of a deed be ſet forth, it ſhall be intended that it had none; and in ſuch caſe it is good from the delivery; for every deed or writing hath a date in law, and that is the day on which it is delivered: And a deed is no deed till the delivery, and that is the *date* of it. *Mod. Ca.* 244. 1 *Nelſ. Abr.* 525. An impoſſible *date* of a bond, *&c.* is no date at all; but the plaintiff muſt declare on the bond as made at a certain time: And if the expreſs *date* be inſenſible, the real date is the delivery. 2 *Salk.* 463. where there is none, or an impoſſible *date*, the plaintiff may count of any *date.* 1 *Lill. Abr.* 393. If there be a miſtaken *date*, or a *date* be impoſſible, *&c.* the plaintiff may ſurmiſe a legal *date* in the declaration, whereupon the defendant is to anſwer to the deed, and not to the date. *Yelv.* 194. If a deed bears *date* at a place out of the realm, it may be averred that the place mentioned in the deed, is in ſome county in *England*; and here the place is not traverſable; without this the deed cannot be tried. 1 *Inſt.* 261. A deed may be *dated* at one time, and ſealed and delivered at another: But every deed ſhall be intended to be delivered on the ſame day it bears date, unleſs the contrary is proved. 2 *Inſt.* 674. Though there can be no delivery of a deed before the day of the date; yet after there may. *Yelv* 138. So that a deed may be *dated* back on a time paſt, but not at a day to come. See **Deed.**

Dates, Is the fruit of the tree, in *Latin* called *palma*, in *Engliſh* the *date-tree*; of which ſee *Gerard's Herbal, lib.* 3. *cap.* 31. They are numbered among the ſpices and drugs to be garbled. 1 *Jac. c.* 19.

Dative, or **Deatife**, That may be given, or diſpoſed at will and pleaſure.——*Whether a prior ſhall be* datife, *and removeable, or perpetual, ſhall be tried by the ordinary.* Anno 9 Rich 2. cap. 4. *Si prior* datife *& removeable, ſuffer eſcape, reſpondeat ſuperior.* 45 Ed. 3. 9, 10.

David, *St. David's head.* See **Octopitarum promontorium.**

Davis's Streights. Whale-fins, *&c.* or fiſh caught in *Davis's Streights*, may be imported by *Britiſh* ſubjects, 12 *Geo.* 1. *c.* 26. *ſect.* 7. See **Greenland** *and* **Whales.**

Dawach, *Dovata Terræ*, A portion of land in *Scotland* ſo called.——*Apud priſcos* Scotos, one *Dawach* of land, *quod continet quatuor aratra terræ, quorum unumquodque trahitur octo bobus.* Skene.——*Non fiet taxatio juxta numerum* davatarum, *ſeu baroniarum; ſed ſecundum verum valorem bonorum.* Statut. David. Reg. Scot. cap. 48.

Day, (*Dies*) Is a certain ſpace of time, containing twenty-four hours; and if a fact be done in the night, you muſt lay in law proceedings *in nocte ejuſdem diei. Dierum alii ſunt* naturales, *alii* artificiales: *Dies* naturalis *conſtat de* 24 *horis, & continent diem ſolarem & noctem, & eſt ſpatium in quo ſol progreditur ab oriente in occidentem, & ab occidente iterum in orientem: Dies* artificialis *ſive ſolaris incipit in ortu ſolis, & definit in occaſu.* 1 Inſt. 135. By this deſcription, the *natural day* conſiſts of twenty-four hours, and contains the ſolar *day* and the night: and the *artificial day* begins from the riſing of the ſun, and ends when it ſets.

Day, *Dies*, Is ſometimes uſed in the law for the *day* of appearance in court, either originally, or upon aſſignation; and ſometimes for the returns of writs. For example, *Days in bank* are days ſet down by ſtatute, or order of the court, when writs ſhall be returned, or when the party ſhall appear upon the writ ſerved. *Cowell.*

The day in leap-year, and the next before, accounted one, 21 *Hen.* 3. *ſt.* 1.

The common days of continuance in real actions and dower, 51 *Hen.* 3. *ſt.* 2. *& ſt.* 3.

In dower *unde nihil habet*, darrain preſentment and *quare impedit*, 52 *Hen.* 3. *cap.* 12.

The abbreviation and alteration of *Trinity* term, 32 *Hen.* 8. *cap.* 21.

Abbreviation of *Michaelmas* term, 16 *Car.* 2. *c.* 6.

In

In dower after iſſue joined, it is ſufficient to have 15 days between the *teſte* and return, 16 *Car.* 1. *c.* 6. *ſ.* 6.

The return *in craſtino aſſenſionis* is made a perfect return, 16 *Car.* 1. *c.* 6. *ſ.* 7.

Perſonal actions may be continued from the *Tres Michaelis* to the *craſtino animarum*, 16 *Car.* 1. *c.* 6. *ſ.* 8.

Writs of *Summoneas ad Warrantizandum* for common recoveries, and writs of right of advowſon, abridged to five returns, 16 *Car.* 1. *cap.* 6. *ſ.* 10.

In perſonal actions after iſſue joined there need not be 15 days between the *teſte* and return, except *in capias* to charge the bail, or to found an outlawry, 13 *Car.* 2. *ſt.* 2. *c.* 2. *ſ.* 6 & 7.

The feaſt of *Eaſter*, and all moveable feaſts thereupon depending, ſhall be obſerved according to the new calendar, 24 *Geo.* 2. *c.* 25. *ſ.* 3.

The farther abbreviation of *Michaelmas* term, 24 *Geo.* 3. *c.* 48.

In dower after iſſue joined there need not be above 15 days between the *teſte* and return of the *venire*, *&c.* 24 *Geo.* 2. *c.* 48. *ſ.* 4.

Proceſs teſted the laſt day of *Eaſter* term may be returnable on the morrow of *Trinity*, 24 *Geo.* 2. *c.* 48. *ſ.* 5.

Writs of ſummons to warrantry may have four returns incluſive, 24 *Geo.* 2. *cap.* 41. *ſ.* 8.

For other matters, ſee **Dower**, **Summons**, and **Term**

To be diſmiſſed without *day*, is to be finally diſcharged the court. *Kitchin*, *fol.* 193. He had a *day* by the roll, *Id. fol.* 197. that is, he had a *day* of appearance aſſigned him. *Day*, *year*, and *waſte*. See **Dies** and **Year**.

Day-light. In reſpect to *day-light*, before *ſun riſing*, and after *ſun ſetting*, is accounted part of the day by the Common law; as to *robberies* committed in the day-time, when the *hundred* is liable. 7 *Rep.* 6. The law regularly rejects all fractions and diviſions of a *day*, for the incertainty. 5 *Rep.* 1. 1 *Inſt.* 135.

Day-rule. See **Day-writ.**

Day-writ. The King may *grant writ of Warrantia diei* to any perſon, which ſhall ſave his default *for one day*, be it *in plea of land*, *or other action*, and be the cauſe true, or not; and this by his prerogative, *quod Nota. Br. Prerogative*, *pl.* 142. cites *F. N. B.* 7.

'Tis againſt law to grant liberty to *priſoners in execution*, by other writs than day-wtits; but they ſhall have as many day-writs as ſhall be needful for attendance on commiſſioners, to whom the cauſe being matter of account was referred, and that without paying any fees, either for making or ſealing them. *Chan. Rep.* 67. 9. *Car.* 1. *Regault* v. *Clobery.*

No priſoner *committed by B. R.* ought to have the benefit of the day-rule of going abroad in term-time, for their impriſonment is their puniſhment for their contempt, or miſbehaviour. 2 *Show.* 88. *pl.* 80. *Hill.* 31 & 32 *Car.* 2. *B. R. The King* v. *Deane.*

One in execution had a *habeas corpus from the lord keeper* (which they call a day-writ) *returnable three or four days after its teſte.* By virtue of this writ, he went to the Wine-Licence Office, but never to any inn of court or Chancery, or to the lord keeper's, and this in the vacation. *Per Pemberton* Ch. J. This is a *habeas* out of Chancery, which they may ſend at any time, and by virtue of the King's writ, the party was brought out of the priſon-houſe, and that is juſtifiable. Then all the day, *ſo long as there was a keeper with him*, he was *in* cuſtody ſtill, and returning to priſon at night, it is well enough, and no eſcape; though Chancery may examine the contempt, that is nothing to *B. R.* 2 *Show.* 298. *pl.* 299. *Paſch.* 35 *Car.* 2. *B. R. Harwood* v. *Manlove.*

A priſoner taken on an *eſcape warrant before the ſitting of the court* the ſame day, ſhall be diſcharged, if his name was entred with the clerk the night before; but not if it was entred the ſame morning only; and in the firſt caſe the proſecutor ſhall be committed. 8 *Mod.* 80. *Trin.* 8 *Geo. Wilkinſon* v. *Matthews.*

Entry of the name in the petition for a day-rule, ſignifies little, unleſs it be *read in court.* 8 Mod. The King *v.* Dunbar.

Days-man, In ſome Northern parts of *England*, any arbitrator, umpire or elected judge, is commonly termed a *dies-man*, or *days-man.* Dr. *Hammond*, in his Annotations on *Heb.* 10, 25. obſerves, that the word *aay*, in all *idioms*, doth ſignify *judgment.* And on this occaſion, it may not be improper to obſerve, that the addition of *dey* or *day*, to the doom-book, or *liber judicialis*, the general ſurvey, in the time of *William the Conqueror*, was not meant with any alluſion to the final day of judgment, as many perſons have conceited: for *day* does not augment the ſenſe of the word, but only doubles, and confirms the ſame meaning: I ſay, the ſyllable *dey* or *day*, in that compoſition, does not really ſignify the meaſure of time, but the adminiſtration of juſtice. So as *Domeſday-book* is but more emphatically, the judicial deciſive record, the book of dooming judgment, and decreeing juſtice, *Cowell. edit.* 1727.

Days of preſixion, A term uſed in the Exchequer; for the explanation whereof, ſee **Remembrancer.**

Dayeria, (*Dairy*) from *day*, *deie*, Sax. *dag*; and ſignified at firſt the daily yield of *milch cows*, or the daily profit made of them. As a *day-were* of land was one day's ploughing, which the *French* called *journal*, Lat. *jornale*; and our midland farmers ſtill call a *journey.* So in *Lorrain* and *Champaigne*, they now uſe the word *dayer* for the meeting of the day-labouring women to give an account of their daily work, and receive the wages of it. Hence any young artificer, who aſſiſts a maſter workman, is ſtill called a *journeyman*: as a threſher, hedger, *&c.* who works by the day, is termed a *days-man.* And it ſeems probable, that the woman hired by the day, to help in the kitchin, *&c.* uſually called a *chair-woman* is no more than a *jour-woman*, or *journe-woman.* A *dairy* in the North, is called *The milkneſs*; as the *dairy-maid*, is in all parts a milk-maid: She is called *androchia* by *Fleta*, *lib.* 2. *cap.* 87. *Androchia pudica eſſe debet, & laborioſa* daeriæ——*Compotus* Henrici Deye, & Johannæ *uxoris ſuæ, de omnibus exitibus, & proventibus de* dayri *domini prioris de* Burnceſtre. *Paroch. Antiq. p.* 548.——*Computant de xxxv. ſolid. vi. den. receptis de* dayeria *de la* Breche. *Id. p.* 570. *Cowell, edit.* 1727.

Daywere of land, As much arable ground as could be ploughed up in one *day's work*, or one *journey*, as the farmers ſtill call it.——*Confirmavi abbati & conventui de* Reading, *tres acras, & ſexdecim* daywere, *de terra arabili.* Cartular. Rading. MS. fol. 90. a.

Daynynne,——*In manerio de* Stiventon, *com.* Berk. *virgatarii ſecabant in autumno per tres dies ſeptimanæ, & tunc quilibet ſecabit dimidium acræ, & vocatur* daynynne. Placit. an. 9 Ed. 1.

Deadly feud, (*Feuda & faida*) Is a profeſſion of an irreconcileable enmity till we are revenged even by the death of our enemy. It is deduced from the *German* word *feed*, which as *Hottoman*, *in verbis Feudalibus*, ſaith, *Modo bellum*, *modo capitales inimicitias ſignificat.* It is uſed in ſtat. 43 *Eliz. c.* 13. And ſuch enmity and revenge was allowed by our ancient laws in the time of the *Saxons*, *viz.* where any man was killed, if a pecuniary ſatisfaction was not made to the kindred, it was lawful for them to take up arms and revenge themſelves on the murderer, and this is called *deadly feud*; and probably this was the original of an appeal. *Cowell*, *edit.* 1727.

Dead pledge, *Mortuum vadium.* See **Mortgage.**

Deaf, dumb, and blind. A man who *could neither ſpeak nor hear* committed felony, and was arraigned, and therefore was commanded to priſon. *Br. Corone*, *pl.* 216. cites 26 *Edw.* 3.

One was *indicted for the death of a man*, who could neither ſpeak nor hear, and the court was in doubt what to do with him, *&c.* wherefore they thought that he ſhould be remanded to priſon. *Thel. Dig.* 6. *lib.* 1. *c.* 7. cites 26 *Aſſ.* 27.

One who had made his will, and became ill, and (as it ſeems) had *loſt his ſpeech*; the ſame will was delivered into his hands, and *it was ſaid to him, that he ſhould deliver it to the vicar, if it ſhould be his laſt will, otherwiſe he ſhould retain it*; *and he delivered it to the vicar, and this was held a good will.* Thel. Dig. 6. lib. 1. cap. 7. ſ. 8. *cites* 44 Aſſ. 36.

A man

A man deaf and dumb *a nativitate*, is *non compos*, but otherwiſe, if by *accident*. But deaf, dumb, and blind by accident is *non compos*, *per Wakering*, Reader of *Lincoln's Inn*, *June* 1626. cited *D.* 56. *pl.* 13. *Marg.*

It appears by oath, that the *defendant is both ſenſeleſs and dumb*, and therefore cannot inſtruct his counſel to draw his anſwer; and therefore ordered that no *attachment*, or other proceſs of contempt, be awarded againſt the defendant for not anſwering, without ſpecial order of this court. *Cary's Rep.* 132. cites 22 *Eliz. Altham* v. *Smith.*

One that is deaf and wholly deprived of his hearing cannot *give*, and ſo one that is dumb and cannot ſpeak. Yet (according to the opinion of ſome) they may *conſent by ſigns and nods*; but it is generally held, that he that is dumb cannot make a gift, becauſe he cannot conſent to it. *Cow. Inſt.* 107.

If a blind man has underſtanding, he may *deliver a deed* ſealed by him. *Jenk.* 222. *pl.* 75. *ad finem.*

The lord ſhall have the *cuſtody of a copyholder* that is deaf and dumb; for elſe he ſhall be prejudiced in his rents and ſervices, and adjudged for the grantee of the lord againſt the prochein amy of the copyholder. *Cro. J.* 105. *pl.* 43. *Mich.* 3 *Jac. B. R. Eavers* v. *Skinner.*

A *dumb* man *ordered to anſwer upon interrogatories*, by Mr. *Colcheſter*. *Toth.* 237. cites 14 *Car. Harcourt* v. *Roberts.*

One born deaf and dumb, who ſignified by ſigns that ſhe underſtood what ſhe was about to do, was allowed to *levy a fine* of lands; by *Bridgman* Ch. J. *& al'* juſtices. *Cart.* 53. *Trin.* 18. *Car.* 2. *C. B. Martha Elliot's* caſe.

For more learning concerning deaf, dumb, and blind, ſee **Ley gager.**

Deaſtoreſted, That is, diſcharged from being *foreſt*, or exempted from the *foreſt-laws*, 17 *Car.* 1. *cap.* 16. *Johannes Dei gratia, &c. Archiepiſcopis, epiſcopis, &c. Sciatis nos omnino* deafforeſtaſſe *foreſtam de Breewood de omnibus quæ ad foreſtam & foreſtarios pertinent. Quare volumus & firmiter præcipimus quod prædicta foreſta & homines in illa manentes & hæredes eorum ſint* deafforeſtati *imperpetuum, &c.* Dat. apud Brug. 13 Martii anno regni noſtri 5.

Dean, (*Decanus*, from the Greek δεκα, *decem*) Is an eccleſiaſtical magiſtrate or dignitary, ſo called, becauſe he preſides over *ten* cannons or prebendaries at the leaſt. And we call him a dean that is under the biſhop, and chief of the chapter, ordinarily in a cathedral church; and the reſt of the ſociety or corporation we call *capitulum*, the chapter. But for the different ſenſes of this word, ſee *Lyndewode*, tit. *De Conſtitut. cap.* 1. verbo *Decani Rurales*; where *rural deans* are ſaid to be certain perſons that have juriſdiction eccleſiaſtical over other miniſters and pariſhes near adjoining, aſſigned them by the biſhop and archdeacon, being placed and diſplaced by them: Such are the dean of *Croyden* in *Surrey*, dean of *Battel* in *Suſſex*, *&c.*

As there are two foundations of *cathedral churches* in *England*, the old and the new, (the new are thoſe which *Henry the Eighth*, upon ſuppreſſion of abbies, transformed from abbot, or prior and convent, to *dean and chapter*,) ſo there are two means of creating *deans:* For thoſe of the old foundation, as the dean of *St. Paul's*, *York*, *&c.* are exalted to their dignity much like biſhops; the King firſt ſending out his *Conge d' eſlire* to the chapter, the chapter then chooſing, the King yielding his Royal aſſent, and the biſhop confirming him, and giving his mandate to inſtall him. Thoſe of the new foundation, whoſe denaries were tranſlated from priories and convents, to dean and chapter, as the *dean of Canterbury*, *Durham*, *Ely*, *Norwich*, *Wincheſter*, *&c.* are donative inſtalled by a ſhorter courſe, by virtue of the King's letter patent, without either election or confirmation; and are viſitable only by the Lord Chancellor, or by ſpecial commiſſion from the King: Bet the letters patent are preſented to the biſhop for inſtitution, and a mandate is iſſued for inſtalment. 1 *Inſt.* 14. *Dav.* 46, 47. There are ſome cathedral churches which never had a dean; as that of St. *David* and *Landaff*, where the biſhop is head of the chapter, and in his abſence the archdeacon. This word is alſo applied to divers who are the chief of certain peculiar churches or chapels, as the *dean of the King's chapel*, the *dean of the arches*, the *dean of St. George's chapel* at *Windſor*, *&c. Nec collegio alicui præfecti, nec juriſdictione ulla donati, nomine tamen velut honoris gratia inſignes*, ſays *Spelman.* Cowell, edit. 1727.

There are four ſorts of deans and deanries; of which and of whom the law of this realm taketh knowledge. The *firſt* is a dean *who hath a chapter* conſiſting of prebendaries or canons, ſubordinate to the biſhop, as a council aſſiſtant to him in matters ſpiritual relating to religion, and in matters temporal relating to the temporalties of his biſhoprick: For ſeeing that it was impoſſible but that ſects, ſchiſms and hereſies ſhould ariſe in the church, it was in Chriſtian policy thought fit and neceſſary, that the burden of the whole church, and the government thereof, ſhould not lie upon the perſon of the biſhop only; and therefore it was thought neceſſary that every biſhop within his dioceſe ſhould be aſſiſted with a council, to conſult with him in matters of difficulty concerning religion, and deciding of the controverſies thereof; and alſo for the better ordering and diſpoſing of the things of the church, and to give their aſſent to ſuch eſtates as the biſhop ſhould make of the temporalties of his biſhoprick; for it was not convenient that the whole power and charge thereof ſhould remain in any one ſole perſon only. The *ſecond* is a dean *who hath no chapter*, and yet he is *preſentative*, and *hath cure of ſouls*; he hath a peculiar, and a court wherein he holdeth eccleſiaſtical juriſdiction; but he is not ſubject to the viſitation of the biſhop or ordinary; ſuch is the dean of *Battle* in *Suſſex*, which deanry was founded by King *William* the Conqueror, in memory of his conqueſt; and the dean there hath cure of ſouls, and hath ſpiritual juriſdiction within the liberty of *Battle*. The *third* dean is eccleſiaſtical alſo, but the deanry is *not preſentative*, but donative, nor *hath any cure of ſouls*, but he is only by covenant or condition; and he alſo hath a court and a peculiar, in which he holdeth plea and juriſdiction of all ſuch matters and things as are eccleſiaſtical, and which do ariſe within his peculiar, which oftentimes extends over many pariſhes; ſuch a dean conſtituted by commiſſion from the metropolitan of the province, is the dean of the *Arches*, and the dean of *Bocking* in *Eſſex*; and of ſuch deanries there are many more. The *fourth* ſort of dean is he who is uſually called the *rural* dean; having no abſolute judicial power in himſelf, but he is to order the eccleſiaſtical affairs with his deanry and percinct, by the direction of the biſhop or of the archdeacon; and is a ſubſtitute of the biſhop in many caſes. *Hughes*, *c.* 2.

The dean which hath a chapter, ſuch as the dean of *Canterbury*, *St. Paul's*, and the like, is ſet forth to be an eccleſiaſtical governor, ſecular over the prebendaries and canons in the cathedral church. *Hughes*, *c.* 2.

The inſtitution of deanries, as alſo of the other eccleſiaſtical offices of dignity and power, ſeems to bear a reſemblance and relation to the methods and forms of civil government, which obtained in thoſe early ages of the church throughout the weſtern empire. Accordingly, as in this kingdom, for the better preſervation of the peace, and more eaſy adminiſtration of juſtice, every hundred conſiſted of ten diſtricts called tithings, every tithing of ten friburghs or free pledges, and every free or frank pledge of ten families; and in every ſuch tithing there was a juſtice, or civil dean appointed, for the ſubordinate adminiſtration of juſtice: So in conformity to ſuch ſecular method, the ſpiritual governors, the biſhops, divided each dioceſe into deanries (decennaries, or tithings,) each of which was the diſtrict of ten pariſhes or churches; and over every ſuch diſtrict they appointed a dean, which in cities or large towns was called the dean of the city or town, and in the country had the appellation of rural deans. *Ken. Paroch. Ant.* 633, 634.

The like office of deans began very early in the greater monaſteries, eſpecially in thoſe of the *Benedictine* order; where the whole convent was divided into decennaries, in which the dean or tenth perſon did preſide over the other nine; took an account of all their manual operations; ſuffered none to leave their ſtation, or omit their particular duty

duty without expreſs leave; viſited their cells or dormitories every night; attended them at table to keep order and decorum at their meals; guided their conſcience; directed their ſtudies; and obſerved their converſation: and for this purpoſe held frequent chapters, wherein they took publick cognizance of all irregular practices; and impoſed ſome leſſer penances; but ſubmitted all their proceedings to the abbot or prelate, to whom they were accountable for their power, and for the abuſe of it. And in the larger houſes, where numbers amounted to ſeveral decuries, the ſenior dean had a ſpecial pre-eminence, and had ſometimes the care of all the others devolved upon him alone. *Ken. Par. Antiq.* 634, 635.

And the office of *dean* in ſeveral colleges in the univerſities, ſeemeth to have ariſen from the ſame foundation.

And the inſtitution of *cathedral deans* ſeemeth evidently to be owing to this practice. When in epiſcopal ſees, the biſhops diſperſed the body of their clergy by affixing them to parochial cures; they reſerved a college of prieſts or ſecular canons for their counſel and aſſiſtance, and for the conſtant celebration of divine offices in the mother or cathedral church, when the tenth perſon had an inſpecting and preſiding power, till the ſenior or principal dean ſwallowed up the office of all the inferior, and in ſubordination to the biſhop, was head or governor of the whole ſociety. His office was, to have authority over all the canons, preſbyters, and vicars, and to give poſſeſſion to them when inſtituted by the biſhop; to inſpect their diſcharge of the cure of ſouls; to convene chapters, and preſide in them, there to hear and determine proper cauſes; and to viſit all churches once in three years within the limits of their juriſdiction. The men of this dignity were called *archipreſbyters*, becauſe they had a ſuperintendance over all their college of canonical prieſts; and were likewiſe called *decani chriſtianitatis*, becauſe their chapters were courts of chriſtianity, or eccleſiaſtical judicatures, wherein they cenſured their offending brethren, and maintained the diſcipline of the church within their own precincts. *Kent. par. Ant.* 634, 635.

Deans of the old foundation come in by election of the chapter upon the King's *Conge d' eſlire*, with the royal aſſent, and confirmation of the biſhop, much in the ſame way as the biſhops themſelves do: but deans of the new foundation come in by the King's letters patent upon which, they are inſtituted by their reſpective biſhops; and then inſtalled upon a mandate, purſuant to ſuch inſtitution, and directed to the chapters. *Gibſ.* 173.

This diſtinction between the old and new foundations came in after the diſſolution of monaſteries, when King *Henry the Eighth* having ejected the monks out of the cathedrals, placed ſecular canons inſtead of them: thoſe whom he thus regulated, are called The deans and chapters of the new foundation; ſuch as are *Canterbury*, *Wincheſter*, *Worceſter*, *Ely*, *Carliſle*, *Durham*, *Rocheſter*, and *Norwich*. And beſides theſe, he erected five cathedrals *de novo*, and endowed them out of the eſtates of diſſolved monaſteries, viz. *Cheſter*, *Peterborough*, *Oxford*, *Glouceſter*, and *Briſtol*: which were by him made epiſcopal ſees, as alſo *Weſtminſter*, but the biſhoprick of this laſt place was altered again, and the monaſtery turned into a collegiate church by Queen *Elizabeth*. *Johnſ.* 54.

For more learning concerning Dean and chapter ſee Dr. Gibſ. Cod. *and Dr.* Burn's Eccleſiaſtical Law.

Death of perſons. There is a *natural* death of a man, and a civil death: natural, where nature itſelf expires and extinguiſhes; and civil, is where a man is not actually dead, but is adjudged ſo by law; as where he enters into religion, *&c.* If any perſon for whoſe life any eſtate hath been granted, remain beyond ſea, or is otherwiſe abſent ſeven years, and no proof made of his being living, ſuch perſon ſhall be accounted naturally dead; though if the party be after proved living at the time of eviction of any perſon, then the tenant, *&c.* may re-enter and recover the profits. Stat. 19 *Car.* 2. *c.* 6. And perſons in reverſion or remainder, after the *death* of another, upon affidavit that they have cauſe to believe ſuch other dead, may move the Lord Chancellor to order the perſon to be produced; and if he be not produced, he ſhall be taken as dead: and thoſe claiming may enter, *&c.* 6 *Ann. c.* 18. A man ſeiſed in fee of lands, made a leaſe in reverſion to *S. D.* for ninety-nine years, to commence after the deaths of *J. D.* and *E. D.* who had then a leaſe in poſſeſſion for the like term; if they or either of them ſo long lived: the plaintiff poſitively proved the death of *J. D.* But as to the death of *E. D.* the proof was that he had been reputed dead, and no body had heard of him for fifteen years paſt, and the defendant not being able to prove that he was alive at any time within ſeven years, this caſe was adjudged within the act 19 *Car.* 2. *Carthew* 246. In law proceedings, the death of either party between the verdict and judgment ſhall not be error; ſo as judgment be entred in two terms. 17 *Car.* 2. *c.* 8. See **Life eſtates, Suits.**

Deawarrennata, Diſwarrened. When a *warren* was broke up and laid in common, King *Henry* 3. in a charter to the citizens of *Lond:n*, dated 18 *Aug. anno reg.* 2. grants to them,——*Quod tota* warrena *de* Stanes, *cum pertin. ſuis ſit* deawarrennata *& deafforeſtata in perpetuum.* ——Placit. temp. Ed. 1. & Ed. 2. MS. fol. 144.

De bene eſſe. To take or do a thing *de bene eſſe*, is to allow or accept it as well done for the preſent, till it comes to be more fully examined, and then to ſtand or fall, according to the merit of the thing, in its own nature, ſo that *valeat quantum valere poteſt.* So in *Chancery*, upon motion for one of the leſs principal defendants to be examined, the court ſometimes will order it *de bene eſſe*, that is, he may be examined, but ſo, that upon hearing, and fully examining the caſe, his depoſition may be allowed, or ſuppreſſed, as the court ſhall think fit. See *Langham's* caſe, *Cro.* 3. *par. fol.* 68. So alſo at Common law, the judges frequently take bail *de bene eſſe*, that is, to be allowed or diſallowed upon the exception, or approbation of the plaintiff's attorney; however in the *interim*, they are good, or have a continual allowance. *Cowell, edit.* 1727.

Debenture, Was by an act made in 1649, ordained to be in the nature of a bond or bail, to charge the commonwealth to pay the ſoldier-creditor, or his aſſigns, the ſum due upon auditing the account of his arrears. The form of which *debenture*, as then uſed, may be ſeen in *Scobell's Acts and Ordinances*, *anno* 1649, *cap.* 63. The word is alſo mentioned in the act of *Oblivion*, 12 *Car.* 2. *cap.* 8. *ſect.* 7. and is uſed in the *Exchequer*. See **Auditor of the Receipts.** In the King's houſe, *debentures* are given uſually to the King's ſervants, for the payment of their wages, board-wages, and the like. *Cowell, edit.* 1727.

Debentures for the drawbacks of the duties paid on 6, 8, 11, 12 & 13 *W.* 3. or 1 *Ann.* how provided for, 1 *Ann. ſt.* 1. *c.* 21. *ſect.* 32.

Stealing debentures made felony, 2 *Geo.* 2. *c.* 25. *ſ.* 3.

Debet & detinet, Are *Latin* words uſed in the bringing of writs and actions. And an action ſhall be always in the *Debet & detinet*, when he who makes a bargain or contract, or lends money to another, or he to whom a bond is made, bringeth the action againſt him who is bounden, or party to the contract or bargain, or unto the lending of the money, *&c.* if he brings debt for the horſe, the writ muſt be in the *detinet* only. *New Nat. Br.* 165. In debt againſt huſband and wife, for a debt due from the wife before coverture, the writ ſhall be in the *debet & detinet*. So in debt againſt or for ſucceſſors, in reſpect of obligations made to the predeceſſor, *&c. Ibid.* Debt againſt an heir, is to be in the *debet & detinet*, or it will be naught; if an heir be to bring debt, it ſhall be in the *detinet:* and if a man be bound to another, and makes his executor and dies, if the money due in the time of the teſtator be refuſed to be paid by the executor, the action muſt be brought againſt him only in the *detinet*; and ſo in all actions brought by executors as executors, though the duty accrued in their own time. But *debet & detinet* lies by an executor on his own contract: and if leſſee for years makes his executor and dies, for rent due after the teſtator's death, there the action ſhall be in the *debet & detinet*. It is the like law in caſes of adminiſtrators, as it is not certain what ſhall be recovered, only according to the aſſets. 5 *Rep.* 31. An

executor upon a *davaſtavit* ſhall be charged in the *debet & detinet*, the action being upon a judgment. 1 *Lill. Abr.* 399. In action grounded on privity of contract; or action of eſcape, it muſt be brought in the *detinet*. *Cro. Jac.* 545, 685. See **Debt** and **Executor**.

Debet & ſolet, Are words frequently uſed by the writers of the Common law. For example, it is ſaid in the *Old. Nat. Brev. fol.* 98. this writ *Deſecta molendini*, being in the *debet & ſolet*, is a writ of right, &c. And again, *fol.* 69. a writ of *Quod permittat* may be pleaded in the county before the *ſheriff*, and it may be in the *debet & ſolet*, or in the *debet* without the *ſolet*, according as the defendant claimeth; wherefore note, that theſe kinds of writs have theſe words in them, as formal words, not to be omitted: and according to the diverſity of the caſe, both *debet* and *ſolet*, or *debet* alone: That is if a man ſue to recover any right by writ, whereof his anceſtor was diſſeiſed by the tenant, or his anceſtor, then he uſeth only the word *debet* in his writ; becauſe *ſolet* is not fit, by reaſon his anceſtor was diſſeiſed, and the cuſtom diſcontinued: But if he ſue for any thing that is now firſt of all denied, then he uſeth both theſe words, *debet & ſolet*; becauſe his anceſtors before him, and he himſelf uſually enjoyed the thing ſued for, as ſuit to a mill, or common of paſture, until the preſent refuſal of the tenant. The like may be ſaid of *debet & detinet*, as appeareth by the *Reg. Orig. fol.* 140. *Cowell, edit.* 1727.

Debt. Where a man oweth another a *certain* ſum of money by obligation, or by bargain for a thing ſold, or by contract, or upon a loan made by the creditor to the debtor, and the debtor will not pay the debt at the day appointed that he ought to pay it, then the creditor ſhall have an action of debt againſt him for the ſame. *F. N. B.* 119.

An action of debt is ſaid to be founded upon contract, either expreſs or implied, in which the certainty of the ſum or duty appears, and therefore the plaintiff is to recover the ſame *in numero*, and not to be impaired in damages by the jury, as in thoſe actions which ſound only in damages; as *aſſumſit*, *trover*, &c. 4 *Co.* 90. *Slade's* caſe. *Vaugh.* 101.

1. *In what caſes action of debt will lie.*

2. *Of extinguiſhing the debt, and pleading in bar thereof.*

1. *In what caſes action of debt will lie.*

If in an action, in which the plaintiff can only recover damages, as in waſte, there be judgment for him, he can afterwards bring an action of debt for thoſe damages. See 1 *Rol. Abr.* 600, 601.

Alſo if after judgment for the plaintiff in *B. R*, the defendant brings a writ of error *in cam. ſcacc.* An action of debt may be brought in *B. R.* upon the judgment, pending the writ of error; and the defendant cannot plead *nul tiel record*, for by the writ of error the tranſcript of the record only is removed. 1 *Sid.* 236. 1 *Lev.* 153. *Raym.* 100. *S. C.*

Debt lies in the *Marſhalſea*, or any other court, upon judgment in *C. B.* or *B. R.* and upon *nul tiel record*, the iſſue ſhall be tried by *certiorari*, and *mittimus* out of Chancery. 1 *Salk.* 209.

Every contract muſt be legally entred into, and the conſideration thereof muſt be lawful, as marriage, work, ſoliciting a cauſe, &c. otherwiſe an action of debt will not lie. See 1 *Rol. Abr.* 593.

If a ſheriff levies a certain ſum of money on a *Levari facias*, at the ſuit of *J. S.* and returns the writ ſerved, *J. S.* may have an action of debt againſt the ſheriff, without any actual contract, for the levying the money to the uſe of *J. S.* is a contract in law, and he ſhould pay it over. *Hob.* 206. *Moor* 886. 1 *Brownl.* 5.

If a ſtatute prohibits the doing a thing under a certain penalty, and preſcribes no particular method for the recovery thereof, the party intitled to the penalty may recover the ſame by action of debt. 1 *Rol. Abr.* 598.

An action of debt lies by a ſheriff upon the ſtatute of 28 *Eliz. cap.* 4. for his fees given by the ſtatute, for an execution ſerved by him; though the ſtatute does not ſay, that he ſhall have his fees, or any action for them, but only ſays, that he ſhall not take for any execution ſerved, any conſideration or recompence beſides that thereafter in the ſaid act mentioned, &c. 1 *Rol. Abr.* 598. *Latch* 17, 51. *Noy* 75.

The action of debt is a proper remedy which the law gives for the recovery of rents reſerved upon leaſes for years. *Co. Lit.* 162. But this extended not to freehold rents; for the reaſon whereof, and how it is now remedied by 8 *Ann.* ſee title **Rents**.

The grantee for years of an annuity may have an action of debt for the arrears. *Co. Eliz.* 268, 895.

If there had been tenant for life of a rent, and he died, the rent being in arrear, his executor, by the Common law, might have an action of debt for the arrears, becauſe there was no other remedy. 4 *Co.* 49.

If a leſſee for years aſſigns over his whole term by indenture, reſerving rent, the leſſee, by the name of rent, may recover in an action of debt upon the contract; although it was objected, that the leſſee having no reverſion, it was to be conſidered as a ſum in groſs, and therefore not recoverable until the term was expired. *Carth.* 161.

If a man lends goods as a ſecurity for money, and the borrower tenders the money, and recovers the goods in an action of trover, yet the pawnbroker may have an action of debt for his money; becauſe though the ſecurity ceaſes, yet the duty remains, in as much as the money lent is not paid back to the party from whence it came. The ſame law as to land. *Cro. Jac.* 243. *Yelv.* 179. 1 *Bulſt.* 29, 31.

Plaintiff agreed to ſell the defendant ſo many ſtacks of wood, and the defendant covenanted to pay the plaintiff 35*l.* for every hundred of the ſaid ſtacks, and bound himſelf in the penalty of 100*l.* to do it. It was held *per cur.* that the plaintiff might have debt or covenant at his election; for the rate being certain, *viz.* 35*l.* for every hundred ſtacks of wood, when the defendant has the wood, the agreement becomes cartain, for which bebt lies. 2 *Ld. Raym. Rep.* 814.

Debt for rent on indenture laid to be made at *London*, for the demiſe of lands in *Surry*. The action was laid in *London*; and on demurrer, it was held, that the plaintiff had his election to bring it in either againſt the leſſee; otherwiſe had it been againſt an aſſignee, who is chargeable only on the privity of eſtate. Judgment for the plaintiff. *Strange* 776.

Debt lies not on a promiſſory note. *Stra.* 680.

Debt will not lie for a wager. *Ld. Raym.* 69.

2. *Of extinguiſhing the debt, and pleading in bar thereof.*

If a man accepts an obligation for a debt due by ſimple contract, this extinguiſhes the contract. 1 *Rol. Abr.* 604. This muſt be intended an obligation from the debtor; for if a ſtranger gives bond for ſuch debt, 'tis otherwiſe. 2 *Leon.* 110. adjudged.——But if upon making the contract a ſtranger gives bond for it, or being preſent promiſes to give bond for it, and after does ſo, the debt by contract is extinguiſhed, the obligation being made upon or purſuant to the contract. 2 *Leon.* 110. *per cur.*——So if a man accepts a bond for a legacy, he cannot after ſue for his legacy in the ſpiritual court, for by the deed the legacy is extinct, and it is become a mere debt at Common law. *Yelv.* 38.

In debt upon an obligation the defendant cannot plead *nil debet*, but muſt deny the deed by pleading *non eſt factum*, for the ſeal of the party continuing it muſt be diſſolved *eo ligamine quo ligatur*. See *Hard.* 332.

But if the debt be due by ſimple contract, then he may plead *nil debet*, for it does not appear that there is any debt continuing. *Hob.* 218. 2 *Inſt.* 651.

In debt for rent, if it be by deed, the proper plea is *non eſt factum*; but if it be without deed the defendant may plead *non dimiſit*, nothing in arrear, or that he never entred;

tred; alſo by the better opinion of the books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, ſince the debt accrued by ſubſequent enjoyment. *Hard.* 332.

In debt for the arrears of an annuity granted for life, *nil debet* is no good plea, for the action is merely founded upon the deed, for without it no action can be maintained; and though by the death of the grantee the nature of the action is changed, the annuity being determined; yet this proves not but that the action is founded upon the deed. *Kelw.* 147.

But in debt for the arrears of a rent-charge, by will deviſed to the plaintiff's wife for life, againſt the adminiſtrator of the occupier of the land, *nil detinet* is a good plea, for a will is no deed, nor wants any delivery; adjudged, and ſaid the action was not ſo much grounded upon the will itſelf as upon the ſtatute, by which men are enabled by will to diſpoſe of their lands and rents iſſuing out thereof. *Hard.* 332.

If in debt for rent, the *plaintiff declares upon a leaſe for years rendering* 31s. *yearly at* Lady-day *and* Michaelmas *by equal portions, and demand* 15s. 6d. *for rent behind for one year ending at* Lady-day *laſt*, the declaration is naught; for the demand of the 15*s.* 6*d.* being for the arrears of the rent of the whole year, it *ought to have been ſhewed how he was ſatisfied the reſidue*; and for this cauſe, after a demurrer to the defendant's plea, the writ was abated. *Cro. C.* 137. *Trin.* 4 *Car. Bailey* v. *Hughes.*

Debt upon bond for performance of covenants in a leaſe; the defendant *pleads performance*, the plaintiff replied, and *aſſigned a breach for non-payment of rent* on ſuch a day, *ſecundum formam & effectum conditionis obligationis præd'*, the defendant *rejoins and alledges an entry by the plaintiff* on the lands leaſed *before the rent due, and that he kept poſſeſſion till the rent-day was paſſed; and found for the plaintiff*; it was moved in an arreſt of judgment on the plaintiff's replication, it being that the defendant did not pay the rent *ſecundum formam & effectum conditionis* of the bond, whereas there is *no mention of any payment of rent in the condition of the bond, but in the leaſe only*; *ſed non allocatur*; becauſe the defendant by his *rejoinder confeſſed that ſuch rent was arrear*, and waived taking iſſue upon it, but took iſſue on another matter, and ſo this is well enough after verdict. And *per Hale* Ch. B. it is all one in ſubſtance to plead, as the plaintiff did, and to have pleaded *ſecundum formam & effectum indenturæ*; for the condition of the bond comprehends all that is comprized in the leaſe; but though *it might have been a queſtion upon demurrer*, yet there can be no doubt of it after a verdict. *Hard.* 319. *pl.* 13. *Mich.* 14 *Car.* 2. *in the Exchequer. Anon'.*

Debt for rent *upon a leaſe for a year, and ſo from year to year, quamdiu ambabus partibus placuerit*; there was a verdict for the plaintiff for two years rent. *Sanders* moved in arreſt of judgment, that the plaintiff alledges indeed, that the defendant entred and was poſſeſſed the firſt year, but mentions no entry as to the ſecond. *Per Twiſden*, the *jury* have *found the rent to be due for both years*, and we now intend, that he was in poſſeſſion all the time for which the rent is found to be due. *Mod.* 3. *pl.* 10. *Mich.* 21 *Car.* 2. *B. R. Goſtwicke* v. *Maſon.*

In debt for *rent upon a demiſe* of a fiſhery to the defendant *for three lives*, the plaintiff in his declaration *ſet out the demiſe, virtute cujus the leſſee entred, & fuit & adhuc eſt inde poſſeſſionatus.* The defendant pleaded *Nil debet*, and there was a *verdict for the plaintiff.* And ſerjeant *Pratt* moved in arreſt of judgment, that it appeared upon the declaration, that the eſtate for the three lives was continuing, and therefore debt did not lie, it being a rent iſſuing out of a freehold. Serjeant *Hooper*, in anſwer ſaid, that this was well enough after a verdict, for that *Nil debet* put all the matter in iſſue, and if the eſtate had not been determined, the plaintiff could not have had a verdict, and that that matter indeed was the greateſt matter litigated at the trial, and therefore the continuing not appearing directly, the court would take the eſtate to be determined. *Pratt* ſaid, that the *averment in the declaration of the ſuit & adhuc, &c.* was an expreſs averment that the eſtate did continue; but if it were only indifferent, it would not be good; for the *plaintiff ought to ſhew expreſsly in his declaration that the eſtate for three lives was determined*, or elſe he was not intitled to bring his action of debt, within the ſtatute of *Hen.* 8. which was agreed by the court, and the judgment arreſted. 2 *Lord Raym.* 1056, 1057. *Mich.* 3 *Ann. Biſhop of Wincheſter* v. *Wright.*

If a man *diſtrains* for rent, *and impounds* the diſtreſs, and then brings debt for the ſame rent, the defendant may plead *levied by diſtreſs*; *per Holt* Ch. J. 11 *Mod.* 144 *Hill.* 6 *Ann.* in the caſe of *Alton* v. *Jarvis.*

In debt for rent the plaintiff *declar'd on a demiſe* by *mentionat' exiſtit*; this was held to be ill, and not helped by defendant's pleading over. 11 *Mod.* 258. *Mich.* 8. *Ann. B. R. Joddrel* v. *Heath.* See Pleadings; *and for other matters relating to the action of debt, ſee* 7 Vin. Abr. *and* 2 Bac. Abr. *tit.* Debt.

Debt and debtors. None to be diſtrained for debts not due, 3 *Ed.* 1. *c.* 23.

For recovery of ſmall debts in *London*, 1 *Jac.* 1 *c.* 14. 3 *Jac.* 1. *c.* 15. 14 *Geo.* 2. *c.* 10. See London.

A tradeſman's ſhop-book not to be given in evidence of a debt, unleſs an action be brought within a year, 7 *Jac.* 1. *c.* 12

Actions of debt to be brought within ſix years, 21 *Jac.* 1. *c.* 16. *ſ.* 3.

Debtors cleared on a compoſition with the creditors, 8 & 9 *W.* 3. *c.* 18. repealed 9 & 10 *W.* 3. *c.* 29. 10 *Ann. c.* 20.

Priſoners for debt relieved, 1 *Ann. ſt.* 1. *c.* 25. 2 & 3 *Ann. c.* 16. 6 *Geo.* 1. *c.* 22. 11 *Geo.* 1. *c.* 21. 2. *Geo.* 2. *c.* 20. 21 *Geo.* 2. *c.* 31. 28 *Geo.* 2. *c.* 13. 29 *Geo.* 2. *c.* 18.

Stat. 2 *Geo.* 2. *cap.* 22. *ſect.* 13. Where there are mutual debts between the plaintiff and defendant, or if either party ſue or be ſued as executor or adminiſtrator, where there are mutual debts between the teſtator or inteſtate and either party, one debt may be ſet againſt the other, and ſuch matter may be given in evidence upon the general iſſue, or pleaded in bar, as the caſe ſhall require; ſo as at the time of pleading the general iſſue, notice be given of the particular ſum or debt intended to be inſiſted on, and upon what account it became due.

Made perpetual, 8 Geo. 2. cap. 24. ſect. 4.

Stat. 8 *Geo.* 2. *cap.* 24. *ſ.* 5. Mutual debts may be ſet againſt each other, either by being pleaded, or on the general iſſue, notwithſtanding that ſuch debts are deemed to be of a different nature; unleſs where either of the debts ſhall accrue by a penalty contained in a bond or ſpecialty. And in all ſuch caſes the debt intended to be ſet off ſhall be pleaded in bar, in which plea ſhall be ſhewn how much is juſtly due on either ſide; and in caſe the plaintiff recover, judgment ſhall be entred for no more than ſhall appear to be juſtly due, after one debt being ſet againſt the other.

Mutual debts may be ſet againſt each other between a bankrupt and his creditors, 5 *Geo.* 2. *c.* 30. *ſ.* 28.

A court erected for recovery of ſmall debts in *Southwark*, 22 *Geo.* 2. *c.* 47. extended by 32 *Geo.* 2. *c.* 6.

For recovery of ſmall debts in *Weſtminſter*, 23 *Geo.* 2. *c.* 27. 24 *Geo.* 2. *c.* 42.

Attornies ſubject to courts of conſcience in *Weſtminſter*, 24. *Geo.* 2. *c.* 42. *ſ.* 1.

For recovery of ſmall debts in the tower hamlets, 23 *Geo.* 2. *c.* 30.

For recovering ſmall debts in the county-court of *Middleſex*, 23 *Geo.* 2. *c.* 33.

For the city of *Lincoln*, 24 *Geo.* 2. *c.* 26.

For the town of *Birmingham*, 25 *Geo.* 2. *c.* 34.

For the town of *St. Albans*, 25 *Geo.* 2. *c.* 38.

For the town of *Liverpoole*, 25 *Geo.* 2. *c.* 43.

For the city of *Canterbury*, 25 *Geo.* 2. *c.* 45.

For the borough of *Boſton*, 26 *Geo.* 2. *c.* 7.

For the hundred of *Brixton*, 31 *Geo.* 2. *c.* 23.

For the borough of *Great Yarmouth*, 31 *Geo.* 2. *c.* 24.

All acts for erecting courts of conſcience declared publick acts, 2 *Geo.* 2. *c.* 16. *ſ.* 2.

Debtors confined on firſt of *Jan.* 1755, ſhall, at the deſire of their creditors, deliver a ſchedule of their effects, or on refuſal ſuffer death, 28 *Geo.* 2. *c.* 13. *ſ.* 39.

Act for relief of inſolvent debtors, 1 *Geo.* 3. *c.* 17.

Effects of inſolvent debtors after diſcharge to be veſted in the clerk of the peace, who is to aſſign them to creditors, 1 *Geo.* 3. *c.* 17. *ſ.* 11.

Landlord to be ſatisfied two years rent before aſſignment of goods diſtrainable. 1 *Geo. c.* 17. *ſect.* 16.

Penalty on clerk of the peace delaying to give priſoner his diſcharge, 1 *Geo.* 3. *c.* 17. *ſ.* 25.

Perjury of priſoner death with clergy, 1 *Geo.* 3. *c.* 17. *ſ.* 26.

Debts to the crown, or of 1000*l.* to one perſon, not diſcharged, by the inſolvent act, 1 *Geo.* 3. *c.* 17. *ſ.* 40.

Eſtates in tail, which debtors may bar, to be deemed eſtates in fee, 1 *Geo.* 3. *c.* 17. *ſ.* 42.

Refuſing to give up his effects, death without clergy, 1 *Geo.* 3. *c.* 17. *ſ.* 46.

Compelling clauſe in 1 *Geo.* 3. *c.* 17. repealed by 2 *Geo.* 3. *c.* 2.

For the recovery of ſmall debts in *Kingſton upon Hull*, 2 *Geo.* 3. *c.* 48.

For recovery of ſmall debts within the hundreds of *Bradford*, *Meltſham*, and *Worlſtown* in *Wilts*, 3 *Geo.* 3. *c.* 19.

Within the borough of *Soke* in *York*, 4 *Geo.* 3. *c.* 40.

In the town, *&c.* of *Kirkby* in *Weſtmorland*, 4 *Geo.* 3. *c.* 41.

Debt to and from the King. The pledges ſhall not be diſtrained where the debtor is ſufficient, *M. C.* 9 *Hen.* 3. *c.* 8.

Remedy for the ſureties againſt the principal debtor, *M. C.* 9 *H.* 3. *c.* 8.

The debtor dying, the King ſhall be firſt paid, *M. C.* 9 *H.* 3. *c.* 18.

Diſtreſs for debt may be fed by the owner, and ſhall not be ſold before 15 days, *&c. De diſtrictione ſcaccarii*, 51 *H.* 3. *ſt.* 4.

Receivers of the King's debts ſhall acquit the debtors at the Exchequer, *De Diſtric. Scacc.* 51 *H.* 3. *c.* 4. on pain of treble damages, *&c. St. Weſt.* 1. 3 *Ed.* 1. *c.* 19. Proceſs againſt ſheriffs for not acquitting, *&c. De Vicecom. &c.* 14 *Ed.* 2.

The order of accounting at the Exchequer, *St. de Scac.* 51 *H.* 3. *ſt.* 5.

Penalty of delaying payment of the King's debts, or taking money for it, *St. Weſtm.* 1. 3. *Ed.* 1. *c.* 32.

Directions for diſcharging the debts that have been paid to ſheriffs, *&c. Stat. Rutl.* 10 *Ed.* 1. *ſ.* 3, *&c. St. de Fin. levat.* 27. *Ed.* 1. *ſt.* 1. *c.* 2.

Pleas not to be held in the Exchequer, unleſs they touch the King, or his miniſters, *St. Rutl.* 10 *Ed.* 1. *ſ.* 11.

On finding ſurety for the King's debt, the diſtreſs ſhall be releaſed, *Art. ſuper Cart.* 28 *Ed.* 1. *ſt.* 3. *c.* 12.

The King's debts ſtalled according to the ability of the debtor, and to be levied *ſalvo contenemento*, 1 *Ed.* 3. *ſt.* 2. *c.* 4.

A priſoner in execution confeſſing a debt to the King, ſhall be remanded at the plaintiff's ſuit. 1 *R.* 2. *c.* 12.

No recognizance or bond in the double ſhall be taken in the Exchequer for the King's debt, 13 *R.* 2. *ſt.* 1 *c.* 14.

Commiſſions ſhall be ſent to inquire into the truth of accounts paſſed in the Exchequer, 6 *H.* 4. *c.* 3.

Accounts for diſmes not chargeable with other men's ſuits in the Exchequer, 1 *Ric.* 3. *c.* 14

Bonds to the King of the ſame force as the ſtatute *ſtaple*, 33 *H.* 8. *c.* 39.

Recognizances how diſcharged, 33 *H.* 8. *c.* 39. *ſ.* 12.

Auditors *&c.* their fee, 33 *H.* 8. *c.* 39. *ſ.* 17, 20.

Penalty of auditors and receivers not accounting, 33 *H.* 8. *c.* 39. *ſ.* 83.

How a bond given to the King ſhall be ſued, 33 *H.* 8. *c.* 39 *ſ.* 50, *&c.*

The King ſhall recover coſts, 33 *H.* 8. *c.* 39. *ſ.* 54.

The penalty of not paying a rent reſerved to the crown, 33 *H.* 8. *c.* 39. *ſ.* 63 & 72.

The King's prerogative in ſuit, 33 *H.* 8. *c.* 39. *ſ.* 74.

Matter of equity may be pleaded in diſcharge of a debt to the King, 33 *H.* 8. *c.* 39. *ſ.* 69.

At what time the King's receivers ſhall account and make their payments, 7 *Ed.* 6. *c.* 1.

The lands of receivers and accountants made liable to pay their debts to the crown, 13 *El. c.* 4. 27 *El. c.* 3. made liable to be ſold, 39 *El. c.* 7.

No debt to be aſſigned to the King, but ſuch as originally accrued to the King's debtor, 7 *Jac.* 1. *c.* 15.

The King's tenant returned in arrear by miſtake ſhall be diſcharged on producing his receipt, 11 & 12 *W.* 3. *c.* 2. *ſ.* 154.

Accountants to the crown charged with intereſt, 12 *W.* 3. *c.* 11. 2 & 3 *Ann. c.* 17.

Penalties on receivers detaining or miſapplying money, 9 *Ann. c.* 21. *ſ.* 14.

Penalties on not duly diſcharging debts received, 3 *Geo.* 1. *c.* 15. *ſ.* 13.

Deceit, *(Deceptio dolus,)* Is a ſubtle trick or device, whereunto may be drawn all manner of craft, ſubtlety, guile, fraud, ſlight, cunning, covin, colluſion, and practice uſed to deceive another man by any means; which hath no other more proper or particular name than *deceit*, or offence. *Weſt's Symbol. tit.* Indictments, *ſect.* 68. See **Deceptione, Dilceit, Covin.**

Serjeants and others ſhall not conſent to any deceit on the court, on pain of a year's impriſonment, *&c. St. Weſtm.* 1. 3 *Ed.* 1. *c.* 29. Writ of deceit where maintainable, 2. *Ed.* 3. *c.* 17.

Decem tales. See **Tales.**

Decenna, and Decennieres. See **Deciners.**

Decennary, *(Decennaria,)* The limits or compaſs of ten friburghs. See **Deciners.**

Decentum. See **Fauſetum.**

Deceptione, Is a writ that lieth properly againſt him, that deceitfully doth any thing in the name of another, for one that receiveth damage or hurt thereby. *F. N. B. fol.* 95. This writ is either *original or judicial*; as appeareth by the *Old Nat. Brev. fol.* 50. where you may read the uſe of both: For ſome ſatisfaction, take the words of that book;——This writ of *deceit*, when it is *original*, lieth in caſe where deceit is uſed by one man to another, by which *deceit* he may be diſherited, or otherwiſe evil treated, as appeareth by the *Regiſter*, *&c.* And when it is *judicial*, then it lieth out of the rolls of record; as in caſe where a *ſcire facias* is ſent to the *ſheriff*, that he warn a man to be before the juſtices at a certain day, and the ſheriff returns the writ ſerved, whereas the ſaid man was not warned, by which the party that ſued out the *ſcire facias* recovereth; then the party which ought to have been warned, ſhall have the ſaid writ againſt the ſheriff. In the *Terms of the law*, it is ſaid, that the *original writ of deceit* lieth, where any *deceit* is done by a man to another, ſo that he hath not ſufficiently performed his bargain or promiſe: In the writ *judicial*, he concurreth with the former book. See *Reg. Orig. fol.* 112. and the *Regiſt. Judicial*, in that table, *verbo* Deceptione. *Cowell.*

Decies tantum, Is a writ that lies againſt a juror, who hath taken money for giving his verdict, called ſo of the effect, becauſe it is to recover *ten times* ſo much as he took. It lies alſo againſt *embracers*, that procure ſuch an inqueſt. Stat 38 *Ed.* 3. *c.* 12, 13. *Reg. of Writs, fol.* 188. *F. N. B. fol.* 171.

But *decies tantum* doth not lie againſt the embracer, if he embrace and take no money; for he ought to take money and alſo embrace. Yet it lies againſt the jurors, although they do not give a verdict, if they take money; and ſo, 'tis ſaid, if they give a true verdict, *decies tantum* lies, if they take money. *Dyer* 95.

Decies tantum lies againſt ſheriffs taking reward for arraying a pannel, 18 *Hen.* 6. *c.* 14.

For more of decies tantum, ſee 7 Vin. Ab. 378—382.

Decimation, *Decimatio*, The puniſhing every tenth ſoldier by lot, was termed *decimatio legionis*: It may be ſtretched

ſtretched to ſignify tithing, or paying the tenth part. There was another ſort of *decimation* in the late times of uſurpation, which, too many of his Majeſty's loyal ſubjects have ſo much ſad cauſe to remember, that I need not renew the memory of it. *Cowell, edit.* 1727.

Decimis ſolvendis pro poſſeſſionibus alienigenarum, Is a writ, or letters patent, yet extant in the *Regiſter*, which lay againſt thoſe that had farmed the *priors aliens* lands of the King, for the rector of the pariſh, to recover his tithe of them. *Reg. Orig. fol.* 179.

Deciners, Decenniers, or Doceners, (*Decennarii,*) Derived from the French *dixiéme*, tenth, ſignifieth in the ancient monuments of our law, ſuch as were wont to have the overſight and check of ten *friburgs*, for the maintenance of the King's peace; and the limits or compaſs of their juriſdiction was called *Decenna*. *Bract. lib.* 3. *tract.* 2. *cap.* 15. of whom you may alſo read *Fleta, lib.* 1. *cap.* 27. and *Reg. Orig. fol.* 98. *b.* Theſe ſeemed to have large authority in the *Saxons* time, taking cognizance of cauſes within their circuit, and redreſſing wrongs by way of judgment, as you may read in the laws of King *Edward*, publiſhed by *Lamb. numb.* 32. In later times mention is made of theſe, as in *Britton cap.* 12. who ſaith in the King's perſon, (as he writeth his whole book in that manner) "We will that all thoſe that be fourteen years old ſhall make oath, that they will be ſufficient and loyal unto us, and that they will neither be felons, or aſſenting to felons; and we will that all be *en dozeine & plevis per dozeners*, that is, profeſs themſelves of this or that *dozeine*, and make or offer ſurety of their behaviour, by theſe or thoſe *dozeniers*, except religious perſons, clerks, knights, and their eldeſt ſons, and women." Yet the ſame author, in his 29th chapter, towards the end, doth ſay, that all of 12 years old and upwards are puniſhable for not coming to the turn of the ſheriff, except earls, prelates, barons, religious perſons, and women. *Staundf. Plac. Cor. f.* 47. out of *Fitzherbert* hath theſe words, "The ſame law is, where the *dozeniers* make preſentment, that a felon is taken for felony, and delivered to the ſheriff, *&c.*" And *Kitchin* out of the *Regiſter*, and *Britton* ſaith thus, Religious perſons, clerks, knights, or women, ſhall not be *deciniers*, *fol.* 33. From all which premiſſes may be gathered, that of late times, this word ſignifieth nothing but ſuch a one as by oath of loyalty to his Prince, is ſettled in the combination or ſociety of a *dozeine*. And a *dozeine* ſeemeth to extend ſo far as every *leet* extendeth; becauſe in *leets* only this oath is miniſtred by the ſteward, and taken by ſuch as are twelve years old and upwards, dwelling within the compaſs of the *leet*, where they are ſworn. *F. N. B. fol.* 161. *a.* The particulars of this oath you may read in *Bracton, lib.* 3. *tract.* 2. *cap.* 1. *num.* 1. where he ſetteth down fifteen years for the age of thoſe that are ſworn to the King's peace; but *lib.* 3. *tract.* 2. *c.* 11. *num.* 5. he nameth twelve years. See **Inlaughe.** From hence we may note the diverſities between the ancient and preſent times, in this point of law and government, as well for the age of thoſe that are to be ſworn, as alſo that *decennier* is not now uſed for the chief man of a *dozeine*, but him that is ſworn to the King's peace. And laſtly, that now there are no other *dozeins* but *leets*; and that no man ordinarily giveth other ſecurity for the keeping of the King's peace, but his own oath. And that therefore none anſwereth for another's tranſgreſſions, but every man for himſelf. See **Frankpledge,** and 2 *part. Inſt. fol.* 37. *Cowell, edit.* 1727.

Declaration, (*Declaratio,*) Is a ſhewing in writing the grief and complaint of the demandant or plaintiff, againſt the defendant or tenant, wherein he is ſuppoſed to have done ſome wrong. And this ought to be plain and certain, both becauſe it impeaches the defendant, and alſo compels him to anſwer thereto. Such a *declaration* in an action real, is termed a *count*. Note; that the *count* or *declaration*, ought to contain *demonſtration*, *declaration*, and *concluſion*. In demonſtration are contained three things: *Quis queritur, contra quem, & pro qua cauſa.* In the *declaration* there ought to be compriſed, *Quomodo inter partes actio accrevit, quando & qua die, anno & loco, & cui dabitur.* And in the *concluſion*, he ought to aver, and proffer to prove his ſuit, and ſhew the damages he has ſuſtained by the wrong done him. See **Count.**

A declaration ought to contain two things, *viz. certainty* and *verity*; for that is the foundation of the ſuit whereunto the adverſe party muſt anſwer, and whereupon the court is to give judgment. *Co. Litt.* 303. *a.*

Declaration muſt be *certain*, containing, 1. Such ſufficient *certainty whereby the court may give a peremptory and final judgment* upon the matter in controverſy. 2. *The defendant may make a direct anſwer* to the matter contained therein. 3. *That the jury*, after iſſue joined, *may give a compleat verdict* thereupon. 4. *No blank* or ſpace *to be left* therein. *Brown's Annal.* 3.

Though the rule of law is, that declarations ſhall *not be taken by intendment*, but ought to have certainty; yet this has an *expoſition* and a meaning, viz. *that where the uncertainty is ſo great, that it is indifferent to take it either way*; but *where one way is more ſtrong, and the indictment this way much exceeds the intendment the other way*, ſuch intendment ſhall be allowed, and declarations ſhall be adjudged good by ſuch intendment. As *in debt againſt an heir*, the *count ſhall be good, notwithſtanding the plaintiff does not ſhew that the executors have no aſſets*; for it ſhall be intended; becauſe it ſhall be *preſumed, that otherwiſe the plaintiff* would not have brought his action. *Pl. C.* 193. *a. b.* 1 *Eliz. Wroteſley* v. *Adams.*

In the Book of Entries is ſet forth, that *treſpaſs was* brought *for heaps of ſtones*, without mentioning any certainty; cited *arg.* but *Dodderidge* ſaid, that the counſel who cited it, never ſaw an action for a heap of ſtones; but *perhaps it might be for a cart-load*, or the like, of ſtones. *Palm.* 447. *Hill.* 2 *Car. B. R.* in the caſe of *Clapham* v. *Middleton.*

An action of *treſpaſs* was brought, *quare teſtas diverſas* (*Anglice* earthen pots) *ipſius querentis cepit*; and moved that it is naught for the uncertainty, and ſo was the opinion of the court, as 5 *Rep.* 34. Treſpaſs was *quare piſces ſuos cepit*, without ſhewing the number, or of what nature they were, and therefore naught. *Noy* 91. *Mich.* 2 *Car. B. R. Clapham* v. *Middleton.*

Action *ſur le caſe*, and declares that *whereas A. was indebted to him* 20 *s. & ultra, B. in conſideration he would forbear it, promiſed to pay him.* After verdict, judgment was arreſted, becauſe of the uncertainty of the ſum in the declaration. *Freem. Rep.* 443. *pl.* 601. *Mich.* 1676 *Cauſon's* caſe.

In *caſe againſt a phyſician*, it is ſufficient to ſay, *that he adminiſtred phyſic unſkilfully, &c. without ſhewing the particular defect in his ſkill. Per Holt* Ch. J. in delivering the opinion of the court. *Lord Raym. Rep.* 471. *Paſch.* 11 *Will.* 3. in the caſe of *Groenvelt* v. *Burwell.*

In *caſe for negligently managing his ſhip that it run over the plaintiff's barge*; the plaintiff *declared, that he was poſſeſs'd of a barge, laden with divers goods* and merchandizes generally, *&c.* the declaration is too general, and the particular goods ought to have been mentioned, as in caſe for burning a houſe of goods, or otherwiſe no damages ſhall be recover'd; *per Holt* Ch. J. at the ſittings at *Guildhall, Hill.* 2 *Ann. Martin* v. *Henrickſon.* See 7 *Vin. Abr.* 383—393.

Declaration ſufficient, if good in ſubſtance, 36 *Ed.* 3. *c.* 15. How to be delivered to priſoners, 4 & 5 *Will. & M. c.* 21. See **Priſon.**

Formerly the declaration itſelf uſed to be delivered to the defendant's attorney to keep 'till he had made a copy of it, and then return it; but inconveniencies ariſing, a rule was made *Trin.* 12 *Will.* 3. whereby the plaintiff's attorney is only bound to deliver a copy of the declaration to the defendant's attorney, who is to pay for the ſame after the rate of 4 *d. per* ſheet, computing ſeventy-two words to a ſheet, beſides the King's duty. 1 *Att. Pract. in K. B.* 146.

And by the ſame rule, if the defendant's attorney refuſes to pay for the copy of a declaration, the plaintiff's attorney may leave the copy with the clerk of the declarations, who is to receive the ſame without fee or reward; and the plaintiff's attorney having given a rule to plead, and demanded a plea, may ſign judgment for want of a plea, and the plea is not to be received before

the copy of the declaration is paid for. 1 *Att. Pract. in K. B.* 147.

Where ſpecial or common bail ſhall be filed for any defendant, and notice thereof given, the attorney for the plaintiff ſhall deliver the declaration to the attorney for ſuch defendant, who ſhall pay for the ſame. But if the attorney for the defendant, or his clerks in his abſence, ſhall refuſe to pay for the ſame, or if the place of habitation of ſuch attorney for the defendant ſhall be unknown to the attorney for the plaintiff, then the attorney for the plaintiff may leave the declaration in the office with the clerk of the declarations, but immediately muſt give notice thereof in writing to the defendant or his attorney; and ſuch declaration ſhall be deemed well deliver'd only from the time of ſuch notice. *Id. ib.*

Upon the delivery of every copy of a declaration, or taking the ſame out of the office, the defendant's attorney ſhall pay to the plaintiff's attorney 4*d.* for the defendant's warrant of attorney, which warrant of attorney the plaintiff's attorney ſhall file with the proper officer; and upon the defendant's attorney refuſing to pay the ſaid 4*d.* for the warrant, judgment may be ſigned. *Mich.* 5 *Ann.* 1 *Att. Pr. in K. B.* 148, 148.

Formerly the defendant in all caſes had an imparlance to the term next after the return of the proceſs, except the proceedings were by original, or for or againſt attornies, or other privileged perſons, or againſt priſoners in cuſtody of the marſhal; in which caſes the defendant was bound to plead, without any imparlance, the ſame term the declaration was delivered (if delivered four days before the end of the term), and except the proceeding were by *habeas corpus*, or the proceſs was returnable the firſt return of *Eaſter* or *Michaelmas* term, and the action laid in *London* or *Middleſex*; in which laſt caſe, if the declaration was delivered before the Eſſoin-day of *Menſ. Paſ.* or *Craſtinum Animarum*, the defendant was to plead two days before the Eſſoin day of the ſubſequent term. *Mich.* 5 *Ann.* 1 *Att. Pract. in K. B.* 148.

But now, by a rule made in *Trinity* term 5 & 6 *Geo.* 2. upon all proceſs to be ſued out of this court, returnable the firſt or ſecond return of any term, if the plaintiff declares in *London* or *Middleſex*, and the defendant lives within twenty miles of *London*, the declaration ſhall be delivered *with notice* to plead within four days after the delivery, and the defendant ſhall plead within the ſaid four days without imparlance; and in caſe the plaintiff declares in any other county, or the defendant lives above twenty miles from *London* the declaration ſhall be delivered *with notice* to plead within eight days after the delivery, and the defendant ſhall plead within the ſaid eight days without any imparlance; and in default of pleading in either of theſe caſes, judgment may be entred. 1 *Attor. Pract. in K. B.* 148, 149.

In both theſe caſes the declaration muſt be delivered at leaſt four days before the end of the term, excluſive of the day of the delivery, otherwiſe the defendant will be intitled to an imparlance. 1 *Attor. Pract. in K. B.* 149.

Where a copy of the proceſs is ſerved, and an appearance is entred, or common bail filed for the defendant by the plaintiff's attorney, a copy of the declaration muſt be left in the office of the clerk of the declarations, and notice thereof is to be given to the defendant, by delivering to, or leaving for him at his laſt or moſt uſual place of abode, a note in writing, ſignifying the nature of the action, at whoſe ſuit proſecuted, and the time allowed by the rules of court for pleading thereto, and that unleſs ſuch defendant plead thereto within ſuch time, judgment will be entred gainſt him by default; and from the time only of giving ſuch notice, ſuch declaration ſhall be well delivered; and if the defendant does not plead within ſuch limited time, judgment may be ſigned without further notice, or other calling for a plea, and the plaintiff may thereupon give notice of executing his writ of inquiry, either by delivering a notice in writing to ſuch defendant or defendants, or by leaving the ſame at the laſt or moſt uſual place of abode of ſuch defendant or defendants. *Trin.* 1 *Geo.* 2. 1 *Attorn. Pract. in K. B.* 149, 150.

When a defendant has filed ſpecial or common bail any perſon may deliver or file againſt him a declaration by the by at any time (ſitting the court) during the term wherein the proceſs againſt the defendant was returnable; and I have heard it ſaid, that the plaintiff, at whoſe ſuit the proceſs is, might declare againſt him in as many actions as he thinks fit, before the end of the next term after the return of the proceſs. 1 *Attorn. Pract. in K. B.* 152, 153.

But for ſettling the practice of the court touching declaring by the by in caſes where the plaintiff in any action or ſuit ſhall file common bail for the defendant, purſuant to the late act of parliament for preventing frivolous and vexatious arreſts, it is ordered, that in all ſuch caſes the plaintiff in ſuch action or ſuit, wherein common bail hath been or ſhall be ſo filed as aforeſaid, may deliver a declaration by the by againſt ſuch defendant in like manner as he might have done by the ancient practice of the court; but that no other perſon (except ſuch plaintiff) is or ſhall be capable of delivering a declaration by the by againſt any defendant by reaſon of common bail being ſo filed by any plaintiff as aforeſaid; and for the better diſtinguiſhing by whom common bail ſhall have been filed in any action or ſuit, it is further ordered, that in all caſes where common bail ſhall be filed by the plaintiff for the defendant by virtue of the ſaid act, theſe words ſhall be wrote on the bail-piece, *viz. filed according to the ſtatute*, or words to the like effect. *Mich.* 10 *Geo.* 2. 1 *Attor. Pract. in K. B.* 153, 154.

Upon all proceſs to be iſſued out of this court, returnable the firſt or ſecond return of any term, where no affidavit ſhall be made and filed of the cauſe of action, purſuant to the late act of parliament for preventing frivolous and vexatious arreſts, the plaintiff may deliver the declaration *de bene eſſe*, at the return of ſuch proceſs, with notice to plead within eight days after the delivery thereof; and if the defendant doth not file common bail, and plead within the ſaid eight days, the plaintiff having filed common bail for the defendant, according to the ſaid act, may ſign judgment for want of a plea, a rule to plead having been duly entred; and upon all proceſs to be iſſued, and made returnable as aforeſaid, where an affidavit ſhall be made and filed of the cauſe of action, purſuant to the ſaid act, the declaration may be delivered at the return of ſuch proceſs, with notice to plead in four days after ſuch delivery, if the *action is laid in* London *or* Middleſex, *and the defendant lives within twenty miles of* London, and in eight days if the action is laid in any other county, or the defendant lives above twenty miles from *London*; and if the defendant puts in bail, and does not plead within ſuch time as is reſpectively before mentioned, judgment may be ſigned, a rule to plead having been duly entred. *Mich.* 10 *Geo.* 2. 1 *Attor. Pract. in K. B.* 154.

Where an executor's time for pleading was out, the court would not inlarge his time for pleading, unleſs he would enter into a rule not to plead any judgment obtained againſt him after his time was out. *Mod. Ca.* 308. & *vide Bulſt.* 122, 123.

In an action requiring bail, the delivering a declaration before bail is put in, is a waiver of the bail; and if before the bail be juſtified, it is an acceptance of them; but if delivered *de bene eſſe*, then it is only conditionally until good bail be put in, or the bail already put in do juſtify. 1 *Attor. Pract. in K. B.* 155.

If proceſs iſſue out of this court returnable at a day certain. and the defendant doth by his attorney appear and file bail of the term wherein the proceſs is returnable, and the plaintiff doth not declare before the end of the term next following, a *nonproſs* may be ſigned without entring any rule to declare, or calling for a declaration, and the defendant ſhall have coſts taxed as uſual. *Stat* 13 *Car.* 2. *ſtat.* 2. *c.* 2. *ſ.* 3.

And if the declaration ſhould be tendered at any time after the end of the ſecond term, and before the *nonproſs* is ſigned, the defendant is not bound to accept the declaration, but may ſign his *nonproſs* at any time after the end of the ſecond term. 1 *Attor. Pract. in K. B.* 155.

For

For other matters of practice: and the forms of declarations, see the first vol. of the Attorney's Practice in the Court of King's Bench, *and the first vol. of the* Attorney's Practice in the Court of Common Pleas.

Declaration of Uses. See **Uses.**

Decree. By the laws of *England* a decree (notwithstanding any contempts thereof) shall *not bind the goods* or moveables, but only charge the person, *Chan. Rep.* 193. 12 *Car.* 2. *Howard* v. *Suffolk.*

A decree in Chancery is of the *like nature with a judgment* at Common law. *Chan. Rep.* 234. 14 *Car.* 2. *Nanny* v. *Martin.*

This court is cautious to make a decree *without a precedent. Chan. Rep.* 240. 15 *Car.* 2. *Roberts* v. *Wynn.*

No decree *pro confesso* till after appearance. 3 *Ch. R.* 22. *Hill.* 1667. *Moyser* v. *Peacock.*

Where there is a remedy at law for one thing in a bill which is complicated with other matters which are proper in equity, in such case equity will determine the whole matter; *per* Lord Chancellor. 2 *Freem. Rep.* 58. *in pl.* 64. *Trin.* 1680.

Where there is but *one witness against the defendant's answer*, the plaintiff can have no decree. *Vern. R.* 161. *pl.* 151. *Pasch.* 1683. *Alam* v. *Jourdon.*

Where no ordinary process upon the first decree will serve for the execution thereof, there must be a new bill to pray execution of the first decree by a second decree. 2 *Chan. Rep.* 127, 128. 29 *Car.* 2. *Lawrence* v. *Berney.*

Verbal *agreement*, though *subsequent* to the decree, yet shall not *stay the execution* of it, but the remedy must be by original bill. 2 *Chan. Cases* 8. *Mich.* 31 *Car.* 2. *Waklin* v. *Walthall.*

After a decree of dismission affirmed on appeal to the lords, a bill is brought for *discovery* of a deed said to be burnt, pending the appeal, which made out the plaintiff's title, so that after such discovery, the plaintiff might apply to the lords for relief. Defendant demurred, but was ordered to answer, but the plaintiff to proceed no further without leave of the court. *Per. Jeffries* C. *Vern.* 416. *pl.* 396. *Mich.* 1686. *Barbone* v. *Searle.*

Where there is a *decree* it cannot be *altered* but by bill of review, but where there is *only a dismission*, an original bill may be brought upon a *new equity.* Arg. says it is an allowed difference. *Vern.* 417. *pl.* 396. *Mich.* 1686. in case of *Barbone* v. *Searle.*

A rule, that whenever a decree is *entred by consent*, the merits after shall never after be enquired into, unless there be an objection, that the word consent be struck out of the order. *MS. Tab. February* 1702. *Norcot* v. *Norcot.*

An original bill, barely *in nature of a bill of revivor*, and not broader or longer than a bill of *revivor*, *does not open the first decree*, to have it looked into; but if it be to enforce a decree, or carry it further, then it opens the cause. *Pasch.* 1706. *Abr. Equ. Cases*, 83. *Vare* v. *Wordall.*

Ordered, that no *application* shall be made *against the minutes after a week*; and no further time to be allowed to *petition for a rehearing*, but *within a week after that. Sel. Cases in Chan. in Lord* King's *time* 21 *Trin.* 11 *Geo.* 1 *Anon'.*

On a *new bill to carry a decree into executiou*, court may vary and *alter what is thought proper*; but on a rehearing, no further than the petition extends; but if the petition be against the decree in general, though particular reasons are given, the whole is open; but otherwise it is, if the petition be only against one or two particulars. *Sel. Cases in Chan. in Lord* King's *time* 13, 14. *Pasch.* 11 *Geo.* 1. *Colchester* v. *Colchester.*

The rule of court is, that *on appeal the whole cause* is open; but on a rehearing, only so much as is petitioned against; if all do not petition, it is open only to the petitioners. *Sel. Cases in Chan. in Lord* King's *time* 24. *Trin.* 11 *Geo.* 1. *Hayward* v. *Colley.*

On *appeal* the party may bring *new matter*, but *aliter in review*, unless there be a clause to receive it. *Sel. Cases in Chan. in Lord* King's *time*, 48. *Trin.* 11 *Geo.* 1. *in Popping's Case.*

Decree may be *altered* upon proper application *the same term* it is so pronounced, without a rehearing. *MS. Tab. May* 1725. *Vaughan* v. *Blake.*

No *original bill* can be to *vacate a decree signed* and inrolled. *G. Equ. R.* 185. *Hill.* 12 *Geo. Floyd* v. *Mansell.*

Matters, proper to be excepted to upon the master's report, shall never be objected to a decree after the report confirmed. *MS. Tab. April* 28, 1726. *Parker* v. *Stanley.*

All appeals from the Rolls are to be made to the Lord Chancellor, and *decrees* made *at the Rolls must be* signed or *approved of by the Chancellor to make them decrees of the court of Chancery.* MS. Tab. March 13, 1727. *Morse* v. *Dubois.*

A decree *gained by fraud* may be *set aside by petition*, as well as a judgment at law by motion *a fortiori may* such decree be set aside *by bill.* 3 *Wms's Rep.* 111. *Pasch.* 1731. *Seldon* v. *Fortescue Aland.*

If a decree be obtained and *inrolled*, so that the cause cannot be re-heard, then *there is no remedy but by bill of review, which must be on error appearing on the face of the decree, or on matters subsequent* thereto, as a release, or a receipt discovered since. 3 *Wms's Rep.* 371. *Trin.* 1735. *Taylor* v. *Sharp.*

One in the Fleet was ordered to be *laid in irons*, because he *refused to perform a decree. Toth.* 129. *South* v. *Gardiner.*

Fine was imposed for breach of a decree. *Toth.* 166. cites *Trin.* 6 *Car. Longman* v. *Hotgood.*

A *defendant lay in the Fleet for breach* of a decree, the *plaintiff* nevertheless *prefers a bill to discover an estate*; defendant demurred because a double execution; yet over-ruled. *Toth.* 137, 138. cites *Hill.* 1630. *Audley* v. *Harris.*

An original bill *to execute a decree of lands* against a purchaser, who claimed under parties bound by the decree, was allowed good on demurrer thereto; *per* Lord Keeper. *Chan. Cases* 231. *Trin.* 26 *Car.* 2. *Organ* v. *Gardiner.*

A *sequestration* may be granted in the exchequer, as it has been always practised in Chancery *where a decree is for a personal duty*, otherwise the jurisdiction of the court of equity would be to little purpose, if it had not authority sufficient to see its decrees executed; *per* three Barons; but the Lord Chief Baron doubted, because the Lord Chief Baron *Hale* could never be prevailed upon to grant it, nor the Lord *Montague*, to whose learning he said, he must greatly subscribe; but by the opinion of the other three it was granted. 2 *Freem. Rep.* 99. *pl.* 109. *Trin.* 1687. *in the Exchequer*, *Gaaver* v. *Fountaine.* See 7 *Vin. Abr.* 394—402.

Decretals, *Decretales*, Are a volume of the Canon laws, containing the *decrees* of sundry popes; or else a digest of the canons of all the councils, that pertained to one matter under one hand. See **Canon Law.**

Decretals are *Instituta proprie*, *Papa præcepta vero Regnum.* They were compiled into one body by *Regino*, *Burchardus*, *Anselmus* bishop of *Luca*, and *Ivo* bishop of *Chartres*; and afterwards by *Gratian*, who lived in the pontificate of *Eugenius* the Third: And because his compilation was generally received and approved by the church, it was called *The first collection of the decretals*; of which you may read at large in *Baluzius*, in his preface to the dialogues of *Anthony Augustine*, *&c.* In this were contained the decrees of *Alexander* the Third, to the time of *Celestine* the Third.

The second collection of the *dercetals* was performed by *Gilbertus* and *Alanus*, and came out under the name of *Volateran*; who twelve years after the first collection published this second, containing not only the *decretals* of former Popes, but those of *Celestine the Third.*

The third collection was begun by *James Major* archdeacon of *Compostella*, and collected out of the *registers* of *Innocent the Third:* It was called *Romana Compilatio*: But because there were many things in it not generally received, therefore that pope was prevailed on, that by his authority some person might be appointed to make another

another collection; and accordingly *Petrus Beneventanus*, a notary, was appointed for that work, which was the first collection that was published by authority.

The council of *Lateran*, held under the same Pope *Innocent*, was the occasion of publishing the fourth collection: In which council there were several canons made, and reduced under seventy-one chapters. That Pope having, in the space of five years after the publishing the third collection, made many more decrees himself, there were two editions printed; one of the canons of that council, and another of his own constitutions; and this was called *The fourth collection*.

The fifth collection consists of the constitutions of *Honorius* the Third, collected by *Tancred*, archdeacon of *Bologna*, and published by *Innocentius Cyronus*, under the name of that pope. *Du Fresne*.

Decuriare, Signifies to bring into order: *Si vero crimen, &c. procurator loci commiserit, agatur rationabiliter de eo, quod de regis agitur præposito*, viz. *ut eo rite* decuriato *ac justo ordine depulso, ille qui dignus sit Christo designetur.* Mon. 1. tom. 243.

Dedbanna, (Sax. *dædbana*,) An actual homicide, or manslaughter; from *dæd*, *factum*, and *bana*, *homicida*.—*Qui ad occidendum aliquem innoxium* redbana, *vel* dedbanna, *fuerit convictus noxæ, componat inde solus.* Leg. Hen. 1. cap. 85. That is, if any one be convicted of the crime of killing another, either as *redebane*, or accessary by his own counsel and persuasion, or as *dedebane*, or actual committer of the murder, then he shall himself alone compound for his fine or satisfaction. *Cowell, edit.* 1727.

Dedi, Is a warrant in law, to the feoffee and his heirs: As if it be said in a feoffment, *A. B. hath given and granted, &c.* It is a warranty. *Co. on Litt.* 384. *a.*

Dedication-day, (*Festum dedicationis*,) The feast of *dedication* of churches, or rather the feast-day of the saint and patron of a church, which was celebrated, not only by the inhabitants of the place, but by those of all the neighbouring villages, who usually came thither; and such assemblies were allowed by the King. *Ad dedicationes, ad synodos, &c. venientibus sit summa pax.* It was usual for the people to feast and drink on those days; and in many parts of *England* they still meet every year in villages for this purpose, which days are called *feasts*. See at large the history of the institution and observance of wakes, or feasts of dedication, in *Kennet*'s *Paroch. Antiq. p.* 610.

Dedimus potestatem, Is a writ, whereby a commission is given to a private man, for the speeding of some act appertaining to a judge. The Civilians call it *Delegationem:* And it is granted most commonly upon suggestion, that the party which is to do something before a judge, or in court, is so feeble, that he cannot travel. It is used in divers cases, as to make a personal answer to a bill in Chancery, to make an attorney for the following of a suit in the county, hundred, wapentake, *&c. Old Nat. Brev. fol.* 20. To levy a fine, *West. Symb. par* 2. *tit.* Fines, *sect.* 112. and divers other effects, as you shall see by *F. N. B.* in divers places. In what diversity of cases this writ or commission is used, see in the table of the *Reg. Orig. verbo* Dedimus potestatem.

Dee. See **Rivers.**

Deed, (*Factum*,) Is an instrument written in parchment or paper, consisting of three things, viz. *writing*, *sealing*, and *delivery*, and comprehending a contract or bargain between party and party; of which there are two sorts, *deeds intended* and *deeds poll*; which names arise from the form or faction of them, the one being cut in and out in the top or side, which we called *indented*, the other being plain. A *deed intended* is a *deed* consisting of two parts, or more, (for there are *tripartite*, *quadripartite*, and *septempartite deeds*; as that of *Hen.* 7. concerning his royal chapel at *Westminster*,) in which it is expressed, that the parties thereto have to every part thereof interchangeably set their several seals. The cause of their *indenting* is, that it may appear they belong to one business or contract. A *deed poll*, or polled (anciently called *Charta de una parte*, or *Charta simplex*,) is a plain deed without indenting; and is used, when the vendor, for example, only seals, and there is no need of the vendee's sealing a counterpart, by reason the nature of the contract is such, as it requires no covenant from the vendee; unless in such case the vendor will, out of caution or curiosity, have a counterpart, to see, upon any occasion, what covenants himself hath given. See *Coke on Litt. fol.* 35. *b.*

There are three things of the essence and substance of a deed, *viz.* (1) writing in paper, (2) in parchment, sealing, and (3) delivery. 2 *Co.* 5.

And to a deed there are ten things necessarily incident: (1) Writing. (2) In parchment (*vellum*) or paper. (3) A person able to contract. (4) By a sufficient name. (5) A person able to be contracted with. (6) By a sufficient name. (7) A thing to be contracted for. (8) Apt words required by law. (9) Sealing. And (10) Delivery. *Co. Litt.* 35. *b.*

1. *As to the writing of a deed:* All the matter and form thereof must be written before the sealing and delivery of it; for if a man seals and delivers an empty piece of parchment or paper, although he therewithal gives commandment that an obligation or other matter shall be written in it, which is done accordingly, yet this will not make it a good deed. *Co. Litt.* 171. *Perk. S.* 118, 119.

The writing must be finished before it be sealed and delivered, or at least before it be delivered; for nothing may be added to it afterwards, nor may any alteration be made in it; and therefore, if a deed of obligation be sealed and delivered, with a blank for the sum, which the obligee does after sealing and delivery fill up, this will make the deed void. *Moor* 28.

And if a deed be made as an obligation single, and after upon the back of it, before the sealing and delivery, is written the intent of the bond is to pay 10*l.* for such costs; this if it was perfect might be a good condition, if there were words of conclusion; but if it be written after the delivery of the deed, it cannot be good. *Hetley* 136, 137.

A deed may be written in any hand, as in text, court or Roman hand; or in any language, as in *Latin* or *French*, and is as good as a deed written in *English* and in a secretary hand. 2 *Co.* 3.

And it is not necessary that the *Latin* or *English* whereby it is made be true and congruous, for false and incongruous *Latin* or *English* seldom hurts a deed, for the rules of the law are, *Falsa orthographia non vitiat chartam; falsa grammatica non vitiat concessionem.* Co. Litt. 6, 5, 121, 10, 133. And yet *false Latin*, if it be very bad, may make a deed void. *Yelv.* 193.

And although the writing be bad, and besides the lines be written crooked, yet this will not hurt the deed.

And if there be any alteration, rasure, or interlining made in any part of the deed before the delivery of it, this will not hurt the deed.

But in such cases it is policy to make a memorandum of it upon the back of the deed, and to give the witnesses notice of it, (this is now usually done in the attestation of the deed thus: *Sealed and delivered, the word—being first interlined, &c.*) For otherwise, if it be in any place material, as in the name of the grantor, grantee, in the limiting of the estate, or the like, and it cannot be proved to be done before the sealing and delivery of it, especially if it be a deed poll, it is greatly suspicious. *Co. Litt.* 37, 225. *Perk. S.* 155, 125, 126, 127, 128.

A deed must be written in paper, parchment or vellum, as being the least subject to alteration; for if writing be on a piece of wood, linen, the bark of a tree, a stone or the like, and be sealed and delivered, it is no good deed. *Co. Litt.* 229. *a. F. N. B.* 222.

It my be written either in a piece of loose paper or parchment, or in a paper or parchment sewed in a book. *Bro. Oblig.* 67. *Co. Litt.* 137, 139. But the paper or parchment must in most cases be stamped.

And although a deed be never so well written as to the hand and language, and on parchment and paper, and duly read, sealed and delivered, yet it must be formally and orderly written as to the matter and manner of it, according to law, that is there must be sufficient words to

o ſet forth the agreement, and to bind the parties to perform it; for a deed may be void, and loſe its force in all or part, for repugnancy, incertainty, miſtake, deficiency and error.

3. Another thing incidently neceſſary to the making a good deed is, that the party contracting is capable of giving, granting, &c.

For ſome perſons are diſabled by Common law, and ſome by ſtatute; ſome are abſolute, and ſome are *ſecundum quid* only; as in caſe of infants, feme coverts, ideots, perſons *non compos mentis*, aliens, tenants in tail, eccleſiaſtical perſons, and others, ſome of which may not make any deeds or eſtates by them at all; others but ſo and ſo limited and qualified. *Stat.* 32 *Hen.* 8. *cap.* 28.

Diſabilities to make deeds, &c. are chiefly amongſt perſons of non-ſane memory, infants, aliens, women who have huſbands, men who have wives, women that have had huſbands, and lands ſettled by their huſbands upon them, perſons born deaf and dumb, perſons attaint of treaſon or felony, or in a *præmunire*, clerk convict, leper, baſtard, tenant in tail, eccleſiaſtical perſons, as biſhops, parſons, and the like, joint-tenants, tenants in common, coparceners, diſſeiſors, diſſeiſees, &c.

And this in ſome of them is in part and temporal only, but in others of them it is abſolute, univerſal and perpetual.

But for all other perſons male and female, and for all other bodies natural and politick, either as ſole corporations or aggregate, and for all perſons eccleſiaſtical and temporal, they are capable to be grantors and grantees, or to give and take by deed.

So that if any ſuch perſon be ſeiſed of an eſtate in fee ſimple in his own right, he may by deed in writing *in pais*, or without writing, by parol, make what gift, grant or exchange upon it, as he pleaſes.

But he who has but an eſtate-tail in land can only make a leaſe of it for his own life by deed, or ſuch a leaſe as is within the *ſtat.* 32 *Hen.* 8.

Eccleſiaſtical perſons cannot make a leaſe of their eccleſiaſtical lands for longer than their own lives, or ſuch a leaſe as is warrantable by the ſtatute of 13 *Eliz. cap.* 10. and 1 *Jac.* 1. *cap.* 3. and others.

And he who has only an eſtate for his own or another's life, or a leaſe for years of land, may give, grant or charge it at his pleaſure for ſo long as his eſtate laſts; and it will be good to all purpoſes, and againſt all perſons for that time.

And a man who has an eſtate in land to him and his wife, and his heirs, may make what eſtate he will of it, and this will be good againſt all but his wife, and that for her life only. 7 *Co.* 12. *Co. Litt.* 42. *Perk. ſ.* 182.

As to the diſability of perſons *ſecundum quid*, or to ſuch a purpoſe only, obſerve, that there are three ſorts of perſons that formerly could not make eſtates for lives, &c. but now may by *ſtat.* 32 *Hen.* 8.

Firſt, Any perſons, huſbands and wives ſeiſed of any eſtate of inheritance in fee-ſimple, or fee-tail, in the right of their wives, or jointly with their wives before or after the coverture.

Secondly, Any perſon ſeiſed of an eſtate-tail in his own right.

Thirdly, Any perſon ſeiſed of an eſtate in fee-ſimple in the right of his church.

4. The fourth thing (as Lord *Coke* obſerves) neceſſarily incident to a deed, is *a ſufficient name of the perſon contracting*.

As to the naming and deſcription of the parties and perſons in deeds, theſe things are neceſſary to be known.

Firſt, The names of the parties to deeds ſerve only to diſtinguiſh perſons, and to make the perſon intended certain; and therefore it is ſafe to deſcribe the perſon intended by his true and proper names of baptiſm and ſurname; and if it be a corporation, by the true name whereby it was made; yet miſtakes in this, unleſs they be very groſs, will not hurt, *Nihil facit error nominis cum de corpore conſtat.* Bulſt. 21, 22. 2 Bulſt. 302, 303. Co. Litt. 3. Perk. ſ. 36.

But if the name of baptiſm or ſurname be miſtaken, as *John* for *Thomas*, or *Adderley* for *Adderby*, this is dangerous. *Moor* 407, 897.

Secondly, There are many deſcriptions of grantors and grantees; as (1) Proper names of baptiſm and ſurnames, and the names of corporations, or bodies politick or corporate. (2) Names of dignities, office, and the like. And theſe (of both ſorts) will admit a deſcription made good by reputation. And ſo land will paſs to one, by the name of a ſon, who is a baſtard; ſo to one by the name of a wife, who is not a wife, if they be reputed or known by that name. *Hob.* 32.

If *W.* by the name of *I.* (without any ſurname) or by the name of *S.* without any chriſtian name, gives or takes by deed, the deed is void. 2 *Bulſt.* 70. *Perk. ſ.* 39.

Thirdly, There muſt be ſuch a perſon *in eſſe* at the time of the deed made as is named, and he muſt be able to give, and capable to receive that which is given or granted by the deed. *Plowd.* 345. *Co. Lit.* 2, 3. *Perk.* 43, 52.

And therefore if an annuity be granted to the right heirs of *J. S.* he being then living, this is void; for there is none ſuch, nor can be whilſt he lives. *Perk. ſ.* 52.

So *primogenit. proli* of *A.* and *B.* and they have no iſſue yet born. *Cro. Car.* 22.

Fourthly, If a man gets another name by common eſteem than his right name, and he is known by his other name, his deed made by this other name may be good. 6 *Co.* 36. *Co Litt.* 3. *Perk. ſ.* 41.

Fifthly, The miſtake is leſs dangerous where any other part of the deed, or ſome other addition, ſhall make the perſon intended certain. 6 *Co.* 36. *Co Litt.* 3, *Perk. ſ.* 40.

Sixthly, The law favours not advantages of miſnaming, otherwiſe than as the ſtrict rules of law require. 6 *Co.* 64.

5. The perſon to whom a contract or grant, &c. is made, muſt be capable to receive and take the thing granted, &c.

All perſons male or female, eccleſiaſtical or temporal, and all bodies natural or politick, are capable to take by grant, or to be contracted with, unleſs diſabled by their being *non compos mentis*, &c. as before, as to the diſabilities to grant, &c.

The King, for the greatneſs of his perſon, is diſabled to take by deed *in pais*; and therefore if a feoffment be made to him there, and livery of ſeiſin be made upon it, this will be void; but he is to take by matter of record, which is of a higher nature than a deed. *Fitz. Fait and Feoffment* 21.

Leaſes made to him by colleges, deans and chapters, or any other having a ſpiritual or eccleſiaſtical living, againſt the ſtatue 13 *Eliz. c.* 10. are reſtrained by the ſame act, as well as leaſes made to common perſons. 5 *Co.* 14.

A leaſe is made to huſband and wife for their lives, the remainder to the heirs of the ſurvivor; this is a good remainder notwithſtanding the incertainty. *Godb.* caſe 167.

If a leaſe be made to the huſband, *habendum* to the wife, the *habendum* to her is void, for ſhe is a ſtranger to the premiſſes of the deed. 3 *Leon.* 32, 33, 34.

If one demiſes his term to *J. S* and makes his wife executrix, and dies, ſhe enters, and then takes another huſband, and they take a leaſe from the leſſor, and then the deviſee enters, and grants all his eſtate to the huſband and wife; this ſhall be good, and ſhall enure as an aſſent in the executor, and ſo a good grant. *Owen* 56. 3 *Leon.* 24.

Land was demiſed to huſband and wife for their lives, the remainder to the ſurvivor of them for years, the huſband granted over the term of years, and died: The wife, and not the grantee, ſhall have the term of years, for there is nothing in the one or the other to grant till there be a ſurvivor: And ſo it is if the wife dies after the grant, and the huſband ſurvives, yet he ſhall have the term againſt his own grant. *Poph.* 5.

If land is given to a man and ſuch a woman as ſhall be his wife, the man takes the whole.

But if a man makes a feoffment in fee to the uſe of himſelf and wife that ſhall be, and afterwards he takes a wife, his wife ſhall take jointly with him, although all at firſt veſts in the huſband. 1 *Co.* 101.

If a feoffment in fee was made before the ſtatute of 27 *Hen.* 8. of uſes, to the uſe of a man and woman and their heirs, and they intermarry, and then the ſtatute was made; they held by moieties, for if he aliens, it is good for a moiety. *Plow.* 58. But if a reverſion be granted to huſband and wife, and before attornment they intermarry, and then attornment is good, they ſhall not have any moieties; as where a feoffment in fee is made to a man, with a letter of attorney to make livery, they intermarry, and then livery is made *ſecundum formam chartæ*, they ſhall have no moieties. *Plow.* 483.

If a reverſion be granted to a man and a woman, and afterwards they intermarry, and the tenant attorns; they ſhall not take by moieties; but by intireties. 2 *Co.* 68.

If after the *ſtat.* 27 *Hen.* 8. a man makes a feoffment to the uſe of his wife, and if ſhe dies, living the huſband, to the uſe of the huſband and ſuch wife as he ſhould after marry, for life for her jointure; the ſecond wife ſhall take jointly with her huſband, or by way of remainder after his death. But if it be a remainder of land in poſſeſſion fallen, then ſhe takes nothing. And a remainder to a woman for life after the death of her huſband, is not a jointure within the ſtatute of 11 *Hen.* 7. and 27 *H.* 8. *c.* 10. *Dyer* 340.

Huſband and wife are jointenants for 108 years, the huſband by deed makes a leaſe for 20 years, to commence after his deceaſe, and dies, this leaſe is good. *Moor* 395.

If an eſtate in fee-ſimple, fee-tail, or for term of life, be made to a feme covert, or to her huſband and her, the huſband alone may diſagree to it, and avoid it for both of them. *Litt. ſ.* 671. 1 *Hen.* 7. 10. 8 *Co.* 72. *Dy.* 51. 5 *H.* 7. 32.

If a ſtatute or obligation be made to them two, or to her alone, during the coverture, the huſband alone by defeazance or releaſe may avoid it; and if an obligation be made to her during the coverture, the huſband by his diſagreement may avoid it. *Co. Litt.* 351. 48 *Ed.* 3. 12. 7 *H.* 6. 1.

6. The ſixth thing neceſſary is a ſufficient name of a grantee.——Grantees, *&c.* muſt not only be perſons in being, and capable to take by grant, *&c.* by the name in the deed mentioned, but they muſt alſo be ſufficiently named and deſcribed one way or other; and he himſelf, and not a ſtranger, muſt take by the deed; and all bodies natural or politick, that are not diſabled by law, may be grantees, and take by deed; and all perſons that may be grantors may be grantees. And ſome others that cannot grant or give, yet may take or receive. And a grant made to two, three, or twenty ſuch perſons, is good. *Co. Litt.* 2, 3. *Perk. ſ.* 43.

If a grant be never ſo well made in all the parts of it, beſides the omiſſion of the name of the grantee, if it does not expreſs who ſhall take by it, it is void.

There are divers ſorts of names and nominations of perſons, or bodies politick or corporate, that may take, whereof there are divers ſorts; as firſt, the proper names or ſurnames, wherein notwithſtanding there may be ambiguity of a gift or grant to my ſon *John*, having two of that name, perhaps may be made good by an avertment which *John* is meant.

There are alſo other names or deſcriptions, as by ſome dignity, office, or the like; as the Earl of *Hertford*, Lord Treaſurer, and the like: And this will admit of a deſcription made good by reputation, though not by truth; as land will paſs even by conveyance to one by the name of *ſon* who is a *baſtard*, by the name of *wife* who is not ſuch, if he or ſhe be ſo reputed or known by that name. 27 *Edw.* 3. 85. *Bulſt.* 3.

But the ſafe way in the caſes of common perſons is, to name the parties grantor or grantee, *&c.* by their names of baptiſm and ſurname. *Co. Litt.* 3.

For where the grant intends to deſcribe the perſon of the grantee by his proper name, and omits or miſtakes his Chriſtian name or ſurname; commonly the deed is void, unleſs there be ſome ſpecial matter to help it.

And yet if the grant does not intend to deſcribe the grantee by his own name, but by ſome other matter, there it may be good, by a deſcription of the perſon, without either name of baptiſm or ſurname. *Co. Litt.* 3.

A biſhop by the name of biſhop of *London*, may take without any other name. *Co. Litt.* 3. *Bulſt.* 21.

A grant to *J. S.* or *J. N.* is void for incertainty; and a delivery of the deed to one of them will not make it good. 11 *Hen.* 7. 13.

If I be known by the name of *Edward Williamſon*, and my name is *Edward Anderſon*, and lands are given to me by the name of *Edward Williamſon*, this is a good name of purchaſe. *Godb.* caſe 47.

By which I may take by deviſe, and ſo it ſeems alſo by grant: And yet a bond made by the name of *Edmond* where his name is *Edward*, is not good. *Godb.* caſe 485. *Owen* 84. *Dyer* 279. 21 *Hen.* 7. 8. 33 *Hen.* 6. 19. *Non facit error nominis ſi conſtat de perſona.*

If a deed be made by or to *Johane B.* by the name of *Jane B.* or to *Jane* by the name of *Johane*, it is good, for they are one name. *Leon.* caſe 204.

If a man marries and has children called by his name, and after he is divorced from his wife, yet the children by that name may have or take. So one that has a child before marriage uſually called by his name. 6 *Co.* 63.

If one gives me a houſe by word, and makes a writing of the gift either by a contrary name of baptiſm of him or me; this gift by word is good, but by deed is void. *Perk. ſ.* 42.

7. The ſeventh thing incident to a deed, is a thing to be contracted for.— All *corporeal* and *immoveable things*, ſuch as are ſaid to *lie in livery*, as *honours*, *iſles*, *villages*, *manors*, *meſſuages*, *cottages*, *lands*, *meadows*, *paſtures*, *woods*, *advowſons*, *moors*, *marſhes*, *furzes*, *heaths*, *mines*, *quarries*, and the like; and ſome *incorporeal things* that are incident and appendant to them, are grantable from any man to another man in fee-ſimple, fee-tail, for life or years at firſt, and tranſmiſſible and aſſignable afterwards by the grantee thereof *in infinitum* at pleaſure. *Co. Litt.* 20.

All perſons and bodies, except corporate bodies, may give or grant any thing that lies in livery, as manors, *&c.* in fee-ſimple, fee-tail, for life or years, to a ſubject, as well without as by a deed; but nothing may be given or granted to the King by a ſubject by word or deed; but it muſt be by ſome matter of record. *Perk. ſ.* 62. 64. 4 *H.* 7. 17. 16 *H.* 7. 3. *Plow.* 150.

It is a rule, that all manner of eſtates in fee-ſimple, fee-tail, for life or years, and for years preſent and to come in land, or the profits thereof, are grantable by or without deed. *Bro. Done* 19.

An eſtate for life or years of land may be made by word of mouth, without a deed: But where it is an eſtate for life, there it muſt be (if it be in poſſeſſion) with livery; if of a reverſion, there muſt be an attornment to perfect it. *Cro. Car.* 482. *Moor*, caſe 31.

And yet if I leaſe land for life or years to one, the remainder in fee to a ſtranger without a deed, this may be good for the remainder alſo, if livery be made to the tenant for life or years. *Perk. ſ.* 61. *Cro. Jac.* 122.

A grant of land, *& unum ovile*, *Anglice* a ſheep-walk, *cum pertinentiis* in *D.* is good, without a deed for the ſheep-walk. *Cro. Jac.* 419.

The father tenant for life, the remainder to his ſon for life, the ſon purchaſes the reverſion in fee, the father cannot in this caſe ſurrender to him without a deed. *Cro. Car.* 269.

A. deviſes, that his executors ſhall ſell his land; the executors may ſell without deed, for the vendee will be in by the will. 1 *Leon.* caſe 38.

Bodies corporate or politick may not give or grant any of the lands, goods or chattels belonging to their corporations, or otherwiſe than by deed. *Perk. ſ.* 64.

And yet the grantees of ſuch lands, goods and chattels, after their grant of them may grant them by deed, or without deed, as other men may do. *Ibid.*

The grant of a monopoly is not good. 11 *Co.* 87.

A grant

A grant may be of a moiety, third, fourth or fifth, or other certain part of a manor, or of land, by the name of a third, fourth, fifth, or other certain part, and good. *Co. Litt.* 190.

So of a third or fourth part of tithes, and the like. *Dyer* 84.

And all *incorporeal things*, such as are said to *lie in grant*, as *rents* and *services*; and of these not only such as are reserved upon any estate made of land, but such as are granted out of land, seigniories, commons, vicarages, advowsons in gross, estovers, dignities, ways, waters, fishings, franchises, ferries, leets, waifs, estrays, and some offices. All these and the like things are grantable by one to another in fee-simple, fee-tail, for life or for years at first, and *de novo*, but they are grantable and assignable over *in infinitum*. But these things may not be granted otherwise than by deed. *Co. Litt.* 144. *Fitz. Grant*, 145. *Perk. s.* 87, 91, 103. *Bro. Grant*, 3. 3 *H.* 6. 20. 9 *H.* 6. 12.

And if a man has a rent reserved on a particular estate, he may grant over parcel of it.

And of whatsoever a fine may be levied, a grant by deed of the same thing may be made.

A grant of an acre of land covered with water, is good. *Co. Litt.* 4.

Any man that has any estate in fee-simple, fee-tail, for life or years, in any land, *&c.* or profit apprender out of it, may grant it over from man to man *in infinitum*. *Bro. Done*, 9.

And he that has any such estate may charge it with rent, or otherwise at his pleasure. *Bro. Done*, 19.

Rents and services reserved upon any estate, and rents granted out of land (it is said) are grantable over *in infinitum*; but one may not grant rent out of a rent, nor may one grant over a rent which he has, till he has seisin of it. *Perk. s.* 88, 89. *Bro. Grant*, 171.

8. The eighth thing lord *Coke* observes to be necessarily incident to a deed is, *apt words required by law*.——Apt words are requisite in a deed, made either to pass or to create an estate.

Littleton (*Tenures*, *s.* 1.) says, If a man would purchase *lands* or tenements in *fee-simple* it behoves him to have these words in his purchase, *To have and to hold to him and to his heirs*; for these words, *his heirs (only)* make the estate of inheritance in all feoffments and grants.

Upon which lord *Coke* (*Co. Litt.* 4. *a.*) observes, that *Littleton* puts *lands* only for an example; for his rule extends to seigniories, rents, advowsons, commons, estovers, and other hereditaments of what kind or nature soever.

And that (*Co. Litt.* 8. *b.*) here *Littleton* treats of purchases by natural persons, and not of bodies politick or corporate; for if lands be given to a sole body politick or corporate, (as to a bishop, parson, vicar, master of an hospital, *&c.*) there to give him an estate of inheritance in his politick or corporate capacity, he must use these words, *To have and to hold to him and his successors*; for in these cases, without the word *successors*, no inheritance passes; for as the heir inherits to the ancestor, so the successor succeeds to the predecessor, and the executor to the testator. But it appears here by *Littleton*, that if a man at this day gives lands to *J. S.* and his successors, this creates no fee-simple in him; for *Littleton*, speaking of natural persons, says, that these words, *his heirs*, make an estate of inheritance in all feoffments and grants, whereby he excludes these words, *his successors*. And yet an ancient grant must be expounded as the law was taken at the time of the grant: A chantry priest incorporate took a lease to him and his successors for a hundred years, and afterwards took a release from the lessor to him and his successors; and it was adjudged, that by the release he had but an *estate for life*, for he had the lease in his natural capacity, for it could not go in succession, and *his successors* gave him no estate of inheritance for want of these words, *his heirs*.

And that (*Co. Litt.* 9. *a.*) if the King by his letters patent gives lands *decano & capitulo habendum sibi & hæredibus & successoribus suis*; in this case although they are persons in their natural capacity to them and their heirs, yet because the grant is made to them in their politick capacity, it shall enure to them and their successors.

And so if the King grants lands to *J. S. habendum sibi & successoribus sive hæredibus suis*, this grant shall enure to him and his heirs.

B. having divers sons and daughters, *A.* gives lands to *B. & liberis suis, & a leur heires*, the father and all his children take a fee-simple jointly by force of these words, *their heirs*; but if he had no child at the time of the feoffment, the child born afterwards shall not take.

These words, *his heirs*, do not only extend to *immediate heirs*, but to his *heirs remote*, and most remote, born and to be born, *Sub quibus vocabulis hæredibus suis, omnes hæredes propinqui comprehenduntur, & remoti, nati, & nascituri*. And *Hæredum appellatione veniunt hæredes hæredum in infinitum*. And the reason wherefore the law is so precise to prescribe certain words to create an estate of inheritance, is for avoiding uncertainty, the mother of contention and confusion.

The necessity of the word *heirs* or *successors*, as the case requires, is therefore absolutely necessary in conveyances of estates of inheritance; for as *Littleton* (in the same section) observes, that if a man purchases lands by these words, *To have and to hold to him for ever*; or by these words, *To have and to hold to him and his assigns for ever:* In these two cases he has but an estate for term of life.

One seised of lands in fee-simple, and having a son going to be married, he being upon the land, used these words: *In consideration of this marriage I do here, reserving an estate for my own and my wife's life, give unto thee and thy heirs for ever, these lands, &c.* This seems to be a good conveyance of the land. *Poph.* 47. *A fortiori* therefore if it be by deed. But there must be livery or attornment upon it in both cases.

9. The ninth thing necessary to a good deed is sealing. Sealing of deeds in old time was not used in *England*; for the *Saxons* used only to subscribe their names, and add the sign of the cross, and to set down a great number of witnesses. And afterwards the *Normans* brought in with them the custom of sealing deeds; but this was only introduced by degrees; first the Kings and a few of the nobility used it, and to seal with their seals of arms; afterwards all the nobility used it, and then the gentlemen; and about the time of *Edward* 3. all men began to use sealing of deeds, which has been continued ever since; so that now it is of necessity, insomuch that if a deed be never so well written before and delivered afterwards, yet if it be not sealed between the writing and delivery, it is not a good deed; but if a stranger seals it by allowance or commandment precedent, or agreement subsequent of him that is to seal it before the delivery of it, it is as well as if the party to the deed did seal it himself: And therefore if another man seals a deed of mine, and I take it up after it is sealed, and deliver it as my deed; this is said to be a good agreement to, and allowance of the sealing, and so a good deed. And if the party seals the deed with any seal besides his own, or with a stick, key, or any such thing which makes a print, it is good. And altho' it be a corporation that makes the deed, yet they may seal with any other seal besides their common seal, and the deed will be never the worse. And if there be twenty to seal one deed, and they seal all upon one piece of wax, and with one seal, yet if they make distinct and several prints, this is a very sufficient sealing, and the deed is good enough. *Terms de la ley*, tit. *Fait. Co. Litt.* 225. 2 *Co.* 4, 5. *Perk. s.* 129, 130, 131, 132, 134.

If a feoffment be made to two with covenants, and one of them seals it, and the other does not, but he who does not seal it survives and occupies the land, he is bound by the seal of his companion. *Hughes's Abr.* 590. *Dyer* 13.

A. and *B.* his son join in a deed to grant an annuity, and *A.* sets his hand to a seal, and a label is put for the son, but he never sealed it, the deed is void as to his son, and shall not bind him. *Dyer* 227.

If two make a deed. and one of them ſeals it at one time, and the other at another time; this is as good as if they ſealed it together. *Lane* 32.

If there be two parts of an indenture of leaſe, and the leſſee ſeals his part, but the leſſor does not ſeal, it is all void as to the paſſing of eſtates, covenants and bonds to perform it. *Yelv.* 18, 19.

But if a feoffor, donor or leſſor ſeals that part of the indenture which belongs to the feoffee, *&c.* the indenture is good, although the feoffee never ſeals the counterpart belonging to the feoffor, *&c.* *Co. Litt.* 229. *Cro. Eliz.* 212.

Although a condition may be pleaded by indenture, ſealed with the ſeal of the other party, yet a conveyance cannot be pleaded by deed not ſealed by the party, agent, feoffor, grantor, leſſor, *&c.* 3 *Leon.* caſe 138.

If a deed conclude with theſe words, *In witneſs whereof I have hereunto ſet my hand*; and the party writes his name, and puts his ſeal; this is a good deed, although no mention be made of putting his ſeal to it. *Hetley* 75.

10. The tenth and laſt thing which lord *Coke* obſerves to be neceſſarily incident to a good deed, is the delivery thereof.——The delivery of a deed is either *actual*, *i. e.* by doing ſomething and ſaying nothing, or elſe *verbal*, *i. e.* by ſaying ſomething and doing nothing, or it may be by both, or there is a delivery in deed and a delivery in law. 3 *Co.* 7. 2 *Co.* 4, 5.

And either of theſe may make a good delivery, and a perfect deed; but by one or both of theſe it muſt be made; for otherwiſe, although it be never ſo well ſealed and written, yet the deed is of no force, nor may any uſe be made of it as a deed. *Cro. Jac.* 136, 137. *Perk. ſ.* 137.

And though the party to whom it is made takes it to himſelf, or happens to get it into his hands, yet it will do him no good, nor him that made it any hurt, until it be delivered. *Cro. Jac.* 263.

And a deed may be delivered by the party himſelf that makes it, or by any other by his appointment or authority precedent, or aſſent or agreement ſubſequent, for *omnis ratihabitio mandato æquiparatur*; and when it is delivered by another that has a good authority, and purſues it, it is as good a deed as if it were delivered by the party himſelf; but if he has no authority, or does not purſue his authority, then it is otherwiſe. *Perk. ſ.* 137. 9 *H.* 6. 37. 11 *Co.* 28. 3 *Co.* 35. *Cro. Eliz.* 167.

And therefore if a deed, or the contents thereof, be read or declared to a man that is to ſeal it, and he (being illiterate) delivers it to a ſtranger, and bids him examine it, and if it be ſo as it was read to him, then to deliver it as his deed, otherwiſe to re-deliver it to him again that made it; in this caſe if the deed be in truth otherwiſe than it was read, and yet notwithſtanding he to whom it was delivered, delivers it to him to whom it is made, this delivery will not avail, neither is the deed by this delivery become a good deed. *Perk. ſ.* 137. 9 *H.* 6. 37. 11 *Co.* 28. 3 *Co.* 35. 47 *Ed.* 3. 3.

A deed may be delivered to the party himſelf to whom it is made, or to any other by ſufficient authority from him; or it may be delivered to any ſtranger, for and on the behalf, and to the uſe of him to whom it is made, without authority from him. But if it be delivered to a ſtranger without any ſuch declaration, intention or intimation, unleſs it be in caſe where it is delivered as an eſcrow, it ſeems this is not a ſufficient delivery. And yet if an obligation be made to the uſe of the third perſon expreſſed by the deed, and the obligor delivers it to him to whoſe uſe it is made, this is ſaid to be a good delivery. *Dyer* 162, 167. *Perk. ſ.* 137. *Co. Litt.* 36.

If a deed be delivered to the uſe of two, if one of them who is particularly named will agree to it, and if he will not agree, that the other ſhall be made acquainted with it, and one of them dies without being privy to the deed, this will not be a good deed. *Moor* 448.

And if a deed be delivered to a ſtranger, to the uſe of him to whom it is made, this delivery is good, and although he to whoſe uſe it is delivered dies before notice or agreement, yet the deed is good; but it is otherwiſe where it is to take effect upon a condition precedent. *Moor* 448.

If one grants a rent to a college in fee by deed, and delivers the deed to a ſtranger to the uſe of the college, and the college ſeals the counterpart of the indenture; in this caſe it was held, that the ſtranger might receive the deed to their uſe, without any letter of attorney; and that their ſealing of the counterpart was an agreement and confirmation of it. *Cro. Car.* 862.

If a deed poll be made by *A.* to *B.* with mutual covenants; *B.* delivers it firſt to *C.* and *C.* afterward to him; this is a good delivery to bind both parties. *Cro. Eliz.* 483.

If a deed be indented, and he who makes it ſeals and delivers his part, but the other does not ſeal and deliver his part, yet he ſhall be bound by it. *Cro. Eliz.* 212.

A ſtranger may receive a deed to the uſe of a corporation without a letter of attorney; and their ſealing of the counterpart of it will amount to a ſufficient agreement to it. *Cro. Eliz.* 862.

If a deed be delivered before or after the day of the date of it, yet it is good enough, but if it be delivered before it be ſealed, it is good for nothing; and where it is delivered before the date, yet in the pleading of it, it muſt not be ſo ſet forth. 2 *Co.* 4. *Plow.* 492. 5 *Co.* 117.

But if no time be ſhewn of the delivery, it ſhall be taken to be delivered at the time of the date of it. 3 *Leon.* caſe 227, 357.

If a deed be dated the 15th of *November* 23 *Eliz.* and is not ſealed or delivered till the 18th of *November* 26 *Eliz.* yet it is good; and he who made it may not plead *non eſt factum* to it, but if there be no occaſion, perhaps by a ſpecial plea he may help himſelf. *Cro. Jac.* 136.

If a deed be made by two, and one delivers it one day, and the other another day, this is good: And *prima facie*, every deed ſhall be intended to be delivered the day of the date of it. *Latch* 61.

If three ſeal a deed at one time, and a fourth at another time, and then it is delivered by them all, it is not the deed of any of them till the delivery. *Cro. Car.* 263.

If an obligation be dated the firſt of *May*, and the firſt of *June* following the obligee makes a releaſe dated the firſt of *March*, and delivers it the firſt of *June*; by this the obligation is not releaſed. *Cro. Eliz.* 14.

If an obligation be made with a condition to do ſomething by a day, and the obligation is not delivered at the time, ſo that it is now impoſſible to be done; in this caſe the condition will be gone, and the obligation ſingle. *Yelv.* 35, 138.

A deed takes effect by the delivery, and be the delivery before or after the date, it is not material; and if delivered before the date, and one of the parties die before the date, yet the deed is good. 2 *Co.* 4.

The delivery of a deed is always intended to be in the place where it was made. *Plow.* 491.

If a man pleads a releaſe, or other deed made at ſuch a place, *viz.* at *D.* in the county of *M.* he ſhall not ſay it was delivered at any other place than where it bears date. *Perk. ſ.* 150.

And therefore if an action of debt be brought by adminiſtrators, and they declare, that the adminiſtration was committed to them in *London*, and the letters of adminiſtration bear date in another place, and in another county, the declaration ſhall abate; for he who pleads a deed is not to vary from the place where it bears date; but he againſt whom a deed is pleaded may ſay it was made by dureſs of impriſonment at another place, and in another county than it bears date. *Perk. ſ.* 251.

If I have ſealed my deed, and after I deliver to him to whom it is made, or to ſome other by his appointment, and ſay nothing, this is a good delivery.

So if I take the deed in my hand, and uſe theſe, or the like words, *here take him*, or *this will ſerve*; or *I deliver this as my deed*, or *I deliver him you*; theſe are deliveries.

So

So if I make a deed of land to another, and being upon the land, I deliver the deed to him in the name of ſeiſin of the land; this is a good delivery.

So if the deed be ſealed, or lying in a window, or on a table, and I uſe theſe, or the like words, *there he is*, take it as my deed; this is a good delivery, and perfects the deed; for as a deed may be delivered by words without deeds, ſo may it alſo be delivered by deeds without words. 9 *Co.* 137. *Dyer* 192, 167. *Co. Litt.* 36, 49. 35 *Aſſ. pl.* 6.

But if a man ſeals and acknowledges before a mayor or other officer appointed for that purpoſe a writing proved for a ſtatute or recognizance, the acknowledgment before ſuch an officer ſhall not amount to a delivery of the deed, ſo as to make it a good obligation if it happens not to be a good ſtatute or recognizance. Adjudged T. 37 *Eliz. B. R.*

If one ſeals and delivers a deed to *L.* to be delivered to the obligee, who refuſes it, but *L.* leaves it at the place, this is a good delivery, and a good deed. *Anderſ.* caſe 8. *Dy.* 1. 5 *Co.* 119.

Deemſters, or **Demſters**, (from the Saxon *dema*, *i. e.* a judge or umpire.) *All controverſies* in the iſle of *Man* are *decided without proceſs*, *writings*, *or any* charges, by certain judges, whom they chooſe from among *themſelves*, *and call deemſters*. Camb. Brit. tit. *Brit. Iſlands.*

Deer. See **Game.**

Deerfold, (Sax. *deor*, *fera*, and *falda*, *ſtabulum*) A park, or deerfold. *Cowell*, edit. 1727.

Deer-hays, Are engines, or great nets, made of cords, to catch deer. *Stat.* 19 *H.* 7. *cap.* 11.

De eſſendo quietum de tolonio, Is a writ which lieth for them, that are by privilege freed from the payment of tool; of which read at large, *F. N. B. fol.* 226.

De expenſis militum. Is a writ commanding the ſheriff to levy ſo much a day for the expences of a knight of the ſhire, and a like writ to levy two ſhillings a day for every citizen and burgeſs, called *De expenſis civium & burgenſium.* 4 Inſt. fol. 46.

De facto, A thing actually done, done in very deed. A King *de facto* is one that is in actual poſſeſſion of a crown, and hath no lawful right to the ſame; in which ſenſe it is oppoſed to a King *de jure*, who hath right to a crown, but is out of poſſeſſion. 3 *Inſt.* 7.

Defamation, *Defamatio*, Is when a man ſpeaks ſlanderous words of another man, of a court of juſtice, magiſtracy, or title of land; for which the party ſhall be puniſhed, according to the nature and quality of the offence; ſometimes by action upon the caſe for ſlander; at other times in the eccleſiaſtical courts; as if a man contrive any falſe lies againſt prelates, dukes, earls, &c. then an *action de ſcandalis magnatum* will lie by the ſtatute 2 *R.* 2. *cap.* 5. But for *defamations* in the ſpiritual courts to be determined, they ought to have three incidents. *Firſt*, To concern matters merely ſpiritual, there triable; as to call a man heretick, ſchiſmatick, adulterer, &c. *Secondly*, That it concern matter merely ſpiritual. *Thirdly*, That it is only for puniſhment of the fault, for the ſoul's health of him that offends. *Cowell*, edit. 1727. For the ſlander or *defamation* of a title of lands, ſee *Co. lib.* 4. *f.* 18.

Whether a prohibition lies for a ſuit for defamation, 13 *Ed.* 1. *ſt.* 4. 9 *Ed.* 2. *ſt.* 1. *c.* 4. See **Actions, Prohibition**, *Biſhop* Gibſon's *Codex*, *and Dr.* Burn's *Eccleſiaſtical Law.*

Default, (Fr. *Defaut*) Is commonly taken for *non-appearance* in court, at a day aſſigned; though it extends to any omiſſion of that which we ought to do. *Bract. lib.* 5. *tract.* 3. *Co. Lit.* 259. If a plaintiff makes *default* in appearance in a trial at law, he will be nonſuited; and where a defendant makes *default*, judgment ſhall be had againſt him by *default*. In action of debt upon bond, if the defendant pleads a releaſe, and iſſue is thereupon joined, if at the trial the defendant makes *default*, the plaintiff may pray judgment by *default*; becauſe by the plea the duty is confeſſed, and therefore no inqueſt need be taken by *default*: But if the defendant pleads *non eſt factum*, by that plea the duty is denied, and therefore if he make *default*, inqueſt muſt be taken by *default*. In treſpaſs, if the defendant plead a releaſe; and then make *default*, the plaintiff cannot pray judgment by *default*; but an inqueſt is to be taken, becauſe damages are incertain. 1 *Salk.* 216.

By *default* of a defendant, he is ſaid to be generally out of court to all purpoſes, but only that judgment may be given againſt him: And no judgment can be afterwards given for the defendant. *Ibid.* 628. When two are to recover a perſonal thing, the *default* of one is the *default* of the other: *Contra*, where they are to diſcharge themſelves of a perſonalty: there the *default* of the one is not the *default* of the other. 6 *Rep.* 25. 1 *Lil. Abr.* 425. In an action againſt two, if the proceſs be determined againſt one, and the other appears; he ſhall be put to anſwer, notwithſtanding the default of his companion. 2 *Danv. Abr.* 480. Where the baron is to have a corporal puniſhment for *default*, there the *default* of the wife ſhall not be the *default* of the huſband: But otherwiſe it is where the huſband is not to have any corporal puniſhment by the *default*. *Ibid.* 472, 473. If a defendant imparl to another day in the ſame term, and make *default* at the day, this is a departure in deſpite of the court: And when the defendant after appearance, and being preſent in court, upon demand makes departure, it is in the deſpite of the court, and the entry is, *Et præd. tenens, licet ſolemniter exactus, non revenit, ſed in contemptum curiæ receſſit, & defaltam fecit, &c. Co. Lit.* 139. Before a verdict is taken by *default*, the cryer of the court calls the defendant three times; and if he doth not appear, the plaintiff's counſel prays, that the inqueſt may be taken by *default*: He is called three times, to ſhew if he hath any challenge to the jurors; and if he doth not appear upon the cryer's calling, then the *Capiatur per defaltam* is indorſed on the back of the pannel. 1 *Lill.* 425.

Suffering judgment to go by default, is an admiſſion of the contract declared on. *Stra.* 612.

After the inqueſt is taken by default, the defendant can make no ſuggeſtion on the roll. *Str.* 46.

Seiſin to be recovered by default *in communi cuſtodia*, *Stat. Marleb.* 52 *Hen.* 3. *c.* 7.

Lords that diſtrain for ſuit of court to loſe by default at the diſtreſs upon the attachment, *St. Marleb.* 52 *Hen.* 3. *c.* 9.

Suit of court not to be recovered by default, *St. Marleb.* 52 *H.* 3. *c.* 9. *ſ.* 2.

Judgment to be by default in all writs where attachments lie in default upon the great diſtreſs, 52 *Hen.* 3. *c.* 12.

Inqueſts to be taken by default (after the firſt default) in writs where attachments lie, 52 *H.* 3. *c.* 13.

None but juſtices in eyre ſhall amerce for default on common ſummons, 52 *Hen.* 2. *c.* 18.

Juſtices in eyre ſhall not amerce a townſhip if a ſufficient number come, except in inquiſitions for the death of a man, 52 *H.* 3. *c.* 24.

Judgment by default on the ſtatute prohibiting the ſurcharging religious houſes, *St. Weſtm.* 1. 3 *Ed.* 1. *c.* 1.

Inqueſt ſhall be taken by default in aſſiſes, attaints, and *juris utrum* after appearance, *St. Weſtm.* 1. 3 *Ed.* 1. *c.* 42.

Judgment to be given in the country courts in *Wales* upon three defaults, *St. Wall.* 12 *Ed.* 1.

Upon two defaults before the juſtice, *St. Wall.* 12. *Ed.* 1.

Default may be recorded at *niſi prius.* 12 *Ed.* 2. *ſt.* 1. *c.* 4.

See **Appearance**, and 7 *Vin. Abr.* tit. *Default.*

Default in criminal caſes. An offender indicted appears at the *capias*, and pleads to iſſue, and is let to bail to attend his trial, and then makes *default*; here the inqueſt, in caſe of felony, ſhall never be taken, but a *capias ad audiendam juratam* ſhall iſſue, and if the party is not taken, an *exigent*; and if he appeared on that writ, and then make *default*, an *exigi facias de novo* may be granted: But where, upon the *capias* or *exigent*, the ſheriff returns *cepi corpus*, and at the day hath not his body, the ſheriff ſhall be puniſhed, but no new *exigent* awarded, becauſe in cuſtody of record. 2 *Hale's Hiſt. P. C.* 202.

Default of jurors, If *jurors* make *default* in their appearance for trying of cauſes, they ſhall loſe and forfeit *iſſues*, unleſs they have any reaſonable excuſe proved by witneſſes, in which caſe the juſtices may diſcharge the iſſues for *default*. *Stat.* 35 *H.* 8. *c.* 6.

Defeaſance, (from the French *Defaire*, to undo, or defeat) Signifies a condition relating to a deed, as to a recognizance or ſtatute, which being performed by the recognizor, the deed is *defeated*, and made void, as if it never had been done. The difference between a *proviſo*, or a condition in a deed, and a *defeaſance*, is, that the condition is annexed to, or inſerted in the deed or grant; and a defeaſance is a deed by itſelf, concluded and agreed on between the parties, and having relation to another deed. 1 *Inſt.* 631. *Weſt's Symb. lib.* 2. *ſ.* 156.

Debt upon *bond* conditioned *to pay ſeveral ſums on* ſeveral days, the defendant *pleaded payment of all* the ſums *due before ſuch a day, at which day the plaintiff per ſcriptum ſuum* ſigned *under his hand*, which the defendant *profert hic in curia, agreed to defer the payment of the reſidue till a farther day* not yet come; and upon a demurrer to this plea, it was adjudged ill, becauſe this action being founded on a deed, there cannot be a defeaſance made thereof without a deed, and *ſcriptum ſuum manu* doth not imply a deed. 3 *Lev.* 234. *Trin.* 1 *Jac.* 2. *C. B. Blemerhaſſet* v. *Pierſon.*

Where *two deeds* are *made at the ſame time*, and they have *no reference the one to the other*, they ſhall not be conſtrued as defeaſances. 12 *Mod.* 221. 10 *Will.* 3. *Clayton* v. *Kinaſton.*

Obligee reciting the bond, *covenants to ſave obligor harmleſs*; it is an abſolute defeaſance, and if it be to ſave him harmleſs on a contingency, it is a conditional defeaſance, becauſe it has an *expreſs relation to the deed*, but otherwiſe, where the deed is only to indemnify againſt all covenants heretofore made, or hereafter to be made, this does not deſtroy a deed made at the ſame time. 2. *Salk.* 574. *Paſch.* 13 *Will.* 3. *B. R. Clayton* v. *Kinaſton.*

A. and *B.* are jointly and ſeverally *bound.*, to *H*; *H. covenants with A. not to ſue A.* this is no defeaſance as to *B.* but if *A.* only had been bound, ſuch covenant had been a defeaſance. 2 *Salk.* 575. in the caſe of *Lacy* v. *Kinaſton.*

If a defeaſance be to one of the parties, it is to all, for if ſeveral *covenant jointly and ſeverally*, a defeaſance to one of them is a defeaſance to all; and it is impoſſible to defeat as to one, without defeating as to all; and if a defeaſance *works a releaſe and diſcharge*, a defeaſance to one is a defeaſance to all, as a releaſe to one is a releaſe to all. 12 *Mod.* 550, 551. *Trin.* 13 *Will.* 3. *Lacy* v. *Kinaſton.*

B. acknowledged a ſtatute to *S. and ſold lands* in the county of *H.* to *T.* afterwards *the land in H. in the hands of T. were extended by the ſtatute. B.* brought *audita querela* on a *defeaſance*, viz. *that if the land in H. ſhould be extended by the ſtatute, then the ſtatute ſhould be void.* Adjudged that the defeaſance was good and not repugnant; for he might ſue execution of land in another county, or of his goods or perſon. *Mo.* 811. *pl.* 1097. *Mich.* 8 *Jac. in Canc. Trot.* v. *Spurling.*

Defeaſance *muſt contain proper words* of defeaſance, as that the thing ſhould be void. 2 *Salk.* 575. *pl.* 2. *Hill.* 10 *Will.* 3. *Br.* in the caſe of *Lacy* v. *Kinaſton.*

A record of a judgment is defeaſible *by bond or deed, per Holt* Ch. J. 12 *Mod.* 229. 10 *Will.* 3. *Anon'.*

A. covenants with B. to pay him 300 *l.* for the uſe of *A. only for her life*; and convenant was brought upon this, and breach aſſigned, that there was ſo much of the 300 *l.* arrear, *defendant pleads* that there was another indenture between him and the plaintiff *ſince* the date, or delivery of the covenant-deed declared on, *reciting the ſaid covenant* and agreement for the payment of the 300 *l. wherein it was covenanted* and agreed, *that ſo long as A. and his wife did cohabit, the payment* of the 300 *l. ſhould ceaſe*, and *avers that they did cohabit* for the time the ſaid arrear became due, and pleads this in bar of the firſt agreement; and there are *expreſs words that the payment ſhould ceaſe during the cohabitation*; and there had been no great harm to conſtrue this as a releaſe of the arrearages during the cohabitation; *but yet it being* a ſum *in groſs and the covenant temporary*, and not perpetual, they held it no good bar. *Per Holt* Ch. J. 12 *Mod.* 552. *Trin.* 13 *Will.* 3. cites 2 *Vent.* 217. *Gawden* v. *Draper.*

In debt on an obligation, the defendant pleaded in bar, that it was given for compounding felony; on a demurrer it was inſiſted, that this was contrary to the import and condition of the bond; and after ſome doubts it was adjudged *per. tot. cur.* for the plaintiff; and by *Forteſcue*, a *parol* agreement can no more be ſet up againſt a *bond*, than a parol defeaſance can againſt a *ſingle bill. Gibb.* 75. *Trin.* 2 & 3 *Geo.* 2. *C. B. Andrews* v. *Eaton.*

Where a bond is made, and after a defeaſance is made thereof, if he pays a leſſer ſum, *&c.* there if he pleads the defeaſance and the *tender of the leſſer ſum*, he needs not ſay *Tout temps priſt*; for by the tender he was diſcharged of all. But otherwiſe of an obligation with condition to pay a leſs ſum. *Cro. E.* 755. *pl.* 16. *Paſch.* 42 *Eliz. C. B. Cotton* v. *Clifton.*

Where a *proviſo* goes by way of defeaſance of a *covenant*, it muſt be *pleaded* on the other ſide, otherwiſe, where by way of explanation, or reſtriction of the covenant; *per Holt* Ch. J. 2 *Salk.* 574. *pl.* 2. *Hill.* 10 *Will.* 3. *B. R. Cleyton* v. *Kinaſton.*

A. entered into a *bond* to *B.* conditioned for payment of 40 *l.* afterwards *B.* agreed and *entered into a covenant, that if A.* (the defendant) *pay* 5 *s. in the pound for every* 20 *s. due to the plaintiff* from the defendant, and ſo at the ſame rate, for every greater or leſſer ſum than 20 *s. on or before the* 25*th of* December, *the plaintiff ſhould and would accept the ſame in diſcharge of all ſums*, as *then were, or on the* 25*th of December ſhould be, due* from the defendant to the plaintiff. The Chief Juſtice delivered the opinion of the whole court for the defendant; that this is a defeaſance to this bond, and ſufficiently relates to it; for it is *not neceſſary to recite the bond*, no more than where a power of revocation is inſerted in a deed; a revocation by a ſubſequent deed is good, though it does not recite or mention the power, or in direct words refer to it. *Comyn's Rep.* 569, 570. *Trin.* 11 *Geo.* 2. *C. B. Trevet* v. *Angus.* See 7 *Vin. Abr.* tit. *Defeaſance.*

Defence, In a legal ſignification is applicable to a plea, and is that which the defendant ought to make immediately, after the count or declaration, *viz.* that he defends all the force, wrong and damages, where and when he ought, *&c.* And by defending the force and wrong, he excuſes himſelf of the wrong ſurmiſed againſt him, and makes himſelf party to the plea; and by defending the damage, he affirms the plaintiff able to be anſwered unto. For the reſidue of the defence, the defendant accepts the power of the court to hear and determine this matter; for if he will plead to the juriſdiction, he ought to omit in his defence the words, *where and when he ought*; and if he will ſhew any diſability in the plaintiff, and demand judgment if the party ſhall be anſwered unto, then he ought to omit the defence of the damage. *Termes de la ley.*

Aſſumpſit was brought *againſt R. G. eſq*; the defendant *venit & defendit vim & injuriam quando, &c. and pleads that he is a gentleman, abſque hoc, that he is an eſquire, &c.* Upon demurrer it was argued for the plaintiff, that the defendant by ſaying *vim & injuriam quando, &c.* has made a full defence, and after that he cannot plead in abatement; but it was anſwered on the other ſide that it is good either way; for this is not a full defence, but the moiety of a defence; for that a full defence is when the defendant proceeds and ſays, *& damna & quicquid quod ipſe defendere debet*, and cited *Paſch.* 3 & 4 *Will & Ma. in B. R. Rot.* 449. that the defendant after *vim & injuriam quando*, pleaded that the defendant was an alien enemy, and the court held that it was good the one way or the other. But *per Powell* J. *quando, &c. amounts to a full defence*, and *damna & quicquid quod ipſe defendere debet* is never put in. No judgment was given as to this point, but all agreed, that the miſnomor being pleaded in abatement by attorney is ill; and a *reſpondeas ouſter* awarded. *Ld. Raym. Rep.* 117. *Mich.* 8 *W.* 3. *Britton* v. *Gradon.*

In this defence there are *three parts* to be conſidered. Firſt, *when he defends the wrong and the force*, this has a *double effect*, viz. *to make himſelf party* to the matter; and

and this is the reaſon, that the defendant in this and the like actions can plead no plea at all before he makes himſelf party by this part of the defence, as it appears here by *Littleton*, that if the defendant will plead *in diſability of the* perſon *of the plaintiff*, he muſt firſt make himſelf party by this firſt part of the defence; neither can be *plead to the juriſdiction of the court* without this part of the defence. *Co. Litt.* 127. *b.*

2dly, by the *defence of the damages*, he affirms that the plaintiff is able to ſue, and (upon juſt cauſe) to recover damages. *Co. Litt.* 127. *b.*

3dly, And by the laſt part, viz. *And all that which he ought to defend, when and where he ought*, he *affirms the juriſdiction* of the court. *Et ſic de ſimilibus.* And of ſuch neceſſity is it for the tenant or defendant to make a lawful defence as albeit he appears, and pleads a ſufficient bar without making defence, yet judgment ſhall be given againſt him. *Co. Litt.* 127. *b.*

In *pleading excommunication* in the plaintiff, *Hole* Ch. J. doubted, if defendant ought not to have made ſome kind of defence, though no full defence is to be made. *Vent* 222. *Trin.* 24 *Car.* 2. *B. R. Jay* v. *Bond.*

In *aſſumpſit* on a bill of exchange, the defendant *pleaded in bar without defence*, and upon a general demurrer this was objected, and the queſtion was, if this was matter of form, and ſo aided by the *general demurrer*. And *prima facie* the court was of opinion, that this was matter of ſubſtance; becauſe the defendant is not party to the action without defence; but after having conſulted the judges of *B.* where it has been a long time held matter of form, they agreed that it was *aided* by general demurrer, though at the ſame time they ſeemed to comply with that opinion, rather than to approve it with their own judgments, to the end that there might be a conformity between the two courts. *Lord Raym. Rep.* 282. *Mich.* 9 *Will.* 3. *Bellaſis* v. *Heſter.*

In ejectment the defendant *venit & dicit, that the land is ancient demeſne, without making any defence*; to this there was a ſpecial demurrer. *Et per Holt* Ch. J. The plaintiff might have refuſed the plea for want of defence; but if he *receives the plea he admits a defence.* If one plead outlawry, he ought to plead it *ſub pede ſigilli*, and if the does not ſo plead it, the plaintiff may refuſe it; but if he accepts the plea, he ſhall not demur for that cauſe; for it is well enough if he allows it. 1 *Salk.* 217. *Paſch.* 4 *Will. & Mar. in B. R. Ferrer* v. *Miller.*

Treſpaſs, *aſſault and battery*, the defendant *venit & defendit vim & injuriam quando, &c. and pleads outlawry in abatement after imparlance*; the plaintiff demurs; and adjudged that the defendant anſwer over, becauſe he cannot plead ſuch a plea after a full defence, by which he has admitted the plaintiff able to recover damages. *Lord Raym.* 117. *arg.* cites 35 *Car.* 2. *B. R. Rot.* 1528. *Gawen* v. *Surby.*

In treſpaſs, *aſſault and mayhem*, the defendant *venit & defendit vim & injuriam quando*, and *pleaded another action depending for the ſame cauſe* undetermined in abatement, and judgment, *quod reſpondeat ulterius*, for the ſame reaſon as before. *Ld. Raym. Rep.* 117. *arg.* cites *Trin.* 4 *W. & M. in C. B. Meacock* v. *Farmer.*

After the defendant has made a full defence in *treſpaſs* by adding the words *quando, &c.* to the *venit & defendit vim & injuriam*, he *cannot plead in diſability, that the plaintiff is an alien born, &c.* but *he ought to omit the Quando*, becauſe by that word the defendant hath admitted that the plaintiff hath capacity to ſue. *Carth.* 230. *Paſch.* 4 *W. & M. in B. R. Jentreer* v. *Jenkins.*

Defendant came and *defendit vim & injuriam quando*, and then would plead *miſnomer*; and ſaid he could not plead that after pleading *defendit vim & injuriam*; for that he had admitted himſelf by that name: *Curia adviſare vult.* 12 *Mod.* 235. *Mich.* 10 *W.* 3. *Clark* v. *Butler.* See 7 *Vin. Abr.* tit. *Defence.*

Defend, *(Defendere)* Signifies in our ancient laws and ſtatutes, to prohibit or forbid: As—— *Uſuarios* defendit *quoque Rex* Edwardus, *ne remanerent in regno.* LL. Edw. Conf. c. 37. 5 Ric. 2. c. 7. Of which word thus *Chaucer:*

Where can you ſay in any manner age,
That ever God defended marriage.

In 7 *Edw.* 1. we have a ſtatute, intitled, *Statutum de* defenſione *portandi arma, &c. And it* is defended *by law to diſtrain on the highway.* Coke on Litt. fol. 161. Nay, in common ſpeech men frequently ſay *God defend*, inſtead of *God forbid*; and the *fence month* is more properly the *defence-month*, that is, the forbidden month, or *tempus vetitum.* Manwood's Foreſt Law, cap. 13. num. 1. See **Fence-month.** *Cowell, edit.* 1727.

Defendant, *(Defendens,)* Is he that is ſued in an *action perſonal*; as *tenant* is he that is ſued in an *action real.* See **Impediens.**

Defendemus, Is an ordinary word in a feoffment or donation, and hath this force, that it bindeth the donor and his hiers to *defend* the donee, if any man go about to lay any ſervitude upon the thing given, other than is contained in the donation. *Bracton, lib.* 2 *cap.* 16. *num.* 10. See alſo **Warrantizabimus & acquietabimus.**

Defender of the faith, *(Defenſor fidei,)* Is a peculiar title given to the King of *England* by the Pope, as *Catholicus* to the King of *Spain*, and *Chriſtianiſſimus* to the *French* King, and *Advocatus Eccleſiæ* to the Emperor. It was firſt given by *Leo* the Tenth, to King *Henry* the Eighth, for writing againſt *Martin Luther* in behalf of the church of *Rome*, then accounted *Domicilium fidei catholicæ.* Stow's Annals, pag. 863. The bull for it bears date *Quinto Idus octo.* 1521. and may be read at large in the Lord *Herbert's Hiſtory of Henry the Eigth, fol.* 105.

Defendere ſe, A phraſe in the *Domeſday Regiſter*, to be taxed for ſuch a quantity of land. As the manor of *Brill, comb. Buck.* having been rated or aſſeſſed at twenty hides, it is ſaid,——*Inde xx. hidæ ſe defendebant.* Paroch. Antiq. p. 165.

Defendere ſe per corpus ſuum, To offer duel, combat, or camp-fight, as a legal trial or appeal. The phraſe occurs in *Bracton, lib.* 3. *de Corona, cap.* 26, 32, *&c.* and many other of our *Engliſh* writers.

Defendere unica manu, To wage law, by denying the accuſation upon oath:——*Et ſi forte forisfactor ille factum ngaverit, & foreſtarius ſolus ſit ſine teſte, ille debet ſe* defendere unica manu *ad unicam vocem rationabili die data in curia abbatis, & ſi unicum teſtem vel plures habuerit, debet ſe defendere ſexta manu, &c.* Charta Facta inter W. de Bray Mil. & Abb. & Convent. de Oſeney, ſine dat. See **Manus.**

Defenſa, A park, or place fenced in for deer, and defended as a property, and peculiar for that uſe and ſervice—*Idem dux fecit inſtaurare prædictum parcum de feris* defenſæ Leiceſtrenſis. Henr. Knyghton *ſub anno* 1352. ——*Dux Lancaſtriæ fecit magnam convocationem magnatum regni ad tenendum apud Legeceſtriam in foreſta &* defenſa, *& in omnibus parcis ſuis ibidem. Ib. ſub Anno* 1390. Cowell, edit. 1727.

Defenſiva, The lords or earls of the marches, the wardens or defenders of the country.——Defenſivæ *locorum ſeu vicecomites locis ſtatuentur ſtatutis.* Rad. de Diceto ſub Anno 1153——*In Marchia principales* defenſivæ *locorum, &c.* Ib. ſub Anno 1198.

Defenſo. That part of an open field that was for corn and hay, upon which there was no common or feeding, was ſaid to be *in defenſo.* So any meadow-ground laid in for hay. And ſo any part of a wood, where the cattle had not liberty to run, but was incloſed and fenced up to ſecure the growth of the underwood.——*Boſcus de Naſſoke debet eſſe* in defenſo *dum durat pannagium, videlicet a feſto Michaelis ad feſtum Sancti Martini.* Mon. Angl. tom. 3. p. 306.

Defenſum, An incloſure, or any fenced ground.—*Si ego meos porcos in parco meo vel in haja, vel in aliqua alio* defenſo, *poſuero ——Mon. Angl. tom.* 2. *p.* 114.

Definitor, *(Diffinitor)* A viſitor.

Deforcement, *(Deforciamentum.)* Matt. Pariſ. *f.* 422. *Quicunque* deforciaverit *eis dotem, & de ipſo* deforciamento *convictus fuerit, id eſt, per vim abſtulerit.* A with-holding lands or tenements by force from the right owner. See **Deforceor**, and *Coke* on *Litt. fol.* 331. *b.*

Deforciant, (*Anno* 23 *Eliz. cap.* 3.) The ſame with *deforceor*. See **Diſſorciare.**

Deforceor, *Deforciator*, (from the French *forceur, expugnator*) Signifies one that overcometh, and caſteth out by *force:* And differeth from diſſeiſor firſt in this, becauſe a man may diſſeiſe another without force: Which act is called *ſimple diſſeiſin. Britton, cap.* 53. Next, becauſe a man may *deforce* another that never was in poſſeſſion. As for example, if many have a right to lands as common heirs, and one entring keepeth out the reſt, the law ſaith, that he *deforceth* them, though he doth not diſſeiſe them. *Old Nat. Brev. fol.* 118. And *Littleton* in his chapter of *Diſcontinuance, fol.* 117. ſaith, That he who is enfeoffed by the tenant in tail, and put in poſſeſſion, by keeping out the heir of him in the reverſion, being dead, doth *deforce* him, though he did not diſſeiſe him, becauſe he entred when the tenant in tail was living, and the heir had no preſent right. And a *deforceor* differeth from an intruder, becauſe a man is made an intruder by a wrongful entry only into lands or tenements void of a poſſeſſor: and a *deforceor* alſo is, by holding out the right heir, as aboveſaid. *Bracton, lib.* 4. *cap.* 1. See more of this in *Pulton de Pace Regis, fol.* 34, 35.

Deforciatio. A diſtreſs, diſtraint, or ſeizure of goods for ſatisfaction of a lawful debt.——*Nos & hæredes noſtros diſtringere poſſunt, per bona mobilia & immobilia & hominum noſtrorum, &* deforciationem *tenere quoſque plenarie fuerit ſatisfactum.* Paroch. Antiq. p. 293.

Degradation, (*Degradatio,*) Is an eccleſiaſtical cenſure, whereby a clergyman is deprived of his holy orders which formerly he had, as of prieſt or deacon. *God. Rep.* 309.

And by the Canon law, this may be done two ways: either ſummarily, as by word only; or ſolemnly, as by deveſting the party degraded of thoſe ornaments and rites, which were the enſigns of his order or degree. *God. Rep.* 309.

This ſolemn degradation was anciently performed in this manner, as is ſet forth in the ſixth book of the Decretals: If the offender was a perſon in inferior orders, then the biſhop of the dioceſe alone, if in higher orders as prieſt or deacon, then the biſhop of the dioceſe, together with a certain number of ôther biſhops, ſent for the party to come before them. He was brought in, having on his ſacred robes, and having in his hands a book, veſſel, or other inſtrument or ornament appertaining to his order, as if he were about to officiate in his function. Then the biſhop publickly took away from him, one by one, the ſaid inſtruments and veſtments belonging to his office, ſaying to this effect; This and this we take from thee, and do deprive thee of the honour of prieſthood; and, finally, in taking away the laſt ſacerdotal veſtment, ſaying thus; By the authority of God Amighty, the Father, tbe Son, and the Holy Ghoſt, and of us, we do take from thee the clerical habit, and be depoſe, degrade, deſpoil, and deprive thee of all order, benefit, and privilege of the clergy. *Gibſ.* 1066.

By *Canon* 122. Sentence againſt a miniſter, of depoſition from the miniſtry, ſhall be pronounced by the biſhop only, with the aſſiſtance of his chancellor and dean (if they may conveniently be had, and ſome of the prebendaries, if the court be kept near the cathedral church; or of the archdeacon, if he may be had conveniently, and two other at leaſt grave miniſters and preachers to be called by the biſhop, when the court is kept in other places.

There is likewiſe a degradation of a lord or a knight, *&c.* at Common law, when they are attainted of treaſon; as *Hill.* 18 *Ed.* 2. *Andrew Harcla*, Earl of *Carliſle*, who was alſo a knight, was degraded; and when judgment of treaſon was pronounced againſt him, his ſword was broken over his head, and his ſpurs hewn off his heels, *&c.* And there is a degrading by act of parliament; for by ſtat. 13 *Car.* 2. *cap.* 15. *William Lord Monſon*, Sir *Henry Mildmay*, and others, were degraded from all titles of honour, dignities, and pre-eminences, and none of them to bear or uſe the title of Lord, Knight, Eſquire, or Gentleman, or any coat of arms for ever after.

Deguttare, To baſte meat in roaſting, by letting butter, fat, or driiping, *gutter* or run by drops upon it. ——*Nec minori tormento vexabantur, qui verubus transfixi ad ignem aſſati* deguttabantur *a dæmonibus ex metallis liquefactis.* Mat. Par. ſub Anno 1153.

Dehors, (Fr.) A word uſed in ancient pleading, when a thing is without the land, *&c.* or out of the point or thing in queſtion. See **Hors de ſon fee.**

De injuria ſua propria. See **De ſon tort demeſne.**

Deirorum regnum, *i. e. York, Lancaſter, Weſtmorland, Cumberland, Northumberland,* and the biſhoprick of *Durham.* From the Saxon *deer, fera,* becauſe of the multitude of wild beaſts there. *Cowell, edit.* 1727.

Dei Judicium. The old Saxon *ordeal* was ſo called, becauſe they thought it an appeal to God for the juſtice of a cauſe; and did believe the deciſion was according to the will and pleaſure of Divine providence.——*Picot contradixit ſuum teſtimonium de villanis & vili plebe, & de præpoſitis qui volant defendre per ſacramentum, aut per* Dei Judicium, *quod ille qui tenuit terram, liber homo fuit*——Domeſday *in* Cerdeſon. *See Dr.* Brady's Introd. p. 272.

Deis, or **Dagus,** The chief or upper table in *Engliſh* monaſteries was ſo called.——*Priore prandente ad magnam menſam quam* deis *appellamus. Additam. ad* Mat. Par. p. 148. *Et ſciendum quod non permittitur ciphus cum pede in refectorio niſi tantum in majori menſa, quam* deis *appellamus.* Ib. Theſe tables had this name from a cloth called *deis,* with which the tables of Kings were covered. *Matt. Pariſ. in vita Abbat. Sancti Albani,* p. 92.

Delatura, *i. e.* An accuſation: *In quibuſdam locis juramenti vel antejuramenti multa eſt diſtantia, ſicut in* delatura, *& plurimis aliis.* Leges H. 1. cap. 64. Sometimes 'tis taken for the reward of an informer. *Leges Inæ* 20. *apud Brompton.* It differs from *Freda, viz. Qui ſcrofas ſex cum verre furatus eſt, in triplum componat &* delaturam, *ſ.* 7. *& in freda totidem.* Du Freſne.

Delegates, The ſtat. 26 *H.* 8. *cap.* 19. ſays are commiſſioners *delegated* or appointed by the King's commiſſion, to ſit upon an appeal to him in the court of *Chancery*, and is granted in three caſes. *Firſt*, When a ſentence is given in any eccleſiaſtical cauſe by the archbiſhop, or his official. *Secondly*, When any ſentenc is given in an eccleſiaſtical cauſe in places exempt. *Thirdly*, When ſentence is given in the Admiralty in ſuits civil and marine, by order of the Civil law. 4 *par. Inſt. fol.* 339. *Stat.* 8 *Eliz. cap.* 5.

Delf, (from the Saxon *delfan*, to dig,) Is a quarry or mine where ſtones or coal is digged. *Anno* 31 *Eliz. cap.* 7. And *Cambden* mentions a charter of *Edward* the Fourth, wherein mention is made of a mine or *delf* of copper. We ſtill retain the word *delve* for dig.

Delgovitia. *Godmundham* in *Yorkſhire.*

Deliverance. When a criminal is brought to trial, and the clerk of the crown aſks him whether he is *guilty*, or *not guilty*, to which he anſwers Not guilty, and puts himſelf on God and his country, the clerk wiſhes him a good deliverance.

Deliverance of cattle deſtrained. See **Second deliverance** and **Replevin.**

Delivery of deeds. See **Deed.**

Demain or **Demeſne,** (*Dominicum*, Gallis *Domanium*, Italis *Demanium*) Is a *French* word otherwiſe written *domaine*, and ſignifieth *Patrimonium domini*, as *Hottoman* ſaith, *In verbis feudalibus, verbo* Dominicum, where by divers authorities he proveth thoſe lands to be *dominicum*, which a man holdeth originally of himſelf, and thoſe to be *feodum* which he holdeth of a ſuperior lord. And by the word *domanium* or *demanium*, are properly ſignified the King's lands in *France*, appertainiug to him in property. In like manner do we uſe it in *England*, although we have no land (that of the crown only excepted) which is not holden of a ſuperior, for all dependeth either mediately or immediately of the crown, wherefore no common perſon hath any *demains* ſimply underſtood; for when a man in pleading, would ſignify his land to be his own, he ſaith, that he is or was ſeiſed thereof in his *demain*,

main as of fee, *Litt. lib.* 1. *c.* 1. whereby he meaneth, that although his land be to him and his heirs for ever, yet it is not true *demain*, but depending upon a ſuperior lord, and holding by ſervice, or rent in lieu of ſervice, and by both ſervice and rent; yet theſe words have been uſed in the King's right. 37 *H.* 8. *c.* 16. and 39 *Eliz. c.* 22. But the application of this ſppech to the King and crown land is crept in by error and ignorance of the word *fee*. *Britton, c.* 78. ſheweth, that this word demain is diverſly taken, ſometimes more largely, as of lands and tenements held for life, *&c.* and ſometimes more ſtrictly, as for ſuch only, as are generally held in fee. This word ſometimes is uſed for a diſtinction between thoſe lands, that the lord of a manor hath in his hands, or in the hands of his leſſee, demiſed upon a rent, for term of years or life, and ſuch other land appertaining to the ſaid manor, which belongeth to free or copyholders. Howbeit, the copyhold belonging to any manor, is alſo in the opinion of many good lawyers accounted *demains*. *Bracton, lib.* 4. *tract.* 3. *c.* 9. *num.* 5. *ſaith, Eſt autem dominicum, quod quis habet ad menſam ſuam & proprie, ſicut ſunt* Bordlands *Anglice. Item dicitur dominicum villenagium, quod traditur villanis quod quis tempeſtive & intempeſtive ſumere poſſit pro voluntate ſua & revocare.* Of this *Fleta* alſo writeth much after the ſame manner. *Lib.* 5. *c.* 5. *ſect. Dominicum autem.* And the reaſon why copyhold is accounted *demains*, is becauſe they who are tenants to it, are judged in law to have no other right, but at the will of the lord; ſo that it is reputed ſtill after a manner to be in the lord's hands. And yet in common ſpeech, that is ordinarily called *demeans*, that is neither free nor copy. And here note, that *demain* is ſometimes uſed in a more ſpecial ſignification, and is oppoſite to frank-fee. For example, thoſe lands which were in the poſſeſſion of *Edward the Confeſſor*, are called *ancient demain*, and others are called *frank-fee*. *Kitchin, fol.* 98. And the tenants who hold any of thoſe lands are called *tenants in ancient* demain the others *tenants in frank-fee*. *Kitchin, ubi ſupra.* And alſo tenants of the Common law. *Weſt. Symbol. part.* 2. *tit.* Fines, *ſect.* 25. The reaſon is, becauſe *tenants in ancient demain* cannot be ſued out of the lord's court. *Terms de la Ley, verbo* Ancient demain. And ſuch tenants, though they have no other evidence, but copy of court roll, yet are they ſaid to have *freehold. Kitchin*, 81. See **Ancient demeſne.** See more on this ſubject in the learned *Spelman, verbo Dominicum*, where he does not allow this word to be written *demean* or *demeſne*, but *demain* only. *Cowell, edit.* 1727.

Demaine cart of an abbot, Seems to be that *cart* which the *abbot* uſeth upon his own *demaine*. *Anno* 6. *H.* 3. *c.* 21.

Demand (Fr. *Demande, i. e. Poſtulatio*) Signifies a calling upon a man for any thing due. It hath alſo a proper ſignification, diſtinguiſhed from *plaint*: For all civil actions are purſued either by *demands* or *plaints*; and the purſuer is called *demandant* or *plaintiff*, *viz. demandant* in actions real, and *plaintiff* in perſonal. And where the party purſuing is called *demandant*, the party purſued is called *tenant*; where *plaintiff*, there *defendant*. If a man releaſe to another all *demands*, this is the beſt releaſe the releaſee can have, and ſhall enure moſt to his advantage. *Litt. fol.* 117. *a.* There are two manner of *demands*; the one in deed, the other in law: *In deed*, as in every *præcipe*, there is an expreſs *demand: In law*, as in every entry in land, diſtreſs for rent, taking or ſeizing of goods, and ſuch like acts, which may be done without any words, are *demands* in law.

As a releaſe of ſuits is more large than of quarrels or actions; ſo a releaſe of *demands* is more large and beneficial that either of them. By a releaſe of all *demands* all executions and all freeholds and inheritances executory are releaſed: By a releaſe of *demands* to the diſſeiſor, the right of entry in the land, and all that is contained therein, is releaſed. And he that releaſeth all *demands*, excludes himſelf from all actions, entries, and ſeizures; but a releaſe of all *demands* is no bar in a writ of error to reverſe an outlawry. *Coke, lib.* 8. *fol.* 153, 154.

In debt upon a *bill of* 70 *l. to be paid upon demand*, it was inſiſted, that a demand was requiſite, ſo that a demand in law by bringing the action will not ſerve the turn; but adjudged well enough; for it is a duty preſently, and ſo needs no demand. *Cro. E.* 548. *pl.* 22. *Hill.* 39 *Eliz. C. B. Capp* v. *Lancaſter.*

Where one is *indebted* to me *ſeverally in ſeveral ſums of* money to be paid upon requeſt, or demand made, and I go and ſay to him *pay me what you owe me*, this is not a ſufficient demand or requeſt. 3 *Le.* 206. *pl.* 166. *Paſch.* 30 *Eliz. B. R.* Said to have been adjudged. But bringing an action is a ſufficient demand. *Cro. J.* 242.

If *a will appoints payment of money*, and mentions no place, there muſt be a requeſt. *Brownl.* 46. *Mich.* 14 *Jac. Anon'.*

Where a contract is made, and no time *expreſſed for the payment* of the money, if the party bring his action before he makes a requeſt, he ſhall not *have damages*, but if he makes an actual requeſt, and the defendant does not pay the money, there he ſhall recover damages, beſides the duty. *Godb.* 362. *pl.* 454. *Trin.* 21 *Jac. B. R. Gleede* v. *Wallis* alias *Harris.*

A. indebted to *B.* in 12 *l.* for goods, *B.* refuſed to truſt him further, on which *C.* comes to *B.* and prays him to truſt *A.* and if he would, he would pay him the old debt, and whatſoever *A.* ſhould be in arrear more, if it did not exceed 100 *l. C.* would pay; *B.* ſold after to *A*, ſeveral goods amounting to 19 *l.* and lent *A.* 3 *l. One demand is* ſufficient for the *three ſeveral ſums. Hetl.* 84. *Paſch.* 4 *Car. C B. Gammon* v. *Malbarn.*

If a man *promiſes to pay* money *at any time within a month upon requeſt*, the creditor *may requeſt after the month, and the debtor ſhall have a month's time after* the requeſt to pay the money. *Freem. Rep.* 346. *pl.* 429. *Mich.* 1673. *B. R. Anon'.*

Note, To pay 50 *l.* to *B.* at any time during their joint lives, within three months after *A.* ſhould demand the ſame, the demand *ought to be perſonal.* 2 *Show.* 235. *pl.* 232. *Mich.* 34 *Car.* 2. *B. R. Duke of Norfolk* v. *Howard.*

Demand *ore tenus* in ſome caſes is good, as in caſe of ſtock to be transferred, it is the uſage amongſt merchants to make all their demands *ore tenus* upon ſuch bargains, as well as ſometimes by writing at the *Eaſt-India* houſe, and not to ſeek after the perſon of the vendor; and judgment accordingly. *Carth.* 269. *Paſch.* 5. *W. & M. in B. R. Hall* v. *Cupper.*

A *leaſe* was made for years, *rendering rent payable at a place off the land*; and the court was moved, whether, a demand of the rent may not be made upon the land, but denied by the whole court; for they ſaid, that the demand muſt be made at the place of payment, although it be off the land. *Brownl.* 96. *Trin.* 5 *Jac. Ventris* v. *Farmer.*

An *executor brings trover of goods taken from his teſtator* by a treſpaſſor. It was held the *executor muſt firſt make a demand* of the treſpaſſor before he can bring this action. *Clayt.* 122. *pl.* 215. *March* 1647. before *Germine*, one of the judges of *B. R. Coldwell's* caſe.

In an action of *debt upon a bond*, with condition *to pay* 300 *l. to the plaintiff, and to add* 3 *l. to every* 100 *l. if it were demanded*; the defendant pleaded payment of 300 *l.* and that he added 3 *l.* to every 100 *l. ſecundum formam conditionis prædict'.* The plaintiff traverſed the addition of 3 *l.* to every 100 *l. ſecundum formam præd'*; after verdict it was moved in arreſt of judgment, that the plaintiff ought to have alledged a demand; and for this cauſe, judgment was given againſt the plaintiff, for this being matter of ſubſtance, without which the plaintiff had no cauſe of action, was not helped by the iſſue nor verdict, notwithſtanding the words *ſecundum formam conditionis*, which was pretended to imply a demand. *Allen* 55, 56. *Paſch.* 24 *Car. B. R. Hill* v. *Armſtrong.*

A *difference* was taken by ſerjeant *Jones*, between a *limitation which depends on the doing of ſome collateral act*, which is *to be done but once, and the payment of a rent* iſſuing out of the land, *which hath ſucceſſive acts*; that in the laſt caſe there ought to be a demand, but not in the firſt. *Freem. Rep.* 24. *Hill.* 1671. *pl.* 32.

Deforciant, (*Anno* 23 *Eliz. cap.* 3.) The ſame with *deforceor*. See **Diſſorciare.**

Deforceor, *Deforciator*, (from the French *forceur*, *expugnator*) Signifies one that overcometh, and caſteth out by *force:* And differeth from diſſeiſor firſt in this, becauſe a man may diſſeiſe another without force: Which act is called *ſimple diſſeiſin*. *Britton*, *cap.* 53. Next, becauſe a man may *deforce* another that never was in poſſeſſion. As for example, if many have a right to lands as common heirs, and one entring keepeth out the reſt, the law ſaith, that he *deforceth* them, though he doth not diſſeiſe them. *Old Nat. Brev. fol.* 118. And *Littleton* in his chapter of *Diſcontinuance*, *fol.* 117. ſaith, That he who is enfeoffed by the tenant in tail, and put in poſſeſſion, by keeping out the heir of him in the reverſion, being dead, doth *deforce* him, though he did not diſſeiſe him, becauſe he entred when the tenant in tail was living, and the heir had no preſent right. And a *deforceor* differeth from an intruder, becauſe a man is made an intruder by a wrongful entry only into lands or tenements void of a poſſeſſor: and a *deforceor* alſo is, by holding out the right heir, as aboveſaid. *Bracton*, *lib.* 4. *cap.* 1. See more of this in *Pulton de Pace Regis*, *fol.* 34, 35.

Deforciatio. A diſtreſs, diſtraint, or ſeizure of goods for ſatisfaction of a lawful debt.——*Nos & hæredes noſtros diſtringere poſſunt, per bona mobilia & immobilia & hominum noſtrorum, &* deforciationem *tenere quoſque plenarie fuerit ſatisfactum.* Paroch. Antiq. p. 293.

Degradation, (*Degradatio,*) Is an eccleſiaſtical cenſure, whereby a clergyman is deprived of his holy orders which formerly he had, as of prieſt or deacon. *God. Rep.* 309.

And by the Canon law, this may be done two ways: either ſummarily, as by word only; or ſolemnly, as by deveſting the party degraded of thoſe ornaments and rites, which were the enſigns of his order or degree. *God. Rep.* 309.

This ſolemn degradation was anciently performed in this manner, as is ſet forth in the ſixth book of the Decretals: If the offender was a perſon in inferior orders, then the biſhop of the dioceſe alone, if in higher orders as prieſt or deacon, then the biſhop of the dioceſe, together with a certain number of ôther biſhops, ſent for the party to come before them. He was brought in, having on his ſacred robes, and having in his hands a book, veſſel, or other inſtrument or ornament appertaining to his order, as if he were about to officiate in his function. Then the biſhop publickly took away from him, one by one, the ſaid inſtruments and veſtments belonging to his office, ſaying to this effect; This and this we take from thee, and do deprive thee of the honour of prieſthood; and, finally, in taking away the laſt ſacerdotal veſtment, ſaying thus; By the authority of God Amighty, the Father, tbe Son, and the Holy Ghoſt, and of us, we do take from thee the clerical habit, and be depoſe, degrade, deſpoil, and deprive thee of all order, benefit, and privilege of the clergy. *Gibſ.* 1066.

By *Canon* 122. Sentence againſt a miniſter, of depoſition from the miniſtry, ſhall be pronounced by the biſhop only, with the aſſiſtance of his chancellor and dean (if they may conveniently be had, and ſome of the prebendaries, if the court be kept near the cathedral church; or of the archdeacon, if he may be had conveniently, and two other at leaſt grave miniſters and preachers to be called by the biſhop, when the court is kept in other places.

There is likewiſe a degradation of a lord or a knight, *&c.* at Common law, when they are attainted of treaſon; as *Hill.* 18 *Ed.* 2. *Andrew Harcla*, Earl of *Carliſle*, who was alſo a knight, was degraded; and when judgment of treaſon was pronounced againſt him, his ſword was broken over his head, and his ſpurs hewn off his heels, *&c.* And there is a degrading by act of parliament; for by ſtat. 13 *Car.* 2. *cap.* 15. *William Lord Monſon*, Sir *Henry Mildmay*, and others, were degraded from all titles of honour, dignities, and pre-eminences, and none of them to bear or uſe the title of Lord, Knight, Eſquire, or Gentleman, or any coat of arms for ever after.

Deguttare, To baſte meat in roaſting, by letting butter, fat, or driiping, *gutter* or run by drops upon it. ——*Nec minori tormento vexabantur, qui verubus transfixi ad ignem aſſati* deguttabantur *a dæmonibus ex metallis liquefactis.* Mat. Par. ſub Anno 1153.

Dehors, (Fr.) A word uſed in ancient pleading, when a thing is without the land, *&c.* or out of the point or thing in queſtion. See **Hors de ſon fee.**

De injuria ſua propria. See **De ſon tort demeſne.**

Deirorum regnum, *i. e. York*, *Lancaſter*, *Weſtmorland*, *Cumberland*, *Northumberland*, and the biſhoprick of *Durham*. From the Saxon *deer*, *fera*, becauſe of the multitude of wild beaſts there. *Cowell*, *edit.* 1727.

Dei Judicium. The old Saxon *ordeal* was ſo called, becauſe they thought it an appeal to God for the juſtice of a cauſe; and did believe the deciſion was according to the will and pleaſure of Divine providence.——*Picot contradixit ſuum teſtimonium de villanis & vili plebe, & de præpoſitis qui volant defendre per ſacramentum, aut per* Dei Judicium, *quod ille qui tenuit terram, liber homo fuit*——Domeſday *in* Cerdeſon. *See Dr.* Brady's Introd. p. 272.

Deis, or **Dagus,** The chief or upper table in *Engliſh* monaſteries was ſo called.——*Priore prandente ad magnam menſam quam* deis *appellamus. Additam. ad* Mat. Par. p. 148. *Et ſciendum quod non permittitur ciphus cum pede in refectorio niſi tantum in majori menſa, quam* deis *appellamus.* Ib. Theſe tables had this name from a cloth called *deis*, with which the tables of Kings were covered. *Matt. Pariſ. in vita Abbat. Sancti Albani*, p. 92.

Delatura, *i. e.* An accuſation: *In quibuſdam locis juramenti vel antejuramenti multa eſt diſtantia, ſicut in* delatura, *& plurimis aliis.* Leges H. 1. cap. 64. Sometimes 'tis taken for the reward of an informer. *Leges Inæ* 20. *apud Brompton.* It differs from *Freda*, *viz. Qui ſcrofas ſex cum verre furatus eſt, in triplum componat &* delaturam, *f.* 7. *& in freda totidem.* Du Freſne.

Delegates, The ſtat. 26 *H.* 8. *cap.* 19. ſays are commiſſioners *delegated* or appointed by the King's commiſſion, to ſit upon an appeal to him in the court of *Chancery*, and is granted in three caſes. *Firſt*, When a ſentence is given in any eccleſiaſtical cauſe by the archbiſhop, or his official. *Secondly*, When any ſentenc is given in an eccleſiaſtical cauſe in places exempt. *Thirdly*, When ſentence is given in the Admiralty in ſuits civil and marine, by order of the Civil law. 4 *par. Inſt. fol.* 339. *Stat.* 8 *Eliz. cap.* 5.

Delf, (from the Saxon *delfan*, to dig,) Is a quarry or mine where ſtones or coal is digged. *Anno* 31 *Eliz. cap.* 7. And *Cambden* mentions a charter of *Edward* the Fourth, wherein mention is made of a mine or *delf* of copper. We ſtill retain the word *delve* for dig.

Delgovitia. *Godmundham* in *Yorkſhire.*

Deliverance. When a criminal is brought to trial, and the clerk of the crown aſks him whether he is *guilty*, or *not guilty*, to which he anſwers Not guilty, and puts himſelf on God and his country, the clerk wiſhes him a good deliverance.

Deliverance of cattle deſtrained. See **Second deliverance** and **Replevin.**

Delivery of deeds. See **Deed.**

Demain or **Demeſne,** (*Dominicum*, Gallis *Domanium*, Italis *Demanium*) Is a *French* word otherwiſe written *domaine*, and ſignifieth *Patrimonium domini*, as *Hottoman* ſaith, *In verbis feudalibus, verbo* Dominicum, where by divers authorities he proveth thoſe lands to be *dominicum*, which a man holdeth originally of himſelf, and thoſe to be *feodum* which he holdeth of a ſuperior lord. And by the word *domanium* or *demanium*, are properly ſignified the King's lands in *France*, appertainiug to him in property. In like manner do we uſe it in *England*, although we have no land (that of the crown only excepted) which is not holden of a ſuperior, for all dependeth either mediately or immediately of the crown, wherefore no common perſon hath any *demains* ſimply underſtood; for when a man in pleading, would ſignify his land to be his own, he ſaith, that he is or was ſeiſed thereof in his *demain*,

main as of fee, *Litt. lib.* 1. *c.* 1. whereby he meaneth, that although his land be to him and his heirs for ever, yet it is not true *demain*, but depending upon a ſuperior lord, and holding by ſervice, or rent in lieu of ſervice, and by both ſervice and rent; yet theſe words have been uſed in the King's right. 37 *H.* 8. *c.* 16. and 39 *Eliz. c.* 22. But the application of this ſppech to the King and crown land is crept in by error and ignorance of the word *fee*. *Britton, c.* 78. ſheweth, that this word demain is diverſly taken, ſometimes more largely, as of lands and tenements held for life, *&c.* and ſometimes more ſtrictly, as for ſuch only, as are generally held in fee. This word ſometimes is uſed for a diſtinction between thoſe lands, that the lord of a manor hath in his hands, or in the hands of his leſſee, demiſed upon a rent, for term of years or life, and ſuch other land appertaining to the ſaid manor, which belongeth to free or copyholders. Howbeit, the copyhold belonging to any manor, is alſo in the opinion of many good lawyers accounted *demains*. *Bracton, lib.* 4. *tract.* 3. *c.* 9. *num.* 5. *ſaith, Eſt autem dominicum, quod quis habet ad menſam ſuam & proprie, ſicut ſunt* Bordlands *Anglice. Item dicitur dominicum villenagium, quod traditur villanis quod quis tempeſtive & intempeſtive ſumere poſſit pro voluntate ſua & revocare.* Of this *Fleta* alſo writeth much after the ſame manner. *Lib.* 5. *c.* 5. *ſect. Dominicum autem.* And the reaſon why copyhold is accounted *demains*, is becauſe they who are tenants to it, are judged in law to have no other right, but at the will of the lord; ſo that it is reputed ſtill after a manner to be in the lord's hands. And yet in common ſpeech, that is ordinarily called *demeans*, that is neither free nor copy. And here note, that *demain* is ſometimes uſed in a more ſpecial ſignification, and is oppoſite to frank-fee. For example, thoſe lands which were in the poſſeſſion of *Edward the Confeſſor*, are called *ancient demain*, and others are called *frank-fee*. *Kitchin, fol.* 98. And the tenants who hold any of thoſe lands are called *tenants in ancient* demain the others *tenants in frank-fee*. *Kitchin, ubi ſupra.* And alſo tenants of the Common law. *Weſt. Symbol. part.* 2. *tit.* Fines, *ſect.* 25. The reaſon is, becauſe *tenants in ancient demain* cannot be ſued out of the lord's court. *Terms de la Ley, verbo* Ancient demain. And ſuch tenants, though they have no other evidence, but copy of court roll, yet are they ſaid to have *freehold. Kitchin*, 81. See **Ancient demeſne.** See more on this ſubject in the learned *Spelman, verbo Dominicum*, where he does not allow this word to be written *demean* or *demeſne*, but *demain* only. *Cowell, edit.* 1727.

Demaine cart of an abbot, Seems to be that *cart* which the *abbot* uſeth upon his own *demaine*. *Anno* 6. *H.* 3. *c.* 21.

Demand (Fr. *Demande, i. e. Poſtulatio*) Signifies a calling upon a man for any thing due. It hath alſo a proper ſignification, diſtinguiſhed from *plaint:* For all civil actions are purſued either by *demands* or *plaints*; and the purſuer is called *demandant* or *plaintiff*, *viz. demandant* in actions real, and *plaintiff* in perſonal. And where the party purſuing is called *demandant*, the party purſued is called *tenant*; where *plaintiff*, there *defendant*. If a man releaſe to another all *demands*, this is the beſt releaſe the releaſee can have, and ſhall enure moſt to his advantage. *Litt. fol.* 117. *a.* There are two manner of *demands*; the one in deed, the other in law: *In deed*, as in every *præcipe*, there is an expreſs *demand: In law*, as in every entry in land, diſtreſs for rent, taking or ſeizing of goods, and ſuch like acts, which may be done without any words, are *demands* in law.

As a releaſe of ſuits is more large than of quarrels or actions; ſo a releaſe of *demands* is more large and beneficial that either of them. By a releaſe of all *demands* all executions and all freeholds and inheritances executory are releaſed: By a releaſe of *demands* to the diſſeiſor, the right of entry in the land, and all that is contained therein, is releaſed. And he that releaſeth all *demands*, excludes himſelf from all actions, entries, and ſeizures; but a releaſe of all *demands* is no bar in a writ of error to reverſe an outlawry. *Coke, lib.* 8. *fol.* 153, 154.

In debt upon a *bill of* 70 *l. to be paid upon demand*, it was inſiſted, that a demand was requiſite, ſo that a demand in law by bringing the action will not ſerve the turn; but adjudged well enough; for it is a duty preſently, and ſo needs no demand. *Cro. E.* 548. *pl.* 22. *Hill.* 39 *Eliz. C. B. Capp* v. *Lancaſter.*

Where one is *indebted* to me *ſeverally in ſeveral ſums of* money to be paid upon requeſt, or demand made, and I go and ſay to him *pay me what you owe me*, this is not a ſufficient demand or requeſt. 3 *Le.* 206. *pl.* 166. *Paſch.* 30 *Eliz. B. R.* Said to have been adjudged. But bringing an action is a ſufficient demand. *Cro. J.* 242.

If *a will appoints payment of money*, and mentions no place, there muſt be a requeſt. *Brownl.* 46. *Mich.* 14 *Jac. Anon'.*

Where a contract is made, and no time *expreſſed for the payment* of the money, if the party bring his action before he makes a requeſt, he ſhall not *have damages*, but if he makes an actual requeſt, and the defendant does not pay the money, there he ſhall recover damages, beſides the duty. *Godb.* 362. *pl.* 454. *Trin.* 21 *Jac. B. R. Gleede* v. *Wallis* alias *Harris.*

A. indebted to *B.* in 12 *l.* for goods, *B.* refuſed to truſt him further, on which *C.* comes to *B.* and prays him to truſt *A.* and if he would, he would pay him the old debt, and whatſoever *A.* ſhould be in arrear more, if it did not exceed 100 *l. C.* would pay; *B.* ſold after to *A*, ſeveral goods amounting to 19 *l.* and lent *A.* 3 *l. One demand is* ſufficient for the *three ſeveral ſums. Hetl.* 84. *Paſch.* 4 *Car. C B. Gammon* v. *Malbarn.*

If a man *promiſes to pay* money *at any time within a month upon requeſt*, the creditor *may requeſt after the month, and the debtor ſhall have a month's time after* the requeſt to pay the money. *Freem. Rep.* 346. *pl.* 429. *Mich.* 1673. *B. R. Anon'.*

Note, To pay 50 *l.* to *B.* at any time during their joint lives, within three months after *A.* ſhould demand the ſame, the demand *ought to be perſonal.* 2 *Show.* 235. *pl.* 232. *Mich.* 34 *Car.* 2. *B. R. Duke of Norfolk* v. *Howard.*

Demand *ore tenus* in ſome caſes is good, as in caſe of ſtock to be transferred, it is the uſage amongſt merchants to make all their demands *ore tenus* upon ſuch bargains, as well as ſometimes by writing at the *Eaſt-India* houſe, and not to ſeek after the perſon of the vendor; and judgment accordingly. *Carth.* 269. *Paſch.* 5. *W. & M. in B. R. Hall* v. *Cupper.*

A *leaſe* was made for years, *rendering rent payable at a place off the land*; and the court was moved, whether, a demand of the rent may not be made upon the land, but denied by the whole court; for they ſaid, that the demand muſt be made at the place of payment, although it be off the land. *Brownl.* 96. *Trin.* 5 *Jac. Ventris* v. *Farmer.*

An *executor brings trover of goods taken from his teſtator* by a treſpaſſor. It was held the *executor muſt firſt make a demand* of the treſpaſſor before he can bring this action. *Clayt.* 122. *pl.* 215. *March* 1647. before *Germine*, one of the judges of *B. R. Coldwell's* caſe.

In an action of *debt upon a bond*, with condition *to pay* 300 *l. to the plaintiff, and to add* 3 *l. to every* 100 *l. if it were demanded*; the defendant pleaded payment of 300 *l.* and that he added 3 *l.* to every 100 *l. ſecundum formam conditionis prædict'.* The plaintiff traverſed the addition of 3 *l.* to every 100 *l. ſecundum formam præd'*; after verdict it was moved in arreſt of judgment, that the plaintiff ought to have alledged a demand; and for this cauſe, judgment was given againſt the plaintiff, for this being matter of ſubſtance, without which the plaintiff had no cauſe of action, was not helped by the iſſue nor verdict, notwithſtanding the words *ſecundum formam conditionis*, which was pretended to imply a demand. *Allen* 55, 56. *Paſch.* 24 *Car. B. R. Hill* v. *Armſtrong.*

A *difference* was taken by ſerjeant *Jones*, between a *limitation which depends on the doing of ſome collateral act*, which is *to be done but once, and the payment of a rent* iſſuing out of the land, *which hath ſucceſſive acts*; that in the laſt caſe there ought to be a demand, but not in the firſt. *Freem. Rep.* 24. *Hill.* 1671. *pl.* 32.

Debt upon a bill obligatory, *scil'*, *borrowed of* J. S. 10 *l. which I promise to pay upon demand*; the plaintiff says, *Quod licet sæpias requisitus* he had not paid it, but does not lay any actual demand; and verdict being for the plaintiff, *Baldwin* moved in arrest of judgment, because no particular request in time and place is averred; and cited the case of *Brown* v. *Durney*, *Hob.* 208. But *pur curiam*, a request is not here necessary, it being for the payment of a debt, and between the parties; but if it had been upon a *penalty*, *or a promise by a stranger*, *or for some collateral matter*, there a request must be laid; but here it appears that a debt was due, and it being for the payment of money by the debtor, although it be said upon demand, yet the bringing of the action is a sufficient demand. *Freem. Rep.* 113. *pl.* 135. *Trin.* 1673. *Ashenden* v. *Clapham*.

A. was indebted to B. and A. dies, and after *B. comes to C. and demands the money*, *and C. in consideration that B. would forbear his debt*, (or to sue,) *did promise to pay him*. Objection was made, that this being a collateral promise, and no debt due from the defendant, here ought to have been a request. But to that the court answered, that a request was not necessary, the *promise* being *generally to pay*, and not upon request. *Freem. Rep.* 439. *pl.* 595. *Mich* 1696. *Anon'*.

Debt for a rent reserved upon a lease for years, in which there was *a proviso*, *that if the rent be behind and unpaid by the space of a month* next after any or either of the days of payment, then *the lease to be void*. The plea was, that the rent was behind a month after a day, on which it was reserved to be paid, and so the lease is void; to which plea the plaintiff demurred, because the defendant did *not say that the plaintiff demanded the rent*; for though the rent be due without the demand, yet the interest shall not be determined without it, which must be expresly laid in the pleading; and of that opinion was the court, except justice *Atkyns*, who doubted. 2 *Mod.* 264. *Trin.* 29 *Car.* 2. *C. B. Steward* v. *Allen*.

Ejectment at *Clemsford* assizes; held by Lord Ch. J. *Pemberton*, that if *legacies* be given by will, *and that in case of non-payment*, *the legatees may enter and enjoy the profits of such land till satisfied*, no demand is necessary; but it is no forfeiture, but an executory devise, although there be a place and time appointed for payment, &c. So was the case of *Tyrrel* v. *Glassack* here. 2 *Show.* 185. *pl.* 190. *Hill.* 33 & 34 *Car.* 2. *B. R. Pierson* v. *Sorrel*.

Where the condition of a *bond* given *by a member of a society is to pay such sums as shall be due*, an action may be brought for non-payment without any demand; for it is a sum in gross. *Ld. Raym. Rep.* 596. *Trin.* 12 *W.* 3. *Levins* v. *Randolph*. *For other matters*, *see* 7 Vin. Abr. *tit.* Demand.

Demandant, (*Petens*) Is the *plaintiff* in a real action, so called because he *demandeth* lands, &c. *Co. on Litt. fol.* 127.

Demihaque. See Haque and Haquebuz.

Demise, (*Dimissio*,) Is applied to an estate either in fee-simple, fee-tail, or for term of life, and so it is commonly taken in many writs, 2 *par. Inst. fol.* 483. The King's death is in law termed *The demise of the King*.

Demise of the King shall not discontinue any writ or process, 1 *Ed.* 6. *c.* 7. *sect.* 1, 2. Nor oblige a defendant who hath pleaded to an information to plead again, unless he desire it, 4 *Will. & Ma. c.* 18. *sect.* 7. Nor determine a parliament till after six months, 7 & 8 *Will.* 3. *c.* 15. Nor determine any commission civil or military, or great office of state, 7 & 8 *W.* 3. *c.* 27. *sect.* 21. 1 *Ann. st.* 1. *c.* 8. 6 *Ann. c.* 7. *sect.* 8.

On demise of the King in the minority of his successor, the parliament shall sit for three years, 24 *Geo.* 2. *c.* 24. *sect.* 18. *For other matters*, *see* Judges, *and* Justices of the peace.

Demisters. See Deemsters.

Demurrer, (from the Fr. *demeurer*, i. e. *manere in aliquo loco*, *vel morari*,) Is a kind of a pause or stop put to the proceedings of an action upon a point of difficulty, which must be determined by the court, before any further proceeding can be had therein: For in every action the controversy consists either in fact or in law; if in fact, that is tried by the jury; if in law, the case is either plain to the judge, or so hard and rare, as it breeds just doubt. We call that plain to the judge, wherein he is assured of the law, though perhaps the party and his counsel yield not to it. And in such case, the judge with his associates proceeds to judgment without more ado; but when it is doubtful, then stay is made, and a time taken, either for the court to consider further of it, and agree if they can, or else for all the judges to meet together in the *Exchequer-Chamber*; and upon hearing what counsel can say on both sides to determine what is law. And whatsoever they conclude stands firm, without any farther appeal. *Smith de Repub. Angl. lib.* 2. *c.* 13. This *demurrer* is in our records expressed in *Latin* by *moratur in lege*. At the Common law, the defendant sometimes *demurreth* to the plaintiff's count or declaration; and sometimes the plaintiff *demurs* to the defendant's plea, by averring that it is not a sufficient plea in law, &c. In *Chancery*, the defendant *demurs* to the plaintiff's bill, averring it is defective in such or such a point, and demands the judgment of the court thereupon, whether he shall be compelled to make any further or other answer thereunto, &c. *Cowell*, See Moratur in lege.

1. *Demurrer in actions at law.*
2. *Demurrer in suits in equity.*

1. *Demurrer in actions at law.*

A demurrer is admitting the matter of fact, since it *refers the law arising on the fact to the judgment of the court*; and therefore the fact is taken to be true on such demurrer, or otherwise the court has no foundation on which to make any judgment. *Gilb. Hist. of C. B.* 55.

A demurrer is a *confession* of all *matters in fact*, but *not of matters in law*; for by it they are put in judgment of the court. *Pl. C.* 85. *a. Hill.* 6 & 7 *Ed.* 6. by *Mountague* Ch. J. in the case of *Partridge* v. *Strange and Coker*.

If a thing be sufficiently alledged, it is confessed by the demurrer, but not otherwise; *per Anderson* Ch. J. *Goldsh.* 52. *pl.* 1.

Demurrer confesses nothing but *what is materialy alledged*. *Arg.* and seems admitted. 12 *Mod.* 578. *Mich.* 13 *W.* 3.

By stat. 27 *El. c.* 5. and 4 *Ann. c.* 16. *sect.* 1. Judgment shall be given on demurrer according to the right of the cause, without regarding form, unless the want of it be shewed for cause.

A demurrer in law, is never a *confession of a thing against the record*, *but only of that which may stand with the record*, for otherwise, his confession would be vain, and should not bind the court; *per cur'*. *Cro. J.* 12. *Pasch.* 1 *Jac. B. R.* in the case of *Arundel* v. *Arundel*.

As a demurrer *at Common law did confess all matters formally pleaded*; so now by *the Statute*, *a general demurrer does confess all matters pleaded though unformally*, according to the forms meant by the statute 27 *Eliz.* 5. for such forms are now not material, not being expressed in demurrer. *Hob.* 233. at the end of *pl.* 295. *Mich.* 12 *Jac.* in the case of *Hoard* v. *Bakerville*.

A general demurrer confesses not the matter; as if in debt upon a bill defendant pleads payment, and the plaintiff demurs, that demurrer does not confess the payment; *per Warburton* J. *Arg. Hutt.* 15. *Trin.* 13 *Jac.*

If count, *plea*, *replication*, &c. upon which the demurrer *was*, *is good*; then all the matter which is contained in the count or plea is confessed, but if the count or plea be vitious, then it is otherwise. 2 *Roll. R.* 22. *Pasch.* 16 *Jac. B. R.* in the case of *Holford* v. *Platt*, cited *per cur.* as a difference taken. 17 *Ass. pl.* 2. 31. *H.* 6. and 22 *H.* 6.

On a *scire facias to repeal a patent to B. for a market* to be held at *C.* reciting that there was an ancient market long before kept at *R.* within half a mile of *C.* and that there was an *ad quod damnum* taken out before the new patent; and the inquest thereupon taken found it not to be to the damage of any, and that it was executed by surprize and without notice; and that notwithstanding it

was

was to the great damage of the former market, &c. to this *ſcire facias B. demurred.* But the lord Chancellor *Finch* (aſſiſted by *North* Ch. J. of *C. B.* and *Jones* J.) gave judgment for repealing of the patent; for the return of the writ of *ad quod damnum* was not concluſive, and here *by the demurrer it is confeſſed to be to the damage of the former market.* 2 *Vent.* 344. *Hill.* 31 & 32 *Car.* 2. *in Canc. Sir Oliver Butler*'s caſe.

Indebitatus aſſumpſit for a horſe ſold for 20*l.* The *defendant pleaded within age*; the plaintiff *replied, that he ſold him his horſe for conveniency to carry him about his neceſſary affairs*; to which the *defendant demurred.* And the ſole queſtion was, whether an action would lie againſt an infant for money for a horſe ſold? It was urged on the defendant's part, that an infant was chargeable only for neceſſaries, as meat, drink, cloaths, lodging, and education, and cited 3 *Cro.* 175. 1 *Cro. Ayliff* v. *Archbold. Latch* 169. But the court were of a contrary opinion, for the plaintiff having averred, that he ſold him the horſe to ride about his neceſſary occaſions. and the defendant having *confeſſed* it by his demurrer, it muſt now be taken to be ſo; if the defendant had traverſed, then the jury muſt have judged of it, whether it were neceſſary or convenient or not, and ſo likewiſe of the price of the horſe, whether it was exceſſive or no. *Jud. pro quer. Niſi. Freem. Rep.* 541. *pl.* 715. *Mich.* 1680. *Barber* v. *Vincent.*

An action of the *caſe brought* upon an inland bill of exchange, in which the plaintiff declared *upon a ſpecial cuſtom in London*, for the bearer to bring the action, &c. and upon a demurrer to the declaration it was held, that the defendant having demurred, *without traverſing the cuſtom*, he had thereby confeſſed there was ſuch a cuſtom, though in truth there was not, and for that reaſon the plaintiff had judgment; for though the court takes notice of the law of merchants, as part of the law of *England*, yet they cannot take notice of the cuſtoms of particular places; and this cuſtom, as ſet forth in the declaration, being ſufficient to maintain the action, and the defendant confeſſing it by his demurrer, he has given judgment againſt himſelf. 3 *Salk.* 68, 69. *pl.* 5, *Paſch.* 5 *W.* 3. *B. R. Hodges* v. *Steward.*

If a thing be *laid by way of preſcription*, which *does not lie in preſcription*, and it be demurred unto, that does not confeſs it; for if this be a courſe of the court it is law, and if it be law we are to take notice of it. *Per Holt* Ch. J. *obiter.* 12 *Mod.* 573. *Mich.* 13 *W.* 3.

In treſpaſs, aſſault, and falſe impriſonment, the defendant juſtifies under a proceſs out of the ſheriff's court in *London, quæ eſt eadem, &c.* and traverſes being guilty *aliter vel alio modo*: To this the plaintiff demurs, and ſhews for cauſe, that the traverſe is idle, and unneceſſary. And upon argument the court were of opinion that this was ill on a ſpecial demurrer, the *quæ eſt eadem* being a ſufficient traverſe. *Lutw.* 1457. And ſo it was held in the caſe of *Carvel* v. *Manby*, where on a general demurrer it was allowed to be well enough; but the court ſaid if it had been a ſpecial demurrer, it would have been otherwiſe. *Judicium pro querente. Stran.* 694.

Debt upon a bond conditioned to indemnify the plaintiff. The defendant upon *oyer* pleaded generally, *quod indempnem conſervavit*, without ſhewing how. And on a general demurrer it was agreed the plea was ill before the act for amendment of the law, for that no iſſue could be joined upon it. 2 *Cro.* 165. *Hob.* 296. 2 *Co.* 4. 2 *Cro.* 363, 503, 634. But then it was objected, that this ſhould have been ſhewn for cauſe of demurrer. And of that opinion was the court, for the ſubſtance is the ſaving harmleſs, and how that was done, is but matter of form; ſo the plaintiff prayed leave to diſcontinue upon payment of coſts, which was granted accordingly. *Stran.* 681.

Scire facias againſt pledges in replevin, ſetting out a judgment for the avowant in *C. B. prout per recordum ibidem jam reſidens: Quod quidem recordum coram nobis certis de cauſis venire fecimus*, where the judgment was affirmed. The defendant demurred, and ſhewed for cauſe, that it was incongruous to ſay the record remains in *C. B.* and at the ſame time was removed to *B. R.* by writ of error.—Serjeant *Branthwayte* would have had it rejected as an unneceſſary averment, and then it would ſtand with only a right reference to the record remaining in *B. R. Sed per curiam*, You cannot ſay but it is informal; and that is enough upon a ſpecial demurrer. The defendant muſt have judgment. *Stran.* 611.

2. *Demurrer in ſuits in equity.*

Demurrer is an allegation of the defendant, which, admitting the matters of fact, or ſome of them, alledged by the defendant to be true, ſhews that, as they are ſet forth by the complainant himſelf, they are inſufficient for him to proceed upon, or to oblige the defendant to anſwer; and therefore demands the judgment of the court, whether the defendant ſhall be compelled to make anſwer to the plaintiff's bill, or to ſome certain part thereof. *Pract. Reg. in C.* 131.

The defendant put in a *demurrer* to the plaintiff's bill becauſe the plaintiff was *outlawed at the ſuit of ſtrangers*, yet ordered to anſwer. *Toth.* 137. cites *Mich.* 9 *Jac. Skies* v. *Rawſon.*——*Ibid.* 139. cites 10 *Jac. Moris* v. *Owen.*

Demurrer, becauſe *excommunicated*, over-ruled about 4 *Car. Toth.* 137. 4 *C. Plumton* v. *Headlam.*

It is allowed a good cauſe of demurrer in this court, that a bill is brought for *part of a matter only*, which is proper for one intire account, becauſe the plaintiff ſhall not *ſplit cauſes* and make a multiplicity of ſuits. *Vern.* 29. *pl.* 24. *Hill.* 1681. in caſe of *Purefoy* v. *Purefoy.*

Demurrer to ſcandalous matter ſuggeſted *in a bill*; *per* Sir *J. Churchill*, as *amicus curiæ*, the courſe of the court in ſuch a caſe is not to put the defendant to anſwer the ſcandalous matter, but to ſtrike out the word demurrer, and leave the plaintiff at liberty to prove it. *Vern. R.* 137. *pl.* 96. *Mich.* 1682. *Page* v. *Neale.*

Where a bill was exhibited to have an *execution of an award, which was performed by neither party*; and the defendant *demurred, becauſe there was no precedent* that a court of equity had ever carried ſuch awards into execution; and the demurrer was allowed. *Abr. Equ. Caſ.* 51 *Mich.* 1704. at the Rolls. *Biſhop* v. *Webſter.*

The defendant *pleaded* that there was *a former bill depending*, and brought *by the ſame plaintiff, for the ſame matter* as in this bill. And *demurred, for that there was no equity in the bill, and that the ſame being two hundred ſheets of paper, was ſtuffed with repetitions*, tautologies, and impertinences. It was inſiſted by the counſel for the plaintiff, that by reaſon of the demurrer, he could not procure a reference to the maſter, to examine whether there was a former ſuit depending or not. Thereupon the *court over-ruled the demurrer* with coſts, *and referred it to the maſter to examine into the former and this bill*, if he found it for the ſame matter, then to tax coſts for the defendant. *Fin. R.* 179. *Mich.* 26 *Car.* 2. *Dumford* v. *Dumford.*

Where a *tort* is *laid to be done after the action* brought, the defendant may take advantage of it on a ſpecial demurrer. *Gilb. Hiſt. of C. B.* 106.

An *original bill* was brought *to explain a decree.* The defendant demurred. The plaintiff inſiſted, that the demurrer confeſſed the matter of the bill, but the court allowed the demurrer good. 2 *Freem. Rep.* 179. *pl.* 242. 15 *Car.* 2. *in Canc. Read* v. *Handby.*

A bill of 20*l.* promiſed the wife if ſhe would procure a *releaſe* from her huſband for purchaſe money, which was part paid, and the reſt ſecured; defendant demurred for that it was *no conſideration*, becauſe the defendant was releaſed by law, by *payment and ſecurity*; and allowed. *Per* Lord Keeper *Bridgman*, 3 *Ch. R.* 70. *July* 24, 1671. *Stuckly* v. *Cook*

The plaintiff brought a bill againſt the defendant, as executor of the obligor, *to diſcover aſſets, and to compel the payment of* the debt. The *defendant demurred, for that the plaintiff had brought an action* againſt him *at law, to which the defendant had pleaded Plene adminiſtravit.* But the demurrer was over-ruled, and the defendant ordered to anſwer without payment of coſts. *Nelſ. Rep.* 127, 128. *Anno* 21 *Car.* 2. *Pitt* v. *Scarlet.*

Plaintiff

Plaintiff having obtained a *decree* againſt the defendants for money out of aſſets in their hands, they being executors, and they having denied aſſets, plaintiff brought a bill to *diſcover* aſſets. Defendants demurred, for it *did not appear that the decree was ſigned and inrolled*, or the defendant ſerved with any decree under ſeal. Demurrer allowed, and bill diſmiſſed. *Fin. R.* 33, 34. *Mich.* 25 *Car.* 2. *Braithwaite* v. *Davis.*

A bill was brought *to baſtardize the iſſue*, and ſet aſide and overthrow the marriage of his late father with the other defendant his mother. *The defendant demurred, for that the validity of the marriage, and legitamacy of the defendant is properly triable at law, and that the defendant the mother, is not bound to diſcover upon oath that ſhe is guilty of ſuch a crime, as will ſubject her to the penalty of the ſtatutes*, and laws of the realm, and that the bill was ſcandalous and impertinent; the demurrer was allowed, and the bill to be taken off the file and burnt. *Fin. Rep.* 72, 73. *Hill.* 25 *Car.* 2. *Trevor* v. *Leſquire.*

In a bill by *obligee againſt the heir of the obligor* for payment of the debt out of aſſets alledged to be deſcended; if the bill does *not alledge that the heir was bound by the bond*, defendant may demur. *Per North. K. Vern.* 180. *pl.* 173. *Trin.* 1683. *Croſſing* v. *Honor.*

Defendant demurred, becauſe the bill was againſt ſeveral *defendants, for ſeveral diſtinct matters*, but was overruled, becauſe the plaintiff by his bill had charged the defendant with *combination*, which defendant had *not denied* in his anſwer. *Vern.* 416. *pl.* 395. *Mich.* 1686. *Powell* v. *Arden and Chevall.*

The bill was *to examine witneſſes to preſerve their teſtimony* touching *the title of certain* lands in the bill mentioned. The defendant *demurred, becauſe there was no impediment that hindered the plaintiff from trying his right at law*; *and* that he had *not obtained any verdict* in affirmation of his pretended title. Demurrer allowed. *Vern.* 441. *pl.* 415. *Hill.* 1686. *Parry* v. *Rogers.*

If an *original bill* be brought *for matters, part of which are in a former bill and decree, and part new, or by way of ſupplemental bill*; the court will on a demurrer, to ſo much as was contained in the former decree, ſend it to a maſter to ſee what was, and what was not in the firſt bill, and allow the demurrer accordingly. *G. Equ. R.* 114. *Hill.* 12 *Geo.* 1. *in Canc'.*

For other matters, ſee 7 Vin. Abr. *tit.* Demurrer.

Demurrer to evidence, Is where a queſtion of law doth ariſe thereupon: As if the plaintiff produces in evidence any records, deeds, writings, *&c.* upon which a queſtion of law ariſes, and the defendant offers to *demur* upon it; and then the plaintiff muſt join in *demurrer*, or waive his evidence. So if the plaintiff brings witneſſes to prove a fact, and a matter of law ariſeth upon it; if the defendant admits their teſtimony to be true, there alſo the defendant may *demur* in law: And ſo may the plaintiff *demur* upon the defendant's evidence. And in theſe caſes, the counſel for the plaintiff and defendant agree the matter of fact in diſpute; and the jury are diſcharged; and the matter of law is referred to the judges to determine. But where evidence is given for the King, in an information, or other ſuit, and the defendant offers to *demur* upon it, the King's counſel are not obliged to join therein; but the court ought to direct the jury to find the ſpecial matter. And indeed becauſe juries uſually find a doubtful matter ſpecially, *demurrers upon evidence* are now ſeldom uſed. 5 *Rep.* 104. 1 *Inſt.* 72. 2 *Inſt.* 426. See **Exception.**

Demurrer to indictments. If a criminal joins iſſue upon a point of law in an indictment or appeal, allowing the fact to be true, as laid therein, this is a *demurrer* in law: And if the indictment or appeal proves good in law, in the opinion of the judges, they proceed to judgment and execution, as if the party had been convicted by confeſſion or verdict. And though by the criminal's demurrer, he refuſeth to put himſelf upon trial by jury, yet he ſhall not, as in other caſes, be put under the *pain fort & dure*; for a demurrer is allowed to be tried by the judges, and not by the inqueſt. And he that is condemned on demmurrer, is ſaid to be convict; for whoever is adjudged, is convicted by law. 2 *Inſt.* 178. *H. P. C.* 243. *S. P. C.* 150. 1 *Hawk. P. C.* 14. But ſee 2 *Hawkins* 334.

Demy ſonke or ſangue, Of the half blood, is, when a man marries a wife, and hath iſſue by her a ſon or a daughter, and the wife dies, and then he takes another woman, and hath by her alſo a ſon or daughter; now theſe two ſons or daughters are after a ſort brothers or ſiſters, or as we uſually term them *half brothers, &c.* or *brothers of the half blood*, becauſe they had both one father; but are not brothers by the mother ſide, as having ſeveral mothers, and therefore cannot be heirs one to another; for he that ſhall claim as heir to one by deſcent, muſt be of the whole blood to him from whom he claims. *Cowell.* See **Deſcent.**

Den. The names of place ending in *den*, ſignify the ſituation to be in a valley, or near woods, as *Tenterden, Biddenden*, from the Sax. *den, vallis*: *Locus ſylveſtris.*

Dena, or Denna, A little portion of woody ground, commonly called a *coppice*, *de ſilva octo* denæ *parvæ*; in another place, *Et una parva* dena *ſylvæ. Domeſday, apud Spelm.* And *Thorn. Anno* 826. tells us, that *Dederunt abbati terram* 20 *aratrorum &* 13 dennas *glandes portantes, &c.*

Dena terræ, A hollow place between two hills; you may find it in the beginning of *Domeſday Book. De ſilva octo denæ parvæ & tres magnæ.* Domeſd. —— Una parva dena ſylvæ, *ib. dederunt abbati terram viginti aratrorum &* xiii. dennas *glandes portantes.* Will. Thorn. ſub An. 826. Sax. *den*, a low place, which gives termination to very many names of places, eſpecially among the woods, as in the *weald* of *Kent, Tenterden, Biddenden, &c.* In ſome of the northern parts of *England* they retain the word *dene* for a valley, as in the biſhoprick of *Durham*, they ſay, *ſkarrs and denes, i. e.* hills and vales. *Cowell.*

Den and ſtrond, Liberty for ſhips or veſſels to run aground, or come aſhore. K. *Edw.* 1. grants this privilege to the barons of the Cinque ports.—*Quod ſint Wrecefry & Wyttefry, & Leſtagefry & Lonetopfry, & quod habeant* den & ſtrond *apud Gernemuth.* —— Placit. temp. Ed. 1. & Ed. 2. MS. 410. penes Dom. Fountains ex Æde Chriſti Oxon.

Denariata terræ. See **Fardingdeal of land.**

Denariatus terræ, Signifies as much land as is worth a penny by the year. *Sibylla Bartholot tenet unam acram &* 5 denariatos terræ *in eodem tenemento.* And in another place, *Tenet dimidiam rodam &* 3 denariatos terræ *in fine boreali meſſuagii. Tab. prioratus Lewis in Suſſex.* Du Freſne.

Denarii, A general term for any ſort of *pecunia numerata*, or ready money.——*Solventur hominibus de* Hedingdon *de denariis domini ſingulis annis proximo die quo falcare incipient quinque ſolid.* Paroch. Antiq. p. 320.

Denarius, An *Engliſh* penny. *Stat. Ed.* 1. *de compoſitione menſurarum, viz.* denarius *Angliæ qui nominatur ſterlingus rotundus ſine tonſura ponderabit* 32 *grana frumenti in medio ſpicæ, &* 20 *denarii faciunt unciam &* 12 *unciæ faciunt libram.*

Denarii de caritate, Whitſun-farthings, or Pentecoſtals, the cuſtomary oblations made to the cathedral-church about the time of Pentecoſt, when the pariſh-prieſts and many of their people went in proceſſion to viſit their mother-church. This cuſtom of voluntary honour was afterwards changed into a ſettled due, and commonly charged upon the pariſh-prieſt; though at firſt but a gift of charity (*denarii de cartitate*) or eleemoſynary preſent to help to maintain and adorn the biſhop's ſee or cathedral church.——*Eo ſalvo, quod denarium S.* Petri & denarios de caritate *perſolvant, quos hactenus perſolvere conſueverunt.* Cartular. Abbat. Glaſton. MS. fol. 15.

Denarius Dei, God's penny, arles or earneſt money. ——*It. quod neuter mercatorum ab illo contractu poſſit diſcedere vel reſilire, poſtquam* denarius Dei *inter principales perſonas contrahentes datus fuerit & receptus.* Cart. 31 Ed. 1. M. 4. See **Argentum Dei.**——The occaſion of this earneſt money being called *God's penny, denarius Dei*, was this; in former times the piece of money ſo given to ſeal the contract was given to God, *i. e.*

to

to the church or the poor, but the pious uſe is now gone.

Denarius S. Petri, Peter-pence. See **Romeſcot.**

Denarius tertius comitatus. In the fines and other profits ariſing from the county-courts, two parts were reſerved to the King, and a third part or penny to the earl of the county, who either received it in *ſpecie* at the aſſiſes and trials, or had an equivalent compoſition paid from the Exchequer. So *Eubulo le Strange*, in right of his wife *Alice*, daughter and heir of *Henry de Lacy* Earl of *Lincoln*, had by letters *Dat.* 5 *Edw.* 3. *Cuſtodiam & wardam caſtelli noſtri de* Lincoln *cum balliva ibidem, & viginti libratas annui redditus, pro* tertio denario comitatus. *Paroch. Antiq.* 418.

Denbera, A place for the running of hogs, a ſwine-cumb, or low valley for the pannage or feeding ſwine. From the Sax. *den*, a vale, and *berg*, a *barrow*, *a* hog. In a charter of King *Ethelred* granted to the manor of *Merſham* to the church of *Canterbury*.——*Hæc ſunt paſcua porcorum quæ noſtra lingua Saxonica* denbera *nominamus.*—And in a charter of K. *Offa* to the ſaid church, —— *Adjectis* denberis *in communi ſaltu*—See *Somner of Rom. Ports and Forts*, *p.* 110.

Dene, *Dena*, In the ſame book ſignifies a *dale*.

Denne, In the ſame book ſtands for a *town*.

Denelage, or **Danelage**, *Denelagia*, Is the law that the *Danes* made here in *England*, out of which, and *Merchenlage* and *Weſt-Saxon-lage*, the conqueror compounded certain ordinances for his ſubjects. *Camd. Brit. p.* 94 & 183.

Denizen, (from the French *donaiſon*, *i. e. donatio*,) Signifies in law an alien that is enfranchiſed by the King's charter, and enabled in all reſpects almoſt to do as the King's native ſubjects do, *viz.* to purchaſe and to poſſeſs lands, and to be capable of any office or dignity; yet it is ſhort of naturalization, becauſe a ſtranger naturalized, may inherit lands by deſcent, which a man made only a *denizen*, cannot. And in the charter, whereby a man is made *denizen*, there is commonly contained ſome one clauſe or other, that abridgeth him of that full benefit which natural ſubjects do enjoy. And when a man is thus infranchiſed, he is ſaid to be under the King's protection, or *eſſe ad fidem Regis Angliæ*, before which time he can enjoy nothing in *England*. *Bract. lib.* 5. *tract.* 5. *c.* 25. *num.* 3. Nay he and his goods might be ſeized to the King's uſe. *Horne* in his *Mirror of Juſtice*, *lib.* 1. *cap. de la Venue de Frankpledge*, and 2 *par. Inſt. fol.* 741. See alſo the ſtatute of 27 *H.* 8. *c.* 24. and *Co. lib.* 7. *Calvin*'s caſe.

By ſtat. 12 *Will.* 3. *c.* 2. and 1 *Geo.* 1. *c.* 4. Aliens made denizens are incapable of offices in the government, to be members of parliament, *&c.* See **Aliens.**

De non decimando. See **Modus.**

De non reſidentia clerici regis, Is an ancient writ, whereof ſee the form in 2 *par. Inſt. fol.* 624.

Denſhiring of lands. To caſt parings of earth, turf and ſtubble into heaps, and when dried, to burn them into aſhes, for a compoſt on poor barren land. This method of improvement is called *burn-beating*, and in ſome parts of *Staffordſhire* they term it *denſhering of land.*

Dentrir, A fiſh with many teeth. *Et ſint quieti de quibuſcunque priſis caponum, columbarum*, dentricium *Anguillarum & omnium aliorum piſcium.* Charta H. 6. pro Monaſter. Rameſey.

Deodand, *Deodandum*, Is a thing given or rather forfeited, as it were, to God, for the pacification of his wrath, in caſe of miſadventure, whereby any chriſtian man cometh to a violent end, without the fault of any reaſonable creature. For example, If a horſe ſhould ſtrike his keeper, and ſo kill him: If a man in driving a cart, and ſeeking to redreſs any thing about it, ſhould ſo fall as the cart-wheel running over him, ſhould kill him: If one ſhould be felling a tree, and he give warning to company preſent, when the tree was near falling, to look to themſelves, and any of them ſhould be ſlain nevertheleſs by the fall of the tree: In the firſt of theſe caſes, the horſe; in the ſecond, the cart-weel, cart and horſes; and in the third, the tree, is a *deodand* and to be given to God; that is, to be ſold and diſtributed to the poor, by the King's almoner, for an expiation of that dreadful event, though effected by unreaſonable, yea ſenſeleſs and inanimate creatures. *Staundf. pl. cor. lib.* 1. *c.* 2. *Bract. lib.* 3. *tract.* 2. *c.* 5. *Britton*, *c.* 17. and *Weſt. Symbol.* tit. *Indictments*, *ſect.* 49.

Fleta ſays, this *deodand* is to be ſold, and the price diſtributed to the poor, for the ſoul of the King, his anceſtors, and all faithful people departed this life. *Lib.* 1. *c.* 25. *De ſubmerſis*; which law ſeems to bear an imitation of that in *Exodus*, *c.* 21. *Si cornu petierit bos virum vel mulierem, ita ut moriatur, lapidabitur bos neque comedetur caro ejus, ac dominus ejus erit innocens.* This word is mentioned in the ſtat. *De officio coronatoris*, *Anno* 4 *Ed.* 1. See 3 *part. Inſt. fol.* 57. Since therefore by the *Moſaical* law the ox was to be ſtoned to death, it ſeems reaſonable that the price of the ox ſhould be beſtowed in pious and charitable uſes. *Cowell*, *edit.* 1727.

A deodand is that inſtrument which occaſions the death of a man, and is forfeited to the King, in order to be diſpoſed of in pious uſes by the King's almoner; this forfeiture of whatever procures the death of a man without the default of another was introduced to increaſe the terror and abhorrence of murder, ſo that nothing that occaſioned it ſhould ſeem to go unpuniſhed; alſo that weapon or inſtrument, whereby one man kills another is called a deodand. 3 *Inſt.* 57, 58. 5 *Co.* 110. *H. P. C.* 34. *Pult.* 125. *Crom.* 31. *a.*

To underſtand what things are forfeited as deodands, we muſt obſerve that it is laid down as a rule, that *omnia quæ movent ad mortem ſunt deodanda*; and therefore that wherever the thing which is the occaſion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited alſo. 1 *Hawk. P. C.* 66, 67.

As where a cart meeting a waggon loaded upon the road, and the cart endeavouring to paſs by the waggon, was driven upon a high bank, and overturned, and threw the perſon that was in the cart juſt before the wheels of the waggon, and the waggon run over the man and killed him, it was held that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved *ad mortem.* 1 *Salk.* 220.

But if a man, riding on the ſhafts of a waggon, fall to the ground, and break his neck, the horſes and waggon only are forfeited, but not the loading, becauſe it no way contributed to his death. 3 *Inſt.* 58. *S. P. C.* 20. 1 *Hawk. P. C.* 66.

So where a thing not in motion cauſes a man's death, that part thereof only which is the immediate cauſe is forfeited; as where one climbing upon the wheel of a cart while it ſtands ſtill falls from it, and dies of the fall, the wheel only is forfeited, but if he had been killed by a bruiſe from one of the wheels being in motion, the loading alſo would have been forfeited, becauſe the weight thereof made the hurt the greater. 1 *Hawk. P. C.* 66.

Alſo if a man riding on a horſe over a river is drowned through the violence of the ſtream, the horſe is not forfeited, becauſe not that, but the water cauſed his death. *Cro. Jac.* 483. 2 *Rol. Rep.* 23. *Poph.* 156. It is otherwiſe if the horſe had thrown him. 1 *Salk.* 220.

By the opinion of our ancient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a ſteeple, *&c.* may be deodands; but by the later reſolutions they cannot, unleſs they were ſevered before the accident happened. 1 *Hawk. P. C.* 66.

Alſo it was formerly held, that this forfeiture did not extend to caſual deaths ariſing from the indiſcretion, of children or infants within the age of diſcretion, for that ſuch puniſhment of innocent owners by taking their goods would anſwer no good end of juſtice; beſides the misfortune in this caſe might ſeem rather owing to the indiſcretion of the infant than any default in the thing; but this diſtinction has not been allowed of late; for the law does not ground the forfeiture on any default in the things

Plaintiff having obtained a *decree* againſt the defendants for money out of aſſets in their hands, they being executors, and they having denied aſſets, plaintiff brought a bill to *diſcover* aſſets. Defendants demurred, for it *did not appear that the decree was ſigned and inrolled*, or the defendant ſerved with any decree under ſeal. Demurrer allowed, and bill diſmiſſed. *Fin. R.* 33, 34. *Mich.* 25 *Car.* 2. *Braithwaite* v. *Davis.*

A bill was brought *to baſtardize the iſſue*, and ſet aſide and overthrow the marriage of his late father with the other defendant his mother. *The defendant demurred, for that the validity of the marriage, and legitamacy of the defendant is properly triable at law, and that the defendant the mother, is not bound to diſcover upon oath that ſhe is guilty of ſuch a crime, as will ſubject her to the penalty of the ſtatutes*, and laws of the realm, and that the bill was ſcandalous and impertinent; the demurrer was allowed, and the bill to be taken off the file and burnt. *Fin. Rep.* 72, 73. *Hill.* 25 *Car.* 2. *Trevor* v. *Leſquire.*

In a bill by *obligee againſt the heir of the obligor* for payment of the debt out of aſſets alledged to be deſcended; if the bill does *not alledge that the heir was bound by the bond*, defendant may demur. *Per North. K. Vern.* 180. *pl.* 173. *Trin.* 1683. *Croſſing* v. *Honor.*

Defendant demurred, becauſe the bill was againſt ſeveral *defendants, for ſeveral diſtinct matters*, but was overruled, becauſe the plaintiff by his bill had charged the defendant with *combination*, which defendant had *not denied* in his anſwer. *Vern.* 416. *pl.* 395. *Mich.* 1686. *Powell* v. *Arden and Chevall.*

The bill was *to examine witneſſes to preſerve their teſtimony* touching *the title of certain* lands in the bill mentioned. The defendant *demurred, becauſe there was no impediment that hindered the plaintiff from trying his right at law*; *and* that he had *not obtained any verdict* in affirmation of his pretended title. Demurrer allowed. *Vern.* 441. *pl.* 415. *Hill.* 1686. *Parry* v. *Rogers.*

If an *original bill* be brought *for matters, part of which are in a former bill and decree, and part new, or by way of ſupplemental bill*; the court will on a demurrer, to ſo much as was contained in the former decree, ſend it to a maſter to ſee what was, and what was not in the firſt bill, and allow the demurrer accordingly. *G. Equ. R.* 114. *Hill.* 12 *Geo.* 1. *in Canc'.*

For other matters, ſee 7 Vin. Abr. *tit.* Demurrer.

Demurrer to evidence, Is where a queſtion of law doth ariſe thereupon: As if the plaintiff produces in evidence any records, deeds, writings, *&c.* upon which a queſtion of law ariſes, and the defendant offers to *demur* upon it; and then the plaintiff muſt join in *demurrer*, or waive his evidence. So if the plaintiff brings witneſſes to prove a fact, and a matter of law ariſeth upon it; if the defendant admits their teſtimony to be true, there alſo the defendant may *demur* in law: And ſo may the plaintiff *demur* upon the defendant's evidence. And in theſe caſes, the counſel for the plaintiff and defendant agree the matter of fact in diſpute; and the jury are diſcharged; and the matter of law is referred to the judges to determine. But where evidence is given for the King, in an information, or other ſuit, and the defendant offers to *demur* upon it, the King's counſel are not obliged to join therein; but the court ought to direct the jury to find the ſpecial matter. And indeed becauſe juries uſually find a doubtful matter ſpecially, *demurrers upon evidence* are now ſeldom uſed. 5 *Rep.* 104. 1 *Inſt.* 72. 2 *Inſt.* 426. See **Exception.**

Demurrer to indictments. If a criminal joins iſſue upon a point of law in an indictment or appeal, allowing the fact to be true, as laid therein, this is a *demurrer* in law: And if the indictment or appeal proves good in law, in the opinion of the judges, they proceed to judgment and execution, as if the party had been convicted by confeſſion or verdict. And though by the criminal's demurrer, he refuſeth to put himſelf upon trial by jury, yet he ſhall not, as in other caſes, be put under the *pain fort & dure*; for a demurrer is allowed to be tried by the judges, and not by the inqueſt. And he that is condemned on demmurrer, is ſaid to be convict; for whoever is adjudged, is convicted by law. 2 *Inſt.* 178. *H. P. C.* 243. *S. P. C.* 150. 1 *Hawk. P. C.* 14. But ſee 2 *Hawkins* 334.

Demy conke or langue, Of the half blood, is, when a man marries a wife, and hath iſſue by her a ſon or a daughter, and the wife dies, and then he takes another woman, and hath by her alſo a ſon or daughter; now theſe two ſons or daughters are after a ſort brothers or ſiſters, or as we uſually term them *half brothers, &c.* or *brothers of the half blood*, becauſe they had both one father; but are not brothers by the mother ſide, as having ſeveral mothers, and therefore cannot be heirs one to another; for he that ſhall claim as heir to one by deſcent, muſt be of the whole blood to him from whom he claims. *Cowell.* See **Deſcent.**

Den. The names of place ending in *den*, ſignify the ſituation to be in a valley, or near woods, as *Tenterden, Biddenden*, from the Sax. *den, vallis*: *Locus ſylveſtris.*

Dena, or Denna, A little portion of woody ground, commonly called a *coppice*, *de ſilva octo* denæ *parvæ*; in another place, *Et una parva* dena *ſylvæ. Domeſday, apud Spelm.* And *Thorn. Anno* 826. tells us, that *Dederunt abbati terram* 20 *aratrorum &* 13 dennas *glandes portantes, &c.*

Dena terræ, A hollow place between two hills; you may find it in the beginning of *Domeſday Book. De ſilva octo denæ parvæ & tres magnæ.* Domeſd. —— Una parva dena ſylvæ, *ib. dederunt abbati terram viginti aratrorum &* xiii. dennas *glandes portantes.* Will. Thorn. ſub An. 826. Sax. *den*, a low place, which gives termination to very many names of places, eſpecially among the woods, as in the *weald* of *Kent, Tenterden, Biddenden, &c.* In ſome of the northern parts of *England* they retain the word *dene* for a valley, as in the biſhoprick of *Durham*, they ſay, *ſkarrs and denes, i. e.* hills and vales. *Cowell.*

Den and ſtrond, Liberty for ſhips or veſſels to run aground, or come aſhore. K. *Edw.* 1. grants this privilege to the barons of the Cinque ports.—*Quod ſint Wrecefry & Wytteſry, & Leſtageſry & Lonetopfry, & quod habeant* den & ſtrond *apud Gernemuth.* —— Placit. temp. Ed. 1. & Ed. 2. MS. 410. penes Dom. Fountains ex Æde Chriſti Oxon.

Denariata terræ. See **Farthingdeal of land.**

Denariatus terræ, Signifies as much land as is worth a penny by the year. *Sibylla Bartholot tenet unam acram &* 5 denariatos terræ *in eodem tenemento.* And in another place, *Tenet dimidiam rodam &* 3 denariatos terræ *in fine boreali meſſuagii. Tab. prioratus Lewis in Suſſex.* Du Freſne.

Denarii, A general term for any ſort of *pecunia numerata*, or ready money.——*Solventur hominibus de* Hedingdon *de denariis domini ſingulis annis proximo die quo falcare incipient quinque ſolid.* Paroch. Antiq. p. 320.

Denarius, An *Engliſh* penny. *Stat. Ed.* 1. *de compoſitione menſurarum, viz.* denarius *Angliæ qui nominatur ſterlingus rotundus ſine tonſura ponderabit* 32 *grana frumenti in medio ſpicæ, &* 20 *denarii faciunt unciam &* 12 *unciæ faciunt libram.*

Denarii de caritate, Whitſun-farthings, or Pentecoſtals, the cuſtomary oblations made to the cathedral-church about the time of Pentecoſt, when the pariſh-prieſts and many of their people went in proceſſion to viſit their mother-church. This cuſtom of voluntary honour was afterwards changed into a ſettled due, and commonly charged upon the pariſh-prieſt; though at firſt but a gift of charity (*denarii de cartitate*) or eleemoſynary preſent to help to maintain and adorn the biſhop's ſee or cathedral church.——*Eo ſalvo, quod denarium S.* Petri & denarios de caritate *perſolvant, quos hactenus perſolvere conſueverunt.* Cartular. Abbat. Glaſton. MS. fol. 15.

Denarius Dei, God's penny, arles or earneſt money. ——*It. quod neuter mercatorum ab illo contractu poſſit diſcedere vel reſilire, poſtquam* denarius Dei *inter principales perſonas contrahentes datus fuerit & receptus.* Cart. 31 Ed. 1. M. 4. See **Argentum Dei.**——The occaſion of this earneſt money being called *God's penny, denarius Dei*, was this; in former times the piece of money ſo given to ſeal the contract was given to God, *i. e.* to

to the church or the poor, but the pious uſe is now gone.

Denarius S. Petri, Peter-pence. See **Romeſcot.**

Denarius tertius comitatus. In the fines and other profits ariſing from the county-courts, two parts were reſerved to the King, and a third part or penny to the earl of the county, who either received it in *ſpecie* at the aſſiſes and trials, or had an equivalent compoſition paid from the Exchequer. So *Eubulo le Strange*, in right of his wife *Alice*, daughter and heir of *Henry de Lacy* Earl of *Lincoln*, had by letters *Dat.* 5 *Edw.* 3. *Cuſtodiam & wardam caſtelli noſtri de* Lincoln *cum balliva ibidem, & viginti libratas annui redditus, pro* tertio denario comitatus. *Paroch. Antiq.* 418.

Denbera, A place for the running of hogs, a ſwine-cumb, or low valley for the pannage or feeding ſwine. From the Sax. *den*, a vale, and *berg*, a *barrow*, *a* hog. In a charter of King *Ethelred* granted to the manor of *Merſham* to the church of *Canterbury*.——*Hæc ſunt paſcua porcorum quæ noſtra lingua Saxonica* denbera *nominamus.*—And in a charter of K. *Offa* to the ſaid church, ——*Adjectis* denberis *in communi ſaltu*—See *Somner of Rom. Ports and Forts*, *p.* 110.

Dene, *Dena*, In the ſame book ſignifies a *dale*.

Denne, In the ſame book ſtands for a *town*.

Denelage, or **Danelage**, *Denelagia*, Is the law that the *Danes* made here in *England*, out of which, and *Merchenlage* and *Weſt-Saxon-lage*, the conqueror compounded certain ordinances for his ſubjects. *Camd. Brit. p.* 94 & 183.

Denizen, (from the French *donaiſon*, *i. e. donatio*,) Signifies in law an alien that is enfranchiſed by the King's charter, and enabled in all reſpects almoſt to do as the King's native ſubjects do, *viz.* to purchaſe and to poſſeſs lands, and to be capable of any office or dignity; yet it is ſhort of naturalization, becauſe a ſtranger naturalized, may inherit lands by deſcent, which a man made only a *denizen*, cannot. And in the charter, whereby a man is made *denizen*, there is commonly contained ſome one clauſe or other, that abridgeth him of that full benefit which natural ſubjects do enjoy. And when a man is thus infranchiſed, he is ſaid to be under the King's protection, or *eſſe ad fidem Regis Angliæ*, before which time he can enjoy nothing in *England*. *Bract. lib.* 5. *tract.* 5. *c.* 25. *num.* 3. Nay he and his goods might be ſeized to the King's uſe. *Horne* in his *Mirror of Juſtice*, *lib.* 1. *cap. de la Venue de Frankpledge*, and 2 *par. Inſt. fol.* 741. See alſo the ſtatute of 27 *H.* 8. *c.* 24. and *Co. lib.* 7. *Calvin's* caſe.

By ſtat. 12 *Will.* 3. *c.* 2. and 1 *Geo.* 1. *c.* 4. Aliens made denizens are incapable of offices in the government, to be members of parliament, *&c.* See **Aliens.**

De non decimando. See **Modus.**

De non reſidentia clerici regis, Is an ancient writ, whereof ſee the form in 2 *par. Inſt. fol.* 624.

Denſhiring of lands. To caſt parings of earth, turf and ſtubble into heaps, and when dried, to burn them into aſhes, for a compoſt on poor barren land. This method of improvement is called *burn-beating*, and in ſome parts of *Staffordſhire* they term it *denſhering of land.*

Dentrit, A fiſh with many teeth. *Et ſint quieti de quibuſcunque priſis caponum, columbarum*, dentricium *Anguillarum & omnium aliorum piſcium.* Charta H. 6. pro Monaſter. Rameſey.

Deodand, *Deodandum*, Is a thing given or rather forfeited, as it were, to God, for the pacification of his wrath, in caſe of miſadventure, whereby any chriſtian man cometh to a violent end, without the fault of any reaſonable creature. For example, If a horſe ſhould ſtrike his keeper, and ſo kill him: If a man in driving a cart, and ſeeking to redreſs any thing about it, ſhould ſo fall as the cart-wheel running over him, ſhould kill him: If one ſhould be felling a tree, and he give warning to company preſent, when the tree was near falling, to look to themſelves, and any of them ſhould be ſlain nevertheleſs by the fall of the tree: In the firſt of theſe caſes, the horſe; in the ſecond, the cart-weel, cart and horſes; and in the third, the tree, is a *deodand* and to be given to God; that is, to be ſold and diſtributed to the poor, by the King's almoner, for an expiation of that dreadful event, though effected by unreaſonable, yea ſenſeleſs and inanimate creatures. *Staundf. pl. cor. lib.* 1. *c.* 2. *Bract. lib.* 3. *tract.* 2. *c.* 5. *Britton*, *c.* 17. and *Weſt. Symbol.* tit. *Indictments*, *ſect.* 49.

Fleta ſays, this *deodand* is to be ſold, and the price diſtributed to the poor, for the ſoul of the King, his anceſtors, and all faithful people departed this life. *Lib.* 1. *c.* 25. *De ſubmerſis*; which law ſeems to bear an imitation of that in *Exodus*, *c.* 21. *Si cornu petierit bos virum vel mulierem, ita ut moriatur, lapidabitur bos neque comedetur caro ejus, ac dominus ejus erit innocens.* This word is mentioned in the ſtat. *De officio coronatoris*, *Anno* 4 *Ed.* 1. See 3 *part. Inſt. fol.* 57. Since therefore by the *Moſaical* law the ox was to be ſtoned to death, it ſeems reaſonable that the price of the ox ſhould be beſtowed in pious and charitable uſes. *Cowell*, *edit.* 1727.

A deodand is that inſtrument which occaſions the death of a man, and is forfeited to the King, in order to be diſpoſed of in pious uſes by the King's almoner; this forfeiture of whatever procures the death of a man without the default of another was introduced to increaſe the terror and abhorrence of murder, ſo that nothing that occaſioned it ſhould ſeem to go unpuniſhed; alſo that weapon or inſtrument, whereby one man kills another is called a deodand. 3 *Inſt.* 57, 58. 5 *Co.* 110. *H. P. C.* 34. *Pult.* 125. *Crom.* 31. *a.*

To underſtand what things are forfeited as deodands, we muſt obſerve that it is laid down as a rule, that *omnia quæ movent ad mortem ſunt deodanda*; and therefore that wherever the thing which is the occaſion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited alſo. 1 *Hawk. P. C.* 66, 67.

As where a cart meeting a waggon loaded upon the road, and the cart endeavouring to paſs by the waggon, was driven upon a high bank, and overturned, and threw the perſon that was in the cart juſt before the wheels of the waggon, and the waggon run over the man and killed him, it was held that the cart, waggon, loading, and all the horſes were deodands, becauſe they all moved *ad mortem.* 1 *Salk.* 220.

But if a man, riding on the ſhafts of a waggon, fall to the ground, and break his neck, the horſes and waggon only are forfeited, but not the loading, becauſe it no way contributed to his death. 3 *Inſt.* 58. *S. P. C.* 20. 1 *Hawk. P. C.* 66.

So where a thing not in motion cauſes a man's death, that part thereof only which is the immediate cauſe is forfeited; as where one climbing upon the wheel of a cart while it ſtands ſtill falls from it, and dies of the fall, the wheel only is forfeited, but if he had been killed by a bruiſe from one of the wheels being in motion, the loading alſo would have been forfeited, becauſe the weight thereof made the hurt the greater. 1 *Hawk. P. C.* 66.

Alſo if a man riding on a horſe over a river is drowned through the violence of the ſtream, the horſe is not forfeited, becauſe not that, but the water cauſed his death. *Cro. Jac.* 483. 2 *Rol. Rep.* 23. *Poph.* 156. It is otherwiſe if the horſe had thrown him. 1 *Salk.* 220.

By the opinion of our ancient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a ſteeple, *&c.* may be deodands; but by the later reſolutions they cannot, unleſs they were ſevered before the accident happened. 1 *Hawk. P. C.* 66.

Alſo it was formerly held, that this forfeiture did not extend to caſual deaths ariſing from the indiſcretion, of children or infants within the age of diſcretion, for that ſuch puniſhment of innocent owners by taking their goods would anſwer no good end of juſtice; beſides the miſfortune in this caſe might ſeem rather owing to the indiſcretion of the infant than any default in the thing; but this diſtinction has not been allowed of late; for the law does not ground the forfeiture on any default in the things

forfeited, ſince it extends to things without life, to which it is plain that no manner of fault can be imputed. 1 *Hawk. P. C.* 66.

This forfeiture takes place at land only, and doth not extend to the ſeas, that are continually liable to ſtorms and tempeſts, and therefore a ſhip in ſalt water, whether in the open ſea, or within the body of a county, from which a man falls and is drowned, is not forfeited.

But a ſhip, by a fall from which a man is drowned in the freſh water, ſhall be forfeited, but not the merchandize therein, becauſe, they no way contributed to his death. 1 *Hawk. P. C.* 66.

In all theſe caſes, if the party wounded die not of his wounds within a year and a day after he received it, there ſhall be nothing forfeited; for the law does not look on ſuch as the cauſe a man's death, after which he lives ſo long; but if the party die within that time, the forfeiture ſhall have relation to the wound given, and cannot be ſaved by any alienation, or other act whatſoever in the mean time. 1 *Hawk. P. C.* 67.

However nothing can be forfeited as a deodand, nor ſeized as ſuch, till it be found by the coroner's inqueſt to have cauſed a man's death; but after ſuch inquiſition the ſheriff is anſwerable for the value of it, and may levy the ſame on the town where it fell; and therefore the inqueſt ought to find the value. 1 *Hawk. P. C.* 67.

Grants of deodands how to be inrolled, 3 & 4 *Will. & Ma. c.* 22. *ſect.* 1.

De deoneranda pro rata portionis, Is a writ that lieth where one is diſtrained for a rent that ought to be paid by others *proportionably* with him. For example, a man holds ten oxgangs of land by fealty, and 10*s.* rent of the King, and aliens one oxgang to one, another to another in fee; afterwards the ſheriff, or other officer, cometh and diſtraineth only one of them for the rent; he that is diſtrained may have this writ for his relief. *F. N. B. f.* 234.

Depalliare. See **Detunicare.**

Departure, From a plea, or matter, is where a man pleads a plea in bar of an action, and being replied thereunto, doth in his rejoinder ſhew another matter contrary to his firſt plea, that is called a *departure from his bar. Plowd. Com. f.* 7, 8. *Reginer* and *Fogaſſa*'s caſe. It may alſo be applied to a plaintiff, who in his replication ſhews new matter from his declaration. *Co.* 2. *par. fo.* 147, *Bagſhaw*'s caſe.

A departure in pleading *is* ſaid to be *when the ſecond plea contains matter not purſuant to his former, and which fortifies not the ſame*, and thereupon it is called *deceſſus*, becauſe he departs from his former plea; and therefore whenſoever the rejoinder (taking one example for all) *contains matter ſubſequent to the matter of the bar, and not fortifying the ſame*, this is regularly a departure, becauſe it leaves the former and goes to another matter. *Co. Lit.* 304. *a.*

As if *in an aſſiſe* the *tenant pleads a deſcent from his father*, and gives a colour, the *demandant intitles himſelf by a feoffment from the tenant himſelf*; the *plaintiff cannot ſay, that that feoffment was upon condition, and to ſhew the condition broken*, for that would be a clear departure from the bar, becauſe it contains matter ſubſequent. *Co. Lit.* 304. *a.*

But in an aſſiſe, if the *tenant pleads in bar that one J. S. was ſeiſed, and infeoffed him, &c.* and the *plaintiff ſhewed that he himſelf was ſeiſed in fee, until by J. S. diſſeiſed, who infeoffed the tenant, and he re-entred, the defendant may plead a releaſe of the plaintiff to J. S.* for this does fortify the bar. *Co. Lit.* 304. *a.*

If a man *pleads performance of covenants*, and the plaintiff *replies that he did not ſuch an act according to the covenant*, the defendant *ſays, that he offered to do it, and the plaintiff refuſed it*, this is a departure, becauſe the matter is not purſuant; for it is one thing to do a thing, and another to offer to do it; and the other refuſed to do it, therefore that ſhould have been pleaded in the former plea. *Co. Litt.* 304. *a.*

Where a man in his former plea *pleads an eſtate made by the Common law*, in the ſecond plea regularly he *ſhall not make it good by an act of parliament.* So when in his former plea he *intitles himſelf generally by the Common law*, in his *ſecond plea* he *ſhall not enable himſelf by a cuſtom*, but ſhould have pleaded it firſt. *Co Lit.* 304. *a.*

In debt on a *bond* conditioned *to perform an award*, the defendant *pleaded Nullum fecerunt arbitrium.* The plaintiff *replied, and ſhew'd an award.* The defendant *rejoin'd, that there were other things ſubmitted, and ſo no award.* Adjudged on demurrer, that this is a departure; for the defendant ought to have pleaded this ſpecial matter in his plea at firſt. *Sid.* 180. *pl.* 16. *Hill.* 15 & 16 *Car.* 2. *B. R. Morgan* v. *Man.*

In *aſſumſit for* 5000 *royals*, the defendant *pleaded the ſtatute of Limitations*; the plaintiff *replied, and tendred an iſſue as to parcel, and as to the reſidue*, he *ſaid, the defendant was indebted to him at Teneriffe in the Canary Iſlands, in warda de Cheap, &c.* And upon a demurrer to this replication, it was objected, that it is a departure, becauſe the plaintiff had *declared for a debt due in London*, and in his *replication* he *alledges it was at Teneriffe*; but adjudged that it is no departure, becauſe it is a perſonal thing, for he who is *indebted* to me in *one place, is ſo in every place. Sid.* 228. *pl.* 24. *Mich.* 16 *Car.* 2. *B. R. Bevin* v. *Chapman.*

Debt upon a bond. The condition was, *to ſave a pariſh harmleſs from the charge of a baſtard child.* The defendant *pleaded Non damnificatus*; the plaintiff *replies, that the pariſh had laid out* 3*l.* for keeping the child. The defendant *rejoins, that he tendred the money*; *and the plaintiff paid it De injuria ſua propria*; whereupon it was demurred. *Twiſden* ſaid, the rejoinder is a departure; you ſhould have pleaded thus, *viz.* that *non fuit damnificat'* till ſuch a time; and that then you offered to take care of the child, and tendred, *&c.* Judgment for the plaintiff, *niſi, &c. Mod.* 43, 44. *pl.* 97. *Hill.* 21. & 22 *Car.* 2. *B. R. Richards* v. *Hodges.*

Debt upon *bond for performance of covenants*, the defendant in his *plea ſet forth the indenture*, which was *to return all the effects of goods ſent to Barbadoes, and* that he had perform'd all the covenants; the plaintiff *replied, that ſuch goods were ſent, of which he had not returned the effects*; the defendant *rejoined, that he had no order to return them*; and upon demurrer this was adjudged a departure, becauſe there was *nothing of order mentioned in the covenants*; but *per Hale*, If the covenant had been to return them on order, they had been good. The Reporter adds two quæries. 2 *Lev.* 67. *Mich.* 24 *Car.* 2. *B. R. Wood* v. *Kirkham.*

In *debt on the recognizance of the bail*, the defendant *pleaded, that there was no* capias ad ſatisfaciendum *proſecuted and returned againſt the principal before the day of exhibiting the bill againſt the now defendant.* The plaintiff *replied, that a* capias ad ſatisfaciendum *was ſued out, and returned before the exhibiting this bill.* Defendant *rejoined, that the defendant in the firſt action brought a writ of error on the judgment before the* ca. ſa. *was proſecuted, returned and filed.* Upon demurrer it was adjudged for the plaintiff, becauſe the rejoinder is a departure from the bar. 2 *Ld. Raym. Rep.* 1256. *Paſch.* 3 *Ann. B. R. Parkins* v. *Wilſon.*

In debt on *bond* conditioned that *J. L. ſhould be a true priſoner without making any eſcape.* The defendant pleads, *that J. Larkin did remain a true priſoner without committing any eſcape, &c.* Plaintiff aſſigns *breach that* 13*th of Jan. J. L. made an eſcape*; defendant *rejoins*, that *J. L.* went a *little way out of the rules of the priſon, but being ſent for back by the plaintiff, he immediately returned with conſent of the plaintiff, was accepted as his priſoner, and ſo continued ever ſince*; to which it was demurred; this is a departure; for if this would excuſe the eſcape, it ſhould have been pleaded at firſt; ſo judgment for the plaintiff. *Comyns*'s *Rep.* 553, 554. *pl.* 230. *Trin.* 9 & 10 *Geo.* 2. in *C. B. Gambier* v. *Larkin.*

Parker Ch. J. delivered the reſolution of the court.

This is an *indebitatus aſſumſit*, laid 16th of *January* 1706. The defendant has pleaded *Actio non accrevit infra ſex annos.* The plaintiff has replied a bill filed 23d of *January* 12 *Ann.* and that the cauſe of action aroſe within ſix years before. The defendant has demurred generally,

generally, and it has been inſiſted on by his counſel, that the replication is a departure, there being ſeven years diſtance between the day in the declaration, and the filing the bill as ſet forth in the replication. But we are all of opinion notwithſtanding, that the plaintiff muſt have judgment; this being only a parol promiſe, the time alledged in the declaration is only matter of form, not of ſubſtance; and not being a departure in a material point, is only a defect in form of pleading, which not being ſhewn for cauſe of demurrer, purſuant to the act for the amendment of the law, the defendant cannot take advantage of it. If a verdict had found the promiſe, or the filing the bill to be another day, that would not have vitiated the proceedings. 1 *Lev.* 110. 1 *Keb.* 566, 578. *Hob.* 164, 199. If the day had been ſubſtance, it would have been a departure; and ſo it was adjudged in this court *Paſ.* 1 *Geo. Stafford* v. *Forcer.* That was upon a promiſſory note dated in 1704; the defendant pleaded *actio non accrevit infra ſex annos*; the plaintiff replied, a bill filed 12 *Ann.* and after a verdict the judgment was arreſted, becauſe in this caſe the day was material: if the day in this caſe ſhould be looked upon as ſuch, it would be in the defendant's power in almoſt all caſes to fix the time and place. As where the plaintiff brings an action of aſſault and battery in *London*, the defendant pleads he made the aſſault in *Middleſex*, and that afterwards the plaintiff releaſed all batteries except in *London*. By this he would make the place material, and the doctrine of bringing tranſitory actions where the plaintiff pleaſed, would fall to the ground, if the defendant ſhould be allowed by artificial pleading, to make the time and place matter of ſubſtance. *Vide Co. Litt.* 282. *b.* *Yelv.* 114. *Stran.* 21, 22.

Action upon the caſe upon ſeveral promiſes; the defendant pleads infancy; the plaintiff replies, it was for neceſſaries, and the defendant rejoins an account ſtated, *quodque ſuperinde præd' querens exoneravit* the defendant. And on demurrer judgment was given for the plaintiff, becauſe the rejoinder was a departure from the plea; or if not, yet *exoneravit* generally will not do, for the party muſt ſhew how he was diſcharged. *Stran.* 422. See 7 *Vin. Abr.* tit. *Departure.*

Departure in deſpight of the court, Is, when a tenant or defendant appears to an action, and hath a day over in the ſame term, or is called after, though he had no day given him, ſo that it be in the ſame term; if he do not appear, but make default, it is a *departure in deſpight of the court*, and therefore he ſhall be condemned. And here obſerve, that *departure in deſpight of the court*, is always on the part of the tenant or defendant, and the entry thereof is, *Quod prædictus A. licet ſolemniter exactus non revenit, ſed in contemptum curiæ receſſit et defaltam fecit:* And this is when in judgment of the law he is preſent in court, and being demanded *departs in deſpight of the court*; this amounts to a bar in reſpect of the *deſpight* and contempt *of the court.* See *Co. lib.* 8. *fol.* 62. and **Default.**

To depart, To divide or ſeparate actively. *This hill* departed *the land of the* Ammonites *from that of the* Amorites. *Bat. upon Bat. lib.* 14. *c.* 13. Men that divide and *depart* fields. *Ib. c.* 50. So in *Wickliff* tranſlation *Gen.* i. 4. *Depart the light from darkneſs.* And it was in that age properly expreſt in our old office of matrimony, *till death us depart*, now more intelligible to the vulgar, *till death us do part.* Hence the *departers of gold and ſilver* were no more than the dividers and refiners of thoſe metals. *Cowell, edit.* 1727.

Departers of gold and ſilver. See **Finers.**

Deperſonatus. See **Diſperſonatus.**

Depopulation. *Depopulatio,* Is the laying waſte, deſtroying and unpeopling of a place. *Co.* 12. *Rep. fol.* 30. This is now the apparent effect of incloſing lordſhips and manors, by which means ſeveral good old populous villages have been reduced from a great number of ſufficient farms, to a few cottages. *Cowell, edit.* 1727.

Depopulatores agrorum, Were great offenders by the Common law, as appears by the ſtatute 4 *H.* 4. 2. and were called *Depopulatores agrorum*, becauſe by proſtrating and ruining of houſes, they ſeemed to *depopulate* towns, that is, leave them without inhabitants. 3 *Par. Inſt. f.* 204. See alſo 13 *Eliz.* 10. and 14 *El.* 11.

Depoſition, *(Depoſitio)* Is the teſtimony of a witneſs, otherwiſe called a *deponent*, put down in writing by way of anſwer to interrogatories exhibited to that purpoſe in *Chancery, &c.* And when ſuch witneſs is examined in open court, he is ſaid to be examined *viva voce. Depoſition* is alſo uſed for death; as in *Provin. Angl. lib.* 2. tit. *De feriis.* Ordinamus quod feſtum depoſitionis *Sancti Johannis de Beverlaco* 7 *die* Maii, *per provinciam noſtram antedictam perpetuis temporibus celebretur.*

A *witneſs* was examined for the plaintiff, and to be *croſs examined* for the defendant, but before he could be croſs examined, *died*; yet this court ordered his depoſitions to ſtand, 2 *Chanc. Rep.* 18. 20 *Car.* 2. & 22 *Car.* 2. *Moſely* v. *Maynard.*

Proofs in an *original cauſe* were not allowed to be read on a bill *of review.* 2 *Chanc. Rep.* 18. 20 *Car.* 2. & 22 *Car.* 2. *Moſely* v. *Maynard.*

Depoſitions taken *in either cauſe*, ordered to be *uſed in both*, wich order was after publication in the firſt cauſe, wherein the proof was made, but before publication in the ſecond cauſe. *Chanc. Caſes* 236. *Mich.* 26 *Car.* 2. *Norcliff* v. *Worſely.*

Depoſitions taken in a former cauſe cannot be *read in another cauſe* againſt one that does not claim under the party againſt whom thoſe depoſitions were taken; *but* ſerjeant *Phillips* ſaid, that it is a common caſe, that if a *legatee* bring a bill againſt the executor, and proves aſſets, another legatee, though no party, may have the benefit of thoſe depoſitions. *Vern. R.* 413. *Mich.* 1686. *Coke* v. *Fountain.*

Creditors of *L.* obtain a decree for payment of their debts, and to ſet aſide conveyances got by fraud, and Sir *H. J.* and the legatees are defendants; the legatees having a bill againſt Sir *H. J.* the queſtion was if the depoſitions in the former cauſe *could be read in this*; *per cur.* The queſtion being the ſame in both cauſes, and Sir *H. J*'s defence the ſame, they ought to be read. 2 *Vern. R.* 447 *Mich.* 1703. *Nevil* v. *Johnſon.*

Maſter examined one witneſs *three times* to the account; ordered that the depoſitions be *ſuppreſſed.* 2 *Chan. Caſ.* 79. *Mich.* 33 *Car.* 2. *Anon'.*

Depoſitions *ſuppreſſed*, becauſe the ſolicitor's clerk in the cauſe, did *write as a clerk* in the execution of the commiſſion. 2 *Chanc. Rep.* 393. 2 *Jac.* 2. *Newte* v. *Foot.*

A witneſs having committed a *miſtake* in his examination before commiſſioners, applied to them to *rectify it*, but the commiſſion being returned to *London*, he went there, made oath of it, and that he was *ſurprized by an haſty examination*; but the commiſſion not being opened, it was returned back to the commiſſioners with a ſpecial commiſſion to open it, and permit the witneſs to rectify his miſtake; the *ſpecial commiſſion* being executed and returned, it was moved to ſuppreſs the depoſitions as unduly taken, and that no ſuch ſpecial commiſſion ought to have been, and they were *ſuppreſſed. N. C. R.* 92. 15 *Car.* 2. *Randall* v. *Richards.*

The Lord Chancellor took notice of what *dangerous conſequence* it would be, that if after publication paſſed, and people ſeeing where a cauſe pinched, they ſhould then be at liberty to look out witneſſes to boulſter up the faulty part of the cauſe; the neceſſary conſequence would be perjury. *Vern* 47. *Paſch.* 1682. in caſe of *Jones* v. *Purefoy.*

After a witneſs is fully examined, the examinations are *read over* to him, and the witneſs is at *liberty to alter*, or amend any thing; after which he *ſigns them*, and then, and not before, the examinations *are* complete, and *good evidence. Wm's Rep.* 415. *Paſch.* 1718. *by the reporter.*

Therefore where a witneſs was examined, and *before ſigning his examination died*, the Maſter of the Rolls upon adviſing with a Maſter in Chancery then in court denied the making uſe of the depoſitions, as being not perfect. *Wm's Rep.* 414. *Paſch.* 1718. *Copland* v. *Stanton.*

But where *after an order for publication, defendant examined* a witneſs, and then perceiving the irregularity (it being after publication) the defendant on the *uſual affidavit* by himſelf, his clerk in court, and ſolicitor, *that they had not, nor would ſee any of the depoſitions, got an order to re-examine* this witneſs; but before re-examination the witneſs died; upon affidavit of this, Ld. C. *Parker* ordered, that the defendant might make uſe of the depoſitions, the re-examination of him being prevented by the act of God. *Wm's Rep.* 415. cites *Mich.* 1720. *Debrox* v. ——.

On a petition to amend the depoſition of a witneſs, who, being examined, ſwore only, that he was induced to believe, that he did expreſs himſelf in the manner the depoſition was taken, and was poſitive he did not intend or mean to ſwear as the examiner had taken it, but really as in the amendment deſired. Lord C. *King* ſaid that where it appears to the court, that *either the examiner is miſtaken in the taking, or the witneſs in making*, the depoſition, he thought it was for the advancement of truth and juſtice to amend it, and the ſooner the better, in regard of death or abſence, and it would be unjuſt to pin a witneſs down to a miſtake by denying to rectify it, and as to the amending it after publication, it could not be known before, and ordered it to be amended and the *witneſs to ſwear it over again.* 2 *Wm's Rep.* (646.) *Mich.* 1731. *Griells* v. *Ganſell.*

Deprivation, *Deprivatio*, Is a bereaving or taking away, as when a biſhop, parſon, vicar or prebend, is *deprived*, or depoſed from his preferment for any matter in fact or in law; as if a ſchiſmatick, or mere layman, be preſented, admitted, inſtituted and inducted; this is good cauſe of *deprivation*. See other cauſes of *deprivation*, in ſtat. 13 *Eliz. c.* 12. 21 *H.* 8. *c.* 13. 2 & 3 *Ed.* 6. *c.* 20. *Deprivation* of biſhops and deans, *ſtat.* 39. *Eliz. c.* 8. See **Eccleſiaſtical perſons**, and **Service and Sacraments**.

Deprivatio a beneficio is when, for ſome great crime, a miniſter is wholly and for ever *deprived* of his living.

Deprivatio ab officio is when a miniſter is for ever *deprived* of his orders, which is alſo called *depoſitio* or *degradatio*, and is commonly for ſome henious crime meriting death, and performed by the biſhop in a ſolemn manner. *Cowell, edit.* 1727.

Deprivation, Is an eccleſiaſtical cenſure, whereby a clergyman is deprived of his parſonage, vicarage, or other ſpiritual promotion or dignity. *Deg. p.* 1. *c.* 9.

And the cauſes of ſuch deprivation are properly and naturally determinable by the eccleſiaſtical laws of this realm: But becauſe generally there are eſtates of freehold dependant upon theſe promotions and dignities, and annexed to them inſeparably, which reſt at the ſole determination of the Common law; the courts of Common law do ſometimes inſpect and regulate the proceedings of the eccleſiaſtical courts; and where they proceed againſt the rules of law, they frequently prohibit them: Eſpecially where ſuch ſentence for any offence is inflicted by act of parliament. *Deg. pag.* 1. *c.* 9.

In all cauſes of deprivation of a perſon actually poſſeſſed of a benefice, theſe things muſt concur: 1. A monition or citation of the party to appear. 2 A charge given him, to which he is to anſwer, called the libel. 3. A competent time aſſigned for the proofs and anſwers. 4. A liberty for counſel to defend his cauſe, and to except againſt the proofs and witneſſes. 5. A ſolemn ſentence after hearing all the proofs and anſwers. Theſe are the fundamentals of all judicial proceedings in the eccleſiaſtical courts, in order to a deprivation. And if theſe things be not obſerved, the party hath juſt cauſe of appeal, and may have a remedy by a ſuperior court. And theſe proceedings are agreeable to the common juſtice and reaſon of mankind; becauſe the party accuſed hath the liberty of defence, and the right of appeal. 1 *Still.* 323. *Ayl. parerg.* 209.

By *Canon* 122. ſentence againſt a miniſter, of deprivation from his living, ſhall be pronounced by the biſhop only, with the aſſiſtance of his chancellor and dean (if they may conveniently be had), and ſome of the prebendaries, if the court be kept near the cathedral church; or of the archdeacon, if he may be had conveniently, and two other at leaſt grave miniſters and preachers to be called by the biſhop when the court is kept in other places.

Deputy, Is he that exerciſes, in another man's right, either office or other things; and his forfeiture or miſdemeanor ſhall cauſe the officer, or him whoſe *deputy* he is, to loſe his office: But a man cannot make his *deputy* in all caſes, except the grant be ſo; as if it be with theſe, or ſuch like words, *To exerciſe and uſe by himſelf, or his ſufficient* deputy; or if the words go farther, *to himſelf, or his* deputy, *or the* deputy *of his* deputy; then he may make his *deputy*, and his *deputy* alſo may make a deputy, or elſe not. As if the office of a parkerſhip be granted to one, he cannot grant this over to another, becauſe it is an office of truſt and confidence, and ſhall not be forfeited, and there is great difference between a *deputy* and aſſignee of an office; for an aſſignee hath an intereſt in the office itſelf, and doth all things in his own name; for whom his grantor ſhall not anſwer, unleſs in ſpecial caſes. But a *deputy* hath not any intereſt in the office, but is only the ſhadow of the officer, in whoſe name he doth all things. And where an officer hath power to make aſſigns, he may implicitly make *deputies* for *cui licit quod majus eſt, non debet quod minus eſt non licere.* And a ſheriff may make a *deputy*, or under-ſheriff, although he have not ſuch expreſs words in his patent. *Cowell, edit.* 1727.

A *miniſterial officer* may make a deputy, but he *ought to make returns in the name of the immediate officer. Per Dodderidge* J. *Roll. Rep.* 274. *in pl.* 49. *Mich.* 13 *Jac. B. R.*

Sir *W. V.* having an eſtate in the manor of *D.* was choſen reeve to gather the lord's rents; he moved for a writ of privilege as a *captain of the guards*, and ſo his perſonal ſervice requiſite in the court of the King; but the writ was denied, becauſe they all (but *Twiſden*) held that he *may make a deputy reeve. Sid.* 335. *pl.* 5. *Hill.* 19 & 20 *Car.* 2. *B. R. Sir Walter Vane*'s caſe.

A *deputy cannot make a deputy*; becauſe it implies an aſſignment of his whole power, which he cannot aſſign over; but he may impower another to do a particular act. 1 *Salk.* 96. *Paſch.* 13 *Will.* 3. *B. R. per Holt.* C. J. in delivering the opinion of the court in the caſe of *Parker* v. *Kett.*

Tenant for life of the bailiwick of the Savoy from the crown made a leaſe thereof for a year to an under-deputy, and adjudged good; for by the ſtatute 5 *Ed.* 6. *c.* 16. all officers of fee are excepted, and ſo are all ſub-grants and ſub-demiſes thereof. 3 *Salk.* 252. *pl.* 7.

A *gaoler* may make a deputy; admitted. See 2 *Ld. Raym. Rep.* 1574. *Mich.* 4 *Geo.* 2. *B. R. The King* and *Huggins.*

Where an office is granted to a man and his heirs, he may make an aſſignee of that office, and by conſequence a deputy. 9 *Rep. Comb*'s caſe.

The earl of *Eſſex* held ſeveral manors of the King by the ſervice, to be conſtable of *England*; he had iſſue two daughters, and died; afterwards they married; adjudged, that before marriage they might exerciſe that office by deputy, and the youngeſt daughter being married to the King, the Huſband of the eldeſt ſhall now exerciſe the office alone. *Trin.* 12 *Eliz. Dyer* 208. *Humphrey de Bohun*'s caſe.

The King granted the office of Steward of his Houſehold, and of all his manors, *&c.* to the Earl of *Shrewſbury*, for life, but there was no power given in the grant to make a deputy of the office of ſteward of the manors; and by the ſame letters patent he granted to the Earl the office of park-keeper in *N.* to hold and exerciſe *offic. prædict'* by his deputy or deputies; and in the concluſion of the grant, he commanded all his officers, *&c.* to be aſſiſting to the ſaid Earl *& deputat' ſive deputatis ſuis*; adjudged, that though a ſteward cannot make a deputy without ſpecial words, becauſe 'tis an office of truſt and knowledge, which are qualities annexed to his perſon; yet when the King grants a ſtewardſhip to an *Earl*, he may make a deputy, becauſe of the dignity of his perſon; for an Earl is *præpoſitus comitatus*, and there is no occaſion for

for any expreſs words in the grant to give him that power, for it ſhall be intended, that his time is taken up ſo much with the publick affairs of the kingdom, that he cannot in perſon attend ſuch an inferior office. 9 *Rep. Earl of Shrewſbury*'s caſe.

Error to reverſe a judgment in the palace-court, held before *James* Duke of *Ormond*; and the error aſſigned was, that the Duke was not in court, but that it was held before one *Wynn*, his deputy, according to the grant, and that there cannot be a judicial place to hold a court by deputy; but adjudged, that many recorders hold their courts by deputy. 1 *Lev.* 76. *Molins* v. *Werby*.

De quibus ſur diſſeiſin, Is a writ of entry. See *Fitz. Nat. Brev. fo.* 191.

Der. Names of places beginning with *der* ſignify they were formerly where wild beaſts herded together, from the Sax. *deor*, *fera*; unleſs the ſituation was near ſome river. *Cowell*, *edit.* 1727.

Deraign or **Dereyn.** (*Deſrationare vel dirationare,*) ſeems to come from the French *deraigner* or *deranger*, id eſt, *confundere*, to confound or to put in diſorder; or of the *Norman* word *deſrene*, which ſignifies nothing but a proof of the denial of a man's own fact. In our Common law it is uſed diverſly. Firſt generally, to prove, as *Dirationabit jus ſuum hæres propinquior*. Glanvile, lib. 2. cap. 6. And *Habeo probos homines, qui hoc viderunt & audierunt & parati ſunt hoc dirationare*. Id. lib. 4. cap. 6. And *Dirationavit terram illam in curia mea*. Id. lib. 2. cap. 20. he proved that land to be his own, &c. And *Bracton* uſeth it after the ſame ſort, in theſe words, *Habeo ſufficientem diſratiocinationem & probationem*. Lib. 4. tract, 6. cap. 16. And ſo he uſeth *dirationare*. Lib. 4. cap. 22. And ſo is *Weſt.* 2. 13 *Ed.* 1. *t.* 32. And *deraign* the warranty. *Old. Nat. Brev. fol.* 146. And to deraign the warranty paramount. 31 *Hen* 8. *c.* 1. And *dereigner le warranty* in *Plowden*, *Baſſet*'s caſe, *in fine* 2. *partis*, *fol.* 6, 7, 8. hath the ſame ſignification. So it is uſed, *Weſt.* 2. *c.* 5. 13 *Ed.* 1. in theſe words: And when the parſon of any church is diſturbed, to demand tithes in the next pariſh by a writ of *indicavit*; the patron of the parſon ſo diſturbed, ſhall have a writ to demand the advowſon of the tithes, being in demand; when it is *deraigned*, then ſhall the plea paſs in the *court chriſtian* as far as the ſame is *deraigned* in the King's court. *Bract.* alſo, *lib.* 3. *tract.* 2. *c.* 3. *num.* 1. ſpeaking of him that appealeth another for treaſon or felony, hath theſe words, *Proponat accuſans appellum ſuum in hunc modum*, ſc. *debet dicere ſe interfuiſſe & vidiſſe certo loco, certo die, certa hora, & ſciviſſe ipſum accuſatum prælocutum fuiſſe mortem Regis vel ſeditionem ſuam, vel exercitus ſui, vel conſenſiſſe, vel auxilium & conſilium impendiſſe, vel ad hoc authoritatem præſtitiſſe, & hoc ego juxta conſiderationem curiæ* diſrationare *paratus ſum*. He uſeth it likewiſe as the *Normans* uſe *diſraiſniam*, for him that offereth to juſtify his denial, as *lib.* 3. *tract.* 2. *c.* 28. *num.* 1. in theſe words, *Rex conſilio epiſcoporum & bonorum miſit propter comitem, ut ſtatuto die veniret ad curiam, ad* diſrationandum *vel defendendum ſe ſi poſſit*. Laſtly, in ſome places the ſubſtantive *deraignment* is found uſed in the very literal ſignification of the French *deraigner* or *deranger*, that is, turning out of courſe, as *deraignment* or departure out of religion, 31 *H.* 8. *c.* 6. And *deraignment* or diſcharge of theira profeſſion, 33 *H.* 8, *c.* 29. which is ſpoken of thoſe religious men which forſook their orders, or profeſſion; as alſo 5 & 6 *Ed.* 6. *c.* 13. So doth *Kitchin* uſe the word, *fol.* 152. ſaying, The leſſee entreth into religion, and afterwards is *deraigned*. And *Britton* hath theſe words, *Semounſe diſrenable*, for a ſummons that may be challenged as defective, or not lawfully made, *c.* 21. Of this you may read more in *Skene de Verb. Signif.* verbo *Diſrationare*, where he confoundeth it with our waging and making of law. *Cowell*, *edit.* 1727.

Dereſeld, A park: From the Sax. *deor*, *fera*, and *ſald*, *ſtabulum*.

De revocatione parliamenti, Is a writ for recalling a *parliament*, as in 5 *Ed*, 3. the *parliament* being ſummoned, was recalled by ſuch a writ before it met. See *Pryn's Animad.* on the 4 *Inſt. fol.* 44.

Derventio, *Auldby upon Derwent in Yorkſhire.*

Derwentwater eſtate. Contracts for ſale of the eſtate, how made void, 5 *Geo.* 2. *c.* 23. Appropriated to *Greenwich* hoſpital, 8 *Geo.* 2. *c.* 20. 11 *Geo.* 2. *c.* 30.

Deſcent, Comes from the *Latin* word *deſcendere*, id eſt, *ex loco ſuperiore in inferiorem movere*; and in a legal underſtanding it is when land, &c. after the death of the anceſtor, is caſt by courſe of law upon the heir. *Co. Litt.* 237. *a.*

This is the nobleſt and worthieſt means whereby lands are derived from one to another, becauſe it is wrought and veſted by the act of law and right of blood, unto the worthieſt and next of blood and kindred of the anceſtor; and therefore it has not in the Common law altogether the ſame ſignification that it has in the Civil law; for the Civilians call him *Hæredem, qui ex teſtamento ſuccedit in univerſum jus teſtatoris*; but by the Common law he is only heir which ſucceeds by right of blood. And this agrees well with the etymology of the word *heir* to whom the laſt deſcend, for *Hæres dicitur ab hærendo, quia qui hæres eſt hæret, hoc eſt, proximus eſt ſanguine illi cujus eſt hæres*. So as he who is *Hæres, ſanguinis eſt hæres, & hæres hæreditatis*. Co. Litt. 237. b.

All poſſible hereditary ſucceſſions may be diſtinguiſhed into theſe there kinds, *viz.* either *firſt, in the deſcending line*, as from father to ſon or daughter, nephew or niece, *i. e.* grandſon or grandaughter. Or,

Secondly, in the collateral line, as from brother to brother or ſiſter, and ſo to brothers and ſiſters children. Or,

Thirdly, in an aſcending line, either direct, as from ſon to father or grandfather (which is not admitted by the law of *England,*) or in the tranſverſal line, as to the uncle or aunt, great uncle or great aunt, &c. And becauſe this line is again divided into the line of the father, or the line of the mother, this tranſverſe aſcending ſucceſſion is either in the line of the father, grandfather, &c. on the blood of the father; or in the line of the mother, grandmother, &c. on the blood of the mother; the former are called *agnati*, the latter *cognati*. *Hale's Hiſt. Com. Law* 223.

By the law uſed in *England before*, and at the *time of the conqueſt*, *all the deſcendants* of a perſon dying inteſtate had preference *not only in perſonal, but alſo in real eſtates*; for if a man had died having three ſons and a daughter, they all equally inherited his real eſtate; and this appears in *Seld. Eadm.* 184. *Lamb. Saxon Law* 68. *Si quis inteſtat' deceſſerit liberi ejus hæreditatem æqualiter dividunto.* But *after the conqueſt*, the kingdom and conſtitution were to be new modelled; and this alteration was made in the time of *Henry* 1. and *daughters were excluded* if there were males, and it was by the 36th. law of *H.* 1. See *Lamb.* 202, 203. and then the *males did inherit all alike*, eſpecially all the common ſocage men. But even then if one had died without iſſue, and had a father or mother, the *land ſhould not go to any collateral, but to the father or mother*; and this appears by the law of *H.* 1. *Lamb. ubi ſupra. Si quis ſine liberis deceſſerit, pater & mater in hæreditatem ſuccedat, vel frater aut ſoror, ſi pater & mater deſit*; ſo the collateral was not to come in but upon failure of father and mother. And though 1 *Inſt.* 11. *a.* this is taken notice of as an exploded opinion; yet *Coke* had not ſeen the laws of *Hen.* 1. then, and the Red Book in the Exchequer, that he contradicts, is very ancient, and of great authority in law. 12 *Mod.* 623. *Hill.* 13 *Will.* 3. *B. R.* in the caſe of *Blackborough* v. *Davis*.

But this law did not continue long, but was *altered between the reigns of H.* 1. *and H.* 2. *and the father and mother altogether excluded*, and then the law came to be adjudged as it is to this day, that the land ſhould not aſcend to father or mother but rather go to collaterals; and this appears by *Glanvile*, *lib.* 7. 1, 2, 3, 4. *C.*—— But this alteration was only as to real eſtates; and perſonal eſtates were left as they were. 12 *Mod.* 624. in the caſe of *Blackborough* v. *Davis*.

The *feudal ſucceſſion came in this manner:* The lords gave lands unto ſuch perſons as beheved themſelves well in the war, for their lives only; ſometimes they alſo married their daughters to them. Then by their feudal donations, they limited the lands to go not only to the

feudary himſelf, but alſo to the iſſue of that marriage; and this brought in the notion of ſucceſſion among the northern nations that invaded the *Roman* empire. The lands therefore in the elder times went to the immediate deſcendants of ſuch marriage, and originally to none elſe; and firſt they went to males, as the moſt worthy of blood, and moſt capable of doing the ſervices annexed to ſuch donations; for want of males it went to females, and deſcendants of the ſame marriage. The feud was united in the eldeſt male, becauſe he was obliged to do the duty in the wars; and for every knight's fee, was to go out 40 days with his lord; ſo that the fued did not divide among the males, becauſe the duty could not be divided commodiouſly. Becauſe 2dly, the males were to keep up the grandeur of the family, therefore the inheritance was not ſhared nor broken. Hence it came to paſs, that among the males the eldeſt was preferred as the moſt worthy, ſince he was ſooneſt able to go to the wars, and do the duties of the tenure. *Gilb. Treat. of Ten.* 9.

Baſtards, or children born out of wedlock, were *totally excluded from all feudal ſucceſſion, though their parents had afterwards intermarried*, becauſe the lords would not be ſerved by any perſons that had that ſtain on their legitimation, nor ſuffer ſuch immoralities in their ſeveral clans, though the Civil law admitted them as adopted by the ſubſequent marriage; and ſo the Canon law, becauſe the matrimony wiped off the precedent guilt. *Gilb. Treat. of Ten.* 17.

The *iſſue of the baſtard eigne* not only *gains* a right of poſſeſſion, but *a right of propriety by the enjoyment of his anceſtor*. Such iſſues are held legitimated by the Civil law, becauſe they are adopted by the marriage of the mother; ſo by the Canon law, becauſe the *matrimonium ſubſequens tollit reatum precedens*; but by the feudal law there were excluded, becauſe ſuch a ſtain was thought to continue from the crime of the parents, that *they could not do the feudal ſervice with honour to the feudal lords*; therefore they were anciently excluded, *niſi nominatim ad feuda legitimatum*. But by our law, if they had any uninterrupted enjoyment during life, the iſſue for ever inherited; for ſince there was no objection to the legitimation during their lives, the perſonal defect muſt die with their perſon, inaſmuch as it were inhumanity to throw reproach on them after their deceaſe; and having done the feudal duties without objection, the objection comes too late when the perſonal diſhonour ceaſes and to the next perſon in poſſeſſion no reproach can ariſe. *Gilb. Treat. of Ten.* 26, 27.

When a feud eſcheated to the lord for felony, or for want of heirs, the lords uſed to reſtore it to the old family, or grant it out again to another family *ut feudum antiquum*, and then the deſcent was formed in ſuch new feud, as if it had been *feudum antiquum*. Hence the lineal ſucceſſion, or ſucceſſion of the father, was totally excluded, becauſe no caſe could happen where the aſcending line could be admitted *in feudis antiquis*; for the father took before the ſon under the firſt feudary in every ancient feudal donation; and all above ſuch donation were excluded, ſo that in ſuch donations the father could not claim as heir to the ſon; and this order of deſcent which excluded the father was the rather continued, becauſe the father was guardian to his ſon; and in thoſe barbarous times they would not truſt the father with any profit from the death of his own iſſue, and ſo the father was totally excluded. *Gilb. Treat. Ten.* 14.

But though the father cannot inherit his ſon, yet if a leaſe for life be made to the ſon, the remainder to his next of blood, the father ſhall take the remainder by purchaſe under the words of deſignation. *Co. Lit.* 10. *b.*

Alſo if the ſon purchaſe lands, and dies without iſſue, and without brothers and ſiſters of the whole blood, and the land deſcends to his uncle, the father may be heir to the uncle, if the uncle was in actual poſſeſſion, but he claims it as heir to his brother who was laſt ſeiſed, according to the rule *Quod ſeiſina facit ſtirpem. Co. Lit.* 11. *b.*

But here we muſt take notice, that if after ſuch deſcent to the uncle, the father has iſſue a ſon or a daughter, that iſſue ſhall enter upon the uncle, for the land deſcended originally upon the uncle, becauſe he was then the next heir; therefore if an heir nearer than him ſprings up, by the ſame rule that he ſucceeded to the land at firſt, that heir muſt now take place, and exclude him; and by the ſame rule, if a man hath iſſue a ſon and a daughter, and the ſon purchaſes lands in fee, and dies without iſſue, the daughter ſhall inherit; but if the father hath afterwards iſſue a ſon, this ſon ſhall enter into the land as heir to the brother, and if he hath iſſue a daughter, and no ſon, ſhe ſhall be coparcener with her ſiſter. *Co. Lit.* 11. *b.*

If a man purchaſed the *feudum novum ut feudum antiquum*, and died without iſſue, it went firſt to the father's ſide, becauſe the lords in ſuch feudal donations were preſumed to reſpect the father's ſide, who had been the ancient tenants of the manor; for where it was given *ut feudum antiquum*, it muſt be preſumed to be meant, as if it had been an ancient feud of that manor, and therefore it went to the father's ſide *in infinitum*, before it could go to any of the female blood; if the father's male line failed, it went to the female blood of the father; for the lords were preſumed rather to reſpect the female blood of their former tenants, than the blood of the mother who was newly introduced into the family of their feudary, becauſe the feud was given as an ancient one, and by conſequence the blood of the precedent tenant was preferred to any other; but the blood of his mother's ſide was preferred to the blood of his grandmother; becauſe being both female bloods, and both coming under the conſideration of ancient tenants, the nearer tenant's blood was preferred to the more remote; but if the father's ſide wholly failed, then the blood of the mother was admitted, to wit, firſt the male line, and then the female of ſuch blood, ſince the lord muſt be preſumed to introduce the blood of the mother, when he had given an indefinite right of repreſentation. *Gilb. Treat. Ten.* 16. *Plowd.* 444—449.

Agreeable to this ſcheme of deſcent upon the purchaſe of the *feudum novum ut feudum antiquum*, if a ſon purchaſe lands in fee ſimple, and die without iſſue, they of the blood of his father's ſide ſhall inherit as heirs to him before any of the blood of his mother's ſide, for the old rules, formerly ſettled for the directing of the deſcents of ſuch feuds as were purchaſed, ſtill prevail; and all new purchaſes made now of lands in fee ſhall be conſidered as the purchaſes formerly made of the *feudum novum ut antiquum*. Lit. ſect. 4.

If the ſon purchaſes land, and dies without iſſue, and it deſcends to any heir of the part of the father, and then the line of the father (after entry and poſſeſſion) fail, it ſhall never reſort to the line of the mother, though in the firſt inſtance, or firſt deſcent, from the ſon, it might have deſcended to the heir of the part of the mother; for now by this deſcent and ſeiſin, it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title as heir, becauſe ſhe can never ſhew that he was heir to him that was laſt actually ſeiſed; which being a rule to be ſtrictly obſerved, he muſt intitle himſelf by it, otherwiſe be excluded. *Lit. ſect.* 4.

General rules concerning deſcents, or hereditary ſucceſſions of lands in fee-ſimple, with examples, reaſons, exceptions, obſervations, &c.

RULE 1. In deſcents, the law prefers the worthieſt in blood.

Example 1. In deſcents immediate, the male is preferred before the female, *viz.* the ſon before the daughter, the brother before the ſiſter, and the uncle before the aunt.

Example 2. In deſcents immediate, the deſcendants from males are preferred before thoſe from females; and hence it is, that the daughter of the eldeſt ſon (in deſcent from the father) is preferred before the ſon of the younger ſon; the daughter of the eldeſt brother, or uncle, before the ſon of the younger; and the uncle, nay,

nay, the great uncle, or grandfather's brother, before the uncle of the mother's ſide. *Hale's Hiſt. Com. Law* 235.

RULE 2. The next of blood is preferred before the more remote, though equally or more worthy. *Hale's Hiſt. Com. Law* 235.

Example 1. The ſiſter of the whole blood, before the brother of the half blood. *Hale's Hiſt. Com. Law* 236.

Reaſon, She is more ſtrictly joined to the brother of the whole blood (*viz.* by father and mother) than the half brother, though otherwiſe he is the more worthy.

Example 2. The ſon or daughter, before the brother or ſiſter, and they before the uncle.

Reaſon, The ſon or daughter is nearer than the brother, and the brother or ſiſter than the uncle.

Exception, Yet the father, or grandfather, or mother, or grandmother, in a direct aſcending line ſhall not immediately ſucceed the ſon or grandchild: But the father's brothers (or ſiſters) ſhall be preferred before the father; and the grandfather's brothers (or ſiſters) before the grandfather: Although the father is nearer of blood to the ſon than the uncle, or the brother; for the brother is of the blood of the brother, becauſe both derived from the ſame parent, the common fountain of both their blood: And therefore the father is preferred in the adminiſtration of goods before the ſon's brother of the whole blood, and a remainder limited *proximo de ſanguine* of the ſon ſhall veſt in the father before the uncle.

RULE 3. No brother nor ſiſter of the half blood ſhall inherit to his brother or ſiſter, but as a child to his parents. *Bac. L. Tracts* 128.

Example 1. If a man have two wives, and by either wife a ſon, the eldeſt ſon over-living his father, is to be preferred. *Bac. L. Tracts* 128.

Example 2. But if the eldeſt ſon enters, and dies without a child, the brother ſhall not be his heir, but the uncle of the eldeſt brother or ſiſter of the whole blood. *Bac. L. Tracts* 128.

Reaſon, Becauſe the younger is only of the half blood to their elder brother. *Bac. L. Tracts* 128.

Example 3. Yet if the eldeſt brother dies, or has not entred in the life of the father, either by ſuch entry or conveyance, then the younger brother ſhall inherit the father's land, although he be a child by the ſecond wife, before any daughter by the firſt. *Bac. L. Tracts* 128.

RULE 4. The eldeſt ſon, or brother or uncle, excludes the younger, and ſhall ſolely inherit. *Hale's Hiſt. Com. Law* 238. *Bac. L. Tracts* 128.

Example 1. If there be three brethren, and the middle brother purchaſes lands in fee-ſimple, and dies without iſſue, the elder brother ſhall have the land by deſcent, and not the younger, *&c.* *Lit. ſ.* 5.

Example 2. Alſo if there be three brethren, and the youngeſt brother purchaſes land in fee-ſimple, and dies without iſſue, the eldeſt brother ſhall have the land by deſcent, and not the middle. *Lit. ſ.* 5.

Reaſon, For the eldeſt ſon is more worthy of blood. *Lit. ſ.* 5.

RULE 5. When females inherit, thoſe of an equal degree of nearneſs ſhall inherit altogether, as parceners. *Bac. L. Tracts* 128.

Reaſon, The law makes them but one heir to the anceſtor. *Bac. L. Tracts* 128.

Example 1. All the daughters, whether by the ſame or divers venters, do inherit together to the ſame father. *Hale's Hiſt. Com. Law* 238.

Reaſon, Whether they be of the ſame or divers venters, they are of the whole blood to their father.

Example 2. All the ſiſters of the ſame venter do inherit to the brother. *Hale's Hiſt. Com. Law* 238.

Reaſon, Thoſe of the ſame venter are of the whole blood to the brother, but thoſe of another venter are only of the half blood.

Exception to this rule, But by a ſpecial cuſtom, deſcents to the females may be otherwiſe. *Hale's Hiſt. Com. Law* 238.

RULE 6. All deſcendants from ſuch a perſon as might have been heir to another, hold the ſame right by repreſentation as that common root from whence they are derived. *Hale's Hiſt. Com. Law* 236, 237.

Reaſon, For they are in the ſame degree of worthineſs and proximity of blood, as their root that might have been heir was if he had been living. *Hale's Hiſt. Com. Law* 237.

Example 1. The ſon or grandchild (whether ſon or daughter) of the eldeſt ſon, ſucceeds before the younger ſon. *Hale's Hiſt. Com. Law* 237.

Example 2. The ſon or the grandchild of the eldeſt brother, before the younger brother. *Hale's Hiſt. Com. Law* 237.

1. *Obſervation*, And ſo through all the degrees of ſucceſſion by the right of repreſentation, the right of proximity is transferred from the root to the branches, and gives them the ſame preference as the next and worthieſt of blood. *Hale's Hiſt. Com. Law* 237.

2. *Obſervation*, This right transferred by repreſentation is infinite and unlimited in the degrees of thoſe that deſcend from the repreſented; for the ſon, grandſon, great grandſon, and ſo *in infinitum* enjoy the ſame privilege of repreſentation, as thoſe from whom they derive their pedigree have, whether in deſcents lineal or tranſverſal. *Hale's Hiſt. Com. Law* 237.

Example 3. The great grandchild of the eldeſt brother (ſon or daughter) ſhall be preferred before the younger brother. *Hale's Hiſt. Com. Law* 237.

Reaſon, Though the female be leſs worthy than the male, yet ſhe ſtands in right of repreſentation of the eldeſt brother, who was more worthy than the younger.

Example 4. If a man have two daughters, and the elder dies in the father's life, leaving ſix daughters, and then the father dies; the younger daughter ſhall have an equal ſhare with the ſix daughters. *Hale's Hiſt. Com. Law* 248.

Reaſon, Becauſe they ſtand in repreſentation, and ſtead of their mother, who could have had but a moiety. *Hale's Hiſt. Com. Law* 238.

RULE 7. The laſt actual ſeiſin in any anceſtor, makes him as it were, the root of the deſcent equally to many intents as if he had been a purchaſer. *Hale's Hiſt. Com. Law* 238.

Obſervation, Therefore he that cannot derive his ſucceſſion from him that was laſt actually ſeiſed, though he might have derived it from ſome precedent anceſtor, ſhall not inherit. *Hale's Hiſt. Com. Law* 238.

Example 1. And hence it is, that where lands deſcend to the eldeſt ſon from the father, and the ſon enters, and dies without iſſue, his ſiſter of the whole blood ſhall inherit as heir to the brother, and not the younger ſon of the half blood. *Hale's Hiſt. Com. Law* 238.

Reaſon, Becauſe he cannot be heir to the brother of the half blood. *Hale's Hiſt. Com. Law* 238.

Example 2. If the eldeſt ſon had ſurvived the father, and died before entry, the youngeſt ſon ſhould inherit as heir to the father, and not the ſiſter. *Hale's Hiſt. Com. Law* 238, 239.

Reaſon, Becauſe heir to the father that was laſt actually ſeiſed. *Hale's Hiſt. Com. Law* 239.

Example 3. And hence it is, that though the uncle is preferred before the father in deſcents from the ſon; yet if the uncle enter after the death of the ſon, and die without iſſue, the father ſhall inherit to the uncle. *Hale's Hiſt. Com. Law* 239.

Reaſon, *Quia ſeiſina facit ſtipitem.*

RULE 8. And whoſoever derives a title to any land, muſt be of the blood to him that firſt purchaſed it. *Hale's Hiſt. Com. Law* 239.

Example 1. Therefore if a ſon purchaſes lands and dies without iſſue, it ſhall deſcend to the heirs of the part of the father; and if he has none, then to the heirs of the part of the mother. *Hale's Hiſt. Com. Law* 239.

Reaſon, For though the ſon has both the blood of the father and of the mother in him, yet he is of the whole blood of the mother, and the conſanguinity of the mother are *conſanguinei cognati* of the ſon. *Hale's Hiſt. Com. Law* 239.

Example 2. If lands deſcend to the ſon from his father or mother, they ſhall go to that ſide only from whence they came. *Bac. L. Tracts* 129.

Exampel

Example 3. But if the father purchaſes lands, and they deſcend to the ſon, who dies without iſſue, and without any heir of the part of the father, it ſhall not deſcend to the line of the mother, but eſcheat. *Hale's Hiſt. Com. Law* 239.

Reaſon, For though the *conſanguinei* of the mother are the *conſanguinei* of the ſon, yet they are not of the conſanguinity to the father, who was the purchaſer. *Hale's Hiſt. Com. Law* 239.

Example 4. Yet if there be none of the blood of the grandfather, it may reſort to the line of the grandmother. *Hiſt. Com. Law* 239, 240.

Reaſon, Becauſe her *conſanguinei* are as well of the blood of the father, as the mother's conſanguinity is of the blood of the ſon. *Hale's Hiſt. Com. Law* 240.

Example 5. If the grandfather purchaſed lands, which deſcended to the father, and from him to the ſon; if the ſon entred and died without iſſue, his father's brothers or ſiſters, or their deſcendants; or, for want of them, his great grandfather's brothers or ſiſters, or their deſcendants; or, for want of them, any of the conſanguinity of the great grandfather, or brothers or ſiſters of the great grandmother, or their deſcendants, may inherit. *Hale's Hiſt. Com. Law* 204.

Reaſon, For the conſanguinity of the great grandmother is the conſanguinity of the grandfather. *Hale's Hiſt. Com. Law* 240.

Obſervation, But none of the line of the mother or grandmother, *viz.* the grandfather's wife, ſhall inherit; for they are not of the blood of the firſt purchaſer. *Hale's Hiſt. Com. Law* 240.

Note 1. The ſame rule *è converſo* holds in purchaſes in the line of the mother or grandmother, they ſhall always keep in the ſame line that the firſt purchaſer ſettled them in. *Hale's Hiſt. Com. Law* 240. See *Example the ſecond of this rule.*

Note 2. But it is not neceſſary, that he who inherits be always heir to the purchaſer; it is ſufficient if he be of his blood, and heir to him that was laſt ſeiſed; for if the father purchaſes lands which deſcend to the ſon, who dies without iſſue, they ſhall never deſcend to the heir of the part of the ſon's mother; but if the ſon's grandmother has a brother, and the ſon's great grandmother has a brother, and there is no other kindred, they ſhall deſcend to the grandmother's brother; and yet if the father had died without iſſue, his grandmother's brother ſhould have been preferred before his mother's brother, becauſe the former was heir of the part of his father, though a female, and the latter was only heir of the part of his mother. But where the ſon is once ſeiſed, and dies without iſſue, his grandmother's brother is to him heir of the part of his father, and being nearer than his grandmother's brother, is preferred in the deſcent. But this is always intended ſo long as the line of deſcent is not broken; for if the ſon alien the lands, and then repurchaſe them again in fee, now the rules of deſcent are to be obſerved, as if he were the original purchaſer, and as if it had been in the line of the father or mother. *Hale's Hiſt. Com. Law* 240, 241.

RULE 9. In all ſucceſſions in the line deſcending, tranſverſal, or aſcending, the line that is firſt derived from the male root has always the preference. *Hale's Hiſt. Com. Law* 241.

Example in the deſcending line. A. has iſſue two ſons *B.* and *C. B.* has iſſue a ſon and a daughter *D.* and *E. D.* the ſon has iſſue a daughter *F.* and *E.* the daughter has iſſue a ſon *G.* neither *C.* nor any of his deſcendants ſhall inherit ſo long as there are any deſcendants from *D.* and *E.* and neither *E.* the daughter, nor any of her deſcendants, ſhall inherit ſo long as there are any deſcendants from *D.* the ſon, whether they be male or female. *Hale's Hiſt. Com. Law* 241.

2*dly*, *In the collateral line*, So in deſcents collateral, as brothers and ſiſters, the ſame inſtances as before applied thereto, evidence the ſame concluſions. *Hale's Hiſt. Com. Law* 242.

Particular Rules of tranſverſal aſcending ſucceſſion.

RULE 1. If a ſon purchaſes lands in fee-ſimple, and dies without iſſue, thoſe of the male line aſcending *uſque infinitum* ſhall be preferred in the deſcent, according to their proximity of degree to the ſon. *Hale's Hiſt. Com. Law* 242.

Example 1. The father's brothers and ſiſters, and their deſcendants, ſhall be preferred before the brothers of the grandfather and their deſcendants. *Hale's Hiſt. Com. Law* 242.

Example 2. If the father has no brothers nor ſiſters, the grandfather's brothers and their deſcendants ſhall be preferred. *Hale's Hiſt. Com. Law* 242.

Example 3. For want of grandfather's brothers, his ſiſters and their deſcendants ſhall be preferred before the brothers of the great grandfather. *Hale's Hiſt. Com. Law* 242.

Obſervation. For although the father or grandfather cannot immediately inherit to the ſon, yet the direction of the deſcent to the collateral aſcending line, is as much as if the father or grandfather had been by law inheritable, and therefore, as in caſe the father had been inheritable, and ſhould have inherited to the ſon before the grandfather, and the grandfather before the great grandfather; and conſequently, if the father had inherited, and died without iſſue, his eldeſt brother and his deſcendants ſhould have inherited before the younger brother and his deſcendants; and if he had no brothers, but ſiſters, the ſiſters and their deſcendants ſhould have inherited before his uncles, or the grandfather's brother and their deſcendants. So though the father is excluded from inheriting, yet the deſcent is directed as it ſhould have been, had the father inherited, *viz.* it lets in thoſe firſt that are in the next degree to him. *Hale's Hiſt. Com. Law* 242, 243.

RULE 2. The line of the part of the mother ſhall never inherit as long as there are any, though never ſo remote, of the line of the part of the father. *Hale's Hiſt. Com. Law* 243.

Example, If the mother has a brother, yet if the *atavus*, or *atavia patris*, (*i. e.* great great great grandfather, or great great great grandmother of the father) has a brother or ſiſter, he or ſhe ſhall be preferred, and exclude the mother's brother, though he is much nearer. *Hale's Hiſt. Com. Law* 243.

RULE 3. The male line of the part of the father aſcending ſhall *in æternum* exclude the female line of the part of the father aſcending. *Hale's Hiſt. Com. Law* 243.

Example, If a ſon purchaſes lands, and dies without iſſue, the ſiſter of the father's grandfather, or of his great grandfather, and ſo *in infinitum*, ſhall be preferred before the father's mother's brother, though the father's mother's brother be a male, and the father's grandfather, or great grandfather's ſiſter be a female, and more remote. *Hale's Hiſt. Com. Law* 244.

Reaſon, Becauſe ſhe is of the male line, which is more worthy than the female line, though the female line be alſo of the blood of the father. *Hale's Hiſt. Com. Law*, 244.

RULE 4. As in the male line aſcending, the more near is preferred before the more remote; ſo in the female line deſcending, if it be of the blood of the father, the more near is alſo preferred before the more remote. *Hale's Hiſt. Com. Law* 244.

Example 1. If a ſon purchaſes lands, and dies without iſſue, and the father, grandfather, and great grandfather, and ſo upwards, all the male lines being dead, without any brother or ſiſter, or any deſcending from them; but the father's mother has a ſiſter or brother, and the father's grandmother has a brother, and the father's great grandmother has a brother, though all theſe are of the blood of the father; and though the remoteſt of them ſhall exclude the ſon's mother's brother; and though the great grandmother's blood has paſſed through more males of the father's blood, than the blood of the grandmother or mother of the father; yet the father's

mother's ſiſter ſhall be preferred before the father's grandmother's brother, or the great grandmother's brother. *Hale's Hiſt. Com. Law* 244, 245.

Reaſon, For they are all in the female line, *viz. cognati*, (and not *agnati*), and the father's mother's ſiſter is the neareſt; ſo ſhe ſhall have the preference as well as in the male line aſcending; the father's brother, or his ſiſter, ſhall be preferred before the grandfather's brother. *Hale's Hiſt. Com. Law* 245.

Example 2. But yet in the laſt caſe, where the ſon purchaſes lands, and dies without iſſue, and without any heir on the part of the grandfather, the lands deſcended to the grandmother's brother or ſiſter, as heir on the part of his father. *Hale's Hiſt. Com. Law* 245.

Example 3. Yet if the father had purchaſed this land, and died, and it deſcended to his ſon, who died without iſſue, the lands ſhould have deſcended to the father's mother's brother or ſiſter.

Reaſon, For the reaſons before given upon the third rule.

Example 4. But for want of brothers or ſiſters of the grandfather's great grandfather, and ſo upwards in the male aſcending line, it ſhould deſcend to the father's grandmother's brother or ſiſter, which is his heir of the part of his father, who ſhould be preferred before the father's mother's brother, who is the heir of the part of the mother of the purchaſer, though the next heir of the part of the father of him that laſt died ſeiſed. *Hale's Hiſt. Com. Law* 245.

Example 5. And therefore, as if the father that was the purchaſer had died without iſſue, the heirs of the part of the father, whether of the male or female line, ſhould have been preferred before the heirs of the part of the mother; ſo the ſon, who ſtands now in the place of the father, and inherits to him primarily in his father's line, dying without iſſue, the ſame devolution and hereditary ſucceſſion, ſhould have been as if his father had immediately died without iſſue, which ſhould have been to his grandmother's brother, as heir of the part of the father, though by the female line, and not to his mother's brother, who was only heir of the part of his mother, and who is not to take till the father's line, both male and female, be ſpent. *Hale's Hiſt. Com. Law* 245, 246.

Rule. 5. If the ſon purchaſes lands, and dies without iſſue, and it deſcends to any heir of the part of the father, and then if the line of the father (after entry and poſſeſſion) fail; it ſhall never return to the line of the mother; though in the firſt inſtance, or firſt deſcent from the ſon, it might have deſcended to the heir of the part of the mother. *Hale's Hiſt. Com. Law* 246.

Reaſon, For now by this deſcent and ſeiſin, it is lodged in the father's line, to whom the heir of the part of the mother can never derive a title as heir, but it ſhall rather eſcheat.

Obſervation, But if the heir of the part of the father had not entred, then that line had failed, and it might have deſcended to the heir of the part of the mother, as heir to the ſon, to whom immediately, for want of heirs of the part of the father, it might have deſcended. *Hale's Hiſt. Com. Law* 246, 247.

Rule 6. And if it had once deſcended to the heir of the part of the father of the grandfather's line, and the heir had entred; it ſhould never deſcend to the heir of the part of the father of the grandmother's line. *Hale's Hiſt. Com. Law* 246.

Reaſon, Becauſe the line of the grandmother was not of the blood or conſanguinity of the line of the grandfather's ſide. *Hale's Hiſt. Com. Law.* 247.

Rule 7. If for default of heirs of the purchaſer of the part of the father, the lands deſcend to the line of the mother, the heirs of the mother of the part of her father's ſide, ſhall be preferred in the ſucceſſion before her heirs of the part of her mother's ſide. *Hale's Hiſt. Com. Law* 247.

Reaſon, Becauſe they are the more worthy. *Hale's Hiſt. Com. Law* 247.

Thus lands in fee-ſimple will deſcend by the Common law, if there is no ſettlement to the contrary by deed or will, *&c.*

For other matters, ſee 7 Vin. Abr. *and* 2 Bac. Abr. *tit.* Deſcent.

Deſcent of Crown lands. All the lands whereof the King is ſeiſed *in jure coronæ*, ſhall, *ſecundum jus coronæ*, attend upon and follow the Crown; ſo that to whomſoever the Crown deſcends, thoſe lands and poſſeſſions deſcended alſo. And if the heir to the Crown be attainted of treaſon, yet ſhall the Crown deſcend to him, and without any reverſal the attainder is avoided. *Plowd.* 247. *Co. Litt.* 15. The dignity of the Crown of *England*, for want of heirs male, is deſcendible immediately to the eldeſt daughter, and her poſterity; and ſo it has been declared by act of parliament: And by ſtat. 25 *Hen.* 8. *cap.* 22. *Regnum non eſt diviſible.* The eldeſt ſiſter of a King, as well as the eldeſt daughter, ſhall inherit all his fee-ſimple lands by *deſcent:* And half-blood is no impediment to the *deſcent* of lands of the Crown. *Co. Litt.* 15, 165. But a daughter of the whole blood ſhall not inherit where there is a ſon of the half blood; as where the King hath iſſue a ſon and a daughter by one venter, and a ſon by another venter, and purchaſes lands and dies; afterwards the eldeſt ſon enters and dies alſo without iſſue, the daughter ſhall not have theſe lands, or any other fee-ſimple lands of the Crown, but they ſhall deſcend to the younger brother. *Plowd.* 245. 34 *Hen.* 6. A perſon coming to be King by *deſcent* of the part of his mother, makes a purchaſe of land to him and his heirs, and dies without iſſue, this land ſhall deſcend to the heir on the part of the mother; contrary to the caſe of a ſubject, where the heir on the father's ſide ſhall enjoy it. *Ibid. Co. Litt.* 16. As the whole kingdom hath an intereſt in the *deſcent of the Crown*, the King cannot ſurrender or alien it, *&c.* See King.

Deſcent of dignities. A dignity alſo differs from common inheritances, and goes not according to the rules of the Common law; for it deſcends to the half blood, and there is no coparcenerſhip in it, but the eldeſt takes the whole. *Co. Litt.* 27. The dignity of peerage is perſonal, annexed to the blood, and ſo inſeparable that it cannot be transferred to any perſon, or ſurrendered even to the Crown; it can move neither forward or backward, but only downward to poſterity; and nothing but corruption of blood, as if the anceſtor be attainted of treaſon or felony, can hinder the *deſcent* to the right heir. *Lex Conſtitutionis, pag.* 85.

Deſcription, *(Deſcriptio,)* Is the act of deſcribing, marking, or making out any perſon or thing by mentioning its properties. *Johnſ. Dict.* In deeds and grants there muſt be a *certain deſcription* of the *lands* granted, the *places* where the *lands* lie, and of the *perſons* to whom granted, *&c.* to make them good. But wills are more favoured than grants as to thoſe *deſcriptions*; and a wrong *deſcription* of the perſon will not make a deviſe void, if there be otherwiſe a ſufficient certainty what perſon was intended by the teſtator. 1 *Nelſ. Abr.* 647.

In treſpaſs, the caſe was, *Hartwell, Rode*, and *Aſhen* were three vills in the *pariſh* of *Rhode*, and a grant was made of all tithes *in the tenure of* Richard Wake *in* Rhode *and* Aſhen, (but did not mention *Hartwell)* and all other tithes in *Rhode*, and at the time of the grant all the tithes in *Hartwell* and *Rode* were in the tenure of the ſaid *Wake*; the queſtion was, whether the tithes in *Hartwell* in the pariſh of *Rhode* did paſs or not? and adjudged in *B. R.* by the three judges againſt the opinion of the Ch. Juſtice, that the tithes in *Hartwell* did paſs; but upon a writ of error in the Exchequer Chamber, that judgment was reverſed, becauſe the tithes of *Hartwell*, being a vill, could not paſs by the name of the tithes in *Rode* and *Aſhen*, for *Rode* being likewiſe a vill, ſhall not be taken for the pariſh of *Rode*, and ſo to include *Hartwell*, for a vill and a pariſh are diſtinct and different things. 2 *And.* 124, *Farmer's* caſe.

The *Duke of Northumberland* being ſeiſed of ſeveral meſſuages *in the pariſh of St. Sepulchre, London*, bargained and ſold to the Lady *Lea*, all his tenements *in the pariſh of St. Andrew in Holborn, in the occupation of W. R.* to have to her for life, remainder to her daughter and her heirs; now, tho' it was true, that the meſſuages were *in the occupation of W. R.* yet becauſe the firſt allegation

was falſe, *viz.* that they were in the pariſh of *St. Andrew* when they were in the pariſh of *St. Sepulchre*, the bargain and ſale was void. 3 *Rep.* 10. *Dowty*'s caſe.

The teſtator deviſed all the profits of his houſes and lands lying in the pariſh of *Billing*, and in a *ſtreet* there, called *Brook-ſtreet*, to his wife for life, when in truth there was *no ſuch pariſh as Billing*, but the land, ſuppoſed to be deviſed, laid in *Billing-ſtreet*; adjudged, that the profits of that land paſſed by this deviſe. 1 *Brownl.* 131. *Pacy* verſus *Knolls*.

In ejectment, the caſe was, that *J. S.* being ſeiſed in fee, made an agreement with *G. D.* to ſell his lands to him, but before any actual conveyance was made to *G. D.* the ſaid *G. D.* ſold the lands to *W. H.* and he the ſaid *W. H.* deviſed the ſaid lands in theſe words, viz. *I bequeath to my ſon R. H. all my lands which I purchaſed of G. D.* when in truth he did not purchaſe them of *G. D.* but of *W. H.* but becauſe it was under the original agreement made between *J. S.* and the aforeſaid *G. D.* tho' no formal conveyance was made to him, it was adjudged, that the deviſe was good. *Cro. El.* 121. *Thorp.* v. *Thompſon*.

The teſtator deviſed a *houſe* wherein *Henry Nichols dwelleth*, called the *White Swan*; now *Nichols* had only the uſe of an entry and three upper rooms in the houſe, yet it was adjudged, and the *whole houſe* paſſed; the word *houſe* in the beginning of the ſentence, which is called the *White Swan* at the end of it, muſt neceſſarily refer to the *whole houſe*, but it can never be intended, that the *houſe* called the *White Swan*, extended only to the entry and three upper-rooms; but this ſentence might have another conſtruction, if the houſe only had been deviſed with the addition of the *White Swan*. *Cro. Car.* 122. *Chamberlaine* verſus *Turner*. *Jones* 195. *S. C.*

So where the teſtator deviſed his *corner-houſe in* Andover, *in the tenure of* Hitchcock, which was a miſtake, for the houſe was not in his tenure, but of one *Benſon*; 'tis true, the teſtator had *another houſe* adjoining, which was in the tenure of *Hitchcock*; adjudged, that houſe did not paſs, but the *corner-houſe*, becauſe that houſe was ſufficiently deſcribed by the name of the *corner-houſe* before, and the addition, that it was in the tenure of *Hitchcock*, is a plain miſtake, and ſurpluſage, and ſhall not make that ill which was well deſcribed before. *Jones* 379. *Blake* verſus *Gold.* *Cro. Car.* 447. *S. C.* See *pl.* 4.

The teſtator having two houſes, one called the *upper-houſe*, and the other called the *lower-houſe*, deviſed all his tenements for the payment of his debts, until his grandſon ſhould come of age, and afterwards he deviſed *all his ſaid tenements*, (*viz.*) *two parts of the lower-houſe* for raiſing 200 *l.* &c. the *remainder* to his grandſon and his heirs; the queſtion was, whether the *(viz.)* and the clauſe which immediately followed it, did reſtrain this deviſe to the *lower-houſe* only, or whether the *whole* paſſed to the grandſon by theſe words which went before, *(viz.) all his ſaid tenements*; and adjudged, that the *whole* did paſs by thoſe *general words*, and that the *(viz.)* was only directory, to whom part of it ſhould go. 4 *Mod.* 140. *Bagnall* verſus *Abdett*.

A wrong deſcription of the perſon will not make the deviſe void, if there is otherwiſe a ſufficient certainty what perſon was intended by the teſtator; as for inſtance, a deviſe to *John Smith the eldeſt ſon of* Thomas Smith, when in truth his name was not *John*, but *Robert Smith*, yet the will is good, becauſe there is a certainty of the perſon, by naming him to be *the eldeſt ſon of* Thomas Smith, for he can have but one *eldeſt ſon*. 3 *Leon.* 18. *Owen* 35. *S. C.*

Yet it hath been adjudged, that where there are *ſeveral deſcriptions of one perſon*, they muſt all meet at the time of the will executed, or the deviſe is void, *(viz.)* The teſtator deviſed his lands to *J. S.* in tail, remainder *to the next of kin of his name*; now the *next of kin*, which is one of the deſcriptions of the perſon was his brother's daughter, who was married, and by conſequence *not of his name*, which is the other deſcription of the perſon, for ſhe loſt his name by her marriage; adjudged, that the *next heir male of his name* ſhall have the land, but if ſhe had been a ſingle woman at the time of the death of the teſtator, though ſhe had afterwards married, the deviſe to her had been good. *Cro. El.* 532. *Bon* verſus *Smith* and 576. *Jobſon*'s caſe, *S. P.* 1 *And.* 306. *Brown* verſus *Peas*, *S. P.* *Cro. Eliz.* 357. *S. C.* *Owen* 24. *S. C.*

The father had one ſon and a daughter, and ſhe had iſſue one daughter, and no more; the father deviſed, that his lands ſhould deſcend to his ſon, and if he died *without iſſues of his body*, then *to the right heirs of his name*, equally to be divided, part and part alike; his brother was of *his name*, but not his *right heir*, for the daughter of his daughter was his *right heir*, but ſhe was not of *his name*; adjudged, that the ſon had an eſtate-tail, but that the will was void as to the reverſion, after the eſtate-tail ſpent, for that deſcended to the ſon of the teſtator, who dying without iſſue, and his ſiſter being likewiſe dead, it muſt deſcend to her daughter, who was the grand daughter of the teſtator. *Moor* 860. *Counden* verſus *Clerke*. *Hob.* 29. *S. C.*

Deviſe to his wife *for life*, and after her death *to her children unpreferred*; now, tho' theſe are general words, yet they were adjudged a ſufficient deſcription, who ſhould take by this will. 1 *And.* 61. *Amner* verſus *Loddington*.

But where the teſtator had a ſon and a daughter, and deviſed his lands to his wife for life, and afterwards *to his iſſue*; this was adjudged void; becauſe the word *iſſue* being in the ſingular number, 'tis uncertain which *iſſue* he intended; 'tis true, *Juſtice Crook* was not of that opinion, for he held that it ſhall go to the ſon as moſt worthy; and the Lord Ch. Juſtice *Hale* was of the ſame opinion. 2 *And.* 134. *Taylor* verſus *Sawyer*. See 1 *Ven.* 229.

The teſtator being ſeiſed of the manors of *Warners* and *Churchall*, deviſed *Warners* to the eldeſt ſon of his couſin *Richard Foſter* in fee, and the manor of *Churchall* to one *Waters*, during her life, and that if after her death, any of his couſin *Foſter*'s children ſhall be living, then he deviſed the *manor of* Churchall *to him, that ſhould have the manor of* Warners: The couſin *Foſter* had iſſue *George* and *John*, *George* entred on the manor of *Warners*, and died with iſſue, then *John* entred, and ſold it, afterwards *Waters*, who had the manor of *Churchall* died, *John Foſter*, who ſold *Warners*, being ſtill living; the queſtion was, whether he ſhould have *Churchall*; and adjudged, that he ſhould not, becauſe he was not a perſon deſcribed by the will to take it, for that muſt be the perſon who ſhould have *Warners* at the time of the death of *Waters*, which *John Foſter* had not, becauſe he ſold it. 1 *And.* 306. *Brown* verſus *Peas*.

De ſon tort demeſne, Are words of form, uſed in an action of treſpaſs by way of reply to the defendant's plea. For example; *A.* ſues *B.* in ſuch an action; *B.* anſwers for himſelf that he did that which *A.* calls a treſpaſs by the command of *C.* his maſter: *A.* ſaith again, that *B.* did it *de ſon tort demeſne, ſans ceo que* C. *luy command, modo & forma*, that is, *B.* did it of his own wrong without that, that *C.* commanded him, in ſuch form. &c. *Cowell, edit.* 1727.

De injuria ſua propria is *no plea*, where the defendant juſtifies by *claiming an intereſt* in the freehold to himſelf; but where one claims not any intereſt, but juſtifies *by command*, or authority derived from another, it is otherwiſe. *Cro E.* 539. *pl.* 2. *Hill.* 39 *El. B. R. Archbiſhop of Canterbury* v. *Kemp.*

In *replevin* the *defendant as bailiff to one* Pyne, who was *ſeiſed of the third part of the place, where, &c. juſtifies for damage feaſant.* The *plaintiff ſays, that a ſtranger was ſeiſed of the other two parts, and by his licence he put in his cattle.* The *defendant ſays, De injuria ſua propria abſque tali cauſa, &c.* And the plaintiff demurs, and it was adjudged to be no plea; but he ought to anſwer to the ſpecial matter in the bar. *Cro. E.* 812. *pl.* 19. *Hill.* 43 *Eliz. C. B. Whitnel* v. *Cook.*

When the *defendant in his own right, or as ſervant* to another, *claims any intereſt in the land*, or *common or rent out* of it, or *way or paſſage* upon it, there *De injuria ſua propria*

propria generally is no plea. 8 *Rep.* 61. *a. the ſecond reſolution, Mich.* 6. *Jac. Crogate's* caſe.

But if the defendant *juſtifies as ſervant*, there *De injuria ſua propria* in the ſaid caſes, *with a traverſe of the commandment is good, where the commandment is material*; and this will reconcile the books. For the general plea *De injuria ſua propria, &c. is properly when the defendant's plea conſiſts merely upon matter of excuſe, without any matter of intereſt* whatſoever. And it is ſaid, *De injuria ſua propria*, becauſe *the injuria properly in this ſenſe is to the perſon or his reputation*, as battery or impriſonment to the perſon, or ſcandal to his fame; there if the defendant excuſes himſelf as upon *ſon aſſault demeſne*, or upon the levying hue and cry, there properly *De injuria ſua propria* generally is a good plea; for there the plea conſiſts only of matter of excuſe. Reſolved 8 *Rep.* 67. *Mich.* 6 *Jac. in the ſecond reſolution in Crogate's* caſe.

When by the plea of the defendant, any *authority*, or power, *is* mediately, or immediately, *derived from the plaintiff*, there, *though no intereſt be claimed*, the plaintiff ought to anſwer thereto, and ſhall not reply generally *De injuria ſua propria*. And the law is the ſame of an *authority given by the law*, as to *ſee waſte, &c.* Reſolved 8 *Rep.* 67. *a. b. Mich.* 6. *Jac. Crogate's* caſe.

De injuria ſua propria is a good *replication to a juſtification by the Common law, or by a general act of parliament.* 2 *Salk.* 628. *pl.* 3 *Mich.* 13 *Will.* 3. *B. R. Chance* v. *Weedon.*

If one comes into my *houſe by my conſent*, and he *will not go away* when I would have him go, I may by authority in law turn him out; if he brings treſpaſs for this, and I *ſet out all the matter ſpecially* in my juſtification, *De injuria ſua propria* generally will be a good plea. *Per. Holt.* Ch. J. 12 *Mod.* 582. *Mich.* 13 *Will.* 3. *in caſe of Chancery* v. *Win & al'.*

Deſpitus, A contemprible perſon. 'Tis mentioned in *Fleta, lib.* 4. *c.* 5. *par.* 4. *viz. Ballivi & ſervientes Regis populum ſibi ſubditum gravare conſueverunt, ponendo in aſſiſis & juratis homines languidos & deſpitos, &c.*

Deſtrales, See **Derrales** and **Derrarius.**

Deſubito, To weary one with continual barking, and then to bite, *viz. Si canis hominem* deſubitet, *aut mordeat tacitus, in prima culpa reddantur ſex ſol.* Leg. Alured. 26.

Detachiare, *Dittachiare*, by writ of *attachment*, or courſe of law, to ſeize or take into cuſtody another's goods or perſon.

Detainer. See **Forcible entry.**

Detiner. See **Deher & detiner.**

Detinue, *Detinendo*, Is a writ that lieth againſt him, who having goods or chattels delivered to him to keep, refuſeth to deliver them again. See of this *F. N. B. fol.* 138. to this is anſwerable in ſome ſort, *actio depoſiti* in the Civil law. And he taketh his action of *detinue*, that intendeth to recover the thing delivered, and not the damages ſuſtained by the *detinue*. *Kitchin, fol.* 176.

Detinue, Is an action that lies for the recovery of goods and chattels, though the party came to the poſſeſſion of them by lawful means, as by bailment, borrowing or pledging; and in this action the plaintiff is to recover the things in ſpecie or damages for the detainer. 2 *Bac. Abr.* 45. *Co. Lit.* 286. 1 *Rol. Rep.* 128.

But as in this action the defendant was allowed to wage his law, (for it was thought but reaſonable that the bailor, truſting to the bailee's honeſty and integrity at firſt, ſhould alſo truſt to his oath in a court of juſtice, ſince the reſtitution might have been ſecret); which being found exceeding inconvenient, it being often experienced, that thoſe, who were ſo diſhoneſt as to retain the goods of another, would generally purge themſelves on their oaths, occaſioned the ſubſtituting the action of trover and converſion in the place thereof, which is the action uſually made uſe of at this day in thoſe caſes. 2 *Bac. Abr.* 45, 46.

If a bailee deliver the goods to another, he ſhall have an action of detinue againſt him becauſe he hath his poſſeſſion, and undertakes for the cuſtody, and the original bailor may have his action againſt either of them, becauſe in him is the property, which both are bound to anſwer to him. 1 *Rol. Abr.* 607.

If *A.* takes the goods of *C.* and *B.* takes them from *A. C.* ſhall have his action againſt *A.* or *B.* at his election, becauſe both damnified *C.* in their taking. 1 *Sid.* 438.

If a man detains the goods of a feme covert which came to his hands before marriage, the huſband can only bring detinue, becauſe the law transfers the property to the huſband, but both ſhall join in the *trover*, becauſe the wrong was originally commenced at the time when the wife was ſole; and if ſuch injury be puniſhed, the wife herſelf, who received this injury, muſt be party to the action, and the wife's demand is ſufficient to prove a converſion in the defendant, but if the poſſeſſion be laid in both it is ill, becauſe if both were poſſeſſed, it is in the poſſeſſion of the huſband only. *Sid.* 172. 1 *Keb.* 641. *Noy* 70. *Yelv.* 165.

If *A.* delivers goods to *B.* to be delivered over to *C.* either *A.* or *C.* may have detinue againſt *B.* for the not delivering them over, according to the undertaking, is an injury done to each of them. 1 *Rol. Abr.* 606.

It has been held formerly that detinue will not lie for money, unleſs in a box or bag, nor for corn out of a ſack, becauſe theſe things have no mark whereby they may be known in order to be delivered to the plaintiff. 2 *Back. Abr.* 46.

It ſeems however clear that if a man lends a ſum of money to another, detinue does not lie for it, but he muſt bring debt on the confract. 1 *Rol. Abr.* 606.

So where a man comes to buy goods, and they agree upon a price, and a day for the payment, and the buyer takes them away, detinue does not lie, but an *aſſumpſit* for the money, becauſe the property was changed by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree on a price for preſent money, and the buyer takes the goods away without payment, detinue lies becauſe the property is not altered; and therefore the taking away the goods without payment of the money is an injurious taking, for which the action lies; but if a man ſell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, detinue lies becauſe the property is in the buyer. *Cro. Eliz.* 867.

Detinue lies for writings in a box, or for writings themſelves, though not in a box, and though the date be not mentioned, or the delivery of the writings, as a deed; and it lies for a huſband and wife, for a deed by which an annuity is granted to the wife; for every man that has a property in deeds may bring his action for the detaining them. 1 *Rol. Abr.* 606. *Co. Lit.* 286. See **Trover.**

For other matters, ſee 8 *Vin. Abr.* tit. *Detinue.*

Detinue of charters. A man may have detinue for deeds and charters concerning land; but if they concern the freehold, it muſt be in *C. B.* and no other court. Action of detinue lies for charters which make the title of lands; and the heir may have *detinue of charters*, although he hath not the land: If my father be diſſeiſed, and dieth, I ſhall have detinue for the charters, notwithſtanding I have not the land; but the executors ſhall not have the action for them. *New Nat. Br.* 138. If a man keep my charters from me, concerning the inheritance of my land, and I know the certainty of them, and the land; or if they be in a cheſt locked up, *&c.* and I know not their certainty, I may recover them by this writ: So where lands are given to me and *J. S.* and my heirs, and he dies; if another gets the deeds; and if tenant in tail give away the deed of intail, and then die, his iſſue may bring a writ of *detinue of charters. Co. Litt.* 286. 1 *Rep.* 2. *F. N. B.* 138. But if the tenant in fee-ſimple, do give away his deeds of the land, his heir may not have this action: And in caſe a woman great with child by her deceaſed huſband, keeps the charters from his daughter and heir that concern the land, during the time ſhe is with child; this writ will not lie againſt her. 41 *Ed.* 3. 11.

Detinue

Detinue was brought for a deed, and the plaintiff had a verdict, that the defendant detained the deed, and the jury gave 20*l.* damages, but did not find the value of the deed; and then there iſſued out a *diſtringas* to deliver the deed, or the value, and afterwards a writ of inquiry was awarded for the value; whereupon the jury found a different value from what the firſt verdict found; and it was adjudged good. *Raym.* 124. *Nelſ. Abr.* 649. In *detinue of charters*, if the iſſue be upon the detinue, and it is found that the defendant hath burnt the charters, the judgment ſhall not be to recover the charters, which it appears cannot be had; but 'tis ſaid it ſhall be for the plaintiff to recover the land in damages. 2 *Rol. Abr.* 101. 2 *Danv. Abr.* 511. For detaining of deeds and charters concerning the inheritance of lands, or an indenture of leaſe, the defendant ſhall not wage law; but in a common action of *detinue* he may do it. 1 *Inſt.* 295.

Detinue of goods in frank-marriage, Is on a divorce betwixt a man and his wife, after which, the wife ſhall have this writ of *detinue* for the *goods* given with her in marriage. *Mich.* 35 *Ed.* 1 *New. Nat. Br.* 139.

Detractare, To tear in pieces with horſes. *Fleta, lib.* 1. *c.* 37 *Apoſtatæ, ſacrilegi, & hujuſmodi, detractari debent & comburi.*

Detunicare, To diſcover or lay open. *Et ſic ſuas proprias proditiones manifeſte toto mundo* detunicavit. *Mat. Weſtm. anno* 1240.

Deva, The river *Dee* in *Cheſhire.*

Deva, or **Devana,** *Cheſter* or *Weſt-Cheſter.*

Devadiatus, Without ſureties or pledges.——*Si homo in villa delinquit & devadiatus fuerit, nil inde habet præpoſitus Regis.* Domeſday *tit.* Suderei.

Devaſtavit or **Devaſtaverunt bona teſtatoris,** Is a writ that lies againſt executors for paying legacies, and debts without ſpecialties, to the prejudice of the creditors that have ſpecialties, before the debts on the ſaid ſpecialties are due: For in this caſe the executors are as liable to action, as if they had waſted the goods of the teſtator riotouſly, or converted them to their own uſe; and are compellable to pay ſuch debts by ſpecialty out of their own goods, to the value of what they ſo paid illegally. *Cowell.*

A *devaſtavit* by an executor or an adminiſtrator, is by miſemploying the eſtate, or miſbehaving himſelf in the management thereof; and this may be done by ſeveral acts, and firſt by paying debts upon *ſimple contract*, before debts on *bonds or judgments:* but then he muſt have *notice* of the bond, which regularly is by an action commenced againſt him; for the law doth not oblige him to take notice of it himſelf, no nor of a *judgment on record* againſt his teſtator, becauſe he is not privy to acts done either by or againſt him. 1 *Mod.* 175. 3 *Lev.* 115. *S. P. Moor* 752. *S. P.*

Where an executor, *&c.* payeth legacies before debts, and hath not ſufficient to ſatisfy both, 'tis a *devaſtavit*, but legacies may be paid before the breach of any covenants entred into by the teſtator; for otherwiſe this inconvenience would neceſſarily enſue, *viz.* the performance of the will would be obſtructed; becauſe 'tis a certain and preſent miſchief not to pay legacies when they are actually due; and if an executor ſhould be compelled by the law to wait for a breach of a covenant, he may wait for ever; for it may happen that the covenant will never be broken. *Allen* 38, 39. *Eales* v. *Lambert. Gold.* 142. *Woodcock* v. *Herne, S. P.*

So where an executor ſells the teſtator's goods at an undervalue, if it was in a fraudulent manner 'tis a *devaſtavit*, but if more could not be had, 'tis otherwiſe: ſo where the ſheriff hath the teſtator's goods in execution, and ſells at an undervalue, or if they are ſold by an infant for leſs than they are worth, this ſhall not make the executor chargeable. *Kelw.* 59. *a.* 3 *Leon.* 143.

But 'tis to be obſerved, that if judgment is had againſt an executor, upon a demurrer, the ſheriff in ſuch caſe cannot return *nulla bona teſtatoris*, becauſe by the demurrer the executor hath confeſſed that he had goods, *&c. Cro. Eliz.* 102. See **Executor.**

Devenerunt, A writ heretofore directed to the eſcheator, when any tenant of the King, holding *in capite*, died; and when his ſon and heir, within age, and in the King's cuſtody, died; then this writ went forth, commanding the eſcheator that he, by the oath of good and lawful men, inquire what lands and tenements by the death of the tenant, *came* to the King. See *Dyer, fol.* 360. *pl.* 4. and *Keilway's Rep. fol.* 199. *a.* Though this writ, in the ſenſe aboveſaid, be diſuſed, yet a new uſe of it is preſcribed by act of parliament, 14 *Car.* 2. *c.* 11. intitled *An act for preventing frauds, and regulating abuſes in his Majeſty's cuſtoms.*

Deveſt, (*Deveſtire,*) Is contrary to *inveſt*; for as *Inveſtire* ſignifies *poſſeſſionem tradere*, to deliver poſſeſſion: ſo *Deveſtire* is *poſſeſſionem auferre*, to take away poſſeſſion. *Feud. lib.* 1. *c.* 7.

Deviſe, (from the Fr. *deviſer*, to ſpeak, as *deviſer per ſon teſtament*, is to ſpeak by his teſtament what his mind is to have done after his deceaſe) Is a diſpoſition of a real or perſonal eſtate, to take effect after the death of the deviſor. *Co. Litt.* 111. *a.*

1. *What eſtate or intereſt may be deviſed.*
2. *Who may deviſe, and to whom.*

1. *What eſtate or intereſt may be deviſed.*

By the Common law, no lands or tenements were deviſable, except by particular cuſtom; neither could they be transferred from one to another but by ſolemn livery and ſeiſin, or matter of record; the true reaſon hereof ſeems to be owing to the nature of the feudal tenures; for by theſe, tho' the lord had given lands to his tenant and his heirs, which were words of limitation, and appropriated to meaſure out the length and continuance of the eſtate; yet as they were underſtood the heirs of the preſent tenant who came in by the donation of the lord, the tenant could not deviſe them even to his own heir, thereby to make him a purchaſer, and ſo deprive the lord of the profits of wardſhips, marriage, and relief, which were incident to the feudal tenure; much leſs could he deviſe them to a ſtranger, who perhaps might not have ability of mind, or ſtrength of body, tho' the one was requiſite to aſſiſt his lord in his courts, and the other to defend his perſon in the field. *Co. Lit.* 111. *Abr. Eq.* 174.

But an eſtate for years might have been deviſed at Common law; for this, as now, was only conſidered as a chattel, and formerly was of very ſhort duration. 1 *Rol. Abr.* 608.

A conveyance by will was a privilege anciently allowed by the Civil law only to perſons *in extremis*, who had not time or aſſiſtance neceſſary to make a formal alienation, and was chiefly intended for military men, who were always ſuppoſed to be under thoſe circumſtances, and therefore the ceremonies and number of witneſſes required of others were diſpenſed with as to ſoldiers, though now the rules for military teſtaments are allowed in moſt caſes; but as to lands and houſes, our law gave no liberty of diſpoſing thereof by will, except in certain boroughs and places where ſuch cuſtom had obtained time out of mind. *Show. P. Caſes* 147. *Sir Edward Hungerford* v. *Noſworthy.*

The ſtatute of 32 *Hen.* 8. which firſt introduced the diſpoſition of lands by will, requires that the deviſor ſhould have a proper title and intereſt in them for that purpoſe; and therefore if a man deviſes lands, in which he has nothing, and after purchaſes them, ſuch a deviſe is void, not being within the ſtatute of *Wills*, for he is not a perſon *having*, as the ſtatute ſpeaks. *Plow.* 343.

So where a man deviſed to his wife all ſuch ſums of money, lands, tenements, and eſtate whatſoever, whereof at the time of his deceaſe he ſhould be poſſeſſed, and after the making of the will he purchaſed lands in gavelkind, and died without making any new publication, and it was held that thoſe new-purchaſed lands did not paſs; for they were not *ſua* at the time of making the will, and the conſtant form of pleading is, that the teſtator

was

was ſeiſed, and that being ſo ſeiſed, &c. which at leaſt is an evidence of the law, and there is no difference as to lands deviſable by cuſtom, or by ſtatute, but ſuch deviſe of things perſonal is good, tho' the teſtator had them not at the time of making the will, becauſe they go to the executor, to whom the will is only directory. 1 *Salk.* 237.

A. agrees with *B.* for the purchaſe of copyhold lands, which were ſurrendred out of court to the uſe of *A.* but before admittance *A.* dies. *A.* was ſeiſed of other copyhold lands, and after the ſaid contract with *B.* had made his will, and deviſed all his copyhold lands to *J. S.* and it was ruled, that the copyhold lands agreed for, paſſed by the will, for after the agreement the purchaſer might in equity recover the land, and oblige *B.* to execute a conveyance, and till ſuch conveyance executed, the vender ſtood ſeiſed in truſt for the purchaſer as he ſhould appoint; and therefore if, after articles agreed on for a purchaſe, the purchaſer deviſes the lands, and dies before a conveyance executed, yet the land paſſeth in equity; for tho' according to the ſtrict notions of law, the deviſor has not lands within the ſtatute till a conveyance be executed, and he thereby becomes ſeiſed of them, yet after articles of purchaſe the purchaſer only is conſidered as maſter of the land, and therefore in equity, will be allowed to diſpoſe of them. 1 *Chan. Ca.* 39. 2 *Chan. Ca.* 144.

So where a treaty of marriage articles were entred into, whereby the ſum of 700 *l.* being the wife's portion, and 700 *l.* more added to it on the part of the huſband, in all 1400 *l.* was agreed to be laid out in the purchaſe of lands, to be ſettled on the huſband for life, remainder to the wife for life, remainder to truſtees, to ſupport contingent remainders, &c. the marriage takes effect, the huſband dies without iſſue, and before any purchaſe made purſuant to the articles, having firſt deviſed all his perſonal eſtate to the defendant, who was his wife, and all his real eſtate to the plaintiffs, who were his nephews, and one of them his heir at law, and made his wife executrix; but took no manner of notice of the 1400 *l.* On a bill brought by the plaintiffs to have this 1400*l.* as they would have the land if the purchaſe had been made purſuant to the articles; for the wife took more by the deviſe than ſhe ſhould be intitled to under the ſettlement, had it been made; and therefore it was agreed, that if it were to be conſidered as lands, ſhe could not have both, the deviſe of the perſonal eſtate being more than equivalent, and therefore a ſatisfaction; and it was held by my Lord Chancellor, that as this caſe is, if a purchaſe had been made even after making the will, tho' at law ſuch lands would not paſs; yet in this court there could be no queſtion but the plaintiffs would have the benefit thereof by the relation to the articles; and tho' no purchaſe was made, yet by the agreement the 1400 *l.* is to be looked upon in a court of equity as a real eſtate, and as ſuch muſt go to the plaintiffs. *Abr. Eq.* 175.

A man ſeiſed in fee deviſed his lands in truſt, to ſell part for payment of his debts, and till his debts were paid, to pay 100 *l. per annum* to his natural daughter *M.* And after the debts paid, 300 *l.* for her life; and if ſhe have children, to convey ſucceſſively to thoſe children; but if ſhe die without iſſue, then to convey to the eldeſt ſon and heir of *J. S.* his nephew, and the heirs of his eldeſt ſon; but if he claim any thing during the life of *M.* then both father and ſon to be excluded from having any thing out of his eſtate; the eldeſt ſon of *J. S.* was *A.* who had two ſiſters *B.* and *T. A.* died, leaving iſſue *T.* who in the life of *M.* deviſed the lands in queſtion, to *J. S.* and died without iſſue, and after the death of *M.* without iſſue, the truſtee conveyed to the two ſiſters of *A.* and their heirs; and it was held, that this being but a mere poſſibility during the life of *M.* the deviſe was void, and the lands well conveyed to the ſiſters of *B.* 3 *Lev.* 427.

J. S. who was to have had a conſiderable advantage by a will, was drawn in by fraud and falſe ſuggeſtions to make a compoſition for his intereſt, and to give a releaſe; afterwards *J. S.* being ſenſible of the fraud, makes his will, and thereby (after other legacies) he deviſes all the reſt of his goods and chattels whatſoever to his wife, upon condition that ſhe paid all his debts, and made her ſole executrix; and it was held, that his right to ſet aſide the releaſe was deviſable, and the words proper for that purpoſe. *Abr. Eq.* 175.

2. *Who may deviſe, and to whom.*

The ſtatutes of 32 & 34 *Hen.* 8. *c.* 1 & 5. give the power of deviſing their lands to all perſons, except infants, ideots, feme coverts, and perſons of *non ſane* memory; and every perſon may be a deviſee within theſe ſtatutes, except bodies politick and corporate; and theſe were excepted becauſe they never anſwered the feudal ſervices, and were reſtrained from purchaſing any lands by the ſtatute of *mortmain.* 1 *Rol. Abr.* 608. 6 *Co.* 16. *b.*

Yet, ſince the ſtatute of Charitable Uſes, (43 *Eliz. c.* 4.) it has been held, that a deviſe to the Principal, fellows and ſcholars of *Jeſus college in Oxford*, and their ſucceſſors, for maintenance of a ſcholar, is good, though ſuch deviſe had been *mortmain* by the ſtatute of Wills. *Hob.* 136. 1 *Lev.* 284. *S. P.*

Altho' a wife, by reaſon of the ſubjection ſhe is under to her huſband, cannot make a will, yet a woman, whoſe huſband is baniſhed for his life by act of parliament, may make a will, and act in every thing as a feme ſole. 2 *Vern.* 104.

Alſo a huſband may bind himſelf by covenant or bond to permit his wife by will to diſpoſe of legacies, &c. and this will be ſuch an appointment as the huſband will be bound to perform. *Cro. Eliz.* 27. *Cro. Car.* 219, 376, 597.

A feme covert executrix cannot deviſe any of the goods, which ſhe hath as executrix, without the aſſent of the huſband, or his agreement after. 1 *Rol. Abr.* 608.

If a feme covert makes and publiſhes her will, and deviſes land by it, and her huſband dies, and then ſhe dies, the deviſe is void, becauſe the conſummation is founded upon the making and publiſhing, which are void acts. *Plowd.* 344.

A wife may be a deviſee, tho' not a grantee to the huſband, for as the grant had been void, becauſe the huſband and his wife are but one perſon in law, ſo the deviſe is good, becauſe it does not take effect till after the death of the huſband, and then they are no more one perſon. *Co. Lit.* 112. 1 *Rol. Abr.* 610.

An infant cannot deviſe his lands; and therefore if one under the age of 21 makes his will, and thereby deviſes his lands, and after attains the age of 21 years, and dies without making any new publication thereof, this deviſe is void. 1 *Sid.* 162.

If there be two jointenants of lands, and one of them deviſes that which belongs to him, and dies, this is a void deviſe, and the deviſee takes nothing, becauſe the deviſe does not take effect till after the death of the deviſor, and then the ſurviving jointenant takes the whole by a prior title, *viz.* from the firſt feoffment; but in this caſe, if the deviſor ſurvives the jointenant, then the deviſe is good for the whole, becauſe he being the ſurviving jointenant has the whole, by ſurvivorſhip, and then the words of the will are ſufficient to carry the whole eſtate; beſides at the time of making the will, though he was not ſole tenant, yet he was ſeiſed *per my et per tout*; and it is impoſſible to fix upon any particular part which he meant to deviſe, becauſe he could not then call one part of the land more his own then another, and the moſt genuine conſtruction ſeems to give the whole land, ſince he was ſeiſed *per tout* of it at the time of the deviſe. *Lit. ſect.* 287. *Perk. ſect.* 500.

It has been much doubted, whether a deviſe to an infant *in ventre ſa mere* be good, becauſe it is not in being to take at the time of the death of the deviſor, and ſince by the deviſe the perſon is to take immediately after the death of the deviſor, the freehold cannot be put in abeyance by the act of the parties. *Dyer* 303. *Bro. Deviſe* 32. 1 *Salk.* 231. *Moor* 637.

Others of as good authority hold, that ſuch deviſe is good, tho' the infant be not *in eſſe* at the death of the

deviſor, and that the freehold ſhall not be in abeyance, but ſhall deſcend to the heir at law in the mean time. *Moor* 177. 1 *Lev.* 135. 1 *Sid.* 153. *Raym.* 163. 1 *Keb.* 851. 2 *Bulſt.* 273.

But all agree in this, that a deviſe to an infant, when he ſhall be born, or when God ſhall give him birth, is a good deviſe, and that the freehold ſhall deſcend to the heir at law in the mean time. 1 *Sid.* 153. 1 *Lev.* 135. *S. C.*

So it is out of doubt, that if land be deviſed for life, the remainder to a poſthumous child, that this is a good contingent remainder, becauſe there is a perſon in being to take the particular eſtate; and if the contingent remainder veſts during the continuance of the particular eſtate, or *eo inſtanti* that it determines, it is ſufficient. *Moor* 637. 3 *Leo.* 408. 4 *Mod.* 359. 1 *Salk.* 227. *Carth.* 309.

A deviſe to an alien, ſo to the heir of an alien, is void, becauſe an alien, according to the policy of our law, can have no heir, either to inherit or take by purchaſe. 1 *Lev.* 592.

For other matter, ſee **Executory deviſe**, *and* **Wills.**

Devoires of *Calais*, Were the cuſtoms due to the King for merchandize brought to, or carried out of *Calais*, when our ſtaple was there. Stat. 2 *Ric.* 2. *ſt.* 1. *c.* 3. —Paying their cuſtoms and *devoirs* to the King. Stat. 34 *Ed.* 3. *cap.* 18. *Devoir* in *French* ſignifies duty.

Devonſhire and Cornwall. Their havens and fiſheries how preſerved, 23 *Hen.* 8. *c.* 8. 27 *Hen.* 8. *c.* 23. 1 *Jac.* 1. *c.* 23. The inhabitants impowered to fetch ſand for bettering their grounds, 7 *Jac.* 1. *c.* 18. The pilchard fiſhing regulated, 13 & 14 *Car.* 2. *c.* 28. The aſſizes of *Cornwall* to be held in a convenient place, 1 *Geo.* 1. *ſt.* 2. *c.* 45. *For other matters ſee* **Cornwall, Drapery,** *and* **Militia.**

Divorce. See **Divorce.**

Dextrare, Signifies to take the right hand of another, viz. *Ordinatis igitur quæ fiunt in applauſibus hujuſmodi*, dextravit *archiepiſcopum Londinenſis epiſcopus, ſiniſtravit Wintonienſis. Dicet in anno* 1193.

Dextrarius. Willielmus de Breoſa *dedit Regi tres* dextrarios, *quinque chacuros, & viginti quatuor ſenſas pro habenda ſeiſina caſtrorum de Groſmunt, Skenefrith & Clanteli.* Rot. Car. in turr. Lond. de anno 7 Joh. n. 38. That is, three light horſes, or horſes for the great ſaddle, from the Fr. *deſtrier*, which ſignifies a horſe for ſervice.

Dextras dare, To ſhake hands in token of friendſhip.

Jam pariter coeant animorum in pignora dextræ.

'Tis mentioned by *Walſingham* as a giving up himſelf to the power of another. *Pag.* 332.

Deyneati canes. — Willielmus Couch *tenet duas carrucatas terræ de Domino Rege apud* Benham *com.* Berk. *per ſerjantiam cuſtodiendi unam menſam* deynectorum canum, *ad cuſtum Domini Regis.* Anno 12 Ed. 1.——Tenures, p. 38.

Diamicus, A very good friend. *Non eſt narratu facile quam efficax fuit in exhortando* diamicos *& diſcipulos.* Malmſ. in vita Aldkelmi, 1 *c.* 3.

Diamond. Diamonds and precious ſtones may be imported and exported duty free; ſaving the duty granted to the *Eaſt-India* company on diamonds imported from any place within the limits of their charter, 6 *Geo.* 2. *c.* 7. *ſect.* 1, 2.

Diapraſium, An electuary, *diapraſii coloris* is green. *Du Freſne.*

Diarium, Daily food; as much as was ſufficient for the day. *Conſtituit quædam* diaria *dari ſcriptoribus.* Du Freſne.

Diaſpre, *Diaper*, or linen variegated in the weaving.— Henricus *abbas* Glaſton. *tempore Regis* Hen. 1. *iſti eccleſiæ contulit ornamenta ſatis pretioſa, videl. pallas novem optimas, quarum quædam erant de* diaſpre, quædam de ſameto.——*Cartular Abbat. Glaſton MS. f.* 12.

Diaſperatus, Stained with many colours. *Sandalia cum caligis de rubeo ſameto* diaſperato *breudeta cum imaginibus regnum.* Mon. 3 tom. pag. 314.

Dica, A tally for accounts by number of *taillees*, cuts, marks, or notches.——*Et præter hoc debet magiſter Mariſchalciæ habere* dicas *de donis & liberationibus quæ fuerint de theſauro regis, & de ſua camera, & debet habere* dicas *contra omnes officiales regis ut teſtes per omnia*, Lib. 6. Rub. Scacc. Angl. f. 30.——*Inſtitutum eſt ut diligenter per* dicam *notetur quantum ex omni genere bladi* vel leguminis expendetur in ſemine——Dica *illa dividatur in duo, & una pars deputabitur cuſtodiæ hoſpitalis fratris— altera Grangiario.* Stat. Ord. de Semplingham, pag. 748.

Dice. See **Cards.**

Dicker or **Decar**, or **Dicre** of leather, is a quantity conſiſting of ten hides. The word probably comes from the *Greek* δεκας which ſignifies ten. *Civitas Glouceſtriæ reddebat* xxxvi dicras *ferri*, & Domeſday; *i. e.* 36 *dickers* of iron, 10 bars to the *dicker. Gale's Hiſt. Brit.* 766.

Dicra ferri, A quantity of iron, conſiſting poſſibly of ten bars.——T. R. E. *reddat civitas de* Gloweceſtre xxxvi. libr. *numeratas, &* xii. *ſextaria mellis ad menſuram burgi, &* xxxvi. dicras *ferri, & centum virgas ferreas ductiles ad clavos navium regis, & quaſdam alias minutas conſuetudines in aula & in camera regis.*—— Lib. Domeſday Glouceſt.

Dictores, and **Dictum**: The one is an arbitrator; the other is the arbitrament. *Protulit* dictum *ſuum & ſententiam pro Rege Angliæ.* Malmſ. pag. 384.

Dictum de Kenelworth, Was an edict or award between King *Henry* III. and all thoſe barons, and others, who had been in arms againſt him; and ſo called, becauſe it was made as *Kenelworth-caſtle*, in *Warwickſhire*, *Ann.* 51 *H.* 3. containing a compoſition of five years rent for the land and eſtates of thoſe who had forfeited them in that rebellion.

Diem clauſit extremum, Was a writ that iſſued out of *Chancery* to the eſcheator of the county, upon the death of any of the King's tenants *in capite*, to inquire by a jury of what lands he died ſeiſed, and of what value, and who was the next heir to him. *Fitz. Nat. Br. fol.* 251.

Dies, There are four ſorts of *days*, 1. A *day natural*, and ſo the ſcripture ſaith, *The evening and the morning made the firſt day.* 2. A *day artificial*, and that is *a crepuſculo matutino uſque ad crepuſculum veſpertinum.* 3. *Dies aſtrologicus*, an aſtrological day from ſun to ſun. 4. A *legal day*, and that is of two ſorts, 1. *Dies juridicus*; and 2. *Dies non juridicus. Dies juridici* are all days in bank, continuance, Eſſoin days, and other days given in term to the parties in court. *Dies non juridici* are all *Sundays* in the year; beſides, in the ſeveral terms particular days, as in *Eaſter-term, Feſtum Aſcenſionis Domini*; in *Trinity-term, Feſtum Sancti* Johannis Baptiſtæ; in *Michaelmas-term, Feſtum Omnium Sanctorum, & Feſtum Omnium Animarum*; and in *Hilary-Term, Feſtum Purificationis Beatæ* Mariæ *Virginis.* And this was the ancient law of *England*, and yet in uſe. 2 *part. Inſt.* 264. See **Day.**

Dies, one day's entertainment, farm, or reception. ——*Reddebat unum diem de firma, & valebat* 95. *libr. &* 6 *denar.* Domeſday. Where there are many other fee-farm rents, as we may call them, reſerved to the King in ſo many days or nights proviſion. *Et reddebat dimidiam diem mellis, &c. et unam diem de firma*; that is, as much honey as was ſufficient for the King's family for half a day; and as much proviſion as was enough for a whole day. *Domeſday apud Spelman.*

Dies datus, Is a day or time of reſpite, given to the tenant or defendant by the court. *Broke*, tit. *Continuance.*

Dies marchiæ, The day of congreſs or meeting between the *Engliſh* and *Scotch*, appointed annually to be held on the *marches* or borders, to adjuſt all differences, and preſerve the articles of peace.——*Dux* Lancaſtriæ— pro die marchiæ *(prout moris eſt) tenenda inter* Anglos & Scotos *annis ſingulis, in partes conceſſerat boreales.* Tho. Walſingham, *in R.* 2. *p.* 278. *Convenerunt ad* diem marchiæ, *& conventum fuit inter eos pro commodo pacis, &c.* Ib. p. 307.

Diera,

Dieta, A days-work.—— *Per ſervitium metendi bladum domini per tres* dietas *in autumno ad cibum ipſius domini ad primam* dietam *per quatuor homines, &c.* Cartular. Rading. MS. p. penult.

Dieta rationabilis, Is uſed in *Bracton* for a reaſonable day's journey. *Lib.* 3. *part.* 2. *c.* 16. And we find in *Fleta*, *Omnis rationabilis* dieta *conſtat ex viginti miliaribus.* Lib. 4. cap. 28. par. 13. It has in the Civil law divers other ſignifications not neceſſary here to be ſet down. See **Utrumque juris.**

Dieu ſon act, Theſe are words oftentimes uſed in our law; and it is a maxim, that the act of God ſhall prejudice no man: And therefore if a houſe be beaten down by tempeſt or other act of God, the leſſee for life or years ſhall not only be quit in an action of waſte brought againſt him, but hath by the law a ſpecial intereſt to take timber to build the houſe again, if he will, for his habitation. *Co. lib.* 4, 63. *&* *lib.* 11. 82. *a.* When the condition of an obligation conſiſts of two parts in the disjunctive, and both are poſſible at the time of the obligation made, and afterwards one of them becomes impoſſible by the *act* of God; the obligor is not bound to perform the other part, for the condition ſhall be taken beneficially for him. *Co. lib.* 5. 22.

Diffacere, To deſtroy. *Si vero non compareat charta, ſed ab illo qui inſervire vult* diffacta *ſit*, (that is, *torn.*) Du Freſne.

Diffactio, Is a maiming any one. *In furto & murdro & eis quæ ad* diffactionem *pertinent.* Leg. H. 1. c. 64, 88. 92.

Difforciare rectum, To deny juſtice, being required to do it. *Si quiſquam de proceribus regni* Difforciaverit *archiepiſcopo vel archidiacono de ſe ſuiſque juſtitiam exhibere, Dominus Rex debet eos juſtitiare.* Mat. Pariſ. Anno 1164. Sometimes it ſignifies to take away; as *difforciare dotem.* See **Deforcement.**

Digeſt, (*Digeſtum*) The book of pandects of the Civil law; ſo called, becauſe it contains *Legalia præcepta excellenter* digeſta. *Du Freſne.*

Dignitaries, *Dignitarii*, Are ſuch as are advanced to any eccleſiaſtical promotion, as dean, archdeacon, prebendary, *&c.* 3 *par. inſt. fol.* 155.

Dignity, (*Dignitas*) Signifies honour and authority; reputation, *&c.* and *dignity* may be divided into ſuperior and inferior: As the titles of duke, earl, baron, *&c.* are the higheſt names of *dignity*; and thoſe of baronet, knight, ſerjeant at law, *&c.* the loweſt. Nobility only can give ſo high a name of *dignity*, as to ſupply the want of a ſurname in legal proceedings: And as the omiſſion of a name of *dignity*, may be pleaded in abatement of a writ, *&c.* So it may be where a peer who has more than one name of *dignity*, is not named by the moſt noble. 2 *Hawk. P. C.* 185, 239. No temporal *dignity* of any foreign nation can give a man a higher title here than that of eſquire. 2 *Inſt.* 667. See **Addition** and **Degree of dignities.**

Dignity Eccleſiaſtical (*Dignitas Eccleſiaſtica*) Is mentioned in the ſtat. 26 *H.* 8. *cap.* 31 *&* 32. *ejuſdem, cap.* 15. and is by the Canoniſts defined to be, *Adminiſtratio cum juriſdictione & poteſtate aliqua conjuncta*; whereof you may read examples in *Duarenus, de Sacris Eccleſ. Miniſtris & Beneficiis, lib.* 2 *cap.* 6. Of *dignities* and prebends. *Cambden* reckons in *England* 544. *Britan. p.* 161.

Dikes, Broken down ſecretly, to be repaired by the towns adjoining. St. *Weſt.* 2. 13 *Ed.* 1. *c.* 46. 6 *Geo.* 1. *c.* 16.

Dilapidation, (*Dilapidatio*) Is where an incumbent on a church living, ſuffers the parſonage houſe or outhouſes to fall down, or be in decay for want of neceſſary reparations: Or it is the pulling down or deſtroying any of the houſes or buildings belonging to a ſpiritual living, or deſtroying of the woods, trees, *&c.* appertaining to the ſame; for it is ſaid to extend to the committing or ſuffering any wilful waſte, in or upon the inheritance of the church. *Deg. Parſ. Counſ.* 89.

A biſhop as ſoon as he is inſtalled, and a rector or vicar as ſoon as he is inducted, ought to procure workmen, as carpenters, maſons, tilers, and others ſkilful in building, to view the dilapidations, or whatſoever ſhall want repairing, and write down for what ſum a workman will or may build or repair the ſame, and ſet their hands to the ſame for a memorial thereof when they ſhall be called to be witneſſes thereto. For after this inſpection ſhall be made, ſuch biſhop, rector, or vicar may commence his ſuit for dilapidations when he pleaſeth. And ſuch workmen in ſupport of the action ought to prove, that ſuch decay cannot ſufficiently be repaired or amended for leſs than ſuch ſum, and that they themſelves would not do it for leſs. And that ſuch proof may be ſufficient, it is requiſite, that there be two witneſſes in every particular, and not one witneſs to one kind of work only, and another to another. *Clarke, Tit.* 124. 1 *Ought.* 253.

If the benefice hath been vacant for ſome time, as for three or four years; or if the incumbent hath not ſued for ſome time after his induction or inſtallation, nor cauſed the dilapidations to be viewed and eſtimated; he ſhall not be intitled to recover the whole ſum eſtimated for dilapidations, but conſideration ſhall be had of the time elapſed from the ceſſation of the laſt incumbency, and a proportionable deduction made for the decays which may reaſonably be ſuppoſed to have been during ſuch intermediate time. *Clarke, Tit.* 126. 1 *Ought.* 255.

If a biſhop, archdeacon, parſon, or the like, abates all the wood upon the land, he ſhall be *dilapidator*; *per Thirwit*; but *per Thyrning* there is no remedy for this by the Common law. *Br. Depoſition, pl.* 1. cites 2 *Hen.* 4. 3.

By ſtat. 13 *Eliz. c.* 10. If any eccleſiaſtical perſons, who are bound to repair the buildings whereof they are ſeiſed in right of their place or function ſuffer them to fall into decay for want of repair, and make fraudulent gifts of their perſonal eſtate with purpoſe to hinder their ſucceſſors from recovering dilapidations againſt their executors or adminiſtrators, in ſuch caſe the ſucceſſors ſhall have like remedy in the eccleſiaſtical court againſt the grantee of ſuch perſonal eſtate, as he might have againſt the executor or adminiſtrator of the predeceſſor.

14 *Eliz. cap.* 11. All monies recovered for dilapidations ſhall within two years be employed upon the buildings for which they were paid, in pain to forfeit to the Queen, *&c.* double ſo much as ſhall not be ſo employed.

Dilapidation of the houſe of the biſhoprick is good cauſe of deprivation. *Roll. R.* 86. *pl.* 34. *Mich.* 12 *Jac. B. R. Stockman* v. *Wither.*

If a biſhop cuts and ſells trees, and does not employ them for reparations, a prohibition ought to be granted out of *B. R.* to him. *Roll. R.* 86. *pl.* 34. *Mich.* 12 *Jac. B. R. Stockman* v. *Whither.*

A biſhop is only to fell timber for building, for fuel, and other neceſſary occaſions. The woods are called the dower of the church; *per Coke* Ch. J. 2 *Bulſt.* 279. *Mich.* 12 *Jac. Anon'.*

Coke Ch. J. ſaid he had ſeen a record 25 *Ed.* 1. where complaint was made in parliament of the biſhop of *Durham* for cutting down timber trees for his coal mines; and there it was agreed that in ſuch a caſe a prohibition did lie, and a prohibition was granted in *B. R.* 2 *Bulſt.* 279. *Mich.* 12 *Jac. Anon'.*

A vicar had cut ſeveral great timber trees, and did not repair the church with them, and on ſuggeſtion of this to the court, and that he would cut more trees in like manner, a prohibition was granted *per cur.* by the Common law. *Roll. R.* 335. *pl.* 44. *Hill.* 13 *Jac. B. R. Knowle* v. *Harvy.*

Any perſon may ſue out a prohibition againſt a parſon that is cutting down trees, and not repairing the church with them. *Roll. R.* 335. *pl.* 44. *Hill.* 13 *Jac. Knowle* v. *Harvy.*

For more learning concerning this ſubject, ſee 8 Vin. Abr. *tit.* Dilapidations, *Dr.* Gibſ. Cod. *and Dr.* Burn's Eccleſiaſtical law.

Dilatory pleas, Are ſuch as are put in merely for delay; and there may be a demurrer to a dilatory plea, or the defendant ſhall be ordered to plead better, *&c.* 6 *Mod.* By ſtat. 4 *&* 5 *Ann. c.* 16. *ſect.* 11. No dilatory

latory plea ſhall be received in any court of record, unleſs the party offering ſuch plea, do by affidavit prove the truth thereof, or ſhew ſome probable matter to the court, to induce them to believe that the fact is true. See **Plea.**

Diligiatus, Outlawed. *De lege ejectus, viz. Si quis* diligiatus *legalem hominem accuſat, funeſtam dicimus vocem ejus.* Leg. Hen. 1. cap. 45.

Dilligrout, Pottage formerly made for the King's table on his coronation-day.——Robertus Agyllon *tenet unam carucatam terræ in* Adington in Com. Surr. *per ſerjantiam faciendi unum ferculum in villa lutea in coquina Domini Regis die coronationis ſuæ. Et vocatur* dilligrout, 39 H. 3.———*Old Tenures, p.* 1.

Dimetæ, *Weſt-Wales*; Scil. *Carmarthen, Pembroke,* and *Cardiganſhires.*

Dimidietas. The moiety or one half——*Sciant quod Ego* Matilda *filia* Willielmi le Franceys dedi——Waltero de Stetton dimidietatem *illius Burgagii, &c. ſine dat.*— Ex Libro Cart. Priorat. de Leominſtre.——

Diminution, (*Diminutio,*) Is where the plaintiff or defendant in a writ of error alledges to the court that part of the record is omitted and remains in the inferior court not certified; whereupon he prays that it may be certified by *certiorari. Co. Ent.* 232, 242. Of courſe *diminution* is to be certified on a writ of error; though if iſſue be joined upon the errors aſſigned, and the matter is entred upon record, which is made a *conſilium,* in this caſe there muſt be a rule of court granted for a *certiorari* to certify *diminution.* 1 *Lill. Abr.* 245. *Diminution* cannot be alledged of a thing which is fully certified; but in ſomething that is wanting, as want of an original, or warrant of attorney, *&c.* 2 *Lev.* 256. 1 *Nelſ. Abr.* 658. And if on *diminution* alledged, the plaintiff in error certifies one original, *&c.* which is wrong; and the defendant in error certifies another that is true; the true one ſhall ſtand. *Cro. Jac.* 597. *Cro. Car.* 91. After a writ of error brought, and the defendant hath pleaded *In nullo eſt erratum,* he cannot afterwards allege *diminution*; becauſe by that plea he affirmeth or alloweth the record to be ſuch as is certified upon the writ of error. *Godb.* 266. But in ſome caſes *diminution* hath been alledged, after *In nullo eſt erratum* pleaded, *ex gratia curiæ,* though not *ex rigore juris. Palm.* 85. And there is an inſtance that the court in ſuch a caſe hath awarded a *certiorari* to inform their conſcience of the truth of the record in *C. B.* when the defendant in error had not joined *In nullo eſt erratum.* 1 *Nelſ.* 658. See **Error.**

Dimiſſory letters, (*Literæ dimiſſoriæ*) When a candidate for holy orders has a title in one dioceſe, and is to be ordain'd in another, the proper dioceſan gives *letters dimiſſory* to ſome other ordaining biſhop, giving leave that the bearer may be ordain'd to ſuch a cure within his diſtrict. *Cowell.*

Dimities. See **Cottons.**

Dioceſe, (*Diœceſis,*) Signifies the circuit of every biſhop's juriſdiction. For this realm hath two ſorts of diviſions; one into ſhires or counties, in reſpect of the temporal ſtate; and another into dioceſes, in regard to the eccleſiaſtical ſtate. *Cowell.* 1 *Inſt.* 94.

The bounds of dioceſes are to be determined by witneſſes and records, but more particularly by the adminiſtration of divine offices. To which purpoſe, there are two rules in the Canon law: In one caſe, upon a diſpute between two biſhops upon this head, the direction is, that they proceed in the buſineſs, by ancient books or writings, and alſo by witneſſes, reputation, and other ſufficient proof: In the other caſe, where the queſtion was, by whom a church built upon the confines of two dioceſes ſhould be conſecrated, the rule laid down is, that it ſhould be conſecrated by the biſhop of that city, who before it was founded, baptized the inhabitants, and adminiſtered to them other divine offices. *Gibſ.* 133.

The juriſdiction of the *city* is not included in the name of *dioceſe,* ſo ſaith the canon law: And accordingly, in citations to general viſitations, directed to the clergy, it is ordered to cite the clergy of the *city and dioceſe. Gibſ.* 133.

A biſhop may perform divine offices, and uſe his epiſcopal habit, in the dioceſe of another, without leave; but may not perform therein any act of juriſdiction, without permiſſion of the other biſhop. *Gibſ.* 133.

A clergyman dwelling in once dioceſe, and beneficed in another, and being guilty of a crime, may, in different reſpects, be puniſhed in both; that is, the biſhop in whoſe dioceſe he dwells, may proſecute him, but the ſentence, ſo far as it effects his benefice, muſt be carried into execution by the other biſhop. *Gibſ.* 134.

Diratiocinare. See **Diſtrationare.**

Directors Of the *Bank, Eaſt-India,* and *South-Sea* companies. See **Bank, Eaſt-India company,** and **South-Sea company.**

Diſability, (*Diſabilitas,*) Is, when a man is *diſabled* or made incapable to inherit or take a benefit which otherwiſe he might have done, which may happen four ways; by the act of the anceſtor, by the act of the party, by the act of law, and by the act of God. 1. *Diſability* by the act of the anceſtor; as if a man be attainted of treaſon or felony; by this attainder his blood is corrupt, and thereby himſelf and his children *diſabled* to inherit. 2. *Diſability* by the act of the party himſelf; as if one man make a feoffment to another who then is ſole, upon condition, that he ſhall enfeoff a third before marriage, and before the feoffment made, the feoffee takes a wife; he hath by that *diſabled* himſelf to perform the condition according to the truſt in him repoſed, and therefore the feoffer may enter, and ouſt him. *Litt. ſect.* 357. So if I bind myſelf, that upon ſurrender of a leaſe, I will grant a new eſtate to the leſſee, and afterwards I grant over my reverſion: In this caſe, though I afterwards purchaſe the reverſion, yet I have forfeited my obligation, becauſe I was once diſabled to perform it. *Co. lib.* 5. *fol.* 21. Alſo if a man be excommunicated, he cannot during that time ſue any action, but ſhall be thereby *diſabled. Co. lib.* 8. *fol.* 69. And ſo in other caſes. 3. *Diſability* by act of law, is properly when a man by the ſole act of the law is *diſabled,* and ſo is an alien born. And therefore if a man born out of the King's ligeance, will ſue an action, the tenant or defendant may ſay, that he was born in ſuch a country, out of the King's ligeance, and demand judgment if he ſhall be anſwered: for the law is our birth-right, to which an alien is a ſtranger, and therefore *diſabled* to take any benefit thereby. 4. *Diſability* by the act of God, as to be *non compos mentis,* or *non ſanæ memoriæ,* which ſo *diſables* him, that in all caſes where he gives or paſſes any thing or eſtate out of him, after his death it may be diſannulled and avoided. And here obſerve, That it is a maxim in our law, That *a man of full age ſhall never be received to* diſable *his own perſon*; and this incapacity to *diſable* himſelf, as to ſome, is perſonal, extending only to the party himſelf; but as to others it is not perſonal, yet ſhall bind them as *privies.* Now there are four manner of *privities,* viz. *Privity in blood,* as heir. *Privity in repreſentation,* as executors and adminiſtrators. *Privies in eſtate,* as donee in tail, the reverſion or remainder in fee, *&c.* And *privies in tenure,* as lord and tenant. Two of theſe may *diſable* a perſon deceaſed, who was *non ſanæ memoriæ, &c.* and ſhall avoid his grants or feoffments, viz. *privies in blood* may ſhew the *diſability* of the anceſtor, and *privies in repreſentation* the infirmity of their teſtator or inteſtate. *Co. lib.* 4. *fo.* 123, 124. See *Lit. ſect.* 405. and *Co. lib.* 8. *fol.* 43.

No man can *take advantage* of his own diſability; as no man can plead that he is a fool, or *non compos mentis*; but if a *non compos* is indicted, the judges muſt acquit him *ex officio*; for the King takes care of all ſuch perſons. But if a man is *diſabled by judgment* to bear an office, he is excuſed; for *judicium redditur in invitum.* But where he *can remove the diſability,* as in caſe of excommunication, he ſhall take no advantage of his diſability. 1 *Salk.* 168. *Hill.* 6. *Will. & Mar. in B. R. per Holt* Ch. J. and *Eyre* J. in the caſe of *The King* v. *Larwood.*

Matter of diſability which might have been *pleaded* to the *action,* is not pleadable to the *ſci. fa.* on judgment. 1 *Salk.* 2. *pl.* 5. *Paſch.* 1. *Ann. B. R. Weſt* v. *Sutton.*

After

After a leaſe granted, leſſor diſables himſelf (by a ſettlement by which he makes himſelf only tenant for life) *to perform the covenants in the leaſe*, as to grant a new leaſe with certain advantages to leſſee, yet this *after ſettlement ſhall not prejudice leſſee*, nor forejudge him of the benefit of any covenant in his life. 9 *Mod.* 59. *Mich.* 10 *Geo. in Canc. Aſhton* v. *Bretland.*

If a *teſtator* be under a diſability *at the time of making his will*, though that diſability be actually *removed before his death*, yet the will will be abſolutely void, becauſe he had no ability at that time. *Per Holt* Ch. J. *Gibb.* 226. in the caſe of *Bunker* v. *Coke.*

Debt upon an obligation; the defendant *pleads*, that at the time of the obligation made he was *non ſanæ memoriæ*, and it was therefore demurred, and adjudged to be no plea; for he cannot ſave himſelf by ſuch a plea, and the opinion of *Fitzherbet* held to be no law: wherefore it was adjudged for the plaintiff. *Cro. E.* 398. *pl.* 4. *Trin.* 37 *Eliz. B. R. Stroud* v. *Marſhall.*

So in caſe againſt an innkeeper upon the common cuſtom of the realm, for not keeping ſafely his gueſt's goods, he cannot diſable himſelf by pleading *non ſanæ memoriæ*, any more than in debt on an obligation. *Cro. E.* 622. *pl.* 13. *Mich.* 40 & 41 *Eliz. B. R.*

Diſadvocare, To deny, or not to acknowledge a thing. 'Tis mentioned in *Hengham Magna c.* 4. viz. *Et ipſe reus dedicit in pleno comitatu ipſi petenti hujuſmodi ſervitia petita, & ipſum* diſadvocat *pro domino.*

Diſagreement, Will make a nullity of a thing that had eſſence before: And diſagreement may be to certain acts to make them void, *&c. Co. Lit.* 380. Diſagreement to a marriage had under age of conſent ought to be publiſhed in court at the age, otherwiſe the iſſue may be baſtardized; for a diſagreement in writing is not a ſufficient diſagreement, nor a good proof; *per Coke* Ch. J. and the Civilians. *Noy* 153. See **Agreement**, and 8 *Vin. Abr.* tit. *Diſagreement.*

Diſalt, Signifies as much as *to diſable*. *Littleton* in his chapter of *Diſcontinuance.*

Diſboſcatio, A turning wood ground into arable or paſture; an aſſarting. See **Aſſart.**

Diſcaligatus, Without ſhoes. *Dicentes nequaquam debere Regem adire tales* diſcaligatos *ribaldos.* Walſing. p. 248.

Diſcarcare, Properly to unlade a ſhip or veſſel by taking out the cargo of goods.——*Et prædictus prior* carcare & diſcarcare *fecit ibidem merchandiſas & denariatas quaſcunque.* Placit. Parl. 18 Ed. 1.

Diſceit. See **Deceit.**

Diſcent. See **Deſcent.**

Diſcent of Crown lands. See **Deſcent of Crown lands.**

Diſcent of dignities. See **Deſcent of dignities.**

Diſcharge, On writs and proceſs, *&c.* is where a man confined by ſome legal writ or authority, doth that which by law he is required to do; whereupon he is releaſed or *diſcharged* from the matter for which he was confined. And if one be arreſted by a *latitat* out of *B. R.* and the plaintiff do not file a declaration againſt the defendant in priſon in two terms, he ſhall be *diſcharged* on common bail. 1 *Lill. Abr.* 470. Alſo where a defendant on arreſt is admitted to *bail*, if the bail bring in the principal before the return of the ſecond *ſcire facias* iſſued out againſt them, they ſhall be diſcharged. *Mich.* 24 *Car.* 2. *B. R.* If an obligee *diſcharges* one joint obligor, where ſeveral are jointly bound, it *diſcharges* the others. *March* 129. And a man may *diſcharge* a *promiſe* made to himſelf, *&c. Cro. Jac.* 483. See **Acquittal**, **Acquittance**, and **Habeas corpus.**

Diſclaimer, (from the French *clamer*, with the privative *dis*) Is a plea containing an expreſs denial, renouncing or *diſclaiming*; as, If the tenant ſue a replevin upon a diſtreſs taken by the lord, and the lord avow, ſaying, That he holds of him as of his lord, and that he diſtrained for rent not paid, or ſervice not performed; then the tenant, denying to hold of ſuch lord, is ſaid to *diſclaim*; and the lord proving the tenant to hold of him, the tenant loſeth his land. Alſo a man denying himſelf to be of the blood or kindred of another in his plea, is ſaid to *diſclaim* his blood. See *Coke on Littl. fol.* 102. and *Fit. Nat. Brev. fol.* 197. If a man arriagned of felony *diſclaim* goods, being cleared, he loſeth them. See *Broke* and *New Book of Entries* tit. *Diſclaimer*, and *Staundf. Pl. Cor. fol* 186. In *Chancery*, If a defendant by his anſwer *diſclaim* the having any intereſt in the thing in queſtion, this is alſo called a *diſclaimer*. *Cowel, edit.* 1727.

Leſſee for years is plaintiff in replevin, the defendant avows upon *A.* a ſtranger as his tenant, who comes and ſays, that he is *A.* the tenant, and that the plaintiff is his leſſee for years; reſolved by all the juſtices in *England*, that *A.* may join in aid *gratis* without proceſs, and that both may diſclaim, and that the plaintiff ſhall recover his damages, and the defendant ſhall be *in miſericordia.* In the caſe of tenant at will, where there is a joinder in aid to him in replevin, no diſclaimer lies for him in this caſe: for he loſes nothing. *Jenk.* 56. *pl.* 3.

Lord, meſne, and tenant in replevin, the meſne cannot diſclaim; for a writ of right, upon a diſclaimer, demands the land, and he has it not; and the lord has no benefit by diſclaimer; for the tenant cannot loſe his tenancy by the diſclaimer of the meſne, and the lord has not more or better, or other ſervices than before the diſclaimer. A writ of right of diſclaimer lies, where both meſne and tenant diſclaim; if the diſclaimer be in a court of record, a writ of right lies upon the diſclaimer. *Jenk.* 143. *pl.* 95.

A. grants an annuity to *B. pro conſilio impendendo*; upon a writ of annuity againſt *A. A.* may diſclaim to have counſel, and ſo extinguiſh the annuity; but it is otherwiſe if the annuity was granted *pro conſilio impenſo & impendendo. Jenk.* 236. *pl.* 14.

Stat. 21 *Jac.* 1. *c.* 16. *ſ.* 5. In all actions of treſpaſs *quare clauſum fregit*, wherein the defendant ſhall diſclaim any title to the land, and the treſpaſs be by negligence or involuntary, the defendant ſhall be admitted to plead a diſclaimer, and that the treſpaſs was by negligence or involuntary, and a tender of ſufficient amends before the action brought; and if the iſſue be found for the defendant, or the plaintiff be nonſuited, the plaintiff ſhall be barred from the ſaid action, and all ſuits concerning the ſame. *For other matters, ſee* 8 Vin. Abr. *tit.* Diſclaimer.

Form of a diſclaimer of executorſhip.

THIS Indenture *tripartite, made the day, &c. between* A. B. *of, &c. of the firſt part,* C. D. *of, &c. of the ſecond part, and* L. B. *of, &c. of the third part. Whereas* T. B. *late of, &c. duly made and publiſhed his laſt will and teſtament in writing, bearing date, &c. and thereby deviſed (amongſt other things) all that meſſuage, &c. to the ſaid* L. B. *and alſo gave and bequeathed, &c. and made the ſaid* A. B. *and* C. D. *executors and truſtees of his ſaid will, as in and by the ſaid will may more fully appear. And whereas the ſaid* T. B. *ſoon after the making and publiſhing of the ſaid will, died; and the ſaid* A. B. *hath refuſed to accept the ſaid executorſhip and truſt, and never acted therein, nor ever received any of the rents and profits of the ſaid meſſuage, or of the goods and chattels of the teſtator* T. B. *but the ſaid* C. D. *alone proved the ſaid will, and took upon him the execution thereof: Now this indenture witneſſeth, that the ſaid* A. B. *as a farther declaration of his not acting in the executorſhip aforeſaid, and to free himſelf from the ſame, doth by theſe preſents renounce and diſclaim the ſaid executorſhip, and all the truſt repoſed in him by the ſaid recited will: And doth alſo by theſe preſents remiſe and releaſe unto the ſaid* C. D. *his executors and adminiſtrators all the eſtate, right, title and intereſt of him the ſaid* A. B. *in and to the ſaid premiſſes, by virtue of the ſaid recited will, or otherwiſe howſoever. In witneſs, &c.*

Diſcontinuance, (*Diſcontinuatio,*) (from the French *diſcontinuer*, that is, *ceſſare*) Signifieth in the Common law nothing elſe but an interruption, or breaking off, and it twofold, *diſcontinuance of poſſeſſion*, and *diſcontinuance of proceſs*: The effect of *diſcontinuance of poſſeſſion* is this, that

that a man may not enter upon his own lands or tenements alienated, whatſoever his right be unto them, of his own ſelf, or by his own authority; but muſt bring his writ, and ſeek to recover *poſſeſſion* by law; as, if a man alien the lands he hath in right of his wife; or if tenant in tail make any feoffment, or leaſe for life, not warranted by the ſtatute 32 *H.* 8. by fine or livery of ſeiſin; ſuch alienations are called *diſcontinuances*; which are indeed impediments to any entry, whereby the true owner is left only to his action. *Cowell.* See *Co. Rep. lib.* 3. Caſe of *Fines. fol.* 85.

Diſcontinuance of an eſtate in lands, ſignifies ſuch an alienation of the poſſeſſion, whereby he, who has a right to the inheritance, cannot enter, but is driven to his action. *Co. Lit.* 325.

In ancient days abbots and prelates were ſuppoſed to be married to the church; and as huſbands and repreſentatives of the church were allowed to have a fee in right of the church, that they might maintain actions, and hold courts within their manors and precincts; therefore at Common law, a biſhop, abbot, or any other perſon ſeiſed in fee in right of his houſe or church, might have diſcontinued, and thereby put his ſucceſſor to his action to recover the right of poſſeſſion. *Co. Lit.* 325. *b. Comp. Incumb.* 484.

But as the right of property was in the church, the biſhop could not alien without the conſent of the chapter, who repreſented the clergy of the dioceſe; nor could the abbot alien without the conſent of his houſe. *Co. Lit.* 325.

And at this day, by the 1 & 13 *Eliz.* neither a biſhop, dean, maſter of an hoſpital, *&c.* can diſcontinue any of their poſſeſſions, or bar their ſucceſſors of the right of entry. *Co. Lit.* 325, 342. 1 *Rol. Abr.* 633.

As to parſons, vicars, prebends, and others who were preſentatives, they were conſidered only as having a qualified right, and their eſtates by the Common law only an eſtate for life, the fee being in obeyſance; and therefore could not diſcontinue, or do any other act to the prejudice of their ſucceſſors, tho' they could alien with the conſent of the patron and ordinary. *Co. Lit.* 341. *a. Dyer* 239. *pl.* 41. *Hetl.* 88.

If a biſhop leaſes a parcel of the demeſnes of a manor for life, not warranted by the ſtatute of 1 *Eliz.* and after leaſes the manor to another for life; the parcel ſo leaſed ſhall paſs with attornment of the firſt leſſee; for the ſaid leaſe did not make any diſcontinuance, but the reverſion thereof continued parcel of the manor. 2 *Rol. Abr.* 58.

If tenant in tail makes a feoffment in fee; this is a diſcontinuance, for he has the right of poſſeſſion inheritable in him; for altho' the ſtatute *de donis* preſerves the right of the inheritance to the iſſue; yet it does not preſerve the right of poſſeſſion, and therefore the iſſue is put to his action. *Lit. ſect.* 598.

So if tenant in tail, remainder to his right heirs, makes a feoffment in fee; this is a diſcontinuance. 1 *Rol. Abr.* 633. *Cro. Car.* 387, 405, 406.

If tenant in tail be diſſeiſed, and releaſes to the diſſeiſor all his right; this works no diſcontinuance; for a leaſe being a conveyance in ſecret cannot paſs the poſſeſſion; and therefore a conveyance, that cannot paſs the poſſeſſion, cannot paſs the right of poſſeſſion. *Lit. ſect.* 598, 599. 3 *Co.* 85. *S. P.*

But if tenant in tail be diſſeiſed, and releaſes all his right to the diſſeiſor, and binds himſelf and his heirs to warranty, and dies; and the warranty deſcends upon the iſſue in tail, this is a diſcontinuance, by reaſon of the warranty. *Lit. ſect.* 601. 3 *Co.* 85. *S. P.*

If tenant in tail leaſes for years, and after levies a fine this is a diſcontinuance, for a fine is a feoffment upon record, and the freehold paſſes. *Co. Lit.* 332. *a.* 1 *Bulſt.* 162. 2 *Rol. Rep.* 484.

But if tenant in tail leaſes for his own life, and after levies a fine, this is no diſcontinuance, becauſe the reverſion expectant upon an eſtate of freehold, which lies only in grant, paſſed thereby. *Co. Lit.* 332.

If tenant in tail leaſes for the life of the leſſee, by this the tail and reverſion thereupon is diſcontinued; and if the tenant in tail by deed grants his reverſion in fee to another, and the tenant for life attorns; and after the tenant for life dies, leaving the tenant in tail, *&c.* this is a diſcontinuance in fee. *Lit. ſect.* 620.

If tenant in tail leaſes for life, the remainder in fee, this is an abſolute diſcontinuance, though the remainder is not executed in the life of tenant in tail, becauſe all but one eſtate, and paſſeth by one livery. *Co. Lit.* 333. *b.*

But if tenant in tail leaſes for three lives, according to 32 *H.* 8. this is no diſcontinuance of the eſtate-tail, or of the reverſion, becauſe it is authoriſed by act of parliament, whereunto every man's conſent is involved. *Co. Lit.* 333. *a.*

If tenant in tail leaſes for life, and after diſſeiſes leſſee for life, and makes a feoffment in fee, and the leſſee dies, and then tenant in tail dies, though the fee was executed, yet becauſe it was not executed by lawful means, it is no diſcontinuance. *Co. Lit.* 333. *b.*

If there be tenant for life, remainder in tail, remainder in tail, *&c.* and tenant for life, and he in the firſt remainder in tail levy a fine, this is no diſcontinuance of either of the remainders, becauſe each of them paſſed only what he lawfully might. 1 *Co.* 79. *a. Co. Lit.* 302. *b. Cro. Eliz.* 827. *Moor* 634. *Owen* 129.

If tenant in tail enfeoffs the donor, this is not any diſcontinuance, becauſe the donor hath the immediate eſtate, and it operates as a ſurrender; it paſſes no more than it lawfully may paſs. *Lit. ſ.* 625. 1 *Co.* 140. *S. P.*

If the donee enfeoff the donor and a ſtranger, this is a diſcontinuance of the whole land. *Co. Lit.* 335. *a.*

If a man covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to his wife for life; the remainder to the heirs males which he ſhall get on the body of his wife, remainder to his eldeſt ſon by a former wife, *&c.* and after the huſband and wife levy a fine with warranty, and die without iſſue, this is no diſcontinuance of the remainder, becauſe the eſtate-tail was not executed, by reaſon of the intervening eſtate limited to the wife, which eſtate is not drowned, but remains diſtinct. 1 *Lev.* 36. *Raym.* 36. *S. C.* 1 *Sid.* 83. *S. C.*

If a man has the right of poſſeſſion, and is not poſſeſſed by virtue of the intail, he cannot diſcontinue otherwiſe than by warranty. *Lit. ſ.* 637, 641. *Carth.* 110. *S. P.*

As if there be grandfather, father, and ſon, and the grandfather is ſeiſed in tail, and the father diſſeiſes the grandfather, and makes a feoffment in fee, and dies, this works no diſcontinuance, becauſe the father was not poſſeſſed of the intail, but of a fee-ſimple by diſſeiſin, which was ſubject to the entry of the tenant in tail; and conſequently the alienee is ſubject to the entry of the iſſue in tail, inaſmuch as the father, who made the alienation, had only the naked poſſeſſion by diſſeiſin, and not the right of poſſeſſion by virtue of the intail. *Lit. ſect.* 658. 1 *Rol. Abr.* 634. *Raym.* 37.

So if tenant in tail leaſes to one for life, and hath iſſue, and dies, and the reverſion deſcends to the iſſue, and the iſſue grants the reverſion to another in fee, and the tenant for life attorns, and dies, and the grantee enters, and is ſeiſed in fee in the life of the iſſue, and the iſſue in tail hath iſſue a ſon, and dies, this is no diſcontinuance; but the ſon may enter, *&c.* for that his father had never any thing in him by force of the intail. *Lit. ſect.* 638.

So if there be tenant for life, the remainder in tail, and he in remainder enters upon the leſſee, and diſſeiſes him, and makes a feoffment over, that is not any diſcontinuance, becauſe he never was ſeiſed by force of the intail. 1 *Rol. Abr.* 634.

But if there be leſſee for years, the remainder in tail to *J. S.* and *J. S.* enters upon the leſſee, and makes a leaſe for life, or feoffment in fee, this is a diſcontinuance, for he was ſeiſed by force of the intail at the time of the feoffment. 1 *Rol. Abr.* 634.

No act of huſband ſhall diſcontinue his wife's eſtate, 32 *H.* 8. *c.* 28. *ſ.* 6, 7.

No diſcontinuance by women of lands come from their huſbands, 11 *H.* 7. *c.* 20. 32. *H.* 8. *c.* 36. *ſ.* 2. See 2 *Bac. Abr.* 91, 92.

Nor by tenant in tail of the gift of the crown, 34 & 35 *H.* 8. *c.* 20.

Nor by tenant in tail of fee farm rents to bar the remainder veſted by the ſtatute, 22 & 23 *Car.* 2. *c.* 24. *ſ.* 6.

For other matters, ſee Co. Lit. 325 *to* 347, *and* 8 Vin. Abr. *and* 2 Bac. Abr. *tit* Diſcontinuance.

Diſcontinuance of proceſs, Is when the opportunity of proſecution is loſt for that time; or the plaintiff is diſmiſſed the court, *&c.* and every ſuit, whether civil or criminal, and every proceſs therein, ought to be properly continued from day to day, *&c.* from its commencement to its concluſion; and the ſuffering any default or gap herein, is called a *diſcontinuance*: The continuance of the ſuit by improper proceſs, or by giving the party an illegal day, is properly a miſcontinuance 2 *Hawk.* 298. Where an action is long depending, and continued from one term to another, the *continuances*, muſt be all entered, otherwiſe there will be a *diſcontinuance*; whereupon a writ of error may be brought, *&c.* 1 *Nelſ. Abr.* 660. If the plaintiff in a ſuit doth nothing, it is a *diſcontinuance*, and he muſt begin his ſuit again: And where it is too late to amend a declaration, *&c.* or the plaintiff is adviſed to proſecute in another court, he is to diſcontinue his ſuit, and proceed *de novo*. *Com. Law com. plac.* 171. But *diſcontinuance* of an action, is not perfect till it is entred on the roll, when it is of record, *Cro. Car.* 236. the plaintiff cannot diſcontinue his action after a demurrer joined, and entered; or after a verdict, or a writ of inquiry, without leave of the court. *Cro. Jac.* 35. 1 *Lill. Abr.* 473. In actions of debt or covenant, after a demurrer joined, the court will give leave to diſcontinue, if there be an apparent cauſe; as if the plaintiff through his own negligence is in danger of loſing his debt: But if the demurrer be argued, then he ſhall not have leave to diſcontinue; nor where he brings another action for the ſame cauſe, and this is pleaded in abatement of the firſt action. *Sid.* 84. It has been ruled, upon a motion to diſcontinue, that the court may give leave after a ſpecial verdict; which is not complete and final; but never after a general verdict. 1 *Salk.* 178. 1 *Nelſ.* 663. An appeal may as well be diſcontinued by the defect of the proceſs as proceeding in it, as it may be by the inſufficiency of the original writ, *&c.* for by ſuch defect, the matter depending is as it were out of the court. 1 *Lill.* 423. A *diſcontinuance* or miſcontinuance, at Common law reverſes a judgment given by default; and *diſcontinuance* upon a demurrer is error; but a miſcontinuance after appearance is not ſo. 8 *Rep.* 150. 46 *Ed.* 3. 30. *Diſcontinuance* of proceſs is helped at Common law by appearance: And by ſtat. 32 *H.* 8. *cap.* 30. all *diſcontinuances*, miſcontinuances and negligences therein, of plaintiff or defendant, are cured after verdict. 2 *Danvers* 352.

Plaintiff, though an adminiſtrator, cannot diſcontinue without payment of coſts: *per cur.* 1 *Barnes* 110.

Plaintiff moved to diſcontinue upon payment of coſts after judgment given on demurrer for the plaintiff (but not entred upon record), and a writ of error brought, and bail put in thereupon; the court refuſed to make a rule to diſcontinue without payment of coſts on the writ of error. 1 *Barnes* 110.

Plaintiff obtained a rule to diſcontinue on payment of coſts. Defendant moved to diſcharge the rule upon affidavit that he had been a ſecond time arreſted for the ſame cauſe of action before the rule was obtained. The court refuſed to make any rule. Plaintiff may diſcontinue at any time. 1 *Barn.* 110.

Caſe in replevin, the avowant had juſtified under a diſtreſs for rent. Plaintiff demurred to the avowry, and upon argu ng the demurrer court gave judgment for the avowant. *Eyre* afterwards moved for plaintiff to diſcontinue; court denied the motion. The queſtion determined upon demurrer being upon the conſtruction of the act of parliament, which is the merits of the cauſe. 1 *Barn.* 111.

Plaintiff had obtained a rule to diſcontinue (which was drawn up in the following manner, (*viz.*) that plaintiff *ſhall* diſcontinue, and *ſhall* pay coſts, *&c.* upon an affidavit that defendant being indebted to plaintiff, a writ was iſſued againſt him; but defendant having paid the money before the arreſt, the Sheriff's officer to whom the warrant was delivered, was countermanded from proceeding, notwithdanding which he arreſted the defendant, who thereupon brought an action for falſe impriſonment in the court of King's Bench. The coſts upon the rule had been paid, but the diſcontinuance was not entred upon record. The court thought the rule not drawn up in common form, which is, that the plaintiff *have leave* or *be at liberty* to diſcontinue; and therefore diſcharged the rule. The action brought in the King's Bench appeared to be vexatious, and plantiff, by diſcharging his rule to diſcontinue, had an opportunity of pleading the action in this court ſtill depending, or juſtify under the *capias*, as he ſhould be adviſed. 1 *Barn.* 111, 112.

A *ſci. fa.* was ſued out by plaintiff to revive a judgment recovered by plaintiff's inteſtate. Defendant craved oyer of the letters of adminiſtration, which being defective, plaintiff dropped the proceeding on *ſci. fa.* and having procured ſufficient letters of adminiſtration, brought an action of debt on the judgment in the court of King's Bench. Defendant pleaded the writ of *ſci. fa.* pending in this court in abatement, and plaintiff replied a diſcontinuance (entred without leave of the court.) Defendant moved to ſet aſide the diſcontinuance, and the queſtion was, whether or no plaintiff could diſcontinue without leave of the court? The practice was variouſly reported; and it not appearing, whether the roll whereupon the diſcontinuance was entred was brought in before or after the plea in the King's Bench, the rule to ſhew cauſe why the diſcontinuance ſhould not be ſet aſide was diſcharged, plaintiff conſenting to pay coſts of the plea in abatement, and that defendant ſhould be at liberty to plead *de novo*. 1 *Barn.* 112, 113.

No ſuit ſhall be diſcontinued by the death of the King, or by the death, *&c.* of the juſtices, 1 *Ed.* 6. *c.* 7.

A new commiſſion ſhall not diſcontinue any proceedings, 1 *Ed.* 6. *c.* 7. *ſ.* 6. 11 *H.* 6. *c.* 6.

Writs not to be diſcontinued for not holding certain days of return in 1660, 12 *Car.* 2. *c.* 3.

Proceſs not diſcontinued by King's death, 1 *Ann. ſt.* 1. *cap.* 8. *ſ.* 4.

For other matters, ſee Error *and* Proceſs.

Diſcontinuance of plea, Is where divers things ſhould be pleaded to, and ſome are omitted; this is a *diſcontinuance*. 1. *Nelſ. Abr.* 660, 661. If a defendant's plea begin with an anſwer to part, and anſwers no more, it is a *diſcontinuance*; and the plaintiff may take judgment by *nil dicit*, for what is not anſwered: but if the plaintiff plead over, the whole action is diſcontinued. 1 *Salk.* 139. Debt upon bond of 500 *l.* the defendant as to 250 *l.* part of it pleads payment, *&c.* and upon demurrer to this plea, it was adjudged, that there being no anſwer to the reſidue, is a *diſcontinuance* as to that, for which the plaintiff ought to take judgment by *nil dicit*. 1 *Salk.* 180. Where no anſwer is given to one part, if the the plaintiff pleads thereto, he cannot have judgment according to his declaration, ; for which reaſon it may be a *diſcontinuance* of the whole. 1 *Nelſ.* 660. But this is helped after verdict by 32 *H.* 8. *c.* 30. See Amendment.

Diſcovert, Is uſed in the law for a woman unmarried, or a widow; one not within the bonds of matrimony. *Law Fr. Dict.*

Diſcovery, Is the act of revealing or diſcloſing any matter by defendant in his anſwer to a bill filed againſt him in the court of equity.

A man is not *bound* to diſcover what may ſubject him to the penalty of *an act of parliament*. Vern. 109. pl. 98. Mich. 1682. Bird. *v.* Hardwick.

Defendant ſhall not diſcover any thing againſt himſelf to charge himſelf with the *penalty of a bond* of arbitration. *Chan. Rep.* 142. 15 *Car.* 1 *Biſhop* v. *Biſhop*.

The huſband deviſed to his wife an eſtate and intereſt in ſeveral goods and things, to be held and enjoyed by her during her widowhood. On a bill brought againſt her to diſcover, whether *married or not*, in order to prove a *forfeiture*

forfeiture of her eſtate, ſhe demurred, and the bill was diſmiſſed. 2 *Chan. Rep.* 68. 24 *Car.* 2. *Monnings* v. *Monnings.*

A bill was to diſcover, *whether the defendant* did not *conceal the cuſtoms and exciſe* upon 260 caſks of currans imported, *and had endeavoured to corrupt the cuſtomhouſe officers* by promiſing 40 *l.* reward to conceal it. On demurrer by the defendant, the court inclined to think he ſhould not be compelled to make a diſcovery, unleſs the Attorney general waived the proceeding for all forfeitures. *Arg. Comyns's Rep.* 664. cites *Hard.* 137, 138. (*Hill.* 1658. *in Scacc.*) *The Attorney general v. Mico.*

The *difference is between cauſes criminal and civil*; if an *offender* be once *legally convicted of an offence, whereby he ought to forfeit his eſtate*, then it is lawful and proper to prefer a bill to diſcover what eſtate in lands and goods he then had; as in caſe of an *outlawry* or *attainder*, &c. for that the effect of ſuch a bill is only to diſcover what is forfeited already, and not to diſcover a cauſe of forfeiture. *Arg. Hard.* 145. in the *S. C.*

A bill for *tithes*; defendant demurred becauſe he had not offered by his bill to accept of the ſingle value, and yet alledged in his bill that the defendant had carried away the corn, &c. without ſetting forth the tithes according to the *ſtatute*. It was urged for the defendant, that ſhould he anſwer, the plaintiff would preſently go to law, and give his anſwer in evidence, and recover the treble value of the tithes, and a court of equity ought not to aſſiſt in recovering a *penalty*, nor compel a diſcovery of a *forfeiture*; but over-ruled, the plaintiff in this caſe being only *executor of a parſon*, and not the parſon himſelf, and ſo not intitled to a forfeiture on the ſtatute. *Vern.* 60. *pl.* 57. *Mich.* 1682. *Anon.*'

Bill was brought to diſcover *ſimony*; defendants demurred, and the demurrer was allowed. *Ch. Prec.* 214. *pl.* 176. *Hill.* 1702. *Attorney general for Hindley* v. *Sundell, Heaketh & al'.*

If *A. ſteals goods* from *B.* and ſells them to *C.* and *A.* takes them from *C.* the *vendee*, *C.* may ſue *A.* in equity to diſcover his title to thoſe goods, and *A.* ſhall be inforced to anſwer. *Holt's Rep.* 50. *pl.* 6. *Mich.* 5 *Ann.* in the caſe of *Gawne* v. *Grandee.*

Where ſeveral are *partners in an unlawful* or clandeſtine *trade*, and *one of them brings a bill of diſcovery againſt the other*, it is no good plea that their anſwer may ſubject them to the penalty of an act of parliament; for by their going on in ſuch trade, they ſeemed to have intirely waived that unlawfulneſs as *between themſelves*; ſo the plea was diſallowed, and they were ordered to anſwer. *G. Equ. R.* 116. *Hill.* 12 *Geo.* 1. *Goſcoyne* v. *Sidwell.*

In an action on the caſe a verdict paſſes againſt the plaintiff for want of being able to prove a letter wrote to him by the defendant; the plaintiff brings a bill to clear up this matter; defendant pleads the verdict, and that the effect of the letter was given in evidence at the trial, and *demurred for want of equity*, and plea and demurrer allowed. *Chan. Caſes* 65. *Hill.* 16 & 17 *Car.* 2. *Sewell* v. *Freeſtone.* See 8 *Vin. Abr.* tit. *Diſcovery.*

Diſcount, or ſtoppage, or ſetting off mutual debts one againſt another. See the ſtatutes 2 *Geo.* 2. *c.* 22. and 8 *Geo.* 2. *c.* 1. under tit. **Debt and debtors**, and 8 *Vin. Abr.* tit. *Diſcount.*

Diſcretion, (*Diſcretio*,) When any thing is left to any perſon to be done according to his *diſcretion*, the law intends it muſt be done with ſound *diſcretion*, and according to law: And the court of *B. R.* hath a power to redreſs things that are otherwiſe done, notwithſtanding they are left to the diſcretion of thoſe that do them. 1 *Lill. Abr.* 477. *Diſcretion* is to diſcern between right and wrong: and therefore whoever hath power to act at *diſcretion*, is bound by the rule of reaſon and law. 2 *Inſt.* 56, 298. And though there be a latitude of diſcretion given to one, yet he is circumſcribed that what he does be neceſſary and convenient; without which no liberty can defend it. *Hob.* 158. The aſſeſſment of fines on offenders committing affrays, &c. and the binding of perſons to the good behaviour, are at the *diſcretion* of our judges and juſtices of peace. 1 *Hawk. P. C.* 132, 138. And in many caſes, for rimes not capital, the judges have a diſcretionary power to inflict corporal puniſhment on the offenders. 2 *Hawk.* 445. Infants, &c. under the age of *diſcretion*, are not puniſhable for crimes, and want of *diſcretion* is a good exception againſt a witneſs. *Ibid.* 434.

Diſcus, *Deſcus*, A deſk or leaning ſhelf. *Cowell, edit.* 1727.

Diſfranchiſe, To take away from any one his privilege or freedom. Stat. 14 *Car.* 2. *c.* 31. It is contrary to *enfranchiſe*. And corporations have power to diſfranchiſe members, for doing any thing againſt their oaths; but not for contempts, &c. 11 *Rep.* 98.

Diſguiſed perſons, Not to hunt in park or warren, 1 *H.* 7. *c.* 7.

Informations againſt them, in what manner to be certified and proceeded upon, 9 *Geo.* 1. *c.* 22. *ſ.* 4, 6.

Concealers, &c. of them where guilty of felony, 9 *Geo.* 1. *c.* 22. *ſ.* 5.

Perſons wounded or killed in apprehending them, or their executors and adminiſtrators, how rewarded, 9 *Geo.* 1. *c.* 22. *ſ.* 12.

Proſecutions muſt be within three years, and the trial may be in any county, 9 *Geo.* 1. *c.* 22. *ſ.* 13, 14.

See **Black Act** *and* **Felony.**

Diſheriſon (Fr. *Diſheritement*) Is an old word, ſignifying as much as *diſinheriting*. It is uſed in the ſtatute of *vouchers*, made 20 *Ed.* 1. *Our Lord the King conſidering his own damage and diſheriſon of the crown*, &c. and in 8 *Rich.* 2. *c.* 4.

Diſheritor, Is one who diſinherits, or puts another out of his freehold.—The ſheriff ſhall forthwith be puniſhed as a diſheritor of our Lord the King and his crown. Stat. 3 *Ed.* 1. *c.* 39.

Diſme quinquinal. See **Quinquinal diſmes.**

Diſmes, *Decimæ*, Are tithes, and ſignifieth the tenth part of the fruits of the earth, or beaſts, or our labour due unto God; and ſo conſequently to him who is of the Lord's lot, that is, our paſtor. It ſignifieth alſo the tenths of ſpiritual livings yearly given to the prince, called a perpetual *diſme*, 2 & 3 *Ed.* 6. *c.* 35. which in ancient time were paid to the pope, till pope *Urbane* gave them to *Richard* the Second, to aid him againſt the *French* King Charles, and thoſe others who upheld *Clement* the Seventh againſt him. *Polydore Virgil. Ang. Hiſt. lib.* 20. Laſtly, It ſignifieth a tribute levied of the temporality. *Holinſhed* in *H.* 2. *f.* 111. Tithes are of three ſorts, *predial*, *perſonal*, *mixt*: *Predial* tithes are of things that came of the ground only, as corn, &c. *Perſonal* tithes are paid of ſuch things as come of the labour and induſtry of man's perſon, as buying and ſelling, &c. *Mixt* tithes are of calves, lambs, pigs, and ſuch like. See **Tithes.**

Diſparagement, *Diſparagatio*, Is in a legal ſenſe uſed eſpecially for matching an heir in marriage under his or her degree, or againſt decency. See *Cowel's Inſtitutes*, tit. *De Nuptiis*, *ſect.* 6. *Co.* on *Littl. fol.* 107. *Lit. lib.* 2. *c.* 4.

Diſpauper. When any perſon by reaſon of his poverty, atteſted by his own oath, of not being worth 5*l.* his debts being paid, is admitted to ſue in *forma pauperis*, if afterwards before the ſuit be ended, the ſame party have any lands, or perſonal eſtate fallen to him, or that the court, where the ſuit depends, thinks fit for that or any other reaſon, to take away that privilege from him, then he is ſaid to be *diſpaupered*, *i. e.* put out of the capacity of ſuing *in forma pauperis*. *Cowell, edit.* 1727. See **Forma pauperis.**

Diſpenſa, A buttery. *Habere debet uxor ſub cuſtodia ſua claves* diſpenſæ *ſuæ archæ ſuæ & ſcrinii ſui.* Bract. lib. 3. tract. 2. cap. 31. par. 9.

Diſpenſation. By the ſtat. 25 *H.* 8. *c.* 21. The *archbiſhop of Canterbury* has power of *diſpenſing* in any caſe, wherein *diſpenſations* (not contrary to the law of God) were formerly granted by the ſee of *Rome*; and may grant *diſpenſations* to the King, as well as to his ſubjects: But ſuch *diſpenſations* ſhall not be granted out of the realm, &c. And during the vacancy of the ſee of *Canterbury*, the guardian of the ſpiritualties may grant *diſpenſations*. The archbiſhop of *Canterbury* grants *diſpenſations*, not only in

in his own province, but in the province of *York*; and the archbiſhop of *York*, and other biſhops, diſpenſe as they were wont to do, by the Common law and cuſtom of the realm. *Wood's Inſt.* 26. Every biſhop of common right has the power of inſtitution into benefices, and of diſpenſing in common caſes, *&c. Ibid.* 505. Diſpenſations to be confirmed under the great ſeal, 28 *H.* 8. *c.* 16. See **Eccleſiaſtical courts. Plurality, Reſidence.**

Diſpenſations of the king. If a *diſpenſation* by the *archbiſhop of Canterbury* is to be in extraordinary matters, or in a caſe that is new, the *King* and his counſel are to be conſulted; and it ought to be confirmed under the broad ſeal. The *King*'s authority to grant *diſpenſations*, remains as it did at Common law, notwithſtanding the ſtat. 25 *H.* 8. 1 *Cro.* 542, 601. The *diſpenſation* of the *King*, *&c.* makes a thing prohibited, lawful to be done by him who hath it: But *malum in ſe* will not admit of a *diſpenſation*. *March Rep.* 213. Where the ſubject hath an immediate intereſt in an act of parliament, the *King* cannot *diſpenſe* with it; but where the *King* is intruſted with the management, and the ſubject intereſted by way of conſequence only, he may. *March* 214, 216. When an offence wrongs none but the *King*, or if the ſuit is only the *King*'s for the breach of a penal law, that is not to the damage of a third perſon, the *King* may *diſpenſe*: But in caſe the ſuit is the *King*'s, for the benefit of another, he cannot. *Vaughan* 344, 334, 339, *&c.*

Diſpenſation by non obſtante. If any ſtatute tends to reſtrain ſome *prerogative* incident to the perſon of the *King*, as the right of pardoning, or of commanding the ſervice of the ſubject for the public weal, *&c.* which are inſeparable from the King; by a *clauſe* of *non obſtante* he may diſpenſe with it. 2 *Haw.* 390. But as in the reign of King *James* 2. the *diſpenſing* power was carried ſo high as to render the execution of our neceſſary laws in a manner dependant on the pleaſure of the Prince; by ſtat. 1 *W. & M. ſeſſ.* 2. *cap.* 2. it is enacted, that no *diſpenſation by non obſtante* of, or to any ſtatute, or any part thereof, ſhall be allowed; but that the ſame ſhall be held void, and of none effect, except a *diſpenſation* be allowed in ſuch ſtatute. The *diſpenſation* by *non obſtante* was brought into this Kingdom by the *Pope*; and firſt uſed by *Hen.* 3. Pryn's *Animadver. on* 4 *Inſt. fol.* 129.

Diſperſonare, To diſparage, or ſcandalize. *Non es* diſperſonatus *mihi miniſtrando cum ſis filius comitis, ego Regis & Reginæ. Cowell, edit.* 1727.

Diſrationare, and **Dirationare**, (Fr. *deſrener*,) To juſtify or make good the denial of a fact. *Eſt contrarium ratiocinando aſſerere, vel quod aſſertum eſt ratiocinando deſtruere.* We now call it *traverſare*, or traverſe. *Dirationare ſe* has been uſed to clear one's ſelf of a crime. See *Gloſſ. in decem Scriptor.* and *Deraign. Sciatis me dediſſe Deo & eccleſiæ & Roberto epiſcopo Lincolniæ* 12 *bovatas terræ, quas Radulfus Baſſet* diſrationavit *eſſe in dominio meo.* Mon. 3 tom. p. 265.

Diſſeiſin. (*Diſſeiſina*,) Signifieth an unlawful diſpoſſeſſing a man of his land, tenement, or other immoveable or incorporeal right. *Cowell.* It is where a man enters into any lands or tenements, where his entry is not congeable, and ouſts him which hath the freehold; ſo that it differs from an abatement, which is the entrance of a ſtranger into lands, of which an anceſtor died ſeiſed before the heir has entered; ſo that there is not properly an actual ouſter committed of the perſon that was ſeiſed of the freehold, as there is in caſe of diſſeiſin; but the entry of the perſon who has the title to the freehold is prevented; in like manner a diſſeiſin differs from an intruſion, which is when an anceſtor dies ſeiſed of any eſtate of inheritance expectant on an eſtate for life, and then tenant for life dies; and between the death of the tenant and entry of the heir, a ſtranger interpoſes and intrudes, and ſo gets poſſeſſion of the freehold; ſo that it is rather a prevention of the heir's entry, than an actual ouſter of him of his freehold. *Lit. ſect.* 279. *Co. Lit.* 181, 277.

If huſband and wife purchaſe lands in fee, and then the huſband is attainted of felony, and the King ſeizes the land, and afterwards the lord of whom it is held, hath it upon ſuggeſtion delivered to him out of the hands of the King, as his proper eſcheat; this is a diſſeiſin of the wife who was jointenant with the huſband, for the lord got poſſeſſion of the freehold by his miſrepreſentation of the nature of the eſtate to the King; which being a manifeſt act of injuſtice and falſhood, the poſſeſſion acquired by it muſt be looked upon as an acquiſition of the ſame nature with a poſſeſſion gained by open and avowed violence; and ſo a diſſeiſin. 1 *Rol. Abr.* 658.

A man has a houſe, and locks it, and departs, and another comes to the houſe and takes the ring of the houſe in his hand, and ſays that he claims the houſe to himſelf in fee, without making any entry into it, this is a diſſeiſin of the houſe; for the claim he made upon taking the ring into his hand ſhews his intention in doing it to be a plain ſeiſin of the intire freehold, and conſequently a diſſeiſin of the true proprietor; and his non-entry into the houſe, upon his ſeiſing of it, will not qualify the intention of what he has done, ſince his ſeiſin of part, in the name of the whole, gives him whatſoever an entry could have done, and therefore ſuch an entry was not neceſſary. 1 *Rol. Abr.* 659.

A man has a mill, and *A.* turns the water that uſed to ſerve the mill, ſo that it cannot grind; this is a diſſeiſin of the mill, for which an aſſiſe lies againſt *A.* for to deprive a man of the means he has of obtaining the profits of his freehold, is in effect to diſſeiſe him of his freehold. *Bro. Diſſeiſin* 25.

If *A.* cuts trees in his ſoil, and *B.* who has common there, ſays, that the ſoil is his, and commands him not to cut there, whereupon *A.* departs out of the land, this is no diſſeiſin in *B.* for he who has no right to a freehold cannot be ſeiſed of it by bare words only, which are fleeting and tranſitory, and do not amount to ſuch an act of notoriety and ſolemnity, as is required in gaining poſſeſſion of a freehold, whereof ſtrangers are to take notice. 1 *Rol. Abr.* 659. *Bro. Diſſeiſin* 42.

If a man who has a right of entry into lands, in coming thither is diſturbed and hindred from entring, this is a diſſeiſin, ſuch hindrance of entry being equivalent to an actual ouſter of the freehold. 1 *Rol. Abr.* 659.

If the King be ſeiſed in fee of the manor of *B.* and a ſtranger erects a ſhop in a vacant plat of it, and takes the profit of it without paying any rent to the King, and after the King grants over the manor in fee, and the ſtranger continues in the ſhop, and occupies it as before, this is no diſſeiſin; for the firſt entry of the ſtranger was no diſſeiſin, but an intruſion on the King's poſſeſſion; for that the King's title appearing on record, the entry in *pais*, which is not an act of equal notoriety, will not deveſt it out of him; if then the King is not diſſeiſed, his conveyance of the freehold is good, and the grantee is ſeiſed by virtue of it, and conſequently cannot be ſaid to be diſſeiſed by the ſtranger who has made no entry upon him after the King's conveyance, but only continued the old intereſt which he had before the grant, and ſo remains an intruder ſtill, and liable to an action of treſpaſs or ejectment for it. 1 *Rol. Abr.* 659. *Hob.* 322. *Bro. Diſſeiſin* 4.

Baron and feme ſeiſed in tail, the baron goes out of the country, and in his abſence the feme infeoffs *A.* in fee, this is a diſſeiſin of the huſband by *A.* becauſe the feoffment by the feme covert was void, and ſo the entry under it tortious. *Bro.* tit. *Diſſeiſin* 24.

If a diſſeiſor makes a leaſe for years or at will, and the diſſeiſee enters upon him, and then the leſſee re-enters, claiming by virtue of his leaſe, though that was only a term for years, yet he is a diſſeiſor, becauſe he enters upon the proprietor of the ſoil, and ouſts him of his poſſeſſion, and that by virtue of a former diſſeiſin, ſo that the poſſeſſion of the freehold cannot be ſuppoſed to be left in the diſſeiſee; and therefore ſuch an entry muſt be equivalent to an avowed diſſeiſin. 1 *Rol. Abr.* 662.

If a man enters into my land, claiming a leaſe for years, or enters as tenant by ſtatute merchant, when he has no right, he is a diſſeiſor, the entry being unlawful, and the pretence of title unjuſt. 1 *Rol. Abr.* 662.

A man makes a leaſe for years to another and his heirs, and the leſſee dies, and the heir claiming the term enters,

forfeiture of her eſtate, ſhe demurred, and the bill was diſmiſſed. 2 *Chan. Rep.* 68. 24 *Car.* 2. *Monnings* v. *Monnings.*

A bill was to diſcover, *whether the defendant* did not *conceal the cuſtoms and exciſe* upon 260 caſks of currans imported, *and had endeavoured to corrupt the cuſtomhouſe officers* by promiſing 40 *l.* reward to conceal it. On demurrer by the defendant, the court inclined to think he ſhould not be compelled to make a diſcovery, unleſs the Attorney general waived the proceeding for all forfeitures. *Arg. Comyns's Rep.* 664. cites *Hard.* 137, 138. (*Hill.* 1658. *in Scacc.*) *The Attorney general v. Mico.*

The *difference is between cauſes criminal and civil*; if an *offender* be once *legally convicted of an offence, whereby he ought to forfeit his eſtate*, then it is lawful and proper to prefer a bill to diſcover what eſtate in lands and goods he then had; as in caſe of an *outlawry* or *attainder*, &c. for that the effect of ſuch a bill is only to diſcover what is forfeited already, and not to diſcover a cauſe of forfeiture. *Arg. Hard.* 145. in the *S. C.*

A bill for *tithes*; defendant demurred becauſe he had not offered by his bill to accept of the ſingle value, and yet alledged in his bill that the defendant had carried away the corn, &c. without ſetting forth the tithes according to the *ſtatute*. It was urged for the defendant, that ſhould he anſwer, the plaintiff would preſently go to law, and give his anſwer in evidence, and recover the treble value of the tithes, and a court of equity ought not to aſſiſt in recovering a *penalty*, nor compel a diſcovery of a *forfeiture*; but over-ruled, the plaintiff in this caſe being only *executor of a parſon*, and not the parſon himſelf, and ſo not intitled to a forfeiture on the ſtatute. *Vern.* 60. *pl.* 57. *Mich.* 1682. *Anon.*'

Bill was brought to diſcover *ſimony*; defendants demurred, and the demurrer was allowed. *Ch. Prec.* 214. *pl.* 176. *Hill.* 1702. *Attorney general for Hindley* v. *Sundell, Heaketh & al'.*

If *A. ſteals goods* from *B.* and ſells them to *C.* and *A.* takes them from *C.* the *vendee*, *C.* may ſue *A.* in equity to diſcover his title to thoſe goods, and *A.* ſhall be inforced to anſwer. *Holt's Rep.* 50. *pl.* 6. *Mich.* 5 *Ann.* in the caſe of *Gawne* v. *Grandee.*

Where ſeveral are *partners in an unlawful* or clandeſtine *trade*, and *one of them brings a bill of diſcovery againſt the other*, it is no good plea that their anſwer may ſubject them to the penalty of an act of parliament; for by their going on in ſuch trade, they ſeemed to have intirely waived that unlawfulneſs as *between themſelves*; ſo the plea was diſallowed, and they were ordered to anſwer. *G. Equ. R.* 116. *Hill.* 12 *Geo.* 1. *Goſcoyne* v. *Sidwell.*

In an action on the caſe a verdict paſſes againſt the plaintiff for want of being able to prove a letter wrote to him by the defendant; the plaintiff brings a bill to clear up this matter; defendant pleads the verdict, and that the effect of the letter was given in evidence at the trial, and *demurred for want of equity*, and plea and demurrer allowed. *Chan. Caſes* 65. *Hill.* 16 & 17 *Car.* 2. *Sewell* v. *Freeſtone.* See 8 *Vin. Abr.* tit. *Diſcovery.*

Diſcount, or ſtoppage, or ſetting off mutual debts one againſt another. See the ſtatutes 2 *Geo.* 2. *c.* 22. and 8 *Geo.* 2. *c.* 1. under tit. **Debt and debtors**, and 8 *Vin. Abr.* tit. *Diſcount.*

Diſcretion, (*Diſcretio*,) When any thing is left to any perſon to be done according to his *diſcretion*, the law intends it muſt be done with ſound *diſcretion*, and according to law: And the court of *B. R.* hath a power to redreſs things that are otherwiſe done, notwithſtanding they are left to the diſcretion of thoſe that do them. 1 *Lill. Abr.* 477. *Diſcretion* is to diſcern between right and wrong: and therefore whoever hath power to act at *diſcretion*, is bound by the rule of reaſon and law. 2 *Inſt.* 56, 298. And though there be a latitude of diſcretion given to one, yet he is circumſcribed that what he does be neceſſary and convenient; without which no liberty can defend it. *Hob.* 158. The aſſeſſment of fines on offenders committing affrays, &c. and the binding of perſons to the good behaviour, are at the *diſcretion* of our judges and juſtices of peace. 1 *Hawk. P. C.* 132, 138. And in many caſes, for rimes not capital, the judges have a diſcretionary power to inflict corporal puniſhment on the offenders. 2 *Hawk.* 445. Infants, &c. under the age of *diſcretion*, are not puniſhable for crimes, and want of *diſcretion* is a good exception againſt a witneſs. *Ibid.* 434.

Diſcus, *Deſcus*, A deſk or leaning ſhelf. *Cowell, edit.* 1727.

Diſfranchiſe, To take away from any one his privilege or freedom. Stat. 14 *Car.* 2. *c.* 31. It is contrary to *enfranchiſe*. And corporations have power to diſfranchiſe members, for doing any thing againſt their oaths; but not for contempts, &c. 11 *Rep.* 98.

Diſguiſed perſons, Not to hunt in park or warren, 1 *H.* 7. *c.* 7.

Informations againſt them, in what manner to be certified and proceeded upon, 9 *Geo.* 1. *c.* 22. *ſ.* 4, 6.

Concealers, &c. of them where guilty of felony, 9 *Geo.* 1. *c.* 22. *ſ.* 5.

Perſons wounded or killed in apprehending them, or their executors and adminiſtrators, how rewarded, 9 *Geo.* 1. *c.* 22. *ſ.* 12.

Proſecutions muſt be within three years, and the trial may be in any county, 9 *Geo.* 1. *c.* 22. *ſ.* 13, 14.

See **Black Act** *and* **Felony.**

Diſheriſon (Fr. *Diſheritement*) Is an old word, ſignifying as much as *diſinheriting*. It is uſed in the ſtatute of *vouchers*, made 20 *Ed.* 1. *Our Lord the King conſidering his own damage and diſheriſon of the crown*, &c. and in 8 *Rich.* 2. *c.* 4.

Diſheritor, Is one who diſinherits, or puts another out of his freehold.—The ſheriff ſhall forthwith be puniſhed as a diſheritor of our Lord the King and his crown. Stat. 3 *Ed.* 1. *c.* 39.

Diſme quinquinal. See **Quinquinal diſmes.**

Diſmes, *Decimæ*, Are tithes, and ſignifieth the tenth part of the fruits of the earth, or beaſts, or our labour due unto God; and ſo conſequently to him who is of the Lord's lot, that is, our paſtor. It ſignifieth alſo the tenths of ſpiritual livings yearly given to the prince, called a perpetual *diſme*, 2 & 3 *Ed.* 6. *c.* 35. which in ancient time were paid to the pope, till pope *Urbane* gave them to *Richard* the Second, to aid him againſt the *French* King Charles, and thoſe others who upheld *Clement* the Seventh againſt him. *Polydore Virgil. Ang. Hiſt. lib.* 20. Laſtly, It ſignifieth a tribute levied of the temporality. *Holinſhed* in *H.* 2. *f.* 111. Tithes are of three ſorts, *predial*, *perſonal*, *mixt*: *Predial* tithes are of things that came of the ground only, as corn, &c. *Perſonal* tithes are paid of ſuch things as come of the labour and induſtry of man's perſon, as buying and ſelling, &c. *Mixt* tithes are of calves, lambs, pigs, and ſuch like. See **Tithes.**

Diſparagement, *Diſparagatio*, Is in a legal ſenſe uſed eſpecially for matching an heir in marriage under his or her degree, or againſt decency. See *Cowel's Inſtitutes*, tit. *De Nuptiis*, *ſect.* 6. *Co.* on *Littl. fol.* 107. *Lit. lib.* 2. *c.* 4.

Diſpauper. When any perſon by reaſon of his poverty, atteſted by his own oath, of not being worth 5*l.* his debts being paid, is admitted to ſue in *forma pauperis*, if afterwards before the ſuit be ended, the ſame party have any lands, or perſonal eſtate fallen to him, or that the court, where the ſuit depends, thinks fit for that or any other reaſon, to take away that privilege from him, then he is ſaid to be *diſpaupered*, *i. e.* put out of the capacity of ſuing *in forma pauperis*. *Cowell, edit.* 1727. See **Forma pauperis.**

Diſpenſa, A buttery. *Habere debet uxor ſub cuſtodia ſua claves* diſpenſæ *ſuæ archæ ſuæ & ſcrinii ſui.* Bract. lib. 3. tract. 2. cap. 31. par. 9.

Diſpenſation. By the ſtat. 25 *H.* 8. *c.* 21. The *archbiſhop of Canterbury* has power of *diſpenſing* in any caſe, wherein *diſpenſations* (not contrary to the law of God) were formerly granted by the ſee of *Rome*; and may grant *diſpenſations* to the King, as well as to his ſubjects: But ſuch *diſpenſations* ſhall not be granted out of the realm, &c. And during the vacancy of the ſee of *Canterbury*, the guardian of the ſpiritualties may grant *diſpenſations*. The archbiſhop of *Canterbury* grants *diſpenſations*, not only in

in his own province, but in the province of *York*; and the archbiſhop of *York*, and other biſhops, diſpenſe as they were wont to do, by the Common law and cuſtom of the realm. *Wood's Inſt.* 26. Every biſhop of common right has the power of inſtitution into benefices, and of diſpenſing in common caſes, *&c. Ibid.* 505. Diſpenſations to be confirmed under the great ſeal, 28 *H.* 8. *c.* 16. See **Eccleſiaſtical courts. Plurality, Reſidence.**

Diſpenſations of the king. If a *diſpenſation* by the *archbiſhop of Canterbury* is to be in extraordinary matters, or in a caſe that is new, the *King* and his counſel are to be conſulted; and it ought to be confirmed under the broad ſeal. The *King*'s authority to grant *diſpenſations*, remains as it did at Common law, notwithſtanding the ſtat. 25 *H.* 8. 1 *Cro.* 542, 601. The *diſpenſation* of the *King*, *&c.* makes a thing prohibited, lawful to be done by him who hath it: But *malum in ſe* will not admit of a *diſpenſation*. *March Rep.* 213. Where the ſubject hath an immediate intereſt in an act of parliament, the *King* cannot *diſpenſe* with it; but where the *King* is intruſted with the management, and the ſubject intereſted by way of conſequence only, he may. *March* 214, 216. When an offence wrongs none but the *King*, or if the ſuit is only the *King*'s for the breach of a penal law, that is not to the damage of a third perſon, the *King* may *diſpenſe*: But in caſe the ſuit is the *King*'s, for the benefit of another, he cannot. *Vaughan* 344, 334, 339, *&c.*

Diſpenſation by non obſtante. If any ſtatute tends to reſtrain ſome *prerogative* incident to the perſon of the *King*, as the right of pardoning, or of commanding the ſervice of the ſubject for the public weal, *&c.* which are inſeparable from the King; by a *clauſe* of *non obſtante* he may diſpenſe with it. 2 *Haw.* 390. But as in the reign of King *James* 2. the *diſpenſing* power was carried ſo high as to render the execution of our neceſſary laws in a manner dependant on the pleaſure of the Prince; by ſtat. 1 *W.* & *M. ſeſſ.* 2. *cap.* 2. it is enacted, that no *diſpenſation by non obſtante* of, or to any ſtatute, or any part thereof, ſhall be allowed; but that the ſame ſhall be held void, and of none effect, except a *diſpenſation* be allowed in ſuch ſtatute. The *diſpenſation* by *non obſtante* was brought into this Kingdom by the *Pope*; and firſt uſed by *Hen.* 3. Pryn's *Animadver. on* 4 *Inſt. fol.* 129.

Diſperſonare, To diſparage, or ſcandalize. *Non es* diſperſonatus *mihi miniſtrando cum ſis filius comitis, ego Regis & Reginæ. Cowell, edit.* 1727.

Diſrationare, and **Dirationare**, (Fr. *deſrener*,) To juſtify or make good the denial of a fact. *Eſt contrarium ratiocinando aſſerere, vel quod aſſertum eſt ratiocinando deſtruere.* We now call it *traverſare*, or traverſe. *Dirationare ſe* has been uſed to clear one's ſelf of a crime. See *Gloſſ. in decem Scriptor.* and *Deraign. Sciatis me dediſſe Deo & eccleſiæ & Roberto epiſcopo Lincolniæ* 12 *bovatas terræ, quas Radulfus Baſſet* diſrationavit *eſſe in dominio meo.* Mon. 3 tom. p. 265.

Diſſeiſin. (*Diſſeiſina*,) Signifieth an unlawful diſpoſſeſſing a man of his land, tenement, or other immoveable or incorporeal right. *Cowell.* It is where a man enters into any lands or tenements, where his entry is not congeable, and ouſts him which hath the freehold; ſo that it differs from an abatement, which is the entrance of a ſtranger into lands, of which an anceſtor died ſeiſed before the heir has entered; ſo that there is not properly an actual ouſter committed of the perſon that was ſeiſed of the freehold, as there is in caſe of diſſeiſin; but the entry of the perſon who has the title to the freehold is prevented; in like manner a diſſeiſin differs from an intruſion, which is when an anceſtor dies ſeiſed of any eſtate of inheritance expectant on an eſtate for life, and then tenant for life dies; and between the death of the tenant and entry of the heir, a ſtranger interpoſes and intrudes, and ſo gets poſſeſſion of the freehold; ſo that it is rather a prevention of the heir's entry, than an actual ouſter of him of his freehold. *Lit. ſect.* 279. *Co. Lit.* 181, 277.

If huſband and wife purchaſe lands in fee, and then the huſband is attainted of felony, and the King ſeizes the land, and afterwards the lord of whom it is held, hath it upon ſuggeſtion delivered to him out of the hands of the King, as his proper eſcheat; this is a diſſeiſin of the wife who was jointenant with the huſband, for the lord got poſſeſſion of the freehold by his miſrepreſentation of the nature of the eſtate to the King; which being a manifeſt act of injuſtice and falſhood, the poſſeſſion acquired by it muſt be looked upon as an acquiſition of the ſame nature with a poſſeſſion gained by open and avowed violence; and ſo a diſſeiſin. 1 *Rol. Abr.* 658.

A man has a houſe, and locks it, and departs, and another comes to the houſe and takes the ring of the houſe in his hand, and ſays that he claims the houſe to himſelf in fee, without making any entry into it, this is a diſſeiſin of the houſe; for the claim he made upon taking the ring into his hand ſhews his intention in doing it to be a plain ſeiſin of the intire freehold, and conſequently a diſſeiſin of the true proprietor; and his non-entry into the houſe, upon his ſeiſing of it, will not qualify the intention of what he has done, ſince his ſeiſin of part, in the name of the whole, gives him whatſoever an entry could have done, and therefore ſuch an entry was not neceſſary. 1 *Rol. Abr.* 659.

A man has a mill, and *A.* turns the water that uſed to ſerve the mill, ſo that it cannot grind; this is a diſſeiſin of the mill, for which an aſſiſe lies againſt *A.* for to deprive a man of the means he has of obtaining the profits of his freehold, is in effect to diſſeiſe him of his freehold. *Bro. Diſſeiſin* 25.

If *A.* cuts trees in his ſoil, and *B.* who has common there, ſays, that the ſoil is his, and commands him not to cut there, whereupon *A.* departs out of the land, this is no diſſeiſin in *B.* for he who has no right to a freehold cannot be ſeiſed of it by bare words only, which are fleeting and tranſitory, and do not amount to ſuch an act of notoriety and ſolemnity, as is required in gaining poſſeſſion of a freehold, whereof ſtrangers are to take notice. 1 *Rol. Abr.* 659. *Bro. Diſſeiſin* 42.

If a man who has a right of entry into lands, in coming thither is diſturbed and hindred from entring, this is a diſſeiſin, ſuch hindrance of entry being equivalent to an actual ouſter of the freehold. 1 *Rol. Abr.* 659.

If the King be ſeiſed in fee of the manor of *B.* and a ſtranger erects a ſhop in a vacant plat of it, and takes the profit of it without paying any rent to the King, and after the King grants over the manor in fee, and the ſtranger continues in the ſhop, and occupies it as before, this is no diſſeiſin; for the firſt entry of the ſtranger was no diſſeiſin, but an intruſion on the King's poſſeſſion; for that the King's title appearing on record, the entry in *pais*, which is not an act of equal notoriety, will not deveſt it out of him; if then the King is not diſſeiſed, his conveyance of the freehold is good, and the grantee is ſeiſed by virtue of it, and conſequently cannot be ſaid to be diſſeiſed by the ſtranger who has made no entry upon him after the King's conveyance, but only continued the old intereſt which he had before the grant, and ſo remains an intruder ſtill, and liable to an action of treſpaſs or ejectment for it. 1 *Rol. Abr.* 659. *Hob.* 322. *Bro. Diſſeiſin* 4.

Baron and feme ſeiſed in tail, the baron goes out of the country, and in his abſence the feme infeoffs *A.* in fee, this is a diſſeiſin of the huſband by *A.* becauſe the feoffment by the feme covert was void, and ſo the entry under it tortious. *Bro.* tit. *Diſſeiſin* 24.

If a diſſeiſor makes a leaſe for years or at will, and the diſſeiſee enters upon him, and then the leſſee re-enters, claiming by virtue of his leaſe, though that was only a term for years, yet he is a diſſeiſor, becauſe he enters upon the proprietor of the ſoil, and ouſts him of his poſſeſſion, and that by virtue of a former diſſeiſin, ſo that the poſſeſſion of the freehold cannot be ſuppoſed to be left in the diſſeiſee; and therefore ſuch an entry muſt be equivalent to an avowed diſſeiſin. 1 *Rol. Abr.* 662.

If a man enters into my land; claiming a leaſe for years, or enters as tenant by ſtatute merchant, when he has no right, he is a diſſeiſor, the entry being unlawful, and the pretence of title unjuſt. 1 *Rol. Abr.* 662.

A man makes a leaſe for years to another and his heirs, and the leſſee dies, and the heir claiming the term

eſters, though the term being a chattle muſt go to the executors, and not to the heir; yet the heir is no diſſeiſor, becauſe he claimed only a term, and no freehold, and ſuch a term too as was in being, and actually limited to him; and therefore the heir in this caſe, that is named in the words of limitation, ſhall be only preſumed to enter on behalf of the executor, to continue the term that was in being, and not to commit a diſſeiſin on the freehold. 1 *Rol. Abr.* 662.

Remedy againſt officers of the King making unwarrantable diſſeiſin, 3 *Ed.* 1. *c.* 24.

The penalty of diſſeiſin with robbery, *St. Weſtm.* 1. 3 *Ed.* 1. *c.* 37.

Damages given againſt diſſeiſors by aſſiſe in *London*, 6 *Ed.* 1. *c.* 14.

Impriſonment for diſſeiſin with armed force, *St. Wall.* 12 *Ed.* 1. in Appendix.

Tenants in novel diſſeiſin may make attornies, 12 *Ed.* 2. *c.* 1.

An aſſiſe ſhall be maintainable againſt the pernor of the profits, notwithſtanding any feoffment for maintenance, 1 *R.* 2 *c.* 9. 4 *H.* 4. *c.* 7. 1 *H.* 6. *c.* 3.

The chancellor ſhall grant a ſpecial aſſiſe, upon oath that a diſſeiſin is made with force or robbery, 4 *H.* 4. *cap.* 8.

For other matters, ſee **Aſſiſe, Entry, Forcible Entry, Infant,** *and* 8 Vin. Abr. *and* 2 Bac. Abr. *tit.* Diſſeiſin.

Diſſeiſin upon diſſeiſin, Is where a diſſeiſor is diſſeiſed by another.

Diſſeiſure, To *diſſeiſe*, eject, or turn out of poſſeſſion.——*Rex Richardus primus* diſſeiſivit Gerardum de Camvilla de Caſtelo & *vicecomitatu* Lincolnienſi. Paroch. Antiq. p. 152.

Diſſeiſor, Is he that putteth another out of his land, and *diſſeiſſee* is the perſon ſo put out, 4 *H.* 4 *cap.* 7.

Diſſeiſoreſs, Is a woman that *diſſeiſeth* another. *Co.* on *Littl. fol.* 357. *b.*

Diſſignare, To break open a ſeal. *Sepulto patre teſtamentum* diſſignatum *eſt.* Neubrigenſis, lib. 2 cap. 7.

Diſſenters. See **Nonconformiſts.**

Diſtillers. All perſons may diſtil ſpirits from malted corn, 2 *W.* & *M. ſt.* 2. *cap.* 9. *ſ.* 11. 8 & 9 *W.* 3. *cap.* 19. *ſ.* 13.

Penalties on ſetting up concealed veſſels or concealing their ſpirits, 3 *W.* & *M. c.* 15. 8 & 9 *W.* 3. *c.* 19. *ſ.* 10. 10 & 11 *W.* 3. *c.* 4. *ſ.* 4. *ſect.* 3. *c.* 21. *ſ.* 23.

Gaugers, &c. may break up ground to ſearch for private pipes, 10 *W.* 3. *c.* 4. *ſ.* 4.

Gaugers, &c. to keep an account of waſh, 10 & 11 *W.* 3. *c.* 21. *ſ.* 22.

Diſtilling of ſpirits from corn reſtrained, 10 & 11 *W.* 3. *c.* 4. 30 *Geo.* 2. *c.* 10. 30 *Geo.* 2. *c.* 15.

Diſtillers not to take licences as alehouſe-keepers, 1 *Ann. ſt.* 2. *c.* 14.

Diſtillers permitted to ſet up other trades, 9 *Geo.* 2 *c.* 23. *ſ.* 21. 11 *Geo.* 2. *c.* 19. *ſ.* 2.

Diſtillers not to act as juſtices upon the acts againſt retailing ſpirituous liquors, 11 *Geo.* 2. *c.* 26. *ſ.* 8.

Duty on diſtillers licences to retail ſpirituous liquors, 20 *Geo.* 2. *c.* 39. repealed, and an additional duty impoſed, 24 *Geo.* 2. *c.* 40.

Penalty on diſtillers ſelling ſpirituous liquors to be unlawfully retailed, 24 *Geo.* 2. *c.* 40. *ſ.* 11.

Penalty on diſtiller not entring his veſſel, 24 *Geo.* 2. *c.* 40. *ſ.* 18.

Commiſſioners of exciſe impowered to reward informers againſt unlawful retailers, 24 *Geo.* 2. *c.* 40. *ſ.* 32.

Juſtices being diſtillers not to grant licences, 26 *Geo.* 2. *c.* 13. *ſ.* 12.

Who are to be deemed common diſtillers, 33 *Geo.* 2. *cap.* 9. *ſ.* 13.

Penalty on malt diſtillers making gin, &c. 33 *Geo.* 2. *c.* 9. *ſ.* 17.

Diſtreſs is the thing which is taken and diſtrained upon any land for rent behind, or other duty, or for hurt done, although the property of the thing belongeth to a ſtranger. *Termes de la Ley.*

Diſtreſs, Signifies a compulſion in certain real actions, whereby to bring a man to appear in court, or to pay a debt or duty denied: The effect whereof moſt commonly is to drive the party *diſtrained* to replevy the *diſtreſs*, and ſo to take his action of treſpaſs againſt the *diſtrainer*, or elſe to compound neighbourly with him for the debt or duty for which the *diſtreſs* was made. *Cowell.*

Diſtreſs is by *Briton, cap.* 71. divided into *perſonal* and *real*. *Diſtreſs perſonal* is made by *diſtraining* a man's moveable goods, and ſeiſing all the profit of his lands and tenements, from the *teſte* or date of the writ, for the defendant's contempt, in not appearing to an action brought againſt him, after he was ſummoned or attached; and the iſſues ſo returned by the ſheriff are forfeited to the King, and eſtreated into the *Exchequer*. *Diſtreſs real* is made upon immoveable goods. This differs from an *attachment*, for that it cannot be taken by any common perſon without the compaſs of his own fee; except it be preſently after the cattle, or other thing, are driven off the ground, purpoſely to avoid the diſtreſs. *Fitz. Nat. Brev. fol.* 904. See **Attach,** and the ſtatute 17 *Car* 2. *c.* 7.

Diſtreſs is alſo divided into *finite* and *infinite*: *Finite* is that which is limited by law, how often it ſhall be made to bring the party to trial of the action, as once, twice, &c. *Old Nat. Br. fol.* 43. *Diſtreſs infinite* is without limitation, until the party come; as againſt a jury, which refuſeth to appear upon certificate of aſſiſe, the proceſs is *venire facias*, *habeas corpora*, and *diſtreſs infinite*. *Old Nat. Br. f.* 113. Then it is divided into a *grand diſtreſs*, (*An.* 52 *H.* 3. *c.* 7.) which *Fitzherbert* calls *magnam diſtrictionem*, and an *ordinary diſtreſs*. A grand diſtreſs is that which is made of all the goods and chattles that the party hath within the county. *Briton, cap.* 26. *fol.* 52. But ſee whether it be not ſometimes *all one* with a *diſtreſs infinite*. *Idem, fol.* 80. with whom alſo the ſtatute of *Marlbridge* ſeems to agree. *An.* 52 *H.* 3. *cap.* 7, 9, & 12. See **Grand diſtreſs** and **Attachment.** *Cowell, edit.* 1727.

1. *Who may diſtrain, and what things may be diſtrained, for rent; and of carrying away goods to avoid diſtreſs.*

2. *Time and manner of diſtraining, and what is to be done with the diſtreſs.*

3. *Where the diſtreſs ſhall be deemed wrongful and exceſſive; and of diſtraining for fines and amercements.*

1. *Who may diſtrain, and what things may be diſtrained, for rent; and of carrying away goods to avoid diſtreſs.*

If a man ſeiſed in fee makes a gift in tail, or a leaſe for life, years, or at will, ſaving the reverſion to himſelf, with a reſervation of rent, or other ſervices; the law gives the donor or leſſor, without any expreſs proviſion, a remedy for ſuch rent or ſervices by diſtreſs. See *Lit. ſect.* 214. *Bro.* tit. *Diſtreſs* 5, 15.

But if the donor or leſſor reſerve not the reverſion, he cannot diſtrain of common right, but he may reſerve to himſelf a power of diſtraining, or the reverſion may be good to bind the leſſee by way of contract, for the performance whereof the leſſor ſhall have an action of debt. *Co. Lit.* 47. *a.* 5 *Co.* 3. 2 *Saund.* 303.

A rent diſtrainable of common right, or by the Common law, cannot iſſue out of an incorporeal inheritance; as if I have a right of common in another man's foil, and I grant it to *A.* reſerving rent, if the rent be behind, I cannot diſtrain the beaſts of *A.* becauſe that the right of common which every man has, runs through the whole common. *Co. Lit.* 47. *a.* 142. *a.* 2 *Rol. Abr.* 446.

A rent granted for equality of partition by one coparcener to another, is good; ſo is a rent granted to a widow out of lands whereof ſhe is dowable, in lieu of her dower; the like law of a rent granted in lieu of lands upon an exchange; and for theſe the law gives a remedy by diſtreſs, without any proviſion of the parties, though

though they have no reverſion. *Co. Lit.* 169. *b.* 3 *Co.* 22. *b.* *Kelw.* 104, 126.

If a termor grants all his term, rendering rent, he cannot diſtrain for it. *Bro. Diſtreſs* 7.

If a man ſeiſed of land in fee, and poſſeſſed of other land for years, grants a rent-charge for life out of both, with a power to diſtrain in both, if the rent be in arrear, the leaſehold as well as the lands of inheritance are ſubject to the diſtreſs, becauſe a man may oblige his chattles to the diſcharge of the rent; but the rent being a freehold ſhall iſſue only out of the inheritance, becauſe the leaſehold being only a temporary and periſhing intereſt, is not a fund commenſurate to the charge, and therefore the rent ſhall iſſue out of the inheritance, which for its duration is a more competent eſtate to ſupport the charge, and render the grant effectual; and hence it was adjudged, that though the grantee might diſtrain the leaſehold lands, yet he muſt avow for a rent iſſuing only out of the inheritance. 7 *Co.* 51. *Co. Lit.* 147. *b.* *Cro. Jac.* 390. 1 *Rol. Rep.* 330. *Cro. Eliz.* 607, 622.

The ſervices or rent, for which the lord or leſſor may diſtrain, muſt be certain, or ſuch as may be reduced to a certainty; for otherwiſe the lord cannot, in his avowry, recover damages for the non-performance or non-payment, when the jury cannot determine what injury he has ſuſtained; but if the tenant holds of his lord to ſheer all his ſheep feeding in ſuch a manor; this is certain enough, becauſe 'tis eaſy to compute the number within the precincts of the manor; and conſequently what expence the lord is at in imploying other hands to that work, and what damages he has ſuſtained by the omiſſion of his tenant. *Co. Lit.* 96. *a.*

If a man ſeiſed in fee, or for life, of a rent-charge, after arrearages incur, grants over the rent to another, he cannot diſtrain for theſe arrearages, becauſe they are by the grant divided from the freehold of the rent. 4 *Co.* 50. *b.* *Vaugh.* 40, 41.

If tenant *pur auter vie*, or tenant for years, held over, yet the leſſor could not diſtrain them for rent, that became due before the determination of their reſpective leaſes, though they continued in poſſeſſion of the lands afterwards; for when the leaſe was determined, the leſſor could not avow on them as his tenants, claiming under a leaſe, which was determined. 6 *Co.* 64. *Co. Lit.* 47. *Cro. Jac.* 442.

To remedy this, it is provided by the 8 *Ann.* "That whereas tenants *pur auter vie*, and leſſees for years, or at will, frequently hold over the tenements to them demiſed, after the determination of ſuch leaſes; and whereas after the determination of ſuch, or any other leaſes, no diſtreſſes can by law be made for any arrears of rent that grew due on ſuch reſpective leaſes, before the determination thereof; it is hereby further enacted, That from and after the firſt day of *May* 1710, it ſhall and may be lawful for any perſon or perſons, having any rent in arrear, or due upon any leaſe for life or lives, or for years, or at will, ended or determined, to diſtrain for ſuch arrears after the determination of the ſaid reſpective leaſes, in the ſame manner as they might have done, if ſuch leaſe or leaſes had not been ended or determined; provided that ſuch diſtreſs be made within the ſpace of ſix kalendar months, after the determination of ſuch leaſe, and during the continuance of ſuch landlord's title or intereſt, and during the poſſeſſion of the tenant from whom ſuch arrears became due."

There muſt be a valuable property in ſome body in the things diſtrained, therefore no diſtreſs can be of dogs, deer, conies, *&c.* which are *feræ naturæ*. *Co. Lit.* 47.

Things fixed to the freehold, or part of the freehold, as furnaces, cauldrons, doors, windows fixed to the freehold, or corn growing cannot be diſtrained. *Co. Lit.* 47. 2 *Mod.* 61.

No man can be diſtrained by the utenſils of his trade for a rent, as the ax of a carpenter, the books of a ſcholar, the materials for making cloth in a weaver's ſhop; for theſe the law protects under a preſumption that without them the tenant could neither be uſeful to others, nor gain a livelihood for himſelf. *Co. Lit.* 47.

Alſo for the benefit of trade and commerce, ſome things are privileged from being diſtrained, as a horſe in a ſmith's ſhop, a horſe in an inn, ſacks of corn or meal in a mill, cloth or garments in a taylor's ſhop, or ſacks of corn or meal in a market. *Co. Lit.* 47. 3 *Bulſt.* 270. 1 *Rol. Abr.* 668. *Cro. Eliz.* 569.

So if a horſe carries corn to a mill, and is tied to the mill-door, during the grinding of the corn, he ſhall not be diſtrained; but cattle driving to a market, and by the way put into a paſture, may be diſtrained. *Cro. Eliz.* 552. 2 *Vent.* 50.

And theſe things are privileged, tho' they continue there three or four days, or are retained never ſo long by the tenant for his ſatisfaction in ſome thing he has done about them. 1 *Rol. Abr.* 668.

If a man rides to a place, and is there taken ſick, by means whereof he is obliged to tarry there two or three days, his horſe cannot be diſtrained for rent. 1 *Rol. Abr.* 668.

Things diſtrained damage-feaſant cannot be diſtrained for rent, becauſe they are in the cuſtody of the law. *Co. Lit.* 47.

If a clothier having put his wool to ſpin comes with an horſe to carry it back, but becauſe there is no beam or weights at the ſpinner's houſe to weigh it, the clothier and ſpinner, with the leave of a neighbour, who had a beam and weights in his houſe, bring the horſe thither, and enter the houſe to weigh the yarn, the lord of the houſe, whilſt they are there, cannot diſtrain the horſe for ſervices. *Cro. Eliz.* 549, 596.

Things for which a replevin will not lie, ſo as to be known again, as money out of a bag, cannot be diſtrained for this reaſon; and alſo for the damages, that ſhocks of corn, hay, *&c.* might ſuſtain, it was held that they could not be diſtrained. 1 *Rol. Abr.* 667. *Kelw.* 145. 2 *Inſt.* 82.

Averia carucæ, or beaſts of the plough, or any thing belonging to it cannot by Common law be diſtrained, while there are other goods or beaſts (which *Bracton* calls *Animalia otioſa*) which may be diſtrained; alſo a covenable diſtreſs is not of armour or veſſel, or apparel, or jewels, ſo long as there are other ſufficient and covenable; nor of ſheep, ſaddle-horſes, poultry, or fiſh. *Co. Lit.* 47. 2 *Inſt.* 143.

By the ſtatute *De diſtrictione ſcaccarii* made 51 *H.* 3. "No man ſhall be diſtrained by the beaſts that gain his land, nor by his ſheep, but until another diſtreſs or chattels ſufficient be found, except for damage-feaſant."

It is agreed, that the cattle of a ſtranger eſcaping into his neighbour's grounds, and there being levant and couchant, may be diſtrained by the lord or leſſor of thoſe grounds for rent or ſervices due to him; for it ſhall be imputed the owner's folly that he did not provide againſt this miſchief by proper bounds and fences. 2 *Inſt.* 296. *Co. Lit.* 47.

Cattle which are in certain land by way of agiſtment may be diſtrained for rent. 1 *Rol. Abr.* 669.

If the tenant ought to incloſe againſt the highway by preſcription, and in driving my cattle by the way, by default of the incloſure they eſcape into the land of the tenant, the lord cannot diſtrain them; ſo if he ought to incloſe by preſcription againſt my land, and my cattle eſcape. 1 *Rol. Abr.* 668.

If *A.* and *B.* have two cloſes lying contiguous, and *A.* by preſcription is bound to repair the fences between both the ſaid cloſes, and *A.* leaſes his cloſes to *C.* for years, rendering rent; and the fences between the two cloſes being out of repair, the cattle of *B.* eſcape into the cloſe of *A.* he may diſtrain them for rent arrear, and it is not material whether they are levant or couchant or not; adjudged, and the judgment affirmed upon a writ of error, tho' objected that they eſcaped there through the default of *A.* who ought to have taken care that they were repaired: And by *Sanders*; *nota*, This was a hard caſe to maintain, there being a vaſt difference between the lord's taking a diſtreſs within his ſeigniory, and the leſſor's diſtraining for rent reſerved upon his own leaſe, for the lord hath nothing to do with the land or fences, and ſo it concerns not him whether they are in repair

or

or not; otherwiſe of the leſſor, for he ought to repair them, elſe he will have advantage of his own wrong. 2 *Saund.* 289, 290.

If a man, that is driving his cattle to *London* to ſell, aſks leave of the leſſor to put his cattle into the ground for a night, and he giving him leave ſo to do, with the conſent of the leſſee, and the cattle are put in accordingly, the leſſor is not concluded by this licence, but that he may diſtrain them for rent; adjudged upon demurrer; and it not appearing by the pleading that the ground belonged to a common inn, it came not in queſtion whether in that caſe they might have been diſtrained. 2 *Vent.* 50. 3 *Lev.* 260, 261.

Stat. 11 *Geo*, 2 *cap.* 19. *ſect.* 1. In caſe any tenant or leſſee of lands or tenements, upon the demiſe whereof any rent is payable, ſhall fraudulently or clandeſtinely carry off his goods, to prevent the landlord from diſtraining; it ſhall be lawful for every landlord within *England*, *Wales*, or *Berwick*, or any perſon by him impowered, within thirty days next enſuing ſuch carrying off, to ſeize ſuch goods wherever the ſame ſhall be found, as a diſtreſs for the rent, and the ſame to ſell or diſpoſe of, as if the ſaid goods had been diſtrained upon ſuch premiſſes.

Sect. 2. Provided that no landlord ſhall ſeize goods ſold *bona fide*, and for a valuable conſideration, to any perſon not privy to ſuch fraud.

Sect. 3. If any ſuch tenant ſhall fraudulently remove his goods, or if any perſon ſhall knowingly aſſiſt ſuch tenant in fraudulently conveying away his goods, or in concealing the ſame, all perſons ſo offending ſhall forfeit to the landlord, from whoſe eſtate ſuch goods were carried off, double the value of the goods, to be recovered by action of debt in any of his Majeſty's courts at *Weſtminſter*, or in the courts of ſeſſion in the counties palatine, or in the courts of grand ſeſſions in *Wales*.

Sect. 4. Where the goods carried off ſhall not exceed the value of 50 *l.* it ſhall be lawful for the landlord, his bailiff, ſervant or agent, to exhibit a complaint in writing againſt ſuch offenders before two juſtices of peace reſiding near the place, not being intereſted in the tenements; who may ſummon the parties, examine the fact, and all witneſſes upon oath, or if quakers, upon affirmation; and in a ſummary way determine whether ſuch perſon be guilty of the offence, and inquire of the value of the goods by them fraudulently carried off or concealed; and upon proof of the offence, by order of the ſaid juſtices, may judge the offenders to pay double the value of the goods to ſuch landlord, his bailiff, ſervant or agent, as the juſtices ſhall appoint; and in caſe the offenders having notice of ſuch order ſhall neglect ſo to do, ſhall by warrant levy the ſame by diſtreſs and ſale of goods; and for want of diſtreſs may commit the offenders to the houſe of correction, to be kept to hard labour for ſix months, unleſs the money be ſooner ſatisfied.

Sect. 5. It ſhall be lawful for any perſon aggrieved by ſuch order of the two juſtices to appeal to the next quarter ſeſſions, who ſhall hear and determine ſuch appeal, and give coſts to either party.

Sect. 6. Where the party appealing ſhall enter into a recognizance with ſurety in double the ſum ordered, with condition to appear at ſuch quarter-ſeſſions, the order of the two juſtices ſhall not be executed in the mean time.

Sect. 7 Where any goods fraudulently carried away by any teneant, his ſervant or agent, or other perſon aſſiſting, ſhall be put in any place locked up or ſecured, ſo as to prevent ſuch goods from being ſeized for rent, it ſhall be lawful for the landlord, his ſteward, bailiff, or other perſon impowered to ſeize for rent ſuch goods, (firſt calling to his aſſiſtance the conſtable, headborough, borſholder, or other peace officer, of the place where the ſame ſhall be ſuſpected to be concealed, who are required to aſſiſt; and in caſe of a dwelling houſe, oath being alſo made before ſome juſtice of peace of a reaſonable ground to ſuſpect that ſuch goods are there) in the daytime to break open ſuch houſe, *&c.* and ſeize ſuch goods for the rent, as they might have done if ſuch goods had been put in any open place.

Sect. 8. It ſhall be lawful for every landlord, his ſteward, bailiff, receiver or other perſon impowered by him, to ſeize, as a diſtreſs for rent, any cattle or ſtock of their tenants feeding upon any common appendant, or appurtenant to any part of the premiſſes demiſed, and alſo to ſeize corn and graſs, hops, roots, fruits or other product, growing on the eſtate demiſed, as diſtreſs for rent; and the ſame to cut, gather and lay up, when ripe, in the barn or other proper place on the premiſſes; and in caſe there ſhall be no proper place, then in any other barn, or proper place which ſuch landlord ſhall procure as near as may be to the premiſſes; and in convenient time to appraiſe, ſell or diſpoſe of the ſame, toward ſatisfaction of the rent, in the ſame manner as other goods may be ſeized and diſpoſed of, the appraiſement to be taken when gathered and made.

Sect. 9. Provided, that notice of the place where the goods ſhall be lodged, ſhall within one week be given to ſuch tenant, or left at his laſt place of abode; and if after any diſtreſs for rent ſo taken, of corn, graſs or other product growing, and before the ſame ſhall be ripe and cut, the tenant, his executors, adminiſtators or aſſigns, ſhall pay to the landlord, or to the ſteward, or other perſon imployed to receive the rents, the whole rent in arrear, together with coſts, ſuch diſtreſs ſhall ceaſe, and the corn, graſs or other product diſtrained, ſhall be delivered up to the tenant, *&c.*

Sect. 19. Where any diſtreſs ſhall be made for rent due, and any irregularity or unlawful act ſhall be afterwards done by the party diſtraining or his agents, the diſtreſs ſhall not be therefore deemed unlawful, nor the party a treſpaſſer *ab initio*; but the party grieved ſhall recover ſatisfaction for the ſpecial damages ſuſtained thereby, and no more, in an action of treſpaſs, or on the caſe; the plaintiff to recover full coſts.

By ſtat. 2 *Will. & M. c.* 5. *ſect.* 3. Any perſon, having rent arrear, may ſeize and ſecure any ſheaves or cocks of corn, or corn looſe, or in the ſtraw, or hay in any barn or granary, or upon an hovel, ſtack or rick, or upon any part of the land charged with ſuch rent, or to lock up or detain the ſame in the place where the ſame ſhall be found, in the nature of a diſtreſs, till the ſame ſhall be replevied, upon ſuch ſecurity to be given as aforeſaid; and in default of replevying the ſame within the time aforeſaid, to ſell the ſame after ſuch appraiſement thereof to be made, ſo as ſuch corn, grain, or hay, be not removed by the perſon diſtraining, to the damage of the owner thereof, out of the place where the ſame ſhall be found and ſeized; but be kept there *as impounded*, till the ſame ſhall be replevied or ſold as aforeſaid.

2. *Time and manner of diſtraining, and what is to be done with the diſtreſs.*

A diſtreſs for a rent-ſervice or rent-charge cannot be in the night, but one may diſtrain cattle damage feaſant in the night, otherwiſe they may be gone before morning. *Co. Lit.* 142. 7 *Co.* 7. *a.* 9 *Co.* 66. *Latch* 211. 4 *Leon.* 218.

By the ſtatute of *Marlbridge*, made 52 *H.* 3. *c.* 2. "None ſhall diſtrain any to come to his court, which is not of his fee, or upon whom he has no juriſdiction, by reaſon of a hundred or bailiwick, nor take diſtreſſes out of the fee or place where he hath juriſdiction."

By the ſame ſtatute, *cap.* 15. it is enacted, "That from thenceforth it ſhall be lawful for no man for any manner of cauſe to take diſtreſſes out of his fee, or in the King's highway, or in the common ſtreet, but only to the King and his officers, having ſpecial authority ſo to do."

If the lord coming to diſtrain hath the view of the beaſts within his fee, and before he can diſtrain them the tenant chaſes them into the highway, the lord, notwithſtanding the ſtatute of *Marlbridge*, *cap.* 15. may diſtrain them there. 2 *Inſt.* 132.

A diſtreſs for rent may be taken in a houſe, if the doors be open; ſo it may be taken out of a window. 1 *Rol. Abr.* 671.

By

By the Common law, a man might have driven a diſtreſs whither he pleaſed, which was very miſchievous, *Firſt*, Becauſe the tenant was bound to give the beaſts ſuſtenance, if impounded in an open pound, and being driven into another county, he could not by intendment of law know where they were. *Secondly*, He could not tell where to have a replevy. 2 *Inſt.* 106. But now by the ſtatute of *Marlbridge*, made 52 *H.* 3. *c.* 4. none ſhall cauſe a diſtreſs to be driven out of the county where taken, on pain of fine, *&c.*

Alſo by the ſtatute of the 1 *&* 2 *Ph. & Mary*, *cap.* 12. "No diſtreſs ſhall be driven out of the hundred, rape, wapentake, or lathe, where taken, except to a pound overt within the ſame ſhire, not above three miles diſtant from the place where taken, and no diſtreſs ſhall be impounded in ſeveral places whereby the owner ſhall be conſtrained to ſue ſeveral replevies; upon pain that every perſon offending ſhall forfeit to the party grieved 5 *l.* and treble damages.

If a man diſtrains dead goods, as utenſils of a houſe, or ſuch like, which may take damage by wet or weather, and the like, he ought to impound them in an houſe or other pound covert within three miles in the ſame county; for if he impounds them in a pound overt he ought to anſwer for them. *Co. Lit.* 47.

If a man diſtrains cattle, and puts them in a pound overt, the owner ought to keep them at his peril, for it is lawful for him to come there for this purpoſe; but if he puts the cattle in a pound covert or cloſe, there he ought to keep them at his peril, and yet he ſhall not have any ſatisfaction for it. *Co. Lit.* 47. 2 *Inſt.* 106. *S. P.*

He who diſtrains cannot make uſe of the diſtreſs, ſo as to work a horſe, *&c.* for he hath no property but a bare power by act of law to take it: So if a man hath a return irrepleviſable, yet he cannot work it, for the judgment is to remit it to the pound *ibidem manſur'*, *&c. Own* 124. *Dyer* 280.

If a man takes a cow for a diſtreſs, he cannot milk her; for tho' the cow be the better for this, yet he ought not to do good to the owner without his conſent, and perhaps the owner would have come before any damage came by this to the cow; and if it periſh by this, yet he who took the diſtreſs may diſtrain again. 1 *Rol. Abr.* 648, 879. *Noy* 119. *Cro. Jac.* 147. *Yelv.* 96.

If a man diſtrains a horſe, and impounds him, and the horſe leaps three times over the pound, which is as high as it uſed to be, and therefore he who diſtrained ties the horſe to a poſt in the pound, by reaſon whereof he ſtrangles himſelf, the owner may have an action of treſpaſs. 1 *Rol. Abr.* 673.

Diſtreſſes for rent being in nature of pledges, and no power to ſell or diſpoſe of them, in the perſon diſtraining, they oftentimes proved of little or no benefit towards haſtening the payment of the rent; for remedy whereof it has been enacted by ſtat. 2 *Will. & M. c.* 5. *ſect.* 2. That where any goods or chattels ſhall be diſtrained for any rent, reſerved and due upon any demiſe, leaſe, or contract whatſoever, and the tenant or owner of the goods ſo diſtrained ſhall not within five days next after ſuch diſtreſs taken, and notice thereof (with the cauſe of ſuch taking) left at the chief manſion-houſe, or other moſt notorious place on the premiſſes, charged with the rent diſtrained for, replevy the ſame with ſufficient ſurety to be given to the ſheriff according to law; that then after ſuch diſtreſs and notice as aforeſaid, and expiration of the ſaid five days, the perſon diſtraining ſhall and may with the ſheriff, or under-ſheriff of the county, or with the conſtable of the hundred, pariſh, or place where ſuch diſtreſs ſhall be taken (who are hereby required to be aiding and aſſiſting therein) cauſe the goods and chattels ſo diſtrained to be appraiſed by two ſworn appraiſers (whom ſuch ſheriff, under ſheriff, or conſtable, are thereby impowered to ſwear) to appraiſe the ſame truly, according to the beſt of their underſtanding; and after ſuch appraiſment ſhall and may lawfully ſell the goods and chattels ſo diſtrained, for the beſt price that can be gotten for the ſame, towards ſatisfaction of the rent for which the ſaid goods and chattels ſhall be diſtrained, and of the charges of ſuch diſtreſs, appraiſement and ſale, leaving the overplus (if any) in the hands of the ſheriff, under-ſheriff, or conſtable, for the owner's uſe.

Sect. 4. And upon any pound-breach or reſcous of goods or chattels diſtrained for rent, the perſon or perſons grieved thereby ſhall, in a ſpecial action upon the caſe, for the wrong thereby ſuſtained, recover treble damages and coſts of ſuit againſt the offender or offenders in any ſuch reſcous or pound-breach, any or either of them, or againſt the owners of the ſaid goods diſtrained, in caſe the ſame be afterwards found to have come to his uſe or poſſeſſion.

Sect. 5. Provided, that in caſe any ſuch diſtreſs and ſale be made by virtue or colour of this act, for rent pretended to be arrear and due, where in truth no rent is arrear, or due to the perſon or perſons diſtraining, or to him or them in whoſe name or names, or right, ſuch diſtreſs ſhall be taken; that then the owner of ſuch goods or chattels diſtrained, and ſold as aforeſaid, his executors or adminiſtrators ſhall and may, by action of treſpaſs, or upon the caſe, to be brought againſt the perſon or perſons ſo diſtraining, any or either of them, his, or their executors or adminiſtrators, recover double the value of the goods or chattels ſo diſtrained and ſold, together with full coſts of ſuit.

By ſtat. 11 *Geo.* 2. *c.* 19. *ſect.* 10. It ſhall be lawful for any perſon lawfully taking any diſtreſs for rent, to impound or ſecure the diſtreſs on ſuch part of the premiſſes chargeable with the rent as ſhall be moſt convenient, and to appraiſe, ſell and diſpoſe of the ſame upon the premiſſes, as any perſon may now do off the premiſſes, by virtue of 2 *W. & Mar. ſtat.* 1. *cap.* 5. or of 4 *Geo.* 2. *cap.* 28. and it ſhall be lawful for any perſon to come and go to and from ſuch part of the premiſſes, to view, appraiſe and buy, and alſo to carry off the ſame on account of the purchaſer; and if any pound-breach or reſcous be made of goods diſtrained for rent ſecured by virtue of this act, the perſon aggrieved ſhall have like remedy as in caſes of pound-breach or reſcous by the ſaid ſtatute.

3. *Where the diſtreſs ſhall be deemed wrongful and exceſſive; and of diſtraining for fines and amercements.*

By the ſtatute of *Marlbridge*, diſtreſſes muſt be reaſonable, and not too great.

If forty ſheep be taken for 2 *d.* and ſixteen oxen for 9 *d.* this is exceſſive. 1 *Rol. Abr.* 674.

So if two oxen are diſtrained for four pair of gloves, ten ſheep for one pair, and ten for another, it is an exceſſive diſtreſs. 1 *Rol. Abr.* 674.

But if a man takes five horſes joined in a cart for 3 *d.* rent, this is not exceſſive for the intirety. 8 *Hen.* 4. 15. 1 *Vent.* 183. *S. C.*

So if the lord diſtrain an ox or an horſe for a penny, if there were no other diſtreſs upon the land holden, the diſtreſs is not exceſſive; but if there were ſheep or ſwine, *&c.* then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value. 2 *Inſt.* 107.

If for ten pound rent due at one day, a man diſtrains goods of the value of 40 *s.* only, and at the time of taking the diſtreſs there are goods of a ſufficient value upon the premiſſes, he cannot, for the ſame rent, diſtrain again; for it was his folly, that at the firſt he diſtrained no more; but if there be rent in arrear at ſeveral days, a diſtreſs may be taken for what was due at the other days. *Moor* 7. *pl.* 26. *Cro. Eliz.* 13. *Cro. Diſtreſs*, 98.

If a diſtreſs be taken of goods without cauſe, the owner may reſcue them. *Co. Lit.* 47.

But if a diſtreſs be taken without cauſe, and put into a pound, the owner cannot break the pound and take them out, becauſe they are in the cuſtody of the law. *Co. Lit.* 47. *b.* 1 *And.* 31,

If the lord, or another that has a rent, diſtrains ſeveral times for his ſervice or rent, where none is in arrear, the tenant may by the common law have an *aſſiſe de ſovent diſtreſs*. *F. N. B.* 178.

or not; otherwiſe of the leſſor, for he ought to repair them, elſe he will have advantage of his own wrong. 2 *Saund.* 289, 290.

If a man, that is driving his cattle to *London* to ſell, aſks leave of the leſſor to put his cattle into the ground for a night, and he giving him leave ſo to do, with the conſent of the leſſee, and the cattle are put in accordingly, the leſſor is not concluded by this licence, but that he may diſtrain them for rent; adjudged upon demurrer; and it not appearing by the pleading that the ground belonged to a common inn, it came not in queſtion whether in that caſe they might have been diſtrained. 2 *Vent.* 50. 3 *Lev.* 260, 261.

Stat. 11 *Geo*, 2 *cap.* 19. *ſect.* 1. In caſe any tenant or leſſee of lands or tenements, upon the demiſe whereof any rent is payable, ſhall fraudulently or clandeſtinely carry off his goods, to prevent the landlord from diſtraining; it ſhall be lawful for every landlord within *England*, *Wales*, or *Berwick*, or any perſon by him impowered, within thirty days next enſuing ſuch carrying off, to ſeize ſuch goods wherever the ſame ſhall be found, as a diſtreſs for the rent, and the ſame to ſell or diſpoſe of, as if the ſaid goods had been diſtrained upon ſuch premiſſes.

Sect. 2. Provided that no landlord ſhall ſeize goods ſold *bona fide*, and for a valuable conſideration, to any perſon not privy to ſuch fraud.

Sect. 3. If any ſuch tenant ſhall fraudulently remove his goods, or if any perſon ſhall knowingly aſſiſt ſuch tenant in fraudulently conveying away his goods, or in concealing the ſame, all perſons ſo offending ſhall forfeit to the landlord, from whoſe eſtate ſuch goods were carried off, double the value of the goods, to be recovered by action of debt in any of his Majeſty's courts at *Weſtminſter*, or in the courts of ſeſſion in the counties palatine, or in the courts of grand ſeſſions in *Wales*.

Sect. 4. Where the goods carried off ſhall not exceed the value of 50 *l.* it ſhall be lawful for the landlord, his bailiff, ſervant or agent, to exhibit a complaint in writing againſt ſuch offenders before two juſtices of peace reſiding near the place, not being intereſted in the tenements; who may ſummon the parties, examine the fact, and all witneſſes upon oath, or if quakers, upon affirmation; and in a ſummary way determine whether ſuch perſon be guilty of the offence, and inquire of the value of the goods by them fraudulently carried off or concealed; and upon proof of the offence, by order of the ſaid juſtices, may judge the offenders to pay double the value of the goods to ſuch landlord, his bailiff, ſervant or agent, as the juſtices ſhall appoint; and in caſe the offenders having notice of ſuch order ſhall neglect ſo to do, ſhall by warrant levy the ſame by diſtreſs and ſale of goods; and for want of diſtreſs may commit the offenders to the houſe of correction, to be kept to hard labour for ſix months, unleſs the money be ſooner ſatisfied.

Sect. 5. It ſhall be lawful for any perſon aggrieved by ſuch order of the two juſtices to appeal to the next quarter ſeſſions, who ſhall hear and determine ſuch appeal, and give coſts to either party.

Sect. 6. Where the party appealing ſhall enter into a recognizance with ſurety in double the ſum ordered, with condition to appear at ſuch quarter-ſeſſions, the order of the two juſtices ſhall not be executed in the mean time.

Sect. 7 Where any goods fraudulently carried away by any teneant, his ſervant or agent, or other perſon aſſiſting, ſhall be put in any place locked up or ſecured, ſo as to prevent ſuch goods from being ſeized for rent, it ſhall be lawful for the landlord, his ſteward, bailiff, or other perſon impowered to ſeize for rent ſuch goods, (firſt calling to his aſſiſtance the conſtable, headborough, borſholder, or other peace officer, of the place where the ſame ſhall be ſuſpected to be concealed, who are required to aſſiſt; and in caſe of a dwelling houſe, oath being alſo made before ſome juſtice of peace of a reaſonable ground to ſuſpect that ſuch goods are there) in the daytime to break open ſuch houſe, *&c.* and ſeize ſuch goods for the rent, as they might have done if ſuch goods had been put in any open place.

Sect. 8. It ſhall be lawful for every landlord, his ſteward, bailiff, receiver or other perſon impowered by him, to ſeize, as a diſtreſs for rent, any cattle or ſtock of their tenants feeding upon any common appendant, or appurtenant to any part of the premiſſes demiſed, and alſo to ſeize corn and graſs, hops, roots, fruits or other product, growing on the eſtate demiſed, as diſtreſs for rent; and the ſame to cut, gather and lay up, when ripe, in the barn or other proper place on the premiſſes; and in caſe there ſhall be no proper place, then in any other barn, or proper place which ſuch landlord ſhall procure as near as may be to the premiſſes; and in convenient time to appraiſe, ſell or diſpoſe of the ſame, toward ſatisfaction of the rent, in the ſame manner as other goods may be ſeized and diſpoſed of, the appraiſement to be taken when gathered and made.

Sect. 9. Provided, that notice of the place where the goods ſhall be lodged, ſhall within one week be given to ſuch tenant, or left at his laſt place of abode; and if after any diſtreſs for rent ſo taken, of corn, graſs or other product growing, and before the ſame ſhall be ripe and cut, the tenant, his executors, adminiſtators or aſſigns, ſhall pay to the landlord, or to the ſteward, or other perſon imployed to receive the rents, the whole rent in arrear, together with coſts, ſuch diſtreſs ſhall ceaſe, and the corn, graſs or other product diſtrained, ſhall be delivered up to the tenant, *&c.*

Sect. 19. Where any diſtreſs ſhall be made for rent due, and any irregularity or unlawful act ſhall be afterwards done by the party diſtraining or his agents, the diſtreſs ſhall not be therefore deemed unlawful, nor the party a treſpaſſer *ab initio*; but the party grieved ſhall recover ſatisfaction for the ſpecial damages ſuſtained thereby, and no more, in an action of treſpaſs, or on the caſe; the plaintiff to recover full coſts.

By ſtat. 2 *Will. & M. c.* 5. *ſect.* 3. Any perſon, having rent arrear, may ſeize and ſecure any ſheaves or cocks of corn, or corn looſe, or in the ſtraw, or hay in any barn or granary, or upon an hovel, ſtack or rick, or upon any part of the land charged with ſuch rent, or to lock up or detain the ſame in the place where the ſame ſhall be found, in the nature of a diſtreſs, till the ſame ſhall be replevied, upon ſuch ſecurity to be given as aforeſaid; and in default of replevying the ſame within the time aforeſaid, to ſell the ſame after ſuch appraiſement thereof to be made, ſo as ſuch corn, grain, or hay, be not removed by the perſon diſtraining, to the damage of the owner thereof, out of the place where the ſame ſhall be found and ſeized; but be kept there *as impounded*, till the ſame ſhall be replevied or ſold as aforeſaid.

2. *Time and manner of diſtraining, and what is to be done with the diſtreſs.*

A diſtreſs for a rent-ſervice or rent-charge cannot be in the night, but one may diſtrain cattle damage feaſant in the night, otherwiſe they may be gone before morning. *Co. Lit.* 142. 7 *Co.* 7. *a.* 9 *Co.* 66. *Latch* 211. 4 *Leon.* 218.

By the ſtatute of *Marlbridge*, made 52 *H.* 3. *c.* 2. "None ſhall diſtrain any to come to his court, which is not of his fee, or upon whom he has no juriſdiction, by reaſon of a hundred or bailiwick, nor take diſtreſſes out of the fee or place where he hath juriſdiction."

By the ſame ſtatute, *cap.* 15. it is enacted, "That from thenceforth it ſhall be lawful for no man for any manner of cauſe to take diſtreſſes out of his fee, or in the King's highway, or in the common ſtreet, but only to the King and his officers, having ſpecial authority ſo to do."

If the lord coming to diſtrain hath the view of the beaſts within his fee, and before he can diſtrain them the tenant chaſes them into the highway, the lord, notwithſtanding the ſtatute of *Marlbridge*, *cap.* 15. may diſtrain them there. 2 *Inſt.* 132.

A diſtreſs for rent may be taken in a houſe, if the doors be open; ſo it may be taken out of a window. 1 *Rol. Abr.* 671.

By

By the Common law, a man might have driven a diſtreſs whither he pleaſed, which was very miſchievous, *Firſt*, Becauſe the tenant was bound to give the beaſts ſuſtenance, if impounded in an open pound, and being driven into another county, he could not by intendment of law know where they were. *Secondly*, He could not tell where to have a replevy. 2 *Inſt.* 106. But now by the ſtatute of *Marlbridge*, made 52 *H.* 3. *c.* 4. none ſhall cauſe a diſtreſs to be driven out of the county where taken, on pain of fine, *&c.*

Alſo by the ſtatute of the 1 *&* 2 *Ph. & Mary*, *cap.* 12. "No diſtreſs ſhall be driven out of the hundred, rape, wapentake, or lathe, where taken, except to a pound overt within the ſame ſhire, not above three miles diſtant from the place where taken, and no diſtreſs ſhall be impounded in ſeveral places whereby the owner ſhall be conſtrained to ſue ſeveral replevies; upon pain that every perſon offending ſhall forfeit to the party grieved 5 *l.* and treble damages.

If a man diſtrains dead goods, as utenſils of a houſe, or ſuch like, which may take damage by wet or weather, and the like, he ought to impound them in an houſe or other pound covert within three miles in the ſame county; for if he impounds them in a pound overt he ought to anſwer for them. *Co. Lit.* 47.

If a man diſtrains cattle, and puts them in a pound overt, the owner ought to keep them at his peril, for it is lawful for him to come there for this purpoſe; but if he puts the cattle in a pound covert or cloſe, there he ought to keep them at his peril, and yet he ſhall not have any ſatisfaction for it. *Co. Lit.* 47. 2 *Inſt.* 106. *S. P.*

He who diſtrains cannot make uſe of the diſtreſs, ſo as to work a horſe, *&c.* for he hath no property but a bare power by act of law to take it: So if a man hath a return irreplevisable, yet he cannot work it, for the judgment is to remit it to the pound *ibidem manſur'*, *&c. Own* 124. *Dyer* 280.

If a man takes a cow for a diſtreſs, he cannot milk her; for tho' the cow be the better for this, yet he ought not to do good to the owner without his conſent, and perhaps the owner would have come before any damage came by this to the cow; and if it periſh by this, yet he who took the diſtreſs may diſtrain again. 1 *Rol. Abr.* 648, 879. *Noy* 119. *Cro. Jac.* 147. *Yelv.* 96.

If a man diſtrains a horſe, and impounds him, and the horſe leaps three times over the pound, which is as high as it uſed to be, and therefore he who diſtrained ties the horſe to a poſt in the pound, by reaſon whereof he ſtrangles himſelf, the owner may have an action of treſpaſs. 1 *Rol. Abr.* 673.

Diſtreſſes for rent being in nature of pledges, and no power to ſell or diſpoſe of them, in the perſon diſtraining, they oftentimes proved of little or no benefit towards haſtening the payment of the rent; for remedy whereof it has been enacted by ſtat. 2 *Will. & M. c.* 5. *ſect.* 2. That where any goods or chattels ſhall be diſtrained for any rent, reſerved and due upon any demiſe, leaſe, or contract whatſoever, and the tenant or owner of the goods ſo diſtrained ſhall not within five days next after ſuch diſtreſs taken, and notice thereof (with the cauſe of ſuch taking) left at the chief manſion-houſe, or other moſt notorious place on the premiſſes, charged with the rent diſtrained for, replevy the ſame with ſufficient ſurety to be given to the ſheriff according to law; that then after ſuch diſtreſs and notice as aforeſaid, and expiration of the ſaid five days, the perſon diſtraining ſhall and may with the ſheriff, or under-ſheriff of the county, or with the conſtable of the hundred, pariſh, or place where ſuch diſtreſs ſhall be taken (who are hereby required to be aiding and aſſiſting therein) cauſe the goods and chattels ſo diſtrained to be appraiſed by two ſworn appraiſers (whom ſuch ſheriff, under ſheriff, or conſtable, are thereby impowered to ſwear) to appraiſe the ſame truly, according to the beſt of their underſtanding; and after ſuch appraiſment ſhall and may lawfully ſell the goods and chattels ſo diſtrained, for the beſt price that can be gotten for the ſame, towards ſatisfaction of the rent for which the ſaid goods and chattels ſhall be diſtrained, and of the charges of ſuch diſtreſs, appraiſement and ſale, leaving the overplus (if any) in the hands of the ſheriff, under-ſheriff, or conſtable, for the owner's uſe.

Sect. 4. And upon any pound-breach or reſcous of goods or chattels diſtrained for rent, the perſon or perſons grieved thereby ſhall, in a ſpecial action upon the caſe, for the wrong thereby ſuſtained, recover treble damages and coſts of ſuit againſt the offender or offenders in any ſuch reſcous or pound-breach, any or either of them, or againſt the owners of the ſaid goods diſtrained, in caſe the ſame be afterwards found to have come to his uſe or poſſeſſion.

Sect. 5. Provided, that in caſe any ſuch diſtreſs and ſale be made by virtue or colour of this act, for rent pretended to be arrear and due, where in truth no rent is arrear, or due to the perſon or perſons diſtraining, or to him or them in whoſe name or names, or right, ſuch diſtreſs ſhall be taken; that then the owner of ſuch goods or chattels diſtrained, and ſold as aforeſaid, his executors or adminiſtrators ſhall and may, by action of treſpaſs, or upon the caſe, to be brought againſt the perſon or perſons ſo diſtraining, any or either of them, his, or their executors or adminiſtrators, recover double the value of the goods or chattels ſo diſtrained and ſold, together with full coſts of ſuit.

By ſtat. 11 *Geo.* 2. *c.* 19. *ſect.* 10. It ſhall be lawful for any perſon lawfully taking any diſtreſs for rent, to impound or ſecure the diſtreſs on ſuch part of the premiſſes chargeable with the rent as ſhall be moſt convenient, and to appraiſe, ſell and diſpoſe of the ſame upon the premiſſes, as any perſon may now do off the premiſſes, by virtue of 2 *W. & Mar. ſtat.* 1. *cap.* 5. or of 4 *Geo.* 2. *cap.* 28. and it ſhall be lawful for any perſon to come and go to and from ſuch part of the premiſſes, to view, appraiſe and buy, and alſo to carry off the ſame on account of the purchaſer; and if any pound-breach or reſcous be made of goods diſtrained for rent ſecured by virtue of this act, the perſon aggrieved ſhall have like remedy as in caſes of pound-breach or reſcous by the ſaid ſtatute.

3. *Where the diſtreſs ſhall be deemed wrongful and exceſſive; and of diſtraining for fines and amercements.*

By the ſtatute of *Marlbridge*, diſtreſſes muſt be reaſonable, and not too great.

If forty ſheep be taken for 2 *d.* and ſixteen oxen for 9 *d.* this is exceſſive. 1 *Rol. Abr.* 674.

So if two oxen are diſtrained for four pair of gloves, ten ſheep for one pair, and ten for another, it is an exceſſive diſtreſs. 1 *Rol. Abr.* 674.

But if a man takes five horſes joined in a cart for 3 *d.* rent, this is not exceſſive for the intirety. 8 *Hen.* 4. 15. 1 *Vent.* 183. *S. C.*

So if the lord diſtrain an ox or an horſe for a penny, if there were no other diſtreſs upon the land holden, the diſtreſs is not exceſſive; but if there were ſheep or ſwine, *&c.* then the taking of the ox or horſe is exceſſive, becauſe he might have taken a beaſt of leſs value. 2 *Inſt.* 107.

If for ten pound rent due at one day, a man diſtrains goods of the value of 40 *s.* only, and at the time of taking the diſtreſs there are goods of a ſufficient value upon the premiſſes, he cannot, for the ſame rent, diſtrain again; for it was his folly, that at the firſt he diſtrained no more; but if there be rent in arrear at ſeveral days, a diſtreſs may be taken for what was due at the other days. *Moor* 7. *pl.* 26. *Cro. Eliz.* 13. *Cro. Diſtreſs*, 98.

If a diſtreſs be taken of goods without cauſe, the owner may reſcue them. *Co. Lit.* 47.

But if a diſtreſs be taken without cauſe, and put into a pound, the owner cannot break the pound and take them out, becauſe they are in the cuſtody of the law. *Co. Lit.* 47. *b.* 1 *And.* 31,

If the lord, or another that has a rent, diſtrains ſeveral times for his ſervice or rent, where none is in arrear, the tenant may by the common law have an *aſſiſe de ſovent diſtreſs*. *F. N. B.* 178.

This action lay at Common law, in which the writ is general and count special, that the lord distrained, &c. and judgment, not that the demandant *recuperet seisinam*, for he hath that, but *quod teneat absque multiplici districtione*. 8 *Co.* 50. *a. b.*

Of common right, a distress is incident to every fine and amercement in the sheriff's torn or court leet, whether the same belong to the King or to a subject; if the offence, for which they were imposed, be of common right incident to the jurisdiction of such courts. 1 *Rol. Abr.* 665. 11 *Co.* 45. *a.* 1 *Co.* 41. *Cro. Jac.* 382.

But if such offences were only the neglect of a duty created by custom, it is questionable whether it doth not require the like custom for a distress, tho' the duty be of a publick nature; as if there be a leet belonging to the manor of *A.* and by custom, time out of mind, the inhabitants of *B.* have used to send a constable to the said leet, and they make default, upon which they are fined by the steward; and whether a distress could be taken for this fine, without a special custom to distrain, was doubted; and the case adjourned, no special custom to distrain being alledged. 1 *Vent.* 105. *Raym.* 204. 2 *Keb.* 701, 739, 745.

But if it be for the private benefit of a subject, no distress is incident to it without a special custom. 1 *Rol. Rep.* 76. 11 *Co.* 44. *b.* 2 *Hawk. P. C.* 60.

The sheriff or lord of a leet may, for such fines or amercements, distrain the goods of the offender in any lands within the county or precinct of the leet, of whomsoever they shall be holden, except only in such lands which shall be in the King's hands; these being wholly out of the jurisdiction of such courts. 1 *Rol. Abr.* 670.

And such a distress may be taken in the highway, for the statute of *Marlbridge*, *cap.* 5. which prohibits the taking of a distress there, is to be intended only of distresses taken for services due by way of tenure of lands. 2 *Inst.* 131.

Such fines and amercements being for a personal offence, no stranger's beast can lawfully be distrained for them, though they have been *Levant* and *Couchant* on the lands of the offender. *Bro. Distress* 3. *F. N. B.* 100. *Owen* 146.

It seems to be agreed, that where any such court is in the King's hands, the goods distrained for such fines and amercements may lawfully be sold, after they have been kept a reasonable time, as the space of sixteen days; and it seems the better opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a publick nature, they may be sold of common right, without any special custom for that purpose. 8 *Co.* 41. *b.* 1 *Rol. Rep.* 76. *Noy* 17. 1 *Bulst.* 53.

No bailiff can lawfully distrain for any such fine or amercement, without a special warrant for so doing; which must be set forth by him in an avowry or justification of such distress. 8 *Co.* 50. *a. b.*

For matter on this subject, see 9 Vin. Abr. *and* 2 Bac. Abr. *tit.* Distress. See **Rent.**

Distress for penalties. By stat. 27 *Geo.* 2. *cap.* 20. *sect.* 1. In all cases where any justice of the peace is or shall be required or impowered by any act of parliament to issue a warrant of distress for the levying any penalty inflicted, or any sum of money directed to be paid by such act; it shall be lawful for the justice granting such warrant, therein to order and direct the goods and chattels so to be distrained, to be sold and disposed of within a certain time to be limitted in such warrant, so as such time be not less than four days, nor more than eight days, unless the penalty, or sum of money for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, be sooner paid.

Sect. 2. And the officer making such distress, shall and may deduct the reasonable charges of taking, keeping, and selling such distress, and the overplus (if any) after such charges, and also the said penalty, or sum of money, shall be satisfied and paid, shall be returned on demand, to the owner of the goods so distrained; and the officer executing such warrant, if required, shall shew the same to the person whose goods are distrained, and shall suffer a copy thereof to be taken.

Sect. 3. But this shall not extend to alter any provisions relating to distresses to be made for the payment of tithes and church rates by the people called *quakers*, contained in the acts of the 7 & 8 *Will.* 3. *cap.* 34. and the 1 *Geo.* 1 *stat.* 2. *cap.* 6.

Distress of the King. By the Common law no subject can distrain out of his fee or seignory; unless cattle are driven to a place out of the fee, to hinder the lord's *distress*, &c. But the *King* may distrain for rent-service, or fee-farm, in all the lands of the tenant wheresoever they be; not only on lands held of himself, but of others; where his tenant is in actual possession, and the land manured with his own beasts, &c. 2 *Inst.* 132. 2 *Danv. Abr.* 643.

Distress of a town. If a town be assessed to a certain sum, a distress may be taken in any part, subject to the whole duty. 2 *Danv.* 643.

Distribution of intestates estates, According to the 22 & 23 *Car.* 2 may be sued for as well in the Chancery, as in the Ecclesiastical court: And if the persons appointed to have it, die before a *distribution* made, their shares go to their executors, &c. 2 *Chanc. Rep.* 374. where the remainder or surplus of an estate, not disposed of by will, shall go and remain to the next of kin, by the statute of *distributions*. 2 *Vern.* 361, 676. See **Administrator, Executor.** *and* **Intestates.**

District *(Districtus)* A territory or place of jurisdiction; the place in which a man hath the power of *distraining*, or the circuit or territory wherein one may be compelled to appear. *Briton, cap.* 120. where we say, *Hors de son fee*; others say, *Extra districtum suum.*

Districiones, *Distraints*, or goods *distrained*, or *distresses*, kept in custody till payment and full satisfaction be made.——*Possunt nos & successores nostros & prædictas omnes terras*——distringere *ad solutionem memoratam*, & districtiones *retinere quosque plenarie fuerit satisfactum.* Paroch. Antiq. p. 344.

Distringas, Is a writ directed to the sheriff, or any other officer, commanding him to *distrain* one for debt to the King, &c. or for his non-appearance at a day. See great diversity of this writ in the *Table of Register Judic. verbo Distringas.* This was sometimes of old called *constringas*, as appears by this writ, *Lib. Ramis. sect.* 227. Henricus *Rex Angliæ hominibus abbatis de* Rameſia *salutem. Præcipio quod cito & juste reddatis abbati domino vestro, quicquid ei debetis in censu, & firma, & debitis, & placitis, sicut juste monstrare poterit quod ei debeatis. Quod si nolueritis, ipse vos inde* constringat *per pecuniam vestram. Teste Chancellar. apud Glouceſter.* By *pecuniam vestram*, in those days, was understood *bona & catalla.* Cowell, edit. 1727.

Distringas juratores, Is a writ directed to the sheriff, to distrain upon a *jury* to appear; and return issues on their lands, &c. for non-appearance. Where an issue in fact is joined to be tried by a *jury*, which is returned by the sheriff in a panel upon a *venire facias* for that purpose; thereupon there goes forth a writ of *distringas jurator'*, to the sheriff, commanding him to have their bodies in court, &c. at the return of the writ. 1 *Lill. Abr.* 483. And the writ of *distringas jurat'* ought to be to the sheriff so timely, that he may warn the jury to appear four days before the writ is returnable, if the *jurors* live within forty miles of the place of trial; and eight days if they live farther off. *Ibid.* 484. There may be an *alias*, or *pluries distringas jur.* where the *jury* doth not appear.

Dividend in the Exchequer, Seems to be one part of an indenture. 10 *Ed.* 1. *c.* 11. and 28 *Ed.* 1. *st.* 3. *c.* 2.

Dividend in the University, Is that share or part which every one of the fellows do justly and equally divide among themselves of their annual stipend,

Dividend in law proceedings, A *dividing* of *fees* and perquisites between officers arising from writs, &c. *Practis. Solic'.*

Dividend of merchants, Is where a just share of profits in *trade* is assigned to any one.

Dividend in ſtocks, A *dividable* proportionate ſhare of the *intereſt* of *ſtocks*, erected on publick funds; as the *South Sea*, *India*, *Bank*, and *African* ſtocks, *&c.* payable to the adventurers half yearly.

Dividend-warrants, Felony to ſteal them, 2 *Geo.* 2. *c.* 25. *ſect.* 3.

Dividend, Was anciently uſed for indenture. *Clauſ.* 6 *Ed.* 2. *in Dorſo. M.* 24, and ſtat. *de Eſcaetoribus* 29 *Ed.* 1.

Diviſa, Signifies a *deviſe* of goods by a laſt will, and ſometimes a will itſelf. *Gervaſ. Dorob.* writing of the will of *Hen.* 2. *Anno* 1182. tells us, *Notum facio quod apud Waltham feci* diviſam *meam de quadam parte pecuniæ meæ in hunc modum, &c.* Sometimes 'tis taken for a charity given by a laſt will; as *in Eadmerus, lib.* 1. *p.* 8. *Huic quadam vice ſolidi quinque de illis (nam* diviſæ *per temporum vices conferebantur) ex precepto ejus dati ſunt, &c.* Sometimes it ſignifies a parcel or portion of land deviſed by a laſt will; or ſet apart, *Diviſis Limitibus.* Leg. Inæ, cap. 44. *Ceorli habeant herbagium in communi, vel aliam compaſcualem terram vel* diviſam *claudendam.* Sometimes 'tis taken for the bounds of a place or farm, as in *Leg. H.* 1. *cap.* 57. *Si inter compares vicinos utrinque ſint quæralæ, conveniant ad* diviſas *terrarum.* And ſometimes it ſignifies an award, as in *Leg. H.* 2. *cap.* 9. *Omnis cauſa terminetur vel in comitatu vel* diviſis *parium.* Cowell, edit. 1727.

Diviſæ, Diviſes or bounds, *Deviſas perambulare*, to walk the bounds of a pariſh.——*Ut ſupra terram unde calumpniata fuit, ipſa cum ſuis, ego vero cum meis ad* diviſas perambulandas *convenerimus.* Cartular. Rading. MS. f. 108. b. So is *diviſæ* uſed for the borders or limits of diviſion between lands, pariſhes, or counties,—*Sic uſque Hetheneburne inter Akemanſtrete inter* deviſas *inter* Com. Oxon. & Buck. Paroch. Antiq. pa. 324. Hence the *Deviſes*, or *Divizes*, a town in *Wiltſhire*, ſituated on the confines of the *Weſt-Saxon* and *Mercian* kingdoms.

Diviſe. See **Deviſe.**

Divorce, (*Divortium, a divertendo*) Is a ſeparation of two *de facto* married together; of which there are two kinds; one *a vinculo matrimonii*; the other *a menſa & thoro.* The woman *divorced a vinculo matrimonii*, receives all again that ſhe brought with her. This only ariſes upon a nullity of the marriage, through ſome eſſential impediment, as conſanguinity or affinity within the degrees forbidden, pre-contract, impotency, *&c.* of which impediments the Canon law allows fourteen, comprehended in theſe verſes.

Error, conditio, votum, cognatio, crimen,
Cultus, diſparitas, vis, ordo, ligamen, honeſtas,
Si ſis affinis, ſi forte coire nequibis,
Si parochi & duplicis deſit præſentia teſtis,
Raptave ſit mulier, nec parti reddita tuta.

Divorce is a judgment ſpiritual; wherefore, if there be occaſion, it ought to be reverſed in the ſpiritual court. See *Coke, lib.* 7. *Kenne's* caſe. *Idem, lib.* 5. *fol.* 98. and on *Litt. fol.* 235.

In the old law, the woman *divorced* was to have of her huſband a writing (as St. *Jerome* and *Joſephus* teſtify) to this effect, *I promiſe, that hereafter I will lay no claim to thee*; which was called *a bill of divorce.*

By the Canon law a divorce is not permitted without ſufficient cognizance had of the cauſe. But by the Civil law, divorces were often made through heat of anger, where the *Romans* had a mind to put away their wives, by ſending them a bill of divorce by one of their freedmen, who was to acquaint the wife with the purpoſe and intention of her huſband. *Ayl. Par.* 225.

Dr. *Ayliffe* ſays, By the Papal Canon law there are only five cauſes of divorce; to wit, adultery, impotency cruelty, infidelity, and entring into religion. *Ayl. par.* 226. unto which ought to have been added conſanguinity.

There be two kinds of divorces: The one that diſolveth the marriage *a vinculo matrimonii*, as for conſanguinity; and the other *a menſa & thoro*, as for adultery, becauſe that divorce by reaſon of adultery cannot diſſolve the marriage *a vinculo matrimonii*, for that the offence is after the juſt and lawful marriage. 3 *Inſt.* 88.

Cauſes for ſeparation *a vinculo*, are conſanguinity or affinity within the degrees prohibited, alſo impuberty or frigidity; where the marriage was merely void *ab initio*, and the ſentence of divorce only declaratory of its being ſo. Inſomuch that in debt upon an obligation, though the defendant pleaded that at the time of the bond ſhe was wife to a perſon there named; yet the plaintiff ſhewing that a former wife was alive at the time of his marrying the defendant, and that thereupon her marriage with him had been adjudged null and void in the ſpiritual court, judgment was given againſt her, becauſe the marriage being merely void, ſhe was always ſole: And it was further ſaid, that in ſuch caſe the divorce was only declaratory, and there needed not any ſuch ſentence. *Cro. El.* 857. *Gibſ.* 446.

The effects of that original voidance and nullity are, that the wife is barred of dower, and the iſſue are illegitimate; and that the perſons ſo divorced may marry any others. *Gibſ.* 446.

Concerning a divorce *a vinculo* in caſe of *impuberty*, or the male or female's marrying under the marriageable years, that is, the firſt under fourteen, or the ſecond under twelve; the books of Common law do confirm and ratify this nullity; not only by declaring, that in caſe of ſuch divorce, the woman may have an aſſiſe for the land given in frank-marriage, but alſo in affirming further, that though the man hath iſſue by ſuch marriage, and is divorced, and marries again, and hath iſſue, and dies, the iſſue of the ſecond wife ſhall be his lawful heir; nor will any averment of conſenting, and living together after the marriageable years be received or admitted in the temporal court, after a divorce in the ſpiritual court made upon the original nullity, and unrepealed. *Gibſ.* 446.

In like manner, do the books of the Common law reſolve, in the caſe of divorce *a vinculo* for *frigidity*, after three years trial and examination, and ſentence in the ſpiritual court, for the perpetual impotency of generation. As it was in *Bury's* caſe, *M.* 40 & 41 *El.* who was ſo divorced, but afterwards married another wife, and had children by her: Upon which it was urged, that the church being evidently deceived as to his perpetual impotency, the divorce thereupon was null; and if ſo, that the ſecond marriage was unlawful, and the iſſue illegitimate. But the court reſolved, that ſince there had been a divorce for frigidity or impotency, it was clear that each of them might lawfully marry again, and though it ſhould be allowed, that the church appearing to have been deceived in the foundation of their ſentence, the ſecond marriage was voidable, yet till it ſhould be diſſolved, it remained a marriage, and the iſſue during the coverture lawful. *Gibſ.* 446.

But tho' a ſentence of divorce, given in the ſpiritual court, may be repealed after the death of the parties, yet if any of the parties be dead before ſuch ſentence given, ſuit cannot be in the ſpiritual court to declare the marriage void, and baſterdize the iſſue; the marriage being already diſſolved by death, and the trial whether legitimate or not, in order to inheritance, originally belonged to the King's court; and the ſentence in the ſpiritual court being given only *pro ſalute animæ*, it comes too late. *Gibſ.* 446. *Viner. Baſt.* G. 4.

Divorce *a thoro et menſa* is, when the uſe of matrimoney, as the uſe of cohabitation of the married perſons, or their mutual converſation, is prohibited for a time, or without limitation of time. And this is, in caſes of adultery, cruelty, or the like; in which caſe the marriage having been originally good, is not diſſolved, nor affected as to the *vinculum* or bond. And this is ſo by the Common as well as by the Canon law; inſomuch that the wife ſo divorced, having ſued for a legacy left to her, and the huſband having given a releaſe hath been adjudged good, notwithſtanding the divorce. Nor doth this kind either bar the wife of her dower, or baſtardize the children; but intitles her to alimoney, which the eccleſiaſtical court aſſigns, in proportion to the circumſtances and condition

condition of her husband; and no prohibition will lie. But as to the having again the goods she brought, or so much as is not spent; that, in the law books, is meant only of divorce *a vinculo*, or when there was a nullity of marriage *ab initio*, so as to be really no marriage. *Gibs.* 535.

But the children which she hath after the divorce, shall be deemed bastards; for a due obedience to the sentence will be intended, unless the contrary be shewed. 1 *Salk.* 123.

By *Can.* 107. In all sentences pronounced only for divorce and separation *a thoro & mensa*, there shall be a caution and restraint inserted in the act of the said sentence, that the parties so separated shall live chastly and continently; neither shall they, during each other's life, contract matrimony with other persons. And for the better observation of this last clause, the said sentence of divorce shall not be pronounced, until the party or parties requiring the same, have given good and sufficient caution and security into the court, that they will not any way break or transgress the said restraint or prohibition.

And this doctrine, that neither of the parties shall contract matrimony during each other's life, hath been confirmed by the temporal judges in the case of *Foliambe*, who having been divorced from his wife for incontinency on her part, married again during her life; and the second marriage was declared to be void, because it was only a divorce *a thoro & mensa*. And the same is the doctrine of the Canon law; and of the same tenor are the ancient constitutions of the *English* church. Nevertheless divers acts of parliament for the divorce of particular persons in the case of adultery, agreeable to what the *reformatio legum* did propose in general, have allowed a liberty to the innocent person of marrying again. *Gibs.* 446. *Mo.* 683.

And by *Can.* 108. If any judge give sentence of divorce or separation, and shall not fully keep and observe the premisses; he shall be, by the archbishop of the province, or by the bishop of the diocese, suspended from the exercise of his office for the space of a whole year; and the sentence of separation so given, contrary to the form aforesaid, shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced.

A divorce for *adultery* was anciently *a vinculo matrimonii*; and therefore in the beginning of the reign of Queen *Elizabeth*, the opinion of the church of *England* was, that after a divorce for adultery, the parties might marry again; but in *Foliambe*'s case aforesaid, *H.* 44 *El.* in the Star-chamber, that opinion was changed; and archbishop *Bancroft*, by the advice of divines, held that adultery was only a cause of divorce *a mensa & thoro*. 3 *Salk.* 138.

Can. 105. Forasmuch as matrimonial causes have been always reckoned and imputed amongst the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony, having been in the church duly solemnized, is required upon any suggestion or pretext whatsoever to be dissolved or annulled; we do straitly charge and injoin, that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out by the deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath, either within or without the court.

The rule of the Canon law upon this head, is in a decretal epistle of pope *Celestine the Third*, who injoineth; that the parties be not seperated by their own confession only, or by the rumour of the neighbourhood: For if they did believe that the ecclesiastical judge would concur with them, some persons would collude together, and confess incest, for the avoiding of their marriage: And the rumour of their neighbourhood ought not so far to be judged valid, as to disannul marriages; unless other reasonable and probable evidence do occur. *Gibs.* 445. See *Dr. Gibs. Cod.* and *Dr. Burn's Ecclesiastical Law.*

Diurnalis, As much land as can be ploughed in a day with an ox; an acre of land. In some authors 'tis wrote *diuturna*. *Similiter concedi duas* diuturnas *telluris*. *Cowell, edit.* 1727.

Do. *To do law*, is the same as to make law. Stat. 23 *Hen.* 6. *c.* 14. See **Make.**

Dobuni, *Gloucestershire* and *Oxfordshire*, or the inhabitants of that part of *Oxfordshire* next *Gloucestershire*.

Docket, or Doget, Is a brief in writing, on a small piece of paper or parchment, containing the effect of a larger writing. *Symbol. part* 2. tit. *Fines sect.* 106. And when rolls of judgment are brought into *C. B.* they are *docketted*, and entered on the docket of that term: So that upon any occasion you may soon find out a judgment, by searching these dockets. See *Attorn. Pract. in C. B.* 219—221.

Doctor and student, Is a book containing certain dialogues between a *doctor* of divinity, and a *student* of the Common law; wherein are contained questions and cases, as well of the equity and conscience used in the Common law, as also a comparison of the Civil, Canon, and Common law together, very worthy the reading. The author is said to be one *Saint German*, and the book was written in the time of *Henry the Eighth*.

Doctors. Doctors and bachelors of divinity and law may have a dispensation for non-residence, 21 *Hen.* 8. *c.* 13. *sect.* 23. Doctors of the Civil law may exercise ecclesiastical jurisdiction although laymen, 37 *Hen.* 8. *c.* 17. *sect.* 4.

Doctors Commons, Is the college of Civilians in *London*, which was purchased by doctor *Harvey*, dean of the arches, for the professors of the Civil law. Here commonly reside the judge of the arches court of *Canterbury*, the judge of the admiralty, and the judge of the prerogative court of *Canterbury*, with divers other eminent Civilians; who there living (for diet and lodging) in a collegiate manner, and commoning together, it is known by the name of *Doctors Commons*. It was burnt down in the fire of *London*, and rebuilt at the charge of the profession. *Camberl. Present State.*

Dog-days, Are sixty-four in all, *a tertio idus Julii usque in idus Septembris*. *Cowell, edit.* 1727.

Dog-draw, Is an apparent deprehension of an offender against venison in the forest. There be four of these mentioned by *Manwood* in his *Forest Law, cap.* 18. *num.* 9. *Stable-stand, dog-draw, back-bear*, and *bloody-hand*; where he saith, That *dog-draw* is where any man hath stricken or wounded a wild beast, by shooting at him either with cross-bow, long-bow, or otherwise, and is found with a hound, or other *dog drawing* after him to receive the same.

Dogger, A kind of little ship. 31 *Ed.* 3. *stat.* 3. *c.* 1. *All the ships called doggers and landships, &c.*

Dogger-fish, Seems to be fish brought in those ships to *Blackness-Haven, &c. Ibid. c.* 2.

Dogger-men, Fishermen that belong to dogger-ships. 25 *Hen.* 8. *c.* 4.

Dogget. See **Docket.**

Dogs. The law takes notice of a greyhound, mastiff *dog*, spaniel and tumbler; for trover will lie for them. 1 *Cro.* 125. 2 *Cro.* 44. A man hath a property in a mastiff: and where a mastiff falls on another dog, the owner of that dog cannot justify the killing the mastiff, unless there was no other way to save his dog, as that he could not take off the mastiff, *&c.* 1 *Sound.* 48. 3 *Salk.* 139. The owner of a dog is bound to muzzle him if mischievous, but not otherwise: And if a man doth keep a dog that useth to bite cattle, *&c.* if after notice given to him of it, his dog shall do any hurt, the master shall answer for it.

Doitkin, A base coin, prohibited by 3 *H.* 5. *cap.* 1. Hence probably we retain that phrase when we would undervalue a man, to say, *He is not worth a* doit *or* doitkin.

Dole, (*Dola*, Sax. *dœl*, *pars*, *portio*, from *delan*, *dividere*, *distribuere*) Is a part or portion most commonly of a meadow, so called to this day; as *dole-meadow*, *anno* 4 *Jac. c.* 11. where several persons have shares. *In le Suthmede*

Suthmede (i. e. *prato australi*) *habet prior per sortem illam quæ vocatur* crumdpreſt, *tres* dolas, *ſicut ſors illa cadit. Et in qualibet* dola, *habet* 4 *polas ſive octo andenas* (*i. e.* ſwaths) *jacentes ſimul.* Lib. Priorat. Dunſtable, cap. 5. We ſtill retain the word to ſignify a ſhare, as to deal a *dole: He dealt his* dole *among ſo many poor people*, that is, he gave every one a ſhare or part. *Cowell, edit.* 1727.

Dole-fiſh, ſeems to be that *fiſh*, which the fiſhermen yearly employed in the North ſeas, do of cuſtom receive for their allowance. See the ſtat. 35 *H.* 8. *cap.* 7.

Dolg-bote, A recompence made for a ſcar or wound, Sax. *Diction. inter Leg. Aluredi Regis*, *cap.* 23. *legitur* dolg bot.

Doom and **Doom**, Words uſed in ancient charters, ſignifying a power of judging, and ſecurity in poſſeſſing. See **Doom**.

Domboc, A *Saxon* word, ſignifying *Liber judicialis*, as appears by the laws of King *Edward* the Elder, *cap.* 8. This was probably a book of ſtatutes, proper to the *Engliſh Saxons*, wherein perhaps the laws of former *Saxon* Kings were contained; that chapter ſeeming to refer to the laws of King *Ina*, *c.* 29.

Dome or **Deom**, (Saxon *dom*) A judgment, ſentence, ordinance, or decree. The homage's oath in the *Black Book of Hereford*, *fol.* 46. ends thus,——*So help me God at this holy dome, and by my trowthe.* See **Doom**.

Domesday, (*Liber judiciarius, vel cenſualis Angliæ*, from the Saxon *dom*, i. e. *cenſus vel æſtimatio*, not *domeſdei*, nor *domus dei* as ſome authors writes it,) Is a moſt ancient record, made in *William the Conqueror*'s time, and now remaining in the *Exchequer* fair and legible, conſiſting of two volumes, a greater and a leſs; the greater comprehending all the counties in *England*, except *Northumberland*, *Cumberland*, *Weſtmorland*, *Durham*, and part of *Lancaſhire*, which were never ſurveyed; and except *Eſſex*, *Suffolk*, and *Norfolk*, which three are comprehended in the leſſer volume, which concludes with theſe words; *Anno milleſſimo octogeſſimo ſexto ab incarnatione Domini, vigeſimo vero regni Williellmi, facta eſt iſta deſcriptio non ſolum per hos tres comitatus, ſed etiam alios.* It is called *Liber judicarius, quia in eo totius regni deſcriptio diligens continetur, ſingulorumque fundorum valentia exprimitur.* And *Domeſday*, (as *Gerv. Tilb.* ſays,) *Non quod in eo de præpoſitis aliquibus dubiis feratur ſententia, ſed quod a prædicto* judicio *non liceat ulla ratione diſcedere.* It was begun by five juſtices, aſſigned for the purpoſe in each county, in the year 1081, and finiſhed in 1086. *Camden* calls it *Gulielmi librum cenſualem*, The tax-book of King *William*. See more of it in *Spelm. Gloſſ.* and 4 *Inſt. fol.* 269. The dean and chapter of *York* have a regiſter called alſo *Domeſday*; ſo has the biſhop of *Worceſter:* And there is an ancient roll in *Cheſter-caſtle* called *Domeſday-roll.*

Our anceſtors had many *doom-books*. We are told by *Ingulphus*, *pag.* 870. and 908. that King *Alfred* made *Talem Rotulum qualem Gulielmus Nothus*, which is called *Domeſday*; and ſometimes the *Wincheſter-roll* becauſe it was kept there.

The *Domeſday-book* made by *Will.* 1. referred to the time of *Edward the Confeſſor*, as that of King *Alfred* did to the time of *Æthelred*: For the entries are thus made, *C. tenet Rex* Willielmus *in dominico & valet, &c. ibi carucate, &c.* T. R. E. *Valebat, &c. i. e.* It was worth ſo much, *tempore Regis Edwardi.* And this book is called *Magna Rolla Winton.*

The third book, which differs from the other in form more than in matter, was made by the command of the ſame King. The one being large, and in *folio*, but this leſſer, and in *quarto*; it ſeems to be the more ancient of the two; 'tis fairer written, and hath very few raſures. See *Monaſticon*, 8 *tom. p.* 272.

'Tis probable *Ingulphus*, though he lived near thoſe days, never ſaw theſe books; for he writes of incorporating theſe rolls, as if at that time they had not been made up in two volumes: of both which the Hon. Sir *John Trevor*, Maſter of the Rolls, had a very fine and exact copy.

There is a fourth book kept in the *Exchequer*, which is called *Domeſday*; and though a great volume, is only an abridgment of the other two. It hath many pictures and gilt letters in the beginning, which refer to the time of *Edward the Confeſſor*. And this led him, who made *notes* on *Fitzherberi's Regiſter*, into a miſtake, who in *fol.* 14. tells us, that *Liber* Domeſday *factus fuit tempore Regis Edwardi.*

There is a fifth book in the *Remembrancer's* office, which is the very ſame with the fourth before mentioned.

'Tis generally known that the queſtion, whether lands are ancient demeſne or not, is to be decided by the *Domeſday* of *Will.* 1. from whence there is no appeal; nor is there any averment to be made againſt it: And 'tis a book of that authority, that even the Conqueror himſelf ſubmitted ſome caſes, wherein he was concerned, to be decided by it. What is contained in this book appears by theſe old verſes:

Quid deberetur fiſco, quæ, quanta tributa,
Nomine quid cenſus, quæ vectigalia, quantum
Quiſque teneretur feodali ſolvere jure,
Qui ſunt exempti, vel quos Angaria damnat,
Qui ſint vel glebæ ſervi, vel conditionis,
Quove manumiſſus patrono jure ligatur.

Domeſmen, Judges, or men oppointed to doom and determine ſuits of quarrels.——*Qui infra libertatem ſeu hundredum de* Irchenfeld com. Heref. *faciunt ſectam ad curiam hundredi, ut minores lites dirimant, vocantur* domeſmen, i. e. *Judices ſeu homines judiciarii.* See *Sil. Taylor* of *Gavelkind*, *p.* 110. Hence falling of *domes* is the *Scotch* phraſe for reverſing of judgments, or annulling of decrees. Hence *domer*, *judicium*, and *æg-deme*, *I deem* or judge. *Cowell, edit.* 1727.

Domicellus and **Domicella**, *John* of *Gaunt*, Duke of *Lancaſter*, had by *Catherine Swinford* before marriage, four illegitimate children, viz. *Henry*, *John*, *Thomas*, and *Joan*; and becauſe they were born at *Beaufort* in *France*, they were vulgarly called *Henry de Beaufort, &c. John*, before 20 *Ric.* 2. was knighted, and *Henry* became prieſt. At the parliament holden 20 *Rich.* 2. the king by his *charter* did legitimate theſe children. *Rex,——Chariſſimis conſanguineis noſtris nobilibus viris Johanni Militi, Henrico Clerico, Thomæ* Domicello *ac dilectæ nobis nobili mulieri Johannæ* Domicellæ, *Germanis præchariſſimi avunculi noſtri, Joh. Ducis Lanc. natis ligeis noſtris, ſalutem, &c. Teſte Rege apud Weſtm.* 9. *die Febr. per ipſum Regem in parliamento.* In this act (ſays Sir *Edward Coke*, 4 *Inſt. fol.* 37.) the ſaid *Thomas* could not be called *Eſquire*, and therefore had the addition *Domicello*, which, (ſays he) ſignifies a young ſoldier not yet knighted, or nobly born, *&c.* which is a miſtake. For there is no ſuch *French* word as *Domoicell*, but *Demoiſel*; nor can *Domicellus* properly be derived from thence, but is an abſolute *Latin* word, anciently given as an appellation or addition to the King's (natural) ſons in *France*, and ſometimes to the eldeſt ſons of noblemen there; whence doubtleſs we borrow the words. See *Spelm. Gloſſ. verbo* Domicellus: *Tidemannus permiſſione divina Wigorn. epiſcopus dilecto in Chriſto filio Johanni de Fulwode noſtræ diæc.* Domicello. *ſalutem.—Dat.* 7 *Febr.* 19 *Rich.* 2. Here it is uſed to a private gentleman as lord of a manor,——*Sed nos indiſcrete de pluribus dominis, quia Barones vocamus* Domicellos, *Angli vero nullum niſi natos Regum, &c.* Hov den, f. 347. n. 50.

But *Domicelli* are only the better ſort of ſervants, as appears by *Thorn. fol.* 1748. Domicellus *abbatis*, and Domicelli *& ſervientes monaſterii*, *pag.* 1990.

Domigerium, Damage, danger,——*Vitam ſuam in laboribus variis ducens cum* domigerio *magno mendicando.* Hiſt. Elien. *apud* Whartoni Angl. Sac. p. 1. p. 652.. *Credebant Londinenſes quod per hæc dona* domigerium *evaſiſſent.* Walſingh. 1392. *Emolumentum Regi accrevit &* domigerium *ad populum.* Knighton, anno 1352. In another place 'tis taken for power over another; *Sub* domigerio *alicujus vel manu eſſe.* Bract. lib. 4. tract 1. cap. 19. par. 2.

Domina, A title given properly to thoſe honourable women, who in their right of inheritance held a barony. So *Maud* the daughter of *Robertus de Oilly ſen.* who inherited the honour of *Walingford*, was therefore ſtiled *Matildis domina de Walingford.* Paroch. Antiq. p. 78.

Dominica in Ramis palmarum, Is *Palm Sunday*, ſo called, becauſe on that day they uſed to diſtribute branches of *palm* and other green boughs in commemoration of our Lord's riding to *Jeruſalem*, and the people cut *palm* boughs, *&c.* to ſtrew in the way, crying *Hoſanna. Md. quod ego Henricus de Erdington feci homagium & fidelitatem domino Will. de Stafford apud Bromſhulf in com. Staff. die Mercurii prox. ante* Dominicam in Ramis palmarum, *anno regni Regis Edw. xxviii. pro terris & tenementis quæ teneo in villa de Hunſtanſeot in com. War. &c.*

Dominicum, Demain or demeſne, *terra dominicalis.* Lands not rented to tenants, but held in demeſne, or in the lord's own uſe or occupation. *Antiquum dominicum Regis*, the King's ancient demeſne, are ſuch royal manors as were reſerved to the crown, to yield proviſion for the King's houſhold, and ſo let out in ſocage for *farms* or victuals, or in ſerjeanty for ſome domeſtic ſervices: but not diſpoſed of to barons or knights to be held by any feudatory or military ſervice. See **Demain.**

Dominium, Right or legal power.——*In ſilva dicti manerii ſive* dominii *de* Pidingtona, *aut infra præcinctum ejuſdem, non habent aliqui extranei* dominium *aliquo modo in parte vel in toto ſe intromittere.* Paroch. Antiq. p. 498.

Dominus, In ancient times being prefixed to a name, uſually denoted him a knight, or a clergyman: for ſo we find it often in charters, with *His teſtibus Domino* Edwardo *de Sancto Mauro*, Willielmo——, *&c.* It ſeems, however, that title was given to a gentleman of quality, tho' not a knight, eſpecially if he were lord of a manor.

Domo reparanda, Is a writ for one againſt his neighbour, by the fall of whoſe houſe he feareth hurt to his own. *Reg. Orig. fol.* 153. In this caſe the *Civilians* have the action *de damno infecto.*

Domus converſorum. See **Rolls.**

Domus Dei, The hoſpital of *St. John in Jeruſalem*; ſo called in *Mon. Angl.* 2 *part. fol.* 440.

Dona, Any ſort of property, or goods. *Cowell edit.* 1727.

Donatio cauſa mortis, Is a gift in proſpect of death; where a perſon moved with the conſideration of his mortality, doth give and deliver ſome thing to another to be his in caſe the giver die, but if he lives he it to have it again. *Law of Teſt.* 179. See **Wills.**

Donative, Is a benefice merely given and granted by the patron to a man, without either preſentation to the ordinary, or inſtitution by the ordinary, or induction by his commandment. *F. N. B. fol.* 35. Of this *Petr. Gregor. de benefic. cap.* 11. *n.* 1. hath theſe words, *Si tamen capellæ fundatæ per laicos non fuerint a diœceſano approbatæ & (ut loquuntur) ſpiritualizatæ, non cenſentur beneficia, nec ab epiſcopo conferri poſſunt, ſed ſunt ſub pia diſpoſitione fundatoris. Cowell, edit.* 1727.

A *donative* is a ſpiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any preſentation to the biſhop; and without admiſſion, inſtitution, or induction by any mandate from the biſhop or other; but the donee may by the patron, or by any other authorized by the patron, be put into poſſeſſion. *Deg. p.* 1. *c.* 13.

And this right in the donor (together with the exemption of the church from eccleſiaſtical juriſdiction) ſeemeth to have come from the conſent of the biſhop in ſome particular caſes: As when the lord of a manor in a great pariſh, having his tenants about him at a remote diſtance from the pariſh church, did offer to build and endow a church there, provided that it ſhould belong intirely to his family, to put in ſuch perſons as they ſhould think fit, if they were in holy orders. It is very poſſible that the biſhops at that time, to encourage ſuch a work, might permit them to enjoy this liberty; which being continued time out of mind, is turned into a preſcription. And they are to be diſtinguiſhed from thoſe called ſine-cures, and exempt juriſdictions: For ſine-cures in truth are benefices preſentable; but by means of vicarages endowed in the ſame places, the perſons who enjoy them have by long cuſtom been excuſed from reſidence: And exempt juriſdictions are not ſo called, becauſe they are under no ordinary; but becauſe they are not under the ordinary of the dioceſe, but have one of their own; and are therefore called peculiars. 1 *Still.* 335.

There is not any one particular ſort of eccleſiaſtical preferments, that are peculiarly ſaid to be donatives; for ſome of all ſorts may be donative, as well as preſentative, or elective. For biſhopricks were donative in *England*, after the conqueſt, until the time of King *John.* And a deanry may; for thoſe deanries that were tranſlated from priories and convents, or which were founded after the diſſolution of abbies and monaſteries by King *Henry* the Eighth, or other Kings of this realm, are donative, and conferred by the King's letters patent. So a prebend may be donative, as at *Windſor* and *Weſtminſter*, in the chapels of the King, where the prebend being void, it is ſaid, that the King ſhall make collation of his clerk by patent, and by force thereof he ſhall take poſſeſſion without any inſtitution or induction. Alſo a benefice with cure of ſouls may be a donative; as the rectory of *Briery* or *Burien* in *Cornwall:* And ſo the church of the Tower of *London* is a cure of ſouls, and the King's donative. *Watſ. c.* 15.

Yet ſome of theſe inſtances, and other ſuch like, may be ſaid to reſemble donations, rather than to be donations, properly ſo called; ſuch as the grant of the King to prebends without inſtitution; ſo alſo, the collation of a biſhop without preſentation; and the nomination to perpetual curacies, which is without either preſentation, inſtitution, or induction. For theſe differ from donatives properly ſo called, which are given and fully poſſeſſed by the ſole donation of the patron in writing; inaſmuch as collations and royal grants are to be followed by induction and inſtalment; and perſons nominated to curacies are to be authorized by a licence from the biſhop, before they can legally officiate, whereas poſſeſſion by donation is not ſubject to any of theſe conſequents, but receives its full eſſence and effect from the ſingle act and ſole authority of the donor as aforeſaid. *Watſ. c.* 15.

By the ſeveral ſtamp acts; for every ſheet or piece of vellum or parchment, or ſheet of paper, upon which any donation which ſhall paſs the great ſeal of *England*, or upon which any donation to be made by any patron whatſoever, of or to any benefice, dignity, or eccleſiaſtical promotion, ſhall be ingroſſed or written, ſhall be paid a double forty ſhilling ſtamp duty. Provided, that ſuch benefice, dignity, or promotion be of the yearly value of 10*l.* or above in the King's books.

The grant of a donative being once made, creates a right as full and laſting as inſtitution and induction; that is, a right not to be taken away, but by the reſignation or deprivation of the donee; the reſignation to be made to the donor, and the deprivation to be made by the donor likewiſe; both the church and the clerk being exempt from ordinary juriſdiction. To this purpoſe it is, what we find in the reports of Sir *John Davis*, that a donative cannot be granted for years or at will only, becauſe this great inconvenience would follow, that the freehold might be in perpetual obeyſance; which is an inconvenience that the law will not ſuffer. *Gibſ.* 819.

The form of a donation may be thus: *To all to whom theſe preſents ſhall come. Know ye, that I* A. B. *of——— in the county of —— eſquire, have given and granted, and by theſe preſent do give and grants to my beloved in* Chriſt C. D. *clerk, the office of or place of curate* [or as the caſe ſhall be] *of the chapel of ——— in the county of ——— now lawfully vacant, and to my donation and free diſpoſition in full right belonging, and by theſe preſents do make, conſtitute, and appoint him the ſaid* C. D. *curate of the ſaid chapel, to have, hold, and enjoy the ſaid office or place of curate in the chapel aforeſaid to him the ſaid* C. D. *during his natural life, with all and every the ſalaries, ſtipends, rights and appurtenances to the ſame office or place of curate aforeſaid in any wiſe belonging or appertaining, as fully, freely, and perfectly, and in as ample manner and form, as any other hath or ought to have, hold and enjoy the ſame. In witneſs whereof I have hereunto ſet my hand and ſeal, the ——— day of —— in the year of our Lord.——* Ecton. 459.

Or thus: *To all to whom these presents shall come*, A. B. of ——— *in the county of* ——— *esquire, lord of the manor of* ——— *in the county of* ——— *sendeth greeting. Whereas the chapel of* ——— *aforesaid, is now vacant, and to my donation in full right belongeth; know ye that I the aforesaid* A. B. *have given and granted to my beloved in* Christ C. D. *clerk, the aforesaid chapel of* ———, *with all its rights and appurtenances, and by the tenor of these presents do induct him the said* C. D. *into corporal possession of the said chapel, with all its apturtenances. In witness whereof, &c.* Ecton. 461.

For other matters, see Dr. Gibson's Cod. *and Dr.* Burn's Ecclesiastical Law.

Donor and Donee. *Donor*, is he who gives land or tenements to another, and he to whom the same is given is the *donee*.

Doom or Dome, Sax. *Dom*, A judgment, sentence, ordinance or decree; also sense or signification. *Substantiva quædam* (says Mr. *Somner*) *exeunt in* dom, *ubi compositionis gratia videtur oppositum, et quandoque munus denotat vel* officium, *item* ditionem & dominium, *ut in* Kingdom, Earldom, *&c.* — *Habeat girthbriche & forfial, & dom, & som, & wreche in Mari.* Mon. Angl. 1. par. fol. 284. a. See. **Doth.**

Dorchester. The burgesses shall have their weighing twelve miles round, 9 *Hen.* 6. *c.* 6.

Dorick. See **Dorlok.**

Dorit. To what duties liable, 4 *Will. & Ma. c.* 5. *sect.* 2.

Dorobernia. *Canterbury.*

Do sale. A cloth or curtain, hanging in the choir, so called, because *sedenti ad dorsum appenditur.*

Tresque dedit cappas, dorsalia *plura, tapetas.*

Dorsile. See **Dorsale.**

Dorture. *Dormitorium, Anno* 25 *H.* 8. *cap.* 11. Is the common room, place, or chamber, where all the friars of one convent slept and lay all night.

Dosens, Straight cloths made in *Devonshire*, and so called in *Rot. Par.* 2 *Hen.* 5.

Dossale, Dorsale, Hangings, tapestry.———*Dederat ei duo* dorsalia *honesta.* Rog. Hoveden sub Ann. 954. —Dossale *sive tapesium*—Mat. Par. *in vit. Abb.* S. Albani.

Dote allignanda, Is a writ that lay for a widow, where it was found by office, that the King's tenant was seised of tenements in fee or fee-tail, at the day of his death, and that he held of the King in chief, *&c.* in which case, the widow came into the *Chancery*, and there made oath, that she would not marry without the King's leave. *Anno* 15 *Ed.* 3. *cap.* 4. and hereupon she had this writ to the escheator, for which see *Reg. of Writs, fol.* 297. and *F. N. B. fol.* 263. These widows are called the *King's widows.* See **Widow.**

Dote unde nihil habet, Is is a writ of dower, that lieth for the widow against the tenant, which bought land of her husband in his life-time, whereof he was seised solely in fee-simple or fee-tail, in such sort as the issue of them both might have inherited it. *F. N. B. fol.* 147. *Regis. fol.* 170.

Dotis admensuratione. See **Admeasurement**, and the *Reg. orig. fol.* 171.

Double plea, (*Douplex placitum*) Is that wherein the defendant allegeth for himself two several matters in *bar* of the plaintiff's action, whereof either is sufficient to effect his desire, which shall not be admitted for a plea. As, if a man allege several matters. the one nothing depending upon the other, the *plea* is accounted *double*, and not admissible; but, if they be mutually depending on each other, then it is accounted single. *Kitchen fol.* 233. See *Brook, hoc tit.* And *Sir Thomas Smith* gives this reason why such *double plea* is not admitted by our law; because the trial is by twelve rude men, whose heads are not to be troubled with too many things at once. *Lib.* 2. *de Rep. Angl. cap.* 13.

By stat. 4 *Ann. c.* 16. *sect.* 4. It shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence.

Plaintiff brings a writ of error to reverse a common recovery. Defendant moved for liberty to plead double. The motion was opposed, because the act for the amendment of the law, whereby a defendant, by the leave of the court first obtained, may plead double, was not to be understood of a defendant in a *writ of error*, but a defendant in an orginal action; but it was insisted upon by the counsel on the side with the motion, that this act did extend to the defendant in a writ of error, as well as an original action; that the one might have as great occasion of pleading double as the other; that it had lately been resolved, that a writ of error did not abate by the death of one of the plaintiffs, whereas, as the law stood before that act of parliament, it would; that by the same reason by which the word plaintiff, in that part of the act of parliament, was to be extended to a plaintiff in error, the word defendant should likewise. It was further urged, that the pleading double was at their own peril; for if the court had not power by this act of parliament to grant them leave to plead double, the other side may demur; and to this opinion the court inclined; but the court made their motion fruitless, by declaring, that one of the things they desiged to plead, did upon the record appear to be false. 10 *Mod.* 326. *Pasch.* 2 *Geo. B. R. Hurtson* v. *Aglionby.*

The court was moved to plead and *demur*, but refused the same; for demurring is not pleading. 10 *Mod.* 280. *Hill.* 1 *Geo. B. R. Hayson & al'* (assignees) v. *Jeffreys.*

An heir shall not have leave to plead *riens per descent* with an other plea, except he make *affidavit* that he has *riens per descent*; nor shall an *administrator* have leave to plead *plene administravit, and no assets*, without an affidavit that he has no assets. 10 *Mod.* 334. *Trin.* 2. *Geo. B. R. Carrington* v. *Warren.*

Double plea was allowed on a promise of marriage, viz. *non assumpsit* and *infancy. Gilb.* 175. *pl.* 23. *Pasch.* 3 *G. B. R. Holt.* v. *Ward.*

A motion was made for liberty to *rejoin double*, as being with the equity of the act, which allows pleading double. But the court said, that they thought that this would be intirely inconvenient, and out of the reason of the act, and therefore refused it. 2 *Barnard. Rep.* 6. *Trin.* 5 *Geo.* 2. *Anon'.*

A rule to plead double, viz. *non assumpsit*, and a *general release* was discharged, because these pleas are *contradictory. Notes in C. B.* 228. *Hill.* 6. *Geo.* 2. *Gibson* v. *Cole.*

In trespass for entring of plaintiff's close and pulling down a weare; defendant moved to plead double, viz. *liberum tenementum* and a *justification* of pulling down the weare as a *nusance*, and rule *nisi* was obtained; but was afterwards on hearing counsel on both sides discharged by the court, the matter prayed to be pleaded being inconsistent. *Notes in C. B.* 229. *Trin.* 6. *&.* 7 *Geo.* 2. *Halsey* v. *Feltham.*

Defendant obtained a rule *nisi* to plead double, *non assumpsit and non assumpsit infra sex annos.* Plaintiff shewed for cause, that the rule to plead was expired before the motion to plead double was made: but the court held, that defendant was *proper to move to plead double any time before judgment signed. Notes in C. B.* 229. *Mich.* 7 *Geo.* 2. *King* v. *Boswell.*

Action was brought *against an innkeeper, for detaining two horses* of the plaintiff's; it was moved to plead double, viz. *Not guilty*, and an *accord and satisfaction*, and would have compared it to *non assumpsit infra sex annos.* The court denied to make any rule, the matter prayed to be pleaded being *contradictory. Notes in C. B.* 230. *Hill.* 7 *Geo.* 2. *Dursley* v. *Cole.*

A rule was made for plaintiff to shew cause why defendant should not plead, viz. *non assumpsit* and *non assumpsit infra sex annos.* Plaintiff on shewing cause, produced an affidavit, *that defendant had not appeared*, and consequently not being in court, was not proper to make the motion, and the rule was discharged. *Notes in C. B.* 233. *Mich.* 8 *Geo.* 2. *Benn* v. *Geary.*

It was moved to plead double, *non assumpsit* and *plene administravit*, which was denied by the court, *no affidavit being*

being produced that defendant had fully administered. Notes in C. B. 234. *Mich.* 8 *Geo.* 2. *Heathfield* v. *Allen.*

On motion to plead double, *solvit ad diem* and *riens per descent*, it was objected that an *affidavit of the fact* as to *riens per descent* ought to be produced from the heir, as from executor or administrator in a *plene administravit*, and the objection was held good. *Notes in C. B.* 234. *Mich.* 8 *Geo.* 2. *The Burgesses of Wisbetch* v. *Frier.*

Defendant pleaded *non assumpsit infra sex annos* and *plaintiff demurred* to the plea; the matters in question *being actions between merchant and merchant*, and *defendant* thereupon *moved to add to his former plea a general non assumpsit upon payment of costs*; but this was *denied. Notes in C. B.* 234. 8 *Geo.* 2. *Parson.* v. *Ives.*

A motion to plead double, viz. *non assumpsit*, and *several matters set off against plaintiff's demand*, was denied *per cur.* as *contradictory.* The general issue must be pleaded with notice to set off pursuant to statute. *Notes in C. B.* 236. *Pasch.* 8 *Geo.* 2. *Jarrat* v. *Robinson.*

A motion to plead double, viz. *nil debet* and *nil habuit in tenementis*, was refused. *Per. cur.* The latter may be given in evidence upon the former. *Notes in C. B.* 236. *Trin.* 8 & 9 *Geo.* 2. *Marshal* v. *Lawrence.*

In a prohibition it was moved to plead double, viz. *That J. C. &c. named in the declaration at a meeting, &c. did not make up a true and just account, &c.* and *that the account mentioned in the declaration was not examined, allowed and approved by the vestry*; and the same was granted on hearing counsel on both sides. *Cases of Practice in C. B.* 122. *Mich.* 9. *Geo.* 2. *Coats* v. *Smith and Midgely.*

In trespass it was moved for defendant for leave to plead doubly, viz. *non cul'* and *liberum tenementum* of the liberty of *St. Catherine*'s, and obtained a rule to shew cause, which was afterwards made absolute upon an affidavit of service, no cause being shewn. *Notes in C. B.* 241. 10. *Geo.* 2. *Stibbs* v. *Neeves.*

In replevin the court gave leave to plead doubly, viz. *that plaintiff in replevin had not property*, and *a justification as a distress for rent. Notes in C. B.* 244. *Mich.* 10. *Geo.* 2. *Bird* v. *Spinks.*

After a judge's *order for time to plead, pleading an issuable plea*, defendant moved to plead double matter, and the question was, whether a rule for that purpose ought to be granted or not? the court took time to consider, and after conferring with the judges of other courts, gave defendant leave to plead doubly, pleading issuable pleas, and taking short notice of trial. *Notes in C. B.* 244. *Mich.* 10. *Geo.* 2. *Leighton* v. *Leighton.*

Defendant had pleaded *non assumpsit infra sex annos*, and moved to add to that plea *non assumpsit generally*, which was denied. After defendant had pleaded a single plea, he cannot have leave to plead doubly. *Notes in C. B.* 245. *Hill.* 10 *Geo.* 2. *Nevil* v. *Fisher.*

In trespass it was moved to plead doubly, *Not guilty* and *justification*, which was denied as contradictory. *Notes in C. B.* 245. *Hill.* 12. *Geo.* 2. *Barnett* v. *Greaves.*

Assumpsit. *Defendant paid* 10*l. on the common rule*, and afterwards obtained a rule to plead double, *non assumpsit* and *non assumpsit infra sex annos.* Plaintiff moved to set aside the double plea with costs, and had a rule to shew cause, which was made absolute. Plaintiff by the rule to pay money into court is confined to plead the general issue, and no other plea. The motion afterwards to plead double, is an imposition on the court. *Notes in C. B.* 245, 246. *East.* 10. *Geo.* 2. *Buck* v. *Warren, Attorney in case.*

It was moved to plead double, viz. *damage-feasant*, and under a *demise from defendant to plaintiff.* Ch. J. said, he thought them inconsistent; but as defendant obtained a rule to shew cause, and plaintiff did not oppose it, it must be absolute. *Notes in C. B.* 246. *East.* 11. *Geo.* 2. *Church* v. *Feudall.*

The court gave defendant leave to plead doubly, viz. *a distress for damage-feasant* and *for rent in arrear.* This is not stronger than *Not guilty* and *liberum tenementum*, *solvit ad diem*, and a *mutual debt*, which have been granted. *Notes in C. B.* 247. *Trin.* 11 & 12 *Geo.* 2. *Baynes* v. *Lutwidge.*

Defendant having obtained a *rule to plead* doubly (*non assumpsit* and *non assumpsit infra sex annos*) plaintiff moved to discharge it, insisting that *defendant* who *was a prisoner in the Fleet at the time of* his being charged with *the declaration, before this rule obtained, was discharged at the sessions of the peace, by the* compulsory clause in the *insolvent debtors act* 10 *Geo.* 2. *and being at large, could regularly apply for the rule to plead doubly without first entring a common appearance*; *which was not done.* The question was never determined, but by consent the plaintiff had leave to discontinue without costs. *Notes in C. B.* 274. *Trin.* 11. & 12 *Geo.* 2. *Cock.* v. *Kerridge.*

Rule made absolute to plead double, *non assumpsit* and defendant's *discharge under the insolvent debtors act* 10 Geo. 2. *Notes in C. B.* 252. *East.* 12. *Geo.* 2. *Jones* v. *Body.*

A rule the same term in case of *Lisle* v. *Jenyns*, had been made to shew cause, and made absolute on affidavit of service (no case being shewn), to plead *non est factum* and *defendant discharged* under the said act. *Notes in C. B.* 252. *Jones* v. *Body.*

For more learning on this subject, see 9 Vin. Abr. *tit.* Double Plea.

Double quarrel, (more properly *Double querele, Duplex querela*) Is a complaint made by any clerk, or other, to the archbishop of the province against an inferior ordinary, for delaying of justice in some cause ecclesiastical; as to give sentence, to institute a clerk presented, or the like: The effect whereof is, that the said archbishop taking knowledge of such delay, directeth his letters under his authentick seal, to all and singular clerks of his province, thereby commanding and authorizing them, and every of them, to admonish the said ordinary, within a certain number of days, namely, nine days, to do the justice required, or otherwise to cite him to appear before him or his official at a day, in the said letters prefixed, and there to alledge the cause of his delay. And lastly, To intimate to the ordinary, that if he neither perform the thing enjoined, nor appear at the day assigned, he himself will without delay proceed to perform the justice required: And this seemeth to be termed a *double quarrel*, because it is most commonly made against both the judge, and him at whose petition justice is delayed. *Cowell.*

Doubles, Signify as much as letters patent, being a French word made of the Latin *diploma.* Stat. 14. *Hen.* 6. *c.* 6.

Dover. What pleas to be held by the constable, 28 *Ed.* 1. *st.* 3. *c.* 7. For paying of the rents to *Dover* castle, 32 *Hen.* 8. *c.* 48. What offenders may be committend to *Dover* castle, 32 *Hen.* 8. *c.* 48. *sect.* 6.

Douglas, *alias* **Afland**, (*River*) See Rivers.

Doulas and lockeram. Under what penalty the contents of every piece or half piece put to sale, must be set upon the cloth, 28 *Hen.* 8. *c.* 4. *sect.* 2.

Douze peers, Were twelve peers in *Henry* the Third's time, who were appointed at the instance of the barons, to be as privy counsellors to the King, or rather *conservators* of the Kingdom. *Cowell, edit* 1727.

Dow. To give, from the Latin *Do.*

Dowager, (*Dotissa*) A widow endowed, or that hath a jointure; a title or addition, applied to the widows of princes, dukes, earls, and persons of honour only.

Dowcates, The same with **Dovecotes.**

Dower, (*Dos* and *Dotarium*) The first (*dos*) properly signifies that which the wife brings her husband in marriage, otherwise called *maritagium*, marriage goods: The other (*dotarium* or *doarium*) that portion of lands or tenements which she hath for term of her life from her husband, if she out-live him. *Glanville, lib.* 7. *cap.* 1. *Briton, lib.* 2. *cap.* 101. *in princip.* Some authors have for distinction, called the first a *dowry*, and the other a *dower*, but they are often confounded. Of the former our law books speak little, this only may be noted; that whereas by the Civil law, instruments are made before marriage, which contain the quantity of the wife's *dowry*, or substance brought to her husband, that he, having the use of it during marriage, may, after certain deductions,

ductions, reſtore it again to the wife's heirs or friends, after the marriage diſſolved. The common law of *England*, whatſoever chattels, moveable or immoveable, or ready money ſhe brings, makes them forthwith her huſband's own, to be diſpoſed of as he will, leaving her at his curteſy, to beſtow any thing or nothing upon her at his death: only if ſhe be an inheritrix, the huſband holds her land but during her life, except he have iſſue by her; and then he holds it by the *curteſy of England*, during his own life. See **Curteſy**. Of dower there are five kinds.

1. Dower *per legem communem.*
2. Dower *per conſuetudinem.*
3. Dower *ex aſſenſu patris.*
4. Dower *ad oſtium eccleſiæ.*
5. Dower *de la plus belle.*

Dower by the Common law is a third part of ſuch lands, as the huſband was ſole ſeiſed of in fee, during the marriage, which the wife is to enjoy during her life; for which there lies a writ of *dower*. *Dower by cuſtom* gives the wife, in ſome places, half her huſband's lands, ſo long as ſhe lives ſole, as in *gavelkind:* And as cuſtom may enlarge, ſo may it abridge *dower*, and reſtrain it to a fourth part: *Ex aſſenſu patris, ad oſtium eccleſiæ*, the wife may have ſo much *dower*, as ſhall be ſo aſſigned or agreed upon, but it ought not to exceed a third part of the huſband's lands. *Glanv. lib.* 6. *cap.* 1. And if it be done before marriage, it is called a *jointure*. *Dower de la plus belle*, is when the wife is endowed of the *faireſt* or beſt part of her huſband's eſtate. See *Coke on Littl. fol.* 33. *b. Romanis non in uſu fuit uxoribus* dotes *retribuere, ideo verbo genuino carent quo hoc dignoſcitur*; *& rem ipſam in Germanorum moribus miratur* Tacitus, *dotem (inquit) non uxor marito, ſed uxori maritus affert.* Spelman.

To the conſummation of *dower*, three things are neceſſary, *viz. Marriage, ſeiſin*, and the *huſband's death. Bingham's caſe*, 2 *Rep.* If the wife be paſt the age of nine years at the death of her huſband, ſhe ſhall be endowed. If a woman elope, or go away from her huſband with an adulterer, and will not be reconciled, ſhe loſeth her *dower*, by the ſtat of *Weſt.* 2. *cap.* 34. 2 *part. Inſt.* 433.

Camden, (in his *Brit.* tit. *Suſſex*) relates this memorable caſe, (out of the Parl. Records, 30 *Edw.* 1.) Sir *John Camois*, ſon of the Lord *Ralph Camois*, of his own free will, gave and demiſed his own wife, *Margaret*, daughter and heir of *John de Gateſden*, unto Sir *Will. Panell*, knight; and unto the ſame *William*, gave, granted, releaſed and quit-claimed all her goods and chattels, *&c.* So that neither he himſelf, nor any man elſe in his name, might make claim, or ever challenge any intereſt in the ſaid *Margaret*, or in her goods and chattels, *&c.* by which grant, when ſhe demanded her *dower* in the manor of *Torpell*, part of the poſſeſſion of Sir *John Camois*, her firſt huſband, then deceaſed, there grew a memorable ſuit in law, but wherein ſhe was overthrown, and judgment pronounced (in parliament 30 *Edw.* 1.) *That ſhe ought to have no* dower *from thence*, upon the ſtat. of *Weſtm.* 2. *Quia receſſit a marito ſuo in vita ſua, & vixit in adulterio cum prædicto Gulielmo, &c.* This caſe is cited alſo in 2 *Inſt. fol.* 435.

Dower, at Common law, is the third part of all the lands whereof the huſband has been ſeiſed during the coverture, of ſuch an eſtate as the children might, by poſſibility, have inherited, and to which, by the death of the huſband, the wife is intitled for her life. *Co. Litt.* 33. *b.* 39. *b.*

Dower, by the Civil law, was the portion the wife brought to her huſband, either in land or money, whereof the *naturale dominium* belonged to the wife, and the *dominium civile* to the huſband; ſo that the huſband had only the *uſufructus* during his life in things immoveable, but could not alien them; in things moveable, he might alien them, but muſt reſtore to the value: theſe, upon the diſſolution of the marriage, by the death of the huſband, or divorce, came back to the wife. See *Vin.* 249. *Corvin, lib.* 23. *tit.* 3. *Honorius* 114, 115. Donations *inter ſponſum & ſponſam propter nuptias* began about the time of *Conſtantine*, and were made before marriage; but by the *Juſtinian* conſtitution they were good after marriage, and were gifts from the huſband to the wife, which, upon the diſſolution of the marriage, came back to the huſband, as the dower did to the wife. *Vin.* 245. *Inſt. of Imperial Law* 43, 117, 118, 119. Among the Feudiſts, the rule was, *non uxor marito, ſed uxori maritus affert*; and the reaſon was, that the huſband and eldeſt ſon in the family being brought up in military exerciſe, the wife and youngeſt ſons tilled and improved the land, and in their expeditions found proviſions for the army; and having the third in labour, ſhe had the third part of the feud for the maintenance of her and her younger children during her life. *Spelman* tit. *Doarium* 175.

Under this head is conſidered,

1. *What woman ſhall be endowed.*
2. *Of what eſtate a woman may have dower.*
3. *Of the things requiſite to the conſummation of dower, namely, marriage, ſeiſin, and the death of the huſband.*
4. *Of the aſſignment of dower.*
5. *Where the wife ſhall have her election to be endowed of one thing or another; and where of both; and of endowment* de novo, *and the* dos de dote.
6. *What ſhall be a bar of dower, and what not.*
7. *Of the proceedings and damages in dower* unde nihil habet.
8. *Of the admeaſurement of dower.*
9. *Of dower by cuſtom, dower* ad oſtium eccleſiæ, *dower* ex aſſenſu patris, *and dower* de la plus belle.

1. *What woman ſhall be endowed.*

If the wife be of the age of nine years or more at the death of her huſband, ſhe ſhall have dower, tho' her huſband be then but four years old: The reaſon they would not allow women before this age to demand dower ſeems to be from their incapacity of having iſſue ſooner. *Lit. ſect.* 36. *Co. Lit.* 33. *a. F. N. B.* 149. 1 *Rol. Abr.* 675.

The ſupport of her children is part of the conſideration whereon this allowance of dower is founded; for as on the one hand it would be unreaſonable to extend it to ſuch women who are incapable of performing the conditions; ſo on the other hand it would not be reaſonable to exclude women of that age, by reaſon of the incapacity of their huſband's; ſince it was the act of God interpoſed to prevent their attaining a capacity, which ought in no ſort to prejudice the wife; much leſs can the huſband by his own act prevent his wife of dower, if ſhe attains the age of nine years during the coverture; and therefore tho' he aliens his land before, yet if ſhe after arrives to nine years of age, her title is now conſummate *ab initio*, and over-reaches his alienation; for dower being intended a proviſion for the wife and children, whenever ſhe attains ſuch an age, as the law adjudges her capable of children, nothing farther is required; and therefore tho' the huſband die before he or his wife are of age of conſent; yet if ſhe be nine years old, this is a ſufficient marriage to intitle her to dower, and ſo ought to be certified by the biſhop. 13 *Co.* 22. *Co. Lit.* 33. *a. Dyer* 313. *pl.* 92. 369. *pl.* 48.

If a man marries a woman of 100 years old, and dies, ſhe ſhall be endowed; for the law cannot determine the preciſe time of the failure of her capacity to have iſſue, which may vary according to the ſtrength and other circumſtances of the woman. *Co. Lit.* 40. 1 *Rol. Abr.* 675. *S. P.*

If a woman alien, be ſhe friend or enemy, marry a ſubject, ſhe ſhall not be endowed, becauſe by the policy of the law all aliens are diſabled from acquiring any freehold amongſt us; but for this *vide* head of **Aliens**, 7 *Co.* 7. *Co. Lit.* 31. *a.*

If a Jew born in *England* marry a Jew born alſo here, and the huſband is converted to the Chriſtian faith, and after purchaſe lands and enfeoffeth the other, and dieth, the wife ſhall not have dower. *Co. Lit.* 31. For *Rich.* 1.

erected a court where all the real and perſonal eſtate of the Jews was regiſtred, and upon the death of any Jew, ſuch eſtate came to the King, tho' it was redeemable by their children paying a fine; and in this court ſhe could not demand dower but againſt a Jew, and ſhe could not demand it at Common law againſt a Chriſtian; and for this reaſon it ſhews, if the huſband had not aliened, yet ſhe could not recover againſt the heir of a Chriſtian. *Hollingſhead, vol.* 3. *p.* 15.

If a woman be attainted of treaſon or felony, ſhe ſhall not have her dower, but if pardoned ſhe ſhall be received to demand it, tho' the huſband has aliened in the mean time, becauſe by the marriage and ſeiſin of her huſband ſhe was intitled to dower, and when the impediment is removed, her capacity is again reſtored. *Co. Lit.* 33. *a.* 13 *Co.* 23.

At Common law, if the huſband was attainted of treaſon, murder, or felony, the wife loſt her dower, becauſe it was a condition annexed to all feuds, that the feudiary ſhould not commit ſuch crimes. *Co. Lit.* 40. *b. Plow.*. 262.

But afterwards the ſtatute of 1 *Ed.* 6. *cap.* 12. ordained, that in all caſes where the huſband was attainted of treaſon or felony, that their wives ſhould notwithſtanding have their dower; but 5 *Ed.* 6. *cap.* 11. repeals that in all caſes of treaſon; the words of which act being general, exclude the wife as well in caſe of petit treaſon as in caſe of high treaſon; but in caſe of miſpriſion of treaſon, or attainder of felony only, the other act ſtands in force, and therefore they ſhall have dower in all ſuch caſes. *Stanf.* 195. *Co. Lit.* 37. *a.* 392. *b.* 13 *Co.* 19. 3 *Inſt.* 216. *Finch* 71.

If the huſband ſeiſed of lands in fee makes a feoffment, and then commits treaſon, and is attainted of it, the wife ſhall not recover dower againſt the feoffee. *Bendl.* 56. *Dyer* 140. *Co. Lit.* 111. *a. S. P.*

The wife of a *felo de ſe* ſhall have dower. *Plow.* 261. *a.* 262. *a.*

So if the huſband be outlawed in treſpaſs, or any civil action, for this works no corruption of blood, or forfeiture of lands. *Bro.* 82. *Perk.* 388. *Co. Lit.* 31. *a.*

After the making of the ſtatute 1 *Ed.* 6. *cap.* 12. it ſeems to have been doubted whether the wife ſhould not loſe her dower in caſe of any new felony made by act of parliament; and therefore where ſeveral offences have been made ſince, care has been taken to provide for the wife's dower: As in ſtat. 5 *Eliz. cap.* 14. which makes a ſecond forgery felony without clergy. So 3 *Eliz. cap* 3. which makes it felony to tranſport ſheep, *&c.* So alſo in 31 *Eliz. cap.* 4. which makes it felony to imbezel the King's armour to the value of 20 *s.* So in 3 *Jac.* 1. *cap.* 4. which makes it felony to ſerve foreign Princes without firſt taking the oath of obedience. So alſo in 1 *Jac.* 1. *cap.* 31. which makes any one's going abroad with the plague upon him, felony; and this loſs of dower being only part of the judgment by implication, may well be ſaved by an expreſs proviſo, without any repugnancy. 3 *Inſt.* 47, 48, 80, 81, 90.

If a woman being a lunatick kill her huſband, or any other, yet ſhe ſhall be endowed, becauſe this cannot be felony in her who was deprived of her underſtanding by the act of God; ſo though ſhe be of ſound mind, and refuſed to bring an appeal of his death, when he is killed by another, yet ſhe ſhall be endowed; for this is only a waver of that privilege the law has given her to be avenged of her husband's murderer; ſo it ſeems if ſhe refuſes to viſit and aſſiſt her husband in his ſickneſs, yet ſhe ſhall be endowed, for this is only undutifulneſs, which the law does not puniſh with the loſs of her intire ſubſiſtence. *Perk.* 364, 365.

If an idiot or lunatick marry, and die, his wife ſhall be endowed, for this works no forfeiture at all, and the King has only the cuſtody of the inheritance in one caſe, and a power of providing for him and his family in the other; but in both caſes the freehold and inheritance is in the lunatick, and therefore the wife dowable. *Co. Lit.* 31. *a.*

Widow of a mortgager not barred of her dower, if ſhe did not join in the mortgage, 14 *Will. & Ma. c.* 16. *ſect.* 5.

2. *Of what eſtate a woman may have dower.*

Of an annuity to a man and his heirs, after a writ of annuity brought, a woman ſhall not be endowed; but if a rent-charge be granted to a man and his heirs, and before any diſtreſs made the husband die, and the wife brings her writ of dower, the heir cannot, by claiming it to be an annuity, defeat her of her dower thereof; but if he brings an annuity, and recovers judgment before the wife, then it is become an annuity *in perpetuum*, and the wife ſhall be barred. *Co. Lit.* 32. *a.* 144. *b. Pop.* 87. *Perk.* 341.

Of copyhold lands a woman ſhall not be endowed, unleſs there be a ſpecial cuſtom for it; but if there be a cuſtom to be endowed thereof, then ſhe ſhall have the aſſiſtance of ſuch laws as are made for the more ſpeedy recovery of dower in general, being within the ſame miſchief, and therefore ſhall recover damages within the ſtatute of *Merton.* 4 *Co.* 22. *Hob.* 216. 5 *Co.* 116.

Of tithes women were not dowable till 32 *H.* 8. for before that ſtatute tithes were not a lay fee, but now they are dowable of them. *Style's P. R.* 122. 11 *Co.* 25. *Co. Lit.* 32. *a.* 159. *a.* 1 *Rol. Ab.* 682. And the beſt way to aſſign dower of tithes is the third ſheaf, or the third part of the tithes generally, becauſe it is uncertain what part of the land will be ſown; and therefore if the garbs of any third part of the land in certain ſhould be aſſigned, the tenant may perhaps not ſow that part at all, and ſo defeat the dower. How dower of wool and lambs is to be aſſigned, ſee 1 *Brownl.* 126. 2 *Brownl.* 143.

Of common of paſture in groſs, which is certain, a woman ſhall be endowed, but not of common without number, becauſe it cannot be divided without ſurcharging the common by two, which before was only in the power of one by the grant; and when one has power by the grant to put in as many cattle as he pleaſes; he alone is made judge of the number, which to divide, or delegate to another, would be unjuſt. *Perk.* 341, 342. *F. N. B.* 142. *Co. Lit.* 30. 1 *Rol. Abr.* 675. 11 *Co.* 45.

Dower of ſeveral lands, meadow, and paſture, and common of paſture *cum pertinentiis* in *D.* and upon *ne unques ſeiſie que dower* pleaded, and verdict for the demandant; it was moved in arreſt, *&c.* that of common in groſs without number a woman could not be endowed, which the court agreed; but here it being after verdict ſhould be intended common appendant, ſince otherwiſe the judge could not have directed the jury to find for the demandant, though it be not ſaid *eiſdem ſpectant'*, and though if appendant, it was included in the *cum pertinent'*, yet it is not *bis petitum*, but only an enumeration of the ſeveral things demanded. *Cro. Car.* 300. 1 *Jones* 315. *S. C.* 1 *Rol. Abr.* 675. *S. C.*

In dower the demand was *de tertia parte liberæ faldæ*, and held not good for want of ſetting out in certain, for what cattle, as to their number and kind, and ſo like common without number. *Godb.* 21.

A woman intitled to dower of a manor, in which were copyholders, demanded her dower by the name of certain meſſuages, certain acres of land, and certain rents, and not by the name of the third part of the manor, and recovered, and kept courts, and granted copyholds, which the whole court held to be void, becauſe ſhe had no manor, having made her demand, as of a thing in groſs; but if the demand had been of the third part of the manor, then ſhe had a manor, and might have kept courts, and granted copies. *Godb.* 135. See *Perk.* 341, 343, 344. *Cro. Jac.* 621. *Palm.* 264. *Co. Lit.* 32, 165.

Of an advowſon, be it appendant or in groſs, a woman ſhall be endowed, for this may be divided as to the fruit and profit of it, *viz.* to have the third preſentation. See *Perk.* 343, 344. *F. N. B.* 148, 150. *Co. Lit.* 32. *Cro. Jac.* 621. *Cro. Eliz.* 360. 1 *Rol. Abr.* 683. *Co. Lit.* 379. 3 *Leon.* 155. *Cro. Jac.* 691.

Of a mill a woman ſhall be endowed, though it cannot be divided, and therefore ſhe ſhall have the third toll diſh,

diſh, or *integrum molendinum per quemlibet tertium menſem. Co. Lit.* 32. *a.* 11 *Co.* 25. *Perk.* 342, 415. 2 *Brownl.* 143. *Bendl.* 202. *F. N. B.* 149.

Dower was brought *de tertia parte* of a mill, a kiln-houſe, *&c.* and judgment to recover the third part *in ſeparalitate per metas & bundas*; and this judgment was reverſed upon error brought, for it ought to have been of the third part generally, and if *per metas & bundas*, none of them can make any uſe of it. 1 *Lev.* 182. 2. *Keb.* 8. *S. C.*

Of a bailiwick a woman ſhall be endowed, as to have the third part of the profits; ſo of a fair or market, the third part of the ſtallage; ſo of an office, as of the office of the *Marſhalſea*, to have the third part of the profits, and in ſuch caſes ſhe ſhall be contributory to the third part of the charge; ſo ſhe may be endowed *de tertia parte exituum provenient' de coſtodia gaolæ abbatiæ Weſtmon.* Or of the third part of the profits of courts, fines, heriots, *&c.* *Perk.* 342. *Co. Litt.* 32. 1 *Rol. Abr.* 676. *F. N. B.* 149. *Plow.* 379.

A woman may be endowed of the third part of the profits of a park-keeper, or of the third part of the profits of a dovehouſe, or of the third part of the profits of a piſcary, as the third fiſh, or *tertium jactum retis. Co. Lit.* 32. *a.* *Plow.* 379. *b.*

Dower; the tenant pleads, that Sir *Thomas Gerrard* was *ſeiſed of the meſſuage* now in demand, *called* B. *in his demeſne as of fee*, and being ſo ſeiſed, *Jac.* 1. *by his letters patent under the great ſeal of* England, *created the ſaid Sir* Thomas Gerrard, *baron of* B. *and ſo the meſſuage in demand became caput baroniæ*, and he prays judgment, if the demandant ought to be endowed thereof. The demandant demurred, and judgment was given for her in *C. B.* tenant aſſigns for error, that the demandant ought not to have dower of this meſſuage, being *caput baroniæ*; that would tend to the diſhonour of the dignity, to have the capital meſſuage divided and diſmembered, but it would be more for the honour of the realm that it be kept intire; and for authority cited *Co. Lit.* 31. *b.* *Fitzh. Dower* 180. *Bracton, lib.* 2. 170. *b. Paſch.* 4 *H.* 3. *rot.* 7. but Serjeant *Wright* and Mr. *Northy contra*, of which opinion was the whole court; for theſe authorities muſt be intended of feodal baronies, of which there are none at this day except *Arundel*; and this privilege was allowed to them, becauſe they ought upon neceſſity to defend the realm, to which they are bound by tenure; for the King at the creation of the barony gave to the baron lands and rents, to hold of him by the defence of the realm; but then this cannot be a feodal barony, for it was in the ſeiſin of the *Gerrards* before, and therefore was not given to the *Gerrards* by the King at the creation of the barony, to hold of him; and *Rokeby* J. ſaid, that this was the reaſon of the judgment in *C. B. Lord Raym. Rep.* 72. *Hill.* 7 *W.* 3. *C. B. Gerrard* v. *Gerrard.*

The eſtate of which the huſband muſt be ſeiſed, muſt be an eſtate in fee-ſimple, fee-tail general, or where the huſband is ſeiſed as heir of the ſpecial tail, which neceſſarily excludes deſcendible freeholds; therefore if a man makes a leaſe for life, rendring rent to him and his heirs, and after marry, and die, his wife ſhall not be endowed of this rent, becauſe it is but a deſcendible freehold; nor of the land, becauſe not ſeiſed during the coverture. 1 *Rol. Abr.* 676. *Plow.* 256. 10 *Co.* 98.

But if tenant in tail bargains and ſells his lands to the huſband, and his heirs, the wife of the bargainee ſhall be endowed againſt his heir, but not againſt the iſſue in tail; ſo if tenant in tail grant all his eſtate to one and his heirs, though it be of things which lie merely in grant, as rents, common, advowſons, *&c.* yet the wife of the grantee ſhall be endowed till the grant be avoided by the iſſue in tail; the reaſon of which difference between theſe deſcendible freeholds, and theſe eſtates made by tenant in tail, ſeems to be, that in the firſt caſe, the eſtate in its creation ſeems to be no greater than a freehold; but in the other nothing appears to the contrary, but that it may be an abſolute fee, and till the iſſue comes in to ſhew it otherwiſe, and claim his right, it ſhall, to all intents, be regarded as ſuch; and by conſequence the wife of ſuch grantee or bargainee is well dowable thereof, till the contrary appears. 1 *Saund.* 261. *Plow.* 556. 1 *Bulſt.* 163. 3 *Co.* 84. 10 *Co.* 96, 98.

If tenant in tail be attainted of treaſon, and the King grant the land to one and his heirs, the wife of the grantee ſhall be endowed; for the King had a qualified fee, ſo long as the tenant in tail had iſſue; and this qualified fee paſſed to the grantee. *Plow.* 557.

But if tenant in tail covenant to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his eldeſt ſon in tail, and after marries, and dies; yet his wife ſhall be endowed, becauſe when he limits an eſtate for his own life, he hath executed all the power he had over the eſtate by ſuch manner of conveyance, and the remainder is merely void; and he continues tenant in tail, as he was before; ſo if he had covenanted that the land ſhould deſcend, remain, or come to his ſon after his death; yet his wife ſhould be endowed; for this is only a covenant to permit his ſon to have what he ought not to hinder him of, and makes no alteration of the father's eſtate. *Cro. Eliz.* 279. 2 *Co.* 72. *S. C. Moor pl.* 105. *S. C. Yelv.* 51.

If tenant in ſpecial tail, remainder to him in general tail or fee be, and his wife die without iſſue, and he marries again, and dies, his wife ſhall be endowed, for by the death of his firſt wife without iſſue, he was become tenant in tail after poſſibility, *&c.* which being but an eſtate for life, was merged by the acceſſion of the remainder in tail or fee; and ſo his ſecond wife dowable. 1 *Rol. Abr.* 677. *Brook* 25. *Perk.* 338.

If *A.* ſeiſed in fee covenants to ſtand ſeiſed to the uſe of himſelf and his heirs, till *C.* his middle ſon take wife, and after to the uſe of *C.* and his heirs; and after *A.* dies, and this deſcends to *B.* his heir, who dies, and then *C.* takes wife; it ſeems the wife of *B.* ſhall loſe dower, becauſe the eſtate of the huſband ended by expreſs limitation made before her title of dower began; and therefore her dower, which is derived out of it, cannot continue longer than the original eſtate. 1 *Rol. Abr.* 676.

Of an eſtate to a man and his wife, and the heirs of their two bodies; if ſuch wife die, and he marry a ſecond wife, and die, ſuch ſecond wife ſhall not be endowed, becauſe the iſſue by her cannot inherit *per formam doni.* See *Bro.* 19, 36. *Cro. Jac.* 615. *Lit. ſect.* 53. 8 *Co.* 36. 1 *Inſt.* 19. *a.* 2 *Inſt.* 336. *Co. Litt.* 31. 1 *Leon* 66. 3 *Leon.* 80. *Noy* 66.

The huſband muſt have the freehold and inheritance in him *ſimul* and *ſemel*, otherwiſe ſhe ſhall not be endowed; therefore if lands are given to the huſband for life, remainder to *B.* in tail, remainder to the huſband in fee or in tail, and he dies, living *B.* or any of his iſſue, his wife ſhall not be endowed. 1 *Rol. Abr.* 677. *Perk.* 335. *Br.* 6. See *Cro. Eliz.* 564.

If a leaſe be made for life, rendring rent; the leſſor marries, and dies, his wife ſhall not be endowed either of the rent or of the land; not of the land, becauſe her huſband was not ſeiſed of the freehold during the coverture, and the rent was but a freehold for life; but if a leaſe be made for years, rendring rent, and the leſſor marries, and dies, his wife ſhall have dower of the third part of the reverſion, and of the third part of the rent, as incident to it; becauſe he had the freehold in the land *ſimul & ſemel*, but ſhe ſhall not be endowed of the rent *per ſe*, merely becauſe her huſband was not ſeiſed of any freehold or inheritance in it; but if no rent be reſerved on the leaſe for years, then *ceſſet executio* during the term; and therefore if a leaſe be made for years, remainder to *J. S.* and his heirs, the wife of *J. S.* ſhall be endowed; but *ceſſet executio* during the term. *Perk.* 348. *Bro.* 44, 60, 89. *Co. Lit.* 32. *a.* 1 *Rol. Abr.* 678.

In dower upon *ne unques ſeiſie que dower* pleaded, the caſe was thus: *A.* tenant for life, remainder to *B.* and his heirs for the life of *A.* remainder to the heirs male of the body of *A.* remainder over; *A.* marries, and dies without iſſue; and if the remainder to *B.* and his heirs, during the

the life of *A.* was such an interposing estate for life to *A.* and the remainder to him in tail, that his wife should not be endowed, was the question. And for the demandant it was said, that all the estate was really in *A.* and the remainder to *B.* for the life of *A.* was but a possibility, that if *A.* should commit a forfeiture, then *B.* might take advantage of it to preserve the remainders; and though by reason of this possibility, the estate for life of *A.* is not merged, yet the tail is executed to such purpose, that his wife shall be endowed; but the court on the first argument, gave judgment against the demandant; the reason seems to be, because the husband was not seised of the freehold and inheritance *simul & semel.* 3 *Leo.* 430, 437.

If the husband be seized of a joint estate, and dies, his wife shall not be endowed; as if lands are given to two men and their heirs, or the heirs of their two bodies, and one of them dies, his wife shall not be endowed, but shall go to the survivor, who is then in form the first feoffor or donor, and may plead it as an original feoffment or gift to himself; and so is paramount her title of dower, which is not complete till her husband's death. 3 *Co.* 27. *Co. Lit.* 30. *a.* 37. *b.* *Bro.* 4, 84. *Cro. Car.* 191.

So if lands are given to two men, and the heirs of the body of one of them, and he who hath the tail marries, and dies, leaving issue; yet his wife shall not be endowed, but the survivor shall take place, and though he die after, yet shall not the wife be endowed, because the husband, during the coverture, was not seised of an estate whereof she was dowable. *Perk.* 334.

Father and son joint-tenants, to them and the heirs of the son, were both hanged in one cart, for felony, (as it must be); the wife of the son brought dower, and upon *ne unques seisie que dower* pleaded, this matter was given in evidence; and further, that the son survived, as appeared by shaking his legs; and adjudged she would be dowable. *Cro. Eliz.* 503. *Noy* 64. *S. C.*

Of a tenancy in common a woman shall be endowed, for there no survivorship takes place, but each moiety descends to the respective heirs of the respective tenants in common; and in such case the dower shall be assigned in common too, for she cannot have it otherwise than her husband himself had. *Co. Lit.* 34. *b.* 37. *a.* *Lit. sect.* 44, 45.

3. *Of the things requisite to the consummation of dower, namely, marriage, seisin, and the death of the husband.*

If a man make a contract of matrimony with a woman, and die before the marriage be solemnized between them, she shall have no dower, because she never was his wife. *Perk.* 306. It was formerly held, that a woman married in a chamber should not have dower, 16 *Hen.* 3. and that the marriage should be celebrated *in facie ecclesiæ*; but the law is now altered, and marriages in private houses, if all circumstances are complied with, held good; and that God is not less present in such houses than in the most sanctified places. *Perk.* 306. *F. N. B.* 150.

If a woman make a contract of matrimony with *J. S.* and then marrieth with *J. D.* who is seised of lands, and dieth, she shall have dower of the lands of *J. D.* But if a man marry a second wife, living the first, and die, such second wife shall have no dower; so if a woman marry a second husband, living the first, and die, she shall have no dower. *Perk.* 304—5. *Moor* 226.

Upon issue of *ne unques accouple en loyal matrimony*, the bishop ought to certify, that they were accoupled in lawful marriage, though the man be under fourteen, or the wife above nine, and under twelve years of age at his death, because it was a good marriage till avoided, which now cannot be after his death; but if either disagree to the marriage at their age of consent, then it is avoided *ab initio*, and the wife shall have no dower. *Co. Lit.* 33. *a.* *Dyer* 305, 313, 369.

In dower upon *ne unques accouple en loyal matrimony*, and issue thereupon; a writ was awarded to the bishop, who certified, that she was accoupled *in vero matrimonio cum prædict'* B. *sed clandestino, & quod* B. & E. (demandant) *thori & mensæ participatione mutuo cohabitaverunt usq; ad mortem prædict'* B. and judgment thereon given for the demandant, and error brought and assigned *(inter alia)* that there was neither day, nor place of the marriage mentioned in the bishop's certificate; but the court held it not material nor issuable, because the certificate from the bishop is concluding; 2. That the certificate is not good, because it does not answer to the words of the issue, *ne unques accouple en loyal matrimony*; for that it was a true matrimony, and that they lived together at bed and board, is but argumentative, that they were *legitimo matrimonio copulati*; but the court disallowed this exception; for *vero matrimonio*, though *clandestino, copulati fuerunt*, is as good as *legitimo matrimonio*, and have all one intendment; and though it be *clandestine*, yet it doth not vitiate the marriage; and when it is added, that *thori & mensæ participatione cohabitaverunt, &c.* This proves they continued as husband and wife during his life, and therefore it is not to be questioned now; and the judgment affirmed. *Cro Car.* 351. See *Bro.* 64. *Dyer* 313. *pl.* 92. 368. *pl.* 48—9. 305. *pl.* 60. *Co. Lit.* 33. *b.* 9 *Co.* 19.

If there be a divorce *causâ adulterii*; yet the wife shall be endowed, for this does not dissolve the marriage, but only separates the parties *a mensa & thoro*, and the marriage still so continues in force, that if either of them marry any other, such marriage is void. *Noy* 108. *Godb.* 145. *Co. Lit.* 32. *a.* 33. *b.* 2 *Leon.* 171. *Cro. Car* 463. 7 *Co.* 70. 1 *Rol. Abr.* 680. *cont.*

So a divorce *propter sævitiam* or *metum*, is of the same nature, and does not dissolve the bond of matrimony, but is only a provision for the woman's safety, that she may avoid her husband's cruelty and ill usage, and therefore the wife in such case shall be endowed the rather. *Cro. Car.* 462.

But if there be a divorce *causâ præcontractus, causâ consanguinitatis, causâ affinitatis*, or *causâ frigiditatis*, the wife shall not be endowed, for these dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again; but if either of the parties die before such sentence of divorce be actually pronounced, it cannot be pronounced after; and therefore if the husband die before such divorce, his wife *de facto* shall have dower, for it was *legitimum matrimonium quoad dotem*, and the bishop ought to certify that they were *legitimo matrimonio copulati.* 1 *Rol. Abr.* 681. *Co. Lit.* 32. *a.* 33. *b.* 7 *Co.* 70. 5 *Co.* 98. 2 *Leon.* 169.

In dower the writ was *præcipe* A. *quod reddat* B. *rationabilem dotem suam* of the lands, *&c. dudum* C. *quondam viri sui*; and for not saying *præcipe quod reddat* B. *quæ fuit uxor* C. *&c.* that so she might appear to have title of dower as his wife, it was held ill; and that *quondam viri sui* would not sufficiently help it. *Cro. Car.* 217.

The husband must be seised either in fact or in law, to intitle his wife to dower; but a seisin in law is sufficient for that purpose, because otherwise it would be in the husband's power to defeat his wife of a subsistence after his death, by his own negligence or malice, and she cannot enter to gain a seisin in his right, as he may do into lands descended to her; which is the reason, that of a seisin in law a man shall not be tenant by the curtesy; and therefore if the ancestor die seised, and before that the husband enter into the land, he dies; yet his wife shall be endowed, though he had but a possession or seisin in law. *Perk.* 304. *Co. Lit.* 31, 358. *Lit. sect.* 681. 8 *Co.* 34, 36. *F. N. B.* 149. *Stamf. Prerog.* 41.

So if a lease be made for life, remainder to *J. S.* in fee, who marries, and the lessee dies, and then a stranger enters and intrudes upon the possession, and *J. S.* dies before any entry made by him, yet his wife shall have dower. *Perk.* 372.

If the husband purchase rent, and die before the day of payment, yet the wife shall be endowed; nay, tho' the day of payment be come, and the rent is tendred to the husband, who will not receive it, but utterly refuses it, and dies before any receipt thereof by him, or any other for

for him, and before any thing paid in the name of ſeiſin thereof. *Bro.* 35, 66, 71. *Perk.* 373.

But if there be neither ſeiſin in fact nor ſeiſin in law in the huſband, during the coverture, but only a right of entry or action, then his wife ſhall not have dower; and therefore if a man be diſſeiſed, and then marries, and dies before any entry made by him, his wife ſhall not be endowed of that land. *Perk.* 366.

So if exchange be of lands between *A.* and *B.* and *A.* enters into the lands of *B.* and then *B.* marries, and dies before any entry into the lands of *A.* his wife ſhall not have dower of thoſe lands. *Perk.* 369.

If one infeoff a ſtranger, upon condition to be performed on the part of the feoffee, and after marries, and then the condition is broken, and the feoffor dies before any entry made, his wife ſhall not have dower; becauſe there was no ſeiſin at all in the huſband, during the coverture. *Perk.* 368.

So if a man makes a bargain and ſale to one and his heirs by indenture inrolled, with a *proviſo*, that if ſuch act be done, that the bargain and ſale ſhall be void; and after the bargainor takes a wife, and then the condition is broken; and before entry the bargainor dies, his wife ſhall not have dower; for though the eſtate of the bargainee veſted by 27 *H.* 8 of uſes; yet becauſe the huſband did not re-enter, the eſtate of inheritance in the bargainee was not deveſted, nor had the huſband any ſeiſin during the coverture. 6 *Co.* 34.

In ſome caſes, though the huſband be ſeiſed in fact, yet his wife ſhall not have dower, as of an inſtantaneous ſeiſin; and therefore if two joint-tenants are, and one of them makes a feoffment of his part, and dies, his wife ſhall not be endowed, becauſe he was ſole ſeiſed but for an inſtant, when he made the livrey; ſo if *ceſtui que uſe* after the ſtatute 1 *Rich.* 3. and before 27 *Henry* 8. had made a feoffment in fee, and died, his wife ſhould not be endowed, becauſe her huſband was ſeiſed but for an inſtant. *Co. Lit.* 31. *F. N. B.* 150. 1 *Rol. Abr.* 676. *Moor* 56.

If leſſee for life makes a feoffment in fee, or a leaſe *pur auter vie*, and die, his wife ſhall not have dower, becauſe he gained the fee but for an inſtant, and parted with it again, and this was no diſſeiſin. 1 *Rol. Abr.* 676. *Bro.* 30. *Cro. Jac.* 615.

If tenant in ſpecial tail marries a ſecond wife, who is not dowable of the tail, and after makes a feoffment in fee, and dies, his wife ſhall not have dower, becauſe he gained the fee but for an inſtant. *Cro. Jac.* 615. 1 *Rol. Abr.* 676. *S. C.*

So if connuzee of a fine grant and render the land by the ſame fine to the conuzor, and die, his wife ſhall not be endowed, becauſe he had ſeiſin but for an inſtant. *Co. Lit.* 31. *Vaugh.* 41. *Cro. Car.* 191. 3 *Leon.* 11.

As to the death of the huſband, this is either a natural or a civil death; but upon a civil death the wife ſhall not be endowed; as if the huſband entred into religion, and be profeſſed, his wife ſhall not have dower till he be naturally dead, for though upon ſuch profeſſion his heir may enter, and a writ of *mordanceſtor* lies; yet becauſe he could not enter into religion without the aſſent of his wife, and if ſhe had diſſented, his profeſſion would be void; therefore if ſhe does aſſent, ſhe in a manner vows chaſtity as well as her huſband, and ſhall have no dower during his natural life. *F. N. B.* 150. 1 *Rol. Abr.* 678. *Perk.* 307. *Co. Lit.* 33. *b.*

In dower of the lands of *A* her late huſband, the tenant pleads in bar that *A.* the huſband, was in full life at ſuch a place, *Et hoc paratus eſt verificare qualitercunq; curia, &c.* the defendant replies, that her huſband *obiit* at ſuch a place, *&c. Et eſt in eccleſia ibidem ſepultus, & hoc parat' eſt verificare qualitercunq; curia, &c. Ideo conſiderat' eſt quod prædict'* M. (demandant) *doceat de morte*, and *dictus* R. (tenant) *de vita viri, & ſuper hoc dies datus eſt.* At which day the demandant examined two witneſſes who did not ſpeak directly to his death, but only of their great intimacy with him, and his being gone beyond ſea for his religion, and that they had not heard of him in ſeven years, and concluded that in their conſcience they rather think him dead; and the tenant examining no witneſſes to prove him living, the demandant had judgment. *Bendl. pl.* 131. *Dyer* 185. *S. C. Moor pl.* 55. *S. C.*

4. *Of the aſſignment of dower.*

If a diſſeiſor, abator, or intruder aſſign dower, this is good, and ſhall not be avoided, unleſs they be in of ſuch eſtates by fraud and covin of the woman, to the intent ſhe may be endowed by them, or recover dower againſt them; and then this ſhall be avoided by the entry of him who hath right, though the aſſignment be indifferently made by the ſheriff after judgment of an equal third part. *Perk.* 394, 395, 398. *Co. Lit.* 35. *a.* 2 *Co.* 67. 3 *Co.* 78. 5 *Co.* 30. 6 *Co.* 58. *Plow.* 54. *b.*

If there be two or more joint-tenants of land, whereby a woman is dowable, and one of them aſſign her dower thereof, this is good, and ſhall bind the others, becauſe they were compellable to aſſign it in ſuch manner; but if one of them had aſſigned her rent thereout in lieu of dower, this ſhall not bind the reſt, becauſe they could not be compelled to it by ſuit. *Perk.* 397. *Co. Lit.* 35, 2 *Co.* 67.

If the huſband makes ſeveral feoffments of his lands to ſeveral perſons, and one of them endows the wife of the feoffor of his part in ſatisfaction of all that ſhe ought to have of the other feoffees, and ſhe accepts it, this is good; but yet they cannot take benefit of it, becauſe ſtrangers thereto, and cannot plead it, nor have any means to bring the other into court to plead it; but if the heir aſſigns her dower in ſatisfaction of dower out of his own lands, and the lands of the feoffees; then if a writ of dower be brought againſt the feoffees, they may vouch the heir who may plead this for his own ſafety, leſt they recover in value againſt him. *Co. Lit.* 35. 9 *Co.* 18. *Perk.* 400, 402.

If the huſband, ſeized of lands in right of his wife, or jointly with his wife, of lands whereof a woman is dowable, aſſigns the third part of the ſame lands to the woman for her dower, this is good, and ſhall bind the wife, although ſhe ſurvives him, becauſe they might be compelled to do it by ſuit. *Perk.* 399. *Co. Lit.* 38. 1 *Rol. Abr.* 681.

None can aſſign dower but thoſe who have a freehold, or againſt whom a writ of dower lies; therefore a tenant by ſtatute merchant, ſtatute ſtaple, or *elegit*, or leſſee for years cannot aſſign dower, for none of theſe have an eſtate large enough to anſwer the plaintiff's demand. *Perk.* 403, 404. *Co. Lit.* 35. *Bro.* 63, 94. 1 *Rol. Abr.* 681. 6 *Co.* 57.

If a woman be dowable of land, meadow, paſture, wood, *&c.* and any of theſe be aſſigned in lieu of dower of all the reſt, it is good, though it be againſt common right, which gives her but the third part of each, for the heir's enjoyment of the reſidue ſufficiently accounts for her title to what ſhe has. 1 *Rol. Abr.* 683. *Moor, pl.* 47, 66.

If a woman be dowable in three manors, and accepts of the heir one of thoſe manors in lieu of dower in all the reſt, this is good, though againſt common right, which gives her but the third part of each manor. 1 *Rol. Abr.* 683.

If lands whereof a woman has no right to be endowed, or a rent out of ſuch lands be aſſigned in lieu of her dower, yet this is no bar to her to demand her dower, for ſhe having no manner of title to thoſe lands, cannot without livery and ſeiſin be any more than tenant at will, which is no ſufficient recompence for an eſtate for life, which her dower was to be. *Perk.* 407. *Co. Lit.* 34. 4 *Co.* 1. *Co. Lit.* 169. *Bro.* 3.

In dower the tenant pleads that he hath aſſigned to her in recompence of her dower twenty buſhels of wheat yearly out of the ſame land for her life, and held a good bar, and in the nature of a rent; but ſheep, horſes, *&c.* aſſigned in recompence of dower are no bar, becauſe they neither iſſue out of land, nor are of the nature of land. *Moor, pl.* 167. *Dyer* 91.

A woman recovers dower, and hath a writ to the ſheriff, who returns that he hath delivered eighty-four acres

to the demandant of the land mentioned in the writ, and after a *ſcire facias* is brought, ſuggeſting that ſixty of eighty-four aſſigned to her by the ſheriff are a ſtranger's not mentioned in the record, and therefore ſhe ought to have a new diviſion; the tenant ſays, that the other twenty-four acres were parcel of the land recovered, and that ſhe had entred and accepted the twenty-four acres; and upon demurrer it was adjudged, that ſhe was barred by her acceptance, and entry into the twenty-four acres. *Moor. pl.* 928.

A woman intitled to dower cannot enter till it be aſſigned to her, and ſet out either by the heir, tertenant or ſheriff in certainty. 1 *Rol. Abr.* 681. *Dyer.* 343. *Plowd.* 529. *Bro.* 16. *Co. Lit.* 34. *b.* 37. *a. b.* And the reaſon ſeems to be from the partiality every one is preſumed to have for themſelves and their own intereſt; and therefore the law will not allow her in ſuch caſe to be her own carver: Another reaſon may be for the better direction of ſtrangers, that they might more certainly know againſt whom to bring their *præcipe*, which they cannot be ſo well appriſed of, if ſhe might enter privately, and take what part ſhe pleaſed; but ſhe need not ſtay for the return of the writ of *habere facias ſeiſinam*, nor for the ſecond judgment. *Palm.* 265, 266. And tho' ſhe once refuſes to accept the part aſſigned her by the ſheriff, yet may ſhe afterwards enter into it. *Dyer* 278.

An aſſignment of dower by commiſſion *De dote aſſignanda* out of the court of wards was held no bar of dower at Common law, but it ought to have been by writ *De dote aſſignanda* out of Chancery; the juriſdiction of which court is not given to the court of wards in ſuch caſe by 32 *Henry* 8. *Cro. Eliz.* 364.

Sir *Thomas Arundell* being attainted of felony, and his wife's dower ſaved by act of parliament, ſhe brought her writ of dower againſt the Earl of *Pembroke*, and he making default after appearance, a termor prays to be received, and ſhews his leaſe after the coverture, *&c.* and the attainder, *&c.* and that *Ed.* 6. granted a commiſſion under the ſeal of the court of augmentations, to aſſign the third part of the land of the ſaid Sir *Thomas Arundell* to his wife in dower, and ſhews further that, by virtue of the commiſſion, the third part of the rent reſerved on the ſaid leaſe was aſſigned to her, and this aſſignment confirmed by letters patent under the Great ſeal, and ſhews her agreement and acceptance thereof, and ſaid that this ſuit was by colluſion to defraud him of his term; and in this caſe it was held, *Firſt*, That the court of augmentations had no power to aſſign dower to the demandant, or any other woman, but it muſt be in Chancery. *Secondly*, That the aſſignment of the rent was not warranted by the commiſſion, and then the confirmation could not make that good which was merely void; and it was adjudged for the demandant. *Dyer* 363. *Co. Ent.* 173. 2 *Mod.* 18.

As to endowments in chancery, it appears by our books that in former times the widows of tenants which held of the King *in capite*, whoſe heir was in ward to the King, were to ſue in Chancery by petition for their dower; and after office found that ſhe was the tenant's widow, then ſhe was to make oath in Chancery that ſhe would not marry again without the king's licence; and upon that there went a writ out of the Chancery *De dote aſſignanda*, to the eſcheator, to aſſign her dower of the third part of all the lands whereof her huſband was ſeiſed, *&c.* but if the heir were of full age at the time of the tenant's death, and the King had the lands only for his primier ſeiſin, then could ſhe not ſue in Chancery, becauſe the King was not then guardian, but had the lands only to ſuch ſpecial purpoſe; and therefore to remedy this, was the ſtatute *De prærogativa Regis cap.* 4. made, which gives power to the King to aſſign dower to them, though the heir were of full age at the time of the tenant's death; but this power was not ſo abſolutely lodged in the King, as to exclude them from ſuing at Common law for their dower, by reaſon of the words *ſi viduæ illæ voluerint*, which left them at liberty in ſuch caſe, either to ſue to the King in Chancery, or if they thought fit, to ſue the heir in the Common Pleas; but if the King had committed the wardſhip to another *durante minore ætate* of the ward; then alſo at Common law the widow had election to ſue either to the King in Chancery, becauſe notwithſtanding ſuch commitment he ſtill continued guardian; or ſhe might ſue the committee at Common law, and recover againſt him; without making the King a party by *ayde prier*, or otherwiſe, which was ordained by the ſtatute of *Bigamis*, *cap.* 3. for avoiding of delays in ſuch caſes, and when ſhe recovered againſt the committee, ſhe took no ſuch oath as when ſhe ſued to the King in Chancery; but yet nevertheleſs ſhe could not marry without the King's licence, it being againſt the policy of thoſe times to permit ſuch widows to marry whom they pleaſed, ſince then they might have brought in enemies or foreigners into the King's feud, and in the King's caſe the fines for alienation ſtill continue. *Stanf. Prær.* 16. *F. N. B.* 164. *Bro.* 66, 76. 2 *Inſt.* 18. *Kelw.* 133. 1 *Brownl.* 126. *Co. Lit.* 38. *b.* 9 *Co.* 16, 17. *Fareſ.* 43.

Another prerogative the King had in thoſe times was, that if the heir of his tenant *in capite* entred before livery ſued, this was looked upon as an intruſion, and his wife loſt her dower by it, by the expreſs proviſion of *Prærog. Regis*, *cap.* 13. but this was meant only of intruſion after office found, which gave the King a title; for if he entred before office found, and died, his wife ſhould be endowed. *Stanf. Prer.* 41. *Bro.* 66. *Co. Lit.* 30. *b. F. N. B.* 149.

5. *Where the wife ſhall have her election to be endowed of one thing or another; and where of both; and endowment* de novo, *and the* dos de dote.

If the huſband, ſeiſed of lands in fee, exchange the ſame lands with a ſtranger for other lands, and die, the wife hath election to be endowed of the lands given or taken in exchange, becauſe her huſband was ſeiſed of both during the coverture, but ſhe ſhall not have dower of both; for that would be unreaſonable. *Perk.* 318, 319. *F. N. B.* 149. *Co. Lit.* 31. *b.*

Husband ſeiſed of lands in the right of his wife, they both join in exchange of thoſe lands with a ſtranger for other lands, which exchange is executed; then the husband and wife alien the lands taken in exchange by fine; and two judges held the wife after the husband's death might well enter into his own lands, notwithſtanding the fine which was of the other lands, and reſembled it to the caſe in *Dyer* 385. where the husband after marriage made a jointure to his wife, and then they both levied a fine *come ceo*, *&c.* thereof to a ſtranger and his heirs; and this was adjudged no bar of her dower, becauſe the election to claim jointure, or dower, is not till after the husband's death; and in the principal caſe judgment was given for the wife. 1 *Leon.* 285.

If lord and tenant are by fealty, and 12 *d.* rent, the lord takes a wife, and after purchaſe the tenancy in fee, and dies, his wife hath election to be endowed either of the ſegnory or the tenancy, becauſe her husband was ſeiſed of both during the coverture; ſo for the ſame reaſon if the husband ſeiſed of a rent-charge in fee purchaſe the land whereout the rent is iſſuing, and die, his wife at her election may be endowed either of the land, or of the rent, and the husband being ſeiſed of both, during the coverture, cannot by his own act alter the wife's dower. *Perk* 320.

If the husband ſeiſed of lands in fee makes a feoffment thereof to a ſtranger in fee, rendring to him and his heirs 3*s.* rent, with clauſe of diſtreſs, and dies, and the feoffee endows the wife of the feoffor of the third part of the land for her dower, ſhe ſhall hold it diſcharged of any rent, and the whole rent ſhall iſſue out of the reſidue of the land, becauſe the wife ſhall be endowed of the beſt poſſeſſion of her husband during the coverture; and the husband had the land diſcharged of the rent after the coverture; and yet becauſe he had alſo an eſtate in the rent during the coverture, it ſeems ſhe may be endowed of that, if ſhe think fit, and waive her dower of the land; but the rent reſerved on the feoffment is no more a bar to her to demand dower of the land, than if none at all had been reſerved, if ſhe chuſes the land. *Perk.* 324.

In

In ſome caſes a woman ſhall be endowed anew; as where the lands, &c. aſſigned to her for dower, are lawfully evicted by elder title; and therefore if one be ſeiſed of two acres by good title, and another by diſſeiſin, and marries, and dies, and his wife is endowed of the acre had by diſſeiſin, and after the diſſeiſee enters into the ſaid acre, now ſhe ſhall be endowed of the third part of the two remaining acres; ſo if the diſſeiſee in ſuch caſe had recovered the acre againſt the wife, ſhe ſhould have been endowed of what remained, and the entry or recovery being by title paramount her title of dower, it is as if her huſband had never been ſeiſed thereof; ſhe ſhall only recover the third part of what is left, and not a full recompence for the acre loſt. *Perk.* 419. *F. N. B.* 149. 1 *Rol. Abr.* 684. 4 *Co.* 122.

If one ſeiſed of two acres in one county marries, and enfeoffs a ſtranger of one acre with warranty, and hath iſſue, and dies, and the iſſue enters into the other acre, and the wife brings dower againſt the feoffee, who vouches the iſſue as heir, and he loſes by default; and thereupon the wife hath a conditional judgment, *viz.* againſt the vouchee; if &c. and the demandant ſues execution againſt the heir, and after is evicted by the elder title, ſhe ſhall have a *ſcire facias* upon the firſt recovery againſt the tenant, to be endowed of the two parts left; upon eviction ſhe may be endowed *de novo* againſt the heir; and the ſame law, if the endowment was in Chancery. *Perk.* 321. 1 *Rol. Abr.* 684. *Br.* 65. 9 *Co.* 17.

As to the *Dos de Dote*, if there be grandfather, father, and ſon, and the father, or after his death, the ſon endows the grandmother, the mother ſhall not be endowed of the grandmother's thirds after her deceaſe, becauſe the grandmother's dower defeats the deſcent to the father; and by conſequence the father was ſeiſed of no more than two thirds of that land, and therefore the wife of the father was intitled to a third of theſe two thirds only, and no more; but if the grandfather had enfeoffed the father of the whole land, and died, and the grandmother had been endowed, either by recovery, or aſſignment, there the mother ſhould be endowed of the grandmother's third after her deceaſe, becauſe by the feoffment the father was ſeiſed of the whole eſtate, which gave a title to his wife to be endowed of that whole eſtate; and though the grandmother recovered one third out of that eſtate during her life, yet ſuch recovery doth not defeat the operation of the livery, ſince by that conveyance the reverſion of that third is claimed; and by conſequence the mother ſhall be endowed of that third when it falls in poſſeſſion, ſince the father was actually ſeiſed of it during the coverture, by virtue of ſuch livery. If there be grandfather, father, and ſon, and the two firſt die, and the mother is endowed by the ſon of a third part of the whole, either by aſſignment *en pais*, or upon a recovery in a writ of dower, and the grandmother brings a writ of dower againſt the mother, and recovers, ſhe leaves the reverſion in her; for the dower was veſted in the mother by the aſſignment, or recovery, and is only defeated during the life of the grandmother, whoſe eſtate as to the mother is leſs than her own eſtate; and therefore the reverſion is in the mother, and ſhe after the grandmother's death may enter into that third recovered from her; and by conſequence the heir may re-enter into the ſecond dower aſſigned to the mother, upon ſuch recovery againſt her by the grandmother; for ſhe cannot have both. *Perk.* 315, 316. 4 *Co.* 122. *F. N. B.* 149. 1 *Rol. Abr.* 677. *Co. Lit.* 31, 42. *a.*

If *A.* ſeiſed of lands marries *B.* and aliens to *C.* who marries *D.* and then aliens to *E.* and dies, and after *D.* is endowed, and then *B.* hath dower aſſigned to her of the third of all the lands, and brings a *præcipe* thereof againſt *D.* who vouches to warranty *E.* who counterpleads upon the matter, and ſays that *D.* ought not to be endowed, *quia non poteſt habere dotem de dote*; and adjudged accordingly. 1 *Rol. Abr.* 677.

6. *What ſhall be a bar of dower, and what not.*

If a recovery be had againſt the huſband by colluſion, this ſhall not bar the wife of dower; as if the recovery be by confeſſion, or reddition, which are always underſtood to be by colluſion, the huſband always acting and concurring in obtaining of them; but it ſeems to have been a very great doubt, whether a recovery by default ſhould not be a bar: and the better opinion being that ſuch recovery was a bar at Common law; therefore the ſtatute of *W.* 2. *cap.* 4. was made, which ordains that notwithſtanding ſuch recovery by default, &c. pleaded, the tenant ſhall moreover in bar of the dower ſhew his right to the tenements recovered; and if it be found that he had no right, then ſhall the demandant recover her dower, notwithſtanding ſuch recovery by default againſt her huſband. 2 *Inſt.* 349. *Perk.* 376.

By the ſtatute of *W.* 2. *cap.* 4. it appears that if the recoverer had right, then the wife is barred; therefore if the heir of the diſſeiſor be by deſcent, and the diſſeiſee enters upon him, and marries, and the heir of the diſſeiſor recovers by default, or reddition, in a writ of entry, in nature of an aſſiſe, and the huſband dies, his wife ſhall not have dower, becauſe he, who recovered, had right to the poſſeſſion by the deſcent; *aliter*, if this diſſeiſin, deſcent, &c. were after marriage, becauſe the huſband was ſeiſed before of a rightful eſtate during the coverture, whereof his wife had title of dower, which cannot be defeated by the diſſeiſin, deſcent and recovery, which all happened during the coverture. *Perk.* 379, 380.

If a recovery be againſt the huſband by verdict, the wife ſhall not falſify in the point tried; but ſhe may ſay that he might have pleaded a better plea, *viz.* a releaſe of all actions, or of all the right of the demandant; or ſhe may confeſs and avoid the recovery, but cannot falſify in the point tried againſt her huſband. 2 *Inſt.* 349. *Perk.* 382. *Br.* 24. See *Perk.* 383. which ſeems *cont'*.

If in a *præcipe*, brought againſt the huſband, he loſes upon a dilatory plea, as upon non-tenure, jointenancy, miſnomer of the town, &c. the wife may falſify upon a writ of dower brought, by ſhewing that the demandant had no right; but if he had right, ſhe cannot falſify the recovery, by ſhewing that her huſband might have pleaded jointenancy, miſnomer, &c. for this would have been only in abatement of the writ, and make nothing to the right; but if ſhe ſhews that her huſband was tenant of the land recovered, and that the demandant had no right nor cauſe of action, but jointly with a ſtranger, which ſtranger by deed *in cur' prolat'* releaſed all his right to the huſband before the action brought; this is a good falſification of the recovery for one moiety of the land recovered. *Bro.* 26. *Perk.* 381, 385, 386.

If the huſband levy a fine with proclamation of his lands, and dies, his wife is bound to make her claim within five years after his death; otherwiſe ſhe ſhall be barred of her dower; for though her title of dower was not conſummate at the time of the fine levied; yet it being initiate by the marriage and ſeiſin of the huſband, the fine begins to work upon it preſently after the huſband's death; and if ſhe does not claim it within five years after, ſhe ſhall be barred. 2 *Co.* 93. 10 *Co.* 49, 99. 3 *Inſt.* 216. *Hob.* 265. *Mo. pl.* 154, 879. *Dyer* 224. 13 *Co.* 20.

If the huſband and wife join in levying a fine, or ſuffer a common recovery, this ſhall bar her of her dower totally, becauſe in both caſes ſhe is examined upon record by the judges, as to her conſent; and ſhe having nothing in the lands in her own right, her joining in ſuch acts can be to no other purpoſe, but to bar her dower; but if the huſband be ſeiſed in fee, and a ſtranger levies a fine to him and his wife *ſur conuzance de droit come ceo*, &c. of theſe lands, and the huſband and wife grant and render the ſame land to the ſtranger and his heirs; it ſeems the wife ſhall not be barred of her dower, becauſe ſhe is not examined in this caſe, as ſhe is in the other; and therefore if this fine *ſur grant and render* be pleaded in bar, ſhe may ſay that ſhe had nothing in the land at the time of the fine levied. *Plowd.* 515. 10 *Co.* 49. *Cro. Eliz.* 129. *Br.* 77.

If a jointure be made to the wife during the coverture, and after the huſband and wife levy a fine thereof; yet this

this is no bar to her dower of any other lands of her husband's, because the jointure being made after the marriage, she had election after the death of the husband to refuse it, and claim dower, and not before; and then the fine levied of the jointure before her time for election of dower was come, can be no bar for electing of dower when it is come. 1 *Bulst.* 173. 1 *Leon.* 285. *Dyer* 358.

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time. *Perk.* 350. *F. N. B.* 149. *Mo. pl.* 103.

If lands are given to the husband and wife, and to the heirs of the husband, who dies, the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband, and his heirs *ab initio*, and so she shall have her dower thereof; but if the estate be made to the husband and wife for the life of the husband, remainder to the right heirs of the husband, it should seem she cannot in this case disagree, because the estate upon the husband's death is determined and gone. *Perk.* 352, 353. 3 *Co.* 27.

7. *Of the proceedings and damages in dower* Unde nihil habet.

Before the statute of *Marlb. cap.* 12. in dower *unde nihil habet*, [see title Dote unde nihil habet.] there were days of common return, as in other real actions, which was mischievous to the wife, by reason of the long delay, she claiming but an estate for life; but this is now remedied by that act, and four days of return in the year are given at least, and that act extends likewise to the vouchee, but not to a writ of dower, nor to dower *ad ostium ecclesiæ*, nor *ex assensu patris*, unless it be *unde nihil habet*, but 32 *Hen.* 8. *cap.* 21. extends to, and gives the same return in every writ of dower. 2 *Inst.* 124.

In dower the tenant at the day of taking the inquest, after the jury had appeared, and before they were sworn, made default, and a *petit cape* was awarded, and the tenant at the day *in banco* informed the court that he was but tenant for life, and the reversion in one *A.* who at the day in *B.* ought to be received, and the court appointed him to plead his plea at the return of the *petit cape* before which time his appearance seems idle. 1 *Brownl.* 126.

In dower of lands in *L. M.* and *N.* the sheriff returns *plegii de pros. A. B. C. D.* and the names of the summoners *E. F. G. H.* and that after the summons made, and 14 days, and more before the return of it, at the most usual church-door of *L.* where part of the lands lay, such a *sunday* after sermon ended, he publickly proclaimed all and singular the things contained in the writ, to be proclaimed according to the form of the statute in that case made, and indorses his name to the return; and exception was taken to this return, because proclamation was not made at all the church-doors; but *per cur'* proclamation at any of the church-doors is sufficient; but the return was held ill, because he says he had proclaimed all and singular the things in that writ contained, without saying what. *Hob.* 133.

Error to reverse a judgment in dower at the grand sessions at *Wales*; it appeared by the record that the tenant appeared at the return of the summons, and day was given over *& adtunc venit per attornat' & nihil dicit in barram*; whereupon *considerat' est quod tertia pars terrar' & tenement' capiatur in manus D'ni regis*; and upon day given *ad audiend' judicium*, judgment was given *quod recuperet*, and error assigned that they ought not to have awarded a *petit cape* because the defendant appeared, and then they ought to have given judgment upon the *nihil dicit*; for the *petit cape* is always upon default after appearance, and is only to answer the default, as the *grand cape* is before appearance to answer the default, and demand; but it was held no error, being only an awarding of more process than needs be, and it was an advantage to the tenant by delaying of the demandant; and *per Twisden*, if erroneous, they might now give judgment upon the *nihil dicit* in this court. 1 *Vent.* 60. 2 *Saund.* 46. *S. C.* 2 *Keb.* 450, 551, 605. *S. C.*

Error of a judgment in dower in *Newcastle* court; because the proceeding was by plaint, and no special custom certified to maintain it; and it was held error, because pleas of frank tenement cannot be held without original writ, unless there be a special custom for it. 1 *Vent.* 267. 2 *Lev.* 98, 123. *S. C.* 3 *Keb.* 277, 326, 421. *S. C.*

In dower if tenant makes default, by which *grand cape* issues, the demandant shall make her demand, for no certainty appears before the demand made. *Bro.* 96.

In dower one appears upon the *grand cape*, who in truth was but lessee for years, and so might plead non-tenure, and if now he might wage his law of non-summons, and the writ be abated, was the question, because it was said that by wager of his law he affirms himself to be tenant; but two justices only in court held that he would be at no mischief, for being but lessee for years, if judgment and execution were against him, he might, notwithstanding, enter upon the demandant; another matter was, that where the writ of dower was *de tertia parte rectoriæ de D.* and the *grand cape* made upon it accordinly; yet the sheriff by colour thereof took the tithes severed from the two parts, and carried them away; and *per cur'*, This is not such a seisure as is by the writ intended, for he ought only to have seized generally, but not carry them away; and the court had a mind to have committed him for a misdemeanor. 1 *Leon.* 92.

In dower tenant demands the view; demandant counterpleads the view; because her husband died seised, *Et hoc parat' est verificare & petit judicium & dotem suam de tenement' prædict' sibi adjudicari*; tenant *protestando*, that the husband did not die seized, demurs, and shews for a cause that the counterplea *male concludit*, for it ought to have been *& petit judicium*, and *quod tenens de visu excludatur*, and the counterplea is but dilatory, and ought not to conclude peremptorily for final judgment; and of this opinion was *Levinz*, but two other justices held it not ill; also the demand was of three messuages, *&c.* where it ought to have been only of the third part of them; and if this might be amended was doubted, 3 *Lev.* 169.

In dower *unde nihil*, *&c.* tenant demands the view, demandant counterpleads it, because the husband *alienavit tenement' prædict'* to the tenant *& hoc*, *&c.* and it was demurred, because *alienavit* does not shew what estate he aliened, for it may be a lease for years; but *per cur'*, Alienation implies all the estate which he had, and the statute *W.* 2. 48 ousts the view, where the husband aliens to the tenant, or any of his ancestors; and this is in the very words of the statute, and a *respondeas ouster* awarded, but no notice taken whether the view was allowable in dower *unde nihil habet*. 3 *Lev.* 220.

At the Common law, before the statute of *W.* 1. *c.* 39. if a woman had accepted any part of her dower, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of dower; for if she brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant, in such a town or county; which being a great mischief to the women is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her dower of any other person before the writ purchased; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her dower. 2 *Inst.* 261.

In dower the tenant pleads, that after marriage the husband had settled other lands on the demandant for life, for her jointure, and that she after his death agreed thereto, and entred accordingly; the demandant replies, that it was a voluntary settlement of her husband, and traverses, that it was not for her jointure; and issue thereupon; and at the *nisi prius* the tenant made default, and a *petit cape* awarded, and returned, and judgment that the demandant have seisin; and the demandant suggests that her husband died seised, and prays a writ to inquire

quire of the damages, returnable ſuch a day; the ſheriff returns that he hath delivered ſeiſin of the lands particularly, and alſo an inquiſition which finds that the lands are worth 114*l.* 11*s.* *per annum*, and that her huſband had been dead ſix years and three quarters, and that ſhe had ſuſtained damages *occaſione detentionis dotis ultra valorem præd' & ultra miſas & cuſtag' ſua* 195*l.* *& pro miſis & cuſtag'* 20*s.* and upon this the demandant *gratis* releaſes the 195*l.* and demands judgment only for the 20*s.* and judgment is given that the demandant recover *tam valorem tertiæ partis prædict'* from the death of her huſband which came to 257*l.* *quam* the 20*s.* and 11*l.* *de incremento*, *in toto* 295*l.* and the tenant brings error, for that the damages being releaſed by the demandant, there ought to have been no judgment againſt him for the value of the land; but the whole court reſolved, that the releaſe was only of the damages ſuſtained *occaſione detentionis dotis*, and not of the meſne profits of the lands, for they are two diſtinct things, as appears by *Co. Litt.* 33. *a.* *Raſt. Entr.* 237. where the writ is to inquire not only of the value of the land, but alſo of the damages *ratione detentionis*; and the judgment is always entred accordingly, and a *fieri facias* lies for the damages; and therefore the judgment was affirmed. *Raym.* 366.

As to damages in dower they are given by the ſtatute of *Merton*, *c.* 1. but that ſtatute extends only to the poſſeſſory action of dower *unde nihil habet*, and not to the writ of right of dower, becauſe they are intended to be given for the detention of the poſſeſſion; and on writs of right where the right itſelf is queſtionable, no damages are given, becauſe no wrong done till the right be determined; alſo that ſtatute extends only to lands, whereof the huſband died ſeiſed; and therefore judgment for the damages was reverſed, becauſe the jury did not find that the huſband died ſeiſed; for otherwiſe ſhe ſhall have no damages; as if the huſband aliens and takes back an eſtate for life, the wife ſhall recover dower, but no damages; becauſe this dying ſeiſed was only of an eſtate of freehold, but if he makes a leaſe for years only, rendring rent, ſhe ſhall recover a third part of the reverſion with a third part of the rent and damages, becauſe there he died ſeiſed as the ſtatute ſpeaks. *Co. Lit.* 32. *Dyer* 284. *pl.* 33. *Yelv.* 112. *Dr. and Stud. lib.* 2. *c.* 13. *f.* 166. 2 *Inſt.* 80.

Damages muſt be after demand of dower, for the heir is not bound to aſſign this proviſion till demanded, becauſe the law caſts the freehold of the whole upon him, which he cannot divide without the concurrence of the wife; but a demand *in pais* before good teſtimony is ſufficient; and if the heir appear the firſt day on ſummons, and plead that he hath been always ready, and ſtill is, to render her dower; ſhe may plead ſuch requeſt; and iſſue may be taken upon it, but the feoffee of the heir cannot plead *tout tempt priſt*, becauſe he had not the land all the time ſince the death of the anceſtor, and therefore ſhe ſhall recover the meſnes profits, and damages againſt him, and if he hath not provided his indemnity and recompence againſt the heir, it is his own folly. *Co. Lit.* 32.

If the heir or feoffee aſſign dower, and the wife accepteth thereof, ſhe loſeth her damages, becauſe having the dower, which is the principal, ſhe cannot ſue for the damages, which are but conſequential or acceſſory. *Co. Lit.* 33. *a.*

8. *Of the admeaſurement of dower.*

If the heir within age aſſign to the wife more land in dower than ſhe ought to have, he himſelf ſhall have a writ of admeaſurement of dower at full age by the Common law; ſo if too much be aſſigned in dower by the heir within age, or his guardian in chivalry; and the heir dies, his heir ſhall have ſuch writ to rectify the aſſignment; but the heir, in whoſe time the aſſignment of too much was by the guardian, cannot have ſuch writ till his full age, becauſe till then the intereſt of the guardian continues; and if any wrong be done, it is to the guardian himſelf, and not to the heir; if a diſſeiſor aſſigns too much, the heir of the diſſeiſee ſhall have admeaſurement by the Common law. *F. N. B.* 148. *Co. Lit.* 39. *a.* 2 *Inſt.* 367.

If the heir within age, before the guardian enters, aſſigns too much in dower, the guardian ſhall have a writ of admeaſurement of dower by the ſtatute of *W.* 3. *c.* 7. before which ſtatute the guardian had no remedy, becauſe the writ of admeaſurement being a real action, lay not for the guardian, who had but a chattel; alſo by the ſame ſtatute it is proved, that if the guardian purſue ſuch writ feintly, or by colluſion with the wife, the heir at full age ſhall have a writ of admeaſurement, and may allege the feint pleading or colluſion generally. 2 *Inſt.* 367.

If the wife after aſſignment of dower improves the lands, ſo as thereby they become of greater value than the other two parts, no writ of admeaſurement lies; ſo if they be of greater value, by reaſon of mines open at the time of the aſſignment, no writ of admeaſurement lies, becauſe the land in quantity was no more than ſhe ought to have; and then 'tis lawful to work the mines, which were open at the time of ſuch aſſignment. *F. N. B.* 149. 2 *Inſt.* 368. 5 *Co.* 12.

If the ſheriff aſſigns too much in dower, by one book it ſeems that the heir ſhall have a writ of admeaſurement; but *Q.* Whether he ſhall have that, or a *ſcire facias* upon the recovery, which was of no more than the third part. *Palm.* 266. *Bro.* 83.

Theſe writs of admeaſurement of dower are vicontiel, and not returnable; and the parties may plead before the ſheriff in the county, if they think fit; but if they are removed in *C. B.* by a *pone*, as the plaintiff may, without ſhewing any cauſe, and the defendant upon ſhewing cauſe; and thereupon proceſs goes out, *viz.* ſumons, attachment, and *diſtringas*; then the ſheriff cannot make admeaſurement, but ought to extend all the lands particularly, and return it in *C. B.* and upon that admeaſurement ſhall be made. *F. N. B.* 148.

9. *Of dower by cuſtom*, *dower* ad oſtium eccleſiæ, *dower* ex aſſenſu patris, *and dower* de la plus belle.

Dower by the cuſtom. This kind of dower varies according to the cuſtom and uſage of the plea, and is to be governed accordingly; and where ſuch cuſtom prevails, the wife cannot waive the proviſion thereby made for her, and claim her third at Common law, becauſe all cuſtoms are equally ancient with the Common law itſelf. *Co. Lit.* 33. *b.* *Cro. Eliz.* 825. 1 *Leon.* 62, 133.

By the cuſtom of gavelkind in *Kent*, the wife ſhall have the moiety ſo long as ſhe keeps herſelf chaſte and unmarried, and the reaſon of this proviſion for the wife ſeems to be founded on the equal diſtribution, which is obſerved in this kind of inheritance in the ſame family for their equal ſupport; and therefore when ſhe proves unchaſte, or marries again, and thereby contracts a new alliance, this proviſion as to her ceaſes, and returns again into the family; but the preſumption is to continue till it be proved ſhe was delivered of a child, begotten during her widowhood, which may be in any action brought by or againſt her. *Co. Litt.* 33. *b.* 111. *a.* *F. N. B.* 150. *Stanf. Prer.* 44. *b.* 1 *Rol. Abr.* 558. *Bro. Dower* 70. *Bro.* tit. *Cuſtom* 67, 69, 72. 2 *Jon.* 6.

Dower, and demands the third part of the lands of *A.* her late huſband lying in *Kent*, *&c.* defendant pleads that the cuſtom there is, that wives ſhall have the moiety of their huſband's lands in dower, ſo long as they live chaſte and unmarried, and *non aliter*, or *non ſecundum curſum communis legis*, and that the demandant after the death of her firſt huſband had married the other demandant, *&c.* *& per cur'*, The cuſtom is good, and is the law in *Kent*; and therefore ſhe can claim no other dower, nor in any other manner, and the rather by reaſon of the negative concluſion. *Cro. Eliz.* 121. 1 *Leon.* 62. *Moor* 260. *pl.* 408. *S. C.*

By the cuſtom of *Borough-Engliſh* the widow ſhall have the whole of her huſband's lands in dower, which is called her free-bench. *Co. Lit.* 33. *b.* 110. *b.* *F. N. B.* 150. *Cro. Eliz.* 415. *Moor*, *pl.* 566. The reaſon of

this is no bar to her dower of any other lands of her husband's, because the jointure being made after the marriage, she had election after the death of the husband to refuse it, and claim dower, and not before; and then the fine levied of the jointure before her time for election of dower was come, can be no bar for electing of dower when it is come. 1 *Bulst.* 173. 1 *Leon.* 285. *Dyer* 358.

If a woman takes a lease for life of her husband's lands after his death, she shall have no dower, because she cannot demand it against herself; and if she takes a lease for years only, yet she shall not sue to have dower during these years, because it was her own act to suspend the fruit and effect of her dower during that time. *Perk.* 350. *F. N. B.* 149. *Mo. pl.* 103.

If lands are given to the husband and wife, and to the heirs of the husband, who dies, the wife may disagree to this estate made during the coverture, and then it will be an estate to the husband, and his heirs *ab initio*, and so she shall have her dower thereof; but if the estate be made to the husband and wife for the life of the husband, remainder to the right heirs of the husband, it should seem she cannot in this case disagree, because the estate upon the husband's death is determined and gone. *Perk.* 352, 353. 3 *Co.* 27.

7. *Of the proceedings and damages in dower* Unde nihil habet.

Before the statute of *Marlb. cap.* 12. in dower *unde nihil habet*, [see title Dote unde nihil habet.] there were days of common return, as in other real actions, which was mischievous to the wife, by reason of the long delay, she claiming but an estate for life; but this is now remedied by that act, and four days of return in the year are given at least, and that act extends likewise to the vouchee, but not to a writ of dower, nor to dower *ad ostium ecclesiæ*, nor *ex assensu patris*, unless it be *unde nihil habet*, but 32 *Hen.* 8. *cap.* 21. extends to, and gives the same return in every writ of dower. 2 *Inst.* 124.

In dower the tenant at the day of taking the inquest, after the jury had appeared, and before they were sworn, made default, and a *petit cape* was awarded, and the tenant at the day *in banco* informed the court that he was but tenant for life, and the reversion in one *A.* who at the day in *B.* ought to be received, and the court appointed him to plead his plea at the return of the *petit cape* before which time his appearance seems idle. 1 *Brownl.* 126.

In dower of lands in *L. M.* and *N.* the sheriff returns *plegii de pros. A. B. C. D.* and the names of the summoners *E. F. G. H.* and that after the summons made, and 14 days, and more before the return of it, at the most usual church-door of *L.* where part of the lands lay, such a *sunday* after sermon ended, he publickly proclaimed all and singular the things contained in the writ, to be proclaimed according to the form of the statute in that case made, and indorses his name to the return; and exception was taken to this return, because proclamation was not made at all the church-doors; but *per cur'* proclamation at any of the church-doors is sufficient; but the return was held ill, because he says he had proclaimed all and singular the things in that writ contained, without saying what. *Hob.* 133.

Error to reverse a judgment in dower at the grand sessions at *Wales*; it appeared by the record that the tenant appeared at the return of the summons, and day was given over *& adtunc venit per attornat' & nihil dicit in barram*; whereupon *considerat' est quod tertia pars terrar' & tenement' capiatur in manus D'ni regis*; and upon day given *ad audiend' judicium*, judgment was given *quod recuperet*, and error assigned that they ought not to have awarded a *petit cape* because the defendant appeared, and then they ought to have given judgment upon the *nihil dicit*; for the *petit cape* is always upon default after appearance, and is only to answer the default, as the *grand cape* is before appearance to answer the default, and demand; but it was held no error, being only an awarding of more process than needs be, and it was an advantage to the tenant by delaying of the demandant; and *per Twisden*, if erroneous, they might now give judgment upon the *nihil dicit* in this court. 1 *Vent.* 60. 2 *Saund.* 46. *S. C.* 2 *Keb.* 450, 551, 605. *S. C.*

Error of a judgment in dower in *Newcastle* court; because the proceeding was by plaint, and no special custom certified to maintain it; and it was held error, because pleas of frank tenement cannot be held without original writ, unless there be a special custom for it. 1 *Vent.* 267. 2 *Lev.* 98, 123. *S. C.* 3 *Keb.* 277, 326, 421. *S. C.*

In dower if tenant makes default, by which *grand cape* issues, the demandant shall make her demand, for no certainty appears before the demand made. *Bro.* 96.

In dower one appears upon the *grand cape*, who in truth was but lessee for years, and so might plead non-tenure, and if now he might wage his law of non-summons, and the writ be abated, was the question, because it was said that by wager of his law he affirms himself to be tenant; but two justices only in court held that he would be at no mischief, for being but lessee for years, if judgment and execution were against him, he might, notwithstanding, enter upon the demandant; another matter was, that where the writ of dower was *de tertia parte rectoriæ de D.* and the *grand cape* made upon it accordingly; yet the sheriff by colour thereof took the tithes severed from the two parts, and carried them away; and *per cur'*, This is not such a seisure as is by the writ intended, for he ought only to have seized generally, but not carry them away; and the court had a mind to have committed him for a misdemeanor. 1 *Leon.* 92.

In dower tenant demands the view; demandant counterpleads the view; because her husband died seised, *Et hoc parat' est verificare & petit judicium & dotem suam de tenement' prædict' sibi adjudicari*; tenant *protestando*, that the husband did not die seized, demurs, and shews for a cause that the counterplea *male concludit*, for it ought to have been *& petit judicium*, and *quod tenens de visu excludatur*, and the counterplea is but dilatory, and ought not to conclude peremptorily for final judgment; and of this opinion was *Levinz*, but two other justices held it not ill; also the demand was of three messuages, *&c.* where it ought to have been only of the third part of them; and if this might be amended was doubted. 3 *Lev.* 169.

In dower *unde nihil*, *&c.* tenant demands the view, demandant counterpleads it, because the husband *alienavit tenement' prædict'* to the tenant *& hoc*, *&c.* and it was demurred, because *alienavit* does not shew what estate he aliened, for it may be a lease for years; but *per cur'*, Alienation implies all the estate which he had, and the statute *W.* 2. 48 ousts the view, where the husband aliens to the tenant, or any of his ancestors; and this is in the very words of the statute, and a *respondeas ouster* awarded, but no notice taken whether the view was allowable in dower *unde nihil habet*. 3 *Lev.* 220.

At the Common law, before the statute of *W.* 1. *c.* 39. if a woman had accepted any part of her dower, though never so small, of any one tenant in any one county or town, she had no other remedy for the residue, but by a writ of right of dower; for if she brought a writ of dower *unde nihil habet*, it was a good plea in abatement, that she had accepted such a part of such a tenant, in such a town or county; which being a great mischief to the women is remedied by that statute, which provides that it shall be no plea in abatement, to say that she hath received part of her dower of any other person before the writ purchased; and this extends as well to guardian in chivalry as to the tenant of the land, because such guardian is to render her dower. 2 *Inst.* 261.

In dower the tenant pleads, that after marriage the husband had settled other lands on the demandant for life, for her jointure, and that she after his death agreed thereto, and entred accordingly; the demandant replies, that it was a voluntary settlement of her husband, and traverses, that it was not for her jointure; and issue thereupon; and at the *nisi prius* the tenant made default, and a *petit cape* awarded, and returned, and judgment that the demandant have seisin; and the demandant suggests that her husband died seised, and prays a writ to inquire

quire of the damages, returnable ſuch a day; the ſheriff returns that he hath delivered ſeiſin of the lands particularly, and alſo an inquiſition which finds that the lands are worth 114*l.* 11*s.* *per annum*, and that her huſband had been dead ſix years and three quarters, and that ſhe had ſuſtained damages *occaſione detentionis dotis ultra valorem præd' & ultra miſas & cuſtag' ſua* 195*l.* *& pro miſis & cuſtag'* 20*s.* and upon this the demandant *gratis* releaſes the 195*l.* and demands judgment only for the 20*s.* and judgment is given that the demandant recover *tam valorem tertiæ partis prædict'* from the death of her huſband which came to 257*l.* *quam* the 20*s.* and 11*l.* *de incremento*, *in toto* 295*l.* and the tenant brings error, for that the damages being releaſed by the demandant, there ought to have been no judgment againſt him for the value of the land; but the whole court reſolved, that the releaſe was only of the damages ſuſtained *occaſione detentionis dotis*, and not of the meſne profits of the lands, for they are two diſtinct things, as appears by *Co. Litt.* 33. *a.* *Raſt. Entr.* 237. where the writ is to inquire not only of the value of the land, but alſo of the damages *ratione detentionis*; and the judgment is always entred accordingly, and a *fieri facias* lies for the damages; and therefore the judgment was affirmed. *Raym.* 366.

As to damages in dower they are given by the ſtatute of *Merton*, *c.* 1. but that ſtatute extends only to the poſſeſſory action of dower *unde nihil habet*, and not to the writ of right of dower, becauſe they are intended to be given for the detention of the poſſeſſion; and on writs of right where the right itſelf is queſtionable, no damages are given, becauſe no wrong done till the right be determined; alſo that ſtatute extends only to lands, whereof the huſband died ſeiſed; and therefore judgment for the damages was reverſed, becauſe the jury did not find that the huſband died ſeiſed; for otherwiſe ſhe ſhall have no damages; as if the huſband aliens and takes back an eſtate for life, the wife ſhall recover dower, but no damages; becauſe this dying ſeiſed was only of an eſtate of freehold, but if he makes a leaſe for years only, rendring rent, ſhe ſhall recover a third part of the reverſion with a third part of the rent and damages, becauſe there he died ſeiſed as the ſtatute ſpeaks. *Co. Lit.* 32. *Dyer* 284. *pl.* 33. *Yelv.* 112. *Dr. and Stud. lib.* 2. *c.* 13. *f.* 166. 2 *Inſt.* 80.

Damages muſt be after demand of dower, for the heir is not bound to aſſign this proviſion till demanded, becauſe the law caſts the freehold of the whole upon him, which he cannot divide without the concurrence of the wife; but a demand *in pais* before good teſtimony is ſufficient; and if the heir appear the firſt day on ſummons, and plead that he hath been always ready, and ſtill is, to render her dower; ſhe may plead ſuch requeſt; and iſſue may be taken upon it, but the feoffee of the heir cannot plead *tout tempt priſt*, becauſe he had not the land all the time ſince the death of the anceſtor, and therefore ſhe ſhall recover the meſnes profits, and damages againſt him, and if he hath not provided his indemnity and recompence againſt the heir, it is his own folly. *Co. Lit.* 32.

If the heir or feoffee aſſign dower, and the wife accepteth thereof, ſhe loſeth her damages, becauſe having the dower, which is the principal, ſhe cannot ſue for the damages, which are but conſequential or acceſſory. *Co. Lit.* 33. *a.*

8. *Of the admeaſurement of dower.*

If the heir within age aſſign to the wife more land in dower than ſhe ought to have, he himſelf ſhall have a writ of admeaſurement of dower at full age by the Common law; ſo if too much be aſſigned in dower by the heir within age, or his guardian in chivalry; and the heir dies, his heir ſhall have ſuch writ to rectify the aſſignment; but the heir, in whoſe time the aſſignment of too much was by the guardian, cannot have ſuch writ till his full age, becauſe till then the intereſt of the guardian continues; and if any wrong be done, it is to the guardian himſelf, and not to the heir; if a diſſeiſor aſſigns too much, the heir of the diſſeiſee ſhall have admeaſurement by the Common law. *F. N. B.* 148. *Co. Lit.* 39. *a.* 2 *Inſt.* 367.

If the heir within age, before the guardian enters, aſſigns too much in dower, the guardian ſhall have a writ of admeaſurement of dower by the ſtatute of *W.* 3. *c.* 7. before which ſtatute the guardian had no remedy, becauſe the writ of admeaſurement being a real action, lay not for the guardian, who had but a chattel; alſo by the ſame ſtatute it is proved, that if the guardian purſue ſuch writ feintly, or by colluſion with the wife, the heir at full age ſhall have a writ of admeaſurement, and may allege the feint pleading or colluſion generally. 2 *Inſt.* 367.

If the wife after aſſignment of dower improves the lands, ſo as thereby they become of greater value than the other two parts, no writ of admeaſurement lies; ſo if they be of greater value, by reaſon of mines open at the time of the aſſignment, no writ of admeaſurement lies, becauſe the land in quantity was no more than ſhe ought to have; and then 'tis lawful to work the mines, which were open at the time of ſuch aſſignment. *F. N. B.* 149. 2 *Inſt.* 368. 5 *Co.* 12.

If the ſheriff aſſigns too much in dower, by one book it ſeems that the heir ſhall have a writ of admeaſurement; but Q. Whether he ſhall have that, or a *ſcire facias* upon the recovery, which was of no more than the third part. *Palm.* 266. *Bro.* 83.

Theſe writs of admeaſurement of dower are vicontiel, and not returnable; and the parties may plead before the ſheriff in the county, if they think fit; but if they are removed in *C. B.* by a *pone*, as the plaintiff may, without ſhewing any cauſe, and the defendant upon ſhewing cauſe; and thereupon proceſs goes out, *viz.* ſumons, attachment, and *diſtringas*; then the ſheriff cannot make admeaſurement, but ought to extend all the lands particularly, and return it in *C. B.* and upon that admeaſurement ſhall be made. *F. N. B.* 148.

9. *Of dower by cuſtom*, *dower* ad oſtium eccleſiæ, *dower* ex aſſenſu patris, *and dower* de la plus belle.

Dower by the cuſtom. This kind of dower varies according to the cuſtom and uſage of the plea, and is to be governed accordingly; and where ſuch cuſtom prevails, the wife cannot waive the proviſion thereby made for her, and claim her third at Common law, becauſe all cuſtoms are equally ancient with the Common law itſelf. *Co. Lit.* 33. *b.* *Cro. Eliz.* 825. 1 *Leon.* 62, 133.

By the cuſtom of gavelkind in *Kent*, the wife ſhall have the moiety ſo long as ſhe keeps herſelf chaſte and unmarried, and the reaſon of this proviſion for the wife ſeems to be founded on the equal diſtribution, which is obſerved in this kind of inheritance in the ſame family for their equal ſupport; and therefore when ſhe proves unchaſte, or marries again, and thereby contracts a new alliance, this proviſion as to her ceaſes, and returns again into the family; but the preſumption is to continue till it be proved ſhe was delivered of a child, begotten during her widowhood, which may be in any action brought by or againſt her. *Co. Litt.* 33. *b.* 111. *a.* *F. N. B.* 150. *Stanf. Prer.* 44. *b.* 1 *Rol. Abr.* 558. *Bro. Dower* 70. *Bro.* tit. *Cuſtom* 67, 69, 72. 2 *Jon.* 6.

Dower, and demands the third part of the lands of *A.* her late huſband lying in *Kent*, *&c.* defendant pleads that the cuſtom there is, that wives ſhall have the moiety of their huſband's lands in dower, ſo long as they live chaſte and unmarried, and *non aliter*, or *non ſecundum curſum communis legis*, and that the demandant after the death of her firſt huſband had married the other demandant, *&c.* *& per cur'*, The cuſtom is good, and is the law in *Kent*; and therefore ſhe can claim no other dower, nor in any other manner, and the rather by reaſon of the negative concluſion. *Cro. Eliz.* 121. 1 *Leon.* 62. *Moor* 260. *pl.* 408. *S. C.*

By the cuſtom of *Borough-Engliſh* the widow ſhall have the whole of her huſband's lands in dower, which is called her free-bench. *Co. Lit.* 33. *b.* 110. *b.* *F. N. B.* 150. *Cro. Eliz.* 415. *Moor*, *pl.* 566. The reaſon of which

which ſeems to be, that in theſe boroughs the eldeſt ſon was introduced into the trade of his father, and therefore the youngeſt ſon inherited the land, and conſequently the wife that was intruſted with the younger children of her huſband had the whole during her life.

Upon a ſpecial verdict, the caſe was this: A cuſtom of a manor was found to be, that if a copyholder in fee died ſeiſed, his wife ſhould hold it during her life as *frank bank*; the lord infeoffs the copyholder, who died ſeiſed; and adjudged, that her cuſtomary eſtate was gone, becauſe by the acceſſion of the freehold the copyhold eſtate was extinguiſhed, and ſo her huſband did not die ſeiſed thereof; *ſecus* if the lord had enfeoffed a ſtranger, for then the copyhold remained ſo ſtill, and the cuſtom with it *Cro. Jac.* 127.

Cuſtom of a manor was, that the wives of copyholders for life ſhould enjoy their huſbands eſtates during widowhood; and the caſe was, that *A.* a copyholder for life, purchaſed the freehold and inheritance of his copyhold, but took the conveyance to *B.* and his heir during the life of *A.* remainder to *A.* in fee, and then *A.* dies; adjudged, that his wife ſhould have her cuſtomary eſtate, becauſe the cuſtomary eſtate of *A.* her huſband continued during his life, and was not extinct, nor altered by the purchaſe of the freehold, which during his life was in *B.* and then all cuſtomary incidents to ſuch cuſtomary eſtate remain, whereof this is one, and grows out of it as an excreſcence or fruit, and ſhe may enter without admittance. *Hob.* 181. *Cro. Jac.* 573. *S. C.*

Cuſtom of a manor was, that the copyholders wives ſhould have their free bench of all copyholds, whereof their huſbands died ſeiſed; and a copyholder, being married, ſurrenders to *A.* in fee, by way of mortgage, for ſecuring ſeventy pounds, and this ſurrender was preſented to be inrolled; but before admittance the ſurrenderer dies, and after his death *A.* is admitted; and if the wife ſhould have her free bench, was the queſtion. For the wife it was ſaid, that till admittance the copyhold remained in the huſband, and then he died ſeiſed, and ſo his wife within the cuſtom; and though the admittance after his death has relation to the time of the ſurrender; yet that is only by fiction of law between the parties, but ſhall not prejudice the wife who is a ſtranger; alſo though the admittance hath relation to the marriage, which was before, and is perfected by the death of the huſband; and ſo her title was begun and perfected too, before the title of the ſurrendree; but the court denied that the wife had any initiate title by the marriage in this caſe, as women have to their dower at Common law; but ſhe hath only conditional inception of a title ſubject to the huſband's power of preventing it by alienation, as here he might have done; for ſhe is not to have her free bench but where the huſband died ſeiſed; and this by the relation of the ſurrender he did not; and adjudged accordingly. 3 *Lev.* 385. 4 *Mod.* 251. *S. C.* 1 *Salk.* 185. *S. C. Carth.* 275. *S. C. Skin.* 406.

The cuſtom of a manor was, that the wife of acopyholder dying ſeiſed ſhould have her widow's eſtate; a commiſſion of bankruptcy is taken out againſt the copyholder, and his eſtate ſold by the commiſſioners; but before the vendee was admitted the copyholder dies; and yet adjudged that the widow's eſtate was gone, becauſe her huſband did not die ſeiſed, his eſtate and right being bound by the ſale, to which the admittance after has relation, and deveſts the widow's eſtate. *Cro. Car.* 569.

If the cuſtom of a manor be, that if any of the tenants marry a widow ſhe ſhall have no dower, this is good; but a cuſtom, that the wife of tenant in fee ſhall not be endowed, is not good. 1 *Rol. Abr.* 562. *Dav.* 30. *b.*

If there be a cuſtom, that where the huſband ſells his lands, and his wife receives part of the money, or it be expended in the family, that his wife ſhall be barred of her dower, this may be good. 1 *Rol. Abr.* 562. *Bro.* tit. *Cuſtom* 53, 78.

Ancient rent, or common in borough-engliſh, gavelkind, *&c.* is of the nature of the land there; and women ſhall have dower accordingly; and ſo it ſeems to be of rent, common, *&c.* newly granted, though ſome have held the contrary; and in all theſe caſes, whether it be of land, or rent, the cuſtom muſt be ſhewn ſpecially *Bro.* tit. *Cuſt.* 44, 58, 65, 69.

If the cuſtom be, that the wife ſhall have for her dower the moiety of the lands and tenements of her huſband, *&c.* ſhe ſhall not be endowed of a fair, or bailiwick, becauſe the cuſtom ſhall be taken ſtrictly, and theſe are no tenements; *Secus* if they were appendant to a manor, whereof ſhe is dowable; for then ſhe ſhall have a moiety of the profits as appendant to a moiety of the manor. *Perk.* 435, 436. 2 *Sid.* 139.

Dower *ad oſtium eccleſiæ*, is where a man of full age, ſeiſed of lands in fee, after marriage endows his wife at the church-door of a moiety, a third or other part of his lands, declaring them in certainty; in which caſe, after her huſband's death, ſhe may enter into ſuch lands without any other aſſignment, becauſe the ſolemn aſſignment at the church door is equivalent to the aſſignment in *pais* by metes and bounds; but this aſſignment cannot be made before marriage, becauſe before ſhe is not intitled to dower. *Lit. ſect.* 39. *Co. Lit.* 34. *a.* 36. *b.* 37. *a.*

If this dower be aſſigned, with a clauſe, that notwithſtanding any divorce that ſhall happen, that the wife ſhall hold it for her life, this is good, becauſe *modus & conventio vincunt legem. Co. Lit.* 32. *a. Co. Lit.* 38.

If tenant in tail aſſign ſuch dower, this ſhall not bind his iſſue againſt the ſtatute *de donis*, nor him in the reverſion after the eſtate ended. *Co. Lit.* 38.

Dower *ex aſſenſu patris* is where the father is ſeiſed of lands in fee; and his ſon and heir apparent after marriage endows his wife by the father's aſſent, *ad oſtium eccleſiæ*, of a certain quantity of them; in which caſe, after the death of the ſon, his wife may enter into ſuch parcel, without any other aſſignment, though the father be living; but this aſſent of the father's muſt be by deed, becauſe his eſtate is to be charged *in futuro*, and this may likewiſe be of more than a third part. *Lit ſect.* 40. *Co. Lit.* 35, 36. *Perk.* 444. *Br.* 7. 80. *Plowd.* 304. *b. Cro. Jac.* 169.

Theſe dowers *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, if the wife enters and aſſents to them, are a good bar of her in Common law, but ſhe may if ſhe will waive them, and claim her dower at Common law, becauſe being made after the marriage, ſhe is not bound by them. 4 *Co.* 1. *Co. Lit.* 36. *Br.* 97. 3 *Leon.* 272.

Theſe dowers follow the nature of dower at Common law, and the wife may have a writ of dower for them, though they are certain, as well as for her dower at Common law, and as well againſt the guardian as the ter-tenant. *Co. Lit.* 35. *F. N. B.* 150.

Theſe dowers are good, though the wife be under the age of nine years at the time of her huſband's death, being made by conſent. *Co. Lit.* 33. *a.* 37. *a.*

Theſe dowers are forfeited for high or petit treaſon in the huſband; and ſo they were anciently, if he were attainted of felony, or murder; but now in theſe laſt caſes they are ſaved by the ſtatute, 1 *Ed.* 6. *c.* 2. and 5 *Ed.* 6. *c.* 11 and remain forfeitable by his attainder of high or petit treaſon. *Co. Lit.* 37. *a.* 41. *Stanf.* 195. *a.*

Dower *de la plus belle* is where there is a guardian in chivalry, and the wife occupies lands of the heir as guardian in ſocage; if the wife brings a writ of dower againſt ſuch guardian in chivalry, he may ſhew this matter, and pray that the wife may be endowed *de la plus belle* of the tenements in ſocage; and it will be adjudged accordingly; and the reaſon of this endowment was to prevent the diſmembring of the lands holden in chivalry, which are *pro bono publico*, and for the defence of the realm. *Lit. ſect.* 48.

After judgment given, the wife may take her neighbours, and in their preſence endow herſelf of the faireſt part of the tenements, which ſhe hath in ſocage, for her life. *Lit. ſect.* 48. *Co. Lit.* 38, 39. *a b.*

If the lands, which the wife hath as guardian in ſocage, are not of value ſufficient for her dower, or if a rentcharge be iſſuing out of them, upon her ſhewing thereof, ſhe ſhall recover of the guardian in chivalry to make it up. *Lit. ſect.* 49. *Perk.* 451.

If all the lands which the huſband had were holden in ſocage, and his wife hath them as guardian in ſocage, ſhe

ſhall be allowed the third part of the profits upon her account in allowance of dower; but ſhe cannot endow herſelf of the third part thereof; becauſe that would be to make herſelf judge in her own cauſe; neither can the heir, in a writ of dower brought againſt him, plead that ſhe is guardian in ſocage, and may endow herſelf. *Perk.* 451.

For more learning on this ſubject, ſee 9. Vin. Abr. *and* 2 Bac. Abr. *tit.* Dower.

Dowry, *(Dos mulieris)* was in ancient time applied to that which the wife brings her huſband in marriage; otherwiſe called *maritagium*, or marriage goods: but theſe are termed more properly, goods given in marriage, and the marriage portion. 1 *Inſt.* 31.

Dowry-Bill. Among the Jews, the bridegroom at time of the marriage gave his wife a dowry-bill. See *Moſes* and *Aaron*, p. 235. *Cowell, edit.* 1727.

Dozein, *Decenna*, in the ſtatute for view of *frankpledge*, made 18 *Ed.* 2. One of the articles for ſtewards in their leets to enquire of, is, if all the *dozeins* be in the aſſiſe of our Lord the King, and which not, and who receive them. *Art.* 3. ſee *deciners*. There is alſo a ſort of *Devonſhire* kerſeys called *dozens*, 5 & 6 *Ed.* 6. *cap.* 6.

Draca, A Drain.——*Cum triginta acris prati juxta dictum novum locum ex parte occidentali in* dracca *juxta foſſatum de Redeclos jacentibus*——Contin. Hiſt. Croyland. p. 479.

Draco Regis, The ſtandard, enſign, or military colours bore in war by our former kings, having the figure of a dragon upon them.—*Cum rex* Angliæ *fixiſſet ſignum ſuum in medio, & tradidiſſet* draconem *ſuum Petro de Portellis ad portandum*----Rog. Hoved. *ſub anno* 1191. See *Wattes*'s gloſſary.

Dragium, *Drag*, A coarſer ſort of bread-corn.——*Item reddit computum de duobus quarteriis avenæ de toto exitu grangiæ trituratis per ſummam, & de xvii. quarteriis & tribus buſſellis* dragii *ſupra mixtis*—*& triturabit buſſellos ordei vel* dragei *avenæ*—Conſuetud. domus de Farendon MS. fol. 11. In *Staffordſhire* they now uſe a ſort of malt made of oats mixed with barley, which they call *dreg malt*. And in *Eſſex*, &c. they have a grain called dreg, of which ſee *Tho. Tuſſer's Huſbandry*, p. 32.

Drags, Seem to be wood or timber ſo joined together, that ſwimming or floating upon the water, they may bear a burden, or load of other wares down the river. *Stat.* 6 *H.* 6. *c.* 5.

Drana, A drain or water-courſe to ſew and empty wet places.——*Conceſſimus humum illam quæ eſt juxta* dranam *quam* Walterus *filius* Amfridi *tenuit*. Cartular. Abbat. Galſton. MS. fol. 29.—*Illud pratum in Thiſtlemor quod eſt intra vetus foſſatum & nemus de* Godeſhall, *& inter* dranam *& riperiam de Avene cum tota criſta dicti foſſati*. Cartular. Abbat. Radinges. MS. fol. 10. a.

Drapery, The meaſure and aulnage of cloths, 2 *Ed.* 3. *c.* 14. 47 *Ed.* 3. *c.* 1. 4 *Ed.* 4. *c.* 1. 1 *R.* 3. *c.* 8. 3 *H.* 8. *c.* 6.

The wearing of foreign cloths prohibited, 11 *Ed.* 3. *c.* 2.

Importation of foreign cloths prohibited, 11 *Ed.* 3. *c.* 3. 4 *Ed.* 4. *c.* 1.

Foreign clothiers may ſettle in *England*. 11 *Ed.* 3. *c.* 5.

Penalties of defective cloths, and of neglects in the aulnager, 25 *Ed.* 3. *ſt.* 4. *c.* 1. 3 *R.* 2. *c.* 2. 7 *R.* 2. *c.* 9. 12 *R.* 2. *c.* 14. 11 *H.* 6. *c.* 9. 4 *Ed.* 4. *c.* 1.

Subſidy on cloths ſold, 27 *Ed.* 3. *ſt.* 1. *c.* 4. certain cloths exempted for three years, 1 *H.* 4. *c.* 19.

Allowance to be made to buyer for defective cloths, 27 *Ed.* 3. *ſt.* 1. *c.* 4.

Cloths ſhall not be exported before they be fulled, &c. 5 *Ed.* 3. *c.* 7. 3 *H.* 8. *c.* 7.

Friſe free of ſubſidy, 50 *Ed.* 3. *c.* 8.

Cogware and *Kendal* cloths may be of leſs aſſiſe, as uſual, 13 *R.* 2. *ſt.* 1. *c.* 10. 9 *H.* 4. *c.* 2.

Cloths ſhall be opened in the counties of *Somerſet Dorſet*, and *Glouceſter*, before they be ſold, as in *Eſſex*, 13 *R.* 2. *ſt.* 1. *c.* 11.

None ſhall buy *Guilford* cloths before they be fulled and ſealed, 15 *R.* 2. *c.* 10.

Cloths may be made of any length and breadth, 17 *R.* *c.* 2.

The penalty of making deceitful cloths, or ſelling them without the aulnager's ſeal, 17 *R.* 2. *c.* 2.

The aulnager ſhall have no aſſured eſtate in his office, 17 *R.* 2. *c.* 5. 31 *H.* 6. *c.* 5.

Cloths made in *London* ſhall be ſealed before ſale, as formerly, 4 *H.* 4. *c.* 6. 17 *Ed.* 4. *c.* 5.

Aulnage of cloths may be let to farm, 4 *H.* 4. *c.* 24. 17 *Ed.* 4. *c.* 5.

The aſſiſe of cloths eſtabliſhed, 7 *H.* 4. *c.* 10. Repealed, 9 *H.* 4. *c.* 6. Confirmed, 13. *H.* 4. *c.* 1. 8 *Ed.* 4. *c.* 1. 4 *Ja.* 1. *c.* 2.

Cloths not to be tacked or plaited before they be ſealed, 11 *H.* 4. *c.* 6.

Cloths cut into ſmall garments to pay cuſtom according to the rate, 11 *H.* 4. *c.* 7.

How the word cloth ſhall be interpreted, 11 *H.* 6. *c.* 9.

Wages to be paid in money, 4 *Ed.* 4. *c.* 1. *ſ.* 5. 10 *Ann. c.* 16. *ſ.* 6. 1 *Geo.* 1. *c.* 15. *ſ.* 12.

Liberty to put flocks in certain cloths in *Devonſhire*, 7 *Ed.* 4. *c.* 2.

Woollen yarn and cloths unfulled not to be exported, 7 *Ed.* 4. *c.* 3. 3 *H.* 8. *c.* 7.

The length and breadth of cloths, and the order of dying of them, 1 *R.* 3. *c.* 8.

Italian merchants prohibited to occupy drapery, 1 *R.* 3. *c.* 9. *ſ.* 8, 10.

Woollen cloths not to be exported till they are rowed, barbed and ſhorn, 3 *H.* 7. *c.* 11. 3 *H.* 8. *c.* 7. 5 *H.* 8. *c.* 3.

Certain cheap cloths excepted, 3 *H.* 8. *c.* 7. *ſ.* 2.

The price of cloth limited, the fineſt to 16 *s.* a yard, &c. 4 *H.* 7. *c.* 8.

Where cuſtom ſhall be paid when cloths are packed in one port, and ſhipped in another, 11 *H.* 7. *c.* 6.

For ſealing of cloth of gold and ſilver, 4 *H.* 8. *c.* 6.

For making of *Devonſhire* white ſtreits, 5 *H.* 8. *c.* 2. 6 *H.* 8. *c.* 8. 7 *Ed.* 6. *c.* 9. 27 *El. c.* 18.

Regulations to prevent deceits in making cloth, 6 *H.* 8. *c.* 9. 27 *H.* 8. *c.* 12. 3 & 4 *Ed.* 6. *c.* 2. 5 & 6 *Ed.* 6. *c.* 6. 4 & 5 *P. & M. c.* 5. 4 *Jac.* 1. *c.* 2. 21 *Jac.* 1. *c.* 18.

The ſelling of white cloths to ſtrangers reſtrained, 14 & 15 *H.* 8. *c.* 1. 27 *H.* 8. *c.* 13.

Veſſes and ſet cloths made in *Suffolk*, not to be within the aſſiſe, 14 & 15 *H.* 8. *c.* 11.

Regulations of the clothing trade in *Worceſterſhire*, 25 *H.* 8. *c.* 18.

Rents of houſes not to be raiſed in the clothing towns in *Worceſterſhire*, 25 *H.* 8. *c.* 18. *ſ.* 3.

Clothier to weave his mark and ſet his ſeal, 27 *H.* 8. *c.* 12.

Worceſterſhire cloths to be ſealed by the ſearchers, 27 *H.* 8. *c.* 12. *ſ.* 5. Packing of *Welſh* whites, 33 *H.* 8. *c.* 3.

Cloths of ſmall value may be exported unrowed, 27 *H.* 8. *c.* 13.

The aſſiſe of the breadth of kerſeys repealed, 33 *H.* 8. *c.* 18.

Exportation of cloths unrowed, &c. of the value of 3*l.* prohibited, 33 *H.* 8. *c.* 19.

For the making of coverlets in *Yorkſhire*, 34 & 35 *H.* 8. *c.* 10.

For *Welſh* friſes and cottons, 34 & 35 *H.* 8. *c.* 11. 34 & 35. *H.* 8. *c.* 26. *ſ.* 121. 1 *Ja.* 1. *c.* 25. *ſ.* 28.

Length to be marked on the ſeal, 3 & 4 *Ed.* 6. *c.* 2.

Shrinking cloth not to be ſold, 3 & 4 *Ed.* 6. *c.* 2. *ſ.* 3.

Meaſure and weight of cloth in *Kent* and *Suſſex*, 5 & 6 *Ed.* 6. *c.* 6. *ſ.* 3.

Of long *Worceſters* and ſhort *Worceſters*, *Ibid. ſect.* 5 & 7.

The meaſure in *Suffolk*, *Norfolk*, *Eſſex*, *Wiltſhire* *Glouceſter* and *Somerſet*, *Ibid. ſect.* 8 & 10.

Of *Devonſhire* kerſeys, *Taunton* and *Bridgewater* cloths, *Welſh* friſes, *Cheſhire* cottons, &c. *Ibid. ſect.* 14, 17 & 21.

Who may make broad cloth, 5 & 6 *Ed.* 6. *c.* 8.

The

The uſe of gig-mills prohibited, 5 & 6 *Ed.* 6. *c.* 22.

Inhabitants of cities, &c. may make cloth though they have not been apprentices, 1 *M. ſt.* 3. *c.* 7.

A clothier ſhall keep but one loom, 2 & 3 *P. & M. c.* 11. *ſ.* 2.

Where woollen cloth may be woven, 2 & 3 *P. & M. c.* 11. *ſ.* 6. 4 & 5 *P. & M. c.* 5. *ſ.* 32.

For viewing and ſealing *Bridgewater* cloths, 2 & 3 *P. & M. c.* 12.

None to make woollen cloths unleſs they have been apprentice, 4 & 5 *P. & M. c.* 5. *ſ.* 33.

Where woollen cloth may be made, 1 *El. c.* 14.

Clothiers not to hire workmen for leſs than a year, 5 *El. c.* 4. *ſ.* 3.

Suffolk and *Kentiſh* cloths not to be exported unwrought, 8 *El. c.* 6.

Regulations of the drapers, cottoners and friſers of *Shrewſbury*, 8 *El. c.* 7. Repealed 14 *El. c.* 12.

Drapers where diſabled, 8 *El. c.* 7. *ſ.* 6.

The duty of the aulnager in the county of *Lancaſter*, 8 *El. c.* 12.

Kerſeys not to be above the length of 18 yards, 14 *El. c.* 10. Repealed 3 *Jac.* 1. *c.* 16.

Inhabitants of *Somerſet*, *Gloceſterſhire* and *Wilts*, may make cloth out of market towns, 18 *El. c.* 16.

The breadth of weſt country cloths, 27 *El. c.* 17. Made perpetual, 35 *El. c.* 7.

For the making of woollen cloths in *Devon* and *Cornwall*, called plain white ſtraights, &c. 27 *El. c.* 18.

For the clothiers in *Boxſtead* in *Eſſex*, 27 *El. c.* 23.

The aſſiſe of coloured cloths in *Somerſetſhire*, &c. 35. *El. c.* 9.

Of *Devonſhire* kerſeys, &c. 35 *El. c.* 10. 3 *Jac.* 1. *c.* 16.

Forfeitures, &c. to be recovered with coſts, 35 *El. c.* 10. *ſ.* 6, 10.

The lord mayor and maſter and wardens of the clothworkers, may ſearch the work of all perſons occupying the broad ſhears in *London*, 39 *El. c.* 13.

Againſt tentering northern cloth, 39 *El. c.* 30.

Cloths not to be wrought deceitfully, nor ſtretched, 43 *El. c.* 10.

Penalty on clothiers, &c. refuſing to obey the order of wages, 1 *Ja.* 1. *c.* 6. *ſ.* 7.

Clothier, being juſtice of peace, not to rate wages of weavers, 1 *Jac.* 1. *c.* 6. *ſ.* 9.

None to incur penalty for want of length, breadth, &c. of *Welſh* cottons under 15 *d. per* yard, 1 *Jac.* 1. *c.* 25. *ſ.* 28. 21 *Ja.* 1. *c.* 28. *ſ.* 5.

Welſh cottons not to be ſearched or ſealed, 3 *Jac.* 1. *c.* 17. 3 *Car.* 1. *c.* 5. *ſ.* 26.

Cloth ſealed to be ſearched only by the buyer, 4 *Ja.* 1. *c.* 2. *ſ.* 22.

Buyer to have half the penalty of faults not certified, 4 *Ja.* 1. *c.* 2. *ſ.* 23.

Cogware and other coarſe cloths made in the northren counties, need not be ſearched, 7 *Ja.* 1. *c.* 16.

For the free vending of *Welſh* cloth, 21 *Jac.* 1. *c.* 9.

Hot-preſſing of cloth prohibited, 21 *Ja.* 1. *c.* 18.

Regulatings of bay-making in the *Dutch* bay-hall at *Colcheſter*, 12 *Car.* 2. *c.* 22. 1 *Geo.* 1. *c.* 41.

For the making of cloth in the weſt-riding of *Yorkſhire*, 13 & 14 *Car.* 2. *c.* 32. 11 *Geo.* 1. *c.* 24. 7 *Geo.* 2. *c.* 25. 11 *Geo.* 2. *c.* 28. 14 *Geo.* 2. *c.* 35.

For the making of *Kiderminſter* ſtuffs, 22 & 23 *Car.* 2. *c.* 8.

The market of *Blackwell Hall* regulated, 8 *W.* 3. *c.* 9.

The duty on exportation taken away, 11 & 12 *W.* 3. *c.* 20. *ſ.* 1.

The aulnage duty taken away, 11 & 12 *W.* 3. *c.* 20. *ſ.* 2.

A duty on broad cloths exported white, 6 *Ann. c.* 8. 9 *Ann. c.* 6. *ſ.* 18.

White woollen cloth may be exported by any perſon, 6 *Ann. c.* 9.

For the true making of *Yorkſhire* cloth, 7 *Ann. c.* 13. 1 *Geo. c.* 15. *ſ.* 14. 11 *Geo.* 1. *c.* 24.

For the true making of medley broad cloth, 10 *Ann. c.* 16. 1 *Geo.* 1 *c.* 15.

Penalties to be recovered with coſts, 1 *Geo.* 1. *c.* 15. *ſ.* 16.

Who may be bay-weavers at *Colcheſter*, 1 *Geo.* 1. *c.* 41.

Inſpectors to be elected for the weſtern counties, 13 *Geo.* 1. *c.* 23.

Penalty of millman, &c. not ſtamping the true length, &c. of broad cloth before it goes to the mill, 7 *Geo.* 2. *c.* 25. *ſ.* 1.

Regulation of the manufacture of narrow woollen cloth in the weſt riding of *Yorkſhire*, 11 *Geo.* 2. *c.* 28.

Juſtices to chuſe additional number of meaſurers and ſearchers of cloth, 14 *Geo.* 2. *c.* 35.

See Woollen manufacture.

Draſcus, Grains or the refuſe of malt after brewing, called ſtill in ſome places *drains* and *draff*—*Et prebendam quotidianam ad duos equos de granario noſtro ſumendam, unum cribrum furfuris, & majorem cuvam de* Draſco, *i. e.* a great baſket of grains. *Matt. Paris in vit.* Abb. S. Albani.

Draw-gere, Any harneſs, or other furniture of cart-horſes for drawing a waggon, or other carriage—*Profactura de* Draw-gere *per Walterum Carpenter de* Langton. Paroch Antiq. p. 549. See *Kennet's Gloſſary.*

Drawbacks. The remedy againſt fradulently landing goods which have had a drawback, 8 *Ann. c.* 13. *ſ.* 16.

Drawlatches, Were thieves and robbers: *Lambert* in his *Eiren.* lib. 1. *c.* 6. calls them *thieves*, *waſters*, and *roberd's-men*; words grown out of uſe. They are mentied in ſtat. 5 *Ed.* 3. *c.* 14. and 7 *R.* 2. *c.* 5.

Drays and Carts. See Carts.

Dredgermen. See Oyſters.

Dreit-Dreit, ſignifies a double right, that is, *jus poſſeſſionis & jus dominii.* Bract. *lib.* 4. *c.* 27. & *lib.* 4. *tract.* 4. *c.* 4 & 5. *tract.* 5. *c.* 5. *Co.* on *Litt. fol.* 266.

Drenched, Is an abſolete word, and ſignifies to overcome, from the *Germ.*

Drenches, or **Drenges** (*Drengi*) Were *tenants in capite*, ſays an ancient MS. *Domeſday* tit. Leſtreſc. Roger. Pictavienſ. Neuton. *Hujus manerii aliam terram* 15 *homines, quos* drenches *vocabant, pro* 15 *maneriis tenebant.* They were (ſays *Spelman*) *e genere vaſſallorum non ignobilium, cum ſinguli qui in Domeſd. nominantur, ſingula poſſiderent maneria.* Such as at the coming in of the conqueror, being put out of their eſtates, were afterwards upon complaint unto him reſtored thereunto; for that they being before owners thereof were neither *in auxilio*, or *conſilio* againſt him: of which number were *Edwyne*, a *Dane*, *Sharneburne* of *Norfolk*, and others. Sir *Edward Coke* on *Littl. fol.* 5. *b.* ſays *drenchs* are free tenants of a manor: miſprinted doubtleſs for *drenches*, and not well interpreted. See *Baron. Angliæ*, *fol.* 118. *a.* In Cukeney *manebat quidam homo, qui vocabatur* gamilbere, *& fuit verus* dreynghe *ante conqueſtum, tenuit duas carucatas terræ de domino rege in capite, pro tali ſervitio, de ferrando palifridum dom. regis, ſuper quatuor pedes de cluario dom. regis, quotieſcunque ad manerium ſuum de* Mansfield *jacuerit, & ſi inclaudet palefridum domini Regis, dabit ei palefridum quatuor mercarum.* Mon Angl. 2 tom. fol. 598. a. In *Newtone* T. R. E. *(i. e.* in the time of King *Edward) fuerunt quinque hidæ, modo ſunt ibi ſex drenghs.* Domeſd. tit. *Derby. Gale* 773.

Drengage, (*Drengagium, vel ſervitium Drengarii,*) The tenure by which the *drenches* held their lands. Of which ſee *Trin.* 21 *Ed.* 3. *Ebor.* and *Northumb. Rot.* 191. *Notandum eſt, eos omnes eorumve anteceſſores, qui e* drengorum *claſſe erant, vel per* drengagium *tenuere, ſua incoluiſſe patrimonia ante adventum Normannorum.* Spelman.

Drift of the Foreſt (*Agitatio animalium in foreſta*) Is an exact view or examination what cattle are in the foreſt, that it may be known whether it be overcharged, or not, and whoſe the beaſts are; and whether they are commonable beaſts, &c. When, how often in the year, by whom, and in what manner this *drift* is to be made, ſee *Manwood, part.* 2. *cap.* 15. and 4 *Inſt. fol.* 309.

Drinklean (Sax. *Drinc-lean*; in ſome records written *potura drinklean)* is a contribution of tenants towards a

potation, or an ale provided to entertain the lord or his ſteward; a *Scot-ale*.

Droſdennes,—*Quod dominus debet habere* droſdennes *arbores de creſcentia xl. annorum & infra.* Knac. Paſch. 44 *Edw.* 3. *quære. Droſdenn, droſ* and *drotten*, among our *Saxons* ſignified a grove, or woody place, where cattle were kept; and the keeper of them was called *Droſman.* Domeſday.

Droſland, or **Dryſland,** (from the Sax. *dryfene*, i. e. *driven*) Was anciently a quit-rent, or yearly payment made by ſome tenants to the King, or their landlords, for driving their cattle through the manor to fairs, or markets, Mr. *Philip's Miſtaken Recompence, fol.* 39.

Droit, (Fr. *Droit*) Right: In law there are ſix kinds of it, *viz.*

1. *Jus recuperandi.*
2. *Jus intrandi.*
3. *Jus habendi.*
4. *Jus retinendi.*
5. *Jus percipiendi.*
6. *Jus poſſidendi.*

All theſe ſeveral ſorts of *rights*, following the relations of their objects, are the effects of the Civil law. Vide *Coke* on *Littl. fol.* 266. and 345. *b.*—Of meer *droit*, and very right, *ſtat.* 27 *H.* 8. *cap.* 26.

Droit de Avowſon. See **Recto de advocatione eccleſiae.**

Droit-cloſe. See **Recto clauſo.**

Droit de Dower. See **Recto dotis.**

Droit-patent. See **Recto patens,** and *Calthorp's Rep. fol.* 132.

Droit ſur diſclaimer. See *Recto ſur diſclaimer.*

Droſſen, Dru, Druit, Druſten, } All according to the book of *Domeſday*, ſignify a thicket, or wood, in a valley.

Dromones, Dromos, Dromunda, At firſt theſe words ſignified high ſhips, but afterwards thoſe which we now call men of war, and in this ſenſe 'tis uſed in *Walſingham, anno* 1292, in *Knighton, lib.* 3. *cap.* 14, &c. *Tres majores naves ſubſequuntur; quas vulgo* dromones *appellant: galeæ vero leviores, & ad quælibet aptanda agiliores præcedunt.* Gaufrid. Vineſauf. Ric. Regis Iter. Hieroſol. c. 60. *Quum proſpere verſus Achon velificaret,* 8 *idus Junii, apparuit ei navis quædam permaxima, quam* dromundam *appellant, miſſa a Saladino.* Matt. Pariſ. *ſub anno* 1191.

Drova, A drove, a drift way, or common road for driving cattle.—*Walterus Cantuar. archiepiſcopus conceſſit ad vitam magiſtro Michaeli de Bercham paſturas de la Rede & Haute juxta Bercham, cum omnibus ſuis juribus & pertinentiis,* drovis, *viis, ſemitis & foſſatis.* Dat. 10 kal. Sept. 1319. *Ex regiſt. eccleſiæ Chriſti Cantuar. MS.*

Drovers, Are thoſe who buy cattle in one place to ſell in another; they are to be married men and houſholders, and be licenſed, by ſtat. 5 *Eliz. c.* 12. and if they drive their cattle on the lord's day, they ſhall forfeit 20 *s.* by 1 *Car.* 1. *c.* 1. drovers not to be deemed bankrupts, 5 *Geo.* 2. *c.* 30. *ſect.* 40. See **Cattle.**

Druggeria, Drogeria, A place of drugs, a druggſter's ſhop.—*Quoddam meſſuagium ſitum in vico Northlode inter tenementum quod fuit Wilhelmi de Scheſteſbury capellani & tenementum proxime* druggeriam, *quod quidem tenementum, &c.* Cartular. Abbat. Glaſton. MS. *fol.* 125. *a.*

Drugs. Drugs rated, or unrated, to what duties liable on importation, 2 *W. & M. ſeſſ.* 2. *c.* 4. *ſ.* 12. 3 & 4 *Ann. c.* 4. *ſ.* 8.

Drugs for dying excepted, 3 *Ann. c.* 4. *ſ.* 8. 8 *Geo.* 1. *c.* 15. *ſ.* 10.

Drugs imported in *Engliſh* ſhipping were to pay the full value mentioned in the book of rates, and thoſe otherwiſe imported, treble the value, 8 & 9 *W.* 3. *c.* 34. Made perpetual, 7 *Ann. cap.* 7. *ſ.* 26.

What time allowed for exportation, 2 & 3 *Ann. c.* 9. *ſ.* 13. 7 *Geo.* 1. *ſt.* 1. *c.* 21. *ſ.* 10.

American drugs may be imported from any of the *Britiſh* plantations, 7 *Ann. c.* 8. *ſ.* 12.

The value of drugs how to be aſcertained in order to fix the duty, 10 *Ann. c.* 2. *ſ.* 33. 11 *Geo.* 1. *c.* 7. *ſ.* 1, 2, 3.

The duties how to be managed, 10 *Ann. c.* 26. *ſ.* 77.

In what caſes to be repaid on exportation, 10 *Ann. c.* 26. *ſ.* 41.

Senna, charged as a medicinal drug, 1 *Geo.* 1. *c.* 43. *ſ.* 3.

Drugs, &c. how to be ſearched and examined, 10 *Geo.* 1. *c.* 20.

Duty on drugs repealed, 11 *Geo. c.* 7. *ſ.* 9.

Borax and camphire refined in *Great Britain*, intitled to a drawback, 17 *Geo.* 2. *c.* 31. *ſ.* 3.

Gum Senega may be imported from any part of *Europe*, 25 *Geo.* 2. *c* 32.

Drunkenneſs. See **Alehouſes.**

Dry exchange. *(Cambium Siccum)* Is a term invented in former times for the diſguiſing and covering of uſury; in which ſomething was pretended to paſs on both ſides, whereas in truth nothing paſſed but on one ſide, in which reſpect it was called *dry. Stat.* 3 *Hen.* 7. *c.* 5.

Dry rent, A rent reſerved without clauſe of diſtreſs. See **Rent Seck.**

Duarium, Doarium, Dotarium, The *dowry*, or jointure of a wife ſettled on her in marriage, to be enjoyed after her huſband's deceaſe. The word *dowrie* is by *Fr. Junius*, rightly referred to the old *Engliſh*, to *dowe, i. e. to give*, as *Chaucer, to whom for evermore my heart I dowe.* See *Kennet's Gloſſary.*

Dublin. *Sea-town* annexed to the archbiſhoprick of *Dublin*, 4 *Ann. c.* 26.

Dubris. *Dover.*

Duces tecum; Is a writ commanding one to appear at a day in the *Chancery*, and to bring with him ſome evidence, or other thing that the court would view. See the *New book of entries, verbo* Duces tecum. There is alſo another kind of *duces tecum* directed to a ſheriff, upon return that he cannot bring his priſoner without danger of death, he being *adeo languidus*; then the court grants a *habeas corpus* in the nature of a *duces tecum licet languidus.*

Duel, *(Duellum)* according to *Fleta, Eſt ſingularis pugna inter duos ad probandam veritatem litis, & qui viceſit, probaſſe intelligitur, &c. Stat. de Finibus levatis,* 27 *Edw.* 1. The trial by *duel, combat,* or *camp fight*, in doubtful caſes, is now diſuſed; though the law on which it was grounded be ſtill in force. See 3 *part. Inſt. fol.* 221. and ſee *Combat. Per* libertatem habere duellum, *Johannes Stanly arm. clamat, quod ſi aliquis placitaverit aliquem de libero tenemento in curia ſua de Alford per breve domini comitis de recto patent. tenere & terminare prædictum placitum per* duellum, *prout jus eſt per communem legem.* Plac. in Itin. apud Ceſtriam, 14 Hen. 7.

Stephanus de Nerbona omnibus — Sciatis me dediſſe Willielmo filio Radulphi de Filungele pro homagio & ſervitio ſuo, & propter duellum *quod fecit pro me,—Duas virgatas terræ*—Sine dat. MS. Will. Dugdale, Mil.

Duel, ſignifies likewiſe a fighting between two, upon ſome quarrel precedent. See **Homicide.**

Duke, *Dux,* In ancient times among the *Romans* ſignified *ductorum exercitas*, ſuch as led their armies; who if by their proweſs they obtained any famous victory, they were by their Soldiers ſaluted *imperatores*, as *Hotoman de verb.* feudal *verb.* Dux, proveth out of *Livy, Tully*, and others: ſince that time thoſe were called *duces*, to whom the King committed the government of any province, *Id.* In ſome nations to this day the ſovereigns of the country are called by this name, as *Florence*, or the Great *Duke* of *Tuſcany, Duke* of *Milan.* In *England, duke* is the next ſecular dignity to the Prince of *Wales.* And (as, *Camden* ſays) heretofore in the *Saxon* times they were called *dukes* without any addition, being mere officers and leaders of armies. After the coming in of the *Conqueror*, there were none who bore this title till *Edward* the Third's days, who made *Edward* his ſon Duke of *Cornwal.* Since that there have been ſeveral made, whoſe titles have deſcended by inheritance to their poſterity; they were created with ſolemnity *per cincturam gladii, cappæq; & circuli aurei in ca-*

pite impoſitionem. See *Camden Brit. pag.* 166. *Zazium de feudis*, pag. 4. num. 7. *Caſſan. de conſuet.* Burgund. *p.* 6. 10. *and Fern's Glory of Generoſity*, 139. At this day we have many of theſe created *Dukes* in *England*, whoſe titles are very well known to every body. *Cowell, edit.* 1727.

Dumfries. A duty of exciſe granted to that town, 3 *Geo.* 1. *c.* 6. 10 *Geo.* 2. *c.* 7.

Dum fuit infra aetatem, Is a writ which lies for him, that before he came to his full age, made a feoffment of his land in fee, or for term of life, or in tail, to recover them again from him, to whom he conveyed them. *F. N B. fol.* 192.

Dum non fuit compos mentis, Is a writ that lieth againſt the alienee, or leſſee, for him that not being of ſound memory, did alien any lands or tenements in fee-ſimple, fee-tail, for term of life, or for years. *F. N. B. fol.* 202.

Dun, *Dune*, A mountain or open place: Therefore the names of towns which end in *dun*, were either built on hills, or near hills in open places.

Duna, A bank of earth caſt up, the ſide of a ditch ——*Faciet foſſatum adeo forte & bonum prout voluit, ita quod fundum a retro* dunae *utriuſq*; *foſſati ſit in fundo* 14 *pedum.* Cartular. Glaſton. MS. f. 75.

Dunbar, A duty of exciſe granted to that town, 5 *Geo.* 1. *c.* 16. 10 *Geo.* 2. *c.* 4. 4 *Geo.* 2. *c.* 11. 20 *Geo.* 2. *c.* 17.

Dundee. A duty of exciſe granted to that town, 4 *Geo.* 2. *c.* 11. 20 *Geo.* 2. *c.* 17.

Dunio, A ſort of baſe coin leſs than a fathing, a double.—— *Nec denarios invenerunt præter octo* duniones *qui ſterlingos duos non valebant.*——Girald. Cambr. apud Whartoni Angl. Sacr. p. 2. p. 595.

Dunjon, A little caſtle; *In illa villa rex habet caſtellum quoddam, ſupra caſtellum autem unum* dungeonem. *Du Freſne.*

Dunnarium, —— *Pateat* —— *quod ego Johannes de Mohun miles dedi abbati & canonicis de Nutle paſturam in omnibus brueris ſeu* dunnariis *meis.* Dat. 29 Ed. 3. penes decan. & capit. Eccl. Cath. Chriſti Oxon. It ſeems to ſignify a down, a hill, or heathy ground.

Dunſetts, Thoſe who dwell on hills or mountains, from the Sax. *dun*, a hill, and Sax. *data*, an inhabitant.

Dunſtable. See **Magiouinium.**

Dunum finus, The creek at *Dunſby* near *Whitby* in *Yorkſhire.*

Dunum and **Duna,** A *down*, in which termination (in ſome, a little varied into *don*) many names of our towns end, as *Aſhdown, Cleydon, &c.* Domeſday.

Duodena, A jury of twelve men. *Robertus Treſilian Juſticiarius——apud S. Albanum convocari fecit* duodenam *quam pridie averraverat ad indictandum & prodendum malefactores.* Tho. Walſingham, p. 276.

Duodena manu. See **Friburgh** and **Oath.**

Duplicate is uſed by *Crompton*, for the ſecond letters patent, granted by the Lord Chancellor in a caſe wherein he had formerly done the ſame, and was therefore thought void. *Cromp. Juriſdict. fol.* 215. Alſo a ſecond letter written and ſent to the ſame party and purpoſe as a former, for fear of a miſcarriage of the firſt, or for other reaſon, is called a *duplicat.* Alſo any copy or tranſcript of a writing is called a *duplicat.* The word is uſed 14 *Car.* 2. *cap.* 10.

Duplodes. See **Gambezon.**

Duplum, A ſort of bread ſo called, made for the monks.

Durden, A thicket of wood in a valley.

Dureſs *(Duritia)* Is where one is kept in a priſon, or reſtrained of his liberty, contrary to the order of law, or threatned to be killed, maimed or beaten: And if ſuch perſon ſo in priſon, or in fear of ſuch threats, make any ſpecialty or obligation by reaſon of ſuch impriſonment or threats, ſuch deed is void in law: And in any action brought upon ſuch ſpecialty, the party may plead, that it was made by *dureſſe*; and ſo avoid the action. *Broke*, in his *Abridgment* joineth *dureſs* and *manaſſe* together, *i. e. duritiam & minas*; hardſhip and threatnings. *Cowell.*

Every legal contract muſt be the act of the underſtanding, which they are incapable of uſing, who are under reſtraint and terrors; and therefore the law requires the free aſſent of the parties as eſſential to every contract, and that they be not under any force or violence. 2 *Bac. Abr.* 155.

It ſeems clearly agreed, that where a perſon is illegally reſtrained of his liberty by being confined in a common goal, or elſewhere, and during ſuch reſtraint enters into a bond, or other ſecurity, to the perſon who cauſes the reſtraint, that he may avoid the ſame for dureſs of impriſonment. *Co. Lit.* 253. *Jenk.* 166.

But if a man be impriſoned by order of law, the plaintiff may take a feoffment of him, or a bond for his ſatisfaction, and for the deliverance of the defendant, notwithſtanding that impriſonment; for this is not by dureſs of impriſonment, becauſe he was in priſon by a courſe of law; for it is not accounted in law dureſs of impriſonment, but where either the impriſonment, or the dureſs that is offered in priſon, or at large, is tortious or unlawful; for *executio juris non habet injuriam.* 2 Inſt. 482.

Lord *Coke* ſays, that for menaces, in four inſtances a man may avoid his own act. *Firſt*, For fear of loſs of life. *Secondly*, Of loſs of member. *Thirdly*, Of mayhem. *Fourthly*, Of impriſonment. 2 *Inſt.* 483.

But menacing to commit a battery, or to burn his houſe, or ſpoil his goods, is not ſufficient to avoid the act; for if he ſhould ſuffer what he is threatned, he may ſue and recover damages in proportion to the injury done him. 2 *Inſt.* 483.

If a man is taken by virtue of a proceſs, iſſuing out of a court that hath no power to grant ſuch proceſs, and for his enlargement gives bond to appear in the ſaid court, this may be avoided, becauſe taken by dureſs; adjudged in an action upon ſuch bond, given by one who was taken upon an attachment under the Privy ſeal of the court of requeſt; for that court had no power to grant ſuch proceſs; and therefore it was no warrant to the ſheriff to take his body. *Cro. Eliz.* 646. 4 *Inſt.* 97. *S. C. Cro. Car.* 596.

If *A.* falſely charges *B.* with felony for ſtealing his horſe, and procures a warrant from a juſtice of peace to a conſtable, whereby he is taken, and being in cuſtody, upon *A.*'s promiſe to diſcharge him, ſeals a bond for 10 *l.* to *A.* and is thereupon immediately diſcharged; this bond may be avoided by dureſs; and ſo ruled, it appearing that the horſe was *B.*'s own horſe, and that theſe proceedings were only to cover the deceit. *Allen* 92.

Alſo in equity, if a man by compulſion enters into a bond, though the terror and force are not ſufficient to make it dureſs at Common law, yet it may be relieved againſt. 2 *Vern.* 497.

But in this, every caſe muſt depend on its own circumſtances; for where *A.* being taken by the huſband going to bed to his wife, gave ſecurities for payment of 500 *l.* and a bill being brought to be relieved againſt the ſecurities, ſuggeſting a plot to catch him; and that the defendant with an ax threatned to cut him in pieces; but there being no proof of a plot, and it appearing that the ſecurities were entred into at three ſeveral times, and when the plaintiff was in cool blood, and that he joined in concealing the conſideration thereof, the court refuſed to relieve. *Preced. Chan.* 266.

Alſo by a rule of the Common law courts, all warrants for confeſſing judgments, taken by any ſheriff or bailiff from any perſon in his or their cuſtody by arreſt, if not executed in the preſence of ſome ſworn attorney of either court, and his name ſet or ſubſcribed thereto as a witneſs, ſhall not be good, or of any force; and upon oath made that the ſame was done, the ſame ſhall be ſet aſide, and the ſheriff or officer may be puniſhed for ſo doing; and if judgment be entred thereon, the ſame on motion will be vacated and ſet aſide; and if the execution thereon be executed, the party will have reſtitution awarded him. 2 *Bac. Abr.* 156, 157.

The dureſs that will avoid a deed muſt be done to the party himſelf; therefore if *A.* and *B.* enter into an obligation,

obligation, by reaſon of dureſs done to *A. B.* ſhall not avoid this obligation, though *A.* may, becauſe he ſhall not avoid it by dureſs to a ſtranger. 1 *Rol. Abr.* 687. 1 *Brownl.* 66.

But a ſon ſhall avoid his deed for dureſs to his father; ſo ſhall the father his deed, by reaſon of dureſs to his ſon. 1 *Rol. Abr.* 687. 2 *Brownl.* 276.

Alſo the huſband ſhall avoid a deed made by dureſs to his wife. 1 *Rol. Abr.* 687. 2 *Brownl.* 276. *S. P.*

But a ſervant ſhall not avoid a deed made by dureſs to his maſter, nor *vice verſa.* 1 *Rol. Abr.* 617. 2 *Brownl.* 276. *S. P.*

If a man makes a leaſe by dureſs, and the leſſee enters, the leſſor ſhall have an aſſiſe againſt him as a diſſeiſor, for the free conſent of parties being eſſential to all contracts, where either of the parties is under force and violence, his free aſſent cannot be ſuppoſed, and therefore ſuch contracts is void, and the perſon who enters by virtue of it is a wrong-doer. *Bro.* tit. *Diſſeiſin* 63.

But if a man by dureſs make a feoffment and livery in perſon, he ſhall have no aſſiſe againſt the feoffee, becauſe ſuch dureſs ſhall not be preſumed, for then the power of the *pais*, who was preſent at the ſolemnity, would have been ſuppoſed to have come unto his reſcue. *Bro.* tit. *Diſſeiſin* 63. See 2 *Inſt.* 483.

So if a man acknowledges and enrolls a deed, he cannot afterwards plead dureſs. *Moor* 42. *Cro. Eliz.* 88. *S. P.*

But a ſtatute merchant may be avoided by *audita querela*, becauſe it was made by dureſs of impriſonment. 1 *Rol. Abr.* 687. *Owen* 142. *S. C.*

In debt, for the arrears of an account, the defendant may ſhew that the plaintiff of his own wrong impriſoned the defendant, and aſſigned auditors to him, being in priſon, and that ſo the account was by dureſs. 1 *Leon* 13.

A will ſhall be avoided by dureſs or menace of impriſonment. *Dyer* 143. *b.*

If a man takes *A. S.* to wife by dureſs, though the marriage be ſolemnized *in facie eccleſiæ*, yet it is merely void, and they are not huſband and wife, for without a free conſent there can be no marriage. *Kelw.* 52. *b.* 1 *Sid.* 65.

If a man executes a deed by dureſs, he cannot plead *non eſt factum*, for it is his deed, tho' he may avoid it by ſpecial pleading judgment *ſi actio, &c.* 5 *Co.* 119. 2 *Inſt.* 483. *S. P.* See 9 *Vin. Abr.* and 2 *Bac. Abr.* tit. *Dureſs.* See alſo Gaolers, Impriſonment, and Eccleſiaſtical Courts.

Durham. Its biſhop and chancellor to be juſtices of peace as uſual, 27 *H.* 8. *c.* 24. *ſ.* 21.

Proclamations how to be awarded in exigents, 31 *El. c.* 9. *ſ.* 2.

The biſhop to have a deputy in the King's Bench and Common Pleas for receiving writs of proclamations, 31 *El. c.* 9. *ſ.* 3.

The forfeiture for not returning them, 31 *El. c.* 9. *ſ.* 4.

Saving of other franchiſes belonging to the biſhoprick of *Durham*, 31 *El. c.* 9. *ſ.* 5.

Writs of ſpecial *capias utlagatum, &c.* to whom to be directed, 31 *El. c.* 9. *ſ.* 6.

One fee only to be taken on awarding a proclamation, 31 *El. c.* 9. *ſ.* 7.

The knights and burgeſſes for parliament how elected, 25 *Car.* 2. *c.* 25. *ſ.* 9.

The chancellor, *&c.* of the county palatine may grant commiſſions for ſwearing affidavits in the courts of *Durham*, 4 *Geo.* 3. *c.* 21.

Durnobarium, *Dorcheſter.*

Durobrovae, *Rocheſter.*

Durolenum, *Lenham* in *Kent.*

Durolitum, *Oldford* upon *Lee* in *Eſſex.*

Durotriges, *Dorſetſhire.*

Durſley, Blows without wounding or blood; *vulgo* dry-blows, from the Germ. *Durre, ſiccus*, and Sax. *Slege, ictus.*

Duſty-foot, or *Duſty-fatt*, A foreigner, trader, pedlar, or travelling merchant, who has no ſettled habitation. So called becauſe their feet in travelling are covered with *duſt. Si quis extraneus mercator tranſiens per regnum, non habens terram, vel manſionem infra vicecomitatum, ſed vagans, qui vocatur pie poudreux, hoc eſt Anglice* Duſty-foot, *&c.* Hence the court of *piepowder* erected for the relief of ſuch foreigners. See Piepowder.

Dutchy-court, Is a court wherein all matters appertaining to the dutchy or county palatine of *Lancaſter* are decided by the decree of the *chancellor* of that court: The original of it was in *Henry the Fourth's days*, who, obtained the crown by depoſing *Richard the Second*, and having the *dutchy of Lancaſter* by deſcent, in right of his mother was ſeiſed thereof as *King*, and not as *Duke*; ſo that all the liberties, franchiſes and juriſdictions of the ſaid *dutchy*, paſſed from the King by his great ſeal, and not by livery or attornment, as the poſſeſſions of *Everwick*, the earldom of *March* and ſuch others did, which had deſcended to the King by other anceſtors than the King's; but, at laſt, *Henry the Fourth*, by authority of parliament, paſſed a charter, whereby the poſſeſſions, liberties, *&c.* of the ſaid *dutchy* were ſevered from the crown; yet *Henry the Seventh* reduced it to its former nature, as it was in *Henry the Fifth*'s days. *Crom. Jur. fol.* 136.

The officers belonging to this court, are, the *chancellor*, attorney, receiver general, clerk of the court, meſſenger: Beſides which, there are certain aſſiſtants, as one *attorney* in the Exchequer, one *attorney* of the *dutchy* in Chancery, four perſons learned in the law retained of counſel with the King in the ſaid court; whereof *Gwin* (in the Preface to his *Reading*) ſpeaks thus; *It grew out of the grant of King* Edward the Third, *who gave that* dutchy *to his ſon* John of Gaunt, *and endowed it with ſuch royal rights, as the county palatine of* Cheſter *had.* And foraſmuch as it was afterwards extinct in the perſon of King *Henry the Fourth*, by reaſon of the union of it with the crown, the ſame King, (ſuſpecting himſelf to be more rightfully *Duke* of *Lancaſter* than King of *England*) determined to ſave his right in the *dutchy*, whatever ſhould befal the kingdom; and therefore he ſeparated the *dutchy* from the crown, and ſettled it ſo in the natural perſons of himſelf and his heirs, as if he had been no King or politick body at all; in which condition it continued during the reign of *Henry the Fifth* and *Henry the Sixth*, that deſcended from him; but when *Edward the Fourth* had (by recovery of the crown) recontinued the right of the houſe of *York*, he feared not to appropriate that *dutchy* to the crown again; yet ſo, that he ſuffered the court and officers to remain as he found them; in which manner it came, together with the crown, to *Henry the Seventh*, who, approving of *Henry the Fourth*'s policy, (by whoſe right alſo he obtained the kingdom) made a like ſeparation of the *dutchy*, and ſo left it to his poſterity, who ſtill enjoy it.

Commiſſioners of ſewers how appointed for the dutchy, 31 *H.* 8. *c.* 5. *ſ.* 14.

Leaſes of Dutchy lands to paſs the Dutchy ſeal, 27 *H.* 8. *c.* 11. *ſ.* 6.

What lands ſhall be parcel of the Dutchy, and how to paſs, and what new ones may be annexed, 27 *H.* 8. *c.* 11. *ſ.* 6, 7. & *c.* 16. 2 & 3 *Ph. & Ma. c.* 20.

Grant of any office whereof the fees do not exceed 2*d.* per day, may be paſſed by the chancellor of the dutchy, *&c.* 27 *H.* 8. *c.* 11. *ſ.* 7.

Debts due to the King in the dutchy ſhall be ſued for there, 33 *H.* 8. *c.* 39. *ſ.* 7.

The ſame fees for the commiſſion as in Chancery, 3 & 4 *Ed.* 6. *c.* 8.

The ſame benefice ſhall be under its ſurvey as anciently, 1 *El. c.* 4. *ſ.* 38.

Decrees of the dutchy court concerning the King's copyhold land how confirmed, 7 *Ja.* 1. *c.* 21.

Chancellor of the dutchy impowered to take affidavits, 16 & 17 *Car.* 2. *c.* 19.

For other matters, See Lancaſter, *and* County Palatine.

Duty, Any thing that is known to be due by law, and thereby recoverable, is a *duty* before it is recovered; becauſe the party intereſted in the ſame hath a power to recover it. 1 *Lill.* 495.

Dwined.

Dwined, *i. e.* consumed; thus we say, to dwindle.

Dyer, Was a learned lawer, and lord Chief Justice of the Common Pleas in Queen *Elizabeth*'s time: he wrote a book still much esteemed, called his *Commentaries*, or *Reports*.

Dyers, Dying, and Dying Drugs. Penalty of dying cloth with orchel, or cork, called jarcock. 1 *R.* 3. *c.* 8. *s.* 15.

Farther directions for dying cloth, 3 & 4 *Ed.* 6. *c.* 2. *s.* 4.

Searchers in every borough to inspect dying, 5 & 6 *Ed.* 6. *c.* 6. *s.* 37.

Provisions for abolishing deceitful materials, and other frauds in dying, 23 *El. c.* 9. 13 *Geo.* 1. *c.* 24.

Penalty on using logwood, 23 *El. c.* 9. *s.* 2.

Every dyer to fix a seal of lead to his cloth, 23 *El. c.* 9. *s.* 5.

Dying wood of the growth of the *English* plantations not to be transported but to *English* plantations, 12 *Car.* 2. *c.* 18. *s.* 18.

To be put on shore in *England*, &c. before it is carried from thence, 15 *Car.* 2. *c.* 7. *s.* 9.

Logwood may be imported and used in dying, 13 & 14 *Car.* 2. *c.* 11. *s.* 26 & 27.

Dying wood, to what duties liable on importation, 4 *W.* & *M. c.* 5. *s.* 2. 3 & 4 *Ann. c.* 4. *s.* 8.

And what to pay on exportation, 8 *Geo.* 1. *c.* 15. *s.* 11.

And within what time to be exported, 2 & 3 *Ann. c.* 9. *s.* 13. 7 *Geo.* 1 *st.* 1. *c.* 21. *s.* 10.

Dying goods in general where exempt from duties on importation, 8 *Geo.* 1. *c.* 15. *s.* 10.

Penalty of deceitful black dying, 13 *Geo.* 1. *c.* 24.

Penalty of using logwood in dying blue, 13 *Geo.* 1. *c.* 24. *s.* 3.

Masters, *&c.* of dyers company in *London* to appoint searchers, 13 *Geo.* 1. *c.* 24. *s.* 4.

Dyke-reeve, An officer that hath the oversight of the *dykes* and drains in *Deeping fens*, &c. mentioned 17 & 18 *Car.* 2. *cap.* 11.

Dynge-thrift, An old play, or sport, of which it is hard to derive the name, or to define the thing. There is a letter directed to the official of the archdeacon of *Richmond*, for censuring one *William Baker*, chaplain of *Ripon*, upon several articles exhibited against him, of which one runs thus——*Item fuit inventor principalis cujusdam ludi pestiferi & a jure reprobati, qui in vulgari dicitur* Dynge-thrift, *qui se magistrum & abbatem illius ordinis fecerat nominari, & pro tali se gessit, & quamplurimos tam clericos quam laicos apud* Ripon *illo ludo noxio & damnoso informavit.*——Dat. 16 kal. Nov. 1311. *Collectan. Matth. Hutton S. T. P. ex Reg. Grenefeld Archiepis. Ebor. MS.*

Dysart. A duty of excise granted to that town, 26 *Geo.* 2. *c.* 44.

Dyteuum, Dictenum, A *dittany*, *ditty*, or song. Whence *venire cum toto ac pleno* dyteno, was to sing Harvest home. *Homines de Heayngdon ad curiam domini singulis annis inter festum S. Michaelis & S. Martini* venient cum toto ac pleno dyteno *sicut hactenus consueverunt.* Paroch. Antiq. p. 320.

E.

EAHALUS, From the Saxon *Eale*, *cervisia*, and *Hus*, *domus*, now called an ale-house; a word which we often find in the laws of King *Alfred*.

Eahtayn, In the Saxon laws of King *Ethelred*, *cap.* 6. —— *Et si* Eahtayn *occidatur, pertineat infractio pacis intra curiam, vel adjacentias ejus,* Eahtayn *persolvatur plena wera.* Mr. *Somner* interprets *Eahtayn* to be *eight men*, or such a number slain; but the word seems rather to be a contraction of *heath-tean*, a high thane, or superior lord, the penalty on whose murder was augmented in proportion to his quality. *Cowell, edit.* 1727.

Ealderman, or **Ealdoman**, *Aldermanus*, Among the *Saxons* was as much as *Earl* among the *Danes*, *Camd. Brit. pag.* 107. It is as much as an *Elder*, or *statesman*, called by the *Romans*, Senator, who were rather counsellors at large, than employed in any particular office, as *Comites* were. See **Countee.** And that signification we retain at this day almost in all our cities and boroughs, calling those *Aldermen* that are associates to the chief officer in the common council of the town. 24 *H.* 8. *cap.* 13. Or sometimes the chief officer himself, as in *Stamford.* See **Alderman.**

Eallehorda, The privilege of assising and selling ale and beer. As among the liberties granted by *Henry the Second* to the abbey of *Glastenbury*—*Habeat quoque eadem ecclesia socam & sacam, on Stronde and on Streme, on Wode, and on Felde, on Grithbriche, on Burchbrich Hundred. Sotene, Adda* and *Ortelas*, Ellehordas, *busa, herden, &c.* Cortular. Abbat. Glaston. MS. fol. 14.

Earle, Sax. *Eorle*, Lat. *Comes* and *Consul*; This was a great title among the *Saxons*, and is the most ancient of any of the peerage, there being no other title of honour used among the present nobility, which was likewise in use among the *Saxons* except this title of *Earl.* The titles of honour among the *Saxons* were originally three, *viz. Ætheling*, *Ealderman*, and *Disen*, or *Dean*; the first comes from the word *Æthel*, which signifies noble, and was usually applied to the first of the Royal line; the other two words were applied to the rest of the nobility; only the *Thani* were afterwards distinguished into *majores* and *minores*; the former were equal to our peers, and the later to our knights: but the title *Earl*, in Lat. *Comes*, in antient times was given to those who were associates to the King in his councils and martial actions: And the manner of their investure into that dignity was, *per cincturam gladii comitatus*; without any formal charter of creation. See *Dugdale's Warwickshire, fol.* 302. But the Conqueror (as *Camden* notes) gave this dignity in fee to his nobles, annexing it to this or that county, or province; and allotted them for their maintenance, a certain proportion of money arising from the prince's profits, for the pleadings and forfeitures of the provinces: For example, he brings an ancient record in these words; *Henricus* 2. *Rex Angliæ his verbis* Comitem *creavit*; *Sciatis nos feciſſe* Hugonem Bigot *comitem de Norf. &c. de tertio denario de Norwic. & Norfolk*; *ſicut aliquis Comes Angliæ liberius comitatum ſuum tenet.* About the reign of King *John*, and ever since, our Kings have made *Earls* by their charter, of this or that county, province, or city; but of late, giving them no authority over the county, nor any part of the profits arising by it; only some annual fee out of the Exchequer, *&c.* The manner of their creation is by girding them with a sword. *Cam. p.* 107. but see the solemnity described more at large in *Stow's Annals, p.* 1121. Their place is next to a marquess, and before a viscount. *Comitatus a comite dicitur, aut vice versa.* See more on this subject in *Spelman's Gloss.* verbo *Comites*; and in *Selden's titles of Honour, fol.* 676. and see **Countee, Consul** and **Eorl.**

Earthen ware, to what duties liable, 2 *Will.* & *M. sess.* 2. *c.* 4. *sect.* 48.

Easement (*Aisiamentum*, from the French *Aise*, i. e. *Commoditas*) Is a service, or convenience, which one neighbour has of another by charter, or prescription, without profit; as a way through his ground, a sink, or such-like. *Kitchin, fol.* 105. this, in the Civil law, is called *servitus prædii.*——*Præcipias R. quod juste & sine dilatione permittat habere H.* Aisiamenta *sua in bosco & in pastura de villa, &c.* Breve Regium vetus apud Glanvil, lib. 12. cap. 14. A person may prescribe to an *easement* in the freehold of another, as belonging to some ancient-house, or to land, *&c.* and a way over the land of another; a gateway, water-course, or washing place in another's ground, may be claimed by *prescription* as *easements:* But a multitude of persons cannot prescribe; tho' for an *easement* they may plead custom. *Cro. Jac.* 170. 3 *Leon.* 254. 3 *Mod.* 294. To allege an *easement* by *consuevit* only is the best way; and things of necessity shall not be extinguished by unity of possession; but a way of *ease* may be there extinguished. *Lill. Abr.* 496. See **Prescription.**

Easter,

Easter, From the Saxon *Eaſter*; which was a goddeſs the *Saxons* worſhipped in the month of *April*; and ſo called, becauſe ſhe was the goddeſs of the *Eaſt*.

East-India Company. This corporation was originally formed towards the latter end of the reign of Queen *Elizabeth*, as appears by their charter, which bears date in 1599: their privileges were renewed by King *James* I. and alſo by *Charles the Second* in 1662, and confirmed by *James* II.

The ſubſcriptions, or ſhares, in this company, were only of 50*l.* originally; and the directors having a conſiderable dividend to make in 1676, it was judged eligible to add the profits of the ſtock, inſtead of withdrawing them; whereby the ſhares were doubled, and from 50*l.* advanced to 100*l.* and it appears by ſtat. 4 & 5 *W.* & *M. c.* 15. *ſect.* 10. that in the year 1692, their joint-ſtock was 744,000*l.*

The company ſuſtaining loſſes by the *Dutch* in *India*, and by the *Great Mogul*, began to decline at the Revolution.—The war with *France*, put it into ſo deplorable a condition, that, apppearing ſcarce poſſible to be ſupported, a new one was erected.

The riſe of this new company was occaſioned by the great caſe of the old one being taken into conſideration by the parliament, which caſe had been depending ſome years. On account of its intricacy, it had been firſt referred by the parliament to the King, and by him back to the parliament, in the year 1698; when the old company offering to advance 700,000*l.* at 4 *per cent.* for the ſervice of the government, in caſe the trade to *India* might be ſettled on them, excluſive of all others; the parliament ſeemed inclined to embrace their propoſals.

In the interim, however, another body of merchants, of whom Mr. *Shepherd* was the chief, and who were ſupported by Mr. *Montague*, chancellor of the Exchequer, propoſed to the houſe of commons to raiſe two millions, at 8 *per cent.* upon condition that the trade to *India*, might be ſettled on the ſubſcribers, excluſive of all others. They propoſed alſo, that theſe ſubſcribers ſhould not be obliged to trade in a joint ſtock; but, if any members of them ſhould afterwards deſire to be incorporated, a charter ſhould be granted to them for that purpoſe.

The parliament judged this new overture not only more advantageous to the government, but alſo very likely to ſettle this controverted trade on a better foundation than it was on before: wherefore a bill was brought in for ſettling the trade to the *Eaſt-Indies*, according to thoſe limitations, and ſome further reſolutions.——In conſequence of which, the old *Eaſt-India* company preſented a petition againſt this bill; which notwithſtanding, was paſſed in favour of the new company, who obtained a charter of incorporation, dated *September* 5, 1698, by the name of, 'The general ſociety intitled to the advantages given by an act of parliament, for advancing a ſum not exceeding two millions, for the ſervice of the crown of *England*.' Whereby the ſum total of all the ſubſcriptions was made the principal ſtock of the corporation; and the new company became inveſted with the ſame privileges, as were granted to the old company, by the charter of King *Charles* II. However, the old company was by the act, indulged with leave to trade to the *Indies* until *Michaelmas* 1701.

The fund of this new company became ſo conſiderable, and ſubſcriptions were carried on with ſuch facility, that, in leſs than two years, the company put to ſea 40 ſhips, equipped for its commerce; which was double the number employed by the old company, in the moſt flouriſhing times of its traffic; and they ſent annually, at leaſt a million ſterling in ſpecie to the *Indies*, whereas the old company had never ſent above 500,000*l.*

The two companies ſubſiſted a few years in a ſeparate ſtate, when having a due regard to their common intereſt, and for preventing ſeveral inconveniencies that might otherwiſe have happened, both to themſelves and the nation in general, they agreed upon ſeveral articles for their union.

Accordinly, in the year 1702, a new charter of union was granted the two companies by Queen *Anne*, under the name of 'The united company of merchants trading to the *Eaſt-Indies*,' which was eſſentially the ſame with thoſe of King *Charles*, and King *William*, becauſe, by the union, they adopted all the regulations made for the government of the old company: So that the united company ſhould rather be deemed the old company continued, than a corporation erected upon a different eſtabliſhment. This charter being ſince expired, another with new powers, was granted them, till 1730; and, the 17th year of King *George* II. was continued until the 25th of *March* 1780; when, on three years notice, and repayment of the capital ſtock borrowed by the government, and the annuities, the company's right to the ſole and excluſive trade to the *Eaſt-Indies* is to ceaſe and determine.

To the 2,000,000*l.* advanced by the new company to *William* III. the united company, in the 6th year of Queen *Anne*, lent the government 1,200,000*l.* which made their whole loan amount to 3,200,000*l.* more; being what may properly be called the capital ſtock of the company: the firſt loan of 2,000,000*l.* was ſecured by the government, out of the duties upon ſalt, and the additional ſtamp duties, granted in the 9th and 10th year of *William* III. chargeable with the payment of 160,000*l.* as a yearly fund for paying the intereſt at 8 *per cent.* But by the act of 3d of *George* II. this annuity of 160,000*l.* was reduced to 128,000*l.* and transferred as a charge upon the aggregate fund; and, in 1749, it was reduced to 3 and a half *per cent.* until *Chriſtmas* 1757, and after that to 3 *per cent.* But beſides this 3,200,000*l.* there is a million more due by the public to this company, being lent by them at 3 *per cent.* in the ſaid 17th year of his late Majeſty.

In regard to the œconomy and policy of this company, all perſons without exception, are admitted members thereof, as well foreigners as natives, men and women; with this circumſtance, that 500*l.* in the ſtock of the company, gives the owner a vote in the general courts, and 2000*l.* qualifies him to be choſen a director. The directors are 24 in number, including the chairman and deputy chairman, who may be re-elected for four years ſucceſſively. They have ſalaries of 150*l.* a year each, and the chairman 200*l* The meetings, or courts of directors are to be held, at leaſt, once a week; but are commonly oftner, being ſummoned as occaſion requires.

Out of the body of the directors are choſen divers committees, who have the peculiar inſpection of certain branches of the company's buſineſs; as the committee of correſpondence, committee of buying, committee of the treaſury, committee of ware-houſe, committee of ſhipping, committee of accounts, committee of private trade, committee of the houſe, and committee to prevent the growth of private trade.

This company is not only granted an excluſive privilege of trade to the *Indies*, and other extraordinary conceſſions from the government, by their charter, but there are ſeveral acts of parliament made in its behalf. See the *Merchant's Lawyer*, vol. 1.

Eaſt-India goods excepted out of the navigation act, 12 *Car.* 2. *c.* 18. *ſ.* 13.

Five *per cent* on *Eaſt-India* ſtock, how to be anſwered to the government, 4 *W.* & *M. c.* 15. *ſ.* 10.

The *Eaſt-India* company's fund eſtabliſhed, 9 & 10 *W.* 3. *c.* 44. 3 *Geo.* 2. *c.* 14.

Limits of their trade, 9 & 10 *W.* 3. *c.* 44. *ſ.* 61.

Security to be given that goods laden in *India* be brought to *England*, 9 & 10 *W.* 3. *c.* 44. *ſ.* 69.

Their ſtock a perſonal eſtate, and exempt from taxes. 9 & 10 *W.* 3. *c.* 44. *ſ.* 71, 72.

Duty of 5 *per cent.* to be paid to the company, 9 & 10 *W.* 3. *c.* 44. *ſ.* 76.

Excluſive trade granted to the company, 9 & 10 *W. c.* 44. *ſ.* 81. 3 *Geo.* 2. *c.* 14.

The proportions of Saltpetre to be delivered by the companies when united, 1 *Ann. ſt.* 1. *c.* 12. *ſ.* 113.

Security to be given that their goods ſhall not be unladen out of *Great Britain*, 6 *Ann. c.* 3.

Their capital increaſed, and their term enlarged, 6 *An. c.* 17.

Officers of the cuſtoms ſhall take bond for the cuſtoms, 6 *Ann. c.* 17. *ſ.* 11.

Their trade to be ſecured notwithſtanding that their fund be redeemed, 10 *Ann. c.* 28.

The company's ſecurity to be given for the cuſtoms, 10 *Ann. c.* 29.

His Majeſty's ſubjects reſtrained from going to *India* without leave of the company, or from taking commiſſions from foreign ſtates for that purpoſe, 5 *Geo.* 1. *c.* 21. 7 *Geo.* 1. *c.* 21.

Not to prejudice the right of the *South Sea* company, 5 *Geo.* 1. *c.* 21. *ſ.* 5.

Impowered to lend money on bottomry to their captains, *&c.* 6 *Geo.* 1. *c.* 18. *ſ.* 26.

Regulations of their power of borrowing upon bond, 7 *Geo.* 1. *c.* 5. *ſ.* 32.

Defendant on acquittal intitled to coſts, 7 *Geo.* 1. *c.* 21. *ſ.* 1.

Contracts and loans on foreign ſhips bound to the *Eaſt Indies* void, 7 *Geo.* 1. *c.* 21. *ſ.* 2.

Bills in the Exchequer may be filed for diſcovery of unlawful trade, 7 *Geo.* 1. *c.* 21. *ſ.* 5.

May export ſtores of war free, 7 *Geo.* 1. *c.* 21. *ſ.* 13.

Penalty on joining in any *India* company in the *Auſtrian Netherlands*, 9 *Geo. c.* 26.

A miſdemeanor for any ſubject to be in *India*, *&c.* without authority, 9 *Geo.* 1. *c.* 26. *ſ.* 6. 17 *Geo.* 1. *c.* 17. *ſ.* 11.

Annuity of 160,000*l.* reduced to 128,000*l.* 3 *Geo.* 2. *c.* 14. *ſ.* 4.

Reſtrained from purchaſing more than the yearly value of 10,000*l.* 3 *Geo.* 2. *c.* 14. *ſ.* 14.

The reduced annuity of 128,000*l.* charged on the aggregate fund, 3 *Geo.* 2. *c.* 20. *ſ.* 22.

An annuity of 30,000*l.* granted to the *Eaſt India* company out of the ſurplus of the duty on ſpirituous liquors, 17 *Geo.* 2. *c.* 17.

Excluſive trade not be determined till after the 25th of *March* 1780, 17 *Geo.* 2. *c.* 17. *ſ.* 13.

Commiſſioners of inland duties to attend ſales of *Eaſt India* company, and take account of lots of tea, *&c.* 18 *Geo.* 2. *c.* 26. *ſ.* 6.

Offences againſt 5 *Geo.* 1. *c.* 21. Excepted out of general pardon, 20 *Geo.* 2. *c.* 52. *ſ.* 40.

Inſurance of ſhips and goods trading to *India* under new foreign commiſſions prohibited, 25 *Geo.* 2. *c.* 26.

The troops of the company made ſubject to martial law, 27 *Geo.* 2. *c.* 9.

Miſdemeanors of their preſidents and council may be tried in *England*, 27 *Geo.* 2. *c.* 9. *ſ.* 13.

His Majeſty may impower directors to authorize their governor and council to hold courts martial at *Fort Marlborough*, 1 *Geo.* 3. *c.* 14.

Eaſtintus, An eaſterling, Sax. *Eaſt-Tyne*, eaſterly coaſt or country. In the laws of King *Edward* the Elder, ——*Si ſit* eſtintus, *ſi ſit* nortintus, *emendat ſicut ſcriptura pacis continet*——Where it ſeems *eaſtintus* was rather meant *eaſtinus*, and *nortintus*, *nordtinus*, *i. e.* whether he lived on the eaſt ſide of the river *Tine*, or on the north. *Cowell, edit.* 1727.

Eaſtland trade. All the King's ſubjects may uſe the *Eaſtland* trade, or be admitted of the *Eaſtland* company, 25 *Car.* 2. *c.* 7. *ſ.* 5.

Eaton college, How diſcharged from firſt fruits and tenths, 1 *Eliz. c.* 4. *ſ.* 34. and its maintenance provided for, 18 *El. c.* 6.

Ebba, Ebb, or low tide.—*Si extra regnum in peregrinatione fuerit,—dilationem habebit* 40 *dierum*, *& duorum ſioddorum & unius* ebbæ, *quia de ultra mare*, *&c.* Bracton, lib. 4. tract. 1. cap. 5. *In quibus eſſoniis dabitur dilatio ad minus* 40 *dierum & unius ſlud. & unius* ebbæ. *Ib. lib.* 5. *tract.* 2. *c.* 2.

Ebdomadarius, An officer in cathedral churches, appointed weekly to ſuperviſe the regular performance of Divine ſervice and other duties, and to preſcribe the particular office of each perſon attending in the choir, what part he is to bear for that week in reading, ſinging, praying, *&c.* To which purpoſe the ſaid *ebdomary* or weeks-man, at the beginning of his week, drew up a form or bill of the reſpective perſons and their ſeveral allotted duties, called *tabula*, and the perſons there entred were called *Intabulati.*—This appears particularly in the

ſtatutes of the church of St. *Paul's*, digeſted by *Ralph Baldock*, dean, *Anno* 1295. *MS. penes Joh. Epiſc. Norwic.*

Ebedin, A relief.

Eberemurder, Sax. *Ebere mord*, *apertum murdrum*, Was one of thoſe crimes which, by *Henry* the Firſt's *Laws*, *c.* 13. *emendari non poſſunt. Hoc ex ſcelerum genere fuit nullo pretio*, (*etiam apud Saxones noſtros*) *expiabilium, cum alia licuit pecuniis commutare.* Spelman. *Ex his placitis quædam emendantur centum ſolidis, quædam were, quædam wita, quædam non poſſunt emendari, quæ ſunt huſbreeh, i. e.* burglary, *bernet, i. e.* ſetting a houſe on fire, open theft, *i. e.* robbery, *& eberemurder. Leg. H.* 1. *c.* 12. See **Aberemurder.**

Ebozacum, *York.*

Eccleſia (Lat.) Is moſt commonly uſed for the place where almighty God is ſerved, commonly called a *church.* But *Fitzherbert* ſays, by this word *eccleſia* is meant only a parſonage; and therefore if a preſentment be made to a *chapel*, as to a *church*, by the name *eccleſia*, this does change the nature of it, and make it preſently a *church. Nat. Brev.* 32. When the queſtion was, Whether it were *eccleſia aut capella pertinens ad matricem eccleſiam?* The iſſue was, whether it had *baptiſterium & ſepulturam?* For if it had the adminiſtration of the ſacraments and ſepulchre, it was in law judged a *church. Trin.* 20 *Ed.* 1. *in Banco, Rot.* 177. 2 *Inſt. fol.* 363. *Eccleſia* is alſo ſometimes taken for the image or ſculpture of a church, which was often cut out or caſt in plate or other metal, and preſerved as a religious treaſure or relick. As in the viſitation of the treaſury of the *church* of St. *Paul*, *Anno* 1295.——*Duo turribala argentea, exterius totaliter deaurata, cum opere gravato & levato, cum* eccleſiis, *& turribus & ſexdecim campanellis argenteis appenſis, & catenis albis argenteis, ponderis* 11 *marc.* 20 *den. &c.* Mong. Angl. tom. 3. p. 309.

Eccleſiaſtical Courts, Perſons and Poſſeſſions. No waſte ſhall be in church lands during vacation, *M. C.* 9 *H.* 3. *c.* 5. 14 *Ed.* 3. *ſt.* 4. *c.* 4.

Eccleſiaſtical perſons ſhall be amerced after their lay tenement, *M. C.* 9 *H.* 3. *c.* 14.

Patrons ſhall have the cuſtody of abbeys in time of vacation, *M. C.* 9 *H.* 3. *c.* 33.

The ſucceſſor ſhall have a remedy for a treſpaſs done to his houſe in the time of his predeceſſor, *St. Marleb.* 52 *H.* 3. *c.* 28.

None ſhall reſort to religious houſes, and put them to expences, *&c. St. Weſtm.* 1. 3 *Ed.* 1. *c.* 1. *Lit. pat. ſuper priſ. bonor. Cler.* 3 *Ed.* 2. *ſt.* 1. *c.* 11.

Elections ſhall be free, *St. Weſtm.* 1. 3 *Ed.* 1. *c.* 5. *Art. Cler.* 9 *Ed.* 2. *c.* 14.

Biſhops ſhall hold pleas in matters merely ſpiritual for correction of deadly ſin, as fornication, *&c. Circumſp. agatis*, 13 *Ed.* 1. *ſt.* 4.

Alſo *pro cœmeterio non clauſo, & pro eccleſiâ non decenter ornatâ*, Ibid.

For penſions, *Circumſp. agatis*, 13 *Ed.* 1. *ſt*, 4.

Alſo for diſputed tithes not exceeding a fourth of the church, *Ibid. Art. Cler.* 9 *Ed.* 2. *ſt.* 1. *c.* 1 & 2.

For violent laying hands on a clerk, or defamation, *Ibid. Art. Cler.* 9 *Ed.* 2. *ſt.* 1. *c.* 3 & 4.

No tax ſhall be laid on the religious orders, to be carried out of the realm, *Stat. De apportis relig.* 35 *Ed.* 1. *ſt.* 1. *c.* 2 & 3. 4 *Ed.* 3. *c.* 6. 5 *Ed.* 3. *c.* 3.

None ſhall buy goods of the clergy againſt their will, 3 *Ed.* 2.

Where ſpiritual and temporal courts may both proceed, 9 *Ed.* 2. *c.* 6.

Clerks in the King's ſervice ſhall be corrected by their ordinary, but are excuſed reſidence, *Art. Cler.* 9 *Ed.* 2. *ſt.* 1. *c.* 8.

Diſtreſſes for the King ſhall not be made in poſſeſſion of the church, *Art. Cler.* 9 *Ed.* 2. *ſt.* 1. *c.* 9.

The ability of a perſon preſented to a church ſhall be examined by the ordinary, *Art. Cler.* 9 *Ed.* 2. *ſt.* 1. *c.* 13.

The temporalties of biſhops ſhall not be unduly ſeized, 1 *Ed.* 3. *ſt.* 2. *c.* 2. 14 *Ed.* 3. *ſt.* 4. *c.* 3. but they ſhall be admitted to a fine for a contempt, 25 *Ed.* 3 *ſt.* 3. *c.* 6.

Purveyance ſhall not be made in the fees of Holy church without the owner's conſent, 14 *Ed.* 3. *ſt.* 4. *c.* 1. nor of their goods, 18 *Ed.* 3. *ſt.* 3. *c.* 4. 31 *Ed.* 3. *ſt.* 4. *c.* 4. 1 *Rich.* 2. *c.* 3.

During vacation the temporalties of a biſhoprick ſhall be leaſed to the dean and chapter, 14 *Ed.* 3. *ſt.* 4. *c.* 5.

Miniſters of holy church ſhall not be anſwerable in the King's courts for matters touching their juriſdiction, 15 *Ed.* 3. *ſt.* 1. *c.* 6.

New purchaſed lands of the clergy taxed to the ſubſidies granted by the commons, 15 *Ed.* 3. *ſt.* 3. *c.* 6.

A biſhop not to be impeached for cauſe or crime without the King's ſpecial command, 18 *Ed.* 3. *ſt.* 3. *c.* 1.

Commiſſions to inquire of eccleſiaſtical judges not to be granted, 18 *Ed.* 3 *ſt.* 3. *c.* 6.

Voidance of a benefice ſhall be tried by the eccleſiaſtical judge, 25 *Ed.* 3. *ſt.* 3. *c.* 8.

Indictments againſt ordinaries, *&c.* to ſet forth the fact, 23 *Ed.* 3. *ſt.* 3. *c.* 9.

The wages of chaplains and curates limited, 36 *Ed.* 3. *c.* 8.

Liberties of the church confirmed, 50 *Ed.* 3. *c.* 1.

Prieſts ſhall not be arreſted while they are attending on Divine ſervice, 50 *Ed.* 3. *c.* 5. 1 *R.* 2. *c.* 15.

Shall have their action of treſpaſs againſt purveyors offending, as they cannot purſue by way of crime, 1 *R.* 2. *c.* 3.

The penalty of procuring perſons to be unduly indicted for proceeding in the eccleſiaſtical courts, 1 *R.* 2. *c.* 13.

If an eccleſiaſtical perſon is ſued for tithes taken away, and excepts, *&c.* the plaintiff ſhall ſhew in ſpecial how it was lay chattel, 1 *R.* 2. *c.* 14.

Whether a prior is perpetual or removeable, ſhall be tried by the ordinary, 9 *R.* 2. *c.* 4.

Prieſts taken in the *Marſhalſea* ſhall pay ſuch fees as others, 9 *R.* 2. *c.* 5.

Abbots may make attornies in the courts of *Staincliffe* and *Frendles*, 3 *H.* 5. *ſt.* 2. *c.* 2. 9 *H.* 6. *c.* 10. 15 *H.* 6. *c.* 7.

Abbots not to be appointed collectors of tenths out of their county, 9 *H.* 5. *c.* 9.

Members of the convocation ſhall have the ſame privilege as members of parliament, 8 *H.* 6. *c.* 1.

A pardon to the clergy of all felonies, of rape, and of offences in taking exceſſive ſalaries, 27 *H.* 6. *c.* 6.

The abbot of *Fountain* permitted to wage his law by attorney, and to perform it by a commoigne, 33 *H.* 6. *c.* 6.

The collectors of the *Diſmes*, while they are acounting in the Exchequer, ſhall not be liable to ſuits there, 1 *R.* 3. *c.* 14.

The ordinaries may impriſon their clerks for incontinency, 1 *H.* 7. *c.* 4.

Patents of diſcharge of *Diſmes* repealed, 4 *H.* 7. *c.* 5. Reſtrained 7 *H.* 7. *c.* 6.

Eccleſiaſtical perſons reſtrained trom taking farms and merchandizing, 21 *H.* 8. *c.* 13. and from keeping a tanhouſe or brewhouſe, *ſ.* 32.

Not to hold two benefices with cure, 21 *H.* 8. *c.* 13. *ſ.* 9.

Penalty of procuring diſpenſations from *Rome*, 21 *H.* 8. *c.* 13. *ſ.* 12, 27.

Who may have diſpenſations for pluralities, *Ibid. ſ.* 13.

Citation out of the dioceſe prohibited, except in caſe of hereſy, probate of wills, *&c.* 23 *H.* 8. *c.* 12. *ſ.* 5. *&c.* 25 *H.* 8. *c.* 19. *ſ.* 3, 4, 5, 6.

No penſion to be reſerved out of any living above the value of the third part, 26 *H.* 8. *c.* 3. *ſ.* 22.

Penſions not to be exacted in *Richmond*, 26 *H.* 8. *c.* 15.

The King impowered to appoint thirty-two perſons to examine the canons and conſtitutions, 25 *H.* 8. *c.* 19. 27. *H.* 8. *c.* 15. 35 *H.* 8. *c.* 16. 3 *&* 4 *Ed.* 6. *c.* 11.

Fruits taken in time of vacation ſhall be reſtored to the next incumbent, 28 *H.* 8. *c.* 11.

Incumbents may bequeath the corn ſown upon their glebe, 28 *H.* 8. *c.* 11. *ſ.* 6.

The puniſhment of prieſts for incontinency, 32 *H.* 8. *c.* 10.

Doctors of the Civil law, though married, may exerciſe eccleſiaſtical juriſdiction, 37 *H.* 8. *c.* 17. 1 *El. c.* 1. *ſ.* 12.

The marriage of prieſts lawful, 2 *&* 3 *Ed.* 6. *c.* 21. 5 *&* 6 *Ed.* 6. *c.* 12. and their children legitimate, 1 *Ja.* 1. *c.* 35. *ſ.* 50.

The Queen authorized to appoint commiſſioners for exerciſe of eccleſiaſtical juriſdiction, 1 *El. c.* 1. *ſ.* 18. Repealed 16 *Car.* 1. *c.* 11.

Fradulent deeds to prevent remedy for dilapidations made void, 13 *El. c.* 10.

Leaſes by ſpiritual perſons for more than 21 years or three lives, made void, 13 *El. c.* 10. *ſ.* 3.

None ſhall retain any benefice not being a deacon at the leaſt, 13 *El. c.* 12. 13 *&* 14 *Car.* 2. *c.* 4. *ſ.* 13.

Leaſes of benefices with cure ſhall endure no longer than while the leſſor is reſident, 13 *El. c.* 10. (made perpetual, 3 *Car.* 1. *c.* 4.) 14 *El. c.* 11. *ſ.* 15, 16.

Charges made upon benefices with cure ſhall be void, 13 *El. c.* 20.

Bonds and covenants for the enjoyment of ſuch land of no more validity than leaſes, 14 *El. c.* 11. *ſ.* 15. 18 *El. c.* 11. *ſ.* 3.

The ſtatute of 13 *El. c.* 10. not to extend to houſes in market-towns, *&c.* 14 *El. c.* 11. *ſ.* 17.

Money recovered in dilapidations ſhall be employed in repairs, 14 *El. c.* 11. *ſ.* 18.

Reſtriction to be obſerved in leaſes made by eccleſiaſtical perſons, 14 *El. c.* 11. *ſ.* 19.

Former leaſes muſt expire, or be ſurrendered within three years after granting a new leaſe, 18 *El. c.* 11.

Sequeſtration to go againſt an incumbent that has leaſed his benefice contrary to 13 *El. c.* 20. 18 *El. c.* 11. *ſ.* 7.

The power of biſhops to inflict fines or corporal puniſhment taken away, 16 *Car.* 1. *c.* 2.

Diſabled to exerciſe temporal juriſdiction, 13 *Car.* 1. *c.* 27. Repealed, 13 *Car.* 2. *ſt.* 1. *c.* 2.

Miniſters reſtored and confirmed, 12 *Car.* 2. *c.* 17.

The ordinary juriſdiction of biſhops, *&c.* reſtored, 13 *Car.* 2. *ſt.* 1. *c.* 12.

The oath *ex officio* ſhall not be adminiſtered, 13 *Car.* 2. *ſt.* 1. *c.* 12. *ſ.* 4.

None to hold any living, or adminiſter the ſacrament, unleſs epiſcopally ordained, 13 *&* 14 *Car.* 2. *c.* 4. *ſ.* 13 *&* 14.

No diſability to be incurred by any church cenſure in *Scotland*, 10 *Ann. c.* 7. *ſ.* 10.

Eccleſiaſtical Juriſdiction. The doctors of the Civil law, although laymen, *&c.* may exerciſe eccleſiaſtical juriſdiction, by ſtat. 37 *Hen.* 8. *c.* 17.

Eccleſiaſtical Laws. See **Canon** and **Eccleſiaſtical Courts, &c.**

Eccleſiaſtical Perſons, Are either *regular* or *ſecular*; *regular*, are ſuch as lead a monaſtick life, under certain rules, and have vowed obedience, perpetual chaſtity, and wilful poverty: When a man is profeſſed in any of the orders of religion, he is ſaid to be a man of religion, a regular or religious; of this ſort are abbots, priors, monks, friars, *&c.* *Secular* are thoſe whoſe ordinary converſation is among thoſe of the world, and profeſs to take upon them the cure of ſouls, and live not under any rule of religious orders: Such are biſhops, pariſh-prieſts, *&c.* *Cowell, edit.* 1727. See **Eccleſiaſtical Courts, &c.**

Eden. See **Eluna, Rivers.**

Eder, A hedge. *Eder-breche*, the treſpaſs of hedge-breaking. Sax. *Eader-bryce*, which occurs in the laws of King *Alfred*, *c.* 45.

Edeſtia,——*Sciant quod ego Adam de Mohaut commiſi Domino Johanni de Barker pro ſervitio ſuo totam terram cum* edeſtiis, *& cum omnibus pertin. ſuis.* Ex Regiſter. Priorat. de Wormley. Perhaps from *Ayſiamenta*, eaſements. *Blount* imagines that this word comes from *ædes*, and is uſed for buildings.

Edia,——*Qualiter quoque onera incumbentia Regi & Regno levias ad* Ediam communitatis ſupportari poterunt. *Henr. Knighton, lib.* 5. The learned *Du Freſne* interprets

prets it *aid*, *auxilium*. But it is indeed meant of *eaſe*, from the Saxon *eath*; and in *Weſtmorland* they ſtill ſay *eathy* for *eaſy*. *Cowell*, *edit.* 1727.

Edict, (*Edictum*) An ordinance or command; a ſtatute. *Lat. Law-Dict.*

Edinburgh. A duty of exciſe continued to the town, 3 *Geo.* 1. *c.* 5. 9 *Geo.* 1. *c.* 14. 1 *Geo.* 2. *c.* 22. 25 *Geo.* 2. *c.* 9. A charitable fund for inſurance from fire at *Edinburgh* eſtabliſhed, 1 *Geo.* 2. *c.* 22 *ſect.* 4. The murder of *Porteous* cenſured, 10 *Geo.* 2. *c.* 34 & 35. For erecting publick buildings, and improving the ſtreets there, 26 *Geo.* 2. *c.* 36. For ſupplying the city with water, 29 *Geo.* 2. *c.* 74.

Edmund's Bury. See **Villa Faustini**.

Edyſtone rock, Its light-houſe, how rebuilt, 4 *Ann. c.* 20. 8 *Ann. c.* 17.

Eele-fares, *alias* **Eele-bare**, 25 *H.* 8. is the fry or brood of *eels*.

Effoꝛcialiter, With military force. *Tu ita* efforcialiter *venis cum equis & armis*. Mat. Pariſ. anno 1213.

Effoꝛciamentum, (*Afforciamentum*,) A diſtreſs or inquiſition. *Abbas veniat per aliquem liberum hominem attornatum ſuum, qualem præſentare voluerit ad* efforciamentum *curiæ tantum*, Monaſt. tom. 1 p. 280. So in a charter of *Edward* 3. *p.* 832. *Et tribus virgatis terræ quietis de ſectis curiæ & adventibus &* afforciamentis.

Effractoꝛes, (Lat.) Burglars, that break open houſes to ſteal. *Qui furandi cauſa domos effringunt, vel ſeſe carcere proripiunt; etiam qui ſcrinia expoliant. MS.*

Effuſio ſanguinis, The mulct, fine, wite, or penalty impoſed by the old *Engliſh* laws for the ſhedding of blood, which the King granted to many lords of manors. As among the privileges granted to the abbey of *Glaſtonbury*. ——*Abbas & conventus habent namia vetita, hutesium levatum, &* effuſionem ſanguinis.———*Cartular. Abbat. Glaſton. MS. fo.* 87. *a.*

Eſtꝛes, Ways, entries, walks, or hedges; from the Sax. *Efter*, *poſt*.

Eggs. Penalty for taking eggs of ſwans or hawks, 11 *Hen.* 7. *c.* 17. See **Game**.

Egilde, The ſame with **Gildum**.

Egyptians, (*Egyptiani*,) We commonly call them *gypſies*, and by our ſtatutes, and the laws of *England*, they are a counterfeit kind of rogues, that being *Engliſh* or *Welſh* people, accompany themſelves together, diſguiſing themſelves in their habits, blacking their faces and bodies, and framing to themſelves an unknown language, wander up and down, and under pretence of telling fortunes, curing diſeaſes, and ſuch like, abuſing the ignorant common people, by ſtealing all that is not too hot or too heavy for their carriage. Stat. 1 & 2 *P. & M. c.* 4. and 5 *Eliz. c.* 20. Theſe are like thoſe whom the *Italians* call *cingari*, ſpoken of by *Franciſcus Leo in ſuo Theſauro fori Eccleſiaſtici*, *part. prim. c.* 13. *Cowell*, *edit.* 1727.

Egyptians, To be puniſhed as vagabonds and ſturdy beggars, 39 *Eliz. c.* 4. *ſect.* 2. Perſons pretending to be gypſies, or wandering in the habit of *Egyptians*, &c. to be deemed rogues and vagabonds, 17 *Geo.* 2. *c.* 5. *ſect.* 2 See **Felonies without clergy**, and **Vagrants**.

Eia, An iſland, an *eyt*, Sax. *eage*. Hence the names of places which end in *ey*, as *Ramſey*, is the iſland of *rams*; *Sheppey*, is the iſland of *ſheep*. *Mat. Pariſ. anno* 833. *Herſey*, the iſland of *harts*. Hence the *French* borrow their *eau*, water. *Cowell*, *edit.* 1727.

Ejecta, A woman raviſhed or deflowered. *Ejectus*, a whoremonger. *Rex fundavit dictum hoſpitale ſuper decem leproſis, & dicunt quod dicti leproſi erant de* ejectibus *civitatis Lincoln. Mon.* 2. *tom. pag.* 388.

Ejectione cuſtodiæ, (*Ejectment de garde*,) Is a writ which lieth properly againſt him who caſteth out the guardian from any land during the minority of the heir. *Reg. Orig. fol.* 227. *F. N. B.* 139. *Termes de la ley*, *verbo* Gard. There are two other writs not unlike this; the one is termed *Droit de gard*, or *right of ward*; the other *Raviſhment de gard*, which ſee in their places.

Ejectione firmæ, Is a writ that lieth for the leſſee for term of years, that is caſt out before his term expired, either by the leſſor or a ſtranger. *Reg. Orig. fol.* 227. *F. N. B. fol.* 220.

Ejectment. An ejectment is an action for a leſſee for years to recover a term when he is ouſted, and this is now generally made uſe of to recover the poſſeſſion of lands. *Gilbert's Law of Eject.* 1.

An ejectment is a mixed action, in which a leſſee for years, when ouſted, ſhall recover his term, as alſo his damages. 5 *Co.* 105. 9 *Co.* 77.

By the ancient law, lands and tenements were never recovered in any perſonal action, but anciently the writs of *entry* and *aſſize* were the uſual means for the recovery of the *poſſeſſion*, and theſe lay only againſt the *freeholder*, becauſe the eſtate for years was heretofore only a precarious poſſeſſion; and therefore to have actions againſt ſuch perſons was to no purpoſe, becauſe ſuch terms were generally defeated or determined before any intricate title could be decided; and were ſuch precarious poſſeſſions with reſpect to the power that the owner of the freehold and inheritance had over them, that every ſuch leſſee was looked upon only as his bailiff; and if ouſted, could only have recovered damages for the loſs of his poſſeſſion; and if ouſted by his leſſor, he could only ſeek a remedy from his covenants.

Thus the law continued till the 14 *Hen.* 4. and then it began to be reſolved, that an *habere facias poſſeſſionem* would lie to recover the *term* itſelf. It ſeems that the long terms about this time had their beginning, which to ſecure to themſelves, the leſſees uſed, when moleſted, to go into equity againſt the *leſſors* for a *ſpecific performance*, and againſt ſtrangers, to have *perpetual injunctions* to quiet their poſſeſſions; which drawing the buſineſs into the courts of equity, was probably one reaſon which obliged the courts of law to come to a reſolution, that they ſhould recover the land itſelf in an *habere facias poſſeſſionem*.

As this reſolution brought on a new method of trial unknown before to the Common law, it became uſual for a man that had a right of entry into any lands, to ſeal leaſes of ejectment on the land, and then any perſon that next entred on the freehold was an ejector; but as this was a means of turning any man out of poſſeſſion, becauſe leſſee would recover his term without any notice to the tenant in poſſeſſion, therefore the courts of juſtice would not ſuffer that they ſhould loſe their poſſeſſions without any opportunity to defend them; wherefore the court made it a ſtanding rule, that no plaintiff ſhould proceed in ejectment to recover his lands againſt ſuch a feigned ejector, without delivering the tenant in poſſeſſion a declaration, and making him an ejector and proper defendant if he pleaſed.

This was a proper rule of court, and in its power to form, or otherwiſe the court would be made inſtrumental in doing an injury to a third perſon, becauſe a declaration might otherwiſe be delivered to a ſtranger, a feint defence be made, and a verdict, judgment, and execution obtained without the tenant's having any notice of it; but it is not to be doubted, but that ſuch actions were brought at firſt againſt the real ejector that reſided in the poſſeſſion; but becauſe any perſon that came into the land *animo poſſidendi*, was equally an ejector with him that reſided, the action in ſtrictneſs of law might be brought againſt him; but becauſe this, as has been ſaid, turned to the injury of the reſiding poſſeſſor, the rule was made, that he ſhould have notice of it, and therefore they would not give judgment in ejectment, unleſs an affidavit was made that the tenant in poſſeſſion was ſerved with a copy of the declaration. But the ancient cuſtom was, that ſuch leaſes were actually to be ſealed and delivered, becauſe otherwiſe the plaintiff would maintain no title to the term, and were alſo obliged to be ſealed on the land itſelf, becauſe it was maintenance to convey out of poſſeſſion, and therefore in relation to the quickneſs of the remedy, the *aſſiſe* had the advantage, becauſe none of this preparation was required beforehand; for the writ of *aſſize* came down to the aſſizes, and the jury was there warned, the cauſe tried and judgment given; yet the method in ejectment, from the conveniency of the repeated trials, notwithſtanding the previous preparations, was generally preferred.

Thus it ſtood till the time of the Lord Chief J. *Rolls*, and he invented the rule now in uſe, which is, that if defendant comes into the room of the *caſual ejector*, he

ſhould

ſhould enter into a rule to confeſs *leaſe, entry* and *ouſter*, and ſhould ſtand upon the *title* only. This rule was reaſonable, becauſe when the plaintiff had made his *leaſe* upon the *land*, any third perſon that came upon the land *animo poſſidendi* in ſtrictneſs of law was an ejector; therefore, when any other ejector was placed in his ſtead, it was very reaſonable in the court to impoſe terms upon him, and therefore the proper terms were, that he ſhould not ſtand on the proof of an *actual entry, demiſe*, and *actual ouſter*, becauſe as this was no more than a form of bringing the title in queſtion, it was not fit that the plaintiff ſhould be nonſuited for want of proving the formal demiſe ſet forth in the declaration, when the caſual ejector would have let judgment go by default. *Ld. Ch. Bar. Gilb. Law of Eject.* 1, 2.

Under this head is conſidered,

1. *Of what things an ejectment will lie, and what ſhall be a ſufficient deſcription of them.*

2. *Of the demiſe and right of entry in the leſſor of the plaintiff, and of the ouſter.*

3. *Of ſerving the declaration; notice to the tenant in poſſeſſion, entring into the common rule, adding proper parties, and paying coſts.*

4. *Of the plea and general iſſue, verdict, judgment and writ of execution in ejectment.*

5. *Of recovering the meſne profits, and of bringing a new or ſecond ejectment.*

1. *Of what things an ejectment will lie, and what ſhall be a ſufficient deſcription of them.*

An ejectment does not lie for a rent or common appendant, or other things that lie merely in grant, becauſe theſe being incorporeal things are in their nature inviſible, *quæ neque tangi nec videri poſſunt*, and therefore not in their nature capable of being delivered in execution. *Cro. Car.* 202. *Cro. Jac.* 146. *Co. Lit.* 9. *a.*

So an ejectment does not lie *de quodam rivulo, & aquæ curſu*, called *Locar* in *L.* for *rivulus ſive aquæ curſus* lies not in demand; for *non moratur*, but is always flowing; nor can execution by *habere facias ſeiſinam* be made thereof, and therefore the action ought to have been of ſo many acres of land *aqua coopert':* but if the land under the river does not belong to the plaintiff, but the river only, then upon a diſturbance, the remedy is by action upon the caſe only. *Yelv.* 143. 1 *Brownl.* 142. *S. C. Poph.* 167. *S. C.* cited, and ſee *Godb.* 257. which ſeems contrary.

So an ejectment does not lie *de pannagio*, becauſe this is only the maſts that fall from the trees which the ſwine feed on, and not part of the ſoil itſelf, as the herbage is, and is no more than the fruit which falls from the trees, which the ſwine have a right to feed on. 1 *Lev.* 212. 1 *Sid.* 416. *S. C.* adjudged.

But an ejectment lies of a boilary of ſalt, that is, where a man hath no inheritance in the ſoil in which there is a well of ſalt water, but only a leaſe or grant of ſo many buckets of the water, as will ariſe (which are called the boilaries) and theſe are withheld from him, he may bring his ejectment for ſo many boilaries as his grant was. *Cro. Jac.* 150.

So an ejectment lies for a coal-mine, becauſe it is not to be conſidered as a bare profit *apprender*; but a coal-mine comprehends the ground or ſoil itſelf, which may be delivered on the execution; and though a man may have a right to the mine without any title to the ſoil, yet the mine itſelf being fixed in a certain place, the ſheriff has a thing certain before him, to deliver execution. *Cro. Jac.* 150. *Noy* 121. *S. C.* 1 *Rol. Rep.* 483. *S. C.* cited, *Hard.* 57. *S. C.* cited to be adjudged, *Carth.* 277. 4 *Mod.* 143. *Comb.* 201.

An ejectment lies *pro prima tonſura*, that is, if a man hath the grant of the firſt graſs that grows on the land every year, he may recover it in ejectment of him that withholds it from him; for the graſs, or *prima tonſura*, is the beſt profit and grant of the property; and therefore he that hath it ſhall be eſteemed the proprietor of the land itſelf till the contrary be proved; for the after-graſs or ſeeding is in the nature of commonage; as therefore he, that hath the firſt graſs or *tonſura*, has the moſt ſignal profits of the land, and may keep it longer or ſhorter on the land, according to the ſeaſonableneſs of the year, it is but reaſonable to give him this remedy againſt the perſon that ouſts him of it, eſpecially when it is a fixed determinate thing, which the ſheriff may put him in poſſeſſion of; which diſtinguiſhes it from a right of common or other profit *apprender*; for the commoner cannot aſſign any one acre which he hath a right to ſeparate from the reſt of the commoners, whereas the grantee of the firſt graſs has in reality a right to the land itſelf till the crop be taken of; for no man can enter on the land till that be off, without being a treſpaſſer. *Cro. Car.* 262.

So an ejectment lies *pro herbagio*, becauſe the herbage is the moſt ſignal profit of the ſoil, and the grantee hath at all times a right to enter and take it. *Hard.* 303. 401.

So an ejectment lies *pro paſtura centum ovium*, that is, for ſo much land as will feed one hundred ſheep. *Dal.* 95.

Although tithes are eſteemed part of the incorporeal inheritance, and by the Common law were only of eccleſiaſtical conuſance; yet being in the hands of lay proprietors are now conſidered as a temporal eſtate, for by the 32 *H.* 8. *cap.* 7. it is provided, that every lay perſon having any eſtate of inheritance, freehold, right, term, or intereſt in tythes, and being thereof diſſeiſed, ouſted, wronged, or otherwiſe kept from the ſame, ſhall have his remedy in the courts of law for them in like manner as for lands; and hence it is that an ejectment lies for tithes. *Cro. Car.* 301. 1 *Jon.* 321.

An ejectment lies *pro rectoria*, becauſe a rectory conſiſts of a church, glebe-lands and tithes. *Latch.* 62.

It was formerly held, that an ejectment did not lie *pro capella*, becauſe it was *res ſacra*, which was not demiſable; but now ſince they are become lay inheritances, they are recoverable in ejectment, as other lay eſtates; but it muſt be demanded by the name of a meſſuage, or it is not formal. 11 *Co.* 25. *Style* 101. *Doct. Pl'it.* 191. 1 *Salk.* 256.

An ejectment lies *pro communia paſturæ* generally, if joined with other lands. *Stran.* 54.

Ejectment lies for mountain in *Ireland*. *Stran.* 71.

Ejectment lies *de parte domus*. *Stran.* 695.

Ejectment lies not for a tenement. *Stran.* 834.

Ejectment lies for *Alder Carr* in *Norfolk*. *Stran.* 1063.

Ejectment lies for a beaſt-gate in *Suffolk*. *Stran.* 1084.

Ejectment lies *de minutis decimis*. *Ld. Raym.* 784.

In this action the law requires, that the thing demanded be ſo particularly ſpecified, that the ſheriff may certainly know what to give the poſſeſſion of, if the plaintiff ſhould recover; for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing ſpecifically demanded; but in this action the judges did not confine themſelves to thoſe rules which govern the *præcipe*, but allowed ſome things to be recovered in this action, which could not be demanded in a *præcipe*; becauſe ſince the eſtabliſhment of that real action, many things have been added and improved by art, and acquired new apellations that are perfectly underſtood now by the law, which are not found in the ancient law-books; and as men begun to contract by new names which were not known in the old law, ſo it was reaſonable to ſuffer the remedy to follow the nature of ſuch contracts. 2 *Bac. Abr.* 168.

But the judges did not extend this action as far as they went in an *aſſiſe*, becauſe the recognitors having the view of the thing demanded in the aſſiſe, muſt have more certain knowledge of the thing demanded than could be given in ejectment. *Dyer.* 84. *pl.* 85.

An ejectment lies for an *orchard*, becauſe it is a word of a certain ſignification, though in a *præcipe* it muſt be demanded by the name of a garden; and it being well enough underſtood, the ſheriff may with certainty deliver it upon an execution. *Noy* 37. *Cro. Eliz.* 854. *S. C.* adjudged, becauſe but a perſonal action, wherein damages.

the principal. 1 *Rol. Rep.* 55. *S. C. Cro. Jac.* 654. *Palm.* 337. *S. P.* adjudged, *Hard.* 55. *S. P. arg.* 1, *Lev.* 58. *S. P. per Twiſden.*

So an ejectment lies of a ſtable, becauſe it is a word of a determinate ſignification, and may be delivered by the writ of execution. 1 *Lev.* 58.

An ejectment of an houſe is good, tho' in a *præcipe* it ought to be demanded by the name of a meſſuage; becauſe the ejectment is an action of treſpaſs in its nature; as a treſpaſs, *wherefore he* broke into the houſe, has been allowed; ſo they allowed it good in ejectment, and the important and certain ſignification of the word *domus*, or houſe, is well enough underſtood in the law; for in waſte the thing itſelf is recovered, beſides damages, and yet the action of waſte is given *de domibus*. *Cro. Jac.* 654. *Palm.* 337. *S. C.* adjudged, and ſee 3 *Leo.* 97. *Hard.* 76.

So an ejectment of a chamber in the ſecond ſtory of ſuch a houſe was held good, there being certainty enough to direct the ſheriff in the execution. 3 *Leon.* 210. *Noy* 109. *Hard.* 57. *S. P.*

But an ejectment *de coquina*, *Anglice*, a kitchen, is naught; for tho' the word is well enough underſtood, yet becauſe any chamber in the houſe is applicable to that uſe, the ſheriff hath not certainty enough to direct him in the execution, in regard the kitchen may be changed between the judgment and execution. *Noy* 109.

An ejectment lies not for a cloſe, becauſe it is of an uncertain extent, nor will it mend the declaration, tho' the cloſe be called by a particular name, becauſe that alſo leaves the extent of it uncertain, ſo that the ſheriff cannot tell what quantity of land to deliver in execution; and though the number of acres contained in the cloſe ſhould be mentioned in the declaration, and be ſet forth to belong to a meſſuage, for which the ejectment was alſo brought; yet even that hath been held too general, becauſe the nature and quality of the land is thereby left uncertain, ſo that the ſheriff is ſtill at a loſs what to deliver the poſſeſſion of, as whether meadow, paſture, &c. *Godb.* 53. 11 *Co.* 55. 1 *Rol. Rep.* 55. *Bridg.* 56.

But an ejectment for a cloſe called *D.* containing three acres of land, is good, becauſe the quality of the land is mentioned, the word *terra* ſignifying in law arable land. *Cro. Jac.* 435. *Palm.* 102. 4 *Mod.* 98.

An ejectment does not lie for a meſſuage and 40 acres of land, meadow and paſture thereto belonging, without diſtinguiſhing how much of one ſort, and how much of the other. *Cro. Car.* 573.

An ejectment *de uno meſſuagio ſive tenemento* is naught for the uncertainty of the word *tenemento*, being of a more extenſive ſignification than the word *meſſuage*, and conſequently uncertain what is demanded by the ejectment. *Cro. Eliz.* 186. 3 *Leon.* 228 *S. C. Poph.* 197, 203. *Noy* 86. *Cro. Jac.* 125. *Style* 364. *S. P.* 1 *Sid.* 295. *S. P.*

But an ejectment for a meſſuage or tenement called the *Black Swan* is good, becauſe the addition reduceth it to a certainty of a dwelling-houſe. 1 *Sid.* 295. 3 *Mod.* 238. 4 *Mod.* 136.

So an ejectment for a meſſuage or burgage in *H.* is good, becauſe both ſignify the ſame thing in a borough. *Hard.* 173. See *Poph.* 203.

An ejectment does not lie *de repoſitorio*, becauſe it ſignifies a *voider* or *cupboard* as well as *warehouſe*, and therefore uncertain what is demanded; but if it had been with an *Anglice*, a warehouſe; this had confined it to that particular thing. *Cro. Car.* 555. 1 *Jon.* 454.

An ejectment for one hundred acres of waſte, or *pro centum acris montis*, was held naught for the uncertainty, becauſe both waſte and mountain comprehended ſeveral ſorts of land; but for one hundred acres of *bogg* is good, in *Ireland*, becauſe the word there hath but one ſignification, and comprehends but one ſort of land. *Hard.* 57.

The plaintiff in an ejectment declared upon the leaſe of a houſe, ten acres of land and twenty acres of meadow, by the name of a houſe and ten acres of meadow, be the ſame more or leſs, and had a verdict, but the judgment was arreſted; for the declaration was ſo repugnant and uncertain, that even the verdict could not help it, in regard the land mentioned in the declaration is of a different nature from that mentioned in the *per nomen*; beſides the number of acres is ſo different, that the words *more or leſs* cannot reduce it to any certainty, for it were unreaſonable to extend them to twenty acres more than was mentioned in the *per nomen*. *Yelv.* 166. 4 *Mod.* 143.

An ejectment for a manor ſeems ill, without deſcribing the quantity and ſpecies of the land contained therein. *Hetl.* 146. *Lit. Rep.* 301. *Latch* 61.

An ejectment brought for ten acres of wood, and ten acres of underwood; this was inſiſted upon as a *bis petitum* in error, but diſallowed, becauſe plainly they are of different natures; and thoſe who argued for the error ſeemed by their argument to have admitted it themſelves, becauſe they inſiſted that no ejectment lay of underwood, which muſt ſhew it muſt be of a different nature from wood; but that objection was diſallowed, becauſe the nature of underwood is ſo well underſtood in the law, ſo that the ſheriff will have certainty enough to direct him in the execution. 2 *Rol. Rep.* 482.

An ejectment was brought *de caſtro, villa & terris*, without expreſſing the number and certainty of acres; and it was held ill on a verdict, and a writ of error brought thereon, becauſe it was too generally demanded, and it was impoſſible for the ſheriff to know what quantity of land he muſt deliver upon the *habere facias poſſeſſionem*. *Yelv.* 118.

An ejectment *de omnibus & omnimodis decimis in decem acris in D.* without ſaying *garbarum fœni, lanæ agnellorum*, or ſome other certainty of the nature or quality of the tithes, is ill, as it would be for one hundred acres of land, without expreſſing the ſeveral natures and qualities of the land; for in this action the plaintiff muſt be as particular and certain in his demand of them as he would be of land. 11 *Co.* 25. *Moor* 837. 1 *Rol. Rep.* 68.

But in this action the plaintiff is not obliged to ſet forth the quality of every ſort of tithe, as he muſt do of every ſort of land, becauſe it is in its nature uncertain, the quantity depending intirely on the goodneſs and fruitfulneſs of the land and ſeaſons; and therefore an ejectment *pro quadam portione granorum & fœni* was held good, becauſe impoſſible to ſay how much the quantity would be. 11 *Co.* 25. *Hard.* 57. *Dyer* 116.

An ejectment for a certain place called *The veſtry* in *D.* is well enough, becauſe that place belonging to a church called a *veſtry* is perfectly known, and therefore the thing demanded is ſufficiently deſcribed to have execution thereof. 3 *Lev.* 96.

In ejectment in the county palatine of *Durham*, the plaintiff declared upon a demiſe *de mineriis carbonum in parochia de D.* generally, not ſaying how many mines, and had a verdict, and judgment, upon a writ of error brought in *B. R.* the error aſſigned was in the declaration, becauſe the uncertainty thereof; for not ſetting forth the the number of coal-mines, ſo as the ſheriff might know of how many to give poſſeſſion; and for this reaſon the court inclined, that the judgment was erroneous; but then the plaintiff produced ſeveral precedents in *Durham*, and alledging that all the entries there in ejectments for coal-mines were the ſame as in this caſe, the judgment was affirmed. *Carth.* 277. 4 *Mod.* 143. *Comb.* 201. 1 *Show.* 364. 1 *Salk.* 255. *S. C.*

2. *Of the demiſe and right of entry in the leſſor of the plaintiff, and of the ouſter.*

Although by the modern practice the plaintiff is not obliged to prove the leaſe mentioned in the declaration, for that is confeſſed by the rule of leaſe, entry, and ouſter, which he is obliged to enter into; yet that being only deſigned for expedition in the trial of the right, and not to give the plaintiff a right of action which he had not at law, therefore it muſt appear by the declaration, that the plaintiff had actually the poſſeſſion, and was ouſted thereof by the defendant; hence it is that if *A.* a leſſee for years, makes a leaſe to *B.* at will, and *B.* is ejected, *A.* cannot have this action upon that ouſter, becauſe though the poſſeſſion of *B.* was in law the

the poſſeſſion of *A.* yet the treſpaſs *vi and armis*, which is complained of in this action, muſt be againſt the actual poſſeſſion, and that was in *B.* 2 *Bac. Abr.* 171.

So if *A.* be a leſſee for years, the remainder to *B.* for years, and *A* is ejected, and then his term expires, *B.* ſhall not have an ejectment on the ouſter of *A.* becauſe the poſſeſſion was not actually in him, and therefore he cannot complain of a treſpaſs done to another. 2 *Bac. Abr.* 171.

Alſo the leſſor of the plaintiff muſt have a right of entry when this action is brought; for if his entry were taken away he is a diſſeiſor, and cannot enter to make a leaſe to try the title; and therefore where tenant in tail makes a diſcontinuance, the iſſue in tail is put to his *formedon*, and cannot have his ejectment, becauſe his entry by the diſcontinuance is taken away. 2 *Bac. Abr.* 171.

Alſo by the ſtatute of limitations, 21 *Jac.* 1. *cap.* 16. none ſhall make an entry into lands, but within twenty years after their right or title, which ſhall firſt deſcend or accrue to them; but this action hath the uſual ſavings for infants, feme coverts, *&c.* which ſee under title **Limitations.**

If a rent be granted in fee, or otherwiſe to *A.* with a clauſe of *proviſo*, in caſe it be in arrear, to enter and hold the land till this arrear be ſatisfied out of the profits thereof, if the rent be in arrear, *A.* may recover the poſſeſſion in an ejectment; for this *proviſo* creates an intereſt in the land to anſwer the rent; and regularly, whoever hath an intereſt may demiſe the ſame to another, and conſequently the perſon claiming under ſuch demiſe may maintain an ejectment; and this is now a ſettled point where the rent is created by grant at Common law, or by way of uſe; but in caſe there muſt be an actual entry made, becauſe the title of the land accrues by the grantee's entring *Cro. Jac.* 511. 1 *Lev.* 170. 1 *Sid.* 223, 262, 344. 1 *Saund.* 112. *Raym* 135.

A. covenanted to ſtand ſeiſed of land to the value of 100*l. per annnm*, to the uſe of himſelf for life, and after to the uſe of his daughters, who ſhould be unmarried at the time of his death, till they ſeverally ſhould receive and levy 500*l.* apiece, the remainder to his ſon; *A.* died the 30 *Eliz.* and the eldeſt ſon entred 42 *Eliz.* the eldeſt daughter (there being four of them) brought an ejectment, but did not recover the lands, becauſe her entry was taken away, ſhe having paſſed the time allowed her to enter and receive the profits; otherwiſe ſhe might keep the other daughters out of the perception of the profits; for if the eldeſt daughter lets the ſon enjoy during the time the profits may be levied, ſhe lapſes time, and muſt therefore have remedy againſt the ſon who received the profits in her prejudice, and cannot charge the land with her portion which is then onerated with portions to be raiſed for the younger ſiſters. *Cro. Eliz.* 800. *Noy.* 33.

The plaintiff muſt lay the commencement of his ſuppoſed leaſe in his declaration to have been preceding the ouſter and ejectment by the defendant; for though ſuch ouſter be a wrong, yet it can be no wrong to the plaintiff if it was done before his title commenced, as where the plaintiff declared on a leaſe made the 27th of *April*, *Anno primo Regis*, and laid the ouſter by the defendant to be the 26th of *April*, *Anno primo prædict'*, this was held bad, becauſe it was plain the plaintiff had no title till the 27th, and therefore that ouſter the 26th was no treſpaſs or injury to him. *Law Ejectm.* 76. *Yelv.* 182.

So if the leaſe had been made 27 *April'*, *habend. a. dict'* 27 *April'*, *virtute cujus* the plaintiff entred, and was poſſeſſed till the defendant *poſtea eodem* 27 *die Aprilis* did eject him, this is bad, becauſe the ejectment was before the plaintiff's title commenced, for the leaſe did not commence till the 28th of *April.* 1 *Sid.* 8. 3 *Mod.* 198. *Cro. Jac.* 135, 258. *Cro. Jac.* 96. *cont'.*

But if the leaſe be made the 27th, *habend.* from thenceforth, there the ejectment may be laid the 27th, becauſe the leaſe commences the 27th, and an ejectment may be the ſame day the plaintiff's title commences. *Cro. Jac.* 258. 5 *Co.* 1.

But the law doth not neceſſarily oblige the plaintiff expreſsly to mention the day of the ouſter, ſo it appears to be after the term commenced, and before the action brought; for where the declaration was on a demiſe the 25th of *March primo Regis* for three years, by virtue whereof the plaintiff entred, and was poſſeſſed, until the defendant *poſtea*, *viz. anno ſupradict'*, entred and ejected him, without ſpecifying the day of the ejectment; this was held good in error; the action being commenced *ſecundo Regis*, and the ejectment laid to be *primo*, it was plain from the declaration, the ouſter and ejectment was after the plaintiff's title commenced, and before the action brought, and confeſſes the plaintiff had good cauſe of complaint, though he did not ſwear to the day the injury was done. *Cro. Jac.* 311.

Neither is the plaintiff, as it ſeems, neceſſarily obliged to allege the particular day of his entry in the declaration; and therefore where the plaintiff declared on a leaſe to commence at a future day, *virtute cujus* he entred, and was poſſeſſed till ejected by the defendant; this was held good on a writ of error, becauſe it is ſaid he entred by virtue of the leaſe, which could not be before it commenced, for he could not enter by virtue of the leaſe till the leaſe commenced; *aliter* if the declaration had been *prætextu cujus* he entred, for the plaintiff might enter unlawfully, or before his time, under a pretence of the leaſe. 1 *Rol. Rep.* 466. *Latch* 199.

The plaintiff declares in ejectment in the Common Pleas, and if after an imparlance (as the courſe of the court is) makes a ſecond declaration, in ſuch caſe if the plaintiff by the firſt declaration ſhould lay the ejectment and ouſter before the commencement of his term, or omit any matter of ſubſtance in the firſt declaration, though the ſecond were right, and the ouſter were laid after his term commenced; yet the plaintiff ſhall not recover, becauſe the declaration on the imparlance roll is the material one on which the action is grounded, and muſt be ſupported by it, and the plea roll is but a recital of the other, and therefore ought to begin with an *alias prout patet*, *&c.* Law Ejectm. 78. Cro. Jac. 311.

And though the declaration in law relates to the firſt day of the term, becauſe the term is in law conſidered as one day, yet the plaintiff may declare on a leaſe made ſome time after the firſt day of the term, and ſhall recover thereon, but then it muſt appear to the court that the declaration was filed after the day of the commencement of the ſuppoſed leaſe; for otherwiſe the plaintiff, complains of an ejectment before he had title; and if the time of filing a bill were not examinable, the act of law, which makes the relation of bills to the firſt day of the term, would be an act of injury to the plaintiff, and delay his right; for then a man ejected out of a leaſe made in term-time could not complain till term was over. 2 *Vent.* 174. 1 *Sid.* 432.

A declaration on a leaſe made the 6th of *May*, *Anno* 7° of the King *&c.* ſetting forth, that the plaintiff was poſſeſſed *quouſque poſtea* the defendant the 18th day *ejuſdem menſis anno ſexto ſupradict'* ejected him; this was objected in arreſt of judgment, becauſe the ejectment, as was inſiſted, was laid to be *anno ſexto*, which was a year before the commencement of the leaſe, that being laid to begin the 6th of *May*, *anno ſeptimo*, but the declaration was allowed to be good to the court, becauſe the ejectment was laid to be 18 *ejuſdem menſis*, which could not be, if it were done in the ſixth year, and therefore they rejected the word *ſexto* as inconſiſtent and void. *Law Ejectm.* 79, 80. See *Carth.* 401, 402.

So where the declaration was of a leaſe 22d of *May*, *habendum a primo die Maii* for three years, *virtute cujus* the plaintiff entred, and was poſſeſſed *quouſque poſtea*, *viz. eodem die & anno*, the defendant ejected him; this on a writ of error was allowed a good declaration, tho' it was inſiſted, that *eodem die & anno* muſt refer to the firſt day of *May*, which was the laſt antecedent, and then the ejectment was laid to be twenty-one days before the leaſe was made. *Cro. Jac.* 662.

The plaintiff in ejectment declared, that whereas *J. S.* by indenture the 9th day of *June*, (without ſaying when it was made or delivered) did demiſe, *&c. habend. a die dat. ſigillationis & deliberationis indenturæ prædict'*, *virtute cujus* the plaintiff entred, and was poſſeſſed till the

the defendant the ſame day ouſted him; it was moved in arreſt of judgment, that it was uncertain by the declaration when the term began, neither the day of the date, nor of the ſealing and delivery being mentioned in the declaration; yet judgment was given for the plaintiff, becauſe after a verdict it ſhall be intended not only to bear date, but alſo be ſealed and delivered the day mentioned in the declaration, which was the 9th, for all deeds are preſumed to be delivered the day that they bear date till the contrary appear. *Law Ejectm.* 81.

But where the limitation of the leaſe is altogether uncertain, the plaintiff cannot recover, becauſe where the commencement of the leaſe is uncertain, the leaſe is void in itſelf, and then the plaintiff cannot have a title; beſides the court cannot poſſibly perceive whether the ejectment was before or after the plaintiff's title accrued, if ſuch uncertain leaſe could give him one; otherwiſe it is where the limitation or commencement is impoſſible; for in ſuch caſe the leaſe commences from the delivery, as if it had no date, and then the court may judge whether the ejectment is laid to be before or after the commencement; but there is this further reaſon for the difference; for the impoſſible limitation is rejected, becauſe it could not be part of the agreement or contract; but an uncertain limitation is part of the contract, but vitiates the whole agreement, becauſe the court cannot reduce it to any certainty. *Law Ejectm.* 81.

Thus were the plaintiff declared on a leaſe, *habend. a die datus indenturæ predict.* without mentioning an indenture before; this was held bad for the uncertainty when the leaſe commenced. *Hetl.* 63.

But if the plaintiff had declared on a demiſe to him *per quoddam ſcriptum obligat' habend. a die datus indent. prædict.* this had been good, becauſe the *ſcriptum obligatorium* ſhall be intended an indenture. 1 *Vent.* 137. 2 *Keb.* 796.

The plaintiff declared on a leaſe of the fourth part of a houſe, in four parts to be divided, by force of which he entred *in tenement. prædict.* and was poſſeſſed till the defendant ejected him *de tenementis prædictis*; this was objected in error, and the plaintiff laid the ouſter to be of more than by his leaſe he had a title to, for the ouſter was *de tenementis prædict.* which at leaſt muſt be underſtood of the whole houſe, and the leaſe was only of the fourth part; but the objection was over-ruled, becauſe *de tenementis prædict.* ſhall be intended only of the fourth part of which the leaſe was made; beſides it was but juſt he ſhould recover as much as he had title to, though he laid his ejectment for more. *Law Ejectm.* 82, 83.

The plaintiff declared on a demiſe the 16th day of *January*, by an indenture dated the ſecond day of *January*, without ſaying *primo deliberat.* the ſixteenth, yet the declaration was held good; for though all indentures ſhall be preſumed to be delivered the day they bare date, unleſs the contrary be ſhewn; and that therefore this leaſe muſt commence the ſecond day of *January*, which, if true, would be a different leaſe from what the plaintiff declared upon; yet in regard it declared on a demiſe the ſixteenth, it muſt neceſſarily be intended that it was delivered on the ſixteen, becauſe it cannot poſſibly be a demiſe before the delivery, and therefore the delivery muſt neceſſarily be intended the day the demiſe is ſaid to have been made, and not the day of the date of the indenture. *Cro. Eliz.* 890. *Law Ejectm.* 83.

But where the plaintiff does not make mention of any particular day when the demiſe was made, but only in general ſays, that *J. S.* by his indenture bearing date the firſt of *January* did demiſe to him, ſo that it doth not appear by the plaintiff's own ſhewing, when the leaſe commenced, law in ſuch caſes conſtrues the delivery to have been the day it bears date; and ſo the declaration was held to be good, and not void for the uncertainty of the commencement of the leaſe, as was objected. *Cro. Eliz.* 773. *Law Ejectm.* 83, 84.

Though by the modern practice the plaintiff is not obliged to prove the leaſe mentioned in the declaration, for that is confeſſed by the rule, and by that means the miſchief of any variance between the leaſe decleared on and the leaſe produced, and proved on the trial, is avoided, which was a danger the plaintiff was expoſed to, and often miſcarried in by the old method of proceeding; yet in the modern practice the plaintiff muſt take care to declare on ſuch a leaſe as ſuits with his leſſee's title; and therefore if there be ſeveral leſſors, and you lay the declaration *quod demiſerunt*, you muſt ſhew in them ſuch a title that they might demiſe the whole, for the word *demiſerunt* muſt be taken in pleading, according to the legal ſenſe it bears; and therefore, if any of the leſſors have not a legal intereſt in the whole premiſſes, he cannot in law be ſaid to demiſe them; for it is only his confirmation where he is not concerned in intereſt, and therefore the confeſſion of this joint leaſe doth not help, becauſe you do not confeſs the title by the rule. *Law Ejectm.* 84. *Cro. Jac.* 613. 2 *Keb.* 376.

So where the plaintiff declared on a leaſe made by *A.* and *B.* and it appears on the trial that *A.* was tenant for life, remainder to *B.* in fee; this on a ſpecial verdict was adjudged againſt the plaintiff, becauſe it could not be the leaſe both of *A.* and *B.* to paſs the land *in præſenti* to the plaintiff, for during the life of *A.* it could be his leaſe only, becauſe he was the tenant in poſſeſſion, and *B.*'s joining in the leaſee mounted only to a confirmation, but could paſs no intereſt during the life of *A.* and therefore the allegation of the plaintiff, that *A.* and *B.* did demiſe was not proved. 6 *Co.* 14. *b.* 15. *a.* *Poph.* 37. *Co. Lit.* 42. 1 *Jon.* 305. 1 *Rol. Rep.* 299. *Raym.* 142. 2 *Jon.* 137.

If the plaintiff declares on a leaſe made by *A.* and *B.* and on the trial it appears that they are tenants in common, the plaintiff cannot recover; but if *A.* and *B.* had been jointenants, a joint leaſe to the plaintiff had been good, and he might have declared *quod demiſerunt*; and the reaſon of the difference is, that tenants in common are of ſeveral titles; and therefore the freehold is ſeveral; and if they be diſſeiſed, they ſhall be put to their ſeveral actions; as therefore the lands of tenants in common are to be conſidered as different eſtates depending upon different titles, the plaintiff ſhall not recover, becauſe that were to allow the plaintiff to try two ſeveral and different titles in one iſſue at the ſame time; and therefore the plaintiff to make out his title muſt ſhew and prove that each demiſed the whole to him, or elſe he doth not prove the declaration, whereas the diſcovery of the tenancy in common proves the contrary; and as they have different titles to a moiety only, ſo they could not each of them demiſe the whole; but jointenants are ſeiſed *per my & per tout*, and they demiſe by one and the ſame title, and therefore each may be ſaid to demiſe the whole; and as they muſt join in an action for any violation of their poſſeſſion, ſo for the ſame reaſon too their leſſee on their joint demiſe; and coparcenets ſeem to ſtand on the ſame foundation and reaſon, becauſe both coming in as one heir, the poſſeſſion muſt be joint as that of jointenants. 1 *Show. Rep.*

In ejectment the plaintiff declared upon two demiſes of ſeveral lands by ſeveral parties, but laid only one *habendum*, viz. *habendum tenementa prædicta* ſo demiſed by the aforeſaid ſeveral parties for ſeven years, and lays in his declaration, that the defendant entred into all the aforeſaid tenements, & *ipſum* (the plaintiff) *a firma ſua prædicta* (in the ſingular number) *ejecit & amovit*; and it was aſſigned for error, that the declaration was ill for want of another *habendum*. for that the verdict is general, and 'tis uncertain to which demiſe the ſingle *habendum* relates; but the court held, that *reddendo ſingula ſingulis*, it was well enough. *Carth.* 224. *Comb.* 190. 2 *Vent.* 214.

If the heir brings an ejectment, and pending the ſuit his anceſtor dies, yet he ſhall not recover, beeauſe every man muſt recover according to the right he had at the time of the action brought; but during the life-time of the anceſtor the ejectment was done, to him only, and therefore to be puniſhed by the anceſtor; for one man connot complain in a court of juſtice of an injury done to another. *Raym* 463.

A leaſe made by a guardian to try the title of an infant ſeems good; for though ſuch leaſe may be voidable as to the infant, yet a ſtranger cannot defeat it; and if the leſſee

leſſee ſhould not be allowed to maintain his ejectment on ſuch leaſe, the infancy would deprive the minor of that remedy of puniſhing the treſpaſſer, which perſons of full age are intitled to, which were to deny the minor the common right and privilege of other ſubjects. *Hard.* 330.

A man may bring an ejectment on a joint leaſe made by baron and feme, of the lands of the wife, ſo the leaſe be made by herſelf in perſon, whether it be by parol or indenture; for the contracts of the wife relating to her own eſtate are but voidable during the coverture, that ſhe may have the benefit of them after the death of her huſband, if they ſhall be for her intereſt to confirm them; and the huſband ought to join in the leaſe, becauſe they are conſidered in the law but as one perſon, and he having, during the coverture, an intereſt in the property of his wife, both muſt join, and on ſuch joint leaſe each may be ſaid to demiſe the whole, and the leſſee may maintain his ejectment on ſuch demiſe, becauſe during the coverture he hath the power of her property; and therefore all his contracts relating to it are good during his life, becauſe his pleaſure muſt determine her who hath reſigned her will to him, but after his death ſhe may avoid the leaſe. 2 *Co.* 61. *Cro. Jac.* 332, 417, 617. *Cro. Eliz.* 470, 488.

But if the plaintiff declares on a joint leaſe by baron and feme, and the leaſe appears on the evidence to have been executed by a third perſon, by virtue of a letter of attorney from the huſband and wife, ſuch evidence will not maintain the declaration, becauſe ſhe cannot delegate a power to a third perſon to act for her, who hath already devolved all power and authority on her huſband; and therefore the letter of attorney being void as to the wife, it muſt remain as to the huſband only; and hence it hath been held, that the leſſee might in this caſe declare on that leaſe as the leaſe of the huſband only. *Cro. Jac.* 617.

3. *Of ſerving the declaration, notice to the tenant in poſſeſſion, entring into the common rule, adding proper parties, and paying coſts.*

According to the modern practice there is regularly no neceſſity of ſealing and delivering leaſes on the lands; but the party who claims a title feigns a leaſe, and in the name of the feigned leſſee delivers a declaration to the tenant in poſſeſſion in the name of the caſual ejector, who is alſo now ſome feigned perſon; on this declaration there is notice to the tenant in poſſeſſion in the caſual ejector's name. 2 *Bac. Abr.* 161.

It hath been holden, that the ſervice of the declaration ought to have been on the tenant himſelf, or his wife, and that ſervice on any of his children or ſervants was not good (1 *Salk* 255, 256.) but now by the 4 *Geo.* 2. *cap.* 28. it is enacted, "That in all caſes between landlord and tenant, as often as it ſhall happen, that one half year's rent ſhall be in arrear, and the landlord or leſſor, to whom the ſame is due, hath right by law to re-enter for the non-payment thereof, ſuch landlord or leſſor ſhall and may without any formal demand or re-entry, ſerve a declaration in ejectment for the recovery of the demiſed premiſſes; or in caſe the ſame cannot be legally ſerved, or no tenant be in actual poſſeſſion of the premiſſes, then to affix the ſame upon the door of any demiſed meſſuage; or in caſe ſuch ejectment ſhall not be for the recovery of any meſſuage, then upon ſome notorious place of the lands, tenements or hereditaments compriſed in ſuch declaration in ejectment; and ſuch affixing ſhall be deemed legal ſervice thereof, which ſervice or affixing ſuch declaration in ejectment, ſhall ſtand in the place or ſtead of a demand and re-entry, *&c.*"

By ſtat. 11 *Geo.* 2. *cap* 12. *ſect.* 19. Every tenant, to whom any declaration in ejectment ſhall be delivered, ſhall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years improved rent of the premiſſes in the poſſeſſion of ſuch tenant, to the perſon of whom he holds; to be recovered by action of debt in any of his Majeſty's courts of record at *Weſtminſter*, or in the counties palatine of *Cheſter*, *Lancaſter*, and *Durham*, or in the courts of grand ſeſſions in *Wales*.

Sect. 13. It ſhall be lawful for the court where ſuch ejectment ſhall be brought, to ſuffer the landlords to make themſelves defendants, by joining with the tenants to whom ſuch declaration ſhall be delivered, in caſe they appear; but in caſe ſuch tenants neglect to appear, judgment ſhall be ſigned againſt the caſual ejector; but if the landlord of any part of the tenements deſire to appear by himſelf and enter into the rule the court ſhall permit ſuch landlord ſo to do, and order a ſtay of execution upon ſuch judgment againſt the caſual ejector.

A landlord made defendant without his tenant may bring error and ſtay execution. *Stran.* 1241.

After the declaration delivered, the plaintiff's attorney (except as is above excepted by the ſtatute) is obliged to make oath that he delivered to *J. D.* tenant in poſſeſſion of the premiſſes in queſtion, a true copy of the annexed declaration, with the beforementioned indorſement or ſuperſcription thereon, which ſaid indorſement, *&c.* the deponent did then read to the ſaid *J. D.* and acquainted him with the contents thereof. 2 *Bac. Abr.* 162.

This affidavit is to be poſitive, that *J. D.* was tenant in poſſeſſion, or that the defendant acknowledged himſelf to be ſo, becauſe no man ſhould be turned out of poſſeſſion without a poſitive affidavit, on which he might charge the defendant with perjury. 2 *Bac. Abr.* 162.

Upon this affidavit the plaintiff moves for judgment againſt the caſual ejector, which is always granted, unleſs the defendant in due time enters into the common rule of confeſſing leaſe, entry, and ouſter; this rule being made with aſſent of parties, an attachment lies for non-performance of it, as for all other rules of court that are diſobeyed; and this is all the remedy which the parties on both ſides have for their coſts. 2 *Bac. Abr.* 162. 1 *Salk.* 259.

If there be ſeveral perſons that claim title, the rule may be drawn generally or particularly; generally, that *J. H.* who claims title to the premiſſes in queſtion in his poſſeſſion, ſhould be admitted defendant for ſuch meſſuage; and this puts a neceſſity on the plaintiff at the aſſizes, to diſtinguiſh by proof, what tenements are in each defendant's poſſeſſion, becauſe by the rule he is to confeſs leaſe, entry, and ouſter, only for the lands in his poſſeſſion; and if the plaintiff cannot diſtinguiſh by proof what tenements are in each defendant's poſſeſſion, he can have no verdict againſt him, and conſequently no judgment. 2 *Bac. Abr.* 162.

Or the rule may be drawn ſpecially, that *J. H.* who claims title to ſuch lands, expreſſing them particularly, ſhould be admitted defendant, and that ſuperſedes the neceſſity of proof, that the lands are in his poſſeſſion; and if the defendant's attorney will not give a note of the particulars of the land for which he was admitted defendant, the plaintiff may ſummon him before a judge, who will order the rule thus ſpecially to be drawn up, in caſe the party in poſſeſſion will admit himſelf to be defendant. 2 *Bac. Abr.* 162.

The declaration againſt the caſual ejector ought to be delivered before the eſſoin-day of the iſſuable term, when the cauſe is deſigned to be tried, and if one delivers an ejectment before the eſſoin-day of either of the two iſſuable terms, the party is bound to plead without further notice, within eight days in that term; but if the declaration be delivered before the eſſoin-day of *Michaelmas* or *Eaſter* term, which are no iſſuable terms, the party is not bound to plead without motion made, and a rule obtained in thoſe reſpective terms; and if that rule be pleaded before the common time in the iſſuable term, then there muſt be notice given of the rule, otherwiſe not. 2 *Bac. Abr.* 162.

Alſo where the declaration was delivered after the eſſoin-day of *Michaelmas* term, and the plaintiff let that term paſs without doing any thing, and alſo till the laſt day of *Hilary* term in like manner, when he moved for a rule to plead, and for want of a plea ſigned judgment; the court held this to be a ſurprize upon the defendant, for when he let all *Hilary* term ſlip without doing any thing, within which time he might have had a trial, he

ought to have given freſh notice; as in caſe a man lets an aſſizes paſs in a country cauſe without proceeding; and for this reaſon will not appear; the judgment was ſet aſide. 1 *Salk.* 257.

If on the trial the defendant will not appear and confeſs leaſe, entry and ouſter, the courſe is to call the defendant and his attorney, if he be within the rule, and then to call the plaintiff himſelf and nonſuit him, and then upon the return of the *poſtea*, judgment will be given againſt the caſual ejector. 2 *Bac. Abr.* 162, 163.

If the plaintiff in ejectment, who is but a nominal perſon, dies, yet the action ſhall not abate, becauſe if there be any other perſon of the ſame name, the court will intend him to be the perſon mentioned in the declaration, becauſe he is only nominal, and therefore, while there is any perſon of the name living, the leſſor of the plaintiff, who is only concerned in the intereſt, may proceed in the ſuit. 3 *Keb.* 772.

Alſo if the plaintiff, who is only a truſtee for the leſſor, releaſes the action, he may be committed for the contempt. 1 *Salk.* 260.

The rule in the common pleas is, that the tenant in poſſeſſion ſhall forthwith appear and receive a declaration; and this ſuperſedes the neceſſity of an original writ, becauſe the tenant is to appear and receive a declaration, and therefore cannot take any advantage for want of an original, unleſs in a writ of error; but when a writ of error is brought, they muſt file an original, unleſs it be after a verdict, when it is helped by the ſtatute 18 *Eliz. Carth.* 288, 289.

Alſo in the King's Bench, where a perſon may proceed as well by original as by bill, there is no need of an original, nor of a *latitat*, or bill of ejectment; but before there be any proceedings, common bail muſt be filed for the caſual ejector; alſo in caſe of writ of error, the party muſt file a bill of ejectment, beſides the plea roll, before the errors are aſſigned. 2 *Show. Rep.* 249. 5 *Mod.* 333.

The court hath changed the plaintiff in ejectment after the declaration delivered, and hath enlarged the term where the cauſe hath been long in agitation, and judgment entred againſt the plaintiff after he is dead. 2 *Bac. Abr.* 163.

No perſon is admitted to defend in ejectment, unleſs he be tenant, and is or hath been in poſſeſſion, or receives the rent, becauſe it is an act of champerty for any perſon to interpoſe to cover the poſſeſſion with his title; and if the party would make any perſon defendant with another, who was not concerned in the poſſeſſion of the tenements, this was a miſchief at Common law, becauſe recovering againſt one of the defendants, there was conſequently no remedy for the ſtranger for his coſts; but that is remedied by 8 & 9 *W.* 3. *cap.* 10. whereby coſts are given to ſuch ſtranger who is made defendant, unleſs the judge certifies immediately on the trial, that the plaintiff had a probable cauſe for making ſuch ſtranger defendant. 2 *Bac. Abr.* 163, 164.

In ejectment, where there are two defendants for the ſame premiſſes, and one appears and confeſſes leaſe, entry and ouſter, and the other does not, the plaintiff cannot proceed againſt the other, but he muſt be nonſuited, becauſe both the defendants not admitting the demiſe, and the plaintiff not proving an actual entry and demiſe, he cannot maintain his declaration; but if there appeared any covin between ſuch perſon not appearing, and the leſſor of the plaintiff, the court will ſtop the judgment againſt the caſual ejector, for the part of him who appeared, and oblige him who did not, to releaſe the coſts, becauſe a declaration was delivered to each of them for their reſpective parts; and therefore where one does not pay obedience to the rule, the plaintiff has judgment againſt the ejector for his part only. 1 *Vent.* 255. 2 *Vent.* 195.

And where there are ſeveral defendants to whom the plaintiff delivers declarations that are ſeverally concerned in intereſt, and the plaintiff moves to join them all in one declaration, yet the court will not do it; but the plaintiff muſt deliver ſeveral declarations to each of them, becauſe each defendant muſt have a remedy for his coſts, which he could not have if they were joined in a declaration, and the plaintiff prevailed only againſt one of them; and by this means the plaintiff might have a tenant of his own defendant with others, in order to ſave the coſts. 2 *Keb.* 524.

The parties by entring into the common rule are under the power of the court, by virtue whereof the court awards coſts, which being taxed by the maſter, if demanded of the party, and he refuſes to pay them, the court on affidavit thereof will grant an attachment. 1 *Salk.* 259.

And although the plaintiff in ejectment be but a nominal perſon, yet if he be not to be found, or if he be not able to pay the coſts, the attorney or ſolicitor is liable, or may be committed until he pay the coſts, or produce a plaintiff that is liable to pay them. 2 *Lev.* 66. 6 *Mod.* 309.

Alſo if a ſtranger carries on a ſuit in another's name, who has a title, and yet is ſo poor that he cannot pay coſts, in caſe he fails; upon affidavit of this matter, the court will order ſuch perſon, who carries on the ſuit, to pay coſts to the defendant. 1 *Keb.* 827.

If an infant delivers a declaration to the defendant, ſome friend or guardian muſt be ſet up as plaintiff to anſwer the defendant's coſts; but if ſuch perſon dies inſolvent, ſo that the defendant has no remedy by this rule, the infant himſelf muſt anſwer the coſts, becauſe the rule was entred into for the infant's benefit; and even infants muſt not diſturb the poſſeſſion of others by unlawful entries, without being puniſhed with coſts. 2 *Bac.* 164.

If there be baron and feme leſſors in ejectment, and one dies after entring into the rule, the ſurviving perſon is liable to pay coſts. 2 *Bac. Abr.* 164.

If ejectment be brought to be tried at bar to bring a matter in queſtion, as the validity of a will, and a parcel of land is inſerted in the declaration, which is not concerned in the queſtion, but to which the plaintiff hath undoubted right, and the defendant confeſſes leaſe, entry, and ouſter for the whole, not obſerving this part; the plaintiff ſhall not on this account be excuſed from the coſts; but the court will give the defendant leave to retract his confeſſion as to this parcel; and ſo it was done in a caſe where a parcel of copyhold land being inſerted in the declaration, which was not touched by the will, no ſurrender being made to the uſe of the will. 2 *Bac. Abr.* 164, 165.

Leſſor of plaintiff may pay the coſts to which of the defendants he pleaſes. *Stran.* 516.

4. *Of the plea and general iſſue, verdict, judgment and writ of execution in ejectment.*

The general rule in the iſſue in this action is, that whatſoever bars the right of entry is a bar to the plaintiff's title; therefore the plaintiff muſt prove ſeiſin within twenty years in himſelf or his anceſtors, or you muſt prove a deed or ſeiſin in the perſon that has a particular eſtate in the land, and that you claimed within twenty years after the reverſion accrued; or that you was an infant, feme covert, *non compos*, impriſoned, or beyond the ſea, at the time when the title accrued. *Law Eject.* 89.

Fine and nonclaim, which take away the entry, are good pleas in this action in bar of the plaintiff's right of entry. 2 *Bac. Abr.* 177.

Accord is a good plea in ejectment, as is alſo ancient demeſne. 9 *Co.* 77.

No relief againſt a tenant's refuſing to appear and make defence in ejectment. *Stran.* 830.

As the verdict is the ground of judgment, it ought not to be entred for more land or different parcels than the defendant was found guilty of by the verdict; but a variance between the verdict and judgment, occaſioned by the miſpriſon or default of the clerk in entering judgment, is not fatal, but hath been amended by the court after a writ of error brought; as where the plaintiff had judgment *quod recuperet terminum* of a meſſuage and ten acres of land, and the verdict acquitted the

the defendant *quoad* the land, here the judgment was larger than the verdict, becauſe it appeared to be the miſpriſon of the clerk, who had not purſued the verdict, which ought to have been his guide in making up the judgment, and no miſtake in point of law in giving the judgment; therefore the party ought not to ſuffer for this miſpriſon, ſince the ſtatute of 8 *H.* 6. *cap.* 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their diſcretion ſeems to be the miſpriſon of the clerks. 2 *Bac. Abr.* 177.

If the plaintiff hath a verdict for all, the entry of the judgment is, that the plaintiff *recuperet termini verſus def' de & in tenementis præd', & quod def' capiatur.* F. N. B. 220. Cro. Eliz. 144.

But if the judgment in ejectment be entred *quod recuperet poſſeſſionem termini prædict'*, this is as well as if it had been *recuperet terminum præd'*, becauſe both ſignify the ſame thing, the poſſeſſion itſelf being to be recovered on the *habere facias poſſeſſionem.* Law Ejectm. 94.

And hence it is, that if the term expires pending the ſuit, the plaintiff cannot recover the poſſeſſion, becauſe the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record, that his title to it is determined; yet he ſhall have his judgment for damages, becauſe the treſpaſs ſtill remained. *Sav.* 28.

In ejectment againſt baron and feme, the huſband was acquitted, and the wife found guilty; the judgment was *quod capiantur*; and held good; becauſe that is only for the fine, which the huſband muſt pay, for the wife cannot. *Cro. Car.* 406.

If the defendant be acquitted in part, and judgment be entred *quod def. ſit quietus quoad, &c.* that part whereof he is acquitted; this is error, becauſe the judgment in this action is not final, as in the writ of right, and the judgment in this action doth not protect the defendant from any further ſuit, but only quits againſt the title ſet up by the plaintiff in that action; but ſince it appears that the plaintiff's demand was groundleſs as to that part whereof the defendant was acquitted, the judgment as to that part muſt be ſet down to be *quod def' eat inde ſine die*, the plaintiff as to that having no farther cauſe to detain him longer in court. *Cro. Eliz.* 763.

If one of the defendants die after a verdict, the plaintiff ſhall have judgment againſt the ſurvivors, on his ſuggeſting the death of one on the roll; but then the judgment muſt be entred as to the perſon deceaſed, *quod quer' nil capiat, &c.* 2 Bac. Abr. 178.

If an ejectment be brought againſt baron and feme, and the plaintiff hath a verdict againſt both, and before judgment the huſband dies, the plaintiff may on the ſuggeſtion have a judgment againſt the wife, not only becauſe this is a treſpaſs committed by the wife, and that therefore ſhe is puniſhable for her own act, which is injurious to another; but becauſe where the wife is found guilty of the ejectment, ſhe muſt have obtained that unlawful poſſeſſion, either jointly with her huſband, and then it ſurvives, or elſe ſhe had the whole poſſeſſion in her own right, and in either caſe the plaintiff may puniſh her, and recover the poſſeſſion, which is wholly in her on the death of her huſband. 1 *Rol. Rep.* 14. *Cro. Jac.* 356.

Although after judgment the plaintiff is intitled to, and may ſue out the writ of *Habere facias poſſeſſionem*; yet if he neglects to ſue out execution within a year after the judgment, he muſt bring a *ſcire facias*, as on all other judgments, otherwiſe the court will award a writ of reſtitution *quia erronice emanavit.* 2 *Bac. Abr.* 178.

But if the plaintiff hath a judgment, with ſtay of execution for a year, he may, after the year, take out his execution without the *ſcire facias*, becauſe the delay is with the conſent of parties, and in favour of the defendant; and the indulgence of the plaintiff ſhall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his inſtance. 6 *Mod.* 288. 1 *Rol. Rep.* 104.

But it ſeems this delay of execution, being only the compromiſe or agreement of the parties, is never entred on the roll; and therefore after the year the plaintiff ought to move the court for the *ſcire facias*, leſt the execution ſhould be ſuſpended *quia erronice emanavit* after the year, without the *ſcire facias.* 1 Keb. 785. 6 Mod. 288.

So if the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year; and the plaintiff in error is nonſuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *ſcire facias*, becauſe the writ of error was a *ſuperſedeas* to the execution, and the plaintiff muſt acquieſce till he hears the judgment above; beſides, while the cauſe is depending on the writ of error, the cauſe is ſtill *ſub judice*, whether the plaintiff ſhall recover the land, or not. 5 *Co.* 88. *Cro. Eliz.* 416. 2 *Inſt.* 471.

The words of the writ are, *Quod habere facias poſſeſſionem*, ſo that there muſt be a full and actual poſſeſſion given by the ſheriff, and conſequently all power neceſſary for this end muſt be given him; and therefore if the recovery be of a houſe, the ſheriff may juſtify breaking open the door, if he be denied entrance by the tenant, becauſe the writ cannot be otherwiſe executed. 5 *Co.* 91. *b. Law Eject.* 108.

If the plaintiff recovers ſeveral meſſuages in the poſſeſſion of different perſons, the ſheriff muſt go to each houſe, and deliver the poſſeſſion thereof; and this is done by turning the tenants out of each of the houſes; for the delivery of the poſſeſſion of one meſſuage, in the name of all, is not a good execution of the writ, becauſe the poſſeſſion of one tenant is not the poſſeſſion of the other, but each hath his ſeveral poſſeſſion. *Law Eject.* 108.

But it ſeems by *Rolls*, that if all the meſſuages had been in poſſeſſion of one tenant, it had been ſufficient to give poſſeſſion of one in the name of all; but without doubt the ſureſt and beſt way is for the ſheriff to remove all the tenants intirely out of each houſe, and when the poſſeſſion is quitted, to deliver it to the plaintiff. 1 *Rol. Abr.* 886.

If the ſheriff turns out all perſons he can find in the houſe, and gives the plaintiff, as he thinks, quiet poſſeſſion, and after the ſheriff is gone there appears ſome perſons to be lurking in the houſe; this is no good execution, and therefore the plaintiff ſhall have a new *habere facias poſſeſſionem*, becauſe he never had execution. 1 *Leon.* 145.

Where the recovery is of land, and there was more demanded than recovered, as ſuppoſe the demand had been for 500 acres, and a verdict and judgment only for 100 acres, it ſeems doubtful how the ſheriff is to give execution. *Rolls* ſays, It is ſufficient to give the plaintiff poſſeſſion of two or three acres in the name of the whole; and this indeed ſeems the ſafeſt way for the ſheriff, becauſe he does at his peril execute the writ; and if he gives poſſeſſion of any land not recovered, and not in the *habere facias poſſeſſionem*, he is a treſpaſſer, and ſhall be puniſhed in an action of treſpaſs; but in regard the *habere facias* is to give the plaintiff the benefit of his judgment, and that cannot be done without an actual poſſeſſion be given of the whole quantity, it hath been held by others, that the ſheriff does not diſcharge his duty by giving one acre in the name of all; but he ought in ſuch caſe to ſet forth all the acres particularly; for to have it otherwiſe would be to leave the execution uncertain, and conſequently not to give the plaintiff the full benefit and advantage of his judgment; but *note*, at this day the practice is for the plaintiff to give the ſheriff ſecurity to indemnify him from the defendant, and then the ſheriff to give execution of what the plaintiff demands. 2 *Bac. Abr.* 179.

If the execution goes to the ſheriff for twenty acres, it ſeems the ſheriff muſt give twenty acres, according to the common eſtimation of the county where the lands lie. 1 *Rol. Rep.* 410.

And here it is further obſervable, that this writ of execution is only returnable at the election of the plaintiff; and the court, at the inſtance of the defendant, will not direct the writ to be returned; this ſeems to be left to the choice of the plaintiff, and he may take what is moſt

for

for his advantage, in order to have the full benefit of his judgment; and the way to that is, to ſuffer him to renew the execution at his pleaſure till a new execution be had; but the plaintiff cannot renew execution after one *habere facias* is returned and filed, becauſe it then appears on record, that the plaintiff hath had the benefit of his ſuit; and then the new execution is but *actum agere*, and conſequently ſuperfluous; and therefore the court will not oblige the ſheriff to make any return, but at the deſire of the plaintiff. 1 *Rol. Abr.* 886. 2 *Keb.* 245. 1 *Rol. Rep.* 353. *Palm.* 289. 2 *Brownl.* 253. 6 *Mod.* 27.

If a writ be returned by the ſheriff, though not filed, it ſeems no new *habere facias* ſhall iſſue, becauſe when the return is made, it becomes a record, which the court then becomes intitled to. 2 *Brownl.* 216.

But where the writ is neither returned nor filed, there is no act of record, by which it appears to the court that the plaintiff hath had any benefit by his judgment; and there upon a ſuggeſtion, that *vic' non miſit breve*, the plaintiff is intitled to a new writ, becauſe the omiſſion of the officer ſhall not turn to the plaintiff's delay or prejudice; but the new writ cannot iſſue till the return of the firſt writ be out; becauſe till the return be paſt *non conſtat* to the court but the ſheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment, and then there can be no occaſion for a new *habere facias*. *Palm.* 289.

If the officer be diſturbed in the execution of the writ, on an affidavit the court will grant an attachment againſt the party, whether he be the defendant or a ſtranger, becauſe the writ is the proceſs of the court, and any diſturbance given to the execution of it, is a contempt to the authority of the court from whence it iſſues, and as ſuch will be puniſhed by the court. The proceſs is not underſtood to be executed, nor the execution compleat, till the ſheriff and his officer be gone, and the plaintiff left in quiet poſſeſſion. 6 *Mod.* 27.

But after the poſſeſſion given, either on *habere facias poſſeſſionem*, or agreement of the parties, the law ſeems to make a difference where the plaintiff is turned out of poſſeſſion by the defendant, and where by a ſtranger; where it is done by the defendant himſelf, the plaintiff may have either a new *habere facias* or an attachment, becauſe the defendant himſelf ſhall never by his own act keep poſſeſſion, which the plaintiff received from him by due courſe of law; but where a ſtranger turns the plaintiff out of poſſeſſion after the execution fully executed, the plaintiff is put to his new action upon an indictment of forcibly entry, where the force will be puniſhed, becauſe the title was never tried between the plaintiff and the ſtranger; and he may claim the land by title paramount the plaintiff, or he may come in under him, and then the recovery and execution in the former action ought not to hinder the ſtranger from keeping that poſſeſſion which he may have a right to; and if the law were otherwiſe, the plaintiff might by virtue of a new *habere facias* turn out even his own tenants, who come in after the execution executed; whereas the poſſeſſion was given him only againſt the defendant in the action, and not againſt others not parties to the ſuit. 1 *Keb.* 479.

Thus in the caſe of *Fortune* and *Johnſon*, the court was moved for an attachment againſt *Johnſon*, for ejecting one who had been put into poſſeſſion by an *habere facias*; but becauſe it appeared that *Johnſon* claimed under an elder judgment, the court would not make any rule in it, becauſe it was title againſt title, and therefore left them to take their courſe at law. *Style* 318.

The plaintiff had judgment in ejectment, and by agreement afterwards, the defendant was to hold the land for the reſidue of his term, and held it accordingly for ſome time; and the plaintiff took an *habere facias* and executes it; the defendant moved the court for reſtitution on the agreement, but the court would not grant it, but left the defendant to his action on the caſe on the agreement, for the judgment was entred abſolutely; but if the judgment had been entred a *ceſſet executio* for ſuch a time, there, if the plaintiff takes execution within the time the defendant ſhall have reſtitution; becauſe the judgment was entred with this limitation, that the plaintiff ſhould not have the fruit of it till ſuch a time; but *quære*, how this appears to the court, ſince it ſeems the *ceſſet executio* is not entered on the roll; the difference ſeems to be between a judgment by confeſſion, and a judgment on verdict, where the former is given with a *ceſſet executio*; if the execution be afterwards taken contrary to the agreement, the court will ſet it aſide, and lay the the attorney by the heels; but where judgment is given on verdict, there the verdict is the foot and ground of the judgment, and the court will not take notice of the ſubſequent agreement of the parties, but leave them to their remedy. *Style* 408. *Law Ejectm.* 113.

5. *Of recovering the meſne profits, and of bringing a new or ſecond ejectment.*

Although in ejectment, the plaintiff, if he prevails, is to recover damages; yet the damages that he hath ſuſtained by being kept out of the meſne profits, are not recoverable in this action, becauſe it is never laid with a *continuando*, and therefore comprehends only the damages ſuſtained in that particular act of ouſter complained of, but does not extend to the meſne profits that were taken during the whole ouſter, ſince every act is a new treſpaſs. 2 *Bac. Abr.* 181.

But where a perſon recovers in ejectment, he may bring an action of treſpaſs for the meſne profits, and recover the ſame from the time of the defendant's entry laid in the declaration; and at the trial it is ſaid not to be neceſſary to prove any entry of the defendant, becauſe the defendant doth in the rule confeſs leaſe, entry and ouſter; alſo the entry of the defendant is found by the recovery in ejectment againſt him. 2 *Bac. Abr.* 181.

If treſpaſs be brought for the meſne profits, and the action is brought againſt a ſtranger to the former verdict, it muſt be brought in the leſſor's name, and the title may be ſtood upon, for there was no leaſe, and no reaſon for an eſtoppel; but if it be brought againſt the defendant in ejectment in the leſſee's name, there the verdict ſhall be concluſive evidence, and ſhall bind the leſſor of the plaintiff, though no party to the record; and in this caſe it is ſufficient to prove the value of the meſne profits, without entring into the title. 1 *Sid.* 293. 1 *Keb.* 944.

One of the advantages attending this action is, that a man may have a remedy *toties quoties*, in being allowed to bring as many ejectments as he pleaſes; which has ſometimes proved a very great miſchief, but is yet without remedy; for though it has been ſometimes attempted in Chancery, after three or four ejectments, by a bill of peace, to eſtabliſh the prevailing party's title; yet it hath been always denied to alter the courſe of the law, for that every termor may have an ejectment, and every new ejectment ſuppoſes a new demiſe; and the coſts in ejectment are a recompence for the trouble and charge to which the poſſeſſor is put; but where the ſuit begins in Chancery for relief touching pretended incumbrances on the title of lands, and the court has ordered the defendant to purſue an ejectment at law, there, after one or two ejectments tried, and the title ſettled to the ſatisfaction of the court, the court hath ordered a perpetual injunction againſt the defendant, becauſe there the ſuit is firſt attached in that court, and never began at law; and ſuch precedent incumbrances appearing to be fradulent and inequitable againſt the poſſeſſor, it is within the compaſs of the court to relieve againſt it. 2 *Bac. Abr.* 182.

If a man has a verdict in ejectment, and coſts taxed, and an attachment iſſues for non-payment of the coſts, the defendant ſhall not have an ejectment againſt the plaintiff in the ſame court till he hath paid coſts; but he may proceed in ejectment in another court without coſts paid; the reaſon is, becauſe the ſame court will ſee an obedience paid to their rules before they will ſuffer the diſobedient perſon to proceed in a cauſe of the ſame kind; but another court cannot take cognizance of the rules of a diſtant court; but every court can inforce obedience to its own rules. 1 *Sid.* 379.

Where

Where judgment is obtained againſt the caſual ejector, the party in poſſeſſion may controvert the title in an action for the meſne profits. *Stran.* 960.

No new ejectment ſhall be brought by the defendant after recovery againſt him, till he has quitted the poſſeſſion, or the tenants have attorned to the plaintiff; ſo that he be in poſſeſſion, and the defendant out. 1 *Salk.* 258.

No new ejectment ſhall be brought till coſts paid of the firſt. *Stran.* 548.

Where there is judgment for the defendant in ejectment, coſts ſhall be paid before a new one brought. *Stran.* 554.

Proceedings not ſtayed till payment of coſts, in a former ejectment, unleſs there has been vexation. *Stran.* 681, 1099.

Proceedings ſtayed in a ſecond ejectment, *&c.* the leſſors not being liable to the former coſts. *Stran.* 1152.

For more matter on this ſubject, ſee 9 Vin. Abr. *and* 2 Bac. Abr. *tit.* Ejectment.

Proceedings on an action of treſpaſs in ejectment, by original, in the King's Bench.

1. The original writ.

GEORGE *the Third, by the grace of God, of* Great Britain, France, *and* Ireland, *King, Defender of the Faith, and ſo forth; to the ſheriff of* Berkſhire, *greeting. If* Richard Smith *ſhall give you ſecurity of proſecuting his claim, then put by gage and ſafe pledges* William Stiles, *late of* Newbury, *gentleman, ſo that he be before us on the morrow of* All-Souls, *wherefoever we ſhall then be in* England, *to ſhew wherefore with force and arms he entred into one meſſuage, with the appurtenances, in* Sutton, *which* John Rogers, *eſquire, hath demiſed to the aforeſaid Richard, for a term which is not yet expired, and ejected him from his ſaid farm, and other enormities to him did, to the great damage of the ſaid* Richard, *and againſt our peace. And have you there the names of the pledges, and this writ. Witneſs Ourſelves at* Weſtminſter, *the ——— day of ———, in the ——— year of our reign.*

Pledges of proſecution, { *John Doe.* / *Richard Roe.*

Sheriff's return.

The within named *William Stiles* is attached by pledges, { *John Den.* / *Richard Sen.*

2. Copy of the declaration againſt the caſual ejector; who gives notice thereupon to the tenant in poſſeſſion.

———, *the ——— of King* George *the Third.*

Berks, to wit. } WIlliam Stiles, *late of* Newbury, *in the ſaid county, gentleman, was attached to anſwer to* Richard Smith, *of a plea, wherefore with force and arms he entred into one meſſuage, with the appurtenances, in* Sutton, *in the county aforeſaid, which* John Rogers, *eſquire, demiſed to the ſaid* Richard Smith, *for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid* Richard, *and againſt the peace of the Lord the King,* &c. *And whereupon the ſaid* Richard, *by* Robert Martin *his attorney complains, that whereas the ſaid* John Rogers, *on the ——— day of ———, in the ——— year of the Lord the King that now is, at* Sutton *aforeſaid, had demiſed to the ſame* Richard *the tenement aforeſaid, with the appurtenances, To have and to hold the ſaid tenement, with the appurtenances, to the ſaid* Richard *and his aſſigns from the feaſt of Saint* Michael the Archangel *then laſt paſt, to the end and term of five years from thence next following, and fully to be complete and ended, by virtue of which demiſe the ſaid* Richard *entred into the ſaid tenement, with the appurtenances, and was thereof poſſeſſed; and, the ſaid* Richard *being ſo poſſeſſed thereof, the ſaid* William *afterwards, that is to ſay, on the ſaid ——— day of ———, in the ſaid ——— year, with force and arms, that is to ſay, with ſwords, ſtaves, and knives, entred into the ſaid tenement, with the appurtenances, which the ſaid* John Rogers *demiſed to the ſaid* Richard *in form aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid* Richard *out of his ſaid farm, and other wrongs to him did, to the great damage of the ſaid* Richard, *and againſt the peace of the ſaid Lord the King; whereby the ſaid* Richard *ſaith, that he is injured and damaged to the value of twenty pounds; and thereupon he brings his ſuit,* &c.

Martin, for the plaintiff. } pledges of proſecution, { *John Doe.* / *Richard Roe.*
Peters, for the defendant. }

Mr. George Saunders.

I AM *informed that you are in poſſeſſion of, or claim title to, the premiſſes mentioned in this declaration of ejectment, or to ſome part thereof; and I, being ſued in this action as a caſual ejector, and having no claim or title to the ſame, do adviſe you to appear next* Hillary *term in his Majeſty's court of King's Bench at* Weſtminſter, *by ſome attorney of that court, and then and there, by a rule to be made of the ſame court, to cauſe yourſelf to be made defendant in my ſtead; otherwiſe I ſhall ſuffer judgment to be againſt me, and you will be turned out of poſſeſſion.*

Your loving friend,

William Stiles.

3. The rule of court.

———*term, in the ———year of King* George *the Third.*

Berks, to wit. } IT *is ordered by the court, by the aſſent of both parties, and their attorneys, that* George Saunders *gentleman, may be made defendant in the place of the now defendant* William Stiles, *and ſhall immediately appear to the plaintiff's action, and ſhall receive a declaration in a plea of treſpaſs and ejectment of the tenements in queſtion, and ſhall immediately plead thereto, Not guilty. And, upon the trial of the iſſue, ſhall confeſs leaſe, entry, and ouſter, and inſiſt upon his title only. And if, upon trial of the iſſue, the ſaid* George *do not confeſs leaſe, entry, and ouſter, and by reaſon thereof the plaintiff cannot proſecute his writ, then the taxation of coſts upon ſuch non-proſs ſhall ceaſe, and the ſaid* George *ſhall pay ſuch coſts to the plaintiff, as by the court of our Lord the King here ſhall be taxed and adjudged for ſuch his default in non-performance of this rule; and judgment ſhall be entred againſt the ſaid* William Stiles, *now the caſual ejector, by default. And it is further ordered, that, if upon the trial of the ſaid iſſue a verdict ſhall be given for the defendant, or if the plaintiff ſhall not proſecute his writ, upon any other cauſe, than for the not confeſſing leaſe, entry, and ouſter as aforeſaid, then the leſſor of the plaintiff ſhall pay coſts, if the plaintiff himſelf doth not pay them.*

Martin, for the plaintiff.
Newman, for the defendant. By the Court.

4. The record.

Pleas before the Lord the King at *Weſtminſter*, of the term of Saint *Hillary* in the ——— year of the reign of the Lord *George* the Third, by the grace of God, of *Great Britain, France* and *Ireland*, King, Defender of the Faith, *&c.*

Berks, to wit. } GEORGE Saunders, *late of* Sutton *in the county aforeſaid, gentleman, was attached to anſwer* Richard Smith, *of a plea, wherefore with force and arms he entred into one meſſuage, with the appurtenances, in* Sutton, *which* John Rogers, *eſquire, hath demiſed to the ſaid* Richard *for a term which is not yet expired, and ejected him from his ſaid farm, and other wrongs to him did, to the great damage of the ſaid* Richard, *and againſt*

the peace of the lord the King that now is. And whereupon the ſaid Richard *by* Robert Martin *his attorney complains, that whereas the ſaid* John Rogers *on the ——— day of ——— in the——— year of the reign of the lord the King that now is, at* Sutton *aforeſaid, had demiſed to the ſame* Richard *the tenement aforeſaid, with the appurtenances, to have and to hold the ſaid tenement with the appurtenances to the ſaid* Richard *and his aſſigns, from the feaſt of Saint* Michael *the archangel then laſt paſt, to the end and term of five years from thence next following and fully to be compleat and ended; by virtue of which demiſe the ſaid* Richard *entred into the ſaid tenement, with the appurtenances, and was thereof poſſeſſed; and the ſaid* Richard *being ſo poſſeſſed thereof, the ſaid* George *afterwards, that is to ſay, on the ——— day of ——— in the ſaid ——— year, with force and arms, that is to ſay, with ſwords, ſtaves, and knives, entred into the ſaid tenement, with the appurtenances, which the ſaid* John Rogers *demiſed to the ſaid* Richard *in form aforeſaid, for the term aforeſaid, which is not yet expired, and ejected the ſaid* Richard *out of his ſaid farm, and other wrongs to him did, to the great damage of the ſaid* Richard, *and againſt the peace of the ſaid lord the King; whereby the ſaid* Richard *ſaith that he is injured and endamaged to the value of twenty pounds; And thereupon he brings ſuit,* [and good proof.] *And the ſaid* George Saunders, *by* Charles Newman *his attorney, comes and defends the force and injury, when* [*and where the court ſhall award;*] *and ſaith that he is in no wiſe guilty of the treſpaſs and ejectment aforeſaid, as the ſaid* Richard *above complains againſt him; and therefore he puts himſelf upon the country; and the ſaid* Richard *doth likewiſe the ſame: Therefore let a jury come thereupon before the lord the King on the octave of the purification of the bleſſed virgin* Mary, *wheresoever he ſhall be then in* England; *who neither* [*are of kin to the ſaid* Richard, *nor to the ſaid* George;] *to recognize* [*whether the ſaid* George *be guilty of the treſpaſs and ejectment aforeſaid;*] *becauſe as well* [*the ſaid* George *as the ſaid* Richard, *between whom the difference is, have put themſelves on the ſaid jury.*] *The ſame day is there given to the parties aforeſaid. Afterwards the proceſs therein, being continued between the ſaid parties of the plea aforeſaid by the jury, is put between them in reſpite, before the lord the King, until the day of* Eaſter *in fifteen days, wheresoever the ſaid lord the King ſhall then be in* England; *unleſs the juſtices of the lord the King aſſigned to take aſſizes in the county aforeſaid, ſhall have come before that time, to wit, on* Monday *the 8th of* March, *at* Reading *in the ſaid county, by the form of the ſtatute* [*in that caſe provided,*] *by reaſon of the default of the jurors* [*ſummoned to appear as aforeſaid.*] *At which day before the lord the King at* Weſtminſter, *come the parties aforeſaid by their attornies aforeſaid; and the aforeſaid juſtices of aſſize, before whom* [*the jury aforeſaid came,*] *ſent here their record before them had, in theſe words, to wit: Afterwards, at the day and place within contained, before ——— ——— eſquire, one of the barons of the Exchequer of the lord the King, and Sir* John Eardly Wilmot *knight, one of the juſtices of the ſaid lord the King, aſſigned to hold pleas before the King himſelf, juſtices of the ſaid lord the King, aſſigned to take aſſizes in the county of* Berks *by the form of the ſtatute* [*in that caſe provided,*] *come as well the within named* Richard Smith, *as the within written* George Saunders, *by their attornies within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit,* Charles Holloway, John Hooke, Peter Graham, Henry Cox, William Browne, *and* Francis Oakley, *come, and are ſworn upon that jury: And becauſe the reſt of the jurors of the ſame jury did not appear, therefore others of the by-ſtanders being choſen by the ſheriff, at the requeſt of the ſaid* Richard Smith, *and by the command of the juſtices aforeſaid, are appointed anew, whoſe names are affixed to the pannel within written, according to the form of the ſtatute in ſuch caſe made and provided; which ſaid jurors ſo appointed anew, to wit,* Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts, *and* Daniel Parker, *being likewiſe called, come; and, together with the other jurors aforeſaid before impannelled and ſworn, being elected, tried, and ſworn, to ſpeak the truth of the matter within contained, upon their oath ſay, that the aforeſaid* George Saunders *is guilty of the treſpaſs and ejectment within written, in manner and form as the aforeſaid* Richard Smith *within complains againſt him; and aſſeſs the damages of the ſaid* Richard Smith, *on occaſion of that treſpaſs and ejectment, beſides his coſts and charges by him put unto about his ſuit in that behalf, to twelve pence; and, for thoſe coſts and charges, to forty ſhillings. Whereupon the ſaid* Richard Smith, *by his attorney aforeſaid, prayeth judgment againſt the ſaid* George Saunders, *in and upon the verdict aforeſaid by the jurors aforeſaid given in the form aforeſaid: And the ſaid* George Saunders, *by his attorney aforeſaid, ſaith that the court here ought not to proceed to give judgment upon the ſaid verdict, and prayeth that judgment againſt him the ſaid* George Saunders, *in and upon the verdict aforeſaid, by the jurors aforeſaid given in the form aforeſaid, may be ſtayed, by reaſon that the ſaid verdict is inſufficient and erroneous, and that the ſame verdict may be quaſhed, and that the iſſue aforeſaid may be tried anew by other jurors to be afreſh impannelled. And, becauſe the court of the lord the King here is not yet adviſed of giving their judgment of and upon the premiſſes, therefore day thereof is given as well to the ſaid* Richard Smith *as the ſaid* George Saunders, *before the lord the King, until the morrow of the aſcenſion of our Lord, wheresoever the ſaid lord the King ſhall then be in* England, *to hear their judgment of and upon the premiſſes, for that the court of the lord the King is not yet adviſed thereof. At which day before the lord the King at* Weſtminſter, *come the parties aforeſaid by their attornies aforeſaid: Upon which, the record and matters aforeſaid having been ſeen, and by the court of the lord the King now here fully underſtood, and all and ſingular the premiſſes having been examined, and mature deliberation being had thereupon, for that it ſeems to the court of the lord the King now here, that the verdict aforeſaid is in no wiſe inſufficient or erroneous, and that the ſame ought not to be quaſhed, and that no new trial ought to be had of the iſſue aforeſaid: Therefore it is conſidered, that the ſaid* Richard *do recover againſt the ſaid* George *his term yet to come, of and in the ſaid tenements, with the appurtenances, and the ſaid damages aſſeſſed by the ſaid jury in form aforeſaid, and alſo twenty-ſeven pounds ſix ſhillings and eight pence for his coſts and charges aforeſaid, by the court of the lord the King here awarded to the ſaid* Richard, *with his aſſent, by way of increaſe; which ſaid damages in the whole amount to twenty-nine pounds, ſeven ſhillings and eightpence. And let the ſaid* George *be taken,* [*until he maketh fine to the lord the King.*] *And hereupon the ſaid* Richard *by his attorney aforeſaid prayeth a writ of the lord the King, to be directed to the ſheriff of the county aforeſaid, to cauſe him to have poſſeſſion of his term aforeſaid yet to come, of and in the tenements aforeſaid, with the appurtenances: And it is granted unto him, returnable before the lord the King on the morrow of the Holy Trinity, wheresoever he ſhall then be in* England, *at which day before the lord the King, at* Weſtminſter, *cometh the ſaid* Richard *by his attorney aforeſaid; and the ſheriff, that is to ſay, Sir* Thomas Reeve, *knight, now ſendeth, that he by virtue of the writ aforeſaid to him directed, on the ——— day of———laſt paſt did cauſe the ſaid* Richard *to have his poſſeſſion of his term aforeſaid yet to come, of and in the tenements aforeſaid, with the appurtenances, as he was commanded.*

Ejectum, *Ejectus maris, quod e mari ejicitur.* Jet, jetſom, wreck.——*Et ſi de navi taliter periclitata aliquis homo vivus evaſerit, & ad terram venerit, omnia bona & catalla in navi cum iſta contenta remaneant, & ſint eorum quorum prius fuerant, & eis non depereant nomine* ejecti— *Si vero infra prædictum terminum nullus venerit ad exigenda catalla ſua, tum noſtra ſint, & hæredum noſtrorum nomine* ejecti, *vel alterius qui libertatem habet* ejectum *habendi.* Cart. Henrici Reg. Angl. anno 1226.

Eigne. (French *ainé, maximus natu,*) The firſt-born, as baſtard *eigne*, and *mulier puiſne. Lit. ſect.* 399. See **Mulier.**

Einecia, Is borrowed of the French *ainé, primogenitus*, and ſignifies in Common law *elderſhip.* Stat. of *Ireland*, 14 *H.* 3. *Skene de verbor. ſignificatione*, verbo *Eneya*, ſays, that in the ſtatute of *Marlbridge, cap.* 9. made in the time of *H.* 3. it is called *Enitia pars hæreditatis:* And likewiſe

likewiſe in another place of the ſame King, *Jus eſniciæ*, that is, in proper Latin, *Jus primogenituræ*. See Enitia pars, and Eldery. *Eyniciam filiam ſuam maritare*, to marry his eldeſt daughter. *Cowell, edit.* 1727.

Eire, alias Eyre, From the old *French* word *eire*, that is, *iter*, a journey, as a *grand eire*, that is *magnis itineribus*. It ſignifies in *Britton, cap.* 2. the court of juſtice *itinerant*. And juſtices in *eyre* are thoſe only which *Bracton* in many places calleth *Juſticiarios itinerantes*, of the *eyre*, and *lib.* 3. *tract.* 2. *cap.* 1, 2. ſaith, the *eyre* alſo of the foreſt is nothing but the *juſtice-ſeat* otherwiſe called, which is, or ſhould by ancient cuſtom be held every three years by the juſtices of the foreſt, journeying up and down for that purpoſe. *Cromp. Jur. fol.* 156. *Manwood's Foreſt Laws, cap.* 24. Read alſo *Skene de verb. ſignif.* verbo *Iter*, whereby, as by many other places, you may ſee great affinity between theſe two kingdoms in the adminiſtration of juſtice and government. See Juſtice in eyre.

Election, Is, when a man is left to his own free will to take or do one thing or another, which he pleaſes; as if *A.* covenants to pay *B.* a pound of pepper or ſaffron before *Whitſuntide*, it is at the election of *A.* at all times before *Whitſuntide*, which of them he will pay; but if he pays it not before the ſaid feaſt, then afterwards it is at the *election* of *B.* to have an action for which he pleaſes. *Dyer fol.* 18. *pl.* 104. 21 *H.* 7. 19. *Co. lib.* 5. *fol.* 59. and *lib.* 11. *fol.* 51. In caſe an *election* be given of ſeveral things, he who is the firſt agent, and ought to do the firſt act, ſhall have the *election*. As if a man make a leaſe, rendring a rent, or a robe, the leſſee ſhall have the *election*. (as being the firſt agent) by payment of the one, or delivery of the other. *Coke on Littl. p.* 144. *b.*

1. *In what caſes an election is given, and who is to do the firſt act.*

2. *In what caſes an election ſhall be deemed to continue, or be determined, and what ſhall be deemed a ſufficient election.*

1. *In what caſes an election is given, and who is to do the firſt act.*

If a man grants twenty acres, parcel of his manor, without any deſcription of them; yet the grant is not void, for an acre is a thing certain, and the ſituation may be reduced to a certainty by the election of the grantee. But if a man ſells 20*l.* worth of his land, parcel of a manor, this is void, it being neither certain in itſelf, nor reducible to a certainty; for no man is made judge of the value. 2 *Co.* 36. *Kelw.* 84.

So if one, being ſeiſed of a great waſte, grants the moiety of a yard-land lying in the waſte, without aſcertaining what part, or the ſpecial name of the land, or how-bounded; this may be reduced to a certainty by the election of the grantee: but it is otherwiſe in caſe of the King's grant, for there can be no election in his caſe; and therefore the grant is void for incertainty. 1 *Leon.* 30. *Noy.* 29. 1 *Co.* 86.

So if a man levies a fine *come ceo que il ad de ſon done* of an houſe and an hundred acres of land in *D.* where he hath there an houſe and 118 acres, the conuſee may elect which 100 acres he will have, for the election is given to him by the fine. 1 *Rol. Abr.* 725.

If a man grants 600 cords of wood out of a large wood, the grantee hath election to take them, when, and in what part of the wood he pleaſes, without any appointment of the grantor, and conſequently may aſſign his intereſt in them to a third perſon, and he ſhall have the like election. 5 *Co.* 24.

But if one grants to me 1000 cords of wood, to be taken at my election, and the grantor or a ſtranger cuts down part of the wood, I can take no part of that which is cut down, but muſt ſupply myſelf out of the reſidue ſtill remaining. 5 *Co.* 24.

But if *A.* covenants with *B.* that he ſhall have twenty of the beſt trees in the wood of *A.* to be taken at the election of *B.* within ſuch a time, 'tis a breach of the covenant in *A.* to cut down any trees within that time, becauſe the latitude of election which *B.* had is thereby abridged. 1 *Vent.* 271.

If rent be reſerved payable at the church of *S.* or *D.* upon conſideration, &c. the leſſee hath his election to pay it at either place; and therefore to take advantage of the condition, the leſſor muſt demand it in ſuch places, where, by his own agreement, he has permitted the tenant to pay it. 2 *Rol. Abr.* 428.

It is laid down as a general rule, that in caſe an election is given of two ſeveral things, he that is the firſt agent, and which ought to do the firſt act, ſhall have the election. *Co. Lit.* 145. 2 *Co.* 37. *a.*

As if a man grants a rent of 20*s.* or a robe, to one and his heirs, the grantor ſhall have the election, for he is the firſt agent by payment of one, or delivery of the other. *Co. Lit.* 145. *a.*

So if a man makes a leaſe, rendring a rent or robe, the leſſee ſhall have the election. *Co. Lit.* 145. *a.*

But if I contract with you to pay you a robe, or twenty ſhillings, at *Eaſter*, you may, after the feaſt, bring debt for the one or the other. *Co. Lit.* 145. *a.*

So if a man leaſes lands for years, reſerving weekly nine quarters of wheat, or the value thereof, as it ſhall then be ſold in the market of *W.* if the leſſee pay neither of theſe at the time appointed, the leſſor may have his action, at his election, for the wheat only; for though the leſſee might have paid any of them, at his election, at the day, yet after the day the law gives the election to the leſſor. 1 *Rol. Abr.* 725.

If *A.* gives one of his horſes in his ſtable to *B. B.* hath the election which horſe to take, for he is the firſt agent by taking the horſe. *Co. Lit.* 145. *Moor* 82. *Dyer* 91.

If one grants to another twenty loads of maple, to be taken in his wood of *D.* there the grantee ſhall have the election; for he ought to do the firſt act, *viz.* fell and take the ſame. *Co. Lit.* 145. *a.*

If one ſeiſed in fee of a manor, *aliens* the manor, except the cloſe called *N.* part of the manor, and there are two cloſes called *N.* which are part of the manor, and one contains nine acres, and the other but three acres, the alienee ſhall not chuſe which of the ſaid cloſes he will have; but the alienor ſhall have the election which of the ſaid cloſes ſhall paſs. 1 *Leon.* 268.

If I have three daughters, and I covenant that *J. S.* ſhall diſpoſe of one of them in marriage, it is at my election of which; and after requeſt I am bound to deliver her to him. *Moor* 72. *pl.* 197. *Dal.* 73. *S. C.*

If an obligation be conditioned to pay *B.* or his heirs annually, 12*l.* at *Midſummer* and *Chriſtmas*, or to pay him or his heirs, at any time of the ſaid feaſts, 150*l.* the obligor hath election to pay the 12*l.* or the 150*l.* but he ought to continue the payment of the twelve pound annually, until he pays the 150*l.* though he may at any time determine the payment of the 12*l.* by payment of the 150*l.* *Cro. Jac.* 594.

If *A.* covenants with *B.* that *A.* or his ſon *C.* or either of them, ſhall work with *B.* at the grinding and poliſhing of glaſs, *B.* paying to each of them ſo much, &c. and *B.* requeſts *C.* to work with him, &c. if he doth not, the covenant is broke, for *B.* had the election to require both, or any of them to work with him. 2 *Sid.* 104.

In debt on an obligation, that if a ſhip put to ſea, and either the goods or the obligor come ſafe, he ſhould pay ſuch a ſum over and above the uſe allowed by the ſtatute; the defendant pleads, that the obligor died before he returned, and inſiſted that he, as his executor, had an election to pay at which time of the contingencies he pleaſed, and that therefore the teſtator never returning, no action accrued: but it was reſolved, that the payment ſhould ariſe on either of the contingencies, and that this being agreeable to the intention of the parties, the law ſupplies the words, *which ſhould firſt happen.* 1 Lev. 54, 55.

2. *In what caſes an election ſhall be deemed to continue, or be determined, and what ſhall be deemed a ſufficient election.*

Where the things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before, otherwiſe when to be performed *unica vice*. *Co. Lit.* 145. *a.* 2 *Co.* 37. *Moor* 85. *Kelw.* 78.

As if I grant another for life an annuity or robe at *Eaſter*, and both are behind, the grantee ought to bring his writ of annuity in the disjunctive; for if he ſhould bring for the one only, and recover, this judgment would determine the election for ever; for he ſhould never have a writ of annuity afterwards, but a *ſcire facias* upon the judgment; which reaſon *Fitzherbert* in his *Natura Brevium* not obſerving, held an opinion to the contrary. *Co. Lit.* 145. *a.*

When nothing paſſes to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life-time of the parties; and the heir or executor cannot make the election. *Co. Lit.* 145. *a.* 2 *Co.* 37. *a.*

But where an eſtate or intereſt paſſes immediately to the feoffee, donee, or grantee, there the election may be made by them, or their heirs or executors. *Co. Lit.* 145. 2 *Co.* 36. *a.* 37. *a.*

When one and the ſame thing paſſeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this; there the intereſt paſſeth immediately, and the party, his heirs or executors, may make election when they will. *Co. Lit.* 145. *a.*

If *A.* being ſeiſed in fee of a manor, part in demeſne, and part in a leaſe for years, rendring rent, and part in copyhold, in conſideration of a ſum of money, by indenture grants, bargains and ſells it to *B.* to hold for ſeventeen years from the death of *A.* and after *A.* covenants to ſtand ſeiſed thereof to the uſe of himſelf and the heirs of his body, and dies, and *B.* enters, he may elect whether he will take by the Common law, or by bargain and ſale, for *A.* had power to paſs it either way; and if he ſhould be obliged to take by demiſe at Common law, then *B.* would loſe the rents reſerved upon the leaſes for years for want of an attornment; and it was alſo held, that this election remained notwithſtanding the alteration of the eſtate by the ſecond indenture, and the death of the leſſor. 2 *Co.* 35. 2 *And.* 202. *S. C.*

If a man levies a fine *come ceo*, &c. of an houſe and 100 acres of land in *D.* where he hath there 118 acres, and the conuſee renders to the conuſor for 100 years, and after the conuſor dies, his executor may elect which of the 100 acres he will have, becauſe this was a thing in intereſt in the teſtator. 1 *Rol. Abr.* 725.

There was a compoſition between the prebend of *A.* and the abbot and convent of *B.* that the prebend of *A.* and his ſucceſſors, for all time to come, ſhould have this election yearly, either to receive tithes in kind of corn or grain, ariſing within certain lands of the abbey, or elſe to receive five marks to be paid by the ſaid abbot and convent in lieu thereof, ſo as ſuch election was notified to the abbot, or any of the monks or porter of the abbey, &c. and the lands came to the King by the 31 *Hen.* 8. and from him to the defendant; and the prebendary came to the King by the 1ſt of *Ed.* 6. of chanteries, &c. and from him to the plaintiff. Upon admitting the compoſition good, it was adjudged that the power of election was gone, becauſe it cannot now be made according to the compoſition; but in this caſe it was ſaid by *Hale* Ch. Baron, that in one *Southwell*'s caſe, (which ſee in *Dyer*. 91.) in the 44 *Eliz.* where an abbot had a quantity of wood, to be taken yearly in ſuch a wood, or a ſum of money at his election; it was held, the election was transferred to the King by the ſtatute of diſſolution of monaſteries. *Hard.* 381.

If one enfeoffs another of two acres, to hold the one for life, and the other in tail, and he before election makes a feoffment of both; in this caſe the feoffor ſhall enter into which of them he will, for the feoffee, by this wrongful act, hath loſt his election. *Co. Lit.* 145. *a.* 2 *Co.* 37. *a.*

If a man gives two acres to another, to hold the one for life, and the other in fee, and the donee after makes a feoffment of one acre; this is an election to have the fee in that. *Plow.* 6. 1 *Rol. Abr.* 726.

If a man leaſes two acres for life, the remainder of one acre in fee; this is an election that he ſhall have the fee in the other acre. *Plow.* 6. 1 *Rol. Abr.* 736.

When the election is given to ſeveral perſons, there the firſt election made by any of the perſons ſhall ſtand: As if a man leaſes two acres to *A.* for life, the remainder of one acre to *B.* and of the other acre to *C.* *B.* or *C.* may elect which of the acres they will have, and the firſt election by one binds the other. *Co. Lit.* 145. *a* 2 *Co.* 37. *a.*

Election of Biſhops, &c. Elections ſhall be free, St. *Weſt.* 1. 3 *Ed.* 1. *c.* 5. *Art. Cler.* 9 *Ed.* 2. *ſtat.* 1. *c.* 14. 9 *Hen.* 4. *c.* 9. Granted on condition to have the royal aſſent, otherwiſe the King to collate, 25 *Ed.* 3. *ſt.* 6. *ſect.* 3. The King's prerogative in election ſaved, 9 *H.* 4. *cap.* 9.

Election of a clerk of the ſtatutes merchant, *Electione Clerici*, Is a writ that lieth for the choice of a *clerk* aſſigned to take and make bonds called *ſtatute-merchants*, and is granted out of the Chancery, upon ſuggeſtion made, that the *clerk* formerly aſſigned is gone to dwell in another place, or hath hindrance to let him from following that buſineſs, or hath not land ſufficient to anſwer his tranſgreſſion, if he ſhould deal amiſs, &c. *F. N. B. fol.* 164.

Election of eccleſiaſtical perſons. There is to be a free election for the dignities of the church, by 9 *Ed.* 2. *c.* 14. and none ſhall diſturb any perſon from making free election, on pain of great forfeiture. If any perſon that hath a voice in elections, take any reward for an election in any church, college, ſchool, &c. the election ſhall be void: And if any of ſuch ſocieties reſign their places to others for reward, they incur a forfeiture of double the ſum; and the party giving it, and the party taking it, is uncapable of any place. Stat. 31 *Eliz. c.* 6.

Election of members of parliament. See Parliament.

Election in London. See London.

Eleemoſyna, Alms. *Dare in puram & perpetuam eleemoſynam*, to give in pure and perpetual alms, or in *frank-almoigne*, as lands were commonly given to religious uſes, and ſo diſcharged from military ſervices, and other ſecular burdens. *Cowell, edit.* 1727.

Eleemoſyna carucarum pro aratris, *i. e. eleemoſyna aratri, (viz.)* A penny which King *Æthelred* ordered to be paid for every plough in *England* towards the ſupport of the poor. *Leg. Æthelred, cap.* 1. *Ut detur de omni caruca denarius vel denarium valens.* So *in Leg Canuti, ca.* 11. Sometimes 'tis called *eleemoſyna Regis*, becauſe it was at firſt appointed by the King. Thus *Simeon Dunelm. Ann.* 887, writes *(viz.)* *Æthelelm comes Wintonienſis* eleemoſynam Regis *Æthelfredi detulit Romam.*

Eleemoſynae, *i. e.* The poſſeſſion belonging to churches. *Quid eſt quod das quando honores eccleſiarum, &c. quod ſi res Domino jure* eleemoſynarum *legitime conſecratæ ſint, eccleſiarum ejus ſunt.* Du Cange. *Hanc eccleſiam dedi Æthelwaldo quiete tenere ſicut decet eccleſiaſticam* eleemoſynam. *Mon.* 3 *tom. p.* 46.

Eleemoſynaria, The place in a religious houſe, where the common alms were repoſited, and thence by the almoner diſtributed to the poor. In old *Engliſh* the *aumere, aumbry, ambry*, which in the North they now uſe for a pantry or cupboard, as the *Welſh* do *almari*; yet the word *eleemoſynaria* was ſometimes taken for the office of *almoner*, to which, as to other offices, there were peculiar rents allotted, as——*Decima prædicti molendini* eleemoſynariæ *ſancti Auguſtini ſolvatur.* Will. Thorne inter x. Scriptor. ſub anno 1128.

Eleemoſynarius, The almoner or peculiar officer who received the *eleemoſynary* rents and gifts, and in due method diſtributed them to pious and charitable uſes. There was ſuch a chief officer in all the religious houſes.

Th-

The greateſt of our *Engliſh* biſhops had their peculiar almoners, as in the council of *Oxford*, *anno* 1122. *Stat. cap.* 2. and *Lindewood's Provincial*, *lib.* 1. *tit.* 12. The dignity and duty of lord almoner to the Kings of *England*, is deſcribed in *Fleta*, *lib.* 2. *cap.* 23.

Elegit, (ſo called from the words in it *elegit ſibi liberari*) Is a writ judicial, and lieth for him that hath recovered debt or damages in the King's court, or upon recognizance in any court, againſt one not able in his goods to ſatisfy the ſame, and directed to the ſheriff, commanding him that he make delivery of half the party's lands or tenements, and all his goods, oxen and beaſts for the plough excepted. *Old Nat. Brev. fol.* 152. *Reg. Orig.* 299 & 301. And the table of the *Regiſter Judicial*, which expreſſeth divers uſes of this writ: In the *New terms of the Law* it is ſaid, that this writ ſhould be ſued within the year. The creditor ſhall hold the moiety of the land ſo delivered unto him, till his whole debt and damages are ſatisfied, and during that term he is tenant by *elegit*. *Weſtm.* 2. *cap.* 18. See *Co. on Litt. fol.* 289. *b.*

An *elegit* is a judicial writ given by ſtatute *Weſt.* 2. *c.* 18. or 13 *Ed.* 1. *c.* 18. either upon a recovery of any debt or damages, or upon a recognizance in any court which had authority to take the ſame. The words of this law are: "When debt is recovered or ackowledged in the King's court, or damages awarded, it ſhall be from henceforth in the election of him that ſueth for ſuch debt or damages, to have a writ of *fieri facias* unto the ſheriff for to levy the debt of the lands and goods; or that the ſheriff ſhall deliver to him all the chattels of the debtor (ſaving only his oxen and beaſts of his plough) and the one half of his land, until the debt be levied upon a reaſonable price or extent. And if he be put out of that tenement, he ſhall recover by a writ of *novel diſſeiſin*, and after by a writ of *rediſſeiſin*, if need be."

When a perſon has judgment in an action of debt, or any other action in which he has damages, and he chuſes to take out execution by *elegit*, the entry is, *Quod elegit ſibi executionem fieri de omnibus catallis & medietate terræ*, and from this election either to have a *fieri facias* or *capias ad ſatisfaciendum*, or this writ, it is called an *elegit*, the form of which being firſt given by this ſtatute (for there was no execution againſt the lands of a debtor at Common law) is *Ac cum idem J. S. juxta ſtatutum inde editum elegerit ſibi liberari pro prædict'* 20 *libris omnia catalla & mediatatem terræ ipſius J. D.* 2 *Inſt.* 395. *Reg.* 299. *Co. Lit.* 189. *b.*

But tho' by this ſtatue the lands of the debtor are made liable, as well as his perſonal eſtate; yet if the creditor takes out an *elegit*, and it appears to the ſheriff, that there are goods and chattels ſufficient of the debtor's, to ſatisfy the debt, he ought not to extend the lands. 2 *Inſt.* 395. But an *elegit* executed upon goods only, is not a *fieri facias*, for a *fieri facias* is executed by ſale by the ſheriff; but the *elegit* by the appraiſement of the goods by a jury, and delivery to the party. 1 *Sid.* 184. 1 *Lev.* 92. 1 *Keb.* 105, 261, 465, 556, 692.

Upon this writ the ſheriff is to impanel a jury, who are to make inquiry of all the goods and chattles of the debtor, and to appraiſe the ſame, and alſo to inquire as to his lands and tenements; and upon ſuch inquiſition the ſheriff is to deliver all the goods and chattels (except the beaſts of the plough) and a moiety of lands to the party, and muſt return his writ, in order to record ſuch inquiſition in that court out of which the *elegit* iſſued: And when the jury have found the ſeiſin and value of the land, the ſheriff, and not the jury, is to ſet out and deliver a moiety thereof to the plaintiff, by metes and bonds. *Cro. Car.* 319.

If the ſheriff, on an inquiſition upon an *elegit*, return the defendant to have twenty acres in *Dale* and twenty acres in *Sale*, and delivers the twenty acres in *Sale* for the moiety of the whole, all is void, for he ought to deliver a moiety of the twenty acres in each vill, and this might be avoided in evidence in ejectment brought for the lands. 1 *Lev.* 160. But ſee 1 *Sid.* 239.

If *A.* and *B.* recover ſeverally againſt *C.* and *A.* ſues out execution, and has a moiety of *C.*'s land delivered to him on an *elegit*, and then *B.* ſues out an *elegit*, he can only have a moiety of the lands which remained with *C.* after the firſt extent, and not the whole delivered to him. *Cro. Eliz.* 482.

But if *A.* acknowledges two judgments to *B.* and in the ſame term he takes out two *elegits*, on the one he may have a moiety of *A.*'s lands delivered to him, and on the other, the other moiety, and is not reſtrained to a moiety of a moiety, for in judgment of law the whole term is but one day. *Hard.* 23.

If upon an inqueſt taken upon an *elegit*, the jury find that the party was poſſeſſed of a term, which commenced the 2 & 3 *Ph. & Mar.* when in truth it commenced the 3 & 4 *Ph. & Mar.* and the ſheriff ſells the term according to the value found by the jury, the execution is void, for the ſheriff has only authority to ſell or extend ſuch things as are found to be the party's; but in this caſe the inqueſt finding one thing and the ſheriff another, the inqueſt does not warrant the ſale. *Cro. Eliz.* 584. 4 *Co.* 74. *S. C.*

But if the inqueſt had found that he was poſſeſſed of ſuch land for term of divers years *adhuc vent'*, which they had appraiſed at ſo much, without ſhewing the certain beginning or determination therof, it had been well enough; for they ſhall not be compelled to find a certainty, not having means to be informed thereof. *Cro. Eliz.* 584.

Upon an *elegit* the ſheriff may either extend a term of years, that is, may deliver a moiety thereof to the plaintiff as part of the lands and tenements of the defendant, or may ſell it abſolutely as part of his perſonal eſtate. 2 *Inſt* 395. 8 *Co.* 171. *Dalt. Sh.* 137.

Alſo it ſeems that a rent-charge may be extended on an *elegit*, for the word *land*, which is made ſubject to the execution, includes all hereditaments extendable, and in this caſe the party may diſtrain and avow for the rent, though the tenant never attorned; for the law creating his eſtate gives him all means neceſſary for the enjoyment of it. *Moor* 32. *pl.* 104.

Lands in ancient demeſne upon an *elegit* may by the ſheriff be delivered in execution, becauſe the title of the land is not directly put in plea in the King's court. *Hob.* 47. 4 *Inſt.* 270. 2 *Inſt.* 397. *Moor* 211. *pl.* 351. 1 *Brownl.* 234.

But the ſtatute of *Weſtm.* 2. which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or conſent. 3 *Co.* 9. *Co. Cap.* 149.

Form of a writ of *elegit*.

GEORGE *the Third, &c. to the ſheriff of* S. *greeting Whereas* A. B. *lately in our court, before us at* Weſtminſter, *by bill without our writ, and by the judgment of the ſame court, hath recovered againſt* C. D. 100 *l. of debt, and alſo* 50 s. *for his damages, which he hath ſuſtained, as well by occaſion of the detention of that debt, as for his expences and coſts laid out by him about his ſuit in that behalf, whereof the ſaid* C. D. *is convicted, as appears to us of record: And afterwards the ſaid* A. *came into our court before us, and hath elected to be delivered to him all the goods and chattels of the ſaid* C. *except the oxen and heifers of his cart, (beaſts of his plough,) and in like manner one moiety of all and ſingular the lands and tenements of the ſaid* C. *in our bailiwick, according to the form of the ſtatute in that caſe made and provided, until the debt and damages aforeſaid be fully levied thereof: Therefore we command you, that all the goods and chattels of the ſaid* C. *within your bailiwick, except the oxen and heifers of his cart (plough,) and likewiſe a moiety of all the lands and tenements of the ſaid* C. *in your baliwick, whereof the ſaid* C. *the day, &c. in the year of our reign &c. on which day the judgment aforeſaid was rendered, or at any time afterwards, was ſeiſed, you cauſe to be delivered without delay to the ſaid* A. *by a reaſonable price and extent; to hold to him the ſaid goods and chattels as his own proper goods and chattels, and alſo to hold the ſaid moiety of the lands and tenements aforeſaid as his freehold, to him and his aſſigns, according to the form of the ſtatute aforeſaid, until the debt and damages aforeſaid ſhall be thereof levied: And how this*

writ you ſhall have executed, make certainly known to us at Weſtminſter, *on the day, &c. (after ſuch a return) under your ſeal, and the ſeals of thoſe by whoſe oath you ſhall have made that extent and appraiſement: And have you then there this writ.* Witneſs, *&c.*

Elephants teeth, To what duties liable, 4 *Will. & M. c.* 5. *ſect.* 2.

Elf-arrows, Flint-ſtones, ſharpened and jagged at each ſide, in ſhape of *arrow-heads*, made and uſed in war by the ancient *Britons*, of which ſeveral have been found in *England*, and greater plenty in *Scotland*, where they call them *elf-arrows*, and do imagine they dropt from the clouds.

Elgine. A duty of two pennies Scots on ale there, 8 *Geo.* 1. *c.* 7.

Eliſors. To impanel juries, *&c.* See **Elliſors.**

Elke, A kind of *ewe* to make bows of. *B.* 2. *H.* 8. *c.* 9.

Elmsfeah, Charitable money, or money given in charity.

Eloine, (from the French *eſloigner,*) To remove, baniſh, or ſend away. So the word is uſed 13 *Ed.* 1. *cap.* 15. viz. *If ſuch as be within age be eloined, ſo that they cannot ſue perſonally, their next friends ſhall be admitted to ſue for them.*

Elopement, Is when a married woman departs from her huſband, and dwells with an adulterer; for which, without voluntary reconcilement to the huſband, ſhe ſhall loſe her dower by the ſtatute of *Weſtm.* 2. *c.* 34. according to theſe old verſes:

Sponte virum mulier fugiens & adultera facta,
Dote ſua careat, niſi ſponſo ſponte retracta.

A woman thus leaving her huſband is ſaid to *elope*, and her huſband in this caſe ſhall not be compelled to allow her any alimony. See **Alimony.**

Tho' the wife be ever ſo lewd, yet while ſhe cohabits with her huſband, he is bound to find her neceſſaries, and to pay for them; for he took her for better for worſe: So if he runs away from her, or turns her away. But if ſhe goes away from him; when ſuch ſeparation becomes notorious, whoever gives her credit, doth it at his own peril; for the huſband is not liable, unleſs he takes her again: for then it is as if a woman had eloped at Common law, ſhe thereby loſt her dower; but if ſhe came again, and the huſband received her, the right of dower is revived. 1 *Salk.* 119. By *Holt* Ch. J.

The plaintiff was an apothecary, and ſerved the defendant's wife with phyſick, who lived ſeparate from her huſband, and had a ſeparate allowance of 20*l.* a year. And by *Holt* Chief Juſtice: If huſband and wife ſeparate by conſent, and ſhe hath a ſeparate allowance, it is unreaſonable ſhe ſhould have it ſtill in her power to charge him; and it is not to be preſumed, but tradeſmen that deal with her truſt her on her own credit, and not on the credit of her huſband; and a perſonal notice is not neceſſary; it is ſufficient that it be publickly and commonly known. 1 *Salk.* 116. *Ld. Raym.* 444.

It was ruled by *Holt* Chief Juſtice, that if a huſband turn away his wife, and afterwards ſhe takes up neceſſaries upon credit of a tradeſman; the huſband ſhall be liable to the tradeſman; to pay for them. But if the wife elopes, tho' the tradeſman hath no notice of the elopement, if he gives credit to the wife, the huſband is not liable. If the wife tells the huſband that ſhe will buy ſuch a thing which is neceſſary, and the huſband tell her that he will not allow of it, and forbids the tradeſman to give his wife credit for it, and afterwards the wife takes up that thing of the ſame tradeſman, upon credit given her by him; the huſband is not liable. It is ſufficient for the huſband to give general notice, that people do not give credit to his wife. *L. Raym.* 444.

If a huſband turns away his wife, he gives her credit wherever ſhe goes, and muſt pay for neceſſaries for her.

But if ſhe runs away from her huſband, he ſhall not be bound by any contract ſhe makes. On the other ſide, while they cohabit, the huſband ſhall anſwer all contracts of hers for neceſſaries; for his aſſent ſhall be preſumed to all neceſſary contracts, upon the account of cohabiting, unleſs the contrary appear. But if the contrary appear, as by notice, there is then no room for ſuch a preſumption. 1 *Salk.* 118. By *Holt* Ch. J.

In *aſſumpſit* for goods ſold and delivered to the defendant's wife, the caſe appeared to be, that the defendant and his wife had formerly lodged at the plaintiff's houſe, and the plaintiff furniſhed her with goods; and the defendant finding the plaintiff had helped her to pawn her watch, and ſuſpected he confederated with her, left the lodgings, after paying the plaintiff his bill, and forbidding him ever to truſt her again. After this, the defendant and his wife cohabited together for a year; when, without any cauſe appearing he left her, locked up her cloths, and upon her finding him out refuſed to admit her, and ſtruck her, and declared he would not maintain her, or pay any body that did. In this diſtreſs, ſhe borrowed cloaths of her friends, and applied to the plaintiff, who furniſhed her with neceſſaries according to the defendant's degree; which the defendant refuſing to pay for, this action was brought: and upon trial the jury found for the plaintiff. Upon motion for a new trial, the court held the verdict was right; for whilſt they were at the plaintiff's there was a particular reaſon for the particular prohibition; yet the cauſeleſs turning her away deſtitute afterwards, gave her the general credit again: and if a huſband ſhould be allowed, under the notion of a particular prohibition to deſtroy her obtaining credit in one place, he may in the ſame manner prevent it with all people ſhe is acquainted with. He appears to be a wrongdoer, and therefore has no right to prohibit any body. *Str.* 1214.

Action for linen ſold to the defendant's wife. Upon *non aſſumpſit*, the delivery was proved. And the defendant proved that ſhe had lived in a very lewd manner; one Mr. *Nott* frequently coming to her at her huſband's houſe, and they were locked up together in a bedchamber; and other indecencies paſſed between them. And it was alſo proved, that ſhe ſeveral time went to the houſe of this *Nott*, a gentleman in *Wiltſhire*, who lived within three miles of the gentleman's houſe. It did not appear farther, than that he diſliked her going and ſtaying at Mr. *Nott*'s. But under theſe circumſtances, the husband and wife continued to live together. Afterwards ſhe went away from him, and went to *Marlborough*, where ſhe reſided ſome time; but after the leaving her husband's houſe, it did not appear that ſhe ever ſaw Mr. *Nott*, or lived in a lewd manner. After ſome time, ſhe ſent *Lucas* an attorney to her husband, to deſire that he would receive her again; the husband told him, that if ſhe came again, ſhe ſhould never ſit at the upper end of his table, nor have the government of the children; but ſhould live in a garret. Then *Lucas* propoſed to him, to make her an allowance, and propoſed about 80*l.* or 100*l.* a year, he being worth about 5 or 600*l.* a year. But that was not complied with; and afterwards ſhe came to *London*, and bought the linen to the amount of 35*l.* By *Raymond* Chief Juſtice: If a woman elopes from her husband, though ſhe does not go away with an adulterer, or in an adulterous manner; the tradeſman truſts her at his peril, and the husband is not bound. And this hath been adjudged in two or three caſes. Indeed if he refuſe to receive her again, from that time it may be an anſwer to the elopement. In this caſe he doth not abſolutely refuſe to receive her again; but that ſhe ſhould neither ſit at his table, nor have the government of the children; but ſhould be kept in a garret; and ſhe deſerved no better uſage. And the plaintiff was nonſuit. *Str.* 875.

By ſtat. 13 *Ed.* 1. *ſt.* 1. *c.* 34. *If a wife willingly leave her huſband; and go away and continue with her adulterer, ſhe ſhall be barred for ever of action to demand her dower that ſhe ought to have of her huſband's lands, if ſhe be convicted thereof; except that her huſband willingly, and without coercion of the church, reconcile her, and ſuffer her to dwell with him, in which caſe, ſhe ſhall be reſtored to her action.*

Willingly

Willingly leave her husband, and go away and continue] Albeit the words of this branch be in the conjunctive, yet if the woman be taken away not willingly, but againſt her will, and afterwards conſent, and remain with the adulterer without being reconciled, ſhe ſhall loſe her dower; for the cauſe of the bar of her dower is not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower. 2 *Inſt.* 435.

And continue with her advowterer] Albeit ſhe do not continually remain in avowtry with the adulterer, yet if ſhe be with him, and commit adultery, it is a tarrying within this ſtatute. 2 *Inſt.* 435.

And if ſhe once remain with the adulterer in avowtry, and afterwards he keepeth her againſt her will; or if the avowterer turn her away, yet ſhe ſhall be ſaid to continue with the advowterer within this ſtatute. 2 *Inſt.* 435.

To demand her dower] In this caſe of elopement, and remaining with the adulterer, the wife could not be barred of her dowry by the Common law, although a divorce were ſued or had for the ſame adultery: but by a divorce *a vinculo* in the life-time of her husband, ſhe loſeth her dower by the Common law. 1 *Inſt.* 33.

Thomas Hyat prayed a prohibition to the Conſiſtory court of *London*, for that he was ſued there by his wife to be ſeparated from him *propter ſævitiam*; and ſentence was there given againſt him, that his wife ſhould live from him, and that he ſhould allow her 5*s.* 6*d.* weekly, altho' the husband offered reconciliation, and deſired cohabitation, and proffered caution to uſe her fitly. But it was denied by the court to grant a prohibition; becauſe the court of the ordinary is the proper court for allowance of alimony, and may take order for ſeparation or divorce, if ſhe be cruelly uſed. *Cro. Jac* 364.

Action for meat and other things provided for the defendant's wife. The defendant proved ſhe went away from him with an adulterer. *Raymond* Ch. Juſtice held, that the husband ſhould not be charged for neceſſaries for her, though the plaintiff who provided for her had no notice; and he ſaid, Chief Juſtice *Holt* always ruled it ſo. *Str.* 647.

In an action againſt the husband for a laced head ſold to the wife, it was proved, that the wife lived from her husband in adultery, and that ſhe told the plaintiff ſhe had a husband, but that ſignified nothing, for ſhe would pay him herſelf. *Raymond* Chief Juſtice held the defendant not chargeable, and ſaid he ſhould have ruled it ſo if there had been no actual notice, which only ſtrengthned the caſe. *Str.* 706.

Ely. Its biſhop and his ſteward to be juſtices of peace, as uſual, 27 *H.* 8. *c.* 24. *ſect.* 20.

Emanſores, Thoſe who go out of the monaſtry. *Transfugæ, & emanſores, a clauſtro effrænes, vagi & ſarabaitæ.* Pet. Bleſenſis Ep. 11. 142.

Emballadors. See **Amballadors.**

Emblements, (from the Fr. *Emblavence de bled, i. e.* corn ſprung, or put up above ground) Signify ſtrictly the profits of land ſown: but the word is ſometime taken more largely for any profits that ariſe and grow naturally from the ground, as graſs, fruit, hemp, flax, *&c. Cowell, edit.* 1727. If tenant for life ſow the land, and afterwards die, the executor of the tenant for life ſhall have the *emblements.* and not he in reverſion: but if tenant for years ſow the land, and before he hath reaped, his term expires, there the leſſor, or he in reverſion, ſhall have the *emblements.* See *Co. lib.* 11. *fol.* 51. And although it is commonly held, that if a man leaſes land at will, and after the leſſee ſows the land, and then the will is determined, that the leſſee ſhall have the *emblements*; yet if the leſſee himſelf determines the will before the ſeverence of the corn, he ſhall not have the *emblements.* See *Co. lib.* 5. *fol.* 116.

If *leſſor at will* be *outlawed* in a perſonal action, the King ſhall have the profits after, but the leſſee ſhall have the emblements; but if leſſee is *outlawed* in a perſonal action, the King ſhall have the emblements. 5 *Rep.* 116. *Hill.* 44 *Eliz. B. R. Oland's* caſe.

A man deviſed land, which was ſowed, *for life*, the *remainder in fee*, and the deviſor died, and the *deviſee for life alſo died before the ſeverance*; and it was adjudged, that the executor of the tenant for life ſhall not have that, but he in remainder. *Win.* 51. cited to be ſo adjudged 18 *Eliz. Allen's* caſe.

A. gives *bond that B. ſhall enjoy a leaſe of Black-Acre immediately after his death*; the corn on the death of *A.* belongs to *A.*'s executors. 4 *Le.* 1. *pl.* 1. *Hill.* 20 *Eliz. Lauton's* caſe.

A. lets land at will to *B.* and afterwards *B. agreed to ſurrender* the land, and his intereſt to *A. A.* entred, and let it to defendant, who took the corn. The queſtion was, If this was a ſurrender, (I agree to ſurrender my land) if it imports an act to be done *in futuro*, or in the preſent time? Judgment *pro quer'*. *Cro. E.* 156. *pl.* 39. *Mich.* 31 & 32 *Eliz. B. R. Sweeper* v. *Randall.*

A. and *B.* are *joint-tenants*; *A.* by conſent of *B. occupies the land alone*, and takes the profits to his own uſe. *A.* by this is tenant at will to *B.* and if *A.* dies, the emblements ſhall go to the adminiſtrator of *A.* But if *B.* had only ſaid to *A. I will not occupy it*, this would be no aſſent that *A.* ſhould have all, nor would it give any thing to *A. Cro. E.* 314. *pl.* 7. *Hill.* 36 *Eliz. B. R. Geanes* v. *Portman.*

If a *leaſe* be made *for ſeven years upon a condition on the part of the leſſee, at the end of the ſeven years to be performed, to have it for life*, the *leſſee the laſt year ſows the land, and performs not the condition*, it was ſaid, that he ſhall have the emblements; but *Popham* and *Fenner* denied it; and judgment was given for the defendant. *Cro. E.* 461. (*bis*) *pl.* 10. *Paſch.* 38 *Eliz. B. R.* in the caſe of *Oland* v. *Burdwick.*

A man *ſeiſed for life, or in fee, or tail in his wife's right or his own*, and ſows it with corn, or any manner of grain, and dies before harveſt, it ſhall go to the executor of the huſband, and not to the wife or heir that ſhall have the land; but *graſs ready to cut, apples, pears, &c. upon the trees*, ſhall go to the wife or heir. *Went. Off. Ex.* 59.

If land ſow'd with corn, ſaffron, hemp, *&c.* or planted with hops, or having graſs ready to be cut, be *ſold or conveyed*, it ſhall all go to the *purchaſer of the land, unleſs excepted*, tho' never ſo near reaping or cutting, or gathering. *Went. Off. Ex.* 59.

Roots of carrots, parſnips, turnips, ſkirrets, &c. ſown by him that had the inheritance of the garden or land, it ſeems, ſhall go to the heir, and not to the executors; for the profitable part is the root which is hidden *within the ground, and cannot be come at without breaking the ſoil*, which the executors cannot lawfully do: but as for *melons* which are above ground, the executors may take them; yet as for artichokes, though the fruit be above the ground, yet it ſeems they have not ſuch yearly ſetting or manurance as ſhould ſever them in intereſt from the ſoil, therefore they ſhall go with it to the heir. *Went. Off. Ex.* 63.

Albeit the *leſſor determines his will before the corn,* &c. *be ripe*, yet becauſe the ſtate of the leſſee is uncertain, and therefore leſt the ground ſhould be unmanured, which ſhould be hurtful to the commonwealth, he ſhall reap the corn which he ſowed in peace. *Litt. S.* 68. and *Co. Litt.* 55. *a. b.*

A man *after judgment given againſt him*, ſowed the land, and afterwards brought a writ of error to reverſe the ſaid judgment; but it was affirmed; he ſhall not take the emblements. Adjudged *per. tot. cur.* 2 *Bulſt.* 213. *Paſch.* 12 *Jac. Wicks* v. *Jordan.*

If A. ſeiſed of land ſows it with corn, and then *conveys it to B. for life, remainder to C. for life*, and *B. dies before the corn is reaped*, now *C.* ſhall have it, and not the executors of *B.* though his eſtate was uncertain. Agreed *per. Cur. Hob.* 132. *pl.* 174. *Trin.* 13 *Jac.* in caſe of *Grantham* v. *Hawley.*

The *leſſor covenanted with the leſſee, his executors,* &c. *that he ſhould carry away to his own uſe ſuch corn as ſhall be growing on the land at the end of the term*; afterwards he *conveyed the reverſion* to the plaintiff, and the *executors of the leſſee ſowed the land, and ſold the corn growing on it at the end of the term* to the defendant: it was objected, that

the

the leſſor had never any property in this corn, and therefore could not grant it away; but adjudged that the very right was paſſed when it ſhould happen; for though the leſſor had not any actual property in the corn, yet he had a right *in poſſe*, becauſe of the lands out of which it proceeds, and the words in the leaſe are ſufficient to paſs the property, as ſoon as the corn is growing on the land. *Nelſ. Abr.* 702. *pl.* 9. cites *Hob.* 132. [*pl.* 174. *Trin.* 13 *Jac.*] *Grantham* v. *Hawley.*

A man was *ſeiſed* of land *in fee, and ſowed the land*, and deviſed that to *J. S.* and before ſeverance he died; and whether the deviſee ſhall have the corn, or the executor of the deviſor, was the queſtion. And by *Hobart*, *Winch*, and *Hutton*, the deviſee ſhall have that, and not the executor of the deviſor. *Win.* 51. *Mich.* 20 *Jac. C. B. Spencer's* caſe.

If a man *deviſe land, and after ſows* it and dies, in this caſe the deviſee ſhall have the corn, and not the executor of the deviſor. *Winch.* J. ſaid it had been adjudged. *Win.* 52. *Mich.* 20 *Jac. C. B.* in *Spencer's* caſe.

Hops growing out of the old roots ſhall go to the executors or adminiſtrator, becauſe they grow by the manurance and induſtry of the owner, and ſo are *like emblements. Cro. C.* 515. *pl.* 13. *Mich.* 14 *Car. B. R. Latham* v. *Atwood.*

If *ſheriff on a fieri facias* ſells corn growing, the vendee cannot juſtify an *entry on the land* to reap it, till ſuch time as the corn is ripe. *Per Twiſden* J. *Vent.* 222. *Trin.* 24 *Car.* 2. *B. R.* in caſe of *Perrot* v. *Bridges.*

Tenant at ſufferance ſows the land, and afterwards *judgment is recovered againſt him, and the corn ſeized thereupon, and ſold* by the ſheriff (ſtanding,) then the treſpaſs lies for the landlord againſt the ſheriff and his officers. *L. P. R.* 612. cites 32 *Car.* 2. Sir *John Banks's* caſe.

Baron and feme jointenants for life, baron ſows the land, and dies before ſeverance; the court propoſed to each to take a moiety. *Per* Lord *Somers.* 2 *Vern.* 322. *pl.* 311. *Mich.* 1694. *Rowney's* caſe.

But where ſtrangers are *jointenants*, the emblements will go to the ſurvivor; it was admitted, *Arg.* 2 *Vern.* 323. *pl.* 311. *Mich.* 1694. *Rowney's* caſe.

A. tenant for life, remainder *to B. his wife for life* for jointure, *remainder to A. in fee. A. deviſes his remainder in fee to B.* and *died in May, leaving hops in the ground*, which were *cultivated at great charge in February, and gathered in Auguſt. Quære*, Whether they belonged to *B.* the wife, or to the executor of *A.?* The Maſter of the Rolls at firſt inclined to think the hops belonged to *B.* in right of her rent and emblements; but in regard of caſes cited as adjudged, that in caſe of dower ſhe ſhall have the emblements, becauſe dower is conſidered as an excreſcence or continuance of the eſtate of the husband, but a jointure is not, he afterwards declared, that the hops and corn growing at the teſtator's death were emblements, and *ought to be accounted for as part of the teſtator's eſtate. MS. Rep. Trin.* 1734. *Canc. Fiſher* v. *Forbes.*

Embleys de gentz, This word occurs in *Rot. Parl.* 21 *Ed.* 3. *n.* 62. where divers murders, *emblers de gentz*, robberies, *&c.* It comes from the French *embler*, to ſteal, and ſeems to ſignify ſtealing from or robbing the people.

Embracer or **Embraſour**, Is he, who, when a matter is in trial between party and party, comes to the bar with one of the parties (having received ſome reward ſo to do) and ſpeaks in the caſe, or privily labours the jury, or ſtands there to ſurvey or overlook them, thereby to put them in fear and doubt of the matter; the penalty whereof is 20 *l.* and impriſonment at the juſtices diſcretion. But perſons learned in the law may ſpeak in the caſe for their clients. Stat. 19 *Hen.* 7. *c.* 13. *Cowell, edit.* 1727.

Embracery, Is the act or offence of *embraceors*. To inſtruct the jury, or promiſe reward for or before appearance, is *embracery. Noy's Rep. fol.* 102.

Embracery is defined in general to be any attempt by either party, or a ſtranger, to corrupt or influence a jury, or to incline them to favour one ſide by gifts or promiſes, threats or perſuaſions, or by inſtructing them in the cauſe, or any other way, except by opening and enforcing the evidence by counſel at the trial, whether the jurors give any verdict or not, and whether the verdict be true or falſe. *Co Lit.* 369. *Moor* 815. 2 *Hawk. P. C.* 259.

Alſo it is an offence of this kind for a ſtranger barely to labour a juror to appear and act according to his conſcience, or for any perſon to labour a juror not to appear; but 'tis no offence for the party himſelf, or for any perſon, who can juſtify an act of maintenance, to labour a juror to appear and give a verdict according to his conſcience. 2 *Hawk. P. C.* 259, 260.

Alſo it is an offence to give money to a juror after the verdict, unleſs it be openly and fairly given to all alike, in conſideration of the expences of their journey and trouble of their attendance. 2 *Hawk. P. C.* 259, 260.

So the bare giving of money to another, to be diſtributed among the jurors, ſavours of embracery, whether any of it be diſtributed or not; and it is an offence of the like kind for a perſon, by indirect means, to procure himſelf, or another, to be ſworn of the *tales*, in order to ſerve one ſide; alſo it is as criminal in a juror, as in another perſon, to endeavour to prevail on his companions to give a verdict on one ſide, by any other arguments beſides the evidence produced, and the general obligations of conſcience. 2 *Hawk. P. C.* 260.

The offence of embracery is puniſhable at Common law by indictment or action; and if it were not known before the trial, it will be a good cauſe to ſet aſide the verdict. 2 *Hawk. P. C.* 260.

Abuſes by others, in relation to juries, are puniſhable by fine and impriſonment; and if a man aſſault or threaten a juror for having given a verdict againſt him, he may be indicted as a diſturber of the adminiſtration of juſtice, and one who is guilty of a contempt of the King's court. 1 *Hawk. P. C.* 58, 59.

Embre or **Embring-days**, (from *embers*, *cineres*,) Either becauſe our anceſtors, when they faſted, ſat in aſhes, or ſtrewed them on their heads. Stat. 2 & 3 *Ed.* 6. *c.* 19. They are thoſe the ancient fathers called *quatuor tempora*, and of great antiquity in the church, being obſerved on the *Wedneſday*, *Friday*, and *Saturday* next after *Quadrageſima Sunday*, *Whit-Sunday*, *Holy-Rood-day* in *September*, and Saint *Lucy's day* in *December*. Our *Saxons* called this faſt *imbren. Et jejunia quatuor tempora (quæ* imbren *vocant)* & cætera omnia, *prout S. Gregorius genti impoſuit Anglorum, conſerventur.* Spelm. de Concil. t. 1. f. 518. They are mentioned by *Briton*, *cap.* 53. and others. *Co.* in his *Inſt. part.* 3. *fol.* 203. ſaith, Theſe *Embring-days* are the week next before *Quadrageſima*; which muſt needs be a great miſtake in the printer, for it is not poſſible that learned men could be ignorant in any thing ſo well known. *Cowell, edit.* 1727.

Embroidery. Deceits in embroidery prohibited, 2 *Hen.* 6. *c.* 9. Foreign embroidery prohibited, 13 & 14 *Car.* 2. *c.* 13. By the ſtat. 22 *Geo.* 2. *c.* 36. No foreign *embroidery*, or gold or ſilver brocade, ſhall be imported, upon pain of being forfeited and burnt, and penalty of 100 *l.* for each piece. No perſon ſhall ſell or expoſe to ſail any foreign *embroidery*, gold or ſilver thread, lace, fringe, brocade, or make up the ſame into any garment, upon pain of having it forfeited and burnt, and penalty of 100 *l.* All ſuch *embroidery*, *&c.* found, may be ſeized and burnt, and the mercer, *&c.* in whoſe cuſtody it was found, ſhall forfeit 100 *l.*

Emendals. *Emenda*, Is an old word ſtill uſed in the accounts of the *Inner Temple*, where ſo much in *emendals* at the foot of an account, ſignifies ſo much in bank in the ſtock of the houſe for the ſupply of all emergent occaſions: *Spelman* ſays it is that, *Quod tribuitur in reſtaurationem damni.*

Emendare, *Emendam ſolvere*, To make *amends* or ſatisfaction for any crime or treſpaſs committed.——*Domino Regi graviter emendare debent.* Legis Ed. Confeſſ. cap. 35. Hence a capital crime, not to be attoned by *fine*, or pecuniary compoſiton, was ſaid to be *inemendabile.* Leges *Canuti*, *cap.* 2.

Emendatio, The power of *amending* and correcting abuſes, according to ſtated rules and meaſures. As *emendatio panni*, the power of *alnage*, *aulnage*, *ulnage* or looking to the aſſiſe of cloth, that it be of the juſt ell or due

due measure. *Emendatio panis & cervisiæ*, the assising of bread and beer, or the power of supervising and correcting the weights and measures of them; a privilege granted by the King to lords of manors, which gave occasion to the present office of *ale-taster*, appointed in every court-leet, and sworn to look to the assise of bread, ale, or beer, within the precincts of that lordship.——*Ad nos spectat* emendatio *panni, panis & cervisiæ, & quicquid Regis est excepto murdredo & latrocinio probato.*——Paroch. Antiq. pag. 196.

Emeralds, Exempt from duties, 6 *Geo.* 2. *c.* 7.

Emissarius, A steed, a stallion. *De* emissario, *cui insederat, cecidit.* Matt. West. sub. anno 1014. —— *Ab ipso vulneratus in brachio de suo dejectus est* emissario. *Ib. sub anno* 1079.

Empanel, *Impanellare, vel ponere in assisis, & juratis*, (from the French *panne*, i. e. *pellis*, or of *paneau*, which denotes as much as *pane* with us, as a *pane* of glass, or of a window,) Signifieth the writing and entring the names of a jury into a parchment schedule, or roll of paper, by the sheriff, which he hath summoned to appear for the performance of such publick service as juries are employed in. *Cowell.* See Impanel.

Emparlance, *(Licentia interloquendi)* Cometh from the French *parler*, to talk, and in the Common law signifieth a desire or petition in court, of a day to pause what is best to do. The Civilians call it *petitionem induciarum.* And *Kitch. fol.* 200. interprets it in these words, If he *imparl*, or pray continuance; when praying continuance is spoken *interpretative.* And *fol.* 201. he mentions *emparlance general* and *emparlance special*; *emparlance general* seemeth to be that which is made only in one word, and in general terms. *Emparlance special*, where the party requires a day to deliberate, adding also these words, *Salvis omnibus advantagiis tam ad jurisdictionem curiæ quam ad breve & narrationem*,——or such like. *Britton, cap.* 53. useth it for the conference of a jury upon the cause committed to them. And an *emparlance* or continuance is thus entred, *Et modo ad hunc diem, scilicet diem Veneris, &c. isto eodem termino usque ad quem diem prædictus A. habuit licentiam interloquendi, &c.* See Imparlance.

Emperor, Is an ancient title of the Kings of *England.* This appears by a charter of King *Edgar*, viz. *Ego Edgarus Anglorum Basileus, omniumque Regum insularum oceani quæ Britanniam circumjacent, &c.* Imperator & *Dominus.*

Empetit. See Impetit.

Empowement. See Impowement.

Enbrever, *(Fr)* To write down briefly. *Brit.* 56.

Encænia, *i. e.* The dedication of churches, which was always on a *Sunday. Encæniare, i. e.* To begin a thing, or to put on a new thing, *viz.* Encæniavit *in Wintoniæ urbe arduam turrim.* Du Fresne.

Encaustum, *i. e.* Ink. *Quæ propter* encausti & *chartæ vitium aboleri incipiebat.* Fleta, lib. 2 c. 27. par 5.

Encheson, A *French* word much used in our law books, as in the statute 53 *Ed.* 3. *cap.* 3. and signifies as much as the occasion, cause or reason for which any thing is done. So it is used by *Staundf. lib.* 1. *cap.* 12. in his description of a *dredland. Skene de verb. signif.* verbo *Encheson*, says, That *Edward*, the first King of *England*, *Westm.* 1. *c.* 6. statutes and ordains, That no man shall be amerced, without reasonable *encheson.*

Encroachment, or **Accroachment**, (from the *French* word *accrocher*, to pull or draw to) signifies an unlawful gaining upon the rights or possessions of another: For example, If two mens grounds lying together, the one presseth too far upon the other; or if a tenant owe two shillings rent-service to the lord, and the lord taketh three. See *Co.* 9 *Rep. f.* 33. *Bucknal's* case. So it is said, That *Hugh Spencer* the father, and *Hugh Spencer* the son, encroached unto them the Royal power and authority. Stat. 1 *Ed.* 3. *in proœm. Cowell, edit.* 1727.

Endeavour. Where one who has the use of his reason endeavours to commit felony, *&c.* he shall be punished by our laws, but not to that degree as if he had actually committed it. As if a man assault another on the highway, in order to a robbery, but takes nothing from him, this is not punished as a felony, because the felony is not accomplished; though as a misdemeanor, it is liable to fine and imprisonment. 3 *Inst.* 68, 69, 161. 11 *Rep.* 98. But in this case the offender shall be transported, by stat. 7 *Geo.* 2. *c.* 21.

Enemy. *(Inimicus,)* Is poperly an alien or foreigner, who in a public capacity, and in an hostile manner, invades any kingdom or country; and whether such persons come hither by themselves, or in company with *English* traitors, they cannot be punished as traitors, but shall be dealt with by martial law. *H. P. C.* 10, 15. 1 *Hawk.* 35. But the subjects of a foreign Prince coming into *England*, and living under the protection of the King, if they take up arms, &c. against the government, they may be punished as traitors, not as alien enemies. 1 *Hawk. ib.* If a prisoner be rescued by enemies, the goaler is not guilty of an escape; as he would have been if subjects had made the rescue, when he might have a legal remedy against them. 2 *Hawk.* 130. See Treason.

Endictment. See Indictment.

Endowment, *(Dotatio,)* Signifieth the giving or assigning of dower to a woman; for which see more in Dower. But it is sometimes by a metaphor used for the setting or severing of a sufficient portion for a vicar towards his perpetual maintenance, when the benefice is appropriated; and so it is used in the statutes, 15 *Rich.* 2. *c.* 6. and 4. *Hen.* 4. *c.* 12. See Appropriation.

Endowment de la plus belle part, Is where a man dying seised of some lands holden in knight-service, and other some in socage, the widow is assigned her dower rather in the socage lands than those holden in knight-service, as being *la plus belle part*, the fairer part; of which read *Littleton* at large, *lib.* 1. *cap.* 5.

Energumeni, *i. e.* Demoniacks, who despising the catholick doctrine, where seduced by the illusions of the Devil. *Concil Carthag.* 4. *c.* 91.

Enfant. See Infant.

Enfranchise, Is to make free, to incorporate a man into a society or body politick, or to make one a *denizen.*

Enfranchisement, (from the *French* word *franchise*, *libertas*,) Signifies the incorporating of a man into any society or body politick: For example, He that by charter is made denizen of *England*, is said to be *enfranchised*; and so is he that is made a citizen of *London*, or other city, or burgess of any town corporate, because he is made partaker of those liberties that appertain to the corporation, whereinto he is *enfranchised:* So a villain is *enfranchised*, when he is made free by his lord, and made capable of the benefits belonging to freemen. And when a man is thus *enfranchised* into a city or borough, he hath a freehold in his freedom for his life; wherefore, whatever shall be the cause of his *disfranchisement*, ought to be a fact, and not only an endeavouring or enterprizing. What shall be sufficient cause to *disfranchise* a freeman, and what not; see in *Co. lib.* 11. *Rep. f.* 91. *Bagg's* case.

Englecery, Englechery, Englechire, or **Englesherv**, in Latin *engleceria*, Is an old word, signifying nothing more than to be an *Englishman.* For example; If a man were privily slain or murdered, he was in old time accounted *francigena*, which word comprehended every alien, until *englecery* were proved, that is, until it was made manifest that he was an *Englishman. Bract. lib.* 3. *tract.* 2. *cap.* 15. *fol.* 134. The original whereof was this, *Canutus* the *Dane* being King of *England*, having settled his estate in peace, at the request of his lords, discharged the land of his armies, upon condition, that whoever should kill an alien, should be liable to justice; and if the manslayer escaped the town where the man was slain should forfeit sixty-six marks to the King, and if the town was not able, then the hundred should pay: And further, that every man murdered should be accounted *francigena*, except *englecery* were proved: And the manner of proving him to be an *Englishman* was before the coroner, by two men or witnesses who knew the father, and by two women who knew the mother; and this was called *englecerie.* See *Horn's Mirrour of Just. lib.* 1. *cap. Of the office of coroners*, and *Fleta, lib.* 2. *cap.* 30. This *englecery*, for the abuses and troubles that were afterwards perceived to grow by it, was utterly taken away by 14 *Ed.* 3. *c.* 4. See *Co. lib.* 7. *fo.* 16. *Calvin's* case.

English. All pleas to be entred in Latin, and debated in Engliſh, 36 *Ed.* 3. *c.* 15.

All pleas, records, bonds and proceedings in courts of juſtice in *England* or *Wales*, or in the Exchequer in *Scotland*, ſhall be in *Engliſh*, and writ in words at length, and in a commmon hand, 4 *Geo.* 2. *c.* 26. *ſ.* 1.

Except known abbreviations and technical words, 6 *Geo.* 2. *c.* 14. *ſ.* 5.

Penalty for writing otherwiſe, 4 *Geo.* 2. *c.* 26. *ſ.* 1. 6 *Geo.* 2. *c.* 14. *ſ.* 4.

Exceptions as to proceedings in the Admiralty certified beyond ſea, 4 *Geo.* 2. *c.* 26. *ſ.* 3. and proceedings in the court of receipt of the Exchequer in *Scotland*, 6 *Geo.* 2. *c.* 6.

Miſtranſlations, variances, and other defects in form, amendable, 4 *Geo.* 2. *c.* 26. *ſ.* 2.

And helped by the ſtatutes of jeofails, 4 *Geo.* 2. *c.* 26. *ſ.* 4.

Engliſhmen, The names of, to be certified into the Chancery who are abroad in *Holland* and *Flanders*, *&c.* and ſhall pay ſuch impoſitions as aliens do. Stat. 14 & 15 *Hen.* 8. *c.* 4.

Engravers, Who ſhall invent, deſign and engrave prints, to have the ſole right of printing them for fourteen years, and they ſhall be engraved with the names of the proprietors; and others copying, and ſelling ſuch prints, tho' by varying, *&c.* without their conſent, ſhall forfeit 5*l.* for every print, and alſo the plates and ſheets, *&c.* Stat. 8 *Geo.* 2. *c.* 13.

Enhance, To raiſe the price of goods or merchandize. See **Foreſtalling.**

Enheritance. See **Inheritance.**

Enitia pars. See **Eſnecy.**

Enpleet was anciently uſed for implead ——May *enpleet*, and be *enpleeted* in all courts. *Mon. Angl. vol.* 2. *f.* 412. *b.*

Enquelt. See **Inquelt.**

Enterver. See **Juſervire.**

Enſigne, French, *Saigne*, blooded, let blood.—— *Si vicarius* enſignè *fuerit, duas noctes ſolummodo habebit quietas, communionem non omittat.* Stat. Eccleſiæ Litchfield. in Mon. Angl. tom. p. 244. The word was likewiſe uſed ſubſtantively for bleeding, or blood-letting, as——*Quod ſolum quatuor vicarii, videlicet duo ex utraque parte chori, quolibet menſe ſolum* enſignè *recipient in feſtis tam trium quam novem lectionum.*——Ib.

Entail, *Feodum talliatum*, (from the French *entail*, *i. e. ineiſus*,) In the Common law is uſed as a ſubſtantive abſtract, ſignifying *fee-tail*, or *fee intailed*: *Littleton*, in the ſecond chapter of his book, deriveth *fee-tail*, from the verb *talliare*, (an *obſolete* and *ſuperannuated* word, I am ſure, if any,) whereas in truth it muſt come from the French *taillie*, *ſectura*, or *tailler*, *ſcindere*; and the reaſon is manifeſt, becauſe *fee-tail* in the law is nothing but fee abridged, ſcanted or curtailed, or limitted, or tied to certain conditions. *Taille* in *Frante* is metaphorically taken for a tribute or ſubſidy. *Cowell, edit.* 1727. *Lupanus de magiſtratibus Francorum, lib.* 3. *cap. Talea.* See **Eſtate, Fee, Tail.**

Entendment. See **Intendment.**

Enterpleder, (Fr. *Enterplaider*, *Interplacitare*,) Signifies in the common law as much as *cognitio prejudicialis* in the Civil, that is, the diſcuſſing of a point incidentally falling out before the principal cauſe can be determined: for example, two ſeveral perſons being found heirs to land, by two ſeveral offices in the county, the King is brought in doubt to which of them livery ought to be made, and therefore firſt they muſt *interplede*, that is, formally try between themſelves who is the right heir. *Staundf. Prærog. cap.* 12. and 11 *Bro.* tit. *Enterpleder*, and *Co. lib.* 7. *fol* 45.

The cauſe of enterpleader is, for that the defendant ſhall not be charged to two ſeverally where no default is in him. 39 *Hen.* 6. 36. *b.* If a ſtatute be acknowledged to a dean and chapter, and delivered to *B.* till certain conditions performed, though this *B.* is one of the chapter, yet if the conuſor brings detinue againſt him, he may ſay that it was delivered upon condition, and garniſhment ſhall be granted againſt the dean and chapter. 13 *Hen.* 4. 8. See **Garniſhment.**

In detinue of goods, the defendant ſaid, that they were delivered to him upon condition, that if *A.* performed certain conditions to the plaintiff, that they ſhould be delivered to *A.* and otherwiſe to the plaintiff, and prayed garniſhment to *A.* and had it, notwithſtanding that *A.* be a ſtranger, and had no writ pending thereof. *Br. Garniſh. pl.* 38. cites 14 *Ed.* 4. 2.

Detinue *of a writing, the defendant alleged delivery to him upon condition*, and prayed garniſhment, and had it, and the *garniſhee confeſſed the condition, but ſaid, that accord was made between them that he ſhould make eſtate of the manor of D. for life, the remainder to the plaintiff, and that the plaintiff ſhould be there, and then the deed ſhould be delivered to him, and* ſaid, *that he was always ready, and the plaintiff did not come, and prayed livery of the writing*, and becauſe it was *accorded in another matter than the condition pleaded* by the defendant, and *he did not ſhew writing of this accord*; and alſo he might have made the eſtate the remainder to the plaintiff, though the plaintiff did not come, therefore the plaintiff recovered by award; for he *did not ſay in the negative, that if the plaintiff did not come that no eſtate ſhould be made.* Br. Garniſhe, pl. 12. *cites* 40 Ed. 3. 11.

In detinue of *an obligation*, the *defendant ſaid, that it was delivered by the plaintiff and T. B. upon certain conditions, and he did not know if the conditions were performed or not, and prayed garniſhment againſt T. B.* who came upon the *ſcire facias*, and *ſaid, that it appeared by the obligation that he and three others were bound who are not warned*; judgment if he ſhall anſwer; *& non allocatur*; for *it may be that the garniſhee only ſealed and delivered the deed, and the other three not*, and therefore he was awarded to anſwer. *Br. Garniſhe, pl.* 16. cites 49 *Ed.* 3. 13.

In detinue of charters the *defendant prayed garniſhment againſt J. N.* and had it, and the *garniſhee* came, and *ſaid, that J. P. gave the land to the feme, now plaintiff, and her firſt baron, and to the heirs of the baron, and the baron died without iſſue, and the garniſhee is heir to him, and the donor delivered the evidences to the baron in ſalvation of his inheritance, after whoſe death his feme got the evidences, and took another baron, now plaintiff, who aliened in fee, and delivered the evidences to the defendant, and the garniſhee as couſin and heir of the firſt baron*, and ſhewed how couſin, entered for alienation to his diſinheritance, and ſo it belonged to him to have the evidences, *&c.* And *per Laken*, the feme ſhall have the charters for term of her life; but *Littleton contra*; and that by the alienation they belonged to the heir; *Laken* ſaid, No, Sir, for we cannot have *cui in vita* after the death of the ſecond baron; but *Littleton* ſaid, Yet we may have them during the life of the ſecond baron; *but* by him in this caſe, becauſe the eſtate was made to her and her firſt baron, and to the heirs of the baron without deed, and the ancient charters delivered to the baron alone in ſalvation of his inheritance, the feme can have none of them. *Contra* of the deed of the ſame eſtate, though it had been delivered to the baron alone; for all that touches his eſtate ſhe ſhall have, and no more. *Br. Charters de Terre, pl.* 11. cites 34 *Hen.* 6. 1.

The *garniſhment* iſſued *againſt baron and feme upon ſurmiſe, that both were parties to the bailment*, and the *baron* came, and *prayed judgment of the writ of ſcire facias* brought againſt him and his feme, *&c.* yet he was put to anſwer, but with a ſaving to them. *Thel. Dig.* 200. *lib.* 13. *cap.* 12. *ſ.* 8. cites *Mich.* 8 *Ed.* 4. 16.

For more learning on this ſubject, ſee 9 Abr. *tit.* Enterpleader. See **Interpleader.**

Enthera, A cheſt or coffin. *Venerabilis Odo corpus* B. *Wilfridi in editiori (hoc eſt) in majori altari, quod in orientali preſbiterii parte parieti contiguum de impolitis lapidibus & cæmento extructum erat, digniter collocaverit.* Eadmerus de æde ſacra Cantuarienſi.

Entierty or **Intierty,** A kind of *French* word, ſignifying *entireneſs*; it is contradiſtinguiſhed in our books from moiety, and denoting the whole. *Cowell, edit.* 1727.

Entire tenancy, Is contrary to *ſeveral tenancy*, ſignifying a ſole poſſeſſion in one man, whereas the other ſignifieth joint or common in more. See *Bro. Several Tenancy*,

Tenancy, and the *New Book of entries*, verbo *Entire Tenancy*.

Entruſion. See **Intruſion.**

Entry, (Fr. *Entrée*, *i. e. Introitus*, *Ingreſſus*,) Properly ſignifies the taking poſſeſſion of lands or tenements. See *Plowden*, *Aſſiſe of freſh Force in* London, *fol.* 93. *b.* It is alſo uſed for a writ of poſſeſſion; for which ſee **Ingreſſus**: and read *Weſt*, *p.* 2. *Symbol.* tit. *Recoveries*, *ſect.* 2, 3. who there ſhews for what it lies, and for what not. Of this *Briton*, in his 114th chapter, writes to this effect: The writs of entry ſavour much of the right of property; as for example: ſome are to recover cuſtoms and ſervices, in which are contained theſe two words (*ſolet & debet*,) as the writs *Quo jure*, *Rationabilibus diviſis*, *Rationabili eſſoverio*, with ſuch like. And in this plea of *entry* there are three degrees: The firſt is, where a man demands lands or tenements of his own ſeiſin after the term expired: The ſecond is, where one demands lands or tenements, let by another, after the term expired: The third, where one demands lands or tenements of that tenant who had *entry* by one, to whom ſome anceſtor of the plaintiff did let it for a term now expired. According to which degrees the writs are varied. And there is yet a fourth form, which is without degrees, and in caſe of a more remote ſeiſin, whereunto the other three degrees do not extend. The writ in the ſecond degree is called a writ of *Entry in le per*: The third degree a writ of *Entry in le per & cui*: and in the fourth form, without theſe degrees, it is called a writ of *Entry in le poſt*, that is, *after* diſſeiſin, which ſuch a one made to ſuch a one. And if any writ of *entry* be conceived out of the right caſe, ſo that one form be brought for another, it is abatable. In theſe four degrees are comprehended all manner of writs of *entry*, which are without certainty and number. Thus far *Briton*, by whom you may perceive that theſe words, *ſolet & debet*, and theſe other, *in le per*, *in le per & cui*, and *in le poſt*, which we meet with many times in books ſhortly and obſcurely mentioned, ſignify nothing but divers forms of this writ applied to the caſe whereupon it is brought; and each form taking its name from the words contained in the writ. Of this read *Fitz. Nat. Brev. fol.* 193.

This writ of *entry* differs from an *aſſiſe*, becauſe it lies for the moſt part againſt him who entred lawfully, but holds againſt law, whereas an *aſſiſe* lies againſt him who unlawfully diſſeiſed: yet ſometimes a writ of *entry* lies upon an intruſion. *Reg. of Writs*, *fol.* 233. *b.* See the *New Book of Entries*, verbo *Entre Brevis*, *fol.* 254. *col.* 3. There is alſo a writ of *entry* in the nature of an *aſſiſe*. Of this writ in all its degrees, ſee *Fleta*, *lib.* 5. *ca.* 34. *& ſeq.* There are five things which put the writ of *entry* out of the degrees, *viz. Intruſion*, *ſucceſſion*, *diſſeiſin* upon *diſſeiſin*, *judgment*, and *eſcheat*. 1. *Intruſion* is where the diſſeiſor dies ſeiſed, and a ſtranger abates. 2. *Succeſſion* is when the diſſeiſor is a man of religion, and dies, or is depoſed, and his ſucceſſer *enters*. 3. *Diſſeiſin* upon *diſſeiſin* is when the diſſeiſor is diſſeiſed by another. 4. *Judgment* is when one recovers againſt a diſſeiſor. 5. *Eſcheat* is when the diſſeiſor dies without heir, or doth commit felony, whereby he is attainted, by which the lord *enters* as in his eſcheat. In all theſe caſes the diſſeiſee or his heir ſhall not have a writ of *entry* within the degrees of the *per*, but in the *poſt*; becauſe in thoſe caſes they are not in by deſcent, nor by purchaſe. *Cowel*, *edit.* 1727.

An entry is where a man enters perſonally, or another by his order, into any lands, tenements or hereditaments to which he has a title of entry, and takes poſſeſſion of them. *Terms de la Ley*, tit. *Entry*. *Lil. Conv.* 131.

A property gained by entry, is where a man finds a piece of land that no other poſſeſſes, or hath title unto, and he that ſo finds enters; this entry gaineth a property. *Bac. L. Tracts*, *p.* 126.

This law ſeems to be derived from this text, *Terra dedit filiis hominum*, which is to be underſtood of thoſe who will till and manure it, and ſo make it yield fruit. *Ibid.*

But this manner of gaining lands was in the firſt days, and is not now of uſe in *England*; for that by the conqueſt, all the lands of this nation were in the Conqueror's hands, and appropriated unto him; except religious and church lands, and the lands in *Kent*, which by compoſition were left to the former owners, as the *Conqueror* found them; ſo that no man, but the biſhopricks, churches, and the men of *Kent*, can at this day make any greater title than from the conqueſt, to any lands in *England*; and lands poſſeſſed without any ſuch title, are in the *crown*, and not in him that firſt enters, as it is by land left by the ſea; this land belongs to the King, and not to him that has the land next adjoining, which was the ancient ſea-banks. This is to be underſtood of the inheritance of lands, *viz.* that the inheritance cannot be gained by the firſt entry. *Bac. L. Tracts*, *p.* 126.

But an eſtate for another man's life by our law may at this day be gotten by entry: As a man called *A.* having land conveyed unto him for the life of *B.* dieth without making any eſtate of it, there, whoſoever firſt enters into the land after the deceaſe of *A.* getteth the property in the land for the time of the continuance of the eſtate which was granted to *A.* for the life of *B.* which *B.* yet liveth, and therefore the ſaid land cannot revert till *B.* dies. And to the heir of *A.* it cannot go, for that it is not any eſtate of inheritance, but only an eſtate for another man's life; which is not deſcendible to the heir, except he be ſpecially named in the grant, viz. *to him and his heirs*. As for the executors of *A.* they cannot have it, for it is not an eſtate teſtamentary, that it ſhould go to the executors as goods and chattels ſhould; ſo as in truth no man can intitle himſelf unto thoſe lands; and therefore the law preferreth him that firſt enters, and he is called *occupans*, and ſhall hold it during the life of *B.* but muſt pay the rent, perform the conditions, and do no waſte, and he may by deed aſſign it over to whom he pleaſes in his life-time; but if he dies before he aſſign it over, then it ſhall go again to whomſoever firſt entreth and holdeth; and ſo all the life of *B.* ſo often as it ſhall happen. *Ibid.* 126, 127.

Likewiſe, if any man does wrongfully enter into another man's poſſeſſion, and put the right owner of the freehold and inheritance from it; he thereby gets the freehold and inheritance by diſſeiſin, and may hold it againſt all men, but him that hath right, and his heirs; and is called a *diſſeiſor*. *Bac. L. Tracts*, *p.* 127.

Or if any one dies ſeiſed of lands, and before his heir doth enter, one that has no right does enter into the lands, and holds them from the right heir, he is called an *abator*, and is lawful owner againſt all men but the right heir. *Ibid.*

And if ſuch perſon, *abator* or *diſſeiſor* (ſo as the diſſeiſor has quiet poſſeſſion five years next after the *diſſeiſin*) do continue their poſſeſſion, and die ſeiſed, and the land deſcend to his heir, they have gained the right to the poſſeſſion of the land againſt him that hath right, till he recover it by fit action at the Common law. And if it be not ſued for at the Common law within ſix years after the diſſeiſin, or abatement committed, the right owner has loſt his right by that negligence. *Bac. L. Tracts*, *p.* 127.

And if a man has divers children, and the elder, being a baſtard, does enter into the land, and enjoyeth it quietly during his life, and dies thereof ſo ſeiſed, his heirs ſhall hold the land againſt all the lawful children, and their iſſues. *Ibid.*

1. *In what caſes entry is congeable, or lawful; and what ſhall be deemed an entry to reduce an eſtate.*

2. *Of entry for a forfeiture, and for the breach of a condition.*

1. *In what caſes entry is congeable, or lawful; and what ſhall be deemed an entry to reduce an eſtate.*

If the conuſee of a ſtatute ſues an extent, by which the lands of the conuſor are ſeiſed into the hands of the King, the conuſee after a *liberate* is ſued *(but not before)* may enter into the land before the *liberate* executed, for this *liberate* is a ſufficient warrant for his entry. 2 *Danv. Abr.* 785.

After

After an extent upon a ſtatute-merchant, ſtaple or recognizance returned, the conuſee may enter without any delivery by the ſheriff, by force of the *liberate*. 2 *Inſt.* 678. but by 1 *Vent.* 41. in an execution upon a ſtatute-merchant there is no need of a *liberate*, as there is upon a ſtatute-ſtaple, for in caſe of a ſtatute-ſtaple the conuſee can bring no ejectment before the *liberate*.

A *liberate* made to the ſheriff to deliver the land to himſelf is void, and an entry in that caſe is void. 2 *Danv. Abr.* 785.

If the King ſeiſes certain lands, upon which an *ouſter le mayn* is ſued to the eſcheator to deliver this land to the party again, he may after enter into the land before any execution of the writ, becauſe there is a judgment given before, that the hands of the King ſhall be removed. *Ibid.*

Upon an *elegit*, if the ſheriff takes an inquiſition, tho' the ſheriff does not deliver the land to the party plaintiff, yet the plaintiff may enter preſently after the inquiſition taken, before the return to the court, without any *liberate* to him directed. *Ibid.* 786.

If a judgment be reverſed in a writ of error againſt the heir of the recoverer, the demandant may enter upon him without more, though he be in by deſcent, but he cannot upon the tertenant without a *ſcire facias*. 3 *Danv. Abr.* 298, 299.

If a man recovers in a real action, and the tenant dies before execution, yet the demandant may enter upon the heir, becauſe the record binds his title: So though it be of lands in tail. *Ibid.* 299. Otherwiſe in a falſe or feint action. *Co. Litt.* 361. *b.*

So if a man recovers in a real action, though there be two, three or four deſcents before his entry, yet he may enter upon thoſe to whom deſcended, becauſe the recovery binds the blood, and diſproves the title. 3 *Danv. Abr.* 299.

So if after a recovery in a real action, and before execution, a ſtranger enters and dies ſeiſed, yet the recoveror may enter upon his heir. *Ibid.*

If a man recov . in a writ of right of advowſon, and after, at an avo.ance, a ſtranger preſents, yet when the church is void again, the recoverer may preſent. *Ibid.*

If there be a recovery in an ejectment, the plaintiff may enter and execute his judgment, and the aſſiſtance of the ſheriff is only to keep the peace. *Far.* 66, 69.

He that recovers may as well enter after the year as within the year againſt him, upon whom the recovery was had. 3 *Danv. Abr.* 299.

But he cannot enter upon a ſtranger to the recovery after the year. *Ibid.*

He cannot enter after a deſcent caſt. *Ibid.* and *Fitz. Entry Congeable* 35.

In all caſes where the writ demands lands, rent, or other thing in certain, the demandant after judgment may enter, or diſtrain before any ſeiſin delivered to him by the ſheriff. *Co. Litt.* 34. *b.*

But in dower where the writ demands nothing in certain, the demandant, after judgment cannot enter or diſtrain till execution ſued, upon which the ſheriff delivers the third part in certain. *Ibid.*

So where the wife of one tenant in common demands the third part of a moiety, ſhe cannot, after judgment, enter till the ſheriff has delivered her the third part, though it is thereby reduced to no more certainty than it was. *Ibid.*

If one recovers in aſſiſe, or aſſiſe of mort d'anceſtor, he may enter and execute the judgment without being put in ſeiſin by the view of the jury. *Moor* 54. *pl.* 156. But it was ſaid in this caſe, that if he be again diſſeiſed, he ſhall not have a *redisſeiſin* but a *poſt diſſeiſin*. *Ibid.*

An entry ſhall be intended to be a good execution of a recovery without a writ of ſeiſin. *T. Jones* 20.

There is a difference between a feoffment and an entry; for a man may make a feoffment of lands in another county, and make livery within the view, although he might enter peaceably to make livery. *Pollex* 47. But a man cannot make an entry into the lands, within the view, where he may actually enter without fear; for it is one thing to inveſt, and another to deveſt. *Co. Litt.* 252. *a. b.*

If the *diſſeiſee* enters into the land, and continues in it with the diſſeiſor, and manures it with him, claiming nothing of his firſt eſtate, yet this is an entry that will reduce his firſt eſtate. 2 *Danv. Abr.* 790.

And if he enters and takes the profits as leſſee at will of the diſſeiſor, or in any manner, this is an entry, and reduces his eſtate. *Ibid.*

And if he commands a ſtranger to put the cattle of ſuch ſtranger into the land to feed them, this is an entry in law into the land. *Ibid.*

If *A.* leaſes to *B.* for years, the remainder to *C.* in fee, and *A.* comes upon the land to make livery, and *B.* to take it, this ſhall not be ſaid any entry of *B.* to veſt the actual poſſeſſion in him till livery made, for then the remainder would be void, which would be againſt the intention of the parties. *Co. Litt.* 49. *b.*

If an entry is made to a ſpecial purpoſe, ſuch entry ſhall be guided by the intent, and tied up to that ſpecial purpoſe: As if it is agreed between diſſeiſor and diſſeiſee, that the diſſeiſee ſhall releaſe all his right to the deſſeiſor upon the land, and accordingly the diſſeiſee enters into the land, and delivers a releaſe; there this is a good releaſe; and the entry of the diſſeiſee being for this purpoſe, does not avoid the diſſeiſin. *Co. Litt.* 49. *b. Lil. Conv.* 131.

But if the diſſeiſor makes a feoffment to the diſſeiſee and others, there, though the diſſeiſee comes to take the livery, yet when the livery is made, the diſſeiſee is remitted. *Co. Litt.* 49. *b.*

If the diſſeiſee comes upon the land and puts his foot in, but takes no profits, but the diſſeiſor ouſts him, this entry does not ſettle any eſtate in him (at the election of the diſſeiſee, as it ſeems) for the diſſeiſee may have an aſſiſe of the firſt diſſeiſin. 2 *Danv. Abr.* 791.

If I have a houſe and land adjoining to a plot of land in queſtion between me and another, and I ſtand upon one piece of the ſtone wall, which is my own ſoil, and put my hand through a wall made of lime and laths which ſtands upon the land in queſtion, and there deliver a leaſe ſealed to try the title, this is a good entry, though I do not come within the plot in queſtion. *Ibid.*

If a baſtard eigne after his father's death enters, and invites the mulier puiſne to ſee the houſe, pictures, *&c.* or to dine, hunt, hawk or ſport with him, or the like, upon the land accordingly, this is no interruption of the poſſeſſion of the baſtard, becauſe he came by his conſent, ſo that the coming upon the land could be no treſpaſs. *Co. Litt.* 245. *b.* 368. *a.*

But if the *mulier* of his own head comes upon the ground, and cuts down a tree, or digs the ſoil, or takes the profits, theſe are interruptions; for rather than the baſtard ſhall puniſh him in an action of treſpaſs, theſe acts ſhall amount to an entry in law. *Ibid.* 245. *b.*

So if a mulier puts his beaſts into the grounds, or commands a ſtranger to put in his beaſts, theſe acts without words amount to an entry, for acts without words may make an entry, but words without an act, *viz.* entry on the land, *&c.* cannot. *Ibid.* See 3 *Leon.* 144.

If the diſſeiſor requeſt the diſſeiſee to go to the cellar, and ſee the antiquity of, *&c.* this is no entry to abate an aſſiſe brought by the diſſeiſee. *Pl. Com.* 93.

So if the diſſeiſee, ſeeing ſeveral cut wood upon the land, goes upon the land and admoniſhes them at their peril to deſiſt; this is no entry to abate his writ. *Ibid. Bulſt.* 9. 2 *Brownl.* 231, 239.

Such entry as will abate a writ ought to be unto the thing demanded, and with an intent to have the thing demanded. 2 *Bulſt.* 9. 2 *Brownl.* 231, 235.

Where the beaſts of him that had a right ſtrayed of their own accord into the land, and it was held no entry. See *Leon.* 110.

If the office of a keeper of a park is granted to one, who is thereof diſſeiſed, and he brings an aſſiſe, and, pending his aſſiſe, enters into the park, kills a ſtag, and takes a ſhoulder of it for his fee; this is no ſuch entry as to abate his writ, for that his entry was not as an officer *ad cuſtodiend'*, but as a wrong-doer to kill, *&c.* *Bulſt.* 4, 8, 9.

If

If a man has common in *J. S.*'s lands, between 25th of *March* and 29th of *September*, and he brings an aſſiſe for it, and at *Chriſtmas* puts in his beaſts, this is no entry to abate his writ; for it cannot be intended for the ſame common. 2 *Brownl.* 238.

Entry ſhall not be of force to avoid a fine, *&c.* unleſs an action be commenced within a year, *&c.* Stat. 4 *Ann. c.* 16. *ſect.* 16.

2. *Of entry for a forfeiture, and for the breach of a condition.*

If leſſee for life aliens for life, the remainder over, and he in remainder enters after the death of the leſſee, the firſt leſſor may enter on him for the forfeiture; for by agreement to the remainder, he agreed to the whole, and ſo a party. 3 *Danv. Abr.* 227.

If the leſſor may enter on the alienee of his leſſee, or any who is party to the forfeiture. *Ibid.*

So he may enter on the alienee of the alienee, or any that has the land, altho' he be not party to the forfeiture. 3 *Danv. Abr.* 228.

If a leſſee for life gives in tail, the remainder in fee to another, and afterwards he in remainder dies, and afterwards the donee dies without iſſue, the leſſor may enter on the heir of him in remainder; for by his entry he agrees to the diſinheritance made by the alienation. *Ibid.*

If tenant for life gives it in tail, and the donee dies, the leſſor may enter on the donor for the forfeiture. *Ibid.*

Where a tenant for life makes a feoffment in fee, a ſtranger may enter for a forfeiture in the name of the reverſioner, and thereby the eſtate ſhall be in him. *Co. Litt.* 245. *a.*

If a leſſee for life aliens in fee and dies, he in remainder or reverſion may enter after the death of the leſſee. 3 *Danv. Abr.* 228.

If tenant for life of an advowſon in groſs levies a fine *come ceo*, *&c.* of it, and before any claim made by him in reverſion,, the church becomes void; afterwards he in reverſion ſhall not have advantage of the forfeiture as to the preſent preſentation, becauſe before election made by him in reverſion, the eſtate of the leſſee was not defeated nor deſtroyed, which election ought to be by claim; and then it was a chattel veſted in the leſſee before the election made by him in reverſion, which cannot be defeated afterwards by the preſentation of him in reverſion. *Ibid.*

If *A.* being tenant for life, leaſes to *B.* for his life, and *B.* dies, and *A.* re-enters; yet the forfeiture remains, and the firſt leſſor may enter. *Co. Litt.* 252. *a.*

If tenant for life ſuffers a common recovery, and execution is thereupon had, yet he in remainder may enter; for being a forfeiture, the ſuing execution will not prevent him. *Hill.* 32 *Eliz. Co.* 14, 15. adjudged; though it appeared the recovery was ſuffered before the ſtatute of 14 *Eliz.*

If a man leaſes two mills, upon condition that if the leſſee leaſes them, or aſſigns either of them to another, it ſhall be lawful for him to re-enter; if he leaſes one, the leſſor may enter into both, for the condition goes to both. 2 *Danv. Abr.* 121.

If *A.* leaſes a meſſuage for years, rendring rent, with a condition of re-entry for non-payment; and the leſſee aſſigns his term in part to one, and in another part to another, and retains part himſelf, and after *A.* by fine grants the reverſion of the whole: if rent be in arrear, afterwards the grantee may enter into all the meſſuage; for the *leſſee*, by apportionment of the land, cannot deſtroy the condition, as the leſſor may by grant of part of the reverſion *Palm.* 382.

If there be two leſſees for years, upon condition that they, nor either of them, ſhall not alien without aſſent of the leſſor, and they make partition; and afterwards one aliens without aſſent of the leſſor; this is a forfeiture of the whole. *Cro. El.* 163.

Where an actual entry ought to be made to avoid a condition, *&c.* the confeſſion of leaſe, entry, and ouſter will not do. *Vent.* 332. *Saund.* 319. *Sid.* 223. *Mod.* 10. *Vent.* 42. 3 *Keb.* 218. *Salk.* 246. *Skin.* 424.

The confeſſion of leaſe, entry and ouſter, confeſſes an entry for condition broken. *Ld. Raym.* 750.

The ſucceſſor of a biſhop, for a breach of condition in time of his predeceſſor, or in time of vacation, may enter. *Moor.* 52. *pl.* 152.

If a feoffment be made upon condition to enfeoff a ſtranger, and the feoffee does not perform it, the ſtranger cannot enter for the breach of it, becauſe he is a ſtranger to the condition; but in this caſe the feoffor himſelf may enter for the condition, broke. 2 *Danv. Abr.* 122.

If the condition of a feoffment be to enfeoff *J. S.* and his heirs, and he refuſes, the feoffor may re-enter; for by the expreſs intent of the condition, the feoffee ſhould not have any benefit, but only an inſtrument to convey over the land. *Co. Litt.* 209. *a. Leon.* 266. 2 *Leon.* 222. *Roll. Abr.* 452. *pl.* 4.

But if the condition had been to make a gift in tail, or to grant a rent-charge to *J. S.* and he refuſed, the feoffor ſhould not re-enter, becauſe the feoffor was to retain the land. *Co. Litt.* 209. *a. Leon.* 266. 2 *Leon.* 222. *Roll. Abr.* 452.

He in remainder cannot enter for a condition broke by the particular eſtate. 2 *Danv. Abr.* 122.

If the King's tenant aliens upon condition, and dies, his heir in ward to the King for other land, the King may enter in the right of the heir for the condition broke. *Ibid.*

If a man leaſes for *years*, upon condition if the rent be in arrear, that the leaſe ſhall ceaſe, and after grants over the reverſion; and after the condition is broke, the grantee of the reverſion may enter into the land, for the leaſe is determined before entry, by the breach of the condition. *Ibid.*

Otherwiſe, if a leaſe for *life*, becauſe a freehold cannot ceaſe before entry. *Co. Litt.* 214. *b.* 2 *Leon.* 134. *Roll. Rep.* 360.

If a man ſeiſed of lands in right of his wife makes a feoffment in fee upon condition, and dies; and after the condition is broke, the heir of the huſband ſhall enter; for tho' no right deſcended to him, yet the title of entry by force of the condition, which was created upon the feoffment, and reſerved to the feoffor and his heirs, deſcended. 8 *Co.* 43. *b.* 44. *a.*

So if a man makes a feoffment in fee of lands in *Borough-Engliſh*, *&c.* the heir at Common law ſhall enter. *Godb.* 3. *Q.* If the younger ſon after ſhall enter upon him.

If a man ſeiſed in fee makes a leaſe for life, rendring rent, and for default of payment, a re-entry, *&c.* and after dies without heir, living the tenant for life: though the lord by eſcheat ſhall have the rent, as incident to the reverſion, and may diſtrain for it, yet he cannot enter, *&c. Litt. ſ.* 348. *Co. Litt.* 215. *b.*

A bailiff, without particular authority for that purpoſe, cannot enter for non-payment of rent. *Heb.* 154. 5 *Rep.* 76. *a.*

An entry by a ſtranger without authority is good to take advantage of a condition, if it be aſſented to afterwards. 2 *Stran.* 1128.

If *A.* makes a feoffment of land to *J. S.* in fee, upon condition that if he pays 10*l.* to *J. S.* the firſt of *May*, 6 *Car.* that it ſhall be lawful for him to re-enter, and after he pays the 10*l.* before the day, *viz.* the firſt of *April*, and *J. S.* accepts it: though this is a good performance of the condition, inaſmuch as payment before the day is payment at the day, yet *A.* cannot re-enter and reveſt his old eſtate by force of the condition, till the firſt of *May*, becauſe the condition does not give him power to re-enter till the ſaid day. 2 *Danv. Abr.* 121.

A rent-charge is not a perſonal duty to be demanded of the perſon, but upon the land, and a diſtreſs is both a demand and a diſtreſs; and the party may demand it at any time. *Lil. Conv.* 137.

Where a rent is granted, payable at a certain day, if it be behind and unpaid, the grantee ſhall diſtrain for it; the grantee need not demand it at the day, but at any time after it is due, which will be ſufficient; for the

After an extent upon a ſtatute-merchant, ſtaple or recognizance returned, the conuſee may enter without any delivery by the ſheriff, by force of the *liberate*. 2 *Inſt.* 678. but by 1 *Vent.* 41. in an execution upon a ſtatute-merchant there is no need of a *liberate*, as there is upon a ſtatute-ſtaple, for in caſe of a ſtatute-ſtaple the conuſee can bring no ejectment before the *liberate*.

A *liberate* made to the ſheriff to deliver the land to himſelf is void, and an entry in that caſe is void. 2 *Danv. Abr.* 785.

If the King ſeiſes certain lands, upon which an *euſter le mayn* is ſued to the eſcheator to deliver this land to the party again, he may after enter into the land before any execution of the writ, becauſe there is a judgment given before, that the hands of the King ſhall be removed. *Ibid.*

Upon an *elegit*, if the ſheriff takes an inquiſition, tho' the ſheriff does not deliver the land to the party plaintiff, yet the plaintiff may enter preſently after the inquiſition taken, before the return to the court, without any *liberate* to him directed. *Ibid.* 786.

If a judgment be reverſed in a writ of error againſt the heir of the recoverer, the demandant may enter upon him without more, though he be in by deſcent, but he cannot upon the tertenant without a *ſcire facias*. 3 *Danv. Abr.* 298, 299.

If a man recovers in a real action, and the tenant dies before execution, yet the demandant may enter upon the heir, becauſe the record binds his title: So though it be of lands in tail. *Ibid.* 299. Otherwiſe in a falſe or feint action. *Co. Litt.* 361. *b.*

So if a man recovers in a real action, though there be two, three or four deſcents before his entry, yet he may enter upon thoſe to whom deſcended, becauſe the recovery binds the blood, and diſproves the title. 3 *Danv. Abr.* 299.

So if after a recovery in a real action, and before execution, a ſtranger enters and dies ſeiſed, yet the recoveror may enter upon his heir. *Ibid.*

If a man recov . in a writ of right of advowſon, and after, at an avo ance, a ſtranger preſents, yet when the church is void again, the recoverer may preſent. *Ibid.*

If there be a recovery in an ejectment, the plaintiff may enter and execute his judgment, and the aſſiſtance of the ſheriff is only to keep the peace. *Far.* 66, 69.

He that recovers may as well enter after the year as within the year againſt him, upon whom the recovery was had. 3 *Danv. Abr.* 299.

But he cannot enter upon a ſtranger to the recovery after the year. *Ibid.*

He cannot enter after a deſcent caſt. *Ibid.* and *Fitz. Entry Congeable* 35.

In all caſes where the writ demands lands, rent, or other thing in certain, the demandant after judgment may enter, or diſtrain before any ſeiſin delivered to him by the ſheriff. *Co. Litt.* 34. *b.*

But in dower where the writ demands nothing in certain, the demandant, after judgment cannot enter or diſtrain till execution ſued, upon which the ſheriff delivers the third part in certain. *Ibid.*

So where the wife of one tenant in common demands the third part of a moiety, ſhe cannot, after judgment, enter till the ſheriff has delivered her the third part, though it is thereby reduced to no more certainty than it was. *Ibid.*

If one recovers in aſſiſe, or aſſiſe of mort d'anceſtor, he may enter and execute the judgment without being put in ſeiſin by the view of the jury. *Moor* 54. *pl.* 156. But it was ſaid in this caſe, that if he be again diſſeiſed, he ſhall not have a *redisſeiſin* but a *poſt diſſciſin*. *Ibid.*

An entry ſhall be intended to be a good execution of a recovery without a writ of ſeiſin. *T. Jones* 20.

There is a difference between a feoffment and an entry; for a man may make a feoffment of lands in another county, and make livery within the view, although he might enter peaceably to make livery. *Pollex* 47. But a man cannot make an entry into the lands, within the view, where he may actually enter without fear; for it is one thing to inveſt, and another to deveſt: *Co. Litt.* 252. *a. b.*

If the *diſſeiſee* enters into the land, and continues in it with the diſſeiſor, and manures it with him, claiming nothing of his firſt eſtate, yet this is an entry that will reduce his firſt eſtate. 2 *Danv. Abr.* 790.

And if he enters and takes the profits as leſſee at will of the diſſeiſor, or in any manner, this is an entry, and reduces his eſtate. *Ibid.*

And if he commands a ſtranger to put the cattle of ſuch ſtranger into the land to feed them, this is an entry in law into the land. *Ibid.*

If *A.* leaſes to *B.* for years, the remainder to *C.* in fee, and *A.* comes upon the land to make livery, and *B.* to take it, this ſhall not be ſaid any entry of *B.* to veſt the actual poſſeſſion in him till livery made, for then the remainder would be void, which would be againſt the intention of the parties. *Co. Litt.* 49. *b.*

If an entry is made to a ſpecial purpoſe, ſuch entry ſhall be guided by the intent, and tied up to that ſpecial purpoſe: As if it is agreed between diſſeiſor and diſſeiſee, that the diſſeiſee ſhall releaſe all his right to the deſſeiſor upon the land, and accordingly the diſſeiſee enters into the land, and delivers a releaſe; there this is a good releaſe; and the entry of the diſſeiſee being for this purpoſe, does not avoid the diſſeiſin. *Co. Litt.* 49. *b. Lil. Conv.* 131.

But if the diſſeiſor makes a feoffment to the diſſeiſee and others, there, though the diſſeiſee comes to take the livery, yet when the livery is made, the diſſeiſee is remitted. *Co. Litt.* 49. *b.*

If the diſſeiſee comes upon the land and puts his foot in, but takes no profits, but the diſſeiſor ouſts him, this entry does not ſettle any eſtate in him (at the election of the diſſeiſee, as it ſeems) for the diſſeiſee may have an aſſiſe of the firſt diſſeiſin. 2 *Danv. Abr.* 791.

If I have a houſe and land adjoining to a plot of land in queſtion between me and another, and I ſtand upon one piece of the ſtone wall, which is my own ſoil, and put my hand through a wall made of lime and laths which ſtands upon the land in queſtion, and there deliver a leaſe ſealed to try the title, this is a good entry, though I do not come within the plot in queſtion. *Ibid.*

If a baſtard eigne after his father's death enters, and invites the mulier puiſne to ſee the houſe, pictures, *&c.* or to dine, hunt, hawk or ſport with him, or the like, upon the land accordingly, this is no interruption of the poſſeſſion of the baſtard, becauſe he came by his conſent, ſo that the coming upon the land could be no treſpaſs. *Co. Litt.* 245. *b.* 368. *a.*

But if the *mulier* of his own head comes upon the ground, and cuts down a tree, or digs the ſoil, or takes the profits, theſe are interruptions; for rather than the baſtard ſhall puniſh him in an action of treſpaſs, theſe acts ſhall amount to an entry in law. *Ibid.* 245. *b.*

So if a mulier puts his beaſts into the grounds, or commands a ſtranger to put in his beaſts, theſe acts without words amount to an entry, for acts without words may make an entry, but words without an act, *viz.* entry on the land, *&c.* cannot. *Ibid.* See 3 *Leon.* 144.

If the diſſeiſor requeſt the diſſeiſee to go to the cellar, and ſee the antiquity of, *&c.* this is no entry to abate an aſſiſe brought by the diſſeiſee. *Pl. Com.* 93.

So if the diſſeiſee, ſeeing ſeveral cut wood upon the land, goes upon the land and admoniſhes them at their peril to deſiſt; this is no entry to abate his writ. *Ibid. Bulſt.* 9. 2 *Brownl.* 231, 239.

Such entry as will abate a writ ought to be unto the thing demanded, and with an intent to have the thing demanded. 2 *Bulſt.* 9. 2 *Brownl.* 231, 235.

Where the beaſts of him that had a right ſtrayed of their own accord into the land, and it was held no entry. See *Leon.* 110.

If the office of a keeper of a park is granted to one, who is thereof diſſeiſed, and he brings an aſſiſe, and, pending his aſſiſe, enters into the park, kills a ſtag, and takes a ſhoulder of it for his fee; this is no ſuch entry as to abate his writ, for that his entry was not as an officer *ad cuſtodiend'*, but as a wrong-doer to kill, *&c.* *Bulſt.* 4, 8, 9.

If

If a man has common in *J. S.*'s lands, between 25th of *March* and 29th of *September*, and he brings an aſſiſe for it, and at *Chriſtmas* puts in his beaſts, this is no entry to abate his writ; for it cannot be intended for the ſame common. 2 *Brownl.* 238.

Entry ſhall not be of force to avoid a fine, *&c.* unleſs an action be commenced within a year, *&c.* Stat. 4 *Ann. c.* 16. *ſect.* 16.

2. *Of entry for a forfeiture, and for the breach of a condition.*

If leſſee for life aliens for life, the remainder over, and he in remainder enters after the death of the leſſee, the firſt leſſor may enter on him for the forfeiture; for by agreement to the remainder, he agreed to the whole, and ſo a party. 3 *Danv. Abr.* 227.

If the leſſor may enter on the alienee of his leſſee, or any who is party to the forfeiture. *Ibid.*

So he may enter on the alienee of the alienee, or any that has the land, altho' he be not party to the forfeiture. 3 *Danv. Abr.* 228.

If a leſſee for life gives in tail, the remainder in fee to another, and afterwards he in remainder dies, and afterwards the donee dies without iſſue, the leſſor may enter on the heir of him in remainder; for by his entry he agrees to the diſinheritance made by the alienation. *Ibid.*

If tenant for life gives it in tail, and the donee dies, the leſſor may enter on the donor for the forfeiture. *Ibid.*

Where a tenant for life makes a feoffment in fee, a ſtranger may enter for a forfeiture in the name of the reverſioner, and thereby the eſtate ſhall be in him. *Co. Litt.* 245. *a.*

If a leſſee for life aliens in fee and dies, he in remainder or reverſion may enter after the death of the leſſee. 3 *Danv. Abr.* 228.

If tenant for life of an advowſon in groſs levies a fine *come ceo*, *&c.* of it, and before any claim made by him in reverſion,, the church becomes void; afterwards he in reverſion ſhall not have advantage of the forfeiture as to the preſent preſentation, becauſe before election made by him in reverſion, the eſtate of the leſſee was not defeated nor deſtroyed, which election ought to be by claim; and then it was a chattel veſted in the leſſee before the election made by him in reverſion, which cannot be defeated afterwards by the preſentation of him in reverſion. *Ibid.*

If *A.* being tenant for life, leaſes to *B.* for his life, and *B.* dies, and *A.* re-enters; yet the forfeiture remains, and the firſt leſſor may enter. *Co. Litt.* 252. *a.*

If tenant for life ſuffers a common recovery, and execution is thereupon had, yet he in remainder may enter; for being a forfeiture, the ſuing execution will not prevent him. *Hill.* 32 *Eliz. Co.* 14, 15. adjudged; though it appeared the recovery was ſuffered before the ſtatute of 14 *Eliz.*

If a man leaſes two mills, upon condition that if the leſſee leaſes them, or aſſigns either of them to another, it ſhall be lawful for him to re-enter; if he leaſes one, the leſſor may enter into both, for the condition goes to both. 2 *Danv. Abr.* 121.

If *A.* leaſes a meſſuage for years, rendring rent, with a condition of re-entry for non-payment; and the leſſee aſſigns his term in part to one, and in another part to another, and retains part himſelf, and after *A.* by fine grants the reverſion of the whole: if rent be in arrear, afterwards the grantee may enter into all the meſſuage; for the *leſſee*, by apportionment of the land, cannot deſtroy the condition, as the leſſor may by grant of part of the reverſion *Palm.* 382.

If there be two leſſees for years, upon condition that they, nor either of them, ſhall not alien without aſſent of the leſſor, and they make partition; and afterwards one aliens without aſſent of the leſſor; this is a forfeiture of the whole. *Cro. El.* 163.

Where an actual entry ought to be made to avoid a condition, *&c.* the confeſſion of leaſe, entry, and ouſter will not do. *Vent.* 332. *Saund.* 319. *Sid.* 223. *Mod.* 10. *Vent.* 42. 3 *Keb.* 218. *Salk.* 246. *Skin.* 424.

The confeſſion of leaſe, entry and ouſter, confeſſes an entry for condition broken. *Ld. Raym.* 750.

The ſucceſſor of a biſhop, for a breach of condition in time of his predeceſſor, or in time of vacation, may enter. *Moor.* 52. *pl.* 152.

If a feoffment be made upon condition to enfeoff a ſtranger, and the feoffee does not perform it, the ſtranger cannot enter for the breach of it, becauſe he is a ſtranger to the condition; but in this caſe the feoffor himſelf may enter for the condition, broke. 2 *Danv. Abr.* 122.

If the condition of a feoffment be to enfeoff *J. S.* and his heirs, and he refuſes, the feoffor may re-enter; for by the expreſs intent of the condition, the feoffee ſhould not have any benefit, but only an inſtrument to convey over the land. *Co. Litt.* 209. *a. Leon.* 266. 2 *Leon.* 222. *Roll. Abr.* 452. *pl.* 4.

But if the condition had been to make a gift in tail, or to grant a rent-charge to *J. S.* and he refuſed, the feoffor ſhould not re-enter, becauſe the feoffor was to retain the land. *Co. Litt.* 209. *a. Leon.* 266. 2 *Leon.* 222. *Roll. Abr.* 452.

He in remainder cannot enter for a condition broke by the particular eſtate. 2 *Danv. Abr.* 122.

If the King's tenant aliens upon condition, and dies, his heir in ward to the King for other land, the King may enter in the right of the heir for the condition broke. *Ibid.*

If a man leaſes for *years*, upon condition if the rent be in arrear, that the leaſe ſhall ceaſe, and after grants over the reverſion; and after the condition is broke, the grantee of the reverſion may enter into the land, for the leaſe is determined before entry, by the breach of the condition. *Ibid.*

Otherwiſe, if a leaſe for *life*, becauſe a freehold cannot ceaſe before entry. *Co. Litt.* 214. *b.* 2 *Leon.* 134. *Roll. Rep.* 360.

If a man ſeiſed of lands in right of his wife makes a feoffment in fee upon condition, and dies; and after the condition is broke, the heir of the huſband ſhall enter; for tho' no right deſcended to him, yet the title of entry by force of the condition, which was created upon the feoffment, and reſerved to the feoffor and his heirs, deſcended. 8 *Co.* 43. *b.* 44. *a.*

So if a man makes a feoffment in fee of lands in *Borough-Engliſh*, *&c.* the heir at Common law ſhall enter. *Godb.* 3. *Q.* If the younger ſon after ſhall enter upon him.

If a man ſeiſed in fee makes a leaſe for life, rendring rent, and for default of payment, a re-entry, *&c.* and after dies without heir, living the tenant for life: though the lord by eſcheat ſhall have the rent, as incident to the reverſion, and may diſtrain for it, yet he cannot enter, *&c. Litt. ſ.* 348. *Co. Litt.* 215. *b.*

A bailiff, without particular authority for that purpoſe, cannot enter for non-payment of rent. *Heb.* 154. 5 *Rep.* 76. *a.*

An entry by a ſtranger without authority is good to take advantage of a condition, if it be aſſented to afterwards. 2 *Stran.* 1128.

If *A.* makes a feoffment of land to *J. S.* in fee, upon condition that if he pays 10*l.* to *J. S.* the firſt of *May*, 6 *Car.* that it ſhall be lawful for him to re-enter, and after he pays the 10*l.* before the day, *viz.* the firſt of *April*, and *J. S.* accepts it: though this is a good performance of the condition, inaſmuch as payment before the day is payment at the day, yet *A.* cannot re-enter and reveſt his old eſtate by force of the condition, till the firſt of *May*, becauſe the condition does not give him power to re-enter till the ſaid day. 2 *Danv. Abr.* 121.

A rent-charge is not a perſonal duty to be demanded of the perſon, but upon the land, and a diſtreſs is both a demand and a diſtreſs; and the party may demand it at any time. *Lil. Conv.* 137.

Where a rent is granted, payable at a certain day, if it be behind and unpaid, the grantee ſhall diſtrain for it; the grantee need not demand it at the day, but at any time after it is due, which will be ſufficient; for the

grantee may demand it when he will, to enable him to diſtrain. *Co. Litt.* 202. *a.*

But where a penalty or re-entry is joined to the thing, you cannot take advantage of the pain or forfeiture without a demand at the very time preſixt. *Hob.* 207, 331. *Hutt* 13, 24, 42, 114. 7 *Co.* 56. *b.* 2 *Roll. Abr.* 42. *Moor* 883. *Dyer* 51. *Plowd.* 70.

Where a feoffment is made reſerving a rent upon condition, that if the rent is behind, it ſhall be lawful for the feoffor and his heirs to enter: Now, if the rent be behind, the feoffor or his heirs may enter and ouſt the feoffee. *Lit. ſ.* 335. *Co. Lit.* 201. *b.* 202. *a.* *Hob.* 207, 331. 5 *Co.* 56. *Dyer* 51.

If the words of a leaſe for years be, *that the leaſe ſhould be void*, yet non-payment is no avoidance without a demand and re-entry. *Lil. Conv.* 137. *For more learning on this ſubject, ſee* 9 Vin. Abr. *tit.* Entry, *and* Wood's Conv. part 1.

Entry ad communem legem. The writ of *Entry ad communem legem* lieth, where tenant in dower, or tenant by the curteſy, or for life, do alien in fee, or for the life of another, or in tail, the lands which they hold, *&c.* after their death he in the reverſion, who hath it in fee or for life, ſhall have this writ againſt whomſoever is in poſſeſſion of the land. *N. N. B.* 477.

Entry ad terminum qui præteriit. A writ of *Entry ad terminum qui præteriit* lieth, where a man leaſeth lands or tenements for term of life, or years, and afterwards the term expireth, and he to whom the leaſe was made, or a ſtranger entereth upon the lands, and occupieth the ſame, and deforceth the leſſor, the leſſor or his heirs ſhall have the writ. And this writ lieth in the *per*, *cui* and *poſt*. For if the leſſee hold over his term, and afterwards maketh a feoffment, the leſſor or heirs may have that writ againſt the feoffee in the *per*; and if the feoffee maketh a feoffment over, he may have it againſt the ſecond feoffee in the *per* and *cui*, and againſt the third feoffee in the *poſt*. *N. N. B.* 464.

Entry in caſu conſimili. A writ of entry *in caſu conſimili* lieth where tenant by the curteſy, or for life, or for another's life doth alien in fee, or in tail, or for life, now he in the reverſion, who hath an eſtate there for life, or in fee-ſimple, or in tail, ſhall have that writ during the life of the tenant for life, who aliened, and that writ is not given by the ſtatute of *Glouceſter*, which gave the writ of *in caſu proviſo*, but it is formed and granted upon the ſtatute of *Weſtminſter* 2. *cap.* 14. *which wills, that as often as it ſhall happen in the Chancery, that in one caſe a writ is found, and in the like caſe falling, wanting the ſame remedy not, the clerks of the Chancery ſhall agree in the making the writ, and that appeareth, H.* 3 *Ed.* 2. *N. N. B.* 474.

Entry in caſu proviſo. The writ of *Entry in caſu proviſo* is given by the ſtat. of *Glouceſt. cap.* 7. And that writ lieth where tenant in dower doth alien in fee, for life, or in tail, the land which he holdeth in dower; he who hath the reverſion in fee, or in tail, or for life, ſhall maintain that writ againſt the alienee; and againſt him who is the tenant of the freehold of land during the life of the tenant in dower, *&c.* and the writ may be made in the *per*, *cui* and *poſt*. *N. N. B.* 473.

Entry cauſa matrimonii prælocuti, Lies where lands or tenements are given to a man, upon condition, that he ſhall take the donor to his wife within a certain time, and he does not eſpouſe her within the limited time, or eſpouſes another; or otherwiſe diſables himſelf, that he cannot take her according to the ſaid condition, then the donor and her heirs ſhall have the ſaid writ againſt him, or againſt whoever elſe is in the ſaid land. *Cowell, edit.* 1727.

Envoice. See **Invoice.**

Enure, Signifieth to take place or effect, to be available. As a releaſe ſhall *enure* by way of extinguiſhment. *Littleton*, cap. *Releaſe*. And a releaſe made to a tenant for term of life, ſhall *enure* to him in the reverſion.

Eodorbrice, Is a *Saxon* word, from *Eodor*, a hedge, and *brice*, *ruptura*. It ſignifies hedge-breaking. 'Tis mentioned in the laws of King *Alfred*, *cap.* 45.

Eorle; It hath been a queſtion whether this word is of *Saxon* or *Daniſh* original. *Wormius* tells us, that the ancient *Danes* called their barons by the name of *earls*: but *Somner*, in *Gloſſ. Saxonico*, is rather of opinion, that it is derived from the *Saxons*. *Æthelward, lib.* 4. *c.* 3. *Conſules ruunt quos ille* eorlas *ſolent nominare, &c.*

Epiacum. *Papcaſtle* in *Cumberland.*

Epimenia, *i. e.* Expences, tributes, or gifts. 'Tis mentioned in *Gildas de Excidio Britanniæ, viz. item queruntur non aſſidue ſibi* epimenia *contribui, &c.*

Epiphany, The day when the ſtar appeared to the wiſe men at *Chriſt*'s nativity, generally called Twelfth day.

Epiſcopalia, Synodals, pentecoſtals, and other cuſtomary payments from the clergy to their dioceſan biſhop; which dues were formerly collected by the rural deans, and by them tranſmitted to the biſhop. As in the charter of *Walter*, biſhop of *Coventry* and *Litchfield*, to the abbey of *Derley*——*Concedimus etiam ut prædictus abbas aut quiſque ſucceſſorum ejus ſit decanus de omnibus eccleſiis* ——*& teneat capitulum*——& epiſcopalia *reddat, vel reddere faciat de eccleſiis diaconatus ſui.* Mon. Angl. tom. 3. f. 61. Theſe cuſtomary impoſitions were called *onus epiſcopale*, and were by ſpecial privilege remitted to thoſe free chapels that were built upon the King's demeſne, and exempt from *epiſcopal* juriſdiction. See *Kennet's Gloſſary* in *Epiſcopale onus.*

Epiſcopus puerorum. It was a cuſtom formerly that ſome layman about the feaſt of *Epiphany* would plait his hair, ſo that he might ſeem to have the tonſure, and to put on the garment of a biſhop, and in them to exerciſe epiſcopal juriſdiction, and to do ſeveral ludicrous actions; for which reaſon he was called the biſhop of the *Boys*, This cuſtom obtained here long after ſeveral conſtitutions were made to aboliſh it: For in an inventory of the ornaments of a church in *York*, *Anno* 1530. we read, *Item una parva mitra cum petris pro* epiſcopo puerorum. *Mon.* 3 *tom. pag.* 169.

Equality. The law delights in equality; ſo that when a charge is laid upon one, and divers ought to bear it, he ſhall have relief againſt the reſt. 2 *Rep.* 25. And where a man leaves a power to his wife, to give an eſtate among three daughters, in ſuch proportions as ſhe ſhall think fit, it hath been held that ſhe muſt divide it equally; unleſs good reaſon be given for doing otherwiſe. *Preced. Chan.* 256. See **Contribution.**

Eques Auratus, Is taken to ſignify a knight, and termed *auratus*, becauſe anciently none but knights might beautify and gild their armour, or other habiliments of war. *Fern's Glory of Generoſity, pag.* 102. yet in law we never uſe *eques auratus*, but *miles*, and ſometimes *chivalier*. *Co.* 4. *Inſt. fol.* 5.

Equilocus, *i. e.* An equal. 'Tis mentioned in *Simeon Dunelm. Anno* 882, *viz. Elfred Rex Saxonum, audaciſſimus ducum, navali prælio ſuffultus, contra paganicas naves congreſſus eſt, ex quibus ipſe* equilocus *duas pitentes virtute naves exſuperavit, &c.*

Equitatura, ——— *Sicunt* —— *quod ego Stephanus de Ebroicis dedi eccleſiæ S. Leonardi de Pyonia*——*molendinum meum de Froma*——*& prædicti fratres habeant* equitaturam *& ſaccum cum blado vel farina, &c.* Reg. Priorat. de Wormley, *fol.* 22. *a. penes* Ed. Harley, *Mil. Baln.* And it ſeems to ſignify here, the liberty of riding, or carrying griſt and meal from a mill on horſeback. *Miles cum equitatura*, is taken for a knight, with his horſe, arms, and furniture. *Cowell, edit.* 1727.

Equity, *Æquitas*, Is of two ſorts, and thoſe of contrary effects, for the one doth abridge and take from the letter of the law, the other doth inlarge and add thereto. The firſt is thus defined, *Æquitas eſt correctio legis generatim lata, quæ parte deficit.* Equity is the correction of the law generally made in that part wherein it fails, which correction is much uſed in our law: As for example, when an act of parliament is made, that whoſoever doth ſuch a thing ſhall be a felon, and ſuffer death; yet if a madman, or an infant that hath no diſcretion, do the ſame, they ſhall not be felons, nor ſuffer death for it; breaking of priſon is felony in the priſoner himſelf, by the ſtatute *De frangentibus priſonam*; yet if the priſon be on fire, and they within break priſon to ſave their

their lives, this ſhall be excuſed by the law of reaſon. So to ſave my life I may kill another that aſſaults me. The other *equity* is defined to be an extenſion of the words of the law to caſes unexpreſſed, yet having the ſame reaſon; ſo that when one thing is enacted, all other things are enacted that are of the like degree: as the ſtatute which ordains, that in an action of debt againſt executors, he that doth appear by diſtreſs, ſhall anſwer, doth extend by *equity* to adminiſtrators; for ſuch of them as ſhall appear firſt by diſtreſs, ſhall anſwer by *equity* of the ſaid act, *qui ſunt in æquali genere.* See **Chancery.**

Equity of redemption, or *mortgages.* If where money is due on a mortgage, the mortgagee is deſirous to bar the *equity of redemption*, he may oblige the mortgagor either to pay the money, or be foreclоſed of equity; which is done by proceedings in the court of Chancery. But the Chancery cannot ſhorten the time of payment of the mortgage money, where it is limited by expreſs covenant; though it may lengthen it: and then upon non-payment, the practice is to foreclоſe the equity of redemption of the mortgagor. 2 *Vent.* 364. To foreclоſe the *equity*, a *bill in Chancery* is exhibited; to which an anſwer is put in, and a decree being obtained, a maſter in Chancery is to certify what is due for principal, intereſt and coſts, which is to be paid at a time prefixed by the decree, whereupon the premiſſes are to be conveyed to the mortgagor; or in default of payment, the mortgagor is ordered to be foreclоſed from all *equity of redemption*, and to convey the premiſſes abſolutely to the mortgagee. *Law of Securities, p.* 129, 133.

A fine or non-claim will bar an *equity of redemption:* but in a common mortgage, a covenant to reſtrain it ſhall not be regarded in chancery. 2 *Vent.* 365. If the condition of a mortgage is, that the mortgagor only ſhould redeem during life, or that he and the heirs of his body ſhall do it; yet the general heir ſhall have the *equity of redemption*, for if the principal and intereſt be offered, the land is free. 1 *Vent.* 33, 190. And it is held, though a bond be conditioned, that if the money be not paid at ſuch a time, then for a further ſum the mortgagee ſhall have the land abſolutely, as a purchaſer, *&c.* in ſuch caſe a man may *redeem. Ibid.* 488.

A perſon who has mortgaged land with ſome others to another, and this appears to be a contrivance to evade the *ſtatute*, the mortgagee ſhall not take advantage thereof. 2 *Vern. Rep.* 589. See *Barnadiſt.* 101.

Where perſons have once mortgaged lands, mortgage the ſame a ſecond time, without diſcovering the firſt mortgage, they forfeit their *equity of redemption*, and the ſecond mortgagee may redeem, *&c.* And it is the ſame where any perſons borrowing money, enter a judgment, *&c.* for ſecurity, and afterwards borrow more money, and mortgage lands to the ſecond lender, without giving notice of the judgment, or paying the ſame off in ſix months, *&c.* by ſtat. 4 *&* 5 *W. & M. cap.* 16. See **Mortgage.**

Equivalent. Commiſſioners are appointed by ſtatute to examine and ſtate the debts due to *Scotland* on the union by way of *equivalent*; and proviſion is made for payment of the ſame, *&c.* by ſtat. 1 *Geo.* 1. *c.* 27. 5. *Geo.* 1. *c.* 20. Application of the equivalent money 6 *Ann. c.* 24. 12 *Ann. c.* 13. 1 *Geo.* 1. *c.* 27. 3 *Geo.* 1. *c.* 14. 13 *Geo. c.* 30. Equivalent charged upon the cuſtoms and exciſe in *Scotland*, 23 *Geo.* 2. *c.* 21. *ſect.* 5.

Equus coopertus, A horſe with ſadle and furniture on him. ——— *Inveniendo pro quolibet feodo unum* equum coopertum, *vel duos diſcoopertos* —— Inqu. 16 Ed. 1. de Baronia de *Dunham Maſſey.* Cowell, edit. 1727.

Er, The ſayllable *er*, in the middle of a word, is contracted from the Saxon *ware*, which ſignifies *inhabitants.* Thus *Canterbury* was anciently called *Cantwara-Burgh*, *i. e.* the inhabitants of a borough in *Kent.* Cowell, edit. 1727.

Eremitorium, A *hermitage*, or deſert place, for the retirement of hermits.——— Eremitorium *in boſco D. ducis petiit, ubique domum hanc aliquanto tempore voluit.* Henr. Knyghton. lib. 5. locus heremitorius—— *Radulphus heremita* locum heremitorium *de Muſſewelle edificavit.*——Mon. Angl. tom. 3. p. 18. a.

Erius, alias **Iris,** Is the flower *de lys*, whoſe divers kinds you may read in *Gerrard's Herb. lib.* 1 *cap.* 34. The root of this is mentioned among merchandiſe, or drugs to be grabled, by ſtat. 1 *Jac. c.* 19.

Ermdii, This word is mentioned in our hiſtorian *Randulphus de Diceto*, and others. Mr. *Somner* did not underſtand the meaning of it; but 'tis very probable it ſignifies the people called *Armenians.* Cowell, edit. 1727.

Ermins, Seemeth to come from the *French* word *ermine.* It ſignifieth a fur of great price.

Ermin-Street. See **Watling-Street.**

Ern, The names of places ending in *ern*, ſignify a melancholy ſituation: from the Saxon *ern*, *locus ſecretus.* Cowell, edit. 1727.

Ernes, The looſe ſcattered ears of corn that are left on the ground after the binding or cocking of it. ——— *Conductо ad præparandum uſque ad carectam* xxix *ſeliones ordei cum les* ernes viii *den.* Parochial Antiq. p. 576. From the old Teuton. *abre*, an ear of corn, *ernde*, harveſt, *ornden*, to cut or mow corn. Hence to *ern*, is in ſome places to glean. See *Kennet's Gloſſary*, in *Ernes.*

Errant, *Itinerant*, may be derived from the old word *erre*, i. *iter:* it is attributed to juſtices that go the circuit. *Staundf. pl. cor. f.* 15. and to bailiffs at large. See **Juſtices in Eyre** and **Bailiff.** See alſo **Eyre.**

Erraticum, A waif or ſtray, *erring* or wandring beaſt. ———*Si* erraticum *quod vulgo dicitur* weredriff, *in curiam ſacerdotis vel clerici qui in atrio manent, venerit, vel in eleemoſynam ejuſdem eccleſiæ, vel in atrium epiſcopi erit.* Conſtitut. Norman. A. D. 1080.

Error, (from the French *Erreur*) Signifieth eſpecially an *error* in pleading, or in the proceſs. *Bro.* tit. *Error.* And thereupon the writ which is brought for remedy of the overſight, is called *a writ of error*, in Latin *Breve de* errore *corrigendo*, thus defined by *Fitz.* in his *Nat. Brev. fol.* 20. A writ of *error* is that properly which lieth to redreſs a falſe judgment given in a court of record, as in the *Common Bench*, *London*, or other city having power, by the King's charter or preſcription, to hold plea of debt, or treſpaſs, above twenty ſhillings. *Cowell.*

A writ of error is a commiſſion to judges of a ſuperior court, by which they are authorized to examine the record, upon which a judgment was given in an inferior court, and on ſuch examination to affirm or reverſe the ſame, according to law. *Jenk. Rep.* 25. 2 *Inſt.* 40. *Yelv.* 209.—But yet if by the writ of error the plaintiff therein may recover, or be reſtored to any thing, it may be releaſed by the name of an action. *Co. Lit.* 288. *b.* —In a writ of error to reverſe a fine as couſin and heir of the conuſor, it need not be ſhewed in the writ of error, how he is couſin; for it is but a commiſſion to examine errors, and needs not ſuch certainty as other writs. *Cro. Jac.* 160.

This writ lies where a man is grieved by any errors in the foundation, proceeding, judgment, or execution of a ſuit. *Co Lit.* 288. *b.*

Under this head is conſidered,

1. *In what caſes, and on what judgments a writ of error will lie.*

2. *Who may bring a writ of error; againſt whom, and at what time it muſt be brought.*

3. *Of writs of error into parliament, into the Exchequer chamber, into the King's Bench, and into the Common Pleas, and other courts.*

4. *Of reverſing judgments in the court of Exchequer; where a writ of error lies in the ſame court in which the record is, and of quaſhing writs of error.*

5. *Of removing the record or a tranſcript; and of alledging diminution, and granting a* certiorari.

6. *Of the* ſcire facias; *proceedings after the record removed; amendment and abatement of the writ of error, and how far it is a* ſuperſedeas.

7. *Of aſſigning errors.*

8. *Of pleading in bar of a writ of error, and of the judgment to be given thereon.*

1. *In what caſes, and on what judgments, a writ of error will lie.*

Regularly an erroneous judgment given in a court of record can only be reverſed by a writ of error; therefore if the tenant in a *cui in vita* dies ſeiſed pending the writ, and after judgment is given againſt him, which is erroneous, and after the recovery ſues execution againſt the heir, and he brings an aſſiſe, he ſhall not avoid this judgment againſt his father, by ſaying, that his father died pending the writ; for the judgment is not void, but only voidable. 28 *Aſſ.* 17. 1 *Rol. Abr.* 742. *S. C.* 2 *Bulſt.* 242. *S. P.*

If an infant ſuffers a common recovery, in which he comes in as a vouchee in his proper perſon, and not by attorney or guardian; tho' this ſhall not bind him, but that he may in a writ of error avoid it becauſe it is error in law; yet at his full age he cannot enter into the land, and avoid it by his entry, before he has reverſed it in a writ of error, becauſe he himſelf is privy to the judgment, and may reverſe it by ſuch means, and he is not a ſtranger to the judgment; for judgments ought not to be ſubverted by matter *in pais*, without matter of record, as a recognizance or fine by an infant where he appears by attorney, and not by guardian. 1 *Rol. Abr.* 742. *Style* 246. *S. C.*

In an action upon the caſe, if the plaintiff be nonſuit, and after it is entred, that, *reliquit actionem, & fatetur ſe nolle ulterius proſequi*, upon which coſts are aſſeſſed, though it be admitted, that this judgment is erroneous, becauſe this is not any nonſuit, as it is entred; yet in an action of debt for the coſts, the defendant ſhall not avoid it by plea with a writ of error; for it is a judgment *de facto* not void, but only voidable by writ of error. 1 *Rol. Abr.* 742.

If a man recovers againſt the principal, and ſues a *ſcire facias* againſt the bail, they cannot ſay the principal died before the judgment, and ſo avoid the judgment by plea, for it is againſt the record. 1 *Rol. Abr.* 742. *Cro. Eliz.* 199. *S. C.* 1 *Leon.* 101. *S. C.*

If a fine is levied without an original, or of more than is contained in the original, it is not void, but only voidable by a writ of error. 2 *Inſt.* 513.

If *A.* levies a fine to *B.* who grants and renders to *A.* and his wife, and the heirs of the body of *A.* this is not void as to the wife, though ſhe is no party to the original, but only voidable by writ of error. 3 *Co.* 5. *a.*

By the practice of the court of *Common Pleas*, a defendant coming in by *capias utlagatum* the ſame term in which an *exigent* is returnable, may avoid the outlawry without a writ of error, by ſhewing that he purchaſed a *ſuperſedeas* out of the ſame court, and delivered it to the ſheriff before the *quinto exactus*, &c. or by ſhewing any other matter apparent on record, which makes the outlawry erroneous, as the want of an original, or the omiſſion of proceſs, or want of form in a writ of proclamation, &c. or a return by a perſon appearing not to be ſheriff, or a variance between the original and *exigent*, or other proceſs, or the want of ſuch addition as is required by the 1 *H.* 5. 2 *Hawk. P. C.* 458—9 1 *Rol. Abr.* 742—3.

In debt upon a bond againſt an adminiſtrator, he pleads a judgment recovered againſt the inteſtate, and that he hath not *aſſets ultra*, &c. the plaintiff may reply, that an action was brought againſt the inteſtate, and that he died before the judgment; and that after his death, judgment was given; for being a ſtranger to the judgment, he can neither bring error nor deceit, and has no way to avoid it but by plea. 2 *Mod.* 308.

If a man is found guilty upon an indictment of felony, and prays his clergy, and it is allowed him, and he is burnt in the hand, he cannot avoid this by a writ of error, becauſe he is convicted only, and not attainted; but the record being removed by *certiorari* into the crown office, if there be a fault in the indictment, it may be diſcharged, and reſtitution awarded to the party of his goods ſeized for that cauſe. *Cro. Eliz.* 489.

If a man had been indicted upon the ſtatute of 3 *Jac.* 1. *c.* 4. for abſenting from his pariſh-church, and thereupon proclamations had been made, that he ſhould render his body, &c. which nor being done, he had been convicted according to that ſtatute, yet no writ of error would have lain thereupon; for by the ſtatute, after proclamations made, and the default recorded, the ſame was a conviction of the offence, as if the ſtatute gave proceſs for the forfeiture; and if there was a fault in the record, the party's remedy was in the Exchequer to quaſh it there. *Raym.* 433.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of error, for the judgment being *quod ſuſpendatur*, &c. which is the judgment of law due for the offence, it muſt be preſumed to have been given, for that he was guilty of the offence; but if judgment of acquittal is given upon ſuch indictment, the King need bring no writ of error; but the offender may be newly indicted, for the judgment being *quod eat ſine die*, &c. may be given as well for the inſufficiency of the indictment, as for the party's innocency. 3 *Inſt.* 214.

Alſo any judgment whatſoever, given by perſons who had no good commiſſion to proceed againſt the perſon condemned, may be falſified, by ſhewing the ſpecial matter, without writ of error, becauſe it is void; as where a commiſſion authorizes to procced on an indictment taken before *A. B. C.* and twelve others, and by colour thereof the commiſſioners proceed on an indictment taken before eight perſons only. 3 *Inſt.* 231. *Hawk. P. C.* 459.

If one is attainted of felony, and after by relation of a general pardon, the felony is pardoned, he ſhall be diſcharged, for he hath no remedy by writ of error, to reverſe the attainder. 6 *Co.* 5. *a.*

By the common law, *in favorum vitæ*, an outlawry of treaſon or felony might be avoided by plea, that the defendant was in priſon, or in the King's ſervice beyond the ſea, &c. at the time of the outlawry pronounced againſt him; but it ſeems that no outlawry for any other crime againſt a party rightly deſcribed, can be avoided by the plea of any matter of fact whatſoever. *Co. Lit.* 259. 2 *Hawk. P. C.* 460.

One who purchaſes land of a perſon who afterwards is outlawed for felony, or condemned upon his own confeſſion, may falſify the record, not only as to the time wherein the felony is ſuppoſed to have been committed, but alſo as to the point of the offence; but where a man is found guilty by verdict, a purchaſer cannot falſify any more than the party, as to the point of the offence, but only as to the time. 2 *Hawk. P. C.* 450.

No writ of error can be brought but on a judgment, or an award in nature of a judgment, for the words of the writ are, *Si judicium redditum ſit*, &c. Co. Lit. 288. b.

If the plaintiff be nonſuit at the *niſi prius*, upon which coſts are taxed by the ſame jury, by the ſtatutes of *H.* 8. and *Jac.* 1. and judgment given for them againſt the plaintiff, the plaintiff may have a writ of error upon this judgment. 1 *Rol. Abr.* 744.

If a man brings a writ of falſe judgment in the *Common Pleas*, upon a judgment given in ancient demeſne, and reverſes the judgment there, a writ of error lies upon the judgment, for this is a matter of record. 1 *Rol. Abr.* 744.

If a man is indicted for felony, and thereupon a *capias* and *exigent* are awarded, but he dies before attainder, his adminiſtrators may have error upon this award of the *exigent*, becauſe by the award of the *exigent*, his goods were forfeited; and this is *ad grave damnum*, &c. tho' the principal judgment can never be given. 11 *Co.* 41. *b.*

If one be outlawed upon an indictment of treaſon, felony, or treſpaſs, but the proceſs and order preſcribed by the ſtatute of 6 *Hen.* 8. *c.* 4. and 8 *Hen.* 6. *c.* 10. are not obſerved, the outlawry may be reverſed by writ of error, which *ex merito juſtitiæ* ought to be granted. 3 *Inſt.* 31.

A writ

A writ of error lies to reverſe an attainder of high treaſon, though ſome have held the contrary, by reaſon of 33 *H.* 8. *c.* 20. which enacts, that every attainder of treaſon by the Common law ſhould be as effectual as if by authority of parliament; for the ſtatute is to be intended of lawful attainders by due courſe of law, and not of erroneous or void attainders; and ſo it was held in a parliament held the 28 *Eliz.* when it was enacted, that no attainder of high treaſon, where the party was executed for the ſame, ſhould be avoided by plea of error; but this act extended only to attainders before that time, where the party had been executed, not to attainders after. 3 *Inſt.* 215. See 3 *Bulſt.* 71. *Raym.* 1, 2.

If one be convicted upon an indictment of recuſancy for abſenting from church for one month, upon which judgment is given, that he ſhall forfeit 20*l.* but it is not *ideo capiatur*; this omiſſion being apparently to the prejudice of the King, it was held a writ of error would lie notwithſtanding the words of 3 *Jac. c.* 4. that no ſuch indictment ſhall be avoided, diſcharged, or reverſed, for want of form or other defect whatſoever, other than by direct traverſe to the point of not coming to church. *Cro. Car.* 504.

If it be entred in an inferior court, that the plaintiff *recuperare debeat*, whereas it ought to be *recuperet*; this is no judgment; ſo no writ of error lies thereupon, for the words of the writ are, *Si judicium redditum ſit. Style* 265.

In an aſſiſe of *darrein preſentment*, if the parties demurr upon the title, and it is adjudged for the plaintiff, and that he ſhall have a writ to the biſhop; a writ of error lies upon this judgment before the damages inquired of, becauſe there were no damages at the Common law, and then the writ would lie preſently; and the addition of damages given by the ſtatute, to be inquired of by the ſheriff, ſhall not ſtay the writ of error; and if it be affirmed, it may be inquired of the damages where it is affirmed. 1 *Rol. Abr.* 749.

If a man recovers by default in a writ of *coſenage* or *aiel*, a writ of error lies upon this before the damages are inquired of, becauſe the damages are but an addition to the Common law given by the ſtatute; and ſo the judgment for the principal continues at it was at Common law. 1 *Rol. Abr.* 749—50.

In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ is directed to the ſheriff to make a partition, no writ of error lies hereupon, for the judgment is not complete till the ſheriff return; and the ſecond judgment, which the law requires herein, viz. *quod partitio præd' foret firma & ſtabilis in perpetuum*, for before that the plaintiff may be nonſuit, or he may, upon the return of the ſheriff, ſuggeſt to the court, that the partition is not equal, and ſo have a new partition, and may alſo releaſe before the laſt judgment. 1 *Rol. Abr.* 750. *Cro. Eliz.* 635. *Moor* 643. *Noy* 71. *S. C.*

So if in an action of account, judgment is given *quod computet*, and thereupon the defendant brings a writ of error; yet the record ſhall not be removed till the intire matter of the account be determined, *Ne curia Domini Regis deficeret in juſtitia exhibenda.* 11 *Co.* 39. *b. Cro. Eliz.* 636. 2 *Leon.* 68. 2 *Bulſt.* 119, 120. 3 *Bulſt.* 233. *Cro. Jac.* 224. 2 *Rol. Rep.* 125.

But if a woman recovers in a writ of dower, a writ of error lies before the writ of inquiry of damages awarded, and before the third part aſſigned by metes and bounds, for the judgment is perfect as to the reality, and the damages are given by the ſtatue by way of addition. 1 *Rol. Abr.* 750. 1 *Brownl.* 127. 11 *Co.* 40. 1 *Rol. Abr.* 760. *Style* 290. *March* 88.

So if the plaintiff recovers in an *ejectione firmæ* by confeſſion *nihil dicit*, *non ſum informatus*, or demurrer, a writ of error lies before a writ of inquiry of damages executed; for the judgment, *quod recuperet poſſeſſionem* is perfect, and the plaintiff may preſently have execution thereupon; and therefore if the defendant were to be hindred from bringing a writ of error before a writ of inquiry executed, it might be in the plaintiff's power, by refuſing to bring or execute the writ of inquiry, to delay the plaintiff for ever. 1 *Rol. Abr.* 751. *Cro. Eliz.* 235. 1 *Leon.* 309. *Latch* 212. *Noy* 95. 1 *Leon.* 193. *Dyer* 291. 3 *Bulſt.* 233. *Palm.* 6. 2 *Rol. Rep.* 126. *Latch* 133. *Style* 109.

So if a man recovers in a *quare impedit* upon a demurrer, the defendant may have a writ of error before the writ of inquiry of damages returned, for ſuch writ may be awarded out of the King's Bench, if the judgment be affirmed there. 1 *Rol. Abr.* 750. See *March* 89. *Noy* 66.

If a man recovers in a *quare impedit*, and after brings a writ *quare non admiſit* againſt the biſhop, a writ of error lies on the judgment in the *quare impedit*, and the record ſhall be removed, tho' the other writ of *quare non admiſit* be not yet diſcuſſed. 1 *Rol Abr.* 751. *Godb.* 439.

If a *quare impedit* is brought againſt two, and one pleads to iſſue, and the other confeſſes the action, upon which judgment is given, he ſhall not have a writ of error till the matter is determined as to the other; for the writ of error muſt rehearſe all that are parties to the original, and as to one, judgment is not given; and if the record is removed before the intire matter is determined, there would be a failure of right. 11 *Co.* 39. *a.*

If in a *formedon* the tenant has judgment for part, no writ of error lies until the intire matter in demand is determined, for the judgment is, *Si judicium inde redditum ſit*, which word *inde* goes to the intire demand. 11 *Co.* 39. *b. Dyer* 291.

If debt be brought againſt divers by ſeveral *præcipes*, and judgment given againſt one, he may have error before determination of the matter as to the others; for there being ſeveral counts, the record of his count and the pleading ſhall be ſeveral from the original, and removed in *B. R.* and yet the original ſhall remain in *C. B.* for otherwiſe the court of Common Pleas could not proceed to determine the reſidue without the original; and my Lord *Coke* ſays it ſeems to him that in this caſe, if there be error in the original upon a *certiorari*, the Chief Juſtice ſhall only certify the tenor of it. 11 *Co.* 41. *a.* 2 *Rol. Rep.* 125. *Dyer* 291. *March* 89.

If in a *quo warranto*, judgment be given as to part of the liberties claimed, and they ſhall be ſeiſed, and that the defendant *capiatur pro fine*, and as to the other part, *curia adviſare vult*, a writ of error lies before any judgment given for the other part. *Palm.* 1, 2.

No writ of error will lie of any judgment that is not given in a court of record; nor of a judgment given in an inferior court, as the County-court, *&c. Co. Lit.* 288. *b.* Nor of a decree or ſentence in Chancery proceeding according to equity. 37 *Hen.* 6. *Bro. Error* 95. 1 *Rol. Abr.* 744, But of a judgment given in the limited court of Chancery, called the Petty-bag, which proceeds according to the Common law, and holds plea of *ſcire facias* for repeal of the King's letters patent, *&c.* a writ of error lies in *B. R.* 1 *Rol. Abr.* 744. *Dyer* 315. 4 *Inſt.* 80. *Plow.* 393.

The authority of the juſtice of *Trailbaſton* was by act of parliament; and therefore, by the general rule of law, if they erred in judgment, a writ of error lay in *B. R.* to reverſe the judgment. 2 *Inſt.* 540. 4 *Inſt.* 186.

If a man be convicted upon the ſtatute of 7 *Jac.* 1. *c.* 11. by two juſtices of the peace, for killing of partridges, upon proof or confeſſion of the party, without indictment; this judgment may be reverſed in *B. R.* being removed there by *certiorari*, without any writ of error; ſo if the conviction had been on the ſtatute againſt ſhooting, or ſuch like. 1 *Rol. Abr.* 743—4.

But if an erroneous judgment be given upon an indictment of barretry at the ſeſſions of the peace, and the party fined thereupon, and committed till he pays it, and he removes the indictment and proceedings by *certiorari*, and himſelf by *habeas corpus*, yet he cannot be relieved unleſs he brings a writ of error. *Cro. Jac.* 404.

But a record of force made by juſtices of peace upon the view, may be quaſhed, upon motion, without a writ of error. 1 *Leo.* 113.

Wherever a new juriſdiction is erected by act of parliament, and the court or judge, that exerciſes this juriſdiction, acts as a court or judge of record, according to the courſe of the Common law, a writ of error lies on

heir judgments; but where they act in a ſummary method, or in a new courſe different from the Common law, there a writ of error lies not, but a *certiorari*. 1 *Salk.* 263.

A writ of error does not lie on refuſing a prohibition. *Stran.* 591, 537.

Writ of error will not lie on the award of a peremptory *mandamus*. *Stran.* 536.

Error lies not on allowing the return of a *mandamus*. *Str.* 628.

Error lies on the award to remand where the court refuſes to bail. *Stran.* 536.

If the plaintiff be nonſuit, and judgment againſt him for coſts, error lies *in camera ſcaccarii*. *Stran.* 235.

Where the judgment is againſt two, a writ of error *ad damnum* of one only will not lie. *Stran.* 606.

Error *coram vobis* lies not after affirmance in the Exchequer Chamber. *Stran.* 690.

After affirmance error *coram vobis* cannot be allowed without leave. *Stran.* 949.

No writ of error *coram vobis* lies after affirmance. *Stran.* 975.

Error does not lie in the Exchequer-Chamber on an award of execution only. *Stran.* 1192.

2. *Who may bring a writ of error; againſt whom, and at what time it muſt be brought.*

No perſon can bring a writ of error to reverſe a judgment, who was not party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reverſal thereof. 1 *Rol. Abr.* 747. *Dyer* 90.

So a writ of error does not lie againſt any but him, who is party or privy to the firſt judgment, his heirs, executors or adminiſtrators. 1 *Rol. Abr.* 747. *Dyer* 90.

And therefore on a judgment for recovery of land, the writ muſt be brought againſt him who was party to the judgment, although he hath nothing in the land, and not againſt the tenant, and on ſuch writ the judgment may be reverſed; but there muſt go a *ſcire facias* againſt all the tertenants. 1 *Rol. Abr.* 749. 1 *Rol. Rep.* 302.

Upon this rule, that none ſhall have a writ of error to reverſe a judgment, but he who is privy to and hath ſome prejudice thereby; it hath been reſolved, that if one hath lands on the part of his mother, and loſeth them by erroneous judgment, and dies, the heir of the part of the mother ſhall have the writ of error. 1 *Leon.* 261. 2 *Sid.* 56. See *Owen* 68. *Godb.* 377.

So the younger ſon, when intitled to the land by the cuſtom of *Borough-Engliſh*, ſhall bring the writ of error, and not the heir at Common law; for this remedy deſcends with the land. *Owen* 68. 1 *Leon.* 261. 4 *Leon.* 5.

So if there be an erroneous judgment, tenant in tail female, the iſſue female, and not the ſon, ſhall bring a writ of error. *Dyer* 90. 1 *Leon.* 261. 1 *Rol. Abr.* 747.

So if a man ſettles land to the uſe of himſelf and the heirs of his body, the remainder to his own right heirs, and dies, leaving iſſue only a daughter, who levies a fine, and dies without iſſue, and *J. S.* brings a writ of error as couſin and collateral heir of the daughter, yet he ſhall never reverſe the fine; for there could no right deſcend to him from the daughter, becauſe ſhe had but an eſtate tail, which determined by her death without iſſue; and it does not appear, that the remainder in fee was in the daughter as right heir, wherefore *J. S.* ſhall not reverſe the fine, *quia de non apparentibus & non exiſtentibus eadem eſt ratio*, eſpecially in a court of judicature, where the judges can take notice of nothing that does not come judicially before them, and appear in the pleading. *Dyer* 89. *Cro. Eliz.* 469. 3 *Lev.* 36.

If there be tenant in tail, the remainder in fee, and in a *præcipe* brought againſt tenant in tail, an erroneous judgment is given againſt tenant in tail, and he after dies without iſſue, he in remainder may have a writ of error; for when the ſtatute *De donis* gave liberty to limit a remainder after an eſtate tail, the law gave ſuch actions to him in remainder as belonged to privies in eſtate. 3 *Co.* 3.

If tenant in tail male hath iſſue a ſon and a daughter by one venter and a ſon by another, and dies, and the eldeſt ſon makes a feoffment, and a common recovery is had againſt the feoffee, in which the eldeſt is vouched, and he vouches over the common vouchee, and after the eldeſt dies, the youngeſt ſon may have a writ of error; for tho' the eldeſt ſhould have rendred a fee ſimple to the feoffee, according to his loſs, yet he ſhould have recovered but an eſtate-tail, *viz.* ſuch an eſtate as he had when the warranty was made, which would have deſcended to the youngeſt, and conſequently the writ of error ſhall be brought by him. 1 *Leon.* 261. *Owen* 68. *Godb.* 377.

If there be ſeveral parties to an erroneous fine, they ſhall all join with the party that is to enjoy the land, though they themſelves can have nothing; and this is ſaid to be neceſſary only by way of conformity. 1 *Rol. Abr.* 747. *Dyer* 89.

But if a tenant for life, and he in remainder in fee, (being an infant) join in a fee, the infant alone may bring error for the error in reſpect of the perſon of the infant, which is the cauſe of the action for him and for no other. 1 *Leon.* 317. *Cro. Eliz.* 115.

A writ of error may be brought by him that is made party by the law, though he was not originally party to the ſuit, as he who comes in as a vouchee. 1 *Rol. Abr.* 748, 755.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may aſſign this for error, for he is party in intereſt to the recovery; and where a man's intereſt is bound by another's act, 'tis but reaſonable he ſhould be allowed to free himſelf from the miſchief of it, by taking advantage of any error in it. 1 *Rol. Abr.* 755, 796.

If *A.* be tenant in tail, the remainder to *B.* and *A.* ſuffers an erroneous recovery, and the common vouchee releaſes to the recoveror; yet if *A.* dies without iſſue, *B.* may, notwithſtanding the releaſe, reverſe it by writ of error, for the common vouchee is only called in for form; as he really has no intereſt in or title to the land, ſo really neither does he make any recompence to the perſon that loſes the land, and therefore it were unreaſonable to carry the notion of the imaginary recompence ſo far as to ſuppoſe him a real ſufferer, and thereby give him the privilege of ſetting aſide a conveyance which he is no way affected by. *Cro. Eliz.* 2. 3 *Co.* 4.

If he in the remainder be made privy to the record by *aid prier*, he ſhall have a writ of error during the life of the tenant for life; ſo if he be received by default of the tenant for life. 3 *Co.* 4. *Bro. Error*, 39.

So if a feme be received by the default of her baron, and loſes the land by judgment, the baron and feme ſhall have a writ of error thereupon. 1 *Rol. Abr.* 748.

If baron and feme levy a fine, they may by error reverſe the fine, for non-age of the feme, during the life of the baron. 2 *Co.* 57. *Cro. Eliz.* 129.

It was formerly holden, that a writ of error could not be brought before the judgment given; and if it bear *teſte* before, it was no *ſuperſedeas*, for the words of the writ are, *Si judicium redditum ſit, &c.* 1 Rol. Abr. 749. But it ſeems now agreed, that a writ of error that bears *teſte* before the judgment is good; and this is the uſual courſe for preventing and ſuperſeding execution; but the judgment muſt be given before the return of it. *March* 140. 1 *Vent.* 255. *Moor* 461. 3 *Keb.* 308. 1 *Vent.* 96. *Latch.* 133.

But a writ of error that bears *teſte* before any plaint entred, is not good. *March* 140.

So where the defendant, upon an indictment of barretry brought a writ of error bearing *teſte* before the aſſiſe, and it was diſallowed, becauſe if ſuch practice ſhould obtain, it would diſappoint all proceedings there. 1 *Vent.* 255. 3 *Keb.* 308.

By the 10 & 11 *W.* 3. *cap.* 14. it is enacted, "That no fine or common recovery, nor any judgment in any real or perſonal action ſhall, from and after the firſt day of *May* 1699, be reverſed or avoided for any error or defect

defect therein, unleſs the writ of error, or ſuit for the reverſing ſuch fine, recovery or judgment be commenced or brought, and proſecuted with effect, within twenty years after ſuch fine levied, or ſuch recovery ſuffered, or judgment ſigned or entered of record:" *Note*, in this ſtatute, are the uſual ſavings as to infants, feme coverts, perſons *non compos*, in priſon, or beyond ſea.

3. *Of writs of error into parliament, into the Exchequer Chamber, into the King's Bench, and into the Common Pleas, and other courts.*

The court of parliament is the ſupreme court, where anciently cauſes of great conſequence, as between the *Magnates Regni*, were heard and determined; hence the lords is the *dernier* reſort, to which a writ of error lies; and therefore if a writ of error be brought of a judgment in the King's Bench into the Exchequer-Chamber, and there the judgment is reverſed; yet a writ of error lies of ſuch judgment into parliament, and the lords may reverſe ſuch ſecond judgment. *Show. Parl. Ca.* 24, 110. 1 *Vent.* 334. *Raym.* 330. 2 *Jon.* 99. 2 *Lev.* 232.

So a writ of error lies into parliament, upon a judgment in *B. R.* either in a cauſe brought there by writ of error, or originally commenced there. 1 *Rol. Abr.* 745.

And tho' upon a judgment in the King's Bench, ſince the 27 *Eliz. cap.* 8. the party may elect either to bring a writ of error into the Exchequer-Chamber, or in parliament; yet if the cauſe commenced in the King's Bench by original writ there lies no writ of error but into parliament; alſo if he elects to bring error in the Exchequer-Chamber, regularly he cannot after bring error in parliament upon the firſt judgment. 1 *Saund.* 346. *Carth.* 180. *S. P.*

And therefore it ſeems, that if a writ of error be brought upon a judgment in the Exchequer-Chamber, where the judgment is affirmed, and after error is brought upon the ſame judgment in the parliament; this writ of error is no *ſuperſedeas*; but if the writ of error be brought upon the judgment in the Exchequer-Chamber, it is a *ſuperſedeas*. See 2 *Rol. Abr.* 492. 2 *Lev.* 232.

As no writ of error lay of a judgment in the King's Bench, but in parliament, and as the ſubjects were often diſappointed of their writ of error by the not ſitting of parliament, or by their being employed in public buſineſs when they did ſit; therefore, by the ſtatute 27 *Eliz. cap.* 8. reciting that erroneous judgments in the King's Bench were only to be reformed in parliament, it was enacted, "That where judgment ſhould thereafter be given in *B. R.* in debt, detinue, covenant, account, caſe, ejectment, or treſpaſs firſt commenced there, other than ſuch where the Queen ſhall be party, the plaintiff or defendant, againſt whom ſuch judgment ſhall be given, may at his election ſue out a writ of error directed to the Chief Juſtice, commanding him to cauſe the record, and all things concerning the ſaid judgment to be brought before the judges of the common Pleas and Barons of the Exchequer, which being of the degree of the coif, or ſix of them, ſhall examine the errors aſſigned or found, and thereupon reverſe or affirm the judgment, other than for errors concerning the juriſdiction of the court of King's Bench, or for want of form in any writ, *&c.* or proceeding, and after the ſame ſhall be brought back in *B. R.* that further proceedings may be had thereupon, as well for execution as otherways."

And by the ſaid act is is further enacted, "That ſuch reverſal or affirmation ſhall not be final, but the party grieved may bring error in parliament."

Writ of error does not lie in the Exchequer-Chamber on an award of execution of a judgment of *B. R.* affirmed in the Exchequer-Chamber; nor of a judgment in *ſcire facias* againſt bail. *Ld. Raym. Rep.* 97, 98.

The court of King's Bench ſuperintends the proceedings of all other inferior courts, and being the King's own court, in which he formerly ſat in perſon, by the plenitude of its power corrects the errors of thoſe courts; hence it is, that a writ of error lies in this court of a judgment given in the King's Bench in *Ireland*. 1 *Rol. Abr.* 745. *F. N. B.* 22. but for this ſee 4 *Inſt.* 356. *Kelw.* 202. 5 *Co.* 18. *a. Calvin's* caſe. 1 *Leon.* 55. *Yelv.* 118. *Style* 386. *Vaugh.* 290, 402.

So a writ of error will lie of a judgment given in Chancery on the Common law ſide, called the *Petty-Bag*, as upon a *ſcire facias* upon a recognizance, altho' both courts were before the King himſelf, and to ſome purpoſes are the ſame. 1 *Rol. Abr.* 744—5. 1 *Rol. Rep.* 287. 29 *Aſſ.* 47. 4 *Inſt.* 80. *Dyer* 315. And ſee *Moor* 570. *pl.* 778.

If a peer be attainted before the Lord High Steward, a writ of error lies in the King's Bench of ſuch attainder, and the party has no other remedy. 1 *Sid* 208. 1 *Lev.* 149.

A writ of error lies of a judgment in the Common Pleas into the King's Bench, which can only correct the errors of that court, and from thence into parliament. 4 *Inſt.* 22.

A writ of error lies into the King's Bench of a judgment in a county palatine, for tho' theſe are ſuperior courts and have *jura regalia*, yet their juriſdiction is derived from the crown. 4 *Inſt.* 214, 223. 1 *Rol. Abr.* 745.

If an erroneous judgment be given in *Durham* in the Chancery, upon proceedings according to the Common law, or before the juſtices of the biſhop, a writ of error lies before the biſhop himſelf, and if he gives an erroneous judgment, error lies in *B. R.* 4 *Inſt.* 218.

If the juſtice in eyre gives an erroneous judgment at a juſtice ſeat in a foreſt, a writ of error lies thereupon in *B. R.* 4 *Inſt.* 297.

By the ſtat. 34 & 35 *H.* 8. *cap.* 26. *par.* 113. Errors in judgments in pleas real and mixt, before the juſtices in their great ſeſſions in *Wales*, ſhall be redreſſed by error in *B. R.* in *England*; but errors in pleas perſonal ſhall be reformed before the preſident and counſel. *Moor* 248. *pl.* 391. *Cro. Eliz.* 104. adjudged.

If an erroneous judgment be given in *London*, or other place, which is a court of record, the party grieved ſhall have a writ of error, and this writ may be returned into the Common Pleas, or into the King's Bench, at the pleaſure of him who ſueth the ſame. *F. N. B.* 44.

No writ of error lies *in Banco* or *Banco Regis*, upon a judgment given within the five ports; but by cuſtom ſuch judgment is examinable by bill in nature of a writ of error *coram domino cuſtode ſeu gardiano quinque portuum apud curiam ſuam de Shepway*. 4 Inſt. 224.

If a judgment be given in the court of ſtannaries of the dutchy of *Cornwall*, no writ of error lies upon this *in Banco* or *Banco Regis*, becauſe it hath not been uſed; but of this there may be an appeal to the guardian of the ſtannaries, and from him to the Prince; and when there is no Prince, to the King's counſel. 1 *Rol. Abr.* 745.

A writ of error lies in the *Common Pleas* upon a judgment given before the judges of aſſize. 1 *Rol. Abr.* 745. But ſee 1 *Leon.* 55. 3 *Leon.* 55. 3 *Leon.* 159. *Dyer* 250. *Moor* 78. 1 *And.* 12. *Cro. Eliz.* 26. *Carter* 222.

Upon a judgment given in the *Huſtings* in *London*, a writ of error lies at *St. Martin's* before certain juſtices, 1 *Rol. Abr.* 745. 1 *Lev.* 309. 2 *Saund.* 253. *S. P.* and that upon a judgment of the ſaid juſtices, a writ of error lies in parliament. See 2 *Leon.* 107.

4. *Of reverſing judgments in the court of Exchequer; where a writ of error lies in the ſame court in which the record is, and of quaſhing writs of error.*

Before the ſtatute of 31 *Ed.* 3. Errors in the Exchequer were ſometimes examined in parliament, and ſometimes before commiſſioners, by force of the King's writ under the great ſeal. 4 *Inſt.* 72. *Moor* 566.

By ſtat. 31 *Ed.* 3. *cap.* 12. In all caſes touching the King, or other perſon, upon complaint of error in proceſs in the Exchequer, the Chancellor and Treaſurer ſhall cauſe the record to be brought before them, and taking to them the judges and other ſage perſons, ſhall call before them the barons to hear the cauſe of their judgment; and,

and, if upon examination error be found, ſhall amend the Rolls, and ſend them into the Exchequer to have execution.

By ſtat. 31 *Eliz. c.* 1. The not coming of the Lord Chancellor or Lord Treaſurer, or either of them, at any day of adjournment, ſhall be no diſcontinuance, ſo as one of them, or both Chief Juſtices come and are preſent.—But this ſtatute not providing remedy where they came not at the return of the writ of error, (ſee 2 *Leon.* 59.) it was enacted by 16 *Car.* 2 *c.* 2. that if the Chief Juſtices or either of them, or the Chancellor or Treaſurer ſhall not come at the return of the writ of error, it ſhall be no abatement or diſcontinuance; but no judgment ſhall be given, unleſs both Chancellor and Treaſurer ſhall be preſent.

And in the *Bankers caſe* adjudged in the Exchequer, which came before the Lord Keeper, *&c.* purſuant to the above ſtatute of 31ſt *Ed.* 3. the Lord Chancellor and three of the judges were of opinion, that the judgment of the Exchequer ſhould be reverſed; and then the queſtion was, whether the judgment of the court ſhould purſue the opinion of the majority of the judges, or that of the Lord Keeper and the three judges; and three of the judges were of opinion, that the majority of the judges ſhould govern this judgment; but the others being of a contrary opinion, the judgment was reverſed, which was pronounced by my Lord Keeper *Somers*.

If upon a judgment in *B. R.* there be error in the proceſs, or through the default of the clerks, it ſhall be reverſed in the ſame court by writ of error ſued there before the ſame juſtices. *F. N. B.* 21. *Poph.* 181 1 *Pol. Abr.* 746.

So if one is indicted of treaſon or felony in *B. R.* or being indicted elſewhere, the indictment is removed in *B. R.* and by proceſs of that court he is erroneouſly outlawed, and ſo returned; a writ of error may be brought in *B. R.* for the reverſal thereof. 3 *Inſt.* 214.

Alſo if an erroneous judgment in point of law be given in *B. R.* upon an indictment in *London*, a writ of error may be brought in the ſame court; for though in civil caſes error does not lie in the ſame court, unleſs for a matter of fact; yet in criminal caſes it lies as well for an error in law as fact. 1 *Sid.* 208.

In *Fitz. N. B.* 21. it is ſaid, that a judgment cannot the ſame term it is given be reverſed in *B. R.* without a writ of error, though ſuch judgment may in the Common Pleas; but it does not ſeem that there is any foundation for this diſtinction, for during the term in which any judicial act is done, the record remains in the breaſt of the judges of the court; and therefore the Roll is alterable during the term, as they ſhall direct. *Moor* 186. *pl.* 332. *Yelv.* 157. *Poph.* 181. But when the term is paſt, the Roll is the record, and admits of no alteration. *Co. Lit.* 260. *a.* See **Amendment.**

But if an erroneous judgment be given, and the error lies in the judgment itſelf, and not in the proceſs, a writ of error does not lie in *B. R.* of ſuch judgment. 1 *Rol. Abr.* 746.

If two bring a writ of error in *B. R.* upon a judgment in an aſſize, and pending the writ one of the plaintiffs dies, and after, the court not knowing of the death of one of them, reverſes the judgment; and after he, againſt whom the judgment was reverſed, brings a writ of error in the ſame court *de B. R.* and aſſigns the death of one of the plaintiffs in the firſt writ of error, which was the act of God, not the error of the court, it ſeems the writ well lies. *Rol. Abr.* 747. *Cro. Eliz.* 105. 4 *Leon.* 60. *S. P.*

If a record is removed by writ of error out of the Common Pleas into the King's Bench, and the writ of error for inſufficiency is quaſhed in the King's Bench, the plaintiff in error may have a writ *coram vobis reſiden'*. But ſuch new writ is not a *ſuperſedeas* in itſelf as the firſt writ was, and therefore he muſt move the court for a *ſuperſedeas*, and put in bail thereon. *Carth.* 368—9.

So if ſuch ſecond writ be quaſhed for inſufficiency, yet the court will grant a new or ſecond writ of error *coram vobis reſiden'*. As alſo a *ſuperſedeas* on putting in bail; for ſuch ſecond writ being void, as if there had been none before. *Carth.* 369, 370.

Writ of error quaſhed by means of the defendant in error, to be without coſts. *Stran.* 139.

Writ of error quaſhed being by one defendant only of a judgment againſt two. *Stran.* 233.

Coſts on quaſhing writs of error are to be given in all caſes. *Stran.* 606.

If a writ of error be quaſhed for any other fault than variance, error *coram vobis* lies. *Stran.* 607.

Court will not quaſh writ of error for being twenty-nine years after judgment. *Stran.* 837.

Judgment againſt the inhabitants of part of three pariſhes, and a writ of error of a judgment againſt the inhabitants of the three pariſhes quaſhed. *Stran* 1110.

Where a writ of error is ſpent by the plaintiff's in error moving in arreſt of judgment, he ſhall pay coſts on quaſhing it. *Stran.* 834.

Writ of error quaſhed, becauſe all the proper parties are not plaintiffs. *Ld. Raym.* 71.

Writ of error *coram vobis*, reciting the former writ to be returnable *coram nobis*, where it was before the King and the late Queen, quaſhed. *Ld. Raym.* 151.

Error *tam quam* may be quaſhed as to one judgment, and ſtand good as to another. *Ld. Raym.* 328.

Writ of error not to be quaſhed till the tranſcript returned and filed. *Ld. Raym.* 329.

Writ of error of a judgment on a recognizance quaſhed, becauſe it was *in adjudicatione executionis judicii. Ld. Raym.* 553.

Writ of error quaſhed for a variance in the ſtile of the court. *Ld. Raym.* 704.

One of the defendants brings a writ of error without the other; though the writ ſhall be quaſhed, the record is removed. *Ld. Raym.* 1403.

What coſts ſhall be given on quaſhing a writ of error. *Ld. Raym.* 1403.

Coſts given on quaſhing a writ of error. 4 *Ann. c.* 16. *ſect.* 25.

5. *Of removing the record or a tranſcript, and of alledging diminution, and granting a* certiorari.

On a writ of error of a judgment in the Common Pleas, or other inferior court, in every adverſary ſuit, the record itſelf ſhall be removed, that it may remain as a precedent and evidence of the law in the like caſes. 1 *Rol. Abr.* 753. 5 *Co.* 39.

But in the caſe of a fine the tranſcript only is removed, for fines are only a more ſolemn acknowledgment or contract of the parties, and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract ſtands as it was, if the latter, the juſtices of *B. R.* may ſend for the fine itſelf, and reverſe it, or they may ſend a writ to the Treaſurer and Chamberlain to take it off the file; beſides, ſhould the record itſelf be removed and affirmed, it could not be ingroſſed for want of a Chirographer in *B. R.* 1 *Rol Abr.* 752. 1 *Bendl.* 51. *Dyer* 89. *Godb.* 248. 2 *Rol. Rep.* 233. *F. N. B.* 20.

Alſo if a writ of error be brought in parliament of a judgment in *B. R.* the chief Juſtice muſt go in perſon into the houſe with the record itſelf, and a tranſcript, which is to be examined and left there, and then the record to be brought back again in *B. R.* and if the judgment be affirmed, the court of *B. R.* may proceed on the record to grant execution; and therefore if the record itſelf ſhould be removed, and judgment affirmed, and the parliament diſſolved, there could not be any proceedings thereupon to have execution. 4 *Inſt.* 21. *Cro. Jac.* 341. 1 *Bulſt.* 166. 1 *Rol. Abr.* 753. *Godb.* 249.

So if a writ of error be brought in *B. R.* here of a judgment in *B. R.* in *Ireland*, the record itſelf is not ſent, but a tranſcript only, by reaſon of the danger of the ſeas; but when it is come ſafe, and entred in the rolls here, then it ceaſes to be a record in *Ireland*, and is a perfect record here; yet if the judgment be affirmed, the King's Bench in *England* ſhall not award execution, but ſhall

ſend

ſend a ſpecial mandate to the Chief Juſtice in *Ireland* to do it. 2 *Bac. Abr.* 203.

If a writ of error be brought in *B. R.* to reverſe a judgment given in *B.* the original ſhall not be removed, if it be not by ſpecial matter, as if error be aſſigned in the original. 1 *Rol. Abr.* 753.

If a writ of error be brought in *B. R.* upon a judgment in an inferior court againſt the plaintiff, there the court may reverſe the judgment, though the original be not removed, no error being aſſigned in the original; for this is removed but to ſue here upon the ſame original. 1 *Rol. Abr.* 753.

In an action of waſte brought in the *Huſtings* in *London*, there was a verdict for the plaintiff, which being after quaſhed for the inſufficiency, and a new *venire* awarded, whereupon a verdict was given for the defendant, and judgment for him, and a writ of error being thereupon brought before ſpecial commiſſioners, it was reſolved, that the firſt verdict ſhould be certified in the record, becauſe it was not ſet aſide, for that the jurors had found againſt evidence, or for any undue practice or misfeaſance of the parties, but only for the inſufficiency thereof in point of law, which the court had adjudged upon the verdict appearing before them upon record. 2 *Saund.* 254. 1 *Lev.* 309. *S. C.*

If a writ of error be brought in *B. R.* upon a fine levied in the *Huſtings* of *Oxford*, the record itſelf ſhall be removed. 1 *Rol. Abr.* 753.

If there be ſeveral records between the ſame parties with which the deſcription in the writ of error agrees, the inferior court may remove which of the records they pleaſe. 1 *Vent.* 96. 1 *Sid.* 466. *Raym.* 189. 2 *Keb.* 684.

If the Judges of the Common Pleas, or other Judges, upon a writ of error, will not certify all the record, the party that ſues the writ of error may alledge diminution of the record, and pray a writ to the juſtices that certified the record before, to certify the whole record. *F. N. B.* 25. *a.*

But diminution cannot be alledged upon a writ of error brought upon a judgment in any inferior court. 1 *Sid.* 40.

And therefore where in a borough-court a plaint was entred as the plaint of *A. B.* and the declaration was by *A. B.* executor of *J. S.* and on a writ of error in *B. R.* this variance was aſſigned for error: the court held, 1. That want of a plaint in an inferior court is the ſame as want of an original in the court of *Common Pleas*, and that this could not be a plaint in this action. 2. If ſuch variance had been in a record of the Common Pleas, diminution might have been alledged, and a good writ certified; but in records out of inferior courts, no diminution can be alledged, and the court muſt take them as they find them. 1 *Salk.* 266.

A man cannot alledge diminution contrary to the record which is certified. 1 *Rol. Abr.* 764.

As if in a writ of error it be certified, that the judgment was *quod defend. ſit in miſericordia*, the defendant in the writ of error cannot alledge diminution: *ſſ.* that the record is *quod capiatur*, becauſe this is contrary to the record certified. 1 *Rol. Abr.* 764.

If upon a writ of error the record be certified, that a challenge was to the ſheriff for coſenage, and after thereupon a *venire facias* was awarded to the coroner upon diminution, it cannot be certified, that the challenge was after the return of the *venire facias*, becauſe this is contrary to the record before certified, for nothing can be certified but that which ſtands with the firſt record. 1 *Rol. Abr.* 764. 1 *Rol. Rep.* 200.

In a writ of error brought in *B. R.* upon a judgment in the Common Pleas, the want of a warrant of attorney being aſſigned for error, the plaintiff prayed one *certiorari* to the Chief Juſtice, and another to the *cuſtos brevium*, both which returned *non inveni aliquod warrant'*, and the defendant dying, the plaintiff by journeys accounts brought a new writ of error againſt the ſon and heir of the defendant, who appearing alledged diminution, in that the warrant of attorney was not certified, and prayed another *certiorari* to the *cuſtos brevium*; and it was urged, the return was not *quod non habetur aliquod warrant'*, but *quod non inveni, &c.* ſo that if upon the ſecond, a warrant ſhould be returned, it would not be repugnant; but it ſeemed to *Wray* Chief Juſtice, that it would be hard to grant a new *certiorari* in this caſe; though if any variance could be alledged, it would be otherwiſe, as adjudged in the caſe of one *Laſſels*; where it was certified there was no warrant of attorney; and becauſe the original was *inter Laſſels executor' teſtamenti, &c.* where he was not named executor in the firſt *certiorari*; and upon the matter a new *certiorari* was granted. 1 *Leon.* 22. See *Cro. Jac.* 277. 1 *Bulſt.* 21.

After *in nullo eſt erratum*, the court to inform their conſciences, may award a *certiorari* to amend the record. 5 *Co.* 37. 1 *Rol. Abr.* 764. *Style* 352. 2 *Rol. Rep.* 471.

If after *in nullo eſt erratum* pleaded, another part of the record is brought in by *certiorari*, and made of record there, the court ought to reverſe the judgment, if the matter ſo requires. 5 *Co.* 37. 1 *Rol. Abr.* 764.

After *in nullo eſt erratum* pleaded, if one party alledge upon record, a diminution of the record to reverſe it, and prays a *certiorari* to certify it, and thereupon a writ of *certiorari* is ſued out, and the record thereupon is certified; but before it is entred of record, the court is informed of this matter, this ſhall not be received; becauſe it comes in by the prayer of the party after *in nullo eſt erratum* pleaded, which is not to be allowed; but upon information to the court, the court may grant it. 1 *Rol. Ab.* 764—5. 1 *Jon.* 139. *S. C.*

In treſpaſs in *B. R.* judgment was given for the plaintiff by default, and a writ of error brought *in camera ſcaccarii*, and there aſſigned for error, that there was not any writ of inquiry of damages filed; and upon a writ of *certiorari* certified, that there was not any ſuch writ; yet after another *certiorari* granted, and upon this the writ of inquiry was certified, upon which the judgment was affirmed. 1 *Rol. Abr.* 765.

So where in a writ of right in *B. R.* after judgment, a writ of error was brought *in cameri ſcaccarii*, and the want of continuances aſſigned for error; and upon a *certiorari*, the want of continuances certified; yet after, upon another *certiorari*, the continuances were certified, and upon this the judgment affirmed. 1 *Rol. Abr.* 765.

If error be aſſigned in the original, and upon a *certiorari* granted an erroneous original is returned; and upon this *in nullo eſt erratum* is pleaded, and after the court *ad informandam conſcientiam* grant another *certiorari* for another original, and upon this a good original is certified; the court ought to intend that this is the original, upon which the judgment was given, in favour of judgments, which ought to be intended to be good. 1 *Rol. Abr.* 765. *Godb.* 407. 2 *Rol. Rep.* 352. *Cro. Car.* 91. *Style* 176.

If a writ of error be brought upon a judgment in *B. R.* in *Ireland*, in a writ of falſe judgment, upon a judgment in the *Toulſel* (which is the court of the mayor and aldermen of *Dublin*;) and it is aſſigned for error, that there was no plaint entered in the *Toulſel*, and that theſe words, *per quod actio accrevit* were omitted in the concluſion of the declaration; if the defendant alledge diminution, yet he ſhall not have a *certiorari* to the Chief Juſtice *de B. R.* in *Ireland*, to certify the reſidue of the record, *&c.* and that if any part of the record be not before him, that he ſhould write to the mayor and aldermen to certify it, and that he ſhould certify it to this court; for by this plea of *in nullo eſt erratum* in *B. R.* in *Ireland*, he hath admitted the record well certified by the mayor and aldermen; and this court hath no authority to require the court *de B. R.* in *Ireland* to write to the mayor, *&c.* and the judgment *de B. R.* in *Ireland*, is only here in queſtion; and ſuch writ being iſſued, a *ſuperſedeas* was granted to the whole, though it was prayed that the *ſuperſedeas* ſhould go as to the inferior court only; but at another day it being moved, that there might go a *certiorari* as to the words *per quod, &c.* it was granted. *Palm.* 285.

If in a writ of error, upon a fine, an error be aſſigned in the proclamations, upon which a *certiorari* goes to the *cuſtos brevium*, and upon his certificate it appears,

that two of his proclamations were made in one day; but it appears in the Chirograph-Office, that the proclamations were duly made; and he making and being the principal officer as to them, and the *cuſtos brevium* having only an abſtract thereof; upon the prayer of the defendant a new *certiorari* was directed to the Chirographer, who having certified the proclamations duly made, after examination of the clerks of the Common Pleas by the Juſtices in *B. R.* they awarded that the proclamations with the *cuſtos brevium* ſhould be amended according to thoſe in cuſtody of the Chirographer. 3 *Leon.* 106.

A writ of error was brought upon a judgment in debt by confeſſion in *C. B.* and the want of an original was aſſigned for error; the defendant, before a *certiorari* returned, came in *gratis*, and pleaded a releaſe in bar, to which there was a demurrer; and it being agreed that the plea was ill for want of a *venue*, the queſtion was, Whether the court *ex officio* might award a *certiorari*; and it was held by three judges, that though the party had concluded himſelf by relying on his releaſe, that yet the court was not bound thereby, but may award a *certiorari*; and if upon the return thereof it appeared that all the proceedings were right, they were obliged to give judgment on the whole record, according to conſcience and right; but *Holt* Chief Juſtice held, that the court in this caſe could not award a *certiorari*, becauſe the queſtion was not, whether error or not, but whether barred or not by the releaſe; which being the point referred to their judgment, they were not at liberty to depart from it. 1 *Salk.* 268. 6 *Mod.* 113, 206. *S. C.*

In a writ of error in the Exchequer-Chamber upon a judgment in *B. R.* it was aſſigned for error, that in the bill, the plaintiff declared on a leaſe for three years; but in the plea-roll, upon which the iſſue was joined, and the record of *niſi prius*, it was upon a leaſe for five years, ſo that the bill and declaration vary; and diminution being alledged by the plaintiff, a bill was certified, in which it was only for three years; upon which the defendant had another *certiorari*, and thereupon a bill was certified, wherein he declared upon a leaſe for five years, which warranted the declaration upon the roll and the *niſi prius*; and it was held by all the Juſtices and Barons, that the ſecond certificate, upon diminution alledged by the defendant, ſhould be received, for that warranting the roll and the record of *niſi prius* ſhall be intended the true bill, and the other a fictitious one. *Cro. Car.* 91.

If the court may award a *certiorari ad informandum conſcientiam* of a releaſe of errors ill pleaded. *Ld. Raym.* 1005.

The court will not reverſe a judgment as not being by original bill, without having it returned to a *certiorari*, that there is no bill. *Ld. Raym.* 1442.

Where it is returned upon a *certiorari*, that there is no writ of inquiry, the defendant in error may have another *certiorari*, and get a writ of inquiry returned. *Ld. Raym.* 1476.

If a *certiorari* to verify errors bear *teſte* before the errors aſſigned, the judgment ſhall be affirmed. *Ld. Raym.* 1554.

A record returned to a *certiorari* contrary to the record returned before, cannot be received. *Stran.* 1122.

An attorney and his wife ſue by writ of privilege, and have judgment by default; the judgment was affirmed, becauſe the writ of privilege was not returned before the court of *B. R.* on a *certiorari*. *Stran.* 1398.

6. *Of the ſcire facias; proceedings after the record removed; amendment and abatement of the writ of error, and how far it is a ſuperſedeas.*

After the record is removed, and the plaintiff in error has aſſigned his errors, which may be either errors in fact or in law, he ſhall have a *ſcire facias ad audiendum errores* againſt the defendant, who thereupon may plead *In nullo eſt erratum*, a releaſe, *&c.* *F. N. B.* 44.

The Exchequer-Chamber doth not award a *ſcire facias ad audiendum errores*, but notice is given to the parties concerned. 1 *Vent.* 34. See *Palm.* 186.

After a writ of error brought the defendant dies, yet the plaintiff in error may ſue out a *ſcire facias*, *&c.* againſt the executor. 1 *Vent.* 34.

If a man condemned in an aſſiſe be outlawed for the fine of the King, and he brings a writ of error to reverſe the outlawry only, there ſhall not be any *ſcire facias* againſt the recoverer, becauſe the outlawry is at the ſuit of the King only. 1 *Rol. Abr.* 763.

The attainder of felony of a perſon who had any lands, ſhall never be reverſed by writ of error without a *ſcire facias* againſt all the tertenants, and lords mediate and immediate; but it is ſettled that ſuch *ſcire facias* is not neceſſary in the caſe of high treaſon; alſo it is ſaid, that it is not neceſſary in the caſe of felony, when it is ſuggeſted on the Roll, that the party had no lands, and the Attorney general confeſſes it. 2 *Bac. Abr.* 207.

Upon a writ of error againſt the heir of him that recovers, a *ſcire facias* lies againſt the heir and tertenants. 1 *Rol. Abr.* 763.

If a writ of error is brought to reverſe a common recovery, the court, before reverſal thereof, ought to award a *ſcire facias* againſt the tertenants; and this is not merely diſcretionary, but *ex neceſſitate juris*; for they may have a matter to plead in bar, as a releaſe, *&c.* *Hill.* 2 & 3 *Jac.* 2. between *Kingſton* and *Herbert*. 3 *Mod.* 119. *per cur.* but *adjornatur*. 1 *Leon.* 290. like point.

But this matter was fully debated in the caſe of *Wynn* and *Lloyd*, where in a writ of error to reverſe a judgment given in a common recovery againſt the vouchee, after *in nullo errat. eſt* pleaded, the court awarded a *ſcire facias* (upon a ſurmiſe of the defendant, that there were tertenants) to the tertenants; the ſheriff returned, that *A.* is tertenant, and a *ſcire feci*, and *A.* comes in and ſays that there are other tertenants, and prayed a *ſcire facias* to them, and had it; the ſheriff returned, that *B.* is tertenant, and *ſcire feci*, and *B.* coming in, ſays there are other tertenants, and prayed *ſcire facias* to them; it was inſiſted, that the tertenant was not a party concerned in the reverſal of the judgment, but only as to his poſſeſſion, and therefore could not otherwiſe plead than as concerning his poſſeſſion; that by this means the delay might be infinite, for he that comes in upon this *ſcire facias* might as well plead that there is another tertenant, and ſo the plaintiff might be ſtaved off from ever having the benefit of his writ of error; beſides, this ſurmiſe is contrary to the return of the ſheriff. On the other ſide it was urged, 1. That the *ſcire facias* ought to go out againſt the tertenants, and had in all caſes, where it ever was controverted, been awarded, as appears by *Dyer* 321. *Cro. Jac.* 392. *Owen* 157. *Bridg.* 69, 70. 21 *E.* 5. 56. *Cro. Car.* 295, 313. *Moor* 524. *Cro Eliz.* 739. *Co. Ent.* 233. 2. That it ought to go out againſt them all, becauſe any one of them may have a releaſe to plead which may diſcharge or advantage the other. 3. That if it cannot be pleaded by the tertenant, yet it may be ſuggeſted to the court as *amicus curiæ*, and awarded *ex officio*; for it may be, he that is not ſummoned can plead in bar of the writ of error, which will go to the whole, and eaſe the court of examining errors; and in that reſpect it may be awarded, and the proceedings ſtay; but the court held, that the awarding a *ſcire facias* to the tertenants was not *ex neceſſitate juris*; and therefore when it is once out, and the tertenants are warned, there is no reaſon to grant it a third time, and here the delay was apparent; but if he could make it out, that he that is not warned has a releaſe of errors to plead, it being in their breaſts and diſcretions, it ſhould be granted, otherwiſe not. 1 *Lev.* 72, 130, 146. 1 *Sid.* 213. 1 *Keb.* 54, 351, 388, 459, 717, 748. *Raym.* 16, 55, 70, 96. *S. C.*

But where a writ of error was brought to reverſe a common recovery, and a *ſcire facias* ſued out againſt him that was the nominal demandant in the writ of entry, and a *ſcire facias* was moved for to the tertneant, but oppoſed, becauſe the tertenant was an infant, and therefore the parol may demur during her nonage, which would greatly delay the plaintiff; beſides, if this infant ſhould die, the lands may remain to another, but notwithſtanding this, the court awarded a *ſcire facias*; and

it

it was held by *Holt* Ch. Juſt. that though the granting a *ſcire facias* in ſuch caſes againſt the tertenants is diſcretionary, and not *ſtricti juris*; yet it hath been the conſtant courſe of this court to grant it; therefore he was of opinion, not to depart from that which had been the uſual courſe of the court. *Carth.* 111.

If the plaintiff in error aſſigns an error in fact, if the defendant will put in iſſue the truth of the fact, he ought to rejoin by denial of the fact, and ſo join iſſue thereupon, and ſhall not ſay *in nullo eſt erratum*, for by this he acknowledges the fact alledged to be true. 1 *Rol. Abr.* 763. *Br. Error* 93.

But when an error in fact is aſſigned, if the defendant will acknowledge the fact to be ſo as alledged, and yet that by law this is not error, he ought to rejoin *in nullo eſt erratum*, for by this he acknowledges the fact, and yet that by law it is not error. 1 *Rol. Abr.* 763.

Alſo if a man who is outlawed brings a writ of error to reverſe the outlawry, and aſſigns his errors, the King's attorney ſhall not plead *in nullo eſt erratum*, which amounts to a demurrer, as is done between common perſons; but upon the aſſignment of the error, the court ſhall give a day to the King's counſel to maintain the outlawry; and it is entred *curia adviſare vult*, till the outlawry is reverſed or affirmed. 1 *Rol. Abr.* 763.

If error be alledged in the body of the record, *in nullo eſt erratum* is a good rejoinder, for this ſhall put the matter in the judgment of the court, the Record being agreed to be ſo. 1 *Rol. Abr.* 763.

So if error be alledged in a matter of record, which is not of the body of the record, but in a collateral thing, as *quod non habetur aliquod recordum*, of reſummons, *in nullo eſt erratum* is a good rejoinder; for if the plaintiff in the writ of error does not pray diminution, and therefore procure a certificate from the inferior court, that there is not any reſummons before the rejoinder entred, this aſſignment is of no effect, but void, inaſmuch as this is to be tried by the record itſelf, and no diminution can be alledged after rejoinder entred; for if the defendant will confeſs the error, yet the court ought not to reverſe the judgment, till they are aſcertained of the error by the record itſelf. 1 *Rol. Abr.* 764. 1 *Leon.* 22.

If a writ of error abates or diſcontinues by the act and default of the party, a ſecond writ of error ſhall be no *ſuperſedeas*; otherwiſe if it abates or diſcontinues by the act of God or the law. 1 *Keb.* 658.

The *ſcire facias* in error muſt be returnable as the original proceſs was. *Stran.* 694.

How the entry ſhall be where a releaſe of errors is found. *Stran.* 683.

The court will take no notice of the recital of a writ in a declaratſon, but will require the writ itſelf to be produced. *Stran.* 225.

Return of a *certiorari* that no writ *civitatis London* is found, allowed. *Stran.* 309.

The court may award a *certiorari* before errors aſſigned. *Stran.* 440.

In nullo eſt erratum a proper plea to an error not aſſignable. *Strau.* 685.

No ſecond *certiorari* to reverſe a judgment. *Stran.* 765, 819.

If there be warrant of attorney any time *pendente lite*, it is ſufficient. *Stran.* 807, 526.

Errors are not verified by a *certiorari*, teſted before the writ of error. *Stran.* 819.

A *certiorari* lies to affirm a judgment after *in nullo eſt erratum*. *Stran.* 907.

The recital of the writ may aid a defect in the court. *Stran.* 1023.

Writs of error may be amended, ſtat. 5 *Geo.* 1. *c.* 13.

Writ of error amended without coſts. *Stran.* 863.

Amendment of writ of error by ſtriking out a plaintiff. *Stran.* 892.

The court may *ex officio* amend a writ of error. *Stran.* 902.

Writ of error is abated by death of one of the plaintiffs, but not by the death of a defendant. *Stran.* 244.

Where error abates by the act of the plaintiff in error, execution ſhall go. *Stran.* 880, 1015.

After the writ of error ſhewn, the plaintiff ought not to take out execution, but the defendant ſhall have four days time to get it allowed, and four days time more to put in bail, if the caſe require it; and if he paſſes that time, the writ of error ſhall be no farther a *ſuperſedeas*. 2 *Keb.* 129.

If judgment in a *formedon* be pronounced 16 *Novemb.* and a writ of error is brought by the tenant bearing *teſte* 27 *Novemb.* and then allowed, and *in majorem cautelam* a *ſuperſedeas* made out againſt executions, and the demandant obtains a writ of ſeiſin, bearing *teſte* 9 *Octob.* before, by warrant of the judgment, which was afterwards entred but as of *Octob. Mich.* being the laſt continuance, which being made appear to the court, and they being ſatisfied that the judgment was pronounced 16 *Novemb.* before which time the defendant could not have a writ of ſeiſin, nor the plaintiff a writ of error, they held this ſuch a trick as would defeat any writ of error; and therefore a new *ſuperſedeas* was awarded againſt that writ of execution, *quia erronice emanavit*. *Hob.* 329. See 3 *Lev.* 312.

If a writ of error is taken out to remove a record between ſuch and ſuch perſons, and ſome of the parties are omitted; ſo that in ſtrictneſs the writ does not agree with the record, yet it is notwithſtanding a *ſuperſedeas*, and no execution can be taken out, for the court below cannot judge of the fitneſs of it, tho' it may be quaſhed in the court out of which it iſſues. 1 *Mod. Hughes* and *Underwood*.

If *A.* recovers in debt or damages againſt *B.* and ſues out a *capias ad ſatisfaciendum* againſt *B.* which is returned *non eſt inventus*, upon which a *ſcire facias* is awarded againſt the bail and returned, and after a ſecond *ſcire facias* awarded but not returned, *B.* brings a writ of error on the principal judgment; this is no *ſuperſedeas* as to the proceedings againſt the bail, but the ſecond *ſcire facias* may well be returned, and the plaintiff may proceed thereon, notwithſtanding the writ of error, which affecting only the principal judgment, is diſtinct from the proceedings againſt the bail. 2 *Rol. Abr.* 491.

If a man recovers againſt *J. S.* and on a *ſcire facias* hath judgment againſt the bail, and the bail bring a writ of error of the judgment on the *ſcire facias*; this ſhall be no *ſuperſedeas* as to the principal judgment, and therefore the plaintiff may take out execution againſt the principal. 2 *Rol. Abr.* 491.

If a man brings a writ of error on a judgment, but does not remove the record within ſix days, this ſhall be no *ſuperſedeas*, but execution may well be taken out, for it appears that the writ of error is merely for delay. 2 *Rol. Abr.* 491.

If a writ of error be brought returnable into the Exchequer Chamber, which is allowed by the clerk of the errors, and a *ſuperſedeas* granted thereupon; but the record is not marked by the clerk of the errors, as the uſage is, nor notice thereof given to the attorney of the other ſide; but theſe matters are omitted becauſe the attorney was not known, nor the number roll of the record; yet this is a good *ſuperſedeas* in law, ſo that if execution be awarded and executed, it is erroneous, and a *ſuperſedeas* ſhall be awarded *quia erronice emanavit*; but it is no contempt in the attorney in taking out execution, he having no notice of the writ of error, and the roll not being marked. 1 *Rol. Abr.* 492.

It ſeems clearly agreed, that an action of debt may be brought upon a judgment in *B. R.* notwithſtanding a writ of error brought in the Exchequer-Chamber; for tho' ſuch a writ be a *ſuperſedeas* to the execution, yet the duty remains upon record; and it is but reaſonable the party ſhould have this remedy for his damages for forbearance. 2 *Rol. Abr.* 490.

A writ of errer ſuperſedes the taking out a *capias ad ſatisfaciendum* in order to charge the bail. *Stran.* 867.

Writ of error ſued out before judgment is a *ſuperſedeas*. *Stran.* 632.

Plaintiff cannot call for the return of a *capias ad ſatisfaciendum* pending error. *Stran.* 1186.

Writ of error brought by one defendant ſuperſedes execution. *Ld. Raym.* 405.

7. *Of*

7. Of aſſigning errors.

Upon a writ of error for want of aſſigning errors, judgment is not affirmed, but execution goes upon the firſt judgment, ſo that the party can have no coſts; but his remedy muſt be upon the recognizance, by which he is bound to proſecute with effect. 1 *Sid.* 294. 2 *Keb.* 52, 71, 75, *S. C.*

The parties upon the removal of the record by the writ of error, have no day in court given to either of them; wherefore if the plaintiff in error delay to ſue forth his *ſcire facias ad audiendum errores*, the defendant hath no way to compel him, but by ſuing out a *ſcire facias quare executionem non*, *&c.* and if upon ſuch a *ſcire facias*, the plaintiff in error doth not plead, that errors are aſſigned, but ſuffer judgment to paſs upon two *nihils*, no errors afterwards aſſigned ſhall prevent execution. *Carth.* 40, 41.

And by a rule of the *King's Bench*, if the plaintiff in error doth not aſſign his errors, and give a copy of them to the defendant's attorney in error, by or before the time given by the rule on the *ſcire facias* is out, the defendant's attorney in error may enter judgment on the *ſcire facias*, and take out execution thereon, but can have no coſts, unleſs he gives a rule for the plaintiff to aſſign error on record; which if he doth not do, he may be *non proſ'*, and then the defendant in error ſhall have his coſts.

Alſo by another rule of the ſame court, when the plaintiff in error hath aſſigned the general errors, he muſt give a copy of them to the defendant's attorney, who may plead *in nullo eſt erratum* to it immediately, and enter both on the roll, paying the plaintiff's attorney 2*s.* 4*d.* for the ſame. See *Att. Pract. in K. B.*

If the defendant in error ſues out a *ſcire facias quare executionem non debet*; this is merely collateral to the record removed, and yet by matter *ex poſt facto* may become a record; as if the plaintiff upon the return of the *ſcire facias* appears and pleads a releaſe or other matter, as he well may, then this is a record annexed to the firſt record removed; but if upon the return of the *ſcire facias*, the plaintiff appears, and aſſigns errors, or hath a day given him to aſſign them, and upon this record aſſigns his errors inſufficiently; this *ſcire facias* is but a piece of paper filed to the record, no proceeding being thereupon. *Yelv.* 6, 7.

In a writ of error, it is no good aſſignment of error, *quod in omnibus erratum eſt*, for the court is not bound to inquire of the errors, if the party does not ſhew them. 1 *Rol. Abr.* 761.

In a writ of error to reverſe an outlawry, errors cannot be aſſigned by *attornatum*, but the party muſt appear in perſon. 2 *Leon.* 22. *Cro. Eliz.* 611.

If two bring ſeveral writs of error, and ſeveral *ſcire facias*'s to reverſe a judgment in an aſſiſe againſt them, they may aſſign errrors jointly. 1 *Rol. Abr.* 761. *Bro. Error* 50.

If a writ of error upon a judgment in an aſſiſe be brought by four and only one appears, and the other makes default, he cannot aſſign errors alone till the other is ſummoned and ſevered. *Yelv.* 3, 4. *Cro. Eliz.* 891.

So if upon a judgment in a *quare impedit*, a writ of error be brought by the biſhop and incumbent, the incumbent only without ſummons and ſeverance cannot aſſign errors. *Cro. Jac.* 94.

If two are outlawed in an appeal of murder, and they bring a writ of error to reverſe it, and one appears, but the other does not, he ſhall not aſſign errors till the other does, becauſe he hath joined with him in the writ of error. 1 *Sid.* 316.

Two brought a writ of error, and made two attornies; upon the *ſcire facias*, the one attorney aſſigned error, to which the defendant took iſſue, and then the other would plead in abatement of the writ; and it was held *per cur'*, if one of the plaintiffs had made default, he ſhould be ſevered; but if they go on, they muſt proceed jointly; and if one attorney will aſſign error, *&c.* without authority from both, we cannot help it, let him take his remedy againſt the attorney. 6 *Mod.* 40.

The plaintiff in error cannot aſſign error in fact, and error in law together, for theſe are diſtinct things, and require different trials. 1 *Rol. Abr.* 761. 1 *Sid.* 147. 1 *Leon.* 105.

If the plaintiff in error aſſigns errors in fact, and errors in law, which are not aſſignable together, and the defendant in error pleads *in nullo eſt erratum*; this is a confeſſion of the error in fact, and the judgment muſt be reverſed, for he ſhould have demurred for the duplicity. *Style* 69. 1 *Lev.* 76. *Salk.* 268. 6 *Mod.* 113, 206.

Alſo if an error in fact be well aſſigned, *in nullo eſt erratum* is a confeſſion of it, for the defendant ought to have joined iſſue upon it, ſo as to have it tried by the country. 1 *Sid.* 93. *Raym.* 59.

But if an error in fact be ill aſſigned, *in nullo eſt erratum* is no confeſſion of it; as if it be aſſigned, that ſuch a one at the time of the return of the *venire* was not ſheriff, and the record be removed into *B. R.* by *certiorari*, there *in nullo eſt erratum* is no confeſſion of that error, becauſe the record is not in court, that being no part of the record, for the plea is *in nullo eſt erratum in recordo*. *Cro. Jac.* 12, 29, 521. *Raym.* 231. *Cro. Car.* 421. 1 *Rol. Abr.* 758.

So if the plaintiff in error aſſigns an error in fact, *viz.* that the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus eſt verificare*, inſtead of concluding to the country, as he ought to do, though the defendant in error pleads *in nullo eſt erratum*; yet it ſhall not amount to a confeſſion, but ſhall be taken only for a demurrer. *Yelv.* 58.

Alſo if an error in fact, that is not aſſignable, be aſſigned, and *in nullo eſt erratum* be pleaded, it is no confeſſion; as if it be aſſigned, that ſuch a day there was no court of Common Pleas ſitting, becauſe that is againſt the record, and in ſuch caſe *in nullo eſt erratum* is only a demurrer; ſo if a man ſays he did not appear, and the record ſays he did, *in nullo eſt erratum* is no confeſſion, but a demurrer, becauſe it is againſt the record. *Cro. Car.* 12, 29, 52. *Yelv.* 58. *Raym.* 231. 1 *Vent.* 252. 3 *Keb.* 259. 1 *Lev.* 76.

After errors aſſigned, and the defendant had pleaded a releaſe, the plaintiff diſcontinued; and becauſe there was manifeſt error in part of the record remaining in *B.* he obtained a writ out of Chancery to the Chief Juſtice to remove the reſidue of the record, which being removed in *B. R.* he would aſſign errors upon the new part removed; and it was ruled *per cur'*, that inaſmuch as the firſt writ was diſcontinued, and this a new writ, the plaintiff is not tied to the former errors, but may ſhew others at his pleaſure, for it is now as if one were aſſigned before, and he may aſſign other errors out of the record; and the removing the record in this manner was held allowable; but this being entered upon another roll, it was held a miſ-entry, and the plaintiff was put to a new writ of error. *Cro. Eliz.* 155, 281. 2 *Leon.* 2. *S. C.*

In error from *Ireland*, rules are given to aſſign errors, otherwiſe *non proſ.* *Stran.* 417.

Plea to the *ſcire facias quare executio non*, ſet aſide. *Stran.* 679.

A rule muſt be given on the *ſcire facias quare executio non*, before a rule to aſſign errors. *Stran.* 917.

Where the plaintiff in error pleads to the *ſcire facias*, there ſhall be execution if it goes againſt him. *Stran.* 390.

Aſſignment of errors ſet aſide as vexatious. *Stran.* 141.

Errors aſſigned by attorney againſt the crown. *Stran.* 443.

On affidavit of the want of a warrant of attorney, it may be aſſigned for error from *Ireland*. Stran. 545.

No error to be aſſigned contrary to the record. *Stran.* 684.

Where two join in a writ of error, and one will not aſſign errors, the court will give the other time to ſummon and ſever. *Stran.* 783.

Aſſigning for error the death of the plaintiff in ejectment is a contempt. *Stran.* 899.

Error in the act of the court may be aſſigned by the party who has advantage by it. *Stran.* 973.

Defendant in ejectment not allowed to aſſign infancy in himſelf. *Stran.* 33.

Matter aſſignable for error by the principal, not aſſignable by the bail. *Stran.* 197.

Matter omitted to be pleaded not aſſignable for error. *Stran.* 197.

In miſericordia, &c. in actions againſt peers is not error. *Stran.* 197.

Judgment on indictment reverſed for errors in the award of the *venire*. *Stran.* 309.

Entry of *capiatur*, where there ſhould be no *capiatur*, nor *miſericordia*, aided by verdict. *Stran.* 313.

Appearance of infant by attorney not amendable. *Stran.* 445.

Leaving out *ſuper ſe aſſumpſit* ill on a judgment by default. *Stran.* 793.

Where error is brought on a judgment that the parol ſhall demur, the non-age cannot be pleaded again. *Stran.* 861.

The jury on an indictment muſt appear to be ſworn in the county. *Stran.* 901.

A ſham plea to a *ſcire facias quare executio non*, to compel the plaintiff to aſſign errors ſhall be ſet aſide. *Ld. Raym.* 1414.

Error cannot be aſſigned both in fact and in law. *Ld. Raym.* 883.

It is not aſſignable, that the original was returned by one who was not ſheriff. *Ld. Raym* 884.

It is not aſſignable, that the perſon by whom judgment was given was not judge. *Ld. Raym.* 885.

Granting oyer is not aſſignable for error, but denying it is. *Ld. Raym* 970.

Giving judgment of *reſpondeas ouſter*, where it ought to be final, is no error aſſignable by the defendant. *Ld. Raym.* 1018.

It is not aſſignable, that a juror who gave his verdict was not returned upon the *venire*, where the *venire* is not returned to a *certiorari*, becauſe againſt the record. *Ld. Raym.* 1414.

It is not aſſignable, that the defendant died before the day of *niſi prius*, where he is recorded to have appeared. *Ld. Raym.* 1415.

Judgment of *reſpondeas ouſter* where it ought to be in chief, is not aſſignable for error by the defendant. *Ld. Raym.* 594.

Miſdirecting the jury is not aſſignable for error. *Ld. Raym.* 470.

8. *Of pleading in bar of a writ of error, and of the judgment to be given thereon.*

The defendant in error may plead a releaſe of all errors, or a releaſe of all ſuits, and theſe pleas, if found for him, will for ever bar the defendant in error. 1 *Rol. Abr.* 788.

So where by a writ of error the plaintiff ſhall recover, or be reſtored to any perſonal thing, as debt, damage, or the like, a releaſe of all actions perſonal is a good plea; and when land is to be recovered or reſtored in a writ of error, a releaſe of all actions real is a good bar; but where by a writ of error the plaintiff ſhall not be reſtored to any perſonal or real thing, a releaſe of all actions real or perſonal is no bar. *Co. Lit.* 288. *b.* 8 *Co.* 152. 1 *Rol. Abr.* 788. 2 *Rol. Abr.* 405.

Alſo if a man loſes in a real action, and he releaſes all his right to the land, this ſhall bar him of his writ of error, for no perſon can bring a writ of error to reverſe a judgment that is not intitled to the land, *&c.* for the courts of law will not turn out the preſent tenant, unleſs the demandant can make out a clear title; poſſeſſion always carrying with it the preſumption of a good title, till the right owner appears. 1 *Rol. Abr.* 747, 788. *Dyer.* 90. *a.* 3 *Leo.* 36.

Hence it is, that if a man releaſes all his right of the land of which a fine was levied, he has thereby barred himſelf of his writ of error; for his releaſe having for ever excluded him from the land, he can have no writ of error, becauſe nobody is intitled who cannot have the land, of which the fine was erroneouſly levied. *Cro. El.* 469. 1 *Rol. Abr.* 789.

So it is if a fine be levied of 120 acres of land, and he, that hath right to a writ of error, makes a feoffment of the whole, he ſhall never reverſe the fine; but if the feoffment had been made, or a releaſe had been given of 20 acres only, he might yet have writ of error to reverſe the fine as to 100 acres, becauſe he has not transferred his right as to thoſe, and therefore may be reinſtated if the fine be erroneous. 1 *Rol. Abr.* 788. *Cro. Eliz.* 46. *Moor.* 413. *Owen.* 22. *S. C.*

If an infant brings a writ of error to reverſe a fine for his non-age, and his non-age after inſpection is recorded by the court; but before the fine reverſed, he levies another fine to another; this ſecond fine ſhall hinder him from reverſing the firſt, becauſe the ſecond having intirely barred him of any right to the land, muſt alſo deprive him of all remedies which would reſtore him to the land. 1 *Rol. Abr.* 788.

But if tenant in tail levies an erroneous fine, with proclamations, and then levies a ſecond fine, which is alſo erroneous, and dies; if the iſſue in tail brings a writ of error to reverſe the firſt fine, the defendant may plead in bar the ſecond fine; for though there be error in the ſecond, yet till that appears judicially to the court, it muſt be looked upon as a fine duly levied, and conſequently a bar to the plaintiff, becauſe while the ſecond, ſtands in force, he cannot have the land; but if in this caſe the plaintiff brings a writ of error to reverſe the ſecond fine, and the defendant pleads in bar the firſt fine, the plaintiff may reply on the firſt writ of error, that the ſecond fine was erroneous, and ſo be relieved againſt both, for here the examination of both fines comes judicially before the court; and if there appears any error the court will ſet them aſide, and not ſuffer them to ſtand in the way of the plaintiff's right. 1 *Rol. Abr.* 788. *Cro. Eliz.* 151.

But in a writ of error to reverſe a fine, the defendant cannot plead the ſame fine now endeavoured to be reverſed, and five years in bar of the writ of error, no more than in a writ of error to reverſe an outlawry, can that outlawry be pleaded in bar of the writ of error, *Quia non valet exceptio iſtius cujus petitur diſſolutio.* 2 Jon. 181. Raym. 461. 1 Vent. 353. 2 Sid. 92.

So if a fine be levied of land in ancient demeſne the lord may reverſe it after five years expired; but if a ſecond fine had been levied, the lord ſhould be barred of his writ of deceit after five years from the ſecond fine, for a fine of ancient demeſne is not originally within the courts of *Weſtminſter*, and the ſtatute in relation to the bar does not extend their juriſdiction; but when a fine is levied of ancient demeſne, it comes within the conuſance of the King's courts till the fine be reverſed, and by conſequence they have a juriſdiction of it, and ſo the fine becomes a bar. 2 *Inſt.* 518. 2 *Bulſt.* 244. *Cro. Jac.* 333. 1 *Rol. Rep.* 36. *Raym.* 462. 1 *Jon.* 181.

If a man outlawed upon a *rediſſeiſin* releaſes all actions to the recoverer, yet he may have a writ of error of the outlawry, becauſe that this does not belong to the party, but to the King in intereſt, and he may aſſign error in the judgment of the *rediſſeiſin* to reverſe the outlawry. 1 *Rol. Abr.* 788.

If the tenant, pending a *præcipe* againſt him, aliens in fee, and after judgment is given againſt him, and he brings a writ of error; this feoffment is not any bar to the writ, becauſe he was privy to the judgment after. 1 *Rol. Abr.* 788. *Bridg.* 77. 1 *Rol. Rep.* 306.

In a writ of error to reverſe a common recovery, it is no good plea, that the plaintiff pending the writ of error hath entred into part, for before the poſſeſſion was taken from him, he might have error to reverſe the judgment, though not to have reſtitution. 1 *Lev.* 72.

In a *ſcire facias* againſt a tertenant, he may plead a releaſe of error, though he be not privy to the judgment. 9 *Hen.* 6. 48. *Bro.* 9. *S. C.*

But the tertenants cannot plead in abatement of the writ of error, but only in bar as a releaſe, &c. in maintenance of their title. 1 *Lev.* 72.

In writ of error againſt the heir of the recoverer within age, and a *ſcire facias* againſt the tertenants; if the parol demurs for the heir, and the judgment is reverſed againſt the tertenant; yet at full age the heir may plead the releaſe of the demandant of the right, or of the errors, and bar him. 9 *Hen.* 6. 48. 1 *Rol. Abr.* 766.

A judgment being an entire thing cannot regularly be reverſed for part, and affirmed for part, as in *formedon de uno croſto*, meſſuage, &c. if the demandant recovers; and in a writ of error it is adjudged, that a *formedon* does not lie of a *croſt*, the judgment for the reſidue ſhall be reverſed alſo, becauſe the writ is not good, inaſmuch as there cannot be a good judgment upon a bad writ. See *Moor* 366. *Noy* 117. 2 *Leon.* 178. *Cro. El.* 425. 2 *Sid.* 57, 94. 2 *Rol. Rep.* 136. 1 *Sid.* 357. 2 *Jon.* 374. *Carth.* 235. 1 *Rol. Rep.* 2. 2 *Bulſt.* 214. *Allen* 74.

So in an action of treſpaſs againſt three, if one dies pending the writ, and yet judgment is given againſt all three, in a writ of error upon this judgment, the whole judgment ſhall be reverſed, becauſe it is intire, though the writ by the death abates but againſt one. 1 *Rol. Abr.* 775. See *Allen* 43. *Yelv.* 209.

In a writ of error upon a judgment in treſpaſs againſt ſeveral, if the judgment be erroneous, becauſe one of the defendants was within age, and appeared by attorney, the judgment ſhall be reverſed *in toto* againſt all. 1 *Rol. Abr.* 776. *Cro. Jac.* 289. *S. C.* and 303. *S. P.* adjudged. *Allen* 74, 75. *S. C.* and *S. P.* adjudged. *Style* 121, 125, 406. *S. P.* adjudged.

If an action be brought againſt *A.* as a feme ſole, where ſhe is covert, and againſt *B.* and *C.* and they all plead to iſſue, and *A.* as a feme ſole, and judgment is given againſt them all accordingly; in this caſe the baron of *A.* with *A. B.* and *C.* may join in error, and aſſign for error the coverture of *A.* and thereupon the judgment ſhall be reverſed for all, becauſe it is intire. 1 *Rol. Abr.* 776.

If in debt for rent on two ſeveral demiſes, and on the firſt the demiſe and reſervation are laid right; but as to the ſecond, the demiſe is with a reſervation of rent *ſecundum ratam* 18*l. per ann.* which is a void reſervation, becauſe no certain time or day being appointed for payment, it would ſubject the leſſee to an action of debt every hour, though the error be only in the ſecond demiſe; yet the judgment being intire, muſt be reverſed *in toto*. *Carth.* 234—5.

But in a writ of dower, if the plaintiff recovers by default, and upon this a writ is awarded to the ſheriff or bailiff, where the recovery is, to deliver to the plaintiff *tertiam partem per metas*, and to inquire of the value by the year; and how much time is paſt after the firſt demand of dower, and what damages ſhe hath ſuſtained; and upon this the ſheriff or bailiff returns, that he had delivered the third part of the lands, and the value found by the jury to 30*l. per ann.* and that two years are paſt after the firſt demand, and damages 50*l.* and therefore judgment is given accordingly, to hold in ſeverally the ſaid third part, and to recover the ſaid damages. In this caſe, tho' the judgment is not good as to the damages, inaſmuch as it is not averred, that the huſband of the plaintiff died ſeiſed (as the uſe is,) nor is it ſo found by the jury; nor was it ſo commanded by the writ to be inquired, by which the judgment as to this is erroneous, yet it ſhall be reverſed only as to this, and ſhall ſtand as to the recovery of the third part of the land. 1 *Rol. Abr.* 776.

So in an action of account, if judgment be given *quod computet*, and after auditors are aſſigned, and upon the account, judgment is given againſt the defendant alſo, and damages and coſts, and after a writ of error is brought upon both judgments, and thereupon the laſt judgment only is found to be erroneous; in this caſe, the laſt judgment only ſhall be reverſed, and not the firſt judgment; but this ſhall ſtand in force, for theſe are two diſtinct judgments and perfect, for the firſt judgment is, *Ideo conſideratum eſt quod computet, & defendens in miſericordia. Cro Eliz.* 776. *Cro. Eliz.* 806.

If a judgment be given againſt executors in an action of debt, and after a *ſcire facias* judgment is given againſt them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this caſe, if the firſt judgment be good, and the laſt erroneous, the laſt judgment only ſhall be reverſed, and the firſt judgment ſhall ſtand. 5 *Co.* 32.

But if a man recovers in debt upon a judgment, if the firſt be reverſed, the ſecond ſhall alſo. 1 *Rol. Abr.* 777.

After a recovery in a rediſſeiſin, if the firſt judgment be reverſed, the judgment on the rediſſeiſin ſhall be reverſed alſo. 8 *Co.* 143. 1 *Rol. Abr.* 777.

By the reverſal of the original judgment, the outlawry depending thereupon ſhall be reverſed. 1 *Rol. Abr.* 777.

If a man recovers in an annuity, and a *ſcire faias* iſſues thereupon afterwards, and the judgment upon the *ſcire facias* is after affirmed in a writ of error; yet if the firſt judgment of the annuity be reverſed, the other ſhall be alſo reverſed. 1 *Rol. Abr.* 777.

If a man recovers upon an original, and hath another judgment in a *ſcire facias*, if the firſt judgment be reverſed, the other ſhall be alſo reverſed. 1 *Rol. Abr.* 777.

If a man recovers in a *quare impedit*, and hath a writ to the biſhop, and after recovers againſt the biſhop in a *quare non admiſit* and after the judgment in the *quare impedit* is reverſed, the judgment in the *quare non admiſit* ſhall be alſo reverſed by this, though this was for the contempt to the King. 1 *Rol. Abr.* 777.

If the demandant recovers againſt the tenant, and the tenant againſt the vouchee, if the heir of the vouchee reverſes the judgment of the value, becauſe the vouchee was dead at the judgment rendred: this ſhall reverſe the judgment againſt the tenant alſo. 1 *Rol. Abr.* 777.

If the principal be outlawed of felony, and the acceſſary attainted and executed, and after the principal reverſes the outlawry, and is indicted and found Not guilty of the felony; by this reverſal and acquittal, the attainder againſt the acceſſary is annihilated, for his heir may have a *mort d'anceſtor* it ſeems, becauſe he hath no remedy by writ of error, or otherwiſe, to reverſe it, for his depends upon the principal. 9 *Co.* 119. 1 *Rol. Abr.* 777.

If the conuſee of a ſtatute recovers in the detinue by erroneous judgment againſt the garniſhee, and ſues execution, if the garniſhee in a writ of error reverſes the judgment given in detinue, yet the execution is not reverſed by this, becauſe it is a collateral thing executed. 8 *Co.* 142—3. 5 *Co.* 90 *b.* 1 *Rol. Abr.* 777.

If an infant and one of full age join in a fine, and the infant after bring error for the reverſal thereof, it ſhall be reverſed *quoad* the infant only. 1 *Leon.* 317. 1 *Co.* 76. *b. Hob.* 278. *Cro. Eliz.* 115, 124. 2 *Leon.* 108. *Moor* 565. 2 *Jon.* 115.

If huſband and wife join in a fine when they are of full age, it ſhall bind them both; but if the feme be within age, they may join in a writ of error to reverſe it during the minority of the wife. *F. N. B.* 21. 1 *Leon* 115.

If a fine be levied of land, of which part is guildable and part ancient demeſne, and as to that which is ancient demeſne, the fine is reverſed by writ or deceit, yet the fine ſhall ſtand for the reſidue, for a mark ſhall be made on the fine in the nature of a cancelling of that which is ancient demeſne only. 1 *Rol. Abr.* 775. *F. N. B.* 98. *Cro. Eliz.* 469. 1 *Jon.* 374. 2 *Jon.* 182.

Judgment reverſed on motion, without putting it in the paper where the defendant in error made default to a *ſcire feci. Stran.* 1210.

Judgment reverſed upon motion. *Stran.* 127.

On a releaſe of errors pleaded, judgment *quod querens nil capiat. Stran.* 127.

Judgment reverſed without a rule to join in error. *Stran.* 144.

On demurrer to aſſignment of errors, the judgment is *quod affirmetur. Stran.* 439.

Where a judgment for a defendant is reverſed, the plaintiff ſhall only have ſuch coſts as ſhould have been given him in the court below. *Stran.* 617.

Judgment reverſed in part, and affirmed *pro reſiduo*. *Stran.* 808.

A judgment erroneouſly given for full coſts ſhall be reverſed *in toto*. *Stran.* 934.

On reverſal of a judgment in part, the court in *Ireland* may be commanded to award a writ of inquiry, *&c.* *Stran.* 973.

Upon pleading the ſtatute of limitations in error, the judgment is to bar the plaintiff of his writ. *Stran.* 1055.

Where an improper judgment is prayed in a plea to a writ of error, the proper judgment ſhall be given. *Stran.* 1055.

Coſts in error where none in the original ſuit. *Stran.* 1084.

On affirming an interlocutory judgment of *B. R.* in *Ireland* on a writ of error there, the record muſt be remanded. *Stran.* 1258.

On *ſcire facias* againſt an executor, judgment given for the plaintiff with coſts, reverſed as to the coſts and affirmed as to the reſidue. *Stran* 188.

For more learning on this ſubject, ſee 9 & 10 Vin. Abr. *and* 2 Bac. Abr. *tit.* Error.

Erthmiotum, A meeting of the neighbourhood, *viz.* It was cuſtomary in former days for the neighbours to meet and compromiſe differences among them by the award of their fellows, *Ita ut ne damnum incurat, &c. aliquando in diviſis vel in* erthmiotis, *ſuum hominem ubique manuteneat, aliquando ſuper ipſam terram.* Leg. H. 1. cap. 57.

Eſbrancatura, From the French *eſbrancher*, to cut off the branches or boughs,——*Qui autem forisfecerit in foreſta Regis de viridi, ſive per culpaturam, ſive per* eſbrancaturam, *ſive per cæditionem turbarum, ſive per eſcoriationem moræ, ſive per eſſartum, &c. erit in miſericordia, &c.*

Eſcaldare, To ſcald, as *eſcaldare porcos*, to *ſcald* hogs. —In the inquiſition of the ſerjancies and knights fees in the 12th and 13th years of King *John*, within the counties of *Eſſex* and *Hertford*,——*Rogerus de Legburn, & Robertus, de Sutton de eo, tenet Bures per ſerjantiam* eſcaldandi *porcos Regis*. Lib. Rub. Scaccar. MS. fol. 137.

Eſcambio, Is a licence granted to one, for the making over a bill of exchange to another over ſea. *Reg. Orig. fol.* 194. For by the ſtatute of 3 *Rich.* 2. *c.* 2. No merchant ought to exchange or return money beyond ſea, without the King's licence. *Cowell, edit.* 1727.

Eſcape, *(Eſcapium)* Cometh from the French *echapper*, that is, *effugere*, to fly from, and ſignifies in the law, a violent or privy evaſion out of ſome lawful reſtraint. For example; if the ſheriff, upon a *capias* directed to him, take one, and endeavour to carry him to the gaol, and he in the way either by violence or by ſlight break from him, this is called an *eſcape*. *Staundf. Pl. Cor. fol.* 70. The ſame *Staundford* in his *Pleas of the Crown. lib.* 1. *c.* 26, 27. nameth two kinds of *eſcape*, the one *voluntary*, the other *negligent: Voluntary* is, when one arreſteth another for felony, or any other crime, and afterwards letteth him go whither he liſteth; in which *eſcape*, the party that permits, is by law guilty of the fault committed by him that eſcapes, be it felony, treaſon, or treſpaſs. *Negligent eſcape* is, when one is arreſted, and afterwards *eſcapeth* againſt his will that arreſteth him, and is not purſued by freſh ſuit, and taken again before the party purſuing hath loſt the ſight of him. *Id. c.* 27. *Cowell.*

Eſcape in general is underſtood, where any perſon, being under lawful arreſt, and reſtrained of his liberty, either violently or privily evades ſuch arreſt and reſtraint, or is ſuffered to go at large before delivered by due courſe of law. 2 *Bac. Abr.* 233.

I. Of eſcape in civil caſes.
II. Of eſcape in criminal caſes.

I. Of eſcape in civil caſes.

Under this head is conſidered,

1. *Where a perſon ſhall be deemed to be legally committed, ſo that the ſuffering him to go at large will be adjudged an eſcape.*

2. *What degree of liberty, or going at large, ſhall be deemed an eſcape.*

3. *Of voluntary and negligent eſcapes; and of eſcapes on meſne proceſs and execution.*

4. *Who are anſwerable for, and to be charged with, eſcapes; and of eſcape-warrants.*

5. *Of the proper remedy, and nature of the action to be brought, for an eſcape; manner of laying the action; the perſon's defence, who ſuffered the eſcape; and of pleading freſh ſuit.*

1. *Where a perſon ſhall be deemed to be legally committed, ſo that the ſuffering him to go at large will be adjudged an eſcape.*

It ſeems agreed as a general rule, that where-ever a ſheriff or other officer hath a perſon in cuſtody, by virtue of an authority from a court which hath juriſdiction over the matter, that the ſuffering ſuch perſon to go at large is an eſcape, for he cannot judge of the validity of the proceſs or other proceedings of ſuch court, and therefore cannot take advantage of any errors in them; hence the law allows him, in an action of falſe impriſonment, to plead ſuch authority, which will excuſe him, tho' it be erroneous; but if the court has no juriſdiction of the matter, then all is void, and conſequently the officer not puniſhable for ſuffering a perſon taken upon ſuch void authority to eſcape. *Moor* 274. *Dyer* 175. *Poph.* 203. 1 *Leon.* 30. 8 *Co.* 141. *b.* 5 *Co.* 64. *Cro. Jac.* 280, 289. 2 *Bulſt.* 64, 256.

Upon this diſtinction it hath been adjudged, that if *A.* obtains judgment againſt *B.* and a year afterwards, without any *ſcire facias*, takes out a *capias ad ſatisfaciendum*, upon which *B.* is taken, and the ſheriff lets him go at large, that this is an eſcape; for tho' the award of the *capias*, after the year, without a *ſcire facias*, was erroneous, yet the ſheriff could not take advadtage thereof, for it was ſufficient authority for him to make the arreſt, and might have been pleaded by him in an action of falſe impriſonment. *Cro. Eliz.* 188. 1 *Salk.* 273.

So where in debt for an eſcape, it was found by ſpecial verdict, that the plaintiff had outlawed *J. S.* after judgment upon a *capias ad ſatisfaciend.* ſued out within the year, and that two years after the outlawry he was taken up upon a *capias utlagatum*, and the ſheriff ſuffered him to eſcape, it was admitted, that if a *capias utlagatum* had been ſued out within the year, no prayer to charge him in cuſtody had been neceſſary, becauſe the plaintiff might have had a *capias ad ſatisfaciend.* without a *ſcire facias*; but this being after the year, the queſtion was, whether he could be ſaid to be in execution for the plaintiff in the original action without prayer, becauſe he would have been ſo, if he had been within the year, and here is no difference, for the plaintiff was at the end of his proceſs at the *exigent*, and no continuance or *ſcire facias* after a *capias utlagatum*, and the very *capias utlagatum*, which is ſued at his charge, imports an election of the body 1 *Salk.* 319. 5 *Mod.* 200.

If at the petition of *A.* and the reſt of the creditors of *B.* a commiſſion upon the ſtatute againſt bankrupts is iſſued ought againſt *B.* and thereupon the commiſſioners ſit and offer interrogatories to *C.* and he refuſes to be examined, and by them is thereupon committed to priſon, and the gaoler ſuffers him to eſcape, as the commiſſioners had ſufficient authority to commit, and *A.* was prejudiced by the eſcape, he may maintain an action againſt the gaoler. 1 *Rol. Rep.* 47. *Moor* 834. *pl.* 1123. *S. C.*

So if there be a ſuit in the eccleſiaſtical court between *A.* and *B.* in which *B.* is excommunicated, and afterwards taken upon an *excommunicatio capiendo*, and ſuffered to eſcape, *A.* may bring an action on the caſe for the

eſcape,

eſcape, tho' it was objected, that this was a ſpiritual matter, and that *A.* had other remedy, as by writ of recaption. 1 *Lutw.* 121—123.

Alſo upon this rule, that the ſheriff cannot take any advantage of the irregularity of the proceedings of a court which hath juriſdiction of the matter, it hath been holden, that if a nobleman be taken in execution, and the ſheriff lets him go, it will be an eſcape. 2 *Bulſt.* 65.

Upon the ſecond part of the diſtinction, that an officer ſhall not be liable to an action for the eſcape of a perſon taken on a writ, which iſſued out of a court that had not juriſdiction of the matter; it hath been holden, that if *A.* brings an action againſt an officer of an inferior court for an eſcape, and declares, that he brought an action againſt *J. S.* in the court of *Kingſton* upon *Hull*, upon an obligation made at *Halifax* in *Com. Ebor.* (but does not alledge it to be within the juriſdiction of the court) and that he obtained judgment, upon which *J. S.* was in execution, and ſuffered to eſcape by the defendant; that this declaration for want of alledging *Hallifax* to be within the juriſdiction of the inferior court, is not ſufficient to maintain the action; for tho' the action be in its own nature tranſitory, yet inferior courts being tied down to matters ariſing within their own limits, they muſt ſhew that they had conuſance of the matter; otherwiſe their proceedings will be void, as being *coram non judice*, of which the officer may well take advantage. 1 *Rol. Abr.* 809, 810.

So if *A.* declares, that he proſecuted one *J. S.* in the court of *Ely* upon a bond made *infra juriſdictionem*, upon which he was in execution, and that the defendant ſuffered him to eſcape; if the jury find that there was ſuch a proſecution, but that the bond was not made *infra juriſdictionem*, the action does not lie; for all that was done was *coram non judice*, and therefore no legal commitment; and though the defendant in the court below pleaded *non eſt factum*, yet that could not give the court any juriſdiction which it had not originally in the cauſe. 2 *Mod.* 29, 30.

Eſcape lies againſt a ſheriff for letting a man go at large being arreſted upon an *excommunicato capiendo*. Ld. Raym. 788.

An action lies for the eſcape of an outlaw. *Stran.* 901.

Eſcape is not purged by receiving the money of the defendant after the eſcape. *Ld. Raym.* 399.

Error in the commitment will not excuſe the gaoler for an eſcape. *Ld. Raym.* 424.

A ſheriff is chargeable criminally, though not capitally, for eſcapes ſuffered by the gaoler of priſoners committed to the ſheriff. *Ld. Raym.* 424.

Eſcape of a criminal that is pardoned, before the pardon is allowed in the court of King's Bench, is puniſhable. *Ld. Raym.* 425.

The ſheriff may juſtify an eſcape by the plaintiff's order. *Ld. Raym.* 555.

It is no plea for a gaoler, that traitors broke the priſon againſt his will. *Ld. Raym.* 651.

The ſheriff cannot be charged with an eſcape before he had the party in actual cuſtody by a legal authority; and therefore if an officer, having a warrant to arreſt a man, ſee him ſhut up in a houſe, and challenge him as his priſoner, but never actually have him in his cuſtody, and the party get free, the officer cannot be charged with an eſcape. *Bro. Eſcape*, 22.

But if *A.* is arreſted, and in the actual cuſtody of the ſheriff, and afterwards another writ is delivered to him at the ſuit of *J. S.* upon the delivery of the writ, *A.* by conſtruction of law is immediately in the ſheriff's cuſtody, without an actual arreſt; and if he eſcapes, the plaintiff may declare, that he was arreſted by virtue of the ſecond writ, which is the operation it has by law, and not according to the fact. 5 *Co.* 89.

So in eſcape againſt the ſheriffs of *London*, the plaintiff may declare, that he levied a plaint in the ſheriffs court againſt him being then in the counter, in cuſtody on a former complaint levied againſt him by *J. S.* and being ſo in cuſtody was ſuffered to eſcape; for the entring the plaint is of the nature of a writ or precept in another court, upon which the *Serjeant at Mace* arreſts the party by his general authority; and therefore by entring the plaint, and charging the defendant in the counter, he is in actual cuſtody of the ſheriff. 1 *Salk.* 273—4.

If by *habeas corpus* the body of *J. S.* together with a plaint entred againſt him in the court of *Norwich*, be removed before the Chief Juſtice of *B. R.* who upon the return of the writ accepts bail, the acceptance of bail, though before the filing thereof, is a diſcharge of the priſoner; and though afterwards a *procedendo* ſhall be awarded, yet the ſheriff cannot be charged with the eſcape. *Cro. Jac.* 203.

If *A.* declares againſt the marſhal of the King's Bench for the eſcape of a priſoner, formerly in the *Fleet*, and he *virtute brevis de habeas corpus*, directed to the warden of the *Fleet*, was *debito modo commiſſus* to the King's Bench; this will not be ſufficient, without alledging an actual commitment, for he cannot be committed on a *habeas corpus*, and that *debito modo* will not help it. 2 *Show.* 17.

If a perſon out upon bail renders himſelf in diſcharge of his bail, and a *reddidit ſe* is entred in the judge's book, and a *committitur* filed in the office, and the priſoner afterwards eſcapes; yet if no notice was given to the marſhal of ſuch render, nor no entry made of the commitment in his book, the priſoner ſhall not be deemed in cuſtody ſo as to charge the marſhal with an eſcape; but it ſeems this matter cannot be inſiſted upon after trial. 1 *Salk.* 272—3.

It hath been held, that entring a *committitur* upon the roll was not ſufficient to charge the marſhal with any eſcape, without proving an actual impriſonment; but that proving the party to be actually in priſon, though there be no entry made in the marſhal's book (without which he pretends he knows not how to take charge of them) is ſufficient. 1 *Sid.* 220. 1 *Keb.* 775.

And now for the greater ſecurity of creditors, and the better to enable them to prove the actual cuſtody of the priſoner, by ſtat. 8 & 9 *Will.* 3. *c.* 27. *ſect.* 9. it is enacted, "That if any perſon, deſiring to charge any perſon with any action or execution, ſhall deſire to be informed by the marſhal or warden, or their reſpective deputy or deputies, or by any other keeper or keepers of any other priſon or priſons, whether ſuch perſon be a priſoner in his cuſtody, or not, the ſaid marſhal or warden, or ſuch other keeper or keepers of any other priſon or priſons, ſhall give a true note in writing thereof, to the perſon ſo requeſting the ſame, or to his lawful attorney, upon demand, at his office for that purpoſe, or in default thereof, ſhall forfeit the ſum of 50*l.* and if ſuch marſhal or warden, or their reſpective deputy or deputies, exerciſing the ſaid office, or other keeper or keepers of any other priſon or priſons, ſhall give a note in writing that ſuch perſon is an actual priſoner in his or their cuſtody, every ſuch note ſhall be accepted and taken as a ſufficient evidence, that ſuch perſon was at that time a priſoner in actual cuſtody."

A *committitur* upon the roll is good evidence in eſcape, without an entry in the marſhal's book. *Ld. Raym.* 705.

2. *What degree of liberty, or going at large, ſhall be deemed an eſcape.*

Every perſon in priſon by proceſs of law is to be kept *in ſalva & aracta cuſtodia*, in order to compel them the more ſpeedily to pay their debts, and make ſatisfaction to their creditors. *Plow.* 36. 3 *Co.* 44. 2 *Inſt.* 381. 1 *Rol. Abr.* 806. And by ſtat. *Weſt.* 2. (13 *Ed.* 1.) *c*, 11. they are to be *impriſoned in irons*, which, Lord *Coke* ſays, was enacted in order to oblige them to a more ſpeedy compliance with their duty. 3 *Co.* 44. *a.* and 2 *Inſt.* 381. in his comment on this ſtatute, he ſays, that tho' priſoners, if need require, may now be kept in irons, yet that it could not be done by the Common law. —— And *Co. Lit.* 260. *a.* he ſays, impriſonment muſt be *cuſtodia*, *non pœna*, for *carcer ad homines cuſtodiendos*, *non adpuniendos*, *dari debet*.

So

If the ſheriff or other officer who hath the cuſtody of a priſoner, either bail him when he is not bailable by law, or ſuffer him to go out of the limits of the priſon, though with a keeper,, and for ever ſo ſhort a time, it is an eſcape. 1 *Rol. Abr.* 806. 3 *Co.* 44. *Plow.* 36. *Dyer* 166. *Hetley* 34.

But the law and proviſion made by *Weſtm.* 2. *cap.* 11 being eluded by the acts and contrivances of ſheriffs, and other keepers of priſons, by the act of 8 & 9 *W.* 3 *cap.* 27. *ſect.* 1. it is enacted, "That all priſoners, either upon contempt or meſne proceſs, or in execution, who are or ſhall be committed to the cuſtody of the marſhal of the *King's Bench* priſon, or warden of the *Fleet*, ſhall be actually detained within the ſaid priſons of the *King's Bench* and *Fleet*, or the reſpective rules of the ſame, until they ſhall be from thence diſcharged by due courſe of law; and if at any time the ſaid marſhal or warden, or any other keeper or keepers of any priſon, ſhall permit and ſuffer any priſoner committed to their cuſtody, either on meſne proceſs, or in any execution, to go or be at large out of the rules of their reſpective priſons (except by virtue of ſome writ of *habeas corpus*, or rule of court, which rule of court ſhall not be granted, but by motion made, or petition read in open court); every ſuch going or being out of the ſaid rules ſhall be adjudged and deemed, and is hereby declared to be an eſcape."

The writ of *habeas corpus* is an ancient writ, and what the ſubject was by law intitled to; yet if a ſheriff or other officer, who hath the cuſtody of a priſoner, does by colour thereof ſuffer the priſoner to go at large, it is an eſcape. *Cro. Car.* 14. 1 *Rol. Abr.* 808. *Hob.* 202 3 *Co.* 44.

As if an *habeas corpus* be returnable the next term, and the ſheriff or gaoler in the mean time ſuffer the priſoner to go at large, it is an eſcape, though he appear at the return of the writ; for the writ only impowers the gaoler to bring him directly to the court, and if he gives him any liberty in the mean time, it is at his peril. *Hard.* 476.

So where an *habeas corpus ad teſtificand.* was directed to the *marſhal* to carry one *Reynolds* to the aſſiſes at *Wells* in *Somerſetſhire*, who after the aſſiſes, was ſuffered to go ſixty miles beyond *Wells*, and though he returned again to the *Marſhalſea*, yet it was held an eſcape. 1 *Mod.* 116.

So if the goaler carry him round about a great way, for the accommodation of the priſoner, it is an eſcape; but he is not bound to bring him the direct way for fear of being reſcued. 1 *Mod.* 116.

Alſo it hath been adjudged, that if the ſheriff hath one in execution, and a *habeas corpus* iſſues to have his body in court ſuch a day, and before the return of the writ the ſheriff brings the priſoner to an inn in *Smithfield*, in his way to *Weſtminſter*, and the priſoner of his own head goes without any keeper to *Southwark*, and next morning returns again to the ſheriff, ſo that at the return of the *habeas corpus* the ſheriff delivers the priſoner into court, this is no eſcape. 3 *Co.* 44.

As the ſheriff muſt be careful that he does not give the priſoner more liberty than by law he ought to do, when he acts in obedience to a lawful authority; ſo he muſt take care that he does not let him go at large by colour of a void authority. *Dalton's Sher.* 486.

Therefore if one, in execution at the ſuit of the King and a private perſon, be, by warrant from the Lord Chancellor or Treaſurer, ſuffered to go at large with a keeper, in order to collect the money due to the King; this is an eſcape as to the private perſon, although he return again to priſon; for the King himſelf cannot licenſe one in priſon to go at large with a keeper. *Dyer* 297. *a.* 1 *Rol. Abr.* 808. *S. C.*

So where the ſheriffs of *York* pleaded, that they let the priſoner go at large by virtue of a writ of privilege to them from the council of *York*; and it not appearing to the court that the writ was a ſufficient warrant for that purpoſe, or that the council of *York* could in ſuch caſe diſcharge a priſoner, the plea was held ill. *Cro. Eliz.* 893.

If an act of parliament is made for the relief of confined debtors, and purſuant thereto the juſtices of the peace are enabled to diſcharge ſuch and ſuch priſoners, if they authorize the ſheriff to diſcharge a perſon that does not come within the deſcription of the act, and he lets the party go at large, it will be an eſcape. 1 *Salk.* 273.

The marſhal of the King's Bench being ſued to judgment, if he be afterwards taken in execution, he can be committed to no other goal but the *Marſhalſea*; and if he is committed to that priſon whereof he is keeper, it will be an eſcape in law of all the priſoners. *Style* 465.

If a woman warden of the *Fleet* priſon marries her priſoner, or if a ſheriff, *&c.* marries a woman in execution with him, in either caſe it will be deemed an eſcape in law. *Plowd.* 17.

If a man hath judgment againſt two perſons, and both are taken in execution, if the ſheriff ſuffer one of them to eſcape, he ſhall be anſwerable for the whole debt, though he hath one of them ſtill in cuſtody. 1 *Rol. Abr.* 810.

By the ſtat. 8 & 9 *Will.* 3. *cap.* 27. *ſect.* 8. it is enacted, "That if the marſhal or warden for the time being, or their reſpective deputy or deputies, or other keeper or keepers of any other priſon or priſons, ſhall, after one day's notice in writing given for that purpoſe, refuſe to ſhew any priſoner committed in execution to the creditor, at whoſe ſuit ſuch priſoner was committed or charged, or to his attorney, every ſuch refuſal ſhall be adjudged to be an eſcape in law.

3. *Of voluntary and negligent eſcapes; and of eſcapes on meſne proceſs and execution.*

It was formerly held, that where the ſheriff ſuffered a priſoner in execution to make a voluntary eſcape, the priſoner was in ſuch caſe abſolutely diſcharged from the creditor, and that the right of action was intirely tranſferred againſt the ſheriff, who by means of ſuch eſcape became *debitor ex delicto*. 1 Leon. 73. Hob. 202. S. P.

But the latter reſolutions have been contrary; and it hath been adjudged, that where a ſheriff ſuffered a voluntary eſcape, the plaintiff might have a new action of debt or *ſcire facias quare executionem non* againſt the priſoner. 1 *Sid.* 330. 1 *Show* 174. 2 *Mod.* 136. 1 *Vent.* 269. 1 *Mod.* 194. 2 *Lutw.* 1264.

Alſo the ſtatue of 8 & 9 *W.* 3. *cap.* 27. hath taken away all diſtinctions between voluntary and permiſſive eſcapes with regard to the plaintiff's remedy; for it is enacted by *ſect.* 7. of the ſaid ſtatute, "That if any priſoner, who is or ſhall be committed in execution to either or any of the ſaid reſpective priſons, ſhall eſcape from thence by any ways or means howſoever, the creditor or creditors, at whoſe ſuit ſuch priſoner was charged in execution at the time of his eſcape, ſhall or may retake ſuch priſoner by any new *capias* or *capias ad ſatisfaciend.* or ſue forth any other kind of execution on the judgment, as if the body of the priſoner had never been taken in execution."

But yet there remains a difference as to other purpoſes between permiſſive and negligent eſcapes; for if a ſheriff ſuffer a priſoner voluntarily to go at large, the ſheriff cannot retake him even upon a freſh ſuit; and if he does, the priſoner may have an action of treſpaſs againſt him. *Cart.* 212.

If the marſhal of the *King's Bench*, or warden of the *Fleet*, or any other who hath the keeping of priſons in fee, ſuffer a voluntary eſcape, it is a forfeiture of the office. 3 *Mod.* 146. *Carter* 212.

And now a further penalty is added by the ſtat. 8 & 9 *Will.* 3. *cap.* 27. *ſect.* 4. which enacts, "That if any marſhal or warden, or their reſpective deputy or deputies, or any keeper of any other priſon within this kingdom, ſhall take any ſum of money, reward, or gratuity whatſoever, or ſecurity for the ſame, to procure, aſſiſt, connive at, or permit any ſuch eſcape, and ſhall be thereof lawfully convicted, the ſaid marſhal or warden, or their reſpective deputy or deputies, or ſuch other keeper of any priſons, as aforeſaid, ſhall for every ſuch

offence forfeit the ſum of 500*l.* and his ſaid office, and be for ever after incapable of executing any ſuch office."

If the ſheriff ſuffer a perſon arreſted on meſne proceſs to eſcape, an action lies againſt him at Common law, from the delay and prejudice which the party ſuffers thereby. 1 *Rol. Abr.* 99, 807. *Moor* 852. *Cro. Eliz.* 623, 652, 868. *Cro. Jac.* 280.

But there is this difference between an eſcape on meſne proceſs and execution, and if the ſheriff arreſts a perſon on meſne proceſs, and he is reſcued by *J. S.* he may return the reſcue, and ſuch return is good, and no action of eſcape lies againſt him after ſuch return; but the court will iſſue proceſs againſt ſuch reſcuer, or fine him; for in this caſe, tho' the ſheriff may, yet he is not obliged to raiſe the *poſſe comitatus*. 1 *Rol. Abr.* 807. 1 *Jon.* 207. 1 *Rol. Rep.* 388. 3 *Lev.* 46.

But after judgment on a *capias ad ſatisfaciendum*, the ſheriff cannot return a reſcue, for in ſuch caſe the ſheriff is obliged to raiſe the *poſſe comitatus* if needful, and therefore if he return a reſcue, an action of eſcape lies, or a new *capias*, for the return of an ineffectual execution is as none. 1 *Rol. Abr.* 807. *Cro. Car.* 240, 255. 8 *Co.* 42.

Alſo upon an arreſt on meſne proceſs, the ſheriff is obliged to take bail by the ſtatute 23 *H.* 6. *cap.* 10. therefore if the plaintiff declares that the defendant being ſheriff of *T.* did arreſt *J. S.* at the ſuit of the plaintiff, and afterwards did ſuffer him to go at large; and the defendant pleads the ſtatute, and that he took good and ſufficient bail, and the plaintiff replies and traverſes, that the defendant took good and ſufficient bail; this action does not lie; for *quoad* the plaintiff the ſufficiency of the bail is altogether immaterial, 'tis for the ſecurity of the ſheriff; and if the party does not appear, the plaintiff need not take an aſſignment of the bail-bond, but proceed againſt the ſheriff by way of amercement, and leave the ſheriff to take his advantage againſt the bail. 2 *Mod.* 177, 227. *Cro. Eliz.* 624.

4. *Who are anſwerable for, and to be charged with, eſcapes; and of eſcape-warrants.*

Where a new ſheriff is appointed, his predeceſſor ought to deliver over by indenture all the priſoners in his cuſtody, charged with their reſpective executions; for the priſoners, until they are turned over to the new ſheriff, remain in the cuſtody of the old ſheriff, and if he omits to deliver them over, every omiſſion will be deemed an eſcape, wherewith he will be chargeable. *Hob.* 266. 2 *Rol. Abr.* 457. *Cro. Eliz.* 365. 1 *Bulſt.* 70. 2 *Leon.* 54. 4 *Co.* 72.

As where one *Buſtard* was ſeverally in execution in the cuſtody of the defendants, then ſheriffs of *London*, as well at the ſuit of *A.* as at the plaintiff's ſuit, and the defendants at the end of the year delivered over the body of *Buſtard* to the new ſheriffs by indenture, wherein the execution of *A.* was mentioned, but the execution at the plaintiff's ſuit was omitted, and afterward *Buſtard* in the time of the new ſheriffs eſcaped; and it was reſolved by the whole court, that the defendants being the old ſheriffs ſhould be charged with this eſcape; for that the old ſheriffs ought to have given notice to the new ſheriffs of all the executions wherewith any perſon was charged in their cuſtody. 3 *Co.* 71.

But if the ſheriff dies during his ſheriffalty, the new ſheriff, as ſoon as he is appointed, muſt take notice of all perſons in cuſtody, and of the ſeveral executions with which they are charged, and this he muſt do out of neceſſity, for there being none to inform him, he muſt himſelf take notice hereof at his peril. 3 *Co.* 72.

J. S. being in execution in the *Fleet*, was ſuffered to make a voluntary eſcape, after which he returned again to the *Fleet*; and the defendant being made warden in the place of the former warden, *J. S.* was turned over with the other priſoners, and afterwards ſuffered to eſcape; and the queſtion was, whether the voluntary eſcape ſuffered by the former warden did not ſo intirely diſcharge the execution, that the priſoner could not be retaken, nor judged in execution, by law, even tho' he ſhould yield himſelf to it; and it was held, that it did not, and that the ſecond warden ſhould be chargeable with the eſcape ſuffered in his time. 2 *Lev.* 109. 3 *Keb.* 487. *S. C.* 1 *Vent.* 269.

So in the caſe of one *Grant*, who being in the cuſtody of the former marſhal was ſuffered by him voluntarily to eſcape, after which he returned voluntarily to priſon, and being found in priſon, the ſucceeding marſhal detain'd him; and in an action of falſe impriſonment brought by him, the court held that he might, and that if he had ſuffered him to go at large, it would be an eſcape. 6 *Mod.* 183.

Where one has the cuſtody of a gaol of freehold or inheritance, and commits it to another perſon, who is inſufficient, the ſuperior is anſwerable for all eſcapes ſuffered by his inferior; but if the inferior be ſufficient, the action muſt be brought againſt him, and not againſt the ſuperior. See 9 *Co.* 98. 2 *Jon.* 60. 2 *Lev.* 158. 1 *Vent.* 314. 2 *Mod.* 119.

Alſo by the ſtat. 8 & 9 *Will.* 3. *cap.* 27. *ſect.* 11. it is enacted, "That the offices of marſhal of the King's Bench priſon and warden of the *Fleet*, ſhall be executed by the ſeveral perſons to whom the inheritance of the priſons, priſon-houſes, lands, tenements and hereditaments of the ſaid priſons of *King's Bench* and *Fleet* or either of them, ſhall then belong or appertain reſpectively, in his or their reſpective proper perſon or perſons, or by his or their ſufficient deputy or deputies; for which deputy or deputies, and for all forfeitures, eſcapes, and other miſdemeanours in their reſpective offices by ſuch deputy or deputies permitted, ſuffered or committed, the ſaid perſon or perſons in whom the aforeſaid inheritances reſpectively are, or ſhall then be, ſhall be anſwerable; and the profits and aforeſaid inheritances of the ſaid ſeveral offices ſhall be ſequeſtred, ſeized or extended, to make ſatisfaction for ſuch forfeitures, eſcapes, or miſdemeanours reſpectively, as if permitted, ſuffered or committed by the perſon or perſons themſelves or either of them, in whom the reſpective inheritances of the ſaid priſons ſhall then be."

If the bailiff of a franchiſe ſuffer an eſcape, and be inſufficient, the lord of the franchiſe ſhall anſwer for him. 2 *Brownl.* 50.

If a gaoler, who is the ſheriff's ſervant, ſuffers a priſoner to eſcape, the action muſt be brought againſt the ſheriff, not againſt the gaoler; for an eſcape out of the gaolor's cuſtody is by intendment of law an eſcape out of the ſheriff's cuſtody; for by the 13 *Ed.* 3. *cap.* 10. ſheriffs are to put in ſuch keepers of gaols as they ſhall anſwer for. 2 *Lev.* 159. 2 *Jon.* 62. 2 *Mod.* 124.

So an arreſt by the ſheriff's officer is in judgment of law the ſame as if the arreſt were by the ſheriff in perſon; and if ſuch officer ſuffer the party arreſted to eſcape, the action muſt be brought againſt the ſheriff. 5 *Co.* 89. 1 *Rol. Abr.* 94.

But if the ſheriff directs his warrant to his bailiff, and afterwards *J. S.* puts in his own name as ſpecial bailiff; here *J. S.* ſhall be only chargeable, and not the ſheriff, becauſe the defendant was never in the ſheriff's cuſtody, but only in the cuſtody of *J. S.* *Cro. Eliz.* 745. *Dalt. Sher.* 560.

So if a writ comes to the ſheriff, and he makes out his mandate to the bailiff of a liberty. who takes the party, and after ſuffers him to eſcape, an action lies againſt the bailiff of the franchiſe, and not againſt the ſheriff. 1 *Rol. Abr.* 98, 99. *Bro. Eſcape*, 40. *Noy* 27.

So where a *capias ad ſatisfaciend.* was awarded to the ſheriff of *Berks* to arreſt *J. S.* who then was in cuſtody of the mayor and burgeſſes of *W.* and thereupon the ſheriff made a warrant to the mayor, *&c.* to take him, and afterward they let him eſcape; and it was clearly held, that the mayor, *&c.* and not the ſheriff, were chargeable with the eſcape. *Cro. Eliz.* 26.

If a *capias* iſſues againſt *A.* out of the ſheriff of *London*'s court, directed to one of the ſerjeants, who arreſts *A.* and lets him eſcape before he is carried to the counter, the ſerjeant in this caſe, and not the ſheriff, is chargeable with the eſcape, for the ſheriff is judge of the court, and not a miniſterial officer; but if *A.* had been carried to the

the counter, and eſcaped thereout, the ſheriff would then be anſwerable, as gaoler or keeper of the counter. 1 *Rol. Abr.* 806. 1 *Sid.* 318.

So if a ſerjeant at mace arreſt a man by virtue of a warrant iſſuing out upon a *latitat*, and afterwards ſuffers him to eſcape before he brings him to the counter; in this caſe an action lies againſt the ſheriff only for this eſcape, becauſe he was in the cuſtody of the ſheriff preſently upon this arreſt; and the ſheriff is the officer of the court of King's Bench, and not the ſerjeant. 1 *Rol. Abr.* 806.

If upon a plaint levied in the court of *B.* before the bailiffs of *B.* according to the cuſtom there, a warrant is directed to the under-bailiffs to take *J. S. Ita quod habeat corpus ejus coram balivis ad prox' curiam*, and the under-bailiffs take him, and commit him to the priſon *ſub cuſtodia* of the goaler of the priſon of *B.* if they have him not at the day, *&c.* an action lies againſt them, and not againſt the goaler; for there was no commitment to him by any lawful authority, and that cuſtody the goaler had was only as a ſervant to the under-bailiffs. *Cro. Eliz.* 743.

A priſoner in *Wood Street counter* upon meſne proceſs on a plaint levied againſt him, *&c.* eſcaped; whereupon the plaintiff brought his action againſt both the ſheriffs of *London*; and upon demurrer to the declaration, the plaintiff had judgment; and it was reſolved, that tho' the plaint was levied before the defendaant was in his court, and the priſoner eſcaped out of his counter, yet that both ſheriffs had the cuſtody of the priſoners in both counters, and by conſequence the action was well maintainable againſt both. *Carth.* 145.

If there are two ſheriffs of the ſame place, and an action of eſcape is brought againſt them both, if one of them dies, yet the writ ſhall not abate; for it being in nature of a treſpaſs, and merely perſonal, the party can only have remedy againſt the ſurvivor. *Cro. Eliz.* 625.

It has been already obſerved, that if the ſheriff ſuffer the priſoner voluntarily to eſcape, that the party at whoſe ſuit he was in cuſtody, may notwithſtanding, ſue out any new execution againſt the perſon eſcaping; for it would be unreaſonable that he ſhould be allowed to take advantage of his own act, or that the creditor ſhould be compelled, whether he will or no, to take his remedy againſt the ſheriff, who may die, or become inſolvent. See *Cro. Car.* 440. 1 *Rol. Abr.* 307.

Therefore where to a *ſcire facias quare executionem non* upon a judgment, the defendant pleaded, that he was formerly taken in execution by a *capias ad ſatisfac.* upon the ſame judgment, and the ſheriff ſuffered him to eſcape, to which eſcape the plaintiff then and there conſented; and this was held an ill plea; for the aſſent ſubſequent will not make it an eſcape with the conſent of the plaintiff, and therefore he has either his remedy againſt the ſheriff, or may retake the party. 1 *Salk.* 271. 1 *Show.* 174. *S. P.*

But if a man in execution upon a judgment for debt or damages be delivered out of execution, by the ſheriff or goaler who hath him in execution, with the aſſent of him at whoſe ſuit he is in execution; and after by colour of this judgment he takes him again and puts him in priſon, an *audita querela* lies upon this matter, and thereupon he ſhall be delivered. 1 *Rol. Abr.* 307.

By ſtat. 1 *Ann. ſt.* 2. *cap.* 6. it is enacted, "That if any perſon committed, *&c.* ſhall eſcape from the cuſtody of the marſhal of the *Queen's Bench* for the time being, or from the priſon of the ſaid *Queen's Bench*, or from the priſon of the *Fleet*, or either of them, it ſhall and may be lawful, upon oath thereof in writing, to be made by one or more credible perſon or perſons, before any of the judges of that court where ſuch action was entred, or judgment and execution were obtained, or where the party was ſo committed or charged as aforeſaid, to and for ſuch judge before whom ſuch oath ſhall be made, as aboveſaid, and ſuch judge is hereby authorized and required from time to time, to grant unto any perſon whatſoever, who ſhall demand the ſame, one or more warrant or warrants under his hand and ſeal, therein reciting the action or actions, execution or executions, contempt or contempts, with which ſuch perſon or perſons ſo eſcaping, or going at large, ſtood charged or were committed at the ſuit of any perſon or perſons, on whoſe behalf ſuch warrant or warrants ſhall be demanded at the time of ſuch eſcape or going at large, (which ſaid warrant or warrants ſhall be in force in all places whatſoever, within that part of *Great Britain* called *England)* directed to all ſheriffs, mayors, bailiffs, conſtables, headboroughs and tythingmen therein, and thereby commanding them and every of them in their reſpective counties, cities, towns and precincts, to ſeize and retake ſuch perſon or perſons ſo eſcaped or going at large; and ſuch perſon or perſons ſo retaken upon ſuch warrant forthwith to convey and commit to the common gaol of ſuch county where ſuch perſon or perſons ſo eſcaped or going at large ſhall be retaken, there to remain without bail or mainprize, or being thence upon any account whatſoever delivered or removed, until he, ſhe, or they ſhall have made full payment or ſatisfaction to the reſpective plaintiff or plaintiffs, creditor or creditors in ſuch action or actions, execution or executions named, or until the judgment or judgments, on which ſuch execution or executions was or were out againſt ſuch perſon or perſons, ſhall be reverſed or diſcharged by due courſe of law, or until judgment in ſuch action or actions be given for ſuch perſon or perſons ſo committed as aforeſaid, or until the contempt or contempts for which ſuch perſon or perſons were or ſhall be committed, be cleared and diſcharged, *&c.*

Before any of the judges of that court] If a perſon charged in execution in the King's Bench be turned over to the *Fleet*, and he eſcape, either a judge of the King's Bench or Common Pleas may grant an eſcape-warrant. 2 *Bac. Abr.* 245. *Paſch.* 10 *Geo.* 1. *The King* and *Dunbar*, ruled on motion.

Directed to all ſheriffs, &c.] If one who is no officer, by virtue of the warrant, ſeizes a perſon eſcaping and brings him before the ſheriff, he cannot detain him; for being illegally executed, it is the ſame thing as if there had been no warrant at all. 6 *Mod.* 154.

To ſeize and retake ſuch perſon or perſons ſo eſcaped or going at large] One may be taken on a Sunday by virtue of an eſcape-warrant; for one may take another on a Sunday upon freſh purſuit, and this is in the nature of it, though it be by a new method; for this is no original proceſs, but the party is in ſtill upon the old commitment continued down. 2 *Salk.* 626. 6 *Mod.* 95, 253—4.

If a perſon is taken upon an eſcape-warrant at eight in the morning, and the ſame day obtains a day-rule purſuant to a petition, which was not read in court till after eight, yet he ſhall be diſcharged, for as to this purpoſe there ſhall be no fraction of a day. 2 *Bac. Abr.* 245. *Trin.* 8 *Geo.* 1. *Wilkinſon* and *Matthews.*

Upon any account whatſoever] A perſon cannot be diſcharged upon bringing the money into court. 6 *Mod.* 21.

Nor can a perſon come out on a day-rule. 6 *Mod.* 63.

By ſtat. 5 *Ann. cap.* 9. *ſect.* 1. All perſons taken by virtue of the act 1 *Ann. ſtat.* 2. *cap.* 6. ſhall inſtead of being committed to the common gaol of the county, be committed to the priſon where the ſheriff keeps the debtors, to remain in cuſtody of the ſheriff, ſubject to the ſame rules as if they had been committed to the common gaol of the county; and if any perſon ſo committed ſhall eſcape, the ſheriff ſhall be anſwerable as in caſe of any other eſcape.

Sect. 2. It ſhall be lawful for the judges to grant like warrants upon oath in writing made before any perſon commiſſionated to take affidavits in the country (the oath being filed) as upon like oath made before himſelf.

Sect. 3. It ſhall be lawful to take upon the Lord's day any perſon by virtue of any warrant granted in purſuance of this or the former act.

Sect. 4. If any perſon ſhall be in cuſtody of any ſheriff or any other officer, for not performing any decree of Chancery or Exchequer, whereby money is decreed to be paid, and ſhall eſcape, the perſon to whom the money was to be paid ſhall have the ſame remedy againſt the ſheriff, as if ſuch perſon had been in cuſtody upon any execution at law, and ſhall recover the money decreed againſt

againſt ſuch ſheriff or other officer, with coſts, in any action of debt, or upon the caſe, in her Majeſty's courts at *Weſtminſter*.

Error of a judgment in *C. B.* in an action of debt brought by huſband and wife againſt the warden of the *Fleet* for 464*l.* 6*s.* 4*d.* on the eſcape of *Oliver Read*, who was committed by the court of Chancery for that ſum. And the declaration ſets forth, that the 5th day of *February* 6 *Geo.* there was a decree, reciting the bill againſt *Read & al'* by the wife only, which ſuit abated by her marriage with the other plaintiff, who revived the ſuit, and *Read* put in his anſwer, inſiſting that he had repaid 200*l.* part of the money; and an iſſue being directed thereupon, the ſame was tried in a feigned iſſue, and found againſt him; and then the cauſe was heard upon the equity reſerved, when it was referred to the maſter to take the account, who after reported 464*l.* 6*s.* 2*d.* to be due, and appointed it to be paid to the huſband. Then the plaintiffs ſet forth, that the report was confirmed, and *Read* proſecuted ſo far as to be committed for non-payment, when the defendant ſuffered him to eſcape. After judgment by default in *C. B.* it was objected on error by Mr. *Strange*, that the wife ought not to have joined in this action, for by 5 *Ann. c.* 9. *ſ.* 4. the action is given to ſuch perſon to whom the money is to be paid by the decree; and this not being an action maintainable at Common law, they muſt take it as the ſtatute has given it; and if the wife be joined where ſhe ought not, it is error. 1 *Rol. Abr.* 782. And this is in the nature of a deſtruction of the firſt cauſe of action, and giving the huſband a new one in his own right. 1 *Sid.* 299. *Sed per curiam:* Tho' the order only appoints it to be paid to the huſband, yet by the firſt decree it is directed that the maſter ſhall take an account what is due to the huſband and wife, which ſhews ſhe is intereſted in the caſe, and therefore proper to join in the action. Judgment affirmed. *Stran.* 726. *Mich.* 13 *Geo.* 1.

Penalty of 500*l.* on goaler ſuffering bankrupts to eſcape, by ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 18, 36.

5. *Of the proper remedy and nature of the action to be brought for an eſcape; the perſon's defence, who ſuffered the eſcape, and of pleading freſh purſuit.*

At Common law the plaintiff had no remedy againſt the ſheriff for an eſcape, whether upon meſne proceſs, or in execution, but by ſpecial action upon the caſe. 2 *Inſt.* 382. 1 *Show.* 176. 2 *Saund.* 34. *Hard.* 30.

But now by an equitable conſtruction of *Weſtm.* 2. *cap.* 11. action of debt is given againſt the ſheriffs, and by the 1 *Rich.* 2. *cap.* 12. againſt the warden of the *Fleet* (which extends to *all* gaolors and keepers of priſons, though infants or feme coverts. 2 *Inſt.* 382.) for eſcapes in execution.

Alſo the plaintiff, at his election, may maintain either an action upon the caſe, or debt, for an eſcape in execution. *Cro. Jac.* 361, 533, 619. *Cro. Eliz.* 877. *Dyer* 278. *b.* See 1 *Jon.* 144. 1 *Sid.* 364. *S. C.*

If there be judgment againſt baron and feme, and the feme only taken in execution, and ſuffered to eſcape, an action of debt lies againſt the marſhal; for as the plaintiff may elect to take either the huſband or wife in execution, ſo by his election he has made her a ſole debtor within the ſtatute of *R.* 2. although it was objected that it ſhould be caſe, becauſe the party is not totally deprived of his remedy, the huſband being ſtill liable. *Cro. Jac.* 657.

If a priſoner in cuſtody upon a *capias utlagatum* is ſuffered to eſcape, the plaintiff may either maintain an action *qui tam* againſt the ſheriff, or bring an action of debt againſt him in his own right. *Cro. Jac.* 361, 533, 619. *Cro. Eliz.* 877.

An action of eſcape is not a local action, and therefore if one eſcapes out of the *Marſhalſea*, which is in *Surry*, the action againſt the marſhal may be laid in *Middleſex*. *Dyer* 278. *b.* See 1 *Jon.* 144. 1 *Sid.* 364. *S. C.*

In this action it is not neceſſary to ſet forth all the formalities required by law in other caſes. *Cro. Eliz.* 877. See 2 *Show.* 424.

Therefore if upon a judgment obtained by the teſtator, the executor brings a *ſcire facias*, and has judgment, whereupon a *capias ad ſatisfac.* iſſues, and *B.* is arreſted, and ſuffered to eſcape, the plaintiff, in an action againſt the ſheriff for this eſcape, may declare briefly upon the judgment in the *ſcire facias*, without ſhewing the gradual proceedings at length, as is uſually done in an action of debt upon a judgment. *Carth.* 148, 149. 3 *Mod.* 324. *S. C. Cro. Eliz.* 877.

But if the plaintiff declares, that he ſued out a writ of execution againſt *J. S.* without ſetting forth any judgment, and that the defendant ſuffered him to eſcape; this is an incurable fault; for by this means he loſt the benefit of pleading *nul tiel record*, which he might do if the plaintiff had ſet forth the judgment. 1 *Saund.* 37—8. 1 *Lev.* 191. and 1 *Sid.* 306. *S. C.*

If *A.* recovers againſt *B.* as executor, and has him in execution, and the ſheriff ſuffers him to eſcape, the action muſt be brought as executor in the *detinet* only, and not in the *debet* and *detinet*. 1 *Lutw.* 893. *Comb.* 114. *S. C.*

If the plaintiff declares, that the priſoner was committed, and eſcaped, but does not ſay, *Prout patet per recordum*; yet upon a general demurrer this ſhall be good; for the gift of the action was the eſcape, and the commitment only inducement. 2 *Salk.* 565. 5 *Mod.* 8. *S. C.* See 3 *Lev.* 393.

If in eſcape the plaintiff declares, that he had *J. S.* and his wife in execution, and that the defendant ſuffered them to eſcape, and the jury find ſpecially, that the huſband only was taken in execution (it being for a debt due from the wife before coverture) and that he eſcaped; this is ſufficient, and the plaintiff ſhall have judgment; for the ſubſtance of the iſſue is found, though not purſuant to the declaration. 1 *Sid.* 5.

So in an action on the caſe for the eſcape of *A.* where the jury found that *A.* was taken by *J. S.* the former ſheriff, and not by the defendant, the preſent ſheriff; but finding that he was legally in his cuſtody, and that he ſuffered him to eſcape, the plaintiff had judgment. *Cro. Jac.* 380.

The plaintiff declared, that whereas he had a good cauſe of action againſt *A.* and ſued out a *latitat* againſt him; the defendant being ſheriff arreſted him, and ſuffered him to eſcape; upon trial at *niſi prius* the plaintiff was nonſuit, becauſe he could prove no cauſe of action againſt *A.* But *Hale* Chief Juſtice ſaid, that if the plaintiff had declared of a debt of 40*s.* and upon evidence could prove but 30*s.* it had been ſufficient; but the book adds a *quære*, it being a ſpecial action upon the caſe. 2 *Lev.* 85.

By the ſtat. 8 & 9 *W.* 3. *cap.* 27. *ſect.* 12. reciting, that the way of proceeding againſt the warden of the *Fleet* priſon, by bill in the courts of Common Pleas and Exchequer at *Weſtminſter*, is found to be very dilatory; it is enacted, "That it ſhall and may be lawful to and for any perſon or perſons having cauſe of action againſt the warden of the *Fleet* priſon, upon bill filed in the ſaid courts of Common Pleas or Exchequer againſt the ſaid warden, and a rule being given to plead thereto to be out eight days at moſt after filing ſuch bill, to ſign judgment againſt the ſaid warden of the *Fleet*, unleſs he plead to the ſaid bill within three days after ſuch rule is out."

If the priſon takes fire, by means whereof the priſoners eſcape, this ſhall excuſe the ſheriff, and he may well plead it. 1 *Rol. Abr.* 808.

So if the priſon is broke by the King's enemies, this ſhall excuſe the ſheriff, for he can have no remedy over againſt them. 4 *Co.* 84. 1 *Rol. Abr.* 808.

But if the priſon was broke by rebels and traitors, the King's ſubjects, this ſhall not excuſe him, for he may have his remedy over againſt thoſe. 4 *Co.* 84. 1 *Rol. Abr.* 808.

If a priſoner in execution eſcapes without the aſſent of the ſheriff, *&c.* and he make freſh purſuit, and retake

take him before any action brought againſt him, this ſhall excuſe the ſheriff. *Cro. Jac.* 657. 1 *Jon.* 144. 1 *Rol. Abr.* 808.

So the ſheriff may plead, that the priſoner eſcaped the ſixteenth day of *December*, and that he made freſh ſuit, and retook him the ſeventeenth day of *December*, and retained him in execution; for it is ſufficient, if he did all he could, though he loſt ſight of him in the night, or otherwiſe. 1 *Rol. Abr.* 809. *Dalt. Sheriff* 562.

So if a priſoner eſcapes, and ſeveral days after, but as ſoon as the ſheriff has notice of it, he makes freſh ſuit, and retakes him before any action brought, this ſhall excuſe him. 1 *Rol. Abr.* 809.

If in debt upon an eſcape, the plaintiff ſets forth in his declaration a voluntary eſcape, the defendant may plead, that he took him upon freſh purſuit, without traverſing the voluntary eſcape; for it was impertinent for the plaintiff to alledge it, and no way neceſſary to his action. 1 *Vent.* 211, 217.

It was formely held, that the ſheriff, *&c.* might give freſh purſuit in evidence, and need not have pleaded it. See 1 *Mod.* 116. 1 *Sid.* 13.

But now by the 8 & 9 *W.* 3. *cap.* 27. *ſect.* 6. it is enacted, "That no retaking on freſh purſuit ſhall be given in evidence on the trial of an iſſue in any action of eſcape againſt the marſhal or warden, or their reſpective deputy or deputies, or againſt any other keeper or keepers of any other priſon or priſons, unleſs the ſame be ſpecially pleaded, nor ſhall any ſpecial plea be taken, received or allowed, unleſs oath be firſt made in writing by the marſhal or warden, or their reſpective deputy or deputies, or by ſuch other keeper or keepers of any other priſon or priſons againſt whom ſuch action ſhall be brought and filed in the proper office of the reſpective courts, that the priſoner for whoſe eſcape ſuch action is brought, did, without his conſent, privity or knowledge, make ſuch eſcape; and if ſuch affidavit ſhall at any time afterwards appear to be falſe, and the marſhal or warden, or other keeper or keepers of any other priſon or priſons, ſhall be convicted thereof by due courſe of law, ſuch marſhal or warden, or other keeper or keepers of any other priſon or priſons, ſhall forfeit the ſum of 500*l.*"

If an action of eſcape be brought againſt the ſheriff, and the judgement upon which it is found is reverſed before ſuch time, as the defendant is forced to plead, he may plead *nul tiel record*, for collateral things executory are as if no judgment had ever been, when reverſed. 8 *Co* 142. *Dalt. Sheriff* 563.

If a priſoner taken on a *capias ad ſatisfaciendum* pays the debt to the marſhal for the uſe of the plaintiff in the original action, and is thereupon diſcharged, yet he cannot plead it to an action brought againſt him for the eſcape, for the marſhal had no authority to receive the money, the words of the writ being *Quod capias, &c. & eum ſalvo cuſtodias ita quod habeas corpus ejus coram juſticiar.* tiel jour *ad ſatisfaciend.* the plaintiff. See *Cro. Eliz.* 404. 1 *Mod.* 194. 2 *Jon.* 97. 1 *Lutw.* 587.

For more learning on this ſubject, ſee 10 Vin. Abr. *tit.* Eſcape.

II. Of eſcape in criminal caſes.

Under this head is conſidered,

1. *What ſhall be judged an eſcape; and where ſuch eſcape is to be eſteemed voluntary, and where negligent.*

2. *Where the priſoner may be re-taken after an eſcape; and whether the eſcape is excuſed by ſuch a re-taking; or by killing the priſoner, if he cannot be re-taken.*

3. *How the officer ſuffering an eſcape is to be indicted; and in what manner an eſcape is to be tried and adjudged.*

4. *How a voluntary and negligent eſcape are to be puniſhed.*

5. *Aiding or aſſiſting priſoners to attempt to eſcape, how puniſhed.*

1. *What ſhall be judged an eſcape; and where ſuch eſcape is to be eſteemed voluntary and where negligent.*

There muſt be an actual arreſt, and therefore, if an officer having a warrant to arreſt a man, ſee him ſhut up in a houſe, and challenge him as his priſoner, but never actually have him in his cuſtody, and the party get free, the officer cannot be charged with an eſcape. 2 *Haw. P. C.* 129.

As there muſt be an actual arreſt, ſuch arreſt muſt alſo be juſtifiable, for if it be either for a ſuppoſed crime, where no ſuch crime was committed, and the party neither indicted nor appealed, or for ſuch a ſlight ſuſpicion of an actual crime, and by ſuch an irregular *mittimus* as will neither juſtify the arreſt nor impriſonment, the officer is not guilty of an eſcape by ſuffering the priſoner to go at large: And it ſeems to be a good general rule, that where-ever an impriſonment is ſo far irregular, that it will be no offence in the priſoner to break from it by force, it can be no offence in the officer to ſuffer him to eſcape. 2 *Hawk. P. C.* 129.

As the impriſonment muſt be juſtifiable, ſo muſt it be alſo for a criminal matter; and ſome are ſaid to have holden, that no eſcape is criminal, but where the commitment is for felony. However it is certain, that the eſcape of one committed for petit larceny only, is criminal; and it ſeems moſt agreeable to the general reaſon of the law, that the eſcape of a perſon committed for any other crime whatſoever, ſhould alſo be criminal. For ſurely where-ever the public juſtice requires, that a perſon be committed for a crime; it likewiſe requires, that he be ſafely kept under ſuch commitment, and conſequently may reaſonably demand public ſatisfaction of the officer to whoſe cuſtody he is committed, if he neglect to keep him as he ought. 2 *Haw.* 129.

As the impriſonment muſt be juſtifiable, and for ſome crime, ſo muſt its continuance, at the time of the eſcape, be ground on that ſatisfaction which the publick juſtice demands from ſuch crime; for if a priſoner be acquitted, and detained only for his fees, it will not be criminal to ſuffer him to eſcape, though the judgment were, that he be diſcharged paying his fees; ſo that till they be paid, the firſt impriſonment continued lawful, as before; for inaſmuch as he is detained, not as a criminal, but only as a debtor, his eſcape cannot be more criminal than that of any other debtor; yet if a perſon convicted of a crime, be condemned to impriſonment for a certain time, and alſo till he pay his fees, and he eſcape after ſuch time is elapſed, without paying them perhaps ſuch eſcape may be criminal for that it was part of the puniſhment, that the impriſonment be continued till the fees ſhall be paid; but it ſeems, that this is to be intended where the fees are due to others as well as the gaoler, for otherwiſe the gaoler will be only ſufferer by the eſcape, and it will be hard to puniſh him for ſuffering an injury to himſelf only, in the non-payment of a debt in his own power to releaſe. 2 *Haw. P. C.* 129, 130.

It is an eſcape, in ſome caſes to ſuffer a priſoner to have greater liberty than by the law he ought to have; as to admit a perſon to bail, who by law ought not to be bailed, but to be kept in cloſe cuſtody; or to permit a priſoner to go out of the limits of the priſon: yet ſome ſeem to have holden, that in this laſt caſe it ſhall not be adjudged an eſcape, unleſs the priſoner be found to have had an intention to eſcape; but it will be difficult to maintain, that the offence of the gaoler can depend on the intention of the priſoner. 2 *Hawk.* 130.

If the gaoler ſo cloſely purſue the priſoner, who flies from him, that he retake him without loſing ſight of him, the law looks on the priſoner ſo far in his power all the time, as not to adjudge ſuch a flight to amount at all to an eſcape: But if the gaoler once loſe ſight of the priſoner, and afterwards retake him, he ſeems in ſtrictneſs to be guilty of an eſcape; and *a fortiori* therefore, if he kill him in the purſuit, he is in like manner guilty tho' he never loſt ſight of him, and could not otherwiſe take him, not only becauſe the King loſes the benefit he might have had from the attainder of the priſoner, by the forfeiture of his goods, *&c.* but alſo becauſe the pub-

lick juſtice is not ſo well ſatisfied by the killing him in ſuch an extrajudicial manner. 2 *Hawk.* 130.

While the privileges of ſanctuaries were allowed, if a ſheriff, conducting a priſoner to gaol, had brought him in the way, through the limits of ſuch a franchiſe, and the priſoner had claimed the privilege of it, and by that means got free, it ſeems that the ſheriff was guilty of an eſcape, for that it was his fault, by bringing his priſoner that way to gaol, to give him an opportunity of claiming the franchiſe. 2 *Hawk.* 130.

Alſo while the law allowed thoſe, who had the benefit of the clergy, to free themſelves from priſon in certain caſes, by making their purgation before the ordinary, it was an eſcape in the ordinary, to ſuffer ſuch perſons to deliver themſelves by it, in ſuch caſes in which they ought not to have been admitted to it. 2 *Hawk.* 130.

If a priſoner be reſcued by enemies, the gaoler is not guilty of an eſcape, as he would have been by the better opinion, if he had been reſcued by ſubjects, becauſe there is a legal remedy againſt them. 2 *Haw.* 130.

There can be no doubt, but that where-ever an officer, who hath the cuſtody of a priſoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to ſave him, either from his trial or execution, he is guilty of a voluntary eſcape, and thereby involv'd in the guilt of the ſame crime of which the priſoner was guilty, and ſtood charged with. And it ſeems to be the opinion of Sir *Matthew Hale*, that in ſome caſes an officer may be adjudged guilty of ſuch eſcape, who hath not ſuch intent, but only means to give his priſoner that liberty which by the law he hath no colour of right to give him; as where a gaoler bails a priſoner who is not bailable. But it ſeems agreed, that a perſon who hath power to bail, is guilty only of a negligent eſcape, by bailing one who is not bailable; neither can I meet with any authority in other books, to ſupport the above-mentioned opinion, that the bailing of one who is not bailable, by one who hath no power to bail, muſt neceſſarily be eſteemed a voluntary eſcape; but the contrary opinion ſeems more agreeable to the purview of ſtat. 5 *Ed.* 3. *c.* 8. ſet forth more at large in the ſubſequent part of this title. Alſo there are ſome caſes wherein an officer ſeems to have been found to have knowingly given his priſoner more liberty than he ought to have had, as to go out of the priſon on his promiſe of returning, or to go among his friends, to find ſome who would warrant goods to be his own, which he is ſuſpected to have ſtolen, and yet ſeems to have been only adjudged guilty of a negligent eſcape. But it muſt be confeſſed, that in theſe caſes, the priſoner was accuſed of larceny; and it doth not appear, whether he were bailable or not, and generally the old caſes concerning this ſubject, are ſo very briefly reported, that it is very difficult to make an exact ſtate of the matter from them; however, thus much ſeems clear, that if in the caſes above mentioned, the officer were only guilty of a negligent eſcape, in ſuffering the priſoner to go out of the limits of the priſon, without any ſecurity for his return, he could not have been guilty in a higher degree, if he had taken bail for his return; from which it ſeems reaſonable to infer, That it cannot be in all caſes a general rule, that an officer is guilty of a voluntary eſcape by bailing his priſoner, whom he hath no power to bail; but that the judgement to be made of all offences of this kind, muſt depend on the circumſtances of the caſe, as the heinouſneſs of the crime with which the priſoner is charged, the notoriety of his guilt, the improbability of his returning to render himſelf to Juſtice, the intention of the officer, the motives on which he acted, &c. 2 *Hawk. P. C.* 130, 131.

Neither is it a certain rule, that an officer, who unlawfully, knowingly, and willingly ſuffers a capital offender to eſcape, is in all caſes to be adjudged guilty of a voluntary eſcape; for where an ordinary ſuffered a clerk, attainted, being committed to his cuſtody, to free himſelf from impriſonment by making his purgation, he might be truly ſaid to have ſuffered ſuch priſoner to eſcape unlawfully, knowingly and willingly; and yet it ſeems, that he was guilty only of a negligent eſcape, for that he did not ſave the priſoner from execution, which was excuſed by the privilege of the clergy, but only from the impriſonment. 2 *Hawk.* 131.

2. *Where the priſoner may be retaken after an eſcape; and whether the eſcape is excuſed by ſuch a re-taking; or by killing the priſoner, if he cannot be re-taken.*

It ſeems to be clearly agreed by all the books, that an officer making a freſh purſuit after a priſoner, who hath eſcaped through his negligence, may retake him at any time after, whether he find him in the ſame or in a different county. And it is ſaid generally in ſome books, that an officer who hath negligently ſuffered a priſoner to eſcape, may retake him where-ever he finds him, without mentioning any freſh purſuit; and indeed, ſince the liberty gained by the priſoner is wholly owing to his own wrong, there ſeems to be no reaſon he ſhould take any manner of advantage from it. But where a gaoler hath voluntary ſuffered a priſoner to eſcape, it is ſaid by ſome, that he can no more juſtify the retaking him, than if he had never had him in cuſtody before, becauſe by his own free conſent he hath admitted, that he hath nothing to do with him. And it ſeems to be holden by Sir *William Staundforde*, that after a gaoler hath been fined for ſuffering a priſoner negligently to eſcape, he cannot afterwards retake him; but the book on which alone he ſeems to ground his opinion, doth not fully come up to it; for the purport of it ſeems to be no more than this, that a gaoler's retaking of a priſoner, after he hath been fined for an eſcape, ſhall be to no purpoſe, for that it is contrary to the record, by which it appears, that the priſoner hath been at large; by which it ſeems only to be intended, that a gaoler, who hath been fined for an eſcape, ſhall not avoid the judgment of his fine by retaking the priſoner: But I do not ſee how it can be collected from hence, that he cannot juſtify the retaking him. 2 *Haw. P. C.* 131, 132.

It is, perhaps, the better opinion, that wherever a priſoner, by the negligence of his keeper, gets ſo far out of his power that the keeper loſes ſight of him, the keeper is finable at the diſcretion of the court, notwithſtanding he retook him immediately after; for it ſeems agreed, That this is to be adjudged a negligent eſcape, which implies an offence, and conſequently that it muſt be puniſhable. It is true indeed, that in an action againſt a gaoler, for ſuffering one arreſted in a civil action to eſcape, it is a good excuſe for the gaoler, that before the action brought, he retook the priſoner upon freſh ſuit, which is well maintained by ſhewing that he purſued him immediately after notice of the eſcape, though it were ſome hours after it, and retook him; but it does not from hence follow, that the like excuſe will ſerve for the negligent eſcape of a criminal, becauſe this is an offence againſt the public, but the other is only a private damage to the party: Neither will it be an hardſhip to the officer to be expoſed to ſuch puniſhment as the court, in diſcretion, ſhall think fit to impoſe upon him for the negligent eſcape of a criminal, as it would be to be liable to an actian of eſcape, for ſuffering a perſon in his cuſtody, in a civil action to eſcape; for that in the former caſe the court would moderate his fine according to the circumſtances of the whole matter, and would certainly mitigate, if not wholly excuſe it, if he he ſhould appear to have taken all reaſonable care: but in the other caſe, if he ſhould be liable to an action, his judgment would not lie in the diſcretion of the court, but he would be bound to pay the whole debt for which the party was in cuſtody, if the eſcape ſhould be adjudged againſt him. However it is certain, that it will be no advantage to a gaoler to retake his priſoner, after he has been fined for the eſcape, as hath been ſhewn in the precedent ſection; alſo it is clear, that he cannot excuſe himſelf by killing a priſoner in the purſuit, though he could not poſſibly retake him; but muſt, in ſuch caſe, be contented to ſubmit to ſuch fine as his negligence ſhall appear to deſerve. 2 *Hawk. P. C.* 132.

3. *How*

3. *How the officer ſuffering an eſcape is to be indicted; and in what manner an eſcape is to be tried and adjudged.*

It ſeems clear, that every indictment for an eſcape, whether negligent or voluntary, muſt expreſsly ſhew, that the party was actually in the defendant's cuſtody for a crime, action, or commitment for it; and that it is not ſufficient to ſay, that he was in the defendant's cuſtody, and charg'd with ſuch a crime; for that a perſon in cuſtody may be ſo charged, and yet not be in cuſtody by reaſon of ſuch charge: And it ſeems alſo, that every ſuch indictment muſt expreſsly ſhew that the priſoner went at large, which is moſt properly expreſſed by the words *exivit ad largum*. Alſo it ſeems neceſſary, to ſhew the time when the offence was committed, for which the party was in cuſtody, not only that it may appear, that it was prior to the eſcape, but alſo that it was ſubſequent to the laſt general pardon. Alſo it ſeems clear, that every indictment for a voluntary eſcape muſt allege that the defendant *felonice et voluntarie A. B. ad largum ire permiſit*; and muſt alſo ſhew the ſpecies of the crime for which the party was impriſoned; for it is not ſufficient to ſay in general that he was in cuſtody for felony, *&c.* for that no one can be puniſhed in this degree, but as involved in the guilt of the crime for which the party was in his cuſtody; and therefore the particular crime muſt be ſet forth, that it may appear, that the principal is attainted for the very ſame crime, if it were felony, or that it was in truth committed, if high treaſon. But it ſeems queſtionable, whether ſuch certainty, as to the nature of the crime, be neceſſary in an indictment for a negligent eſcape, for that it is not material in this caſe, whether the perſon who eſcaped were guilty or not. 2 *Haw. P. C.* 132, 133.

Where perſons being preſent in a court of record, are committed to priſon by ſuch court, the keeper of the gaol is bound to have them always ready, whenever the court ſhall demand them of him; and if he ſhall fail to produce them at ſuch demand, the court will adjudge him guilty of an eſcape, without any farther inquiry, unleſs he have ſome reaſonable matter to allege in his excuſe, as that the priſon was ſet on fire, or broke open by enemies, *&c.* for he ſhall be concluded, by the record of the commitment, to deny that the priſoners were in his cuſtody. And ſome have holden, that if the gaoler ſay nothing in his excuſe of ſuch an eſcape, it ſhall be adjudged voluntary; but I cannot find any reſolution to this purpoſe; and where it ſtands indifferent, whether an eſcape be negligent or voluntary, it ſeems difficult to maintain that it ought to be adjudged a crime of ſo high a nature, without a previous trial. 2 *Hawk. P. C.* 133.

As to other priſoners who are not ſo committed, but are in the cuſtody of a gaoler, ſheriff, conſtable, or other perſon, by any other means whatſoever, it ſeems agreed, that the perſon who has them in cuſtody is in no caſe puniſhable for their eſcape, except in ſome ſpecial caſes, until it be preſented: For the better underſtanding whereof it is neceſſary to obſerve, that by ſtat. *Weſt.* 1. *c.* 3. it is enacted, that "Nothing be demanded nor taken, nor levied by the ſheriff, nor by any other, for the eſcape of a thief, or felon, until it be judged for an eſcape by the juſtices in eyre; and that he who does otherwiſe, ſhall reſtore to him or them that have paid it, as much as he or they have taken or received, and as much alſo unto the King."

It hath been adjudged, that this ſtatute reſtrains not the court of King's Bench from receiving ſuch preſentments for that its juriſdiction includes in it that of juſtices in eyre, and this court is itſelf the higheſt court of eyre. 2 *Haw. P. C.* 134.

It is farther enacted by ſtat. 31 *Ed.* 3. *c.* 14. "That the eſcape of thieves and felons, and the chattels of felons, and of fugitives, and alſo eſcapes of clerks convicts, and of their ordinary's priſon, from thenceforth to be judged before any of the King's juſtices, ſhall be levied from time to time, as they ſhall fall, as well of the time paſt as time to come." By which it ſeems to be implied, that other juſtices, as well as thoſe in eyre, may take cogniſance of eſcapes; and it is certain, that juſtices of gaol-delivery may puniſh juſtices of peace for a negligent eſcape, in admitting perſons to bail, who are not bailable. 2 *Hawk. P. C.* 134.

And it is farther enacted, by ſtat. 1 *Rich.* 3. *cap.* 3. "That Juſtices of peace ſhall have authority to inquire, in their ſeſſions, of all manner of eſcapes of every perſon arreſted and impriſoned for felony."

It is laid down as a rule, by Sir *William Staundford*, that where-ever an eſcape is finable, the preſentment of it is traverſable; but that where the offence is amerciable only; there the preſentment is of itſelf concluſive; ſuch amercements being reckoned among thoſe *minima de quibus non curat lex*; and this diſtinction ſeems to be well warranted by the old books. 2 *Hawk. P. C.* 134.

4. *How a voluntary and negligent eſcape are to be puniſhed.*

It ſeems to be generally agreed, that ſuch eſcape amounts to the ſame kind of crime, and is puniſhable in the ſame degree, as the offence of which the party was guilty, and for which he was in cuſtody, whether it be treaſon, felony or treſpaſs; and whether the perſon eſcaping were actually committed to ſome gaol, or under an arreſt only and not committed; and whether he were attainted, or only accuſed of ſuch crime, and neither indicted nor appealed: And it is ſaid to be no excuſe of ſuch eſcape, that the priſoner had been acquitted on an indictment of death, and only committed till the year and day be paſſed, to give the widow, or heir of the deceaſed, an opportunity of bringing their appeal. 2 *Hawk.* 134.

Alſo ſuch an eſcape, ſuffered by one who wrongfully takes upon him the keeping of a gaol, ſeems to be puniſhable in the ſame manner as if he were never ſo rightfully intitled to ſuch cuſtody, for that the crime is in both caſes of the very ſame ill conſequence to the publick; and there ſeems to be no reaſon that a wrongful officer ſhould have greater favour than a rightful, and that for no other reaſon, but becauſe he is a wrongful one. 2 *Hawk. P. C.* 134.

Alſo if the warrant of a commitment do plainly and expreſsly charge the party with treaſon or felony, but in ſome other reſpect be not ſtrictly formal, yet it ſeems, that it may be probably argued, that the gaoler ſuffering an eſcape, is as much puniſhable as if the warrant were perfectly right; for it would be highly inconvenient to ſuffer gaolers to take advantage of a ſlip of this kind in commitments, which, being generally made by perſons of no great knowledge in the law, cannot be expected to be always agreeable to its form; and therefore, if they be good in ſubſtance, the public good ſeems to require that the gaoler be as much bound to obſerve them, as if they were never ſo exactly made. 2 *Hawk. P. C.* 134, 135.

But it ſeems to be agreed, that no eſcape can amount to a capital offence, unleſs the cauſe for which the party was committed, were actually ſuch at the time of the eſcape; and therefore, if a gaoler ſuffer one to eſcape who is committed for having given a dangerous wound to another, who afterwards dies of ſuch wound, yet he is not guilty of felony, for that the offence of the priſoner was but a treſpaſs at the time of the eſcape; and though by a fiction of law it be afterwards for ſome purpoſes, eſteemed a felony from the time of the giving of the wound, yet ſince it is, in truth, no felony till the death of the party, it ſhall be afterwards conſtrued ſuch in reſpect of thoſe only who were privy to the giving of the wound. 2 *Haw. P. C.* 135.

Alſo it ſeems clear, that he who ſuffers another to eſcape, who was in his cuſtody for felony, cannot be arraigned for ſuch eſcape as for a felony, until the principal be attainted; for that he who ſuffers ſuch eſcape, is, by the better opinion, not puniſhable in this degree, but as an acceſſory to the felony; and it is a rule, that no acceſſory ought to be tried till the principal be attainted: yet it ſeems certain, that one accuſed of ſuch an eſcape, may be indicted and tried for a miſpriſon, before the attainder of the principal

pal offender, for that whether ſuch offender were guilty or innocent, it was a high contempt to ſuffer him to eſcape: and if the commitment were for high treaſon, and the perſon committed actually guilty of it, it ſeems, that the eſcape is immediately puniſhable as high treaſon alſo, whether the party eſcaping be ever convicted of ſuch crime or not; for that there are no acceſſories in his treaſon, but all who are guilty of aſſiſting the party guilty of ſuch crime, in ſuch a manner as would make them acceſſories to a felony, are accounted principals in the treaſon. 2 *Hawk. P. C.* 135.

Alſo it ſeems to be clear, that no one is puniſhable in this degree for a voluntary eſcape, but the perſon only who is actually guilty of it; and therefore, that the principal gaoler is only finable for a voluntary eſcape ſuffered by his deputy, for that no one ſhall ſuffer capitally for the crime of another. 2 *Hawk. P. C.* 135.

It ſeems to be taken for granted at this day, that whoever *de facto* occupies the office of gaoler is liable to anſwer for ſuch an eſcape; and that it is no way material whether his title to the office be legal or not. 2 *Hawk. P. C.* 135.

Alſo it ſeems to be the better opinion that a ſheriff is as much liable to anſwer for an eſcape ſuffered by his bailiff, as if he had actually ſuffered it himſelf, and that the court may charge either the ſheriff or bailiff for ſuch an eſcape; and that if a deputy gaoler be not ſufficient to anſwer a negligent eſcape, his principal muſt anſwer for him: but if the gaoler who ſuffers an eſcape, have an eſtate for life, or years in the office, I do not find it agreed how far he in reverſion is liable to be puniſhed. 2 *Hawk. P. C.* 135, 136.

It ſeems the better opinion, that one negligent eſcape will not amount to a forfeiture of the gaoler's office, as one voluntary one will; yet if a gaoler ſuffer many negligent eſcapes, it is ſaid, that he puts it in the power of the court to ouſt him of his office by its diſcretion. 2 *Hawk. P. C.* 136.

It ſeems to be certain, that where-ever a perſon is found guilty, upon an indictment, or preſentment, of a negligent eſcape of a criminal actually in his cuſtody, he ought to be condemned in a certain ſum to be paid to the King, which ſeems moſt properly to be called a fine; but this doth not clearly appear from the old books, for in ſome of them it ſeems to be taken as a fine, in others as an amercement, and in others it is ſpoken of generally, as an impoſition of a certain ſum, and without any mention either of fine or amercement. But where the books ſpeak of the puniſhment of a vill, or hundred, for ſuffering a felon to eſcape without being arreſted, they ſeem always to take it as an amercement, and not as a fine: and where a ſheriff, having returned a *cepi corpus* into the King's Bench, or a *capias* againſt a man on an indictment of felony, does not bring him in at the day, it ſeems, that he is, by the courſe of the ſaid court, to be amerced, not fined. 2 *Hawk. P. C.* 136.

It hath been holden, that a negligent eſcape may be pardoned by the King before it happens, but that a voluntary one cannot ſo be pardoned. 2 *Hawk. P. C.* 136.

And it ſeems by the Common law, the penalty for ſuffering the negligent eſcape of a perſon attainted, was of courſe 100*l.* and for ſuffering ſuch eſcape of a perſon indicted, and not attainted, was 5*l.* but if the perſon eſcaping were neither attainted nor indicted, it ſeems that it was left to the diſcretion of the court to aſſeſs ſuch a reaſonable forfeiture as ſhould ſeem proper; and if the party had twice eſcaped, it ſeems, that the penalties above mentioned were of courſe to be doubled; yet it ſeems, that the forfeiture was to be no greater for ſuffering a priſoner, committed on two ſeveral accuſations, to eſcape, than if he had been committed but on one. 2 *Hawk. P. C.* 136.

As to the manner offences of this kind are puniſhable by ſtatute, it is recited by 5 *Ed.* 3. *ch.* 8. "That perſons indicted of felonies in times paſt, had removed the indictments before the King, and there yielded themſelves, and by the marſhals of the King's Bench had been incontinently let to bail, and after had done many evil deeds *&c.*" And thereupon it is enacted, "That ſuch inditees and appellees ſhall be ſafely and ſurely kept in priſon, as belongeth to them; according to the charge which the ſaid marſhals ſhall have of the juſtices; and if any marſhal ſhall do otherwiſe, at the complaint of every man that will complain, the juſtices ſhall do him right during the terms; and in the end of the terms, upon their riſing, the ſaid marſhals ſhall chooſe before the ſaid juſtices, before they depart, their places, in what town they will keep ſuch priſoners at their peril: and in the ſame town they ſhall allow to them houſes to keep ſuch priſoners at their own coſt and charges; and there they ſhall keep them in priſon, and ſhall not ſuffer them to go wandring abroad, neither by bail, or without bail. And if any ſuch priſoner be found wandring out of priſon, by bail, or without bail, and that he be found at the King's ſuit, or at the ſuit of the party, the marſhal which ſhall be found thereof guilty, ſhall have half a year's impriſonment, and be ranſomed at the King's will; and the juſtices ſhall thereof make inquiry when they ſee time; and as to the marſhalls, it ſhall be done within the verge that which reaſon will. And in caſe that the marſhals ſuffer by their aſſent ſuch priſoners to eſcape, they ſhall be at law, as before the time of the ſtatute they had been. And the King intendeth not by this ſtatute to looſe the eſcape, where he ought to have the ſame."

Alſo it is enacted by 19 *H.* 7. *c.* 10. "That every ſheriff have the cuſtody of the King's common gaols, during the time of his office, except all gaols whereof any perſon or perſons have the keeping of eſtate of inheritance: And that all letters patents made for term of life, or years, of the keeping of the ſaid gaols, *&c.* ſhall be annulled and void. And then it is recited by the ſaid ſtatute, that divers perſons before that time, for treaſons and felonies had been taken, ſome for ſuſpection of the ſame deeds, and ſome upon indictments, and thereupon brought to the ſame gaols, and ſome time remained in the keeping of the perſon that ſo arreſted them for the ſaid cauſes, and that ſuch perſons, by colour of negligence, ſubtilly and craftily, and oftentimes for favour, made, affection or corruption, ſuffered the ſaid offenders to eſcape, as if it had been by negligence, to the overt and expreſs impediment of juſtice: And when ſuch eſcapes had been found before juſtices having authority to inquire thereof, and thereupon the parties convicted, or yielded themſelves to make a fine for the ſame, ſmall fines had been ſet in thoſe cauſes, to the little dread and fear, and great imboldning of the offenders, by means whereof, great and arrant felons, and heinous murders have eſcaped, *&c.*" And thereupon it is enacted, "That for every negligent eſcape from any ſheriff, having the keeping of any gaol, or from any conſtable of caſtle, or other, being keeper of any gaols where ſuch priſoners accuſtomably have been, or ſhall be kept, of perſons indicted of high treaſon being in their keeping, that no leſs fine be ſet or made for every ſuch eſcape, than 100 marks, and more, by the diſcretion of the juſtices that ſhall aſſeſs ſuch fines: and for every eſcape of perſons eſcaping, being in their keeping for ſuſpection of high treaſon, no leſs fine to be ſet ne made than 40*l.* and for every eſcape of perſons indicted of murder, or petit treaſon, 20*l.* at leaſt, and more, by the diſcretion of the juſtices that ſhall aſſeſs ſuch fines: and for every perſon eſcaping, being in their keeping, indicted of felony, other than murder or treaſon, 10*l.* and for every perſon ſuſpected of felony, other than murder or treaſon, 100 ſhillings or more, by the diſcretion of the juſtices, after the manner and quantity of their demirits; ſaving to every perſon ſuch right and title to any ſuch eſcapes, and fines for the ſame, as to be quit of ſuch eſcapes, or of any other eſcapes, as they had, or ought to have had at the time of making of the ſaid act."

5. *Aiding.*

5. *Aiding or aſſiſting priſoners to attempt to eſcape, how puniſhed.*

By ſtat. 16 *Geo.* 2. *cap.* 31. *ſect.* 1. it is enacted, That if any perſon be aſſiſting to any priſoner to attempt to make his eſcape from any gaol, although no eſcape be made, in caſe ſuch priſoner was then attained or convicted of treaſon, or any felony, except petty larceny, or committed to, or detained in gaol for treaſon, or any felony, except petty larceny, expreſſed in the warrant of commitment or detainer; every perſon ſo offending and convicted, ſhall be deemed guilty of felony and be tranſported to one of his Majeſty's colonies in *America* for ſeven years; and in caſe ſuch priſoner then was convicted of, committed or detained for petty larceny, or any other crime, not being treaſon or felony expreſſed in the warrant of commitment or detainer, or then was in gaol upon any proceſs for debt, damages, coſts, or ſums of money, amounting to 100*l.* every perſon ſo offending and convicted ſhall be deemed guilty of a miſdemeanor, for which he ſhall be liable to a fine and impriſonment.

Sect. 2. If any perſon convey into any gaol any diſguiſe or inſtrument, or arms proper to facilitate the eſcape of priſoners, and the ſame deliver or cauſe to be delivered to any priſoner, or for the uſe of any priſoner, without the privity of the keeper, or under-keeper of ſuch gaol; every ſuch perſon, although no eſcape or attempt to eſcape be made, ſhall be deemed to have delivered ſuch diſguiſe, inſtrument, or arms, with intent to aſſiſt ſuch priſoner to eſcape; and in caſe ſuch priſoner then was attainted or convicted of treaſon, or any felony, except petty larceny, or committed or detained for treaſon, or any felony, except petty larceny, expreſſed in the warrant of commitment or detainer, every perſon ſo offending and convicted ſhall be deemed guilty of felony, and be tranſported to *America* for ſeven years; but in caſe the priſoner to whom, or for whoſe uſe ſuch diſguiſe inſtrument, or arms, ſhall be ſo delivered, then was convicted, committed or detained for petty larceny, or any other crime, not being treaſon or felony, expreſſed in the warrant of commitment or detainer, or upon any proceſs for debt, damages, coſts, or ſums of money amounting to 100 *l.* every perſon ſo offending and convicted ſhall be deemed guilty of a miſdemeanor, for which he ſhall be liable to a fine and impriſonment.

Sect. 3. If any perſon aſſiſt any priſoner to attempt to make his eſcape from the cuſtody of any conſtable, headborough, tithingman, or other officer, who ſhall then have the lawful charge of ſuch priſoner in order to carry him to gaol, by warrant of commitment for treaſon, or any felony (except petty larceny) expreſſed in ſuch warrant; or if any perſon be aſſiſting to any felon, to attempt to make his eſcape from any boat or ſhip, carrying felons for tranſportation, or from any perſon to whom ſuch felon is lawfully delivered in order for tranſportation; every perſon ſo offending and convicted ſhall be deemed guitly of felony, and be tranſported to *America* for ſeven years.

Sect. 4. There ſhall be no proſecution for any of the ſaid offences, unleſs ſuch proſecution be commenced within one year after ſuch offence.

Sect 5. If any perſon ordered for tranſportation in purſuance of this act return, or be at large in *Great Britain*, without lawful cauſe, before the expiration of the term for which he was ordered to be tranſported, ſuch perſon ſhall be liable to the ſame puniſhment, and to the like methods of proſecution, trial, and conviction, as other felons tranſported, or ordered to be tranſported.

Eſcapio quietus. He who by charter is *quietus de eſcapio*, is delivered from that puniſhment which by the laws of the foreſt lieth upon thoſe whoſe beaſts are found within the land where forbidden. *Cromp. Juriſd.* 196.

Eſcapium, What comes by hap, chance, or accident.——*Ita quod nec dicti abbas & conventus vel eorum tenentes aliquid juris clamare poſſint——in communia paſturæ——ſeu in curſu canum ſuorum in ipſo boſco, niſi forte per eſcapium eveniat.* Cartula Abbat. Glaſton. *MS. penes dom.* Clarges *ex Ædc Chriſti Oxon. f.* 67. *b.*

Eſceppa, A *ſcepp* or meaſure of corn.——*Richardus de Reveſbia recepit unam bovatam in Sticcefordia per idem ſervitium per annum, excepto quod* eſchepa *braſii quam debet habere, erit de avena.*——Mon. Angl. tom. 1. p. 823. See **Sceppa.**

Eſchanderia, The *chandlary*, or *chandry*, the office where candles were repoſited and delivered out for domeſtic uſes.——*Willielmus de Bigod tenet terras & villam de Bures per ſerjeantiam* eſchanderiæ *& valet villa centum ſolidos.* 11 *Hen.* 3.

Eſchange or **Erchange,** *Eſcambium* or *Excambium. Hanc terram* cambiavit Hugo Briccuino *quod modo tenet comes Moriton & ipſum* ſcambium *valet duplum.* Domeſday. See **Erchange.**

Eſcheat, (*Eſchaeta*, from the Fr. *Eſcheoir*, *i. e. cadere, accidere*) Signifies any lands, or other profits, that caſually fall to a lord within his manor, by way of forfeiture; or by the death of his tenant, leaving no heir general or ſpecial; *Magna Charta*, *cap.* 31. *Fitz. Nat. Br. fol.* 143. *T. Eſcheat* is alſo uſed ſometimes for the place or circuit, in which the King or other lord hath *Eſcheats* of his tenants. *Bract. lib.* 3. *tract.* 2. *cap.* 2. *Pupilla Oculi*, *par.* 2. *cap.* 22. *Eſcheat* (thirdly) is uſed for a writ, which lies, where the tenant having eſtate of fee ſimple in any lands or tenements holden of a ſuperior lord dies ſeiſed without heir general or ſpecial. In which caſe the lord brings this writ againſt him that poſſeſſeth the lands after the death of his tenant, and ſhall thereby recover the ſame in lieu of his ſervices. *Fitz. Nat. Br. fol.* 144. In the ſame ſenſe as we ſay, the fee is *eſcheated*, the *Feudiſts* uſe *Feudum Aperitur.* See *Coke on Littleton*, *fol.* 92. *b.* and the *Civilians* call theſe forfeitures *bona caduca.* Sometimes the word *eſcheat* ſignifies a lawful inheritance deſcending on the heir, but then the adjective *recta* is uſually added; as *recta eſchaeta*, *i. e. legitima*, or ſuch as is caſt on another by law: Thus *in Leg. H.* 1. *cap.* 1. *Salvo ſibi & hærædibus ſuis recto caduco, ſive recta* eſchaeta: *Gervas* of *Tilbury*, *lib.* 2. writes, *Eſchaeta cum hærede, viz. cum pater familias &c. de rege tenens in capite, fata debita ſolveret, relictis tamen liberis quorum primogenitus minor eſt annis, redditus quidem ejus ad fiſcum redeunt, ſed hujuſmodi non ſimpliciter* eſchaeta *dicitur, ſed* eſchaeta *cum hærede, de ipſa hæreditatæ per officiales Regios tam hæres quam cæteri liberi neceſſaria percipiunt.* What we call *eſcheats*, are in the kingdom of *Naples* called *excadentia*, or *bona excadentia*; as, *Baro locat excadentias eo modo quo locatæ fuerint ab antiquo, ita quod nulla debita ſervitia minuantur, & non remittit gallinam debitam.* Jacob. de Franchiis *in præludiis ad Feudorum uſum.* Cowell.

An eſcheat happens two manner of ways, *aut per defectum ſanguinis*, that is, for default of heir, *aut per delictum tenentis*, that is, for felony; which is by judgment three manner of ways, *aut quia ſuſpenſus per collum*, *aut quia abjuravit regnum*, *aut quia utlagatus*; and therefore they who are hanged by martial law, *in furore belli*, forfeit no lands. *Co. Lit.* 13. *a.*

Huſband and wife tenants in ſpecial tail; the huſband is attainted of treaſon, and executed, leaving iſſue; the wife died; the lands ſhall eſcheat, becauſe the iſſue in tail ought to make his conveyance by father and mother, and from the father he could not, by reaſon of the attainder. *Dyer* 332. *pl.* 27. *Paſch.* 16 *Eliz.* Sir *Nicholas Carew*'s caſe.

Eldeſt ſon in the life of his father is *attainted of felony*, and *dies*, *living the father*; the youngeſt ſhall have the land as heir to his father; but if an *iſſue* of the eldeſt is *living*, the land ſhall eſcheat to the lord. *D.* 48. *a. pl.* 16. *Trin.* 32 *H.* 8. Anon'.

Attainders that give eſcheat to the lord, muſt be by judgment of death given in ſome court of record againſt the felon found guilty by verdict, or confeſſion of the felony, or it muſt be by outlawry of him. *Bacon's Uſe of the Law* 38.

If a *baſtard* dies ſeiſed without iſſue, and the lord by eſcheat enters, this dying ſeiſed ſhall not bar the mulier, becauſe there is no deſcent. *Co. Lit.* 244. *a.*

There can be no eſcheat, but *pro defectu tenentis. Per Hale. Hardr.* 494. *Mich.* 20 *Car.* 2. *in Scaccario.* Sir *George Sands*'s caſe.

If a man be *ſeiſed in jure uxᵉ*, and the *wife is attainted of felony*, the lord ſhall enter and ouſt the huſband; he gains nothing but a bare perception of profits till iſſue had; after iſſue he has eſtate for life. *Arg. Mod.* 91 *pl.* 59. *Mich.* 22 *Car.* 2. *B. R.* in the caſe of *Parſons* v *Perns*.

A. ſeiſed in fee of land died without iſſue, brother or ſiſter, but *left two couſins his heirs at law, one of whom was his own mother*. The Maſter of the Rolls held, that his mother might inherit immediately as heir in the capacity or relation of couſin; and further obſerved, that the other couſin, being but *half an heir, could not take the whole, nor could any thing go to the lord by eſcheat:* for *as long as there is any heir he cannot take*; ſo that though the other couſin could take but a moiety, yet her being a moiety of an heir would prevent the lord's title by eſcheat; and that though this was a very uncommon caſe, he took it to be a clear one. 2 *Wms's Rep.* (613.) (614.) *Trin. Eaſtwood* v. *Vinke* alias *Styles*.

The *father is ſeiſed of land in fee holden of J. S.* The *ſon is attainted of high treaſon*. The *father dieth*, the land ſhall eſcheat to *J. S. propter defectum ſanguinis*; becauſe the father died without heir; and the King cannot have the land, becauſe the ſon never had any thing to forfeit. But the King ſhall have the eſcheat of all the lands whereof the perſon attainted of high treaſon was ſeiſed, of whomſoever they were holden. *Co. Litt.* 13. *a* and in Marg. cites *Pl. Com. in Nichol's* caſe.

Eſtates tail in caſe of treaſon ſhall not eſcheat to the lord who has *jura regalia*, for the King himſelf could not have them but by the ſtatute 26 *H.* 8. and alſo the tenant in tail holds of his donor, and not of the lord. And alſo for *new treaſons*, made ſince ſuch grants of *jura regalia*, the patentee ſhall not have the forfeiture. *D.* 289. *pl.* 57. *Paſch.* 12 *Eliz.*

If a man having an eſtate *for his own or anothers life* committed *treaſon or felony*, the whole eſtate is forfeited to the Crown, but no eſcheat to the lord. *Bacon's Uſe of the Law* 40.

But a *copyhold*, or fee ſimple, or for life, is forfeited to the lord, and not to the Crown; and if it be *entailed* the lord is to have it during the life of the offender only, and then his heir is to have it. *Bacon's Uſe of the Law* 40.

Eſcheat of all lands for *high treaſon* belongs to the King only, and to no other; but *entailed lands* did not veſt in the King at Common law *before office*, but did deſcend to the iſſue in tail till office; but this is altered by 33 *H.* 8. which gives and *veſts all in the King by the attainder*. 3 *Rep.* 10. *b. Trin.* 26 *Eliz. in Scaccario*, *Dowtie*'s caſe.

A. ſeiſed of a houſe in *Southwark* held of the archbiſhop of *C.* as of his borough of *S.* ſurrendered it 30 *H.* 8. to the King, who granted the *houſe and divers other lands in London, Middleſex, and Eſſex*, to *J. S.* and his heirs, to hold in *libero burgagio* by fealty for all ſervices and demands, and not in *capite*. Q. *Mary* granted the manor and borough of *S.* to the mayor, &c. of *London*, and the tenant of the ſaid houſe died without heir; adjudged that the Queen ſhould have the eſcheat; for the firſt patentee of the houſe held of the Queen *in capite as of a ſeigniory in groſs*, and the words *in libero burgagio* are merely void; for the land out of the borough cannot be held *in libero burgagio*, and there ſhall *not be ſeveral tenures*, for one tenure was reſerved by the King for all, and therefore muſt neceſſarily be a *tenure in ſocage of the King*. *Cro. E.* 121. *pl.* 9. *Mich.* 30 & 31 *Eliz. B. R. May and Baniſter* v. *Street*.

If an *alien purchaſes land and dies*, the law caſts the inheritance on the King. *Co. Litt.* 2. *b.*

If an *alien made denizen* purchaſes land and dies without iſſue, the lord, and not the King, ſhall have the eſcheat. *Co. Lttt.* 2. *b.*

For other matters, ſee 10 Vin. Abr. *tit.* Eſcheat. See Inquiſition and Eſcheator.

Eſcheat of wood. All the appendages of lop and top, &c. that belonged to a tree felled or falling down. *John de Grey*, biſhop of *Norwich*, gave liberty to the monks of his church, that in his wood of *Thorp*, *habebunt unam arborem cum ramis, cortice, coſpellis, radice, & tota* eſchaeta. *Ex Reg. Eccl. Norwic'*.

Eſcheator, (*Eſchaetor,*) Was an officer (appointed by the Lord Treaſurer) who obſerved the *eſcheats* due to the King in the county whereof he was *eſcheator*; and certified them into the *Chancery* or *Exchequer*, and found offices after the death of the King's tenants, which held by knight's ſervice *in capite*, or otherwiſe by knight's ſervice. He continued in his office but one year, nor could any be *eſcheator* above once in three years. Stat. 1 *H.* 1. *cap.* 8. and 3 *eiuſdem*, *cap.* 2. See more of this officer and his authority, in *Crom. Juſtice of Peace. Fitzherbert* calls him an officer of record, *Nat. Br. fol.* 100. becauſe that which he certified by virtue of his office, had the credit of a record. *Officium eſchaetriæ* is the *eſcheatorſhip*. *Reg. of Writs, fol.* 259. *b.* This office having its chief dependance on the court of wards, is now out of date. See 4 *Inſt. fol.* 225. There was alſo anciently an *eſcheator* of the Jews. *Clauſ.* 4 *Ed.* 1. *m.* 7. *Cowell, edit.* 1727.

If the eſcheator ſeizes without cauſe, *aſſiſe* lies againſt him, and in the aſſiſe againſt him it ſhall be tried whether he had cauſe or not, and if the cauſe be true or not. *Br. Aſſiſe, pl.* 257. (256.) cites 24 *Aſſ.* 7.

If eſcheator *enters* to the uſe of the King, *where the King has no title*, he is diſſeiſor, and a man may enter upon him where he ſo enters without office. *Br. Entre Congeable, pl.* 5. cites 35 *H.* 6. 60.

In aſſiſe the *tenant ſaid that the land is ſeized into the hands of the King*, and prayed that the eſcheator be examined, who teſtified it, yet the aſſiſe ſhall not remain, *per Houſe*; *contra* if he *ſhews cauſe*, and ſays that he ſeized according to the cauſe, which others agreed; and ſo ſee a diverſity, where cauſe is ſhewn by the eſcheator, and no cauſe. *Br. Aſſiſe, pl.* 381. cites 9 *H.* 7. 8.

If eſcheator *takes my goods for the goods of J. S. who is outlaw'd*, he is puniſhable by treſpaſs, but if he does ſo by *colour of an office*, finding my goods to be *J. S.*'s he is excuſable, becauſe he did it by colour of juſtice, &c. *Kelw.* 66. *b.* 20 *H.* 7.

Eſcheator was an *ancient officer*, ſo called becauſe his office is properly *to look to eſcheats, wardſhips* and other caſualties belonging to the Crown. *Co. Litt.* 13. *b.*

In ancient time *there were but two eſcheators* in *England*, the one *on this ſide Trent, and the other beyond Trent*, at which time they had *ſub-eſcheators*. But in the reign of *Ed.* 2. the offices were divided, and ſeveral eſcheators made in every county for life, and ſo continued till the riegn of *Ed.* 3. And afterwards by the ſtat. 14 *Ed.* 3. it is enacted by authority of parliament, That there ſhould be as many eſcheators aſſigned as when King *Edw.* 3. came to the Crown, and that was one in every county, and that no eſcheator ſhould tarry in his office above one year; and by another ſtatute, to be in office but once in three years. *Co. Litt.* 13. *b.*

The Lord Treaſurer nameth the eſcheator. *Co. Litt.* 13.

How eſcheats ſhall be anſwered to the King, *St. de Scac.* 51 *H.* 3. *ſt.* 5. *St. de Echaetor'.* 29 *Ed.* 1.

Eſcheators ſhall not commit waſte in wards lands, 28 *Ed.* 1. *cap.* 18.

Shall reſtore iſſues of lands wrongfully ſeiſed, 28 *Ed.* 1. *c.* 19.

The King's prerogative in eſcheats of biſhops tenants and of felons, *Prerog. Reg.* 17 *Ed.* 2. *ſt.* 1. *c.* 14. & 16.

Eſcheators ſhall have lands ſufficient in the county to anſwer the King and his people, 4 *Ed.* 3. *c.* 9. 5 *Ed.* 3. *c.* 4.

There ſhall be a ſufficient number of eſcheators elected yearly by the Chancellor, &c. 14 *Ed.* 3. *ſt.* 1. *c.* 8.

Caſual profits to be anſwered according to the rate, 28 *Ed.* 3. *c.* 4.

Shall take inqueſt of good jurors, &c. 34 *Ed.* 3. 13. 23 *H.* 6. *c.* 16.

Offices found ſhall be returned into Chancery, 36 *Ed.* 3. *c.* 13.

Shall have 20*l.* a year in land, 42 *Ed.* 3. *c.* 5. 12 *Ed.* 4. *c.* 9.

Shall

Shall be removed every year, 46 *Ed.* 3.

Commiſſions ſhall go to inquire of the accounts of ſheriffs, eſcheators, &c. 6 *H.* 4. *c.* 3.

No eſcheators to take inqueſts but of people returned by the ſheriffs, 8 *H.* 6. *c.* 16.

Lands ſeized not to be lett till a month after office returned, *ibid.*

Shall return inquiſitions within the month, 18 *H.* 6. *c.* 7.

Eſcheator's fees, 23 *H.* 6. *c.* 16.

Eſchecum. *Anno* 24 *Hen.* 3. *Inter abbatem S. Albani & Galfridum de Childwic & alios,——quod habuerunt venationem illam vi aut permiſſione anteceſſorum prædicti abbatis vel per* eſcheccum. The Gloſſ. at the end of *Matthew Paris*, (where the pleadings are to be ſeen at large *fol.* 538. and 539.) interprets it *Increpationem abbatis, vetationem & interruptionem.* But *quære*, if it may not rather ſignify *by chance*, from the Fr. *eſcheoir*, to happen or to fall out, and not of right; as when *S. S.* ſtarts a hare in his own lordſhip and purſues the chace through another's, in which caſe he needs no permiſſion, according to the law of huntſmen. *Cowell, edit.* 1727.

Eſchequer. See **Exchequer.**

Eſchipare, To build or equip: *Naves bene* eſchipatas *bonis & probis marinellis.* Du Freſne.

Eſcoriatio moræ, Paring off the turf of ſedgy or mooriſh ground for burning. *Qui autem foris fecerit in foreſta Regis de viridi, ſive per culpaturam, ſive per eſbrancaturam, ſive per foditionem turbarum, ſive per* eſcoriationem moræ, *ſive per culpationem ſub nemore, &c.* Rog. Hov. Annal. p. 784.

Eſcuage, *Scutagium*, (from the French *ecu*, *clypeus*, a ſhield) Signifieth a kind of knight's ſervice, called *ſervice of the ſhield*, whereby the tenant is bound to follow his lord into the *Scotch* or *Welſh* wars at his own charge; for which ſee **Chivalry.** He who held a whole knight's fee, was bound to ſerve with horſe and arms forty days at his own charge; and he who held half a knight's fee was to ſerve twenty days. But note, that *eſcuage* is either *uncertain*, or *certain: Eſcuage uncertain* is properly *eſcuage* and knight's ſervice, being ſubject to homage, fealty, and (formerly) ward and marriage; and ſo called, becauſe it is *uncertain* how often a man ſhall be called to follow his lord into thoſe wars, and what his charge will be in each journey. *Eſcuage certain* is, when a certain rent is paid yearly in lieu of all ſervices, being no further bound than to pay his rent, called a *knight's fee*, or *the fourth part of a knight's fee* according to his land; and this loſeth the nature of knight's ſervice, though it hold the name of *eſcuage*, being in effect but ſocage. *F. N. B. fol.* 8. But ſee the ſtat. 12 *Car.* 2. *c.* 24. for taking away the *court of wards and liveries*, and turning all tenures into free and common ſocage. See *Littleton, lib.* 2. *cap.* 3. And ſee **Capite.** *Cowel, edit.* 1727.

Eſcuage alſo is ſometimes taken for that duty or payment, which they who held lands under this tenure, were bound to make to the lord when they neither went themſelves to the wars, nor provided one in their place. *Monaſticon*, 2 *tom. p.* 99. *Scutagium aſſiſum per regnum.*

Eſcuage is ſometimes called a reaſonable aid which was demanded by the lord of his tenants who held lands in knight's ſervice, viz. *Conceſſerunt domino Regi ad maritandam filiam ſuam de omnibus qui tenent de domino Rege in capite de ſingulis ſcutis* 20 *ſolidos ſolvendos.* Matt. Paris, anno 1242. It was an uncertain duty till it was known how much money the parliament would raiſe, but *eſcuage certain* is called *ſocage.*

Eſcurare, To ſcour or cleanſe.——*Proviſo inſuper quod quoties & quando neceſſe erit & opportunum dicta foſſata noſtra mundare, purgare, vel* eſcurare, *liceat nobis & ſucceſſoribus noſtris totam aquam dictorum foſſatorum convertere & transferre.* Charta Thomæ Epiſcopi B. W. dat. 29 Octob. 4 Ed. 4.——*Ex Collectaneis Matth. Hutton. S. T. P. MS.*

Eſgliſe, *(Fr.)* A church; in the old books a law title or head. *L. Fr. Dict.*

Eſingae, The Kings of *Kent*, ſo called from *Ochta*, ſurnamed *Eſe*, the grandfather of King *Ethelbert.*

Eſkectores, (from the French *eſcher.*)——*Dicunt etiam (juratores quod latrones & eſkectores de terra de Morgannon intraverunt predictam terram de* Brekenhok,—*Placit. Parl.* 20 *Ed.* 1. Robbers or deſtroyers of other mens lands or fortunes.

Eſkenage, The mayor and aldermen of *Calais* petition the King to grant them the aſſiſe of wine, ale, beer, and bread, within the juriſdiction of the ſame town, called *la eſkenage*, *Rot. Parl.* 4 *H.* 4.

Eſkippamentum. *Clauſ.* 1 *Ed.* 1. whereby the ſea-port towns were to provide certain ſhips.——*Sumptibus propriis & duplici* eſkippamento. Sir *Robert Cotton* renders it, double *ſkippage*, *i. e.* double tackle, or furniture. *Cowell, edit.* 1727.

Eſkippeſon, Shipping or paſſage by ſea. *Ceſte endenture faite parentre lui noble home Monſ.* Thomas Beauchamp *counte de Warwyke d'une parte, &* John Ruſſel *eſcuier d' autre parte, teſmoigne, &c. Et que le dit* John *aura* eſkypeſon *covenable pour ſon paſſage & repaſſage outre meer, as cuſtages le dit counte, &c. Done a Warwyke,* 2 *Jan.* 50 *Ed.* 3. And *Humfrey* Earl of *Bucks*, in a deed, *(dat.* 13 *Febr. Hen.* 6.) covenants with Sir *Phil. Chitwind*, his lieutenant of the caſtle of *Calais*, to give him allowance for his ſoldiers *ſkippeſon* and *reſkippeſon*, *i. e.* paſſage by ſhip, and repaſſage.

Eſnecy, *(Æſnecia, dignitas primogeniti)* Is a prerogative given to the eldeſt coparcener, to chooſe firſt after the inheritance is divided. *Fleta, lib.* 5. *cap.* 10. *ſect. in diviſionem. Salvo capitali meſſuagio primogenito filio pro dignitate* æſneciæ *ſuæ.* Glanvil, lib. 2. c. 3. *Jus* æſneciæ, *jus primogenituræ. Skene de verb. ſig. ſtat. Marlb. c.* 9. calls it *Enitia pars hæreditatis.* See *Co. on Littl. f.* 166. *b.*

Eſpealtare, *(Expeditare,)* To expeditate, which in a proper old *Engliſh* term was called *lawing* of dogs, and was done two ſeveral ways; either, firſt, by cutting off the three fore claws of the right foot; or ſecondly, by cutting out the ball of the foot; that ſo by either way the dogs might be diſabled from hunting or running hard. This method of preventing miſchief from dogs neighbouring on a foreſt, was invented by king *Henry* 2. or at leaſt by him firſt injoined in the aſſiſe of *Woodſtock*, *artic.* 6. *Nullus dominicos canes abbatis & monachorum* eſpealtare *cogat, verum canes hominum ſuorum intra foreſtam manentium abbas & monachi* eſpealtari *faciant.*——Cartular. Abbat. Glaſton. MS. Penes Magiſt. Clarges, nuper ex Æde Chriſti, f. 7. See **Expeditare.**

Eſplees, *(Expletia,* perhaps from *expleo,)* Seem to be the full profits that the ground or land yieldeth; as the hay of the meadows, the feed of the paſture, the corn of the arable; the rents, ſervices, and ſuch like iſſues. The profits compriſed under this word, the *Romans* call properly *Acceſſiones*; *nam acceſſiones ea generaliter omnia, quæ ex re de qua agitur orta ſunt, veluti fructus, partus & omnis cauſa rei & quæcunque ex re procedunt.* And note, that in a writ of right of land, advowſon, or ſuch like, the demandant ought to allege in his count, that he or his anceſtors took the *eſplees* of the thing in demand; otherwiſe the pleading is not good. *Termes de la ley. Dominus epiſcopus habebit omnia* expletia *& proficua de corona emergentia.* Plac. Parl. 30 Ed. 1. Sometimes it ſignifies the farm or lands themſelves, viz. *Et pro eo quod prædict. homines, & eorum animalia, per terras & paſcua mea &* expleta *eant & redeant abſque ullo ſervitio.* Du Freſne.

Eſperverius and **Sparverius,** (Fr. *epervier)* A ſparhawk, *Char. Foreſtæ, cap.* 14.——*Reddit. ſolut.* Willielmo Talboys *arm. ad manerium ſuum de Kyme pro omnibus ſervitiis ſecularibus unum* eſpervarium *vel* 2*s. per annum ad feſtum ſancti Mich. &c.* Comput. Davidis Gefferon. Collect. Redd. de Wragby. Anno 35 Hen. 6——*Dicunt quod* Richardus *de Herthall die quo obiit tenuit manerium de Poley in com. War. in dominico ſuo ut de feodo per fidelitatem & ſervitium unius* eſpervarii *vel* 2*s. ad feſtum S. Jacobi, &c.* Eſc. de anno 19 Ed. 2. num. 53.

Eſpicurnantia, The office of *Spigurnel*, or ſealer of the King's writs. The word *ſpigurnellus*, which *Spelman* and *Du Freſne* recite without interpreting, ſeems detorted from the Saxon *ſparron*, to ſhut up or encloſe. *Oliver de Staundford*

Staundford, in 27 *Ed.* 1. held lands in *Nettlebed*, *com. Oxon. per ſerjantiam* eſpicurnantiæ *in cancellaria domini Regis.* Paroch. Antiq. p. 292. See *Kennet's Gloſſary*, *ibid.*

Eſpouſals, *(Sponſalia,)* Are a contract or mutual promiſe between a man and a woman to marry each other; and where marriages may be conſummated, eſpouſals go before them. Marriage or matrimony is ſaid to be an eſpouſal *de præſenti*, and a conjunction of man and woman in a conſtant ſociety. *Wood's Inſt.* 57. See **Matrimony.**

Eſquire, From the French *ecü*, which ſignifies a ſhield, from the Lat. *ſcutum*, from the Greek σκύτος, which ſignifies an hide, of which ſhields were anciently made, and afterwards covered; and here in the time of the *Saxons*, the ſhields were covered with leather, ſo that eſquire was originally he who attending a knight in time of war, did carry his *ſhield*. Whence he was called *eſcuier* in French, *ſcutifer* or *armiger* in Latin: howbeit this addition hath not along time had any reſpect at all to the office or employment of the perſon to whom it hath been attributed, but been merely a title of dignity, and next in degree below a knight. Thoſe to whom this title is now of right due, are, all the *younger ſons of noblemen*, and the eldeſt ſons of ſuch younger ſons; the eldeſt ſons of knights, and their eldeſt ſons ſucceſſively: The *four eſquires* of the *King's body*: Thoſe that ſerve the King in any *worſhipful calling*, (to uſe *Camden*'s words) as the *ſerjeant chirurgeon*, *ſerjeant of the ewry*, *maſter cook*, &c. Such as are created eſquires by the King, with a collar of SS. of ſilver, as the *heralds* and *ſerjeants at arms*. The chief of ſome ancient families are likewiſe *eſquires* by preſcription; thoſe that bear any ſuperior office in the commonwealth, as *high-ſheriff* of any county, who (as ſome hold) retains the title of eſquire during his life, in reſpect of the great truſt he has had of the *poſſe commitatus*; he who is a *juſtice of peace*, has it, during the time he is in commiſſion, and no longer, if not otherwiſe qualified to bear it. *Barriſters at law* in the late acts of parliament for poll-money, were ranked among *eſquires*, and ſo many wealthy men, (by reaſon they were commonly reputed to be ſuch) and paid accordingly. In *Walſingham's Hiſtory of Richard the Second*, we read of one *John Blake*, who is ſaid to be *juris apprenticius*, and has the addition of *ſcutifer* there given him; but, whether intitled thereto by reaſon of his profeſſion or otherwiſe, does not appear. See *Camd. Brit. f.* 111. and 2 *Inſt. fo.* 595.

A principe fiunt armigeri *vel ſcripto vel ſymbolo vel munere. Scripto, cum Rex ſic quenpiam conſtituerit. Symbolo, quum collum ergo alicujus argenteo ſigmatico (hoc eſt torque ex SS. confecto) adornaverit, eumve argentatis calcaribus (ad diſcrimen equitum, qui aureis uſi ſunt) donaverit. Tales in occidentali Angliæ plaga (ut aliquando didici in conventu rei antiquæ ſtudioſorum)* white ſpurs *dicti ſunt. Munere, cum ad munut quempiam evocaverit, vel in aula vel in repub.* armigero *deſignatum: Cujuſmodi multa hodie, patribus noſtris incognita. Inter* armigeros *qui fiunt (non naſcuntur) primarii habentur quatuor illi* armigeri *ad corpus Regis* (eſquires of the body) *quos & equitum filiis primogenitis anteponendos aſſerunt.* Thus the learned *Spelman*, in whoſe *Gloſſarium* you may find mention of another ſpecies of *eſquires*, *viz.* ſquier born de quater cotes.

Omnibus ——Walterus de Pavely miles filius quondam Reginaldi de Pavely ſalutem. Noveritis me obligari Rogero Marmion filio quondam Philippi Marmion omnibus diebus vitæ ſuæ in una roba cum pellura *de ſecta* armigeorum *meorum annuatim ad feſtum nativitatis Domini percipiend. ſine aliqua contradictione vel retractione mei vel hæredum meorum aut aſſignatorum. Ad quam quidem ſolutionem robæ prædictæ cum pellura annuatim ad terminum ſupradictum fideliter perſolvendum obligo me & hæredes meos, bona & catalla noſtra mobilia & immobilia, ubicunque fuerint inventa in maneriis meis in hundredo de Weſtbury exiſtitentibus vel extra*, &c. ſine dat. Ex codice MS. penes Gul. Dugdale Mil. *Cowell, edit.* 1727.

Camden, in his *Brit. fol.* 111. having ſpoken of knights, hath theſe words of eſquires, *Hiis proximi fuere armigeri, qui & ſcutiferi hominesque ad arma dicti, qui vel vel a clypeis gentilitiis quæ in nobilitatis inſignia geſtant; vel qui principibus & majoribus illis nobilibus ab armis erant, nomen traxerunt*, &c. *Hotoman*, in the ſixth chapter of his *Diſputations upon the Feuds* ſaith, that thoſe which the *French* call *eſquires*, were a military kind of vaſſals, having *jus ſcuti*, that is, they bear a ſhield, and in it the enſigns of their family, in token of their gentility or dignity. *Cowell, edit.* 1727.

Eſquires of the king, Are ſuch who have the title by creation: Theſe, when they are created, have put about their necks a collar of SS. and a pair of ſilver ſpurs is beſtowed on them: And they were wont to bear before the Prince in war, a ſhield or lance. There are four eſquires of the King's body, to attend on his Majeſty's perſon. *Camb.* 111.

Eſſartum, Exartum, Aſſartum, *Aſſart*, or woodland broke up or ploughed.——*Placitum quoque foreſtarum de* eſſartis, *de cæſione, de combuſtione, de venatione*——Leg. H. 1. Reg. Angl. ca. 17. See **Aſſart.**

Eſſendi quietum de tolonio, Is a writ that lieth for citizens and burgeſſes of any city or town, that hath a charter or preſcription to exempt them from toll through the whole realm, if it happen the ſame to be any where exacted of them. *F. N. B.* 226. *Reg. Orig. fol.* 258.

Eſſoin, *(Eſſonium*, Fr. *Exoine)* Signifies the allegation of an excuſe for him that is ſummoned, or ſought for to appear, and anſwer to an action real, or to perform ſuit to a court-baron, upon juſt cauſe of abſence: It is as much as *excuſatio* with the *Civilians*. The cauſes that ſerve to *eſſoin* any man, ſummoned, are divers, yet drawn chiefly to five heads; whereof the firſt is, *Ultra mare*, whereby the defendant ſhall have forty days. The ſecond, *De terra ſancta*, where the defendant ſhall have a year and a day, and theſe muſt be laid in the beginning of the plea. The third, *De malo veniendi*, which is alſo called, *The common eſſoin*. The fourth is, *De malo lecti*. And the fifth, *De ſervitio Regis*. For further knowledge of theſe, I refer you to *Glanvile*, in his whole firſt book, and *Bracton*, *lib.* 5. *tract.* 1. *per totum*, and *Britton. ca.* 122, 123, 124, 125. and *Horn's Mirrour of Juſtices*, *lib.* 1. *cap. de Eſſoins*, who maketh mention of ſome more *eſſoins* touching the ſervice of the King Celeſtial, and of ſome other points not unworthy to be known. Of theſe *eſſoins* you may read further in *Fleta*, *lib.* 6. *cap.* 8. & *ſeq.* And that theſe came to us from the *Normans*, is well ſhewed by the *Grand Cuſtomary*, where you may in a manner find all ſaid that our lawyers have ſpoken of this matter. *Cap.* 39, 40, 41, 42, 43, 44, 45. *Cowell, edit.* 1727.

Eſſoin de malo lecti, Is when the defendant is ſick in bed.

Eſſoin de malo veniendi, Is when the defendant is infirm in body, and not able to come.

Eſſoin per ſervitium Regis, Is when the defendant is in the King's ſervice.

Eſſoin de malo villae, Is when the defendant appears in court the firſt day, but departed without pleading, and being afterwards ſurprized by ſickneſs, or any other infirmity, cannot attend the court, but ſend two *eſſoiners*, who openly proteſt in court that he is detained by ſickneſs, in ſuch a village, that he cannot come, *pro lucrari & pro perdere*; and this muſt be admitted for full proof, without any further ſurety, for 'tis incumbent on the plaintiff to prove whether the eſſoin is true or not.

Eſſoin de terra ſancta, Was an expedition to the *Holy Land*, *viz.* to *Jeruſalem*.

Eſſoin de ultra mare, Was when the defendant is beyond ſea.

Burghill brought a *quare impedit* againſt the defendants. The writ was returnable *tres Mich.* 5 *Will. & Mar.* at which day the defendant *Gibbons* caſt an eſſoin, which was not adjourned. Then the archbiſhop of *York* caſt an eſſoin, which was not adjourned. Upon which the defendants entred a *non proſ.* againſt the plaintiff, which upon motion in *Hilary* term laſt was ſet aſide, becauſe the eſſoin of the archbiſhop of *York*, for the non-adjournment of which the plaintiff was nonſuit, was ill caſt, the eſſoin of *Gibbons* not being adjourned, ſo that the

the archbiſhop had no day in court to caſt an eſſoin; upon the ſetting aſide of which *non proſ.* the record was made right, and the proceedings were in this manner, *viz.* the writ was returnable *tres Mich.* 5 *Will. & Mar.* at which time *Gibbons* was eſſoined, which was adjourned to *craſt. Martin.* then the archbiſhop caſt an eſſoin, which was adjourned to *Octab. Hilar.* and at *Octab. Hilar.* the two other defendants were not eſſoined, but made default; then the plaintiff ſues a *pone* againſt them, to ſhew cauſe why they made default, returnable *Octabis purificationis*, at which day iſſued an *alias pone*, which was continued until the firſt return of laſt *Hilary* term; at which day the biſhop of *Carliſle* caſt an eſſoin, which was adjourned to *quinden. paſchæ*; at which day the univerſity caſt an eſſoin, to which the plaintiff entered a challenge upon the eſſoin roll, and the defendant demurred to the challenge, and the eſſoin was quaſhed by the court, becauſe an eſſoin is an excuſe of the appearance of the party; now a corporation cannot appear, and therefore cannot caſt an eſſoin, nor enter into recognizance. *Bendl.* 121. 21 *Ed.* 4. 79. And now ſerjeant *Gould* moved, that the archbiſhop of *York* might have an eſſoin, his former eſſoin which he caſt being adjudged ill upon the ſetting aſide of the *non proſ.* and ſo he had not had any eſſoin. And *per curiam*, he ſhall have an eſſoin, for the courſe of the court is, that an eſſoin may be caſt at any time before a *ne recipiatur* is entered; and the reaſon of the irregularity of the firſt eſſoin of the archbiſhop (which was ſet aſide for that cauſe) proceeded from the plaintiff's own fault, *viz.* the non-adjournment of the eſſoin of *Gibbons*, upon which he might have been nonſuit; but where there are ſeveral defendants, and one of them caſts an eſſoin, which is challenged, and upon demurrer the challenge is allowed; the others have no day in court to caſt an eſſoin, becauſe *idem dies datus eſt* to them all; but all the defendants may join in eſſoin if they pleaſe, or any two of them may have ſeveral eſſoins. And by *Powell junior* Juſtice, it is not error, to allow an eſſoin where it does not lie, but it is error to deny an eſſoin where it does lie; and (by him) it is not error to allow two eſſoins. But *Powell ſenior* Juſtice ſeemed to doubt of this latter point, becauſe it is within the act of fourching by eſſoins. And *Powell junior* Juſtice cited the caſe of one *Slay*, where an eſſoin was caſt for the defendant at *niſi prius*, which the plaintiff challenged, becauſe an attorney was entered upon record, and the challenge was allowed, and judgment peremptory was given, and upon error brought, it was affirmed in *B. R.* becauſe it was in nature of a departure in deſpight of the court; which caſe, as well all the court, as the ſerjeants at the bar, remembered. *Ld. Raym. Rep.* 78, 80. *Eaſt.* 8 *Will.* 3. *Burghill* v. *Archiep. Ebor. Epiſcop. Carliol. Gibbons & Univerſitat. Cantab'.*

After iſſue joined there ſhall be but one eſſoin, *St. Marleb.* 52 *H.* 3. *c.* 13.

Eſſoin need not be ſworn to in the county or court-baron, *St. Marleb.* 52 *H* 3. *c.* 20.

Lies not after appearance in aſſizes, attaints, and *juris utrum*, *St. Weſtm.* 1. 3 *Ed.* 1. *c.* 42. nor ſhall the plaintiffs have eſſoin, *St. Weſtm.* 2. 13 *Ed.* 1. *c.* 28.

Parceners and joint-tenants ſhall not fourch by eſſoin, *St. Weſt.* 1. 3 *Ed.* 1. *c.* 43.

Nor huſband and wife, *St. Glouceſt.* 6 *Ed.* 1. *c.* 16.

Eſſoin *de ultra mare* may be challenged before the juſtices, for that the tenant was within *England* the day of the ſummons, and three weeks after, *St. Weſt.* 1. 3 *Ed.* 1. *c.* 44.

On failure of warranting an eſſoin *de ſervitio Regis*, the defendant ſhall pay coſts, *St. Glouc.* 6 *Ed.* 1. *c.* 8.

Eſſoin does not lie in aſſiſe in *Wales*, *St. Wall.* 12 *Ed.* 1.

No eſſoin lies for an appellor in any caſe, 13 *Ed.* 1. *c.* 12.

De malo lecti may be challenged, for that the tenant is not ſick, *St. Weſtm.* 2. 13 *Ed.* 1. *c.* 17.

Shall not lie in a writ of right between two claiming by one deſcent, *St. Weſtm. Ed.* 1. *c.* 17.

After iſſue joined an eſſoin ſhall only be allowed at the firſt day given. *St. Weſtm.* 2. 13 *Ed.* 1. *c.* 27.

In what caſes eſſoins lie, and in what not, *St. Eſſoin*, 12 *Ed.* 2. *ſt.* 2.

In what caſes eſſoin *de ſervitio Regis* lieth not, *St. de Viſu, &c. incerti temp'.*

Eſſoin *de ſervitio, &c.* and protection does not lie in attaint or in aſſiſe of novel diſſeiſin. 5 *Ed.* 3. *c.* 6.

In debt againſt divers executors, they ſhall not fourch by eſſoin, 9 *Ed.* 3. *ſt.* 1. *c.* 3.

For more learning concerning eſſoins, ſee 10 Vin. Abr. *tit.* Eſſoins.

Eſſoins and proffers, Words uſed in ſtat. 32 *Hen.* 8. *cap.* 21. See **Proffer.**

Eſſonio de malo lecti, Is a writ directed to the ſheriff, for the ſending of four lawful knights to view one that hath *eſſoined* himſelf *de malo lecti*. Reg. Orig. fol. 8. b.

Eſtabliſhment of dower, Seemeth to be the aſſurance of *dower* made to the wife by the husband, or his friends, before or at marriage; and aſſignment is the ſetting it out by the heir afterwards, according to the *eſtabliſhment*. Britton. cap. 102 & 103.

Eſtache, (from the old Fr. *eſtacher*, *to faſten*) Is uſed for a bridge, or ſtank of ſtone and timber. *Cowell*, *edit.* 1727.

Eſtandard. See **Standard.**

Eſtate, May be deduced from the *French* word *etat*, *conditio*, and ſignifieth that title or intereſt which a man hath in lands or tenements; as *eſtate ſimple*, otherwiſe called *fee-ſimple*; and *eſtate conditional*, or upon condition, which is as *Littleton* ſaith, *lib.* 3. *cap.* 5. either by *condition in deed*, or upon *condition in law: Eſtate upon condition in deed* is, where a man by deed indented infeoffeth another in fee, reſerving to him and to his heirs yearly a certain rent payable at one feaſt, or at divers, upon condition, that if the rent be behind, *&c.* that it ſhall be lawful to the feoffor, and to his heirs, to enter into the lands or tenements, *&c.* *Eſtate upon condition* in *law*, is ſuch as hath a conſideration in law annexed to it, though not ſpecified in writing: For example, if a man grant to another by his deed the office of parkerſhip for term of his life, this *eſtate* is upon condition in the law, or implied by law, *&c.* if the parker ſhall ſo long well and truly keep his park. *Cowell.*

Eſtate ſignifieth ſuch inheritance, freehold, term for years, tenancy by ſtatute-merchant, ſtaple, *elegit*, or the like, as any man hath in lands or tenements. *Co. Lit.* 345. Eſtates are *real*, of lands, tenements, *&c.* or *perſonal*, of goods or chattels; otherwiſe diſtinguiſhed into *freeholds*, that deſcend to the heir, and chattels which go to the executors.

Under this head it is thought proper to treat,

I. Of eſtate in fee-ſimple.
II. Of eſtate in tail.

I. Of eſtate in fee-ſimple.

An eſtate in fee-ſimple is an eſtate in lands, tenements, lordſhips, advowſons, commons, eſtovers, and all hereditaments, to a man and his heirs for ever: Alſo where a corporation ſole or aggregate are capable of holding in ſucceſſion, and lands are given to them and their ſucceſſors, they are ſaid to have a fee-ſimple. *Lit. ſect.* 1. *Co. Lit.* 4. *a.* 2 *Bac. Abr.* 249.

It was a common practice among the northern nations that invaded the *Roman* empire, for the lords, who held great diſtricts, to give lands to ſuch perſons as had behaved themſelves well in the wars, ſometimes for life only; and when they married their daughters to any of thoſe ſoldiers, who were uſually their vaſſals or tenants, they gave the lands to them and the iſſue of that marriage, which brought in the notion of ſucceſſion amongſt us. *Digb. lib.* 1. *tit.* 1. How from this notion of ſucceſſion a fee-ſimple aroſe by lettieg in all heirs, whether lineal or collateral, to the excluſion of the aſcending line, baſtards, and the half-blood, and why the male line was preferred, ſee title **Deſcent.**

Lord *Coke* divides *fee*, which he ſays ſignifies the ſame with inheritance, into fee-ſimple or abſolute, conditional and qualified, or baſe. *Co. Lit.* 21. *b.* And fee-ſimple, which is the moſt ample eſtate of inheritance, may be in things *real*, *perſonal*, or *mixed*; real, as in lands or tenements; perſonal, as when an annuity is granted to one and his heirs; mixed, as when an earl is created of ſuch a county. *Co. Lit.* 1. *b.* 2. *a.*

1. *Who may purchaſe or inherit an eſtate in fee-ſimple.*

2. *Of the import of the word* heir, *which creates an eſtate in fee-ſimple; when it is a word of limitation, and when a word of purchaſe.*

1. *Who may purchaſe or inherit an eſtate in fee-ſimple.*

An alien cannot purchaſe any lands in *England*; the reaſon is, becauſe every perſon is preſumed to have a natural and neceſſary allegiance to that ſociety that firſt protected and preſerved him; and therefore he cannot pay any allegiance to any other ſociety, unleſs he be afterwards received into it. *Vaugh.* 227, 291. 7 *Co.* 16, 17, 18. *Dyer* 2. *pl.* 8. See Alien.

All perſons attainted of treaſon or felony are incapable of purchaſing; felony, by the ancient feudal law, being a crime for which a vaſſal forfeited his feud to the lord, becauſe he breaks his oath of fealty in the higheſt manner, his body, with which he had engaged to ſerve the lord, being forfeited to the King; and his blood is ſaid to be corrupted, becauſe no man can repreſent his perſon, that perſon itſelf being forfeited by the law, and the note of infamy reſting upon his family; ſo that no repreſentative of his can be received to do any feudal ſervice: for the greater terror of all offenders, therefore, ſuch tenant dying without heirs, the land is in the lord by eſcheat; but if the tenant commits treaſon, the lands are forfeited to the King, becauſe there is an exception in the oath of fealty that ſaves his allegiance to the King; ſo that if he forfeits his allegiance, even thoſe lands held of another lord are forfeited to the King; for the lord himſelf cannot give out lands, but upon that condition, as appears by the reſervation in the oath. 2 *Bac. Abr.* 249. *Co. Lit.* 8. *a.* See *Dig. Feud. lib.* 2. *tit.* 23, 24. *Vigellius* 242, 350. *Spelman's Gloſſ.* 214, 215.

If a man be attainted of felony, and after purchaſe land, and dies, the King ſhall have it by his prerogative, and not the lord of the fee; becauſe his perſon being forfeited to the King, he cannot purchaſe but for the King. *Co. Lit.* 2. *b.*

If the father be attainted, and dies during the life of the grandfather, yet the ſon ſhall not inherit the grandfather, becauſe he muſt repreſent his father, who cannot be repreſented; but if the grandfather be ſeiſed in tail, and the father be attainted of treaſon ſince the 26 *H.* 8. and dies in the life-time of the grandfather, the ſon ſhall inherit the grandfather; for the ſon is heir *per formam doni* to the tail, which is originally not forfeitable, and by that ſtatute, the father only forfeits the lands and right that he hath in him. *Co. Lit.* 8.

If a man attainted be pardoned by act of parliament, he is totally reſtored and inheritable to all perſons; but if he be pardoned by charter, he may thenceforth purchaſe lands, but cannot inherit his former relations; for the King's charter cannot alter the law, or take away the right of others, or reſtore the relation that was loſt. *Co. Lit.* 8.

If there be grandfather, father and ſon, and the father be attainted, the ſon cannot inherit the grandfather, becauſe the father cannot be repreſented; but if the father be attainted, two brothers may inherit each other, becauſe there is no diſability in the one to be repreſented, or in the other to repreſent; if the father be attainted, the ſon may inherit the mother; if the eldeſt ſon be attainted, and the father die in the life-time of ſuch eldeſt ſon, the younger cannot inherit, becauſe there is the line of the elder brother in being before him; but if the eldeſt ſon dies in the life-time of the father without iſſue, the younger brother ſhall inherit; but if he leave iſſue, neither the iſſue nor younger brother can inherit. *Noy* 158 *to* 170. *Co. Lit.* 8. 4 *Leon. pl.* 21. *Mo. pl.* 775. *Dyer* 48.

All cuſtomary eſtates are within this rule, unleſs there be ſome particular cuſtom to the contrary, as in gavelkind, becauſe the perſon is *civiliter mortuus* by the attainder, and therefore is diſabled to have or hold any eſtate, or to have any property in any thing; and therefore if a perſon be ſeiſed in fee of a copyhold, and be attainted of treaſon or felony, the copyhold is in the lord without any preſentment of the homage, becauſe it is againſt the nature of a court-baron to inquire of criminal matters or offences, againſt the King, and ſuch homage is at the will of the lord, and often influenced by him; but if a copyholder be convicted of felony and preſented by the homage, by ſpecial cuſtom, the eſtate may be forfeited to the lord; but this is only by the ſpecial cuſtom, ſince the copyholder is not diſabled by the conviction to hold the eſtate, as he is if he were attainted; and therefore ſince it is by the cuſtom only that ſuch forfeiture accrues, it muſt be in the manner in which the cuſtom has ſettled it, which is by preſentment of the homage; but if a copyhold is granted for life, and by another copy the reverſion is granted to another, *habendum* after the death of the firſt copyholder, or ſurrender, forfeiture, or other determination of the firſt eſtate, the firſt copyholder commits murder, and is thereof attainted, and the King pardons the murder and the attainder, and all forfeitures thereby; in this caſe he in the reverſion is intitled to the eſtate, for the King cannot have it for the baſeneſs of the tenure, ſince he cannot be tenant at will to any perſon, and the lord cannot have it becauſe he cannot be tenant to himſelf; therefore the particular eſtate of tenant for life being extinguiſhed, the reverſion immediately commences. *Pollex.* 617. 2 *Keb.* 451, 456. 2 *Vent.* 38—9. 2 *Brownl.* 118. See *Co. Cop. ſect.* 58. *cont.*

A baſtard cannot inherit; but if he hath got a name by reputation, he may purchaſe by it, for all ſurnames were originally acquired by reputation. *Co. Lit.* 3. *b.* See Baſtard.

As for *Jews*, they were tranſlated from *Roan*, by *William* the Conqueror, *ob numeratum pretium*, and were allowed by ſeveral Kings after the Conqueror, becauſe they dealt with one another chiefly for money, and ſo drew a great deal of money into the kingdom, which they let out to Chriſtians on uſury, and were taxable to the King at his pleaſure. *Richard the Firſt* erected a court where all their real and perſonal eſtates were regiſtred; which all, upon the death of any *Jew*, came to the King, but was redeemable by his children, paying their fines, and all the children equally inherited; the wives ſued for dower in this court, and could not ſue at Common law for it; and therefore if a *Jew* born in *England* took to wife a *Jew* alſo born in *England*, if the husband was converted to the Chriſtian faith, and purchaſed lands, and enfeoffed another and died, the wife could not demand dower at Common law againſt a Chriſtian. 2 *Bac. Abr.* 251.

As to papiſts, the ſtatute 11 & 12 *Will.* 3. *cap.* 4. diſables all perſons, who after the 29th day of *September* 1700, attaining the age of eighteen years, do not within ſix months after take the oaths, *&c.* to inherit, or take by deſcent, deviſe, or limitation, *&c.* any lands, tenements, *&c.* and that during the life of ſuch papiſt, or until he or ſhe do conform, the next of his or her proteſtant kindred ſhall hold and enjoy the ſaid lands, without being accountable for the profits, ſubject to wilful waſte; and that from the 10th day of *April* 1700, all papiſts ſhall be diſabled to purchaſe any manors, lands, *&c.* and that all eſtates, terms, intereſts, *&c.* made, ſuffered, or done, to or for their uſe, benefit, truſt or behoof, mediately or immediately, ſhall be utterly void to all intents and purpoſes.

A monſter not having human ſhape cannot purchaſe or inherit, but an hermaphrodite ſhall inherit or purchaſe *ſecundum prævalentiam ſexus incaleſcentis*; one born deaf and dumb may inherit; ſo may one born deaf, dumb and blind, becauſe it is for their advantage; but they cannot contract, becauſe they cannot underſtand the ſigns of contracting;

tracting; an infant, an ideot, and a perſon of *non ſane memory* may inherit, becauſe the law, in compaſſion to their natural infirmities, preſumes them capable of property; ſo alſo an infant or a perſon of *non ſane memory* may purchaſe, becauſe it is intended for his benefit, and the freehold is in him till he diſagree thereto, becauſe an agreement is preſumed, it being for their benefit, and becauſe the freehold cannot be in the grantor, contrary to his own act, nor can be in abeyance, for then a ſtranger would not know againſt whom to demand his right; if at full age, or after recovery of his memory they agree thereto, they cannot avoid it; but if they die during minority or lunacy, the heirs may avoid it; for they ſhall not be ſubject to the contracts of perſons who wanted capacity to contract; ſo if after his memory recovered, the lunatick or perſon *non compos* die without agreement to the purchaſe, their heirs may avoid it. *Co. Lit.* 8. 1 *Inſt.* 2. 2 *Vent.* 303. See Infant and Ideot.

A feme covert is capable of purchaſing; for ſuch an act does not make the property of the husband liable to any diſadvantage, nor does it ſuppoſe a ſeparate will or power of contracting in the wife; but here the will of the wife is ſuppoſed the mind of the husband, ſince no man is ſuppoſed not to aſſent to that which is for his benefit; but in this caſe the husband may diſagree, and it ſhall avoid the purchaſe; for ſince husband and wife, according to the inſtitution of marriage, are reckoned one perſon, they can have but one will, and that muſt be ſeated in the husband, as fitteſt to govern, therefore the ſupreme direction of all affairs in his family muſt belong to him; but if he neither agrees nor diſagrees, the purchaſe is good, for his conduct ſhall be eſteemed a tacit conſent, ſince it is to turn to his advantage; but in this caſe, tho' the husband ſhould agree to the purchaſe, yet after his death ſhe may waive it; for having no will of her own at the time of the purchaſe, ſhe is not indiſpenſibly bound by the contract, therefore if ſhe does not, when under her own management and will, by ſome act expreſs her agreement to ſuch purchaſe, her heirs ſhall have the privilege of departing from it. 1 *Inſt.* 3. *a.* 2 *Bac. Abr.* 252. But the Queen Conſort, as ſhe is a woman of greater dignity than any other of her ſex in the kingdom, ſo ſhe hath greater privileges than any of them, for ſhe is conſidered by the law as a perſon exempt from the king, and hath ability to purchaſe and grant without him; which oeconomy ſeems to be introduced as well for the greater ornament and grandeur of the monarchy, by enabling the Queen to ſupport and keep a court of her own, as to encourage princes to court the alliance of our princes by marriages attended with ſo much eaſe and dignity. 2 *Bac. Abr.* 252.

2. *Of the import of the word* heir, *which creates an eſtate in fee-ſimple; when it is a word of limitation, and when a word of purchaſe.*

If land be given to *J. S.* and his heirs, *J. S.* can claim it, becauſe he is particularly named; and whoever can make himſelf heir to *J. S.* that is, can ſupport the character of a legal repreſentation to *J. S.* may claim it alſo by the words of the gift; but if land be granted to *J. S.* for ever, no perſon can ſtand in his place after his death, or claim any intereſt, becauſe the party that is next of kin by the law cannot bring himſelf within the words of the conveyance. *Co. Lit.* 9.

It is therefore a general rule, that nothing but the word *heir* will create a fee, for it ſignifies ſuch a neareſt of kin, with all other legal qualifications that are neceſſarily required in all perſons that repreſent or ſtand in the place of another, by the *Engliſh* law; but this general rule has theſe following exceptions. *Co. Lit.* 9.

For if the father enfeoff the ſon, to hold to him and his heirs, and the ſon enfeoffeth the father as fully as the father enfeoffed him; this conveyance paſſeth a fee to the father, for when the act of diſpoſal relates to another thing, that thing becomes in a manner part of the diſpoſition; for in ſuch caſes the mind is carried to the notion of an heir as truly and ſurely as if the word had been in the inſtrument itſelf; ſo that there is a great difference between this caſe and the caſe where other words are ſubſtituted inſtead of the word *heir*; for ſcarce any other word can expreſs all the notions that make up the idea of an heir; but where there is a relation to a legal heir, it is the ſame thing as if it were expreſſed in the conveyance itſelf, becauſe the word is to put us in mind of the thing which is done already by the relation; for as we ſay not only, that is certain, which is ſo in itſelf, but that alſo which by ſome other ſtandard is reducible to a certainty; ſo we ſay, that not only that conveyance hath force, which hath words in it to anſwer the intent of the party, but that alſo which borrows ſtrength from any other thing to anſwer the ſame deſign; and this will appear plain by the following inſtances. 2 *Bac. Abr.* 252.

By a fine *come ceo, &c.* a fee-ſimple will paſs without the word *heirs*, becauſe it hath relation to a precedent feoffment, which is ſuppoſed to paſs the fee. *Co. Lit.* 9.

If the lord releaſes all his right to the tenant, the ſeigniory is extinct without the word *heirs*; for this inſtrument is to diſcharge the eſtate of the tenant, and therefore has a neceſſary relation to the eſtate, which the lord firſt created, and conſequently it refers to thoſe words that in the orignal of the eſtate gave him a fee-ſimple. *Co. Lit.* 9.

If there be two coparceners, and one of them releaſes all her right to the other, without the word *heirs*, this paſſes a fee; for each coparcener till partition is ſeiſed of the whole eſtate in fee, tho' each of them hath right or legal demand to the fee of a moiety only; when therefore one releaſes all her right, it hath a neceſſary relation to the eſtate whereof the other is ſeiſed, and to which ſhe hath a right, which is the fee. *Co. Lit.* 9.

If there be two jointenants, and one releaſes to the other, this paſſeth a fee without the word *heirs*, becauſe it refers to the whole fee which they jointly took, and are poſſeſſed of by force of the firſt conveyance; but tenants in common cannot releaſe to each other, for a releaſe ſuppoſeth the party to have the thing in demand; but tenants in common have ſeveral diſtinct freeholds, which one cannot transfer to the other without the ſolemnity of livery. *Co. Lit.* 9. 200. *b.*

A common recovery is in nature of an action commenced, and judgment upon it, and therefore paſſeth without the word *heirs*; for it hath relation to a precedent right in the recoveror, which muſt be ſuppoſed a right of the fee. *Co. Lit.* 9.

If one coparcener grants a rent to another for owelty of partition, the grant is good without the word *heirs*; for coming in recompence of an inheritance, it has a plain relation to the inheritance departed with as if the word *heirs* had been in the gift. *Co. Lit.* 9.

A reſtitution to a perſon attainted and pardoned will not paſs a fee without the word *heirs*; for ſince the party forfeited the eſtate, the reſtitution is in nature of a new grant; and here are no words that create a neceſſary relation to that fee which the perſon formerly attainted had, for he may be reſtored to his eſtate during his own life. *Co. Lit.* 9. *b.*

Where a man is called to parliament by writ, the inheritance is in him without the word *heirs*, becauſe the writ is in nature of a citation to appear at the court of parliament, and the heir cannot be cited to appear, and therefore there is no mention made of him; but yet in ſuch caſe the peer hath an inheritance. 1 *Inſt.* 9. *b.*

There are ſome ſpecies of fees that are expreſſed without the word *heirs*; for the words whereby they are created do ſignify inheritance, with ſome other notion over and above, not expreſſed by the word *heirs*; as the word *frankmarriage* ſignifies an inheritance given in conſideration of marriage, which being for the peopling of the country had ſeveral privileges annexed to it; ſo *frankalmoigne* ſignifies an inheritance devoted to God, which was mightily favoured by the ſuperſtition of ancient times; likewiſe if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many perſons capable to purchaſe, they have a fee-ſimple without the word *ſucceſſors*, becauſe in judgment of law they never die; for the ſame reaſon, if lands are given to the King by deed inrolled without the word

word *ſucceſſors* or *heirs*, a fee-ſimple paſſeth. *Co. Lit.* 9. *b.*

There are likewiſe particular kinds of laws within the kingdom, that allow of the transferring of inheritances without the word *heirs*; as the law of the foreſt, which dependeth on the mere pleaſure of the King, and not on the ſolemnities and forms of a contract; and therefore, if the King granted an aſſart at a juſtice's ſeat, *habend' & tenend' ſibi in perpetuum*, the party had a fee without the word *heirs*, inaſmuch as the King had ſignified his pleaſure, that the party ſhould have the privilege of tillage for ever. *Co. Lit.* 10. *a.*

In wills and teſtaments, where the mind of the party appears to transfer a fee, for the mind of dying perſons delivered in haſte ought to receive a benign interpretation. *Co. Lit.* 9. See Deviſe, Wills.

As to the word *heir* being a word of purchaſe, the firſt rule to be obſerved is this, that where the anceſtor takes an eſtate for life, and a limitation is afterwards made to his right heirs, there the anceſtor has the reverſion executed in himſelf, and the right heirs are no purchaſers; as if a leaſe for life be made to *A.* remainder to the right heirs of *A.* ſuch remainder is executed in *A.* and he may grant it over; but if a leaſe for years be made to *A.* remainder to the right heirs of *A.* this is a contingent remainder to the right heirs of *A.* and *A.* himſelf takes nothing by ſuch limitation; and the reaſon of the difference is this; in the firſt caſe *A.* having an eſtate for life is *feoffatus* within the ſtatute *Quia emptores*, &c. and conſequently capable of performing the feudal ſervices; and then to make the right heir a purchaſer would be to ſuſpend the ſervices of the feud during the life of *A.* who is capable of performing them; which would apparently tend to the weakening of the tenure and ſtate of the kingdom; and therefore ſuch interpretation ought to be made as beſt ſupports the tenure, when the words will bear both ſenſes; for if after ſuch limitation to the right heirs of tenant for life, he ſtill continued but barely tenant for life, he would not be in the homage of the lord; nor would he be obliged to venture his life in the wars for ſuch eſtate; and he in remainder would not be obliged to do the feudal ſervices, becauſe during the life of the tenant for life he has no intereſt in the land, becauſe his remainder cannot execute during the particular eſtate, and conſequently not obliged to do the ſervices of the feud; and if ſuch remainder was to veſt in the right heirs as purchaſers, it could not veſt during the life of tenant for life, *quia non eſt hæres viventis*, and then by ſuch conſtruction the ſervices of the feud would be neglected during the life of *A.* for there would be no one to perform them; but in the laſt caſe you cannot veſt the remainder in the leſſee for years, for he is not *feoffatus* within the ſtatute; for the perſon that properly takes by the feoffment is the freeholder, and then conſequently, altho' you ſhould conſtrue a limitation to ſuch right heirs, a remainder veſted in the leſſee for years; yet he having not the immediate freehold in him, would not be obliged to do the feudal ſervices till the intermediate remainder was ſpent; and therefore the remainder to the right heirs is not immediately veſted in the leſſee for years, becauſe the heir is the firſt that can have the freehold as feudal tenant to the lord, and therefore by the words of the donation muſt be the firſt purchaſer of ſuch remainder; and tho' in the firſt caſe they admit ſuch limitation to be a remainder, executed for publick convenience, *viz.* that the feudal ſervices, if poſſible, may be anſwered; yet it would be ridiculous to admit ſuch conſtruction in the laſt caſe, ſince it would make a feudal tenant to anſwer the ſervices; for to run counter to the tenor of a man's grant, without a benefit to any body, would be moſt abſurd, for ſuch conſtruction would not make a feudal tenant, becauſe the leſſee for years would not hold of the lord, nor could the lord avow upon him. *Lit. ſect.* 578. 2 *Rol. Abr.* 415, 417. 1 *Co.* 104.

But if a feoffment be made to the uſe of *A.* and *B.* during their joint lives, and after the death of either of them, to the uſe of *C.* for life, and after to the heir of the body of *B.* though *B.* hath an eſtate of freehold, yet the remainder limited to the heirs of his body does not veſt, but is in abeyance, becauſe by this limitation the eſtate of freehold may determine in *B.* during the continuance of his life; and ſince *B.* is not let into the eſtate during his whole life, his heir cannot take as repreſentative of him, for ſuch repreſentative muſt be of an eſtate of which *B.* was ſeiſed; and ſince by the intention of this conveyance, the feoffor hath not limited in ſuch a manner, that *B.* in all events ſhould die ſeiſed of the eſtate, 'tis plain he deſigns only a contingent benefit to the heirs of the body of *B.* as original purchaſers, and not by derivation from him. 2 *Rol. Abr.* 418.

If a leaſe for life be made to *A.* remainder to the right heirs of *B.* this is a good contingent remainder if livery be made, becauſe ſuch act of notoriety delivers over the freehold to *A.* at the time it is made, and thereby creates a tenant, who is *feoffatus* within the ſtatute to hold of the lord, who is capable of doing the feudal ſervices, except homage, and on whom the lord may avow; and by this conſtruction there is no inconvenience or ſuſpenſion of all the feudal ſervices; for if *A.* ſhould die during the life of *B.* the contingent remainder would become void, becauſe there would be no feudal tenant to attend the ſervices; for the right heir could not take it during the life of *B.* and then the land would return to the donor, who would be again tenant to anſwer the ſervices. 2 *Rol. Abr.* 418.

But if *A.* makes a leaſe for life, or a gift in tail, remainder to his right heirs, this is a void limitation in its original creation, for it cannot veſt immediately no more than in the former caſe, *Quia non eſt hæres viventis*, and to conſtrue it a contingent remainder would be to ſuſpend the ſervices of the feud to no purpoſe; for 'tis not poſſible that it can veſt during the life of the grantor, for ſo long as he lives he can have no repreſentative or heir, and therefore not like the former caſe, which may poſſibly veſt the minute after the grant is made, or at leaſt during the life of the grantor; beſides, that in this caſe, where the feoffor has not parted with the whole eſtate out of him, the feoffee does not hold of the lord within the ſtatute *Quia tempores*, &c. and to conſtrue this limitation to the right heirs in parting with the whole eſtate, would be an abſurd conſtruction, becauſe the anceſtor, in caſe he outlives the particular eſtate, muſt be in of his old reverſion, ſince he cannot have an heir during his life; and the anceſtor cannot be ſuppoſed to deſign the heir ſhould take as a purchaſor, ſince it were an abſurd intention, that that eſtate, which would of courſe deſcend to him, ſhould veſt in him in the ſame manner as a purchaſor, and by conſequence, ſince there is no alteration by the conveyance from the courſe in which the eſtate would have deſcended, it muſt be a void limitation. 1 *And.* 3. *Co. Lit.* 20. *b.* *Dyer* 156. 1 *Rol. Abr.* 827. 2 *Rol. Abr.* 415. 1 *Leon* 182.

II. Of eſtate in tail.

An eſtate is ſaid to be *intailed*, when it is aſcertained, what iſſue ſhall inherit it. *Lit. ſect.* 18. Fee-tail was originally termed the *feudum novum*, in oppoſition to fee-ſimple abſolute, or the *feudum antiquum*, and went only to the deſcendants, either male or female, according to the words and limitation of the feudal donation, and thence came to be diſtinguiſhed into *feudum maſculinum* and *fœmininum*. 2 Bac. Abr. 256.

Before we enter into a diſquiſition of eſtates-tail, as they ſtand in ſtatute *De donis conditionalibus*, (13 *Ed.* 1. *c.* 1.) 'twill be neceſſary to take a more particular view of the conditional fee at Common law, becauſe the ſtatute *De donis* creates no eſtate-tail, but of ſuch eſtates as were anciently conditional fees. 2 *Bac. Abr.* 256.

If lands were given to a man, and the heirs male of his body, the iſſue female were not inheritable, becauſe the feudal donation, expreſſing particularly what heirs of the donee were to inherit, no heir, though of the body of ſuch feudatory, could inherit, that did not come under the words and limitation of the donation. *Co. Lit.* 19. *a.*

And if the donee had iſſue two ſons, and died, and the eldeſt died, leaving a daughter, the youngeſt ſon came into the ſucceſſion of the feud, and excluded the daughter;

daughter; and if there had been no ſon, the feud reverted (the collateral heirs being excluded, 1 *Rol. Abr.* 841.) to the donor; for the expreſs words of the firſt donation, which regulated all ſubſequent deſcents, excluded all females from inheriting ſuch feud; ſo *e contra*, if the feud had been given to a man, and the heirs female of his body, the deſcent was to be conveyed to the females only, excluſive of all males, according to the words of the firſt donation. *Co. Lit.* 19. *a.* 7 *Co.* 35. *a.*

But if the limitation of the feud had been to a man, and his heirs male, ſuch donation doth not exclude the females, but lets them, and all collateral heirs in, becauſe ſuch donation, not limiting the feud to the deſcendants of any body, cannot be good as a *feudum novum*; and if it be conſtrued a *feudum antiquum*, the courſe of deſcent cannot be altered by any man's private fancy; and ſince it appears from the words of the donation, that the donor intended an eſtate of inheritance, his words ſhall be taken moſt ſtrongly againſt himſelf, and ſhall paſs the moſt abſolute ſtate of inheritance, which is a fee ſimple, to which not only his lineal heirs, but alſo his collateral heirs are inheritable. *Co. Lit.* 13. *a.*

The power of alienation was not abſolute in the *feudum novum*, becauſe ſuch power might have been imployed to diſappoint the lord of his reverter, and yet they did not abſolutely take away from ſuch feudatories the power of alienation, becauſe that would have created a perpetuity, which was againſt the original policy of the *Engliſh* law. To come therefore to a temper between theſe extremes, the donee was not allowed to alien till iſſue had, becauſe till then he had not a deſcendable eſtate in him, and therefore could not transfer a deſcendable eſtate to others, and if he ſhould have been allowed to have aliened, whether he had iſſue or not, ſuch alienations would have diſappointed the limitations and reſtrictions in the gift, which brought it back to the lord on failure of iſſue; and therefore they conſtrued the words of the feudal donation not only as a limitation but condition, which the feudatory was obliged to perform before he had an abſolute power over the eſtate, for ſuch donations were generally made for the propagation of families, and therefore it beſt anſwered the deſign of ſuch gifts, to ſuppoſe the power of alienation to ariſe on the begetting iſſue, becauſe in ſuch caſes the feaudatory had the contingencies of a family; for when iſſue was had, they looked upon the lord's poſſibility to be at a great diſtance, and they admitted of an abſolute power of alienation, therefore if a man aliened before iſſue had, the lord could not have entered for a forfeiture, becauſe that would have been contrary to his own donation, which carried to the feudatory and his deſcendants, and therefore if deſcents were afterwards born, the lord was excluded during the continuance of ſuch iſſue, and the iſſue born after the alienation could not have entered, becauſe they only claim as repreſentatives to their anceſtor, and therefore his actual alienation barred them. 2 *Bac. Abr.* 256, 257. *Co. Lit.* 19. *a. Plow.* 246. *b.* 7 *Co.* 34. *b.* 1 *Rol. Abr.* 840, 841. 2 *Inſt.* 333.

But if ſuch tenant aliened before ſuch iſſue had, and afterwards had iſſue, and then the tenant, and ſuch iſſue had died, ſuch alienation had not barred the donor of his right of reverter, becauſe the condition was not performed at the time of the alienation; ſo that the tenant had not an abſolute property veſted in him for the purpoſe; wherefore, ſince the alienation was before the tenant had ſuch power, it was ſubject to the lord's claim as if no ſuch alienation had been, and by conſequence the lord might have entered as in his reverter, as if the tenant had died without iſſue; and the ſubſequent birth of the iſſue is not a ſufficient performance of the condition to make the precedent alienation valid; ſince that were to allow of the alienation of a perſon who had no power to alien. *Plow.* 235. *Co. Lit.* 19.

But if a gift was made to a man, and the heirs of his body, and the donee had died leaving iſſue, ſuch iſſue, without having iſſue, might have aliened, becauſe coming in by deſcent he had the power over it, as he had over other eſtates deſcendable, and ſucceeding into his anceſtor's eſtate, who had an abſolute power of alienation, he took it in the ſame manner diſcharged of any reſtraint from the condition, and the rather, becauſe otherwiſe the iſſue could not have made the neceſſary proviſions on his own marriage by a family ſettlement; but if the iſſue had not aliened, it had followed the limitation of the firſt donation, becauſe the eſtate had continued in the ſame condition without alteration, and conſequently on failure of iſſue, according to the firſt donation, the lord had been in his feudal right of reverter. 7 *Co.* 34, 35. *Co. Lit.* 19. *a.*

And as the feudatory had power to alien the land after he had iſſue, ſo likewiſe might he have charged it with a rent, common, &c. for this power neceſſarily follows an abſolute and intire property; for if he might have aliened the feud from his iſſue, it is but part of that power to tranſmit it to his iſſue under any charge or incumbrance he thought fit. *Co. Lit.* 19. *a.* 1 *Rol. Abr.* 840.

So the feudatory, by having iſſue, might have forfeited the feud for treaſon or felony. *Co. Lit.* 19. *a.* 1 *Rol. Abr.* 840.

If there was no expreſs reſervation of ſervices in the firſt feudal donation, the donee held of the donor as he held over. *Co. Lit.* 19.

Thus the law ſtood till the 13 *Ed.* 1. when the ſtatute *De donis conditionalibus* was made, which deprived the feudatory of his ancient power of alienation, upon his having iſſue, or performing the condition; the pretence of making this ſtatute, as appears from the preamble, was to comply with the will of the donor, who in all ſuch grants intended that the feud ſhould be tranſmitted to the deſcendants of the feudatory in the ſame plight he received it; and upon failure of the deſcendants, that it ſhould revert to the donor himſelf; but the real deſign of making the ſtatute was, to introduce a perpetuity to other purpoſes; for, towards the end of the barons war, the crown took up a new method of politicks to break the intereſt of the baronage; for when any feud that was then ſubſiſting in large diſtricts and territories eſcheated, or was forfeited to the crown, the King divided them, and gave them out in leſſer feuds, thereby to deſtroy the power of the peerage: this the barons ſaw would tend to the ruin of their body, and therefore paſt this act to make all ſuch new feuds unalienable, and by that means not forfeitable for treaſon, though the condition ſhould be performed by leaving iſſue; and from the time of this ſtatute, the donor's poſſibility or right of reverter was turned into a reverſion; and the donee, who before had a fee-ſimple conditional, has now but an eſtate-tail. 6 *Co.* 40. *Co. Lit.* 21, 392. 2 *Inſt.* 335. *Mo.* 155, 156. 1 *Vent.* 299. 2 *Mod.* 131.

The above-mentioned ſtatute of 13 *Ed.* 1. *c.* 1. commonly called the ſtatute *De donis conditionalibus*, or *the ſtatute of entails*, is thus: "Firſt concerning lands [*tenementis* in the original Latin] that many times are given upon condition, this is to wit, where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the ſame man and his wife, with ſuch condition expreſſed, that if the ſame man and his wife die without heirs of their bodies between them begotten, the land ſo given ſhall revert to the giver or his heir. In caſe alſo where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expreſſed in the deed of gift, which is this, that if the huſband and wife die without heir of their bodies begotten, the land ſo given ſhall revert to the giver or his heir. In caſe alſo where one giveth land to another, and the heirs of his body iſſuing; it ſeemed very hard, and yet ſeemeth to the givers and their heirs, that their will being expreſſed in the gift, was not heretofore, nor yet obſerved. In all the caſes aforeſaid, after iſſue begotten and born between them (to whom the lands were given under ſuch condition) heretofore ſuch feoffees had power to alien the land ſo given, and to diſinherit their iſſue of them, contrary to the minds of the givers, and contrary to the form expreſſed in the gift. And further, when the iſſue of ſuch feoffee is failing, the land ſo given ought to return to the giver, or his heir, by form of the gift expreſſed in the deed, though the iſſue (if any were) had died: Yet

the deſcendants of the ſurvivor may inherit the gift, 'tis a tail general. *Co. Lit.* 26. *a.* 10 *Co.* 51. *Reg.* 239. *b.*

Tail ſpecial is where the eſtate is limited to ſome particular heirs of the body of the donee, as to the heirs by ſuch a woman, as if lands be given to a man and his wife, and the heirs of their two bodies begotten; for tho' all the deſcendants of that marriage may inherit the gift, yet all the heirs of the body of the donee cannot inherit; for if the woman ſhould die, and the man take another wife, the iſſue of the donee by the ſecond wife ſhould not inherit, becauſe the limitation of the gift was only to the deſcendants of the feudatory by the firſt marriage. *Lit. ſect.* 16.

If land be given to a man and a woman unmarried and the heirs of their bodies; this is a tail ſpecial, for the poſſibility that they may marry, and then the deſcendants of that marriage can only inherit; ſo if the gift be made to a man that hath a wife, and to a woman that hath a huſband, and the heirs of their bodies; this is a tail ſpecial preſently in them, for the poſſibility that they may marry, and the deſcendants of ſuch marriage may inherit according to the limitation of the gift. *Co. Lit.* 25. *b. Bro. Eſtate* 22. *Tail* 16.

But if land be given to two men and their wives and the heirs of their bodies begotten, they have a joint eſtate for life, and ſeveral inheritances, but no joint eſtate in tail; becauſe tho' the huſband and the wife of the other may die, and the ſurvivors may marry, yet the gift being made to them all, and the heirs of their bodies, 'tis impoſſible that there ſhould be one heir or deſcendant of all their bodies, and therefore it can be no joint eſtate-tail in them all; but they all four take jointly for life; and each huſband and his wife have a ſeveral inheritance in a moiety. *Plow.* 35. *a. Co. Lit.* 25. *b.*

If lands be given to two men and the heirs of their bodies begotten, they have but a joint eſtate for life, and ſeveral inheritances; for though the gift be limited to the deſcendants of their bodies, they cannot have a joint eſtate-tail. *Lit. ſect.* 283.

So if lands be given to one man and two women and the heirs of their bodies begotten, they have a joint eſtate for life, and ſeveral inheritances, becauſe there can be no one iſſue of both the women's bodies; and if the man ſhould marry one of them, yet it is not limited in the donation, which of them in caſe of ſuch intermarriage ſhould firſt take. *Lit. ſect.* 283. *Co. Lit.* 25.

If an eſtate be limited to huſband and wife and the heirs of their bodies, and they are divorced *a vinculo matrimonii*, they are only tenants for life, becauſe they ſhall not be preſumed to intermarry after they are once legally divorced by church cenſures. 3 *Hen.* 6. 48. 7 *Hen.* 7. 6.

But there are other ſorts of eſtates-tail; as when the donation is limited not only to the deſcendants of the donee by one woman, but more particularly to one ſort of deſcendants of ſuch marriage, excluſive of others; as if lands be given to a man and a woman, and the heirs male of their bodies; this is an eſtate in tail male, for the donor having expreſs'd what heirs ſhall inherit, none can claim under ſuch gift that does not come under ſuch particular deſcription; ſo if the limitation had been to the heirs female; for the donee being capable of taking by purchaſe, the donor may limit the ſucceſſion of the land to which of the deſcendants of the donee he pleaſes; but if the limitation had been to *A.* for life, remainder to the heirs female of the body of *J. S.* and *J. S.* has iſſue a ſon and a daughter, the daughter can take nothing by ſuch gift; the reaſon of the difference is this, becauſe in the firſt caſe the donation ſpecifies, what ſort of deſcendant of the donee ſhall take; but in the laſt caſe it ſpecifies who ſhall take originally; and the firſt purchaſer muſt come fully up to the deſcription in the donation, or elſe there can be no gift; and while there is a ſon of *J. S.* no female can be heir, and conſequently not a perſon capable of taking originally by the gift; but if *J. S.* hath iſſue a ſon and a daughter, and the ſon hath iſſue a dauhgter, and dies, and a leaſe for life is made, remainder to the heirs female of the body of *J. S.* the daughter of the ſon ſhall be the purchaſer, becauſe ſhe comes within the deſcription, being both heir, and likewiſe a female, tho' ſhe was deſcended from a male. *Co. Lit.* 24. *b. Hob.* 31.

If lands be given to a man and his wife and the heirs male of the body of the huſband; this is a ſpecial tail in the huſband, and but an eſtate for life in the wife; ſo if the limitation had been to the heirs male of the body of the wife by the huſband begotten, 'tis an eſtate for life in the huſband, and a tail in the wife; for to which ever body the word *heirs* inclines by the limitation, it creates a deſcendible eſtate in ſuch perſon; but if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a deſcendible eſtate in both of them; as if lands be given to huſband and wife, and the heirs which the huſband ſhall beget on the body of his wife, both of them have an eſtate-tail, becauſe the word *heirs*, which creates the deſcendible eſtate, is not limited to one more than the other. *Lit. ſect.* 26, 27, 28. *Yelv.* 131.

If a feoffment be made to the uſe of *A.* and *B.* huſband and wife, and the longeſt liver of them, and after the deceaſe of *A.* and *B.* then to the uſe of the heirs of the body of the ſaid *A.* begotten on the body of *B.* this is an eſtate-tail in the huſband, for the word *heirs* is limited to the body of *A.* tho' to be begotten on the body of the wife. *Hob.* 84.

So if lands be given to baron and feme and the heirs of the body of the feme, by the huſband and *J. S.* engendred; this is an eſtate-tail in the feme, but ſo far inlarged by the laſt words, that the heirs of her body begotten by *J. S.* may inherit after the iſſue by the preſent huſband. *Yelv.* 131.

And it is to be obſerved, that in all inſtances of ſuch ſpecial tails, which limit the lands to one particular ſort of heirs, no deſcendant of the donee can make himſelf inheritable to ſuch gift, unleſs he can convey his deſcent thro' that particular ſort of heir to which the ſucceſſion of the land was firſt limited; therefore if lands be given to a man and the heirs male of his body, and he has iſſue a daughter, who has iſſue a ſon, this ſon ſhall never inherit that gift; for the ſon being obliged to claim through the daughter, muſt neceſſarily ſhew himſelf out of the words of the firſt donation, which limited the lands only to the heirs male of the donee, which the daughter cannot poſſibly be taken to be. *Lit. ſect.* 24.

For the ſame reaſon, if the lands be given to a man and the heirs male of his body begotten, the remainder to him and the heirs females of his body, and the donee hath iſſue a ſon, who hath iſſue a daughter, who hath iſſue a ſon; this ſon can inherit neither of theſe gifts; nor the tail male, becauſe whoever claims as heir to ſuch a gift, muſt convey his deſcent wholly thro' males, which the ſon cannot do in this caſe, becauſe he muſt neceſſarily ſhew himſelf a deſcendant of the daughter, before he can make himſelf heir to the firſt ſon; nor can he inherit the tail female, becauſe that limitation being to that particular ſort of heir, no male, tho' the immediate deſcendant of a female, can inherit, becauſe he is another ſort of heir than is deſcribed in the donation; but if in this caſe the gift had been to a man and the heirs male of his body, remainder to him and the heirs, ſuch ſon may claim under that gift, becauſe every deſcendant of ſuch donee may claim under the remainder, it not being limited to one ſort of heir more than another. *Co. Lit.* 25. *b.*

Land given to a man and his wife *& hæredi de corpore & uni hæredi tantum*, was adjudged an eſtate-tail, tho' the limitation be to the heir in the ſingular number, becauſe the word *heir* is *nomen collectivum*, and extends to all that deſcend from him. 1 *Vent.* 228.

2. *What words are requiſite to create an eſtate-tail in a deed or gift.*

When the notion of ſucceſſion prevailed, it was neceſſary in feudal donations to uſe the word *heirs* to diſtinguiſh ſuch deſcendible feud from that which was granted only for life; but as to the word *body*, it was not neceſſary

Yet by the deed and feoffment of them (to whom land was ſo given upon condition) the donors have heretofore been barred of their reverſion, which was directly repugnant to the form of the gift."

Sect. 2. "Wherefore our lord the King, perceiving how neceſſary and expedient it ſhould be to provide remedy in the aforeſaid caſes, hath ordained, that the will of the giver, according to the form in the deed of gift manifeſtly expreſſed, ſhall be from henceforth obſerved; ſo that they to whom the land was given under ſuch condition, ſhall have no power to alien the land ſo given, but that it ſhall remain unto the iſſue of them to whom it was given after their death, or ſhall revert unto the giver, or his heirs, if iſſue fail (becauſe there is no iſſue at all); or if any iſſue be, and fail by death, or heir of the body of ſuch iſſue failing. Neither ſhall the ſecond huſband of any ſuch woman, from henceforth, have any thing in the land ſo given upon condition, after the death of his wife, by the law of *England*, nor the iſſue of the ſecond huſband and wife ſhall ſucceed in the inheritance, but immediately after the death of the huſband and wife (to whom the land was ſo given) it ſhall come to their iſſue, or return unto the giver, or his heir, as before is ſaid."

Under this head is conſidered,

1. *What things may be intailed by the ſtatute of intails; and the ſeveral kinds of eſtates tail.*

2. *What words are requiſite to create an eſtate-tail in a deed or gift.*

3. *How far tenant in tail may charge his eſtate, and what acts of his relating to the inheritance ſhall bind the iſſue, though the intail continues.*

1. *What things may be intailed by the ſtatute of intails; and the ſeveral kinds of eſtates-tail.*

The ſtatute makes uſe of the word *tenementum*, and therefore the eſtate to be intailed may be as well incorporeal as corpereal inheritances, becauſe the word *tenementum* comprehends the one as well as the other, and conſequently not only lands may be intailed, but all rents, commons, eſtovers, or other profits ariſing from lands. *Co. Lit.* 19. *b.* 20. *a.*

But it is not neceſſary that the thing to be intailed ſhould iſſue out of land; for if it be annexed to lands, or any ways concerns or relates to them, it may be intailed within the ſtatute; and therefore offices and dignities may be intailed; and accordingly it has been reſolved, that if the King creates a man Earl of *D.* to him and the heirs male of his body; this is a good intail of the dignity within the ſtatute, becauſe the title or dignity relates to lands; and anciently they were computed from their poſſeſſions, as baron's fee, and earl's fee, *&c.* *Co. Lit.* 20. *a.* 7. *Co.* 33.

So offices may be intailed; as the office of Earl-marſhal of *England*, or the office of a ſteward, bailiff, or receiver of a manor, becauſe theſe are demandable in a *præcipe, ut tenementa*, and being exerciſeable within the manor, are therefore look'd upon as members or branches of it. *Co. Lit.* 20. *a.* 1 *Rol. Abr.* 838. 7 *Co.* 33. *Plow.* 2.

An equity of redemption is intailable, becauſe the mortgage being a pledge for money, equity looks upon the eſtate in the ſame plight as it was before. *Hard.* 465.

Charters may be intailed, becauſe they are muniments belonging to the land itſelf; but if the intail be barred by collateral warrantry, then the heir ſhall not have detinue of them, for then he cannot make title by virtue of the intail. *Co. Lit.* 20.

But things merely perſonal, which only charge the perſon, and neither iſſue out of land nor relate to it, nor can be demanded *ut tenementum* in a *præcipe*, cannot be intailed within the ſtatute; and therefore if I grant to *B.* and the heirs of his body, to be maſter of my hawks, or keeper of my hounds, with a fee or ſalary annexed to it; this is no intail within the ſtatute, becauſe this can no way fall within the notion of *tenementum*. *Co. Lit.* 20. *a.* *Plow.* 2. *b.* 1 *Rol. Abr.* 837.

So if *A.* for him and his heirs grants an annuity to *B.* and the heirs of his body; this having no manner of relation to land, is no intail within the ſtatute, for ſuch grant only affects the perſon of the grantor. *Plow.* 3. *a.* 1 *Rol. Abr.* 837. *Co. Lit.* 20. *a.*

No chattels real can be intailed, and therefore tho' a man poſſeſſed of a term for years, ſhould deviſe his term to *J. S.* and the heirs of his body, yet the term would go in its old channel to the executors, and the iſſue of the body of the donee has no intereſt in the term, and *J. S.* may ſell or diſpoſe of it as he pleaſes; for this being no *tenementum* within the ſtatute, the deviſee is not tied up from alienating it by that act; ſo it is of a truſt, for a man can no more intail a term in groſs by way of truſt, than by way of deviſe; but a term for years, which is created or kept on foot to attend the inheritance, is allowed in Chancery to wait on the intail of the inheritance. 10 *Co.* 87. 1 *Rol. Abr.* 837. *Cro. Eliz.* 143. 1 *Chan. Rep.* 200. 1 *Vent.* 194. 2 *Chan. Rep.* 233.

If lands are given to a man and the heirs of his body; this is a *tail general*, becauſe all his deſcendants may poſſibly come into the ſucceſſion; ſo that if the donee has ſeveral wives, the deſcendants of every wife may inherit, becauſe they fall within the words of the donation; but the donor might have by particular expreſſions confined the ſucceſſion to any particular deſcendant, as to the heirs male or heirs female; and hence the diſtinction between eſtates in *tail male* and *tail female*. *Lit. ſect.* 14.

If lands are given to a man and his heirs males and females of his body; this is a tail general, becauſe by ſuch limitation all the deſcendants of the feudatory may inherit. *Co. Lit.* 25. *b.* But great care muſt be taken to limit the eſtate to the deſcendants of the body of the donee; for if lands be given to a man and his heirs male, this is a fee-ſimple. *Co. Lit.* 13. So if the limitation had been to the donee and his heirs females, or to the donee and his heirs male or female. *Lit. ſect.* 31.

If land be limited to the ſon and his heirs, of the body of his father; this is a fee-ſimple in the ſon, and no intail at all, not being limited to the ſon's deſcendants; nor is there in this caſe any proper limitation or reſtriction of the word *heirs*, becauſe it limits it to his heirs of the body of the father; now there is plainly a deſign to place the intereſt that is to veſt in the ſon; and yet it ſhould not go merely to the ſon's deſcendants, but to all collaterals as far as they could claim under the body of the father; now ſuch a limitation the law will not endure, it not being an eſtate-tail confined to the deſcendants only; and therefore it muſt be a fee-ſimple; for to allow men to form ſuch new ſorts of eſtates would be very inconvenient, as it would put it in the power of private perſons to make new limitations touching the courſe of deſcents, and thereby render all deſcents uncertain. *Co. Lit.* 27.

But if the eſtate were limited to the ſon, and to the heirs of the body of the father, tho' the father was dead at the time of the gift; yet it is a good intail, becauſe here the word *heirs* are words of purchaſe; and 'tis a good name of purchaſe after the father's deceaſe; and the ſon, being only tenant for life by the words of the gift, by the ſecond words takes the intail as a purchaſer; but in the other caſe, the words *his heirs* are merely words of limitation, and therefore affect an intail, which the law will not endure. *Lit. ſect.* 30.

If there had been grandfather, father, and ſon, and the father dies, and the limitation had been to the grandfather and to his heirs, of the body of the father; this is a good intail, for it goes to the deſcendants only, and it limits what ſort of deſcendants it ſhall go to, *viz.* ſuch only as were begotten by the father. *Co. Lit.* 20. *b.* *Bro. Tail.* 10.

If lands be given to huſband and wife and the heirs of the body of the ſurvivor; this is a good donation to veſt an eſtate-tail general in the ſurvivor; but the eſtate-tail does not veſt till one of them dies; and then becauſe all the

ſary to make uſe of that in the donation, but it might be expreſſed by any equivalent words, and therefore a gift to a man, and *hæredibus de ſe*, or *de carne, quos ſibi contigerit habere*, or *procreavit*, is a good eſtate-tail; for theſe ſufficiently circumſcribe the word *heirs* to the deſcendants of the feaudatory: And the reaſon of the difference is, for that inheritances being only derived from the law, the law requires the word *heirs* that comprehends the whole notion of ſuch legal repreſentation, but the limiting the inheritance to the deſcendants of this or the other body, is only the particular intention of the perſon that forms the gift, and therefore the law leaves every man to expreſs himſelf in ſuch manner as may manifeſt that intention. 2 *Bac. Abr.* 259. *Co. Lit.* 20. 7 *Co.* 41. *b.*

Therefore if lands are given to a man *& hæredibus, quos ſibi contigerit habere de uxore ſuâ*; this is an eſtate-tail, though the word *body* be omitted; ſo if the gift had been to him *& hæredibus ſuis de prima uxore ſua*, for this confines the word *heirs* to the deſcendants of his body, ſince his heirs which can inherit that gift, muſt be of his wife, which no collateral heir can poſſibly be. 7 *Co.* 41, 42.

A feoffment was made to the uſe of *A.* for life, remainder to the uſe of *B.* and of the heirs male of the ſaid *B.* lawfully begotten, and for default of ſuch iſſue, remainder over, *A.* dies, this is no eſtate-tail in *B.* but a fee-ſimple, becauſe there are no words to ſhew from whoſe body the heirs male of *B.* muſt proceed: for to the creation of an eſtate-tail, 'tis requiſite that there be words ſufficient to ſhew from what body the heirs mentioned in the gift are to proceed, though the word *body* be not expreſsly uſed; for in this caſe ſuch may be heirs male of *B.* that were never proceeding from his body ſince the words of the donation leave it at large, and do not require that they ſhould be begotten by any particular perſon. *Cro. Eliz.* 478. *Mo.* 424. 7 *Co.* 41.

So where *A.* ſeiſed in fee of a copyhold, ſurrendered the ſame to the uſe of himſelf for life, and after to *B.* and *C.* his wife, *pro & durante termino vitarum ſuarum naturalium & hæred. & aſſignat. prædict. B. & C. & pro defectu talis exitus*, to the uſe of himſelf and his heirs; and it was held by *Holt* Ch. J. and two judges, againſt *Gould*, that *B.* and *C.* had a fee-ſimple, and that *pro defectu talis exitus* imported nothing of their dying without iſſue, but was to be taken generally, and every heir is the iſſue of ſome body. 2 *Salk.* 620.

But if *A.* ſeiſed in fee makes a voluntary feoffment to the uſe of himſelf for life, remainder to the uſe of *J. S.* and his heirs for ever; and for default of iſſue of the body of *J. S.* then to the uſe of the right heirs of *A.* this being in a conveyance by way of uſe, which is always conſtrued like a will, and according to the intention of the party, gives *J. S.* but an eſtate-tail. *Carth.* 343. 5 *Mod.* 266. *S. C.*

If land be given to *A.* and *B.* his wife, and their heirs, *& aliis hæredibus* of the ſaid *A. ſi dicti hæredes de* A. & B. *exeuntes obierint ſine hæredibus de ſe*, this is a good eſtate-tail, though the word *body* be omitted, becauſe there are words equivalent, which equally circumſcribe the general import of the word *heirs* to the deſcendants of the body of *A.* and *B.* 7 *Co.* 41.

If lands be given to a man and his heirs, *habend.* to him and the heirs of his body; this is but an eſtate-tail, becauſe the *habendum* expounds the general word *heirs* in the premiſſes; for though it cannot change or alter them, ſo as to retract the gift in the premiſſes, yet it may well conſtrue and explain them while ſuch conſtruction is conſiſtent with the premiſſes, and does not deſtroy the operation of the words mentioned in them, but only explains in what ſenſe they are to be taken, and what heirs are comprehended; but if the limitation in the premiſſes had been to a man and the heirs of his body, *habendum* to him and his heirs, it had been a tail with a fee-ſimple expectant, becauſe this *habendum* cannot be conſtrued an expoſition, for that it comprehends all heirs in general, and doth not confine or interpret the premiſſes, and therefore being more comprehenſive than the premiſſes, paſſes the fee-ſimple expectant. *Co. Lit.* 21. *a.* 8 *Co.* 154 *b.* 2 *Rol. Abr.* 66, 68.

If lands be given to a man and his heirs, *habendum* to him and his heirs, if the donee has heirs of his body; and if he dies without heirs of his body, that the land ſhall revert to the donor, or *habendum* to him and his heirs, if he hath iſſue of his body begotten; and if he dies without heirs of his body, that the land ſhall revert to the donor; this is but an eſtate-tail in the donee, becauſe the *habendum* plainly explains in what ſenſe the word *heirs*, which are uſed generally in the premiſſes, are to be taken, nor does ſuch explication retract the gift in the premiſſes, becauſe the word *heirs* have ſtill their operation, and by ſuch conſtruction are more conformable to the will and intention of the donor; but if the *habendum* had been for life, that had been a void limitation, becauſe no explication can reconcile the *habendum* to the premiſſes; and where the laſt words of the donation retract the former gift, they are taken as inſignificant and void, becauſe no man is allowed to vacate his own grant. 1 *Rol. Abr.* 838. *Co. Lit.* 21. *a.*

If lands are given to a man and the heirs of his body, remainder to *J. S.* and his heirs *in formâ prædicta*; this is a good remainder in tail to *J. S.* for by a neceſſary relation the mind is carried to the words of the gift, which circumſcribe the heirs of the donee to the deſcendants of his body; ſo if the remainder had been limited to *J. S. in formâ prædict.* this limitation, without the word *heirs*, had veſted a good eſtate-tail in him in remainder; or if a leaſe for life had been made to *A.* the remainder to *B.* and the heirs of his body, remainder to *J. S. in eadem formâ*, theſe words, having ſuch a neceſſary relation to thoſe words which immediately precede them, repreſent to us the intention of the donor, as plainly as if he had expreſſed himſelf in all the terms of the firſt limitation. 1 *Rol. Abr.* 838. *Co. Lit.* 20. *b.*

But if a gift be made to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *J. S. in formâ prædict.* this, according to my Lord *Coke*, is a void limitation to *J. S.* for, though the mind is carried to the former limitations, yet finding no neceſſary relation to one more than the other, it can determine nothing poſitively as to the intention of the donor, and therefore ſuch limitation is void for uncertainty. *Co. Lit.* 20. *b.*

A feoffment was made to *A. habendum* to him and his heirs of his body, to the uſe of him and his heirs and aſſigns for ever; this is only an eſtate-tail in *A.* and no fee-ſimple, for the lands are ſo appropriated by the firſt words to the donee and his iſſue, that no act or limitation of the parties can take it out of them; nor does the ſtatute 27 *Hen.* 8. execute the poſſeſſion to the uſe; for the ſtatute never intended to execute any uſe but that which the legal tenant had been obliged to execute before the ſtatute; but the act *De donis*, as it tied down the donee from alienation, ſo it would not permit the Chancery to oblige the donee to give the land away from his iſſue; the ſame law if the uſe had been limited over to a ſtranger for the ſame reaſon. *Cro. Jac.* 400. 2 *Co.* 78. *Plow.* 555. *Bro.* tit. *Feoffment to uſes* 40. *Co. Lit.* 19. *b.*

Lands were given to baron and feme, *habend.* to baron and feme to the uſe of them and the heirs of their bodies; this was adjudged an eſtate-tail; for though ſuch limitation of a uſe to a ſtranger had not been a good eſtate-tail; becauſe the legal eſtate in baron and feme had only been for their lives; yet here being no feoffee diſtinct from the *Ceſtui que uſe*, but they being all the ſame perſon, by conſequence there is no uſe diſtinct from the legal eſtate, and therefore the word *uſe* may be very properly rejected, in order to eſtabliſh the intention of the conveyance, and then the caſe amounts to no more than if an eſtate were limited to baron and feme for their lives, with remainder to them and the heirs of their bodies. *Cro. Car.* 231.

If a feoffment be made to *A* and his heirs, with a warranty to him and his heirs, and if it happens that he dies without heirs of his body, that it ſhall remain to

J. S.

J. S, in fee; this limitation of a remainder explains what heirs of the donee ſhould take; for 'tis plain that the donor intended the word *heirs* in the premiſſes ſhould not be taken in their moſt extended ſenſe, for then they would convey an abſolute eſtate, which would bear no limitation of a remainder over to *J. S.* and then that part of the gift would be void, which, by an eaſy explication of what heirs the donor meant in the premiſſes, is made good and conſiſtent, without any force or violence to the premiſſes. 1. *Rol. Abr.* 839. 2. *Rol. Abr.* 68.

If lands are given to a man and a woman and their heirs, *habendum* to them and the heirs of their bodies, remainder to them, and the ſurvivor of them for life, to hold of the chief lord; this has been adjudged an eſtate-tail with a fee-ſimple expectant; for though the *habendum* explains what heirs are meant in the premiſſes, and there is no mention of the word *heirs* in the remainder; yet 'tis plainly the intention of the donor, that the intereſt in the land ſhall not ceaſe upon the determination of the eſtate-tail, becauſe there is a remainder limited over to take effect when the tail is ſpent; and if the limitation of the remainder paſſes any thing, it muſt be a fee, becauſe they had a greater eſtate already in them than for life; and this the rather, becauſe the *tenend.* is expreſsly to be of the chief lord, which ſhews they intended to have no eſtate in themſelves. *Cro. Car.* 476. 2. *Rol. Abr.* 68.

If I give land to a man and his heirs, *viz.* the heirs of his body; this is but an eſtate-tail; for here I explain the general import of the word *heirs* to the deſcendants of the body of the donee. *Hob.* 172.

3. *How far tenant in tail may charge his eſtate, and what acts of his relating to the inheritance ſhall bind the iſſue, though the intail continues.*

The ſtatute *De donis*, affecting a perpetuity, reſtrained the donee in tail, either from alienating or charging his eſtate-tail; and by that act the tenant in tail was likewiſe to leave the land to his heirs as he received it from the donor; and upon that ſtatute the heir in tail might have avoided any alienation or incumbrance of his anceſtor; and as the law ſtood upon that act, ſo might he in reverſion, when the heirs of the donee failed, which were inheritable to the gift. The crown long ſtruggled to break through the perpetuity which was eſtabliſhed by this law; and in the reign of *Edward* IV. we find the pretended recompence given againſt the vouchee in the common recovery to be allowed an equivalent for the eſtate-tail; and becauſe this recompence was to go in ſucceſſion as the land in tail ſhould have done, therefore they allowed the recovery to bar the reverſion as well as the iſſue in tail, becauſe he in the reverſion was to have the recompence upon failure of iſſue of the donee. 2 *Bac. Abr.* 265. 6 *Co.* 40. 10 *Co.* 39. 1. *Vent.* 299.

At the Common law the tenant in tail could not grant or alien, nor make any rightful eſtate of freehold to another, but for term of his own life; for though a feoffment in fee, or for life, made by tenant in tail, are good againſt the tenant himſelf, becauſe the law allows no man to avoid his own act; yet after his death the iſſue in tail, or thoſe in reverſion after failure of iſſue, may by proper actions avoid ſuch feoffments, and recover againſt the feoffee. *Lit. ſect.* 613.

The tenant in tail is maſter of the inheritance, and as ſuch has power over all the laſting improvements growing on it; ſo that he may cut down the timber trees, and diſpoſe of them as he pleaſes, without barring the intail; but this muſt be underſtood with this reſtriction, that if tenant in tail ſell the trees growing on the inheritance, the vendee muſt ſever them during the life of tenant in tail, for if he dies before they are cut down, his heirs in tail ſhall have them as part of the inheritance, and the vendee, though obliged to pay the whole ſum contracted for, yet ſhall not be allowed to cut down one tree after the death of the tenant in tail; for as the tenant in tail has power over the inheritance but during his own life; ſo he can delegate that power to another but for the ſame time; and conſequently whatever remains part of the inheritance at the death of the tenant in tail, at which time his power over it ceaſes, muſt neceſſarily go to the heir to whom the inheritance belongs. *Bro. contract*, 26. 11 *Co.* 50. *Popb.* 194.

So if tenant in tail grants eſtovers to another, or the veſture of his woods, theſe grants determine with his death, for as they are charged on the inheritance, ſo they muſt neceſſarily ceaſe when his power who granted them is determined. 1. *Rol. Abr.* 841, 842.

If tenant in tail acknowledges a ſtatute or recognizance, upon which the land is extended, the iſſue may ouſt the conuſee after the death of his anceſtor; for the tenant in tail can charge the intail but during his life, becauſe the ſtatute *De donis* preſerves it free from all incumbrances for the iſſue in tail, *ut voluntas donatoris obſervetur.* 1 Rol. Abr. 842.

But if tenant in tail acknowledges a recognizance, and dies, and the conuſee brings a *ſcire facias* againſt the heir in tail, who pleads *riens per diſcent* in fee-ſimple, and hanging the *ſcire facias* makes a leaſe for years to *J. S.* and the jury find the iſſue in tail had land in fee-ſimple by deſcent, the court adjudged, that the conuſee ſhould extend the land againſt the iſſue in tail, and that *J. S.* could not falſify; for after the verdict the iſſue ſhall not be allowed to ſay, that he is tenant in tail; but the verdict, though a perverſe one, ſhall bind him, and be in force till diſproved by attaint; nor can the leſſee falſify, becauſe the leaſe was made after verdict given, when the iſſue himſelf was bound, and conſequently all that claim under him muſt be ſo too. 3 *Bulſt.* 245.

Yet if a diſſeiſor makes a gift in tail to *A.* and *A.* in conſideration of a releaſe from the diſſeiſee of all his right to the land, grants him a rent-charge in fee; this ſhall bind the iſſue, for this turns upon the reverſe of the former caſes, for as the iſſue in tail may avoid thoſe grants and charges, becauſe they tend to the prejudice of the iſſue and deſtruction of the intail; ſo this grant to the diſſeiſee is good to bind the iſſue, becauſe it tends to the advantage of the donee and his iſſue, by ſtrengthening their title, and making that indefeaſible which before was a precarious eſtate. *Co. Lit* 343. *b.* 1 *Rol. Abr.* 842. *Plow.* 436. 10 *Co.* 57.

So were a deviſe was made of land in tail, upon condition that the donee ſhould grant a rent-charge out of the land to another and his heirs, the donee granted the rent purſuant to the condition; and adjudged the rent ſhould not determine with the death of the donee, but ſhould bind his iſſue, for this is in preſervation of the intail, and for the benefit of the iſſue, and is not *contra formam doni*, but in compliance to the will of the donor. *Cro. Jac.* 427. 1 *Rol. Abr.* 842.

A ſeiſed of lands in tail agrees with *B.* that he and his heirs ſhall enjoy the intailed lands, if *A.* and his heirs may enjoy his fee-ſimple lands; this agreement is executed accordingly; and *B.* had a decree againſt *A.* to levy a fine, and ſettle it purſuant to the agreement; but *A.* died without doing of it, though 'twas decreed that *A.* himſelf was bound by his agreement to convey, yet ſince he died before he executed the fine, his iſſue was not bound by the agreement; but if the iſſue in tail had approved of his anceſtor's agreement, as he did in this caſe, by entring on the land of *B.* then it becomes his own agreement, and conſequently in equity he ſhall be obliged to perform it. 1 *Chan. Ca.* 171.

Tenant in tail *deviſed to his wife for life* voluntarily, and not in purſuance to marriage articles, it was inſiſted that the father, the deviſor, had power to dock the intail, and that there were precedents for making good the deviſe againſt the iſſue. *Per Finch* C. I will never help the iſſue againſt a *purchaſer*, but here it is only a bounty in this caſe, and in ſuch caſe, the heir having a good title, ſhall be aided; and decreed for the plaintiff. 2 *Chan. Caſes* 4. *Mich.* 32 *Car.* 2. *Anon'*.

Tenant for life, remainder for life, remainder in tail; *tenant for life grants a building leaſe*, remainder-man for life conſents by parol, *remainder-man in tail*, both during his minority, and after his full age, *negotiated to procure* his father's conſent, who was the remainder-man for life;

but whether he ſhould be decreed to confirm, Lord Chancellor would adviſe, but decreed remainder-man for life to confirm. 2 *Chan. Caſes* 27. *Paſch.* 32 *Car.* 2. *Sidney* v. *Earl of Leiceſter.*

Partition between tenants in tail, though but *by parol*, decreed to bind the iſſue; *per cur.* 2 *Venn.* 233. *Trin.* 1691. cites the caſe of *Burton* and *Jeux*, and the caſe of *Reſe* v. *Reſe.*

If tenant in tail *exchanges land* and dies, and *iſſue enters on the lands taken in exchange*, the exchange ſtands good during his life, and after his death his iſſue may avoid it by entring, and ſo on *toties quoties*; ſo that a *baſe fee* paſſes from the tenant in tail; and ſo it does in caſe of a leaſe and releaſe, bargain and ſale, and covenant to ſtand ſeiſed to uſes in fee, ſuch conveyances paſs a baſe fee, which continue till determined by the act of the iſſue in tail. 7 *Mod.* 25. *Trin.* 1 *Ann. B. R.* in the caſe of *Machil* v. *Clerke.*

For more matter under this title, ſee 2 Bac. Abr. *and* 9 Vin. Abr. *tit.* Eſtate. See likewiſe Fee, Freehold, Leaſe, Life-eſtate, Occupant, Tail.

Eſtercha frumenti, An old meaſure of corn; perhaps the ſame with a ſtrike or buſhel. *Cowell, edit.* 1727.

Eſterling. See Sterling.

Eſtoppel, (from the French *eſtouper*, *oppilare*, *obſtipare*,) Denotes as much as an impediment, or bar of action, ariſing from his own fact that hath, or otherwiſe might have had his action. For example; a tenant maketh a feoffment by colluſion to one, the lord accepteth the ſervices of the feoffee; by this he debarreth himſelf of the wardſhip of his tenant's heir. *F. N. B. fol.* 142. Divers other examples might be ſhewed out of him, and *Broke hoc titulo. Co. lib.* 2. *fol.* 4. *Goddard's* caſe, defineth an *eſtoppel* to be a bar or hindrance unto one to plead the truth, and reſtraineth it not to the impediment given to a man by his own act only, but by another's alſo. *Lib.* 3. the caſe of *Fines*, *fol.* 88. *Cowell.*

There be *three kinds* of eſtoppels, *viz. by matter of record*, by matter *in writing*, and by matter *in pais*. By matter of record, *viz.* by letters patents, fine, recovery, pleading, taking of continuance, confeſſion, imparlance, warrant of attorney, admittance. By matter in writing as by deed indented, by making of an acquittance by deed indented or deed poll, by defeaſance by deed indented or deed poll. By matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, and by acceptance of an eſtate. *Co. Litt.* 352. *a.*

Every eſtoppel *ought to be reciprocal*, that is to bind both parties; and this is the reaſon, that regularly a *ſtranger* ſhall neither take advantage, nor be bound by the eſtoppel: privies in blood, as the heir, privies in eſtate, as the feoffee, leſſee, *&c.* privies in law, as the lords by eſcheat; tenant by curteſy, tenant in dower, the incumbent of a benefice, and others that come under by acts in law, or in the poſt, ſhall be bound and take advantage of eſtoppels, and a rebutter is a kind of eſtoppel. *Co. Litt.* 352. *a.*

2dly, That every eſtoppel, becauſe it concludes a man to allege the truth, muſt be *certain to every intent*, and not to be taken by argument or inference. *Co. Litt.* 352. *b.*

3dly, Every eſtoppel ought to be *a preciſe affirmation* of that which makes the eſtoppel, and *not* to be ſpoke imperſonally; as if it be ſaid, *ut dicitur*, *quia imperſonalitas non concludit nec ligat*; *imperſonalis dicitur*, *quia ſine perſona.* Neither does a recital conclude, becauſe it is no direct affirmation. *Ibid.*

4thly, *A matter* alleged that is *neither traverſable nor material* ſhall not eſtop. *Co. Litt.* 352. *b.*

5thly, Regularly a man ſhall not be concluded *by acceptance* or the like, *before his title accrued. Ibid.*

6thly, Eſtoppel *againſt eſtoppel* does put the matter at large. *Ibid.*

7thly, Matters alleged by way of *ſuppoſal in count ſhall not conclude after nonſuit*; *otherwiſe* it is *after judgment given*, and after nonſuit, although the ſuppoſal in the count ſhall not conclude, yet the bar, title, replication, or other pleading of either party, which is preciſely alleged, ſhall conclude after nonſuit; and hereby are the books reconciled. *Ibid.*

8thly, Where the verity is apparent in the ſame record, there the adverſe party ſhall not be eſtopped to take advantage of the truth, for he *cannot be eſtopped to allege the truth, when the truth appears of record. Ibid.*

If a fine be levied without any original, it is voidable but not void; but if an original be brought and a *retraxit* entred, and after that a concord is made, or a fine levied, this is void in reſpect the verity appears of record. *Ibid.*

An impropriation, if made after the death of an incumbent, to a biſhop and his ſucceſſors, the biſhop by indenture demiſes the parſonage for 40 years, to begin after the death of the incumbent, the dean and chapter confirms it, [the biſhop dies] the incumbent dies, the demiſe ſhall not conclude [the ſucceſſor] for it appears that he had nothing in the impropriation till after the death of the incumbent, [who ſurviv'd the leſſor.] *Ibid.*

9thly, Where the *record* of the eſtoppel *does run to the diſability or legitimation of the perſon*, there ſtrangers ſhall take benefit of that record, *as outlawry*, excommengement, profeſſion, attainder of præmunire, of felony, *&c.* baſtardy, mulierty, and ſhall conclude the party, tho' they be ſtrangers to the record. *But* of a record *concerning the name* of the perſon, *quality or addition*, no eſtranger ſhall take advantage, becauſe he ſhall not be bound by it. But *nota*, that in caſe of the *mulierty*, *prima facie*, an eſtranger ſhall take benefit of it, *&c.* But yet, becauſe he may be a mulier by the Eccleſiaſtical law, and a baſtard by the Common law; therefore againſt ſuch certificate pleaded, the adverſe party may allege the ſpecial matter, and confeſs the certificate of the biſhop according to the Eccleſiaſtical law, and allege further the ſpecial matter according to the Common law, whereunto the adverſe party muſt anſwer; and ſo are the books that treat of this matter to be reconciled. *Co. Litt.* 352. *b.*

Eſtoppels are odious in law, and *admitted merely out of neceſſity*, becauſe they are concluding to ſpeak the truth; as for inſtance, a *ſtranger joined with the owner of the land in making a leaſe*; now though in reality this was the leaſe of the owner, yet it is likewiſe the leaſe of the ſtranger by concluſion, otherwiſe his ſigning it would be to no purpoſe, ſo that it is an eſtoppel by neceſſity. *Arg.* 8 *Mod.* 312. and *Ibid.* 313. agreed *per cur. Mich.* 11 *Geo.* in the caſe of *Skipwith* v. *Green.*

Leſſee enters before the day; leſſor afterwards brings debt for rent, and recovers; *quære* if leſſor ſhall notwithſtanding his recovery, in which he has admitted him to be the leſſee for years, *put him out* as a diſſeiſor? or if his *heir be eſtopped* by it to ſay he is not in by the leaſe? or if the recovery in debt has *purged* the wrong? *Per Yelverton*, By the *bringing debt for the rent*, the leſſor is concluded. But *quære* it if ſhall bind his heir. It was conceived it ſhall, becauſe it is by record, the ſtrongeſt concluſion that is. *Godb.* 314. *pl.* 472. *Paſch.* 3 *Car. B. R. Green* v. *Moody.*

Where a man *confeſſes an indictment* he may produce *affidavits to prove ſon aſſault upon the proſecutor* in mitigation of the fine; otherwiſe where the defendant is found guilty; for the entry upon a confeſſion is only *non vult contendere cum Domina Regina*, *& ponit ſe in gratiam curiæ.* 1 *Salk.* 55. *pl.* 6. *Trin.* 1 *Ann. B. R. The Queen* v. *Templeman.*

R. brought a writ of *dower* againſt *J. S.* who pleaded, and judgment given for the defendant, and afterwards the *judgment was reverſed*; and ſhe brought a *new writ of error*, and the *tenant pleaded, that he always was ready, and yet is*, *&c.* againſt which the *demandant pleaded the firſt record* to eſtop the tenant; to which the *tenant pleaded nul tiel record.* It was the opinion of the court, that here the demandant cannot conclude the tenant by that replication to plead *nul tiel record*; for the judgment is reverſed, and ſo no record, and *it cannot be certified a record.* But if the demandant had taken iſſue upon the plea of the tenant, *abſque hoc* that he was ready; the ſame might well have been given in evidence againſt the tenant 3 *Le.* 52. *pl* 75. *Mich.* 15 *El. C. B. Riche's* caſe.

In

In *debt on bond dated* 27th *of April*, 2 *Ann.* defendant prayed oyer of *the original*, which *bore teſte* 16th *of April*, 2 *Ann.* whereupon defendant *pleaded*, *the original was ſued out before the date of the bond.* The plaintiff *replied*, *that the writ upon which he declared was another writ, and then ſets it forth*; the defendant rejoined by way of eſtoppel, becauſe of the oyer aforeſaid; the plaintiff demurred, and concluded in bar, and joined in demurrer. *Trevor* Ch. J. and *Nevil*, and *Blencow* J. held the replication good; for the writ being filed, the reading of it is the act and office of the court, and ſhall not conclude the plaintiff from ſhewing the true writ, and that this is *not like to the oyer of a deed, the reading of which is the act of the plaintiff himſelf*, and therefore ſhall not be admitted to ſay that the deed ſo read to the defendant is not the deed upon which he counted; but *Tracey* J. held, that when the defendant prayed oyer of the writ, and it was read to him, this was the act of the court, and when it is entred upon record, the plaintiff ſhall not be admitted to ſay, that this is not the true writ, and ſo falſify the act of the court; but had the writ been miſtaken, the plaintiff's attorney, upon delivery of the paper-book, ought to have rectified it, or have applied to the court to rectify it; but after it is recorded, he is eſtopped to ſay that it is not the true writ; but judgment was given for the plaintiff. 2 *Lutw.* 1641, 1644. *Trin.* 2 *Ann. Simpſon* v. *Garſide.*

If a *feme covert be arreſted by a wrong name*, and *gives bail-bond*, yet *ſhe may plead miſnomer*; for her bond being that of a feme covert, ſhe may plead *non eſt factum* to it; *ideo* it will not eſtop her; *per cur.* 6 *Mod.* 311. *Mich.* 3 *Ann. B. R.* in the caſe of *Linch* v. *Hooke.*

Tenant in tail had acknowledged a judgment or recognizance, and died. Upon a *ſcire facias againſt his heir* and tenant, the *ſheriff returned a ſcire feci*, and there was *judgment by default*; and in ejectment it was ruled, that the *iſſue in tail could not give in evidence that the cauſor was only tenant in tail*, becauſe he might have pleaded it to the *ſcire facias.* A caſe cited by *Holt* Ch. J. *Comb.* 446. in the caſe of *Lambert* v. *Cameret.*

Where the eſtoppel appears on the record, the other ſide may demur, as *in debt for rent upon an indenture*, if the *defendant pleads nihil habuit in tenementis*, the plaintiff need not reply that eſtoppel, but may demur, becauſe the declaration is on the indenture, and the eſtoppel appears on the record; otherwiſe if he had declared *quod cum demiſiſſet.* 1 *Salk.* 227. *pl.* 5. *Paſch.* 4 *Ann. B. R. Kemp.* v. *Goodal.*

F. arreſted the defendant in aſſiſe and trover, who now moved that he might anſwer without putting in bail, becauſe he was a *peer*, *viz.* Earl of *Buckingham*, Viſcount *Purbeck*, and Baron *Stoke*, and ſo was free from arreſt; that if he ſhould *put in bail*, it muſt be *by the name whereby he is arreſted, which would eſtop from claiming his peerage. Sed per cur.* In all civil caſes the bail only enters into the recognizance, and not the party himſelf, and therefore it would be no eſtoppel to him; they could not take notice of his peerage otherwiſe than by plea, which could not be till he was in cuſtody of the marſhal, and therefore being *by coercion*, it would not prejudice him; ſo the court would order nothing, *ſed currat lex*; but *Holt* ſaid, if this had been a *criminal caſe*, they would *diſpenſe with his joining in the recognizance to ſave the eſtoppel*, and that in this they would make the plaintiff declare ſpedily, and not be allowed the uſual time. 12 *Mod.* 217. *Mich.* 10 *Will.* 3. *Roberts* v. *Villars*, alias *Danvers.*

A man covenants to pay the rent reſerved by a former indenture; he is eſtopped to ſay no rent was reſerved. *Stran.* 512.

The tenant is not eſtopped by the deſcription of lands in the leaſe. *Stran.* 610;

Where eſtoppel appears on the record, it need not be replied. *Stran.* 818.

An Aſſignee may take advantage of an eſtoppel. *Stran.* 818.

Where an heir in tail is returned heir in fee and warned, after the award of execution, he cannot give the intail in evidence on an ejectment. *Ld. Raym.* 590.

The heir in tail ſuffers judgment in a *ſcire facias* by default; he is eſtopped to claim the benefit of the intail. *Ld. Raym.* 1051.

In a *ſcire facias* upon a miſrecited judgment, the defendant pleads *nul tiel record*, and it is found that there is ſuch a record; he is eſtopped from ſhewing the variance afterwards. *Ld. Raym.* 1050.

In debt for rent, where the plaintiff declares upon a demiſe by indenture, the defendant cannot plead *nil habuit in tenementis*; and it is ill upon demurrer, without replying the eſtoppel, becauſe that appears upon record. *Ld. Raym.* 1551, 1554.

If a man be indicted by his right name, and plead *miſnomer* in abatement, he is eſtopped to deny that name, that he gives himſelf. *Ld. Raym.* 1308.

By a recognizance to a corporation the defendant is eſtopped to ſay they are no corporation. *Ld. Raym.* 1535.

An aſſignee of the reverſion ſhall have the benefit of the eſtoppel againſt a leſſee by indenture. *Ld. Raym.* 1551.

A leſſee by indenture cannot plead *nil habuit*, *&c.* ſpecially, without admitting an intereſt. *Ld. Raym.* 1551.

For more learning on this ſubject, ſee 10 Vin. Abr. *tit.* Eſtoppel.

Eſtovers, (*Eſtoverium*) According to *Spelman* is derived from the Fr. *etoffe*, i. e. *materia*, and that from the verb *etoffer*, which is to ſupply with neceſſaries; and in law properly ſignifieth nouriſhment or maintenance. For example; *Bracton*, *lib.* 3. *tract.* 2. *cap.* 18. *num.* 2. uſeth it for that ſuſtenance, which a man committed for felony, is to have out of his lands or goods for himſelf and his family, during his impriſonment. And the ſtatute made 6 *Ed.* 1. *cap.* 3 uſeth it for an allowance in meat or cloth. It is alſo uſed for certain allowances of wood, to be taken out of another man's wood. So it is uſed *Weſtm.* 2. *cap.* 25. *anno* 13 *Ed.* 1. *Weſt. Symb. part.* 2. tit. *Fines*, *ſect.* 26. ſaith, that the name of *eſtovers* containeth *houſe-bote*, *hay-bote*, and *plough-bote*; as if he have in his grant theſe general words, *De rationabili* eſtoverio *in boſcis &c.* he may thereby claim theſe three. In ſome manors the tenants have common of *eſtovers* out of the lord's woods, and pay a certain ſmall annual rent for the ſame. *Cowell.*

Under the name of eſtovers are comprehended, houſe, plough, fire, cart, and hedgebotes, and if a man hath reaſonable eſtovers in the woods of another, to be taken by view and delivery of the baily of the manor, if he take them without, he is a treſpaſſer; if they are demanded and denied, he may have an aſſiſe. 5 *Rep.* 25. in Sir *Thomas Palmer*'s caſe.

At Common law an aſſiſe did not lie for a diſſeiſin *de libero eſtoverio*; but now by the words in the ſtat. *W.* 2. *cap.* 25. *De proficuo in certo loco capiendo*, he may. 8 *Rep.* 48. in *Jehu Weeb*'s caſe.

If eſtovers are granted to be burnt in ſuch an houſe, they ſhall go to him who hath the houſe, by whatſoever title he holdeth it; and therefore if a man is ſeiſed of an houſe in the right of his wife, and a grant is made to the huſband and his heirs, to have ſufficient eſtovers to be burnt in that houſe, in ſuch caſe the eſtovers are appurtenant to the houſe, and ſhall deſcend to the iſſue of the huſband and wife. 8 *Rep.* 52, 54. *Simms*'s caſe. *Poſtea*, *pl.* 13. *S. C.* this caſe is queſtioned by *Vaughan* Ch. J. in 1 *Mod.* 182.

A man having eſtovers to his houſe, either by grant or preſcription, altho' he alters the rooms, without making new chimnies, the preſcription ſtill holds; and if he build new chimnies, the preſcription is not deſtroyed, but he muſt not ſpend any of the eſtovers in them. 4 *Rep.* 87. *Lutterell*'s caſe. 4 *Leon.* 240. *Brown*'s caſe. *S. P.*

If a man hath common of eſtovers in fee, and the owner grubs up the wood, he ſhall have an aſſiſe; but if he hath it but for a term of years, he ſhall have an action on the caſe. 9 *Rep.* 112. in *Robert Mary*'s caſe. *Hob.* 43. *Cowper* v. *Andrews*, *S. P.*

A preſcription to have eſtovers for repairing the old houſes, and for building new houſes on the copyhold lands, is good. *Cro.* 33. *Arundel* v. *Steers*,

In

In treſpaſs for taking away the boughs of trees felled, the defendant juſtifies by virtue of a cuſtom of the manor, that when the Lord felled any timber-trees, the poor tenants had the boughs for neceſſary eſtovers to be burnt *in focali in terris & ten'tis, &c.* adjudged, that the cuſtom was not well alleged, to burn eſtovers *in terris*. *Godb.* 234, *Biſhop of Chicheſter* v. *Strodwick*.

Treſpaſs, *&c.* for cutting down trees, *&c.* the defendant pleaded, that he was ſeiſed in fee of an ancient houſe and lands, *&c.* and ſo preſcribed to have eſtovers for repairing the houſe, or for the *building a new houſe* on thoſe lands; and upon demurrer it was objected againſt this preſcription, for that it ought to be reaſonable and uſual, which is to repair ancient houſes, but not to build new ones; but adjudged, that the preſcription is good, becauſe ſuch eſtovers may be granted, even at this time, and by the ſame reaſon there may be a preſcription for them. 2 *Cro.* 25. *Counteſs of Arundel* verſus *Steer*.

Where a man hath a grant of *eſtovers to be burnt in ſuch a houſe*, they ſhall go to him who hath that houſe, by whatſoever title he hath it, becauſe one is inſeparably incident to the other; and if the owner of the houſe cut them down, and another carries them away, he may have an action of reſpaſs againſt him, though he who took them away had common of eſtovers in the ſame place. 1 *Brownl.* 44. *Spilman*'s caſe. *Antea pl.* 5. *S. C.*

Leaſe for years, and that the leſſee ſhall have convenient fuel, not cutting down or felling any trees; the leſſee cut down trees for fuel, and the leſſor brought an action of convenant; and adjudged, that the action was well brought, for this was a covenant on the part of the leſſee, becauſe the law allows him reaſonable eſtovers, and by this covenant he had abridged himſelf of that privilege. *Paſch.* 15 *Car. March* 9.

In treſpaſs *vi & armis*, for entring into his land, and digging it; the defendant pleaded, that he was ſeiſed of an ancient meſſuage, and ſo preſcribes to have fourteen days to dig turf in the place where, *&c. tanquam ad meſſuagium præd' pertinen'*; and upon a demurrer to this plea, it was adjudged ill, becauſe he ſaid the turfs were appertaining to his meſſuage, but did not ſay they were to be burnt or uſed therein. *Sid.* 354. *Heyward* verſus *Cannington*. See *Antea pl.* 12. *S. P.* See *Preſcription* (B) 13.

Eſtrangers, Are ſometimes taken for thoſe that are not privies or parties to the levying a *fine*, or making of a deed; ſometimes for thoſe who are born beyond ſea. *Cowell, edit.* 1727.

Eſtray, (from the old French *Eſtrayeur*, Lat. *Extrahura, pecus elapſum e cuſtodia campos pererrat ignoto domino*) Signifies any beaſt not wild, found within any lordſhip, and not owned by any man; for in this caſe, it being cried, according to law, in the market towns adjoining, if it be not claimed by the owner in a year and a day, it is the *lord's of the ſoil*. See *Britton, cap.* 17 Cowell. The ancient law of King *Ina* was, *Diximus de ignotis pecoribus, ut nemo habeat ſine teſtimonio hundredi, ſive hominum decennæ*, that is, the ſuitors at a court-leet. *Spelman*.

The reaſon of eſtray is, becauſe when there is none who can make title to the thing, the law gives it to the King, if the owner does not claim it within a year and a day, and alſo becauſe the cattle might not periſh, which are called *animalia vagrantia, &c. per Coke* Ch. J. *Godb.* 150. *pl.* 195.

He who juſtifies for eſtray made preſcription in his manor, and ſaid further, that according to the cuſtom in the realm of *England* uſed, they ſhall proclaim them in two market vills, *viz.* in *D.* and *S.* and ſo it ſeems, that eſtrays ſhall be proclaimed in the two next market vills, by the Common law, and two market days, the one in the one vill, and the other in the other vill. *Br. Eſtray, pl.* 10. cites *Lib. Inſtr.*

The eſtray ought to be proclaimed in market in two ſeveral vills adjoining; and therefore till this be done, and the year and day paſſed, the lord of the franchiſe has not any property. *Finch's Law* 45.

In the proclamation it ought to be ſhewn of what kind the eſtray is, as ſheep, horſe, *&c.* and ought to tell the name of the ſeizor, ſo as the owner may know whither to reſort for his cattle. *Godb.* 151. *pl.* 195. *Paſch.* 5. *Jac. Taylor* v. *James*.

The proclamation muſt be in convenient time, which the court will adjudge of; *per Hobart* Ch. J. *Win.* 68. *Mich.* 12 *Jac. C. B.*

If a man takes beaſts as eſtray, and keep them for three quarters of a year, and after they eſtray from him, and another gets them, the firſt Lord who kept them for three quarters of a year cannot retake them, becauſe he has no property in them till he has kept them the year and day, and proclamation paſſed; *quod nota bene*; for the poſſeſſion of the ſecond Lord is good againſt him who has no property. *Br. Eſtray, pl.* 11. cites 33 *H.* 8.

So if it be but the day before the year ended. *Brownl.* 236. *Trin.* 8 *Jac. Harvey* v. *Blacklole*.

It ought to be kept in land in the Lord's poſſeſſion. *Godb.* 150. *pl.* 195. *Paſch.* 5 *Jac. C. B. Taylor* v. *James*.

The Lord cannot ride an horſe that is an eſtray. *Yelv.* 96. *Hill.* 4 *Jac. Bagſhaw* v. *Gaward*.

Nor can he work an ox. 12 *Rep.* 100. *Trin.* 10 *Jac. per cur. Anon'*.

Leſſee for life of a manor ſeizes an eſtray, and dies before the year and the day paſſed; it ſeemed that the executors of the leſſee ſhall have it, and not he in the reverſion; for although the leſſee had not an abſolute property in it during his life, yet when the year is paſt, the property ſhall have relation to the time of the ſeizure. *Mo.* 11. *pl.* 43. *Hill.* 4 *Ed.* 6. *Anon'*.

If a man have waif and ſtray within his manor by preſcription, and another man takes the waif or ſtray out of the manor, *&c.* he who has the manor ſhall have an action of treſpaſs for them, *&c.* and that without any ſeizure of them before. *F. N. B.* 91. (B)

Waif in one manor ſtrays into another; *per Catlin* Ch. J. No property is changed by the waif without ſeizure, unleſs in the King's caſe of prerogative. *D.* 338. *a. pl.* 40. *Trin.* 16 *Eliz. Anon'*.

When cattle come into other men's grounds ſtraying from the owners, then the party or Lord into whoſe grounds or manors they come cauſeth them to be ſeized, and wythe put about their necks, and to be cried in three markets adjoining, ſhewing the marks of the cattle, and then if the true owner claims them not within a year and a day, the property of them is in the Lord of a manor whereunto they did ſtray, if he have all eſtrays by cuſtom or charter, elſe to the King. *Bacon's Uſe of the Law* 65.

If two tenants in common be of a manor, to which waif and ſtray do belong, and a ſtray does happen; they are tenants in common of the ſame, and if the one does take the ſtray, the other has no remedy by action, but to take him again. *Co. Lit.* 200. *a.*

But if by preſcription the one is to have the firſt beaſt happening as a ſtray, and the other the ſecond, there an action lies if the one takes that which pertains to the other. *Co. Lit.* 200. *a.*

If any eſtray happen within the manor of the wife, if the huſband dies before ſeizure, the wife ſhall have it, for that the property was not in the huſband before ſeizure. *Co. Lit.* 351. *b.*

A man ſeiſed of a manor to which he has ſtray appendant by preſcription, *&c.* by his bailiff he ſeized an ox as a ſtray within the manor, and makes proclamations according to law, and within the year, and lets the manor with all royalties and liberties, and after the year and day paſſed; *Brown* J. was of opinion, that the leſſor ſhould have it, foraſmuch as he had the poſſeſſion, and when the year and day are paſſed, the property ſhall have relation to the time of the firſt ſeizure, but all the juſtices were againſt him, and that the leſſee ſhall have it, foraſmuch as the property of the ſtray is not altered or changed before the year and day, and the Lord of the manor until the year and day are paſſed, has but the cuſtody, ſo that the owner may relieve it within the year and day, if he will pay for the meat of it. 12 *Rep.* 100. *Trin.* 10 *Jac. Anon'*.

Treſpaſs for his horſe; defendant pleaded, that one *P.* was owner of the horſe, and that the horſe eſtrayed out of his poſſeſſion, and came to the hands of the plaintiff, and that he by command of *P.* demanded the horſe, and that the horſe within a year, *&c.* and tendered amends, and that the plaintiff refuſing to deliver him he took him; to this there was a frivolous replication, and upon that a demurrer. Without telling any marks, or making any proof of property which may be made on the trial, the owner may ſeize his horſe where he finds him; *per cur'*. *Salk.* 686. *Mich.* 4 *Ann. Henly* v. *Walſh.*

Though the defendant does not plead directly that he tendered amends, but only that he demanded the horſe *proferendo ſatisfaction'*, yet the court held this a direct affirmation, like the caſe of *warrantizando vendidit* where the participle affirms as directly as a verb; ſo *aans plagam mortalem* is well enough. *Ibid.* ſays, *vide* 2 *Cro.* 630. 4 *Rep. Long*'s caſe.

And *per cur.* though it was ſaid he tendered amends generally, and did not expreſs any certain ſum, yet that was good in this caſe; and a difference was taken between this caſe, and that of a tendor of amends for a treſpaſs; in that of a treſpaſs, if the defendant pleads a tender of amends, he muſt ſhew what he tendered, for he muſt tender a certain ſum; and the law put this difficulty upon him becauſe he is the wrong-doer, and the other is confeſſedly a party injured; but the owner of the eſtray is no wrong-doer, and it is impoſſible he ſhould know how long his horſe had been in the Lord's cuſtody, nor how much will make a proper ſatisfaction. 2 *Salk.* 686. *Mich.* 4 *Ann. Henly* v. *Walſh.*

Another exception was, that the defendant does not aver, that the amends tendered was refuſed; *& adjornatur*. Ibid.

Where the plaintiff brought treſpaſs for taking his eſtray, and then in his replication does not ſet forth that he proclaimed him, and it does alſo there appear that it was more than a year and a day after the taking it as an eſtray, that the defendant as owner took it away; in this caſe the plaintiff's replication deſtroys his action; for now, after the year and day the Lord had the abſolute property, which is a much greater property than a Lord has in an eſtray, and if you firſt declare for him as an eſtray, and in your replication ſhew that the property was abſolute in you, it is bad; *per Holt* Ch. J. *Holt's Rep.* 564. *pl.* 42. *Hill.* 4 *Ann. Henly* v. *Walſh.*

Holt Ch. J. cited *Noy* 144. *Godb.* 150. to ſhew, that in caſe of an eſtray, the Lord ought to make a demand of what the amends ought to be for the keeping, and then if the party thinks the demand unreaſonable, he ought to tender ſufficient amends; but if he tender inſufficient amends, the Lord ought to take iſſue, and let the jury ſettle what the keeping is worth. Note; in this caſe the action was brought for an eſtray colt, and by the replication it appeared that it was after the year, and then it ceaſed to be an eſtray, and became the Lord's property. *Per Holt* Ch. J. it became an eſtray after the firſt proclamation, and not ſooner; the owner is ſubject to pay for no more than a year's keeping, which ſhall commence from the ſeizure. *Per Powell* J. the pleading a tender of ſufficient amends is well, and a good iſſue. 11 *Mod.* 89. *pl.* 12. *Trin.* 5 *Ann. B. R. Henly* v. *Walſh.*

If in treſpaſs by the Lord for taking his eſtray after the year, the Lord does not ſhew that it was proclaimed the next market day after it was found, at the next market town, he has no property in the eſtray, and the action fails; for the Lord to juſtify himſelf muſt ſhew that he did what the law required of him to give him this title. *Per Holt* Ch. J. to which *Powell* agreed, and judgment accordingly. *Holt's Rep.* 564. *Henly* v. *Walſh.*

Eſtreat, *Extractum*, Is uſed for the true copy, or duplicate of an original writing; for example, of amercements or penalties ſet down in the rolls of a court, to be levied by the bailiff, or other officer, of every man for his offence. See *F. N. B. f.* 57, & 76. and ſo alſo it is uſed *Weſt.* 2. *cap.* 8.

The Chancellor (after the end of the *Norman* period) put the King's ſeal to all patents, which was the foundation and baſis of the revenue; but when any ſuch patents were ſealed, they were eſtreated into the Exchequer, and the execution iſſued out of the court of Exchequer for all the reſervations on ſuch patents; for as the Chancery was a cheque upon the civil juſtice by iſſuing originals, ſo likewiſe it kept the foot and foundation of all certain revenues of the crown, which were eſtreated into the Exchequer, in order to be there gathered and paid in. *Gilb. Hiſt. View of the Court of Exchequer* 8.

Likewiſe all fines upon crimes in the court of King's Bench were to be eſtreated into the Exchequer, in order to levy ſuch fines there, or if they were already levied, they were yet to be eſtreated, in order that the clerk of the crown might account for ſuch fines ſo received in the court of Exchequer. *Gilb. Hiſt. View of the court of Exchequer* 9.

A by-law was made in a court-leet held for the King within his honour of *Grafton*, that every perſon within the leet, who ſhould receive or place any inmate in a houſe there, without giving ſecurity to the overſeers of the poor, *&c.* ſhould pay 5*l. per* month, and *J. S.* was fined 20*l.* for a breach of the ſaid by-law, which fine was eſtreated, and proceſs iſſued upon it. *Hale* Ch. Baron ſaid, it is a good by-law, and frequent in leets, but it is hard to eſtreat the fine before taking uſual remedy for it by diſtreſs; and to extend the party's lands when perhaps he may have ſomething to plead to it, as that he is not within the leet, or that he received no inmate; but the officers ſaid it was uſual to eſtreat ſuch fines into the Exchequer when they belonged to the King; otherwiſe when they belong to ſubjects; and the party was ordered to plead. *Hardr.* 471. *pl.* 6. *Trin.* 19 *Car.* 2. *in ſcacc'*. *Anon'*.

In an information, in nature of a *quo warranto*, iſſues were returned upon three ſeveral *diſtringas's*, and upon a motion for a rule to reſtreat them, *Holt* Ch. J. ſaid, that the courſe of the court is to ſend them up into the Exchequer at the uſual times, which are twice a year, *viz.* on the laſt days of the iſſuable terms; but in extraordinary caſes there may be a rule to eſtreat them, and the motion was denied. 1 *Salk.* 55. *pl.* 4. *Mich.* 11. *W.* 3. *B. R. The King* v. *Mayor of Hertford.*

If recognizances are eſtreated into the Exchequer, becauſe not punctually complied with; yet if the party appears, and takes his trial next ſeſſions, he may compound for a very ſmall ſum in the court of Exchequer, becauſe the effect, though not the exact form of the recognizance, is complied with. 10 *Mod.* 273. *Hill.* 1 *Geo.* 1. *B. R. The King* v. *Tomb.*

Judges of oyer and terminer are the proper judges, whether recognizances ought to be eſtreated or ſpared. It is for the advantage of publick juſtice, that it ſhould be in the power of juſtices of oyer and terminer, to ſpare the recognizance, if upon the circumſtances of the caſe they ſee fit. *Per cur'*. 10 *Mod.* 278. *Hill.* 1 *Geo.* 1. *The King* verſus *Tomb.*

Statute of eſtreats, 16 *Ed.* 2. *ſect* 1. Eſtreats ſhall be made in manner following: Firſt ſhall be entred the fines which moſt commonly happen, as to have writs and all other fines wherein the ſum is expreſſed: And all theſe fines of one county for the whole year wall be written by themſelves by order, as the fines ſhall be entred in the rolls; and of all other counties, whatſoever ſhall happen to follow in any one county. And for the more ready recourſe to the rolls, if any thing ſhall be doubted of, either of the number, or other letter in the eſtreat; the date of the day when the fine was made, ſhall be entred into the eſtreat which is delivered into the Exchequer.

Sect. 2. After thoſe fines ſhall be entred charters, letters patent and commiſſions, in which any farm or yearly rent is due to the King, or wherein any accounts are to be made, and theſe ſhall be written by counties ſeverally after the readieſt manner.

Sect. 3. After theſe ſhall be written homages and fealties, whereof the reliefs are to be demanded, and other things whereof the ſum is not expreſſed, nor any yearly demand to be made.

Sect. 4. In the ſame eſtreat ſhall be entred charters of gift, by which the King ought to have ſervice.

Sect. 5. There ſhall be entred in the ſame eſtreat, the names of thoſe which that year ſhall be aſſigned to hear and inquire, or to do any thing whereby fine or amerciament, or other profit appertaining to the King might ariſe.

Sect. 6. In the end of the eſtreat the rediſſeiſins and ſurcharging of paſtures.

Sect. 7. The ordinance of the Exchequer ſhall be kept, and by writ commanded to the juſtices of both benches, and the warden of the foreſt on this ſide of *Trent*, and beyond.

Sect. 8. The ſteward of the King's houſe ſhall be commanded to deliver yearly to the Treaſurer of the Exchequer his eſtreats of the fines, amerciaments, iſſues, forfeitures, and other profits ariſing to the King, by reaſon of the pleas holden before the ſteward and marſhal, twice in the year, *viz.* at *Eaſter* and *Michaelmas*.

Sect. 9. Charge ſhall be given to the clerk of the market and of meaſures, that he deliver his eſtreats in form aboveſaid.

Sect. 11. The butler for the King ſhall be charged, that he ſhall make proviſion by view of the honeſt men in the town where the ſame purveyance ſhall be; and if the ſame be in a port where are gatherers of the King's cuſtom, the ſame ſhall be teſtified by them.

Sect. 12. No cuſtomer ſhall be deputy to the butler, ſo long as he ſhall be attendant upon the cuſtom.

Sect. 13. The butler ſhall put into a roll all his buyings, how many tuns, of whom he bought them, at what time, and by woſe view.

Sect. 14. He ſhall inroll the wines of priſage in like manner.

Sect. 15. All the cuſtomers ſhall be charged, that they twice yearly ſhall certify the treaſurer and barons, at the feaſt of *Eaſter* and *St. Michael*, how many ſhips have arrived within their bounds laden with wines, and of whence they were, and who bought them, and when they arrived and diſcharged, and how much wine every ſhip did bring, *&c.* how many ſhips arrived of which the King did take prize of wine, and how many tuns, and in what ſhips the King did take 2*s.* for the tun, and how many tuns he did take 2*s.* for the tun.

Stat. 42 *Ed.* 3. *cap.* 9. Where in the Green wax it is ſent to the ſheriffs to levy the King's debts, the ſheriffs miniſters levy the ſame by rolls and other remembrances, and do not ſhew the eſtreats under the ſeal of the Exchequer, ſo that which is once levied cometh another time in demand, becauſe that they do not charge themſelve fully of that that is levied; it is ordained, that men ſhall ſee the eſtreats ſealed, and that the ſame which is paid be totted, and the eſtreats ſent to the ſheriffs upon the receipt. And if any ſheriffs or miniſters do to the contrary, they ſhall anſwer to the party which will complain, and yield him treble damages, and make fine to the king. And he ſhall give his ſuit as well before juſtices of peace as before other juſtices. And the ſheriffs ſhall account by the ſame eſtreats ſo totted and by none other; and the ſame eſtreats ſhall not be copied out by the ſheriffs, but the copy of the eſtreats in how much they touch the franchiſes of lords ſhall be delivered to the bailiffs of the franchiſes under the ſeal of the ſheriff; and the ſame bailiffs ſhall yield their account to the Exchequer by the copies ſo delivered.

Stat. 7 *H.* 4. *cap.* 3. The juſtices, before whom iſſues or amercements be forfeit, ſhall charge the clerks of the eſtreats in ſuch places, by their oath, that they make the rolls of the eſtreats of ſuch iſſues and amercements diſtinctly by expreſs words of the cauſe of the loſs, of the term of the year, and the nature of the writ, and betwixt what parties ſuch iſſues and amercements be loſt.

Stat. 22 & 23 *Car.* 2. *cap.* 22. *ſect.* 2. All fines, poſt-fines, iſſues, amercements, forfeited recognizances, ſums of money paid, in lieu of them, and other forfeitures impoſed or forfeited in the King's Bench, Common Pleas or Exchequer, ſhall be eſtreated into the Exchequer twice every year, *i. e.* all ariſing from the beginning of *Hilary* term to the beginning of *Trinity* ſhall be eſtreated the laſt day of *Trinity* term.

Sect. 3t All ariſing from the beginning of *Trinity* term to the beginning of *Hilary* term ſhall be eſtreated into the Exchequer the laſt day of *Hilary* term, on pain that every officer making default therein ſhall forfeit 50*l.* the one moiety to the King, the other to the proſecutor.

Sect. 4. This act ſhall not alter the courſe uſed in certifying and eſtreating iſſues from the Common Bench, nor of fines *pro licentia concordandi* called poſt-fines, nor the termly eſtreating of iſſues out of the office of pleas in the Exchequer.

Sect. 5. Fines, iſſues, recognizances and all forfeitures, impoſed or forfeited before any judge of aſſiſe, clerk of the market or commiſſioners of ſewers, ſhall be eſtreated into the Exchequer twice yearly, *i. e.* all ariſing betwixt *Michaelmas* and *Eaſter* before the firſt day of *Trinity* term.

Sect. 6. All fines, *&c.* ariſing in the courts laſt mentioned from *Eaſter* to the feaſt of *St. Michael* ſhall be eſtreated before the firſt day of *Hilary* term, on pain that every perſon making default therein ſhall forfeit 50*l.* one moiety to the King, the other to the proſecutor.

Sect. 7. Clerks of the peace and town-clerks ſhall deliver to the ſheriffs within twenty days after the 29th of *September* yearly, a perfect eſtreat of all fines, iſſues, amercements, recognizances, ſums of money, and other forfeitures, which ſhall have been impoſed or forfeited in the ſeſſions of the peace held before *Michaelmas*.

Sect. 8. And alſo ſhall yearly, on or before the ſecond *Monday* after the morrow of *All Souls*, deliver into the Exchequer a duplicate of ſuch eſtreats ſo delivered to the ſheriffs, that the ſheriffs may be charged therewith on their appoſals, on pain to forfeit 50*l.* the one moiety to the King, the other to the proſecutor.

Sect. 9. No officer belonging to the King's Bench, Common Pleas or Exchequer, nor any clerk of aſſiſe, clerk of the peace, town-clerk, or any officer under them, nor any other, ſhall conceal any indictment, fine, poſt-fine, iſſue, amercement, forfeited recognizance or other forfeiture, unleſs by order of court; nor ſhall they miſcertify any of the ſame; on pain to forfeit the treble value of what they conceal or miſcertify; one moiety to the King, the other to the proſecutor; and alſo on pain to loſe his office, and be incapable of any office where any part of the King's revenue is managed or paid.

Sect. 10. Where any ſums of money or forfeitures due to the King ſhall be paid to any ſheriff or other officer, and according to the act certified and eſtreated into the Exchequer, proceſs of Green wax ſhall be awarded to the ſheriffs againſt ſuch officers for levying the ſame.

Sect. 11. Nothing in this act ſhall prejudice the rights of any bodies politick or corporate, lords of manors, liberties or franchiſes.

Sect. 12. Nothing in this act ſhall extend to the rights of the city of *London*.

Made perpetual, 4 Will. & Mar. cap. 4. ſect. 4.

Stat. 4 *Will. & Mary*, *cap.* 24. *ſect.* 5. Clerks of the court of King's Bench, of the Common Pleas, clerks of aſſiſe, clerks of the peace, town-clerks, clerks of ſewers, clerks of the market, and others to whom it belongeth to make returns of eſtreats into the Exchequer, ſhall upon delivery of ſuch eſtreats take the oath following, viz.

YOU ſhall ſwear, that theſe eſtreats now by you delivered, are truly and carefully made up and examined, and that all fines, iſſues, amercements, recognizances and forfeitures which were ſet, loſt, impoſed or forfeited, and in right and due courſe of law ought to be eſtreated in the court of Exchequer, are, to the beſt of your knowledge and underſtanding, therein contained, and that in the ſame eſtreats are alſo contained and expreſſed all ſuch fines as have been paid into the court from which the ſaid eſtreats are made, without any wilful or fraudulent diſcharge, omiſſion, miſnomer, or defect whatſoever. So help you God.

Which oath the barons of the Exchequer, or any one of them, are required to adminiſter.

By ſtat. 3 *Geo.* 1. *c.* 15. *ſect.* 12. The barons may amerce clerks of aſſiſe, *&c.* for not returning eſtreats.

Clerk

Clerk of the eſtreats, *Clericus extractorum.* See in Clerk.

Eſtreciatus, Streightened, blocked up. *Inquiratur de viis Domini Regis* eſtreciatis.——*Plac. Coron. temp. R.* 1.

Eſtregbords, Eaſtern boards, or deal, or fir, brought from the Eaſtern parts for wainſcot and other uſes.—— *Et in ſex* eſtregbords *videl. waynſcots emptis apud* Stereſbregge 11. *fol.* 11. *den.* Paroch. Antiq. p. 575.

Eſtrepe, French *etropier*, i. e. *mutilare:* To make ſpoil by a tenant for life in lands or woods, to the prejudice of him in the reverſion.

Eſtrepement, or **Eſtrepament**, (*Eſtrepamentum*, from the French word *etropier*, *mutilare.*) It ſignifies the ſpoil made by tenant for life upon any lands or woods, to the prejudice of the reverſioner, as namely in the ſtatute made *anno* 6 *E.* 1. *cap.* 13. And it may ſeem by the derivation, that *eſtrepement* is properly the unmeaſurable ſoaking or drawing out of the heart of the land by plowing or ſowing it continually, without manuring, or other ſuch uſage as is requiſite in good huſbandry: And yet *etropier* ſignifying *mutilare*, may not improperly be applied to thoſe that cut down trees, or lop them, farther than the law will bear. This ſignifies alſo a writ, which lieth in two manners; the one is, when a man having an action depending, (as a *formedon*, or *dum fuit infra ætatem*, or *writ of right*, or any other) wherein the demandant is not to recover damages, ſueth to inhibit the tenant from making waſte during the ſuit. The other ſort is for the demandant, that is adjudged to recover ſeiſin of the land in queſtion, and before execution ſued by the writ *habere facias ſeiſinam*, for fear of waſte to be made before he can get poſſeſſion, ſueth out this writ. See more in *F. N. B. fol.* 60, 61. *Reg. Orig. fol.* 76. and *Reg. Jud. f.* 33. In ancient records we often find *vaſtum* & extrepamentum *facere*; and *Spelman* thinks, eſtrepamentum *gravis vaſti genus deſignare. Cowell, edit.* 1727.

There are two kinds of eſtrepement, the one *original*, and may be ſued out with the original *præcipe*, by which the land is demanded, or at any time pending the plea, directed to the ſheriff, the party, or both; the other is *judicial*, to be granted by that court where the plea dependeth. 2 *Inſt.* 328.

There is a difference between eſtrepement and waſte; for waſte is by a particular tenant, who may be puniſhed by writ of waſte; and eſtrepement is by him who has eſtate of inheritance by defeaſible title. *Br. Eſtrepement, pl.* 10.

By ſtat. *Glouceſter*, 6 *Ed.* 1. *c.* 13. "After a plea is moved in *London* by writ, the tenant ſhall have no power to make waſte or eſtrepement of the tenement, hanging the plea; if he do, the mayor and bailiffs ſhall cauſe it to be kept ſafe at the ſuit of the demandant. And the ſame ſhall be obſerved in other cities and boroughs, and throughout the realm."

Before this ſtatute there lay at the Common law a writ of eſtrepement after judgment, and before execution; and ſo an eſtrepement doth lie for waſte done after verdict, and before judgment. 2. *Inſt.* 328.

And ſome do hold, that the original writ of eſtrepement did lie at the Common law to prohibit any waſte done *pendente placito*; for there lieth a writ *de bonis arreſtandis ne diſſipentur pendente placito, &c. a fortiori* in caſe of inheritance, wherein if waſte ſhould be done, it ſhould be inconvenient, and againſt the common wealth: But certain it is, that the judicial writ is given *pendente placito* by this ſtatute. 2 *Inſt.* 328.

The ſtatute of *Glouceſter*, *cap.* 13. is ſo conſtrued, that the party ſhall recover damages for waſte done (*pendente placito*) after the writ delivered, and therefore it is good policy to purchaſe the writ of eſtrepement together with the writ. 2 *Inſt.* 329.

The writ itſelf founded upon this ſtatute is but a prohibition, and upon the attachments the parties do plead. 2 *Inſt.* 329.

Upon a writ of eſtrepement at the Common law, *viz.* after judgment, the plaintiff ſhall recover damages for the waſte done before, without any prohibition formerly delivered. 2. *Inſt.* 329.

Upon a writ of eſtrepement grounded upon this ſtatute of *Glouceſter*, *cap.* 13. the ſheriff may reſiſt them that do offer to do waſte, and if otherwiſe he cannot do it, he may lawfully impriſon them, or make a warrant to others to do it, and if neceſſity requires it, may take the *poſſe comitatus:* So odious in law is waſte and deſtruction. 2 *Inſt.* 329.

Oath was made that the ſervants of tenant in dower had done waſte after the writ of eſtrepement made known to them, but the court would not commit them, becauſe it was directed immediately to her and her ſervants, for then it had been a contempt of the court. *Hob.* 85. *pl.* 113. *Trin.* 12 *Jac. Cumberland* (*Earl*) v. *The Counteſs Dowager.*

Original of *formedon* was ſhewn in *C. B.* returnable the next term, and the demandant ſurmiſed waſte and deſtruction, and prayed eſtrepement; *per Englefield*, The ſtatute of *Glouceſter*, *cap.* 13. is, That if a man does waſte or deſtruction, pending the plea, that the party ſhall have eſtrepement, and the plea is not pending till the writ be returned. *Br. Eſtrepement, pl.* 1. cites 18 *H.* 8. 5.

Where action is brought, as *formedon*, *&c.* in which a man ſhall recover damages, there he ſhall have writ of eſtrepement. *Br. Eſtrepement, pl.* 10. cites *F. N. B.* 60, 61.

A writ of eſtrepement was granted in a writ of dower *unde nihil habet*, becauſe at firſt it is uncertain whether the demandant will recover damages or not in this writ. *Bendl.* 33. *pl.* 55. *Paſch.* 3 *Ed.* 6. *Anon'.*

In every *præcipe* where the demandant is to defeat the poſſeſſion of the tenant, there for doubt that his adverſary will do waſte, he may have writ of eſtrepement to prohibit him to do waſte. *Mo.* 69. *pl.* 186. *Trin.* 6 *Eliz. Anon'.*

Writ of eſtrepement was brought againſt huſband and wife, after judgment in a *quid juris clamat*, and before execution; and it was granted. *Dyer* 325. *b. pl.* 39. *Trin.* 15 *Eliz. Cateſby* v. *Bandes*, and *Ibid.* cites *S. P. Mich.* 30 *H.* 8. *Bowldes* v. *Newport.*

Pending a writ of partition between coparceners, the tenant committed waſte; the court would not grant a writ of eſtrepement, becauſe in this caſe there was equal intereſt between the parties, and the writ will not lie but only where the intereſt of the tenant is to be diſproved. *Gouldſb.* 50. *pl.* 12. *Paſch.* 29 *Eliz. Anon'.*

Entry *ſur* diſſeiſin of a diſſeiſin made to himſelf. The plaintiff prayed a writ of eſtrepement, and it was doubted if he ſhould have it, becauſe he is in this action to recover all his damages; but afterwards the writ was granted; for otherwiſe the plaintiff might have his houſes and woods defaced and deſtroyed, and turned to his remedy to recover his damages againſt one who perhaps is not worth ſo much. *Cro. E.* 484. *pl.* 21. *Trin.* 38 *Eliz. C. B. Wright* v. *Penry.*

Error was brought to reverſe a common recovery in *Lancaſter* in a writ of entry, and whilſt that writ was depending, an eſtrepement was awarded to the tertenants, and an attachment thereupon; and adjudged, that it was well granted. *Cro. E.* 774. *pl.* 4. *Mich.* 42 & 43 *Eliz. B. R. Holland* v. *Dauntſy.*

This writ lies in action of waſte as well at any time before judgment as after judgment, and before execution; for he cannot recover damages for more than is contained in the count, and he cannot aſſign any waſte done after the writ purchaſed; reſolved, 5 *Rep.* 115. *b. Trin.* 43 *Eliz. C. B. Foliamb's* caſe.

Where damages are to be recovered, but not *pendente placito*, there without queſtion eſtrepement doth lie. 2 *Inſt.* 328.

Error was brought to reverſe a common recovery had againſt an infant, and upon that a *ſci. fac. ad audiendum errores*; eſtrepement was prayed, and *per curiam* allowed; becauſe it lies in the original writ; ſee likewiſe a writ of entry in the poſt. *Noy* 134. *Trin.* 7 *Jac. B. R. Louch's* caſe.

In a *partitione facienda*, by one tenant in common againſt the other, an eſtrepement was granted for all that the plaintiff had confeſt to be held in common, and not of more,

more, for by ſuch means, a man many be inhibited to cut his own bows, according to his occaſions. But *Bendlowes, cap.* 5. *fol.* 4. ſeemed, that an eſtrepement does not lie between tenants in common. But in *M.* 6. *Jac.* it was ruled that the eſtrepement ſhall be granted, although that *Coke* Ch. J. held with *Bendlowes.* But note, that in 5. *Jac.* Lady *Lucy* v. *Oxenbridge*, an eſtrepement was granted in a *partitione facienda*, becauſe it is a real action; and no damages to be recovered. And *Brownlowe* ſhewed many precedents contrary to *Bendlowes. Noy* 143. *Baily* v. *Knighton.*

A writ of eſtrepement was given in waſte becauſe that for waſte done, pending the writ, the plaintiff cannot recover damages. *Per tot' cur'. Godb.* 164. *pl.* 229. *Paſch.* 8. *Jac. C. B. Anon'.*

In an action of waſte for digging earth to make brick, eſtrepement was awarded, and on affidavit that the writ of eſtrepement was delivered to the ſheriff, and that he gave notice of that to the party, and he notwithſtanding continues to do waſte, attachment was awarded. 2 *Brownl.* 168. *Paſch.* 10 *Jac. C. B. Anon'.*

Affidavit that waſte was committed after an eſtrepement, yet no attachment was granted, but had it appeared by pleading, or upon the return of the ſheriff, it had been otherwiſe. *Winch* 15. *Paſch.* 19. *Jac.* Sir *George Tipping*'s caſe.

In a writ of partition after ſummons an eſtrepement was granted generally againſt the parties, and their ſervants, for in partition no damages are to be recovered. *Het.* 32 *Mich.* 3 *Car. C. B. Anon'.*

It ſeems that eſtrepement lies not on a writ of error of a judgment in partition. *Sid.* 369. *pl.* 7. *Trin.* 2 *Car.* 2. *B. R. Danby* v. *Palmes.*

For more learning on this ſubject, ſee 10 Vin. Abr. *tit.* Eſtrepement.

Elumare, To excuſe or eſſoin: *Cum dies placiti, &c. non potui, &c. adire, ſed miſi* eſumatores *qui me* eſumaverunt *apud Cantuar'.* Du Freſne.

Elurium, *Alborough.*

Etate probanda. See **Ætate probanda.**

Ethbrich. See **Ewbryche.**

Etheling or **Atheling**, Is a *Saxon* word, ſignifying *noble*, and among the *Engliſh Saxons* was as the title of prince among us, or as the King's eldeſt ſon; ſuch was *Edgar Atheling*, the deſigned ſucceſſor of *Edward the Confeſſor.* Camden. *Edgar Ætheling*, *England*'s Darling.

Etocetum, The *wall* in *Staffordſhire.*

Evenings, The delivery at *even* or night of a certain portion of graſs or corn, or under-wood to a cuſtomary tenant, who performs his wonted ſervice of cutting, mowing, or reaping for his Lord, and at the end of his day's work, receives ſuch a quantity of the materials he works upon, to carry home with him, as a gratuity or encouragement of his bounden ſervice. So in the manor of *Burceſter*; *com.* Oxon —— *Virgata terræ integra ejuſdem tenuræ habebit liberam ad veſperas quæ vocatur* evenings, *tantum ſicut falcator poteſt per falcem levare et domum portare per ipſum* —— Paroch. Antiq. pag. 401. —— See *Kennet's Gloſſary*, at the end of that work.

Everwickſhire, *Yorkſhire*, Heretofore ſo called, perhaps derived from the Latin *Eboracum*, from which *Eborac* and *Evoric* or *Everwick* corruptly is no ſtrange variation; and the Saxon *Scyre*, which ſignifieth *ſhire. Willielmus Rex Angliæ Thomæ Archiepiſcopo & Betramo de Verdon et baronibus ſuis Francis & Anglis de* Everwicſcire, *&c.* Charta Will. Conq. It is alſo written *Ewyereſcire*, *in Rot. Magno* 30 *Hen.* 2. and elſewhere *Eboraceſchira.* Cowell, edit. 1727.

Eves-droppers, Are ſuch as ſtand under walls or windows by night or by day, to hear news, and to carry them to others, to make ſtrife and debate among neighbours: Theſe are evil members in the commonwealth, and therefore by the ſtat. *Weſt.* 1. *cap.* 33. are to be puniſhed. And this miſdemeanor is preſentable and puniſhable in the court-leet. *Kitchin, fol.* 11.

Eveſque. See **Biſhop**, and 10 *Vin. Abr.* tit. *Eveſque.*

Evidence, (*Evidentia,*) Signifies generally all proof, be it teſtimony of men, records or writings. Sir *Thomas Smith* uſeth it in both ſenſes, *lib.* 2. *cap.* 17. in theſe words; *Evidence* is authentical writings of contracts, after the manner of *England*, that is to ſay, written, ſealed and delivered: And *lib.* 2. *cap.* 23. ſpeaking of the priſoner that ſtandeth at the bar to plead for his life, and of thoſe that charge him with felony, he ſaid thus; Then he telleth what he can ſay; after him, likewiſe all thoſe who are at the priſoner's apprehenſion, or can make any proof, which we in our language call *evidence*, againſt the malefactor. It is called *evidence* becauſe it makes the iſſue *evident* to the jury; for *Probationes debent eſſe* evidentes *& perſpicuæ. Co. on Littl. fol.* 283. *Cowell, edit.* 1727.

As in publick judicatures it is neceſſary to ſearch into the truth of facts as they really are; hence, whatever may be exhibited to a court or jury, whether it be by matter of record or writing, or by the teſtimony of witneſſes, in order to enable them to pronounce with certainty concerning the truth of any matter in diſpute, whether ſuch matter relates to a perſon's life, liberty or property, is called *evidence.* And as the diſcovery of truth is of the utmoſt conſequence to thſe good of ſociety, ſo it lays men under the ſtrongeſt obligations, when called upon to give their evidence, to adhere inviolably to truth; and this is a matter, not only injoined by the precepts of religion, but alſo by thoſe of reaſon; the violation of truth being a ſin againſt human ſociety, as it breaks in upon that correſpondence that is neceſſary to ſociable creatures, by deſtroying the end of language, which is the common tie and band of ſociety; and as raiſing a different idea in the mind of the hearer from that which is formed in the mind of the ſpeaker, deſtroys all intercourſe between mankind; ſo it prevents that truſt from being repoſed in them which is ſo neceſſary to their own preſervation and the good of others. 2 *Bac. Abr.* 284.

It hath been obſerved by Mr. *Locke*, that there are ſeveral degrees from perfect certainty and demonſtration, quite down to improbability and unlikelineſs, even to the confines of impoſſibility; and there are ſeveral acts of the mind proportioned to theſe degrees of evidence, which may be called the degrees of aſſent, from full aſſurance and confidencc, quite down to conjecture, doubt, diſtruſt, and diſbelief. Now what is to be done in all trials of right, is to range all matters in the ſcale of probability, ſo as to lay moſt weight where the cauſe ought to preponderate, and thereby to make the moſt exact diſcernment that can be, in relation to the right. But to come to the true knowledge of the nature of probability, 'tis neceſſary to look a little higher, and ſee what certainty is, and whence it ariſes. *Gilb. L. Ev.* 1, 2.

All certainty is a clear and diſtinct perception, and all diſtinct perceptions depend upon a man's own proper ſenſes; for this in the firſt place is certain, and that which we cannot doubt of if we would, that one perception or idea is not another, that one man is not another; and what belongs to one man, does not belong to another; and when perceptions are thus diſtinguiſhed, on the firſt view, it is called ſelf-evidence, or intuitive knowledge. *Gilb. L. Ev.* 2.

There are ſome other things whoſe agreement or difference is not known on the view, and then we compare them by the means of ſome third matter, by which we come to meaſure their agreement, diſagreement or relation. As if the queſtion be, whether certain land be the land of *J. S.* or *J. N.* and a record be produced whereby the land appears to be transferred from *J. S.* to *J. N.* Now when we ſhew any ſuch third perception, that doth neceſſarily infer the relation in queſtion, this is called knowledge by demonſtration. The way of knowledge by neceſſary inference is certainly the higheſt and cleareſt that mankind is capable of in his way of reaſoning, and therefore always to be ſought when it may be had. *Gilb. L. Ev.* 2, 3.

Demonſtration is generally converſant about permanent things, which being conſtantly obvious to out ſenſes, do afford to them a very clear and diſtinct compariſon; but tranſient things that cannot always occur to our ſenſes are generally more obſcure, becauſe they have no conſtant being, but muſt be retrieved by memory and recollection. Now moſt of the buſineſs of civil life ſubſiſts on the actions

E V I

tions of men that are tranſient things, and therefore oftentimes are not capable of ſtrict demonſtration, which, as hath been ſaid, is founded on the view of our ſenſes, and therefore the rights of men muſt be determined by probability. But as all demonſtration is founded on the view of a man's own proper ſenſes, by a gradation of clear and diſtinct perceptions, ſo all probability is founded upon obſcure and indiſtinct views, or upon report from the ſight of others. *Gilb. L. Ev.* 3.

Now this in the firſt place, is very plain, that when we cannot ſee or hear any thing ourſelves, and yet are obliged to make a judgment of it, we muſt ſee and hear by report from others; which is one ſtep farther from demonſtration, which is founded upon the view of our own ſenſes; and yet there is that faith and credit to be given to the honeſty and integrity of credible and diſintereſted witneſſes, atteſting any fact under the ſolemnities and obligation of religion, and the dangers and penalties of perjury, that the mind equally acquieſces therein as on a knowledge by demonſtration, for it cannot have any more reaſon to be doubted than if we ourſelves had heard and ſeen it; and this is the original of trials, and all manner of evidence. The firſt therefore and moſt ſignal rule, in relation to evidence, is this, that a man muſt have the utmoſt evidence, the nature of the fact is capable of; for the deſign of the law is to come to rigid demonſtration in matters of right, and there can be no demonſtration of a fact without the beſt evidence that the nature of the thing is capable of; leſs evidence doth create but opinion and ſurmiſe, and does not leave a man the intire ſatisfaction, that ariſes from demonſtration; for if it be plainly ſeen in the nature of the tranſaction, that there is ſome more evidence that does not appear, the very not producing it is a preſumption, that it would have detected ſomething more than appears already, and therefore the mind does not acquieſce in any thing lower than the utmoſt evidence the fact is capable of. *Gilb. L. Ev.* 4, 5.

From the importance therefore of evidence, the wiſdom of our laws has laid down ſeveral rules relating to it, which ſhall be conſidered under the following heads.

1. *Who may, and may not, be good witneſſes in general.*

2. *Who may, and may not, be witneſſes in reſpect of their being intereſted.*

3. *Of the number of witneſſes required by our laws; of compelling a witneſs to appear; of non-appearance, and of the manner of giving evidence.*

4. *Of written evidence, and what ſhall be admitted evidence.*

5. *Of parol, preſumptive and hearſay evidence.*

1. *Who may, and may not, be good witneſſes in general.*

All perſons may be witneſſes who appear to have ſufficient diſcretion, and who from their principles muſt be preſumed to have a right ſenſe of the ſanctity of an oath, and of the obligations it lays them under to depoſe the whole truth, and nothing but the truth; therefore infants, aliens, villains, bondmen, *&c.* may be witneſſes. *Co. Lit.* 6.

The depoſitions of witneſſes of the *Gentou* religion in the *Eaſt Indies*, ſworn according to their ceremonies, ought upon the ſpecial circumſtances of the caſe to be read as evidence. *Atkyns's Rep.* 21.

The Jews, before their expulſion from *England*, and ſince their return to it, have been conſtantly admitted as witneſſes. *Per Willes* Ch. J. *Atkyns's Rep.* 44.

A Jew may be a witneſs, being ſworn on the old Teſtament. 2 *Keb.* 314.

If infidels do not believe a God, or rewards and puniſhments hereafter, they ought not to be admitted as witneſſes. *Per Willes* Ch. J. *Atkyns's Rep.* 45.

No quaker, or reputed quaker, ſhall be qualified to give evidence in any criminal cauſe, by virtue of the ſtatute 7 & 8 *W.* 3. *cap.* 34.

By ſtat. 4 & 5 *Anne*, *cap.* 16. All witneſſes who ought to be allowed good witneſſes upon trials at law, ſhall be deemed good witneſſes to prove any nuncupative will.

An infant of the age of nine years has been allowed to give evidence. *H. P. C.* 263.

One produced to be an evidence againſt the appellee, who was under twelve years of age, and the appellee's counſel objected to him for that reaſon, and beſides they ſaid he had taken money. *Holt* Ch. J. ſaid, that if he knew the danger of an oath, he might be an evidence; and that appearing he was admitted. 11 *Mod.* 228. *B. R. pl.* 2. *Trin.* 8 *Anne. Young* v. *Slaughterford.*

Huſband and wife are conſidered as one and the ſame perſon in law, and to have the ſame affections and intereſt, from which it has been eſtabliſhed as a general rule, that the huſband cannot be a witneſs for or againſt the wife, nor the wife be a witneſs for or againſt the huſband, by reaſon of the implacable diſſenſion which might be cauſed by it, and the great danger of perjury from taking the oaths of perſons under ſo great a biaſs, and the extreme hardſhip of the caſe. *Co. Lit.* 6. *b.* 2 *Rol. Abr.* 686. *pl.* 4. *H. P. C.* 263. 1 *Brownl.* 47. *Hutton* 116. *Raym.* 1. 2 *Keb.* 403. 2. *Haw. P. C.* 431.

Hence it hath been adjudged, that the huſband cannot be a witneſs againſt the wife, nor the wife againſt the huſband to prove the firſt marriage, on an indictment on the ſtatute of 1 *Jac.* 1. *cap.* 11. for a ſecond marriage; but the ſecond huſband or wife may be allowed to give evidence, ſuch ſecond marriage being void, and therefore they were never huſband and wife. *Raym.* 1. *State Trials, vol.* 4. *fol.* 754.

But ſome exceptions have been allowed to this general rule, eſpecially in caſes of evident neceſſity; and therefore it hath been adjudged, and is the conſtant practice at this day, that on an indictment for a forcible marriage grounded on the 3 *H.* 7. the wife may be a witneſs againſt the huſband; ſo where huſband and wife have cauſe to demand ſureties of the peace againſt each other. See 1 *Sid.* 431. *Cro. Car.* 488. 1 *Vent.* 243, 244. 4 *Mod.* 8. 2 *Hawk. P. C.* 432.

Alſo in Lord *Audley*'s caſe, who held his wife's hands and legs while his ſervant, by his command, raviſhed her, the wife was admitted an evidence. *Hutt.* 116. 2 *Hawk. P. C.* 432. But in *Raym.* 1. this caſe is denied to be law; and in *Vent.* 244. it is doubted of by Lord Ch. J. *Hale*, becauſe here is a wife *de jure*, and ſo not like the caſe, where a woman is admitted to prove a forcible marriage.

Alſo in *Raym.* 1. it is ſaid, that a huſband and wife may be witneſſes againſt one another in treaſon; but the contrary is adjudged in 1 *Brownl.* 47. and with this laſt book, 2 *Hawk. P. C.* 432. ſeems to agree.

By ſtat. 21 *Jac.* 19. *ſ.* 6. "The commiſſioners ſhall have power to examine the wife of a bankrupt upon oath for the diſcovery of his eſtate, goods, and chattels, and ſuch wife refuſing to appear, or to anſwer interrogatories, ſhall incur the ſame penalties as are provided againſt other perſons in the like caſes."

In ejectment, the plaintiff made title to his leſſor to the land in queſtion, as ſon and heir of *Jerome Jacques*, and *Hannah* his wife, in right of *Hannah*. The defendant gave in evidence, that *Jerome Jacques* was married, before he was married to *Hannah*; and the woman, to whom it was ſuppoſed he was married before, was produced at the trial, Summer aſſizes 13 *W.* 3. at *Maidſtone*, to prove this marriage. The counſel for the plaintiff approved her teſtimony, becauſe ſhe ſwore for her advantage, *viz.* to have a huſband, the huſband then being living. But nevertheleſs, *Gould* Juſtice of *B. R.* then judge of aſſize, admitted her teſtimony. But afterwards the ſame cauſe, upon the ſame title, between the ſame parties, was tried before *Holt*, Chief Juſtice, at the aſſize in *March* at *Maidſtone*, 1 *Ann.* and he refuſed, after the debate, to admit the former wife to be a witneſs for this purpoſe; but upon other evidences, the former marriage was proved to the ſatisfaction of the jury, being gentlemen, whereupon they found a verdict for the defendant. But in the former trial before *Gould* Juſtice, the jury found a verdict for the plaintiff. 2 *Lord Raym. Rep.* 752. 1 *Ann.* 1701-2. *Broughton* v. *Harper.*

E V I

A woman is not bound to be ſworn, or to give evidence againſt another, in caſe of theft, *&c.* if her huſband be concerned, tho' it be material againſt another, and not directly againſt her huſband. 2 *Hale's Hiſt. Pl. C.* 301.

If a feme covert acknowledge a thing at a trial, which is for the preſent advantage of her huſband, but is for her own future diſadvantage, yet this is no good evidence to a jury, *Mich.* 23 *Car. B. R.* for her huſband's advantages are her's alſo, and are more look'd upon than her future diſadvantage. *L. P. R.* 550.

In an information for a cheat, baron and feme were diſcharged of a judgment entered into by the feme (to a matchmaker on payment of 100 *l.* which he retook of her again preſently in another room) upon the evidence of the wife. *Sid.* 431. *pl.* 20. *Mich.* 21 *Car.* 2. *B. R. King* v. *Paris. & al'.*

The wife executrix to her huſband, married a ſecond huſband; a bill is exhibited againſt them to diſcover the truſt; the huſband and wife diſagreed in the matter, and put in ſeverally their anſwers; the huſband denied the truſt, but the wife confeſſed it. The cauſe proceeded to hearing, and the plaintiff proved the truſt only by one witneſs, which the plaintiff inſiſted on, with the wife's confeſſion, to be ſufficient, the matter being but in that wherein ſhe was concern'd as executrix. But the bill was diſmiſſed, *quia* the wife's anſwer ſhall not bind the huſband; *ex relatione* Sir *John Churchill* and ſerjeant *Rawlinſon. Chan. Caſes* 39. *Trin.* 32 *Car.* 2. *Anon'.*

In an indictment proſecuted by the huſband for ſeducing away his wife, and keeping her ſome time in adultery, the wife was admitted to be a witneſs againſt the defendant *coram* Juſtice *Wyndham* at Lent aſſizes at *Ayleſbury*, and the defendant found guilty. She may be a witneſs to prove a cheat upon her and her huſband. *L. E.* 55. *pl.* 12. cites *T. p. Pais* 160.

The plaintiffs were infants, and the children of the defendant's wife by a former huſband; their bill was to have an account of the eſtate left them by their father, and of the produce thereof. Upon the hearing it was referred to an account, and the defendant and his wife were to be examined on interrogatories for diſcovery of the eſtate; the wife being at variance with the huſband, and living apart from him, upon her examination, made the eſtate of the plaintiffs (who were her children) as great as ſhe could, and thereupon to fix the charge upon the huſband. The plaintiffs, upon a petition to the Maſter of the Rolls, obtained an order to examine the wife as a witneſs againſt the huſband *de bene eſſe*, and the maſter upon her evidence, had charged the huſband with ſeveral ſums of money, as intereſt, and produce of the infant's eſtate; but now, upon exceptions to the report, the Lord Chancellor diſallowed her evidence, and declared the wife could not be a witneſs againſt her huſband. 2 *Vern.* 70. *pl.* 11. *Trin.* 1688. *Cole* v. *Gray.*

It ſeems agreed, that it is no exception againſt a perſon's giving evidence, either for or againſt a priſoner, that he is one of the judges who is to try him; and therefore in the caſe of *Hacker*, two of the perſons in the commiſſion for the trial came off from the bench, and were ſworn and gave evidence, and did not go up to the bench again during the trial. 2 *Hawk. P. C.* 432. *Kelyn.* 12. 1 *Sid.* 133. *Style* 233.

When a juryman, who was hearing evidence with his companions, was ſworn to give evidence upon prayer of defendant's counſel, and he gave evidence publickly to his companions, and yet continued of the jury. *Sid.* 133. in a *nota* at *pl.* 3. *Paſch.* 15 *Car.* 2. *B. R.*

The jury may go upon evidence of their own perſonal knowledge, being returned *de vicineto*; *per Vaughan* Ch. J. *Vaughan* 147. in *Buſhell*'s caſe.

The judge would not ſuffer a grand juryman to be produced as a witneſs, to ſwear what was given in evidence to them, becauſe he is ſworn not to reveal the ſecrets of his companions. *Clayt.* 84. *pl.* 14.

It ſeems agreed, that neither counſellors, attornies or ſolicitors are obliged to give evidence, or to diſcover ſuch matters as came to their knowledge in the way of their profeſſion; for by the duty of their offices they are obliged to conceal their clients ſecrets, and every thing that they are intruſted with, is *ſub ſigillo confeſſoris*; for were it otherwiſe, no perſon could ever with ſafety employ a counſel, *&c. Style* 449. 1 *Keb.* 505.

But as the inconveniency would be very great, if a counſel, *&c.* were not at all to be made uſe of as witneſſes, for by this means every ſuch perſon's evidence may be taken off by giving him a fee; ſo the courts have come to this mean, *&c.* upon every queſtion, to aſk him if he knew it of his own knowledge, or from his client, *&c.* for tho' the oath is general, to ſwear the whole truth; yet the intention thereof, and of the law, is only, that he ſhould declare what he knew of his own knowledge, and not to reveal what he was intruſted with by his client. 1 *Vent.* 197. *Skin.* 404.

Queſtion was, whether one who had been an attorney for defendant ſhould be compelled to be a witneſs; and *Darnell* ſaid, This being a criminal matter he ſhould, but not ſo in a civil matter. But *Pratt* ſaid, that if he be ſworn, we muſt aſk him his whole knowledge, and perhaps he cannot diſcover that without charging himſelf, for if one's declaration generally may be made uſe of againſt him, *a fortiori* what he ſays upon oath ſhall; and this ſeemed to weigh with the court. But *Holt* ſaid, he was of opinion againſt his brothers ſome years before, in the caſe of one *Holford*, that any thing an attorney knew, otherwiſe than *quatenus* an attorney, he ought to declare. But his brothers held, an attorney ought not upon any account to be received to reveal his client's ſecrets; and *Holt* ſaid, If a client bring a forged deed to counſel, the counſel ought to proſecute him, and that he had known ſuch a thing done. 12 *Mod.* 341. *Mich.* 11 *W.* 3. in the caſe of *The King* v. *Warden of the Fleet.*

On a trial at bar in *B. R.* in ejectment, whether there was a proper and good tenant to the *præcipe* to a common recovery ſuffered in *Mich.* term; a bargain and ſale was produced dated before that term, but in fact executed afterwards; it was propoſed to prove this by Mr. *Knight* an attorney, againſt whom it was objected for that he was an attorney in the cauſe, and he ought not to be examined to diſcover the ſecrets of his clients; but it was ruled, that it was the privilege of the client, and not of the attorney, not to be examined; for where a counſel or attorney is intruſted by his client, and his ſecrets are diſcovered to him, he receives them under a truſt of ſecrecy which he is not to break; neither ought he to aſſiſt the other party; ſo that what the client tells him, he ſhall not go and diſcover; but the queſtion here is, when the deed was executed, and whether by the party or not, for he was concerned in paſſing this recovery, and he preſent at the execution of the deed; it is an act of his own knowledge, he is to teſtify and ſhew the truth only concerning this deed, and any one might know this as well as an attorney. *Knight* being examined ſaid, the deed was executed about the latter end of *February* or the beginning of *March.* 10 *Mod.* 40. *Mich.* 10 *Ann. B. R.* Lord *Say and Seal*'s caſe.

In an action of treſpaſs againſt ſeveral perſons, one of them, whom the plaintiff deſigned to make uſe of as a witneſs, was by miſtake made a defendant, and on motion the court gave him leave to admit him, and have his name ſtruck out of the record, tho' after iſſue joined, in order to have the benefit of his teſtimony. 1 *Sid.* 441. But ſee *Style* 401, 404. *Savil* 34. 2 *Rol. Abr.* 685.

According to the law and practice in the courts of equity, defendants in a cauſe may be witneſſes, for they are forced into the cauſe; and if their being made parties ſhould abſolutely invalidate their teſtimony, it would be in the power of any one, who had a mind to oppreſs another, to deprive him of his defence, by making the moſt material witneſſes defendants in the ſuit; and therefore any of the defendants to a ſuit may be examined as witneſſes, ſaving juſt exceptions to their credit. 2 *Chan. Ca.* 214. 1 *Vern.* 230.

But plaintiffs cannot examine each other as witneſſes in the cauſe; becauſe if the cauſe miſcarries, the plaintiffs will be liable to coſts, and therefore their ſwearing is to exempt themſelves. 1 *Vern.* 230. *Abr. Eq.* 225.

And

And the practice is, that if a plaintiff wants to examine a defendant as a witneſs, he muſt obtain an order by motion or petition for that purpoſe; this order is of courſe, and muſt be ſerved on the adverſe party's clerk in court; alſo the defendant may obtain the like order to examine a co-defendant as a witneſs for him; but all theſe orders are upon ſuggeſtion, that the defendant is not concerned in point of intereſt in the matters in queſtion, and they are never granted but with a clauſe of (ſaving juſt exceptions to the other ſide); and this muſt be made at the hearing of the cauſe; and this order for examining a defendant muſt be produced at the Commiſſion-Office, or in the Examiner's, when the defendant attends to be examined, without which he cannot be examined; for it is by virtue of that order, and the authority given them by the court, that impower them to examine him, and they cannot do it otherwiſe. 2 *Bac. Abr.* 287, 288.

As to accomplices in crimes being witneſſes for or againſt their companions, the following particulars are laid down as law by Mr. Serjeant *Hawkins: Firſt*, That it hath been long ſettled, that it is no exception againſt a witneſs, that he hath confeſſed himſelf guilty of the ſame crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witneſſes, it would be generally impoſſible to find evidence to convict the greateſt offenders. Alſo it hath been often ruled, that accomplices who are indicted, are good witneſſes for the King, until they be convicted. Alſo it hath been adjudged, that ſuch of the defendants in an information, againſt whom no evidence is given, may be witneſſes for the others. It hath alſo been adjudged, that where *A. B.* and *C.* are ſued in three ſeveral actions on the ſtatute, for a ſuppoſed perjury in their evidences concerning the ſame thing, they may be good witneſſes in ſuch actions for one another. 2 *Hawk. P. C.* 432.

It ſeems now agreed, that a conviction, and therefore *a fortiori* an attainder or judgment of treaſon, felony, piracy, præmunire, or perjury, or of forgery on 5 *Eliz.* and alſo a judgment in attaint for giving a falſe verdict, or in conſpiracy at the ſuit of the King, and alſo judgment for any crime whatſoever to ſtand in the pillory, or to be whipped or branded, being in a court which had a juriſdiction, are good cauſes of exception againſt a witneſs, while they continue in force. 2 *Hawk. P. C.* 432. See *Skin.* 578—9.

But no ſuch conviction or judgment can be made uſe of to this purpoſe, unleſs the record be actually produced in court; alſo it is a general rule, that a witneſs ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime, and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes whereof he never was convicted. 2 *Hawk. P. C.* 433.

It is alſo agreed, that outlawry in a perſonal action is not a good exception againſt a witneſs, as it is againſt a juror, and that a perſon convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby re-enabled to be a witneſs. 2 *Hawk. P. C.* 433.

Alſo it ſeems agreed, that the King's pardon of treaſon or felony after a conviction or attainder, reſtores the party to his credit; and it is holden by Chief Juſtice *Holt*, that the King's pardon will remove a man's diſability to be a witneſs in all caſes whatſoever, wherein it is only the conſequence of the conviction or judgment againſt him, and not an expreſs part of the judgment, as it is in conſpiracy at the ſuit of the King, and in perjury on the ſtatute. 2 *Hawk. P. C.* 433.

It hath been ruled, that a conviction of perjury doth not diſable a man from making an affidavit in relation to the irregularity of a judgment. 2 *Hawk. P. C.* 433.

There is a difference where the diſability is only the conſequence, and where it is part of the judgment itſelf. In the firſt caſe, the King may pardon it, but in the ſecond caſe, the King's pardon will not take away the diſability. Therefore, if a man be convict of perjury on the ſtatute, the King's pardon will not reſtore, for it is not a conſequence, but part of the judgment, *quod in poſterum non ſit receptus ac teſtis.* Co. Ent. 368. But a pardon by act of parliament, will reſtore him, even in that caſe; *quære* of a perjury at Common law, and if the law be the ſame, for there the diſability is only the conſequence, and no part of the judgment, otherwiſe if a jury be convict in attaint. *Raſt.* 86. *a.* cited 2 *Salk.* 689. *Paſch.* 7 *W.* 3. *B. R. King* v. *Croſby.*

A perſon convict of perjury upon the ſtatute, and pardoned, cannot be a witneſs, for the puniſhment is part of the judgment, appointed by the ſtatute; *contra* of a conviction at Common law, for there it is only a conſequential diſability; therefore in the latter caſe the King may pardon, and that reſtores him to his teſtimony; but in the former caſe, he muſt reverſe the judgment, or he cannot be reſtored. *Per cur'.* 2 *Salk.* 514. *Mich.* 9 *W.* 3. *B. R.* in caſe of the *King* v. *Grepe.*

A bare conviction of perjury would take away one's evidence; becauſe it is an infamous crime; not ſo of barratry, which was not of an infamous nature, without an infamous puniſhment were inflicted, as the pillory, *&c.* Arg. But the whole court held *contra*, and that it was not the nature of the puniſhment, but the nature of the crime, and the conviction thereof, that created the infamy; and *per Holt.* Ch. J. If one be convicted of perjury on the ſtatute, he cannot be reſtored to his credit by the King's pardon; for by the ſtatute, it is part of the judgment that he be infamous, and loſe his credit, but he may be reſtored to his credit by a ſtatute pardon; but in indictments of perjury, at Common law, the infamy is only the conſequence of the judgment; and therefore the King's pardon in ſuch caſes reſtores the party to his credit; held upon a trial at bar. 2 *Salk.* 690, 691. *pl.* 3. *Mich.* 12 *Will.* 3. *B. R.* in caſe of *The King* v. *Ford.*

Hawkins having a great perſonal eſtate, and being a priſoner in *Newgate* for opprobrious words of the Lord Mayor of *London*, and a little diſturbed in his mind, made his will; atteſted by ſeveral witneſſes; and upon hearing the cauſe in the Prerogative court, ſentence was given againſt the will; and upon an appeal to the delegates, two records were produced to avoid the teſtimony of two witneſſes to the will, by which it appeared, that one of them was convicted for a libel, and the other for ſinging a ballad againſt the government, and both of them adjudged to the pillory, but no proof that they ſtood in it; after theſe witneſſes were examined in the ſpiritual court, and before ſentence given, there came a general pardon, by which they were pardoned; and the queſtion now was, whether their depoſitions taken in the ſpiritual court ſhall be admitted as evidence. It was agreed, that if their teſtimony was not good at the time it was taken, the ſubſequent pardon would not make it good, and that the judgment of pillory makes the infamy, though never executed; but the chief queſtion was, whether the judgment for theſe crimes ſhould make them infamous, becauſe (as it was objected) it is not from the judgment, but from the nature of the crimes for which the offenders are convicted, that the infamy ariſes; as for ſuch crimes as import deceit and fraud, or cheats, *&c.* And if one is convicted of cheating, yet he may be a witneſs, if he has not judgment of pillory for it. And though pillory infers infamy at the Common law, yet it imports no ſuch thing either by the Canon or Civil law, unleſs the cauſe for which it is inflicted is infamous, and it is by theſe laws that this caſe (being concerning a will) is to be determined; therefore the matter for which theſe witneſſes were convicted, being not infamous, either by the Canon or Civil law, though they had judgment for the pillory, their depoſitions were admitted for evidence, and the ſentence in the Prerogative court reverſed, and the will ſentenced to be good. 3 *Lev.* 426. *Trin.* 7 *Will.* 3. before the delegates at *Serjeants Inn* in *Fleet-ſtreet*, *Chator* v. *Hawkins*, *&c.*

E V I

2. *Who may, and who may not, be witneſſes in reſpect of their being intereſted.*

It has been always held a ſacred and inviolable rule of evidence in all caſes whatſoever, not to admit the teſtimony of a witneſs, who is either to be a gainer or loſer by the event of the cauſe, whether ſuch advantage be direct or immediate, or conſequential only. *Co. Lit.* 6, 1 *Sid.* 237. And this rule has been ſo ſtrictly adhered to, that it is ſaid, that though a witneſs is examined an hour together; yet if in any part of his evidence it appears, that he was a party intereſted, the court will direct the jury, that he is no witneſs, nor his evidence to he regarded. 2 *Vern.* 463. But if a witneſs, who lies under an objection of this kind, be croſs-examined by the adverſe party, this makes him a good witneſs, and his credit muſt be left with the jury. 1 *Vern.* 254.

From this general rule ſeveral doubts and difficulties have aroſe, with regard to thoſe caſes where the party may be ſaid to have an intereſt, and from the extreme difficulty attending certain particular caſes, which ſeem in ſeveral inſtances to leave this matter very unſettled, and which can only be learned from the nature and circumſtances of the caſes themſelves. 2 *Hawk. P. C.* 433—4.

Therefore it has been held, that an heir apparent may be a witneſs concerning the title of the land, for the heirſhip of the heir is a mere contingency; but if there be tenant in tail, remainder in tail, he in remainder cannot be a witneſs concerning the title of thoſe lands; for he hath an eſtate, ſuch as it is. 1 *Salk.* 283.

It ſeems to be agreed, that one commoner cannot be a witneſs to prove the right of common in an action brought by another; for the right being intire, his ſwearing tends to intitle himſelf. *Skin.* 174.

So where the maſter of a ſhip brought an action againſt the cuſtom-houſe officers, for refuſing to clear his ſhip, and redeliver his cockets; and it was held, that the owners of the goods on board could not be admitted as witneſſes to prove him maſter, *&c.* for that they were all concerned in one bottom, and in one adventure. *Skin.* 174.

In an action againſt the maſter of a ſhip, for ſo negligently managing the ſhip, that it ran over the plaintiff's barge: it was held, that the pilot could not be a witneſs, becauſe he was anſwerable, if faulty in ſteering, to the maſter. 1 *Salk.* 287.

The maſter of a ſhip took a prize, and diſpoſed of 100 cheſts of lemons to *A.* for which he brought his action, and a mariner was allowed to be ſworn as a witneſs, though it appeared, that by the admirality law he was to have a ſhare of the prize; for the maſter is accountable to the mariners for their ſhare, which they ſhall recover from him, whether he recovers in this action or not. *Skin.* 403.

It ſeems agreed clearly, that a legatee in a will cannot be a witneſs to prove the will, becauſe he is preſumed to be partial in ſwearing for his own intereſt. *Hard.* 331. 2 *Salk.* 691.

But a legatee may be a witneſs againſt the will, for when he ſwears againſt the will, he ſwears againſt his own intereſt, and is therefore the ſtrongeſt witneſs. 2 *Salk* 691. —So freemen of a corporation were allowed witneſſes againſt the corporation. 2 *Show.* 146.

A legatee may be examined as a witneſs to prove a deed or other thing which has no relation to the will. *Style* 370.—So if the parſon ſues one of his pariſhioners for tithes, who pleads a *modus*, the other pariſhoners, though they cannot be witneſſes as to the cuſtom, yet they may well be witneſſes as to the value of the tithes.

But if the legacy be ſo inconſiderable, as that he cannot be preſumed to be biaſſed by it; as if it be 5 *s.* to a private perſon, or 5 *l.* to a nobleman, it is ſaid that he may be a witneſs for the will. 1 *Vern.* 254. See 2 *Vern.* 317. where it is ſaid, that the minuteneſs of the intereſt is no objection, and that therefore where the party is concerned in intereſt, though never ſo ſmall, he cannot be a witneſs, and ſee 1 *Vent.* 351.

Where a witneſs hath a legacy by the will, by a releaſe of the legacy, though at the trial, he becomes diſintereſted, and ſo is a good witneſs. 1 *Sid.* 315.——So a bankrupt, who has aſſigned and releaſed all his eſtate and right to the aſſignees, may be examined as a witneſs for them. 2 *Vern.* 637.

So if *J. S.* deviſes lands to *A.* and the will is ſigned, ſealed and publiſhed in the preſence of the ſaid *A.* and *B.* and *C.* who atteſted the ſame; yet this is no good will to paſs thoſe lands; for the ſtatute of frauds requires three or more competent witneſſes, which *A.* cannot be, being concerned in the intereſt as a deviſee of the lands, and therefore not a credible witneſs. *Carth.* 514.

It is ſaid by *Hale* Ch. Juſt. that he knew it to have been adjudged, that an executor in a cauſe concerning the teſtator's eſtate, if he hath not the ſurpluſage given to him by the will, may be a witneſs for the will. 1 *Mod.* 107. The children of an inteſtate cannot, by reaſon of their intereſt, under the ſtatute of diſtributions, be witneſſes in any thing relating to the inteſtate's eſtate. *Skin.* 223.

He, who borrows money upon an uſurious contract, cannot be a witneſs upon an information for the uſury (unleſs he hath paid the money) whether ſuch information be brought by himſelf or any other; for if in ſuch caſe a man might be a witneſs, he would in effect ſwear for himſelf, by proving a matter which may avoid his own contract. *Co. Lit.* 6. *b.* 2 *Rol. Abr.* 685. *Raym.* 191. 2 *Hawk. P. C.* 433.

Hence alſo it hath been held, that he, who by a ſlight has been impoſed upon to ſet his hand to a note for more money than he intended, is no good witneſs on an information for the cheat; becauſe a conviction may be a means to avoid the note, by being made uſe of by the party when ſued upon it, as a motive to influence the jury, which cannot well be prevented, though in law it be no evidence. 1 *Salk.* 283. But ſee 1 *Sid.* 431. 1 *Vent.* 49. 2 *Keb.* 572.

Alſo it ſeems generally agreed, that he, whoſe property may be prejudiced by a forgery, is no evidence to prove it on an indictment or information. 1 *Salk.* 283. And if it be a forgery within 5 *Eliz.* a farther reaſon is given in 2 *Hawk. P. C.* 433. why ſuch perſon cannot be an evidence, namely, becauſe he may have an action on the ſtatute.

So upon this reaſon it hath been adjudged, that he, againſt whom a verdict is given, cannot be a witneſs to prove perjury in the evidence. 2 *Rol. Abr.* 685.

Yet notwithſtanding theſe caſes, and the force of theſe reaſons, there are ſeveral inſtances, where, in caſes of neceſſity, (as on the ſtat. of robberies, a man ſwears for himſelf, becauſe there can be no other witneſs. 3 *Mod.* 114, 115.) a perſon to whoſe damage an indictment (as in an indictment for a battery, *&c.* 2 *Haw. P. C.* 433.) or information concludes, has been allowed and admitted an evidence, and his credit left to the jury. 1 *Sid.* 211, 237. 2 *Keb.* 384. 1 *Salk* 286.

If the warden of the *Fleet* ſuffers a voluntary eſcape, and an inquiſition, by virtue of a ſpecial commiſſion iſſuing out of Chancery, is taken thereof, which he traverſes, the perſon eſcaping, though he gave a bond to be a true priſoner, is a good witneſs to prove the eſcape; for this does not make the bond void, as a conviction on the ſtatute of uſury does; beſides, this is a matter privately tranſacted between the party and officer, of which there can be no other evidence. 2 *Salk.* 690.

Upon this rule, that an intereſted perſon cannot be a competent witneſs, it has been often doubted, how far a freeman of a corporation, the inhabitants of a hundred or pariſh, ſhould be admitted as witneſſes in matters which concern thoſe places; and here it is ſaid, that no general rule can be laid down, but that every caſe muſt ſtand upon its own particular circumſtances, *viz.* whether the intereſt be of that nature or ſo conſiderable as by preſumption to produce partiality in the witneſſes. See 1 *Sid.* 192. 2 *Lev.* 231. 2 *Jon.* 116. 2 *Lev.* 236.

Hence in an information in nature of a *Quo warranto*, for taking 1 *d. per* chaldron for all ſea-coals brought to *London*, where the defendants preſcribed for the duty, upon which iſſue was taken, and tried at the bar, it was held, that the freemen of *London* were good witneſſes to prove the preſcription, though the mayor, *&c.* have the whole profit of this toll, which is for the benefit of the corporation, of which all the citizens and freemen are members; for it cannot be preſumed, that for an advantage ſo ſmall and ſo remote, they would be partial, and perjure themſelves. 2 *Lev.* 231.

So in the caſe of the city of *London*, concerning the duty of water-bailage, where the mayor and commonalty brought an *indebitatus aſſumpſit* againſt *A. B.* for 5*l.* for ſo much due to them for divers tons of wine brought from beyond the ſeas to the port of *London*, at 4 *d. per* ton; and ſome freemen being produced as witneſſes, it was objected, that the commonalty of *London* comprehending all the freemen, this made them intereſted in the ſucceſs of the cauſe; but it was held by three judges againſt one, that ſo ſmall and remote an intereſt did not diſable them from being competent witneſſes, yet they were laid aſide by conſent. 1 *Vent* 351. In 1 *Vern.* 254. it is held generally, that freemen of a corporation cannot be witneſſes, and this caſe is there cited, as a caſe in which evidence was rejected, and ſo ſaid to be reſolved. 2 *Vern.* 317.

At a trial at bar concerning boundaries of lands; the parſon of the one pariſh, the land lying in two pariſhes, was refuſed, becauſe he might enlarge his own pariſh, and by conſequence the tithes; but one, who about ſeven years before had taken the profits, under the title of one of the parties, was received a witneſs, becauſe now he might plead the ſtatute of limitations. *Fareſt.* 63.

It is ſaid to have been ruled on evidence at a trial at bar, that if a remainder after an eſtate for life be limited to the miniſter and churchwardens of a certain pariſh, for the uſe and benefit of the poor of the pariſh, that any of the pariſhoners may be witneſſes to prove this deviſe. 2 *Sid.* 109.

In an action againſt the hundred, upon the ſtatute of *Winton*, an hundredor cannot be a witneſs. 1 *Vent.* 351. In 1 *Mod.* 73. *S. P.* though he be poor, and pays no taxes nor pariſh-duties; for when the money recovered of the hundred comes to be levied, he may then be worth ſomething; but ſervants, and thoſe who receive alms, may be witneſſes. 2 *Keb.* 73. *S. P.*

On an indictment againſt the county for not repairing a bridge, it has been doubted, whether an inhabitant of the county could be a witneſs. 1 *Vent.* 351.

But now by the ſtat. 1 *Ann. cap.* 18. *ſect.* 13. reciting, that whereas many private perſons, or bodies politick or corporate, are of right obliged to repair decayed bridges, and the highways thereunto adjoining; but becauſe the inhabitants of the county, riding or diviſion, in which ſuch decayed bridges, or highways lie, have not been allowed, upon informations or indictments brought againſt ſuch perſon or perſons, bodies politick or corporate, for not repairing ſuch decayed bridges and the highways thereunto adjoining, by the judges before whom ſuch information or indictment is to be tried, to be legal witneſſes; it is enacted, "That in all informations or indictments to be brought and tried in any of her Majeſty's courts of record at *Weſtminſter*, or at the aſſiſes or quarter ſeſſions of the peace, the evidence of the inhabitants, being credible perſons, or any of them of the town, corporation, county, riding or diviſion, in which ſuch decayed bridge or highway lies, ſhall be taken and admitted in all ſuch caſes in the courts aforeſaid."

And by the ſtat. 3 & 4 *W.* 3. *cap.* 11. "In all actions to be brought in the courts of *Weſtminſter*, or at the aſſizes, for money miſpent by churchwardens, the evidence of the pariſhioners, other than ſuch as receive alms, ſhall be taken and admitted."

Pariſhioner may be a witneſs on a proſecution for keeping a bawdy-houſe, *&c.* by ſtat. *Geo.* 2. *c.* 36. *ſect.* 9.

If there be a diſpute between two pariſhes, which of them ſhall repair a certain highway, the inhabitants of neither of the pariſhes can be witneſſes. 4 *Mod.* 48, 49.

On the rule, that an intereſted perſon cannot be a witneſs, the time and manner of a witneſſes's becoming intereſted ſeems alſo material; and therefore it has been held, that it is no good exception againſt a witneſs, that he hath a promiſe of a reward, on condition of giving his evidence, eſpecially unleſs ſuch reward be promiſed by the perſon for whoſe benefit he is to ſwear, and by way of contract for giving ſuch and ſuch particular evidence; alſo it hath been held, that a witneſs's laying a wager about the ſucceſs of the cauſe, is no objection againſt his being ſworn as a witneſs, for the party hath an intereſt in his teſtimony, which to deprive him of by his own act would be unreaſonable. *Skin.* 586.

Hence it hath been held, that on a *ſcire facias* againſt the King's patentee, a perſon, who has a promiſe of being made a deputy, may be a witneſs. 1 *Mod.* 21.

But it has been held, that if ſeveral perſons lay wagers at a horſe-race, *&c.* and an action is brought againſt one of them for the money loſt, that a better on the ſame ſide cannot be a witneſs for him who loſt; but if ſuch perſon acknowledges that he loſt the wager, and pays the money he may be a witneſs. 3 *Lev.* 152, 153.

It has been held in Chancery, that if a perſon is examined as a witneſs, who is no ways concerned in intereſt, and afterwards he becomes heir at law, and thereby intereſted in the matter, that notwithſtanding his depoſitions, when thus diſintereſted, may be read, even at a trial at law; and that it was like the caſe, where the only ſurviving witneſs to a deed becomes the party intereſted, or where a witneſs to a deed becomes blind; in which caſes his hand may be proved at law. 2. *Vern.* 699. *Abr. Eq.* 224. But at a trial at bar in *C. B.* on an iſſue directed out of Chancery, the judges refuſed to have ſuch depoſitions read, becauſe the witneſs was ſtill living. *Abr. Eq.* 224. But in 2 *Vern.* 699. ſuch depoſitions were read in Chancery, and there ſaid, that the reaſon of rejecting ſcuh evidence at law was, becauſe it was againſt the rule, *viz.* that where the witneſs is living, and might be produced at the trial, the depoſition of ſuch witneſſes cannot be read.

A witneſs was examined whilſt ſhe was intereſted, before the hearing; and the cauſe being heard and decreed to an account, ſhe was re-examined efter the hearing, before the maſter, on the account, having firſt releaſed her intereſt; and it was objected, that ſhe ought not to be read, for having been examined whilſt intereſted, and her depoſitions publiſhed, ſhe was thereby engaged, and almoſt under a neceſſity of ſtanding to what ſhe had before ſworn, and could not be free to retract or contradict it; but the Lord Keeper over-ruled the objection. 2 *Vern.* 472.

It is no good exception againſt a witneſs, that he has a maintenance from the King or other perſon, for every one may maintain his own witneſſes; nor is it any exception againſt a witneſs, that he has received a reward for having made a diſcovery of the crime to be proved againſt the priſoner, nor that he hath the promiſe of a pardon on condition of giving his evidence. 2 *Hawk. P. C.* 434.

3. *Of the number of witneſſes required by our laws; of compelling a witneſs to appear; of non-appearance, and of the manner of giving evidence.*

It is holden by my Lord Chief Juſtice *Holt*, that at Common law it was not neceſſary in any caſe, that a proof of matter of fact ſhould be made by more than one witneſs, and that the ſingle teſtimony of one credible witneſs was ſufficient to prove any fact, and that the authorities cited by my Lord *Coke* (*Co. Lit.* 6. *a.*) do not warrant the opinion founded on them. *Carth.* 144.

But the Civil law requires two witneſſes to prove a fact; and therefore it has been holden, that if the ſpiritual court, which proceeds according to the Civil and Canon law, refuſes, where a temporal matter is pleaded in bar of an Eccleſiaſtical demand, to admit the evidence of one witneſs, they ſhall be prohibited; as where an executor proves payment of a legacy by one witneſs,

&c. 1 *Show.* 158. 1 *Vent.* 291. *Carth.* 142. 4 *Mod.* 285. 2 *Salk.* 547.

Hence it hath been eſtabliſhed as a fundamental rule in the courts of equity, that a decree cannot be made on the teſtimony of one ſingle witneſs againſt the flat and poſitive denial of a fact by the defendant's anſwer; becauſe the oath of the party is ever looked upon in equity to be as good as the oath of a ſingle perſon. 1 *Show.* 158. 1 *Vent.* 291. *Carth.* 142. 4 *Mod.* 285. 2 *Salk.* 547.

Yet caſes may, and do often fall out, that the court may ground a decree upon the oath of a ſingle witneſs, attended with other circumſtances to corroborate it; as where the anſwer of the party appears to be notoriouſly falſified, by which means it comes to loſe that credit which otherwiſe it would and ought juſtly to have. See 2 *Vern.* 554. *Abr. Eq.* 229.

Alſo by ſeveral acts of parliament, a certain number of witneſſes is required as by the 29 *Car.* 2. *cap.* 3. "That all deviſes of lands ſhall be atteſted and ſubſcribed in the preſence of the teſtator, by three or four credible witneſſes, or elſe ſhall be void." And by the 7 *W.* 3. *c.* 3. it is enacted, "That no perſons ſhall be indicted, tried, or attainted for high treaſon, but upon the oaths of two lawful witneſſes, either both of them to the ſame overt-act, or one of them to one, and the other of them to another overt-act, of the ſame treaſon."

There muſt be one witneſs to one, and another witneſs to another overt-act of the ſame ſpecies of treaſon, or at leaſt one witneſs to an overt-act, and another to a material circumſtance to prove it. 2 *Hawk. P. C.* 428.

It is held to be maintenance for a perſon officiouſly to give evidence in a cauſe, without being called upon to do it; alſo if a man, who is not *ſubpœna'd*, happens to be in court during a trial, he ſhall not be forced to be ſworn againſt his will; but if he conſents, the want of a *ſubpœna* is not material; alſo in certain caſes, the court will in diſcretion wait till a *ſubpœna* can be procured. 28 *Hen.* 6. 6. *a.* 11 *Hen.* 6. 4. *b.* *Bro. Maintenance* 5, 51. 2 *Rol. Abr.* 118.

From hence it follows, that the parties have a right to proceſs to bring in their witneſſes, and to this purpoſe it is enacted by 5 *Eliz. cap.* 9. *ſect.* 12. "That if any perſon or perſons, upon whom any proceſs out of any of the courts of record within this realm, or *Wales*, ſhall be ſerved, to teſtify or depoſe concerning any cauſe or matter depending in any of the ſame courts, and having tendered unto him or them, according to his or their conntenance or calling, ſuch reaſonable ſums of money for his or their coſts and charges, as having regard to the diſtance of the place is neceſſary to be allowed in that behalf, do not appear according to the tenor of the ſaid proceſs, having not a lawful and reaſonable let or impediment to the contrary; that then the party in making default, to loſe and forfeit for every ſuch offence ten pounds and to yield ſuch further recompence to the party grieved, as by the diſcretion of the judge of the court out of which the ſaid proceſs ſhall be awarded, according to the loſs and hindrance that the party which procured the ſaid proceſs ſhall ſuſtain, by reaſon of the non-appearance of the ſaid witneſs or witneſſes; the ſaid ſeveral ſums to be recovered by the party ſo grieved againſt the offender or offenders, by action of debt, plaint, or information, in any of the Queen's Majeſty's courts of record."

Any perſon or perſons] A feme covert is within the ſtatute, and if ſhe be ſerved with a *ſubpœna*, and refuſes to appear, the action lies againſt the huſband and wife. *Cro. Eliz.* 122. *Havithlome* and *Harvey*, adjudged. 1 *Jones* 430. *S. C.* and *S. P.* adjudged.

Shall be ſerved] In debt upon this ſtatute, it was moved, after verdict in arreſt of judgment, that the declaration did not ſet forth that he left the writ with defendant; for the ſtatute is, if he be ſerved with proceſs; and it is not ſerving of proceſs when the writ is not left, although it be read unto the party, and a note left of the cauſe, place and day; *ſed non allocatur*; for *Jones*, *Berkely* and *Croke* held it to be a ſufficient ſerving of the proceſs within the intent of the ſtatute, and according to the uſual courſe and practice; for there may be two, three, or four names of witneſſes in a writ, (and ſo there be uſually) and he cannot leave the writ with every one of them, and it would be very chargeable unto the ſubject to have ſeveral writs for every witneſs. Second exception, becauſe he ſhews that he paid unto her 12 *d.* for her pains, and promiſed to pay unto her as much more, as ſhe would require, when ſhe came to be a witneſs at *Glouceſter*, which is not ſufficient according to the ſtatute; for the ſtatute is, that he ſhall pay ſufficient charges for her travel, according to the diſtance of the place, and the quality of the perſon ſo to be paid; and the witneſs is not bound to accept his promiſe for the reſidue; *ſed non allocatur*; for when it is alledged, that he paid unto her 12 *d.* and promiſed to pay the reſidue when ſhe came to *Glouceſter*, and ſhe accepted thereof, ſhe is then bound to come, for ſhe hath accepted of his promiſe for the reſidue, otherwiſe ſhe might have refuſed, and told him ſhe would not accept of his promiſe. Third exception, becauſe the plaintiff doth not ſhew that he is damaged by her non-appearance, *viz.* that the verdict paſſed againſt him, or that he was inforced to be non-ſuited, or any other grievance; for ſo is the ſtatute, that the party grieved ſhall have his part of the 10 *l.* and his farther damages taxed by the juſtices, before whom, *&c.* But *Grimſton*, for the plaintiff anſwered, that the action being brought only for the 10 *l.* and not for further damages, it is well enough; and the 10 *l.* is due for her non-appearance, to the King and the party. But all the juſtices held, that the declaration was ill, for this cauſe; for there ought to be a party grieved by the non-appearance, otherwiſe there is no cauſe of forfeiture. And ſo are the expreſs words and ſcope of the ſtatute; wherefore it was adjudged for the defendant, *abſente Brampſton*. *Cro. Car.* 540. *pl.* 4. *Paſch.* 15 *Car. B. R. Goodwin* v. *Anne Weſt.*——*Jo.* 430. *pl.* 3. *S. C.* adjudged for the defendant.——*Mar.* 18. *pl.* 43. *S. C.* adjudged the plaintiff *nil capiat.*

A delivery of a ticket, containing the ſubſtance of the writ, is a ſufficient ſervice within the act. 5 *Mod.* 355.

Having tendered to him or them] If a feme covert be the perſon to appear as a witneſs, the tender muſt be to her, and not to her huſband. *Cro. Eliz.* 122. 1 *Jon.* 430. *S. P.*

Such reaſonable ſums of money] If the party gives the witneſs a ſhilling, which he accepts, and promiſes that on his appearance he will pay him all further reaſonable charges; this is ſufficient. *Cro. Car.* 522, 540. *March* 18.

Recompence to the party grieved] In *Cro. Eliz.* 130. and the *S. C.* 1 *Leon.* 122, it is adjudged, that the plaintiff need not ſet forth any ſpecial damage which he had ſuſtained by the negligence of the defendant in not apppearing to give evidence, where the action is brought for 10 *l.* only, and not for any more damages; but the contrary has ſince been reſolved in *Cro. Car.* 522, 540. *Goodwin* and *Weſt.* 1 *Jon.* 430. and 5 *Mod.* 355. *Maddiſon* and *Shore*, which was affirmed on a writ of error; for there muſt be a party grieved, otherwiſe there is no cauſe of forfeiture, and a particular damage muſt be ſet forth, *&c.*

Plaintiff brought an action of debt upon the ſtatute 5 *Eliz. cap.* 9. for 10 *l.* and declared, that the defendant was warned by *ſubpœna* to appear ſuch a day at one o'clock in the afternoon to be a witneſs, *&c.* and upon *nil debet* pleaded the *ſubpœna* given in evidence was generally to appear at this day, and not at ſuch an hour; and though a *ſubpœna* to appear at ſuch a day, be of that effect that the party ought to attend the whole day, and ſo, as it was objected, includes that he ought to appear at this hour, yet in reſpect of the variance it cannot be ſaid to be the *ſubpœna* on which the plaintiff did declare, and therefore he was non-ſuited; and in this caſe no regard was had to the ticket left with the defendant, which was according to the declaration. *Tr. per Pais*, 7th edit. cites 24 *Car.* 1. *Radford*'s caſe.

In criminal caſes, if the witneſſes come not according to the time mentioned in the proceſs with which they were ſerved, an attachment lies againſt them. *Sty.* 579.

If a perſon, who can give evidence againſt one who is accuſed of felony, refuſes to be bound to give evidence, either at the general gaol-delivery, *&c.* the juſtice of peace may either commit to priſon ſuch perſon ſo refuſing, or may bind him to his good behaviour, and to appear at the next gaol-delivery or quarter ſeſſions. *Dalt. Juſt.* 111.

Lord *Preſton* was committed by the court of quarter ſeſſions for refuſing to be ſworn to give evidence to the grand jury on an indictment of high treaſon; he was brought by *habeas corpus* in *B. R.* and *Holt* Ch. Juſt. ſaid, it was a great contempt, and that had he been there, he would have fined him, and committed him till he paid the fine; but being otherwiſe, he was bailed. 1 *Salk.* 178.

It ſeems that by the common law, the defendant, in capital caſes, had no right to any proceſs againſt his witneſſes, without a ſpecial order of the court; but now by the 7 *W.* 3. *cap.* 3. it is enacted, That all perſons accuſed and indicted for any high treaſon, whereby any corruption of blood may enſue, ſhall have the like proceſs of the court, where they ſhall be tried, to compel their witneſſes to appear for them at any trial or trials, as is uſually granted to compel witneſſes to appear againſt them; and now ſince the ſtatute 1 *Ann. cap.* 9. which ordains, that the witneſſes for the priſoner ſhall be ſworn, proceſs may be taken out againſt them of courſe in any caſe whatſoever. 2 *Hawk. P. C.* 435.

On a commiſſion iſſuing out of Chancery for the examination of witneſſes, there muſt be a *ſubpœna ad teſtificandum* taken out, directed to the witneſſes, and a ſummons from two of the commiſſioners of the time and place where they are to be examined; and, if the witneſs ſo ſummoned and ſerved does not appear, the court will grant an attachment againſt him, unleſs he comes up at his own expence to be examined before the examiner; or if he be ſummoned by the commiſſioners without a *ſubpœna ad teſtificandum*, and do not appear, the court will order ſuch witneſs to attend at his own expence, and to be examined; and if he diſobey ſuch order, then an attachment ſhall go againſt him. 2 *Bac. Abr.* 295.

The examination of witneſſes *viva voce*, in open court, is juſtly eſteemed one of the greateſt excellences of our law, not only from the awe and reverence which the ſolemnity of the manner is ſuppoſed to produce in the witneſs, and the regard which from thence he muſt have for truth; but alſo from the benefit of croſs-examination; as alſo the air and manner of giving evidence often carry ſuch convictions with them, as will induce the court and jury to believe or reject what the witneſs has ſworn. *Hob.* 325.

Hence it hath always been held as a ſettled rule, that in caſes of life, no evidence is to be given againſt a priſoner, but in his preſence. 2 *Hawk. P. C.* 428.

Alſo in a civil caſe, where the jury withdrew to confer about their verdict, one of the witneſſes, that was before ſworn on the part of the defendant, was called by the jurors, and he recited again his evidence to them, and they gave their verdict for the defendant; and complaint being made to the judge of aſſiſe of this miſdemeanor, he examined the jury, who confeſſed all the matter, and that the evidence was the ſame in effect that was given before, *& non alia nec diverſa*; and this matter being returned upon the *poſtea*, the opinion of the court was, that the verdict was not good, and a *venire facias de novo* was awarded. *Cro. Eliz.* 189.

But it is ſaid, that a witneſs, who by reaſon of ſickneſs, extreme age, or other cauſe, cannot come to a trial, may, by order of court, be examined in the country before any judge of the court where the cauſe depends; and the teſtimony ſo taken ſhall be allowed to be given in evidence at the trial. *Style Pract. Reg.* 671, 672. In *Comb.* 63. it is ſaid, that witneſſes may be examined before a judge, by leave of the court, as well in criminal cauſes as in civil, where a ſufficient reaſon appears to the court, as going to ſea, *&c.* and then the other ſide may croſs examine them. But ſee 1 *Keb.* 36. 249, 787. 2 *Keb.* 13.

But if a witneſs going to ſea be by rule of court examined upon interrogatories before a judge, and the trial come on before he is gone, his depoſitions ſhall not be read, but he muſt appear, for the rule was made on ſuppoſal of his abſence. 2 *Salk.* 691.

Every perſon produced as a witneſs muſt, before he gives his evidence, be ſworn to depoſe the truth, the whole truth, and nothing but the truth; this is the law required in all caſes, except in indictments for capital offences, where by immemorial practice the witneſſes againſt the King were not ſuffered to be ſworn. *Cro. Car.* 292. 2 *Bulſt.* 147. But now by ſtat. 1 *Ann. cap.* 9. it is enacted, "That every perſon who ſhall be produced, or appear as a witneſs on the behalf of the priſoner, before he or ſhe be admitted to depoſe, or give any manner of evidence, ſhall firſt take an oath to depoſe the truth, the whole truth, and nothing but the truth, in ſuch a manner as the witneſſes for the Queen are by law obliged to do; and if convicted of any wilful perjury in ſuch evidence, ſhall ſuffer all the puniſhments, penalties, forfeitures and diſabilities, which by any of the laws and ſtatutes of this realm are or may be inflicted upon perſons convicted of wilful perjury."

By the practice of the courts, if one be produced and ſworn for the plaintiff or defendant, being once ſworn, the other may examine him to any thing whatſoever, though it be the ſolicitor of the party who produces him; alſo either party may, on application to the court, have the witneſs examined apart, and out of the hearing of the others. 2 *Bac. Abr.* 296.

It is a general rule, that a witneſs ſhall not be aſked any queſtion, the anſwering to which might oblige him to accuſe himſelf of a crime, and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes, againſt which he cannot be preſumed to be prepared to defend himſelf. 2 *Hawk. P. C.* 433. *Fareſt.* 119.

If a witneſs, when under examination, through ſurprize or inadvertency, gives a wrong anſwer to a queſtion that is aſked him, he is always allowed to recollect himſelf, and that, which he affirms on due deliberation, is to be taken for the truth; alſo if he miſtakes the true ſtate of the queſtion, in ſuch a manner as ſhews, that it is rather owing to his weakneſs than perverſeneſs, he cannot be puniſhed for it as guilty of perjury. 5 *Mod.* 350.

If a perſon is produced as a witneſs for the King, upon a trial in an information, and he is guilty of perjury, he cannot be puniſhed for it on the 5 *Eliz.* by way of indictment, which is the ſuit of the King, and ſuch a one diſcharged accordingly. *Cro. Jac.* 120.

If a witneſs in giving evidence reflects on the Character of another, or makes uſe of ſuch words as are actionable; yet this being in a judicial way, he cannot be puniſhed for it, nor will an action lie for ſuch words. 1 *Rol. Rep.* 61.

In examining a witneſs, counſel cannot queſt on his whole life, as that he is a whore-maſter, *&c.* but if he has done ſuch a notorious fact, which is a juſt exception againſt him, they then may except againſt him. *March* 83, *pl.* 136. *Paſch.* 17 *Car. Anon'.*

An evidence given to a jury may be anſwered by the counſel, either by confeſſing and avoiding it, or elſe by encountering the evidence given, with giving ſtronger evidence, and of greater credit on the other ſide. *Mich.* 22 *Car. B. R.* which is, upon the matter, a denial of all the evidence given on the other ſide to be true, by proving the contrary. *L. P. R.* 548.

The defendant's counſel, ought to conclude by way of anſwer to the evidence that was given to the jury by the plaintiff's counſel. *Mich.* 24 *Car. B. R.* For if the plaintiff's counſel doth begin the evidence, it is reaſon, that the defendant ſhould ſpeak in anſwer to that evidence, becauſe he is upon the defenſive part, and is to give anſwer to all that is ſaid againſt him, in matter of evidence; but the plaintiff's counſel after this, is to ſum up his evidence to the jury, which is no more than to put them in mind how he hath proved his cauſe. *L. P. R.* 551.

Upon

Upon a trial at the bar, the counſel of that party who doth begin to maintain the iſſue that is to be tried, whether it be the counſel of the plaintiff, or the counſel of the defendant, ought to conclude the evidence. *Paſch.* 1650. 1 *Mail B. S.* that is, only ſum up his evidence given; but if he give new evidence, the other party hath liberty to anſwer it, or encounter it with another evidence. *L. P. R.* 551.

Holt. would not ſuffer the plaintiff to diſcredit a witneſs of his own calling, he ſwearing againſt him. 12 *Mod.* 375. *Paſch.* 12 *W.* 3. *Adams* v. *Arnold.*

4. *What ſhall be admitted evidence.*

The word *evidence*, as hath been obſerved, comprehends not only the teſtimony of witneſſes, but alſo matters of record, as letters patents, fines, recoveries, inrolments, and the like; as alſo writings under ſeal, as charters and deeds, and other writings without ſeal, as court rolls, accounts, *&c.* and theſe are ſaid to prove themſelves, and to admit of no averment againſt the truth of them. *Co. Lit.* 283. *a.*

A jury may and muſt take knowledge of any particular record, either patent, ſtatute or judgment, if it be given in evidence to them; for ſuch records, *&c.* are their *allegata* verbally alledged and produced, if it make to the iſſue. *Hob.* 227. and ſee 1 *Leon.* 206. 1 *And.* 37. *Plow.* 92, 411. *Dyer* 118. 9 *Co.* 12. *Co. Lit.* 227.

Acts of courts. The act or order of eccleſiaſtical court for granting letters of adminiſtration proved by the book, is good evidence. *Lev.* 25. *Paſch.* 13 *Car.* 2. *B. R. Garret* v. *Liſter.*

Copy of the inrollment of the grant of office of clerk of the papers in *B. R.* allowed to be good evidence, *Vent.* 296, *Trin.* 28 *Car.* 2. *B. R. Woodward* v. *Aſton.*

Two commoners in behalf of themſelves, and all the commoners within *H.* preferred a bill in the dutchy court againſt the owner of the land, in which they claimed common, *&c.* and upon hearing the cauſe, the common was decreed for them. The dutchy court was put down, and the now defendant having purchaſed land within *H.* the plaintiff, who was a commoner when the decree was made, but not a plaintiff in that cauſe, exhibited his bill againſt the now defendant to have the uſe of the depoſitions taken in the cauſe in the dutchy court at a trial to be had at the aſſizes, and the defendant demurred to the bill, and allowed, becauſe neither the plaintiff nor the defendant were parties to the former cauſe, tho' the ſuit there was the ſame cauſe upon which the action of law was now brought, and of general concernment; and it ſeemed hard, conſidering that the defendant here claimed under the defendant there. *Hardr.* 22. *Mich.* 1655. *Scacc'. Stanly* v. *Pegg.*

Act of the commiſſioners for ſtating the debts of the army, concluſive evidence. *Stran.* 481.

Acts of parliament. In an action the defendant pleaded the compoſition act; the plaintiff replied *nul tiel record*, and upon the day given to the defendant to bring in the record, he produced the printed ſtatute; *per Holt* Ch. J. An act printed by the King's printer is always allowed good evidence of the act to a jury, but was never yet allowed to be a record without an exemplification under the great ſeal, and it muſt be pleaded as exemplified. 2 *Salk.* 566. *Trin. W.* 3. *B. R. Anon'.*

A private act printed among the public acts, hath been allowod in evidence; *per King Chanc. Trin. Vac.* 1727.

Even a private act of parliament in print that concerns a whole county, as the act of *Bedford-Levels*, may be given in evidence without comparing it with the record; *per Holt* Ch. J. 12 *Mod.* 216. *Mich.* 10 *W.* 3. at *Guildhall*, in the caſe of *Dupais* v. *Shepherd.*

A copy of an act of parliament is no evidence, unleſs the act had been before allowed of, and ſo made a record of this court, for otherwiſe nothing ſhall be allowed of as a ſufficient evidence of the act, but the exemplification of it under the great ſeal, and the reaſon is, becauſe the court is a party, which cannot pray oyer as the party may; ſo that the court would be in a worſe condition than a common perſon, if they were to receive for evidence a copy offered them. 10 *Mod.* 126. in this caſe of the Univerſity of *Cambridge*, cites 35 *H.* 6. 14. and this was allowed to be ſo *per curiam.*

Ancient uſages for three or four hundred years is good evidence of a law. If an act of parliament be loſt or imbezilled, the law remains ſtill. 12 *Mod.* 181. *Hill.* 9 *W.* 3. *King* v. *Hewſon.*

A printed copy of a private act of parliament, or ordinance obſolete, was diſallowed by all the court to be given in evidence, unleſs it had been examined by the original. *Keb.* 2 *pl.* 4. *Paſch.* 13 *Car.* 2. *B. R. Anon'.*

Tho' acts of parliament and the inrollments of them are deſtroyed by fire, or rebellion, or by the injury of time, yet if by any circumſtances and proofs they may be manifeſted, they have the force of acts of parliament. *Jenk.* 280. *pl.* 5.

Act of parliament produced in evidence for ſelling delinquents eſtates was ſworn to be examined by the parliament-roll, and that it was a true copy, before it was admitted to be read in evidence. *Sty.* 462. *Mich.* 1655. in the caſe of *Thurle* v. *Madiſon.*

The copy of a private act of parliament may be given in evidence; and if upon collateral iſſue it is to be proved that ſuch a one was juſtice of the peace or baronet, *&c.* common reputation is ſufficient proof without ſhewing the commiſſion or letters patent of the creation. *L. E.* 89. *pl.* 12. cites *Tr. per Pais* 226. 3 *Jac.* 2.

A printed copy of an act of parliament is not to be given in evidence, if not examined by the rolls, and ſworn to be a true copy. *L. E.* 89. *pl.* 13. cites *Tr. per Pais*, 232. 3 *Jac.* 2.

A private act that concerned *Rocheſter* bridge, tho' printed by *Raſtal*, was not allowed in evidence, not being examined by the record; otherwiſe of general ſtatutes; there the printed ſtatute-book is good evidence. *L. E.* 89. *pl.* 14. cites *Tr. per Pais* 232.

Admiſſion. Finding by ſpecial verdict, or admiſſion on former pleading is good evidence, unleſs the contrary appear. 1 *Keble* 720. *pl.* 50. *Paſch.* 16 *Car.* 2. *B. R.* in the caſe of *Lee* v. *Boothby.*

At *Guildhall* in an action for work done, *&c.* the plaintiff gave in evidence to charge the defendant a copy of a bill delivered to the defendant, and copied by the order of the defendant, and divers exceptions were taken by the defendant to the bill, *ſcil.* Firſt to the quantity of the work done, and the others were marks againſt divers parcels; *ſcil. O.* and *N.* intending by it that theſe parcels were wrought for others, and not for the defendant, and other exceptions there were to the price; and he ordered the ſervant to indorſe upon the backſide the exceptions to the quantity and price, but to omit the marks *O.* and *N.* and it was ruled by *Holt* Ch. J. upon evidence, firſt, that this copy of a bill delivered was evidence, as a copy of a bill and not a copy of a copy, and the bill is an original as well as the book. 2dly, That the acceptance of a bill delivered without objection but to ſome particulars, is an admittance of the reſidue to be true. 3dly, That the ordering a copy of the bill indorſed *ut ſupra*, omitting the marks *O.* and *N.* and this copy with the exceptions being ordered to be delivered to the plaintiff, it is a waving of the exceptions ſignified by thoſe marks. 4thly, Tho' it was objected that this evidence is a confeſſion, and therefore it ought to be taken together; yet *per Holt* Ch. J. They are not part of a confeſſion (which ought to be of the ſame thing), but a cavil or objection as to the price or quantity, *&c.* *Skin.* 672. *pl.* 11. *Mich.* 8 *W.* 3. *B. R. Worral* v. *Holder.*

In debt upon a bond, defendant pleaded that he became a bankrupt, that a commiſſion was taken, *&c.* and that bond was given to induce plaintiff to ſign the certificate, and ſo void, *&c.* iſſue on this; and at the trial *coram Powys* at *Guildhall in abſentia* Ch. J. defendant was held to prove the whole matter, and he being not able to do it, there was a verdict *pro quer'.* But on a motion for a new trial, this verdict was ordered to ſtand as a ſecurity, and a new trial was granted; becauſe what they were called upon to prove was admitted by the iſſue, which was only whether the bond was given *ea intentione* to induce the

plaintiff

plaintiff to ſign the certificate. *Mich.* 6 *Geo. B. R. Chace* v. *Lewis.*

Admittance. An admittance of a freeman written two months after the time, and not ſigned, *&c.* not admitted in evidence. *Ld. Raym.* 1446.

Affidavit. A man being about to convey lands to a purchaſer, made oath before a Maſter in Chancery, that there was no incumbrance on the eſtate; in an ejectment brought, this affidavit was produced in court, but not ſuffered to be read but as a note or letter, unleſs the plaintiff would produce a witneſs to ſwear that he was preſent when the oath was taken before the Maſter. 3 *Mod.* 36. *Mich.* 35 *Car.* 2. *B. R. Smith* v. *Goodier.*

The plaintiff or the defendant may make an affidavit in their own cauſe depending here, and it may be filed, but it may not be admitted in evidence in the trial of the cauſe betwixt them. *L. P. R.* 552. cites *Mich.* 1656.

Tho' an affidavit cannot be read in evidence, yet if the party who made the affidavit be ſworn, and gives evidence, his own affidavit may be read againſt him; and this is allowable to ſhew in what he contradicts himſelf. *Skin.* 403. *pl.* 39. *Mich.* 5 *W. & Mar. in B. R. The King and Queen* v. *Rachel Taylor.*

On queſtion on a trial, whether the property of a parcel of wine was in the defendant, in order to aſcertain whether alien or *Britiſh* cuſtom was due for them, a paper under his hand, being an affidavit he had made at the cuſtom-houſe, was given in evidence, he ſwearing in it that the wine was his. *Paſch.* 4. *Geo. B. R.*

Affidavit of the deceaſed huſband read in proof of the marriage. *Stran.* 35.

Affidavits ſworn before a judge in *Ireland* read in *England. Stran.* 545.

Almanack. In error of a judgment given in *Lynn*, the error aſſigned was, that the judgment was given at a court held there on the 16th of *Feb.* 26 *Eliz.* and that this day was *Sunday*, and it was ſo found by examination of the almanacks of that year; upon which it was ruled, that this examination was a ſufficient trial, and that a trial *per pais* was not neceſſary, altho' it were an error in fact; and ſo the judgment was reverſed. *Cro. E.* 227. *pl.* 12. *Paſch.* 33 *Eliz. B. R. Page* v. *Faucet.*

Upon evidence in a trial at bar the queſtion was, if one was of full age at the time of his will made by him; and upon evidence it appears that he was born the 14th of *Feb.* 1608. and he made his will when he was of the age of 21 years within two days; and to prove his nonage, the defendant produced an almanack in which his father had writ the nativity of the deviſor, and it was allowed to be ſtrong evidence. *Raym.* 84. *Mich.* 15 *Car.* 2. *B. R. Herbert* v. *Tuckal.*

Tho' in moveable terms the court is not bound to take notice on what day of the month the returns are, yet when it is alledged of record what day of the month the return is, the court may take notice of it, and the day of return ſhall be tried by almanacks, and not *per pais*, and cites 3 *Cro.* 227. *quod fuit conceſſum per curiam. Sid.* 300. *Mich.* 19 *Car.* 2. in the caſe of *Courtny* v. *Philips.*

The almanack is part of the law of *England*, of which the court muſt take judicial notice; *per cur'.* 11 *Mod.* 41. *Mich.* 2. *Ann. B. R.* in the caſe of *The Queen* v. *Dyer.*

Ancient deeds. An ancient deed is good evidence, without proving or ſeal on it. 1 *Keb.* 877. *pl.* 27. *Paſch.* 17 *Car.* 2. *B. R. Wright* v. *Sherrard.*

A deed found in the archives of the chapter of *Hereford*, was read to prove an endowment of a vicarage, being but concurrent evidence, tho' it appeared not to have been ever ſealed or delivered. 2 *Keb.* 126. *pl.* 79. *Mich.* 18 *Car.* 2. *B. R. Smith* v. *Rawlins.*

An ancient writing, that is proved to have been found amongſt deeds and evidences of land, may be given in evidence, although the executing of it cannot be proved; for it is hard to prove ancient things, and the finding them in ſuch a place is a preſumption they were honeſtly and fairly obtained, and preſerved for uſe, and are free from ſuſpicion of diſhoneſty. *Tri. per Pais* 220. cites 24 *Car. B. R.*

An original leaſe could not be produced, being an ancient leaſe, but the grandſon of the leſſor produced a counterpart found among the evidences of his grandfather; this was allowed for evidence, tho' there was no ſubſcribing witneſſes to it; for juſtice *Windham* ſaid, he had ſeen many deeds in Queen *Elizabeth*'s time without any. *Lev.* 25. *Paſch.* 13 *Car.* 2. *B. R. Garret* v. *Liſter.*

Where a deed before time of memory is ſupported by uſage, after ſuch deed is pleadable and good, but that the books which ſay deeds before time of memory ſhall not be pleaded, are to be intended deeds of ſuch liberties and franchiſes as cannot be claimed or ſupported by uſage *in pais*, as if one claim goods of *felo de ſe* by deed before time of memory, he cannot ſhew his deed, and ſay *virtute cujus, &c.* but muſt ſhew an ancient confirmation, or a claim and allowance in eyre; ſo in this caſe, if they had pleaded the deed, and relied upon it *virtute cujus, &c.* it had been naught; but when they ſhew the deed, and likewiſe a uſage to ſupport it, it is ſufficient. *Skin.* 239. *pl.* 4. *Mich.* 1 *Jac.* 2. *B. R. James* v. *Trollop.*

An old deed is good evidence without any witneſs to ſwear it was executed; *per Holt.* Ch. J. 3 *Salk.* 154. *pl.* 6. *Hill.* 8 *W.* 3. *B. R. Lynch* v. *Clerke.*

Whether the indorſements on a bond by the obligee, after his death and after thirty-five years entring into it, ſhall be given in evidence at law to take off an objection to the antiquity of the bond. 8 *Mod.* 278. *Trin.* 10 *Geo. Serle* and *Barrington.*

Ancient tables of duties. In the caſe of water-baillage in the city of *London*, evidence of conſtant payment, and their ancient tables of duties imported, was judged ſufficient, though it was urged there could be no preſcription for it; and judgment accordingly for defendant. 2 *Show.* 48. *pl.* 33. *Paſch.* 31 *Car.* 2. *B. R. King* v. *Carpenter.*

Apprentices indentures. By ſtat. *Ann. cap.* 9. *ſ.* 43. No indenture of apprenticeſhip to be admitted in evidence, unleſs oath made, that duties are paid.

It was ruled by *Holt* Ch. J. at ſummer aſſizes at *Ryegate*, 10 *W.* 3. that the ſervice of an appreticeſhip ſeven years beyond the ſea, though the defendant was not bound, excuſes from the 5 *Eliz. cap.* 4. *Ld. Raym. Rep.* 738. *Frith* v. *Torin.*

Appropriations. A man had got a preſentation to the parſonage of *Goſnal* in *Lincolnſhire*, and brought a *quare impedit*, and the defendant pleaded an appropriation; there was no licence of appropriation produced, but becauſe it was ancient, the court would intend it. Said *per Hale* Ch. J. in 1 *Mod.* 117. *pl.* 17. *Paſch.* 26 *Car.* 2. *Green* v. *Proude.*

Arreſt. Where the iſſue was upon an arreſt, the plaintiff demurred upon the evidence, becauſe the defendant who pleaded it had not produced the proceſs itſelf, becauſe matters of record cannot be tried but by themſelves. *Sid.* 105. *pl.* 13. *Hill.* 14 & 15 *Car.* 2. *B. R. Bryan* v. *Fitzharris.*——It was agreed *per cur.* that the writ ought to have been produced in evidence; but by the demurrer the arreſt (being matter of fact) is confeſſed, tho' it be ſuch matter of fact as is to be proved by matter of record, and the jury might know of their own knowledge that there was a writ, and the judgment was affirmed. *Lev.* 87. *Fitzharris* v. *Bojen, S. C.*

Aſſault. In treſpaſs of aſſault, battery, and wounding, the defendant pleaded the plaintiff began firſt, and the ſtroke he received, whereby he loſt his eye, was on his own aſſault, and in defence of the defendant; and on trial at the bar now by evidence it appeared the plaintiff ſtruck the defendant, and ſaid, *Were it not aſſize-time he would tell him more of his mind*, which was ſaid, bending his fiſt, and with his hand on his ſword; yet *per cur.* This is no aſſault, as it would be without that declaration; but it was farther ſworn, that the plaintiff with his elbow punch'd the defendant, which if done in earneſt diſcourſe, and not with intention of violence, is no aſſault, nor then is it a juſtification of battery after a retreat, as *Phineas Andrew*'s caſe; and the jury not believing the defendant, found for the plaintiff and gave 500 *l.* damages. 2 *Keb.* 545. *pl.* 13. *Mich.* 21 *Car. B. R. Turbervile* v. *Savadge.*

E V I

In an action of battery, which was laid in the declaration to be the 10th day of *February* 1621. defendant pleaded *ſon aſſault demeſne*, *&c.* and at iſſue upon that, and defendant proved an aſſault by the plaintiff, but another day; and ruled that this doth not prove this iſſue for the defendant, becauſe the juſtification ſhall refer to the time laid in the declaration, if the defendant do not difference the times in his plea; and in ſuch caſe, when the defendant intends to ſhew the aſſault was at another day and place, he ſhall ſhew that ſuch a day before that in the declaration, as here the 8th of *February*, the plaintiff did him aſſault, and would have beaten him, and traverſe the day in the declaration. *Clayt.* 110. *pl.* 187. *March* 24 *Car. Turner* ſerjeant, judge of aſſiſe, *Hardcaſtle* v. *Lockwood.*

But ſee in the caſe of an officer, who is not tied up to ſpecial pleading, it ſeems he, upon Not guilty, may vary in his evidence to juſtify from the time in the declaration, *&c. quod nota.* And the prejudice may come to the plaintiff's being unprovided perhaps in ſuch caſe to a reply; whereas when the matter is by pleading brought to a ſpecial iſſue, he knows his work, *&c.* *Clayt.* 110. 24 *Car. Hardcaſtle* v. *Lockwood.*

Attorney's bill. Attorney's bill, though not ſigned, is evidence for his executors, as well as for himſelf, and perhaps ſeveral of the things could not in their nature be proved by record; *per Holt. Comb.* 348. *Mich.* 7 *W.* 3. *B. R. Blacheler* v. *Crofts.*

Belief. It is no ſatisfaction for a witneſs to ſay, that he thinks or perſuades imſelf, and this for two reaſons, by *Coke*; *Firſt*, Becauſe the judge is to give abſolute ſentence, and ought to have more ground than thinking. *Secondly*, That judges, as judges, are always to give judgment *ſecundum allegata & probata*, notwithſtanding that private perſons think otherwiſe. *Dy.* 53. *b. Marg. pl.* 15. *Mich.* 19 *Jac.* in the Star-chamber, *Adams* v. *Canon.*

Beyond ſea. Evidence of things done there. A ſhip was *Dutch* built, and after made an *Engliſh* ſhip, the maſter was *Dutch*, ſome of the ſeamen *Engliſh*, and two *Dutch*; there being a war betwixt the *French* and *Holland*, the *French* ſeize the ſhip as a *Dutch* ſhip, and condemn her as a *Dutch* ſhip in the court of Admiralty in *France*; ſhe is there ſold, and after coming into *England*, the firſt owner ſeizes her, and the other brings trover, and a ſpecial verdict was found; but the court would not ſuffer it to be argued, but ordered judgment to be entred for the plaintiff; for they ſaid, that ſentences in the courts of the Admiralty ought to bind generally according to *jus gentium*; and that if we did not obſerve the ſentences given abroad, they would not obſerve ours, which would be a general inconvenience; and if the merchant in this caſe had received wrong, he ought to apply to the Admiralty and Council; this is a matter of government; and that the King, if he ſaw cauſe, would ſend an Ambaſſador Lieger into *France*, who would take care that right ſhould be done; and that if right be not done, then the King would grant letters of marque and repriſal; and in this caſe they remembered *Cottinton*'s caſe, *Skin.* 59. *Mich.* 34 *Car.* 2. *B. R. Hughes* v. *Cornelius.*

Leſſor brought debt for rent againſt leſſee upon a demiſe at *London* of lands in *Jamaica*, which was held to be well, being founded on the privity of the contract, which is tranſitory; but if a foreign iſſue, which was local, ſhould happen, it may be tried where the action is laid, and there may be a ſuggeſtion on the roll for that purpoſe, and ſuch a place in ſuch a county is next adjacent, and there it may be tried by a jury from that place according to the laws of that country, and upon *nil debet* pleaded you may give the laws of that country in evidence. 2 *Salk.* 651. *pl.* 31. *Trin.* 3 *Ann. B. R. Way* v. *Yalley.*

In trover and converſion, the cuſtom of *India* was found concerning the buying and ſelling of ſlaves, and it was held that the action would lie well enough. *Freem. Rep.* 452. *pl.* 616. *Trin.* 1677. *B. R. Anon'.*

Exemplification of a ſentence given in a foreign country, ſhall be read as evidence here to prove that ſuch ſentence was given there, without any farther proof. 9 *Mod.* 66. *Mich.* 13 *Geo. Anon'.*

To prove a delivery of goods to the defendant, an exemplification of an entry made in the Cuſtom-houſe of *Rotterdam*, and atteſted by a publick notary, and ſealed with the publick ſeal there, was offered in evidence; but the court would not admit it. 8 *Mod.* 75. *Paſch.* 8 *Geo. The King* v. *Maſon.*

Per Lord Chan. *Mich.* 10 *Geo.* where a ſuit is for a debt or other thing, a ſentence in another country is not binding; but the court here muſt examine into the matter, in order to form a judgment; *contra*, where the ſuit here is in order to carry that ſentence into execution, for then the proceedings here are founded upon the ſentence, and not upon the debt. *Vin. Evid.* 87.

Copy of an agreement regiſtered in *Holland*, and atteſted by a publick notary there, may be given in evidence for defendant, eſpecially ſince he proved that the plaintiff took out another copy of the ſame agreement, and would not now produce it, ſo he knew the agreement, and could not be ſurpriſed. 8 *Mod.* 322. *Mich.* 11 *Geo. Walrond* v. *Van Moſes.*

Affidavit by a plaintiff in *Holland*, atteſted by a publick notary, ſhall be admitted as good evidence to hold defendant to ſpecial bail here. 8 *Mod.* 323. *Mich.* 11 *Geo. Walrond* v. *Van Moſes.*

A. draws a bill of exchange on *B.* who is reſident at *Leghorn*, payable to *C.* three months after date; the bill is negociated through ſeveral hands, and indorſed to one who lived at *Leghorn*. *B.* accepts the bill, and about a week afterwards *B.* had advice, that *A.* had ſtopped payment, and he refuſed to pay, and by a ſuit in court at *Leghorn*, *B.* got a ſentence to be diſcharged from the acceptance and payment. He brought a bill for injunction, and was relieved, and he inſiſted upon the ſentence at *Leghorn. Mich.* 13 *Geo. Per* Lord Ch. *King.* The court at *Leghorn* had juriſdiction of the thing, and of the perſon, and he cited the caſe of a perſon that cemmitted murder in *Portugal*, and was tried there, and acquitted, and afterwards upon a proſecution here on ſtatute *H.* 8. he alledged the former trial, and it was allowed. A ſuit is for ſeamens wages in the Admiralty, and there is a diſmiſſion, this allowed on *non aſſumpſit* at law; objected, that this ſentence was matter proper for defence at law, and that the ſentence was wrong in itſelf, not ſufficient proof there of *A.*'s inſolvency, but by certificiates of three merchants, which is no proof here, that this was of acquittal of acceptors, for inſolvency of the drawer is not the general law of merchants, nor local at any other place; but Lord Ch. thought he was bound by the ſentence, and he relied upon the ſentence; and perpetual injunction granted; he ſaid, that when he was Ch. J. he always allowed foreign ſentences to be given in evidence. Debt contracted in *Holland* by work done, the party comes here, he ſhall be liable according to the Civil law, and bill and relief. *Mich.* 13 *Geo. Canc. Burrows* v. *Temineau. Vin. Ev.* 88.

Bill and anſwer in Chancery. The infant guardian's anſwer in Chancery of a feoffee in truſt, was refuſed by the court to be given as evidence; becauſe he was living, and not party to the ſuit, which was only between the heir, and *ceſtui que truſt. Keb.* 281. *pl.* 83. *Paſch.* 14 *Car.* 2. *B. R. Anon'.*

Allegations by a complainant in a bill in Chancery, ſhall by a copy be made uſe of as evidence againſt the complainant in a ſuit at law, for it ſhall be intended to be exhibited by his conſent and privity; but *per Bridgman*, there is a difference where there is a proceeding upon ſuch bill, and when not; for in the firſt caſe, it ſhall be admitted in evidence, but in the ſecond not. If bill be preferred *ſans* privity of the plaintiff, an action lies. *Sid.* 221. *Mich.* 16 *Car.* 2. *B. R. Snow* v. *Phillips.*

A bill in Chancery allowed *in dom. proc.* as evidence to confront a woman who pretended marriage. *Parl. Coll. n.* 88.

An anſwer in an *Engliſh* court is good evidence to a jury againſt the defendant himſelf, but not againſt other parties, yet it is not binding to the jury. *Godb.* 326. *pl.* 418. *Paſch.* 21 *Jac. B. R. Anon'.*

If

If the plaintiff will read the defendant's anſwer in Chancery againſt him in evidence, the defendant may likewiſe take advantage thereof; for all his evidence, or none. 3 *Salk.* 154. *Hill.* 8. *W.* 3. *B. R. per Holt* Ch. J. *Lynch* v. *Clerke.*

An anſwer in Chancery cannot be given in evidence, for the party who made it, or againſt a third perſon not deriving any title under him. 8 *Mod.* 181. *Trin.* 9 *Geo. Hilliard* v. *Phaley & al'.*

An anſwer in Chancery is evidence of a deed againſt all that claim under that perſon, and reputation of claiming ſo, is ſufficient to put a party upon ſhewing another title. *Lord Raym.* 311.

Books. By the ſtat. 7 *James* 1. *cap.* 12. reciting, that whereas divers men of trades and handicraftsmen, keeping ſhop-books, do demand debts of their cuſtomers upon their ſhop-books, long time after the ſame hath been due, and when, as they ſuppoſed, the particulars and certainty of the wares delivered to be forgotten, then either they themſelves or their ſervants, have inſerted into their ſhop-books divers other wares ſuppoſed to be delivered to the ſame parties, or to their uſe, which in truth never were delivered; and this of purpoſe to increaſe, by ſuch undue means, the ſaid debt; and whereas divers of the ſaid tradeſmen and handicraftsmen, having received all the juſt debts due upon their ſaid ſhop-books, do oftentimes leave the ſame books uncroſſed, or any way diſcharged, ſo as the debtors, their executors or adminiſtrators are often by ſuit of law enforced to pay the ſame debts again to the party that truſted the ſaid wares, or to his executors or adminiſtrators, unleſs he or they can produce ſufficient proof by writing, or witneſſes of the ſaid payment, that may countervail the credit of the ſaid ſhop-books, which few or none can do in any long time after the ſaid payment; it is therefore enacted, "That no tradeſman or handicraftsman keeping a ſhop-book, as aforeſaid, his or their executors or adminiſtrators, ſhall be allowed, admitted, or received to give his ſhop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the ſame action brought, except he or they, their executors or adminiſtrators, ſhall have obtained or gotten a bill of debt, or obligation of the debtor for the ſaid debt, or ſhall have brought or purſued againſt the ſaid debtor, his executors or adminiſtrators, ſome action for the ſaid debt, wares, or work done, within one year next after the ſame wares delivered, money due for wares delivered, or work done."

"Provided, that this act ſhall not extend to any intercourſe of traffick, merchandizing, buying, ſelling, or other trading or dealing for wares delivered, or to be delivered, money due, or work done, or to be done, between merchant and merchant, merchant and tradeſman, or between tradeſman and tradeſman, for any thing directly falling within the circuit or compaſs of their mutual trades and merchandize; but that for ſuch things only they and every of them ſhall be in caſe as if this act had never been made; any thing herein contained to the contrary thereof notwithſtanding."

Shop-book allowed as evidence on proof of the ſervant's hand that entered it, and that was uſed to make the entries, (he being dead) and no proof was required of the delivery of the goods; and *per Holt* Ch. J. Though the ſtatute 7 *Jac.* 1. 12. ſays, a ſhop-book ſhall not be evidence after the year, *&c.* it is not of itſelf evidence within the year. 2 *Salk.* 699. *pl.* 2. *Hill.* 11 *W.* 3. *Pitman* v. *Maddox* in *Middleſex.*

Evidence of beer delivered was thus, The draymen came every night to the clerk of the brewhouſe, and gave him account of the beer delivered out, to which the draymen ſet their hands, and that the drayman was dead, but that his hand was ſet to the book; and that was held good evidence of a delivery. 1 *Salk.* 285. *pl.* 18. *Trin.* 2 *Ann. Coram Holt* Ch. J. at *Niſi prius* at *Guildhall, Price* v. *Earl of Torrington.*

Scrivener's book to prove a conſideration paid (as a tradeſman's book) is no evidence for himſelf, but for another it is; ſo a tradeſman's book after his death.—— We have allowed a burſer's book of a college for evidence; *per Holt. Comb.* 249. *Paſch.* 6 *W.* and *Mar.* in *B. R. Smart* v. *Williams.*

Per Holt: The book of a man that keeps regular entries, might be evidence for him. *Comb.* 348. *Mich.* 7 *W.* 3. *B. R. Blackler* v. *Crofts.*

Ordered, that the regiſter books of a dean and chapter ſhould be made uſe of at a trial, for they are publick books. *Comb.* 247. *Paſch.* 6 *W.* and *Mar.* in *B. R.*

So of transfer books of the *Eaſt India* company, *&c.* for they are the books of a publick company, and kept for publick tranſactions in which the publick are concerned; the books are the title of the buyers of ſtock by act of parliament. 7 *Mod.* 129. *Hill.* 1 *Ann. B. R. Gery* v. *Hopkins.*

How far entries in a treaſurer's books ſhall not be allowed to be evidence againſt the partners whoſe treaſurer he is. *Barnard Chan. Rep.* 417. *Hill.* 1740. *Smith* v. *The Duke of Chandos.*

If an action be brought by a ſhopkeeper for money due on ſale of goods, we never inforced him to produce his books; but if very ſlender evidence be with him, then if he will not produce his books, it brings a great ſlur upon his cauſe. *Per cur'.* 6 *Mod.* 264. *Mich.* 3 *Ann. B. R.* in the caſe of *Ward* v. *Apprice.*

A church-book was given in evidence, to prove the non-age of the plaintiff, at a time of a leaſe made by him; and judgment for the plaintiff. *Cro. E.* 411. *pl.* 1. *Mich.* 37 & 38 *Eliz. B. R. Vicary* v. *Farthing.*

The plaintiff exhibited his bill in the Exchequer for tithes of houſes in the pariſh of St. *Hellens* in *London*, according to the ſtatute 37 *H.* 8. the defendants in their anſwer ſet forth a cuſtomary payment in lieu of tithes, and thereupon a trial was directed at law; and now the plaintiff exhibited another bill againſt the pariſhioners. that the ledger book in their cuſtody might be produced in evidence at trial, which book concerned him, as well as the pariſh; and upon a demurrer to this bill, becauſe it was only to provide himſelf of ſupplemental evidence after hearing the cauſe, it was decreed that the demurrer was ill, becauſe the bill was to have ſupplemental evidence in the ſame cauſe, and in the ſame way of proceeding, but collateral to it, *viz.* at a trial at Common law; beſides theſe are common evidences for both parties, they are court-rolls, which belong as well to the tenant as to the lord of the manor, and therefore they may bring a bill to have the uſe of them. *Hard.* 180. *Paſch.* 13 *Car.* 2. *in Scacc. Langham* v. *Lawrence.*

The entry of the names and titles of perſons in a church-book, either for marriages or births, (though not forged) cannot be poſitive evidence of the marriage or birth of any perſons, unleſs the indentity of the perſons by ſuch entries intended are fully proved, and alſo ſtrengthened with circumſtances, as cohabitation, the allowance of the perſons themſelves, *&c. Draycot* v. *Draycot.* Parl. Coll. n. 88.

Survey-books of a manor, which are ancient, unleſs ſigned by the tenants, or they appear to be made at a court of ſurvey, are no evidence; they are elſe only private memorials; *per Baron* at *Exon.* Summer 1719. *Vin. Ev.* 90.

But old court-rolls are evidence, ſo rentals, or accounts of money received by the ſteward were allowed at *Wincheſter* and *Dorcheſter* aſſizes, Lent 1719. *Coram King* Ch. Juſtice.

But rentals without money received and paid upon them are nothing, but payment makes them of effect. *Ibid.*

A corporation book was offered in evidence to prove at the aſſizes a member of the corporation not in poſſeſſion, and refuſed. 1 *Salk.* 288. *pl.* 26. *Paſch.* 7 *Ann. B. R. Wright* v. *Sharp.*

The books of a corporation, containing their publick acts, are very proper evidence, yet ſome account ought to be given of them, by whom kept, *&c.* and a book ſent in 1707. during the mayoralty of *Sharpe*, and entries made therein by him, or by his party in the corporation of elections and other publick acts, but not produced by the town-clerk, *&c.* were diſallowed; and this was agreed *per cur' B. R.* on motion for a new trial; it looks as if the

the book was made for a particular purpoſe, there being no other acts entred in it by the proper officer, nor any acts but of this mayor only who has been adjudged no mayor; yet their common books are evidence, in regard they contain a regiſter of their publick tranſactions. *Paſch.* 4 *Geo.* 1. *B. R.* caſe of *Thetford*, *Vin. Ev.* 90.

Corporation-books muſt appear to be kept by the proper officer, or be proved to have been regularly kept, in order to be given in evidence. *Stran.* 93.

The day-book from whence the pariſh regiſter is made up, not allowed in a queſtion of legitimacy. *Stran.* 1073.

Rule to inſpect the books of the commiſſioners for ſtating the debts of the army. *Stran.* 304.

Original poll-book not ordered to be produced. *Stran.* 307.

Eaſt-India company not obliged to produce book of letters. *Stran.* 646, 717.

No rule granted to inſpect a corporation's private books. *Stran.* 717.

Leave given to inſpect books in which boundaries are entred. *Stran.* 954.

No acceſs to books of poſt-office in collateral actions. *Stran.* 1005.

Rule made for a plaintiff to produce his books. *Stran.* 1130.

No rule to inſpect books on claim of right to hold a leet. *Stran.* 1203.

No inſpection of books by a proſecutor of a miſdemeanor. *Stran.* 1210.

Books of a corporation may be inſpected on diſputes between the members, to which the corporation are no parties. *Stran.* 1223.

Acceſs granted to books of the court of conſcience. *Stran.* 1242.

A rule to produce the caſh-book of the *India* company, and the transfer-book of bank-ſtock at a trial. *Ld. Raym.* 851.

The hand of a ſervant that is dead, to a delivery-book, is good evidence of the delivery of goods. *Ld. Raym.* 873.

Rule to produce corporation books denied to a proſecutor upon the teſt act. *Ld. Raym.* 927.

In an action of falſe impriſonment againſt the officers of the college of phyſicians, the court will not make a rule for the plaintiff to inſpect their books. *Ld. Raym.* 253.

Where a perſon claims an intereſt againſt a pariſh, he ſhall not have a rule to inſpect their books. *Ld. Raym.* 337.

Motion for a rule to produce the cuſtom-houſe books denied. *Ld. Raym.* 705.

A ſhop-book kept by a ſervant that is dead is evidence of the delivery of goods. *Ld. Raym.* 732.

A ſhop-book is not evidence alone, unleſs for a ſtranger. *Ld. Raym.* 733, 745.

Certificates. In debt againſt ſheriff of *Bucks*, for reward given by the ſtatute 6 & 7 *W.* & *M.* to thoſe that ſhould diſcover and convict clippers and coiners. Note; Here plaintiff had a certificate from my Lord Ch. J. *Holt*, who tried the malefactor, of his having been convicted on the plaintiff's evidence, which being produced, though under my Lord's hand, yet it was proved by my Lord's clerk to the jury. 12 *Mod.* 310. *Mich.* 11 *W.* 3. *Bignoll* v. *Rogers*.

The certificates of clerks of aſſize or peace is made ſufficient evidence of a perſon's being convicted and ordered for tranſportation, ſo as to make him guilty of felony without benefit of clergy for returning from tranſportation, by ſtat. 6 *Geo.* 20. *ſect.* 7.

On a conteſt in Chancery concerning a promiſe made by the Lord *Abigny*, to ſettle lands on the Lord *Clifton* and his Lady, who was the daughter of the Lord *Abigny*; the King's certificate under his ſign manual, ſignifying the purport of the ſaid promiſe, was held ſufficient evidence of it. *Hob.* 213. *Godb.* 199. *S. P.* But ſee 2 *Rol. Abr.* 686.

Chancery, proceedings there. At hearing the cauſe, the plaintiff offered to give in evidence a bill formerly exhibited againſt him by the now defendant; it was objected, that it ought not to be given in evidence, unleſs it was proved that it was exhibited by the order, direction and privity of the defendant; for any man may file a bill in another's name, and the court was of the ſame opinion. *N. Ch. R.* 102. 16 *Car.* 2. *Woollet* v. *Roberts*.

It was objected, that a bill in Chancery is no evidence, becauſe it only contains matter ſuggeſted perhaps by a counſel or ſolicitor, without the privity of the party; but *per cur.* after debate, the copy of the bill againſt the ſame party, was admitted as evidence, for they ſaid they would not intend that it was preferred without the privity of the party; and if it was, he had good remedy againſt them that ſo preferred it by action *ſur caſe*; but they ſaid that this evidence is not ſo valid as a letter of the party and note; and it was not urged, that the defendant anſwered in Chancery, and they had proceeded upon it, which, as it ſeems to me, is the better reaſon why it ſhall be allowed to be evidence, for the proſecution of the plaintiff takes away that objection, that it might have been preferred without his privity by a ſtranger. And at the ſittings after term at *Guildhall*, *London*, in *C. B.* where I was a counſel, when a bill in Chancery was offered as evidence, *Bridgman* Ch. J. demanded if there had been any proceedings upon it, otherwiſe he would not allow it; and becauſe the anſwer to the bill, and other proceedings upon it were ſhewn, it was allowed for evidence. *Sid.* 221. *pl.* 8. *Mich.* 16 *Car.* 2. *B. R.* in the caſe of *Snow* v. *Phillips*.

A bill in another cauſe is no evidence againſt the plaintiff in it, unleſs it be proved to be exhibited with his privity. *Chan. Caſes* 64. *Hill.* 16 & 17 *Car.* 2. *Woollet* v. *Roberts*.

In evidence in a trial at bar by leaſe of one *Wright*, an anſwer of one *Lewis Mordant* ſurviving truſtee, under whom the plaintiff claimed, was offered, but being after a conveyance made to him, the court refuſed; but had it been before, *per Wyndham* and *Moreton*, it would be good againſt all claiming under him; which *Twiſden* denied, becauſe an anſwer doth not diſcover the whole truth, and therefore ſhall be admitted only againſt the party himſelf that made it, and not of one defendant againſt another, much leſs againſt a ſtranger. 2 *Keb.* 424. *pl.* 57. *Mich.* 20 *Car.* 2. *B. R. Mills* v. *Barnardiſton*.

Upon trial of a title of land, a bill in Chancery was given in evidence againſt the complainant, tho' it was held to be of ſlight moment. *Vent.* 66. *Paſch.* 22 *Car.* 2. *B. R. Mews* v. *Mews*.

It was ſaid that a voluntary affidavit before a Maſter in Chancery cannot be given in evidence at a trial. *Sty.* 446. *Paſch.* 1655. *Anon'*.

The plaintiff obtained an injunction in this court; the defendant moves to diſſolve it, and obtained an order to diſſolve it; before the order was drawn up the defendant arreſts the plaintiff; and it was held clearly that this was a contempt to the court, and the defendant was ordered to be committed; for it is no order till it is drawn up and paſſed by the Regiſter, for the Regiſter's minutes are only a warrant for an order, and no order. 2 *Freem. Rep.* 46. *pl.* 51. *Mich.* 1649.

An anſwer in Chancery is evidence of a deed againſt all that claim under that perſon, and reputation of claiming ſo is ſufficient to put a party upon ſhewing another title. *Ld. Raym. Rep.* 311. *Hill.* 9 *W.* 3. *The Earl of Suſſex* v. *Temple*,

An anſwer in Chancery is not to be admitted as evidence at Common law, unleſs proved to be ſworn by him againſt whom it is produced. *Secondly*, It ought to appear, that that part of it which is given in evidence be pertinent to the matter contained in the bill, for elſe it ſhall be accounted void and ſuperfluous; *per Holt* Ch. Juſt. at *Guildhall*, *Comb.* 473. *Paſch.* 10 *Will.* 3. *B. R. Kingſton* v. *Read*.

The plaintiff proving his pedigree would have given in evidence the anſwer of an infant by his guardian to a bill in Chancery, but it was held it could not be read. *Comb.* 156. *Mich.* 1 *W.* & *M. Eccleſton* v. *Spekes*.

A man makes an anſwer in Chancery prejudicial to his title, and after conveys away his eſtate, this anſwer cannot

E V I

cannot be read againſt the alienee by any claiming under the alienor. 6 *Mod.* 44. *Trin.* 2 *Ann. B. R. Ford* v. *Lord Grey.*

An order in Chancery is not to be given in evidence, without producing a copy of the bill on which it was made. *Mod.* 149. *Paſch.* 3 *Ann. B. R. Turner* v. *Nurſe.*

A decree between other parties may be read as a precedent, though not as evidence. *January* 23, 1717. *MSS. Tab. Auſtin* v. *Nichols.*

Chirograph of a fine. Chirograph of a fine may be given in evidence to a jury. *Pl. C.* 410. *b. Mich.* 13 & 14 *Eliz. Newys* v. *Scholaſtica.*

Chirograph of a fine is of ſo high a nature, that no parol evidence ſhall be allowed to falſify it; admitted *Arg.* 10 *Mod.* 42. *Mich.* 13 *Ann. B. R.* in *Lord Say and Seal*'s caſe.

Circumſtances. De morte viri, in caſe of dower brought by the wife after the huſband had been abſent ſeven years beyond ſea, may be by circumſtances; and in ſuch caſes *qui melius probat, melius habet. D.* 185. *a. pl.* 68. *Paſch.* 2 *Eliz. Thorn.* alias *Thorp* v. *Rolf.*

A man has two manors of *D.* and levies a fine of the manor of *D.* circumſtances may be given in evidence to prove what manor he intends. *Trial. (y. e.* 3) *pl.* 11. cites 6, 7 *E.* 685 *per Montague*, and 12 *H.* 7. 6.

Circumſtantial evidence ought never to be admitted where better may be had, *ex natura rei*, becauſe circumſtances are fallible and doubtful, and it is upon this reaſon that a copy of a record is good, becauſe one cannot have the record itſelf; but a copy of a copy will not do. *Arg.* 12 *Mod.* 500. *Paſch.* 13 *W.* 3. *Dillon* v. *Crawley.*

Collateral warranty. Where a collateral warranty binds, this may well be given in evidence; for although it does not give a right, yet in law this ſhall bar and bind a right. *T. per p.* 157. cites *Lib.* 10. 97.

Collateral warranty may be taken notice of as well by evidence as by rebutting. *Per Powell* J. 11 *Mod.* 103. *pl.* 9. *Mich.* 5 *Ann. B. R. Smith* v. *Tindall.*

Compariſon of hands. In debt upon a bond upon iſſue of *Non eſt factum*, if plaintiff prove the witneſſes dead, beyond ſea, or that he has made ſtrict inquiry after them, and cannot hear of them, he ſhall be let in to prove their hands; *per Holt* Ch. J. at *Niſi prius*, 12 *Mod.* 607. *Mich.* 13 *Will.* 3. *Anon'.*

A parſon's book between 1645 and 1654 was produced, to prove a *modus* in the pariſh of *H.* and one *Saunders*, rector, and to prove that this was his hand-writing, and his name to it, one *P.* ſaid he had examined the pariſh-books of that kind, where *Saunders*'s name was as rector, and therefore believed the name in the book was the hand-writing of *Saunders*: this was allowed to be read, becauſe the pariſh-books were not in the plaintiff's power to produce; and he alſo proved, that one *R.* in diſcourſe with plaintiff had diſcovered to him, that he had theſe papers from the hands of one *G.* who was *Saunders*'s daughter, and ſaw that delivered to plaintiff, and *R.* was dead. *Per* Lord Chanc. 6 *Decem.* 1736. *in Chanc.*

Compariſon of hands, not evidence in a capital caſe. *Ld. Raym.* 40.

Condemnation of goods ſeized. Trover for a parcel of brandy, *coram* Baron *Price* at *Bodmyn*, *T. vac.* 1716, an information in the name of the Attorney general in the Exchequer, and an acquittal thereupon, and a judgment were given in evidence, the brandy being ſeized, *&c.* To which the other ſide objected, but the judge refuſed to admit any evidence againſt this determination, or to let the parties in to conteſt the fact over again, which had been tried on the information. So if goods are condemned in the Exchequer, the party ſhall never try this matter over again in a collateral action. *Vin. Ev.* 95.

If goods are condemned by the court, and proclaimed as forfeited, the property is altered, ſo as no action of treſpaſs or trover will lie by the proprietor againſt the perſon that ſeizeth them; adjudged by the whole court. *Raym.* 336. *Mich.* 31 *Car.* 2. *in Scacc. Ekins* v. *Smith.*

Confeſſion of one againſt another. The queſtion was, if the confeſſion of an under-ſheriff of an eſcape be any evidence againſt the high-ſheriff; and adjudged that it is, for though the ſheriff is ſuable, yet the under-ſheriff gives him a bond to ſave him harmleſs, and therefore it will all fall upon him. And therefore his confeſſion is good evidence, becauſe in effect it charges himſelf. *Lord Raym. Rep.* 190. *Eaſt.* 9 *W.* 3. *Yabſley* v. *Doubl.*

Confeſſion of delivery of goods in the court of requeſts, may be given in evidence againſt the defendant at law. *Mar.* 103. *pl.* 175. *Trin.* 17 *Car. C. B. White* v. *Grubble.*

In an information for publiſhing a libel, the defendant's own confeſſion was given in evidence againſt him. *Per Holt* Ch. J. If there was no evidence againſt him but his own confeſſion, the whole muſt be taken, and not ſo much of it as would ſerve to convict him. 5 *Mod.* 167. *Hill.* 7 *W.* 3. *King* v. *Pain.*

Confeſſion is the worſt ſort of evidence that is, if there be no proof of a tranſaction or dealing, or at leaſt a probability of dealing, between them, as in the principal caſe there was, the one being a ſailor, the other a maſter of a ſhip. *Per Holt* Ch. J. 7. *Mod.* 42. *Mich.* 1 *Ann. Anon'.*

Confeſſion of a pawnbroker's ſervant is evidence againſt his maſter. *Ld. Raym.* 738.

Confeſſion of the under-ſheriff evidence againſt the ſheriff. *Ld. Raym.* 190.

In *Sayer*'s caſe, *Mich.* 9 *Geo.* in a caſe of high-treaſon, Mr. *Staney*, an Under Secretary of State, gave evidence of *L.*'s confeſſions, upon his examination before the council, which though taken in writing, yet the writing was not read. *Vin. Ev.* 96.

Where there is any confidence or truſt between the parties, the confeſſion of one in an anſwer, *&c.* might be given in evidence againſt the other, though it might be a queſtion if concluſive or not. *Per* Lord Chanc. 8 *Mod.* 180. *Trin.* 9 *Geo. Hilliard* v. *Phaley.*

A point was reſerved at the ſittings of *Niſi prius*, whether the proof of the indorſor of a promiſſory note his acknowledgment that the name indorſed on the ſaid note was his hand-writing, be ſufficient to prove the indorſement in an action brought by plaintiff as indorſee againſt defendant as drawer; the objection was, that no perſon's confeſſion but the defendant's himſelf can be evidence, and the indorſor's hand muſt be proved. The objection was held good; and the verdict, as to the ſecond promiſe in the declaration, was ordered to be vacated. *Barnes's Notes in C. B.* 311, 312. *Mich.* 6 *Geo.* 2. *Hemings* v. *Robinſon.*

The examination of the priſoner himſelf (if not on oath) may be read as evidence againſt him; but the examination of others (though on oath) ought not to be read if they can be produced *viva voce.* St. Tr. 1 vol. 169. 780.—2 vol. 575.

Conſpiracy. In conſpiracy for indicting him of felony, *&c.* the plaintiff was to prove the indictment now ſhewed in evidence a true copy, then he was put to prove what the witneſſes ſwore to the jurors, who did procure them to ſwear and give ſuch evidence; and proof was, that one *W.* gave the evidence to the jury of life and death, that the plaintiff ſtole the goods, *&c.* but the witneſs now in court ſwore, that his oath was, the plaintiff took them, but not that he ſtole them; it was found for the defendant, *ut credo.* Clayt. 126. pl. 224. March 1647. B. R. Burnley's caſe.

Holt Ch. J. expreſly declared, that theſe kind of actions are not to be encouraged, but that the judge before whom any of them are tried, ought to hold the plaintiff to a proof of expreſs malice in the defendant in his proſecution by way of indictment; for if it does not appear that the proſecution was grounded in malice, the action is not maintainable, but the plaintiff muſt be nonſuit. *Carth.* 417. *Trin.* 9 *Will.* 3. *B. R.* in caſe of *Savil.* v. *Roberts.*

In an action of conſpiracy for indicting the plaintiff of felony, and the defendant in his defence did prove he had goods ſtolen, and thereupon did prefer an indictment which was found *ignoramus*, and then it was proved he did prefer a ſecond indictment, after he had notice the goods were taken by another, and pawned to the plaintiff; and for this the jury found him guilty, and that malice was in this proſecution, which is the chief cauſe to maintain

this action; and moreover it was proved, that the defendant had brought actions at law, which was a civil proceeding for the ſame goods ſuppoſed to be ſtolen, which was urged to ſhew the malicious proſecution; but for this, the judge held this of itſelf would not maintain this action; for the party whoſe goods are ſtolen, may proceed both ways without malice; and alſo it was held a ſecond indictment may be preferred upon better evidence, without making the proſecutor liable to this action; ſo note, it was the notice of the matter aboveſaid only did maintain this action. *Clayt.* 85, 86.

If two or three perſons meet together, and diſcourſe, and conſpire to accuſe another falſely of an offence, it is of itſelf an overt-act, and is indictable: *Per Holt* Ch. J. But *per Powell* J. that to make a meeting to conſult and conſpire criminal, they ought to come to ſome reſolution. 11 *Mod.* 55. *Paſch.* 4 *Ann. B. R.* in caſe of *Queen* v. *Baſs.*

In information for conſpiracy and attempt to rob Sir *Robert Gaire*, and binding themſelves by oath to execute the ſame, and lying in wait, *&c.* they ſaid as to the oath it was out of the county, *viz.* at the *Devil Tavern*, which is in *London*, and therefore ſhould not be regarded; no overt-act, or lying in wait was proved, without which, *per cur.* the information will not lie, as 2 *Inſt.* and verdict for the defendant, there being no certain appointment of time, place or perſon, *&c.* 3 *Keb.* 799. *pl.* 58. *Trin.* 29 *Car.* 2. *B. R. King* v. *Parkhurſt* and *Elling.*

Conſtat. If a man loſt his letters patents, he may have new letters patents out of the Chancery, if he ſhews to the Chancellor, that he has loſt them; *per Fiſher quære inde*, for it ſeems, that he ſhall not have but a *conſtat*, *& non negatur ibidem.* But admitted upon the argument, whether he ſhews the letters patents of the gift of the King, or not, but that he has loſt his letters patents, and has a new patent, that it ſhall be intended a *conſtat*, as it ſeems to me, that in this caſe it ſhall ſerve him to ſhew or plead, as well as the firſt patent. *Br. Patents, pl.* 58. cites 22 *H.* 7. 12, 13.

Copies. In ejectment, the jury found that the leſſor of the plaintiff had releaſed all right in the land to *J. S.* but they found, that the releaſe itſelf was not ſhewn to them, but a copy thereof. *Per tot' cur':* This releaſe may well be found, thus to defend a poſſeſſion. *Cro. E.* 863. *pl.* 41. *Mich.* 43 & 44 *Eliz. C. B. Brome* v. *Car.*

There was a covenant between the parties to levy a fine of lands to *T.* upon condition, that if he did not pay ſo much money by ſuch a day, that it ſhould be to the uſe of *C.* and his heirs; the fine was levied, and before the day of payment, *C.* releaſed to *T.* all his right in the land, and all demands; but afterwards ſuppoſing, that the releaſe he made before the condition broken was not a ſufficient diſcharge of the future uſe, he brought an ejectment, and at the trial a copy of this releaſe was produced in evidence; and all the court held, that this releaſe might well be found in this manner, it being to defend the poſſeſſion. *Cro. Eliz.* 863. *pl.* 41. *Mich.* 43 & 44 *Eliz. C. B. Brome* v. *Car.*

If parties have matter of evidence by record of this court, they ought to produce the records themſelves; copies of them are not allowable; ruled *per curiam* in the Exchequer. *Lane* 97. *Hill.* 8 *Jac. Smith* v. *Jennings.*

This court ordered copies of depoſitions, and other records, to be recorded and uſed, and to be authentick, and this was with the aſſiſtance of the judges. *Chan. Rep.* 15 *Car.* 1. *Kinaſton* v. *The Earl of Derby.*

A copy of a deed is good evidence, where the defendant has the deed, and will not produce it. *Clayt. Rep.* 15. *pl.* 24. *Mich.* 1633. 208.

Where the defendant has the deed in his hands, which concerns the land in queſtion, and will produce it, in ſuch caſe, the copy thereof ſhall be permitted to be given in evidence, and ſo it was, and the plaintiff ſwore, it was once in his hand, and this was a true copy of the deed, and himſelf did examine it. *Clayt.* 15. *pl.* 24. *Mar.* 1633. before *Vernon*, Judge of aſſiſe. *Anon'.*

Plaintiff having only a copy of a deed of feoffment, under which ſhe claimed, the original being loſt, and the defendant having a counterpart, the plaintiff prayed the copy might be compared with the counterpart, and if it agreed that the ſame might be allowed in pleading as a good deed, ſealed and delivered; referred to a maſter to ſettle the ſame. *N. Ch. R.* 82. 13 *Car.* 2. *Griffin* v. *Boynton.*

Plaintiff claimed lands by a will, which was proved, the original was taken out of the Prerogative office; decreed, that the copy of the probate of the will, out of the Regiſter's book in the Prerogative office, ſhould be admitted in evidence at law at any trial, which ſhould be had concerning the title of the ſaid lands, as the true original will. *Nelſ. Ch. Rep.* 82. 13 *Car.* 2.

It was ruled by *Holt* Ch. J. in *B. R. Mich.* 10 *Will.* 3. that if a man deſtroys a thing that is deſigned to be evidence againſt himſelf, a ſmall matter will ſupply it, and therefore the defendant having tore his own note, ſigned by him, a copy ſworn was admitted to be good evidence to prove it. *Lord Raym. Rep.* 731. *Anon'.*

A copy of a fine or recovery is evidence, ſo as it be ſworn to be a true copy, and examined; *per Holt* Ch. J. 3 *Salk.* 154. *pl.* 6. *Hill.* 8 *W.* 3. *B. R. Lynch* v. *Clerke.*

Where-ever an original is of a publick nature, and would be evidence, if produced, an immediate ſworn copy thereof will be evidence; as the copy of a bargain and ſale, of a deed inrolled, of a church regiſter, *&c.* But where an original is of a private nature, a copy is not evidence, unleſs the original is loſt or burnt; *per Holt* Ch. J. 3 *Salk.* 154. *pl.* 6. *Hill.* 8 *W.* 3. *B. R. Lynch* v. *Clerke.*

Copies of affidavits proved to be examined by the originals on the file, and produced in evidence, were allowed (theſe affidavits were taken before commiſſioners in the country); It was objected, that was no evidence, unleſs the commiſſioner who gave the oath was preſent to prove that the defendants were the ſame perſons who made affidavits before him; *ſed non allocatur*; *coram* Juſtice *Eyre* in *Oxford* circuit, and adjourned to *B. R. pro opinione*; *Paſch.* 4 *W. & M.* on indictment of perjury; and *per tot' curiam*, the copies are ſufficient evidence. *Carth.* 220. *The King* v. *James.*

A copy of an original is evidence whereſoever the original is evidence, *i. e.* if proved a true copy, but the copy of the probate of a will in the Eccleſiaſtical court is no evidence, becauſe that is but a copy of a copy. *Hale* at *Huntingdon* aſſiſes allowed a copy of a ſhort note of a judgment in an inferior court as good evidence, though the judgment was not entred upon record. Matters of evidence ariſe from conſtant uſage, as well as from what is ſtrictly legal; copies of court rolls, or proceedings in Eccleſiaſtical courts, *&c.* are good evidence; we know it is uſual for inferior courts not to draw up their records, but only ſhort notes, and copies of theſe ſhort notes being publick things are good evidence; but otherwiſe of private things, for copies of rent rolls are no evidence, but the original muſt be produced. *Comb.* 337. *Trin.* 7 *W.* 3. *B. R. The King* v. *Hains, alderman of Worceſter.*

In a trial at bar concerning a leaſe, and when the ſame was to take effect in poſſeſſion, a copy of a ſurvey taken in the late times in 1647, by virtue of a commiſſion granted by the powers then in being, was admitted as evidence; and it was then ſaid, that thoſe ſurveys were taken with great care, and had been often admitted in evidence; but there aſon why the copy was admitted here was, becauſe it was proved, that the original was removed from *Gurney-houſe* to St. *Faith*'s under St. *Paul*'s, and were there burnt in the great fire; and *Northy* ſhewed me a caſe in *Mich.* 25 *Car.* 2. *B. R.* between *Berry* and *Halſted*, where ſuch a ſurvey was admitted in evidence, by *Hale* Ch. J. *Freem. Rep.* 509. *pl.* 684. *Mich.* 1699. *Underhill* v. *Durham.*

Holt Ch. J. ſaid, that at *Huntingdon* before *Hale* Ch. J. the book of town-clerk was read; and if the book may be read, a copy of the book may be read, for in all caſes where the original is evidence, the copy is evidence; but if the original be a copy, there a copy of ſuch original may not be read, as a book for probate of a will of land. *Skin.* 584. *Trin.* 7 *W.* 3. *B. R.* in caſe of *The King* v. *Hains.*

A copy

E V I

A copy of the book at Doctors Commons was produced in evidence to prove such a one to be executor; it was objected, that it was no evidence, because it was but a copy of a copy, and the book ought to be produced, or the will with the probate, or a copy of the probate; *non allocatur*; for *per cur'*, it being a will of goods, the act of the court is the original, and the will is proved by the act of the court before that it is under the seal with the probate, and so a copy of the act of the court is sufficient; but if it was a will for lands, there a copy would not be sufficient; but they ought to have the entry, and book itself there; *per Holt* Ch. J. *Skin.* 431. *Pasch.* 6. 10 *W. & M. B. R.* cites it as in a trial at bar the same term in *Andrew Newport's* case.

Mich. 8 *W.* 3. *C. B.* In ejectment, a motion was made for a new trial, because the party against whom the verdict was given, produced in evidence a fine, and the copy of the inrolment of a deed, which led the uses of it; and *Rokeby* J. before whom it was tried, refused to admit this copy of the inrolment to be evidence; and resolved in *C. B.* that such copy is evidence *prima facie*, but the party shall not be estopped by it, as by the record, but may controvert it, as forged, *&c.* because inrolment at Common law, and that for some purpose; and they relied upon Mr. *Kendal's* case. (See it now reported, 3 *Lev.* 387) And of this opinion, *Powell* J. was generally; but *Treby* Ch. J. doubted, whether such evidence generally speaking was evidence; but here he agreed with the other justices, *viz. Powell* and *Nevil*; because it was only to lead the uses of the fine, which might be done by parol. *Ld. Raym. Rap.* 746. 10 *W.* 3. *Taylor* v. *Jones.*

Copy of a note given by *A.* to *B.* which being left with *C.* the copy was taken by *C.* who is since dead.—And according to the copy it seems, that under the note, the defendant *B.* had subscribed an acknowledgment, that nothing was really due; this though not proved to be a true copy (*C.* being dead, and the note in the hands of *B.*) and though *B.* had sworn in his answer that there was no such acknowledgment subscribed, was allowed to be heard as evidence, being the hand-writing of *C.* and on producing the note which was on stampt paper, it appeared that the bottom was torn off; *Per Cowper* Ch. 2 *Vern.* 603. *pl.* 541. *Hill.* 1707. *Winne* v. *Lloyd.*

A deed made by *Robert Spencer* and *Elizabeth* his wife, to declare the uses of a fine levied by them of the wife's inheritance, being lost, but having been inrolled for safe custody; upon the first hearing of these causes, it being objected, that the conveyance was not a bargan and sale, and so did not operate by the inrolment; and that therefore the copy of the inrolment not to be allowed as evidence; and the court seemed to be of that opinion. But an issue at law being directed to try whether the deed to lead the uses of the fine was duly executed by Mr. *Spencer* and his wife, the Lord Ch. J. allowed the copy of the inrolment to be given in evidence, and a scrivener also who drew the deed being examined, a verdict passed for the plaintiffs, that the deed was duly executed. 2 *Vern.* 591. *pl.* 529. *Mich.* 1707. *Combs* v. *Dowell*, and *Squire* v. *Dowell.*

A copy of a rule of court signed by the officer of the court, is no evidence in any other court, unless the judge of the court set his hand to it himself; but at *nisi prius* the hand of the officer is enough, because it is the same court. 10 *Mod.* 109. *Hill.* 1 *Ann. B. R. Stennil.* v. *Brown.*

Warrant to a constable to distrain goods by virtue of an act of parliament; he makes a distress and returns the goods to the offender, but keeps the warrant. Resolved that a copy of the warrant in this case will be good evidence. 6 *Mod.* 83. *Mich.* 2 *Ann. B. R. Morley* v. *Staker.*

The copy of the writ, and the return thereof in the Crown Office, is evidence enough of the false return of a *mandamus* to be the mayor's. 6. *Mod.* 152. *Pasch.* 3 *Ann. B. R. Queen* v. *Chapman mayor of Bath.*

A copy of a deed leading the uses of a fine, and inrolled for safe custody only, allowed to be read as evidence at a trial at law. 2 *Vern. R.* 471. *pl.* 429. *Mich.* 1704. *Combes* v. *Spencer.*

A copy of the record of a deed inrolled may be given in evidence against the party acknowledging it, as well as any other copy of a record, but it shall not be good against a stranger; *per Holt* Ch. J. and *Powell. Mich.* 5 *Ann B. R.* 3 *Lev.* 387, 388.

On trespas at the house of the warden of the *Fleet*, to prove the possession not in the plaintiff, a copy of an inquisition finding a forfeiture of the office, with a judgment thereon of seizure, was produced; *sed non allocatur. Trin.* 9 *Ann. B. R.*

The copy of a revocation of the deputation of an office was offered in evidence of the revocation, but not allowed, because it did not appear but the original might be produced. 10 *Mod.* 74. *Hill.* 10 *Ann. B. R. Queen* v. *Sutton.*

A copy of the condemnation of a ship in the Admiralty court of *France*, was refused as evidence, for want of an exemplification under the seal of the court. 10 *Mod.* 108. *Hill.* 11 *Ann. B. R. Stennil* v. *Brown.*

Motion was made that a Justice of peace might produce on a trial on an indictment for subornation of perjury, an examination taken before a justice of peace from a woman, who, at the solicitation and by procurement of the defendant, had charged such an one with being the father of a bastard child; the woman had been convicted of perjury; and *per cur.* A copy of the examination is no evidence, because it deprives the party of controverting whether it were his hand subscribed to it or not, and therefore the original ought to be shewn; and so it is in all cases were written evidence is produced, which is grounded upon being under a man's hand; and a rule was made that the justice *produci faciat* the examination at the trial, and the party to have copies in the mean while. It was said, that the reason of allowing copies of the Bank or *East-India* books, was because the hand-writing must be proved; and *Fortescue* J. added, that in an indictment for perjury in an affidavit, the original ought to be produced, though he said there had been some question about this matter, and a copy was not sufficient. *Mich.* 5 *Geo. B. R. The King* v. *Smith. Vin. Ev.* 104.

By stat. 8 *Geo. cap.* 25. *sect.* 2 Copies of recognizance, in nature of statutes staple, signed by the clerk or his deputy, if original lost, good evidence.

Copy of an old letter in the corporation chest, not evidence. *Stran.* 401.

Copy of a record may be read at a trial for malicious prosecution, tho' not ordered by the court. *Stran.* 1122.

Counterparts. Y. covenants with *C.* to make an assurance of *Blackacre* before *Easter* by indenture. *Y.* dies, the covenant performed, and the very original deed comes into the hands of the executor of *Y.* and *C.* brought a writ of covenant on the counterpart; and it was said by the court, that it does not lie without the deed itself; *per Walmsly*, He may have an action of detinue to recover the deed. *Noy* 53. *Yelverton* v. *Cornwallis.*

In ejectment, title was under a long term, but the original lease could not be produced, but being an ancient lease, the grandson of the lessor produced a counterpart found among the other writings of his grandfather, and this was allowed for evidence, tho' no witnesses were subscribed to it; and *Windham* J. said, that he had seen many deeds in the time of Queen *Elizabeth* without witnesses. 1 *Lev.* 25. *Pasch.* 13 *Car.* 2. *B. R. Garret* v. *Lister.*

Trin. 9 *Ann. C. B.* Sir *William Pole's* case, *arguendo.* In order to induce the court to read the counterpart of a deed where the original could not be produced, it was said there ought to be good reason shewn to the court; as 1st, that the deed is lost; 2dly, that it is in the adversary's hands; 3dly, that the possession was gone according to the deed, and if possession has not gone according to the deed, there ought to be a very good acccunt given why it did not; the court of *C. B.* was divided in their opinion; there was now a bill of exceptions, and writ of error brought in *B. R.* but no judgment was there given, the case being agreed. *Vin. Ev.* 104.

Per

Per Holt Ch. J. In a caſe in my Lord *Hale*'s time between *Comb* and *Mayo*, a counterpart of an acient deed was admitted as evidence of the deed, and the ſpecial verdict was drawn up, as finding the deed, with a *prout patet* by the counterpart, which he ſaid was done to preſerve the precedents; and now by all the court, the counterpart of a deed without other circumſtances is not ſufficient evidence of itſelf. *Salk.* 287. *pl.* 23 *Mich.* 3 *Ann. B. R. Anon'.*

Court-Rolls. As to the time of a ſurrender made, or court held, the rolls of the manor are no concluding evidence; but ſhall be tried by the country. *Le.* 289, 290. *pl.* 395. *Trin.* 26 *Eliz. B. R. Burgeſs* v. *Foſter.*

To maintain cuſtomary deſcents, the court enforced the parties which maintained the cuſtom, to ſhew precedents in the court-rolls to prove the uſage; and *Coke* Ch. J. ſaid without ſuch proof, that it hath been put in uſe, though it had been deemed and reported to have been the true cuſtom, yet the court could not give credit to the proof by witneſſes. 4 *Le.* 242. *pl.* 395. *Paſch.* 8 *Jac. C. B Ratcliff* v. *Chaplin.*

Proclamations whereby the lord claims forfeiture of a copyhold ought to be proved *viva voce*, and not by the court-rolls only; held in evidence to a jury. *Keb.* 287. *pl.* 98. *Paſch.* 14 *Car.* 2. *B. R. Pateſon* v. *D'Anges*, alias *Lord Saliſbury*'s caſe.

On traverſe of tenure by ſuit of court-rent of 16*s.* and relief in replevin; as evidence of the relief, ſeveral ancient rolls *tempore H.* 8. and *Ed.* 6. and *Eliz.* and *Jac.* 1. were produced, ſhewing relief due for the eſtate in queſtion, and alſo for other eſtates; alſo old accounts of bailiffs of the manor in which reliefs were mentioned; alſo there was parol proof, the rent and ſuit of court, and verdict *pro domino manerii*; for in caſe of heriots, juſtice *Levenz* allowed of ſuch ancient memorials, tho' no evidence could be given of any modern payment; that till the time of Queen *Elizabeth* theſe rolls were kept regularly and well by counſel, but ſince that time they were drawn up by attornies and others not ſkilled in the law, and ſo were not of that great authority as formerly; that a relief was incident to a tenure of ſocage by rent and fealty, and upon death of the tenant the heir ought to pay double the rent; that ſeiſin of the rent was ſeiſin of the fealty, and ſeiſin of fealty was ſeiſin of all manner of ſervices; that the ſtatute of *Car.* 2. had aboliſhed the ſlaviſh part of the tenures, but had preſerved and eſtabliſhed all duties telating to them; that he would not preſume the relief or other ſervices had been releaſed; that tho' the preſcription here was to hold a court-leet and court-baron every year within a month after *Michaelmas* and *Eaſter*, and court-barons ought to be held oftener, and are not tied down to this rule by any ſtatute; yet of late years they have uſually been held together, and as it is the general practice, it is well enough. Mr. *Hale*'s caſe, lord of the manor of *King's-Nympton*, *coram* Baron *Price*, at Lent, *Devon.* 1717, 1718. *Vin. Ev.* 105.

If proof be to be made of a particular benefit, which the lord of the manor is to have, no better proof can be of this than by the rolls of the court; for no proof can be more directly and particular, than by ſetting down of all the rolls in certain; *per Whitlock* J. *per Dodderidge* J. The lord ought to ſhew that the rent or heriot, *&c.* was paid; for the ſteward may put in what he will; afterwards judgment was for the lord. 3 *Bulſt.* 324. *Hill.* 1 *Car. B. R. Hungerford* v. *Haviland.*

Decrees. A decree of Chancery, or other court of equity, is not any evidence in a court of Common law, as in *Walſingham*'s caſe. *Agreed per curiam*, 2 *Sid.* 75. *Paſch.* 1658. *B. R.* in the caſe of *Marret* v. *Sly.*

A decretal order under ſeal, which recites all the proceedings on exemplification under the great ſeal, hath been allowed to be read; *per Twiſden*, but *per Allen contra*, not unleſs it hath the bill and anſwer, to which *Windham* agreed; but by *Twiſden*, Where the decree is produced only in paper, then the bill and anſwer ought to be adjoined, but not ſo when the decree is under ſeal; and in *C. B. Stiffe* v. *Stiffe*, the judges admitted a decree to have been under ſeal, and yet would not allow it without bill and anſwer; and by *Allen* it is uſual to diſallow ſuch decrees; but an exemplification in Chancery, *per curiam*, always recites the bill and anſwer. *Moreton* ſerjeant ſaid, he never did ſee the ſeal of any court denied to be given in evidence. *Keb.* 21. *pl.* 62. *Paſch.* 13 *Car.* 2. *B. R. Trowell* v. *Caſtle.*

Deeds. Regularly he who pleads a deed, or will take any benefit by it, muſt produce the deed itſelf; and this my Lord *Coke* ſays, is for two purpoſes: *Firſt*, That it may appear to the court, what the operation of the deed is, and that it be not on condition, limitation, or containing a power of revocation; and of this the judges are to judge. *Secondly*, That it may appear to have been legally executed, and without raſures, interlineations, or other imperfections; and of this the jury are to determine. 10 *Co.* 92. *a. b.*

But though it be regularly true, that the deed itſelf muſt be produced, yet in caſes of extreme neceſſity, as where the deed is burnt, *&c.* the court will admit a copy of it to be given in evidence, or will admit it to be proved by witneſſes. 10 *Co.* 92.

Cancelled deeds allowed in evidence after proof of the ill practice how they came to be cancelled. *Het.* 138. *Hill.* 4 *Car. C. B. Beckrow*'s caſe.

Seals broken off from a deed to lead the uſes of a recovery ſubſequent, yet being proved it was done by a little boy, and that the ſeals were once annexed, and the raſures of the parts agreed upon examination, it was admitted to guide the uſes. *Lat.* 226. *Mich.* 3 *Car. Anon'.*

The defendant produced a deed under the plaintiff's hand and ſeal, whereto were witneſſes names; but becauſe they did not prove the witneſſes dead, nor that they were gone to ſea, though they alledged it, it was not permitted at firſt to be given in evidence; but afterwards, upon proof that it was read at a former trial, it was ſuffered to be read. *Freem. Rep.* 84. *pl.* 103. *Paſch.* 1673. *Phillips* v. *Crawly.*

Twiſden ſaid he had ſeen adminiſtration given in evidence after the ſeal broke off, and ſo wills and deeds. 1 *Mod.* 11. *pl.* 34. *Mich.* 21 *Car.* 2. *B. R.* in caſe of *Clerk* v. *Heath.*

It was ſaid, that when there is a common ſeal put to a deed, that is title enough of itſelf, without witneſs to prove it, or that the major part of the college be agreed; and if it was ſaid that it was put to by the hand of a ſtranger, that ſhall be proved on the ſide that ſays ſo. *Skin.* 2. *pl.* 2. *Mich.* 33 *Car. B. R. Lord Brounker* v. *Sir Robert Atkins.*

Upon a trial at bar the plaintiff made title by an act of parliament 16 & 17 *Car.* 2. the defendant's defence was upon a *proviſo* in that act, which ſaved all rights to the King, and eſtates before 1639. made with power of revocation, by Sir *Robert Carr* the father, and then not actually revoked. The defendant would have ſet up a ſettlement made before that time, and proved it ſealed and delivered before that time, and to prove that it was not actually revoked by Sir *Robert Carr*, offered an abſtract of the deed, and a caſe made upon it, with an opinion, under the hand of Mr. juſtice *Ellis*, with the depoſitions of Mr. juſtice *Ellis* in Chancery, in a caſe between Sir *Robert Carr* the ſon and his mother; wherein it appears to be a deed in force after Sir *Robert Carr*'s death, though not cancelled and cut in pieces; yet the court refuſed it as evidence, and would not allow the deed to be read. *Skin*, 205. *pl.* 2. *Mich.* 36 *Car.* 2. *B. R. Scroop* v. *Carr.*

Deeds not ſtamped will not be allowed to be given in evidence. See the ſtamp acts, 5 & 6 *W.* & *M. cap.* 21. *&c.*

A deed of bargain and ſale acknowledged by the bargainee, and inrolled, by which a term for years was aſſigned, was given in evidence without any proof made of the bargainor's ſealing and delivery thereof; and after debate it was allowed, *per Holt* Ch. J. and *Eyre* J. and *tot. cur.* For the acknowledgment of the Party in a court of record, or before a maſter extraordinary in the country (as this was) is good evidence of its being ſealed and delivered, and ſuch an acknowledgment eſtops a man from pleading *non eſt factum.* Alſo inrollments of deeds on the

E V I

the ſtatute are admitted every day in evidence, without witneſſes of the ſealing and delivery; and it is the acknowledgment which gives it credit, and not its operation or contents. 1 *Salk.* 280. *pl.* 7. *Paſch.* 6 *W. & M.* in *B. Smart* v. *Williams.*

Alſo they held a ſworn copy of a deed inrolled, good evidence. 1 *Salk.* 281. *Ibid.*

Counterpart of ancient deeds loſt good evidence with other circumſtances, but not of itſelf, but of a deed leading the uſes of fine, it is good evidence of itſelf. 6 *Mod.* 225. *Mich.* 3 *Ann. B. R.*

Depoſitions. It was inſiſted upon by the ſolicitor general, that the depoſitions in Chancery, which were read againſt the Lord of *Bath* in the other cauſe are no evidence in this, becauſe the trial is not between the ſame parties, and depoſitions are never evidence but where they are mutual, and this defendant ſhelters himſelf under the other's title, and the title of the land is not in queſtion, but to whom the rent ſhall be paid. If the defendant gives the plaintiff's anſwer in Chancery in evidence, he may inſiſt to read only ſuch part as he will; for it is like examination of witneſſes; but the other ſide may inſiſt to have the whole read after. 5 *Mod.* 9. *Mich.* 6 *W. & M. E. of Bath* v. *Batterſea.*

An appeal was from the commiſſioners of exciſe to the commiſſioners of appeals upon the ſtatute 12 *Car.* 2. *cap.* 23. the queſtion was, Whether the depoſitions of witneſſes, and their examination wrote by the clerk of the commiſſioners of exciſe, ſhould be read in evidence upon this appeal? or whether the commiſſioners of appeal ſhould not re-examine the witneſſes *viva voce?* The court *(mutata opinione)* held, that the commiſſioners ought to examine the witneſſes *de novo* on the appeal. And that it was the intent of the act, and the commiſſioners of appeals had authority given for that purpoſe by the act to adminſter oaths, and this was juſt, becauſe the firſt ſentence might be by default, or the depoſitions might miſrepreſent, or not repreſent the whole caſe; and that on appeals from orders of juſtices, examination is always *de novo*; thereupon a prohibition was granted; but *Holt* Ch. Juſtice ſaid that his private opinion was, that if witneſſes were dead, they might uſe the depoſition. 2 *Salk.* 555. *Mich.* 8 *W.* 3. *B. R. Breedon* v. *Gill.*

Depoſition taken before juſtices of the peace cannot be read upon appeal to the quarter ſeſſions, nor can depoſitions taken before commiſſioners of bankrupts be uſed at trial at Common law. *Arg. Ld. Ray. Rep.* 220. *Eaſt.* 9 *W.* 3. in caſe of *Breedon* and *Gill.*

If a witneſs who is not likely to be had at a trial be examined before a judge, and croſs-examined by the other party, and his depoſitions put in writing; yet if at the trial it be proved, that the party might have had him there, his depoſitions are not to be read. *Per cur'.* 12 *Mod.* 493. *Paſch.* 13 *W.* 3. *Anon'.*

On a trial on an information for a libel, depoſitions taken before a juſtice of peace relating to the fact, the deponent being ſince dead, where not allowed in evidence. *Per. B. R.* Upon advice, with the judges of *C.B.* In caſes of felony ſuch depoſitions before a juſtice, if the deponent die, may be uſed in evidence, by 1 & 2 *Ph. & Mar. cap.* 13. but this cannot be extended farther than the particular caſe of felony. 1 *Salk.* 281. *Hill.* 7 *W.* 3. *B. R. The King* v. *Pain.*

To prove a jointure (the jointure deed being loſt) depoſitions in Chancery were produced and offered to be read) the bill and anſwer being taken off the file and loſt) but propoſed to prove by the ſix clerk's book, that it was once filed, and produced and inrollment of the decree, which mentioned both bill and anſwer; and the court held, that the deed being loſt, the proof might be ſupplied by memorials. 5 *Mod.* 210. *Paſch.* 8 *W.* 3. *Barley's* caſe.

At *Lent* aſſiſes at *Thetford*, 12 *W.* 3. 1699. *Holt.* Ch. J. refuſed to admit depoſitions in Chancery to be given in evidence after the bill was diſmiſſed; but it was reſerved as a point for his future conſideration, and conference had with the practicers in Chancery; he gave his opinion, that notwithſtanding ſuch diſmiſſion of the bill, the depoſitions were good evidence. And ſo he ruled it afterwards at *Guildhall*, at the ſittings after *Hillary* term 1 *Ann. Lord Raym. Rep.*. 735. *Smith* v. *Veale.*

If a witneſs going to ſea be by rule of court examined upon interrogatories before a judge, and the trial comes on before he is gone, his depoſitions ſhall not be read, but he muſt appear, for the rule was made on ſuppoſal of his abſence. 2 *Salk.* 691. *Paſch.* 13 *W.* 3. *B. R. Anon.* and by conſent of the parties. *Per Pratt*, Ch. J.

Theſe depoſitions *in perpetuam, &c.* cannot be made uſe of againſt any others but the defendants who were ſubpœnaed to defend the matter, or ſome claiming under them, to whom ſome intereſt accrued ſince the bill preferred. *Pract. Reg.* 36, 37.

It was ruled by *Holt* Ch. J. at *Lent* aſſiſes, at *Eaſt-Grimſtead*, 11 *Will.* 3. 1699. that if an anſwer to interrogatories in Chancery be given in evidence at a trial, they ought to be proved by the examiner himſelf, to have been the ſame day that is mentioned upon them. *Ld. Raym. Rep.* 734. *Goring* v. *Evelin.*

Several perſons were examined as witneſſes, no ways concerned in intereſt, and the cauſe heard, and iſſues directed to be tried, but the trials were not carried on, and the cauſe ſlept many years, and after abated; and then thoſe perſons who had been examined as witneſſes became heirs at law, and thereby intereſted in the matter; the cauſe was revived and heard, and the ſame iſſues directed to be tried; and the perſons who had been ſo examined (being now plaintiffs) prayed to have an order that their depoſitions taken when they were diſintereſted might be read, as evidence at law for themſelves; and my Lord Keeper ordered accordingly, and likened it to the caſe where one is the only, or only ſurviving witneſs to a deed, becomes the party intereſted, his hand may be proved at law; ſo if a witneſs to a deed becomes blind. Then the cauſe proceeded to trial at bar in *C. B.* where the whole court held their depoſitions could not be read without conſent, the parties being living; but the defendant conſented, and had a verdict for him, and the plaintiff obtained a new trial, and then would have had the ſame order; but my Lord Keeper ſaid, Since the judges had reſolved otherwiſe, he could not take upon him to make that evidence which was not, amd therefore only ordered they ſhould be read in evidence, as by law they might. *Abr. Equ. Caſes* 224. *Trin.* 1702. *Holcraft* v. *Smith.*

Depoſitions were taken in Chancery *in perpetuam rei-memoriam*; and it happened afterwards that the inheritance of the ſame land deſcended to a perſon who was ſworn as a witneſs, and he was now a party to the ſuit in ejectment; and upon a queſtion in *C. B.* whether theſe depoſitions could be read, *Trevor* Ch. J. held they ought; but *Tracy* and *Blencow contra*; whereupon *Tracy* went to *B. R.* for the opinion of the court, and *per cur'*, they ought not to be read; for the only intent of ſuch depoſitions was to perpetuate teſtimony in caſe witneſſes died, and they cannot be read in any caſe between other parties till after the death of the witneſs, who is to appear and give evidence *viva voce* as long as he lives: much leſs can they be read in this caſe where the witneſs himſelf is a party. 1 *Salk.* 286. *Mich.* 2 *Ann. Tilly's* caſe.

The depoſitions of one in *Ireland*, or elſewhere out of *England*, where no proceſs will fetch him, may be read as evidence to prove the record, as alſo in caſe one be ſick, *&c.* *Per Gould* and *Powell* J. it is better to have witneſſes *viva voce*, where they may be had; but ſuppoſe the record be out of the Queen's dominions, or in the *Weſt-Indies*, or in Scotland, a depoſition would do in ſuch caſes; *per Powell* J. the law requires the beſt evidence that can be had; but we cannot compel any one to come out of *Ireland*, nor oblige any one to go and inform himſelf in order to be a witneſs; but the rule is to be interpreted with reſpect to the perſons depoſing, is that a man's affidavit ſhall not be read when he is here to give his evidence *viva voce*; yet the depoſitions of thoſe that are abſent may be read; *per Holt* Ch. J. and cited *Cro.* 541. but ſaid, he would not warrant the authority of the caſe. 11 *Mod.* 210. *pl.* 1. *Paſch.* 8 *Ann. B. R. Lord Altham* v. *Lord Angleſey.*

E V I

Depoſitions in another cauſe, in which the matters in queſtion were not in iſſue, cannot be read. *MSS. Tab.* 1706. *Allibone* v. *Attorney General.*

Regularly the depoſitions in Chancery of a witneſs ſhall not be given in evidence, if he be alive, although he be beyond ſea, as in *Ireland, &c.* otherwiſe if he be in *France*, or another kingdom, not ſubject to the dominion of our King. *Tr. per Pais, 7th edit.* 385, 386.

Depoſitions in a former cauſe, where neither plaintiff nor defendant were parties, cannot be read as evidence, but depoſitions in a cauſe, where either plaintiff or defendant were parties, may be read as evidence againſt ſuch plaintiff or defendant. *MSS. Tab. January 20th* 1702. *Lord Peterborough* v. *Germain.*—— *February* 25, 1717. *Everard* v. *Aſhton.*

Where a perſon has been examined in Chancery, his depoſition may be read at law between the ſame parties, if proved to be dead, or ſick, or out of the kingdom. *Atkyns's Rep.* 445.

Depoſitions in Chancery are evidence after the bill is diſſmiſſed. *Stran.* 735.

Examination. Examination of one examined in the Admiralty court, uſed here at the hearing. *Toth.* 288. cites 16 *Eliz. li. a. fo.* 530. *Watkins* v. *Furſland.*

The defendant having prepared for a former trial, which the plaintiff delayed, and would not proceed then, but now ſtirred a trial on again, whereupon the defendant prayed, that it might be ſtayed on ſuggeſton, that his material witneſſes were mariners, and now going to ſea with the fleet, and would not be ready 'till *Michaelmas* term next. The court agreed to examine the witneſſes by conſent of parties before the Ch. J. the trial being to be before him, and that the plaintiff, if he would, might croſs-examine them. 2 *Keb.* 13. *pl.* 32. *Paſch.* 13 *Car.* 2. *B. R. Catline* v. *Pidgeon.*

A witneſs not to be examined *viva voce* at the hearing. *Toth.* 287. cites *Wright* v. *Moor*, 6 *Car.* 1.

To examine witneſſes upon oath for proof of acquittances, payments, and other diſburſements upon hearing. *Toth.* 287. cites *Comes Kenrice* v. *Gore, Paſc.* 6 *Car'.*

Nota pro regula. Examination of witneſſes by interrogatories out of the term, by *Foſter* Ch. J. is extrajudicial, and not to be allowed, though the party conſent; contrary by *Twiſden* and *Windham, conſenſus* (if according to law) *tollit errorem*; and the court may as well allow the examination of witneſſes before a judge by depoſitions, as read the affidavit of a perſon abſent; this is no more than the law allows. 1 *Keb.* 36. *pl.* 98. *Paſch.* 13 *Car.* 2. *B. R. Blake* v. *Page.*

If one witneſs be examined for the defendant *de bene eſſe*, to preſerve his teſtimony upon a bill preferred, and before anſwer, and upon an order in court for his examination made upon hearing counſel on both ſides; and if after anſwer the witneſs dies before he is examined again, the anſwer coming on the 28th of *Nov.* and the witneſs's death hapening on the 18th of *December* following, and he being ſick all the mean time, ſo that he could not go to be examined; the examination of ſuch witneſs ſhall not be read in evidence, becauſe it was taken before iſſue joined in the cauſe, and he might have been examined after; and the defendant did not appear to be in contempt. Held upon evidence in the Exchequer *per curiam*, by advice of all the other judges conſulted with thereupon. *Hard.* 315. *pl.* 6. *Mich.* 14. *Car.* 2. *Browne*'s caſe.

The witneſſes may be examined before a judge by leave of the court, as well in criminal cauſes as in civil, where a ſufficient reaſon appears to the court, as going to ſea, *&c.* and then the other ſide may croſs-examine them. *Comb.* 63. *Mich.* 3 *Jac.* 2. *B. R. Mather* v. *Port.*

In a trial at bar, *May* 14, 1705. of an iſſue out of Chancery to try if a leaſe was made in purſuance of a power, which was to make leaſes for the beſt rent that could be got; a witneſs named *Ruſhley* was examined in Chancery concerning the value of the land, having been collector of the rents; and at the time of his examination in Chancery he referred to and conſulted his rental. But now at this trial he was become blind, and thereupon his examination in Chancery, and depoſitions there were admitted to be read; becauſe if he had been ſo ill as that he could not have come to the trial, they had been good evidence, and now he is diſabled to conſult the rental, by the act of God, and therefore the ſame reaſon holds. He alſo gave evidence of what he remembered beſides. 2 *Ld. Raym. Rep.* 1166. *Eaſt.* 4 *Ann. Kinſman* v. *Crook.*

Where a ſupplemental bill is brought after publication in the original cauſe, it is irregular to examine the witneſſes to a matter that was in iſſue, and not proved in the original cauſe, and ſuch proofs are not to be read. *March* 31, 1725. *Tab. Bagnall* v. *Bagnall.*

Exemplification. In aſſiſe, he who pleads a recovery in a writ of right in court-baron in bar of aſſiſe before juſtices of aſſiſe, ought to ſhew the record exemplified under the ſeal of the Chancellor, and otherwiſe it is no plea, and it ought to be removed into Chancery by *recordare, &c.* and then to be exemplified. *Br. Barr. pl.* 95. cites 28 *Ed.* 3. *and Fitz.* tit. *Aſſiſe.*

By ſtat. 3 & 4 *Ed.* 6. *cap.* 4. *ſect.* 2. "All perſons which ſhall claim by force of any patents to be made by the King, and all other that ſhall have an eſtate or intereſt in any lands, offices, or other things, by or under ſuch patentees, may convey unto themſelves title, as well againſt the King as againſt any other perſon, by ſhewing forth the exemplification or conſtat of the roll, or of ſo much thereof as ſhall ſerve for the matters in variance, under the Great Seal; and the exemplification or conſtat of the inrollment ſhall be of the ſame force, as the firſt letters patent ſhould be, or if the ſame where pleaded or ſhewed."

Exemplifications of depoſitions taken in Chancery to prove one's being of age when he levied a fine, was allowed as evidence, and the jury regarded it more than the fines being reverſed for non-age. *Dy.* 301. *pl.* 40. *Trin.* 13 *Eliz.*

By ſtat. 13 *Eliz. cap.* 6. "An exemplification or conſtat of a patent under the Great Seal is ſufficient for the patentee."

And by the ſame ſtatute, "An exemplification of the inrollment of the letters patent by *H.* 8. *E.* 6. *Qu. M. Ph. & M. Qu. Eliz.* or any of them, ſince the 4th of *Feb.* in the 27th *H.* 8. or hereafter to be granted by the queen, her heirs or ſucceſſors, ſhall be of as good force to be ſhewn and pleaded in behoof of the patentees, their heirs and ſucceſſors, and aſſigns, and every other perſon having any eſtates from, by, or under them, or any of them, as well againſt the Queen, her heirs or ſucceſſors, as againſt any other perſons whatſoever, as if the letters patent themſelves were produced."

By ſtat. 17 *Eliz. cap.* 9. *ſ.* 8. "The exemplification of records of any fine or recovery inrolled, or any part thereof, in the twelve ſhires of *Wales*, and the town of *Haverfordweſt*, under the judicial ſeal, or in the counties palatine, under the ſeal of the reſpective county palatine, ſhall be of as good force as the orignal record itſelf."

In ejectment upon the iſſue of Not guilty, the defendant gave in evidence a recovery in *Wales* in a *quod ei deforceat*, and iſſue being tendered thereupon, the defendant produced an exemplification under the ſeal of the great ſeſſions; but not the record itſelf, whereupon the plaintiff demurred to the evidence; and after long arguments it was ſaid by the judges, that an exemplification of a record in *Wales* might not be given in evidence while the record itſelf is in being, unleſs the ſame where exemplified under the Great Seal, and then the court ought to take notice; but not of other inferior ſeals, but an exemplification may be produced in evidence in the ſame court, to prove a record upon a *nul tiel record* pleaded; but agreed, that a ſworn copy of a record in *Wales* might be given in evidence. *Hard.* 118, 119, 120. *Trin.* 1658. *in Scacc. Oliver* v. *Gwyn.*

Copies of depoſitions are not to be allowed to be exemplified. 2 *Chan. Rep.* 36. 21 *Car.* 2. *Brabant* v. *Perne.*

The

E V I

The defendant ſetting up an intail, the plaintiff exhibited an exemplification of a recovery in the Marquis of *Wincheſter*'s court in ancient demeſne; the other ſide objected that they did not prove it a true copy; but becauſe it was ancient, the court ſaid they ſhould not be ſo ſtrict upon the evidence of it, for the other ſide ſaid the court-rolls were burnt in the Baſeing-houſe in the time of the wars, and *Hales* ſaid the mayor of *Briſtol* had offered in evidence an exemplification of a recovery under the town ſeal, of houſes in *Briſtol*, the records being burnt, and that exemplification was allowed for evidence. 1 *Mod.* 117. *pl.* 17. *Paſch.* 26 *Car.* 2. *B. R. Green* v. *Proude.*

In evidence to a jury at bar of *Eſſex* in ejectment, *Maynard pro defendant* offered an exemplification under the Great Seal in 1588, of depoſitions in Chancery, whereby a conveyance made in 86, and loſt, was proved; and the court agreed, that being ſo old, and the records of the rolls burnt ſince, it is good evidence, though the bill and anſwer were not in it, which, *per Twiſden* and *Maynard*, was uſed but thirty years laſt paſt, and before it was not uſual to inſert the bill and anſwer; and this was given in evidence in a former trial here at bar, tho' it appearing to be a bill of diſcovery by *Francis Moor* and *Richard Moor* his father, under whom the plaintiff claimed as heir, the defendant as purchaſer, becauſe the depoſitions of ſuch are never publiſhed without notice given to both parties. 2 *Keb.* 31. *pl.* 65. *Paſch.* 18 *Car.* 2. *B. R. Blower* v. *Thetchmore.*

Exemplification of letters patent of a grant of fee-farm rents was produced, but ſo far only as concerned this grant was ſhewn forth, and good. *Carth.* 209. 3 *W. & M.* in *B. R. Tucker* v. *Hodges.*

Will exemplified under the great ſeal is no evidence to a jury in ejectment. *Comp.* 46. *Paſch.* 3 *Jac.* 2. *B. R. Anon'.*

In replevin, exception was taken to the avowry, that the demiſe of the manor for ninety-nine years was alledged to be to Sir *H. B. &c.* by indenture under the Great Seal, *prout* by inrollment of the ſaid indenture in Chancery it appears, but did not produce any exemplification or conſtat thereof; but after it is alledged that this indenture is loſt; but that the ſaying that the indenture is loſt is not ſufficient; for if this ſhould be allowed, the ſtatute of 3 & 4 *Ed.* 6. *cap.* 4. was made to no purpoſe, by which act in ſuch caſe, title may be made by producing an exemplification or conſtat, *&c.* and to this all the court at firſt inclined, if it was not aided by the confeſſing it in the bar by a direct *bene & verum eſt*; but afterwards *Powell* and *Rookby* Juſtices held, that it was not aided; but this was not fully reſolved *per curiam*; and the reporter adds a *quære* alſo if advantage can be taken of it unleſs by ſupecial demurrer. 2 *Lutw.* 1171, 1172. *Hil.* 1 *W. & M.* in caſe of *Hill* v. *Bolton.*

Exemplification of part of a patent not allowed to be read in evidence, notwithſtanding the ſtatutes of 3 & 4 *Ed.* 6. and 13 *Eliz.* in caſes where the other ſide have not time to conſult the patent roll, and ſo may be ſurprized by an imperfect exemplication. *Chan. Prec.* 59. *pl.* 56. *Mich.* 1695. *Attorney General*, at the relation of the inhabitants of *Stains* v. *Taylor.*

Plaintiff would have read in evidence an exemplification of part of a patent; but defendant objected, that nothing but the patent itſelf, or an exemplification, or copy of the whole, could by law be evidence; and it was not ſuffered to be read in evidence, notwithſtanding the ſtatutes 3 & 4 *Ed.* 6. & 13 *Eliz.* where the other ſide have no time to conſult the patent roll; and ſo may be ſuprized by an imperfect exemplification. *Chanc. Prec.* 59. *Mich.* 1695. *Attorney General*, at the relation of the inhabitants of *Stains* v. *Taylor.*

To prove the delivery of goods to a maſter of a ſhip, an exemplification of the entry thereof was offered in evidence, which entry was made in the cuſtom-houſe books at *Rotterdam*, atteſted by a publick notary, and ſealed with the publick ſeal there; but the court would not admit this exemplification to be given in evidence. 8 *Mod.* 75. *Paſch.* 8 *Geo. The King* v. *Maſon.*

Fine. A fine may be given in evidence to a jury, tho' not under the ſeal of the court or great ſeal. *Pl. C.* 410. *Mich.* 13 & 14 *Eliz. Newys* v. *Larke.*

Foreign letters in a ſtrange language. In a cauſe in *Chanc.* between two Jews, ſeveral letters written in *Portugueſe* were tranſlated (without order of the court) and the *Engliſh* copies were proved to be true copies of the orignals; but *per* Maſter of the Rolls, Theſe are no evidence, for the court always appoints a tranſlator, and he would not allow theſe *Engliſh* copies to be read, although it was ſaid the *Portugueſe* letters were alſo proved. *Paſch.* 9 *Geo. in Chanc.*

Goldſmith's note. Goldſmith's note to pay is evidence of his receiving money. 1 *Salk.* 283. *pl.* 14. *Hill.* 12 *Will.* 3. *Ford* v. *Hopkins.*

Guardian's anſwer in Chancery. On a trial at bar in ejectment the queſtion aroſe, whether the anſwer of a guardian in Chancery ſhall be received as evidence in *B. R.* to conclude the infant, there being ſome opinions that it ought to be read; and the defendant's counſel inſiſting on the contrary, Mr. Juſtice *Eyres* being the *puiſne* juſtice was ſent to *C. B.* to know their opinion, who returning made this report, That the judges of that court where all of opinion, that ſuch anſwer ought not to be read as evidence, for it was only to bring the infant into court, and to make him a party. 3 *Mod.* 258. *Mich.* 1 *W. & M. in B. R. Eggleſton* v. *Speke.*

Hearſay. To prove a diſcharge of tithes by unity of poſſeſſion in the time of the abbot, and at the time of the diſſolution, two perſons teſtified, that they had ſeen a deed of appropriation of the parſonage to the abbot, for which reaſon they verily thought there was an unity of poſſeſſion at the time of the diſſolution; but it was ruled to be no proof; for it may be intended not to continue, and a conſultation was granted, but they ſaid that hereſay ſhall be allowed for a proof. *Cro. E.* 228. *pl.* 17. *Paſch.* 33 *Eliz. B. R. Stanſham* v. *Cullington.*

Hearſay from others is not to be applied immediately to the priſoner; however thoſe matters that are remote at firſt may ſerve to prove there was a general conſpiracy to deſtroy the King and government; and ſo was the conſtant rule and method about the popiſh plot, firſt to produce evidence of the plot in general; by Ch. J. cites *Sidney*'s caſe, *Tri. per Pais* 56.

Being told by perſons of good credit all along the road of the parliament's prorogation, is good evidence of notice in an action of falſe impriſonment. 2 *Show.* 300. *pl.* 302. *Paſch.* 31 *Car.* 2. *B. R. Vercon* v. *Deacle.*

On a modus alledged, it was agreed that where the ſtatute appoints proof of the ſurmiſe to be by two, it is ſufficient if two affirm that they have known it be ſo, or that the common fame is ſo. *Noy* 28. *Anon'.*

On a modus ſuggeſted, and iſſue joined upon it, the witneſſes ſaid, that for a long time, as they heard ſay, the occupiers of that farm, *&c.* had uſed to pay annually to the parſon three ſhillings for all tithes; and it was agreed, that a prooof by hearſay was good enough to maintain the ſurmiſe, within the ſtatute 2 *E.* 6. *Noy* 44. *Webb* v. *Potts.*

If a witneſs ſwear in a cauſe and dies; *per cur'.* held, that in another trial one that heard him may upon oath repeat his teſtimony, and it ſhall be good evidence. 2 *Show.* 48. *pl.*33. *Paſch.* 31 *Car.* 2. *B. R. King* v. *Carpenter.*

Though a hearſay was not be allowed as a direct evidence, it may be made uſe of to this purpoſe, *viz.* to prove that a man was conſtant to himſelf, whereby his teſtimony was corroborated. 1 *Mod.* 283. *pl.* 29. *Trin.* 29 *Car.* 2. *B. R. Lutterell* v. *Reynell.*

In ſuit between *A.* and *B. A.* produced a deed. In a ſuit afterwards, between *C.* and *A.* it was *viva voce* proved, that *A.* in a cauſe between *A.* and *B.* produced ſuch a deed which proved ſo and ſo, *&c. Per cur'.* It is good evidence; for here *A.* may give that very deed in evidence if he will, which *C.* cannot, becauſe it is in *A*'s cuſtody. *Carth.* 80. *Mich.* 1 *W. & M. B. R. Eccleſtone* v *Speke.*

The ſaying of old men not to be given in evidence on iſſue, whether parcel or not parcel, as they may in caſe of

E V I

of a modus; *coram* Baron *Bury*, at *Launceſton*. *Lam.* 1710.

Queſtion in ejectment, whether ſuch a parcel belong to one or other; the declaration of a perſon who held under both, and by deed was allowed as evidence by Lord Ch. J *Hardwicke*. Summer aſſizes at *Exeter* 1735. between *Roll* v. *Fellow*.

In the caſe of murder, what the deceaſed declared after the wound given, may be given in evidence. *Coram King* Ch. J. *apud Old Baily*, 1720. *King* v. *Ely*.

In *Trowter*'s caſe, *Paſch.* 8 *Geo. B.R.* the court would not admit the declaration of the deceaſed, which had been reduced into writing, to be given in evidence without producing the writing.

Herald's books. Herald's books were admitted to be good evidence for triers of a challenge to prove couſinage in the ſheriff. 2 *Plow.* 426. *a. Mich.* 14 & 15 *Eliz. C. B.* in the caſe of *Vernon* v. *Mannors*.

In indictment at a taial at bar, a herald's book being ancient, was admitted as evidence to prove a pedigree; and an inquiſition *poſt mortem* is likewiſe evidence, but not concluding evidence. 2 *Jones* 224. *Mich.* 34 *Car.* 2. *B. R. Earl of Thanet* v. *Foſter*.

In this caſe the viſitation-book of the county of *Worceſter* by the heralds, was allowed as evidence, being an original, but a copy has been often diſſallowed. *Comb.* 63. *Mich.* 3 *Jac.* 2. *B. R. Matthews* v. *Port*.

An entry in the herald's office ſhall not be allowed good evidence to prove a pedigree for an heir; becauſe they are not matters of record, but allowed only as circumſtantial evidence. *L. P. R.* 537.

Herald's books not allowed as evidence to prove a pedigree at *Sarum* aſſizes, Lent 1719. *coram Forteſque A.* in ejectment; for he ſaid it was made up by the party that ſigned it, and returned into the office and not the entries of any publick office.

Hiſtory. A general hiſtory may be given in evidence to prove a matter relating to the kingdom in general, becauſe the nature of the thing requires it, but not to prove a particular right or cuſtom. 1 *Salk.* 281. *pl.* 9. *Mich.* 7 *W.* 3. *B. R. Stainer* v. *The Burgeſſes of Droitwich*.

Speed's chronicle was given in evidence to prove the death of *Iſabell* Queen dowager to *Ed.* 2. though *Maynard* ſeemed to oppoſe it; and *Dolbin* ſaid it was done by conſent; yet the Chief Juſtice ſaid, he knew not what better proof they could have; and *Waller* ſaid, that in the houſe of lords it was admitted by them in lord *Bridgwater*'s caſe. *Skin.* 15. *pl.* 16. 33 *Car.* 2. *B. R. Lord Brounker* v. *Sir Robert Atkyns*.

In ejectment for the barony of *Cockermouth*, and all the honours, manors, *&c.* of *Joceline* the late Earl of *Northumberland*, of the family of *Piercy* in the county of *Cumberland*, Sir *William Dugdale*'s book of the Baronage of *England* was offered as evidence: *ſed non allocatur*. 2 *Jo.* 164. *Mich.* 33 *Car.* 2. *B. R. Piercy* v. ——.

Dugdale's Monaſticon was refuſed in evidence to prove the abbey of *Fountains* of the order of *Ciſtertians* in the Exchequer in this term, becauſe it might be proved by the records in the court of augmentation; the ſame law of *Dugdale's* baronage in *Piercy*'s caſe; *le quel jeo obſervavi*. *Skin.* 624. *pl.* 17. *Mich.* 7 *Will.* 3. *B. R.* in the caſe of *Steyner* v. *Droitwich Burgeſſes*.

Deed was produced 1 *W. & M.* and chronicles were admitted to prove that King *Philip* did not uſe the ſtile which was not in the deed at that time. 12 *Mod.* 86. *Mich.* 7 *W.* 3. cites *Neal* v. *Jay*.

Upon an iſſue out of Chancery, whether by the cuſtom of *Droitwich*, ſaltpits could be ſunk in any part of the town, or in a certain place only, *Camden's Britannia* was offered in evidence but refuſed; for the court held, that a general hiſtory might be given in evidence to prove a matter relating to the Kingdom in general, becauſe the nature of the thing requires it, but not to prove a particular right or cuſtom. So in the caſe of St. *Katherine*'s hoſpital, *Hale* Ch. J. allowed a chronicle to be evidence of a particular point of hiſtory in *E.* 3. time. 1 *Salk.* 281. *pl.* 9. *Mich.* 7 *W.* 3. *B. R. Stainer* v. *Burgeſſes of Droitwitch*.

There was a trial at bar concerning the right of viſiting Univerſity college in *Oxford*. One of the iſſues in this caſe was, whether King *Alfred* was founder? and the counſel for the plaintiff would have given in evidence ſeveral hiſtorians as to this point; but the Ch. J. declared, that ſuch evidence is never admitted, unleſs in proof of a point concerning the government; the reſt of the court did not deny it; accordingly it was waived. 1 *Barnard. Rep. in B. R.* 14 *Paſch.* 13 *Geo.* 1. *Cockman* v. *Mather*.

Indorſement. In debt by adminiſtratrix on a bond to inteſtate dated 35 years ago; at the trial the plaintiff offered in evidence an indorſment by the inteſtate's own hand, of the payment of intereſt for one year after the bond was nine years old; but the Ch. J. who tried it, would not admit it, becauſe the indorſement being all his own hand-writing, might be made at one time and dated at another, and being made by himſelf ought not to be given in evidence for him; plaintiff was nonſuited; and on a caſe ſtated by way of reference for the opinion of the court, it was agreed for the plaintiff, that the rule that no man can be evidence in his own cauſe is diſpenſed with in caſe of neceſſity, where no other evidence can be had, as in the plaintiff's caſe, and the rather as it is to prove money paid in diſcharge of the defendent. Urged *e contra*, that if ſo, any one, who gets the poſſeſſion of an old bond, may charge the obligor after payment, by making ſuch an indorſement. *Per* two juſtices, No judgment can be given, as it comes not judicially before the court; but after ſaid it was a queſtion for the jury, whether this was a true indorſement or not, and that this might be admitted, becauſe ſuch indorſements are daily made, and at the requeſt of the obligor, and is the ſureſt evidence, becauſe acquittances may be loſt, whereas the indorſement continues as long as the bond itſelf; Ch. J. *diſſentiente*; it was adjourned. 8 *Mod.* 279. *Trin.* 10 *Geo. Serle* v. *Barrington*.

Inqueſt of office. An inqueſt of office is no concluding evidence. 2 *Jo.* 224. 34 *Car.* 2. *B. R. King* v. *Foſter*.

An inquiſition not admitted to be read as evidence, there being no commiſſion to warrant it. *Jan.* 23. 1717. *MSS. Tab. Auſtin* v. *Nichols*.

An old inquiſition *poſt mortem* read as evidence without producing the commiſſion. *MSS. Tab. Feb.* 6. 1726. *Anderton* v. *Magawly*.

Inrollment of deeds. It was ſaid by *Glyn* Ch. J. that if divers perſons did ſeal a deed, and but one of them acknowledge the deed, and the deed is thereupon inrolled, this is a good inrollment within the ſtatute, and may be given in evidence as a deed inrolled at a trial. *Sty.* 462. *Mich.* 1655. in a trial at bar. *Thurle* v. *Madiſon*.

Inrollment of a deed which needs no inrollment is no evidence. 1 *Keb.* 117. *Mich.* 13 *Car.* 2. *Eden* v. *Chalkhill*.

A queſtion ariſing, whether an inrolled deed ſhould be evidence without furthur proof, a difference was taken where the eſtate paſſes by the inrollment, as in a bargain and ſale, there it is an evidence; but where it is only for ſafe cuſtody, there it is not, otherwiſe than againſt the party who ſealed it, and all claiming from, by, or under him, and ſo far it ſhall. 2 *Freem. Rep.* 259. *pl.* 327. *Trin.* 1702. *Lady Holecroft* v. *Smith*.

At a trial at bar in ejectment, the queſtion was upon a commencement of a leaſe, which was to be upon the determination of a leaſe then in being to Queen *Elizabeth*, of certain lands belonging to the church; and to prove ſuch leaſe to the Queen, an ancient book in which entries were of leaſes of theſe lands ſince *Henry* VIIth's time, and this was found amongſt the evidences of the biſhop's (this being biſhop's land), was offered, but oppoſed becauſe not ſuch good evidence as they might have had; for the leaſe being made to the Queen, it muſt have been inrolled, and then they might have brought a copy of the inrollment; for without an inrollment the Queen could not take, and it is better evidence of a leaſe in fact as well as in law than the book, and therefore muſt be produced. 6 *Mod.* 248. *Mich.* 3 *Ann. B. R. Stillingfleet* v. *Parker*.

By

By ſtat. 10 *Ann. c.* 18. " Where in any declaration or pleading whatſoever, an indenture of bargain and ſale inrolled ſhall be pleaded with a *profert hic in curia*, the perſon ſo pleading it may produce a copy of the inrolment of the bargain and ſale, which being examined with the inrolment, and ſigned by the proper officer, and proved on oath to be a true copy, ſhall be of the ſame effect as if the original indenture of bargain and ſale were produced.

" Provided, that this act ſhall not give any benefit in pleading, or deriving a title to any rent which hath not been paid or levied within twenty years next before the time of ſuch pleading or deriving a title."

Inſpeximus. It is ſaid, that one may not ſhew in evidence to a jury an *inſpeximus* of a deed inrolled in Chancery, unleſs it be a deed of a bargain and ſale inrolled here; for if it be a deed of feoffment, he muſt ſhew the deed itſelf, for the *inſpeximus* is no matter of record; but *per Roll* Ch. J. Tho' it be the *inſpeximus* of the inrolment and not of the deed itſelf, yet if it be an ancient deed it may be given in evidence. *Sty* 445. *Paſch.* 1655. *Anon'.*

The defendant, in an ejectment on a trial at bar, gave evidence on an *inſpeximus* of a leaſe by the abbot of *B.* which the court diſallowed, being a private deed, and may be forged, and an *inſpeximus* lies only of matter of record; whereupon they ſhewed an allowance of the ſame deed in the court of augmentations, which *per cur.* is good againſt the King. 2 *Keb.* 294. *pl.* 79. *Mich.* 19 *Car.* 2. *B. R. Kirby* v. *Gibbs.*

A *conſtat* or *inſpeximus* of letters patents made ſince the 27 *H.* 8. may be pleaded by the King's patentees, or any claiming under them, as well againſt the King as any other. *Hawk. C. L.* 311. (225.)

Inventory. In an action of trover upon Not guilty pleaded, an inventory of the goods was given in evidence to the jury, as the goods were appraiſed by upholſterers; judgment for the plaintiff. 4 *Leon.* 243. *pl.* 396. *Paſch.* 8 *Jac. C. B. Arden* v. *Goad.*

Jones moved, that *Haſtings* ſheriff of *Middleſex* might bring in an inventory of goods taken in execution by *fieri facias* for evidence (in trover) of the value of the goods, which the court granted in a ſuit between other parties, the ſheriff being not charged, albeit he be not compellable on ſuch a writ, but only on extent, and he agreed to bring it at the trial if he could find it. 2 *Keb.* 277. *pl.* 39. *Mich.* 19 *Car.* 2. *B. R. Baxter* and *Cramfield* v. *Seix.*

Jointenancy. Jointenancy cannot be given in evidence, but muſt be pleaded in abatement. *L. Evid.* 331. *pl.* 27. cites *Trials per Pais* 207. *Hill.* 1652. *Jones* v. *Randal.*

Journal. Journal of the houſe of commons is no evidence becauſe they have no power to give an oath; *per Jefferies* Ch. J. in *Oates*'s trial.

Journal of the houſe of lords proved and admitted in the biſhops trial, to prove the King's ſpeech 1662, and the opinion of the houſe of lords about the King's power in eccleſiaſtical affairs. *Vin. Ev.* 122.

Minutes of proceedings in courts. In an action for a malicious proſecution brought againſt the defendant, for inditing a bailiff for forcibly taking away his goods without a legal authority, the plaintiff, to juſtify his having authority, produced the minutes of a judgment in the court-baron, and likewiſe a warrant for execution made upon it; but the judge was of opinion, that the judgment ought to have been drawn up, and that the minutes were not evidence of it. Accordingly the plaintiff was nonſuited, though ſerjeant *Urling* ſubmitted it, that 2 *Mod.* 306. is contrary to the judge's opinion. 2 *Barnard. Rep. in B. R.* 406. *Hill.* 7 *Geo.* 2. *Pitcher* v. *Rinter.*

Negative. In what caſes a negative muſt be proved, and what ſhall be proof thereof. In a ſuit for tithes in the ſpiritual court, the defendant pleaded that the plaintiff had not read the thirty nine articles; and the court put the defendant to prove it, though a negative; whereupon he moved for a prohibition which was denied; for in this caſe the law will preſume that a parſon has read the articles; for otherwiſe he is to loſe his benefice; and when the law preſumes the affirmative, then the negative is to be proved. 1 *Roll. Rep.* 83. *pl.* 29. *Mich.* 12 *Jac. B. R. Marke* v. *Butler.*

Witneſſes cannot teſtify a negative but an affirmative. 4 *Inſt.* 279. *cap.* 4.

Where there is an affirmative affidavit and a negative affidavit, the affirmative affidavit of the plaintiff is to be taken. *Cumb.* 18. *Paſch.* 2 *Jac. B. R.*

Defendant ſwore an affidavit, and information againſt him for it, although a negative cannot be proved, yet the court directed that they ſhould firſt give their probable evidence, and that the defendant ſhould afterwards prove his affirmative if he could. *Cumb.* 57. *Trin.* 3 *Jac.* 2. *B. R. The King* v. *Combs.*

Nonſuit. Debt on bond, in which obligee had made a material raſure, defendant pleaded *non eſt factum*, and plaintiff finding that defendant upon oyer had diſcovered the forgery, he countermanded the notice; the court ſaid, the beſt way was for the defendant to carry the cauſe down by proviſo, and if the plaintiff would ſuffer himſelf to be nonſuited, whereby the ſuit would be at an end, and the plaintiff intitled to take his bond out of court, yet that nonſuit would be great evidence againſt him in another action to be brought thereupon. 6 *Mod.* 233. *Mich.* 3 *Ann. B. R. Selby* v. *Green.*

Notary publick's certificate. It was reſolved, that a copy of an agreement regiſtred in *Holland*, and atteſted by a publick notary there, may be given in evidence for the now defendant, eſpecially ſince he proved that the plaintiff took out another copy of the ſame agreement, and would not now produce it; therefore the copy which the defendant had taken out was given in evidence; for it is plain that the plaintiff knew the agreement, he having taken a copy thereof, ſo could not be ſurprized. 8 *Mod.* 322. 11 *Geo. Sir John Walrond* v. *Jacob Senior Henricus Van Moſes.*

The court held, that a plaintiff who was in *Holland*, might make affidavit there, and get it atteſted by a publick notary; and that it ſhould be admitted as evidence to hold the defendant to ſpecial bail here. 8 *Mod.* 233. *Mich.* 11 *Geo.* in the caſe of *Sir John Walrond* v. *Jacob*, *&c.*

Office found. Nota; by *Coke* and *Bryan*, an office before an eſcheator ſhall not be given in evidence, unleſs it be exemplified; for it ſhall not otherwiſe be deliver'd to the jury, unleſs it be under the Great ſeal of *England*, no more than a teſtimonial, and it is good law. *Bro. Gen. Iſſ. pl.* 75. cites 21 *Ed.* 4. 25.

Office of *poſt mortem* found was held to be no concluding evidence. 2 *Jones* 224. *Mich.* 34 *Car.* 2. *B. R. Earl of Thanet*'s caſe.

Parliament rolls. Upon view of the parliament-roll of the ſtat. 2 *Ed.* 6. for payment of tithes, and comparing it with the declarations in the cauſes between *Bowes* and *Broadhead*, and *Burreſton* and *Herbert*, it was found, that the ſtatute was rightly recited, notwithſtanding what had been objected, and the journal-book of parliament produced to the contrary; and thereupon judgment was given in both caſes; and court ſaid, that they were to be ruled by the parliament-roll, and not by the journal-book. And the ſame day, in the caſe between *Boyer* and *Tantulyar* for the ſame reaſon, and the court ordered the parliament-roll to be brought into court the next term, to make it appear whether an ajournment in parliament was well recited, and would not credit the journal-book. *Style* 155. *Mich.* 1649. *B. R. Anon'.*

Parol evidence. Parrol agreement or evidence is not to be admitted againſt a deed, or a truſt expreſſed in a deed; yet a declaration fully proved, and made before a deed was drawn, and it appearing plainly to be the deſign of executing the deed for a particular purpoſe, is proper and right. 2 *Chan. Caſes* 180. *Mich.* 2 *Jac.* 2 *Harvey* v. *Harvey.*

Parol evidence may be given concerning the election of an alderman, *&c.* in a corporation, againſt an entry in the corporation books by the town-clerk, or other officer, for theſe may be cooked up for the purpoſe; *per Parker* Ch. J. *Paſch.* 4 *Geo. B. R.*

Parol evidence admitted to prove the effect of a record loſt and of another obliterated. *Feb.* 6, 1726. *MSS. Tab. Anderton* v. *Magawly.*

Parol evidence not admitted to fix the conſtruction of a will. *Stran.* 1261.

Parol evidence may be given of the condition of records, and the manner of keeping them, but not of the matter of them. *Stran.* 210.

Parol evidence not admitted to explain a depoſition. *Stran.* 794.

A bill brought to ſet aſide an aſſignment of a leaſehold eſtate, *&c.* upon ſuggeſtion that it was not intended as an abſolute aſſignment, but ſubject to a truſt for the plintiff's benefit: though no expreſs truſt in the deed, yet as it might be collected from circumſtances ariſing out of the aſſignment itſelf; and other circumſtances created a ſtrong preſumption of a truſt; Lord Chancellor admitted parol evidence to explain this tranſaction. *Atkyns's Rep.* 447.

Though there can be no parol declaration of a truſt ſince the 29 *Car.* 2. yet parol evidence is proper here in avoidance of fraud intended to be put upon the plaintiff. *Atkyns's Rep.* 448.

A perſon left to *A.* 20 *l. per ann.* by a codicil to his will, and after talking of making another codicil, and leaving him 15 l. more, the attorney told him, that if *B. C.* and *D.* whom he had made deviſees of his eſtate would give him a bond to pay him 15 *l. per ann.* it would be ſufficient; *B.* being preſent, promiſed that he and the deviſees would, and a draught was prepared, but not executed; teſtator lived five weeks after, and *A.* remained nine years without demanding the performance of the promiſe or draught to be perfected, and then brings his bill; diſmiſſed at the rolls, and upon appeal decree of diſmiſſion affirmed. *Atkyns's Rep.* 448.

The court will not add a legacy to a will upon parol proof, though it concerns the perſonal eſtate only; *a fortiori* where it intends to charge lands. *Atkyns's Rep.* 449.

Preſentment of the foreſters. The preſentments of the officers of the foreſt was ſufficient evidence, that ſuch wood and timber was felled, and there was no other evidence given. 1 *Jo.* 268. 8 *Car. Itin. Windſor. Whitlock*'s caſe.

Preſumption. Length of time. Preſumptions are of three ſorts, *viz.* violent, probable, light and temerary; violent preſumption is many times *plena probatio*, a clear proof; as if one be run through the body with a ſword in a houſe whereof he inſtantly dieth, and a man is ſeen to come out of that houſe with a bloody ſword, and no other man was at that time witoin the houſe; probable preſumption moveth a little; but *præſumptio levis*, or a light preſumption moveth not at all. *Co. Lit.* 6. *b.* cites *Bracton.*

The abbot of *S.* held the parſonage of *B.* in the county of *L.* appropriate, which, as a parſonage impropriate came to King *H.* 8. by the diſſolution of monaſteries, 31 *H.* 8. who in the 37th year of his reign granted it in fee-farm, under which grant the plaintiff claims the defendant has obtained a preſentation of the Queen, and to deſtroy the ſaid impropriation did ſhew the original inſtrument of it 22 *Ed.* 4. with condition that a vicarage ſhould be competently endowed, and alledged, that the ſaid vicarage was never endowed, and therefore the impropriation was void, and in truth there was no inſtrument, nor any direct proof of the endowment of the vicarage; but becauſe the ſaid rectory was during all the time of the impropriation ſuppoſed, reputed, and taken to be appropriate, and all that time a vicar preſented, admitted, inſtituted, and inducted as a vicar rightfully endowed, and paid his firſt fruits and tenths, it was reſolved by all the court, that it ſhall be preſumed that the vicarage, in reſpect of continuance, was lawfully endowed, for that *omnia præſumunter ſolenniter eſſe acta*; and it ſhall be of a dangerous precedent to examine the originals of impropriations of any parſonages and the endowments of vicarages, becauſe the originals of them in time will periſh; and ſo it was decreed for the plaintiff. 12. *Rep.* 4. *Trin.* 30 *Eliz.* in the Exchequer-Chamber, *Crimes* v. *Smith.*

E V I

An impropriation ſhall not be avoid becauſe of an eſtate-tail in the patron, grantor, *&c.* but it ſhall be preſumed, by reaſon of ancient and continual poſſeſſion; that an ancient grant was made by one that had power to make it, and that it was duly made; for if an objection or exception ſhould now prevail, the ancient and long poſſeſſion of the owners of the ſaid rectory ſhould hurt them; for if theſe objections or exceptions had been made in the life-times of the parties, without any queſtion they had been anſwered, or otherwiſe in ſo many ſucceſſions of ages it would have been impeached or impugned. 12 *Rep.* 4. *Hill.* 4. *Jac. Bedle* v. *Beard* and *Wingfield*, in *Cam'*.

In quare impedit in *C. B.* the ſuit was ſtayed by aid prayer, and the record removed into Chancery; the plaintiff moved for a *procedendo*, and upon oyer of cauſe before *Bromley* Lord Chan. *&c.* plaintiff ſhewed a gift in tail of the ſaid advowſon to his anteceſſor 18 *R.* 2. and a verdict for his anteceſſor 12 *H.* 8. and a preſentation by his grandfather of a clerk who was admitted, inſtituted, and inducted, with poſſeſſion for certain years, and other matters to prove his title; yet becauſe the defendant, and thoſe from whom he claims time out of mind had the poſſeſſion of the parſonage as impropriate (ſaving interruption for a ſmall time), and it would be a dangerous precedent to owners of impropriations, being able to maintain the appropriations to be perfect in all points, requiſite to the making an abſolute and complete impropriation, the appropriations being made of ancient time; it was reſolved that no *procedendo in loquela* ſhould be granted in Chancery. 12 *Rep.* 3. *Paſch.* 4. *Jac. Lord St. John* v. *Dean of Glouceſter.*

If a deed of feoffment be given in evidence to have been made forty years paſt, but it cannot be proved that livery was made, yet if poſſeſſion has all along gone with the deed, this is good evidence to the jury; *per Coke* Ch. J. who ſaid, that in ſuch caſe he would direct the jury to find a livery; for it ſhall be intended; but if the jury find all this matter ſpecially, we cannot adjudge it a good ſeoffment without livery. *Rol. Rep.* 132. in *pl.* 9. *Hill.* 12 *Jac. B. R.*

If a parſon ſhews that for two hundred years certain land was parcel of his glebe, it is not therefore of neceſſity that the other ſhould produce a confirmation from the patron, and ordinary; for the continuance in poſſeſſion makes it intendable to be according to law when it was made. *Cro. J.* 456. *pl.* 13. *Mich.* 15 *Ja. B. R.* in caſe of *Griffin* v. *Stanhope.*

About eighteen years before the bill filed, *Moyle* the father became bound in a bond of 200 *l.* conditioned for the payment of 100 *l.* to the Lord *Roberts* the defendant at a certain day long ſince paſt; afterwards the obligee purchaſed lands of *(Roſecarrick)* the principal obligor to the value of 500 *l.* which purchaſe was made about four years before *Roſecarrick*'s death; after his death *Moyle* took out adminiſtration to him, and being ſued upon this bond, exhibited a bill for relief, and in regard of the antiquity of the bond, and for that *Roſecarrick* himſelf never ſued in his life-time, it was preſumed, that the defendant did deduct the debt out of the purchaſe-money; and notwithſtanding there were no proofs of the payment of the money made, the court decreed, that the defenddant ſhould be reſtrained from the proceeding at law on the bond; *per Lord Coventry.* N. Ch. R. 9. 5 Car. 1 Moyle *v.* Ld. Roberts.

Where there had been four ſiſters, and the queſtion was as to their being alive, and who ſhould prove it? *Chamberlain* and *Doderidge* held, that they ſhall be intended to be alive if the contrary be not proved. *Rol. Rep.* 461. *Mich.* 22 *Jac. B. R. Throgmorton* v. *Walton.*

In things of great antiquity *omnia præſumuntur ſolemniter eſſe acta*; *per Crew* Ch. J. *Palm.* 327 *Paſch.* 2 *Car. B. R.* in caſe of *Cape* v. *Bedford.*

Whether after forty years poſſeſſion of a copyhold under a will, a ſurrender to the uſe of the will ſhall not be preſumed? Lord Keeper was clear that the want of a ſurrender ſhould be ſupplied, ſurrenders being kept by the lord and his ſtewards who are oftentimes changed, and not ſo careful as they ſhould be, and therefore a ſurrender might

might be loſt without the default or negligence of the party. *Vern.* 195. *pl.* 192. *Mich.* 1683. *Lyford* v. *Coward.*

Length of time is only a preſumption of payment, and there is a difference between debts and legacies as to their antiquity. Legacies always appear upon the face of the will, and ſo an executor knows what he ought to pay without being aſked or told; but for debts and other dormant demands, againſt which he cannot provide without notice, the ſtatute had reaſon to limit the time. *Vern.* 256, 257. *pl.* 140. *Mich.* 1684, in the caſe of *Parker* v. *Aſh.*

Where two facts are alleged againſt the ſame man, and it be queſtioned whether it be the ſame man, it is ſufficient that it be reported; and this is good evidence, unleſs ſome one elſe of the ſame name be produced. *L. E.* 278. *pl.* 8. cites *Oats* 2 *Try.* 15.

If defendant pleads payment of a bond or bill, and it appears that the debt is very old, and hath not been demanded nor any uſe paid for it for many years, a common preſumption is good evidence that the money is paid, and the juries uſed to find for the defendant in ſuch caſes. *Try. per Paris, 7th edition,* 311.

A ſleeping mortgage of ſeventeen years due, which time the mortgagor and a purchaſor under him, have been in quiet poſſeſſion, and the mortgagee having purchaſed lands of the mortgagor, and paid him money, ſhall be preſumed to be ſatisfied; and decreed, that the mortgage-deeds be delivered up to be cancelled. *Chan. Rep.* 8. *Car.* 1. 60. *Sibſon* v. *Fletcher.*

After long poſſeſſion, as for twenty-five years, livery and ſeiſin ſhall be preſumed; for this is much favoured in law as well as in equity. *Vern.* 196. in *pl.* 192. cites 11 *Car.* 1. *Biden.* v. *Loveday.*

Reconveyance of lands, which were a ſecurity for a recognizance to pay an annuity, gives a probable reaſon to imagine that the recognizance was diſcharged, and no part of the ſaid annuities being paid for ſeveral years after, and though demanded, yet being denied; decreed the ſame to be vacated. *Chan. Rep.* 102. 12 *Car.* 1. *Baldwin* v. *Proctor.*

Probate. If a teſtament be raſed in the name of the executors, yet writ ſhall go by them; for it appears in the Regiſter if they were made executors or not, and alſo the party may traverſe, that they were not executors, notwithſtanding the teſtament; *per Newton* and all his companions; *Brooke* ſays, and ſo ſee, that the probate (as it ſeems) is not matter of record at the Common law. *Br. Teſtament, pl.* 4. cites 22 *H.* 6. 52.

The probate of a will, if it reſpects lands, ſhall be no evidence at Common law, nor ſhall examination of witneſſes of the probate be made uſe of at Common law. *Cro. C.* 395, 396. *pl.* 7. *Hill.* 10 *Car. B. R. Netter* v. *Bret.*

In ejectment of terms for years; the plaintiff claimed by letters of adminiſtration granted by the archbiſhop of *Armagh* (the lands lying in *Ireland*), and the defendant produced a probate of a will made by the teſtator, and in which defendant was made executor, and this was under the ſeal of the biſhop of *Fernes* (where the land lay); this is concluſive evidence, and nothing can be given in evidence againſt it but forgery, or its being obtained by ſurpriſe; and if a verdict be given contrary to the probate, the defendant ought to demur upon the evidence, and not bring a writ of error, for if he does the judgment will be affirmed, for the jury may hazard an attaint if they will. *Raym.* 404. *Mich.* 32 *Car.* 2. *B. R. Chicheſter* v. *Philips.*

To prove the ſealing and delivery of a deed, and not knowing the parties that did it, is not good evidence; but if he knows the party upon ſight of him, it is good enough. *Tr. per Pais* 172.

In a writ of error on a judgment in the Common Pleas in *Ireland* in ejectment, this queſtion aroſe upon a bill of exceptions, which was preferred, becauſe the judges there would not direct the jury, that the probate of a will before the archbiſhop of *Canterbury*, in whoſe province the teſtator died, and alſo before the biſhop of *Fernes*, was ſufficient and concluding evidence, but only that they were good evidence, and ſo left it to the jury; to which the other ſide ſhewed in evidence letters of adminiſtration of the goods under the ſeal of the primate of *Ireland*; the thing in queſtion was a leaſe for years in *Ireland*, claimed by the leſſor of the plaintiff under the ſaid adminiſtration; and on the firſt opening of the cauſe, judgment was affirmed. 2 *Jan.* 146. *Paſch.* 33 *Car.* 2. *Philips* v. *Chicheſter.*

At *Rygate* in *Surrey*, ſummer aſſizes 10 *W.* 3. it was ruled by *Holt* Ch. J. upon the evidence, that becauſe in the ſpiritual court after probate of a will ſix months are allowed to regiſter it, and when it is regiſtered, it is regiſtered by the original, but the probate is ſigned by the regiſter only upon the atteſtation of the proctor and the examination of him; therefore a will proved in 1666. in the archdeacon's court of *London*, and the office was burnt in the fire of *London* ſoon after, and the probate was produced in evidence to prove the will with all theſe circumſtances; it was denied by *Holt* Ch. J. to be good evidence to prove the will. Lord *Raym. Rep.* 732. *Anon'.*

In this caſe, tho' the will was made in 1685, yet it was inſiſted to have it proved, and the court would not allow the probate to be read, that being in nature only of a copy, and cannot be read as to lands, unleſs the original be loſt. The will was proved in a former cauſe, and order for reading the depoſitions in that cauſe, but the will produced not being marked by the examiner as an exhibit, objection was taken *hac cauſa* as to its being read, but the will being ſet forth *in hæc verba* in the interrogatory, and being examined in court with it, the will was ordered to be read; but agreed it could not be read out of the interrogatory, becauſe that is no more than a copy, and only evidence when the original is loſt. And *King* chancellor examined the officer who brought the will into court, where he had the will, *&c.* though no order in the cauſe to examine *viva voce. Wiſeman's MSS. Rep. Mich.* 2 *Geo.* 2. in the caſe of lady *Jones v.* Ld *Say and Seal.*

Proceedings in court ſpiritual. A thing concluded in the eccleſiaſtical court touching lands cannot be given in evidence at a trial at law for land, *per curiam. Sty.* 10. *Paſch.* 23 *Car. C. B.* in caſe of *Betſworth* v. *Betſworth.*

In debt upon a bond by an executor, the defendant pleaded *Ne unques executor*, &c. and on this iſſue at a trial, a will under the ſeal of the ordinary was offered in evidence, upon which the defendant offered to prove that the will was forged; but *per cur.* (on a caſe ſtated by the opinion of court) Nothing can be given in evidence againſt what is adjudged and allowed in the ſpiritual court; but it may be given in evidence that it is not the ſeal of the ordinary, or that the ſeal is forged, or that it is repealed, for theſe things are in affirmation of the ſpiritual proceedings. No difference between an adminiſtration under ſeal, or a will of goods under ſeal. So here the defendant may give in evidence that there were *bona notabilia contra* that another is executor, or that the teſtator was not *compos mentis*; for theſe falſify the proceedings of the ordinary in caſes whereof he is a judge. 1 *Sid.* 359. *Raym.* 404, 407. *Comyn's Rep.* 150. *C. Paſch.* 20 *Car.* 2. *B. R. Noel* v. *Wells.*

In treſpaſs the defendant pleaded ſimony in the plaintiff (againſt whom a ſentence of decree had been given in the ſpiritual court for the ſimony), and now upon the trial the defendant offered to read the proofs in the ſpiritual court, but was not allowed, becauſe thoſe courts are no courts of record; but the ſentence of deprivation was allowed to be read. It was objected againſt reading them, that the plaintiff ought not to be concluded of his intereſt in his freehold, by what was done in the ſpiritual court. But the court ſaid, that the ſpiritual court did not by ſentence ouſt him of his freehold, but that it was a conſequence of the ſentence; and that ſimony being a matter they had properly cognizance of, (for tho' ſince 31 *Eliz. cap.* 6. the temporal courts have juriſdiction, yet that ſtatute has not taken away the juriſdiction which the ſpiritual court had at common law) they ought not to ravel into the grounds of the ſentences, but to give credit to them, as they ſhould in a certificate of marriage or baſtardy, and other things which lie within their conuſance, ſo that they muſt take him as guilty of ſimony; he being deprived for it in the ſpiritual court. *Freem. Rep.* 84. *pl.* 103. *Paſch.* 1673. *Philips* v. *Crawley.*

Upon

Upon a trial at bar in ejectment the ſole queſtion was, if Sir *Robert Carr* was actually married to *Iſabella Jones* by whom he had iſſue, and under whom the plaintiff claims; the defendant, by way of anticipation to the evidence which the plaintiff was about to give, moved the court, that the plaintiff ought not to be allowed to prove a marriage between them, becauſe there was a ſentence in the Arches, upon a ſuit brought againſt her *cauſa jactitationis maritagii*; by which it was decreed, that there was no marriage between them, but that they were free one of another, and that they might marry ſeparately, which they afterwards did. And this ſentence was now offered in evidence by the defendant's counſel, as a bar to conclude the plaintiff from any proof of the marriage, unleſs he could ſhew that the ſame was repealed. And upon debate, the court were all of opinion, that this ſentence, whilſt unrepealed, was concluſive againſt all matters precedent, and that the temporal courts muſt give credit to it until it is reverſed, it being a matter of mere ſpiritual conuſance; and hereupon the plaintiff was nonſuit. *Carth.* 225, 226. *Paſch.* 4 *W. & M. Br. Jones* v. *Bow.*

A matter which has been directly determined by their ſentence, cannot be gainſaid; their ſentences are concluſive in ſuch caſes, and no evidence ſhall be admitted to prove the contrary; but that is to be intended only in the point directly tried; otherwiſe it is if a collateral matter be collected or inferred from their ſentence; as where, becauſe the adminiſtration is granted to the defendant, therefore they infer that the plaintiff was not the defendant's husband, as he could not have been taken to be, if the point tried in their court had been, married or unmarried, and their ſentence had been, not married. *Per Holt* Ch. J. 1 *Salk.* 290. *pl.* 30. *Hill.* 7 *Ann. Blackham*'s caſe.

Proceedings in the ſpiritual court againſt the father for incontinency with the mother cannot be given in evidence againſt the children not deriving any title under her to the lands in queſtion, and the intent of reading it being to ſhew that the mother's marriage was not until their births, was not allowed by the judge to be read; which the lord chancellor thought hard of. 8 *Mod.* 180. *Trin.* 9 *Geo. Hilliard* v. *Phaley.*

But if there was a marriage, and they were divorced for conſanguinity, ſuch ſentence would have been concluſive evidence to baſtardize the children born in wedlock before the divorce; and what could be better evidence in a court of law, to ſhew there was no marriage, than a ſentence in the ſpiritual court carried on in a regular ſuit, and pronounced in the life-time of the parties that they were guilty of fornication, and the proof of the commutation money paid by the father; *per* lord chancellor. 8 *Mod.* 180. *Trin.* 9 *Geo. Hilliard* v. *Phaley.*

Proclamation. In caſe on a wager about the day on which the peace was concluded, it was held by *Holt* Ch. J. that a printed proclamation was good evidence though not examined by the record inrolled in Chancery, nor proved to have been under the Great ſeal. 12 *Mod.* 215. *Mich.* 10 *W.* 3. *Dupais* v. *Shepherd.*

Proclamations muſt be examined with the original; *per King Chan. Trin. vac.* 1727.

Receipt. In debt for rent, on reference to the ſecondary to ſee if all were paid, he reported, that a receipt of the laſt half year's rent was ſhewed in diſcharge of all former arrearages: but *per cur'*: This is only evidence of payment of all, but is no diſcharge of the former arrear, unleſs it be under hand and ſeal, and then but by eſtoppel. 2 *Keb.* 346. *pl.* 25. *Paſch.* 20 *Car.* 2. *B. R. Coome* v. *Denne.*

A receipt of the laſt half year's rent is evidence that all before was paid. *L. E.* 204. cites *Tr. per Pais* 211.

Recital. It was ſaid, that if a deed expreſs a conſideration of money upon the purchaſe made by the deed, yet this is no proof upon a trial that the monies expreſſed were paid; but it muſt be proved by witneſſes. *Sty.* 462. *Mich.* 1655. *B. R. Thurle* v. *Madiſon.*

Recital in a patent of a former patent is no evidence without producing the firſt patent. 2 *Lev.* 108. *Trin.* 26 *Car.* 2. *B. R.* reſolved in caſe of *Cragg* v. *Norfolk.*

Error of a judgment upon a demurrer to evidence in *C. B.* the witneſs to the ſealing and delivery of a deed being ſubpœnaed did not appear; but to prove it the party's deed, they proved an indorſement made by him thereupon three years after, reciting a *proviſo* within, that if he paid ſuch a ſum the deed ſhould be void, and acknowledging that the ſaid ſum was not paid; and a fine was levied of the very lands mentioned in the deed to *Crawley*, and by the indorſement he expreſly owned it to be his deed, and upon this the deed was read; and now it was objected, that this was not good evidence, becauſe not the beſt the nature of the thing could bear, but only circumſtantial, which never ought to be admitted where better may be had *ex natura rei*, becauſe circumſtances are fallible and doubtful; and it is upon this reaſon that a copy of a record is good, becauſe one cannot have the record itſelf, but a copy of a copy will not do. *Holt* Ch. J. ſaid, Can there be better evidence of a deed than to own it, and recite it under his hand and ſeal; & *per totam curiam* judgment affirmed. 12 *Mod.* 500. *Paſch.* 13 *Will.* 3. *Dillon* v. *Crawley.*

A fine was produced, but no declaring the uſes; but a deed was offered in evidence which did recite a deed of limitation of the uſes; and the queſtion was, whether that was evidence? And the court ſaid, that the bare recital of a deed was not evidence, but that if it could be proved that ſuch a deed had been, and loſt, it would do, if it were recited in another; and it not being proved, that ever there was a deed leading the uſes of the fine, the counſel on one ſide oppoſed the ſaid deed of recitals being at all read; but the court ſaid, we cannot hinder the reading of a deed under ſeal, but what uſe is to be made of it is another thing. 6 *Mod.* 45. *Mich.* 2 *Ann. B. R. Ford* v. *Lord Grey.*

The recital of a leaſe in a deed of releaſe is good evidence of ſuch leaſe againſt the releaſor, and thoſe that claim; but not as to others, without proving there was ſuch a deed, and that it was loſt or deſtroyed.

A. gave a bond to *B.* for payment of 2000 *l.* within a year after his death (he having ſeduced her and had a child by her); afterwards *A.* by deed poll reciting that he had given a bond (as above), agreed the 2000 *l.* ſhould be laid out in an annuity for the uſe of *B.* and the child for their lives. *A.* died; *B.* ſued the adminiſtrator on the bond, but there being only one witneſs to it, and (tho' his hand-writing was proved, yet) he ſwearing that he did not ſee the bond ſealed and delivered, *B.* was nonſuited, and brought her bill to be paid out of the aſſets. Lord Chan. *King* held, that the recital in the deed, that *A.* had given ſuch a bond, was ſufficient evidence of there having been ſuch; that it is a confeſſion by the obligor himſelf, and ſtronger than a verbal confeſſion, being under his hand and ſeal, and decreed accordingly. 2 *Wms's Rep.* 432. *Hill.* 1727. *Annandale* (*Marchioneſs*) v. *Harris*, & *e contra.*

Record. When the party makes a title by record he muſt ſhew it under the Great ſeal, unleſs in the ſame court, and a day is given to bring it in. *Pl. C.* 411. *a. Mich.* 13 & 14 *Eliz.* in caſe of *Newys* v. *Larke.*

In pleading, a man cannot make himſelf a title in any caſe by record, without ſhewing it under the Great ſeal. *Pl. C.* 411. *a. Mich.* 13 & 14 *Eliz.* in caſe of *Newys* v. *Larke.*

A deed of uſes was loſt, and to ſupply it, evidence was given, that the loſt deed had formerly been ſhewed in evidence in the Exchequer upon an alienation there queſtioned, the land being holden *in capite*, and the record thereof was ſhewed; and this was allowed for evidence. *Clayt.* 85. *pl.* 131. 16 *Car.* before *Foſter* J. Lord *Watton*'s caſe.

If a record be given in evidence the jury may find it, though it is not *ſub pede ſigilli*, if they have other good matter of inducement to prove it; but if it be given in evidence, it muſt be *ſub pede ſigilli*; *per Rolle* Ch. J. *Sty.* 22. *Paſch.* 23 *Car. B. R.* in caſe of *White* v. *Pynder.*

Indebitatus aſſumpſit for 5 *l.* received to the uſe of the plaintiff for fees of his office of clerk of the peace for *Oxfordſhire*; upon *non aſſumpſit* pleaded, it was inſiſted that the

E V I

the plaintiff had forfeited the office by not taking the oaths within the time appointed by law, and to prove it, the record of ſeſſions was given in evidence, and held good. 1 *Salk.* 284. *Mich.* 12 *W.* 3. *B. R. Thurnſton* v. *Stafford.*

No particular crime ſhall be proved againſt a witneſs, except the record of his conviction be produced. *L. E.* 35. *pl.* 2.

Recovery. In other courts than thoſe of *Weſtminſter.* Upon a trial in *Herefordſhire* for lands in the county of *Brecknock*, a recovery had in the grand ſeſſions of *Wales* was produced in evidence under the ſeal of that court; and it was objected, that the courts at *Weſtminſter* could not take notice of it; but adjudged, that ſince the grand ſeſſions is appointed by act of parliament, *viz.* by the ſtatute of 24 *H.* 8. *cap.* 26. the courts of *Weſtminſter* ought to take notice of it, 2 *Sid.* 145. *Hill.* 1658. *in Scacc. Olive* v. *Gwynn.*

Regiſter-book. A regiſter-book for entry of marriages, births, *&c.* is evidence; *per Glynn* Ch. J. 2 *Sid.* 71. *Paſch.* 1658. *B. R.* in *Dudley*'s caſe.

Rent. Diſcharge thereof. In debt for rent, on reference to the ſecondary to ſee if all were paid, he reported that a receipt of the laſt half year's rent was ſhewn in diſcharge of all former arrearages; but *per cur':* This is only evidence of payment of all, but it is no diſcharge of the former arrear, unleſs it be under hand and ſeal, and then but by eſtoppel. 2 *Keb.* 346. *pl.* 25. *Paſch.* 20 *Car.* 2. *B. R. Coomes* v. *Denne.*

Rentals. Bill in Chancery by truſtees of a charity, to ſubject an eſtate to a rent of 3*l.* 13*s.* 7*d.* againſt the owners of the land, one whereof was lately purchaſor but had reſerved money in his hands on account of this rent, though not certain out of what lands it was iſſuing. Several court-rolls were read where this rent was mentioned, but not ſaid out of what lands; others mentioned land in ſuch a place: They read alſo papers, (copies of rentals given to bailiffs to collect by) and read evidence, that theſe bailiffs charged themſelves with the ſums there mentioned. Decree for plaintiff aganſt all defendants; they joining in defence, and it not appearing out of what particular lands the rent was iſſuing, ſo no remedy at law. *Paſch.* 11 *Geo. in Canc'. Vin. Ev.* 132.

Ancient rent-rolls proved by a receiver, denied to be read as evidence; but the decree reverſed. *April* 1727. *MSS. Tab. E. Angleſey* v. *Ram.*

A rental was but weak evidence, unleſs payment alſo proved, and not ſufficient *de ſe*; *coram* Baron *Cummins*, at *Taunton* aſſizes, *Hill. Vac.* 1727-8.

Reputation common. The judges ſhall apprehend words as they are intended in places, where the land demanded lies. *Palm.* 102. *Paſch.* 17 *Jac. B. R.*

Uſage may expound ancient charters where the words are obſolete and obſcure, and may bear ſeveral ſenſes, but *contra* where the charter is of modern date. The reputation and declaration of people, may be given in evidence to xplain old words in a conveyance, in the deſcription of an eſtate or lands; *coram* Baron *Price*, at *Launceſton.*

No witneſs ſhould be aſked how the defendant ſtands affected; but if the defendant give evidence of a general reputation, it may be anſwered by particular inſtances on the other ſide for the King. *Comb.* 337. *Trin.* 7 *W.* 3 *B. R. The King* v. *Hains, alderman of Worceſter.*

The copy of a private act of parliament may be given in evidence, and if upon collateral iſſue it is to be proved that ſuch a one was juſtice of the peace or baronet, *&c.* common reputation is ſufficient proof without ſhewing the commiſſion, or letters patent of the creation. *L. E.* 89. cites *T. per Pais* 226.

Rule of court. It was ruled by *Treby* Ch. J. of *C. B.* at *Guildhall, Paſch.* 10 *W.* 3. that if at the trial at *niſi prius* a rule of the court of *C. B.* or *B. R.* be produced under the hand of the proper officer, there is no need to prove it to be a true copy, becauſe it is an original. *Ld. Raym. Rep.* 745. *Selby* v. *Harris.*

Seals of courts. A recovery under the ſeal of *Brecknock* is evidence; *per Witherington* Ch. Baron. 2 *Sid.* 146. *Hill.* 1658.

The ſeal of *Cheſter* may be given in evidence; *per Witherington* Ch. B. 2 *Sid.* 146. *Hill.* 1658.

The courts at *Weſtminſter* ought to take notice of the ſeal of the grand ſeſſions in *Wales*, their authority being by act of parliament, and the profits of thoſe ſeals are appointed to be paid into the court of Exchequer; *per Witherington* Ch. B. 2 *Sid.* 146. *Hill* 1658.

Moreton ſerjeant ſaid, that he never ſaw the ſeal of any court denied in evidence. *Keb.* 21. *pl.* 62. *Paſch.* 13 *Car.* 2. *B. R.* in the caſe of *Trowell* v. *Caſtle.*

Sentence. In the Exhequer, as to goods forfeited. Upon a ſeizure of goods, as brandy, *&c.* if the property is once determined in the Exchequer upon an information, *&c.* and the defendant acquitted, the title ſhall not afterwards be drawn over again in another action. So if goods are condemned, the party is bound by this, and ſhall not have liberty afterwards to conteſt this in a collateral action; *coram* Baron *Price*, at *Bodmyn, Trin. Vac.* 1716.

Signet manual of the King. In caſe between *A.* and *C.* in Chancery, the King by letters under his ſignet manual certified the manner and ſubſtance of the agreement between them; and it was allowed as proof beyond exception. *Hob.* 213. *pl.* 271. 9 *Jac. Abignye* v. *Clifton.*

Similitude of hands. In debt upon a ſingle bill for the payment of 200*l.* on demand, upon *non eſt factum* pleaded, one witneſs gave full evidence of the ſealing and delivery. On the other ſide was produced a perſon of the ſame name and ſurname with the other ſubſcribing witneſs, who acknowledged that the hand was very like his, but that it was not his hand, and that he never knew either of the parties, nor the other witneſs, neither could the other witneſs ſay that he was the man; and both their reputations being good, *Holt* Ch. J. ordered both to write their names, which they did, and left it to the jury, who found for the plaintiff. 6 *Mod.* 167. *Paſch.* 3 *Ann. B. R. Oſbourn* v. *Hoſier.*

Things done or ſworn at another trial. In an action of debt for tithes, the caſe was, Theſe tithes were in leaſe to *F.* for life, remainder to the plaintiff for life; and at a trial for theſe tithes had by *F.* the firſt tenant for life in poſſeſſion, ſeveral witneſſes were examined, which are dead; and it was now moved that the depoſitions taken in that cauſe might be read as evidence for the now tenant for life in remainder; but it was denied, becauſe he in remainder was neither party nor privy to the firſt ſuit. 2 *Roll. Rep.* 211. *Mich.* 18 *Jac. B. R. Shotbolt* v. *Frances.*

The evidence given upon an indictment cannot be offered by either party as evidence upon an appeal of murder brought for the ſame offence, but the witneſſes on the indictment muſt appear themſelves to give their teſtimony. Neither can the evidence on an indictment of treſpaſs be given in evidence in an action of treſpaſs, although the witneſſes ſhould be dead. *Sid.* 325. *Paſch.* 19 *Car.* 2. *B. R. Sampſon* v. *Tothill.*

Information againſt *Buckworth* for perjury; upon Not guilty pleaded, a witneſs was produced to prove the perjury, what one (who is ſince dead) ſwore at the trial in which the perjury was ſuppoſed to be committed; and this was allowed by the opinion of two judges againſt one. *Mich.* 20 *Car.* 2. *B. R. Raym.* 170. *Buckworth*'s caſe.

One legatee ſhall have benefit of depoſitions taken by another legatee to prove aſſets. 1 *Vern.* 413. *pl.* 390. *Mich.* 1688. *Coke* v. *Fountain.*

In caſe, the plaintiffs preſcribed to have a farthing for every quarter of malt brought by any of the Weſt-Country barges to *London.* On the general iſſue a trial was at bar, where the plaintiff offered in evidence four ſeveral verdicts at *niſi prius* againſt four Weſt Country malſters; and the court admitted them to be given in evidence, though the defendant was neither party or privy to thoſe records; for it is as reaſonable that a recovery againſt a ſtranger ſhould be given in evidence, as that payment of the duty ſhould be proved by other ſtrangers,

E V I

ſtrangers, which was never yet doubted. *Carth.* 181 *Hill.* 2 & 3 *Will. & Mar. in B. R. The city of London* v. *Clerke.*

And *per Holt* Ch. J. If a lord of a manor claims ſuit of his tenements *ad molendinum* by cuſtom, *&c.* and in an action, recovery is againſt one tenant, that recovery may be given in evidence in a like action to be brought againſt other tenants upon the reaſon above, unleſs the defendant can ſhew any covin or colluſion between the firſt action. *Quod nota. Ibid.*

Ordered, upon a long debate, that the depoſitions of witneſſes taken in a cauſe thirty years ſince about the ſame matters, being incumbrances and damnifications, ſhould be made uſe of in this cauſe, witneſſes being dead, though that ſuit were between other parties from whom theſe claim not; and the caſe between *Trinity Hall* and *Doctors Commons* cited, and between *Charlton* and *Vaughan. Freem. Rep.* 184. *pl.* 258. *Paſch.* 1692. *in Curia Cant. Tervit* v. *Greſham.*

Ejectment to prove a pedigree; it was allowed to ſhew that the defendant had, at another trial for part of the ſame eſtate, produced a deed of releaſe, which had a clauſe in it to prove the pedigree. Objected that it was no evidence, becauſe the now plaintiff was not a party; *et res inter alios acta non nocet*, and it is not mutual. And depoſitions taken to perpetuate the teſtimony of witneſſes, if the witneſs ſhould die, are no evidence but only between the parties to the ſuit; *ſed non allocatur.* For here the defendant may give this deed in evidence of the will, and it is reaſonable the plaintiff ſhould have advantage to prove it *viva voce*, becauſe the defendant hath the deed in his cuſtody, and may diſprove the witneſs if he ſwore falſly. *Carth.* 79, 80. *Mich.* 1 *W. & M.* in *B. R. Eccleſton* v. *Petty*, alias *Speke.*

If a man was ſworn a witneſs at a former trial, and gave evidenee, and died; the matter that he gave in evidence at the former trial, may be given in evidence at another trial by any perſon who heard him ſwear it at the former trial. Reſolved at a trial at bar. *Lord Raym. Rep.* 730. *Mich.* 8 *W.* 3. in *B. R. Pyke* v. *Crouch.*

It was reſolved *Mich.* 8 *W.* 3. in *B. R.* upon evidence in a trial at bar,

1. That legatee cannot be a witneſs to prove the will, becauſe the legacy is deviſed to him, unleſs he has releaſed the legacy. But after ſuch releaſe he will be a good witneſs to prove the will; if the counſel of the other ſide have permitted ſuch legatee to be ſworn, and to be examined as a witneſs to prove the will, without having taken exception againſt him, they cannot afterwards except againſt his evidence for the reaſon that he was a legatee.

2. If the duplicate of a will be written by the direction of the teſtator, and ſent by him to a ſtranger to keep it ſafely, and the ſtranger ſends back a letter to the teſtator, in which he makes mention that he has received the ſaid will; after the death of the ſtranger ſuch letter may be read as circumſtantial evidence, to prove that ſuch duplicate of the will was ſent by the teſtator to the ſaid ſtranger.

3. If a man, produced as a witneſs for the plaintiff in ejectment, confeſſes that there was ſuch a will made as the defendant's counſel pretends, and under which the defendant makes title to the lands in queſtion; yet that is not ſufficient proof that there was ſuch a will, but the will itſelf ought to be produced, or other legal proof made of it.

4. If ſeveral eſtates in remainder be limited in a deed, and one of the remainder-men obtains a verdict for him in an action brought againſt him for the ſame land, that verdict may be given in evidence for the ſubſequent remainder-man, in an action brought againſt him for the ſame land, though he does not claim any eſtate under the firſt remainder-man, becauſe they all claim under the ſame deed. *Ld. Raym. Rep.* 730. 1 *Mich.* 8 *W.* 3. on a trial at bar, *Pyke* v. *Crouch.*

Conviction at ſuit of the King for battery, *&c.* cannot be given in evidence in an action of treſpaſs for the ſame battery, nor *vice verſa.* 12 *Mod.* 339. *Mich.* 11 *W.* 3. in caſe of *King* v. *Warden of the Fleet.*

The like law of an uſurious contract. *Ibid. Mich.* 11 *W.* 3.

No record of conviction or verdict can be given in evidence, but ſuch whereof the benefit may be mutual, *viz.* where the defendant as well as plaintiff might have made uſe of it, bring it into court, and give it in evidence in caſe it did for him. So if the record had been for the plaintiff's advantage, and that they could not give it in evidence, the defandant ſhould not give it in evidence for that very reaſon; and this was reſolved at another trial at bar before this term, between *Sherwin* and Sir *Walter Clarges*, where a verdict between the Earls of *Bath* and *Mountague*, upon the very ſame point and title now in queſtion, *viz.* the legitimacy of *Chriſtopher* Duke of *Albemarle*, was denied for evidence. *Ibid.* 12 *Mod.* 339. *Mich.* 11 *W.* 3. *King* v. *Warden of the Fleet.*

In an inquiſition againſt the Warden of the *Fleet* for miſdemeanors, whereby he was to forfeit his office, a priſoner, who had given bond to be a true priſoner, was produced to prove, that the warden ſuffered him voluntarily to eſcape; reſolved, that a conviction of the warden upon the priſoner's evidence of an eſcape, would be no evidence againſt the warden in debt on the bond to be brought by the warden againſt the priſoner, ſo as to ſet it aſide as a bond for eaſe and favour, nor in action of falſe impriſonment by the priſoner for retaking him, becauſe it would not be between the ſame parties. 12 *Mod.* 339. *Mich.* 11 *W.* 3. *King* v. *Warden of the Fleet.*

Evidence given at a former trial, and between other parties, *&c.* is not evidence in another trial, *&c. L. E.* 32. *pl.* 60. cites *State Tr.* 2 *vol.* 354, 380, 385.

By *Jeffries*, Though in ſtrictneſs we do not uſe to admit of what others have ſworn at another trial, unleſs the party be dead that ſwore it, yet the priſoner is ſomething indulged ſo far as to be admitted to prove it. *L. E.* 278. *pl.* 9. cites *Oates*, 2 *vol. State. Tr.* 40.

No evidence ought to be given of what an accomplice has ſaid, eſpecially if not in the ſame indictment. *L. E.* 32. *pl.* 61. cites *State Tr.* 2 *vol.* 436.

Yet a priſoner may bring evidence to prove the witneſs gave a different teſtimony before a juſtice of peace, or at another trial; but the court will not command the depoſitions taken before the juſtice to be produced for him to make uſe of. *L. E.* 32. *pl.* 62. cites 2 *vol. State Tr.* 578.

Anſwer in Chancery by a mother cannot be given in evidence againſt the children, not deriving any title under her to the lands in queſtion, and the intent of reading it being to ſhew that the mother's marriage was not till after their births, was not allowed by the judge to be read, which the Lord Chancellor thought hard of. 8 *Mod.* 180. *Trin.* 9 *Geo. Hilliard* v. *Phaley.*

In treſpaſs, the defendant produced a deed under the plaintiff's hand and ſeal, whereto were witneſſes names, but becauſe they did not prove the witneſſes dead, nor that they were gone to ſea, though they alledged it, it was not permitted at firſt to be given in evidence, but afterwards upon proof, that it was read at a former trial, it was ſuffered to be read. *Freem. Rep.* 84. *pl.* 103. *Paſch.* 1673. *Phillips* v. *Crawley.*

Where a new trial is directed upon the ſame iſſue between the ſame parties, and a witneſs examined at a former trial dies before the ſecond trial, depoſitions made by him in Chancery whence the iſſue was directed, and alſo what he ſwore at the former trial, may be given in evidence. 2 *Wms's Rep.* 563. *Hill.* 1729. *Coker* v. *Farewell.*

On a feigned iſſue from the Exchequer, to try a cuſtom about grinding at *Bovey Mills* in *Devon* by all the inhabitants of the pariſh, former decrees were admitted to be read in evidence, and ſaid, that former verdicts about cuſtoms had been admitted as evidence, although not concluſive evidence; at *Exon* aſſiſe, *Lent* 1731. *Vin. Ev.* 136.

Torn papers, books, &c. In action upon the caſe for taking the profits of the under clerk of the Treaſury, a note obtained by the Lord *Finch*, maſter of the office formerly, of the officers ſubſcription that they were but ſervants (which by *Allen* the plaintiff, is no more than

ſome

ſome pariſhioners ſubſcriptions to pay tithes in kind) which will not bind others; which the court agreed, and refuſed to let it be given in evidence, eſpecially part being cut off. 1 *Keb.* 258. *pl.* 36. *Paſch.* 14 *Car.* 2. *B. R. Whitchurch* v. *Pagett.*

To prove taking the oath, *&c.* in the act of uniformity, a certificate was produced that had only a ſmall bit of wax upon it. *Per Twiſden:* If it were ſealed, though the ſeal were broken off, yet it may be read as we read recoveries after the ſeal broken off, and ſaid he had ſeen adminiſtration given in evidence after the ſeal broke off, and ſo wills and deeds. 1 *Mod.* 11. *pl.* 34. *Mich.* 21 *Car.* 2. *B. R. Clerk* v. *Heath.*

Transfer books of a company. Transfer books of a company were allowed as evidence. 7 *Mod.* 129. *Hill.* 1 *Ann. B. R. Gery* v. *Hopkins.*

Verdict. A verdict againſt one, under whom either plaintiff or defendant claims, may be given in evidence againſt the party ſo claiming. *Contra* if neither claim under it. *L. E.* 95. *pl.* 22. cites *Duke* v. *Ventres*, *Mich.* 1656. *B. R. Try. per Pais* 206.

Finding by ſpecial verdict, or admiſſion by former pleading, is good evidence, unleſs the contrary appear; agreed *per curiam. Keb.* 720. *pl.* 50. *Paſch.* 16 *Car.* 2. *B. R. Lee* v. *Boothby.*

In an ejectment brought by a reverſioner, or in debt upon ſtatute of *Ed.* 6. by a proprietor of tithes, they may give in evidence a verdict for a former leſſee, becauſe the parties to this action could not have been parties to the former ſuit, in that the then preſent leſſee could be only party. *Hard.* 472. *Hill.* 19 & 20 *Car.* 2. *Ruſhworth* v. *Pembroke.*

Verdict on a former trial ought not to be read as evidence on a new trial in the ſame cauſe. *Per Saunders* Ch. J. 2 *Show.* 255. *pl.* 262. *Hill.* 34 & 35 *Car.* 2. *B. R. Rogers* and *Ux'* v. *Goddard.*

Upon a trial at bar in ejectment it was reſolved *per curiam*, that if a plaintiff hath a title to ſeveral lands, and brings an ejectment againſt ſeveral defendants, and recovers againſt one, he ſhall not give that verdict in evidence againſt the reſt; becauſe the party, againſt whom the verdict was had, might be relieved againſt it, if erroneous, but the reſt cannot, though they claim under the ſame title, and all make the ſame defence. 3 *Mod.* 141. *Mich.* 3 *Jac.* 2. *B. R.* in caſe of *Lock* v. *Norborne.*

So if two tenants will defend a title in ejectment, and a verdict ſhould be had againſt one of them, it ſhall not be read againſt the other, unleſs by rule of court. *Ibid.* 142.

But if an anceſtor has a verdict, the heir may give it in evidence, becauſe he is privy to it; for he who produces a verdict muſt be either party or privy to it, and it never ſhal be received againſt different perſons, if it does not appear that they are united in intereſt; therefore a verdict againſt *A.* ſhall never be read againſt *B.* for it may happen that the one did not make a good defence, which the other may do. 3 *Mod.* 142. *Mich.* 3. *Jac.* 2. *B. R.* in caſe of *Lock* v. *Norborne.*

Verdict in a civil cauſe, may be given in evidence in a criminal cauſe; but not *vice verſa*; and court ſaid, they grant a new trial where a verdict might become evidence in a criminal cauſe. 12 *Mod.* 319. *Mich.* 11 *W.* 3. *Richardſon* v. *Williams.*

If defendant ſued upon a forged bond, brings caſe for ſuing him on a forged bond, a verdict therein will be evidence for him. *Per* Serjeant *Darnell.* 6 *Mod.* 234. *Mich.* 3 *Ann. B. R. Selby* v. *Green.*

Water-courſes. Diverting them. In treſpaſs upon the caſe in turning part of a courſe of water running from a ſpring in *C.* by a conduit to his houſe, the evidence was that *A.* finding an ancient pipe in his yard, through which the water was conveyed to the plaintiff's houſe, put a quill and a cork into the ſaid main pipe, and ſo drew water to ſerve his houſe, and ſtopped it as he pleaſed, and after his death his wife continued to do the ſame; and it was held that the action lay; for every opening was a new diverſion. *D.* 319 *b. pl.* 17. *Mich.* 14 & 15 *Eliz. Moor* v. *Brown.*

In action on the caſe, a ſpecial verdict was found that the plaintiff was ſeiſed of a ſtream running through his land; and that about ſixty years ſince he had erected a water-mill upon his own freehold; and likewiſe it was found, how that the defendant was ſeiſed of an ancient dam upon the ſame ſtream above the plaintiff's mill, and how that the defendant had pulled down the ſaid dam, and thereby diverted the ſtream from the plaintiff's mill, whereupon the plaintiff commences this action. *Pollexfen* argued for the plaintiff, and cited *Palmer* 29. *a.* and 1 *Cr.* 575. and took that to be a clear caſe; that the ſtream being the plaintiff's, the defendant could not divert it, and ſo held the court, that an action had lain for diverting a ſtream, though no mill had been erected; and that therefore it need not be ſhewn to be an ancient mill, as it muſt where he preſcribes to have a water-courſe, where the water is not his own; as the court ſaid was the meaning of *Lutterell*'s caſe, 4 *Rep.* 80. for there preſcribing to the water-courſe he ought to ſhew that they were ancient mills, but here he need not: ſo the court ſeemed wholly for the plaintiff, for here the ſtream is his own, ſo there needs no preſcription. *Skin.* 65. *pl.* 10. *Mich.* 34 *Car.* 2. *B. R. Palmes* v. *Hebblethwait.*

Year books. To prove the cuſtom of a manor relating to copyholders about cutting down of trees, the book-caſe of 14 *Ed.* 3. *tit. Bar. Fitz.* was given in and avowed for good evidence. *Godbolt* 235. *pl.* 326. *Mich.* 11. *Jac. C. B.* in the caſe of the *Biſhop of Chicheſter* v. *Strodwick.*

A year book is evidence to prove the courſe of the court. 1 *Salk.* 281. *Mich.* 7 *W.* 3 *B. R. Stainer* v. *The Burgeſſes of Droitwich.*

5. *Of parol, preſumptive, and hearſay evidence.*

It ſeems to have been agreed as a general rule, even before the ſtatute of frauds and perjuries, that no parol evidence could be admitted to controul what appeared on the face of a deed or will, not only from the danger of perjury, but from a preſumption, that whatſoever the parties at that time had in contemplation, was all reduced into writing. 5 *Co.* 68. *a. b.* 8 *Co.* 155. *a. Kelw.* 49.

But this rule has recived, a relaxation, eſpecially in the courts of equity, where a diſtinction has been taken between evidence, that may be offered to a jury, and to inform the conſcience of the court, *viz.* that in the firſt caſe no ſuch evidence ſhould be admitted; becauſe the jury might be inveigled thereby; but that in the ſecond it could do no hurt, becauſe the court were judges of the whole matter, and could not diſtinguiſh what weight and ſtreſs ought to be laid on ſuch evidence. 2 *Vern.* 98, 337, 625.

Alſo to aſcertain a fact, parol evidence hath been admitted to explain the intent of the teſtator; as where the teſtator had two ſons both named *John*, and he deviſed lands to his ſon *John*; here parol evidence was admitted, to ſhew which of his ſons he meant; and it being proved, that one of his ſon's of that name had been abſent ſeveral years beyond ſea, and that the teſtator apprehended that he was dead, the deviſe was held good, and that the other ſhould take; for without ſuch evidence the will muſt be void. 2 *Vern.* 98, 337, 625.

It has been held, that if *A.* purchaſes lands in the name of *B.* that *A.* may be admitted to prove, that he paid the purchaſe-money, and ſo make it a reſulting truſt, or truſt by implication of law for himſelf.

An entry in the ſteward's book, and parol proof by the foreman of a jury was admitted as good evidence, to ſhew that a feme covert ſurrendered her whole eſtate, although the ſurrender upon the roll, and the admiſſion thereon was but of a moiety. 1 *Vern.* 366. 2 *Vern.* 547.

Alſo to ouſt an implication, and rebut an equity, parol evidence has been admitted to explain the intention of the teſtator; and where a man deviſes particular legacies to his executors, and makes no diſpoſition of the ſurplus of his eſtate; in this caſe, according to the no-

tions

tions of the court of equity, the executors ſhall be only truſtees for the next of kin; but to rebut this equity which ariſes by implication only, the executors have been allowed to prove by parol evidence, that the teſtator deſigned them the ſurplus. 1 *Vern.* 473. 1 *Chan. Ca.* 19. *b.* 2 *Vern.* 99, 648, 736. See *Abr. Aq.* 230, 243.

So where the Earl of *Gainſborough* made his will, and thereby deviſed ſeveral legacies, and charged his real eſtate with the payment of them and his debts, and deviſed his eſtate ſo charged, to the defendant, his nephew, and made the plaintiff, his wife, executrix; and the bill was brought to have the perſonal eſtate diſcharged from the debts and legacies, ſuggeſting that the creditors threatned to come upon and exhauſt the perſonal eſtate; and that it was the intent of the teſtator, that ſhe ſhould have the perſonal eſtate clear to herſelf, and that the directions for making the will were ſo; but that either by the miſtake or contrivance of the perſon who drew the will, it was not ſo expreſſed; and on demurrer, becauſe no ſuch averment could be admitted againſt a will in writing, the demurrer was over-ruled; and it was held by *Rawlinſon* and *Hutchins*, that tho' ſuch an averment could not be admitted where it was to make the party a title; yet where it was only to rebut an equity, as in this caſe, it might. 2 *Vern.* 252. *Abr. Eq.* 230.

So where *J. S.* deviſed all his houſhold goods, as woollen, linen, pewter, and braſs whatſoever, except a trunk under the chamber window; and the queſtion was, whether the parol proof of the perſon who drew the will ſhould be admitted to explain theſe words; and my Lord Keeper thought it might, notwithſtanding the ſtatute of frauds and perjuries; for it here neither adds to nor alters the will, but only explains which of the meanings ſhall be taken, as in caſe of a deviſe to ſon *John*, when the teſtator had two of the ſame name; and here the word *as* may be a reſtriction, or if the following be as particular inſtances, it may not reſtrain the word *whatſoever*, and he thought the words imported to carry all the houſhold goods; and of that opinion was the Maſter of the Rolls; and the proof was read accordingly. *Abr. Eq.* 231. 2 *Vern.* 517.

So where one not of kin, but a ſtranger, was made executor, and had conſiderable legacies given him, although it was decreed by Sir *Peter King*, in the mayor's court, in favour of the teſtator's brothers, that the ſurplus ſhould be diſtributed; yet upon appeal to the houſe of peers, that decree was reverſed, not barely as it ſtood upon the will, but that parol proof ought to be received in favour of the executor's title, conſiſtent with the will; and the proof being full as to the teſtator's frequent declarations, that his executor, though a ſtranger, ſhould have the ſurplus, it was decreed accordingly. *Abr. Eq. Littlebury* and *Buckley*.

But notwithſtanding theſe caſes, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it's certain that too much caution cannot well be uſed in this particular, eſpecially when it is conſidered that by the ſtat. of frauds and perjuries, which was made to prevent perjury, contrariety of evidence and uncertainty, binds the courts of equity as well as the Common law courts; as alſo that little regard ought in many caſes to be had to the expreſſions of the teſtator, either before or after the making his will, becauſe poſſibly theſe expreſſions might be uſed by him, on purpoſe to controul or diſguiſe what he was doing, or to keep the family quiet, or for other ſecret motives and inducements, which cannot after his death be found out. See 2 *Vern.* 98, 337, 625. and 1 *Salk.* 234. Where in the caſe of *Cole* and *Rawlinſon*, it is laid down by Lord Chief Juſtice *Holt*, that the teſtator's intent muſt be collected from the words of the will, and not from his circumſtances, or any matters *debors*, and that to ravel into the affairs of the teſtator, would render property precarious, and introduce uncertainty and confuſion in the law itſelf.

Hence in a caſe in the houſe of lords, where the teſtator deviſed ſeveral legacies, and amongſt the reſt gave conſiderable legacies to his two executors, to whom alſo he deviſed the ſurplus of his eſtate; and there being a debt of 3000*l.* due by bond to the teſtator from one of the executors, he inſiſted, that there being ſufficient aſſets to ſatisfy all the legacies, that this 3000*l.* ſhould not be brought into the ſurplus of the teſtator's eſtate, but that the ſame was extinguiſhed for his benefit, by his being made co-executor; and that tho' the ſurplus of the eſtate was deviſed to them both, yet that this debt could not be taken to be part of that ſurplus being before extinguiſhed; and by the evidence of the perſon who drew the will, fully proved, that this was the teſtator's intention, which evidence, it was urged, ought to be admitted, being only to rebut an equity, and ouſt an implication of law ariſing from the notions of the courts of equity, which revives the debt in theſe caſes, and gives equal benefit to both the executors; but the lords refuſed going into this parol evidence, and decreed that the 3000*l* ſhould be taken as part of the ſurplus of the teſtator's perſonal eſtate, which both the executors were equally entitled unto; for tho' in ſome books the teſtator's making a debtor executor is ſaid to be an extinguiſhment of the debt, becauſe an executor cannot ſue himſelf; yet it was never doubted, but that ſuch a debt remained aſſets to ſatisfy other creditors; alſo it has been reſolved to be aſſets to ſatisfy legacies; and this deviſe of the ſurplus and reſidue of the teſtator's eſtate being as much a legacy, and as well recoverable in the ſpiritual court as any particular legacy, it was but fitting, that ſince the courts of equity claim now a concurrent juriſdiction with the eccleſiaſtical courts in matters of this nature, that there ſhould be the ſame meaſure of juſtice in both theſe courts. 2 *Bac. Abr.* 311. *Selwin* and *Brown*, 21 *March* 1734, *in domo procerum.* Note; This cauſe was firſt heard before the maſter of the Rolls, who admitted the parol evidence, and on the ſtrength thereof decreed, that the 3000*l.* ſhould not be taken as part of the ſurplus of the teſtator's perſonal eſtate; but that it was extinguiſhed for the benefit of the obligee, and accordingly ordered the bond to be cancelled; but this decree was reverſed by the Lord Chancellor, tho' he admitted the parol proof to be read, as not thinking the teſtimony of a ſingle witneſs, according to the circumſtances of this caſe, ſufficient to controul what appeared on the face of the will. 2 *Bac. Abr.* 311.

As to preſumptive proof; Lord *Coke* diſtinguiſhes preſumptive proof, by which he ſays juries are often induced, into, 1. Violent preſumption, which amounts to *plena probatio*; as if one be ſtabbed in an houſe, and a man is ſeen running out of it with a knife bloody, and none elſe in the houſe. 2 *Præſumptio probabilis*, which moves a little. 3. *Præſumptio levis*, which moves not at all. *Co. Lit.* 6.

Alſo in caſe of a feoffment, if all the witneſſes to the deed are dead, then a continual and quiet poſſeſſion for any length of time will make a ſtrong preſumption, which ſtands for proof; and here the rule is, that *ex diuturnitate temporis omnia præſumuntur ſolemniter eſſe acta*; alſo the deed may receive credit by comparing the ſeals, the hand-writing, and other circumſtances, all which muſt be left to the jury. *Co. Lit.* 6.

Perſons once in being ſhall be intended ſtill living, if the contrary is not proved. 2 *Roll. Rep.* 461. But now by ſtat. 19 *Car.* 2. *c.* 6. it is enacted, "That if any perſon or perſons, for whoſe life or lives eſtates have been, or ſhall be granted, ſhall remain beyond the ſeas, or elſewhere abſent themſelves in this realm, by the ſpace of ſeven years together, and no ſufficient and evident proof made of the life or lives of ſuch perſon or perſons reſpectively, in any action commenced for the recovery of ſuch tenements by the leſſors or reverſioners, in every ſuch caſe the perſon or perſons, upon whoſe life or lives ſuch eſtate depended, ſhall be accounted as naturally dead; and in every action brought for the recovery of the ſaid tenements, by the leſſors or reverſioners, their heirs or aſſigns, the judges, before whom ſuch action ſhall be brought, ſhall direct the jury to give their verdict, as if the perſon ſo remaining beyond the ſeas, or otherwiſe abſenting himſelf, were dead."

By the ſtat. 21 *Jac.* 1. *cap.* 27. it is enacted, "That if any woman be delivered of an iſſue, which being born alive ſhould, by the laws of this realm, be a baſtard, and

endeavour

endeavour privately, either by drowning or ſecret burying, or any other way, either by herſelf, or the procuring of others ſo to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; in every ſuch caſe, the mother ſo offending ſhall ſuffer death, as in caſe of murder, unleſs ſhe can prove by one witneſs at leaſt, that ſuch child was born dead."

Conceal the death thereof] If the woman appear to have endeavoured to conceal the death of ſuch child, there is no need of any proof, that it was born alive, or that there were any ſigns of hurt, for it ſhall be taken undeniably, that the child was born alive and murdered. *Kelyng.* 32. But where a woman lay in a chamber by herſelf, and went to bed without pain, and waked in the night, and knocked for help, but could get none, and was delivered of a child, and put it in a trunk, and did not diſcover it till the night following, ſhe was adjudged not to be within the ſtatute, becauſe ſhe knocked for help. *Kelyn.* 32. Neither is a woman within the ſtatute, who having confeſſed herſelf with child beforehand, is afterwards ſurprized and deliverd, no body being with her; and therefore in theſe caſes it muſt appear by ſigns of hurt, or ſome other way, that the child was born alive. *Kelyn.* 32. 2 *Hawk. P. C.* 438.

It ſeems in regard to evidence to be an unconteſtable rule, that the party, who is to prove any fact, muſt do it by the higheſt evidence the nature of the thing is capable of. 1 *Show. Rep.* 397.

As where the queſtion was, whether the abbey *De ſentibus* was an inferior abbey or not, *Dugdale's Monaſticon Anglicanum* being produced for evidence was refuſed, becauſe the orignal records might be had in the augmentation-office. 1 *Salk.* 281.

So if a witneſs be to teſtify what another ſwore on a former trial, the record of ſuch trial muſt be produced, or his evidence is not to be admitted, *&c.* 2 *Show Rep.* 163.

As to hearſay evidence, it ſeems agreed, that what another has been heard to ſay, is no evidence, becauſe the party was not on oath; alſo, becauſe the party, who is affected thereby, had not an opportunity of croſs-examining; but ſuch ſpeeches or diſcourſes may be made uſe of by way of inducement or illuſtration of what is properly evidence. 1 *Mod.* 383. *Skin.* 402.

Alſo what a witneſs hath been heard to ſay at another time, may be given in evidence, in order either to invalidate or confirm the teſtimony he gives in court. 2 *Hawk. P. C.* 431.

So what a perſon accuſed of a crime hath been heard to ſay at another time, may be given in evidence at his trial, for him or againſt him. 2 *Hawk. P. C.* 431.

Ewagium. *Charta Regis Johannis Deo & B. Johanni & hominibus de* Beverlaco, *quod ſint quieti de theolonio, ſcutagio, paſſagio, peſagio, laſtagio, ſtallagio, & de wrec & de logan, de* ewagio *& de lene, &c.* Hill. 14 H. 3. In Theſauro Reg Scacc. Ebor. Rot. 15. *Euagium* is the ſame with *aquagium*, from the French *eau, aqua*, and ſignifies a toll paid for the paſſage of water. *Cowell.* edit. 1727.

Ewbrice, Adultery; from the Saxon *ewe, conjugium*, and *bryce, fractio.* The word occurs in the laws of King *Edmund, ſect.* 4. tho' in the edition of *Brompton* it is faſly wrote *ewice.* From this Saxon *ewe*, marriage, we derive our preſent *Engliſh* word to *woo*, a *wooer. Cowell, edit.* 1727.

Ewe, Is a German word, but it was uſed by the *Engliſh Saxons*, and ſignifies a law. 'Tis mentioned in *Leg. W.* 1. viz. *De malefactoribus qui vitæ periculum ſe cundum* euva *Saxonum incurrere debent.*

Exaction, Is a wrong done by an officer, or one pretending to have authority, in taking a reward or fee for that which the law allows not. The difference between *exaction* and extortion is this; extortion is, where an officer extorts more than his due; *exaction* is, where he wreſts a fee or reward, where none is due. See **Extortion.**

Exactores Regis, The King's *exactors* or *collectors*, ſometimes taken for the ſheriff. And in this ſenſe the *Black-Book* in the Exchequer, *part* 1. *cap. ult. Tabulas, quibus vicecomes cenſum Regium colligit rotulum* exactorium *vocat*; but generally *Quicunque publicas pecunias, tributa, vectigalia & res fiſco debitas exigit proprie nominatur* exactor Regis. *Cowell. edit* 1727.

Examination, (*Examinatio,*) A ſearching after or cognizance of a magiſtrate. By ſtat. 3 & 4 *Ph. & Mar. cap.* 10. *ſect.* 2. Juſtices before whom any perſon ſhall be brought for manſlaughter or felony, or for ſuſpicion thereof, before they commit ſuch priſoner, ſhall take the examination of ſuch priſoner, and information of thoſe that bring him, of the fact and circumſtances; and as much thereof as ſhall be material to prove the felony, ſhall put in writing within two days after the examination, and the ſame ſhall certify in ſuch manner as they ſhould do if ſuch priſoner had been bailed upon ſuch pain as in the act 1 & 2 *Ph. & Mar. cap.* 13. (See **Bail.**) is limited; and the ſaid Juſtices ſhall have authority to bind all ſuch by recognizance or obligation, as declare any thing material to prove the felony, to appear at the next genereal gaol delivery where the trial of the felony ſhall be, to give evidence againſt the party, and the juſtices ſhall certify the ſaid bonds taken before them, in like manner as in the ſaid former act.

Examiners in Chancery, (*Examinatores,*) Are two officers who examine upon oath witneſſes produced on either ſide in *London*, or near it, upon ſuch interrogatories as the parties to any ſuit do exhibit to that purpoſe; and ſometimes the parties themſelves are by particular order likewiſe examined by them. In the country, witneſſes are examined by commiſſioners, uſually attornies not concerned in the cauſe, on the parties joining in commiſſion, *&c.* Heretofore there was ſuch an examiner in the *Star-Chamber*; but the court being aboliſhed, the office and officer is extinct. *Cowell, edit.* 1727.

Exannual roll, In the old way of delivering the ſheriffs accounts, the *firmæ mortuæ vel obſoletæ, i. e.* illeviable fines and deſperate debts, were tranſcribed into a roll called the *Exannual roll*, which was to be yearly read to the ſheriff upon his account, to ſee what might be gotton. See *Hale's Sheriff's Accounts, p.* 67.

Excambiator, Was anciently uſed for an exchanger of land, ſuch as we now call *brokers* that deal upon the Exchange between merchants. *In libro chartarum priorat. Leominſt. de anno* 2 *Ed.* 2. it is ſaid, *Ita quod unuſquiſque eorum qui damna ſuſtinuit aliquo caſu contingente, quod* excambiator *refundat damna, &c. Cowell, edit.* 1727.

Exception, (*Exceptio*) Is a ſtop or ſtay to any action being uſed in the Civil and Common law both alike, and in both divided into *dilatory* and *peremptory.* See *Bracton, lib.* 5. *tract.* 5. *per totum*, and *Britton, cap.* 91, 92. In law proceedings, it is a denial of a matter alleged in bar to an action: And in Chancery it is what is alleged againſt the ſufficiency of an anſwer, *&c.* The counſel in a cauſe are to take all their exceptions to the record at one time, and before the court hath delivered any opinion therein. 1 *Lill. Abr.* 559. And on an indictment for treaſon, *&c.* exception is to be taken for miſnaming, *&c.* before any evidence is given in court, or the indictment ſhall be good. Stat. 7 *W.* 3. *c.* 3. Where by a general pardon, any particular crime is excepted, if a perſon be attained, *&c.* of that offence, he ſhall have no benefit of the pardon. 6 *Rep.* 13. 2 *Nelſ. Abr.* 765. And when a pardon is with an exception as to perſons, the party who pleads it ought to ſhew, that he is not any of the parties excepted. 1 *Lev.* 26. A negative expreſſion may be taken to enure to the ſame intent as an exception; for an exception in its nature is but a denial of what is taken to be good by the other party, either in point of law or pleading: And *Exceptio in non exceptis firmat regulam.* 1 *Lil.* 559.

Exception to evidence, *&c* At Common law a writ of error lay for an error in law, apparent in the record, or for an error in fact, where either party died before judgment; yet it lay not for an error in law not appearing in the record; and therefore, where the plaintiff or demandant, tenant or defendant, alleged any thing *ore tenus*, which was over-ruled by the judge, this could not

not be aſſigned for error, not appearing within the record, nor being an error in fact, but in law; and ſo the party grieved was without remedy. 2 *Inſt.* 426. And therefore,

By the ſtatute of *Weſtm.* 2, "When one impleaded before any of the juſtices, alleges an exception, praying they will allow it, and if they will not, if he that alledges the exception writes the ſame, and requires the juſtices will put to their ſeals, the juſtices ſhall ſo do; and if one will not, another ſhall; and if, upon complaint made of the juſtice, the King cauſe the record to come before him, and the exception be not found in the roll, and the plaintiff ſhew the written exception, with the ſeal of the juſtices thereto put, the juſtice ſhall be commanded to appear at a certain day, either to confeſs or deny his ſeal; and if he cannot deny his ſeal, they ſhall proceed to judgment according to the exception, as it ought to be allowed or diſallowed."

In the conſtruction of this ſtatute, the following opinions have been holden,

That the ſtatute extends to the plaintiff as well as defendant, alſo to him who comes *in loco tenentis*, as one that prays to be received, or the vouchee; and in all actions, whether real or perſonal, or mixt. 2 *Inſt.* 427.

It ſeems agreed, that no *bill of exceptions* is to be allowed in treaſon or felony, for the words of the ſtatute are, *cum aliquis implacitatur coram aliquibus juſticiariis*, *&c.* And if ſuch bills were allowed, it would be attended with great inconveniency, becauſe of the many frivolous exceptions that might be put in by priſoners, to the delay of juſtice; beſides, in criminal caſes the judges are of counſel with the priſoner, and are to ſee that juſtice is done him. 1 *Sid.* 84. Sir *Henry Vane*'s caſe. 1 *Lev.* 68. *S. C.* 1 *Keb.* 324. *S. C.*

The ſtatute extends not only to all pleas dilatory and peremptory, but to prayers to be received, *oyer* of records and deeds, *&c.* alſo to challenges of jurors, and any material evidence offered and over-ruled. 2 *Inſt.* 427. *Dyer* 231. *pl.* 3. *Raym.* 486.

If in a trial upon a title to a leaſe for years, the judges (though inſiſted upon) will not direct the jury that the probate of a will is concluſive evidence, but will only tell the jury that it is good evidence; and thereupon the jury find there is no ſuch will; yet a bill of exceptions will not lie; for though the evidence be concluſive, the jury, if they will, may run the hazard of an attaint. *Raym.* 404. 2 *Jones* 146. *S. C.*

If one offers to demur upon evidence, and is overruled, and after judgment a writ of error is brought, this cannot be aſſigned for error, but it is a proper caſe for a bill of exceptions, and the remedy which the ſtatute in that caſe appoints. *Cro. Car.* 341.

Lord *Coke* is of opinion, that the ſtatute, notwithſtanding theſe words, *& ſi forte ad querimoniam de facto juſtic' venire fac' Dominus Rex recordum coram eo*, extends not only to the Common Pleas, but to all other courts of record, on whoſe judgment a writ of error lies to the King's Bench, and alſo to the county-court, the hundred, and court-baron; for therein, ſays he, the judges are moſt likely to err, and albeit of judgments given in them a writ of error lieth not, but a writ of falſe judgment in the *C. B.* yet the caſe being in the ſame or greater miſchief, the purview of this ſtatute doth extend to theſe inferior courts. 2 *Inſt.* 427.

If one of the juſtices ſets his ſeal to the bill, it is ſufficient; but if they all refuſe, it is a contempt in them all; for which the party grieved may have a writ grounded upon the ſtatute, commanding them to put their ſeals, *&c.* 2 *Inſt.* 427. *Raym.* 182. *S. P.* 2 *Lev.* 237. *S. P.*

Although no time be appointed by this act when the juſtices ſhall put their ſeals, the party muſt pray the ſame before judgment; but if they deny it, then may they be commanded after judgment to put their ſeals, and then the putting of their ſeals after judgment ſhall be ſufficient. 2 *Inſt.* 427.

But where a corporation-book was offered in evidence at the aſſizes, to prove a member of the corporation not in poſſeſſion, and refuſed, and no bill of exception was then tendred, nor was the exception then reduced to writing, ſo the trial proceeded, and a verdict was given for the plaintiff; the court being the next term moved for a bill of exceptions, it was urged for the bill, that the law requires *quod proponat exceptionem ſuam*, and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict is given againſt him; and the ſame memory that ſerves the judges for a new trial, will ſerve for a bill of exceptions. On the other ſide it was ſaid, that this practice would prove a great difficulty to judges, and delay of juſtice, that the precedents and entries ſuppoſe the exception to be written down upon its being diſallowed, and the ſtatute ought to be conſtrued ſo as to prevent inconvenience; beſides, the words of the act are in the preſent tenſe, and ſo is the writ formed on the act. *Holt* Ch. J. If this practice ſhould prevail, the judge would be in a ſtrange condition; he forgets the exception, and refuſes to ſign the bill; ſo an action muſt be brought; you ſhould have inſiſted on your exception at the trial, you waive it if you acquieſce, and ſhall not reſort back to your exception after verdict againſt you, when perhaps, if you had ſtood upon your exception, the party had other evidence, and need not have put the cauſe on this point; the ſtatute indeed appoints no time; but the nature and reaſon of the thing requires the exception ſhould be reduced to writing when taken and diſallowed, like a ſpecial verdict, or a demurrer to evidence; not that they need be drawn up in form, but the ſubſtance muſt be reduced to writing whilſt the thing is tranſacting, becauſe it is become a record; ſo the motion was denied. 1 *Salk.* 288.

When this bill is ſigned, there goes out a *ſcire facias* to the judge who ſigned it, *ad cognoſcendum ſcriptum*, and the *ſcire facias* to the judge, and his return with the bill muſt be entred on the iſſue-roll, and made part of the record, which is to be removed by writ of error. See 1 *Lutw.* 905, 906.

When a bill of exceptions is allowed, the court will not ſuffer the party to move any thing in arreſt of judgment on the point in which the bill of exceptions was allowed; for his proper redreſs is by writ of error, and it is preſumed, that the court was ſatisfied in the point when the party tendred his bill of exceptions. 1 *Vent.* 366, 367. 2 *Lev.* 237. 2 *Jones* 117.

Exception in deeds and writings. The exception is a clauſe whereby the donor, feoffor, grantor or other perſon contracting, excepts or takes a particular thing out of a general thing granted or conveyed. 1 *Wood's Conv.* 241.

The thing excepted is exempted, and does not paſs by the grant, neither is it parcel of the thing granted; as if a manor be granted, excepting one acre thereof, hereby in judgment of law that acre is ſevered from the manor. 1 *Wood's Conv.* 241.

Rules and examples concerning exceptions in deeds.

Rule 1. *It muſt be of ſuch thing as he who makes the exception may have, and does belong to him.* For if the exception be of ſuch a thing as the grantor cannot have, nor does belong to him by law, as if a leſſee for years aſſigns over all his term in the land, excepting the timber trees, earth or clay, this exception is not good. *Shep. Touch.* 79. 5 *Co.* 12. *b.*

But if a leſſee for life makes a leaſe for years, or leſſee for twenty-one years makes a leaſe for twenty years; or tenant by the curteſy, or in dower, grants over their eſtate, excepting the timber trees, theſe are good exceptions.

And if a leſſee for life or years opens a coal-mine, and then aſſigns over his eſtate, excepting the mines, or the profits thereof; theſe are void exceptions. *Shep. Touch.* 79.

Rule 2. *It muſt not be the whole thing granted, but a part thereof only.* An exception that goes to the whole thing granted or demiſed, is a void exception. *Cro. Eliz.* 6. *pl.* 2. 244. *pl.* 1.

Alſo if one grants all his lands in *Lambhurſt*, except the manor of *Hodley*, and he has no other lands in *Lambhurſt* than the ſaid manor, the exception is void. *Cro-Eliz.* 6.

A man

A man cannot grant an eſtate, and reſerve a part of the eſtate; as, to make a feoffment in fee, and reſerve a leaſe for life; or grant an advowſon, and reſerve the preſentation for his life. *Shep. Touch.* 79.

The exception muſt be of part of the thing, and not of part of the eſtate.

Rule 3. *The thing that is excepted muſt be part of the thing granted before, and not of ſome other thing.* The exception is always of a thing granted, and a thing in *eſſe*, and not of a new thing, which was not before mentioned or granted. *Dyer* 59. *a. pl.* 11.

If the exception be of another thing than the thing granted; as if one grants a manor or land, excepting twelve-pence, or excepting the tithes, or excepting one acre of ground which is no parcel of the manor, or the land before granted; or if one grants the land deſcended to him on the part of his father, excepting the land deſcended to him on the part of his mother; theſe exceptions are void. *Shep. Touch.* 78, 79.

Rule 4. *The thing excepted muſt be of ſuch a thing as may be ſevered from the thing granted, and not of inſeparable incidents.* Dyer 59. a. Exceptions of ſeveral incidents are good; but if inſeparable incidents, as if a manor be granted excepting the court-baron; or land be granted, excepting the common appendent thereto belonging; theſe exceptions are void. *Shep. Touch.* 79.

A grant of a manor, excepting the courts, is void, for a manor cannot be without courts. *Hob.* 101.

But a man may grant a manor, excepting any of the demeſnes and ſervices, ſo as a real manor, not a reputative manor, be left. *Hob.* 170.

If a man has but one cloſe in *Dale*, and he grants all his lands in *Dale*, excepting that one cloſe, this exception is void. *Hob.* 170. *Moor*, caſe 1239.

If a man makes a leaſe for life of a manor to which an advowſon belongs, and he excepts the advowſon, if he grants over the reverſion, the advowſon does not paſs, becauſe it is ſevered and diſmembred from the manor, and thereby is become an advowſon in groſs. 11 *Co.* 50. *a.*

But if one has a manor in which he has parks and fiſh ponds, and he grants the manor for life, except the game and fiſh, and afterwards grants the reverſion of the manor; by this the game and fiſh will paſs. 11 *Co.* 50. *b.*

If I let my rectory, except the glebe, it is a void exception: ſo of a leaſe of a manor, excepting the demeſnes, for a rectory cannot be without glebe, nor a manor without demeſnes. *Winch* 23.

Rule 5. *It muſt be of a particular thing out of a general, or of an intire thing, and not of a particular out of a particular, or the whole thing itſelf granted.* If the exception be of a particular thing out of a particular thing; as if one grants *Whiteacre* and *Blackacre*; or grants twenty acres of land by particular names, excepting one acre of them; theſe exceptions are void. *Shep. Touch.* 79.

For the grant ſhall be taken moſt ſtrongly againſt the grantor. *Carter* 104.

An exception of a thing granted by a ſpecial name in the premiſſes, is void; but it is good for a thing granted in the premiſſes by general words; and although it is by ſpecial name excepted, yet the exception is void. *Moor*, caſe 1236.

A. lets to *B.* a rectory for years, excepting the manſion-houſe of the rectory, ſaving to *B.* (the leſſee) a chamber; this is an exception out of an exception; which is good, and ſhall make it paſs by force of the leaſe; for this exception or ſaving makes the thing excepted, as if it never had been let; ſo a ſaving out of a ſaving, makes it as if it had been excepted, and then it paſſes by force of the leaſe at firſt. *Cro. Eliz.* 372. *pl.* 19.

Rule 6. *An exception muſt be conformable to the grant, and not repugnant thereto.* If it is repugnant to the grant, it ſubverts it utterly, and takes away the fruit of it; if one grants a manor or land to another, excepting the profits thereof; or makes a feoffment of a cloſe of meadow or paſture, reſerving or excepting the graſs of it; or grants a manor excepting the ſervices; theſe are void exceptions. *Shep. Touch.* 79.

So if one grants his houſe, chamber, cellars and ſhops, excepting his ſhops; it is ſaid this is no good exception. *Ibid.*

And if one grants his meadow and paſture grounds; this exception is not good, no more than if one grants two manors, or two acres, excepting one of them. *Ibid.*

And yet if a man makes a leaſe for years of a mill, excepting the profits thereof during the life of the leſſor; it is ſaid, this has been adjudged a good exception. *Sed Q.* For the exception of the profits of a thing is the exception in effect of the thing itſelf. *Shep. Touch.* 79.

An exception that croſſes the grant or is repugnant thereto, is vod. *Hob.* 72, 170. *Vid. Moor*, caſe 1236.

Rule 7. *The thing excepted muſt be certainly deſcribed and ſet down.* As, if a man grants all his lands in *Eſſex*, ſaving, beſides, or except his lands in *Dale*; or all his Lands in *Dale*, excepting one houſe, or one acre in certain; or one houſe, excepting one chamber in certain; theſe and ſuch like exceptions are good. *Shep. Touch.* 78.

And if one grants a manor, excepting one tenement, (parcel of the manor) or excepting the ſervices of *J. S.* (who holds of the manor) or excepting one cloſe; or excepting one acre; or excepting the advowſon appendant: or excepting the woods; or excepting twenty acres of wood; or excepting all the groſs trees; theſe are good exceptions. *Ibid.*

And if one grants a meſſuage and houſes thereunto belonging excepting, the barn, or excepting the dove-houſe, it ſeems this is a good exception; for they may paſs by the grant of a meſſuage, *&c.* *Ibid.*

And if one grants land, excepting the timber-trees thereupon, or excepting the trees thereupon; or if a man ſells a wood excepting twenty of the beſt oaks, and ſhews which in certain; theſe are good exceptions, *Ibid.*

So if a man has a manor wherein is a wood called the Great wood, and he grants his manor, excepting all the woods and underwoods that grow in the Great wood, and all the trees that grow elſewhere; this is a good exception. *Shep. Touch.* 78.

And if one grants a meſſuage, and all the lands and tenements thereunto belonging, excepting one cottage; this is a good exception. *Ibid.*

And if one grants a reverſion excepting the rent; this is a good exception of the rent, and doth keep it from paſſing by the grant. *Ibid.*

So if a man has a rent charge out of land, and he releaſes his right, in the land, except the rent, the exception is good. *Ibid.*

So if the lord releaſes to his tenant *ſalvo Dominio ſuo, &c.* this is a good exception.

If one grants all his horſes, except his white horſe; this is a good exception of the white horſe.

If a man be ſeiſed of a manor, and leaſe it by deed indented for life, *exceptis & reſervatis quod bene liceat* to the leſſor *ſuccidere, dare & vendere omnes groſſas arbores in dicto manerio creſcentes, &c.* it ſeems this is a good exception of the trees, *Shep. Touch.* 78.

If *A.* lets all his lands in *D.* other than *Whiteacre*, and all his lands in *S.* except *Blackacre*, for twenty-one years, the remainder to *B.* in fee, except before excepted; I hold (ſays *Tyrrel*) *Whiteacre* paſſes; for the grant ſhall be taken moſt ſtrongly againſt the grantor. *Carter* 104. So that the exception is void for incertainty.

A. lets the manor of *Sale*, ſaving *Whiteacre*, to *B.* the remainder to *C.* for twenty years, ſaving *Greenacre*; the remainder of all to *D.* except *Drycloſe*; the remainder to *John a Stile* of all, except before excepted. I think (*ſays Tyrrel*) in this caſe all paſſes to *John a Stile*, except *Drycloſe*. *Carter* 104.

Yet (*ſays* he) I grant, that if *A.* lets to *B.* all his land in *Sale*, ſaving or reſerving, or other than *Whiteacre*, the remainder to *C.* except before excepted; in this caſe I grant *Whiteacre* is excepted becauſe there is no exception before, and the exception would be vain and idle if it ſhould not be ſo taken. *Carter* 104.

A man made a feoffment to divers uſes, excepting two cloſes, for the life of the feoffer only; it was adjudged that

that theſe two cloſes were excepted, and did deſcend (to the heir at law), either becauſe the exception was good, tho' the latter part of the ſentence, *viz.* for the life of the feoffer only, was void and therefore to be rejected; or the whole exception was void becauſe one intire ſentence; yet the court agreed, that there was no uſe limited of theſe two cloſes, which were intended to be excepted; for the uſe was limited to the manor, *exceptis præexceptis*, which excluded the two acres; for although there were not ſufficient words to except them, there was enough to declare the intention of the feoffor to be ſo. *Vent.* 106, 107.

If a feoffment be made of a manor, except *Blackacre*, to himſelf for life only, *habendum*, except before excepted, to the uſe of *B.* in tail, *Blackacre* ſhall not paſs to *B.* in tail. *Lev.* 287.

If a man bargains and ſells his lands in *D.* except what he ſhall afterwards deviſe, this exception is void for incertainty. *Hob.* 72.

If woods whereof a *præcipe* lies (by the name of ſo many acres of wood) be parcel of a manor, and I leaſe the manor excepting the woods; by this the ſoil whereon they grow is excepted. 11 *Co.* 49. *b.* *Poph.* 146.

By the exception of woods and underwoods, the ſoil itſelf whereon they grow is excepted. 5 *Co.* 11. *a.* *Poph.* 146.

But if I except all my trees growing in the manor, in that caſe the ſoil itſelf is not excepted. 11 *Co.* 49. *b.* *Poph.* 146.

In exceptions of woods and trees obſerve theſe ſix things.

Firſt, That notwithſtanding they are excepted, they are parcel of the inheritance, and by demiſe for years of the manor they will paſs, becauſe the freehold remains, and the leſſor remains tenant to the *præcipe*; but by a demiſe for life with ſuch exceptions *e contra.* 5 *Co.* 11. *a. b.* 11 *Co.* 50. *a.*

Secondly, That where the exception is of the trees only, the ſoil itſelf is not excepted, but only ſufficient nutriment for the trees.

One lets a tenement, a cloſe whereof was wood, and commonly known by the name of a wood, and in the leaſe was an exception of all ſaleable woods now growing, or of which ſhall grow hereafter, which have been ſold by the lord of the premiſſes, with free entry, egreſs and regreſs, for ſelling, making and carrying off the ſame at all times convenient; in this caſe the ſoil was not excepted, but paſſed to the leſſee. *Cro. Jac.* 524.

Thirdly, That the leſſee ſhall have the paſture growing under the trees. See the caſe above.

Fourthly, That the leſſor ſhall have all the benefit of the trees. 11 *Co.* 50. *a.*

Fifthly, That he ſhall have the fruits, and all other profits of the trees. 11 *Co.* 50.

Sixthly, That where the leſſor excepts the trees, and afterwards he intends to ſell them, the law gives to him, and to thoſe who buy them, power, as an incident to the exception, to enter and view the trees, and ſo to cut them down and carry them away. *Lex eſt, cuicunque aliquis aliquid concedit, concederē videtur & id ſine quo res ipſa eſſe non potuit*, is a principle in law. 11 *Co.* 52. *a.* 13 *Co.* 68.

Rule 8. The exception out of a thing granted may be in any part of the deed but it moſt commonly and properly ſucceeds the ſetting down of the things granted, and is made by one of theſe words, *excepted* or *excepting*, *beſides*, *ſaving*, *ſave only*, *excepted and always reſerved*, *&c.*

The form may be in this manner: *All that, &c.* (deſcibing the things granted, as before, and then go on with the exception), *ſaved and excepted to the ſaid A. B. his heirs and aſſigns for ever, out of this feoffment or grant*, (or grant, bargain and ſale, *&c.*) *all that meſſuage, &c. and all and ſingular the, &c.*) *always forepriſed, excepted and reſerved unto the ſaid A. B. his heirs and aſſigns.*

If a leaſe be made, provided that the leſſee ſhall not fell the woods; this proviſo is no exception, but the woods are demiſed. *Brownlow* 241.

Rule 9. *It may be made by other words that carry the ſame ſenſe, but the words before mentioned are the moſt proper.* The words *other than*, will make an exception; as in the ſtatute of fines, 4 *H.* 7. which concludes thus, ——All perſons, except feme coverts, other than thoſe that be parties to the ſaid fine——Here *other than* makes an exception out of an exception. *Carter* 99.

Exchange, (*Excambium* or *cambium*,) Signifies generally as much as *permutatio* with the Civilians; as the King's exchange, which is the place appointed by the King for exchange of plate or bullion for the King's coin, *&c.* Theſe places have been divers heretofore; but now there is only one, *viz.* the mint in the Tower. Stat. 1 *H.* 6. *cap.* 4. By 9 *Ed.* 3. *c.* 7. Exchanges are to be kept where the King pleaſes: And every man may exchange gold for ſilver, or ſilver for gold, *&c.* but none ſhall take profit of money exchanged but the King's exchangers, on pain of forfeiture. 25 *Ed.* 3. *c.* 12. Alſo none ſhall give or take any more for exchange of coin than the true valuè, under the penalty of forfeiting the money exchanged, or to be fined and impriſoned, *&c.* 5 & 6 *Ed.* 6. *cap.* 19. There is a Royal Exchange of merchants in *London*: And exchange amongſt merchants, is a commerce of money, or a bartering or exchanging of money of one city or county for that of another: Money in this ſenſe, is either real or imaginary; real, any real ſpecies current in any country at a certain price, at which it paſſes by the authority of the ſtate, and of its own intrinſick value: And by imaginary money, is underſtood all the denomination made uſe of to expreſs any ſum of money, which is not the juſt value of any real ſpecies. *Lex Mercatoria*, or *Merch. Comp.* 98. The method of exchange for money uſed in *England* ought to be *par pro pari*, according to value for value: And our exchange is grounded on the weight and fineneſs of our own money, and the weight and fineneſs of that of other countries, according to their ſeveral ſtandards, proportionable in their valuation; which being truly and juſtly made, reduces the price of the exchange of money of any nation or country to a certainty. But this courſe of exchange is of late abuſed; and money is become a merhandize, and riſes and falls in its price in regard to the plenty and ſcarcity of it. *Ibid.* At *London*, all exchanges are made upon the pound ſterling of 20 s. In the *Low Countries*, *France* and *Germany*, upon the *French* crown; *Spain* and *Italy*, *&c.* upon the ducat; and at *Florence*, *Venice*, and other places in the *Streights*, by the dollar and florin. See **Bill of exchange**, and *The Law of Bills of Exchange*, *&c.*

Exchange of goods and merchandiſe, Was the orignal and natural way of commerce, precedent to buying; for there was no buying till money was invented; though in exchanging, both parties are as buyers and ſellers, and both equally warrant. 3 *Salk.* 157.

Exchange of lands, Hath a peculiar ſignification in our common law, and is uſed for that compenſation which the warrantor muſt make to the warrantee, value for value, if the land warranted be recorvered from the warrentee. *Bract. lib*, 2. *cap.* 16. *& lib.* 1. *cap.* 19.

An *exchange* is the mutual grant of equal intereſts, the one in exchange for the other: Or it is, where a man is ſeiſed or poſſeſſed of lands in fee-ſimple, fee-tail, for life or years; or is poſſeſſed of goods, and another is ſeiſed or poſſeſſed of other lands, or poſſeſſed of other goods in the like manner, and they exchange their land or goods the one for the other; and in this there is a double grant, for each of them grants that which is his to the other. *Terms de lay ley. Finch's Law, Lit. f.* 62.

Exchange is a mutual grant of equal intereſts, each in exchange of other, as of land in fee-ſimple; for other of the ſame eſtate; but to exchange an eſtate *pur auter vie*, for an eſtate for life is not good; for though both have a freehold, yet an eſtate during another's life, is not ſo high a freehold, as an eſtate during his own life. *Finch's Law* 27.

Five things are neceſſary to the perfection of an exchange, *viz.* 1ſt, That the eſtates given be equal. 2dly, That this word (*excambium*, exchange) be uſed, which is ſo individually requiſite as it cannot be ſupplied by any

other word, or deſcribed by any circumlocution. In the books of *Domeſday* I find, *Hanc terram combiavit Hugo Briccuino, quod modo tenet comes Meriton, & ipſum ſcambium valet duplum. Hugo de Belcamp pro eſcambio de Warres.* 3dly, That there be an execution by entry or claim in the life of the parties. 4thly, That if it be of things that lie in grant it muſt be by deed. 5thly, If the lands be in ſeveral counties, there ought to be a deed indented, or if the thing lies in grant, albeit they be in one county. *Co. Litt.* 51. *b.*

Equality in lands are of three ſorts, *viz.* 1ſt, Equality in value. 2dly, In quantity of lands given and taken. 3dly, In quality or manner of the eſtate given and taken. Equality in value of lands in an exchange is not requiſite, nor equality in the quality or manner of the eſtate, but equality of the quantity of the eſtate is requiſite. *Co. Litt.* 50. *a. b.*

In every exchange rightly made, the word *excambium* imports in itſelf tacitly condition, and alſo a warranty, the one to give an entry, and the other a voucher and recompence in regard of the reciprocal conſideration, the one land being given in conſideration of the other; reſolved. 4 *Rep.* 121. *a. Paſch.* 1 *Jac. B. R. Buſtard's* caſe.

Exchange importeth in the law a condition of re-entry and a warranty, voucher and recompence of the other land that was given in exchange. *Noy's Max.* 61.

The fruit and effect of an exchange is, that it gives the intereſt, and alters the property of the things exchanged, to either party, according to the agreement. And if the exchange be of lands or tenements of any eſtate of inheritance or freehold, whether it be by word or deed, it has a condition and a warranty in law, incident and annexed to it as a thing made by the word *exchange*, and *tacite* implied in every grant of exchange; a condition to give a re-entry upon all the land given in exchange, if he be put out of all or part of the land taken in exchange, and a warranty, to enable him to vouch and to recover over in value, ſo much of his own land again given in exchange, as ſhall be recovered from him of the land taken in exchange, if he be ſued for it: So that upon every exchange either party, if he be put out of or loſe by action the land he takes in exchange, has a double remedy againſt the other; and yet this remedy goes only in the privity, and ſhall not go to an aſſignee: As if *A.* exchanges land with *B.* and *B.* be put out of all or part of the land upon a title *paramount* by a recovery in a real action or otherwiſe; in this caſe *B.* may either enter upon his own land again which he gave in exchange, or elſe if it be in an action brought, he may vouch *A.* upon the warranty in law, and ſhall recover as much in value againſt him of the land he gave, as he has loſt of the land he took in exchange. But if *B.* aliens his land taken in exchange to *C.* and *C.* be put out of all or part of the land upon a title *paramount*, *C.* in this caſe can neither enter upon the land given to *A.* in exchange upon the condition in law, nor vouch *A.* to warranty, and recover over in value upon the warranty in law. And yet *A.* in this caſe ſhall have the like remedy againſt *C.* the alienee, upon the condition and warranty both, as he had againſt *B.* But if *A.* himſelf implead *C.* for the land he gave to *B.* in exchange, *C.* may make uſe of this warranty in law by way of rebutter againſt *A.* And in all theſe caſes, where one of the parties is put out of all or part of the land, or out of part of the eſtate by entry, and the other party enters upon the other's land upon the condition in law, he may enter upon the whole land and avoid the whole exchange. But if he be impleaded for a part only, or for the whole, and a part only be recovered from him; in this caſe he ſhall recover ſo much in value of the other's land only as he hath loſt, and no more: As if an exchange be of three acres for three acres, and after one of the parties is put out of one of the acres by the entry of a ſtranger; in this caſe he may enter upon the whole three acres he had given in exchange, and ſo avoid the whole exchange, if he will. And if *A.* and *B.* be jointenants for life, and the fee-ſimple is in the heirs of *A.* and *A.* exchanges this land with *C.* in fee, and then dies, and *B.* enters and avoids the exchange for his life, (as he may), in this caſe *C.* may avoid the whole exchange, and enter upon his own three acres again. So if he in reverſion diſſeiſes his tenant for life, and then he exchanges the land, and after the tenant for life enters, the other party may defeat the whole exchange. But in the caſe of an exchange of three acres for three acres, if one of the acres were gained by diſſeiſin, and the diſſeiſee brings an action and recovers it againſt the diſſeiſor; in this caſe if he vouches over the other party to the exchange, he ſhall recover ſo much in value only of the three acres he gave in exchange, as the acre he has loſt, and no more. 4 *Co.* 121. 15 *Ed.* 4. 3. 9 *Ed.* 4. 21. *Bro. Exchange in toto*, and *Fitz. Exchange in toto.*

Form of a deed of exchange of lands in fee.

THIS Indenture, *made, &c. between* A. B. *of, &c. of the one part, and* C. D. *of, &c. of the other part, witneſſeth, that the ſaid* A. B. *hath given and granted, and by theſe preſents doth give and grant unto the ſaid* C. D. *his heirs and aſſigns, all that meſſuage, &c. lying and being, &c. To have and to hold the meſſuage or tenement and premiſſes abovementioned, with the appurtenances, unto the ſaid* C. D. *his heirs and aſſigns for ever; in exchange for all that meſſuage or tenement, &c. of the ſaid* C. D. *ſituate and lying, &c. For which conſideration, the ſaid* C. D. *hath given and granted, and by theſe preſents doth give and grant unto the ſaid* A. B. *his heirs and aſſigns, all that the ſaid meſſuage or tenement laſt above mentioned, with the appurtenances; To have and to hold the ſaid meſſuage or tenement and premiſſes laſt above-mentioned, with the appurtenances, unto the ſaid* A. B. *his heirs and aſſigns for ever; in exchange of and for the ſaid meſſuage and premiſſes firſt above-mentioned. And the ſaid* A. B. *for himſelf, his heirs and aſſigns, doth covenant and grant to and with the ſaid* C. D. *his heirs and aſſigns, by theſe preſents, that he the ſaid* C. D. *his heirs and aſſigns, ſhall or lawfully may from time to time, and at all times hereafter for ever, peaceably and quietly enter into, have, hold and enjoy the ſaid meſſuage or tenement and premiſſes firſt above-mentioned, or intended to be hereby given and granted by the ſaid* A. B. *with the appurtenances, without any let, trouble, challenge, claim, diſturbance or interruption of or by him the ſaid* A. B. *his heirs or aſſigns, or of or by any other perſon or perſons whatſoever, claiming or to claim from, by or under him, them, or any of them. And the ſaid* C. D. *for himſelf, his heirs and aſſigns, doth covenant and grant to and with the ſaid* A. B. *&c.* [The like from *C. D.* to *A. B.* for quiet enjoyment of the meſſuage, *&c.* laſt abovementioned; and there may be a proviſo for either party to re-enter on his former lands, if there be an eviction.] In witneſs, &c.

For more learning on this ſubject, ſee 10 Vin. Abr. *tit.* Exchange, *and* Wood's Conv. vol. 1. 736—744.

Exchange of church livings, Is were two perſons, having procured licence from the ordinary to treat of an exchange (of which ſort there are many to be found in the eccleſiaſtical records) do by one inſtrument in writing, agree to exchange their benefices being both ſpiritual (for a lay preferment, as an hoſpital, cannot be exchanged or go for a prebend or other ſpiritual benefice); and in order thereunto do reſign them into the hands of the ordinary: Such exchange being executed, the reſignations are good *Watſ. c.* 4. *Gibſ.* 821.

But tho' the one is inſtituted and inducted into the others benefice, yet if the exchange be not executed on both parts, the clerk on whoſe part the exchange was not executed may have his benefice again; for in this caſe of exchanging, the law doth annex this condition to a reſignation, *viz.* if it be fully executed. *Watſ. c.* 4.

Thus where one is both inſtituted and inducted, and the other is only inſtituted, and dies, or refuſes to finiſh; in this caſe, tho' they have proceeded ſo far, yet the reſignation and all that followed upon it ſhall be void, and both (if both are living) may return to their former benefices upon the foot of former poſſeſſion; or if one dies before he is inducted, and after the induction of the other, this induction and all that went before ſhall be void,

void, becauſe the exchange was not fully executed during the lives of the parties. *Gibſ.* 868.

And this is agreeable to the reaſon of the Common law: for at the Common law if a man exchange lands, and the lands he receives in exchange be evicted, he may repair to his own lands, and re-enter upon them. *Deg. p.* 1. *c.* 14.

By the 31 *El. c.* 6. *ſ.* 8. If any incumbent of any benefice with cure of ſouls, ſhall corruptly reſign or exchange the ſame; or corruptly take for or in any reſpect of the reſigning or exchanging the ſame, directly or indirectly, any penſion, ſum of money, or other benefit whatſoever; as well the giver as the taker of any ſuch penſion, ſum of money, or other benefit corruptly, ſhall loſe double the value of the ſum ſo given, taken or had; half to the Queen, and half to him that ſhall ſue for the ſame in any of her Majeſty's courts of record.

Exchangers, Are thoſe that uſe to return money beyond ſea, by bills of *exchange*, which by the ſtat. 5 *R.* 2. ought not to be done without the King's licence. See **Eſcambio.**

Exchequer, (*Scaccarium*, from the *French* word *Eſchequier*, i. *abacus*, *tabula luſoria*) Signifieth the place or court of all receipts belonging to the crown. *Polyd. Virg. lib.* 9. *Hiſt. Ang.* ſaith, that the true word in *Latin* is *ſtatarium*; but it may with more probability be taken from the *German* word *ſchatz*, denoting as much as *theſaurus* or *fiſcus*. *Camden*, in his *Britannia*, *pag.* 113. ſaith, that this court or office took the name from *tabula ad quam aſſidebant*, proving it out of *Gervaſius Tilburienſis*, the cloth which covered it being party-coloured or chequered. By the *Grand Cuſtumary*, it is brought from the *Normans*, *cap.* 56. where it is thus deſcribed, The *Exchequer* is called *an aſſembly of High Juſticiers*, to whom it appertaineth to amend that which the bailiffs and other meaner juſticiers have evil done, and unadviſedly judged, and to do right to all men without delay, as from the Prince's mouth. *Skene de verbor. ſignif. verb. Scaccarium*, hath out of *Paulus Æmilius* theſe words, *Scaccarium dicitur quaſi ſtatarium, quod homines ibi in jure ſiſtantur, vel quod ſit ſtataria et perennis curia cum cæteræ curiæ eſſent indictivæ, nec loco nec tempore ſtatæ.* Alſo he addeth further, that it might be called *Scaccarium a ſimilitudine ludi Scaccorum*, from the reſemblance it has to the game at *Cheſs*; many perſons meeting and pleading their cauſes there, as if they were fighting in an arrayed battle. And *Smith* deduces it from an old Saxon word, *ſcata*, ſignifying treaſure, whereof account is made in the *Chequer*. This court conſiſteth, as it were, of two parts, whereof one dealeth eſpecially in the judicial hearing and deciding of all cauſes appertaining to the prince's coffers, anciently called *Scaccarium computorum*, as *Ockham* teſtifies in his *Lucubrations*. The other is called *The receipt of the Exchequer*, which is properly imployed in the receiving and paying money. *Cromp. Jur. fol.* 105. ſays, it is a court of record, wherein all cauſes touching the revenues of the crown are handled: the officers belonging to both theſe are mentioned in *Camden's Brit.* cap. *Tribunalia Angliæ*. The King's *Exchequer* now ſettled at *Weſtminſter*, was in divers counties of *Wales*. See 27 *H.* 8. *cap.* 5, 26. and 4 *par. Inſt. fo.* 103. *Cowell.*

The common derivation of the word *Exchequer*, is from the old French word *Eſchequier*, which ſignifies a *cheſs-board*, or *chequer-work*; and becauſe a cloth of that kind was laid upon the table, upon which the accountants telled out the King's money, and ſet forth their accounts in the ſame artificial manner as is done in the Cofferer's account at this day, it was called The Court of Exchequer. *Maddox* 109. *Spelman's Gloſſ.* tit. *Scacc. Forteſcue on Monarchy* 117, 118.

It was formed from the Exchequer in *Normandy*, which was a court of ſovereign juriſdiction, and ſuperintended all manner of complaints, by, and againſt the ſheriffs and bailiffs who exerciſed an ordinary juriſdiction, and whoſe duty it was to gather the Duke's rents in each bailiwick, and to account for the ſame in this great court; and as in the court of *Normandy*, the great officers of ſtate ſat as judges; ſo with us, before the diviſion of the courts, the great miniſter, as the *Juſticiar*, Conſtable, Seneſchal, Chancellor and Treaſurer, ſat in this court; but the Treaſurer uſually preſided, as beſt acquainted with all matters relating to the revenue. *Maddox* 109. See alſo for the antiquity of this court, and of its ſeveral officers and their duty, 4 *Inſt.* 103. *Sav.* 48. 2 *Inſt.* 104, 105, 551.

The court of Exchequer is an ancient court of record, for all matters relating to the revenue of the crown. 4 *Inſ.*. 103.

In the Exchequer there are ſeven courts, 1. The court of Pleas. 2. The court of Accounts. 3. The court of Receipt. 4. The court of Exchequer-Chamber, being the aſſembly of all the judges of *England*, for matters in law. 5. The court of Exchequer-Chamber, for errors in the court of Exchequer. 6. The court of Exchequer-Chamber, for errors in the King's Bench. 7. The court of Equity in the Exchequer-Chamber. 1. *Bac. Abr.* 597.

By the ſtatute of *Rutland*, made 10 *Ed.* 1. "No plea ſhall be held in the Exchequer, unleſs it ſpecially concern the King or his miniſters;" but it hath been doubted, whether this is an act of parliament, or an ordinance only, made by the King for the better order of this court. *Plow.* 209. 4 *Inſt.* 113. But 2 *Inſt.* 551. it is ſaid there is a writ in the Regiſter under title *Brevia de Statut'*, which recites the words of this ſtatute; and in the margin of the writ, *Statut' de Rutland* is quoted; ſo that without queſtion this ſtatute was made by authority of parliament. And 4 *Inſt.* 113. it is ſaid, it is entered in the parliament rolls, and ſee 8 *Co.* 20.——But 4 *Inſt.* 114. it is ſaid, the writ is founded upon the Common law and cuſtom of the realm.

1. *Of the juriſdiction of the court of Exchequer, and what perſons ſhall have privilege of ſuit.*

2. *Manner of proceeding in the Exchequer, and of diſputes between it and other courts.*

3. *Statutes concerning the Exchequer.*

1. *Of the juriſdiction of the court of Exchequer, and what perſons ſhall have privilege of ſuit.*

The King's farmer may ſue one that detains from him part of the poſſeſſions that he hath from the King, out of which the farm is to be paid, by which he cannot pay his farm to the King. 1 *Rol. Abr.* 538.

The debtor of the King's debtor may ſue here by *quo minus*. 4 *Inſt.* 112.

An Information for the Queen and party, upon the ſtatute of liveries, 8 *Ed.* 4. *cap.* 2. was brought in the Exchequer, though by the expreſs words of the ſtatute it ought to be in the King's Bench, or Common Pleas, before juſtices of the peace, *&c.* but the Exchequer is not mentioned; and it was adjudged it lay in this court, becauſe the Queen was party, and there were no negative words, without which this being a ſuperior court ſhall have juriſdiction. *Sav.* 134. *Agard* and *Cavendiſh* adjudged. *Cro. Eliz.* 326. *S. C. adjorn. Moor.* 564. *S. C.* upon a writ of error *in Cam' Scacc'*, reverſed as to the informer; for the penalty was given to him only that informed in the courts ſpecially named. 2 *And.* 127. *S. C.* reverſed accordingly.

If the King's farmer ſues in the Exchequer, againſt a perſon for detaining of tithes, parcel of the poſſeſſions to him leaſed in farm by the King, though the right of tithes comes in debate between them, yet the court ſhall not be ouſted of juriſdiction. 1. *Rol. Abr.* 538.

If *J. S.* be parſon impropriate of *D.* and *B.* vicar there, and the King patron of the vicarage, and there is a debate between the parſon and vicar for tithes, the ſuit for theſe tithes ought to be in the Exchequer, *Lane* 100. 1 *Rol. Abr.* 538. *S. C.*

If a copyholder of the King's manor be ſued in the eccleſiaſtical courts for tithes, upon a ſuggeſtion in *Scaccario*, that he preſcribed to pay a certain *modus decimandi*, he ſhall have a prohibition there, and this *modus* ſhall be tried there. 1 *Rol. Abr.* 539. *S. C.*

If

If a man be amerced in the King's leet, and upon proceſs out of the Exchequer the bailiff diſtrains him for the amercement, and he brings treſpaſs, he ought to bring this action of treſpaſs in the office of Pleas of the Exchequer; for the bailiff levied it as an officer of this court. *Lane* 55. 1 *Rol. Abr.* 539.

If an erroneous judgment be given in a formedon in a copyhold court, in the county where the King is Lord, the party, againſt whom the judgment is given, may ſue by petition or bill to the King in the court of Exchequer-Chamber, in the nature of a writ of falſe judgment, for the reverſal of this judgment; for as in the court of a common perſon, the proper ſuit for reverſal thereof is to the Lord, by petition; ſo it his here to the King; and the Exchequer-Chamber, is the more proper to ſue to the King by petition than the Chancery, becauſe it concerns the King's manor. 1 *Rol. Abr.* 539. *Lane* 98. *S. C.*

An action of falſe impriſonment, or other action, may be brought againſt the under-ſheriff, in the Exchequer, though the ſheriff be the officer of the court, for the court takes notice of the under-ſheriff alſo. 1 *Rol. Abr.* 539.

If *A.* holds lands of the King by fealty and rent, and makes a leaſe thereof for years to *B.* and *C.* pretends a prior leaſe to him by *A.* though there is a rent iſſuing out of thoſe lands to the King, yet neither *B.* nor *C.* can ſue in this court by any privilege, in reſpect of the rent; for that the King can have no prejudice or benefit thereby; for whether *B.* or *C.* prevails the rent muſt be paid. 4 *Inſt.* 118.

But if the King extends lands, as the lands of *A.* for the debt of *A.* and leaſes the ſame to *B.* for years, reſerving rent, and *C.* pretends that *A.* had nothing in the land, but that he was ſeiſed thereof, *&c.* this is within the privilege of the court; for if *C.* prevails the King loſes his rent. 4 *Inſt.* 118.

If the King leaſes to *A.* for years, rendring rent, the King may diſtrain in all other the lands of *A.* for his rent, yet *A.* hath no privilege for his other lands, to bring them within the juriſdiction of this court. 4 *Inſt.* 119.

If a man files a croſs bill in this court, he need not intitle himſelf to the juriſdiction of the court, becauſe the croſs bill is grounded upon another bill in court. *Hard.* 160.

So if a man be ſued in the office of Pleas, he may have an *Engliſh* bill to relieve againſt that ſuit, without ſetting forth matter of juriſdiction. *Hard.* 160.

If *A.* is outlawed at the ſuit of *B.* and lands in the poſſeſſion of *A.* extended, and *C.* claims title to them, and pleads the inquiſition, if *C.* will bring an ejectment for them, it muſt be in this court, becauſe the King's revenue is concerned. *Hard.* 176.

If *A.* hath title to lands under an extent of the Exchequer, for debts in aid, he muſt bring his ejectment for them in this court, and having brought his ejectment for them in the Common Pleas, upon motion he was ordered to proſecute here. *Hard.* 193.

By the ſtat. 33 *H.* 8. *cap.* 39. the court of Exchequer has power to diſcharge all debts and duties due to the King, upon any equity diſcloſed; and it is by virtue of this act that they diſcharge recognizances; and it ſeems by the ſaid act, they may diſcharge penal laws made before this ſtatute; but all penal laws made after the ſtatute cannot be diſcharged, but muſt be compounded. *Sav.* 22. *Hard.* 334.

King *Charles* the Second having taken up ſums of money of the petitioners, (bankers) granted to them and their heirs, ſervant annuities chargeable upon the hereditary revenue of exciſe, given to the King by 12 *Car.* 2. *cap.* 24. The barons held, that the remedy, by petition to the barons was a proper remedy, and judgment was given for the petitioners by the opinion of 3. But *Letchmere* B. held, that the King could not alien or charge this revenue, and that for ſeveral reaſons there mentioned. *Freem. Rep.* 331. *pl.* 413. *Hill.* 1691. *in Scacc.* upon the petition of *Hornbee. & al'.*

There are three ſorts of privileges in the Exchequer, 1ſt, As debtor. 2dly, As accountant. 3dly, As officer of the court. Againſt the firſt of theſe, any man who hath a ſpecial privilege in another court, as an officer of the court, or an attorney, ſhall have his privilege, becauſe the privilege of a man as debtor is only a general privilege; put if an accountant begins his ſuit here, no privilege ſhall be allowed elſewhere, becauſe he has a ſpecial privilege, by reaſon of his attendance, to paſs his account, in which the King hath a particular concern; the ſame holds in an officer of the court; if he commences a ſuit here, no privilege in another court ſhall prevail againſt him, becauſe his attendance here is requiſite, and his privilege here is attached firſt by commencing his ſuit; but where the accountant has finiſhed his account, and reduced it to a certainty, ſo that it is become a debt, then he hath only a privilege as a general debtor has; ſo a ſervant to an officer or miniſter of the court, has no privilege againſt a privileged perſon elſewhere; *per cur. Hard.* 365. *Paſch.* 16 *Car.* 2. in the Exchequer, *Clapham* v. *Sir J. Lenthall.*

Thomas Young Juſtice, ſued a bill in the Exchequer againſt the clerk of the Hanaper upon this account, and the defendant caſt *ſuperſedeas* of the privilege of the Chancery, becauſe he was clerk of the Chancery; and by all the Juſtices in the Exchequer-Chamber the *ſuperſedeas* ſhall not be allowed; for every one who is accountant ought to be attendant and preſent, and there he ſhall be ſued, for it is an advantage to the King that he ſhall attend, and ſhall account; and accountant may have a bill againſt his debtor, and this is for the King's advantage, *quod citius ſolvat regi*; and if accountant be ſued in *C. B.* they ſhall ſend *ſuperſedeas* to ſurceaſe; and if he be ſued in *B. R.* thoſe of the Exchequer ſhall ſhew the record that he is accountant, *&c.* and ſhall not have *ſuperſedeas* to the King; for the pleas there are *coram rege*, *&c.* and he ſhall be diſmiſſed, and ſhall be ſued in the Excequer. *Br. Privilege, pl.* 25. cites 9 *Ed.* 4. 53.

The plaintiff, as debtor to the King, and Treaſurer of the Navy, exhibited his bill in the Exchequer. The defendant pleaded his privilege, as one of the Six Clerks in Chancery, under the Great Seal. *Hale* Ch. B. and the court held, that a general privilege, as debtor, will not hold againſt a ſpecial privilege, but againſt a general privilege it will. But a privilege as accountant will hold againſt a ſpecial privilege in another court, as officer of the court, or otherwiſe, though it be not alleged that he has entred upon his account; and in this caſe the plaintiff, being Treaſurer to the Navy, is *eo ipſo* an accountant. *Hard.* 316. *Mich.* 14 *Car.* 2. in the Exchequer. *Sir Geo. Carteret* v. *Sir John Maſſam.*

An accountant in the Exchequer to the King was ſued in *B. R.* and a baron of the Exchequer came into the court and produced his book of accounts to the King, and that the defendant was one, and prayed the privilege of the court of Exchequer, and that the ſuit might be ſtayed. The court demanded of the ſecondary, what the courſe was in ſuch caſe, whether to grant it upon ſuch bare averment of the baron, or that it ought to be pleaded and prayed by the party? Upon his informing the court that it had been uſually allowed without plea or prayer, it was granted accordingly. But *Williams* J. was ſtrongly againſt it, and ſaid, that there are many books wherein it was adjudged in point, that it ought to be upon the party's plea and prayer, and that without this the court cannot certainly know whether he be the ſame party for whom the privilege is prayed. 2 *Buſt.* 36. 10 *Jac. Anon'.*

The plaintiff being an accountant in the Exchequer, by bill there prayed to be relieved againſt a bond put in ſuit by defendant in the petty-bag, by reaſon of his privilege as uſher of the Chancery. The defendant pleaded his privilege as an officer of the court of Chancery. The court agreed, that when both parties are privileged, his privilege ſhall take place who ſues firſt; and that in this caſe the ſuit in equity to be relieved againſt the penalty of the bond is firſt attach'd here, and it is not the ſame ſuit with that at Common law, but diſtinct from it. And it was further ſaid, that if both parties are privileged perſons, and the attendance of the one is more requiſite than of the other, (as in the principal caſe it is, the plaintiff here being an accountant in this court, and entred into his account, as by his bill is alleged, which cannot be completed by deputy or attorney) in ſuch caſe his

privilege

void, becauſe the exchange was not fully executed during the lives of the parties. *Gibſ.* 868.

And this is agreeable to the reaſon of the Common law: for at the Common law if a man exchange lands, and the lands he receives in exchange be evicted, he may repair to his own lands, and re-enter upon them. *Deg. p.* 1. *c.* 14.

By the 31 *El. c.* 6. *ſ.* 8. If any incumbent of any benefice with cure of ſouls, ſhall corruptly reſign or exchange the ſame; or corruptly take for or in any reſpect of the reſigning or exchanging the ſame, directly or indirectly, any penſion, ſum of money, or other benefit whatſoever; as well the giver as the taker of any ſuch penſion, ſum of money, or other benefit corruptly, ſhall loſe double the value of the ſum ſo given, taken or had; half to the Queen, and half to him that ſhall ſue for the ſame in any of her Majeſty's courts of record.

Exchangers, Are thoſe that uſe to return money beyond ſea, by bills of *exchange*, which by the ſtat. 5 *R.* 2. ought not to be done without the King's licence. See **Eſcambio.**

Exchequer, (*Scaccarium*, from the *French* word *Eſchequier*, i. *abacus*, *tabula luſoria*) Signifieth the place or court of all receipts belonging to the crown. *Polyd. Virg. lib.* 9. *Hiſt. Ang.* ſaith, that the true word in *Latin* is *ſtatarium*; but it may with more probability be taken from the *German* word *ſchatz*, denoting as much as *theſaurus* or *fiſcus*. *Camden*, in his *Britannia*, *pag.* 113. ſaith, that this court or office took the name from *tabula ad quam aſſidebant*, proving it out of *Gervaſius Tilburienſis*, the cloth which covered it being party-coloured or chequered. By the *Grand Cuſtumary*, it is brought from the *Normans*, *cap.* 56. where it is thus deſcribed, The *Exchequer* is called *an aſſembly of High Juſticiers*, to whom it appertaineth to amend that which the bailiffs and other meaner juſticiers have evil done, and unadviſedly judged, and to do right to all men without delay, as from the Prince's mouth. *Skene de verbor. ſignif. verb. Scaccarium*, hath out of *Paulus Æmilius* theſe words, *Scaccarium dicitur quaſi ſtatarium, quod homines ibi in jure ſiſtantur, vel quod ſit ſtataria et perennis curia cum cæteræ curiæ eſſent indictivæ, nec loco nec tempore ſtatæ.* Alſo he addeth further, that it might be called *Scaccarium a ſimilitudine ludi Scaccorum*, from the reſemblance it has to the game at *Cheſs*; many perſons meeting and pleading their cauſes there, as if they were fighting in an arrayed battle. And *Smith* deduces it from an old Saxon word, *ſcata*, ſignifying treaſure, whereof account is made in the *Chequer*. This court conſiſteth, as it were, of two parts, whereof one dealeth eſpecially in the judicial hearing and deciding of all cauſes appertaining to the prince's coffers, anciently called *Scaccarium computorum*, as *Ockham* teſtifies in his *Lucubrations*. The other is called *The receipt of the Exchequer*, which is properly imployed in the receiving and paying money. *Cromp. Jur. fol.* 105. ſays, it is a court of record, wherein all cauſes touching the revenues of the crown are handled: the officers belonging to both theſe are mentioned in *Camden's Brit.* cap. *Tribunalia Angliæ*. The King's *Exchequer* now ſettled at *Weſtminſter*, was in divers counties of *Wales*. See 27 *H.* 8. *cap.* 5, 26. and 4 *par. Inſt. fo.* 103. *Cowell.*

The common derivation of the word *Exchequer*, is from the old French word *Eſchequier*, which ſignifies a *cheſs-board*, or *chequer-work*; and becauſe a cloth of that kind was laid upon the table, upon which the accountants telled out the King's money, and ſet forth their accounts in the ſame artificial manner as is done in the Cofferer's account at this day, it was called The Court of Exchequer. *Maddox* 109. *Spelman's Gloſſ.* tit. *Scacc. Forteſcue on Monarchy* 117, 118.

It was formed from the Exchequer in *Normandy*, which was a court of ſovereign juriſdiction, and ſuperintended all manner of complaints, by, and againſt the ſheriffs and bailiffs who exerciſed an ordinary juriſdiction, and whoſe duty it was to gather the Duke's rents in each bailiwick, and to account for the ſame in this great court; and as in the court of *Normandy*, the great officers of ſtate ſat as judges; ſo with us, before the diviſion of the courts, the great miniſter, as the *Juſticiar*, Conſtable, Seneſchal, Chancellor and Treaſurer, ſat in this court; but the Treaſurer uſually preſided, as beſt acquainted with all matters relating to the revenue. *Maddox* 109. See alſo for the antiquity of this court, and of its ſeveral officers and their duty, 4 *Inſt.* 103. *Sav.* 48. 2 *Inſt.* 104, 105, 551.

The court of Exchequer is an ancient court of record, for all matters relating to the revenue of the crown. 4 *Inſ.*. 103.

In the Exchequer there are ſeven courts, 1. The court of Pleas. 2. The court of Accounts. 3. The court of Receipt. 4. The court of Exchequer-Chamber, being the aſſembly of all the judges of *England*, for matters in law. 5. The court of Exchequer-Chamber, for errors in the court of Exchequer. 6. The court of Exchequer-Chamber, for errors in the King's Bench. 7. The court of Equity in the Exchequer-Chamber. 1. *Bac. Abr.* 597.

By the ſtatute of *Rutland*, made 10 *Ed.* 1. "No plea ſhall be held in the Exchequer, unleſs it ſpecially concern the King or his miniſters;" but it hath been doubted, whether this is an act of parliament, or an ordinance only, made by the King for the better order of this court. *Plow.* 209. 4 *Inſt.* 113. But 2 *Inſt.* 551. it is ſaid there is a writ in the Regiſter under title *Brevia de Statut'*, which recites the words of this ſtatute; and in the margin of the writ, *Statut' de Rutland* is quoted; ſo that without queſtion this ſtatute was made by authority of parliament. And 4 *Inſt.* 113. it is ſaid, it is entered in the parliament rolls, and ſee 8 *Co.* 20.——But 4 *Inſt.* 114. it is ſaid, the writ is founded upon the Common law and cuſtom of the realm.

1. *Of the juriſdiction of the court of Exchequer, and what perſons ſhall have privilege of ſuit.*

2. *Manner of proceeding in the Exchequer, and of diſputes between it and other courts.*

3. *Statutes concerning the Exchequer.*

1. *Of the juriſdiction of the court of Exchequer, and what perſons ſhall have privilege of ſuit.*

The King's farmer may ſue one that detains from him part of the poſſeſſions that he hath from the King, out of which the farm is to be paid, by which he cannot pay his farm to the King. 1 *Rol. Abr.* 538.

The debtor of the King's debtor may ſue here by *quo minus*. 4 *Inſt.* 112.

An Information for the Queen and party, upon the ſtatute of liveries, 8 *Ed.* 4. *cap.* 2. was brought in the Exchequer, though by the expreſs words of the ſtatute it ought to be in the King's Bench, or Common Pleas, before juſtices of the peace, *&c.* but the Exchequer is not mentioned; and it was adjudged it lay in this court, becauſe the Queen was party, and there were no negative words, without which this being a ſuperior court ſhall have juriſdiction. *Sav.* 134. *Agard* and *Cavendiſh* adjudged. *Cro. Eliz.* 326. *S. C. adjorn. Moor.* 564. *S. C.* upon a writ of error *in Cam' Scacc'*, reverſed as to the informer; for the penalty was given to him only that informed in the courts ſpecially named. 2 *And.* 127. *S. C.* reverſed accordingly.

If the King's farmer ſues in the Exchequer, againſt a perſon for detaining of tithes, parcel of the poſſeſſions to him leaſed in farm by the King, though the right of tithes comes in debate between them, yet the court ſhall not be ouſted of juriſdiction. 1. *Rol. Abr.* 538.

If *J. S.* be parſon impropriate of *D.* and *B.* vicar there, and the King patron of the vicarage, and there is a debate between the parſon and vicar for tithes, the ſuit for theſe tithes ought to be in the Exchequer, *Lane* 100. 1 *Rol. Abr.* 538. *S. C.*

If a copyholder of the King's manor be ſued in the eccleſiaſtical courts for tithes, upon a ſuggeſtion in *Scaccario*, that he preſcribed to pay a certain *modus decimandi*, he ſhall have a prohibition there, and this *modus* ſhall be tried there. 1 *Rol. Abr.* 539. *S. C.*

If

If a man be amerced in the King's leet, and upon proceſs out of the Exchequer the bailiff diſtrains him for the amercement, and he brings treſpaſs, he ought to bring this action of treſpaſs in the office of Pleas of the Exchequer; for the bailiff levied it as an officer of this court. *Lane* 55. 1 *Rol. Abr.* 539.

If an erroneous judgment be given in a formedon in a copyhold court, in the county where the King is Lord, the party, againſt whom the judgment is given, may ſue by petition or bill to the King in the court of Exchequer-Chamber, in the nature of a writ of falſe judgment, for the reverſal of this judgment; for as in the court of a common perſon, the proper ſuit for reverſal thereof is to the Lord, by petition; ſo it his here to the King; and the Exchequer-Chamber, is the more proper to ſue to the King by petition than the Chancery, becauſe it concerns the King's manor. 1 *Rol. Abr.* 539. *Lane* 98. *S. C.*

An action of falſe impriſonment, or other action, may be brought againſt the under-ſheriff, in the Exchequer, though the ſheriff be the officer of the court, for the court takes notice of the under-ſheriff alſo. 1 *Rol. Abr.* 539.

If *A.* holds lands of the King by fealty and rent, and makes a leaſe thereof for years to *B.* and *C.* pretends a prior leaſe to him by *A.* though there is a rent iſſuing out of thoſe lands to the King, yet neither *B.* nor *C.* can ſue in this court by any privilege, in reſpect of the rent; for that the King can have no prejudice or benefit thereby; for whether *B.* or *C.* prevails the rent muſt be paid. 4 *Inſt.* 118.

But if the King extends lands, as the lands of *A.* for the debt of *A.* and leaſes the ſame to *B.* for years, reſerving rent, and *C.* pretends that *A.* had nothing in the land, but that he was ſeiſed thereof, *&c.* this is within the privilege of the court; for if *C.* prevails the King loſes his rent. 4 *Inſt.* 118.

If the King leaſes to *A.* for years, rendring rent, the King may diſtrain in all other the lands of *A.* for his rent, yet *A.* hath no privilege for his other lands, to bring them within the juriſdiction of this court. 4 *Inſt.* 119.

If a man files a croſs bill in this court, he need not intitle himſelf to the juriſdiction of the court, becauſe the croſs bill is grounded upon another bill in court. *Hard.* 160.

So if a man be ſued in the office of Pleas, he may have an *Engliſh* bill to relieve againſt that ſuit, without ſetting forth matter of juriſdiction. *Hard.* 160.

If *A.* is outlawed at the ſuit of *B.* and lands in the poſſeſſion of *A.* extended, and *C.* claims title to them, and pleads the inquiſition, if *C.* will bring an ejectment for them, it muſt be in this court, becauſe the King's revenue is concerned. *Hard.* 176.

If *A.* hath title to lands under an extent of the Exchequer, for debts in aid, he muſt bring his ejectment for them in this court, and having brought his ejectment for them in the Common Pleas, upon motion he was ordered to proſecute here. *Hard.* 193.

By the ſtat. 33 *H.* 8. *cap.* 39. the court of Exchequer has power to diſcharge all debts and duties due to the King, upon any equity diſcloſed; and it is by virtue of this act that they diſcharge recognizances; and it ſeems by the ſaid act, they may diſcharge penal laws made before this ſtatute; but all penal laws made after the ſtatute cannot be diſcharged, but muſt be compounded. *Sav.* 22. *Hard.* 334.

King *Charles* the Second having taken up ſums of money of the petitioners, (bankers) granted to them and their heirs, ſervant annuities chargeable upon the hereditary revenue of exciſe, given to the King by 12 *Car.* 2. *cap.* 24. The barons held, that the remedy, by petition to the barons was a proper remedy, and judgment was given for the petitioners by the opinion of 3. But *Letchmere* B. held, that the King could not alien or charge this revenue, and that for ſeveral reaſons there mentioned. *Freem. Rep.* 331. *pl.* 413. *Hill.* 1691. *in Scacc.* upon the petition of *Hornbee. & al'.*

There are three ſorts of privileges in the Exchequer, 1ſt, As debtor. 2dly, As accountant. 3dly, As officer of the court. Againſt the firſt of theſe, any man who hath a ſpecial privilege in another court, as an officer of the court, or an attorney, ſhall have his privilege, becauſe the privilege of a man as debtor is only a general privilege; put if an accountant begins his ſuit here, no privilege ſhall be allowed elſewhere, becauſe he has a ſpecial privilege, by reaſon of his attendance, to paſs his account, in which the King hath a particular concern; the ſame holds in an officer of the court; if he commences a ſuit here, no privilege in another court ſhall prevail againſt him, becauſe his attendance here is requiſite, and his privilege here is attached firſt by commencing his ſuit; but where the accountant has finiſhed his account, and reduced it to a certainty, ſo that it is become a debt, then he hath only a privilege as a general debtor has; ſo a ſervant to an officer or miniſter of the court, has no privilege againſt a privileged perſon elſewhere; *per cur. Hard.* 365. *Paſch.* 16 *Car.* 2. in the Exchequer, *Clapham* v. *Sir J. Lenthall.*

Thomas Young Juſtice, ſued a bill in the Exchequer againſt the clerk of the Hanaper upon this account, and the defendant caſt *ſuperſedeas* of the privilege of the Chancery, becauſe he was clerk of the Chancery; and by all the Juſtices in the Exchequer-Chamber the *ſuperſedeas* ſhall not be allowed; for every one who is accountant ought to be attendant and preſent, and there he ſhall be ſued, for it is an advantage to the King that he ſhall attend, and ſhall account; and accountant may have a bill againſt his debtor, and this is for the King's advantage, *quod citius ſolvat regi*; and if accountant be ſued in *C. B.* they ſhall ſend *ſuperſedeas* to ſurceaſe; and if he be ſued in *B. R.* thoſe of the Exchequer ſhall ſhew the record that he is accountant, *&c.* and ſhall not have *ſuperſedeas* to the King; for the pleas there are *coram rege, &c.* and he ſhall be diſmiſſed, and ſhall be ſued in the Excequer. *Br. Privilege, pl.* 25. cites 9 *Ed.* 4. 53.

The plaintiff, as debtor to the King, and Treaſurer of the Navy, exhibited his bill in the Exchequer. The defendant pleaded his privilege, as one of the Six Clerks in Chancery, under the Great Seal. *Hale* Ch. B. and the court held, that a general privilege, as debtor, will not hold againſt a ſpecial privilege, but againſt a general privilege it will. But a privilege as accountant will hold againſt a ſpecial privilege in another court, as officer of the court, or otherwiſe, though it be not alleged that he has entred upon his account; and in this caſe the plaintiff, being Treaſurer to the Navy, is *eo ipſo* an accountant. *Hard.* 316. *Mich.* 14 *Car.* 2. in the Exchequer. *Sir Geo. Carteret* v. *Sir John Maſſam.*

An accountant in the Exchequer to the King was ſued in *B. R.* and a baron of the Exchequer came into the court and produced his book of accounts to the King, and that the defendant was one, and prayed the privilege of the court of Exchequer, and that the ſuit might be ſtayed. The court demanded of the ſecondary, what the courſe was in ſuch caſe, whether to grant it upon ſuch bare averment of the baron, or that it ought to be pleaded and prayed by the party? Upon his informing the court that it had been uſually allowed without plea or prayer, it was granted accordingly. But *Williams* J. was ſtrongly againſt it, and ſaid, that there are many books wherein it was adjudged in point, that it ought to be upon the party's plea and prayer, and that without this the court cannot certainly know whether he be the ſame party for whom the privilege is prayed. 2 *Buſt.* 36. 10 *Jac. Anon'.*

The plaintiff being an accountant in the Exchequer, by bill there prayed to be relieved againſt a bond put in ſuit by defendant in the petty-bag, by reaſon of his privilege as uſher of the Chancery. The defendant pleaded his privilege as an officer of the court of Chancery. The court agreed, that when both parties are privileged, his privilege ſhall take place who ſues firſt; and that in this caſe the ſuit in equity to be relieved againſt the penalty of the bond is firſt attach'd here, and it is not the ſame ſuit with that at Common law, but diſtinct from it. And it was further ſaid, that if both parties are privileged perſons, and the attendance of the one is more requiſite than of the other, (as in the principal caſe it is, the plaintiff here being an accountant in this court, and entred into his account, as by his bill is alleged, which cannot be completed by deputy or attorney) in ſuch caſe his

privilege

privilege ſhall be allowed who has moſt cauſe of privilege; *& adjornatur*. But at another day the plea was overruled, and an injunction granted till anſwer. *Hard.* 117. *pl.* 2. *Trin.* 1658. *Baker* v. *Lenthall.*

2. *Manner of proceeding in the Exchequer, and of diſputes between it and other courts.*

If prohibited goods were ſeized, and proclamation made according to the courſe of the court, the owner ſhall not have them delivered unto him upon ſecurity, without putting in a plea, ſhewing cauſe why he ſhould have them. *Sav.* 10.

Before the ſtat. 5. *R.* 2. ſo great care was taken of the King's revenue, that no man might ſue or plead for their diſcharge of any debt, account or demand in this court, without expreſs command, or letter of the Great ſeal. 4 *Inſt.* 110.

But by ſtat. 5 *R.* 2. *cap.* 9. This practice was declared illegal, and ordained, that the barons ſhould have power to hear every anſwer of every demand in this court: ſo that every perſon, *&c.* may plead, ſue, *&c.* without ſuing any writ or other commandment. 4 *Inſt.* 110.

In caſe of an outlawry, it is the courſe of the Exchequer, to prefer an information in nature of a trover and converſion, againſt him that hath the goods of the party outlawed. 1 *Mod.* 90.

A cauſe had been heard in the Exchequer where two ſeveral trials had been directed, *viz.* will or no will, and a verdict was for the plaintiff in both; and yet the Chief Baron diſmiſſed the bill there, but without prejudice in law or equity. It was argued that thoſe words *without prejudice in law or equity*, muſt be underſtood to hinder the plaintiff from ſeeking relief in any other court of law or equity. And the court conceived accordingly, and ordered that the plaintiff who had brought an original bill in Chancery for the ſame matters, and to examine witneſſes in order thereto *in perpetuam rei memoriam*, might examine any witneſſes not examined in the Exchequer; and as to matters examined unto there, he might examine the ſame witneſſes *de bene eſſe*, and how far thoſe *de bene eſſe* ſhould be uſed, the court would conſider. *Chan. Caſes* 155. *Hill.* 21 & 22 *Car.* 2. *Anon'.*

A bill was exhibited in Chancery, concerning tithes and bounds of a pariſh, which proceeded to anſwer and replication. Then he exhibited another bill in the Exchequer, and there witneſſes were examined, and now proceeds again in Chancery, and replies. The defendant pleaded the proceedings and examination in the Exchequer, and ruled good as to examination of the ſame matters, which, being examined to there, were not examined in Chancery. *Chan. Caſes* 233. *Trin.* 26 *Car.* 2. *The King* v. *Brownlow.*

Mortgagor exhibits a bill to redeem in the Exchequer; the defendant there ſhall be at liberty to exhibit a bill to foreclоſe in Chancery, and the pendency of a former ſuit is no plea, though it was inſiſted that this was only in nature of a croſs bill to that in the Exchequer, which the now plaintiff might have exhibited there, and then one account of the profits would have ſerved all, and it was vexatious in the plaintiff to bring the ſame matter in iſſue in another court at the ſame time; and if the deputy remembrancer in the Exchequer ſhould take the account one way, and a maſter here ſhould take it another, it would breed confuſion; and if this court ſhould be of an opinion, that there ought to be no redemption, and the Exchequer ſhould decree a redemption, the juriſdictions would claſh; and therefore, to avoid theſe inconveniences, priority of ſuit ought to give juriſdiction to the Exchequer. Lord Keeper declared his opinion to be, that in any caſe if the mortgagor exhibited a bill to redeem in the Exchequer, that the defendant there ſhould be at liberty to exhibit to foreclоſe in his court; and overruled the plea, and ordered the defendant to pay coſts. *Vern.* 220. *pl.* 219. *Hill.* 1683. *Earl of Newburg* v. *Wren.*

Aſſignees under a commiſſion of bankruptcy bring a bill for on account againſt ſome perſons who had ſeized the bankrupt's eſtate by virtue of three *extents*, one for the King, and the other two were *extents* in aid; bill diſmiſſed, the matter being properly cogniſable in the court of Exchequer, which is the King's court of revenue. 2 *Vern.* 426. *pl.* 387. *Paſch* 1701. *Brown and Sandys* v. *Trant and Bridges & al'.*

The court of Chancery will not examine the *quantum* of the King's debt, nor how far extents ſued out are neceſſary. 2 *Vern.* 426. *pl.* 387. *Paſch.* 1701, in caſe of *Brown and Sandys* v. *Trant and Bridges & al'.*

A ſuit in Chancery was againſt ſeveral defendants, one of the defendants died, the ſurvivors pleaded the privilege of the Exchequer. But becauſe this ſuit was joint at firſt againſt the deceaſed and others, and any thing appearing he had no privilege in the Exchequer, ſo that the court of Chancery being lawfully poſſeſſed of the plea, his death ought not to give any more privilege to the other defendants to draw the cauſe from this court than they ſhould have had at the beginning, or while he lived; and therefore his lordſhip did adjudge the defendant's bill in this court. 1 *Chan. R.* 69, 70. 9 *Car.* 1. *Lake* v. *Phillips.* See 4 *Inſt.* 103 *to* 117.

3. *Statutes concerning the Exchequer.*

The order of accounting there, *Stat. de Scaccario*, 51 *H.* 3. *ſt.* 5.

The King ſhall aſſign three ſurveyors to extend the eſcheats, 51 *H.* 3. *ſt.* 5. *ſ.* 4.

The collector of the cuſtoms when to account, 51 *H.* 3. *ſt.* 5. *ſect.* 6.

The officers reſtrained as to appointing deputies, *St. de Scac'.* 51 *H.* 3. *ſt.* 5. *ſ.* 7 & 8.

Eſtreats of fines and amerciaments ſhall be delivered into the Exchequer every year, 51 *H.* 3. *ſt.* 5. *ſect.* 10. 22 & 23 *Car.* 2. *c.* 22.

The ſummons of the Exchequer ſhall be ſhewn *gratis*. *St. Weſtm.* 1. 3 *Ed.* 1. *c.* 19.

Directions for writing the rolls of ſheriffs accounts, *St. Rutl.* 10 *Ed.* 1.

Writs of *ſecunda ſuperoneratione* and *re diſſeiſin* ſhall be inrolled, and a tranſcript ſent into the Exchequer, *St. Weſtm.* 2. 13 *Ed.* 1. *c.* 8.

One baron and one clerk to be ſent into every county once a year, to inroll the payment of debts, 27 *Ed.* 1. *ſt.* 1. *c.* 2.

The Common Pleas ſhall not be held in the Exchequer, *Art. ſuper Cart.* 28 *Ed.* 1. *ſt.* 3. *c.* 4.

The King's clerks employed in the Exchequer ſhall not be compelled to reſidence, *Art. Cler.* 9 *Ed.* 2. *ſt.* 1. *c.* 8.

Juſtices of aſſiſe, *&c.* ſhall ſend their records to the Exchequer every year, 9 *Ed.* 3. *ſt.* 1. *c.* 5.

The duty of the barons, 20 *Ed.* 3. *c.* 2.

A clerk of the remembrance ſhall ſit above the clerk of the pipe to imbreviate the diſcharges of the King's debtors, 37 *Ed.* 3. *c.* 4.

Penalty on clerks of the Exchequer making out proceſs for a debt paid, 1 *R.* 2. *c.* 5.

The barons ſhall admit any one to plead in diſcharge without privy ſeal, 5 *R.* 2. *ſt.* 1. *cap.* 10.

The covenants of perſons retained in the King's ſervice, ſhall be ſent into the Exchequer in order to be allowed their accounts, 5 *R.* 2. *ſt.* 1. *c.* 11.

Accounts in the Exchequer ſhall be more ſpeedily determined, 5 *R.* 2. *ſt.* 1. *c.* 12.

Two clerks ſhall be aſſigned to make parcels of accounts, 5 *R.* 2. *ſt.* 1. *c.* 13.

Accounts of *nichil* ſhall be put out. 5 *R.* 2. *ſt.* 1. *c.* 14.

The clerk of the pipe and the remembrancers ſhall every term execute all privy ſeals of diſcharge, and tranſmit ſchedules of the diſcharges to each other, 5 *R.* 2. *ſt.* 1. *c.* 15.

On a judgment of livery certified, the remembrancer ſhall indorſe a diſcharge on the *mittimus*, 5 *R.* 2. *ſt.* 1. *c.* 16.

The fees of the clerks for commiſſions and *niſi prius*, 5 *R.* 2. *ſt.* 1. *c.* 17.

No bond ſhall be taken for the King's debt in double the ſum, 13 *R.* 2. *ſt.* 1. *c.* 14.

Commiſſions to inquire into accounts paſſed in the *Exchequer*, 6 *H.* 4. *c.* 3.

How rolls of eſtreats are to be made, 7 *H.* 4. *c.* 3.

Certain fees limited, and extortions prohibited, 33 *H.* 6. *c.* 3.

Penalty on officers of the *Exchequer* refuſing inquiſitions returnable there, 1 *H.* 8. *c.* 8. *ſ.* 4.

The authorities of the court of Augmentations, *&c.* which have ſince been united to the *Exchequer*, 33 *H.* 8. *c.* 39. *ſ.* 56, *&c.*

The duty and fees of the auditors and receivers, 33 *H.* 8. *c.* 39. *ſ.* 67, *&c.*

Coufirmation of certain orders for the limiting of fees, and regulating the iſſuing of proceſs, 1 *Jac.* 1. *c.* 26.

Suits on the act of navigation may be proſecuted in the *Exchequer*, 13 *&* 14 *Car.* 2. *c.* 11. *ſect.* 28.

No writ of delivery ſhall be granted out of the *Exchequer*, without ſecurity, 13 *&* 14 *Car.* 2. *c.* 11. *ſ.* 30.

All ſeizures and inquiſitions, returned, to be certified to the ingroſſer of the great roll before the firſt day of the next term, *&c.* 13 *&* 14 *Car.* 2. *c.* 11. *ſ.* 4.

For aſſigning of orders, 19 *Car.* 2. *c.* 12.

Penalty on not paying money into the *Exchequer* in due time, 20 *Car.* 2. *c.* 2. 9 *&* 10 *W.* 3. *c.* 44. *ſ.* 42.

Rules for paying certain monies into the *Exchequer*, 1 *W. & Mar. ſt.* 2. *c.* 1.

Regulations for receiving and paying money at the *Exchequer*, 8 *&* 9 *W.* 3. *c.* 28.

The duty of the tellers, auditors, and of the talley-office regulated, 8 *&* 9 *W.* 3. *c.* 28. 10 *&* 11 *W.* 3. *c.* 22. *ſ.* 14.

Penalty on officers of the *Exchequer* not keeping an account of all monies appropriated to the bank, 8 & 9 *W.* 3. *c.* 20. *ſ.* 37.

New bills may be made forth at the *Exchequer*, in lieu f thoſe filled up with indorſements, 9 *W.* 3. *c.* 3. *ſ.* 3.

Eſtabliſhment of the *Exchequer* in *Scotland*, 6 *Ann.* *c.* 26.

Alteration of *Whitſuntide* and *Lammas* terms for the court of *Exchequer* in *Scotland*, 7 *Ann.* *c.* 15.

Earl of *Ranelagh*'s aſſignments declared good, 5 *Geo.* 1. *c.* 2. *ſ.* 8.

Regulations for the indorſing of orders, 9 *Geo.* 1. *c.* 12.

Officers indemnified for money ſtolen out of the *Exchequer*, 2 *Geo.* 2. *c.* 6.

The act that proceedings ſhall be entred in *Engliſh* not to affect the receipt of *Exchequer*, 6 *Geo.* 2. *c.* 6.

A million charged on duties on licences, *&c.* 16 *Geo.* 2. *c.* 12.

Fees on *niſi prius* records iſſuing out of *Exchequer*, 23 *Geo.* 2. *c.* 26. *ſ.* 10.

Clauſes in the land-tax act relating to *Exchequer* bills extended to the malt-tax act, 30 *Geo.* 2. *c.* 4. *ſ.* 34.

Exchequer bills. Statutes for circulating *Exchequer* bills, 5 *Ann.* *c.* 13. 6 *Ann.* *c.* 32. 12 *Ann. ſt.* 1. *c.* 11. 6 *Geo.* 1. *c.* 2. *ſ.* 8. 6 *Geo.* 1. *c.* 4. *ſ.* 69, *&c.* 8 *Geo.* 1. *c.* 20. 11 *Geo.* 1. *c.* 17. 12 *Geo.* 1. *c.* 2. *ſ.* 29, *&c.* 13 *Geo.* 1. *c.* 7. *ſ.* 15. 3 *Geo.* 2. *c.* 16. 30 *Geo.* 2. *c.* 3. *ſ.* 166.

And for payment of thoſe loſt, 7 *Geo. ſt.* 1. *c.* 20. *ſ.* 33. 8 *Geo.* 1. *c.* 2. *ſ.* 34. 11 *Geo.* 1. *c.* 8. *ſ.* 23. 12 *Geo.* 1. *c.* 2. *ſ.* 29. 12 *Geo.* 1. *c.* 4. *ſ.* 65. 13 *Geo.* 1. *c.* 7. *ſ.* 36. 14 *Geo.* 2. *c.* 41. *ſ.* 16. 30 *Geo.* 2. *c.* 3. *ſ.* 174. 2 *Geo.* 3. *c.* 9.

Two millions to be raiſed by *Exchequer* bills, 33 *Geo* 2. *c.* 1.

Loans to be taken at *Exchequer* for a million, 33 *Geo.* 2. *c.* 18.

Loan for making up the deficiencies of the year 1760, 33 *Geo.* 2. *c.* 21.

Loan for 1,500,000*l.* 33 *Geo.* 2. *c.* 23.

Loan for 1,762,400*l.* 1 *Geo.* 3. *c.* 18.

Loan for 1,000,000*l.* out of next ſupplies, or ſinking fund, 1 *Geo.* 3. *c.* 19.

Loan for 1,500,000*l* for diſcharging navy debt, 1 *Geo.* 3. *c.* 20.

Loan for 1,500,000*l.* for diſcharging navy debt, 2 *Geo.* 3. *c.* 7.

Loan for 1,009,217*l.* 2*s.* 8*d.* 2 *Geo.* 3. *c.* 33.

Loan for 1,000,000*l.* out of next ſupplies or ſinking fund, 2 *Geo.* 3. *c.* 34.

Loan for 1,800,000*l.* out of next ſupplies or ſinking fund, 3 *Geo.* 3. *c.* 17.

Tallies of loan to be ſtruck for 2,000,000*l.* iſſuing out of ſinking fund, 3 *Geo.* 3. *c.* 18.

Proviſion for the more eaſy diſcharge of recognizances eſtreated into the *Exchequer*, 4 *Geo.* 3. *c.* 10.

Loan of 2,000,000*l.* for 1764, 4 *Geo.* 3. *c.* 13.

Treaſury impowered to iſſue *Exchequer* bills for 800,000*l.* to be paid out of firſt ſupplies, or out of ſinking fund, 4 *Geo.* 3. *c.* 23.

Loan for 800,000*l.* 5 *Geo.* 3. *c.* 19.

Exciſe, Is a charge or impoſition laid upon beer, ale, cyder, and other liquors, within the kingdom of *England*, *Wales*, and *Berwick*, by an act of parliament made 12 *Car.* 2. *cap.* 23. during the King's life, and according to the rates in the ſaid act mentioned.

Brewers to make their entries once a month, 12 *Car.* 2. *c.* 23. *ſ.* 15.

Thirty-ſix gallons to be reckoned to a barrel of beer, and thirty-two gallons to a barrel of ale, 12 *Car.* 2. *c.* 23. *ſ.* 8.

Duties on foreign liquors to be paid by the importer, 12 *Car.* 2. *c.* 23. *ſ.* 14. 15 *Car.* 2. *c.* 11. *ſ.* 17. 22 *&* 23 *Car.* 2. *c.* 5. *ſ.* 9

Oaths of officers of exciſe, 12 *Car.* 2. *c.* 23. *ſ.* 33.

The hereditary exciſe granted, 12 *Car.* 2. *c.* 24. *ſ.* 15, *&c.*

Brewers muſt give notice of their brewing veſſels. 15 *Car.* 2. *c.* 11.

The commiſſioners ſhall not take the exciſe to farm, 15 *Car.* 2. *c.* 11. *ſ.* 2.

Exciſe officers to be kept in the market-towns, 15 *Car.* 2. *c.* 11. *ſ.* 20.

Hours for carrying out beer, 15 *Car.* 2. *c.* 11. *ſ.* 11.

Brewers ſhall not mingle ſtrong worts with ſmall, 15 *Car.* 2. *c.* 11. *ſ.* 12. 2 *&* 23 *Car.* 2. *c.* 5. *ſ.* 11.

Penalty of bribing an exciſeman, 15 *Car.* 2. *c.* 11. *ſ.* 16.

Directions for landing exciſeable liquors imported, 15 *Car.* 2. *c.* 11. *ſ.* 17.

Where appellant to have coſts, 15 *Car.* 2. *c.* 11. *ſ.* 19

Exemption of colleges in univerſities, 15 *Car.* 2. *c.* 11. *ſ.* 21.

Powers of commiſſioners given to the farmers, 16 *&* 17 *Car.* 2. *c.* 4.

Additional exciſes now expired, 22 *&* 23 *Car.* 2. *c.* 5. 29 *Car.* 2. *c.* 2. 3 *W. & M. c.* 1. 1 *W. & M. c.* 24. 2 *W. & M. ſt.* 2. *c.* 3. *&* *c.* 10. 3 *W. & M. c.* 1. 5 *W. & M. c.* 7. 7 *&* 8 *W.* 3. *c.* 30.

Allowance for waſte, 22 *&* 23 *Car.* 2. *c.* 5. *ſ.* 3.

Juſtices or commiſſioners may mitigate fines, 22 *&* 23 *Car.* 2. *c.* 5. *ſ.* 8.

Lending the uſe of a brewhouſe prohibited, 22 *&* 23 *Car.* 2. *c.* 5. *ſ.* 10.

Retailer of ale not to mix ſtrong and ſmall beer together after the gage is taken, 22 *&* 23 *Car.* 2. *c.* 5. *ſ.* 11. 7 *W.* 3. *c.* 30.

Certioraries not to be allowed on proceedings on the exciſe law, 22 *&* 23 *Car.* 2. *c.* 5. *ſ.* 14.

In the country, thirty-four gallons to be reckoned a barrel of beer or ale, 1 *W. & M. ſt.* 1. *c.* 24. *ſ.* 5.

Brewer not diſcharged of miſ-entry unleſs he ſhews the beer, 1 *W. & M. ſt.* 1. *c.* 24. *ſ.* 10.

Penalty on officers taking fees, 1 *W. & M. ſt.* 1. *c.* 24. *ſ.* 15.

Informations againſt brewers to be exhibited within three months, 1 *W. & M. c.* 24. *ſ.* 16.

The exciſe granted to King *William* and Queen *Mary*, 2 *W. & M. c.* 3.

Additional exciſe granted, 4 *W. & M. c.* 3. 5 *W. & M. c.* 2. *ſ.* 10. 4 *Ann. c.* 6. *ſ.* 6.

Theſe duties are made perpetual, and the ſurplus appropriated to the aggregate fund, 1 *Geo.* 1. *c.* 12.

The duties granted by 4 *Ann. c.* 6. are charged with annuities; and by 6 *Geo.* 1. *c.* 4. *South-Sea* company are impowered to purchaſe annuities.

Notes of gages to be left with the brewer, 5 *W. & M. c.* 20. *ſ.* 49. 7 & 8 *W.* 3. *c.* 30. *ſ.* 46.

Powers and directions for preventing the concealment of liquors ſubject to exciſe, 7 & 8 *W.* 3. *c.* 3.

Commiſſioners or juſtices may ſummon witneſſes, 7 & 8 *W.* 3. *c.* 30. *ſ.* 24.

Officers may break open brewhouſes to ſearch for private tons, *&c.* 7 & 8 *W.* 3. *c.* 30. *ſ.* 27.

Inferior offices to continue though commiſſioners die, 7 & 8 *W.* 3. *c.* 3. *ſ.* 30.

Brewers to make declaration of party guiles, 8 & 9 *W.* 3. *c.* 19.

Penalties on concealed veſſels, 8 & 9 *W.* 3. *c.* 19. *ſ.* 4.

The duties on vinegar and low wines leſſened, 10 & 11 *W.* 3. *c.* 21.

Informations to be brought within three months, 12 *W.* 3. *c.* 11. *ſ.* 17.

The weekly ſum of 3700*l.* to be paid out of the exciſe revenue as a fund, 12 & 13 *W.* 3. *c.* 12.

This weekly charge made perpetual by 1 *Geo.* 1. *ſt.* 1. *c.* 1. and the annuities granted upon it ſubſcribed into the *South Sea* fund, 6 *Geo.* 1. *c.* 4.

The exciſe charged with three *per cent.* on the banker's debt, 12 *W.* 3. *c.* 12. *ſ.* 15.

Great part of this debt was ſubſcribed for annuities upon general fund, purſuant to 3 *Geo.* 1. *c.* 7.

Additional exciſe granted, 8 *Ann. c.* 7.

The duties laid by 8 *Ann. c.* 7. made perpetual by the *South Sea* act, 6 *Geo.* 1. *c.* 4.

Commiſſioners and officers to be ſworn, 10 *Ann. c.* 19. *ſ.* 122. 10 *Ann. c.* 96. *ſ.* 75.

Certain duties put under the management of commiſſioners of exciſe, 12 *Ann. ſt.* 2. *c.* 9. *ſ.* 11.

Penalty of obſtructing exciſe officers, 6 *Geo.* 1. *c.* 21. *ſ.* 7.

Exciſe officers may ſearch ſhips for brandy and exciſeable liquors, 11 *Geo.* 1. *c.* 30.

May by warrant ſearch houſes, 11 *Geo.* 1. *c.* 30. *ſ.* 2.

Rules for taking out permits, 11 *Geo.* 1. *c.* 30. *ſ.* 10.

Penalty on a conſtable refuſing to aſſiſt an officer, 11 *Geo.* 1. *c.* 30. *ſ.* 31.

Proof to be admitted of an officer's authority without producing his deputation, 11 *Geo.* 1. *c.* 30. *ſ.* 32.

Penalty on offering to corrupt an officer, 11 *Geo.* 1. *c.* 30. *ſ.* 40.

Directions for the commiſſioners of cuſtoms and exciſe to proceed upon ſeizures of tea, coffee, and exciſeable liquors, 12 *Geo.* 1. *c.* 28.

Officers not ſubject to penalty for not leaving a copy of their charge, unleſs requeſted in writing, 12 *Geo.* 1. *c.* 28. *ſ.* 30.

Right of appeal confirmed, 1 *Geo.* 2. *c.* 16. *ſ.* 3.

Three commiſſioners impowered to act, 1 *Geo.* 2. *c.* 16. *ſ.* 4.

Powers granted to the commiſſioners with reſpect to retailers of ſpirituous liquors, 9 *Geo.* 2. *c.* 23. *ſ.* 4. *&c.*

The duty on ſweets leſſened, 10 *Geo.* 2, *c.* 17.

Directions for preventing frauds in dealers in exciſeable goods, 18 *Geo.* 2. *c.* 26. *ſ.* 8.

Offenders in one juriſdiction may be proſecuted in another, 18 *Geo.* 2. *c.* 26. *ſ.* 13.

Puniſhment of perſons going armed in defiance of laws of exciſe, 19 *Geo.* 2. *c.* 34.

Offences againſt exciſe laws and monies ariſing from exciſe, excepted out of general pardon, 20 *Geo.* 2. *c.* 52. *ſ.* 28, 39.

Office hours of attendance altered, 23 *Geo.* 2. *c.* 26. *ſ.* 12.

Summons left at offenders houſes to be deemed legal notice, 32 *Geo.* 2. *c.* 17.

Officers of exciſe may ſeize forfeited veſſels, 33 *Geo.* 2. *c.* 9. *ſ.* 16.

Additional exciſe granted, 1 *Geo.* 3. *c.* 7. *ſ.* 1.

For other matters, ſee the ſeveral ſorts of exciſeable goods.

Exhamſhire and Tindal. Proceſs how to iſſue againſt perſons of the franchiſes of *Exhamſhire, &c.* committing murder, *&c.* 2 *Hen.* 5. *ſt.* 1. *c.* 5. 9 *Hen.* 5. *ſt.* 1. *c.* 7. *Exham* and *Exhamſhire* ſhall be within *Northumberland.* Stat. 14 Eliz. c. 13.

Erclusa. A ſluice for water dammed or pent up.—*Et ripam Savernæ in foreſta ſua ad tenendam* excluſam *piſcariæ vel molendini de Ettona.* Cart. H. 1. in Mon. Angl. tom. 1.———*Excluſagium* is of the ſame import, as——*Dedi in puram eleemoſynam*——excluſagium & *ſtagnum de piſcaria & molendino de Waderhalla.*——Mon. Anglican. tom. 1. pag. 398. And nearer to our preſent Engliſh, *ſluſagium.*——*Ex dono Richardi filii Lucæ* ſluſagium *unum ſuper terram ſuam ad molendinum monachorum fullericum,* Ib. p. 868.

Erclusagium, Was a payment due to the lord for the benefit of having a ſluce. *Et duo molendina in eodem manerio cum aquis* excluſagiis, *&c.* Mon. 1 tom. 398, 587.

Excommengement. In ſtat. 23 *Hen.* 8. *cap.* 3. is in law *French,* the ſame with *excommunication* in *Engliſh.*

Excommunication, Is an eccleſiaſtical cenſure, whereby the perſon againſt whom it is pronounced is for the time caſt out of the communion of the church. *God.* 624. And it is of two kinds, the leſſer and the greater: The leſſer excommunication is, the depriving the offender of the uſe of the ſacraments and divine worſhip; and this ſentence is paſſed by judges eccleſiaſtical, on ſuch perſons as are guilty of obſtinacy or diſobedience, in not appearing upon a citation, or not ſubmitting to penance, or other injunctions of the court. The greater excommunication is that whereby men are deprived, not only of the ſacraments, and the benefit of divine offices, but of the ſociety and converſation of the faithful. *Johnſ.* 168.

Excommunication is divided into the greater and leſſer; the greater excludes a man from the communion of the faithful, as well as of the ſacraments; the leſſer excludes a man from the communion of the ſacraments only; but they both equally diſable the perſon from bringing any action, *&c. Co. Lit.* 134.

Excommunication is the higheſt eccleſiaſtical cenſure which can be pronounced by a ſpiritual judge againſt a chriſtian, for thereby he is excluded from the body of the church, and diſabled to bring any action, or ſue any perſon in the Common law courts. *Co. Lit.* 133. *Godol.* 624.

By the 33d article of the church of *England,* that perſon, which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken of the whole multitude of the faithful as an heathen and publican, until he be openly reconciled by penance, and received into the church by a judge that hath authority thereunto. *Gib. Cod.* 1095-6. ——It was uſed by way of puniſhment only for great and heinous crimes, according to the rule in the *Reformatio Legum,* fol. 80. *Non debet excommunicatio minutis in delictis verſari, ſed ad horribilium criminum atrocitatem admovenda eſt, in quibus eccleſia graviſſimam infamiam ſuſtinet, vel quod illis evertatur religio, vel quod boni mores pervertuntur.* But now the frequent uſe of excommunication is in caſes of contumacy, for not appearing or diſobeying of ſentences, though in the ſmalleſt matters, and thoſe oft-times of a civil nature, which is one of the principal means of bringing a contempt upon it, and yet is the only way which the ſpiritual court has to inforce obedience. *Gib. Cod.* 1095.

1. *In what caſes the ſpiritual court may excommunicate, and where a perſon ſhall be ſaid to be* ipſo facto *excommunicated.*

2. *By whom excommunication is to be pronounced and certified, and of the diſabilities of the perſon excommunicated.*

3. *Of the proceedings on the writ of* excommunicato capiendo, *both at Common law, and by ſtat.* 5 Eliz. *and of abſolving and aſſoiling a perſon excommunicated.*

1. *In what caſes the ſpiritual court may excommunicate, and where a perſon ſhall be ſaid to be* ipſo facto *excommunicated.*

It ſeems agreed, that where-ever the ſpiritual court hath juriſdiction in any cauſe, and the party refuſes to appear to their citation, or after ſentence, being admoniſhed, to obey their decree, that he may be excommunicated. 1 *Rol. Abr.* 883. 12 *Co.* 76.

Alſo it ſeems, that at Common law, the *ſignificavit* of an excommunication might be upon a general cauſe, as *propter contumaciam*, or *de non parendis mandatis eccleſiæ*; but now by the 5. *Eliz.* the cauſe muſt be ſet forth in the writ *De excommunicato capiendo* itſelf, becauſe by that ſtatute the writ is made returnable in *B. R.* which would be to no purpoſe, if the cauſe were not ſet forth in the writ, ſo as to enable the court to judge thereof. 1 *Salk.* 293. *Gibſ. Cod.* 1097.

But it was always holden, that the biſhop's certificate, ſignifying the excommunication into Chancery, on which the writ of *Excommunicato capiendo* iſſued, ought to compriſe the particular cauſe of the excommunication; ſo that the court might judge whether it were a matter within their juriſdiction, or not. 1 *Rol. Abr.* 883.

If the excommunication appears to have been by an archdeacon of a peculiar or limited juriſdiction, it ought to appear by the certificate, either expreſsly, or by implication, that the matter thereof aroſe within his juriſdiction, otherwiſe it is void. 1 *Rol. Abr.* 884.

If the excommunication in a writ of *Excommunicato capiendo* is recited to be *pro quibuſdam cauſis ſubſtractionis decimarum ſive aliorum jurium eccleſiaſticorum*; this is too uncertain for the *alia jur'* might be ſuch matters as were out of their juriſdiction; for of that the King's courts are to be judges, and not they themſelves. 1 *Salk.* 293.

So where in a writ of *Excommunicato capiendo*, the recital of the *ſignificavit* was, that he was excommunicated for not paying the coſts *in quodam negotio puerorum educationis ſive inſtructionis ſine aliqua licentia in ea parte prius obtenta*; and the writ was quaſhed for incertainty, becauſe it might be a teaching to fence or dance, and not letters. 1 *Salk.* 294.

There was a preſentment in the ſpiritual court of the biſhop of *Ely* againſt the defendant, for teaching ſchool in *Cambridge* without a licence, by the churchwardens of the pariſh; whereupon, as the way was there, a citation was fixed up at the church-door, for the defendant to come in and anſwer the charge of the preſentment; but he being a diſſenter, and not coming to church, had no notice of the citation; and for this contempt in not coming, he was excommunicated; whereupon he applied to the biſhop to get himſelf abſoiled, for that it was a writing ſchool he taught, and ſo not within the biſhop's juriſdiction, but the court refuſed to abſoil him, unleſs he would put in a caution to anſwer ſuch articles, and abide by ſuch ſentence as they ſhould make thereupon; which he was adviſed not to do, becauſe that would be owning their juriſdiction, and concluding himſelf to abide by their ſentence; and thereupon he moved for a prohibition, and had it, with a ſpecial clauſe to abſoil him. Mr. *Page* moved for the prohibition, and inſiſted, that they could not excommunicate any one for a contempt, without ſhewing that the matter itſelf was within their juriſdiction; and as they could not excommunicate for the original matter, if it were not within their juriſdiction; ſo neither could they for a contempt to a citation upon that matter, and cited 8 *Co.* 68. *Trollop*'s caſe, *Doctor and Student.* 12 *Co.* 77. 14 *H.* 4. 5 *Co.* 23. and he ſaid, by theſe books it appears, that if the biſhop refuſed to abſoil him, that an action on the caſe would lie againſt him; but now-a-days, a prohibition was thought the better way; and he ſaid, this preſentment being only for teaching ſchool, they could not come after with articles, and charge him with any other matter, as a writing-ſchool, *Latin*-ſchool, or other particular ſchool; which the court agreed, and ſaid it was like a preſentment by a grand jury here, which cannot be altered or changed by articles after; and as the grand jury are upon their oath, ſo are the churchwardens there, and ſaid, that when articles are given in againſt any one, the citation ought to be founded upon that; but when it was by preſentment, that was a charge, and a citation itſelf, and cannot be after altered by articles; though Serjeant *Parker* ſaid, he thought this preſentment to be only in the nature of a ſummons, and that it was neceſſary articles ſhould be drawn up againſt him after, to charge upon the particulars; but the prohibition with the ſaid clauſe was granted. 2 *Bac. Abr.* 315. *Paſch.* 6 *Ann. Queen* and *Bentley.*

By ſeveral acts of parliament, offenders of ſeveral kinds are made to incur the puniſhent of excommunication *ipſo facto*: And to this purpoſe it is enacted by 6 *Ed.* 6. *cap.* 4. "That if any perſon whatſoever ſhall, by words only, quarrel, chide or brawl, in any church or churchyard, that then it ſhall be lawful unto the ordinary of the place where the ſame offence ſhall be done, and proved by two lawful witneſſes, to ſuſpend every perſon ſo offending, that is to ſay, if he be a layman *ab ingreſſu eccleſiæ*; and if he be a clerk, from the miniſtration of his office for ſo long a time as the ſame ordinary ſhall by his diſcretion think meet and convenient, according to the fault."

And it is further enacted by the ſaid ſtatute, "That if any perſon ſhall ſmite, or lay violent hands upon any other, either in any church or churchyard, that then *ipſo facto* every perſon ſo offending ſhall be deemed excommunicate, and be excluded from the fellowſhip and company of *Chriſt*'s congregation."

And it is further enacted by the ſaid ſtatute, "That if any perſon ſhall maliciouſly ſtrike any perſon with any weapon in any church or church-yard, or ſhall draw any weapon in any church or church-yard, to the intent to ſtrike another with the ſame weapon, that then every perſon ſo offending, and thereof being convicted by verdict of twelve men, or by his own confeſſion, or by two lawful witneſſes before juſtices of aſſiſe, juſtices of oyer and terminer, or juſtices of peace in their ſeſſions, by force of this act, ſhall be adjudged by the ſame juſtices, before whom ſuch perſon ſhall be convicted, to have one of his ears cut off, *&c.* and beſides that, every ſuch perſon to be, and ſtand *ipſo facto* excommunicated, as aforeſaid.

In the conſtruction of this ſtatute the following opinions have been holden, 1. That the ſtatute extends as well to cathedral as parochial churches and church-yards, *Cro. Eliz.* 224.

That notwithſtanding the words of the ſtatute be expreſſed, that he who ſmites another in the church, *&c.* ſhall *ipſo facto* be deemed excommunicate; yet there ought either to be a precedent conviction at law, which muſt be tranſmitted to the ordinary, or elſe the excommunication muſt be declared in the ſpiritual court, upon a proper proof of the offence there; for it is implied in every penal law, that no one ſhall incur the penalty thereof till he be found guilty upon a lawful trial; alſo it muſt be intended, in the conſtruction of this ſtatute, that the excommunication ought to appear judicially; for otherwiſe there could be no abſolution. *Dyer* 275. *pl.* 48. *Cro. Jac.* 462. *Lit. Rep.* 149. *Hetl.* 86. *Cro. Eliz.* 919. 1 *Vent.* 146.

That when the proceedings for the offences againſt this ſtatute are in the ſpiritual court, coſts may be given *pro expenſis litis*, but not *pro damnis. Cro. Jac.* 464. *Hetl.* 86. *S. P.*

That he who ſtrikes in a church, *&c.* can no way excuſe himſelf, by ſhewing that the other aſſaulted him. *Cro. Jac.* 367.

That churchwardens who whip boys for playing in the church, or pull off the hats of thoſe who obſtinately refuſe to take them off themſelves, or gently lay their hands on thoſe who diſturb the performance of any part of divine ſervice, and turn them out of the church, are not within the meaning of the ſtatute. 1 *Saund.* 13. 2 *Keb.* 124. 1 *Lev.* 196. 1 *Sid.* 301. 1 *Mod.* 168. *S. C.*

That if the proceedings be in the temporal courts, by way of indictment, for drawing a weapon in the church, *&c.*

&c. and it conclude *contra formam ſtatuti*, it muſt be laid to be, with an intent to ſtrike ſuch a perſon; for being laid to be *contra formam ſtatuti*, the jury cannot inquire of any other offence, than that which comes within the deſcription of the act. *Cro. Eliz.* 231. 4 *Leon.* 49. *Noy* 171. *S. C.*

That in an indictment upon this ſtrtute, for ſtriking in the church, in order to bring the offender within the latter clauſe of the ſtatute, which ſubjects him to the loſs of an ear, *&c.* it muſt be ſhewed, that the ſtriking was with a weapon. *Cro. Eliz.* 464.

So it hath been holden, that if a man takes up a ſtone in the churchyard, and offers to throw it at another, or having a hatchet or ax in his hand offers to ſtrike another therewith, that this is not an offence within this part of the ſtatute; for theſe are not ſuch weapons as may properly be ſaid to be drawn, as a ſword, dagger, *&c.* *Dalt.* 49.

Alſo two perſons committed to priſon by certain juſtices of the peace, for diſturbing a miniſter in his office, were diſcharged upon a *habeas corpus*, by the court of King's Bench, for that their commitment was too general, not ſhewing wherein they diſturbed, but only that they *per apertum factum* diſturbed, *&c.* not ſhewing the particular fact whereby they did diſturb, *viz.* by brawling, fighting, or otherwiſe, there being ſeveral puniſhments to each; but the court bound them to their good behaviour for a year. 3 *Keb.* 803.

By the ſtat. 3 *Jac.* 1. *cap.* 5. *ſect.* 11 & 12. it is enacted, "That every popiſh recuſant convict ſhall ſtand to all intents and purpoſes diſabled, as a perſon lawfully excommunicated, and as if ſuch perſon had been ſo denounced and excommunicated according to the laws of this realm, until he or ſhe ſhall conform, *&c.* and that every perſon ſued by ſuch perſon ſo diſabled, may plead the ſame in diſabling of ſuch plaintiff, as if he or ſhe were excommunicated by ſentence in the eccleſiaſtical court, except the action of ſuch recuſant do concern ſome hereditament or leaſe, which is not to be ſeized into the King's hands, by force of ſome law concerning recuſancy."

In the expoſition hereof it hath been holden,

1. That a plea in diſability, purſuant to this ſtatute, ought to ſhew before what juſtices the conviction was, that the court may know where to ſend for a certificate thereof, if it be denied; and that the record itſelf, or at leaſt a certificate thereof, ought immediately to be produced. *Noy* 89. *Latch* 176. 3 *Lev.* 333, 334.

2. That if after ſuch plea it be certified, that the plaintiff hath conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapſe and become convict again, the defendant cannot plead the ſame diſability a ſecond time. *Hetl.* 176.

3. That it muſt appear either from the conviction itſelf, or by proper averments, that the plaintiff is convicted of popiſh recuſancy, becauſe no recuſants, except popiſh ones, are within the ſaid clauſe; but this is ſufficiently ſet forth, by alleging, that the plaintiff being *papalis recuſans* was indicted and convicted *ſecundum formam ſtatuti*, *&c.* 3 *Lev.* 333, *&c.*

Alſo it is holden by ſome, that all popiſh recuſants convict may be taken up by the writ *de excommunicato capiendo*, and that they are not to be admitted a competent witneſs in any cauſe. 2 *Bulſt.* 155. But by ſerjeant *Hawkins*, this ſeems to be a conſtruction over ſevere; for inaſmuch as this, like all other penal ſtatutes, ought to be conſtrued ſtrictly, and the words thereof are no more, than that ſuch perſons ſhall ſtand diſabled, *&c.* as perſons lawfully excommunicate, *&c.* and the purport thereof may be fully ſatisfied by the diſability to bring an action; it ſeems to be too rigorous to carry them farther. 1 *Hawk. P. C.* 23.

By the 25 *Ed.* 1. *cap.* 4. it is enacted, "That all archbiſhops and biſhops ſhall pronounce the ſentence of excommunication againſt all thoſe that by word, deed, or counſel, do contrary to the charters of *Magna Charta*, or that in any point break or undo them; and that the ſaid curſes be twice a year donounced and publiſhed by the prelates aforeſaid. See *Gibſ. Cod.* 1098.

2. *By whom excommunication is to be pronounced and certified, and of the diſabilities of the perſon excommunicated.*

The ſentence of excommunication can only be pronounced by the biſhop, or other perſon in holy orders, being a maſter of arts at leaſt, alſo the prieſt's name pronouncing ſuch ſentence is to be expreſſed in the inſtrument iſſuing under ſeal out of the court. *Gibſ. Cod.* 1095.

Excommunication muſt be certified by the biſhop of the dioceſe, whoſe proper ſubject the party is, and cannot be certified by his commiſſary, or official; the reaſon whereof, according to the Civilians, is, becauſe no perſon inferior to a biſhop, can call in the ſecular arm, by the laws of the church; but my Lord *Coke* aſſigns the reaſon of it to be, becauſe no certificate of excommunication by any ſhall diſable one, but the certificate of him to whom the court may write to abſolve the party excommunicated. *Co Lit.* 133. 1 *Rol. Abr.* 884. *Gibſ. Cod.* 1097. 8 *Co.* 68.

But the vicar general, *epiſcopo in remotis agente*, or the guardian of the ſpiritualities, *vacante ſede*, may do it, either by direct certificate, that the perſon is excommunicated, or by letters teſtimonial, reciting the entry thereof in the Regiſter, and atteſting that ſuch entry is there found. *Co. Lit.* 133. *F. N. B.* 1. 1 *Vent.* 222. 3 *Keb.* 60, 69.

So a perſon excommunicated by a commiſſary, official or archdeacon, who derive their juriſdiction from the biſhop, may be certified excommunicated by the biſhop himſelf. 8 *Co.* 63. 1 *Rol. Abr.* 434.

Alſo the biſhop, after election, tho' before conſecration, may certify excommunication. *F. N. B.* 140.

In times of popery, excommengement certified by the pope, or delegates commiſſioned by him, did not diſable the plaintiff to ſue, *&c.* becauſe the courts had no perſon to whom they could write to have him aſſoiled. 1 *Rol. Abr.* 883.

The court will not receive the certificate of excommunication of one biſhop from another, becauſe they muſt have the certificate from the biſhop, whoſe proper ſubject he was; and he might have him aſſoiled by his own ordinary after the firſt certificate to the biſhop. 8 *Co.* 63.

Nor will they receive a certificate from a biſhop deceaſed, becauſe he may ſtand aſſoiled by the preſent ordinary that now is, after the deceaſe of the biſhop who has certified; and the court will not receive any certificate, but from ſuch perſon to whom they can write to aſſoil. *Bro. Excom.* 21. *Co. Lit.* 134. 1 *Rol. Abr.* 883.

The certificate ought to be directed, either to the court, or at leaſt *univerſis S. Matris eccleſiæ filiis*, and ought to contain the day of the excommunication. 8 *Co.* 63. 1 *Rol. Abr.* 883.

A perſon excommunicated is thereby diſabled to be a witneſs in any cauſe, cannot be attorney or procurator for another, is to be turned out of church by the churchwardens, and not to be allowed chriſtian burial. *Gibſ. Cod.* 435, 1096-7.

Alſo an excommunicate perſon is diſabled to ſue or commence an action; but ſuch diſability cannot be pleaded after a general imparlance, for thereby the defendant admits him a good plaintiff. *Co. Lit.* 133. 8 *Co.* 63. 1 *Rol. Abr.* 883.

Alſo when excommunication is pleaded, the biſhop's letter under his ſeal, witneſſing the excommunication, muſt be ſhewn; and though the plaintiff cannot deny the plea, yet the writ ſhall not abate, but the defendant *eat inde ſine die*, becauſe the plaintiff upon producing his letters of abſolution, ſhall have a re-ſummons or re-attachment. *Lit. ſect.* 207. 8 *Co.* 69. *Co. Lit.* 134. 3 *Lev.* 208, 240.

If in an appeal of murder, *&c.* the defendant pleads excommunication in the plaintiff in diſability, the appellee ſhall be bailed, until the plaintiff purchaſes letters of abſolution, and then he muſt plead in chief, for if the defendant ſhould be kept in priſon till the plaintiff be abſolved, he might be a priſoner for life. 2 *Hawk. P. C.* 114.

Excommunication is a good plea to an executor or adminiſtrator, tho' they ſue *in auter droit*, for an excommunicate perſon is excluded from the body of the church, and incapable to lay out the goods of the deceaſed to pious uſes; alſo it is one of the effects of excommunication, that he cannot be procurator or attorney for any other perſon, and therefore cannot repreſent the deceaſed. *Co. Lit.* 134.

Excommunication is no plea on a *qui tam*, becauſe it is for example; and the ſtatute having given the informer an ability to ſue, and not excepted excommunicated perſons from the liberty of informing, he is enabled to ſue by the ſtatute, notwithſtanding the cenſures of the church. 12 *Co.* 61.

When a prohibition is brought againſt the biſhop, and he pleads excommunication againſt the plaintiff, and in the excommunication there is no cauſe of ſuch excommunication ſhewn; this is no good plea, for in ſuch caſe it will be intended, that the excommunication was for endeavouring to hinder the biſhop's proceeding, by application to the temporal court; and if ſuch excommunication were allowed, it would deſtroy all prohibitions, and the plea of excommunication in this caſe is *exceptio ejuſdem rei cujus petitur diſſolutio.* 28 *Ed.* 3. 97.

If an action be brought by the bailiffs and commonalty of a corporation, the defendant ſhall not plead excommunication in the bailiffs, becauſe they ſue as a corporation, and a corporation cannot be excluded from the communion of the viſible church. *Co. Lit.* 134.

When excommunication is pleaded in the plaintiff, he ſhall not reply, that he has appealed from the ſentence, for the ſentence is in force until it is repealed; and whilſt it is in force, he cannot appear in any of the courts of juſtice, but he may reply, he is abſolved; for then his diſability is taken away. *Bro. Excommunication* 3. 3 *Bulſt.* 72.

3. *Of the proceedings on the writ of* excommunicato capiendo, *both at Common law, and by ſtat.* 5 Eliz. *and of abſolving and aſſoiling a perſon excommunicated.*

It is ſaid, that the writ *de excommunicato capiendo* is a liberty or privilege peculiar to the church of *England*, above all realms in *Chriſtendom*; for tho' the aſſiſtance of the ſecular arm hath ever been afforded to the church in moſt other *Chriſtian* countries as well as this, yet in no inſtance is it ſo ſurely and ſo effectually reached out, as in the execution of this writ, which is *debitum juſtitiæ*, and not made to depend upon the pleaſure of the prince. *Gibſ. Cod.* 1102. cites *Coſ. Apol.* 8. But in 2 *Inſt.* 623, 631, it is expreſly ſaid, that *breve Regis de excommunicato capiendo de gratia Regis procedit.*

The writ of *excommunicato capiendo* iſſues out of Chancery, and is founded on the biſhop's certificate, ſignifying the excommunication, and at Common law was only returnable into that court; ſo that for any uncertainty or defect in the writ, the party could only be diſcharged in Chancery. *F. N. B.* 140. 1 *Salk.* 293.

But now by the 5 *Eliz. cap.* 23. intitled, *An act for the due execution of the writ* de excommunicato capiendo, reciting, "Foraſmuch as divers perſons offending in many great crimes and offences, appertaining merely to the juriſdiction and determination of the eccleſiaſtical courts and judges of this realm, are many times unpuniſhed for lack and want of the good and due execution of the writ *de excommunicato capiendo*, directed to the ſheriff of any county, for the taking and apprehending of any ſuch offenders, the great abuſe whereof, as it ſhould ſeem, hath grown, for that the ſaid writ is not returnable in any court that might have the judgment of the well executing and ſerving the ſaid writ, according to the contents thereof; but hitherto hath been left only to the diſcretion of the ſheriffs and their deputies, by whoſe negligence and defaults for the moſt part, the ſaid writ is not executed upon the offenders as it ought to be, by reaſon whereof ſuch offenders be greatly encouraged to continue their ſinful and criminous life, much to the diſpleaſure of Almighty God, and to the great contempt of the eccleſiaſtical laws of this realm."

Sect. 2. "Wherefore, for the redreſs thereof, Be it enacted, That from and after the firſt day of *May* next coming, every writ of *excommunicato capiendo*, that ſhall be granted and awarded out of the high court of Chancery againſt any perſon or perſons within the realm of *England*, ſhall be made in the time of term, and returnable before the Queen's highneſs, her heirs and ſucceſſors, in the court commonly called the King's Bench, in the term next after the *teſte* of the ſame writ, and the ſame writ ſhall be made to contain, at the leaſt, twenty days between the *teſte* and the return thereof; and after the ſame writ ſhall be ſo made and ſealed, that then the ſaid writ ſhall be forthwith brought into the ſaid court of the King's Bench, and there, in the preſence of the juſtices, ſhall be opened and delivered of record to the ſheriff or other officer, to whom the ſerving and execution thereof ſhall appertain, or to his or their deputy or deputies; and if afterwards it ſhall or may appear to the juſtices of the ſame court for the time being, that the ſame writ ſo delivered of record be not duly returned before them at the day of the return thereof, or that any other default or negligence hath been uſed or had in the not well ſerving and executing of the ſaid writ, that then the juſtices of the ſaid court ſhall and may, by authority of this act, aſſeſs ſuch amercement upon the ſaid ſheriff or other officer, in whom ſuch default ſhall appear, as to the diſcretion of the ſaid juſtices ſhall be thought meet and convenient; which amercement ſo aſſeſſed ſhall be eſtreated into the court of Exchequer, as other amercements have been uſed."

Sect. 3. "And the ſheriff, or other officer, to whom ſuch writ of *excommunicato capiendo*, or other proceſs by virtue of this act ſhall be directed, ſhall not in any wiſe be compelled to bring the body of ſuch perſon or perſons that ſhall be named in the ſaid writ or proceſs into the ſaid court of King's Bench, at the day of the return thereof, but ſhall only return the ſame writ and proceſs thither, with declaration briefly, how and in what manner he hath ſerved and executed the ſame, te the intent that thereupon the ſaid juſtices may then further proceed, according to the tenor and effect of this preſent act."

Sect. 4. "And if the ſheriff or other officer, to whom the execution of the ſaid writ ſhall ſo appertain, do or ſhall return, that the party or parties named in the ſaid writ cannot be found within his bailiwick, that then the ſaid juſtices of the King's Bench for the time being, upon every ſuch return, ſhall award one writ of *capias* againſt the ſaid perſon or perſons named in the ſaid writ of *excommunicato capiendo*, returnable in the ſame court in the term time, two months at leaſt next after the *teſte* thereof, with a proclamation to be contained in the ſaid writ of *capias*, that the ſheriff, or other officers to whom the ſaid writ ſhall be directed in the full county court, or elſe at the general aſſiſe or gaol-delivery to be holden within the ſaid county, or at a quarter-ſeſſions to be holden before the juſtices of the peace within the ſaid county, ſhall make open proclamation, ten days at the leaſt before the return, that the party or parties named in the ſaid writ ſhall, within ſix days next after ſuch proclamation, yield his or their body or bodies to the priſon of the ſaid ſheriff, or other ſuch officer, there to remain as a priſoner, according to the tenor and effect of the firſt writ of *excommunicato capiendo*, upon pain of forfeiture of ten pounds; and thereupon after ſuch proclamation had, and the ſaid ſix days paſt and expired, then the ſaid ſheriff, or other officer to whom the ſaid *capias* ſhall be directed, ſhall make return of the ſame writ of *capias* into the ſaid court of the King's Bench of all that he hath done in the execution thereof, and whether the party named in the ſaid writ have yielded his body to priſon or not."

Sect. 5. "And if upon the return of the ſaid ſheriff it ſhall appear, that the party or parties named in the ſaid writ of *capias*, or any of them, have not yielded their bodies to the gaol and priſon of the ſaid ſheriff or other officer, according to the effect of the ſame proclamation, that then every ſuch perſon, that ſo ſhall make default, ſhall, for every ſuch default, forfeit to the Queen's Highneſs, her heirs and ſucceſſors, ten pounds, which ſhall likewiſe be eſtreated by the ſaid juſtices into the ſaid

feitures limited againſt ſuch perſons excommunicate by this ſtatute, by reaſon of ſuch writ of *Excommunicato capiendo*, wanting ſufficient addition, or of ſuch *ſignificavit*, wanting all the cauſes afore-mentioned, ſhall be utterly void in law, and by way of plea to be allowed to the party grieved."

Sect. 14. "And if the addition ſhall be with a *nuper* of the place, then in every ſuch caſe at the awarding of the firſt *capias* with proclamation, according to the form mentioned, one writ of proclamation, without any pain expreſſed, ſhall be awarded into the county, where the offender ſhall be moſt commonly reſiant at the time of the awarding the ſaid firſt *capias*, with pain, in the ſame writ of proclamation, to be returnable the day of the return of the ſaid firſt *capias*, with pain and proclamation thereupon, at ſome one ſuch time and court as is preſcribed for the proclamation, upon the ſaid firſt *capias*, with pain; and if ſuch proclamation be not made in the county where the offender ſhall be moſt commonly reſiant, in ſuch caſes of additions of *nuper*, that then ſuch offender ſhall ſuſtain no pain or forfeiture by virtue of this ſtatute, for not yielding his or her body according to the tenor afore-mentioned; any thing before ſpecified, and to the contrary hereof, in any wiſe notwithſtanding."

If writ ſhall be forthwith brought into the King's Bench.] See *Sect.* 2. of the foregoing ſtatute. It hath been often adjudged, that this form of taking out the writ, and the ſeveral ſteps therein (as contained in this clauſe of the act) ought to be preciſely purſued; and for default thereof many perſons have been diſcharged. *Gibſ.* 1056. cites 2 *Cro.* 567. 3 *Cro.* 583. *Siderf.* 165, 285.

Into the court of King's Bench] In the biſhop of St. *David*'s caſe, *Mich.* 1 *Ann.* it was declared, that before this ſtatute, the writ was returnable into Chancery; and there the *ſignificavit* was quaſhed, if undue: but now the judgment of that, by this ſtatute, is devolved on the court of King's Bench. *Farreſt.* 57.

Capias] See *Sect.* 4. The penalties of this act being inflicted upon none but thoſe who are excommunicated for ſome of the cauſes ſpecified in *Sect.* 13. the *capias* accordingly muſt not be with penalty in any other caſe: or if it iſſue ſo by miſtake, the court will grant a *ſuperſedeas* upon motion; and if the party be taken, will upon pleading (after the *habeas corpus* is granted and returned, and ſo the matter is judicially before them) diſcharge him from the penalties, though not from the impriſonment. In conſideration of which pleading, and the trouble and charge that attends it, it is ſaid, that he may have an attachment againſt the plaintiff. *Gibſ.* 1056. 1 *Salk.* 294.

He ſhall remain in the cuſtody of the ſaid ſheriff] See *Sect.* 8. The plaintiff obtained ſentence againſt the defendant for 210 *l.* for non-payment of tithes and coſts. The defendant for non-payment was excommunicated, and arreſted upon an *Excommunicato capiendo*, and the ſheriff let him eſcape. The plaintiff brought an action againſt the ſheriff; and had a verdict againſt him for the 210 *l.* It was moved in arreſt of judgment, that the action would not lie. But by the court it was adjudged, that the action well lay: and they relied much upon the caſe, where it is held, that an action lies againſt the ſheriff for ſuffering a man to eſcape, being arreſted upon a *capias utlagatum* after outlawry upon meſne proceſs. *L. Raym.* 788.

Without bail] See *Sect.* 8. By the ſtatute of the 3 *Ed.* 1. *cap.* 13. perſons excommunicate, taken at the requeſt of the biſhop, ſhall be in no wiſe repleviſable by the common writ, nor without writ; that is to ſay, he that is certified into the Chancery by the biſhop to be excommunicated, and after is taken by force of the King's writ of *Excommunicato capiendo*, is not bailable: for in ancient time, men were excommunicated only for *hereſies propter lepram animæ*, or other heinous cauſes of eccleſiaſtical cognizance, and not for ſmall or petty cauſes; and therefore in thoſe caſes the party was not bailable by the ſheriff or gaoler without the King's writ: but if the party offered ſufficient caution *de parendo mandatis eccleſiæ in forma juris*, then ſhould the party have the King's writ to the biſhop to accept his caution, and to cauſe him to be delivered. And if the biſhop will not ſend to the ſheriff to deliver him, then ſhall he have a writ out of the Chancery to the ſheriff for his delivery: or if he be excommunicated for a temporal cauſe, or for a matter whereof the eccleſiaſtical court hath no cognizance, he ſhall be delivered by the King's writ without any ſatisfaction. 2 *Inſt.* 188.

And where it is ſaid, that the ſheriff ſhall not bail them *by the common writ, nor without writ*; this is to be underſtood, that the ſheriff ſhall not replevy them by the common writ *De homine replegiando*, nor without writ, that is, *ex officio*; but they may be bailed in the King's Bench. 2 *Inſt.* 189.

Shall not in the ſame writ have a ſufficient and lawful addition] See *Sect.* 13. The defendant was excommunicated for a certain cauſe of jactitation of marriage, and taken upon a *capias*, and brought up by a *habeas corpus*; and exception was taken to the writ, that therein no addition was given to the defendant: but the court held, that for any of the cauſes mentioned in the ſtatute, the defendant's addition ought to be in the writ; but that in other caſes no addition is neceſſary. 1 *Salk.* 294. *Mich.* 1 *Ann.* Q. and *Sangway*.

If in the ſignificavit *it be not contained, &c.*] See *Sect.* 13. By *Holt* Chief Juſtice: At the Common law, the cauſe had no need to be ſhewn in the writ of *Excommunicato capiendo*; but it was ſufficient to ſay, that the party was excommunicate for manifeſt contumacy: but in the biſhop's certificate it ought to be ſhewn. And now ſince the ſtatute of the 5 *Eliz.* the cauſe ought to be ſhewn in the writ. *L. Raym.* 619.

On a *habeas corpus* the return was, that *Fowler* was taken, and in cuſtody by a writ of *Excommunicato capiendo*; and the excommunication was in the writ recited to be, for certain cauſes of ſubſtraction of tithes, or other eccleſiaſtical rights; and becauſe this return was uncertain, the court was moved that he might be diſcharged. And the queſtion was, whether this return was uncertain; and whether that uncertainty would vitiate the writ. And the court reſolved, 1. That the return was uncertain; for that the other rights might be ſuch matters as were out of their juriſdiction, and they ought to ſhew the matter was within their juriſdiction; for of that the King's courts are to be judges, and not they themſelves. 2. The cauſe of excommunication muſt be ſet forth in the writ. At Common law, the writ *Excommunicato capiendo* was always general for contumacy; not containing a ſpecial cauſe. And the writ was returnable in Chancery, and founded on a certificate of the biſhop, which certificate ſet forth the cauſe before, and the party could not be diſcharged but by *ſuperſedeas* in Chancery, if the cauſe were inſufficient. But now the cauſe muſt be ſet forth in the writ *De excommunicato capiendo* itſelf, becauſe by the ſtatute of the 5 *Eliz.* the writ is made returnable in this court, which would be to no purpoſe, if the cauſe were not to be ſet forth in the writ, and this court judge of that cauſe. 3. The court held, they might diſcharge the party, upon the inſufficiency of the return. Before the 5 *Eliz.* there were no diſcharges in this court on *Excommunicato capiendo's*, but where a man was excommunicated pending a prohibition: now, the caſe is altered; for this court may quaſh the writ of *Excommunicato capiendo*, or award a *ſuperſedeas*; becauſe this court are judges of the cauſe, and have it before them, and the party cannot go into Chancery for a *ſuperſedeas* now, becauſe it is returnable here. Accordingly the writ was quaſhed, and this ſpecial entry made on the *habeas corpus*, that the party was diſcharged becauſe the writ *De excommunicato capiendo* was quaſhed. 1 *Salk.* 293. *Mich.* 12. *Will.* 3. *K.* and *Fowler*.

The defendant, having been arreſted upon *an excommunicato capiendo*, was brought into court by *habeas corpus*, And upon the return it appeared, that he was excommunicated for non-payment of coſts, in which he was condemned by commiſſioners delegate *in a certain cauſe* of office or correction at the promotion of *Lucy*. And this by the court was held to be ill; becauſe it did not appear that theſe coſts were adjudged in a cauſe of eccleſiaſtical cognizance; and it is plain, ſince the ſtatute of the

5 *Eliz.*

court of Exchequer, in ſuch manner and form as fines and amerciaments there taxed and aſſeſſed are uſed to be."

Sect. 6. "And thereupon the ſaid juſtices of the King's Bench ſhall alſo award forth one other writ of *capias* againſt the ſaid perſon or perſons, that ſo ſhall be returned to have made default, with ſuch like proclamation as was contained in the firſt *capias*, and a pain of twenty pounds to be mentioned in the ſaid ſecond writ and proclamation; and the ſheriff or other officer, to whom the ſaid ſecond writ of *capias* ſhall be ſo directed, ſhall ſerve and execute the ſaid writ in ſuch like manner and form, as before is expreſſed, for the ſerving and executing of the ſaid writ of *capias*; and if the ſheriff, or other officer, ſhall return upon the ſecond *capias*, that he hath made the proclamation according to the tenor and effect of the ſame writ, and that the party hath not yielded his body to priſon according to the tenor of the ſaid proclamation, that then the ſaid party, that ſo ſhall make default, ſhall, for ſuch his contempt and default, forfeit to the Queen's Highneſs, her heirs and ſucceſſors, the ſum of twenty pounds, which ſaid ſum of twenty pounds, the ſaid juſtices of the King's Bench for the time being ſhall likewiſe cauſe to be eſtreated into the ſaid court of Exchequer, in manner and form aforeſaid."

Sect. 7. "And then the ſaid juſtices ſhall likewiſe award one other writ of *capias* againſt the ſaid party, with ſuch like proclamation and pain of forfeiture, as was contained in the ſaid ſecond writ of *capias*, and the ſheriff, or other officer, to whom the ſaid third writ of *capias* ſhall be ſo directed, ſhall ſerve and execute the ſaid writ of *capias*, in ſuch like manner and form as before in this act is expreſſed and declared, for the ſerving and executing of the ſaid firſt and ſecond writs of *capias*; and if the ſheriff, or other officer, to whom the execution of the ſaid third writ ſhall appertain, do make return of the ſaid third writ of *capias*, that the party upon ſuch proclamation hath not yielded his body to priſon, according to the tenor thereof, that then every ſuch party, for every ſuch contempt and default, ſhall likewiſe forfeit to the Queen's Majeſty, her heirs and ſucceſſors, other 20 *l.* which ſum of 20 *l.* ſhall likewiſe be eſtreated into the ſaid court of Exchequer, in manner and form aforeſaid; and thereupon the ſaid juſtices of the King's Bench ſhall likewiſe award forth one writ of *capias* againſt the ſaid party, with like proclamation, and like pain of forfeiture of 20 *l.* and that alſo the ſaid juſtices ſhall have authority by this act infinitely to award ſuch proceſs, with ſuch like proclamation, and pain of forfeiture of 20 *l.* as is before limited againſt the ſaid party that ſo ſhall make default in yielding his body to the priſon of the ſheriff, until ſuch time as by the return of ſome of ſuch ſaid writs before the ſaid juſtices it ſhall and may appear, that the ſaid party hath yielded himſelf to the cuſtody of the ſaid ſheriff, or other officer, according to the tenor of the ſaid proclamation, and that the party, upon every default and contempt by him made againſt the proclamation of any of the ſaid writs ſo infinitely to be awarded againſt him, ſhall incur like pain and forfeiture of 20 *l.* which ſhall likewiſe be eſtreated in manner and form aforeſaid."

Sect. 8. "And when any perſon or perſons ſhall yield his or their body or bodies to the hands of the ſheriff, or other officer, upon any of the ſaid writs of *capias*, that then the ſame party or parties, that ſhall ſo yield themſelves, ſhall remain in the priſon, or cuſtody of the ſaid ſheriff, or other officer, without bail, baſton, or mainprize, in ſuch like manner and form to all intents and purpoſes, as he or they ſhould or ought to have done, if he or they had been apprehended and taken upon the ſaid writ of *Excommunicato capiendo*."

Sect. 9. "And if any ſheriff, or other officer, by whom the ſaid writ of *capias*, or any of them, ſhall be returned, as is aforeſaid, do make an untrue return upon any of the ſaid writs, that the party named in the ſaid writ, hath not yielded his body upon the ſaid proclamations, or any of them, where indeed the party did yield himſelf, according to the effect of the ſame, that then every ſuch ſheriff, or other officer, for every ſuch falſe and untrue return, ſhall forfeit to the party grieved, and damnified by ſuch falſe return, the ſum of 40 *l.* for the which ſum of 40 *l.* the ſaid party grieved ſhall have his recovery and due remedy by action of debt, bill, plaint or information, in any of the Queen's courts of record, in which action, bill, plaint or information, no eſſoin, protection, or wager of law ſhall be admitted or allowed for the party defendant."

Sect. 10. "Saving and reſerving to all archbiſhops and biſhops, and all others having authority to certify any perſon excommunicated, and like authority to accept and receive the ſubmiſſion and ſatisfaction of the ſaid perſon ſo excommunicated in manner and form heretofore uſed, and him to abſolve and releaſe, and the ſame to ſignify as heretofore it hath been accuſtomed to the Queen's Majeſty, her heirs and ſucceſſors, into the High Court of Chancery, and thereupon to have ſuch writs for the deliverance of the ſaid perſon ſo abſolved and releaſed from the ſheriff's cuſtody or priſon, as heretofore they or any of them had, or of right ought or might have had; any thing in this preſent ſtatute ſpecified or contained to the contrary hereof in any wiſe notwithſtanding."

Sect. 11. "Provided always, that in *Wales*, the countines palatine of *Lancaſter*, *Cheſter*, *Durham*, and *Ely*, and in the cinque ports, being juriſdictions and places exempt, where the Queen's Majeſty's writ doth not run, and proceſs of *capias* from thence not returnable into the ſaid court of the King's Bench, after any *ſignificavit*, being of record in the ſaid court of Chancery, the tenor of ſuch *ſignificavit* by *mittimus* ſhall be ſent to ſuch of the ſaid head officers of the ſaid country of *Wales*, counties palatines, and places exempt, within whoſe offices, charge, or juriſdiction, the offenders ſhall be reſiant, that is to ſay, to the chancellor or chamberlain for the ſaid county palatine of *Lancaſter* and *Cheſter* and for the cinque ports to the lord warden of the ſame, and for *Wales* and *Ely*, and the county palatine of *Durham*, to the chief juſtice or juſtices there; and thereupon every of the ſaid juſtices and officers, to whom ſuch tenor of *ſignificavit* with *mittimus* ſhall be directed and delivered, ſhall, by virtue of this eſtatute, have power and authority to make like proceſs to the inferior officer and officers to whom the execution of proceſs there doth appertain, returnable before the juſtices there, at their next ſeſſions or court, two months at the leaſt after the *teſte* of every ſuch proceſs, ſo always as in every degree they ſhall proceed in their ſeſſions and courts againſt the offenders, as the juſtices of the ſaid court of King's Bench are limited, by the tenor of this act, in term times to do and execute."

Sect. 12. "Provided alſo, and be it enacted, that any perſon, at the time of any proceſs of *capias* afore-mentioned awarded, being in priſon, or out of this realm, in the parts beyond the ſea, or within age, or of *non ſane memorie*, or women covert, ſhall not incur any of the pains or forfeitures afore-mentioned, which ſhall grow by any return or default happening during ſuch time of nonage, impriſonment, beyond ſea, or *non ſane memorie*; and that by virtue of this ſtatute, the party grieved may plead every ſuch cauſe or matter in bar of, and upon the diſtreſs of other proceſs, that ſhall be made for levying of any of the ſaid pains or forfeitures."

Sect. 13. "And that if the offender, againſt whom any ſuch writ of *Excommunicato capiendo* ſhall be awarded, ſhall not in the ſame writ of *Excommunicato capiendo* have a ſufficient and lawful addition, according to the form of the eſtatute of *primo* of *Henry* the Fifth in caſes of certain ſuits, whereupon proceſs of exigent are to be awarded, or if in the *ſignificavit* it be not contained, that the excommunication doth proceed upon ſome cauſe, or contempt of ſome original matter of hereſy, or refuſing to have his or their child baptized, or receive the holy communion, as it is now commonly uſed to be received in the church of *England*, or to come to divine ſervice, now commonly uſed in the ſaid church of *England*, or error in matters of religion, or doctrine now received and allowed in the ſaid church of *England*, incontinency, uſury, ſimony, perjury in the eccleſiaſtical court or idolatry; that then all and every pains and forfeitures

5 *Eliz.* that the cauſe ought to appear in the writ; for otherwiſe how can this court make judgment of the ſeveral cauſes ſpecified in that ſtatute, in order to award ſeveral proceſſes with penalties? And the court quaſhed the writ of *excommunicato capiendo*, and diſcharged the defendant. *Ld. Raym.* 817. *Mich.* 1 *Ann. Q.* and *The Biſhop of St. David's.*

So in the court of Chancery, *Mich.* 10 *Geo.* 2. *K.* and *Eyre.* The *ſignificavits* were quaſhed, being only ſaid to be in a cauſe which came by appeal concerning a matter merely ſpiritual. For by the Lord *Talbot*; We are not to lend our aſſiſtance, but where it appears clearly they have juriſdiction, and are not to truſt them to determine what is a matter merely ſpiritual. In *Fowler's* caſe it was, in cauſes of eccleſiaſtical rights, and held not ſufficient. *Str.* 1067.

If a perſon be unjuſtly excommunicated for a matter of which the ſpiritual court hath not conuzance, and he is taken on a writ of *excommunicato capiendo*, the party grieved ſhall have a writ out of Chancery to the ſheriff, to deliver him out of priſon. 2 *Inſt.* 623. 12 *Co.* 76. *F. N. B.* 141.

So if the ſpiritual court proceeds *inverſo ordine*, as if they refuſe a copy of the libel, *&c.* a prohibition ſhall go, with a clauſe to abſolve and deliver the party injured. 1 *Sid.* 232.

Alſo if a man be excommunicated, and offers to obey and perform the ſentence, and the biſhop refuſeth to accept it, and to abſoil him, he ſhall have a writ to the biſhop, requiring him, upon performance of the ſentence, to abſoil him; and the reaſon thereof is, for that by the excommunication the party is diſabled to ſue any action, or to have any remedy for any wrong done unto him, ſo long as he ſhall remain excommunicate; and alſo the party grieved may have his action upon his caſe againſt the biſhop, in like manner as he may when the biſhop doth excommunicate him for a matter which belongeth not to the eccleſiaſtical conuſance; alſo the biſhop, in thoſe caſes, may be indicted at the ſuit of the King. 2 *Inſt.* 623.

But if the excommunication be for a juſt cauſe, the party muſt make preſent ſatisfaction before he can be abſolved, or he muſt put in caution, that he will hereafter perform that which the biſhop ſhall reaſonably and according to law enjoin him; which caution, in the Civil law, is of three ſorts. 1. *Fidejuſſoria*, as when a man bindeth himſelf with ſureties to perform ſomewhat. 2. *Pignoratio*, or *realis cautio*, as when a man engageth goods or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing, taketh a corporal oath to do it; which laſt is now the moſt frequent method.

This method of taking caution was held to be againſt law. 1 *Bulſt.* 122.——But was afterwards on great debate held to be good; and that the biſhop having a diſcretionary power herein, it was much in his option to take caution by obligation as by either of the two other methods. 2 *Lev.* 36. *Raym.* 225.

If after a perſon is excommunicated, there comes a general act of pardon, which pardons all contempts, *&c.* it ſeems that this offence is taken away without any formal abſolution. See *Cro. Car.* 199. *Cro. Jac.* 212. 8 *Co.* 68. 1 *Jon.* 227. 2 *Lev.* 36. *Gibſ. Cod.* 1110.

For more learning on this ſubject, ſee 10 Vin. Abr. *tit.* Excommunication.

Excommunicato capiendo, Is a writ directed to the ſheriff for the apprehenſion of him who ſtandeth obſtinately *excommunicated* forty days; for ſuch a one not ſeeking abſolution, hath or may have his contempt certified into the Chancery, whence iſſueth this writ, for impriſoning him without bail or mainprize, until he conform. *F. N. B. f.* 62. 5 *El. c.* 23. *Reg. Orig. f.* 65, 67, 70.

Excommunicato deliberando, Is a writ to the under-ſheriff, for the delivery of an *excommunicate* perſon out of priſon, upon certificate of the ordinary of his conformity to the juriſdiction eccleſiaſtical. *F. N. B. fol.* 63. *and Reg. Orig. fol.* 65 & 67.

Excommunicato recipiendo, Is a writ whereby perſons *excommunicate*, being for their obſtinacy committed priſon, and unlawfully delivered thence, before they have given caution to obey the authority of the church, are commanded to be ſought for, and impriſoned again. *Reg. Orig. fol.* 67.

Execution, *(Executio,)* In the Common law ſignifies the laſt performance of an act, as of a *fine* or a *judgment.* And the *execution* of a *fine*, is the obtaining poſſeſſion actually of the things contained in the ſame by virtue thereof, which is either by entry into the lands, or by writ; whereof ſee at large *Weſt. part.* 2. *Symbol.* tit. *Fines, ſect.* 136, 137, 138. *Executing* of judgment and ſtatutes, and ſuch like, ſee *F. N. B. in Indice* verbo *Execution. Co.* in his 6 *Rep. Blomfield's* caſe, *f.* 87. maketh two ſorts of *executions*, one *final*, another with a *quouſque* tending to an end: An *execution final*, is that which maketh money of the defendant's goods, or extendeth his lands, and delivereth them to the plaintiff: for this the party accepteth in ſatisfaction, and this is the end of the ſuit, and all that the King's writ commandeth to be done. The other ſort with a *quouſque* is tending to an end, and not final; as in the caſe of a *capias ad ſatisfaciendum, &c.* this is not final, but the body of the party is to be taken, to the intent and purpoſe to ſatisfy the demandant, and his impriſonment is not abſolute, but until the defendant do ſatisfy. *Idem ibid. Cowell.*

Execution is the obtaining the actual poſſeſſion of a thing required by judgment of law, and is called the life of the law, and therefore in all caſes to be favoured. *Co. Lit.* 154. *a. Carter* 194. *Executio eſt fructus, finis et effectus legis. Co. Lit.* 289. 5 *Co.* 87. It differs from an action which continues only till judgment is given, and therefore a releaſe of all actions is regularly no bar of an execution. *Co. Lit.* 289. 2 *Rol. Abr.* 484.

1. *What things were liable to execution by the Common law.*

2. *Of the ſeveral kinds of judicial writs, that lie after judgment; where the party ſhall be concluded by electing one of them, and his further remedy when he hath not received intire ſatisfaction on his firſt writ.*

3. *Who may ſue out execution, and againſt whom,* viz. *where there are ſeveral parties, againſt the heir and executor, againſt infants, againſt a feme covert, againſt privileged perſons, and againſt a clerk, or one in holy orders.*

4. *To what time the execution ſhall have relation, ſo as to avoid any alienation by the party; and of the King's precedency in executions.*

5. *At what time execution may be ſued out; and of the neceſſity of a* ſcire facias.

6. *Of the ſheriff's duty and authority in doing execution; and the remedy againſt him for neglect of duty.*

7. *Of obſtructing an execution; the party's remedy when the execution is irregular, and of ſetting it aſide for ſuch irregularity.*

1. *What things were liable to execution by the Common law.*

And here it will be neceſſary to conſider what things are liable to execution at Common law in perſonal actions; and theſe we find were only the annual profits of the land as they aroſe, and the goods and chattels of the debtor; for neither his body nor lands were affected by recognizance or judgments for debt or damages, except as herein after excepted. *Hob.* 60. 3 *Co.* 12. *b. Cro. Jac.* 450. *Plow.* 440. 2 *Inſt.* 19. 2 *Rol. Abr.* 472.

The reaſon why the Common law ſubjected only the perſonal eſtate to the payment of debts, ſeems to be, for that it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men truſted one another no further than they had viſible chattels to anſwer the debt; the lands were not liable, becauſe they were liable to the feudal lord; and a new tenant could not be forced upon him without his conſent in the alienation; and the perſon was not liable, becauſe

becauſe that was obliged by the tenure to ſerve the King in the wars, and at home the ſeveral lords, according to the diſtinct natures of their tenure; but tho' this law was well framed for a nation bred to wars, which were to extend their fame and power by arms; yet it was no ways calculated to the circumſtances and conditions of a trading people, whoſe power and credit riſe and fall in proportion to the increaſe or decay of trade; therefore in ſuch a nation, laws ought to be ſo contrived and framed, as to invite foreigners to trade with us, and bring their commodities to us, and the great encouragement to this will be to allow them all poſſible ſecurity in their contracts and dealings; and the way to that will be to ſubject all the effects if the debtor, whether in lands or chattels, and his perſon too, to ſatisfy the creditor; for otherwiſe it would be in the power of every ill man, by converting his chattels into land to defraud his creditor, and againſt all reaſon and equity enjoy the profits of that land which he purchaſed with another's money; and accordingly we find, that toward the reign of *Ed.* 1. when *Magna Charta* had given the tenants a power of alienation, without acquainting their lords, if they left enough to anſwer the duties of their tenure; they began to ſubject the land to anſwer the debts in trade; and as they grew more and more a trading people, it was thought reaſonable that the perſon ſhould be liable, that a cloſe confinement might oblige him the ſooner to ſatisfy his creditors, as alſo make him the more wary how he contracted debts without the proſpect of a competent fund or proviſion to diſcharge them. *Plow.* 440. 3 *Co.* 11. 2 *Inſt.* 19.

But even at Common law we find, that the King, by his prerogative, might have execution of body, goods and lands, but ſtill under this reſtriction, that the land was not extendable while the chattels were ſufficient, and the debtor ready to anſwer the debt. *Plow.* 441. 3 *Co.* 11.

Alſo in caſe of a private perſon, the land was liable to execution, in an action of debt againſt an heir upon an obligation made by his anceſtor; if the plaintiff had judgment, the law diſpenſed with the former rules, rather than the creditor, who fairly made out his demands, ſhould be without a remedy, and therefore gave the lands deſcended in execution to anſwer the debt; for ſince the Common law allowed the action of debt againſt the heir, he could have no benefit by the action, unleſs he were permitted to have execution of the lands which deſcended to the heir. 3 *Co.* 12. *a.* *Cro. Jac.* 450. *Plow.* 441.

So if *A.* had granted for him and his heirs, to *B.* and his heirs, ſuch a rent out of his lands, in this caſe, the heirs being comprehended in the contract, are bound to make good the grant as far as they have aſſets by deſcent from the grantor; and this was allowed at Common law, becauſe the grantee of the rent had the land originally in view for his ſecurity; and by the grant itſelf, having it in his power to diſtrain the land for the rent, it was equal to the heir, whether the land was to anſwer the rent by diſtreſs, or by an execution upon a judgment in a writ of annuity. 1 *Rol. Abr.* 226. *Poph.* 87. *Hob.* 58. *Dyer* 344. *b.* *Co. Lit.* 144.

Thus ſtood the Common law till the ſtatute of *Acton Burnel*, and the 13. *Ed.* 1. *de mercatoribus*, which, as appears in the preamble, was for the ſecurity of merchants and encouragement of trade, and ſubjected not only the goods and perſons, but the land likewiſe of the debtor, into whoſe hands ſoever they came after the ſtatute acknowledged. *Hob.* 60. 2 *Rol. Abr.* 475.

Alſo in the ſame year and reign the *elegit* was given; and by this ſtatute, *viz.* 13 *Ed.* 1. *c.* 18. (See 2 *Inſt.* 394-5) he who recovereth in debt or damages, may have either a *fieri facias* of the chattels of the debtor, or a writ on which the ſheriff ſhall deliver to him all the chattels of the debtor, ſaving only his oxen and beaſts of his plough, and the one half of his land, until the debt be levied upon a reaſonable price or extent.

The ſtat. 25 *Ed.* 3. *cap.* 17. ſubjected the perſon of the debtor, and gave the *capias ad ſatisfaciend.* in debt, detinue, *&c.* in the caſe of a common perſon. See *Dalt. Sher.* 144.

2. *Of the ſeveral kinds of judicial writs, that lie after judgment; where the party ſhall be concluded by electing one of them, and his further remedy when he hath not received intire ſatisfaction on his firſt writ.*

The judicial writs that lie after judgment are the *elegit*, the *capias ad ſatisfaciendum*, *fieri facias*, *levari facias*, and *habere facias ſeiſinam* and *poſſeſſionem*, which ſee under the reſpective heads.

When the plaintiff has judgment, he has it in his election to ſue out what kind of execution he pleaſes; but he cannot regularly take out two different executions on the ſame judgment, nor a ſecond of the ſame nature, unleſs upon failure of ſatisfaction on the firſt. 2 *Rol. Abr.* 475. *Hob.* 60. 2 *Inſt.* 395.

Therefore if the plaintiff, upon a judgment or recognizance at Common law, ſues out an *elegit*, he can have no *capias ad ſatisfaciendum* afterwards to take the body, becauſe he hath determined his choice by that writ to the goods and chattels, and a moiety of the land; and tho' he takes but an acre of land in execution, yet it is held a ſatisfaction of the debt, be it never ſo great, becauſe in time it may come out of it. *Bro. Elegit*, 15. 1 *Rol. Abr.* 896.

But tho' the plaintiff cannot take out a ſecond *elegit* after the firſt is returned, executed, and filed; yet if upon the firſt the ſheriff returns *nihil*, the plaintiff may ſue out a ſecond. *Hob.* 2. *Cro. Jac.* 339. *pl.* 3.

So where in debt on a judgment of 2000 *l.* the defendant pleaded, that the plaintiff had ſued three ſeveral *elegits* on the ſaid judgment into ſeveral counties, on one of which the ſheriff returned, that he had levied of the defendant's goods 500 *l.* and on demurrer it was adjudged 1ſt, That this *elegit* being executed on the goods of the party only, the plaintiff was not precluded by his election thereof from any benefit he had at the Common law, by any nice conſtruction of the ſtatute of *Weſtm* 2. which intended to give a farther remedy than there was at Common law, and that the action well lay. 2dly, That if, as objected, any lands were extended on the other two *elegits* which were not returned, the defendant ought to have ſhewed it in pleading. 1 *Lev.* 92. 1 *Keb.* 105, 261, 465, 496, 556, 692, *S. C.* 1 *Sid.* 184. *S. C.* and ſame points adjudged, but there ſaid, that the court was divided, whether the plaintiff could take out any new execution.——But 'tis held by Lord *Hobart*, that if upon an *elegit*, the execution lies on the goods only, without any lands, and they appear not to be ſufficient, that the party may have a *capias*, for it is in effect but a *fieri facias* tho' the word be *elegit*. *Hob.* 58.

After *elegit* executed upon goods, and a return that the defendant has no lands, the plaintiff may have the body in execution for the remainder of his debt. *Lord Raym.* 1451. *Stran.* 226.

It was formerly held, that if a perſon taken on a *capias ad ſatisfaciendum* died in execution, that the plaintiff had no further remedy, becauſe he determined his choice by this kind of execution, which affecting a man's liberty, is eſteemend the higheſt and moſt rigid in the law. *Hob.* 52, *&c.* *Cro. Jac.* 136, 143. 1 *Rol. Abr.* 903.

But now by the 21 *Jac.* 1. *cap.* 24. reciting, "That foraſmuch as daily experience doth manifeſt, that divers perſons of ſufficiency in real and perſonal eſtate, minding to deceive others of their juſt debts, for which they ſtood charged in execution, have obſtinately and wilfully choſen rather to live and die in priſon, than to make any ſatisfaction according to their abilities; to prevent which deceit, and for the avoiding ſuch doubts and queſtions hereafter, Be it declared, explained and enacted by the King's moſt excellent Majeſty, the lords ſpiritual and temporal, and the commons, in this preſent parliament aſſembled, and by the authority of the ſame, That from and after the end of this preſent ſeſſion of parliament, the party or parties at whoſe ſuit, or to whom any p rſon ſhall ſtand charged in execution for any debt or damages recovered, his or their executors or adminiſtrators may, after the death of the perſon ſo charged, and dying in execution, lawfully ſue forth and have new execution againſt the lands and tenements, goods and chattels, or any of them,

of the perſon ſo deceaſed, in ſuch manner and form, to all intents and purpoſes, as he or they, or any of them might have had by the laws and ſtatutes of this realm, if ſuch perſon ſo deceaſed had never been taken or charged in execution."

"Provided, that this act ſhall not extend to give liberty to any perſon or perſons, their executors or adminiſtrators, at whoſe ſuit or ſuits any ſuch party ſhall be in execution, and die in execution, to have or to take any new execution againſt any the lands, tenements, or hereditaments of ſuch party dying in execution, which ſhall at any time after the ſaid judgement or judgments be by him ſold *bona fide*, and for the payment of any of his creditors, and the money which ſhall be for the lands ſo ſold, either paid, or ſecured to be paid to any of his creditors, with their privity and conſent, in diſcharge of his or their due bebts, or ſome part thereof."

If *A.* has judgment againſt *B.* and he takes out a *capias ad ſatisfaciendum*, directed to the ſheriff of *Middleſex*, who directs his precept to the bailiff of the liberty of the dutchy *Ad cap. B. Ad reſpond. A.* inſtead of *Ad ſatisfaciendum*; and thereupon the ſheriff returns *Cepi corpus ſecundum exigentiam brevis*, though by this return the ſheriff makes himſelf liable to the debt, by not purſuing his authortty; yet *A.* may take out a new writ of execution againſt *B.* for he never was in cuſtody by virtue of the *Capias ad ſatisfaciendum*. Yelv. 52.

So if a party taken on a *Capias ad ſatisfaciendum* eſcapes, or is reſcued, though the ſheriff is hereby liable, becauſe he ought to have taken the *poſſe comitatus*, yet the plaintiff may take out a new execution and ſhall not be compelled to take his remedy againſt the ſheriff, who may be dead or inſolvent. *Cro. Car.* 40, 455. 1 *Vent.* 4.

If on a *fieri facias* all the money is not levied, the plaintiff may take out a new execution; but as ſuch new execution muſt be grounded on the firſt writ, ſuch writ muſt be returned, and muſt recite, that all the money was not levied on the firſt; but if on the firſt writ, all the money had been levied, it need not be returned, for no further proceſs was neceſſary. 1 *Salk.* 318.

If on a *fieri facias* the defendant pays the money to the ſheriff, he is diſcharged of the execution, and the plaintiff muſt bring his action againſt the ſheriff. *Cro. Eliz.* 208-9.

So if the ſheriff take goods in execution by virtue of a *fieri facias*, whether he ſells them, or not; yet being taken from the party againſt whom the execution was ſued, he may plead that taking in diſcharge of himſelf, and ſhall not be liable to a ſecond execution, though the ſheriff hath not returned the writ; and the reaſon is, becauſe the defendant cannot avoid the execution, and he would therefore be in a very bad condition if he was to be charged the ſecond time; and if the ſheriff dies after the goods are taken in execution, his executors are liable to the plaintiff, for they have *quid pro quo*, and 'tis in nature of contract raiſed by law. 2 *Mod.* 214. 1 *Salk.* 223.

As therefore the defendant in theſe caſes is diſcharged as to the plaintiff, hence it ſeems to be clearly agreed, that the plaintiff may maintain an action of debt againſt the ſheriff; for though there is no actual contract between the ſheriff and the creditor, yet the levying the money creates a contract in law, which lays alien on the ſheriff; for otherwiſe the party would be without remedy. *Hob.* 206. 4 *Mod.* 404. 2 *Show.* 79, 281.

Alſo it hath been held, that an action lies againſt an under-ſheriff for money levied on a *fieri facias*, as money received to the plaintiff's uſe, though before the return of the writ; for if the ſheriff were permitted to ſtave off the action by his delay, in not returning his writ, it would be allowing him to take advantage of his own wrong. 2 *Show* 79, 281. *S. P.*

So it hath been held, that ſuch action is not within the ſtatute of limitations; for though it be not a matter of record till the writ be returned; yet it is founded upon a record, and hath a ſtrong relation to it. 1 *Show.* 79. 2 *Mod.* 212.

And as the law ſubjects the ſheriff to an action in thoſe caſes; ſo it veſts ſuch a property in him in the goods taken by him in execution, that if they are taken out of his poſſeſſion, he may maintain treſpaſs or trover againſt the wrong-doer at his election. 2 *Saund.* 47.

If *A.* and *B.* have two ſeveral judgments againſt *C.* and they take out two writs of *fieri facias*, which are both delivered to the ſheriff on the ſame day, and the ſheriff executes that which was laſt delivered, it bearing *teſte* before the other; and afterwards apprehending that he ought to have executed that which was firſt delivered, he takes the ſame goods, and delivers them in execution on the firſt writ; this ſecond execution is void; for tho' the ſheriff ought to have executed the writ that was firſt delivered, yet having executed the laſt firſt, the vendee ſhall keep the goods, and the party muſt ſeek his remedy againſt the ſheriff; and the reaſon hereof is, for the quiet of purchaſers under ſheriffs upon execution; for otherwiſe it would be dangerous to make ſuch purchaſes of ſheriffs, which might make writs of execution of no effect. *Carth.* 419, 420. 1 *Salk.* 320. *S. C.*

So where a writ of *fieri facias* is delivered to the ſheriff to-day, and another to-morrow, and the ſheriff executes the laſt firſt, by making ſale of the goods, ſuch ſale will ſtand good, and the vendee ſhall hold the goods againſt him who firſt delivered the writ to the ſheriff; and his remedy is only by action againſt the ſheriff. *Carth.* 420.

3. *Who may ſue out execution, and againſt whom, viz. where there are ſeveral parties, againſt the heir and executor, againſt infants, againſt a feme covert, againſt privileged perſons, and againſt a clerk, or perſon in holy orders.*

No perſon is intitled to, or can ſue out execution, who is not privy to the judgment, or intitled to the thing recovered, as heir, executor, or adminiſtrator to him who has judgment. 1 *Rol. Abr.* 889.

But if an adminiſtrator, *durante minori ætate* of an executor, recovers in debt, and before execution the executor comes of age, he ſhall have a *ſcire facias* on this judgment; for carrying on the ſuit in right of the executor, made the executor privy thereto. 1 *Rol. Abr.* 888-9.

So if *J. S.* makes *A.* executor, upon condition, that if *A.* does ſuch an act, that the executorſhip ſhall ceaſe, and that then *B.* ſhall be executor; if *A.* recovers in debt, and then does the act, *B.* ſhall take out execution. 1 *Rol. Abr.* 889.

If *A.* feme, executrix to *J. S.* marries, and her huſband and ſhe bring an action of debt on obligation, as executrix to *J. S.* and have judgment, and the wife dies; in this caſe the huſband, though privy to the judgment, ſhall not ſue out execution, for he is not intitled to the thing recovered, but the ſame belongs to the ſucceeding repreſentative of *J. S.* 1 *Rol. Abr.* 889. *Cro. Car.* 208, 227. 464. *S. C.*

So where *A.* ſued as adminiſtrator to *J. S.* on an obligation entred into by the defendant to the inteſtate, and had judgment, and afterwards the letters of adminiſtration were repealed; though *A.* was privy to this judgment, and took out execution thereupon, yet the court granted a *ſuperſedeas* thereof, and held, that the adminiſtration being revoked, the ſuing out execution afterwards was void; for the adminiſtrator had no intereſt or authority, but as a miniſterial officer to the ordinary. *Yelv.* 83. 2 *Saund.* 148-9.

Alſo it was formerly held, that if an adminiſtrator had judgment in right of his inteſtate, and died before execution, that the adminiſtrator *de bonis non* could not have a *ſcire facias*, ſo as to take out execution on this judgment, not being privy to the record. *Cro. Jac.* 4. *Yelv.* 83—4. *S. P.*

But where an executor had judgment, and ſued out an *elegit*, but died inteſtate before the debt was levied; yet it was held, that the adminiſtrator *de bonis non* ſhould take advantage thereof, and that the *elegit* being ſued out, made it an intereſt veſted, though it would have been

otherwiſe

otherwiſe if execution had not been ſued out. 1 *Sid.* 29. 6 *Mod.* 260. *S. C.* cited.

And now by ſtat. 17 *Car.* 2. *cap.* 18. *ſect.* 2. it is enacted, "That where any judgment, after a verdict ſhall be had, by or in the name of any executor or adminiſtrator; in ſuch caſe an adminiſtrator *de bonis non* may ſue forth a *ſcire facias*, and take execution upon ſuch judgment." See 6 *Mod.* 290. and 1 *Salk.* 323. where it is ſaid *per curiam* to be but reaſonable, and within the equity of this act, that an adminiſtrator *de bonis non* ſhould be permitted to perfect an execution begun by an executor or adminiſtrator, though the judgment was by default, *&c.*

If a man has judgment for the arrearages of rent, and dies, his executor ſhall ſue out execution, and not the heir: for by the recovery it becomes a chattel veſted, to which the executor is intitled 1 *Rol. Abr.* 889.

So if the demandant in a writ of coſenage, or other real action, in which land and damages are recovered, has judgment, and dies, the heir ſhall take out execution as to the land, and the executor as to the damages. 1 *Rol. Abr.* 889.

If a ſtatute be entred into to huſband and wife, and the huſband dies, the wife ſhall take out execution. 1 *Rol. Abr.* 889.

So if huſband and wife recover lands and damages, and the huſband dies, the wife ſhall have execution of the damages, and the executors of the huſband. 1 *Rol. Abr.* 342, 889, 890.

If there are two executors who have judgment, and the one prays a *capias*, and the other a *fieri facias*, it is ſaid the *capias* ſhall be awarded, as being beſt for the teſtator. *Hob.* 61.

If the preſident of the college of phyſicians brings an action againſt one for practiſing phyſick in *London* without licence, purſuant to the ſtatute 14 *H.* 8. and has judgment, and dies before execution; the ſucceſſor, and not the executor of him who recovered, ſhall ſue out execution; for this action is given to the preſident by an act of parliament, and the proceedings and judgment thereupon abtained by him, was in his corporate capacity; and therefore the ſucceſſor, on whom the law transfers the duty, ſhall take out execution. *Cro. Jac.* 159.

If a man has judgment in an aſſiſe againſt three for lands and damages, he cannot ſue execution by *capias* againſt one only, for the damages; but the *capias* ought to be againſt all, for the execution ought to enſue the nature of the original. 1 *Rol. Abr.* 888.

So if a man has judgment in debt againſt two, he muſt take out joint execution againſt both, and cannot have a *capias* againſt one, and an *elegit* againſt the other. 1 *Rol. Abr.* 888.

But if a man has judgment for damages againſt two, and he ſues out a *ſcire facias* againſt both; if one be returned ſummoned, and he makes default, and it be returned, that the other hath nothing, the plaintiff may have execution againſt him who made default for the whole. 1 *Rol. Abr.* 890.

So if two become bail for *J. S.* and he is condemned, and there is judgment on *ſcire facias* againſt the bail, the plaintiff may take out execution againſt either of them, being ſeverally as well as jointly bound. 1 *Rol. Abr.* 888.

If there be judgment in debt againſt two, and one dies, a *ſcire facias* lies againſt the other alone, reciting the death, and he cannot plead, that the heir of him that is dead has aſſets by deſcent, and demand judgment, if he ought to be charged alone; for at Common law, the charge upon a judgment being perſonal ſurvived, and the ſtatute of *Weſtm.* 2. that gives the *elegit*, does not take away the remedy of the plaintiff at Common law; and therefore the party may take out his execution which way he pleaſes, for the words of the ſtatute are, *ſit in electione*; but if he ſhould, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by ſuggeſtion, or elſe by *audita querela*. *Raym.* 26. 1 *Lev.* 30. *S. C.* 1 *Keb.* 92, 123. *S. C.*

If there be judgment againſt one who has lands in fee-ſimple, or if ſuch a one acknowledges a ſtatute, and dies, and his lands deſcend to his heir, execution may be taken out againſt the heir, but his body is protected; for it would be moſt unreaſonable to ſubject the heir to the payment of his anceſtor's debts, any farther than to the value of the aſſets deſcended. See *Dyer* 81. *pl.* 62. 207. *pl.* 15. *Co. Lit.* 103, 290.

So if there be judgment againſt *J. S.* and he dies inteſtate, or having made his executor, a *fieri facias* may be executed of his goods in the hands of the executor or adminiſtrator. See 1 *Mod.* 188. 2. *Vent.* 218. *Skin.* 257. 2 *Show.* 485. 1 *Salk.* 322.

By the Common law, if judgment be given againſt a man for debt or damages, and the defendant dies before execution ſued, his heir within age is not liable to execution during his minority; but the parol muſt demur in ſuch caſe till he comes of age. *Co. Lit.* 290. *a.* 1 *Rol. Abr.* 140.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as if there be father and two daughters, and judgment be given for debt againſt the father, who dies, one of the daughters being within age, partition being made, the eldeſt ſhall not be charged alone, but ſhall have the benefit of her ſiſter's minority, which puts a ſtop to the execution. *Co. Lit.* 290. *a.*

So if the conuzor of a ſtatute-merchant dies, and his heir within age endow his mother, the land in dower ſhall not be extended during the minority of the heir. *Co. Lit.* 290. *a.* *Bro. Stat. Merch.* 33.

If a perſon recovers in treſpaſs againſt baron and feme, execution may be ſued out againſt the feme after the death of the huſband. 1 *Rol. Abr.* 890.

So if a recovery be in aſſiſe againſt them upon a diſſeiſin, execution ſhall be againſt the feme after the death of her huſband, as well for the damages as for the principal. 1 *Rol. Abr.* 346.

So if in a *quare impedit*, damages be recovered againſt baron and feme to the amount of two years, and the huſband dies, the damages may be recovered againſt the wife. 1 *Rol. Abr.* 890.

There can be no execution taken out againſt a member of parliament during privilege of parliament: Alſo no *capias* can iſſue againſt a peer; for even in the caſe of a private perſon at Common law, the body was not liable to a man's creditors; and the ſtatute of *Ed.* 3. which ſubjects the body, does not extend to peers, becauſe of the ſacredneſs of their perſons; as alſo the law ſuppoſes, that perſons thus diſtinguiſhed by the King, have wherewithal otherwiſe to ſatisfy their creditors. 6 *Co.* 52. *Hob.* 61. *Cro. Car.* 205.

If a writ of execution be taken out againſt a clerk in holy orders, on a judgment obtained againſt him, or upon a ſtatute ſtaple or recognizance in nature of it, which he has entred into; and the ſheriff returns, that he is a clerk, he ought to extend his lay fee and chattels, or return that he hath neither; but if he returns, *quod clericus ſit beneficiatus nullum habens laicum feodum, ſed quod beneficiatus eſt* in ſuch a dioceſe, then a writ of ſequeſtration ſhall iſſue to the biſhop to ſequeſter the living. 2. *Rol. Abr.* 474. 1 *Rol. Abr.* 891. 2 *Inſt.* 472. *Jenk.* 207.

So if the conuſor of a ſtatute merchant be a clerk within orders, by the ſtatute of 13 *Ed.* 1. the ſheriff cannot take the body in execution; and if he returns, that he is a clerk, no execution ſhall be granted to the ſheriff to levy the debt *de bonis eccleſiaſticis*, for his perſon is protected by the letter of the ſtatute, and the ſtatute doth not ſubject the *bona eccleſiaſtica* to the execution; but in this caſe the conuſee may have execution granted out of his lay fee. 2 *Rol. Abr.* 468. *Reg. Jud.* 8. *Bro. Stat. Merch.* 38. *Co. Ent.* 13.

On a *fieri facias* againſt a fellow of *Wincheſter* college, the ſheriff returned, *clericus beneficiatus nullum habens laicum feodum*, whereupon a *fieri facias de bonis eccleſiaſticis* iſſued to the biſhop, who ſent his mandate to the warden and fellows of the college to ſequeſter his ſalary, and they refuſed; and it being moved in *B. R.* to know, whether the biſhop might not compel them by eccleſiaſtical cenſures, the

the court thought that this was not an eccleſiaſtical conſtitution, the univerſities being only ſocieties *ad ſtudendum & orandum*, but ſaid that a prebend is an eccleſiaſtical benefice; and in ſuch caſe, if the prebend have a ſole diſtinct corpſe, it may be ſequeſtred; but where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a ſequeſtration; and therefore they left the biſhop to do as he ought by law. 1 *Salk.* 320.

4. *To what time the execution ſhall have relation, ſo as to avoid any alienation or ſale of lands or goods by the party; and of the King's precedency in executions.*

As to lands, they are bound from the time of the judgment, ſo that execution may be of theſe, tho' the party aliens *bona fide* before execution ſued out; ſo of ſtatutes merchant, ſtaple, and recognizances, which alſo bind the lands from the time of entering into them. *Co. Lit.* 102. *a. b.* 8 *Co.* 171. 1 *Rol. Rep.* 77.

Therefore if a man has judgment for debt, or is conuſee of a ſtatute, and the debtor, before execution ſued, aliens by fine, and five years paſs, yet the plaintiff may ſtill ſue out execution. 1 *Mod.* 217, 1 *Chan. Ca.* 268.

But here it is neceſſary to obſerve, that by the 29 *Car.* 2. *cap.* 3. called the ſtatute of frauds, reciting, that it hath been found miſchievous, that judgments in the King's courts in *Weſtminſter* do many times relate to the firſt day of the term whereof they are entred, or to the day of the return of the original, or filing the bill, and bind the defendant's lands from that time, altho' in truth they were acknowledged or ſuffered and ſigned in the vacation-time after the ſaid term, whereby purchaſers find themſelves aggrieved;

By the 14th ſection of that ſtatute, it is enacted, "That any judge or officer of any of his Majeſty's courts of *Weſtminſter*, that ſhall ſign any judgments, ſhall, at the ſigning of the ſame, without fee for doing the ſame, ſet down the day of the month and year of his ſo doing, upon the paper-book, docket, or record which he ſhall ſign, which day of the month and year ſhall alſo be entred upon the margent of the roll of the record where the ſaid judgment ſhall be entred.

And by *ſect.* 15. it is enacted, "That ſuch judgments, as againſt purchaſers *bona fide*; for valuable conſideration of lands, tenements, or hereditaments to be charged thereby, ſhall, in conſideration of law, be judgments only from ſuch time as they ſhall be ſo ſigned, and ſhall not relate to the firſt day of the term whereof they are entred, or the day of the return of the original or filing the bail."

And by *ſect.* 18. it is enacted, "That the day of the month and year of the inrolment of recognizances ſhall be ſet down in the margent of the roll where the ſaid recognizances are inrolled, and that no recognizances ſhall bind any lands, tenements or hereditaments in the hands of any purchaſer *bona fide*, and for valuable conſideration, but from the time of ſuch inrolment."

Alſo for the greater ſecurity of purchaſers, by the 4 & 5 *W. & M. cap.* 20. it is enacted, "That the clerk of the eſſoins of the court of *C. B.* the clerk of the doggets of the court of King's Bench, and the maſter of the office of pleas in the court of Exchequer, ſhall make and put into an alphabetical dogget, by the defendant's names, a particular of all judgments by confeſſion, *non ſum informatus*, or *nihil dicit*, entred in their ſeveral courts, *&c.* and that no judgment not doggeted, and entred in the books as aforeſaid, ſhall effect any lands or tenements as to purchaſers or mortgagees, or have any preference againſt heirs, executors or adminiſtrators, in their adminiſtration of their anceſtors, teſtators or inteſtates eſtates."

Here alſo we muſt obſerve a difference as to judgments which affect the lands of an anceſtor, and thoſe which affect the heir; for as to the firſt, the plaintiff ſhall not have execution, but only of that land which the defendant had at the time of the judgment, becauſe the action was brought in reſpect of the perſon, and not in reſpect of the land. *Co. Lit.* 102. *a.*

But if an action of debt be brought againſt the heir, and he alieneth, hanging the writ; yet ſhall the land be had at the time of the original purchaſed becharged, for the action was brought againſt the heir in reſpect of the land. *Co. Lit.* 102. And therefore if the anceſtor deviſed away the lands, creditors whoſe ſecurities were inferior to judgments, had no remedy at Common law, either againſt the heir or deviſee. *Abr. Eq.* 149. But now by the ſtat. 3 & 4 *Will. & Ma. c.* 14. it is enacted, That all wills concerning lands, or any rents, profits, term, or charge out of the ſame, whereof the deviſor ſhall be ſeiſed in fee-ſimple, in poſſeſſion, reverſion, or remainder, ſhall be deemed to be fraudulent and void againſt creditors upon bonds or other ſpecialties, their executors, adminiſtrators, *&c.* and ſuch creditors ſhall have their actions of debt againſt the heir at law and the deviſees jointly.

It hath been adjudged, that if there are two creditors, *viz. A.* and *B.* of *J. S.* whoſe heir is bound, and who has lands by deſcent, and *A* files an original in *C. B.* and hath judgment thereon, *Trinity* term 2 *Jac.* 2. by default, and there upon a general *elegit* iſſues againſt all the lands of the heir, and a moiety thereof is delivered to *A.* and *B.* on a bill filed in *B. R.* 1 & 2 *Jac.* 2. has a ſpecial judgment againſt the aſſets confeſſed by the heir, *Trinity* term 3 *Jac.* 2. tho' *B.*'s judgment be ſubſequent to *A.*'s, yet it appearing that his bill or original was filed before *A.*'s, the judgment ſhall have relation thereto, and therefore he muſt be firſt ſatisfied. *Carth.* 245.

Alſo in the above caſe it ſeems, that tho' *A.*'s judgment had been on an original actually filed before *B.*'s, that *B.* muſt have been preferred, becauſe his judgment was general againſt the heir, and the execution a general and common execution by *elegit*, and not againſt the aſſets only by way of extent; and therefore ſuch a general judgment will not operate by way of relation to the original, but binds only in common caſes from the time of the judgment given. *Carth.* 246. 181.

As to goods and chattels, the execution at Common law had relation to the time of the awarding thereof, and therefore, if after the *teſte* of the writ of execution, the defendant had ſold the goods, tho' *bona fide*, and for valuable conſideration, yet were they ſtill liable to be taken in execution into whoſe hands ſoever they came. 8 *Co.* 171. *Cro. Eliz.* 174, 440. 2 *Vent.* 218.

But as this created ſome inconveniency with reſpect to trade, in making thoſe goods ſtill ſubject to executions, tho' in the hands of a perſon who came by them for valuable conſideration, and without notice of any ſuch execution; and as there was a farther inconveniency in making a writ of execution taken out in vacation, to have relation to the laſt day of the precedent term; for remedy hereof, by the 29 *Car.* 2. *cap.* 3. *ſect.* 16. it is enacted, "That no writ of *fieri facias*, or other writ of execution, ſhall bind the property of goods againſt whom ſuch writ of execution is ſued forth, but from the time that ſuch writ ſhall be delivered to the ſheriff, under-ſheriff, or coroners, to be executed; and for the better manifeſtation of the ſaid time, the ſheriff, under-ſheriff, and coroners, their deputies and agents ſhall, upon the receipt of any ſuch writ (without fee for doing the ſame) indorſe upon the back thereof the day of the month or year whereon he or they received the ſame."

This ſtatute binds the property of goods taken in execution from the delivery of the writ to the ſheriff with reſpect to purchaſers only, but in reſpect of executors where the party dies after the *teſte* and before execution, it binds the property from the *teſte*. *Per* Ch. J. and *Dobben*, *obiter*. *Comb.* 145. *Mich.* 1 *W. & M. in B. R. Anon'.*

The *fieri facias* bore *teſte* before the party's death, but the delivery and indorſement was after. The court held the execution good at Common law, and rather inclined that it was good ſince the ſtatute, and that it was made for the benefit of ſtrangers, who might have a title to the goods between the *teſte* and the time of delivery to the ſheriff, but as to the party himſelf, the goods were bound from the *teſte* ever ſince the ſtatute. But it was ordered to be further ſpoken to. 2 *Vent.* 218, *Mich.* 2 *W. & M. in C. B. Anon'.*

The

The ſtatute of frauds and perjuries intended only to remedy an inconvenience of ſelling goods after the *teſte* of the writ; ſo that the writ binds now only from the delivery *quoad* a purchaſor: but the ſtatute was not made for the benefit of the party or his executors, ſo that *quoad* them it binds from the *teſte*, and there is no fraud in the caſe. *Comb.* 33. *Mich.* 2 *Jac.* 2. *B. R. Horton* v. *Ruſeby.*

If a writ of execution be deliver'd to the ſheriff againſt *A.* and *A.* becomes a bankrupt before it is executed, the execution is ſuperſeded, and conſequently the property of the goods is not abſolutely bound by the delivery of the writ to the ſheriff. But the *teſte* of the writ binds againſt all ſales and acts of the party himſelf. *Per Holt* Ch. J. *Ld. Raym. Rep.* 252. *Mich.* 9 *W.* 3.

Fieri facias upon a judgment, defendant dies before execution, the writ may be executed upon the inteſtate's goods; and *Windham* ſaid, The property of the goods is ſo bound by the *teſte* of the writ, as that a ſale made of them *bona fide* ſhall be void; to which the court agreed. 1 *Mod.* 188. *Farrer* v. *Brookes, adminiſtrator of Brookes.*

Two executions, one delivered before the other on the ſame day, but the laſt teſted was delivered firſt. The ſheriff ought to execute that which was firſt deliver'd to him; but if he executes the laſt, the execution is good; but the other party has his remedy againſt the ſheriff; but as to the party himſelf, his goods are bound by the *teſte*; adjudged. *Carth.* 419. *Mich.* 9 *W.* 3. *B. R. Smallcomb* v. *Buckingham, S. C.* adjudged. 1 *Salk.* 320. *N. B.* He who brought the firſt *fieri facias* told the ſheriff that he was not in haſte, ſo took out no warrant nor left any fee, and this inclined the opinion of the court more ſtrongly againſt him. 1 *Salk.* 320. *Carth.* 420. ——5 *Mod.* 377. reports that this was mentioned *per Holt* Ch. J. and that *Holt* ſaid, that if the ſecond *fieri facias* had been delivered a fortnight after, yet if it be firſt executed it ſhall be good, and the other has only his remedy againſt the ſheriff.——The court thought that no wrong was done in this caſe, becauſe he that had the firſt writ never deſired any warrant, and was plainly deſigned only as a ſcreen to protect the party from the ſecond *fieri facias*, and judgment accordingly. 12 *Mod.* 126. *S. C.*——*Lord Raym. Rep.* 251. *Smallcomb* v. *Croſs and Buckingham, S. C.* held accordingly, and that in this caſe no action lies againſt the ſheriff, becauſe he who delivered his writ firſt, would not take a warrant from the ſheriff to levy the goods; ſo that it ſeems he had a deſign only to keep that execution in his pocket to protect the defendant's goods by fraud. And judgment for the plaintiff by the whole court.

If judgment be entred in vacation, and writ taken out againſt the party's goods as of the term before, yet the writ ſhall levy the money of his goods in the hands of his executors. *Per Holt* Ch. J. 7 *Mod.* 95. *Ann. B. R. Oades* v. *Woodward.*

An execution was taken out againſt the teſtator in his life-time, and executed after his deceaſe, the writ was returnable *Octab. Martini*, and executed on the 16th of *November*, which was two days before the return was out; the execution being ſued out before the teſtator's death may be executed afterwards without a *ſcire facias*, as was reſolved in Dr. *Needham*'s caſe; and it may be executed at any time before the return of the writ, nay, on the very day that it is returnable, and good; and if it is executed in the vacation, it ſhall refer to the antecedent term, and ſo it ſhall if it is executed in term-time; *per cur'*. 8 *Mod.* 225. *Hill.* 10 *Geo. Anon'*. And ſays ſo is *Cro. E.* 181. *Parker* v. *Moſs.*

As to the King's precedency in executions, it hath been already obſerved, that the King by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election. *Hob.* 60. 2 *Inſt.* 19. 2 *Rol. Abr.* 472.

And here we muſt obſerve, that the King's execution relates as to land, to the time of becoming in debt to the king; for as to debts that were of record, they always bound the lands and tenements; for all lands being held mediately or immediately from the King, when any debt was returned of any perſon, it laid the eſtate as liable to ſuch debt, as if it had been a reſervation on the firſt grant. 8 *Co.* 171. 2 *Rol. Abr.* 156, 157.

And as to debts not of record, they bind the lands from the time they are entered into; but this is by force of the ſtatute 33 *H.* 8. *cap.* 39. by which it is enacted, "That if any ſuit be commenced or taken, or any proceſs hereafter be awarded for the King, for the recovery of any of the King's debts, that then the ſame ſuit and proceſs ſhall be preferred before any perſon or perſons; and that our ſaid ſovereign Lord, his heirs and ſucceſſors, ſhall have firſt execution againſt any defendant or defendants, of and for his ſaid debts, before any other perſon or perſons, ſo always, that the King's ſaid ſuit be taken and commenced, or proceſs awarded for the ſaid debt, at the ſuit of our ſaid Sovereign Lord the King, his heirs or ſucceſſors, before judgment given for the ſaid other perſon or perſons."

As to the King's execution of goods, the ſame relates to the time of the awarding thereof, which is the *teſte* of the writ, as it was in the caſe of a common perſon at law; for tho' by the 29 *Car.* 2. No execution ſhall bind the property of goods, but from the time of the delivery of the writ to the ſheriff; yet as this act does not extend to the King, an extent of a later *teſte* ſuperſedes an execution of the goods by a former writ; becauſe by the King's prerogative at Common law, if there had been an execution at the ſubject's ſuit, and afterwards an extent, the execution was ſuperſeded till the extent was executed, becauſe the publick ought to be preferred to the private property, and the rather, becauſe the King is ſuppoſed by publick buſineſs not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to the King; and if he was to be prevented of his execution by another perſon's coming in before him, laches muſt be imputed to him, which the law does not. 2 *Bac. Abr.* 363.

If the King's debt be prior on record, it binds the lands of the debtor, into whoſe hands ſoever they come, becauſe as has been obſerved, it is in the nature of an original charge upon the land itſelf, and therefore muſt ſubject every body that claims under it; but if the lands were aliened in whole or in part, as by granting a jointure before the debt contracted, ſuch alienee claims prior to the charge, and in ſuch caſe the land is not ſubject. See 2 *Rol. Abr.* 156-7. *Moor* 126. 3 *Leon.* 239, 240. 4 *Leon.* 10.

5. *At what time execution may be ſued out; and of the neceſſity of a* ſcire facias.

At common law, in real actions, where land was recovered, the demandant, after the year, might take out a *ſcire facias* to revive his judgment, becauſe the judgment being particular in the real action, *quoad* the lands with a certain deſcription, the law required, that the execution of that judgment ſhould be entred upon the roll, that it might be ſeen, whether execution was delivered of the ſame thing of which judgment was given; and therefore if there was no execution appearing on the roll, a *ſcire facias* iſſued to ſhew cauſe, why execution ſhould not be. 2 *Inſt.* 471. 5 *Co.* 88. *Cro. Eliz.* 416. 6 *Mod.* 288.

But if the plaintiff, after he had obtained judgment in any perſonal action, had lain quiet, and had taken no proceſs of execution within the year, he was put to a new original upon his judgment, and no *ſcire facias* was iſſuable at law on the judgment, becauſe there was not a judgment for any particular thing in the perſonal action, with which the execution could be compared; therefore after a reaſonable time, which was a year and a day, it was preſumed to be executed, and therefore the law allowed him no *ſcire facias* to ſhew cauſe why there ſhould not be execution; but if the party had ſlipped his time, he was put to his action on the judgment, and the defendant was obliged to ſhew how that debt, of which the judgment was an evidence, was diſcharged. 2 *Inſt.* 469. *Carth.* 30, 31. 1 *Sid.* 351.

To remedy this, and to make the forms of proceeding more uniform in both actions, the ſtatute of *Weſtm.* 2.

cap. 45. gave the *ſcire facias* to the plaintiff to revive the judgment, where he had omitted to ſue execution within the year after judgment was obtained: The words of the act are; "Becauſe that of ſuch things as be recorded before the Chancellor and the juſtices of the King that have record, and be inrolled in their rolls, proceſs of a plea ought not to be made by ſummons, attachments, eſſoin, view of land, and other ſolemnities of the court, as hath been uſed to be done of bargains and covenants made out of the court; from henceforth it is to be obſerved, that thoſe things which are found inrolled before them that have record, or contained in fines, whether they be contracts, ſervices, or cuſtoms knowledged, or other things whatſoever inrolled, wherein the King's courts, without offence of the law and cuſtom, may execute their authority, from henceforth they ſhall have ſuch vigour, that hereafter it ſhall not need to plead for them. But when the plaintiff cometh to the King's court, if the recognizance or fine levied be freſh, that is to ſay, levied within the year, he ſhall forthwith have a writ of execution of the ſame recognizance made. And if the recognizance were made, on the fine levied of a further time paſſed, the ſheriff ſhall be commanded, that he give knowledge to the party of whom it is complained, that he be afore the juſtices at a certain day, to ſhew if he have any thing to ſay why ſuch matter inrolled or contained in the fine ought not to have execution. And if he do not come at the day, or peradventure do come, and can ſay nothing why execution ought not to be done, the ſheriff ſhall be commanded to cauſe the thing inrolled or contained in the fine to be executed."

It hath been doubted, whether a *ſcire facias* lay to revive a judgment in ejectment after a year and a day, either by the Common law, or by force of this ſtatute; for at Common law this was looked upon as a perſonal action, and it was thought that the ſtatute extended only to ſuch perſonal actions in which debt or damages are recovered, and not to provide a remedy in this caſe, when at the time of making the act, the poſſeſſion was not recovered in this action; but it ſeems now ſettled and confirmed by daily practice, that a *ſcire facias* lies on a judgment in ejectment, for the words of the act are, *Sive ſervitia ſive conſuetudines ſive alia quæcunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *ſcire facias*, as the demandant had on a judgment in a real action at Common law. 1 *Sid.* 351. 2 *Salk.* 600.

Here alſo it may be proper to diſtinguiſh between taking out execution on judgments and recognizances at Common law, and on ſtatutes merchant and ſtaple; that on the firſt, *ſcire facias* after the year and day is abſolutely neceſſary; but as to ſtatute merchants, *&c.* the conuſee may at any time ſue execution on them, without the delay or charge of a *ſcire facias*. *Co. Lit.* 291. *a.* 2 *Inſt.* 469. *F. N. B.* 296. *Bro. Recog.* 17.

The reaſon, why the plaintiff is put to his *ſcire facias* after the year, is becauſe where he lies quiet ſo long after his judgment, it ſhall be preſumed he hath releaſed the execution, and therefore the defendant ſhall not be diſturbed without being called upon, and having an opportunity in court of pleading to the releaſe, or ſhewing cauſe if he can, why the execution ſhould not go. 2 *Inſt.* 470.

Alſo it is ſaid in *Salkeld*, that if a judgment be above ten years ſtanding, the plaintiff cannot ſue a *ſcire facias* without motion in court; and if it be under ten, but above ſeven, he cannot have a *ſcire facias* without a motion at the ſide-bar; and a note is added, that if after ſuch motion and judgment revived by *ſcire facias*, the defendant dies before execution, the plaintiff muſt ſue a new *ſcire facias*, but may have it without motion, for the judgment was revived before. 2 *Salk.* 598.

But tho' the general rule be, that the plaintiff cannot take out execution after the year and day without a *ſcire facias*, yet the rule muſt be underſtood with theſe reſtrictions.

That if the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonſuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *ſcire facias*, becauſe the writ of error was a *ſuperſedeas* to the execution, and the plaintiff muſt acquieſce till he hears the judgment above; beſides, while the cauſe is depending on the writ of error, the cauſe is ſtill *ſub judice*, whether the plaintiff ſhall recover, or not, and the year for the execution ought to be accounted from the final judgment given. *Cro. Jac.* 364. *Yelv.* 7. 1 *Rol. Abr.* 899. 4 *Leon.* 197. 5 *Co.* 88. *Carth.* 236-7. 6 *Mod.* 288.

So if the plaintiff hath a judgment, with ſtay of execution for a year, he may, after the year, take out his execution without the *ſcire facias*, becauſe the delay is by conſent of parties, and in favour of the defendant; and the indulgence of the plaintiff ſhall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his inſtance. 6 *Mod.* 288. 1 *Rol. Rep.* 104.

Alſo if the plaintiff enters, on the roll of the judgment, an award of an *elegit* of the ſame term with the judgment, and continues it down with *vicecomes non miſit breve*, he may take out that writ at any time afterwards, without ſuing out any *ſcire facias*; tho' upon debate of this matter, the judges at firſt inclined that the *elegit* ſhould be actually taken; otherwiſe ſuch an award as this might be entred at any time, paying only for the continuances, and the party thereby tricked out of the benefit which the law gives him of pleading any matter *poſt factum* upon the *ſcire facias*; but upon examination of ſeveral of the ancient practiſing clerks then in court, this appeared to have been the conſtant practice amongſt them for many years; and therefore the court conſidering the inconveniency of opening a gap to deſtroy ſo many executions for this irregularity, and becauſe the practice had prevailed ſo long, that it was become the law of the court, ordered that the execution ſhould ſtand good. *Carth.* 283-4. 1 *Rol. Rep.* 104. 2 *Show.* 235. *Comb.* 346.

But if the defendant had been tied up by an injunction out of Chancery for a year, yet he cannot take out execution without a *ſcire facias*, becauſe the courts of law do not take notice of Chancery injunctions, as they do of writs of error; beſides, in that caſe it had been no breach of the injunction to have taken out the execution within the year, and continued it down by *vic' non miſit breve*, which cannot be done in the caſe of a writ of error, becauſe that removes the record out of the court where the judgment was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts. 1 *Salk.* 322. 6 *Mod.* 288. *S. C.*

6. *Of the ſheriff's duty, and authority in doing execution; and the remedy againſt him for neglect of duty.*

The ſheriff or officer, who has proper authority to begin an execution, is compellable to proceed in the ſame. 1 *Salk.* 323.

Hence it hath been adjudged, that if a ſherlff on a *fieri facias* ſeizes goods in his hands to the value of the debt, and pays part of the debt, and is diſcharged, without having ſold the reſt of the goods, or having returned his writ, that notwithſtanding ſuch diſcharge, and without any writ of *venditioni exponas*, he may ſell the goods remaining in his hands, and ſuch ſale and execution ſhall be good by force of the writ of *fieri facias*. *Cro. Jac.* 73. *Mo.* 757. *S. C.*

If a *fieri facias* be delivered to an under-ſheriff, 9th of *November* 34 *Eliz.* on which he levies part of the debt; and on the ſame day, a writ of diſcharge is delivered to him, dated 6th of *November*; yet if it be not proved, that he had notice of this diſcharge prior to his commencing the execution, he ſtill remains under-ſheriff, and liable to the plaintiff's action for the money levied by him. *Cro. Eliz.* 440.

As the authority of the old ſheriff continues, ſo the law has provided a remedy to oblige him to proceed in the execution, which is by *diſtringas nuper vicecomitem*, which is, either to diſtrain the old ſheriff to ſell and bring

bring in the money, or to ſell and deliver the money to the new ſheriff to bring into court. 1 *Salk.* 323.

It is laid down as a general rule in our books, that the ſheriff in executing any judicial writ, cannot break open the door of a dwelling-houſe; this privilege which the law allows to a man's habitation, ariſes from the great regard the law has to every man's ſafety and quiet, and therefore protects them from the inconveniencies which muſt neceſſarily attend an unlimited power in the ſheriff and his officers in this reſpect; and hence it is, that every man's houſe is called his caſtle. 5 *Co.* 91, *&c.* 3. *Inſt.* 162. *Moor.* 668. *Yelv.* 28. *Cro. Eliz.* 908. *Dalt. Sher.* 350.

But yet in favour of executions, which are the life of the law, and eſpecially in caſes of great neceſſity, or where the ſafety of the King and Commonwealth are concerned, this general caſe hath the following exceptions:

That whenever the proceſs is at the ſuit of the King, the ſheriff or his officer may after requeſt to have the door opened, and refuſal, break and enter the houſe to do execution, either on the party's goods, or take his body, as the caſe ſhall be. 5 *Co.* 91. *b.*

2. So in a writ of ſeiſin or *habere facias poſſeſſionem* in ejectment, the ſheriff may juſtify breaking open the door if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual poſſeſſion, conſequently the ſheriff muſt have all power neceſſary for this end; beſides, in this caſe the law does not, after the judgment, look upon the houſe as belonging to the tenant, but to him who has recovered. 5 *Co.* 91.

3. Alſo this privilege of a man's houſe relates only to ſuch execution as affects himſelf; and therefore if a *fieri facias* be directed to the ſheriff to levy the goods of *A.* and it happen that *A.*'s goods are in the houſe of *B.* if after requeſt made by the ſheriff to *B.* to deliver theſe goods, he refuſes, the ſheriff may well juſtify the breaking and entring his houſe. 5 *Co.* 93. *a.* 1 *Sid.* 186.

4. Alſo this privilege extends to a man's dwelling-houſe, or out-houſe adjoining thereto, and therefore it hath been adjudged, that the ſheriff, on a *fieri facias*, may break open the door of a barn, ſtanding at a diſtance from the dwelling houſe, witout requeſting the owner to open the door, in the ſame manner as he may enter a cloſe, *&c.* 1 *Sid.* 186. 1 *Keb.* 698. *S. C.*

5. So on a *fieri facias*, when the ſheriff or his officers are once in the houſe, they may break open any chamber-door or trunks for the compleating the execution. 2 *Show.* 87.

6. So if the ſheriff's bailiffs enter the houſe, the door being open, and the owner locks them in, the ſheriff may juſtify breaking open the door, for the inlarging and ſetting at liberty the bailiffs; for if in this caſe he were obliged to ſtay till he could procure a *homine replegiando*, it might be highly inconvenient; alſo it ſeems, that in this caſe, the locking in the bailiffs is ſuch a diſturbance to the execution, that the court will grant an attachment for it. *Palm.* 52. *Cro. Jac. p.* 555. *S. C.* 2 *Rol. Rep.* 132. *S. C.*

7. That if the ſheriff in executing a writ, breaks open door, where he has no authority for ſo doing by law, yet the execution is good, and the party has no other remedy but an action of treſpaſs againſt the ſheriff. 5 *Co.* 93. *a.*

If the ſheriff refuſes to execute any judicial writ; this is a contempt to the court, for which an attachment will be granted. 1 *Salk.* 323.

So if he executes the writ, and makes a falſe return, the party injured may have an action on the caſe againſt him. 1 *Salk.* 323.

If a *fieri facias* be directed to the ſheriff, and he returns that he levied goods to ſuch a value, he muſt anſwer goods to that value, and in ſuch caſe, if he returns, that they remain in his hands for want of buyers a *venditioni exponas* ſhall be awarded; upon which, if he refuſes to ſell the goods, a *diſtringas* iſſues to the coroner. *Fareſt.* 118. 6 *Mod.* 299. 1 *Salk.* 323,

But if to a *fieri facias* the ſheriff returns, that he ſeiſed goods to ſuch a value, and that they were reſcued out of his hands; in this caſe he makes himſelf liable to an action of debt, or a *ſcire facias* may be brought againſt him by the plaintiff, for the ſheriff having levied the goods, he can have no remedy againſt the defendant; alſo in this caſe there can be no *venditioni exponas* to the ſheriff, becauſe by his own ſhewing it appears, that he has got the goods in his hands. See *Cro. Jac.* 514. *Godb.* 276. 2 *Rol. Rep.* 57. *Bridg.* 53. *Cro. Jac.* 556. *Cro. Car.* 53. 2 *Saund.* 343.

7. *Of obſtructing an execution, and the party's remedy when the execution is irregular.*

There were anciently caſtles, fortreſſes and liberties, where they reſiſted the ſheriff in executing the King's writs, which creating great inconvenience, the ſtatute of *Weſtm.* 2. *cap.* 39. (13 *Ed.* 1.) hindered the ſheriff from returning reſcuers to the King's writ of execution. 2 *Bac. Abr.* 368. The words of which ſtatute are: "The ſheriffs make alſo many times falſe anſwers, returning that they could not execute the King's precept for the reſiſtance of ſome great man; wherefore let the ſheriff beware from henceforth, for ſuch manner of anſwers redound much to the diſhonour of the King. And as ſoon as his bailiffs do teſtify that they found ſuch reſiſtance, forthwith all things ſet apart (taking with him the power of the ſhire) he ſhall go in proper perſon to do execution; and if he find his under bailiffs falſe, he ſhall puniſh them by impriſonment, ſo that other by their example may be reformed; and if he do find them true, he ſhall puniſh the reſiſters by impriſonment, from whence they ſhall not be delivered without the King's ſpecial commandment. And if it percaſe the ſheriff when he cometh do find reſiſtance, he ſhall certify to the court the names of the reſiſters, aiders, conſenters, commanders, and favourers, and by a writ judicial they ſhall be attached by their bodies to appear at the King's court; and if they be convict of ſuch reſiſtance they ſhall be puniſhed at the King's pleaſure. Neither ſhall any officer of the King's meddle in aſſigning the puniſhment, for our Lord the King hath reſerved it ſpecially to himſelf, becauſe that reſiſters have been reputed diſturbers of his peace, and of his realm."

The judges conſtrued theſe words only to executions, and not to writs on meſne proceſs, that the ſheriff was not obliged to carry the *poſſe comitatus* where the man was bailable, for they did not preſume, that in ſuch caſes the King's writ would be diſobeyed. 2 *Bac. Abr.* 368.

The original of commitment for contempts ſeems to be derived from this ſtatute; for ſince the ſheriff was to commit thoſe who reſiſted the proceſs, the judges who awarded ſuch proceſs muſt have the ſame authority to vindicate it; hence, if any one offers any contempt to his proceſs, either by word or deed, he is ſubject to impriſonment during pleaſure, *viz. from whence they ſhall not be delivered without the King's ſpecial commandment*; ſo that, notwithſtanding the ſtatute of *Magna Charta*, that none to be priſoned *without judgment of their peers, or by the law of the land*, this is one part of the law of the land to commit for contempts, and confirmed by this ſtatute. 2 *Bac. Abr.* 368.

But though the court will on affidavit grant an attachment againſt the party, whether he be the defendant or a ſtranger, who diſturbs the execution; yet where the ſheriff delivered poſſeſſion by virtue of an *habere facias poſſeſſionem* in the morning, and ſome hours after the ſheriff was gone, and the party in poſſeſſionem, the defendant came and turned him out again; and the court held, that if the plaintiff had been turned out immediately after he was put into poſſeſſion, or while the ſheriff and his officers were there, an attachment might have been granted, for this had been a diſturbance to the execution, and a contempt, but being ſeveral hours after, they doubted; but it was agreed in this caſe, that the court might grant a new *habere facias poſſeſſionem*, if the firſt was not returned. 1 *Salk.* 321. 6 *Mod.* 17. *S. C.*

Alſo

Alſo though the court will grant an attachment, yet if *A.* be taken on a *capias ad ſatisfaciendum* at the ſuit of *B.* and reſcued by *J. S. B.* may bring an action on the caſe againſt *J. S.* for the reſcue, or the ſheriff may have ſuch action againſt the reſcuer, becauſe he is liable to *B.* but his being liable does not prevent *B.* from bringing his action againſt which of them he pleaſes. *Cro. Car.* 109.

If upon an *elegit* the ſheriff delivers all the party's lands, or a third part, or more than a moiety, the extent is void; but in this caſe it can only be made void by writ of error, or *audita querela.* 1 Sid. 91. Carth. 453.

But if upon an *elegit* the ſheriff delivereth a moiety of an houſe without metes and bounds, ſuch return is ill, and ſhall be quaſhed for incertainty, on motion, without a writ of error, or *audita querela,* Carth. 453.

So if a *fieri facias* be not warranted by the judgment upon which it is awarded, though the ſheriff ſhall be excuſed, yet it is merely void as to the party. 1 *Vent.* 259.

Hence it has been held, that in treſpaſs againſt the ſheriff, it is enough for his juſtification, to ſhew a writ; ſo it is in the caſe of his bailiff or officer, with this difference, that the ſheriff muſt ſhew the writ was returned, if returnable; but the bailiff need not, becauſe it is not in his power; but in treſpaſs againſt the plaintiff himſelf or a mere ſtranger, they cannot juſtify themſelves, unleſs they ſhew there was a judgment as well as an execution, for the judgment may be reverſed, and it ought to be at their peril, if they take out execution afterwards; but it ſeems, that if one comes in aid of the officer, at his requeſt, he may juſtify as the officer may do, but ſuch requeſt or command of the officer is traverſable. 1 *Salk.* 409.

So where a man had judgment, and execution executed, and afterwards the judgment was vacated for being unduly obtained, and reſtitution awarded, and afterwards the defendant brought treſpaſs againſt the plaintiff in the firſt action for the taking of the goods; and it was adjudged, that it well lay againſt the party, for by the vacating of the judgment it is as if it never had been, and is not like a judgment reverſed by error; but in this caſe it was held, that no action would lie againſt the ſheriff, who had the King's writ to warrant what he did. 1 *Lev.* 95, *Raym.* 73, *S. C.*

If upon his judgment the plaintiff takes out a *fieri facias,* and thereupon the ſheriff ſells a term for years to a ſtranger, and the judgment is afterwards reverſed, the defendant ſhall only be reſtored to the money for which the term was ſold, and not to the term itſelf; for by the writ the ſheriff had authority to ſell; and if the ſale may be avoided afterwards, few would be willing to purchaſe under executions; which would render writs of execution of no effect. 1 *Rol. Abr.* 778. 8 *Co.* 19, 143. *Cro. Eliz.* 278. *Moor.* 273. 1 *Leon.* 96. 3 *Leon.* 189. *Cro. Jac.* 246. *Godb.* 27.

But if the plaintiff takes out an *elegit* on his judgment, and the ſheriff, upon this writ, delivers a leaſe for years, of the defendent's, to the value of 50 *l.* to the plaintiff *per rationabile pretium & extentum,* to have as his own term, in full ſatisfaction of 50 *l.* part of the ſum recovered, and after the defendant reverſes the judgment, he ſhall be reſtored to the ſame term, and not to the value; for though the ſheriff might have ſold the term on this writ, yet here is no ſale to a ſtranger, but a delivery of the term to the party that recovered by way of extent, without any ſale, and therefore the owner ſhall be reſtored. 1 *Rol. Abr.* 778. *Cro. Jac.* 246. *Yelv.* 179. 1. *Brownl.* 107, 108.

And for this reaſon, if perſonal goods were on this writ delivered to the party *per rationabile pretium & extentum,* upon the reverſal of the judgment he ſhall be reſtored to the goods themſelves. 1 *Rol. Abr.* 778.

So if the goods of an outlawed man are ſold by the ſheriff on a *capias utlagatum,* and after the outlawry is reverſed by writ of error, he ſhall be reſtored to the goods themſelves, becauſe the ſheriff was not compellable to ſell theſe goods, but only to keep them to the uſe of the King. 5 *Co.* 90. 1 *Rol. Abr.* 778. *Cro. Eliz.* 278.

So upon a *fieri facias* on a judgment againſt *B.* the ſheriff takes the goods of *B.* into his hands; but before any ſale of them, *B.* delivers to the ſheriff a *ſuperſedeas* on a writ of error, *B.* ſhall have the goods again, for by this ſeizure no property is altered. 2 *Rol. Abr.* 491. See 1 *Rol. Abr.* 492. *Cro. Eliz.* 597. *Moor* 542. *Style* 159. 1 *Vent.* 255. *Comb.* 389.

For more learning on this ſubject, ſee 10 & 11 Vin. Abr. *and* 2 Bac. Abr. *tit.* Execution.

Execution for the *King's debt,* or *prerogative execution,* Is always preferred before any other executions. See **Prerogative.**

Execution of criminals, Muſt be according to the judgment, and the King cannot alter a judgment from hanging to beheading, becauſe no *execution* can be warranted, unleſs it be purſuant to the judgment. 3 *Inſt.* 52, 211.

The following particulars are obſerved by Mr. ſerjeant *Hawkins* with reſpect to the execution of criminals; 1ſt, That the court of King's Bench hath not only power to award execution againſt perſons attainted there, but alſo againſt perſons attainted in parliament, or any other court; the record of their attainders or tranſcript thereof being firſt removed into the court of King's Bench, and themſelves brought thither by *habeas corpus.* 2dly, That execution ought not to be awarded into a different county from that wherein the party was tried and convicted, except only where a record of attainder is removed into the court of King's Bench, which may award the execution in the ſame county wherein it ſits. 3dly, That where a perſon attainted hath been at large after his attainder, and afterwards is brought into court, and demanded why execution ſhould not be awarded againſt him, if he deny that he is the ſame perſon, it ſhall be immediately tried by a jury returned for that purpoſe. 4thly, That the court may command execution to be done without any writ. 5thly, That it is holden by *Coke* and *Hale,* that no execution can be warranted unleſs it be purſuant to the judgment, and therefore that it cannot be altered by the King, as from hanging to beheading. Yet ſince there is a great number of precedents, where men condemned to be hanged for felony, and women condemned to be burnt for treaſon, have been beheaded by force of a ſpecial warrant from the King for that purpoſe; and ſince *Bracton* and *Staunforde,* and the year book of 35 *H.* 6. ſpeaking of this matter, are not ſo expreſs as *Coke* and *Hale,* but ſay only in general, that the ſheriff cannot lawfully behead a man who is only condemned to be hanged, by which they perhaps intend no more than that he cannot lawfully do it of his own authority; I ſhall leave this matter to be farther conſidered. However it is agreed, that where beheading is part of the judgment, as in caſe of high treaſon, the King may pardon all the reſt, and conſequently in ſuch caſe the judgment will be well executed by beheading only. 6thly, That it ſeems agreed at this day, that an execution cannot be lawfully executed by any but the proper officer. 7thly, That it is clear, that if a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again; for the judgment was not executed till he was dead. 8thly, That it ſeems agreed, that every court which has power to award an execution, has alſo of common right a diſcretionary power of granting a reprieve; as where a perſon pleads a pardon defective in point of form, but ſufficiently ſhewing the King's intention of mercy; or where it is doubtful whether the offence be not included in a general ſtatute pardon; or whether, as it is laid in the indictment, it amounts to ſo high a crime as that with which the priſoner was charged. And it ſeems agreed at this day, that judges continue to have this power after their commiſſion is determined. 9thly, That it is clear, that if a woman quick with child be condemned either for treaſon or felony, ſhe may allege her being with child in order to get the execution reſpited, and thereupon the ſheriff or marſhal ſhall be commanded to take her into a private room, and

to

to impanel a jury of matrons to try and examine whether ſhe be quick with child or not; and if they find her quick with child, the execution ſhall be reſpited till her delivery. But it is agreed, that a woman cannot demand ſuch reſpite of execution by reaſon of her being quick with child more than once; and that ſhe can neither ſave herſelf by this means from pleading upon her arraignment, nor from having judgment pronounced againſt her upon her conviction. Alſo it is ſaid, both by *Staundford* and *Coke*, that a woman can have no advantage from being found with child, unleſs ſhe be alſo found quick with child. 2 *Hawk. P. C.* 462, 463, 464.

By ſtatute 25 *Geo.* 2. *c.* 37. Murderers are to be executed the next day but one after ſentence, and their bodies to be delivered to the hall of the ſurgeons company. See **Murder.**

Execution of ſtatutes. The court of *Star-Chamber* erected in the reign of King *Henry* VII. was ſaid to be for the execution of ſtatutes, *&c.* Stat. 3 *Hen.* 7. *c.* 1.

Executione faciendâ, Is a writ commanding *execution* of a judgment; the divers uſes whereof ſee in the *Table* of the *Regiſter Judicial.*

Executione faciendâ in withernamium, Is a writ that lies for taking his cattle, who formerly had conveyed out of the county the cattle of another: So that the bailiff, having authority from the ſheriff to replevy the cattle ſo conveyed away, could not execute his charge. *Reg. of Writs, fo.* 82. *b.*

Executione judicii. Writ *de executione judicii* lieth where judgment is given in the court of any lord upon a writ of right patent, or upon a plea of debt or treſpaſs in the ſame court, or in the hundred, county, court-baron, or in any court of record; and if the ſheriff or the bailiff will not do execution of the judgment, then the party ſhall have this writ directed unto the ſheriff or the bailiff, in which court the execution ought to be; and if they will not do execution, he ſhall have an *alias* and *pluries*, with this clauſe in the writ of *pluries*, or ſignify to us the cauſe why, *&c.* And if they do not execution upon this writ, or return not ſome reaſonable cauſe wherefore they delay the execution, the party ſhall have an attachment againſt him who ought to have done the execution returnable into the King's Bench, or into the Common Pleas. And if the plea be in the lord's court baron, then the writ of execution ſhall be directed unto the bailiff of the court. But if the plea and the judgment be given in the ſheriff's court, as in the county court, then the writ ſhall be directed unto the ſheriff himſelf to do execution, and the *alias* and *pluries* ſhall be to the ſame ſheriff; and if they will not do execution of the judgment, then an attachment againſt the ſheriff ſhall be directed unto the coroners, returnable as aboveſaid, to anſwer, *&c.* And ſo if the writ *de executione judicii* be directed to the bailiffs of any court of any lord, or unto the bailiffs of a hundred, to do execution, and at the *alias* and *pluries* they will do nothing, the attachment ſhall be to the ſheriffs againſt the bailiffs, returnable as aforeſaid, to anſwer, *&c.* And if the judgment be in a court of record, then it ſeemeth that the writ *de executione judicii* ſhall be directed unto the juſtices of the ſame court where the judgment was given, to do execution, and not unto the officer of the court. For if the officer of the court will not execute the writs directed unto him, nor return them as he ought, the judges of the courts may amerce him. *New Nat. Brev.* 43, 44.

Executor, (*Executor,*) Is he that is appointed by any man in his laſt will and teſtament, to have the diſpoſing of all his ſubſtance, according to the contents of the ſaid will. This *executor* is either *particular* or *univerſal*; *particular*, as if this or that thing only be committed to his charge; *univerſal*, if all. And this is in the place of him whom the Civilians call *Hæredem deſignatum*, or *Teſtamentarium*; and the law accounteth him one perſon with the party whoſe executor he is, as having all the advantage of action againſt men that he had, ſo likewiſe being ſubject to every man's action as himſelf was. This *executor* had his beginning in the Civil law, by the conſtitutions of the Emperors, who firſt permitted thoſe that thought good by their wills to beſtow any thing upon godly and charitable uſes, to appoint whom they pleaſe to ſee the ſame performed: And if they appoint none, then they ordained, that the biſhop of the place ſhould have authority of courſe to effect it. *Lib.* 28. *cap. de Epiſcopis & Clericis.* And hence probably grew the uſe of *univerſal executors*, and alſo brought the adminiſtration of their goods, that die inteſtate, unto the biſhop. *Cowell.*

According to the Civil and Canon law, there are three perſons who are called executors, and who have to do with the execution of a perſon's goods after his deceaſe; the firſt is the ordinary, or biſhop of the dioceſe, and is called *Executor a lege conſtitutus.* 2dly, *Executor a teſtatore conſtitutus*, being appointed by the laſt teſtament of the party. 3dly, *Executor ab epiſcopo conſtitutus*, who in the Civil law is called *Executor dativus*, and in our law, an adminiſtrator. *Godolph.* 75. *Swinb.* 360.

1. *Who may be executors; and of appointing the King, aliens, corporations, creditors, criminals, debtors, femes covert, ideots and lunaticks, infants, and poor perſons, executors.*

2. *Of the different kinds of executors and adminiſtrators,* viz. *an executor* de ſon tort, *adminiſtrator during the minority of an infant executor, and adminiſtrator* de bonis non.

3. *Of the manner of appointing an executor, and of appointing co-executors; where they muſt anſwer for each other's acts, and where they muſt jointly ſue and be ſued.*

4. *Of the probate of wills, and juriſdiction for that purpoſe; form of proving a will, and of entring a caveat.*

5. *What ſhall be deemed a* devaſtavit *in executors; order of paying debts and legacies; and in what caſes an executor may make himſelf liable* de bonis propriis.

6. *Of actions and remedies againſt executors.*

1. *Who may be executors; and of appointing the King, aliens, corporations, creditors, criminals, debtors, femes covert, ideots and lunaticks, infants, and poor perſons, executors.*

It ſeems to be admitted, that the King may be appointed executor; but as he is preſumed to be ſo far engaged and taken up with the publick and arduous affairs of the kingdom, as not to have leiſure to attend to the private concerns of any particular perſon, ſo the law allows him to nominate ſuch perſons as he ſhall think proper, to take upon them the execution of the truſt, againſt whom all perſons may bring their actions; alſo the King may appoint others to take the accounts of ſuch executors. 4 *Inſt.* 335. *Godol.* 76.

Accordingly we find, that *Katherine* Queen Dowager of *England*, mother of *Henry* 6. who died *June* 2, 1436, made her will, and thereof appointed *Henry* 6. ſole executor, and that the King appointed *Robert Rolleſton* keeper of the wardrobe, *John Merſton* and *Richard Alreed* to execute the ſaid will, under the inſpection of the cardinal, the duke of *Glouceſter* and the biſhop of *Lincoln*, or any two of them, to whom ſuch executors ſhould account. 4 *Inſt.* 335.

It ſeems agreed, that by our law, an alien, or one born out of the allegiance of our King, may be an executor or adminiſtrator; alſo it hath been adjudged, that ſuch a one ſhall have adminiſtration of leaſes as well as perſonal things, becauſe he hath them *in auter droit*, and not to his own uſe. *Off. of Ex.* 17.

But it has been long doubted, whether an alien enemy ſhould maintain an action as executor, for on the one hand it is ſaid, that by the policy of the law, alien enemies ſhall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourſelves and enrich the enemy, and therefore publick utility muſt be preferred to private convenience; but on the other hand it is ſaid, that thoſe effects of the teſtator are not forfeited to the King by way of repriſal, becauſe they are not the alien enemy's, for he is to recover them for others; and if he allows ſuch alien enemies to poſſeſs the effects as well as an alien friend, he muſt allow them power to recover, ſince in that there is no difference,

and by conſequence he muſt not be diſabled to ſue for them; if it were otherwiſe, it would be a prejudice to the King's ſubjects, who could not recover their debts from the alien executor, by his not being able to get in the aſſets of the teſtator. *Cro. Eliz.* 683. *Moor* 431. *Carter* 49, 191. *Skin.* 370.

It ſeems that aggregate corporations conſiſting of divers perſons cannot be executors: 1ſt, Becauſe they cannot be feoffees in truſt for the uſe of others. 2dly, Becauſe they are a body framed for a ſpecial purpoſe. 3dly, Becauſe they cannot come to prove a will, or at leaſt to take an oath, as others do. *Wentw. Off. Ex.* 17.

A debtor may make his creditor executor, and in ſuch caſe the executor may retain ſo much of the teſtator's aſſets, as will ſatisfy himſelf; but this muſt be underſtood where his debt is in an equal degree with other creditors; for if he be a ſimple contract creditor, he cannot retain againſt a creditor by ſpecialty, or any other of a ſuperior nature. *Plow.* 185. *Hutt.* 128. *Offic. of Ex.* 31. *Godolph.* 115. 1 *Salk.* 304. *Godb.* 216. *Hob.* 10. *Cro. Car.* 372. 1 *Jon.* 345.

So if adminiſtration be granted to a creditor, he may retain ſo much of the inteſtate's aſſets, as will ſatisfy himſelf; but this alſo muſt be underſtood as to creditors in equal degree. *Godol.* 115. *Off. of Ex'.*

Alſo ſuch adminiſtrator who is a creditor by ſpecialty, may bring an action againſt one who poſſeſſes himſelf of the inteſtate's goods as executor *de ſon tort*, with an averment, that none of the goods came to his hands to ſatisfy the debt; for tho' he may bring trover or treſpaſs againſt him as adminiſtrator, yet as againſt a ſtranger he is not deprived of this other remedy; for the reaſon why the debtor's making the creditor executor, or his taking out adminiſtration, is ſaid to ſuſpend or extinguiſh the action is on ſuppoſition of aſſets. 1 *Rol. Abr.* 940. *Style* 384.

So if there are no aſſets, he may ſue the heir of the obligor, where the heir is bound. 1 *Salk.* 304. 1 *Rol. Abr.* 940.

So if *A.* and *B.* be jointly and ſeverally bound to *C.* and *A.* makes *C.* his executor (or as the caſe was) makes *D.* his executor, who makes *C.* his executor; in this caſe, if *C.* has not received ſatisfaction of the aſſets of *A.* he may ſue *B.* for, being jointly and ſeverally bound, he may ſue which of them he pleaſes. 2 *Lev.* 73.

There are few or none, who, by our law, are diſabled, on account of their crimes, from being executors; and therefore it hath been always holden, that perſons attainted or outlawed may ſue as executors or adminiſtrators, becauſe they ſue *in auter droit*, and for the benefit of the party deceaſed. *Co. Lit.* 128. *Cro. Car.* 8, 9. 1 *Rol. Abr.* 914. 1 *Vern.* 184.

Alſo a villain may be an executor, and the lord cannot ſeize thoſe goods which he has to the uſe of the deceaſed; nay, where a villain was made executor, he might ſue his own lord for a debt due to the teſtator. 1 *Rol. Abr.* 915.

But an excommunicated perſon cannot be an executor or adminiſtrator, for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceaſed to pious uſes. *Co. Lit.* 134. *Swinb.* 349. *Godolph.* 85.

It is laid down as a general rule, that if a creditor makes his debtor executor, it is an extinguiſhment of the debt, for he cannot ſue himſelf. 1 *Rol. Abr.* 920-1. 5 *Co.* 30. *Offic. of Ex.* 30. *Godolph.* 113.

But if a perſon dies inteſtate, and the ordinary commits adminiſtration to a debtor, the debt is not thereby extinguiſhed, for he comes into the adminiſtration by the act of law, whereas the other is the act of the party. 5 *Co.* 136. 1 *Salk.* 306. *Offic. of Ex.* 31.

If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the ſurviving co-executor ſhall not have an action to recover the debt againſt the executor of the debtor, becauſe the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithſtanding one alone adminiſtred; and it could not be brought in both their names, becauſe the debtor could not ſue himſelf. *Plow.* 264. 1 *Leon.* 320.

So where *A.* being bound in an obligation to *B. B.* makes *A.* his executor, who adminiſters ſeveral of the goods, but dies before probate of the will, and adminiſtration to *B.* being granted to *J. S.* he brought his action againſt the heir of *A.* but it was held, that the debt was releaſed in this caſe, though *A.* never proved the will; for by adminiſtring as executor, he was complete executor for this and ſeveral other purpoſes. 1 *Salk.* 299.

But all theſe caſes of extinguiſhments by making debtors executors, muſt be underſtood where there are aſſets ſufficient to diſcharge and ſatisfy the teſtator's debts and legacies. *Cro. Car.* 373. *Offic. of Ex.* 30.

Therefore, where a debtor and another were made executors by the debtee, who by his will appointed, that out of that debt due to him they ſhould pay a certain legacy, it was adjudged, that as to the legatee, this debt was not extinct, but that it remained aſſets to pay legacies as well as debts; and this being a legacy, and properly recoverable in the ſpiritual court, the court of *B. R.* refuſed to grant a prohibition to a ſuit for it there, and the rather in this caſe, becauſe it was expreſsly deviſed to be paid out of the debt. *Yevl.* 160.

So in a caſe, where the teſtator deviſed ſeveral legacies, and amongſt the reſt gave conſiderable legacies to his two executors, to whom alſo he deviſed the ſurplus of his eſtate; and there being a debt of 3000*l.* due by bond to the teſtator from one of the executors, he inſiſted, that there being ſufficient aſſets to ſatisfy all the legacies, that this 3000*l.* ſhould not be brought into the ſurplus of the teſtator's eſtate, but that the ſame was extinguiſhed for his benefit by his being made co-executor; and that though the ſurplus of the eſtate was deviſed to them both, yet that this debt could not be taken to be part of that ſurplus being before extinguiſhed; but it was decreed, that the 3000*l.* ſhould be taken as part of the ſurplus of the teſtator's perſonal eſtate, and both executors equally intitled to the ſame; for though in ſome books the teſtator's making a debtor executor is ſaid to be an extinguiſhment of the debt, becauſe an executor cannot ſue himſelf; yet it was never doubted, but that ſuch a debt remained aſſets to ſatisfy creditors, and was alſo reſolved to be aſſets to ſatisfy legacies; and this deviſe of the ſurplus, and reſidue of the teſtator's eſtate being as much a legacy, and as well recoverable in the ſpiritual court, as any particular legacy, it was but fitting, that ſince the courts of equity claim now a concurrent juriſdiction with the eccleſiaſtical courts in matters of this nature, that there ſhould be the ſame meaſure of juſtice in both theſe courts. 2 *Bac. Abr.* 380. *Selwin* and *Brown*, decreed and affirmed in the houſe of Lords, *March* 21, 1734.

If the debtee makes the executrix of the debtor his executrix, and dies, this is no extinguiſhment of the debt, becauſe the executrix is intitled to the ſame, not in her own right, but in right of another. *Cro. Car.* 372. 1 *Jon.* 345.

Under this head of making debtors executors, it may be proper to obſerve, that if a debtor be in execution, and the plaintiff dies, by which the right of adminiſtration deſcends upon the debtor; in this caſe he cannot be diſcharged upon a *habeas corpus*, becauſe *non conſtat de perſona*; neither can he give a warrant of attorney to acknowledge ſatisfaction; and therefore it ſeems moſt adviſeable to renounce the adminiſtration, and get it granted to another, and then he may be diſcharged by a letter of attorney from ſuch adminiſtrator. 2 *Mod.* 315.

If a debtor be mede executor, the debt is totally extinguiſhed, otherwiſe if he be appointed adminiſtrator; for it is no extinguiſhment of the debt, but a ſuſpenſion of the action, and his repreſentative is chargeable at the ſuit of the adminiſtrator *de bonis non*, &c. of the firſt inteſtate. *Atkyns* 461.

A feme covert may be appointed executrix, and in the ſpiritual courts ſhe is conſidered as feme ſole, capable of ſuing and being ſued without her huſband; and

therefore

therefore it ſeems, that according to their law ſhe may take upon her the probate of the will without the aſſent of the huſband, who hath no right to interpoſe or meddle in the affair. *Offic. of Ex.* 202. *Godolph.* 110.

But by our law, huſband and wife are conſidered but as one perſon, and as having but one mind, which is placed in the huſband, as moſt capale to rule and govern the affairs of the family, and therefore the wife can do no act, which may prejudice the huſband without his conſent and concurrence: Hence the huſband muſt be joined in all actions by or againſt his wife; and conſequently a wife cannot, by our law, take upon her the office of executorſhip, without the conſent of her huſband. *Keilw.* 122. 1 *And.* 117. *Offic. of Exec.* 203.

Therefore it ſeems, that if a wife, who is made executrix, is cited in the ſpiritual court to take upon her the executorſhip, and the huſband appears, and refuſes his conſent thereto, if afterward they proceed to compel her, a prohibition will be granted. *Offic. of Exec.* 203.

Alſo a wife cannot, againſt her conſent, though her huſband is willing, be compelled to take upon her an executorſhip; but if the huſband adminiſters, ſhe will be bound by it during the coverture. *Godol.* 109, 110.

So if a wife adminiſters, though againſt the conſent of the huſband, and an action is brought againſt them, they are eſtopped to ſay, that the wife was not executrix. *Godol.* 110.

So if a feme ſole be made executrix, and ſhe marries before ſhe intermeddles with the eſtate, and her huſband adminiſters; this is ſuch an acceptance as will bind her, and ſhe can never afterward refuſe it. *Bro. Execut. Godolph.* 110.

It is ſaid, that a feme covert executrix may, without the conſent of her huſband, make a will, and appoint an executor as for thoſe things which ſhe hath as executrix, for ſhe has them *in auter droit*. Off. of Ex. 198-9.

By our law, as well as by the Civil law, ideots and lunaticks are incapable of being executors or adminiſtrators, for theſe diſabilities render them not only incapable of executing the truſt repoſed in them; but alſo by their inſanity and want of underſtanding they are incapable of determining whether they will take upon them the execution of the truſt, or not. *Godolph.* 86.

Therefore it hath been agreed, that if an executor became *non compos*, that the ſpiritual court may, on account of this natural diſability, commit adminiſtration to another. 1 *Salk.* 36.

An infant may be appointed executor, but he cannot adminiſter till he is of the age of ſeventeen, during which time adminiſtration is to be granted to ſome friend of his. *Godolph.* 103. *Off. of Ex.* 208.

So a child *in ventre ſa mere* may be appointed, and if the mother is delivered of two or more children at the birth, they ſhall be all executors. *Godolph.* 102. *Off. of Ex.* 213.

As to acts done by an infant in execution of the office of an executor, it ſeems agreed, that regularly all acts done by him in this reſpect, before the age of ſeventeen, are not binding, as if he ſells the teſtator's goods, aſſents to a legacy, receives debts due to the teſtator, *&c.* *Off. of Ex.* 213, 214.

But all things, that an infant executor doth after he attains the age of ſeventeen, though before the age of twenty-one, if done according to the office and duty of an executor, will hold good, and ſhall bind him; as paying of debts, ſuing for and recovering debts, ſelling the teſtator's goods, *&c.* *Offic. of Ex.* 215, 216. *Cro. Car.* 490. 1 *Jon.* 400. *Moor* 852. 1 *And.* 177. 5 *Co.* 27.

But if an infant executor after the age of ſeventeen, but before the age of twenty-one, gives an acquittance or releaſe for a debt or duty owing to the teſtator, ſuch a releaſe, without an actual payment to the infant is void; for if this ſhould be conſtrued good, it would be taking away the privilege which the law allows infants to avoid their acts, when they are apparently to their diſadvantage; and this, which is in prejudice both to the infant and to the eſtate of the teſtator, cannot be ſaid to be done according to his office as an executor. 5 *Co.* 27. *Co. Lit.* 172. *Off. of Ex.* 215. *S. C.*

If an infant executor ſues or is ſued, he muſt regularly appear by his guardian, and not by attorney, for by law he is diſabled to make an attorney, for if he ſuffers by the neglect or falſe pleading of his attorney, he has no remedy againſt him. 2 *Bac. Abr.* 378.

It ſeems to be now agreed, that the ſpiritual court cannot refuſe to grant the probate of a will to a perſon appointed executor, on account of his poverty or inſolvency; for, as he is but a truſtee for the deceaſed, and ſuch a perſon, as the teſtator thought proper to appoint for that office, without any previous qualification, the refuſing to admit him executor would be attended with theſe inconveniencies: 1ſt, That though he has a temporal intereſt, yet he cannot ſue for the debts of the teſtator before probate, which may be a conſiderable detriment to the teſtator's eſtate, and conſequently to creditors and legatees. 2dly, That whilſt this affair is in controverſy, there will be neither executor or adminiſtrator againſt whom an action may be brought to recover debts or legacies. 3dly, That if adminiſtration ſhould be granted to another, it would be a good plea at law to an action brought by ſuch a one, that there was a will, and an executor appointed. 1 *Salk.* 36, 299. *Carth.* 457. 1 *Show.* 293.

Therefore, where to a *mandamus* to the judge of the prerogative court, to grant the probate of a will to a perſon named executor therein, the ordinary returned, that he was an abſconding perſon and inſolvent, and that he refuſed to give caution to pay legacies bequeathed to ſome of the teſtator's infant relations; and a peremptory *mandamus* was granted; for the ordinary has no authority to interpoſe and demand caution of the executor, when the teſtator himſelf required none. *Carth.* 457. 1 *Salk.* 299. *S. C.*

So where after probate of the will the executor became a bankrupt, and there being a ſuit commenced in the eccleſiaſtical court to revoke the probate, and grant adminiſtration to another, the court of King's Bench granted a prohibition. 1 *Show.* 293. 1 *Salk.* 36. *S. C.*

But as an executor is conſidered but as a bare truſtee in equity; ſo if he be inſolvent, the court of Chancery will oblige him, as they will any other truſtee, to give ſecurity before he enters upon the truſt. *Carth.* 458. 1 *Show.* 294.

As where the teſtator deviſed a legacy to *J. S.* payable at the age of twenty-one years; on a bill ſuggeſting that the executor waſted the eſtate, and praying that he might give ſecurity to pay the legacy when due, it was decreed accordingly. 1 *Cham. Ca.* 121.

So where the teſtator deviſed a legacy to his child, an infant, payable at the age of twenty-three, and made his wife executrix and reſiduary legatee, and ſhe married a ſecond huſband, and died, and he took out adminiſtration *de bonis non*, with the will annexed, (his wife being reſiduary legatee) and upon ſuggeſtion of inſolvency, the court decreed him to give ſecurity to pay the legacy when it ſhould become payable. 2 *Vern.* 249.

2. *Of the different kinds of executors and adminiſtrators, viz. an executor* de ſon tort, *adminiſtrator during the minority of an infant executor; and adminiſtrator* de bonis non.

An executor *de ſon tort* is a perſon, who, without any authority from the deceaſed or the ordinary, does ſuch acts as belong to the office of an executor or adminiſtrator. *Swinb.* 448. *Office of Execut.* 171.

There are variety of acts which will make a man executor *de ſon tort*, ſuch as poſſeſſing and converting the deceaſed's goods to a man's own uſe, paying the deceaſed's debts out of his aſſets, ſuing for and receiving debts due to him; and it is ſaid in general, that all acts of acquiſition, transferring, or poſſeſſing of the deceaſed's eſtate, will make an executor *de ſon tort*, becauſe theſe are the only *inditia*, by which creditors can know againſt whom to bring their actions. 5 *Co.* 33. *b.* *Offic. of Exec.* 171.

Godol.

Godol. 171. *Dyer* 105, 157. *Kelw.* 59. 1 *Rol. Abr.* 918. 2 *Leon.* 224. 3 *Leon.* 57. *Hob.* 49.

Alſo a perſon may be executor *de ſon tort*, by releaſing debts due to the teſtator, by paying legacies with the deceaſed's effects, by entring on a ſpecifick legacy without the executor's aſſent, by paying and diſcharging the deceaſed's mortgages with his money or goods, by delivering to the deceaſed's wife more apparel than are ſuitable for her, or by anſwering as executor to any action brought againſt him, or by pleading any other plea than *ne unques executor*. *Godolph.* 91, 92. *Off. of Ex.* 174.

So if a perſon is appointed by the ordinary *ad colligendum bona defunct'*, tho' his acting in obedience to ſuch authority will not make him an executor *de ſon tort*; yet if he proceeds further, and ſells *bona peritura*, *&c.* he becomes executor *de ſon tort*; ſo if the ordinary had given him expreſs authority to ſell the goods, yet this would not free him from being executor *de ſon tort*, for the ordinary himſelf cannot give any ſuch authority. 1 *Rol. Abr.* 918. *Dyer* 256.

And by the 43 *Eliz. cap.* 8. it is enacted, "That every perſon and perſons, that hereafter ſhall obtain, receive, and have any goods or debts of any perſon dying inteſtate, or a releaſe or other diſcharge of any debt or duty that belonged to the inteſtate upon any fraud, or with ſuch valuable conſideration as ſhall amount to the value of the ſame goods or debts, or near thereabouts (except it be in or towards ſatisfaction of ſome juſt and principal debt of the value of the ſame goods or debts to him owing by the inteſtate at the time of his deceaſe,) ſhall be charged and chargeable as executor of his own wrong, and ſo far only as all ſuch goods and debts coming to his hands, or whereof he is releaſed or diſcharged by ſuch adminiſtrator, will ſatisfy, deducting nevertheleſs to and for himſelf allowance of all juſt, due, and principal debts, upon good conſideration, without fraud, owing to him by the inteſtate at the time of his deceaſe, and of all other payments made by him, which lawful executors or adminiſtrators may and ought to have and pay by the laws and ſtatutes of this realm."

But notwithſtanding this, there are ſeveral acts which a ſtranger may do without running the hazard of making himſelf an executor *de ſon tort*; ſuch as taking care of the deceaſed's funeral, feeding his cattle, taking an inventory of his eſtate and effects, paying or diſcharging his debts or legacies with his own proper money, repairing his houſes in decay, providing neceſſaries for his children, *&c.* for theſe are to be eſteemed offices of kindneſs and charity, and not ſuch as involve him in an executorſhip. *Godol.* 91.

Alſo here we muſt obſerve, that regularly there cannot be an executor *de ſon tort* where there is a rightful executor, or when adminiſtration has been duly granted; for if after probate of the will, or adminiſtration granted, a ſtranger gets poſſeſſion of the deceaſed's goods, he is a treſpaſſer to ſuch executor or adminiſtrator, and may be ſued as ſuch. 5 *Co.* 33. 1 *Chan. Co.* 33. 1 *Salk.* 313.

But if a ſtranger gets poſſeſſion of the deceaſed's goods before probate of the will, he may be charged as executor *de ſon tort*, becauſe the lawful executor can be no further charged than for the aſſets that came to his hands. 5 *Co.* 33. *b.*

So altho' there be a rightful executor who adminiſtred, yet if a ſtranger takes the deceaſed's goods, and claiming to be executor, pays debts or receives debts, or pays legacies, or otherwiſe intermeddles as an executor, he becomes an executor *de ſon tort*. 5 *Co.* 34. *a.*

As to thoſe things on which ſtranger enters and takes poſſeſſion, and which will make him an executor *de ſon tort*, it is now clearly agreed, that a perſon may be an executor *de ſon tort*, by entring on a leaſe or term for years, eſpecially if, according to the old books, he enters in right of the deceaſed, and does acts upon the land, which belong to the office of an executor or adminiſtrator; as ordering the deceaſed's cattle to be fed on the land, *&c.* by meddling with the inteſtate's goods, *&c.* he is then a diſſeiſor, and not an executor *de ſon tort*. *Moor.* 126. *Style* 407. 2 *Mod.* 174.

But this matter will be beſt explained by inſerting the two following reſolutions: In an action of debt in the *debet* and *detinet* againſt an executor upon a leaſe for years, it was found by ſpecial verdict, that the plaintiff leaſed to *Simon Taylor*, father of the defendant, for years, rendring 180 *l. per annum* rent; *Simon* died inteſtate, and the defendant entred, and uſed the inteſtate's cattle, and fed them upon the land for three months, and that he fed the cattle with the inteſtate's hay upon the ground, and three days before the rent became due, the defendant drove the cattle off the land, and afterwards took out adminiſtration of all but this leaſe; and whether he ſhould be chargeable, or not, for the rent, was the queſtion; and all the court were of opinion, and ſo gave judgment, that he ſhould be charged; and in this caſe theſe points were reſolved: 1ſt, That the action was well enough laid in the *debet* and *detinet*. 2dly, That an executor cannot waive a term, but ſhall be charged as far as he hath aſſets, though the rent be greater than the value of the land. 3dly, That adminiſtration may be granted by the ordinary for part, as in this caſe, adminiſtration granted, excepting the leaſe. 4thly, That if an executor *de ſon tort* takes out adminiſtration, this does not purge the wrong ſo but that a creditor may charge him as executor *de ſon tort*. 5thly, An executor *de ſon tort* of a term ſhall be chargeable for the receipt of the profits till there be a rightful executor or adminiſtrator to charge, as in *Read*'s caſe, 5 *Co.* 34. *a.* After adminiſtration or probate, the ſtranger that meddles with goods ſhall not be chargeable as executor *de ſon tort* unleſs he pretending and claiming to be adminiſtrator, pays debts and does other things as executor; now there being no rightful adminiſtrator of this term, his meddling, has charged himſelf as executor *de ſon tort* thereof. 2 *Bac. Abr.* 388, 389. cites *Paſch.* 31 *Car.* 2. in *C. B.* between *Garth* and *Taylor*, and ſeveral other authorities.

In an action of waſte, the plaintiffs declared that they made a leaſe to *J. S.* of a barn for thirty-one years, who died inteſtate, and that the defendant entred claiming *terminum prædict'* as executor, and committed waſte by pulling down the ſaid barn; and on demurrer it was urged for the defendant, 1ſt, That there could not be an executor *de ſon tort* of a term, for no man can qualify his own wrong, by alledging, when he enters generally, that he took only a particular eſtate, and therefore muſt be a diſſeiſor in fee. 2. Admitting there may be an executor *de ſon tort* of a term, yet there is no privity between the leſſor and him, to charge him in an action of waſte; for at Common law, and alſo by the ſtatute of *Glouceſter*, waſte lies only againſt tenant by curteſy, dower, for life or years, neither of which is this tenant; beſides, in this action the place waſted is to be recovered with treble damages, which will be an injury to the rightful adminiſtrator, as alſo to the creditors of the deceaſed. As to the firſt objection the court was of opinion, that there might be an executor *de ſon tort* of a term; and as to a wrong doer's qualifying his own wrong, the difference in theſe caſes they ſaid was, that where a perſon enters generally upon lands of which there is no term in being, there he cannot qualify his wrong, by ſaying that he claims only a particular eſtate, but muſt be a diſſeiſor in fee; ſo where there is a term in being, as in this caſe, he cannot inlarge his eſtate by claiming a fee, and it is no objection, that the leſſor did not charge as a diſſeiſor, when he had it in his election to charge him either way, which is the diſtinction taken in the books. As to the ſecond objection, it was held, that the want of privity was not material, and that ſince the ſtatute of *Glouceſter*, which is rather a remedial than a penal law, privity is not requiſite, for waſte will lie againſt the lord of a villain, who enters upon the land leaſed to the villain for life, or years; it will lie alſo againſt an occupant, who is a mere ſtranger, as well as againſt a ſpecial occupant, who comes in by the limitation of the leſſor. So if tenant for life commits treaſon, and the King grants over the eſtate, waſte will lie againſt the grantee; ſo if a reverſion eſcheats, waſte will lie for the lord; in all which caſes there is no privity; and it would

be

be a manifeſt injury to the leſſor in this caſe, if he ſhould be delayed of his action till adminiſtration was taken out; and as to the objection, that this will be an injury to the rightful adminiſtrator, the court held, that the rightful adminiſtrator might falſify the recovery, for a recovery againſt one, that has not right, ſhall not bind him that has, and after adminiſtration granted he is *paramount* the recovery, *viz.* from the death of the inteſtate. 3 *Lev.* 31, 35. *Mayor and Commonalty of Norwich* v. *John.* 3 *Mod.* 90. *S. C.* adjudged for the plaintiff in *C. B.* and affirmed in *B. R.*

As to the value of the things taken by a ſtranger, ſo as to make him an executor *de ſon tort*, it ſeems not to be material; and therefore where an action was brought againſt ſuch a one, who pleaded *ne unques executor*, and it was found that a bedſtead only came to his poſſeſſion, he was charged with a debt of 60 *l.* *Noy* 69. *Goulſ.* 116.

So where on a like plea it was found, that the defendant took only a bible, he was charged with a debt of a hundred pounds. *Noy* 69.

So where the jury found, that the defendant detained *bonum partem bonorum*, and ſold them, tho' it was objected, that *bona pars* was very uncertain; yet the court held, that he ſhould be chargeable, for he cannot detain any part, and if he does, let it be of ever ſo ſmall value, he is liable as an executor *de ſon tort.* *Cro. Eliz.* 472.

But in theſe caſes, where the things are of a very inconſiderable value, it is ſaid that there may be relief in equity, as where on a plea of *ne unques executor*, the plaintiff proved that a chimney-back came to the defendant's hands, or that the defendant took money for a pot of ale ſold by the teſtator; in theſe caſes the defendant was relieved in equity. 2 *Vern.* 147, 148.

An executor *de ſon tort* may do ſeveral acts which a lawful executor may do, and which ſhall be as binding as if done by a rightful executor. *Off. of Exec.* 179.

Therefore if he pays juſt debts, and an action is brought againſt him by a creditor, he may plead *plene adminiſtravit.* 5 *Co.* 30.

But if an action of trover be brought by a rightful executor or adminiſtrator againſt an executor *de ſon tort*, he cannot plead payment of debts to the value, *&c.* or that he hath given the goods, *&c.* in ſatisfaction of the debts, becauſe no man ought to obtrude himſelf upon the office of another; but yet upon the general iſſue pleaded, ſuch payments ſhall be recouped in damages. *Carth.* 104. *Skin.* 274. For this would take from the rightful executor the liberty which the law gives him of preferring one creditor to another; nay, of preferring himſelf to other creditors which are equal in degree with him. *Off. of Ex.* 181.

Alſo it is clearly agreed, and hath been ſolemnly adjudged, that an executor *de ſon tort* cannot retain any part of the deceaſed's effects, in ſatisfaction of a debt due to himſelf, either againſt a creditor whoſe debt may be inferior to his, or againſt the rightful executor or adminiſtrator; for if it were permitted every man to be his own carver, it would occaſion endleſs ſtrife and confuſion, and would in effect be allowing him to take advantage of his own wrong. 5 *Co.* 30. *Cro. Eliz.* 630. 1 *Rol. Abr.* 922. *Moor* 527. 1 *Brownl.* 103. *Yelv.* 137. 2 *Mod.* 51. *Carth.* 104.

If an executor *de ſon tort* pays 100 *l.* of the teſtator's in a bag to a creditor, the rightful executor ſhall not have trover and converſion againſt the creditor. *Ld. Raym.* 661.

An executor *de ſon tort* makes himſelf liable as far as he hath aſſets, to all the debts due by the deceaſed, as alſo to his legacies, and ſubjects himſelf to the action of the rightful executor or adminiſtrator, and may by his own falſe plea (as if an action is brought againſt him by a creditor, and he pleads *ne unques executor*, which is found againſt him) ſubject himſelf to the payment of the whole debt, tho' the goods which came to his hands be of ever ſo ſmall value. 5 *Co.* 30. *Hob.* 49. 1 *Rol. Abr.* 919.

And tho' an executor *de ſon tort* does afterwards take out letters of adminiſtration, yet it is ſtill in the election of a creditor to charge him as executor or adminiſtrator; for having once made himſelf liable to the action as executor *de ſon tort*, he ſhall never afterwards diſcharge himſelf by a matter *ex poſt facto.* *Godb.* 217. 3 *Leon.* 198. *Cro. Eliz.* 102, 365, 810.

But this it is ſaid muſt be ſo underſtood, that the defendant cannnot by this plea abate the plaintiff's writ, by alledging himſelf adminiſtrator; but that yet to other purpoſes a ſubſequent adminiſtration purges the firſt wrong, and hath relation to the death of the party; as if one poſſeſſeth himſelf of the goods of an inteſtate, and pays as much money as the goods are worth, and then takes out letters of adminiſtration; in this caſe he may plead *plene adminiſtravit*, and ſhall retain the goods in ſatisfaction of what he paid. 1 *Rol. Abr.* 923. *Style* 337, 1 *Sid.* 76. *Raym.* 58. 1 *Lev.* 254. 2 *Vent.* 180.

So where an executor *de ſon tort* enters, and takes poſſeſſion of the goods, and ſells them, and afterwards takes out adminiſtration, yet the ſale is good by relation; but if the inteſtate was intitled to a leaſe for years in reverſion, and ſuch an executor *de ſon tort* had ſold the term, and afterwards had taken out adminiſtration, and had ſold it again to another, the ſecond vendee muſt have enjoyed it, becauſe there can be no executor *de ſon tort* of a reverſion; beſides, no entry can be made on a term in reverſion. *Moor* 126.

If a widow takes poſſeſſion of her huſband's goods, and with the aſſent and direction of her ſon ſells thereof to the value of 400 *l.* and afterwards the ſon takes out adminiſtration, and diſcharges all the debts of the inteſtate, not only to the value of this 400*l.* but of all the aſſets which the inteſtate died poſſeſs'd of, and an action is brought againſt her by a creditor, ſhe may plead *plene adminiſtravit*, and ſhall be diſcharged upon this evidence; for the action being brought againſt her after adminiſtration taken out, it is unreaſonable that ſhe ſhould be liable both to the creditor and adminiſtrator, or that creditors ſhould have ſatisfaction for more than the party dies poſſeſſed of. *Cro. Car.* 88.

If one makes an infant his executor, or dies inteſtate, and the right of adminiſtration devolves upon an infant, in theſe caſes the ordinary is to grant adminiſtration during the minority of the infant, *i. e.* in the firſt caſe, till he arrives at the age of ſeventeen, and in the latter till he arrives at the age of twenty-one, becauſe an infant cannot, before his full age, give bond to adminiſter faithfully. *Godolph.* 102. 5 *Co.* 29. *Hob.* 250. *Yelv.* 128.

And as ſuch an adminiſtrator is but in nature of a curator for the infant, and has no intereſt or benefit in the teſtator or inteſtate's eſtate, but in right of the infant, it has been always held diſcretionary in the ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged within the ſtatute 21 *H.* 6. to grant it to the next a-kin either of the deceaſed, or the infant. *Hob.* 250. 1 *Vent.* 219. 1 *Keb.* 549. 3 *Mod.* 24. 5 *Mod.* 395.

If *A.* makes *B.* his executor, and *B.* makes *C.* an infant executor, and letters of adminiſtration are granted to *J. S.* during the minority of *C. J. S.* cannot bring an action againſt a debtor of the firſt teſtator by virtue of this adminiſtration. *Cro. Eliz.* 211.

If an infant, and one of full age, are made executors, he who is of full age may take out adminiſtration *durante minoritate* of the infant, and may declare as executor or adminiſtrator *durante minoritate*; and there is no abſurdity in this caſe, that there ſhould be an executor and adminiſtrator to the ſame party. 2 *Lev.* 239, 240.

It ſeems to be agreed, that though an adminiſtrator *durante minoritate* hath but a limited and ſpecial power in the eſtate of the deceaſed, yet he may do all acts which are incumbent on an executor, and which are for the advantage of the infant and eſtate of the deceaſed, and therefore he may ſell *bona peritura*, ſuch as fat cattle, or any thing elſe which may be the worſe for keeping; ſo he may aſſent to a legacy, and may ſue and be ſued. 1 *Rol. Abr.* 910. *Owen* 35. 5 *Co.* 29. *Cro. Eliz.* 717-8. *Godb.* 104.

But cannot do any thing to the prejudice of the infant, and therefore he cannot ſell the goods of the deceaſed any

farther than they are neceſſary for the payment of the debts, nor can he ſell a term for years during the minority of the infant, for the words of his authority are, *We commit adminiſtration of all and ſingular the goods, for the uſe, benefit and advantage of the executor during his minority, and not otherwiſe, nor in any other manner, &c.*

If adminiſtration *durante minoritate* be granted to *A.* and afterwards repealed and granted to *B.* who obliges *A.* to account to him, and afterwards gives him a releaſe; this releaſe will not bind the infant, for this does not appear to be for the benefit or advantage of the infant. 1 *Rol. Abr.* 910, 911.

If an adminiſtrator *durante minori ætate* waſtes the aſſets, the more proper way to charge him is by action on the caſe by the infant when he comes of age; alſo by ſome opinions he may bring detinue againſt him for thoſe goods which he ſtill continues in his poſſeſſion, or he may oblige him to account in the ſpiritual court, but cannot bring a writ of account againſt him at law; neither is he chargeable in any action at the ſuit of a creditor, after the infant comes of age; but ſuch creditor may ſue the infant, who has his remedy againſt the adminiſtrator. *Latch.* 160, 267. *Noy* 86. 1 *And.* 34. 1 *Mod.* 174. 1 *Sid.* 57. 6 *Co.* 18. *b.*

If an admniſtratrix *durante minori ætate* of her infant daughter executrix, gives ſeveral bonds to the teſtator's creditors for their debts, and takes a ſecond huſband, the huſband may retain as his own, ſo much of the goods of the teſtator as amounted to the value of the debts paid and undertaken by the wife. *Hob.* 250. But a *quære* is added, how the caſe would be if the wife died, by which the huſband would be no longer chargeable, and ſee *Raym.* 484.

So if an action be brought againſt a ſpecial adminiſtrator, and the adminiſtration determines pending the action, he ought to retain aſſets to ſatisfy the debt which is attached on him by the action. *Comb.* 465.

It has been already obſerved, that there is an eſtabliſhed difference, where adminiſtration is granted to one as guardian to an infant, who hath a right to adminiſter, but is incapable to take it by reaſon of his minority, and where an adminiſtration is granted during the minority of an infant executor; that in the laſt caſe the adminiſtration determines as ſoon as the executor attains the age of ſeventeen years; but in the other caſe it continues till the infant attains his full age. 5 *Co.* 29. *Hob.* 251. *Cro. Eliz.* 602. *Cro. Car.* 516. *Carth.* 446. *Comb.* 475. 1 *Salk.* 39. 5 *Mod.* 395.

Alſo it ſeems agreed, that if adminiſtration be granted during the minority of ſeveral infants, that it determines upon the coming of age of any of them; and it is laid down by my Lord *Coke*, that adminiſtration granted during the minority of an infant executrix ceaſes upon her marriage. 5 *Co.* 29.

One made his will, and thereby, after ſeveral ſpecifick and pecuniary legacies, gave and deviſed the reſidue and remainder of his perſonal eſtate to his four nieces, and made *J. S.* his executor, and died; and the executor proved the will, and afterwards died inteſtate, and thereupon adminiſtration *de bonis non, &c. cum teſtamento annexo* was granted to the plaintiff during the minority of the four nieces; the reſiduary legatee, one of the nieces, married a perſon who was of full age, but ſhe herſelf was an infant, under the age of twenty-one years, though above ſeventeen; and Sir *Henry Johnſon*, in the year 1606. having given the teſtator a promiſſory note for the payment of 890*l.* and upwards, by his will, in 1719, gave and deviſed all his real and perſonal eſtate to *William Guidott*, Eſq; for the payment of his debts, legacies, and ſubject thereto, in truſt for ſuch children, as the defendant, the Lord *Strafford*, ſhould have by his Lady, who was the only daughter and heir of Sir *Henry Johnſon*, to whom he had been married about ſix or ſeven years; and in the ſame year 1719, Sir *Henry Johnſon* died, Mr. *Guidott*, the executor, renounced, and the Lord *Strafford*'s children being infants of tender years, the Lord *Strafford* took out letters of adminiſtration *cum teſtamento annexo*, during the minority of his children, to Sir *Henry Johnſon*; and there being likewiſe a bond given by Sir *Henry Johnſon* to the ſame perſon, for payment of a further ſum of money, the plaintiff *Jones* brought an action of debt upon the bond in the court of Exchequer, to which the defendant, the Lord *Strafford*, pleaded *ſolvit ad diem*; and alſo by leave of the court pleaded further as a double plea, purſuant to the act for amendment of the law, that he had fully adminiſtred, *præterquam* ſuch and ſuch judgments to ſeveral perſons, and that he had not aſſets *ultra* ſufficient to pay and ſatisfy thoſe judgments; upon this plea the plaintiff *Jones* brings his bill for a diſcovery, and account of aſſets, and the three nieces, who were infants, and unmarried, and likewiſe the married niece, who was alſo an infant, and her huſband, were co-plaintiffs in the bill. To this bill, which was not only for a diſcovery of aſſets of Sir *Henry Johnſon*, but likewiſe for payment and ſatisfaction both of the bond-debt, and likewiſe for the ſimple contract debt due on the note, the defendant the Lord *Strafford* put in a demurrer, which was that of the plaintiff's own ſhewing, in their bill it appeared, that one of the nieces was married, and therefore having a huſband capable of acting for her, the adminiſtration granted to the plaintiff *Jones*, during the minority of the four nieces, was determined; and the queſtion was, whether one of the four nieces being married, and her huſband of full age, whether the adminiſtration granted to the plaintiff *Jones*, during the minority of the four nieces, determined; tho' ſhe herſelf was ſtill under the age of twenty-one years; it was agreed on all hands, that where an infant is made executor, and adminiſtration is granted during his minority, that ſuch adminiſtration ceaſes *ipſo facto*, when he attains the age of ſeventeen years; and the opinion of Lord *Coke*, 5 *Co.* in *Prince*'s caſe was cited, that ſo it would likewiſe, if ſuch infant executrix, being under ſeventeen, ſhould marry, becauſe her huſband was capable of acting for her; and it was argued for the defendant, that if this were ſo in caſe of an infant executrix, there was the ſame reaſon for it in the preſent caſe, where one of the four nieces, during whoſe minority adminiſtration *cum teſtamento annexo* was granted, was married; that it was agreed on the other hand, that whenever any one of the four nieces attained the age of twenty-one years, that the adminiſtration ceaſed, and there was the ſame reaſon when one of them married, and had a huſband capable of acting for her; that this was to be reſembled to the caſe of a guardian at Common law, and that if an infant feme married, the guardianſhip was determined, becauſe the huſband was immediately on the marriage become her guardian; and it would be inconſiſtent that ſhe ſhould at the ſame time be under the power of another guardian; ſo here ſhe, from her marriage, became under the care and guardianſhip of her huſband, and he was capable of acting for her, and conſequently the adminiſtration granted during the minority of the four was then determined in the ſame manner as if ſhe had attained her age of twenty-one years; and then the plaintiff *Jones*, during the minority of the four, had no right to bring this bill, and that the demurrer was good; and for this were cited 5 *Co.* 29. *Prince*'s caſe, 6 *Co.* Sir *Moyle Finch*'s caſe, 1 *Salk.* 39. and that the only caſe againſt it was 2 *Jon.* 48. and they alſo cited the opinion of Juſtice *Twiſden*, 1 *Vent.* 103. But on the other ſide it was argued, that the court was clear of opinion, that the adminiſtration in this caſe did not determine by the marriage of one of the four nieces; they ſaid, that it was by no means clear, even in the caſe of the infant executrix, that if ſhe married under the age of ſeventeen, that the adminiſtration granted during her minority was thereby determined; that this was not the principal point in *Prince*'s caſe, but only the opinion of, or an obiter caſe put by my Lord *Coke*; and the ſame caſe was reported in *Cro. Eliz.* 718. and 1 *And.* and there nothing ſaid of it; that in the office of executors, ſuppoſed to be written by Juſtice *Doderidge*, he much marvels at this opinion of the Lord *Coke*; that in the ſpiritual courts where theſe adminiſtrations are granted, they take no notice of the huſband, nor will in ſuch caſe grant probate of the will or adminiſtration, but look upon the

wife

wife as to this purpoſe as a feme ſole and that the only power, which the huſband has in theſe caſes, is derived to him from the Common law, by which he is in many caſes enabled to pay and receive, and to act for his wife; but the property of none of the goods or chattels, which the wife has as executrix or adminiſtratrix, is veſted in him; for if ſhe ſurvive, they likewiſe ſurvive to her, and if ſhe dies firſt, there muſt be an adminiſtration *de bonis non* of her teſtator granted to another; and if this be ſo in the caſe of an infant feme executrix, that the adminiſtration granted during her minority does not ceaſe by her marriage, much leſs in the preſent caſe; for here the adminiſtration is granted to the plaintiff *Jones*, *donec una earum quatuor vigeſimum primum ann' ætatis attigerit*; ſo that by the expreſs words of the adminiſtration, 'tis not to determine ſooner; and though it does then determine, when any one of the four attains her age of twenty-one years, that is not the preſent caſe; for here, though ſhe is married, yet ſhe is under twenty-one; and the huſband has nothing to do with it; he, by his marriage, is not become next of kin to the teſtator, nor will the ſpiritual court grant adminiſtration to him; and if the marriage were to be a determination of the firſt adminiſtration, he could not ſucceed to it, for in that caſe the adminiſtration could only be granted to the wife; nay, they would not grant it to the huſband and wife jointly; that the wife, in this caſe was not intitled to the whole perſonal eſtate as an infant executrix is, but only to her own undivided fourth part; and tho' the ſpiritual court may grant adminiſtration as to a particular thing, or in a particular place, yet they never grant adminiſtration as to an undivided third or fourth part of the ſame thing, for then who ſhould bring the action for it, as of a horſe, or other intire thing? The huſband in this caſe would be intitled but to a fourth part of it in right of his wife; and muſt there be ſeveral adminiſtrations granted for one and the ſame thing? This would be abſurd, as well as to actions to be brought by them, as to actions brought againſt them; that if the adminiſtration is determined by the marriage, it will be to no manner of purpoſe to make application to the ſpiritual court, they will not grant it to the huſband, and the wife being ſtill under age, they muſt grant it to ſome other perſon during the minority of her and her three ſiſters, as it was before; and then it would be a vain thing to determine it; that the ſpiritual court by 31 *Ed.* 3. is to grant adminiſtration to the next of kin, which the huſband is not in this caſe; that the law takes notice of an executor before probate, and he may do ſeveral things before probate; but the power of an adminiſtrator is derived to him only by the letters of adminiſtration; that if the huſband has no right to claim the adminiſtration in this caſe, no more has the wife; for ſhe being ſtill under age, as well as the other nieces, the court will grant adminiſtration to none of them; or if they would, might grant it to any of the others as well as to her; it being in the diſcretion of the ordinary; and if the ſpiritual court ſhould grant adminiſtration to the huſband, that is not *de jure*, that he is intitled to it, but they may grant it to him as they would to any other perſon. So the court was of opinion, that *Jones* ſtill continued adminiſtrator during the minority of the four nieces, notwithſtanding the marriage of one of them, and that ſuch adminiſtration did not determine till one of them came to the age of twenty-one years, and ſo over-ruled the demurrer. 2 *Bac. Abr.* 382, 383, 384. *Hill.* 1730. *Jones* v. *Ld. Strafford.*

Although it ſeems clear, that the authority of an adminiſtrator *durante minoritate* of an infant executor determines at ſeventeen, and that of an adminiſtrator *durante minoritate* of an infant who is intitled to adminiſtration, at the age of twenty-one; yet if an action be brought againſt ſuch an adminiſtrator, the plaintiff in his declaration need not aver, that the infant is ſtill under thoſe ages; for this is a matter more properly within the conuſance of the defendant, and if his power be determined, he ought to ſhew it; but he cannot object it, eſpecially after he has taken iſſue on another point, which is an admiſſion that his authority ſtill continues. *Hob.* 251. *Cro. Jac.* 590. 1 *Rol. Rep.* 400. 5 *Co.* 29. *a.* 1 *Rol. Ab.* 910.

But it is ſaid, that if ſuch an adminiſtrator brings an action, he muſt aver, that the infant is ſtill under age, becauſe it is a matter within his conuſance, and the thing that intitles him to the action; but in this caſe alſo it hath been adjudged, that the defendant muſt take advantage of this omiſſion by way of plea or demurrer, and cannot object it after he has joined iſſue with him on another point, which admits the continuance of his authority. *Hob.* 51. *Cro. Jac.* 590. *Cro. Car.* 240.

But if an action of debt be brought againſt an adminiſtrator generally, and the defendant pleads in abatement, that adminiſtration was granted to him during the minority of his wife, he muſt aver, that the wife is ſtill living, for though he was a ſpecial adminiſtrator at firſt, yet if his wife were dead, he might be adminiſtrator generally, as the declaration ſuppoſeth. *Comb.* 465.

It ſeems to be clearly ſettled, that if an adminiſtrator *durante minoritate* brings an action and recovers, and then his time determines, that the executor may have *ſcire facias* upon that judgment. 1 *Rol. Abr.* 888-9. *Cro. Car.* 227. 2 *Brownl.* 83. *Godb.* 104. 1 *Lev.* 181. 1 *Keb.* 750. 1 *Vern.* 25.

Alſo it hath been held, that if ſuch an adminiſtrator obtains judgment, he may bring a *ſcire facias* againſt the bail, and they cannot object, that the infant is of full age; for the recognizance being to the adminiſtrator himſelf by name, tho' he be adminiſtrator *durante minore ætate tantum*, yet he may have a *ſcire facias* againſt the bail. 2 *Lev.* 37.

Adminiſtrations *de bonis non* are granted in the following inſtances: 1. If a perſon dies inteſtate, and adminiſtration is granted to *J. S.* who dies without having adminiſtred all the inteſtate's goods, in this caſe the ordinary muſt grant adminiſtration of the goods unadminiſtred to another; for the firſt adminiſtrator cannot continue the truſt repoſed in him to his executor or adminiſtrator, becauſe he has no intereſt but what he derives from the act of the ordinary. *Swinb.* 396. 1 *Rol. Abr.* 907. *Vaugh.* 182.

So if an executor dies inteſtate, adminiſtration *de bonis non cum teſtamento annexo* of the teſtator muſt be granted by the ordinary, for they are not devolved on the adminiſtrator of the inteſtate, becauſe he had them *in auter droit*, in order to diſcharge the truſt repoſed in him; but if the executor makes his executor, then the truſt is devolved on him; and after payment of the debts and legacies of the firſt teſtator, he has an abſolute property in the goods. 1 *Rol. Abr.* 907. *Vaugh.* 182.

If the executor dies before probate, tho' he adminiſtred in part by diſpoſing of the teſtator's goods, *&c.* yet his executor cannot be executor to the firſt teſtator; but in this caſe there is not an adminiſtration *de bonis non adminiſtrat'* granted, but an immediate adminiſtration, becauſe the executor died *ante onus executionis teſtamenti ſuper ſe ſuſceptum*, which is the foundation the ſpiritual courts proceed upon. 1 *Rol. Abr.* 907. 1 *Salk.* 305. *Dyer* 372.

So if an executor refuſes adminiſtration with the will annexed, it is to be granted to another. 9 *Co.* 37.

In theſe caſes adminiſtration is to be granted to the next of kin to the firſt teſtator or inteſtate; but if the teſtator appoints a reſiduary legatee, ſuch legatee is intitled to adminiſtration. *Dyer* 372. *a.* 1 *Show.* 25. 3 *Mod.* 59. 1 *Vern.* 200.

An adminiſtrator *de bonis non* is intitled to all the goods and perſonal eſtate, ſuch as terms for years, houſhold goods, *&c.* which remain in ſpecie, and were not adminiſtred by the firſt executor or adminiſtrator, as alſo to all debts due and owing to the teſtator or inteſtate. 1 *Salk.* 306. *Skin.* 143.

Alſo it is held, that if an executor receives money in right of the teſtator, and lays it up by itſelf, and dies inteſtate, that this money ſhall go to the adminiſtrator *de bonis non*, being as eaſily diſtinguiſhed to be part of the teſtator's effects, as goods *in ſpecie*. 1 *Salk.* 306.

But

But if *A.* dies inteſtate, and his ſon takes out adminiſtration to him, and receives part of a debt, being rent arrear to the inteſtate, and accepts a promiſſory note for the reſidue, and then dies inteſtate; this acceptance of the note is ſuch an alteration of the property as veſts it in the ſon, and therefore on death it ſhall go to his adminiſtrator, and not to the adminiſtrator *de bonis non.* 1 *Vern.* 473. See 2 *Vent.* 362. 1 *Rol. Abr.* 380.

If a feme executrix to *J. S.* takes a huſband, and the huſband and wife bring an action of debt upon an obligation in right of the wife, as executrix to *J. S.* and they have judgment to recover the debt with damages and coſts; if the wife dies, the huſband cannot take out execution, for he is not intitled to the thing recovered, but it ſhall go to the ſucceeding adminiſtrator of *J. S.* 1 *Rol. Abr.* 889.

But yet in theſe caſes, tho' the adminiſtrator *de bonis non* was intitled, yet he could not ſue out execution, becauſe he was not privy to the judgment, and therefore was driven to a new action. *Yelv.* 83. *Cro. Car.* 4. *Latch* 140. *Palm.* 443. 1 *Saund.* 149. 1 *Sid.* 29. But this being very inconvenient, by ſtat. 17 *Car.* 2. *c.* 18. (made perpetual by 1 *Jac.* 2. *c.* 17.) it is enacted, "That were any judgment after a verdict ſhall be had by or in the name of any executor or adminiſtrator, in ſuch caſe an adminiſtrator *de bonis non* may ſue forth a *ſcire facias*, and take execution upon ſuch judgment.

3. *Of the manner of appointing an executor, and of appointing co-executors; where they muſt anſwer for each other's acts, and where they muſt jointly ſue and be ſued.*

Here we muſt firſt obſerve, that the appointing an executor is an eſſential part of a will; for if a man makes ſeveral deviſes, *&c.* and appoints no executor, he dies inteſtate as to his goods and chattels; but though ſuch a ſignification of the teſtator's mind as to the diſpoſition of his goods, *&c.* be no more properly to be called a teſtament, than every deed, wherein he expreſſes his mind to grant ſuch and ſuch things, may be called a teſtament; yet it is not altogether of no force and validity; for ſince there is an expreſſion of the teſtator's mind for the diſpoſition of his goods in this or that manner; ſo far it ſhall be of effect, that the diſpoſition ſhall be made according as he hath expreſſed his mind, and therefore ſhall adminiſtration be granted to the next of kin *cum codicillo annexo*, as it is where a perfect will is made, and an executor refuſes. *Godolph.* 76. *Off. of. Ex.* 3. *Noy* 12.

On the contrary, the bare naming an executor in the will, without giving any legacy, or appointing any thing to be done, is ſufficient to make it a will, and as a will it is to be proved, for the naming of executors is by implication a gift or donation to them of all the goods, chattels, credit, and perſonal eſtate of the teſtator, and the laying upon them an obligation to ſatisfy the teſtator's debts to the juſt value of his goods and chattels. *Godolph.* 82. *Off. of Exec.* 3.

But altho' the appointing an executor be an eſſential part of a will, yet it is not neceſſary, that the teſtator ſhould make uſe of the word executor in conſtituting him, for any words which ſhew his intention, that ſuch a one ſhould be executor, are ſufficient; for a man's will, being ſuppoſed his laſt act, and made when he is *inops conſilii*, and is to receive a favourable interpretation. *Off. of Ex.* 8. *Godolph.* 82, 83. *Dyer* 90.

Therefore if the teſtator ſays, that he commits all his goods to the adminiſtration, or to the diſpoſition of *A. B.* in this caſe *A. B.* is as effectually made executor, as if the teſtator had made uſe of the word executor; ſo if the teſtator appoints that *A. B.* ſhall diſpoſe of the goods in his cuſtody, he is thereby made executor of theſe goods; or if he ſays, *I make* A. B. *lord of all my goods*, or, *I leave all my goods to him*, or, *I make* A. B. *legatory of all my goods*, or, *I leave the reſidue of my goods to him. Godolph.* 83.

So if the teſtator ſaith, I will that *A. B.* be my executor if *C. D.* will not; in this caſe *C. D.* is appointed executor, and may if he pleaſes be admitted to the executorſhip, and exclude *A. B. Godolph.* 83.

So if the teſtator, ſuppoſing his child, his brother, or his kinſman to be dead, ſays thus in his will, Foraſmuch as my child, my brother, *&c.* is dead, I make *A. B.* my executor; in this caſe, if the perſon, whom the teſtator thought dead, be alive, he ſhall be executor. *Godolph.* 83.

Alſo if the teſtator being aſked by another; whether he doth make *A. B.* his executor, doth anſwer, *yea*, *I do*, or *what elſe*, or *why not?* or, *whom elſe ſhould I make executor?* or, *I cannot deny it*, or other words to that purpoſe, *animo teſtandi*, this amounts to an aſſignation of *A. B.* executor. *Godolph.* 83.

So if the teſtator make *A. B.* or *C. D.* his executor; in this caſe they ſhall both of them be executors, for *or* ſhall be here conſtrued *and*, rather than the party for this uncertainty ſhould be ſaid to die inteſtate. *Godolph.* 84.

But if *A.* be made an executor, and *B.* a co-adjutor, without more, he is not by this an executor with *A.* nor hath ſuch co-adjutor or overſeer any power to adminiſter, or to intermeddle otherwiſe than to counſel, perſuade and adviſe. *Off. of Execut.* 9. 1 *Rol. Abr.* 914.

It is ſaid, that an appointing him executor who is named in ſuch a note left with *C. D.* is not a ſufficient making of him an executor at all; but according to *Godolph.* this muſt be underſtood, that it is no ſufficient appointing of an executor to make it a written will, becauſe the appointing en executor is left out of the will; but ſurely it will be a good nuncupative will, if not a good written will; for why ſhould not ſuch an appointment be good in caſe where the teſtator had made a diſpoſition by writing, as well as if he appointed an executor by word of mouth, where he hath made diſpoſition by writing of his goods and chattels. *Godolph.* 76.

If one appoint my executor to be his executor, and die, if the will be not void for uncertainty; yet he is *dead inteſtate* until I die, and die teſtate; but if I die inteſtate, then he is inteſtate alſo. *Godolph.* 78.

If there be demonſtration in a will, that is only added as *deſcriptio perſonæ*, and that is falſe; yet if the perſon be well enough known with it, that is ſufficient; as if the teſtator appoints his ſon *Thomas*, who was lately married, to be his executor, that is well enough, though he be not married. *Godolph.* 85.

Any word in a will, that ſuſpends the aſſignation of an executor in expectation of ſome further events, makes the executorſhip conditional; but if the condition be contrary to the former part of the will, it is void; and if one makes two executors, provided that one ſhall not adminiſter, this is void. *Off. of Ex.* 10. *Godolph.* 40.

A condition ought properly to relate to ſomething in contingency, that may, or may not be; for if it be ſubject to no contingency either in ſubſtance or circumſtance, it is no condition; as if *A.* makes *B.* his executor, upon condition that the ſun riſe ten days after his death, he is executor abſolutely, for there is no contingency to ſuſpend his being ſo. So if the teſtator makes *A.* his executor, upon condition the teſtator's wife and daughter be alive at the time of the death of the teſtator and he never had any daughter, the will is abſolute, for there is nothing poſſible to overthrow it; and in ſuch caſe, where there is nothing to be a contingency, the adding of a condition can be interpreted nothing but the making an illicitous grant. So captious conditions, that are contrary to the diſpoſition made, are void, becauſe they cannot be ſuppoſed to be made with any other deſign, than that a man ſhould avoid his own grant. *Godolph.* 43.

Neceſſary conditions, either in reſpect of fact or law, are of no manner of force; for it is in vain to require that which muſt neceſſarily be; impoſſible conditions in reſpect of law, perſons, nature, or contrariety, are in themſelves void, and therefore never hinder an executorſhip. *Godolph.* 44.

If an executor is appointed, upon condition that he gives ſecurity before ſuch a day to perform the will, or before he takes upon him the adminiſtration, he muſt in

thoſe caſes perform the condition before he is complete executor. *Offic. of Execut.* 11.

But in caſe of arbitrary conditions, the executor hath time, during his life, to perform the condition in, and may enjoy the executorſhip in the mean time, unleſs the judge appoints a time for him to perform the condition in; but if the judge appoints time and place, and the executor do it not, then is the condition broken, and the perſon inteſtate, and ſo adminiſtration is to be granted to the next of kin. *Godolph* 43, 78.

The time may be limited when the executorſhip ſhall begin, and that either certainly, or with reference to contingency; for by our laws it is lawful for a teſtator to appoint his executor, either from a certain time, or until a certain time, and in the mean time adminiſtration may by committed to the next of kin, or to the widow; and the act done by ſuch adminiſtrator cannot be avoided by the executor afterward; and in this ſenſe the ſame perſon may be ſaid to die partly teſtate, and partly inteſtate, which by the ſtrictneſs of the Civil law is not allowable. *Godolph.* 77. *Hob.* 265-6.

So a perſon may appoint, that *J. S.* ſhall be executor till his ſon comes of age, or for any limited time he pleaſes. *Off. of Ex.* 10.

The teſtator may limit and divide the power of his executors in the following manner: 1ſt, He may make *A.* his executor for his plate and houſhold ſtuff, *B.* for his ſheep and cattle, *C.* for his leaſes and eſtates by extent, and *D.* for the debts due to him; or, 2dly, He may appoint *A.* executor for his goods in the county of *S. B.* for his goods in the county of *N.* and *C.* for his goods in the county of *H.* *Off. of Ex.* 12. *Godolph.* 78. 1 *Rol. Abr.* 914.

And though ſeveral executors are appointed with ſeparate and diſtinct powers; yet is the will but one will, and needs only one probate. *Off. of Ex.* 13.

But if a perſon is made executor without any limitation or reſtriction, he cannot take out adminiſtration for part, but muſt renounce the executorſhip *in toto*, or not at all. 1 *Salk.* 297.

Therefore if an executor has a term, and the premiſſes are of leſs value than the rent reſerved thereon; in an action brought againſt him in the *debet* and *detinet*, he muſt plead ſpecially, that he has not aſſets, and that the land is of leſs value than the rent, and demand judgment, if he ought to be charged in the *detinet tantum*; and this will free him from being charged *de bonis propriis*; for otherwiſe the premiſſes ſhall be preſumed to be of greater value than the rent. *Yelv.* 103. *Cro. Jac.* 549. 1 *Mod.* 185. 1 *Salk.* 297.

If a man appoints ſeveral executors, they are eſteemed in law but as one perſon, repreſenting the teſtator, and therefore the acts done by any one of them, which relate either to the delivery, gift, ſale, payment, poſſeſſion, or releaſe of the teſtator's goods, are deemed the acts of all, for they have a joint and intire authority over the whole. *Godolph.* 134. *Off. of Execut.* 95. 1 *Rol. Abr.* 924.

Hence it hath been adjudged, that if the teſtator dies poſſeſſed of a leaſe for years, and having made two executors, one of them grants all his intereſt to a ſtranger, that the whole term paſſes, for each had an intire authority and intereſt different from other joint-tenants. *Dyer* 23. *b. pl.* 146. *Cro. Eliz.* 347.

And for this reaſon it is held, that if one executor grants or releaſes his intereſt in the teſtator's eſtate to the other, that nothing paſſes thereby, becauſe each was poſſeſſed of the whole before. *Godolph.* 134.

Alſo it hath been adjudged, that if an obligee makes two executors, and dies, and one of them delivers the obligation to a ſtranger in ſatisfaction of a debt due from himſelf, and dies, that though the debt does not paſs by the aſſignment, being a choſe in action, and not properly aſſignable; yet by this delivery the party hath ſuch an intereſt in the paper and wax, that he may juſtify the detainer in an action of detinue brought againſt him by the ſurviving executor. 2 *Rol. Abr.* 46. *Dyer* 23. *b. Cro. Eliz.* 478.

It is clearly agreed, that one executor ſhall not be charged with the wrong or *devaſtavit* of his companion, and ſhall be no farther liable than for the aſſets which came to his hands; and therefore where an action was brought againſt two executors, and the jury found that the two and another were made executors, and that the third waſted the aſſets to the amount of 600*l.* and died, and that only ſixteen pounds came to the hands of the two others; the court held, that they ſhould be chargeable for no more than the 16*l.* for that it was the teſtator's folly to truſt ſuch a perſon, which muſt not turn to the prejudice of the other executors. *Godolph.* 134. *Off. of Ex.* 100. *Cro. Eliz.* 318.

Alſo it hath been held in Chancery, that if there be two executors, and they join in a receipt, and one only receives the money, as to creditors, who are to have the utmoſt benefit in law, each is liable for the whole, tho' one executor alone might give a diſcharge, and the joining of the other way unneceſſary; but as to legatees, and thoſe claiming diſtribution, who have no remedy but in equity, the receipt of one executor ſhall not charge the other, for the joining in the receipt is only matter of form, the ſubſtantial part is the actual receiving, and this only is regarded in conſcience. 1 *Salk.* 318.

If *A.* deviſes legacies, and makes *B.* and *C.* his executors, and *B.* makes *C.* and *D.* his executors, and dies, and they poſſeſs themſelves of the eſtate of *A.* they may be both charged in equity; for though in point of law the executorſhip ſurvived to *C.* and *D.* is not privy, yet the eſtate of *A.* in whoſe hand ſoever, ought to be liable. 1 *Chan. Ca.* 57.

One executor cannot regularly ſue another of his co-executors touching any thing relating to their teſtator's will, or that is within the power, duty, or office of an executor. *Off. of Ex.* 99. *Godolph.* 135.

But if the reſidue of the perſonal eſtate, after debts and legacies, be deviſed to both the executors, one of them may ſue the other in the ſpiritual court for a moiety; for this is in the nature of a gift, or legacy to him, and he may bring treſpaſs againſt the other executor, if he takes it out of his poſſeſſion, or detinue, if he detains it from him. *Off. of Ex.* 99. *Godolph.* 135.

A joint executor was charged with payment of a legacy out of his moiety of the ſurplus, though he had left the money in the hands of the other executor, from whom the legatee had received intereſt, as well as a divivend out of his eſtate after he became bankrupt. *Lord Raym.* 1320.

As executors in repreſenting the teſtator make but one perſon, they are all regularly to ſue and be ſued. *Off. of Ex.* 95. *Godolph.* 134.

But if debt be brought againſt an executor, and he pleads that *J. S.* is co-executor with him, and he is not named in the writ, without averring that *J. S.* had adminiſtred, the plea will be ill; for although when an executor ſues, the defendant may plead another executor not named, without ſhewing that the other hath adminiſtred, becauſe he cannot know, whether the other hath adminiſtred, or not; yet when an executor is ſued, if he pleads another executor not named, he ought to go forth and ſay that he has adminiſtred, for that lies in his own conuſance. 1 *Lev.* 161. 1 *Sid.* 242.

Alſo if an action be brought againſt one executor, where there are more, if that one executor doth not plead that matter in abatement, but plead to the action, he ſhall never have the advantage of ſuch a plea afterwards. *Carth.* 61.

If two executors ſue, and ſet forth themſelves to be executors, and that they proved the will, but upon the probate ſet forth it appears that one proved the will; and the defendant pleads this in abatement, a *reſpondeas ouſter* will be awarded, for both have the right in them; and he that did not prove may come in when he pleaſes, but cannot refuſe during the life of him that has proved. 1 *Salk.* 3.

If a man appoints two executors, there ſhall be ſummons and ſeverance, becauſe one of the executors may releaſe, yet ſuch a releaſe is a *devaſtavit* in him; but if he will not proceed at law, it is no *devaſtavit* in him, and therefore both executors being only truſtees for the perſon deceaſed, they ſhall not be compelled to go on together; but if one refuſes, the other may bring his

action in the name of both, and have ſummons and ſeverance; for otherwiſe each co-executor might, by colluſion with the debtor, and not proceeding, keep the other from recovering aſſets, and not create a *devaſtavit* in himſelf; but after ſuch ſummons and ſeverance he does not proceed for a moiety, but as repreſentative of the teſtator proceeds for the whole the teſtator was intitled to. *Cro. Car.* 420. 2 *Rol. Abr.* 98. *Off. of Exec.* 96, 104.

Therefore if there be two executors, and they bring an action of debt, and one of them is ſummoned and ſevered, and the ſevered perſon dies, the writ ſhall not abate. *Cro. Eliz.* 652. *Co. Lit.* 139.

If debt be brought againſt ſeveral executors, and one appears, and the other makes default upon the grand diſtreſs, the court may proceed againſt him that appears; and if the plaintiff recover, judgment ſhall be againſt all the executors for the goods of the teſtator; and the 25 *Ed.* 3. *cap.* 17. which gives a *capias* in debt, has been always conſtrued within the equity of the 9 *Ed.* 3. ſo that if there be ſeveral executors defendants, and *cepi* is returned as to one, and a *non eſt inventus* as to the reſt, the plaintiff ſhall proceed againſt him that appears, and ſhall have judgment againſt all, for the default upon a *capias* is the ſame as upon the grand diſtreſs. 1 *Salk.* 312.

If one executor hath the poſſeſſion of the teſtator's goods, which are taken from him, both muſt join in an action of treſpaſs; for the poſſeſſion of one is the poſſeſſion of the other; and if one only ſhould bring the action and the other ſhould releaſe it, ſuch releaſe would be good. 19 *Hen.* 6. 65. 16 *Hen.* 7. 4. 3 *Leon.* 209. *S. P. per Coke*; but in *Godolph.* 134. and *Off. of Ex.* 104. it is ſaid, that if goods he taken out of the poſſeſſion of one executor, he alone may maintain an action for the ſame, and that without naming himſelf executor, for which is cited 38 *Ed.* 3. 9.

It is ſaid, that executors, when ſued, cannot plead diſtinct pleas, becauſe they repreſent but one perſon, who could have but one plea, if he was living; but it is ſaid to be holden by others, that executors may plead diſtinct pleas, and that ſhall be tried which is beſt for the teſtator, and moſt peremptory to ſettle the controverſy. *Off. of Execut.* 98. *Godolph.* 136.

4. *Of the probate of wills, and juriſdiction for that purpoſe; form of proving a will, and of entring a caveat.*

It appears to have been a matter of great controverſy, to whom the probate of wills and granting adminiſtration did originally belong, and whether theſe were matters intirely of eccleſiaſtical cognizance; but it ſeems now to be the better opinion, that the probate of teſtaments did not originally belong to the eccleſiaſtical juriſdiction, but to the reſpective lords of manors where the teſtator died, as all other matters did. 2 *Bac. Abr.* 397, 398.

Lindwood 174. *verbo Approbatis* ſays, That the juriſdiction of the eccleſiaſtical court touching teſtamentary matters, is by the cuſtom of *England*, and not by the eccleſiaſtical law.——*Wilkins* 78. *Lamb. Saxon Laws* 64. make it appear, that the biſhop and ſheriff ſat together in the county-courts; and by the *Saxon* laws, which they give us, it plainly appears, that the probate of teſtaments was in the county-courts.—— *Seld. Eadmerus* 167. gives the charter of *William the Conqueror*, which firſt ſeparated the Eccleſiaſtical court from the Civil; but this charter does not mention matters teſtamentary, or the probates of wills, to be of eccleſiaſtical conuzance, but only ſays, that the crimes that were to be proſecuted *pro ſalute animæ*, were to be of that conuſance.———And therefore, according to *Selden*, *Eatlmerus* 168. the eccleſiaſtical juriſdiction did not prevail herein till the time of *Rich.* 2. at which time the clergy got the King to publiſh the law of *William the Conqueror*, and confirm the ſame, and that no matters of eccleſiaſtical conuſance ſhould be tranſacted in the county court; this is the charter of 2 *Rich.* 2. *Membrano* 12. *No.* 5. and is mentioned in *Selden's Eadmerus* 168. From henceforward the clergy had the whole juriſdiction of wills, becauſe the county court could not receive the probate, and the King's court could not intermeddle with it, becauſe by a charter in *Henry the Firſt*'s reign, the King's tenants who owed ſuit to it, were enabled to diſpoſe of their perſonal eſtate for the good of their ſouls, and of this the clergy were thought to be the propereſt perſons to take care. *Plow.* 179. in the caſe of *Gregs* and *Fox*.——Hence in *Fitz. Abr.* tit. *Teſtament* 148. it is ſaid by *Fairfax*, that it was but of late the church had the probate of wills, and he ſuppoſes that it was given to them by ſome act of parliament.——And in the 11 *H.* 7. *Fineux* aſſerts that the probate of wills did not belong to the ſpiritual court by the eccleſiaſtical law, but came to them by cuſtom and uſage.——And with theſe opinions Lord *Coke* agrees in *Henſlow*'s caſe, 9 *Co.* 38. and on theſe foundations concludes, that when the will is proved in the eccleſiaſtical court, the court has executed its authority, but the executors are to ſue in the temporal courts to get in the eſtate of the deceaſed.

But however it might have been formerly, it is now certain, that the ſpiritual court is the only court, except in very few inſtances, (ſee *Off. Ex.* 43.) that has juriſdiction of the probate of wills, and as incident to ſuch juriſdiction, hath power to determine all thoſe matters that are neceſſary to the authenticating of them. Hence it hath been adjudged, that if the ſeal of the ordinary appears to the probate, it cannot be ſuggeſted or given in evidence in the Common law courts, that the will was forged, or that the teſtator was *non compos*, or that another perſon was executor; but it may be given in evidence, that the ſeal was forged, or the will repealed, or that there were *bona notabilia*, becauſe theſe are not in contradiction to the real ſeal of the court, but admit the ſeal and avoid it. *Raym.* 405, 406. 1 *Sid.* 359. 1 *Lev.* 235. *Vaugh.* 207. 1 *Show.* 293. *Hard.* 131. 2 *Rol. Abr.* 299. *Carth.* 143.

But if the ſpiritual court do admit a will, but yet will not give the probate thereof to the executor, becauſe he cannot give ſecurity for a juſt adminiſtration, the temporal courts will grant a *mandamus*; for though they are to determine whether there be a will or not, yet if there be a will, the executor has a temporal right, and they cannot put any terms on him but what are mentioned in the will. *Skin.* 299. 1 *Salk.* 36.

As to the diſpoſition of inteſtates eſtates, and granting adminiſtration, ſee title Adminiſtrator.

The judge may, *ex officio*, or at the inſtance of the party intereſted, call the executor to prove the will; ſome ſay he may be cited at the inſtance of any perſon, to know whether the party inſtancing hath any legacy left him, or no. *Godolph.* 60.

If the executor appears not to prove the will upon the ordinary's proceſs, but ſtands in contempt, he is excommunicable; but if he appears and makes oath, that the teſtator had *bona notabilia* in divers dioceſes, or within ſome peculiar juriſdiction than that wherein he died, he is to be diſmiſſed to prove the will in the archbiſhop's court, and to exhibit the ſame under ſeal within forty days next after. *Godolph.* 58, 59.

Alſo the ordinary or metropolitan, as the caſe ſhall require, may ſequeſter the teſtator's goods until the executor proves the will. *Godolph.* 63.

If it be uncertain, whether the teſtator be dead or alive, it muſt be left to the diſcretion of the judge, whether he thinks him ſo or not; and if there be good preſumptive evidence in law to think him dead, then he muſt prove the will, as if he be beyond ſea in remote parts, and it's common and conſtant fame, that he is dead, eſpecially if the executor of ſuch perſon be honeſt, and the goods are *bona peritura*, and the teſtament itſelf in favour of children, or to pious uſes. *Godolph.* 61, 62.

The time of proving a will is left to the diſcretion of the judge, according as the circumſtances of the caſe ſhall require or admit; but regularly it ought to be inſinuated or brought in to be proved within four months after the teſtator's death. *Godolph.* 61.

Teſtaments may be proved either in common form, as where there is no conteſt about the will; but the executor preſenting the will before the judge, without citing the parties intereſted, doth depoſe the ſame to be the true, whole, and laſt will of the teſtator, and thereupon the judge does allow the will, and fixes his ſeal and probate

to

to it. *Godolph.* 62. Or a will may be proved in form of law, as were it is exhibited before the judge in preſence of the parties intereſted, as the widow and next of kin, and then the proof examined and fully heard, and at laſt allowed. *Godolph.* 62.

The difference between the two probates is this; Where a will is proved in common form, it was, at any time afterwards within thirty years, to be queſtioned and called in debate; which it cannot be in caſe it be proved in form of law. *Godolph.* 62.

If the executor refuſes to prove the will, or if there be a will and no executor named, the ordinary is to commit adminiſtration *cum teſtamento annexo* to ſome proper perſon, from whom he may take bond for a faithful adminiſtration; but in caſe there be no will, then he is to grant adminiſtration to the next of kin of the deceaſed; and in caſe of their refuſal, he may grant it to a creditor, or any other perſon deſiring the ſame; and if no-body will take adminiſtration, the ordinary may grant letters *to collect the goods of the deceaſed.* *Godolph.* 61.

It is uſual, when there is a conteſt about a will, or when the right of adminiſtration comes in queſtion, to enter a caveat in the ſpiritual court, which by their law is ſaid to ſtand in force for three months. *Godolph.* 258. *Goldſb.* 119. 2 *Rol. Rep.* 6. *Cro. Jac.* 463-4.

But it is ſaid, that our law takes no notice of a caveat, and that it is but a mere cautionary act done by a ſtranger, to prevent the ordinary from doing any wrong, and that therefore if adminiſtration be granted pending a caveat, this is valid in our law, tho' by the law in the ſpiritual court, it may be ſuch an irregularity as will be ſufficient to repeal it. 1 *Rol. Rep.* 191. *Cro. Jac.* 463. 2 *Rol. Rep.* 6.

In the caſe of one *Offley*, where adminiſtration was granted to him pending a caveat, and no notice taken of it, or of the party that entred it, and for this cauſe there was a citation to have this adminiſtration repealed; and on a motion for a prohibition in behalf of *Offley*, it was urged, that the ſpiritual court having once granted adminiſtration, they had executed their authority, and have no power over the adminiſtrator afterwards, and a caveat is only for private information of the judge, but does not ſuſpend their juriſdiction; it is *conſilium*, but not *præceptum*; no countenance was ever given to it by the law; that to give them liberty to repeal adminiſtration for this cauſe, were to give it them in all caſes, and then all the inconveniencies of compelling diſtributions will follow; for they may leave out ſome formality on purpoſe to preſerve power over the adminiſtrator, or they may make it cauſe of repeal, becauſe adminiſtration is granted to a child already preferred, or the like; and by 21 *Hen.* 8. they have an election, which when it is once made, no man can complain; for none have any right or title precedent; and for theſe reaſons a prohibition was granted. But on another day, on motion for a conſultation, the court ſaid, that to take from the ſpiritual court all power of examining the formality of granting letters of adminiſtration, would occaſion undue catching of adminiſtrations, and confound and deſtroy all their form, and courſe of proceedings, which are in ſome caſes neceſſary; and it was not the intention of the ſtatute, to alter the courſe of granting adminiſtrations, and to eſtabliſh irregular adminiſtrations, but only to direct the ordinary, and to ſtreighten the liberty they took upon them before; and for the matter of the caveat, we know not what weight and regard it may have in their law; it may be eſſentially neceſſary, that where there is a conteſt and competition, both parties ſhould be heard before any thing be done, or the caveat diſmiſſed; they have a rule, that no adminiſtration ſhould be granted within fourteen days, that no party may be ſurprized, and we have known an adminiſtration granted againſt this rule repealed, tho' no-body elſe could pretend any right; but the ſame day a new adminiſtration has been granted to the ſame party, and in theſe kind of queſtions creditors are concerned; and it may be very miſchievous to throw off and ſlight all their forms; wherefore the court would adviſe, and according to the report of this caſe in 1 *Lev.* *Moreton* and *Windham*, at another day, were for diſcharging the rule for a prohibition; and they held, that granting adminiſtration, pending a caveat, was ſufficient cauſe to revoke, and that was like a *ſuperſedeas* in our law, which made a judgment given afterward erroneous; but *Kelynge* and *Twiſden* held, that the caveat was of no force to hinder the grant of the adminiſtration; for it is not a judicial act of the court, but only an entry of a memorandum by a clerk in court, for the giving of caution; and being no judgment or record of the court, the court of *B. R.* are as proper judges of the force and effect of it as the ſpiritual courts, and are likewiſe to ſee, that they grant adminiſtration according as they are impowered by the ſtatutes; and the court being thus divided, there could be no rule for diſcharging the prohibition. 1 *Lev.* 186. 1 *Sid.* 293. and 2 *Keb.* 63, 72. *S. C.*

5. *What ſhall be deemed a* devaſtavit *in executors, and pleadings therein; order of paying debts and legacies; and in what caſes an executor may make himſelf liable* de bonis propriis.

A *devaſtavit* is a miſmanagement of the eſtate and effects of the deceaſed, in ſquandering and miſapplying the aſſets, contrary to the truſt and confidence repoſed in them, and for which executors and adminiſtrators ſhall anſwer out of their own pockets, as far as they had, or might have had aſſets of the deceaſed. *Off. of Ex.* 156. *Godolph.* 203.

Executors may be guilty of a *devaſtavit*, not only by a direct abuſe by them, as by ſpending and abuſing the effects of the deceaſed, but alſo by ſuch acts of negligence and wrong adminiſtration as will diſappoint creditors of their debts. *Off. of Execut.* 157.

Therefore it hath been held, that if the executor ſells the teſtator's goods at an under value, eſpecially if he might have got more for them; or if this were done by him for his own advantage, and to defraud creditors, that is a *devaſtavit*, and he ſhall anſwer the real value. *Off. of Ex.* 157. *Kelw.* 59. 3 *Leon.* 143.

So if an executor omits to ſell the goods at a good price, and after they are taken from him, there the value of the goods ſhall be aſſets in his hands, and not what he recovers, for there was a default in him. 6 *Mod.* 181-2.

But if, without any omiſſion of his, goods are taken out of his poſſeſſion, and he does not recover ſo much in damages as the goods were really worth, and that happens not through any default of his, he ſhall anſwer for no more than he recovers: ſo if the goods be periſhable goods, and before any default in him to preſerve them, or ſell them at due value, they are impaired, he ſhall not anſwer for the firſt value, but ſhall give that matter in evidence to diſcharge himſelf; but if one takes goods out of his poſſeſſion, he muſt ſue him that took them, to have an opportunity of diſcharging himſelf of anſwering more in aſſets than he recovers. 6 *Mod.* 181.

If the executor releaſes debts due to the teſtator, this ſhall charge him to the value of the debt, though perhaps he did not receive near ſo much as was due: ſo if he releaſes a cauſe of action, accruing either in the lifetime of the teſtator, or in his own time, in the right of the teſtator, this will be a *devaſtavit*. *Off. of Ex.* 158. *Hob.* 66. 1 *And.* 138. *Cro. Eliz.* 43. 4 *Leon.* 102. *Godb.* 29.

Alſo it is ſaid, that if an executor pays money in diſcharge of an uſurious bond, entred into by his teſtator, that this is a *devaſtavit*. *Hob.* 167. *Noy* 129.

It is holden, that if an executor to an obligee in a penal bond, after the bond is forfeited, releaſes the penalty on receipt of principal and intereſt, that this is a *devaſtavit*; but the contrary hereof his holden by three judges in *Cro. Car.* for that the executor in this caſe does no more than what in equity and conſcience he ought to do; but if an infant executor gives ſuch a releaſe, it is void; but this it ſeems ariſes from the privilege of infancy. *Off. of Ex.* *Cro. Car.* 490.

If an executor takes an obligation in his own name, for a debt due by ſimple contract to the teſtator, this ſhall charge him as much as if he had received the money;

money; for the new ſecurity hath extinguiſhed the old right, and is *quaſi* a payment to him. *Off. of Ex.* 158. *Yelv.* 10. 2 *Lev.* 189.

So if the executor ſues a perſon by trover and converſion, in which he has a right to recover; and afterwards he and the defendant come to an agreement, that he ſhall pay the executor ſuch a ſum at a future day, and the party fails, this is a *devaſtavit*; and he ſhall anſwer *ad valorem*. 2 *Lev.* 189. 2 *Jon.* 88. *S. C.* 1 *Vern.* 474. *S. C.*

So if an executor ſubmits the debts, or whatever he is intitled to in right of the teſtator, to arbitration, and the arbitrators award him leſs than his due; this being his own voluntary act ſhall bind him, and he ſhall anſwer for the full value. *Off. of Ex.* 71, 159. 3 *Leon.* 51.

If an executor neglects to pay intereſt, and afterwards acknowledges a judgment for principal and intereſt, this is a *devaſtavit*. 2 *Lev.* 40.

If an executor ſells at great under value the goods of the teſtator, 'tis no *devaſtavit*; *per Frowicke* Ch. J. *Kelw.* 51. *a. pl.* 5. *Trin.* 18 *H.* 7. *Anon'.*

If executor ſells goods worth 10*l.* for a penny, all the ſurpluſage ſhall be adjudged a *devaſtavit*; *per Frowicke* Ch. J. *Kelw.* 59.——The plaintiff may aver the under value, and it ſhall be tried by jury; *per Frowicke* Ch. J. 63. 6.—But it is better to ſell under the value than to loſe the whole by a total forfeiture, as in caſe of a leaſe for years, which comes to the executor ſubject to a condition for payment of rent, or of a ſum in groſs, and no profits accrue to him to enable him to pay it. *Went. Off. of Ex.* 114, 115.

Adminiſtration *durante minore ætate* of two infants executors was granted to another, who poſſeſſed himſelf of the goods of the teſtator to the value of 400*l.* and when the infant executors came of age they releaſed to the adminiſtrator all demands. Adjudged this was a *devaſtavit*, though the goods never were in their poſſeſſion, and the releaſe of the infants executors was aſſets. *Godb.* 29. *pl.* 39. 27. *Eliz. C. B. Kitley*'s caſe.

Surrender of a term by executor, which was deviſed by *A.* adjudged a *devaſtavit*, yet it ſeems *A.* may have this as a legacy notwithſtanding this ſurrender. *Mo.* 358. *pl.* 487. *Trin.* 36 *Eliz. Carter* v. *Love.*

If one ſues the adminiſtrator, and gives notice, yet he may confeſs the action of another that commences his ſuit after if there is no fraud; but if adminiſtrator is ſued on a bond, and pays another debt on bond without ſuit, there if he had notice of the ſuit it is a *devaſtavit*. The notice is material. *Mo.* 678. *pl.* 926. *Trin.* 44 *Eliz. C. B. Searleſs*'s caſe.

In a *ſci. fa.* on a judgment, 'tis ſuggeſted, that defendant *bona, &c. ad valentiam, &c. elongavit, vendidit, & in uſum ſuum proprium convertit, & diſpoſuit ea intentione quod dicta executio non fieret.* The ſheriff found that *diſpoſuit in uſum proprium*, and defendant appeared and traverſed, and 'tis found by verdict againſt him; the court will not doubt the *ea intentione*, and ſo he has done a tortious act in contriving and endeavouring to defraud the plaintiff of his debt, which amounts to a *devaſtavit*. *Saund.* 307. *Mich.* 21 *Car.* 2. *Merchant* v. *Driver.*

An executor in caſe of a *devaſtavit* is in nature of a truſtee of an eſtate. *Chanc. Caſes* 304. *Mich.* 29. *Car.* 2. in *Vanacre*'s caſe.

The penalty of a bond is but 40*l.* but the condition is for 200*l.* the executor cannot pay it without a decree, without a *devaſtavit* to other creditors; but the payment was decreed. 2 *Chanc. Caſes* 225. *Hill.* 28 & 29 *Car.* 2 *Sims* v. *Urry.*

Execution againſt the goods of the executor for a debt *in jure proprio* is a *devaſtavit nolens volens*, 3 *Keb.* 839. in *pl.* 1. *Hill.* 29 & 30 *Car.* 2. cites it as held by *Rainsford* Ch. J. in the laſt term in *Norden*'s caſe.

It is a *devaſtavit* to permit intereſt to run in arrear, and then ſuffer judgment for it; and want of aſſets to pay before the incurring of it by the adminiſtrator ſhall not be intended unleſs it be expreſsly pleaded. 2 *Lev.* 40. *Hill.* 23 & 24 *Car.* 2. *B. R. Seaman* v. *Dee.*

Executor confeſſes judgment in *aſſumpſit* when there is another debt upon bond, he muſt pay both, for he might have pleaded the bond in bar of the contract debt, which not having done, his not having aſſets to pay both is no excuſe. 3 *Lev.* 114. *Paſch.* 35 *Car.* 2. *C. B. Britton* and *Bathurſt.*

Place waſted recovered againſt an executor *de ſon tort* is a *devaſtavit*, and if there happen to be a rightful executor or adminiſtrator, he ſhall recover againſt the executor *de ſon tort*, but he cannot get the land from the reverſioner again. 2 *Show.* 457. *Hill.* 1 & 2 *Jac.* 2. *B. R. City of Norwich* v. *Johnſon.*

Executor of an obligee takes a goldſmith's note, who fails; it is a *devaſtavit*; cited as adjudged by *Pemberton* Ch. J. *Vern* 474. *Mich.* 1687. in the caſe of *Barker* v. *Talcot and Shaw.*

Executor loſes a bond due to teſtator. The court inclined to charge defendant with the debt, but for the preſent directed only that defendant proſecute with effect a ſuit brought by him againſt the obligor, in order to recover the money on the loſt bond, and reſpited judgment in the mean time. 2 *Vern.* 299. *Trin.* 1693. *Goodfellow* v. *Burchet.*

A recovery by baron of a feme executrix amounts to a *devaſtavit* at law *pro tanto*, ſo as to charge huſband and wife in their own right. *Per Holt* Ch. J. but *per Rookby* J. it is direct aſſets at law. *Carth.* 463. *Mich.* 10 *W.* 3. *B. R. Yard* v. *Ellard.*

Executor appoints another to receive a debt of teſtator's, who will not repay; it is a *devaſtavit*. 6 *Mod.* 93. *Hill.* 2 *Ann. B. R.* in the caſe of *Jenkins* v. *Plume.*

A term aſſigned by an executor in truſt to attend the inheritance, ſhall in equity follow all the eſtates created out of it, and all incumbrances ſubſiſting upon it; but the term being by this means become not aſſets at law, the executor who aſſigned the ſame is liable to the creditors as for a *devaſtavit*. *Per* Lord Chancellor. 3 *Wms's Rep.* 330. *Mich.* 1734. in the caſe of *Charlton* v. *Low.*

A. is a creditot by ſtatute 100*l.* and *B. C.* and *D.* by bond 100*l.* and the aſſets in the executor's hands are only 100*l.* executor pays the 100*l.* to *D.* this is a *devaſtavit* only as to *A.* and he is not liable to *B.* or *C.* *Went. Off. Ex.* 163.

But if he had only paid a legacy or debt by contract, leaving nothing to ſatisfy the debts by ſpecialty, then he had been equally liable to each of the other creditors, *viz.* to him who could firſt recover, or by the voluntary act of the executor could obtain payment, who muſt be preferred if the ſum would reach no farther, and there being no creditor by record. *Went. Off. Ex.* 163.

R. brought debt againſt *A.* as executor, and upon *plene adminiſtravit* and iſſue upon that, aſſets are found, and judgment for the plaintiff, and upon a *teſtat'* execution was awarded to the ſheriff in another county than where the trial was; that ſheriff may return a *nihil*, and is not eſtopped by the verdict and judgment; otherwiſe it is of the ſheriff of that county where the action was brought, for he cannot return a *nihil, &c.* but he ought to return a *devaſtavit*. *Noy* 69. *Robbin*'s caſe, cites 9 *H.* 6. 9.

If judgment be given againſt an executor on demurrer, and execution be awarded, the ſheriff cannot return *nulla habet bona teſtatoris*, but is to return a *devaſtavit*, as if it had been found againſt the executor by verdict; for *per cur.* he has charged himſelf by his own plea. *Cro. E.* 102. *pl.* 9. *Trin.* 30. *Eliz. B. R. Stubbs* v. *Rightwife.*

Sheriff of the county where the writ is brought ought to return *devaſtavit, &c.* and thereupon the plaintiff ſhall have proceſs in another county; but a further queſtion was, If a *ſci. fa.* upon *teſtatum* ſhall iſſue into another county before the ſheriff of the county where the writ was brought had returned a *devaſtavit?* For ſome conceived that *devaſtavit* where the writ was brought ought firſt to be returned, and then upon a *teſtatum*, proceſs ſhould iſſue into any county in *England.* Others conceived that ſo it might, though no *devaſtavit* was returned on a *teſtatum*. 2 *Lee* 67. *pl.* 90. *Trin.* 31 *Eliz.* in the Exchequer. *Noon*'s caſe.

Sci. fa. againſt an executor, why the plaintiff ſhould not have execution *de bonis propriis*, is not to be awarded

on the ſurmiſe of the party upon a devaſtation, nor in any caſe where the judgment is *de bonis teſtatoris*, unleſs it be upon return of the ſheriff where he returns a *devaſtavit*. *Cro. E.* 530. *pl.* 61. *Mich.* 38 & 39 *Eliz. C. B. Aldworth* v. *Peel.*

The defendant is not concluded by the inquiſition and return of the ſheriff, but that he well may traverſe it. For otherwiſe he ſhould be without remedy. *Cro. E.* 860. *Gibſon* v. *Brook.*

In caſe of a *devaſtavit* by one executor, judgment ſhall be general againſt all for the principal *de bonis teſtatoris*, & *ſi non*, *de bonis* of him only againſt whom the *devaſtavit* is returned. *D.* 210. *Marg. pl.* 23. cites *Mitford*'s caſe.

In *ſcire facias* againſt an executor upon a *devaſtavit* returned: he pleaded that he had no aſſets at the time of the iſſuing of the *ſcire facias*, *obſque hoc* that he had waſted, *&c.* And this was adjudged to be an ill traverſe; for his having waſted is but inducement; and the ſubſtance is, whether or no he had aſſets at the time of the firſt action brought. *Hardr.* 70. *pl.* 6. *Trin.* 1656. *in Scacc. The Protector* v. *Holt* cites *Mich.* 22 *Car. B. R. Lord Roberts* v. *Luxton.*

An action of debt lies not on a *devaſtavit*, unleſs there be a judgment too. *Cart.* 2 *Mich.* 16 *Car.* 2. *C. B. Burrel* v. *Richmond.*

In a judgment againſt an executor a *fieri facias* iſſued out to the ſheriff, with a *ſcire fieri* inquiry, and a *devaſtavit* was found according to the common courſe, the return whereof was, *Quod diverſa bona quæ fuerunt teſtatoris, &c. habuit, quæ elongavit & in uſum ſuum proprium convertit*; it was objected againſt this return, that it was not ſaid *devaſtavit*, for in caſes an executor may juſtly convert the goods to his own uſe.

Hale ſaid, Anciently when the ſheriff returned a *devaſtavit*, which was not found by any inquiſition, and to which there was no anſwer, it was neceſſary to inſert the word *devaſtavit*, but otherwiſe in a return upon this ſpecial writ; for if the caſe be, that he hath not waſted the goods, but only eloigned them ſo as the ſheriff cannot come at them, the executor is chargeable upon the writ *de bonis propriis*, and this return anſwers the writ. *Vent.* 221. *Trin.* 24 *Car.* 2. *B. R. Blackamore* v. *Mercer.*

In a *ſcire facias*, with inquiry of aſſets, and waſte found and returned, to which the defendant pleads a former judgment, *ultra quod*, *&c.* ſo *plene adminiſtravit*, to which the plaintiff demurred, eſpecially becauſe the waſte is not traverſed, which is the point of the inquiſition; *per cur.* it ought to be traverſed, albeit on a *ſcire facias* on a judgment *plene adminiſtravit* be a good plea without traverſe of the ſuppoſed waſte in the count; but here the waſte being returned it is otherwiſe. *Sed adjornatur.* 3 Keb. 187, 188. pl 45. Trin. 25 Car. 2. B. R. Bold *v.* Rice.

If feme executrix ſurvives her baron, ſhe ſhall be charged for waſte committed by the baron, but not for the coſts returned againſt the baron *de bonis propriis.* 2 Lev. 161. Hill. 27 & 28 Car. 2. B. R. Horſey *v.* Daniel.

In a *devaſtavit*, an inventory, though not exhibited by the party defendant, but by commiſſioners on a commiſſion out of the ſpiritual court, *&c.* was allowed for evidence, and if defendant do not, or will not exhibit an inventory, it ſhall be taken *pro confeſſo* that he has aſſets; *per Pemberton* Ch. J. 2 *Show.* 163. *pl.* 152. *Trin.* 33 *Car.* 2. *B. R. Anon'.*

On a ſpecialiſſue after verdict it was held ill for defendant to ſay, *Non devaſtavit ad valorem* as the plaintiff had alledged, becauſe he did not ſay, *Nec aliquam inde parcel'*; for if part were waſted the plaintiff ſhall recover ſo much, as well as on a *plene adminiſtravit*, if aſſets be found to part of the debt. 2 *Show.* 447. *pl.* 414. *Mich.* 1 *Jac.* 2. *B. R. Blanch* v. *Gabard.*

Debt on bond againſt an adminiſtrator who waſtes goods, and dies inteſtate, leaving goods worth 500 *l.* and debts of his own of that value; *ſcire facias* is brought on the new ſtatute againſt his adminiſtrator, and he pleads payment of the 500 *l.* for ſimple contract debts of the waſting adminiſtrator, and held good; for the waſting is the charge, and that is of no higher nature, and by that ſtatute he is to be in the ſame caſe with his inteſtate, and he might have paid his own debt with it. 2 *Show.* 485. *pl.* 447. *Mich.* 2 *Jac.* 2. *B. R. Britton* v. *Buckworth.*

An adminiſtrator ſhall not be compelled to find ſpecial bail upon a bare ſuggeſtion of a *devaſtavit*; but in a debt upon judgment where a *devaſtavit* is actually returned by the ſheriff he ſhall. *Cumb.* 206. *Paſch.* 5 *W. & M. Dubray* v. ———.

Upon a writ awarded to the ſheriff upon a *devaſtavit* ſuggeſted againſt two executors, to inquire of a waſting by both; the ſheriff returned a *devaſtavit* as to one, but ſaid nothing as to the other; this being aſſigned for error after judgment upon a verdict was held to be aided by the verdict, being but an inſufficient return, or a miſreturn, by reaſon of the omiſſion; but it would have been otherwiſe if no return at all had been made. 1 *Salk.* 363. *pl.* 1. *Paſch.* 5 *W. & M.* in *B. R. Brook* v. *Ellis.*

The better to conſider the order which the law preſcribes for the payment of debts, and the duty injoined executors and adminiſtrators in diſcharging themſelves of the aſſets of the deceaſed, and which they muſt obſerve at their peril, it is neceſſary to take notice, that theſe debts are divided into three ſorts; 1. Debts by record. 2. Debts by ſpecialty. 3. Debts by ſimple contract *Off. of Ex.* 131.

Debts by record, which are to have the firſt precedency, are again divided into debts due to the crown, debts by judgments obtained in any court of record, and debts by recognizances, ſtatutes merchant or ſtaple. *Off. of Ex.* 131.

Of theſe the higheſt in its nature is the King's debt, and his prerogative to be preferred, other creditors ariſes from the regard the law has to the publick good beyond any private intereſt. 2 *Inſt.* 32 *Off. of Ex.* 132. *Cro. Eliz.* 793.

Therefore if an executor, whoſe teſtator was indebted by matter of record to the King, be ſued by judgment, or any other creditor, he may plead in bar, that his teſtator died ſo much indebted to the King, ſhewing how; and that he hath not aſſets above the value of that debt; and this will be a good plea: ſo if a creditor purſues his remedy by ſuing out execution upon a ſtatute merchant or ſtaple, the executor upon ſetting forth this matter will be relieved on an *audita querela.* *Off. of Ex.* 132.

But the debts due to the crown, which are to have a precedency, muſt be underſtood of debts of record; and therefore ſums of money due to the King upon wood-ſales, ſales of tin, or other his minerals, and for which no ſpecialty is given, are not to be preferred to the ſubject's debt by matter of record. *Off. of Execut.* 133.

So of amercements in the King's courts baron, courts of his honours which be not of record; alſo of fines for copyhold eſtates, or money for which ſtrays within the King's manors, or liberties, are ſold; theſe are not debts by record. *Off. of Ex.* 133.

Alſo whatever accrues to the King by an attainder or outlawry, is to be conſidered as a debt by ſimple contract before office found; for though the debts due to the perſon out-lawed, or attainted, were by matter of record, and although the outlawry and attainder are upon record, yet the King's title alſo muſt appear on record, which can't be before office found. *Off. of Execut.* 133.

Alſo it is ſaid that the arrearages of rent due to the King, whether it be a fee-farm rent, or rent reſerved on a leaſe for years, is to be conſidered as a debt by ſimple contract. *Off. of Ex.* 134.

Next to the King's debts on record are judgments to be paid, for theſe in regard to the ſolemnity of them are of greater notoriety than recognizances, or ſtatutes; for though theſe likewiſe be of record, yet as they are entred into by the private conſent and agreement of the parties, they are not eſteemed ſecurities of as high a nature in the eye of the law as judgments which are preſumed to be given *invitè*, though voluntarily acknowledged by the party. *Off. of Ex.* 135. 1 *Rol. Abr.* 926. *Cro. Eliz.* 793.

Therefore if a *ſcire facias* be brought againſt an executor on a judgment entred into by his teſtator, he can't plead *plene adminiſtravit*; for a judgment being to be paid next to the King's debt, the executor ought to ſhew, that he laid out the aſſets in the diſcharging the King's debt, or in ſatisfying ſome other judgment; otherwiſe it might be that he adminiſtered the aſſets in diſcharging ſtatutes, recognizances, or debts in ſpecialty; which he could not do before a debt on a judgment. *Cro. Eliz.* 575. *Allen* 48. *Moor* 858. *Raym.* 230. 3 *Keb.* 258. 2 *Keb.* 736. *Comb.* 298.

But if the judgment be ſatisfied, and only kept on foot to wrong other creditors; or if there be any defeazance of the judgment yet in force, the judgment will not avail to keep off other creditors from their debts. *Off. of Ex.* 136.

It hath been holden, and ſeems now agreed, that a decree in a court of equity is equal to a judgment at law; and that the filing of a bill in equity is of equal force to the filing of an original at law, to prevent the alienation of aſſets; and therefore where an executor, tho' without notice of a decree, paid a debt due by ſpecialty, he was decreed to pay it over again out of his own pocket. 1 *Vern.* 143. 3 *Lev.* 355. 2 *Vern.* 37, 88.

As to ſtatutes and recognizances they are of an equal degree, and to be paid next to judgments; and therefore the executor, where there are ſeveral conuzees, may prefer a ſubſequent ſtatute to a prior; for each ſtatute equally affects the perſonal eſtate, though as to lands the firſt ſhall have precedence. *Off. of Exec.* 138. *Dyer* 80. 1 *Rol. Abr.* 925. *Bridg.* 70, 80.

But if the teſtator had entred into a ſtatute for performance of covenants, and none of them were broken, in an action of debt againſt the executor on a ſpecialty, he can't plead this ſtatute; for perhaps the covenants may never be broken, and it would be unreaſonable to allow the executor to ward off a juſt debt upon a contingency that may never happen. 5 *Co.* 28. 1 *Rol. Abr.* 925. *Cro. Jac.* 8. *Cro. Car.* 362.

Debts by ſpecialty, as thoſe by bonds, *&c.* ſealed by the teſtator, are next to be paid. *Off of Ex.* 141.

Alſo it hath been adjudged, that if an action be brought againſt an executor on a ſimple contract of his teſtator's that he may plead, that his teſtator entred into a bond payable at a future day, and this will be a good bar. *Cro. Eliz.* 315. 3 *Lev.* 57. *S. P.*

Alſo rent arrear, and unpaid by the teſtator, is equal to a debt by ſpecialty; for this ſavouring of the realty, the executor can no more wage his law againſt ſuch a debt, than he can a debt by ſpecialty. *Off. of Ex.* 145. 1 *Rol. Abr.* 927.

So where debt was brought againſt an executor for rent reſerved on a parol-leaſe, after the leaſe was determined, and the executor pleaded, that the teſtator entred into an obligation, and that he had not aſſets *ultra* 5 *l.* which were not ſufficient to diſcharge this obligation; and on demurrer it was reſolved, that this rent, though reſerved on a parol-leaſe, was yet equal to an obligation; and that it ſtill remained in the realty, though the term was determined. 3 *Lev.* 267. 4 *Mod.* 44. 2 *Vent.* 184. *S. C. Comb.* 183. 1 *Vern.* 490.

Alſo by the cuſtom of *London*, if a citizen of *London* dies indebted by ſimple contract, ſuch debt is equal to a debt by ſpecialty. *Cro. Eliz.* 409. *Noy.* 53. 1 *Rol. Abr.* 557.

Debts by ſimple contract are poſtponed to all others, being debts of an inferior nature; yet an executor is bound, as far as he has aſſets, to pay them, as much as any other debt; and therefore a ſimple contract creditor need not allege, that the executor had aſſets to ſatisfy debts of a ſuperior nature, and his alſo; but if the truth be, that the executor has only aſſets ſufficient to ſatisfy ſuch ſuperior debts he muſt plead it. 9 *Co.* 88. *Off. of Ex.* 155. 1 *Rol. Abr.* 921. 5 *Co.* 82.

But though the law requires that debts ſhould be paid according to their ſuperiority, as herein ſet forth; yet may an executor pay a debt on a ſimple contract before a ſpecialty, if he has no notice of ſuch ſpecialty; for otherwiſe it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket, until he had paid away all the aſſets in diſcharging ſimple contract debts. *Keilw.* 51. *Plow.* 279. 2 *And.* 157. 1 *Sid.* 230. 2 *Shaw.* 492. 3 *Lev* 113-4. *Vaugh.* 94.

Alſo where there are ſeveral creditors in an equal degree, the executor may prefer which he pleaſes. See *Off. of Ex.* 142. *Dyer* 22. 1 *Rol. Abr.* 926. 1 *Sid.* 21. And an executor may, when a creditor himſelf, retain aſſets againſt thoſe who are in an equal degree with him. 1 *Rol. Abr.* 922. *Hob.* 127, 250. *Godb.* 217. *Cro. Eliz.* 135, 120. 1 *Leon.* 111. *Moor* 260.

Debt; the defendant pleaded fully adminiſtred; the plaintiff replied, that at another time he brought an action of debt againſt the now defendant, whereupon ſhe was outlawed upon mean proceſs, and ſhe brought error and reverſed the outlawry, whereupon he freſhly brought this action, and that at the time of the firſt action brought ſhe had aſſets, *& hoc petit quod inquiratur per patriam, & defendens ſimiliter*; and thereupon a verdict found for the plaintiff, and judgment; error was brought, and inſiſted upon, that here is not any plea; for though ſhe had aſſets at the time of the firſt action brought, yet ſhe afterwards might have well adminiſtred it by reaſon of a lawful recovery, or lawful payment after; *ſed non allocatur*; for it ſhall not be intended without ſpecial matter ſhewn; and it ſuffices if there was enough at the time of the firſt action brought, unleſs ſhe ſhews ſufficient cauſe of diſcharge after that time. *Cro. J.* 579. *pl.* 9. *Trin.* 18 *Jac. B. R. Aldrich* v. *Walthal.*

A. mortgaged land to *J. S.* and gave a bond to perform covenants, and about ſix years after died inteſtate; *M.* poſſeſſed herſelf of the goods without taking letters of adminiſtration, and pays away all the aſſets in diſcharge of debts on ſimple contract. About ſeven years after *A.*'s death an old dormant intail was diſcovered, and the heir in tail brought ejectment and recovered poſſeſſion, whereupon the executor of *J. S.* ſued *M.* on the bond; *M.* prays an injunction, ſhe having paid all away, and never having any notice given her of the bond. Defendant demurred and was allowed, the bill being an attempt to alter the courſe of law; but if any fraud had been charged on defendant, by which ſhe was deceived, or inducing her to pay away the aſſets, it might have varied the caſe. *Chanc. Prec.* 524. *pl.* 329. *Trin.* 1720. *Greenwood* v. *Brudniſh.*

Bond to ſecure 400 *l.* borrowed, was made *in quadraginta libris*, where the ſum borrowed amounted to *quadringent*, 120 *l.* of the 400 *l.* was paid; decreed the bond to ſtand as a good bond of the penalty of the 400*l.* for the ſecuring the 280 *l.* due, and that this bond takes place of any other bond on which judgment has not been obtained. *Trin. Rep.* 413. *Hill.* 31 *Car.* 2. *Simms* v. *Barry.*

A freeman of *London* having three baſtards by *B.* confeſſes a judgment to *B.* of 1000*l.* defeaſanced for payment of 500 *l.* in three months after his death; decreed that this, being a voluntary judgment, ſhall not prevail againſt debts by ſimple contract, nor againſt the widow of the freeman, but that ſhe muſt have her ſhare according to the cuſtom of the city, without any regard had to this judgment; but his debts being paid, the judgment would bind the legacy-part. 2 *Vern.* 202. *pl.* 186. *Hill.* 1690. *Fairbeard.* v. *Bowers.*

Legacies are properly recoverable in the ſpiritual court, yet if an executor pays legacies before debts, though by ſimple contract, it is a *devaſtavit* in him. *Off. of Ex.* 26. *Keilw.* 128. *Dyer* 254

And as the law makes it a *devaſtavit* in the executor to pay legacies before debts; ſo it prohibits the legatee from meddling with the legacy without the aſſent of the executor; and therefore it hath been holden, that if a legatee takes poſſeſſion of the thing deviſed, without the aſſent of the executor, that he may have an action of treſpaſs againſt him. *Godolph.* 148, 149. *Off. of Ex.* 27.

But

But as it is the will of the teſtator which gives the intereſt to the legatee; ſo this matter of aſſent ſeems only a perfecting act for the ſecurity of the executor; and therefore the law does not require any exact form in which it is to be made. Hence any expreſſion or act done by the executor, which ſhew his concurrence to the thing deviſed, will amount to an aſſent. *Off. of Ex.* 29. *Godolph.* 148. *Plow.* 525.

If *A.* deviſes a term to *B.* for life, remainder to *C.* and the executor aſſents to the deviſe to *B.* this will amount to aſſent to the deviſe over to *C.* and veſt the intereſt in him accordingly. 4 *Co.* 28. 3 *Co.* 96.

If one is himſelf both the executor and deviſee, and he enters generally without claim or demonſtration of election, he ſhall have the thing deviſed as executor, which is his firſt and general authority. 10 *Co.* 47. *Plowd.* 520. *a.* *Dyer* 367. *Cro. Eliz.* 223. 2 *Co.* 37. *b.*

So where a man poſſeſſed of a long term deviſed it to his wife for life, remainder to truſtees for his ſon's life, *&c.* and made his wife executrix; and it was held, that the wife took the term wholly as executrix in the firſt place, till ſhe agreed to the deviſe; but it being proved, that ſhe ſaid ſhe would take the term according to the will, it was held by the court to be a ſufficient aſſent. 1 *Lev.* 25.

So where in a like caſe, where the wife ſaid, that the ſon was to have the eſtate after her; and this was reſolved to be a ſufficient aſſent. 1 *Lev.* 25.

Hence it hath been held, that if a ſpecifick legacy be deviſed, as three gowns, *&c.* and the legatee takes money in ſatisfaction of them, that this amounts, 1ſt, to a conſent of the executor to the legacy or deviſe of them; and then it is a ſale of them by the legatee or deviſee to the executor for the money *eo inſtanti.* 2 *Bac. Abr.* 435. cites *Hil.* 5 *Ann. Becket* and *Ball.*

An executor may lay out ſo much of the teſtator's aſſets, as are neceſſary for defraying his funeral expences, before he has paid any of his debts or legacies. 1 *Rol. Abr.* 926.

And herein the executor is to be careful that the expences be moderate, and not exceeding the decree and circumſtances of the deceaſed, otherwiſe he may be guilty of a *devaſtavit.* *Off. of Ex.* 129, 130. *Comb.* 342.

And in ſtrictneſs it is ſaid, that no funeral expences are allowable againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearers fees; but not for pall or ornaments. 1 *Salk.* 296.

Executors are no farther chargeable than they have aſſets, unleſs they make themſelves ſo by their own act; as by pleading a falſe plea, *i. e.* ſuch a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be falſe. 1 *Rol. Abr.* 930. *Godolph.* 198.

Therfore if an executor being ſued pleads *ne unques executor*, and it is found againſt him, the judgment ſhall be *de bonis teſtatoris ſi, &c. ſi non, de bonis propriis*; for thereby he eſtrangeth himſelf from the teſtator, and by his own falſity and folly hath made his own goods chargeable. 1 *Rol. Abr.* 930, 933.

So if to an action brought againſt him he pleads a releaſe made to himſelf, and it is found againſt him, this ſhall charge him *de bonis propriis*; for it is a falſity which falls within his own knowledge. *Cro. Jac.* 671. 2.

So where an action of debt upon an obligation was brought againſt an adminiſtrator for 14 *l.* and he pleaded, that before notice of the action his adminiſtration was revoked; and that likewiſe before notice he delivered over 200 *l.* which he had of the inteſtate's, to the new adminiſtrator; the plaintiff replied, that the revocation was by covin and fraud, which being found for him, it was held, that he ſhould recover abſolutely from the adminiſtrator. *Yelv.* 219. 1 *Bulſt.* 187. *S. C.*

But if an executor pleads, that ſuch a deed is not the deed of his teſtator, or that a releaſe was given to the teſtator; tho' theſe prove falſe, yet the judgment ſhall be *de bonis teſtatoris*, for of theſe the executor cannot be preſumed to have ſo perfect a knowledge. 1 *Rol. Abr.* 931. *Cro. Jac.* 672.

So in debt upon a bond againſt baron and feme as adminiſtratrix, the defendant pleaded payment by the feme, after the death of the inteſtate, and it was found againſt him, and the judgment was, that he recover againſt them, *de bonis teſtatoris, ſi tantum habent in manibus, & ſi non, pro miſis de bonis propriis*, and held well enough; for though the plea is falſe, yet the huſband was a ſtranger to the inteſtate, and might not know whether the wife had paid it to the plaintiff, or not. *Cro. Jac.* 191.

So if an action of covenant be brought againſt an executor, and the breach aſſigned be in the time of the executor; yet the judgment ſhall be *de bonis teſtatoris*, for it is the teſtator's covenant which binds the executor, as repreſenting him, and therefore he muſt be ſued by that name. *Hob.* 188. *Cro. Jac.* 647, 671. *Hutt.* 35. 1 *Brownl.* 24. 1 *Rol. Abr.* 931, 932.

It is holden in *Shipley's* caſe, that if an action of debt on an obligation of 200 *l.* be brought againſt an executor, who pleads fully adminiſtred; and the plaintiff replies aſſets, which are found by the jury to the value of 172 *l.* that a judgment to recover the intire debt and damages, and coſts of the goods of the teſtator, *ſi, &c. & ſi non, tunc* the damages of his proper goods, is good, for that the defendant's bar being in effect, that he had not aſſets, the ſame amounted to a confeſſion of the debt, on which the plaintiff may take judgment immediately, tho' he cannot have execution until aſſets come to the hands of the executor. 8 *Co.* 134.

But in the caſe of *Dorcheſter* and *Webb* it ſeems to be holden, that the plaintiff, upon a plea of *plene adminiſtravit*, cannot have judgment of aſſets *in futuro*; for that this is ſuch an acknowledgment of the want of aſſets, as will bar him in the ſame manner as if the plaintiff had denied, that he had fully adminiſtred, which being found againſt him will bar him, and on which the plaintiff muſt alſo pay coſts. *Cro. Car.* 373.

But this matter came to be fully conſidered in the caſe of *Woel* and *Nelſon*, where in debt againſt an executor he pleads fully adminiſtred, whereupon the plaintiff prays judgment of aſſets *in futuro*, and it was ſo entred; and after, upon a ſuggeſtion of aſſets, the plaintiff ſues forth a *ſcire facias*, to which he pleads no aſſets, and it is found againſt him, and judgment accordingly; and it was urged for error, that the plaintiff hereby has confeſſed the plea of fully adminiſtred, and then it is as ſtrong againſt him as if there had been a verdict, in which he ſhould have been barred for ever; but it was reſolved for the plaintiff, for he had a good cauſe of action, and probably did not know that there were aſſets, and hath done nothing amiſs; for as ſoon as the executor denies aſſets by his plea, he reſts ſatisfied, and makes only a reſonable prayer, that he may be paid when aſſets come, as it is fit he ſhould, and therefore they agreed *Shipley's* caſe to be good law; for when the executor pleads *riens en mains*, he confeſſes the debt, which is a good foundation for the judgment; but the want of aſſets at preſent hinders execution, which is therefore ſtayed till aſſets ſhall come. 1 *Lev.* 286. 2 *Saund.* 214. 1 *Sid.* 448. 2 *Keb.* 606, 671. 1 *Vent.* 94.

If an executor, in conſideration that a creditor to the teſtator will forbear to ſue him for a certain time, promiſes to pay him his debt, this ſhall bind him; and an *aſſumpſit* lies againſt him on this promiſe, without alleging that he hath aſſets. *Cro. Jac.* 47. 1 *Rol. Abr.* 921.

So where in *aſſumpſit* the plaintiff declared, that *J. S.* deviſed a legacy to him, and made the defendant executor, and the plaintiff intending to ſue him for the legacy, the defendant, in conſideration of forbearance, promiſed to pay him: the defendant pleaded divers bonds and judgments, and *nul aſſets ultra*, upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had aſſets or no, for he is charged upon his own promiſe, in conſideration of forbearance; and a forbearance of ſuit for a legacy is a ſufficient conſideration. 2 *Lev.* 3. 1 *Vent.* 120.

So if *A.* together with *B.* is bound to *C.* for the proper debt of *B.* and *A.* pays the money, and *B.* dies, and makes *D.* his executor, and *D.* in conſideration that *A.* will

will forbear to ſue him till ſuch a time, aſſumes and promiſes to repay him; this conſideration is good, though *D.* was liable in equity only. 1 *Sid.* 89. 1 *Lev.* 71. *S. C.*

6. *Of actions and remedies againſt executors, and pleadings.*

It is clearly agreed, that executors and adminiſtrators ſtanding in the place of thoſe they repreſent, ſhall be anſwerable for all their debts, covenants, *&c.* as far as they have aſſets, and that the teſtators covenants ſhall extend to them, though not expreſsly mentioned. *Off. of Exc.* 117. *Cro. Car.* 187. 1 *Jon.* 223. *Yelv.* 103.

And therefore, where a man covenanted that *A.* ſhould ſerve *B.* as an apprentice for ſeven years, and died, it was held, that if *A.* departs within the term, a writ of covenant lies againſt the executor of the covenantor without naming. *Bro. Covenant*, 12.

If a man be bound to inſtruct an apprentice in a trade for ſeven years, and the maſter dies, the condition is diſpenſed with, for it is perſonal; but if he were likewiſe bound to find him with meat, drink, cloaths and lodging; this the executors are obliged to perform. 1 *Sid.* 216 1 *Keb.* 761, 820. 1 *Lev.* 177. *S. C.*

If *A.* leaſes to *B.* and *B.* covenants to repair, *&c.* and he aſſigns to *J. S.* who dies inteſtate; the premiſes being out of repair, the leſſor may bring covenant againſt his adminiſtrator as aſſignee, and declare, that he made a leaſe to *B. &c. cujus ſtatus & reſiduum termini anorum, &c. devenit, &c. per aſſignationem* to the adminiſtrator. *Carth.* 519. 1 *Salk.* 309. *S. C.*

The executor of a leſſee for years muſt pay the rent reſerved, though the rent be of greater value than the land, *Off. of Execut.* 1 *Salk.* 296.

And if an action of debt be brought againſt an executor, for the arrearages of a rent reſerved upon a leaſe for years, and incurred after the death of the teſtator, the writ ſhall be in the *debet* and *detinet*, becauſe the executor is charged of his own poſſeſſion. 1 *Rol. Abr.* 603. *Cro. Eliz.* 711. *Moor* 566. 1 *Brownl.* 56. *Cro. Jac.* 411, 546. 1 *Bulſt.* 23.

But though he is to be charged in the *debet* and *detinet*, yet the executor may plead that he has not aſſets, and that the land is of leſs value than the rent, and demand judgment, if he ought not to be charged in the *detinet* only; but ſo long as he hath aſſets he can't wave the term, or ſay, that it is of leſs value than the rent; but after he hath diſcharged himſelf of the aſſets, he may waive the poſſeſſion by giving notice to the reverſioner. 1 *Salk.* 297. *Off. of Exec.* 119.

Alſo in all actions againſt executors and adminiſtrators, the charge muſt be in the *detinet* only; for they are only chargeable in reſpect of the aſſets. 8 *Co.* 159, 536. But it hath been held, that if debt be brought againſt an adminiſtrator in the *debet* and *detinet*, for rent due before his time, where it ſhould be only in the *detinet*, that this is aided after verdict, by 16 & 17 *Car.* 2. 1 *Sid.* 379.

But if an executor obliges himſelf to pay a debt due by contract by the teſtator, in debt upon this obligation the writ may be in the *debet* and *detinet*, becauſe the obligation makes it his own debt. 1 *Rol. Abr.* 603.

So after a judgment againſt an executor, one may in a new action of debt in the *debet* and *detinet* ſuggeſt a *devaſtavit*, and thereby charge him *de bonis propriis*. 1 *Sid.* 397.

The taking up an executorſhip is an engagement to anſwer all debts of the deceaſed, and all undetakings that create a debt, as far as there are aſſets; but doth not embark him in the perſonal truſts of the deceaſed; nor is he obliged to anſwer for his ſeveral injuries, which none can tell how they might have been diſcharged or anſwered by the teſtator himſelf. *Plow.* 181. *Off. of Execut.* 120.

Hence it hath been eſtabliſhed as a maxim, that *actio perſonalis moritur cum perſona*; and on this foundation it was formerly held, that there was no remedy for the recovery of debt due by ſimple contract by the teſtator, eſpecially by action of debt; for herein the teſtator might have waged his law, of which benefit his executor is deprived. 1 *Rol. Abr.* 21, 25. 9 *Co.* 86. 4 *Co.* 23. *Cro. Eliz.* 121, 302.

But it is now agreed, that an action lies againſt executors, where there is a duty as well as a wrong; and that they are anſwerable in thoſe perſonal actions which ariſe *ex contractu*, and not *ex malificio*; for that every contract implies a promiſe to perform it, in which the teſtator himſelf could not wage his law, becauſe he could not make oath that he had diſcharged the duty before the *quantum* had been aſcertained by a jury. 9 *Co.* 87. 10 *Co.* 77. *b. Cro. Jac.* 293. *Vaugh.* 101.

So where in caſe againſt an executor the plaintiff declared, that he proſecuted an attachment of privilege againſt the teſtator; and that the teſtator, in conſideration that he would forbear any further proceedings, promiſed to pay him 50 *l.* and it was held, that the action lay againſt the executor, this being ſuch a contract as bound the teſtator himſelf. *Hob.* 216.

Alſo it hath been reſolved, that there is no difference between a promiſe to pay a debt certain, and a promiſe to do a collaterial act, which is uncertain, and reſts only in damages; as a promiſe to give ſuch a fortune with his daughter, to deliver up ſuch a bond, *&c.* and that whenever in thoſe caſes the teſtator himſelf is liable to an action, his executors ſhall be liable alſo. *Cro. Jac.* 405. 417, 571. 1 *Jon.* 16. *Palm.* 329.

So where a prohibition was prayed, becauſe a parſon libelled in the ſpiritual court for tithes, ſubſtracted by teſtator, againſt an executor, upon this ground; that it was a perſonal tort, that died with the perſon; at leaſt the penalty given by the ſtatute ſhould not be recovered after the party's death who offended; but the court denied the prohibition, and held, that the rule, that *quod oritur ex delicto & non ex contractu* ſhould not charge the executor, did not extend to the caſe of tithes. *Raym.* 95. 1 *Sid.* 181. 1 *Keb.* 692. *S. C.* 1 *Lev.* 39. *S. P.*

Trover lies againſt executors, for this action is not merely *ex maleficio*, which dies with the perſon, but here there is ſuppoſed an intention in the teſtator to reſtore the goods to the right owner, for the law will not preſume an intention of injury in any perſon; and therefore the *maleficium* is in the executors, in not making reſtitution accordingly. 2 *Bac. Abr.* 445.

And tho' the rule at common law, that a perſonal action dies with the perſon, hath been conſtrued equally to extend to wrongs and injuries done by or to the teſtator; ſuch as aſſaults and batteries, breaches of truſt, *&c.* yet it ſeems, that an executor in ſome caſes may, within the equity of 4 *Ed.* 3. *cap.* 7. *de bonis aſportatis in vita teſtatoris*, maintain an action for an injury done to his teſtator; whereas if it had been done by the teſtator, it would have come within the rule of *actio perſonalis moritur cum perſona.* 4 *Mod.* 403. 1 *Salk.* 314.

And therefore it hath been held, that if a ſheriff ſuffers a perſon in his cuſtody on mean proceſs to eſcape, that the executor of the party, at whoſe ſuit he was in cuſtody, may maintain an action againſt him; becauſe the body of the priſoner being a pledge for the debt, the executor might be otherwiſe without any remedy, which is an injury to the goods and not to the perſon of the teſtator: but in this caſe, if the ſheriff died, the party could have no remedy againſt his executor. 1 *Jon.* 173. *Poph.* 189. *Latch* 167. *Noy* 87.

So where to a *fieri facias* the ſheriff made a falſe return, *viz.* that he levied only ſo much, when in truth he had actually levied more; and the executor of the party brought an action for this falſe return, and adjudged, that it lay; for this was not properly an injury done to the perſon of the teſtator, for then *moritur cum perſona*, but it was an injury to his eſtate. 4 *Mod.* 403. 1 *Salk.* 12.

It ſeems agreed, that executors or adminiſtrators of executors or adminiſtrators, were not at Common law liable to the *devaſtavits* of thoſe they repreſented, becauſe they could not be ſuppoſed to know how their teſtators or inteſtates had diſpoſed of the goods; and therefore this was eſteemed *actio perſonalis quæ moritur cum perſona.*

1 *Rol.*

1 *Rol. Abr.* 920. 2 *Lev.* 110, 133. 3 *Keb.* 462, 530. 1 *Vent.* 292.

But it being found very inconvenient, that where an executor *de ſon tort* died, there could be no remedy at law againſt his executors or adminiſtrators; or that where a lawful executor made an alteration of the goods of the teſtator, and died, that creditors to the firſt teſtator ſhould be diſappointed of their debts, though ſuch executor left ſufficient aſſets: therefore by an act of 30 *Car.* 2. creditors were enabled to recover their debts of the executors and adminiſtrators of executors in their own wrong; and this act by the 4 & 5 *W. & M. cap.* 24. is made perpetual; and alſo by the laſt mentioned act reciting, that it had been doubted, whether the 30 *Car.* 2. extended to any executor or executors, adminiſtrator or adminiſtrators of any executor or adminiſtrator of right, who for want of privity in law were not before anſwerable; it is enacted and declared, "That all and every the executor and executors, adminiſtrator or adminiſtrators of ſuch executor or adminiſtrator of right, who ſhall waſte or convert to his own uſe goods, chattels or eſtate of his teſtator or inteſtate, ſhall from thenceforth be liable and chargeable in the ſame manner, as his or their teſtator or inteſtate ſhould or might have been."

Executors and adminiſtrators, when plaintiffs, pay no coſts; for they ſue *in auter droit*, and are but truſtees for the creditors, and are not preſumed to be ſufficiently conuzant in the perſonal contracts of thoſe they repreſent; and therefore are not comprehended within the ſtatutes 23 *H.* 8. *cap.* 15. 4 *Jac.* 1. *cap.* 3. or 8 & 9 *W. & M. cap.* 10. which give defendants coſts. *Cro. Jac.* 228. *Yelv.* 168. 1 *Brownl.* 107. *Keilw.* 207. *Hutt.* 69, 79. *Cro. Eliz.* 69, 503. *Cro. Car.* 289. *Winch.* 10. 70.

But if executors or adminiſtrators bring an action in their own right, as for a converſion or treſpaſs in their own time, they ſhall pay coſts, although they name themſelves executors, for this is but ſurpluſage. *Sav.* 134. *Hutt.* 79. *Latch.* 220. 1 *Vent.* 92. 6 *Mod.* 94. 181.

So an executor defendant ſhall pay coſts in all caſes, and the judgment is *de bonis teſtatoris, ſi, &c. & ſi non, tunc de bonis propriis*; alſo when he is defendant, and there is judgment for him, he ſhall have his coſts. *Plow.* 183. *Hard.* 165. *Cro. Eliz.* 503. *Hutt.* 69.

Where judgment againſt an adminiſtrator for coſts *de bonis propriis*, and error brought, that it ought to have been *de bonis teſtatoris, & ſi nulla bona*, then *de bonis propriis*, and this was agreed to be error; but whether this judgment for the coſts might not be reverſed without affecting the principal judgment was the queſtion, they being diſtinct judgments; and it was held by *Holt* Chief Juſtice, that if judgment be given for recovery of dower and meſne profits in damages, it may be reverſed for the one, and ſtand for the other; and he took this difference; if one part of the judgment be warranted by act of parliament, and the other by Common law, this may be reverſed for part, and ſtand for the other; but if all be at Common law, it muſt ſtand or be reverſed in all; and in this caſe the judgment for the coſts was reverſed, and the principal judgment affirmed. 2 *Bac. Abr.* 446. *Trin.* 6 *Ann.* in *B. R. Hickman* and *Weſtbrook.*

Executors and adminiſtrators are not to be held to ſpecial bail; for the demand is not on the perſons, but on the aſſets of the deceaſed; and it would be unreaſonable to ſubject their perſons to an execution for the debt of another. *Cro. Jac.* 350. *Yelv.* 53. *Cro. Car.* 59. *Lit. Rep.* 2.

Hence it hath been held, that if there be a judgment againſt an executor for the debt *de bonis teſtatoris*, and for the damages only *de bonis propriis*, he may bring error, and have a *ſuperſedeas*, without giving ſureties, according to 3 *Jac.* 1. *cap.* 8. For though the words of the ſtatute are general, yet it muſt be intended where judgment is againſt the defendant himſelf upon his own bond, or where the judgment is general againſt executors; for it would be unreaſonable thy ſhould find ſureties to pay the whole out of their own eſtate. *Cro. Jac.* 350. *Cro. Jac.* 59. *S. P.* *Lit. Rep.* 2. *S. P.* 1 *Keb.* 716. *S. P.*

But upon a *devaſtavit*, executors ſhall be held to ſpecial bail; and herein the difference is, that upon a bare ſuggeſtion of a *devaſtavit*, an executor ſhall not be held to ſpecial bail; but where upon a judgment againſt him execution is taken out, and the ſheriff returns a *devaſtavit*, upon an action of debt upon this judgment, the executor ſhall be held to ſpecial bail. 1 *Lev.* 145. 1 *Sid.* 63. 1 *Salk.* 95. *Carth.* 264. *Comb.* 206.

A. was accountable to *J. S.* and afterwards *J. S.* was outlawed in an action perſonal. *A.* died. The Queen by her letters patents granted unto *B. omnia bona & catalla, exitus, proficua, forisfactur' & advantagia quæcunque* which came to her, or accrued by reaſon of the outlawry of the ſaid *J. S.* and now *B.* brought an action of account againſt the executors of the ſaid *A.* as executors of their own wrong. The defendants plead, that they had letters of adminiſtration committed to them by the ordinary, and demanded judgment of the writ. The plaintiff in maintenance of his writ replied, that the defendants adminiſtred of their own wrong before that adminiſtration was granted unto them. Upon which the defendants did demur in law. It was the opinion of ſome of the juſtices, that the wrong is purged by taking of letters of adminiſtration, and now they are to be charged as adminiſtrators only, and not otherwiſe. *Ley* 197. *pl.* 250. *Hill.* 30 *Eliz.* in the Exchequer. *Anon'* cites 50 *Ed.* 3. 9. 20 *H.* 6. 1. 3.

Aſſumpſit againſt an adminiſtrator, who pleaded that on *Saturday* the inteſtate entred into a bond to *J. S.* to pay 40*l.* at *Michaelmas* next enſuing, and that *plene adminiſtravit* all the goods of the ſaid *inteſtate præterquam* to ſatisfy that 40*l.* and upon a demurrer the court held it a good plea; for debts on bonds are to be paid before debts on contract. *Cro. E.* 315. *Hill.* 36. *Eliz. B. R. Buckland* v. *Brooke.*

Debt was brought againſt an executor upon a bond of his teſtator. The defendant pleaded *non eſt factum ſuum.* It was inſiſted for the plaintiff that this plea was ill, becauſe the relative *ſuum* muſt refer to the defendant, and not to the teſtator, there being no mention of teſtator in all the bar. But three juſtices held *e contra*, for it ſhall be referred to that to which it may reaſonably relate to make the plea good; but *Whitlock* doubted. *Latch* 125. *Trin.* 1 *Car. Baker's* caſe.

Debt againſt an executor who pleaded *plene adminiſtravit.* It was held no good evidence to prove the defendant had promiſed to pay *J. S.*'s debt due by the teſtator before this action brought; but otherwiſe if he had given his bond for it; and if an executor renew a bond which teſtator had entered into as ſurety only, this is no ſuch adminiſtration as will make this plea good againſt other creditors by ſpecialty. *Clayt.* 88. *pl.* 148. *July* 16 *Car.* before *Foſter* J. *Arluſh* v. *Colliſon.*

In debt on bond againſt an executor who pleads *plene adminiſtravit*, and gave in evidence bonds cancelled and taken in, and acquittances for money; this was held not good without proof of real payments made, or new ſecurity given. *Clayt.* 112. *pl.* 193. *March* 24 *Car. Sot's* caſe.

Adminiſtrator may have treſpaſs or trover for goods taken before adminiſtration granted to him, for that relates to the death of the inteſtate, and not to the time of the granting it. *Sty.* 341. *Mich.* 1652. *Long.* v. *Hebbs.*

Where the creditor adminiſters to the inteſtate debtor, he may retain the goods to ſatisfy his debts, and where the goods are taken away before adminiſtration granted to him, ſo that he hath none to retain, in ſuch caſe he may have treſpaſs or trover, or debt againſt the perſon who took them, for the action is not ſuſpended by the adminiſtration. *Sty.* 384. *Trin.* 1653. *Aſhly* v. *Child.*

Debt againſt an executor who imparled, and afterwards pleaded a miſnomer in bar, *viz.* that he was adminiſtrator, with the will annexed, and not executor, and therefore ought to be named adminiſtrator; but upon demurrer judgment was for the plaintiff *niſi, &c.* for he cannot plead a miſnomer after imparlance. *Sty.* 385. *Trin.* 1653. *B. R. Fiſher* v. *Jefferies.*

Riens enter mains pleaded by an executor is an affirmative plea in ſubſtance, though it ſounds ſomewhat in the negative, for it is in effect the ſame with *plene adminiſtravit*, and ſuch plea muſt be averred; *per Roll* Ch. J. *Sty.* 405. *Hill.* 1654. *Anon'*.

If an action of debt be brought againſt an executor upon a ſimple contract of the teſtator, and he appears and pleads *nil debet*, and found againſt him, the plaintiff ſhall have judgment becauſe he has diſpenſed with his advantage. *Freem. Rep.* 6, 7. *in pl.* 5. *Mich.* 1670.

In *aſſumpſit* againſt executor the defendant pleaded a recognizance not ſatisfied, and alſo a judgment in debt for 5000*l.* upon a goldſmith's note, payable with intereſt upon demand, which not being paid till ſuch a time after, and the intereſt amounted to 1700*l.* the judgment againſt him was found for 7600*l.* [6700] and that he had not *ultra* 40*l.* chargeable to this recognizance and judgment; adjudged that this plea was ill, becauſe pleading a judgment for intereſt, which is *devaſtavit* to permit it to run in arrear, and then to ſuffer judgment for it, and it ſhall not be intended that there was a want of aſſets to pay it before the incurring of it by the adminiſtrator, the ſame not being expreſsly pleaded. 2 *Lev.* 39. *Hill.* 23 & 24 *Car.* 2 *B. R. Seaman* v. *Dee.*

Aſſumpſit by the plaintiff as adminiſtrator, but at the end of the declaration the *profert hic in curia literas teſtamentarias* was omitted. There was a frivolous plea, on which the plaintiff demurred, the defendant joined in demurrer and inſiſted on this fault; but it was ruled by *Hale*, *cæteris tacentibus*, that it was only matter of form, becauſe it was not a fault in the declaration itſelf, but an omiſſion of what ought to be inſerted after the end of the declaration; and therefore on a general demurrer no advantage can be taken of it. It was urged, that there are 20 books that prove it to be matter of ſubſtance, which *Hale* confeſſed, but ſaid that the opinion had been otherwiſe for 10 years paſt, (but the Reporter thinks that he intended his own opinion); and thereupon judgment for the plaintiff. 2 *Saund.* 402. *Paſch.* 24 *Car.* 2. *Slow* v. *Wilmott.*

Sci. fa. by an adminiſtrator upon a judgment of 1000*l.* the defendant pleaded, that ſuch a day before adminiſtration was granted to the plaintiff it was granted to *J. N*, who is ſtill alive at *B.* and demanded judgment of the writ. The plaintiff replied, that *J. N.* was dead, and concludes to the country. The defendant demurred, for that the plaintiff ſhould have traverſed, *abſque hoc* that he is alive. This plea was held ill, for though it contradicts the declaration, the one affirming that adminiſtration was granted to him, and the other that it was granted to *J. N.* yet an apt iſſue is not formed without an affirmative and a negative. *Vent.* 213. *Trin.* 24 *Car.* 2. *B. R. Forteſcue* v. *Holt.*

Aſſumpſit againſt executor; the defendant pleads four judgments, and that he had but 5*l.* aſſets to ſatisfy thoſe judgments (each of the judgments being for a greater ſum); the plaintiff replies to one of the judgments, that it was kept on foot by fraud and covin, *&c.* and demands judgment whether he ought to have his debt. It was objected, that he ought not to anſwer only to one, but to all; as if a man pleads outlawries in bar, and the plaintiff reverſes one of them, this will not ſerve his turn, but he muſt reverſe them all. *Vaughan* ſaid, the defendant hath four ſtrings to his bow, whereof each of them will ſerve his turn; though you have caſhiered one, yet he has three left; and the moſt proper replication would have been, that he had aſſets above 5*l.* and then if iſſue had been taken, and it had been found for the plaintiff, he ſhould have judgment *de bonis teſtatoris*, as if iſſue had been taken upon a *plene adminiſtravit*, and aſſets had been proved. This was referred to ſerjeant *Turner*, who made an end of it. *Freem. Rep.* 28. *pl.* 35. *Hill.* 1671. *Chamberlain* v. *Pickering.*

An action of debt was brought on a bond againſt the defendant as heir of the obligor, who pleaded that his anceſtor died inteſtate, and that adminiſtration, *&c.* was granted to *J. S.* who gave the plaintiff another bond in ſatisfaction of the firſt; adjudged a good plea, becauſe by this bond given by the adminiſtrator the plaintiff's ſecurity was bettered, and the adminiſtrator is now chargeable *de bonis propriis.* Mod. 225. pl. 14. Trin. 28 Car. 2. C. B. Blythe *v.* Hill.

Three ſeveral actions were brought at one time for 100*l.* each, he pleaded *riens enter mains ultra* 100*l.* to each action, and ſo upon each action there was a judgment againſt him for 100*l.* and upon a motion for an injunction, it was denied by Lord *North.* In caſes proper for law a man may defend himſelf by legal pleadings, and every executor ought to be careful to cover all his aſſets with a judgment. *Vern.* 119. *pl.* 108. *Hill.* 1682. *Anon.*

Judgment upon a *ſci. fa.* againſt an executor, and an inquiry, and returned that he *diverſa bona teſtatoris diſpoſuit, elongavit, & ad proprium uſum convertit*; he comes and pleads that he was never executor, or adminiſtred as executor, and traverſes, *abſque hoc* that he *bona teſtatoris diſpoſuit, &c.* whereupon iſſue joined, and found againſt him, and judgment, which was held good upon a writ of error, for he having gone off from his plea of *ne unque executor*, and traverſed the converſion, it ſhall be intended a converſion as executor. *Skin.* 85. *pl.* 3. *Hill.* 35 *Car.* 2. *B. R. Bird* v. *Harriſon.*

The probate of a will is not traverſable. 2 *L. P. R.* 587. tit. *Traverſe*, cites *Raym.* 406, 407. *Chicheſter* v. *Philips.*

An executor has 20*l.* aſſets, and he is ſued by two obligees for 20*l.* at the ſame time, and pleads *plene adminiſtravit*, both ſhall have judgment for that aſſets; but had he paid it to one on the firſt ſuit, or confeſſed judgment to one, he might plead it to the other. *Arg.* 2 *Show.* 503. *Mich.* 2 *Jac.* 2. *B. R.*

Debt againſt an executor, who pleaded that his teſtator entred into a bond of ſuch a penalty to *T. S.* conditioned to pay ſo much money, which was not yet paid, beyond which he had not aſſets. To this plea the plaintiff demurred ſpecially, and ſhewed for cauſe, that the defendant did not aver (as he ought) that the bond was entred into by the teſtator *pro vero & juſto debito.* But the court held the plea good without ſuch averment, for it ſhall be intended the bond was given for a juſt debt, and the obligation itſelf ſhall be ſufficient to diſcharge the executor, though he had not received any money of teſtator's. *Carth.* 8. *Trin.* 3 *Jac.* 2. *Lake* v. *Raw.*

Action againſt an executor who pleads ſeveral judgments, the plaintiff may reply to them ſeverally, or generally, that they were kept on foot by fraud; *per Holt* Ch. J. *Adjornatur. Show.* 289, 290.

If executor ſuffers judgment to go againſt him by default, it is an admiſſion of aſſets, and the ſheriff may on the *fi. fa.* return a *devaſtavit.* 12 *Mod.* 411. *Trin.* 12 *W.* 3. *Rook* v. *Sheriff of Saliſbury.*

In an action againſt an executor or adminiſtrator, if he pleads 20 judgments, he confeſſes aſſets for above 19 of them; and yet they muſt at their peril plead all the judgments in force againſt them, for if they fail in one of them, they ſhall never take advantage of it, for the creditor ſhall have judgment to execute when aſſets came, and if the executor plead not all his judgments, he loſes the right of preferring them, and may be charged in a *devaſtavit* for thoſe judgments he has omitted to plead, of which ſee a caſe well reported in *Hutton*; for the pleading of the judgment is a protection of the aſſets which you have or may have until the judgment be ſatisfied; and if one pleads 5 judgments, and one of them be falſe or fraudulent, you are ſaddled with the whole debt. *Per Holt* Ch. J. and *Gould* J. 12 *Mod.* 196. *Trin.* 13 *W.* 3. *Aſfield* v. *Parker.*

When an executor pleads to a recognizance, he muſt ſet it forth to the court, that the court may ſee whether it be performed or not, but if it be a debt, they need only ſay that a judgment was obtained againſt him in ſuch a court, if it be in any of the courts of *Weſtminſter*; but if it be in any inferior court, they muſt give it juriſdiction, and ſay *taliter proceſſum fuit, &c.* Here the plaintiff had judgment upon the firſt exception; *per Holt.* Ch. J. 12 *Mod.* 613. *Hill.* 13 *W.* 3. *B. R.* in the caſe of *Ingram* v. *Foot.*

Adjudged,

Adjudged, that where an executor ſuffers judgment to go againſt him by default, upon the writ of inquiry, he ſhall not give in evidence want of aſſets, becauſe he is now eſtopped; for he ought to have pleaded *plene adminiſtravit*, or ſpecially what aſſets he had. 6 *Mod.* 308. *Mich.* 3 *Ann. B. R.*

In debt againſt an executor for rent incurred after his entry, he cannot plead *plene adminiſtravit*, for that confeſſes miſapplication, ſince no other payment out of the profits can be juſtified till the rent be anſwered. 1 *Salk.* 317. *pl.* 25. *Trin.* 9 *Ann. B. R. Buckley* v. *Pink.*

An executor cannot plead *riens en ſes mains* in any caſe but to a *ſcire facias* upon a judgment, for he may commit a *devaſtavit* by a releaſe, though he had never the goods in his hands. *Trin.* 9 *Ann. B. R. Peck* v. *Peck.*

Executor promiſed to pay a debt of teſtator's on a certain future day, and the action was againſt him as executor; but *Parker* Ch. J. held, that the naming him executor was ſurpluſage, becauſe it appears on the face of the record, that the demand was a demand upon him upon his own contract. In effect the forbearance is the conſideration of this promiſe, becauſe without forbearance no advantage can be taken of this promiſe; cites 1 *Salk.* 117. *Yard.* v. *Ellard*; and to this opinion the reſt of the court inclined. *Sed adjornatur.* 10 *Mod.* 254. *Trin.* 13 *Ann. B. R. Johnſon* v. *Gardiner.*

In debt upon bond againſt an executor, who pleaded ſeveral judgments in bar to the action, *ultra quod* he had not aſſets; the plaintiff replied, that (*placitum*) *prædict' eſt minus ſufficiens* to bar him, becauſe ſatisfaction was acknowledged on ſuch an one of the judgments, and all the other were kept on foot by fraud, and *hoc parat' eſt verificare*, but did not ſay *per recordum*; and upon demurrer to this replication, if was adjudged for the plaintiff, becauſe *hoc parat' eſt verificare* ſhall be taken reſpectively, and ſhall be good on a general, though otherwiſe on a ſpecial demurrer, and the word *placitum* is not but one bar, *viz.* all the judgments make but one bar, and therefore *placitum* in the replication anſwers the whole. *Sid.* 429. *pl.* 16. *Mich.* 21 *Car.* 2. *B. R. Hancock* v. *Prowt.*

If an executor pleads ſeveral judgments, the plaintiff may reply diſtinctly to each of them, that they were obtained by fraud; or you may ſay *ſeparalia judicia, &c. obtent' per fraudem*, but in the laſt pleading if one is found to be a true debt, the plaintiff muſt have judgment. *Per Twiſden.* 2 *Mod. pl.* 79. *Hill.* 21 & 22 *Car.* 2. *B. R. Anon'.*

In debt againſt an executor, he pleaded judgments, and that he had not aſſets *ultra*; the plaintiff replied, that the judgments were kept on foot by fraud and covin. The defendant rejoined, that he did not keep them on foot by fraud; and exception was taken, becauſe he did not ſay the judgments or any of them. *Vaugh.* Ch. J. held the exception good, for the rejoinder is a negative pregnant; and judgment *per tot. cur.* for the plaintiff. *Cart.* 221. *Paſch.* 23 *Car.* 2. *C. B. Warcupp* v. *Symonds.*

Debt againſt an executor upon a bond of his teſtator; the defendant pleaded two judgments had againſt the teſtator, and ſet them forth, and that he had not aſſets *ultra* 40*s.* towards ſatisfaction. The plaintiff replied, that the defendant paid ſo much upon the firſt judgment, and ſo much upon the other; yet kept on foot by fraud; and upon demurrer it was inſiſted, that the replication was ſo complicated, that no diſtinct iſſue could be taken upon it, for the plaintiff put them both together, when he alleges they were kept on foot by fraud; but the replication was held good, and the plaintiff had judgment. 2 *Mod.* 36. *Paſch.* 27 *Car.* 2. *C. B. Maſon* v. *Stratton.*

Debt on bond againſt an executor, who pleaded a judgment obtained againſt him upon another bond of the teſtator, but did not ſay *prout patet per recordum*; then he pleaded ſeveral other judgments, and that *plene adminiſtravit* all the goods of the teſtator *præterquam* 10*s.* which was charged with the ſaid judgments, and not ſufficient to ſatisfy them; the plaintiff replied *proteſtando*, that all the judgments were obtained by fraud, *pro placito dicit*, that the day of the writ there was no more than 100*l.* due on all the judgments, and that the defendant then had ſufficient aſſets to ſatisfy the judgments, and likewiſe the debt due to the plaintiff, but that he ſuffered the judgments to remain in force to defraud him; upon demurrer, it was reſolved, that this general pleading of aſſets to ſatisfy all the judgments, and the plaint was good; but becauſe no *venue* was laid where he had aſſets, ſo that it was not triable, it was an incurable fault. 3 *Lev.* 311. and 368. *Trin.* 2 *W. & M.* in *C. B. Knighton* v. *Moreton.*

A. brought action againſt an adminiſtrator, who pending that ſuit, let judgment be had againſt him by *B.* and did not plead that judgment in bar to the firſt action, but ſold the goods of the inteſtate to pay *B.* *A.* likewiſe got judgment, and brought a *fieri facias*, on which the ſheriff levied part, and as to the reſt returned a *devaſtavit.* In an action brought againſt the ſheriff for a falſe return, it was inſiſted for the plaintiff, that the ſuffering judgment upon default was no confeſſion of aſſets, and that the ſheriff ought not to have returned a *devaſtavit*, but a *nulla bona*, and upon that there ought to have been a *ſcire fieri* inquiry; but adjudged, that he may return a *devaſtavit* on the firſt *fieri facias*, if he will run the riſque of its being true or not, and that the inquiry is only for his ſafety; that if an executor ſuffer judgment to go by default, or confeſs it, he admits aſſets; that he might have pleaded the firſt judgment obtained by *B.* againſt the action of *A.* & *riens ultra*; but not having done it, it is an admiſſion of aſſets, to anſwer the judgment in this as well as to the firſt action, and he is eſtopped to ſay the contrary upon a *devaſtavit* returned. 1 *Salk.* 310. *pl.* 14. *Mich.* 12 *W. & M. B. R. Rock* v. *Leighton.*

If there are three judgments againſt the teſtator, each one for 20*l.* and the executor has aſſets but to the value of 20*l.* if he pleads theſe three judgments, and one of them is ill pleaded, or upon iſſue joined, one of them is found againſt the executor, (though in fact perhaps he has but 20*l.* which will not be ſufficient to ſatisfy the other two judgments of 20*l.*) yet by pleading the three, it is an implicit confeſſion of aſſets for more than the two judgments, and therefore in ſuch caſes judgment ſhall be againſt him for the value of the ſaid judgments; *per Holt* Ch. J. which *Gold* J. agreed. *Ld. Raym. Rep.* 678, 679. *Trin.* 13 *W.* 3. caſe of *Parker* v. *Atfield.*

The teſtator left a perſonal eſtate to the value of 2000*l.* and owed 500*l.* on ſpecialties, and 500*l.* more upon ſimple contract, and diſpoſed of 400*l.* in legacies, and made the defendant executor *durante minore ætate* of his ſon; the executor paid 1400*l.* in diſcharge of the ſaid debts and legacies, and accounted with the infant executor when he came of age, and upon payment of 91*l.* *reſiduum* to him he releaſed to him all actions. Afterwards an action was brought againſt him by an executor of one of the creditors of his teſtator, and upon pleading *plene adminiſtravit*, the jury found that he had paid ſuch and ſuch debts and legacies, and had delivered up all the reſidue of the perſonal eſtate of the teſtator to the infant executor when he came of age; it was objected by *Atkins* J. that this verdict did not maintain the plea of *plene adminiſtravit*; for that cannot be pleaded, unleſs all debts, *&c.* are diſcharged, as far as the aſſets will reach; whereas here the *reſiduum* is delivered over, and that is liable to the payment of this debt which is yet undiſcharged; but the three juſtices held, that howſoever he diſcharges himſelf of the teſtator's eſtate, he may plead this plea, and that it is his ſafeſt plea. *Mod.* 174. *pl.* 10. *Paſch.* 26 *Car.* 2. *C. B. Brooking* v. *Jennings.*

On a *ſcire facias* againſt the executors of the plaintiff in replevin to know why he ſhould not have execution of *ret' habend'*, adjudged on verdict againſt the teſtator; the defendant pleaded fully adminiſtred all but one cow; to which the plaintiff demurred. And by *Rainſford* and *Wild*, this cow being *in cuſtodia legis* is in his hands, and ſo aſſets; and if an *averia elongata* be returned, a writ of *withernam* ſhall be *de bonis teſtatoris*; and if the ſheriff return the teſtator had no goods, on a *ſcire facias* with a *fieri facias*, there remains no remedy, but

but as on *devaſtavit*; and judgment for the plaintiff *niſi*. 3 *Keb.* 463. *pl.* 4. *Paſch.* 27 *Car.* 2. *B. R. Green* v. *Sutcliffe*.

Aſſumpſit againſt an executor, who pleaded ſeveral bonds owing by the teſtator not ſatisfied, and that *plene adminiſtravit* all the goods which the teſtator had at the time of this death, *præterquam bona, &c. ad valentiam* 10*l.* upon demurrer to this plea it was adjudged ill, becauſe the plea relates to the time when it was pleaded; and if iſſue had been joined upon it, the defendant might give in evidence at the trial, that after the writ brought, and before the plea pleaded, he had paid debts upon contract without ſuit; and for want of the intervenient clauſe, *Et quod ipſe nulla habet bona et catalla teſtatoris, vel habuit die impetrationis brevis præd' vel unquam poſtea, præterquam* goods and chattels to the value of 10*l.* which are not ſufficient to ſatisfy the debts due on the bonds with which they ſtand charged, and this would have made the plea good; but as the pleading is, the plaintiff had no remedy but to demur, and therefore judgment was given for the plaintiff. 3 *Lev.* 28. *Mich.* 33 *Car.* 2. *C. B. Heblet* v. *Framingham*.

Adjudged upon demurrer, that *plene adminiſtravit* is no good plea in an action of debt brought againſt an executor or adminiſtrator in the *debet* and *detinet* as for rent. *Sid.* 334. *pl.* 19. *Paſch.* 19 *Car.* 2. *B. R. Auſtin.* v. *Miller*.

Caſe, *&c.* againſt an executor upon *plene adminiſtravit* pleaded; *Holt* Ch. J. declared, that the plaintiff muſt prove his debt, or elſe he ſhall recover but a penny damages though there be aſſets, becauſe this plea only admits the debt, but not the *quantum*; that all ſeperate debts mentioned in the inventory ſhall be accounted aſſets in the executor's hands; for it is as much as to ſay that they may be had on demand, unleſs a demand and refuſal is proved. 1 *Salk.* 296. *pl.* 3. *Trin.* 5 *W. & M. in B. R. Shelley*'s caſe.

Upon a *plene adminiſtravit Holt* ſaid, If an inventory be produced where there is one particular of good and bad debts, the defendants ſhall be charged with the whole, becauſe he doth not diſtinguiſh them, unleſs he can diſcharge any part of it by ſpecial evidence. *Comb.* 342. 7 *W.* 3. *B. R. Anon'*.

At *Guildhall*, upon *plene adminiſtravit* the queſtion was, if the defendant ſhall be allowed the payment of a quarter's rent accrued due within four or five days after the death of the inteſtate, he having received all the profit of the land till within ſuch a ſmall time; it was objected, that this was not a debt due *tempore vitæ* of the inteſtate, and therefore it not being his debt, it ought not to be allowed to be paid out of his eſtate. On the other ſide 'twas ſaid, that it will be hard that an executor or adminiſtrator ſhall pay a rent out of his own eſtate when the inteſtate, *&c.* had received all the profits, except for two or three days; and *Holt* Ch. J. ſeemed to incline, that if this was a term continuing after the death of the inteſtate, that the adminiſtrator ſhall be allowed for the rent; otherwiſe if it be determined by his death. *Skin.* 649, 650. *pl.* 8. *Trin.* 8 *W.* 3. *B. R. Mitchel* v. *Meeſe*.

In debt by huſband and wife againſt an executor who pleaded *plene adminiſtravit*; and upon iſſue it was proved, that the executor had diſcharged a debtor of the inteſtate out of *Ludgate* taking a bond from him for the debt, and it appeared that he was ſo extreme poor that he was down-right ſtarving; yet the debt was adjudged aſſets in the executor's hands. 12. *Mod.* 346. *Mich.* 11 *W.* 3.

It was moved to plead double, *non aſſumpſit* and *plene adminiſtravit*, but was denied by the court, no affidavit being produced that defendant had fully adminiſtred. *Notes in C. B.* 234. *Mich.* 8 *Geo.* 2. *Heathfield* v. *Allen*.

On motion to plead double, *ſolvit ad diem* and *riens per deſcent*, it was objected, that an affidavit of the fact as to *riens per deſcent* ought to be produced from the heir, as from an executor or adminiſtrator in a *plene adminiſtravit*, and the objection was held good. No rule. *Notes in C. B.* 234. *Mich.* 8 *Geo.* 2. *The Burgeſſes of Wiſbetch* v. *Frier*.

For more learning on this ſubject, ſee 11 Vin. Abr. *and* 2 Bac. Abr. *tit.* Executors.

Executory, Is where an eſtate in fee, created by deed or fine, is to be afterwards executed by entry, livery, writ, *&c.* And leaſes for years, rents, annuities, conditions, *&c.* are called inheritances *executory*. *Wood's Inſt.* 293. Eſtates *executed*, are when they paſs preſently to the perſon to whom conveyed, without any after-act. 2 *Inſt.* 513.

Executory deviſe. An executory deviſe is defined a future intereſt, which cannot veſt at the death of the teſtator, but depends upon ſome contingency which muſt happen before it can veſt. *Abr. Eq.* 186.

There are three ſorts of executory eſtates; one where the deviſor parts with his whole fee-ſimple, but upon ſome contingency qualifies that diſpoſition, and limits another fee upon that contingency, which is altogether new in law, as appears by the 1 *Inſt.* 18. a fee cannot be limited upon a fee. The ſecond ſort is, where he gives a future eſtate to ariſe upon a contingency, and does not part with the fee at preſent, but retains it; theſe are not againſt law; for by Common law one might deviſe, that his executor ſhould ſell his land, and in ſuch caſe the vendee is in by the will, and the fee deſcends to the heir in the mean time. A third ſort of executory deviſes is of terms, which are well ſettled in *Matthew Manning*'s caſe; and it is dangerous to extend the boundary of theſe executory deviſes, which at preſent is a life or lives. *Per Powell* J. 1 *Salk.* 229, 230. *Trin.* 9 *W.* 3. *C. B.* in the caſe of *Scatterwood* v. *Edge*.

1. *Of executory deviſes of lands of inheritance.*
2. *Of executory deviſes of terms for years.*

1. *Of executory deviſes of lands of inheritance.*

To underſtand this doctrine, it muſt be obſerved as an eſtabliſhed rule, that a fee cannot be limited on a fee, as if lands are limited to one and his heirs, and if he dies without heirs, that ſhall remain over to another, this laſt limitation is void; ſo if lands are given by deed to one and his heirs, ſo long as *J. S.* hath iſſue, and after the death of *J. S.* without iſſue, to remain over to another, this remainder is likewiſe void, becauſe the firſt deviſee had a fee, tho' it was a baſe and determinable fee. *Dyer* 41. 1 *Co.* 85. *Plow.* 29. 2. *Leon.* 69. *Co. Lit.* 19. *Poph.* 34. 2 *Rol. Rep.* 220. *Godolph.* 355.

Yet, in a will ſuch limitations may be good upon a contingency, that may happen within the compaſs of a life or lives *in eſſe*, or nine months after the expiration of a life, or reaſonable number of years; for theſe tend not to a perpetuity, which is ſo odious in law; but this not by way of direct remainder, but by way of executory deviſe. *Cro. Eliz.* 205. 1 *Rol. Abr.* 626. *Dyer* 124.

As if tenant in fee-ſimple deviſes his land to *A.* and his heirs, and if he dies without iſſue in the life of *B.* then to *B.* and his heirs, tho' this be a limitation of a fee-ſimple upon a fee; yet, becauſe the remainder to *B.* muſt veſt upon a contingency, which will fall in a life, it has been held good as an executory deviſe. 3 *Chan. Ca.* 9.

So in the celebrated caſe of *Pell* and *Brown*, where one having three ſons *A. B.* and *C.* by his will in writing deviſes lands to *B.* his ſecond ſon, and his heirs for ever, paying 20*l.* and if *B.* dies without iſſue, living *A.* then *A.* to have thoſe lands to him and his heirs for ever; *B.* enters and ſuffers a common recovery to the uſe of himſelf and his heirs, and then deviſes thoſe lands to *J. S.* and his heirs, and dies without heirs, living *A.* and it was adjudged, firſt that *B.* had a fee-ſimple, and yet the limitation to *A.* good, as an executory deviſe in fee; for it was to happen within the compaſs of a life; and therefore if *B.* died with iſſue, living *A.* or without iſſue, after the death of *A.* then this future intereſt was never to ariſe. Secondly it was adjudged, that this being a mere collateral poſſibility was not bound by the recovery; for it had not exiſtence at all when the recovery was ſuffered; and therefore the recompence in value could not extend to it; beſides, to allow the particular tenant to deſtroy any ſuch future intereſt, would be the means of fruſtrating the moſt commendable

commendable intentions of a deviſor, providing for his younger children, or for the payment of his debts, &c. *Cro. Jac.* 590. 1 *Rol. Abr.* 611. *Palm.* 131. 2 *Rol. Rep.* 216. 2 *Leon.* 111. *Vaugh.* 272.

One by will deviſes lands to his mother for life, and after her death to his brother in fee; provided that if his wife (being then enſient) be delivered of a ſon, that then the land ſhall remain to him in fee, and dies, and the ſon is born; and it was held, that the fee of the brother ſhould ceaſe, and veſt in the ſon by way of executory deviſe upon the happening of the contingency. *Dyer* 127. *in marg.*

One having iſſue *A.* his only daughter and heir apparent, by will deviſes lands in *D.* to her and her huſband, and her heir, upon condition that they ſhould aſſure lands in fee to his executors and their heirs to perform his will; and if they failed, then he deviſed the ſaid lands in *D.* to his executors and their heirs, and died; and it was adjudged to be no condition, for then by the deſcent to the daughter being heir, it would be deſtroyed; but it was held a limitation, or an executory deviſe in his executors, in caſe the aſſurance was not made, and that they might, for breach thereof, enter and ſell; for tho' a fee cannot be limited upon a fee abſolute, yet upon a fee determinable it may, and enures as a new original deviſe to take effect when the firſt deviſee failed to make the aſſurance. *Palm.* 135. *Dyer* 33. *in marg.* *Cro. Eliz.* 359. *Cro. Jac.* 592.

If *A.* deviſes lands to *B.* for five years from *Michaelmas* following, the remainder to *C.* and his heirs, this is a good remainder, altho' it cannot veſt before the particular eſtate begins, and the freehold cannot be in expectancy, for in the mean time the fee ſhall deſcend to the heir. *Cro. Eliz.* 878.

One deviſes lands to his wife till his ſon came to the age of 21 years, and then that his ſaid ſon ſhould have the land to him and his heirs, and if he dies without iſſue before his ſaid age, then to his daughter and her heirs; this is a good contingent or executory deviſe to the daughter, if the contingency happens, and in the mean time the fee deſcends to the ſon as heir; and if he lives to 21, tho' he after die without iſſue, or leaves iſſue, tho' he die before 21, yet the daughter is not to have the land, becauſe he is to die without iſſue, and before 21, or elſe the daughter cannot take. 2 *Rol. Rep.* 197. *Palm.* 132.

But where one having iſſue three ſons, *A. B.* and *C.* deviſes to his ſon *A.* after the death of his wife, to him and the heirs of his body lawfully begotten in fee-ſimple; and if he die in the life-time of my wife, that then my ſon *C.* ſhall be his heir, and dies; *A.* hath iſſue and dies in the life-time of the wife; and it was adjudged that the iſſue ſhould have the land after the death of the wife, and not *C.* for it was in effect a deviſe to the wife for life, remainder to *A.* in tail, remainder to *C.* in fee, upon the contingency of *A.*'s dying in the life of the wife, and does not abridge the eſtate-tail, expreſsly given *A.* by his dying in the life of the wife. *Cro. Car.* 185.

Baron and feme being ſeiſed of a copyhold, to them and the heirs of the baron; he ſurrenders it to the uſe of his will and then deviſes it to the heirs of the body of the feme, if they attain the age of 14, and dies without iſſue, and then ſhe marries a ſecond huſband and has iſſue that attains the age of 14, and then ſhe dies; and whether this was a good deviſe by reaſon of the double contingency, *ſcilicet*, the having heirs of her body, and that ſuch heir ſhould live till 14, was doubted; but it was admitted, that if the deviſe was good, it muſt be by way of executory deviſe, which is allowable, when to take effect within the compaſs of a life, but not after a dying without iſſue; for that tends to a perpetuity, and it cannot take effect by way of remainder; for it is a new deviſe to take effect after her death, and is not a remainder joined to her eſtate; but the court being divided upon the point of the contingency, it was agreed to be adjourned into the Exchequer Chamber, and the Reporter ſuppoſes the parties agreed afterwards, for he heard no more of it. 1 *Lev.* 135.

If *A.* hath iſſue two ſons, *viz. B.* and *C.* and deviſes lands to *B.* for life; and if he dies without iſſue living at his death, that then the fee ſhall remain to the heirs of *B.* for ever, by which deviſe *B.* has only an eſtate for life, the remainder to his heir not executed; and tho' the reverſion deſcended in *B.* as heir of *A.* yet it drowned not the eſtate for life, againſt the expreſs deviſe and intention of the will, but left an opening, as it was termed, for the interpoſition of the remainder, when it ſhall happen to interpoſe between the eſtate for life and the fee; and that this being a contingent remainder, and not an executory deviſe, was barred by the recovery ſuffered by *B.* 1 *Lev.* 11.

If one deviſes lands to his wife for life, and if ſhe hath a ſon, and cauſes him to be called by the Chriſtian and ſurname of *Sampſon Shelton*, then after her death deviſes the ſame to her ſon, and if he die before 21, to the right heirs of the deviſor, and dies; and after the wife marries *Broughton*, by whom ſhe has a ſon, which ſhe cauſed to be chriſtened *Sampſon Shelton*, &c. the deviſe is good by way of contingent remainder, but not by way of executory deviſe, for when a contingent eſtate is limited, and depends upon a freehold, which is capable of ſupporting a remainder, it ſhall never be conſtrued an executory deviſe but a contingent remainder, adjudged; and that the reverſion deſcending to the heir of the deviſor till the contingency happened by the bargain and ſale, and fine thereof, by the heir of the deviſor to *B.* and his wife, and their heirs, before the birth of their ſon, the contingent remainder was deſtroyed. 2 *Sand.* 380.

If a man having only one ſiſter and heir, who had iſſue *A.* and after married *B.* by whom ſhe had iſſue *C.* and *D.* deviſes lands to his ſiſter until *C.* attains 21, and after *C.* attains that age, to *C.* and his heirs; and if *C.* dies before 21, then to the heirs of the body of *B.* and their heirs, as they ſhall attain their reſpective ages of 21, and dies; *C.* dies before 21, living *B.* and after *B.* dies, *D.* either as heir to *C.* in whom the fee was veſted, or as heir of the body of *B.* (though he could not be ſo during the life of *B.*) being of age after the death of *B.* ſhall have the eſtate by way of executory deviſe, and not the right heir of the deviſor. 2 *Mod.* 289.

A man deviſed lands to his executors till his ſon ſhould come of age, and when his ſon ſhould come of age, then he ſhould enjoy it for him and his heirs, this is a remainder executed in the ſon and not in contingency, for the words *when* and *then* in this caſe only denote the time when the remainder is to execute, and will no more make the remainder contingent than in the common caſe, when a leaſe is made for life or years; and after the deceaſe of the tenant for life, or the expiration of the term for years, then to remain to another; for tho' the words be *after the term it ſhall remain*, yet it is a preſent and not a contingent remainder; for where words refer to that which muſt needs happen, there ſhall be no contingency. 3 *Co.* 19.

A. having iſſue five ſons (his wife being enſient with a ſixth) deviſed two thirds of his lands to his four younger ſons, and the child *in ventre ſa mere*, if it were a ſon, and their heirs; and if they all die without iſſue male of their bodies, or any of them; that the land ſhall revert to the right heirs of the deviſor; by this deviſe the younger ſons are tenants in tail in poſſeſſion, with croſs remainders over to each, and no part ſhall revert to the heir of the deviſor, till all the younger ſons be dead without iſſue male of their bodies. *Dyer* 303. *Hob.* 33.

A. having two ſons, *B.* and *C.* deviſed lands to *B.* for 50 years, if he ſhould ſo long live, and for my inheritance after the ſaid term I deviſe the ſame to the heirs males of the body of *B.* and for default of ſuch iſſue then to *C.* and the court reſolved, 1ſt, That *B.* had not an eſtate-tail by implication upon the words *without iſſue*, becauſe the deviſor had given him an eſtate for years by expreſs words, and the court cannot make ſuch a conſtruction againſt expreſs words, when thereby they would drown the eſtate for years, and make an eſtate of inheritance. 2dly, The court held this deviſe to the heirs males of the body of *B.* to be void in its crea-

tion for want of an eſtate of freehold to ſupport it; and they ſeemed not to think it an executory deviſe, becauſe it was limited as a remainder, and becauſe it was limited *per verba in præſenti*; for if one deviſes his eſtate to the heir of *J. S.* and *J. S.* is living, the deviſe ſhall not be conſtrued an executory deviſe, and ſuch deviſe is therefore void; but if it were to the heir of *J. S.* after the death of *J. S.* that is good as an executory deviſe. 3dly, The court held the limitation to the heirs of *B.* was become void by the event, whatever it was in its creation, becauſe *John* is now dead without iſſue. 4thly, The court held, that if the remainder to the heirs males of *B.* was void in point of limitation, then the next remainder limited to *C.* took effect preſently, 1 *Salk.* 226. 4 *Mod.* 255. *S. C.*

A. ſeiſed in fee, deviſed to truſtees for 11 years, and then to the firſt ſon of *A*, and the heirs males of his body, and ſo on to the ſecond, third, *&c.* ſons in tail male, provided they the ſaid ſons ſhall take on them my ſurname; and in caſe they, or their heirs, refuſe to take my ſurname, or die without iſſue, then I deviſe my land to the firſt ſon of *B.* in tail male, provided he take my ſurname; and if he refuſe, or die without iſſue, then to the right heirs of the deviſor; *A.* had no ſon at the time of the deviſe, and died without iſſue, and *B.* had a ſon who was living at the time of the deviſe, who took the ſurname of the deviſor; the whole court agreed, that the deviſe to *B.* was not a contingent remainder, becauſe of the precedent eſtate for years, which could not ſupport it; it appears likewiſe by the caſe, to be the opinion of *Treby* Ch. J. and J. *Powel*, that it could not be good as an executory deviſe, if it were conſidered as a deviſe to the heirs of *A.* being limited *per verba in præſenti*; but *Blencow* Juſt. held, that the deviſe to the ſon of *A.* was future, for he ſuppoſed the teſtator knew that *A.* had no ſon, and the rather becauſe he does not name him; but it was adjudged in *C. B.* and affirmed in *B. R.* that the remainder to *C.* was good, and veſted in him. 1 *Salk.* 229.

A man having two ſons, deviſed part of the lands to one of them and his heirs, and the reſt to the other and his heirs, and further wills that the ſurvivor ſhall be heir to the other, if either dies without iſſue; by this the deviſees are tenants in tail, with remainder in fee; executed of each other's part. *Cro. Jac.* 695.

But were a man having three ſons, and ſeiſed of three houſes, deviſed a houſe to each ſon and his heirs, with this *proviſo*, that if all his ſaid children ſhall die without iſſue of their bodies lawfully begotten, that then all his ſaid meſſuages ſhall remain over, and be to his wife and her heirs; and it was held in this caſe, that theſe words did not raiſe any croſs remainders, but that at the death of any of the ſons his houſe ſhould go immediately to the wife; and though a croſs remainder may be by implication where lands are limited to two, yet they cannot riſe where three or more houſes are limited to three, without expreſs limitation. *Cro. Jac.* 655.

A. being ſeiſed of two meſſuages, and having a ſon and two daughters by ſeveral venters, deviſed one meſſuage to *B.* his daughter in fee, and another meſſuage to *C.* his daughter in fee; and if *C.* died before her age of 16 years, *B.* then living, then her part to go to *B.* in fee, and if *B.* died without iſſue, then both the meſſuages ſhall go to his ſon in fee; *B.* died without iſſue, and her part went to the ſon, and not to the ſurviving daughter, becauſe the laſt clauſe created no croſs remainders. *Bendl.* 212. *Dyer* 330. *Vaugh.* 267.

Deviſe to *A.* in tail, remainder to *B.* in tail, remainder to *C.* in tail, and if *C.* dies without iſſue, *A.* and *B.* being dead, then to *D.* in tail; this is a remainder veſted in *D.* and not contingent. *Lord Raym. Rep.* 523. *Hill.* 11 *W.* 3 *B. R. Badger* v. *Lloyd.*

If deviſe be made to the heir at law, paying ſuch and ſuch legacies, *&c.* and for default thereof remainder over; the heir, till default, is in by deſcent, and the other's intereſt is by way of executory deviſe. It is hard to maintain, either by uſe or deviſe, a remainder to a ſtranger after a preſent fee to one that is not heir at law. 6 *Mod.* 241. *Per Holt* Ch. J. *Mich.* 3 *Ann. B. R. Anon'.*

Deviſe was of lands to his wife for life, remainder to *C.* his ſecond ſon in fee, provided if *D.* his third ſon, ſhall within three months after the wife's death pay 500 *l.* to *C.* his executors, *&c.* then he deviſed them to *D.* and his heirs; *D.* died, living the wife; then the wife dies; the heir of *D.* may enter upon the lands upon payment or tender of the 500 *l.* It is not a condition, but an executory deviſe. 10 *Mod.* 420. *Mich.* 5 *Geo.* 1. *Marks* v. *Marks.*

J. C. being tenant for life, with remainder to his wife for life, remainder to his own right heirs, 20*th October* 1683. made his will, *viz. Item*, My land at *W.* my wife *Mary* is to enjoy for her life, after her death it of right goes to my daughter *Eliz.* for ever, provided ſhe has heirs; but if my ſaid daughter dies before her mother or without heirs, and my ſaid wife *Mary* ſhall marry again and ſhould have heirs male, I bequeath all my ſaid right in *W. &c.* to her heirs male by her ſecond huſband, thinking I can never ſufficiently reward her love; provided, if my ſaid wife ſhould marry again, and fail of heirs males, and my daughter ſhould fail of heirs, then I deviſe 50 *l.* annuity out of *W. &c.* to my brother *Joſ. C.* and deviſed ſeveral other annuities charged on the land to ſeveral perſons who were his heirs at law, but he made no deviſe of the land to any one. *Mary* the wife died before *Elizabeth* the daughter, who died without heirs, but *Mary* married a ſecond huſband and had iſſue male. In ejectment, leſſors of the plaintiff were heirs at law, and the defendant was the heir male of the wife by the ſecond huſband. On trial a caſe for the opinion of the court.

The firſt objection was, that the firſt clauſe was a deviſe to the daughter in fee, but yet that was afterwards controuled and qualified by ſubſequent words, and it was intended to be hers, and the heirs of her body only. Said *per cur.* The perſon to whom the deviſe over is, *i. e.* heir male of the body of the wife by a ſecond huſband, he is a ſtranger, and where the deviſe over is to a ſtranger, that will not alter the conſtruction of the will from what it would have been without it; ſo it will continue a deviſe to *Eliz.* in fee-ſimple. So is *Cro.* 415. and it is law now, and not to be drawn in queſtion, though it was once diſputed. A deviſe to a ſtranger will not alter a poſitive deviſe to a perſon and his heirs. But when this deviſe is over of a rent-charge, or anuities charged on the land to the heirs at law, that ſhews what was meant by heirs in the firſt place, and then it will be a deviſe to *Eliz.* and the heirs of her body; remainder to the heirs males of the body of the wife, with a deviſe over to theſe annuitants, and there is no difference whether the deviſe over be of the lands, or of an annuity charged on them, becauſe in the laſt caſe he could never intend the lands themſelves ſhould paſs to the perſon to whom he had given the annuities. 2dly, But *per cur.* the firſt clauſe is not a deviſe to the wife, or to *Eliz.* for they were ſettled upon her for life, and what is ſaid as to the dauhgter is only a declaration of the deviſor, what the eſtate and condition of the eſtate was, and how ſhe was to enjoy it, and he could not ſay of right, ſhe were to enjoy them, if ſhe claimed under the will. The conſequence of this is, that the lands deſcended to *Eliz.* as heir at law, and the deviſe to heirs males if the wife by the ſecond huſband will be contingent; firſt, whether *Eliz.* ſhould die in the life-time of the wife, which muſt happen within the compaſs of a life; next contingency, if the wife ſhould marry, *&c.* and have heirs of her body by a ſecond huſband. But though as in *Lloyd* and *Carey*'s caſe, ſhe might have heirs after his death, and not within the compaſs of a life, yet ſo near as there could be no inconvenience if it ſhould take effect as an executory deviſe in ſuch a caſe. But this is not ſo here; for if the words are taken disjunctively, (if my daughter dies in the life of her mother, or without heirs) the contingency never happened, becauſe the daughter ſurvived the mother, ſo the deviſe could never take effect, but will be void; if taken copulatively, and (or) taken

for

for (and) here it will be hard to turn words out of their natural ſenſe and import, unleſs there be a plain intimation of the intent of the deviſor ſo to do. How doth the deviſor intend it (copulative?) What occaſion is there for it? For if the daughter ſurvived the mother, he might intend it for her in fee; why ſhould it be taken, if my daughter dies without heirs in the life-time of *Eliz* 3dly, But if it were ſo, the deviſe over cannot take effect, becauſe the contingency never happened. 4thly, But the death of the daugther without heirs is too remote, and the deviſe over is void. The deviſe of the annuities is to take effect in nature of a remainder, and if the firſt cannot take effect in nature of a remainder, all that comes after cannot take place, it being not to take effect, but as a remainder, and then not at all. Next (if the wife ſhould marry again, and have a ſon, and ſhould die without heirs males) this is alſo too remote, and ſo the deviſe over is void, becauſe to commence upon a contingency too remote, and if it cannot be good by way of executory deviſe, then it muſt be by way of remainder, and it cannot be good as a remainder, becauſe there is no particular eſtate to ſupport it to any one; for there was no particular eſtate at all, what went before being only a declaration of what did belong to the daughter, and as this contingent remainder had no particular eſtate antecedent to it, it is void. Not good as an executory deviſe, becauſe the contingency never happened, or if it did happen, it was too remote, and ſo void, and therefore the heirs at law have good title. 5thly, If the ſon of the wife by the ſecond huſband could take, he would take fee-ſimple, ſo that the teſtator was miſtaken in the law; for he thought he had deviſed to him but an eſtate-tail. Judgment for the plaintiffs. *MS. Rep. Paſch.* 7. *Geo. B. R. Wright* v. *Hammond.* 8 *Vin. Abr.* 110.

A term for years was deviſed to *A.* for life, remainder to *B.* this is an executory deviſe. 9 *Mod.* 101. *Mich.* 9 *Geo. Theobald* v. *Duffay.*

A deviſe of lands to *R. B.* and his heirs for ever, upon condition he pay all my debts, and legacies and funerals, and if he do not pay them, then I deviſe the premiſſes to *E. F.* (the defendant) and her heirs for ever. And as to all the reſt and reſidue of my real and perſonal eſtate whatever, not before herein bequeathed, I give to *E. F.* and her heirs; the deviſee *R. B.* died before the deviſor, ſo it was a lapſed legacy; and the firſt queſtion counſel made was, whether this was an executory deviſe to *E. F.* By Ch. J. *Eyre*, *& tot' cur.* This cannot be an executory deviſe to *E. F.* unleſs it were an original deviſe, here is no firſt deviſee, for he is dead, and that deviſe is void. *Forteſcue's Rep.* 184, 185. *Paſch.* 2 *Geo.* 2. *C. B. Roe.* v. *Fludd.*

A. having the reverſion in fee of lands ſettled upon the mrrriage of *B.* his ſon, in the uſual manner, deviſed all the lands in the ſettlement on failure of iſſue of the body of *B.* and for want of heirs male of his own body, to his daughter *F.* and the heirs of her body. This will does not give an eſtate-tail by implication to *B.* the deviſe to *F.* is executory and is void, as being on too remote a contingency. *Caſes in Equity in Lord Talbot's time*, 262. *Paſch.* 1733. *Laneſborough* v. *Fox.*

2. *Of executory deviſes of terms for years.*

If a farmer deviſes his term to *A.* for life, the remainder to another, though *A.* has the whole eſtate, (for that is in him during his life) and ſo no remainder can be limited over at Common law, yet it is good by way of executory deviſe. *Cro. Car.* 198. 1 *Rol. Abr.* 610. 8. *Co.* 94.

The great queſtion in theſe caſes was, Whether the diſpoſition of the term to a man for his life was not ſuch a total diſpoſition of it, that no remainder could be limited over, it being in the eye of the law a greater eſtate than for any number of years; and this was reſolved in the affirmative in the reign of *Ed.* 6. *Dyer* 74. by all the judges of *England*; but this reſolution ſeeming very ſevere, and againſt natural juſtice, that a man ſhould be hindered from making proviſion for his family, and the contingencies of it, occaſioned a contrary reſolution. 19 *Eliz. Co. Lit.* 46. *Dyer* 35. For the judges obſerving the good effect ſuch limitations by way of truſt had, which were allowed in Chancery, permitted farmers to diſpoſe of their leaſes in the ſame manner by laſt will; and then the Chancery, the better to fix them in it, allowed of bills by the remainder man, to compel the deviſee of the particular eſtate to put in ſecurity, that he in the remainder ſhould enjoy it according to the limitation; but when they perceived that this multiplied Chancery ſuits, they reſolved that there was no need of that way. 10 *Co* 47. *a.* 52. *b.* 1 *Sid.* 451. But that the particular deviſee ſhould not have power to bar the remainder man; ſo that the law has been long ſettled, that executory deviſes of terms for years are good, provided the contingency is to happen within a life, or 20 lives, all *in eſſe*; for then there can be no tendency to a perpetuity, which was the great miſchief apprehended from theſe kinds of limitations. *Abr. Eq.* 191.

So if *A.* poſſeſſed of a term for years deviſes it to *B.* his wife for 18 years, and after to *C.* his eldeſt ſon for life, and after to the eldeſt iſſue male of *C.* for life, though *C.* had not an iſſue male at the time of the deviſe, and death of the deviſor; yet if he had iſſue male before his death, this iſſue male ſhall have it as an executory deviſe; for although it be a contingency upon a contingency, and the iſſue not *in eſſe* at the time of the deviſe; yet inaſmuch as it is limited to him but for life it is good, and all one with *Manning*'s caſe. 1 *Rol. Abr.* 612.

But if *A.* deviſes his term to his wife for her life, and after her deceaſe to *B.* his ſon; and if *B.* die without iſſue, then to *C.* adjudged, that this deviſe to *C.* after the death of *B.* without iſſue was void; for ſince it could not veſt while *B.* had iſſue of his body, the deviſe is no more than to *B.* and the heirs of his body, which without doubt had been void; for though men preſumed on the judges when they firſt allowed of remainders of terms after eſtates for lives, and endeavoured to bring remainders upon eſtates-tail within the reaſon of theſe reſolutions and conceſſions; yet the courts would never endure thoſe remainders, becauſe 'tis too foreign and diſtant to expect them after the man's death, without iſſue, and if they were allowed of would make a direct perpetuity, which is an undeniable reaſon againſt any ſettlement; for 'tis againſt the nature of human affairs ſo to ſettle an eſtate in a family, that upon no contingency, or revolution of fortune, the owner ſhall have power over it. *Cro. Car.* 167. 1 *Rol. Abr.* 610. 1 *Sid.* 450. *Cro. Jac.* 461. 4 *Inſt.* 87. 3 *Chan. Ca.* 6. 10.

Therefore the deviſe to *B.* in the above caſe is an abſolute diſpoſition of the term to him, and veſts it totally in him, and at his diſpoſal, and ſhall go to his executors during the continuance of it, and ſhall never for default of iſſue of his body revert to the executors of the deviſor. 1 *Sid.* 451. 1 *Rol. Abr.* 611, 831. But ſee 10 *Co.* 87, and 1 *Sid.* 37. which ſeem *contra*, but have been denied to be law. 3 *Chan. Ca.* 6, 10.

If one poſſeſſed of a term deviſes it to his wife for life, the remainder to his firſt ſon for life; and if he dies without iſſue, to his ſecond ſon, *&c.* the remainder to the ſecond ſon is void, for the remainder of a term cannot depend upon a poſſibility ſo remote, as the dying without iſſue; altho' it was objected, that the deviſe was not to the firſt ſon and his iſſue (in which caſe it was agreed it ſhould go to his executor) but it was given to him for life only, with an executory deviſe to the ſecond ſon, upon the contingency of the firſt not having iſſue at the time of his death. 1 *Lev.* 290. 1 *Chan. Rep.* 14. *S. C.*

A. having iſſue ſeveral ſons (the eldeſt *non compos*) created a term for years, and by another deed declared the truſt thereof to his ſecond ſon, and the heirs males of his body, remainder to his other ſons; provided that if his eldeſt ſon died without iſſue, or not leaving his wife enſient with a child, living the ſecond ſon; ſo that the Earldom of——deſcended on the ſecond ſon, then the ſaid term to remain to the third ſon and the heirs males of his body, with like limitations to the other ſons; the

eldeſt

eldeſt ſon died without iſſue, living the ſecond, and this limitation to the third ſon was held good. 3 *Chan. Ca.* 1, 2, *&c.* Decreed by Lord *Nottingham*, but reverſed by *North* Lord Keeper, 1 *Vern.* 163. But upon an appeal to the Houſe of Lords, *North*'s decree was reverſed, and *Nottingham*'s eſtabliſhed, 1 *Chan. Ca* 53. and has been ever ſince admitted to be law; and note, that executory deviſes and limitations of the truſt of a term are governed alike. 1 *Vern.* 234. *Pollex.* 15 *to* 20.

If a term is deviſed to *A.* and the heirs of his body; and if *A.* die without iſſue, living *B.* this is a good limitation, the contingency ariſing within the compaſs of a life. 1 *Salk.* 225. *Carth.* 266. *S. C.*

A. deviſes to his ſon, his executors, adminiſtrators and aſſigns for ever, a leaſehold eſtate; but if he die before 21 without iſſue, in that caſe he deviſes it over to his brother; and the queſtion was, whether the remainder over was good; it was objected that it was a perpetuity, for that the remainder depends on the ſon's dying without iſſue; for if he die before 21, tho' he leaves a child, and that child afterwards dies without iſſue, the ſon may be ſaid to be dead before 21 without iſſue, yet the court held the remainder good. 2 *Vern.* 151. *Martin* and *Long.*

One *F.* being poſſeſſed of a term for years, deviſes it to his wife for life, and after her death to *R. F.* for her life, and after her death to *T. F.* and his children, and then deviſes in this manner, and if it ſhall happen that the ſaid *T. F.* die before the expiration of the ſaid term, not having iſſue of his body then living, then to go over to the plaintiffs for the reſidue of the term; the defendant's title was by an aſſignment of *R. F.* and *T. F.* of all their eſtate, right, title, and intereſt; *R. F.* was dead, and *T. F.* died without iſſue; and the plaintiff brought his bill to have an aſſignment of the term purſuant to the will; all that was inſiſted upon, for the defendant to difference this caſe from the Duke of *Norfolk*'s of a term, and *Pell* and *Brown*'s caſe of a fee, was, that this contingency of his dying without iſſue was not confined to his own death; but that the words *then living* ſhould relate to the words *before the expiration of the term*, and ſo this went farther than any of the caſes had ever yet been carried; for he might have iſſue for ſeveral generations; and yet if ſuch iſſue failed at any time before the expiration of the term, then it was to go over, and this in a long term tended plainly to a perpetuity; and therefore ought not to be allowed but by the deviſe to *T. F.* and his children; and the ſubſequent words, and if he die without iſſue, the whole term and intereſt was veſted in him, and he may diſpoſe thereof as he thought fit, and it could not be reſtrained by the words *then living*, which related only to the words *before the expiration of the term*, and ſo the remainder over to the plaintiff void. But for the plaintiffs it was argued and decreed, that the remainders to them were good by way of executory deviſe, and that the words *then living* muſt relate to the time of his death; for otherwiſe there would be no difference between this and the common limitations of a term to one, and the heirs or iſſue of his body; and if he dies without iſſue, the remainder to another, which is void; for there it muſt likewiſe be intended if he die without iſſue before the expiration of the term, or during the term; ſince after the expiration of the term he can limit no remainders over, becauſe nothing remains then to be limited; but here it being limited over upon this contingency, if he die without iſſue then living, *viz.* at the time of his death, it is good, becauſe this contingency muſt happen within one life, or not at all; for upon his death it will be certainly known whether he leaves iſſue or not; if he does, the contingency cannot take place; if he does not, then it may; and this being to happen within the compaſs of a life, is good as an executory deviſe, and differs in nothing from the Duke of *Norfolk*'s caſe, ſave only that there it was by *proviſo*; and alſo upon the death of another perſon without iſſue then living; and here it is upon his own death, which makes no manner of difference. *Abr. Eq.* 193.

A man poſſeſſed of a term for 31 years, deviſes it to his ſon *H.* during his minority; and if he attains to his age of 21 years, then to him during his life, if the term ſhall ſo long continue, and no longer, and after his death, to ſuch of his iſſue to whom he ſhall deviſe it; but if he die without iſſue, then to his other ſon *G.* for the reſidue of the term; *H.* afterwards died without iſſue, or without making any diſpoſition of the reſidue of the term; and the only queſtion was, whether by the words of this will the whole term did not veſt in *H.* and it was decreed, that it did not; for the words *die without iſſue* have a two-fold meaning, either without iſſue at the time of his death, or without, whenever the iſſue fails; and though in caſe of an inheritance, if lands are deviſed to one, and if he die without iſſue, the firſt deviſee takes an eſtate-tail by implication, which ſhall go to his iſſue, and they ſhall take in a courſe of deſcent to all ſucceeding generations; but to make ſuch a conſtruction in the caſe of a term, which cannot come to the iſſue by deſcent, is unneceſſary; and therefore in ſuch caſe the other conſtruction of the words, which is moſt natural and obvious, ſhall take place; and it ſhall be intended only, if he die without iſſue, living at the time of his death; and conſequently the dying without iſſue, being confined within the compaſs of a life, hinders not the remainder over, but it may well take place by way of executory deviſe, according to former reſolutions. *Abr. Eq.* 193, 194. See 2 *Vern.* 43. 195, 668. and *Abr. Eq.* 362.

Exemplification of letters patent, Is a copy or duplicate of *letters patent* made from the inrolment thereof, and ſealed with the Great Seal of *England*; which *exemplifications* are as effectual to be ſhewed or pleaded, as the originals themſelves. *Nota*, Nothing but matter of record ought to be *exemplified.* 3 *Inſt. fol.* 173. See *Co.* 5 *Rep. Page*'s caſe.

Exemplifications of deeds deſtroyed by rebels in the reign of *Ric.* 2. made of the ſame force as the deeds themſelves. 5 *Ric.* 2. *ſt.* 1. *c.* 9. 6 *Ric.* 2. *ſtat.* 1. *c.* 4.

Where judgment ſhall not be reverſed for error in record contrary to exemplification, 8 *Hen.* 6. *c.* 12. *ſ.* 4.

Fines and recoveries how exemplified in *Wales*, and the counties palatine, 27 *Eliz. c.* 9.

Exemplificatione, Is a writ granted for the *exemplification* of an original. See *Reg. Orig. fol.* 290.

For other matters, ſee **Patents.**

Exemplum and **Exemplata terra,** The ſame with **Aſſart,** and *lands aſſarted.*

Exemption, Is a privilege to be free from ſervice or appearance; and therefore a baron and baroneſs, *dignitatis cauſa*, are *exempted* to be ſworn on any inqueſt. *Co. lib.* 6. *fol.* 53. Alſo knights, clerks, and women are *exempted* to appear at the ſheriff's turn, by the ſtatute of *Marl. cap.* 10. And a man may be *exempted* from being put upon inqueſts and juries by the King's letters patent, as the college of *Phyſicians*, *London*, were by letters patent of *Hen.* 8. *Co. lib.* 8. *fol.* 108. In what caſe thoſe that have charters of exemption are compellable to be ſworn on juries. *St. Marlb.* 52 *Hen.* 3. *c.* 14.

Exenium, A reward or gift, or any payment in the name of a gift. *Bracton, lib.* 5. *tract.* 5. *c.* 4. *Fleta, lib.* 2. *c.* 71.

Exercituale was anciently uſed for a *heriot*, exercituale *vironis ſive baronis Regis, qui erit proximus ei, quatuor equi.* LL. Edw. Conf. 1.——This demonſtrates the derivation of *heriot* or *heregate*, from *here*, *exercitus*, becauſe the old Feudal heriot was paid only in arms or military accoutrements. *Cowell, edit.* 1727.

Exeter. The corporation of merchant adventurers there, not prejudiced by 3 *Jac.* 1. *c.* 6. 4 *Jac.* 1. *c.* 9. Its neighbouring gaol and workhouſe provided for, 19 *Car.* 2. *c.* 4. *ſect.* 4. 5. The Queen enabled to grant the ſite of the caſtle of *Exon* for 99 years, for the benefit of the county of *Devon*, 9 *Ann. c.* 19. Taxes aſſeſſed on the water-works at *Exon*, are chargeable on the perſons collecting them, 4 *Geo.* 3. *c.* 2. *ſect.* 94. *For the regulation of ſilver in Exeter,* ſee **Gold.**

Exfrediare, To break the peace, to commit open violence; from the Saxon *frede*, *frith*, peace. *Frithian*, to protect.——*Si quis profiliat, & domum* exfrediet, *nec tamen aliquem percutiat dimidio forisfacto culpa consistat.*—— Leges H. 1. cap. 31.

Ex gravi querela, Is a writ that lieth for him to whom any lands or tenements in fee within a city, town, or borough, being deviſable, are deviſed by will, and the heir of the deviſor entreth into them, and detaineth them from him. *Reg. Orig. fol.* 244. *Old Nat. Brev. fol.* 17. *See F. N. B. fol.* 198.

Exhenium, or **Exennium,** A gift, a preſent, a token, more properly a new year's-gift.—— *In expenſis Domini Regis &* exhenniis *eidem factis apud Farendon centum ſol. ſex denar. in expenſis Dominæ Reginæ ibidem pernoctantis, &* exhenniis, *eidem factis lxxv ſol.*——Ex compoto domus de Farendon. MS. Penes W. Kennet. fol. 31. *Cowell, edit.* 1727.

Exhibit, (*Exhibitum,*) When a deed, acquittance, or other writing is in a Chancery ſuit *exhibited* to be proved by witneſſes, and the examiner writes on the back that it was ſhewed to ſuch a one at the time of his examination; this is there called an *exhibit.* The word is mentioned 14 *Car.* 2. *c.* 14. *Exhibits* cannot be inſpected before hearing. *Stran.* 764. 2 *P. Will.* 410.

Exhibitio, An allowance for meat and drink, ſuch as the religious appropriators made to the poor depending vicar. So in all churches appropriated to the abbey of *Oſeney.*—— *Vicarius habebit ſufficientem* exhibitionem, *ſicut canonici quoad victualia in menſa canonicorum, ubi canonici moram faciunt.*——Paroch. Antiq. pa. 304. The benefactions ſettled for maintaining of ſcholars in the univerſity, not depending on the foundation, are now called *exhibitions.*

Exigendary of the Common Bench, *Exigendarius de Banco Communi,* Is otherwiſe called *exigenter,* 10 H. 6. *c.* 4. and is an officer belonging to that court, for which ſee **Exigenter.**

Exigent, (*Exigenda,*) Is a writ that lieth where the defendant in an action perſonal cannot be found, nor any thing within that county, whereby he may be attached or diſtrained; and is directed to the ſheriff, to proclaim and call him five county-days one after another, charging him to appear under the pain of outlawry. *Terms de la ley.* This writ lieth alſo in an indictment of felony, where the party indicted cannot be found. *Smith de Rep. Ang. lib.* 2. *c.* 19. It ſeemeth to be called an *exigent,* becauſe it exacteth the party, that is, requireth his appearance, to anſwer the law: for if he come not at the laſt day's proclamation, he is ſaid to be *quinquies exactus,* and then is outlawed. *Crom. Juriſd. fol.* 188. And this *Manwood* alſo ſetteth down for the law of the *Foreſt, c.* 18. See **Outlawry.**

Exigenter, *Exigendarius,* (18 *H.* 6. *c.* 9.) Is an officer of the court of *Common Pleas,* of whom there are four in number: They make all *exigents* and proclamations in all actions, where proceſs of outlawry doth lie, and writs of *ſuperſedeas,* as well as the *prothonotaries,* upon ſuch *exigents* as were made in their offices. But the making writs of *ſuperſedeas,* is ſince taken from them by an officer in the ſame court, created by King *James* by letters patent, towards the latter end of his reign.

Exile, A baniſhment: And this exile is either by reſtraint, when the government forbids a man, and makes it penal to return; or it is voluntary, where he leaves his country upon diſguſt, but may come back at pleaſure. 2 *Lev.* 191.

No freeman ſhall be exiled but by lawful judgment of his peers, or by the law of the land. 9 *Hen.* 3. *c.* 29.

Exilium, Waſte, deſtruction, as in the ſtatute of *Marlebridge* under *Henry* 3. *cap.* 25.—— *Firmarii tempore firmarum ſuarum vaſtum, venditionem vel* exilium *non facient de domibus, boſcis, vel hominibus*—where *exilium* relating to *hominibus,* ſeems to be the injury done to an eſtate in reſpect of the tenants, by altering their tenure or conditions, by ejecting, advancing, remitting, &c. And this indeed is the ſenſe that *Fleta* does expreſsly determine. *Vaſtum & deſtructio fere æquipollent, & convertibiliter ſe habent in domibus, boſcis & gardinis, ſed* exilium *dici poterit, cum ſervi manumittuntur & a tenementis ſuis injurioſe ejiciuntur.* Fleta, lib. 1. c. 11.

Exitus, Iſſue, child or children.——*Qui genuit Robertum de Alfreton baronem—qui per Agnetem uxorem ejus habuit* exitum *Thomam filium & hæredem.* Mon. Angl. tom. 2. p. 607. The word is frequent in our old law writings, and in ſome epitaphs, as on a ground-ſtone in the chancel of the pariſh-church of *Amerſden,* in the county of *Oxford.*——*Sepultus eſt hic Johannes Denton, filius primogenitus Johannis Denton & Magdalenæ uxoris ejus, nuptus Theodoretæ Blundell uni filiarum Johannis Blundell, & moriebatur ſine* exitu *e corpore ejus exeunte in vita prædicti Johannis ſeptimo die Septemb.* 1566.

Exitus, Iſſues; the rents or profits of lands or tenements: *Et ſciat vicecomes quod redditus, blada in grangia, & omnia mobilia præter equitaturam, indumenta, & utenſilia domorum continentur ſub nomine* exituum. Stat. 11 *Weſtm. cap.* 43.

Exlegalitus, *(Calumniari de exlegalitate)* Is he who is proſecuted as an outlaw. 'Tis mentioned in *Leg. Ed. Confeſſ. c.* 38.

Ex mero motu, Are words formally uſed in any charter of the Prince, whereby he ſignifieth, that he doth that which is contained in the charter of his own will and motion, without petition or ſuggeſtion made by any other; and the effect of theſe words are to bar all exceptions that might be taken unto the inſtrument, wherein they are contained, by alledging, that the prince in paſſing that charter was abuſed by any falſe ſuggeſtion. *Kitchin, fol.* 152. *Co. lib.* 1. *fol.* 45.

Ex officio, By virtue of a branch of the ſtat. 1 *Eliz. cap.* 1. the Queen by her letters patent might authorize any perſon or perſons, *&c.* to adminiſter an oath *ex officio,* (ſo called, becauſe the eccleſiaſtical judge did it *ex officio ſuo,*) whereby the ſuppoſed delinquent was compelled to confeſs, accuſe, or purge himſelf of any criminal matter, and thereby be made liable to cenſure or puniſhment, *&c.* The branch of which ſtatute relating to the ſaid oath is repealed, 17 *Car.* 1. *cap.* 11.

Exoneratione ſectae, Is a writ that lay for the King's ward, to be diſburthened of all ſuit, *&c.* to the county hundred, leet, or court baron, during the time of his wardſhip. *F. N. B. fol.* 158.

Exoneratione ſectae ad curiam com' vel baron'. This writ lieth where the tenant holdeth his land to do ſuit at the county-court, hundred, or court-baron, or wapentake or leet, and he who ought to do the ſuit is in ward unto the King, or his commitee; and the lord of whom he holdeth by ſuch ſervice, will diſtrain him to do his ſuit at his court during the time he is in ward unto the King or his committee; his guardian ſhall ſue this writ unto the ſheriff, or bailiffs of the court, that they do not deſtrain him, *&c.* to do ſuit, during the term he is in ward to the King or his committee. See *N. Nat. Brev.* 370, 371.

Exoſſatus ager, A field without ſtones. *Cowell, edit.* 1727.

Expalmare, To ſtrike with the palm of the hand. *Vide eum in horto ligatum, in atrio pontificis* expalmatum, *i. e.* buffetd. *Petre. Bleſenſis. Sermon.* 18 *de Chriſto.*

Ex parte, (Lat.) Partly, or of one part. In the court of Chancery it hath this ſignification: A joint commiſſion is that wherein both plaintiff and defendant join. A commiſſion *ex parte* is that which is taken out and executed by one party only.

Ex parte talis, Is a writ that lieth for a bailiff, or receiver, that having auditors aſſigned to hear his account, cannot obtain of them reaſonable allowance, but is caſt into a priſon by them. *F. N. B. fol.* 129. The courſe in this caſe is, to take this writ out of the Chancery directed to the ſheriff, to take the four mainpernors, to bring his body before the barons of the Exchequer at a day certain, and to warn the lord, to appear at the ſame time. *Cowell. edit.* 1727.

Expectant, Is uſed in the Common law with this word *fee,* and thus it is oppoſite to fee-ſimple. For example;

ample; Lands are given to a man and his wife in *frank-marriage*, to *have and to hold* to them and their heirs; in this caſe, they have fee-ſimple; But if it be given to them, and the heirs of the body, *&c* they have tail and fee *expectant*. *Kitchin, fol.* 153.

Expedimentum, Bag and baggage. *Dixit ſe non habere literas præ manibus, quia miſerat eas cum* expedimento *ad Wintoniam. Cowell, edit.* 1727.

Expeditate, (*Expeditare vel expealtare,*) In the foreſt-laws, ſignifies to cut out the ball of dogs forefeet, for the preſervation of the King's game. Every one that keeps any great dog not *expeditated*, forfeits three ſhillings and four pence to the King. The ball of the foot of maſtiffs is not to be cut out, but the three claws of the forefoot to the ſkin. 4 *part Inſt. fol.* 308.——*Nullus dominicos canes abbatis, & monachorum* expealtari *cogat.* Charta Hen. 3. Abbati de Rading,——*Et ſint quieti de* expeditamentis *canum.* Ex Magno Rot. Pipæ, de anno 9 Ed. 2. This relates not only to maſtiffs but to every man's dog who lived near the foreſt, and to the dogs of the foreſter's themſelves. And this *expeditation* was to be done once in every three years. *Du Freſne.*

Expeditatae arbores, Trees rooted up, or cut down to the roots.—— *Inquiratur de quercubus & aliis arboribus* expeditatis *in foreſta — vel ſi aliquò ingenio alio dictas quercus cadere facerint.* Fleta, lib. 2. cap. 41. ſect. 31.

Expenditors, Are the perſons appointed by commiſſioners of ſewers to pay, diſburſe, or expend the money collected by the tax for the repairs of ſewers, *&c.* when paid into their hands by the collectors, on the reparations amendments and reformation ordered by the comiſſioners, for which they are to render accounts when thereunto required. *Laws of ſewers* 87, 88. Theſe officers are mentioned in the ſtatute 37 *Hen.* 8. *c.* 11. and other ſtatutes. The ſteward or ſworn officer, who ſuperviſes the repair of the banks and water-courſes in *Romney Marſh*, is now called *The expenditor.* See **Sewers.**

Expenſis militum levandis, Is a writ directed to the ſheriff, for levying the allowance for knights of the parliament. *Reg. Orig. fol.* 191.

Expenſis militum non levandis ab hominibus de dominico, nec a natibis, Is a writ to prohibit the ſheriff from levying any allowance for the knights of the ſhire, upon thoſe that hold in ancient demeſne, *&c. Reg. Orig. fol.* 261.

Explees. Some are of opinion, that becauſe *explees* are the full profits of the land, therefore the word muſt be derived from the Lat. *expleo*; but rather *ex placito, viz.* from the agreement made with the lord to pay him ſo much *ex proventibus terræ.* For *expletum* ſignifies thoſe lands or farms, the profits whereof are taken by the lord. *Cowell, edit.* 1727. See **Eſplees.**

Explitia, Expletia, Expleta, The rents or mean profits of an eſtate in cuſtody or truſt.—— *Capiendo inde* explitia *ad valentiam quinque ſolidorum & amplius.*—— Paroch. Antiq. pag. 414.

Explorator, A ſcout,—*In memoriam* Henrici Croft *equitis aurati,* exploratoris *in Hibernia generalis, qui obiit anno* 1609. where *explorator generalis* ſignifies *ſcout maſter general.* Sometimes alſo it is uſed for a huntſman, as *Idem abbas habens* exploratores *ſuos* (his huntſmen) *ponere fecit retia, &c.* In Itin. Pickering, 8 Ed. 3. Rot. 4.

Exportation, Is the ſhipping or carrying out the native commodities of *England* for other countries; mentioned in the ſtatues relating to the cuſtoms. *Jacob.*

Three years from the time of importation of goods allowed for their exportation. 7 *Geo.* 1. *ſt.* 1. *c.* 21. *ſ.* 10. See **Importation.**

Expoſition of deeds. In the conſtruction of deeds it muſt be conſidered firſt, How a deed in the groſs ſhall be taken and enure; and ſecondly, How it ſhall be taken and expounded in the ſeveral parts and pieces of it. And as to the firſt, theſe rules are to be known: 1. If ſeveral join in a deed, and ſome are able to make ſuch a deed, and ſome are not, this ſhall be ſaid to be the deed of thoſe alone who are able. And ſo *e converſo*, if a deed be made to one that is uncapable, and to others that are capable; in this caſe it ſhall enure only to him that is capable. *Co. Lit.* 302. *Perk. ſ.* 66.

2. It ſhall enure as much as may be according to the apparent intent of the parties. *Finch's Law* 58.

3. A deed that is intended and made only to one purpoſe may enure to another; for if it will not take effect that way, it is intended it may take effect another way. See *Dyer* 251. 2 *Co.* 35. *Co. Lit.* 49.

Where a conveyance will not take effect the way it was intended, there rather than it ſhould have no effect, it ſhall paſs by another way than what the parties deſigned. *Lucas* 35. And ſhall never be void where the words may be employed to ſome intent. *Plow.* 160. *b.*

4. When a deed is made it ſhall enure as it may, and ſo as it may have and take the moſt and beſt effect that may be according to reaſon. See *Plow.* 140, 59. *Co. Lit.* 302.

In conveyances we are to reſpect two things, the form and effect of them; and in all caſes where the form and effect cannot ſtand together, the form ſhall be rejected, and the effect ſhall ſtand. 2 *Leon.* 25. *p.* 17.

5. When a deed may enure to divers purpoſes, he to whom the deed is made ſhall have election which way to take it, and he may take it that way as ſhall be moſt for his advantage. *Co. Lit.* 301. *Dyer* 251.

6. The words of an indenture are the words of both parties. *Cro. Jac.* 398. *pl.* 4. *Lucas* 47, 48. Tho' they are ſpoken as the words of one party, yet they are not his words only, for he has the conſent of the other party to every one of theſe words. *Plow.* 134.

But not ſo in a deed poll, for they are only of the grantor, and ſhall be taken moſt ſtrongly againſt him. 1 *Plow.* 134. *a.* 2 *Rol. Abr.* 65. *Co. Lit.* 146. *Lucas* 47.

7. If one has divers eſtates in land, and he makes any charge or grant upon or out of it; this ſhall iſſue out of all his eſtates. And if one has a poſſeſſion and an ancient right, and grants a rent-charge out of the land, or makes a leaſe of the land; this ſhall iſſue out of both the eſtates and it ſhall enure from him having ſeveral eſtates, as it ſhall enure from ſeveral perſons having the ſame eſtates. *Quando duo jura concurrant in una perſona æquum eſt ac ſi eſſent in diverſis.* See *Perk. ſ.* 592.

Expoſition of words and ſentences. Pleading of notice given to *J. T.* will be intended of the ſame *J. T.* that was named before, otherwiſe of *cuidam J. T. Lord Raym.* 119.

The words *ibidem invent.* in treſpaſs, refer to the vill, and not to the cloſe. *Lord Raym.* 122.

The word *adtunc* in the award of releaſes ſhall refer to the time, and not to the performance of the other parts of the award, which may be void. *L. Raym.* 124.

The words *ante tertiam horam*, without ſaying *poſt meridiem*, bad pleading, but made good by pleading over. *Ld. Raym.* 124.

Words tending to enlargement ſhall not be conſtrued a reſtraint of a former clauſe. *L. Raym.* 269.

The words *juxta tenorem ſequentem* are ſufficient in an indictment for a libel; otherwiſe of *ad effectum ſequentem. Ld. Raym.* 415.

The words *adtunc et ibidem* refer to the laſt time and place. *L. Raym.* 576.

The words *ea occaſione* will ſupply the want of *coram ipſo rege* in the deſcription of the priſon of the King's Bench in a *ſcire facias* againſt bail. *Lord Raym.* 805.

An agreement to pay ſo much for every hundred ſtacks of wood, will not make any thing due for fifty ſtacks, without the words *ſecundum ratam. Ld. Raym.* 815.

A *viz.* rejected in a *reddendum*, becauſe repugnant. *Lord Raym.* 819.

Where a *viz.* ſhall be axplanatory, and may contain an averment. *Lord Raym.* 1271.

The word *prædict.* in an information relating to the county, where ſeveral counties are mentioned before, is uncertain. *Ld. Raym.* 886.

The word *prædict.* ſhall refer to the perſon named before, that is meant in common underſtanding, though there is another of the ſame name. *Lord Raym.* 1095.

The

The word *prædict.* in an order or indictment does not refer to the county mentioned in the margin, as it does in a declaration. *Lord Raym.* 1304.

Treſpaſs for breaking the plaintiff's cloſe, and taking goods there found, and alſo taking and carrying away ſo much ground wheat of the plaintiff's; after intire damages, judgment arreſted, becauſe it did not ſufficiently appear, that the firſt goods were the plaintiff's. *Lord Raym.* 890.

Proclamation made the 4th of *December*, that an election would be made on the 9th of *December* then next following; the word *next* refers to the day, and not to the month. *Lord Raym.* 905.

Gilda mercatoria, is a corporation. *Ld. Raym.* 1134.

Expreſſio eorum quæ tacite inſunt will have no operation upon the clauſe wherein it is expreſſed, but may control a ſubſequent clauſe. *Lord Raym.* 1154.

In a declaration againſt a priſoner in cuſtody of a ſheriff by virtue of a *latitat*, *de placito quod reddat ei*, *&c.* Theſe laſt words ſhall be referred to the *latitat*, ſo as to ſhew it to be at the ſuit of the plaintiff according to the act of parliament. *Lord Raym.* 1362.

Articles of a horſe race to ride *ſine flagello & baculo vel aliis armis*, the whole ſentence is disjunctive. *Lord Raym.* 1367.

Quoddam, the ſame as *aliud*. *Ld. Raym.* 1522.

The writing croſs the face of a bank note, is properly called an indorſement. *Stran.* 18.

To pay on ſuch a day next, in a note, refers to the date. *Stran.* 394.

Barratry in a policy, the ſame as fraud. *Stran.* 581.

The word *et* taken disjunctively after a verdict. *Stran.* 594.

Reſervations or powers at the end of a ſentence, refer to all the members of the ſentence. *Stran.* 965.

The word *quamplurimi* does not import the greater part. *Stran.* 1097.

Curia de Banco noſtro, in a writ, means the King's Bench. *Stran.* 302.

Indentura facta inter, *&c.* imports ſealing by both parties. *Stran.* 512.

N. H. by will gives to *Elizabeth* his wife all his eſtate, leaſes, and intereſt *in his houſe in* Hatton Garden, and all the goods and furniture therein at the time of his death, and alſo all his plate, jewels, *&c.* but deſired her, *at or before* her *death*, *to give ſuch leaſes*, *houſe furniture goods*, *plate*, and *jewels unto and amongſt ſuch of his own relations*, *as ſhe ſhould think moſt deſerving and approved of*, and made her executrix. *Elizabeth* by her will gave all her eſtate and intereſt to *H. S.* in the ſaid houſe in *Hatton Garden*, and after ſeveral legacies, the reſidue of her perſonal eſtate to the defendant, and two other perſons, and made them executors; but neither gave, at or before her death, the goods in the ſaid houſe, or her huſband's jewels to his ſaid relations. The Maſter of the Rolls was of opinion, that *Elizabeth*, under the will of *N. H.* took only beneficially during her life, and that ſo much of the houſhold goods in *Hatton Garden*, as were not diſpoſed of by her according to the power given her by the will of *N. H.* in caſe the ſame remain in ſpecie, or the value thereof, ought to be divided equally among ſuch of the relations, as were, *&c.* at the time of her death. *Atkyn's Rep.* 469.

The words *willing* or *deſiring* in a will, have been frequently conſtrued to amount to a truſt. *Atkyn's Rep.* 470.

Where the uncertainty is ſuch that the court cannot poſſibly determine who are meant in a will, it may be conſtrued only as a recommendation to the firſt deviſee, and make it an abſolute gift to him. *Atkyn's Rep.* 470.

Where there is a deviſe to *relations* in a will, the ſtatute of diſtributions is a good rule to go by, in conſtruing who are meant by that word. *Atkyn's Rep.* 470.

Sir *J. L.* gives by a codicil to his will to *E. M.* during her natural life, his houſe in *Greenwich*, *with* all the houſhold goods that ſhall be found therein at the time of his deceaſe: the word *with* ſo conjoins the deviſe of the houſe and houſhold goods, that the deviſee can have no larger intereſt in the latter than was limited as to the former. *Atkyn's Rep.* 470. The word *with* would have had the ſame effect in the caſe of a grant. *Ibid.*

A tenant for life of goods, is not obliged to give ſecurity for the goods, but to ſign an inventory only to the perſon in remainder. *Atkyn's Rep.* 471.

A. deviſes ſeveral leaſehold eſtates to two truſtees, in truſt; if his grand-daughter married without their conſent to convey the premiſſes to two other truſtees, in truſt for her ſeparate uſe during the huſband's life, and after her death, for the uſe and benefit of her iſſue: though ſhe has no children by the firſt huſband ſhe has only a right for her life, for the iſſue by any huſband are provided for by this ſettlement. *Atkyn's Rep.* 472.

Ex poſt facto, Is a term uſed in the law, ſignifying ſomething done after another thing that was committed before. And an act done, or eſtate granted, may be made good by matter *ex poſt facto*, that was not ſo at firſt, by election, *&c.* as ſometimes a thing well done at firſt, may afterwards become ill. 8 *Rep.* 146. 5 *Rep.* 22.

Extales, The entrials. *Mures qui* extales *corrodunt*. *Petrus Bleſenſis*, Epiſt. 100.

Extend, *Extendere*, In a legal ſenſe denotes to value the lands or tenements of one bound by ſtatute, *&c.* that hath forfeited his bond, to ſuch an indifferent rate, as by the yearly rent the creditor in time be paid his debt. The courſe and circumſtances hereof, ſee *F. N. B. fol.* 131.

Extendi facias, Is a writ ordinarily called *a writ of extent*, whereby the value of land, *&c.* is commanded to be made and levied in divers caſes; which ſee in the table of the *Reg. Original.*

Extent, *Extenta*, Hath two ſignifications, ſometimes ſignifying a writ or commiſſion to the ſheriff, for the valuing of lands or tenements. *Reg. Judic. in Tabula.* Sometimes the act of the ſheriff, or other commiſſioner upon this writ. *Bro.* tit. *Extent*, *f.* 313. 16 & 17 *Car.* 2. *cap.* 5. And it more frequently ſignified the eſtimate or valuation of lands, which when done to the utmoſt value, was ſaid to be to the full *extent*; whence our *extended* rents or rack-rents. *Hæc eſt* extenta *terrarum ——de terris & tenementis prioris de Durhurſte——quantum valeant inſtaurare*, *& quantum deinſtaurare.* Mon. Angl. tom. 1. p. 548. *and in* 2 tom. fol. 321. *Ad inquirendum Æſtimationem &* extentam *per probos viros.* Fleta, lib. 2. cap. 71. See **Statute.**

Extinguiſhment, In our laws ſignifies, an effect of conſolidation: for example, If a man have due to him a yearly rent out of any lands, and afterwards purchaſe the ſame lands, now both the property and rent are conſolidated or united in one poſſeſſor; and therefore the rent is ſaid to be *extinguiſhed.* In like manner it is, where a man hath a leaſe for years, and afterwards buyeth the property; this is a conſolidation of the property and the fruits, and is an *extinguiſhment* of the leaſe. See *Terms de la Ley.* So if a man have an highway appendant, and after purchaſe the land wherein the highway is; then the way is *extinct:* and ſo it is of common appendant. But if a man have an eſtate in land but for life or years, and hath fee ſimple in the rent; then the rent is not *extinguiſhed*, but in *ſuſpenſe* for the time; and after the term, the rent ſhall be revived. And if there be lord, meſne, and tenant, and the lord purchaſe the tenancy, then the meſnalty is *extinct*; but the meſne ſhall have the ſurpluſage of the rent, if there be any, as rent-ſeck. *Terms de Ley. Cowell, edit.* 1727.

Wherever a right, title or intereſt is deſtroyed, or taken away by the act of God, operation of law, or act of the party; this in many books is called an extinguiſhment. *Co. Lit.* 147. *b.* 1 *Rol. Abr.* 933.

1. *Of the extinguiſhment of rents.*
2. *Of the extinguiſhment of copyholds, common, and debts.*

1. *Of the extinguiſhment of rents.*

If a leſſor purchaſes the tenancy from his leſſee, the leſſor can't have both the rent and the land, nor can the tenant

tenant be under any obligation to pay the rent when the land, which was the conſideration thereof, is reſumed by the leſſor into his own hands; and this reſumption or purchaſe of the tenancy, makes what is properly called an extinguiſhment of the rent; that is, the rent can never become due or payable by the tenant, by virtue of the donation which created the tenancy, when the land or tenancy is conveyed to the leſſor in as abſolute a manner as he was ſeiſed of the rent. *Pollex.* 142.

But if the conveyance to the leſſor was not abſolute, but upon condition; or if it were only of a paricular eſtate, of ſhorter duration than the eſtate which the leſſor had in the rent; in theſe caſes, though there be an union of the tenancy and the rent in the ſame hand, yet becauſe that union is but temporary, for upon the performance of the condition, or determination of the particular eſtate, the tenant is reſtored to the enjoyment of the land, and conſequently the obligation to pay the rent revives; therefore the rent in ſuch caſe is only ſuſpended, and not extinguiſhed. *Bro. Extinguiſhment* 17. *Vaugh.* 39, 199. *Pollex.* 142.

Alſo if the lands demiſed be evicted from the tenant, or recovered by a title paramount, the leſſee is diſcharged from the payment of the rent from the time of ſuch eviction; and this is alſo called an extinguiſhment of the rent. But notwithſtanding ſuch recovery or eviction, the tenant ſhall pay the rent which became due before the recovery; becauſe the enjoyment of the land being the conſideration for which the tenant was obliged to pay the rent, ſo long as the conſideration continued, the obligation muſt be in force; there being the ſame reaſon that the tenant ſhould pay the rent for part of the time contracted for, as for the whole term, if he had enjoyed the land ſo long. 2 *Rol Abr.* 429. *Hob.* 82. *Cro. Eliz* 47. *Co. Lit.* 148. *b.* 201. *b.*

For the ſame reaſon, if part only of the land letten be evicted from the tenant, ſuch eviction is a diſcharge of the rent, in proportion to the value of the land evicted. 10 *Co.* 128. 1 *Rol. Abr.* 135. *Dyer* 56.

Covenant upon indenture for non-payment of rent; the plaintiff declares, that he was ſeiſed of tithes, and by indenture demiſed them to the defendant, rendring rent, and the defendant covenanted to pay it, and he aſſigned his breach in non-payment of ſo much; and the defendant pleaded eviction. The plaintiff demurred; and judgment was given for the defendant, becauſe it is a rent, and the eviction is a ſuſpenſion of it, and therefore a good plea. *Lord Raym. Rep.* 77. *Paſch.* 8 *W.* 3. *Dalſton* v. *Reeve.*

If a man who hath a rent-ſervice, purchaſes part of the land out of which the rent iſſues, the rent-ſervice is not extinguiſhed, but ſhall be apportioned according to the value of the land; ſo that ſuch purchaſe is a diſcharge to the tenant for ſo much of the rent only as the value of the land purchaſed amounts unto. *Lit. ſ.* 222.

But if a man has a rent charge, and purchaſes part of the land out of which the rent iſſues, the whole rent is extinguiſhed, and conſequently the tenant diſcharged from the payment of it. *Lit. ſect.* 222, 223. 8 *Co.* 105.

But in this caſe if the grantor by deed reciting the purchaſe had granted that the grantee ſhould diſtrain for the ſame rent in the reſidue of the land, the whole rent-charge had been preſerved; becauſe ſuch power of diſtreſs had amounted to a new grant. *Co. Lit.* 147.

But the law has carried this notion of extinguiſhment only to ſuch caſes, where the grantee of the rent wilfully by his own act prevents the operation of the grant, according to the orignal intention thereof; for if part of the land deſcends to the grantee of the rent-charge, the rent ſhall be apportioned according to the value of the land, for the grantee in this caſe is perfectly paſſive, and concurs not by any act of his to defeat the intention of the grant; and therefore it would be unreaſonable and ſevere, that he ſhould be puniſhed without his default, or concurring in that act which extinguiſhes the rent. *Lit. ſect.* 224. *Co. Lit.* 149. *b.* 1 *Rol. Abr.* 236.

Hence likewiſe it is, that if a man grants a rent-charge out of two acres, and afterwards the grantee recovereth one acre by title paramount the grant, the whole rent ſhall not be extinguiſhed, becauſe the law, that gives the remedy for the recovery of a man's right, will not prevent the proſecution of ſuch right, by depriving the proſecutor of a greater profit than the thing recovered may amount to; but in this caſe there ſhall be no apportionment, but the grantee ſhall have the whole rent after he has recovered the one acre, becauſe by the grant each acre is charged with the whole rent; and upon the recovery it appears, that the grantor had no intereſt in one acre, and conſequently could not charge it; and therefore the grant being to be taken moſt ſtrongly againſt him, the whole rent ſhall continue after the recovery, becauſe the grant was originally for ſo much, and therefore ſhall iſſue out of that land which he had power to charge; whereas in the former caſe the grantor had, at the time of the grant, power to charge all the land, and therefore when part of the land, ſubject to ſuch charge, comes to the grantee by act of law, 'tis reaſonable at leaſt that the charge ſhould be apportioned. *Co. Lit.* 148. *b.*

Alſo a rent-charge may in ſome caſes be apportioned by the act of the party; as if the grantee releaſes part of his rent to the tenant of the land, ſuch releaſe does not extinguiſh the whole rent; ſo if the grantee gives part of it to a ſtranger, and the tenant attorns, ſuch grant ſhall not extinguiſh the reſidue, which the grantee never parted with, but ſuch releaſe or diſpoſition makes no alteration in the orignal grant, nor defeats the intention of it, as the purchaſe of part of the land does; for the whole rent is ſtill iſſuable out of the whole land, according to the orignal intention of the grant. *Co. Lit.* 148. *a.* But *Cro. Eliz.* 742. ſeems *cont'.*

Here alſo, as to the apportionment of a rent-ſervice, by the purchaſe of the leſſor of part of the tenancy, we muſt diſtinguiſh between ſervices diviſible in their own nature, as a rent, and ſuch as are indiviſible, as a horſe, a hawk, *&c.* for in the laſt caſe, if the lord purchaſe part of the tenancy, there can be no apportionment of the ſervice from the nature of the thing; and therefore ſuch ſervice is extinct, and the tenant diſcharged from the payment of it; for the whole tenancy being equally chargeable with the payment of ſuch ſervice, the lord by his own act ſhall not diſcharge part, and throw the whole burthen upon the reſidue for his own private benefit and advantage. 6 *Co.* 1. *Co. Lit.* 149. *a.* 8 *Co.* 105. *Moor* 203.

But if ſuch intire ſervices were for the benefit of the publick, as knight-ſervice and caſtle-guard, for the defence of the realm, or for the adminiſtration of juſtice; or if ſuch intire ſervice were a work of charity or piety; in all ſuch caſes the tenant is ſtill chargeable with the whole ſervice; for their can be no apportionment, becauſe the thing in its nature is indiviſible, and the whole ſhall not be extinguiſhed becauſe the publick has an intereſt in ſuch ſervices, and therefore ſhall not be prejudiced by the private tranſactions of the parties 6 *Co.* 1, 2. *Co. Lit.* 149.

So where the tenure is by a ſervice in its nature indiviſible, as a horſe, or a hawk, *&c.* which are only for the private benefit or pleaſure of the lord; yet if part of the tenancy comes to the lord by deſcent, the ſervice is not extinguiſhed; becauſe here is no conſent or concurrence of the lord to the diviſion. *Co. Lit.* 149. *a.*

It was formerly doubted, whether a rent-ſervice incident to a reverſion could be apportioned, or was not utterly extinguiſhed by a grant of part of the reverſion; for ſince the reverſion and rent incident thereto were intire in their creation, they thought it hard that by the act of the leſſor they ſhould be divided, and thereby the tenant made liable to ſevereal actions and diſtreſſes for the recovery of them; but it was at length reſolved, that the reverſion being a thing in its nature ſeverable, the rent as incident to it may be divided too, becauſe that being made in retribution for the land ought, from the nature of it, to be paid to thoſe who are to have the land upon the

the expiration of the leaſe; and hence it is that the rent paſſes incidently with the reverſion, without any expreſs mention of it in the grant; beſides the tenant has really no prejudice from ſuch grant, becauſe it is in his power, and his duty to prevent the ſeveral ſuits and diſtreſſes by a punctual payment of the rent; and therefore he ought not to complain of a miſchief which he wilfully brings upon himſelf; beſides that, formerly *(viz.* before the 4 & 5 *Ann.)* ſuch grants could not take effect without the attornment and conſent of the tenant; but on the other hand it would be extremely prejudicial, if upon ſuch grants the rent ſhould not be apportioned, becauſe then the leſſor could not out of his eſtate make a proviſion for his younger children, or anſwer the contingencies of his family which are in view. 2 *Inſt.* 504. 1 *Rol. Abr.* 234. *Cro. Eliz.* 651, 851. *Co. Lit.* 148. 8 *Co.* 79. *Dyer* 326. *Hob.* 177. 13 *Co.* 57, 58. *Moor, pl.* 255, 256.

If leſſee for life or years ſurrenders part, or if he commit a forfeiture of part by making a feoffment, or doing waſte, there can be no colour to conſtrue theſe acts an extinguiſhment of the whole rent; but in theſe caſes the rent ſhall be apportioned, becauſe the rent is retribution for the land, and therefore muſt neceſſarily ceaſe according to the proportion of the land reſumed by the leſſor; for it were abſurd, that the leſſor ſhould have the land and retribution for it; but the whole rent is not extinguiſhed, becauſe from the nature of the contract the rent is to be paid in conſideration of the enjoyment of the land, and therefore the tenant ſhall be obliged to pay the rent in proportion to the land which he enjoys; ſo if the leſſor grant the reverſion of part to the leſſee, the rent ſhall be apportioned. *Co. Lit.* 148. *a.* 1 *Rol. Abr.* 235. *Dyer* 5. *a.* 13 *Co.* 58. *Moor, pl.* 255.

There ſeems to have been variety of opinions, whether the leſſor's entring wrongfully into part of the lands demiſed, did not ſuſpend the whole rent during ſuch tortious entry, or whether the rent ought not to be apportioned; and it is now ſettled, that ſuch tortious entry ſuſpends the whole rent; for if any apportionment were allowed in this caſe, it would be in the power of the lord or leſſor to reſume any part of the land againſt his own engagement and contract, and ſo, by taking that which lies moſt commodiouſly for the tenant, render the remainder in effect uſeleſs, or put him to the expence to reſtore himſelf to ſuch part by courſe of law; and therefore to prevent theſe inconveniencies, and that no man might be encouraged to injure or diſturb his tenant, whom he ought to protect and defend, it hath been reſolved, that ſuch diſſeiſin or tortious entry ſuſpends the whole rent, and that the tenant or leſſee is diſcharged from the payment of any part of it till he is reſtored to the whole poſſeſſion. *Co. Lit.* 148. *b. Bro.* tit. *Extinguiſhment* 48. 1 *Rol. Abr.* 938. 4 *Co.* 52. 9 *Co.* 135. 3 *Keb.* 453, 497. *Pollex.* 142, 144. 1 *Vent.* 277.

2. *Of the extinguiſhment of copyholds, commons, and debts.*

As to the extinguiſhment of copyholds, it is laid down as a general rule, that any act of the copyholder's which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguiſhment of his copyhold. *Hutt.* 81. *Cro. Eliz.* 21. 1 *Jon.* 41.

As if a copyholder in fee accepts a leaſe for years of the ſame land from the lord, this determines his copyhold eſtate; or if the lord leaſes the copyhold to another, and the copyholder accepts an aſſignment from the leſſee, his copyhold is extinct. *Moor* 184. 2 *Co.* 16. *b. Godb.* 11. 101.

So if a copyholder bargains and ſells his copyhold to the leſſee for years of the manor, his copyhold is thereby extinguiſhed; or if he joins with his lord in a feoffment of the manor, his copyhold is thereby extinct, for theſe are acts which denote his intention to hold no longer by copy. *Hutt.* 65. 1 *Jon.* 41. *S. C. Godb.* 11.

So if a copyholder accepts to hold of his lord, by bill under the lord's hand, this determines his copyhold; ſo if he accepts an eſtate for life by parol, if livery, this is an extinguiſhment; otherwiſe not; for without livery nothing but an eſtate at will paſſes, which cannot merge or extinguiſh an eſtate at will. 1 *And.* 199. *Latch* 213.

If one ſeiſed of a manor in right of his wife lets lands by indenture for years; this doth not deſtroy the cuſtom as to the wife; for after the death of her huſband ſhe may demiſe it again by copy. *Cro. Eliz.* 459.

So if a copyhold is in the hands of a ſubject, who after becomes King, the copyhold is extinct, for it is below the majeſty of a King to perform ſuch ſervile ſervices; yet after his deceaſe the next that hath right ſhall be admitted, and the tenure revived. 2 *Sid.* 82. 4 *Co.* 24. *Cro. Eliz.* 252. See 2 *Leon.* 208. 4 *Co.* 26. *b. Cro. Eliz.* 103.

If a commoner, who hath common appurtenant, purchaſes part of the land in which he hath ſuch common, this is an extinguiſhment of the common; but if ſuch purchaſe had been made by one who had common appendant, this being of common right muſt be apportioned; alſo both common appendant and appurtenant ſhall be apportioned by alienation of part of the land to which the common is appendant or appurtenant. *Co. Lit.* 122. *Hob.* 235. 8 *Co.* 78. *Owen* 122. 4 *Co.* 37.

It ſeems to be agreed as a general rule, that a creditor's accepting a higher ſecurity than he had before, is an extinguiſhment of the firſt debt; as if a creditor by ſimple contract accepts an obligation, this extinguiſhes the ſimple contract debt. 1 *Rol. Abr* 470, 471, 604. 6 *Co.* 44.

So if a man accepts a bond for a legacy, he cannot after ſue for his legacy in the ſpiritual court; for by the deed the legacy is extinct, and it is become a mere debt at Common law. *Yelv.* 38.

So if a bond creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment, which is a ſecurity of a higher nature than the bond. 6 *Co.* 44. *b.*

But theſe caſes muſt be underſtood where the debtor himſelf enters into theſe ſecurities; and therefore if a ſtranger give bond for a ſimple contract due by another, this does not extinguiſh the ſimple contract debt; but if upon making the contract, a ſtranger gives bond for it, or being preſent, promiſes to give bond for it, and after does ſo, the debt by ſimple contract is extinguiſhed, the obligation being made upon, or purſuant to the contract. 2 *Leon.* 110.

But the accepting a ſecurity of an inferior nature is by no means an extinguiſhment of the firſt debt; as if a bond be given in ſatisfaction of a judgment. *Cro. Jac.* 579. 2 *Brownl.* 29. *Cro. Jac.* 649, 650.

Alſo the accepting a ſecurity of equal degree is no extinguiſhment of the firſt debt; as where an obligee has a ſecond bond given to him; for one deed cannot determine the duty upon another. *Cro. Eliz.* 304, 716, 727, 1 *Brownl.* 74. *Lit. Rep.* 58. *Cro. Car.* 86.

Alſo it is ſaid to have been adjudged, that if the condition of an obligation be to pay ten pounds at a day, which is not paid at the day, but after the day the obligee accepts a ſtatute-ſtaple from the obligor for the ſame debt, in full ſatisfaction of the obligation; yet this is not any ſatisfaction, for tho' the ſtatute be a matter of record and higher than the obligation, yet the obligation remains in force, and the obligee hath his election to ſue the one or the other. 6 *Co.* 44. 1 *Rol. Abr.* 470. *Cro. Car.* 86. *S. C.* cited.

If an infant becomes indebted for neceſſaries, and the party takes bond of the infant; this ſhall not extinguiſh the ſimple contract, for the bond has no force. *Cro. Eliz.* 920.

Though a bond is taken for a ſimple contract debt, yet if it is after an act of bankruptcy, the ſimple contract is not extinguiſhed. *Stran.* 1042.

Extinguiſhment of ſervices. The lord purchaſes or accepts parcel of the tenancy, out of which an intire ſervice is to be paid or done; by this the whole ſervice will

will be extinct: but if the ſervice be *pro bono publico*, then no part of it ſhall be extinguiſhed; and homage and fealty are not ſubject to extinguiſhment, by the lord's purchaſing part of the land. 6 *Rep.* 1, 105. *Co. Lit.* 149. If the lord and another perſon do purchaſe the lands, whereout he is to have ſervices, they are extinct: Alſo by ſeverance of the ſervices, a manor may be extinguiſhed. *Co. Lit.* 147. 1 *And.* 257.

Extinguiſhment of ways. If a man hath a highway as appendant, and after purchaſes the land wherein this way is, the way is extinct. *Terms de la ley.* Though a way of neceſſity to market or church, or to arable land, *&c.* is not extinguiſhed by purchaſe of grounds, or unity of poſſeſſion. 11 *H.* 7. 35. 1 *Inſt.* 155.

Exterpare, To ſpend or loſe. In the laws of *Edward the Confeſſor, cap.* 6. 'tis provided, That if a thief take any thing unlawfully, and is near at hand, let him reſtore it; *Et ſi illud penitus* extirpaverit, let him make the owner full ſatisfaction. *Cowell, edit.* 1727.

Extirpatione, Is a writ judicial, that lieth againſt him, who after a verdict found againſt him for land, *&c.* doth maliciouſly overthrow any houſe upon it, *&c.* and it is two-fold, one *ante judicium*, the other *poſt judicium. Reg. Jud. fol.* 13, 56, 58.

Extocare, To ſtock up, to grub wood-land, and reduce it to arable or meadow.——*Dedi etiam eis pratum quod Rogerus de Tocheham de grava quadam* extocavarat. *Mon. Angl. tom.* 2. *p.* 71.

Extortion, *(Extortio,)* Is an unlawful or violent wringing of money or money-worth from any man: For example, If any officer, by terrifying any of the King's ſubjects in his office, take more than his ordinary duties or fees, he committeth this offence, and is indictable for it. To this may be referred the exaction of unlawful uſury, winning by unlawful games; and in one word, all taking of more than is due, by colour or pretence of right, as exceſſive toll in millers, exceſſive prices of ale, bread, victuals, wares, *&c. Weſt. Symbol. part* 2. tit. *Indictment, ſect.* 65. *Manwood* ſaith, that *extortion* is *colore officii*, and not *vertute officii*. *Crompton* in his *Juſtice of Peace, fol.* 8. hath theſe words; Wrong done by any man, is properly a treſpaſs, but exceſſive wrong by any man is called *extortion*; and this is moſt properly in officers, as ſheriffs, mayors, bailiffs, eſchetors, and the like, that by colour of their office do great oppreſſion, and exceſſive wrong unto the people, in taking exceſſive rewards or fees for the execution of their office: Great diverſity of caſes touching *extortion*, you may read in *Crom. Juſtice of Peace, fol.* 48, 49, 50. See the difference between *colore officii*, and *virtute vel ratione officii*, *Plow. fol.* 64. *Dive*'s caſe. This word is uſed in the ſame ſignification in other countries; for *Cavalcanes de Brachio Regio. part* 5. *num.* 21. thus deſcribeth it,—*Et* extortio *dicitur fieri, quando Judex cogit aliquid ſibi dari quod non eſt debitum, vel quod eſt ultra debitum, vel ante tempus petit id, quod poſt adminiſtratam juſtitiam debetur. Cowell, edit.* 1727.

Extortion is ſaid by Lord *Coke* to ſignify any oppreſſion by colour or pretence of right, and in this reſpect it is ſaid to be more heinous than robbery itſelf, as alſo, that it is uſually attended with the agravating ſin of perjury. *Co. Lit.* 268. *b.* 10 *Co.* 102. *a.* 2 *Haw. P. C.* 170. *Cro. Car.* 438, 448.

But in a ſtrict ſenſe it is defined, the taking of money by any officer, by colour of his office, either where none at all is due, or not ſo much is due, or where it is not yet due. *Co. Lit.* 368. 10 *Co.* 102.

1. *Who may be guilty of extortion.*

2. *How puniſhable, and pleadings.*

1. *Who may be guilty of extortion.*

By the Common law, as alſo by the ſtatute of *Weſtm.* 1. *cap.* 26. it is declared and enacted to be extortion, for any ſheriff, or other miniſter of the King, whoſe office any ways concerns the adminiſtration or execution of juſtice, or the common good of the ſubject, to take any reward whatſoever, except what he received from the King. 2 *Inſt.* 209. *Co. Lit.* 368.

And this inſtitution hath been thought ſo conducive to the good of the publick, that all preſcriptions whatſoever, which have been contrary to it, have been held to be void: as where the clerk of the market claimed certain fees as due time out of mind, for the examination of weights and meaſures; and this was adjudged to be void. 2 *Rol. Abr.* 226. *Moor* 523. 2 *Inſt.* 209. 4 *Inſt.* 274.

But the ſtated and known fees, allowed by the Courts of juſtice to their reſpective officers for their labour and trouble, are not reſtrained by the Common law, or by the ſaid ſtatute of *Weſtm.* 1. and therefore ſuch fees may be legally demanded and inſiſted upon, without any danger of extortion. *Co. Lit.* 368.

And for this reaſon it is held, that the fee of 20 *d.* called the bar fee, taken time out of mind by the ſheriff for every priſoner that is acquitted, and the fee of a penny claimed by the coroner from every *viſne*, when he came before the juſtice in eyre, are not within this ſtatute; as alſo becauſe they are due of courſe as perquiſites, whether any thing be done by ſuch ſherff or coroner, or not. 2 *Inſt.* 176, 210. *Staund. P. C.* 49.

Alſo it ſeems that an officer, who takes a reward which is voluntarily given to him, and which has been uſual in certain caſes, for the more diligent or expeditious performance of his duty, cannot be ſaid to be guilty of extortion; for without ſuch a *premium* it would be impoſſible in many caſes to have the laws executed with vigour and ſucceſs. 2 *Inſt.* 210. 3 *Inſt.* 149. *Co. Lit.* 368.

But it has been always held, that a promiſe to pay an officer money for the doing of a thing, which the law will not ſuffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. 1 *Rol. Abr.* 16. 1 *Rol. Rep.* 313. *Noy* 76. 1 *Jon.* 65. *Cro. Eliz.* 654. *Moor* 468. *Cro. Jac.* 103.

Churchwardens of St. *Martins* were indicted for extortiouſly taking of one *Reynel* a ſilver cup for making him gallery-keeper in the church: *Keeling* ſaid this was no offence, nor ſuch an offence whereupon extortion can be grounded, but a bare employment. But the court would not quaſh it without a trial; for then it will appear whether the cup were great or little, exacted or freely given; and *per Keeling*, if the churchwardens have accounted, it ſhall be quaſhed, but not elſe. 2 *Keb.* 100. *pl.* 27. *Mich.* 18 *Car.* 2. *B. R. The King* v. *Ayres & al'.*

Bailiffs taking exceſſive bail, as 40 *l.* where the plaint was but of 30 *s.* an information was ordered againſt them for this extortion. 1 *Keb.* 873. *pl.* 23. *Paſch.* 17 *Car.* 2. *B. R. Randal* v. *Keise.*

Every ſeveral taking is a ſeveral extortion, and it is not good to lay too many extortions together; *per Holt* Ch. J. *Cumb.* 194. *Paſch.* 4 *W. & M.* in *B. R. The King* v. *Roberts.*

Under-ſheriff refuſing to execute proceſs till he had his fees, if the party pays him the fees ſo before-hand, he may after indict him of extortion. 1 *Salk.* 330. *pl.* 3. *Mich.* 6 *W. & M.* in *B. R. Heſcot*'s caſe.

An indictment for extortion againſt an officer for taking money for not carrying his priſoner to a ſpunging houſe; the court looked upon it to be ſo ill a practice, that they would not hear a motion to quaſh it. 12 *Mod.* 253. *Mich.* 10 *W.* 3. *The King* v. *Beechcroft.*

An indictment was againſt ſeveral for intending to defraud *A.* of his money, and that they threatned to ſend him to *Newgate* by colour of a warrant, and to indict him of perjury, unleſs he would give them money, and a note, which he did by reaſon of their threats; and judgment for the Queen. 11 *Mod.* 137. *Mich.* 6 *Ann. B. R. The Queen* v. *Woodard.*

Judge of a biſhop's court convicted of extortion, for compelling probate of a will proved in the Prerogative court. *Stran.* 74.

If

If the defendant erects ſeveral ſtalls, and does not leave ſufficient room for the market people to ſtand and ſell their wares, ſo that for want of room they are forced to hire the ſtalls of the defendant, the taking of money for the uſe of the ſtalls in ſuch caſes is extortion. *Ld. Raym.* 149.

2. *How puniſhable, and pleadings.*

This offence of extortion is puniſhable at Common law by fine and impriſonment, and alſo by a removal from the office in the execution whereof it was committed; and there is a farther additional puniſhment by the ſtatute of *Weſtm.* 1. with regard to the perſons to which the ſtatute extends, by which it is enacted, "That no ſheriff, nor other King's officer, ſhall take any reward to do his office, but ſhall be paid of that which they take of the King, and that he, who ſo doth, ſhall yield twice as much, and ſhall be puniſhed at the King's pleaſure." 2 *Rol. Abr.* 32, 33, 37. *Raym.* 315. 2 *Inſt.* 209.

Juſtices of the peace at ſeſſions have conuſance of extortion. *Stran.* 75.

If an indictment of extortion charges *J. S.* with the taking of 50*s.* as bailiff of an hundred *colore officii*, without ſhewing for what he took it; this is good, at leaſt after verdict, for perhaps he might claim it generally, as being due to him as bailiff, in which caſe the taking could not be otherwiſe expreſſed. 1 *Sid.* 91.

This term *Nelme*, a bailiff, in *Whitechapel*, being indicted, and convicted of extortion, was fined 13*l.* 6*s.* 8*d.* to be impriſoned one week without bail, and then till he found ſureties for his good behaviour, and diſabled for ever to execute the office of bailiff or under bailiff. *MS. Rep.* (ſaid to be a copy of Lord Ch. J. *Keyling*'s) *Mich.* 15 *Car.* 2. *B. R. Nelme*'s caſe.

The governor of the *Gatehouſe* priſon in *Weſtminſter*, was found guilty of extortion and hard uſage of the priſoners in a moſt barbarous manner, and was fined 100 marks, and removed from her office. *Raym.* 216. *Mich.* 24 *Car.* 2. *B. R. The Lady Broughton*'s caſe.

An action lies againſt a ferryman for extorting money for paſſage of one that is toll-free by cuſtom, contrary to the cuſtom, becauſe there is no other remedy. *Carth.* 194. *Trin.* 3 *W. & M.* in *B. R.* in caſe of *Pain* v. *Patrick.*

It is againſt the courſe of the court to quaſh an indictment for oppreſſion or extortion; *per cur.* We cannot do it. Demur to it. 5 *Mod.* 13. *Mich.* 6 *W. & M. The King* v. *Wadſworth.*

Upon affidavit of extortion, though the courſe is to take a recognizance to anſwer interrogatories, yet in caſe of great oppreſſion the court may commit the party, and he muſt anſwer *in vinculis*; *per Holt* Ch. J. *Cumb.* 448. *Trin.* 9 *W.* 3. *B. R.*

Indictment was againſt *A.* and others, for that being receivers of the Queen's tax, they *colore officii* extorted money from ſeveral perſons. On motion in arreſt of judgment it was held, that two men may be indicted jointly for a battery or extortion, becauſe it is a crime at Common law, or they may be jointly or ſeverally guilty. 1 *Salk.* 382. *pl.* 32. *Paſch.* 5 *Ann. B. R. The Queen* v. *Atkinſon.*

The place where the extortion was committed ſhould be ſet down in the declaration. See *Pl. C.* 200. *Stradling* v. *Margan.*

The ſum certain extorted muſt be particularly ſet forth, and he cannot ſay, that the defendant did extort divers ſums from divers men generally; and ſo it was adjudged in *Reignolds* caſe in this court; *per Richardſon* Ch. J. *Godb.* 438. *pl.* 583. *Mich.* 4 *Car.* in the Star-Chamber; *Floyd* v. *Cannon.*

If the charge is for oppreſſing *A. B.* and *C.* particularly, and 100 men generally, the proof muſt be firſt to *A. B.* and *C.* before any be given as to the others. *Godb.* 438. *pl.* 583. *Mich.* 4 *Car.* in the Star-Chamber; *Floyd* v. *Cannon.*

It was moved to quaſh an indictment againſt a miller for taking too great toll, becauſe it was not ſaid *jurat'*, nor *onerat'*, nor the jurors named. But *per curiam*, it is againſt the courſe of the court to quaſh an indictment againſt extortion or oppreſſion, and we cannot do it; and bid them demur to it. 5 *Mod.* 13. *Mich.* 6 *W. & M. The King* v. *Wadſworth.*

A complaint and charge of extortion ought to be particular, and that the defendant took it *extorſive, & colore officii.* 2 Salk. 680. pl. 2. Paſch. 5 Ann. in Cam. Scacc. The Queen *v.* Baynes.

If a man be indicted for taking extorſively 20*s.* and there is but proof of one ſhilling, yet the defendant is guilty. *Ld. Raym.* 149.

Extracta curiae, The iſſues or profits of holding a court ariſing from the cuſtomary dues, fees, and amercements.——*Cumputant de tribus denariis receptis de* extractis *unius* curiæ *tentæ apud Burceſter.*—— Paroch. Antiq. p. 572.

Extracts or **Extreats.** See **Eſtreats.**

Extrajudicial, Is when judgment is given in a cauſe or caſe not depending in that court, where ſuch judgment is given, or wherein the judge has not juriſdiction.

Extraparochial, Out of any pariſh privileged or exempted from the duties of a pariſh. *Stat.* 22 & 23 *Car.* 2.

If a place is extraparochial, and has not the face of a pariſh, the juſtices have no authority to ſend any poor perſon thither; poſſibly a place extraparochial may be taxed in aid of a pariſh, but a pariſh ſhall not in aid of that; *per Holt.* 2 *Salk.* 486. *pl.* 44. *Hill.* 11 *W.* 3. *B. R. Precinct of Bridewell* v. *Clerkenwell.*

If a place be a reputable pariſh, and have churchwardens and overſeers of the poor, it is within 43 *Eliz.* though in truth it be no pariſh; but if it be merely extraparochial, as the juſtices cannot ſend to ſuch a place, ſo they cannot ſend from it; as it is exempt from receiving, ſo it ſhall not have the benefit of removing, for they have not proper perſons to complain; perſons in extraparochial places muſt ſubſiſt on private charity, as all perſons did at Common law before 43 *Eliz.* which enacts, that every pariſh ſhall keep their own poor; and that act does not extend to extraparochial places. *Per Holt* Ch. J. 2 *Salk.* 487. *pl.* 48. *Trin.* 12 *W.* 3. *B. R. Inhabitants of the Foreſt of Dean* v. *The Pariſh of Linton.*

One ſettled in a pariſh removes into an extraparochial place, where he gains a ſettlement, and then removes into another pariſh where he becomes chargeable. The queſtion was, what this laſt pariſh can do with him; whether by the ſtatute, that enables them to ſend ſuch a one to the laſt pariſh where he was laſt legally ſettled, they may ſend him to the pariſh he lived in before he removed to the extraparochial place? for ſend him to the extraparochial place they cannot, for want of proper officers to receive him. *Powell* J. took this to be *caſus omiſſus*, and what ought to be moved in parliament, theſe extraparochial places being many in number and of great extent. 10 *Mod.* 81. *Hill.* 10 *Ann. B. R. The Queen* v. *Doughton.*

By virtue of 13 & 14 *Car.* 2. *cap.* 12. *ſect.* 21. The juſtices may exerciſe the powers given by 43 *Eliz.* and that act, in all extraparochial places containing more houſes than one, ſo as to come under the denomination of a vill or townſhip. Adjudged by *Parker* Ch. J. and *tot. cur.* 2 *Salk.* 486. *pl.* 44. *in Marg.* cites 11 *Ann. B. R. Stoke-Lane Inhabitants* v. *Dolting.*

The ſtatute of 43 *Eliz.* 2. extends to extraparochial places, and ſo do all poor acts, when ſuch places are within the ſame miſchief as other pariſhes, and ſhall be ſubject to the controul of the juſtices of peace, and the penalty for not meeting in the church ſhall never be inflicted on the overſeers of the poor, becauſe the inhabitants of ſuch places have no church to meet in. Moſt of the foreſts in *England* are extraparochial, and ſo is *Chriſt-Church* in *Oxford*; but they ought to maintain their own poor. 8 *Mod.* 39. *Paſch.* 7 *Geo. Rufford* pariſh's caſe.

Extraria, The ſame with **Eſtray.**

Extravagants, Theſe are certain conſtitutions of popes, and are ſo called, becauſe they are *extra corpus canonicum Gratiani, ſive* extra *decratorum libros vagantur,* Du Freſne.

Extumae, Relicks.——*Abbas igitur & conventus accipientes eorum* extumas *cum gaudio in majorem tranſtulerunt eccleſiam in Mauſoleo nobiliter exculpto.*——Cartular. Abbat. Glaſton. MS. penes virum Rev. Dom. Clarges, f. 15.

Exuperare, To overcome. It ſometimes ſignifies to apprehend or take; as, Exuperare *alium vivum vel mortuum.* Leg. Edm. cap. 2. So in the laws of King *Alfred apud Brompton, cap.* 7. Exuperetur *& in epiſcopi judicio reſervatur.*

Ey, *Inſula,* An iſland. *Domeſday.*

Eyery of hawks. See **Aery.**

Eyet, *Inſuletta,* A ſmall iſland or iſlet: it is corruptly called by the moderns vulgarly *an eyght.*

Eyrar, An *ey, eyrie,* brood, neſt: Sir *Thomas Havyll* his ſon and heir entred to the ſaid ccc. acres of paſture, which *Thomas* releaſed his title to the ſaid poor, to have IIII. couples of *eyrare* ſwannys (*i. e.* brood-ſwans) in the water, with all iſſue and profits.———*Munimenta* Hoſpital. SS. Trinitat. de Pontefracto. MS. fol. 53.

Eyre. See **Eire.**

Eyrendale, An old meaſure of corn. *Willielmus de Longo Campo epiſcopus Elienſis ordinavit, ut in die anniverſarii ſui dentur pauperibus* xiii. eytendeles *de frumento.* Hiſtor. Elien. apud Whartoni Angl. Sacr. P. 1. p. 633.

The END of the FIRST VOLUME.

FH
MVSEVM
BRITANNICVM